CONTENTS

FROM THE CHAIR................................................................. 1
FUTURE MEETINGS ............................................................ 3
BUSINESS LAW SECTION 2019 ANNUAL MEETING ...................... 4
  Legal Opinions Committee ................................................. 4
  Securities Law Opinions Subcommittee;
  Federal Regulation of Securities Committee ........................ 7
  Audit Responses Committee ............................................... 7

SUMMARY OF RECENT LISTSERVE ACTIVITY
APRIL 2019 – SEPTEMBER 2019
(AUDIT RESPONSES COMMITTEE) ........................................ 8

RECENT DEVELOPMENTS ..................................................... 10
  Lessons from the GemCap Lending Litigation ....................... 10
  Mylan Settlement Shows Continuing SEC Focus
  on Disclosure of Government Investigations ..................... 13

LEGAL OPINION REPORTS ................................................... 17
  Chart of Published and Pending Reports .............................. 18

MEMBERSHIP ........................................................................ 21

RECENT DEVELOPMENTS ON TWITTER ................................. 21

NEXT NEWSLETTER .............................................................. 21
FROM THE CHAIR

This is my first message to you as Chair of the Legal Opinions Committee. I want to express my gratitude to Ettore Santucci and the Business Law Section for granting me the opportunity to lead the Committee as its Chair. I can only hope to continue the vibrant meetings and strong programs that prior chairs have established as hallmarks of the Committee.

Accomplishments and Challenges. When advised that my first message to the members of the Committee in this issue of In Our Opinion should include my plans and goals for the next three years, I was somewhat at a loss what to write down because my predecessor chairs (including Don Glazer, John Power, Stan Keller, Tim Hoxie and most recently Ettore) have done a great job in establishing the Committee as one of the preeminent committees of the Business Law Section, and I can only realistically hope “not to screw it up.” But upon reflection, I believe that there is at least one issue that the Committee needs to address over the next three years (if not much sooner) to ensure its active continuation. Our mission statement provides that the Committee has three basic goals in fostering national standards for third-party legal opinions: (i) to promote discussions among our members on national opinion practice, (ii) to sponsor programs on such national standards, and (iii) to participate in the preparation of reports on issues relevant to opinion practice.

If I had to grade the success of the Committee in achieving these goals, I can confidently say that an “A” grade is appropriate in all three areas. In addition, however, the ABA encourages us to have diversity in our membership – and, unfortunately, our grade with respect to achieving that goal is, at best, an “incomplete.” Consequently, I am asking for your help in putting the Committee on a path to broadening our membership. Some might call this goal just another “membership drive” or others might call for an appointment of a “diversity director” (which position is currently vacant but is needed in so many ways: age, ethnicity and gender). But one thing is certain: failure to broaden our membership could well be an existential issue for the Committee and lead it eventually to fail in meeting its core missions as our current membership ages and fades away.

The bad news is that our membership is down roughly 3% this year, but the “good news” is that our decline is less than the over 13% decline for the Business Law Section overall. I would welcome any new ideas or a volunteer to serve as diversity or membership director to ensure the healthy continuity of the Committee. I hope to speak in the near future to many of you individually for your ideas on how to address the make-up of our membership and I would hope to implement your ideas in the three years of my tenure as Chair.

Agenda Changes. On a more mundane level going forward, I have modified the agenda from past meetings. The biggest change is that we will be having small segments of our meetings devoted to our various task forces and also our “sibling” opinion organizations: Tribar and WGLO. I am also hoping that the various segments of our meetings will be devoted less to reading reports and more to back and forth discussions regarding the direction of the task forces.

2019 Annual Meeting. We had a very successful Annual Meeting in Washington D.C. in September, including a well-attended (and animated) program reviewing “in progress” and recently issued national and state bar reports. A summary of our annual meeting is included elsewhere in this issue of the Newsletter. The program focused on, among others, reports in progress at Tribar (including a revised LLC report), a forthcoming California UCC sample opinion (targeted for publication next summer in The Business Lawyer), and the 2018 Washington state comprehensive legal opinion report. The panelists offered the members of the audience the opportunity to provide their input on the reports and opinion issues addressed, and the audience avidly took up the invitation on a host of issues.
Fall 2019 Meeting. The Business Law Section’s Fall Meeting in Washington, D.C. will be held November 22-23, 2019. By now you should have received at least one if not more notices about that meeting. The Committee will actively participate in the Fall Meeting by holding a regular meeting of its members and by sponsoring three task force meetings (Opinion Practices Survey, Cross-Border Opinions, and Intellectual Property Opinions). In particular, the Opinion Practices Survey task force, under the joint leadership of John Power and Arthur Cohen, is making great progress towards completing a report on the Committee’s third survey of opinion practices. This group seems to do its best work early in the morning and, as noted in this Newsletter below (“Future Meetings”), will meet at 9:00 a.m. on Saturday, November 23. The other two task forces will be meeting later Saturday morning and early afternoon.

While I urge you to attend the Fall Meeting, we will make arrangements for participation in the meetings by telephone. Please note that as of this writing the times of the meetings and programs are accurate, even though some of you may note that they vary somewhat from what appeared in the initial version of the meeting schedule posted online by the Section.

This Issue of the Newsletter. This issue of the Newsletter includes excellent summaries of the meetings held at the annual meeting of the Section by our Committee, the Securities Law Opinions Subcommittee of the Federal Regulation of Securities Committee, and the Audit Responses Committee. We also include, from the Audit Responses Committee, its summary of recent listserv activity. We are particularly delighted to include in this issue Arthur Field’s note on the GemCap decision, an important opinion that addresses a number of issues involving opinion letters, and that acknowledges opinion letter practice as a national practice. I know you will find Arthur’s article of interest.

We are also delighted to have Tom White’s detailed analysis of the SEC’s Mylan settlement. Mylan agreed to pay $30 million to settle the SEC’s charges based on Mylan’s failure to disclose or accrue a loss contingency attributable to the Department of Justice’s civil investigation into whether Mylan misclassified EpiPen as a generic drug. The treatment and disclosure of loss contingencies is particularly challenging with respect to government inquiries, and Tom and Stan Keller have written previously on the topic. See note 11 to Tom’s article for a listing of their prior articles.

We will work to keep all of you informed of the Committee’s activities and developments in opinion practice through this Newsletter. And that would not happen without the tireless efforts of our Editor, Jim Fotenos. We – and I in particular – owe him a great debt, which grows with each issue of In Our Opinion.

- Richard Frasch, Chair

rmfrasch@gmail.com
What follows are the presently scheduled times of meetings and programs of the Fall Meeting that may be of interest to members of the Legal Opinions Committee. To confirm information on meeting times and rooms, check here.¹

**Legal Opinions Committee**

**Friday, November 22, 2019**

Committee Meeting:
4:00 p.m. – 5:30 p.m.

**Saturday, November 23, 2019**

Survey of Opinion Practices Subcommittee:
9:00 a.m. – 10:30 a.m.

Intellectual Property Opinions Joint Task Force:
11:00 a.m. – 12:30 p.m.

Cross-Border Opinions Task Force:
12:30 p.m. – 1:30 p.m.

¹ The URL is
The Business Law Section held its Annual Meeting in Washington, D.C. on September 12-14, 2019. The Section had a full complement of meetings and programs. The following are reports on meetings held at the Annual Meeting of interest to members of the Committee on Legal Opinions.

Legal Opinions Committee

The Legal Opinions Committee met on Friday, September 13, 2019. The following is a summary of the meeting.

The Chair of the Committee, Ettore Santucci, had circulated an agenda for the meeting to the members of the Committee by his email of September 5, 2019.

The meeting of the Committee was held late in the day. Earlier that day, the Survey of Opinion Practices Subcommittee (“Survey Subcommittee”) and the Cross-Border Opinions Task Force (“Cross-Border Task Force”) met. The Survey Subcommittee has received more than 300 completed surveys from law firms throughout the country and has begun the laborious process of reviewing and tabulating the responses to the survey. The Cross-Border Task Force is developing an outline of topics to be addressed in its report. The Chair also reported on the well-attended program earlier that afternoon, put on by the Chair (as moderator) and Rick Frasch, Christina Houston, and Tim Hoxie entitled “Cutting Edge Opinion Issues and Lessons Learned from Recent Reports.” That program focused on the recently published TriBar Limited Partnership Opinions Report and continuing issues with opinion letters on venture capital transactions.2

Exceptions; Covered Law. Don Glazer led a discussion at the meeting of common exceptions or qualifications and exclusions from laws covered. As background: opinion givers use “exceptions” to narrow an opinion, in particular the enforceability opinion. Exceptions to an enforceability opinion typically exclude entirely from the opinion’s coverage particular provisions in the agreement. See TriBar Opinion Committee, “Third-Party ‘Closing’ Opinions” §§ 1.9(i), 3.2, 53 Bus. Law. 591, 606-607, 622 (1998).

The “covered law” of an opinion letter is typically federal law and the law of the jurisdiction in which the opinion giver practices. Thus, the covered law of an opinion letter given by a New York law firm on a loan agreement between its client, as borrower, and a lender would be federal law and the law of the State of New York.

It is understood as a matter of customary practice that opinion givers are only responsible for law that lawyers practicing in the covered law jurisdiction, exercising customary diligence, would reasonably recognize as being applicable to the client or to the transaction that is the subject of the opinions being given. Statement of Opinion Practices ¶ 6.2, 74 Bus. Law. 801, 810 (2019).

Even when recognized as being applicable, some laws (for example, securities, tax, and insolvency laws) are not covered by a closing opinion. A closing opinion also does not cover municipal and other local law. Id.

Opinion givers often list specific laws that they are not addressing. Here is a typical list:

2 The program materials are available to members of the Business Law Section at https://www.americanbar.org/groups/business_law/resources/materials/2019/annual_materials/.
“...we express no opinion on local or municipal law, antitrust, unfair competition, environmental, land use, antifraud, securities, tax, pension, labor, employee benefit, healthcare, privacy, margin, insolvency, fraudulent transfer, antiterrorism, money laundering, racketeering, criminal and civil forfeiture, foreign corrupt practices, foreign asset or trading control, or investment company laws and regulations.”

The discussion then turned to current candidates for inclusion in the list of exceptions and excluded laws in opinion letters. Don focused on three candidates: mandatory forum selection clauses, transactions that may be within the purview of the Committee on Foreign Investment in the United States (“CFIUS”) under the amendments to CFIUS’ jurisdiction enacted in 2018 by the Foreign Investment Risk Review Modernization Act of 2018 (“FIRRMA”), and the EU Bail-In Legislation.

Don expressed the view that opinion givers should routinely take an exception from the coverage of their enforceability opinions for forum selection clauses. He pointed to the courts’ increasing tendency to decline jurisdiction notwithstanding being named as the exclusive forum in an agreement and notwithstanding the agreement’s explicit waiver of the defense of forum non conveniens. He cited as recent examples the 2018 decision of the Massachusetts Supreme Judicial Court in Oxford Global Resources, LLC v. Hernandez, 106 N.E.3d 556 (2018) (choice of Massachusetts law set forth in agreement between California office of a Delaware corporation headquartered in Massachusetts and account manager resident in California contrary to public policy of California; exclusive Massachusetts forum selection provision in agreement does not preclude dismissal on the ground of forum non conveniens), and the California Court of Appeal’s decision in Quanta Computer Inc. v. Japan Communications Inc., 230 Cal. Rptr. 3d 334 (2018) (Court of Appeal affirmed trial court’s dismissal of action on a contract between a Taiwanese company and a Japanese company because suitable alternative forums existed for resolution of the parties’ dispute and California has no public interest in burdening its courts with an action lacking any identifiable connection to the state, notwithstanding the parties’ exclusive choice of California courts as the fora to resolve their disputes and notwithstanding CA CCP § 410.40, which permits the bringing of an action in the courts of California where the action arises from an agreement selecting California law and the agreement includes a provision in which the foreign corporation or non-resident agrees to submit to the jurisdiction of the courts of the State of California).

Don also suggested that opinion givers include an express exception for foreign investment laws such as FIRRMA whenever they conclude that a pre-closing review might be required. One important reason is that the facts and circumstances regarding the opinion recipient often will be why a pre-closing filing with CFIUS is required. Moreover, in many transactions a legal opinion that a pre-closing filing with CFIUS is not required would be heavily dependent upon assumptions and qualifications that would limit the opinion’s usefulness.

A third candidate for explicit exclusion from the covered law of an opinion letter is the European Union’s Bank Recovery and Resolution Directive and the implementing legislation of member states of the European Economic Area, commonly referred to as “Bail-In Legislation.” In response to this legislation, credit agreements now routinely include language excusing participating lenders (including future assignees or participants in the facility) from honoring certain obligations
undertaken by the lenders if instructed to do so by a European regulator.³

The consensus of the Committee members present was that express exceptions from the coverage of opinion letters for mandatory forum selection clauses, CFIUS, and Bail-In Legislation are often accepted by opinion recipients.

The Chair pointed out that forum selection clauses in cross-border transactions pose significant challenges for opinion givers delivering opinions on cross-border agreements. He noted that these challenges are discussed in detail in the Committee’s cross-border opinions report, “Cross-Border Closing Opinions of U.S. Counsel,” 71 Bus. Law. 139, 167-184 (Winter 2015-2016).

Statement of Opinion Practices. Stan Keller reported on the publication of the Statement of Opinion Practices (“SOP”) in the Summer 2019 issue of The Business Lawyer, 74 Bus. Law. 801 (2019). That issue includes an article prepared by Stan (who served as co-chair of the task force that prepared the SOP and related Core Opinion Principles) and Steve Weise (who served as the reporter for the task force), “Obtaining National Consensus on Key Opinion Practices: An Introduction to the Statement of Opinion Practices.” Besides the useful introduction and history by Stan and Steve, the article includes an explanatory note to the SOP, a table of its sources from the Legal Opinion Principles and Guidelines for the Preparation of Closing Opinions, a list of matters in the Guidelines not addressed in the SOP, the full SOP and Core Opinion Principles (a statement of opinion principles drawn from the SOP that can be incorporated by reference in or attached to opinion letters), and a schedule of the approving organizations through July 31, 2019.

Stan also noted that he and Don Glazer have prepared an update to the Boston Streamlined Form of Closing Opinion based upon the ABA Legal Opinion Principles (“A Streamlined Form of Closing Opinion Based On the ABA Legal Opinion Principles,” 61 Bus. Law. 389 (2005)), to reflect the SOP, incorporation of the Core Opinion Principles, and other opinion developments, which is scheduled to be published in the Fall 2019 issue of The Business Lawyer. The new form of opinion letter will be called the Streamlined Form of Closing Opinion. The article accompanying the updated form of closing opinion will describe changes to the form arising from changes in opinion practice since 2005.⁴

Current Opinion Issues with Control Agreements. Steve Weise alerted the Committee to a troublesome development he has been seeing recently with deposit account and securities entitlement control agreements, that affects the ability of opinion givers to give perfection opinions on such agreements if not corrected. This development relates to a modification of the standard form (as illustrated by the ABA’s Model Deposit Account Control Agreement⁵) which provides for “springing” control by the secured party, meaning that the secured party’s ability to instruct the depository bank or brokerage firm with respect to the collateral only arises upon satisfaction of a condition, such as an event of default under the credit agreement. These provisions defeat the establishment of the requisite secured party control at inception, and prevent an opinion giver for the borrower from delivering a perfection opinion on the control agreement.

³ For an excellent discussion of the Bail-In Legislation and its impact upon opinion practice, see the article by Chair Santucci, and commentary by Don Glazer, Tim Hoxie, and Richard Howe, in the Spring 2016 issue of the Newsletter (vol. 15, no. 3), at 11-22.

⁴ [Editor’s Note: See “A Streamlined Form of Closing Opinion (2019 Update),” 74 Bus. Law. 1065 (Oct. 2019).]

A Passing of the Baton. This meeting represented the last of Ettore Santucci’s three-year term as Chair of the Committee. He thanked the Committee members for their support and guidance, introduced his successor as Chair of the Committee, Rick Frasch, and happily turned over the reins of power to Rick. Rick expressed his and the Committee’s gratitude for Ettore’s service and deferred his inaugural speech to the cocktail hour following the Committee’s meeting.

Next Meeting. The next meeting of the Committee will be held at the Section’s Fall 2019 Meeting in Washington, D.C. on November 22-23, 2019.

- James F. Fotenos
  Greene Radovsky Maloney
  Share & Hennigh LLP
  jfotenos@greeneradovsky.com

Securities Law Opinions Subcommittee; Federal Regulation of Securities Committee

The Subcommittee met on September 13, 2019 to discuss a draft comment letter on the SEC’s Concept Release on Harmonization of Securities Offerings, Release No. 33-10649 (June 18, 2019). The draft comment letter expressed the view that the SEC should consider adopting a brand new exemption from registration rather than focusing on incremental changes to existing rules. Participants discussed the pros and cons of each approach.

The next meeting of the Subcommittee will be held at the Section’s Fall Meeting in Washington, D.C. on November 22-23, 2019. The agenda for the meeting will include a further revised draft of the report on opinions given in connection with resales conducted pursuant to Section 4(1 1/2).

- Thomas J. Kim, Chair
  Sidley Austin LLP
  thomas.kim@sidley.com

Audit Responses Committee

The Audit Responses Committee met on Saturday, September 14, 2019. The principal discussion points are summarized below.

Update on New Audit Responses Committee Website. Alan Wilson updated the Committee on the status of the new Committee website. He noted that he and Randall McClanahan met with Graham Hunt, the Section’s Technology Specialist, who indicated that work remains ongoing to improve the new website platform, including ways to better organize Committee resource materials. Mr. Wilson reminded the Committee that the new website structure replaces the Committee’s listserve with a blog on the Committee’s ABA Connect website. The former listserve content was not fully transferred to the new website, but Mr. Wilson noted that he has assembled a compiled PDF archive that he is working to make available to all members of the Committee through the ABA Connect website.

Critical Audit Matters. Thomas White provided a brief update regarding the latest experience with the PCAOB’s new critical audit matters (CAMs) disclosure requirement, which became effective for large accelerated filers for fiscal years ending on or after June 30, 2019. Without repeating the more detailed discussion held during the Law and Accounting Committee meeting held earlier, Mr. White highlighted that the early CAMs disclosure process appears to be working smoothly – in part attributable to the efforts of accounting firms to manage the process. He highlighted that so far at least one CAM has involved a loss contingency, which was included in the 2019 auditor’s report for CDK Global, Inc. Members of the Committee discussed this CAM disclosure, observing, among other things, that it did not present “new information” that was not already disclosed by the company. As the Committee has mentioned in prior meetings, this will be an area for attorneys to remain vigilant to possible nonconforming requests in audit inquiry letters as the new CAMs disclosure regime becomes effective.
Report on Recent Committee Listserve Activity. Stanley Keller briefly commented on a listserve discussion that took place the prior day, which involved a request for guidance on when to disclose an ongoing Department of Justice investigation in an audit response letter. A summary of recent relevant activity on the Committee’s listserv is included in this issue of the Newsletter below.

Report on Article for Business Lawyer’s 75th Anniversary Issues, “Developments in Guidance on Audit Responses.” Mr. Wilson updated the Committee on his progress in working through an initial draft of an article entitled Developments in Guidance on Audit Responses. The article will be submitted by January 2020 for publication in connection with the 75th anniversary of The Business Lawyer. The draft will be circulated to a smaller working group for review and comment prior to the Committee’s November 2019 meeting.

Discussion of Statement on Timing Issues Under Audit Response Letters. Prior to the Committee’s meeting, Noël Para had circulated to a small working group an initial discussion draft of a proposed Committee publication that will address difficult timing issues to be considered in preparing audit response letters. As Mr. Para noted, that draft sparked discussion about different approaches that firms take with respect to certain matters, particularly the relevant date or period for identifying the potential loss contingencies to report in an audit response letter. Stan Keller and Donna Brooks offered insights, with each taking a competing approach – Mr. Keller considering as disclosable matters from the beginning of the period under audit and Ms. Brooks considering as disclosable only matters existing as of the end of the period and through the end date noted in the audit response letter. Both discussed the bases for their competing approaches, and an informal poll of those attending in person suggested that practice is split. This divide in practice will be a point for analysis and discussion in drafting the proposed Committee Statement on Timing Issues Under Audit Response Letters, which will be developed by a smaller working group before being shared with the Committee.

Committee Leadership Succession. Mr. Para noted that his term as Committee Chair expires at the end of this meeting, and members of the Committee thanked him for his service. Randall McClanahan will succeed Mr. Para as Chair, and Mr. Wilson will serve as Vice Chair.

Next Meeting. The Committee’s next meeting is scheduled for the Business Law Section’s Annual Meeting in Washington, D.C., on November 22, 2019.

- Randall D. McClanahan, Chair
  Butler Snow LLP
  Randy_McClanahan@ButlerSnow.com

- Noël J. Para, Former Chair
  Alston & Bird LLP
  noel.para@alston.com

SUMMARY OF RECENT Listserv Activity APRIL 2019 – SEPTEMBER 2019 (Audit Responses Committee)

[Editor’s Note: This summary of listserv activity during the period of April 2019 – September 2019 among members of the Audit Responses Committee does not necessarily represent the views of the Committee or authoritative pronouncements regarding audit response practice, but rather reflects views of individual members of the Committee on current practice topics. The ABA has reorganized its website. Listserv dialogues that formerly

6 Alan J. Wilson, Esq., of Wilmer Cutler Pickering Hale and Dorr LLP, Vice Chair of the Committee, served as secretary of the meeting and prepared these minutes.
appeared under the “listserve” item on the Audit Responses Committee’s web page now appear under “Audit Responses Connect” on the reorganized web page of the Committee.)]

Reporting Loan Defaults. A Committee member asked about practice for reporting client loan defaults as loss contingencies. Specifically, the member asked under which of the following four proposed scenarios would members consider it necessary or choose to disclose the default in response to a standard form of audit request letter:

1. You are aware of but have not yet advised on or otherwise devoted substantive attention to the default;
2. You have advised on consequences of the default and potential alternatives for dealing with it;
3. You have engaged with the lender regarding a waiver or extension, or other solution; and
4. You are representing the client in litigation involving the lender’s enforcement action.

Members were in agreement that disclosure should be made in scenario no. 4, assuming any materiality threshold in the request letter is met. With respect to scenario nos. 1 and 2, one member took the view that there would be no threatened litigation or claim, so disclosure would not be required, but a conversation with the client about voluntary disclosure would be advisable. This same member noted that under scenario no. 3, disclosure would be advisable but with specific client consent, assuming the materiality threshold is met.

Another member noted that in scenario no. 1 he would never disclose, but that scenario nos. 2 and 3 present grey areas. Another member said that the default would possibly be reportable under scenario no. 3 if the lender had sent a notice of default prior to negotiations that threatened litigation. Yet another member stated that he would consider disclosure [with specific client consent] if the default could be a trigger for other defaults probable of assertion, citing the example of a cross-default provision to a funding arrangement with an equity source or other debt source.

Reporting DOJ Investigations. A Committee member asked whether a law firm is required to report cases where a client is the subject of a DOJ antitrust investigation, the firm has very little details concerning the status of the investigation, and the audit request letter does not mention the investigation as an unasserted claim.

Members were unanimous in noting that, as a general matter, the mere existence of an investigation does not necessarily require disclosure.7 That said, members generally agreed that the situation involved a degree of judgment and should be discussed with the client, especially if it is probable that the investigation will lead to litigation.

Resources are available that further discuss considerations relevant to this scenario.8

- Alan J. Wilson, Vice Chair
Audit Responses Committee
Wilmer Cutler Pickering Hale and Dorr LLP
alan.wilson@wilmerhale.com

---

In Our Opinion

Recent Developments

Lessons from the GemCap Lending Litigation

On September 11, 2019, the Ninth Circuit affirmed the district court’s grant of summary judgment to defendants (the opinion giver law firm and the lawyer who prepared the opinion) on claims made by the recipient. GemCap Lending, LLC v. Quarles & Brady, LLP, 2019 WL 4303021. The district court decision is reported in 269 F.Supp.3d 1007 (C.D. Cal 2017).

The Ninth Circuit opinion on appeal was not certified for publication, indicating the view of the Ninth Circuit panel that the case did not involve issues of unique interest or of substantial public importance. See Ninth Circuit Rule 36-2(d). Nevertheless, the district court decision is of significant interest to those concerned with opinion practice. It treats opinion practice as a national practice although both parties were California based. The decision involves a number of issues that are likely to arise in legal opinion cases litigated in the future. The discussion in the district court decision of these issues repeatedly refers to national opinion practice sources.

Facts. GemCap Lending, LLC (“GemCap”) is a California asset-based lender. It made loans to Crop USA Insurance Agency, Inc. and its affiliate (collectively, “Crop”), a broker of agricultural crop insurance policies. All of the loan documents stated that they were governed by California law. All Crop assets were security for the loans. However, GemCap placed primary reliance on a lock-box arrangement applicable to commissions payable to Crop by its insurers. The Crop loan fell into default. Some commissions were paid by the insurers to Crop’s subagents rather than to the lock-box. Crop was unable to pay and GemCap sustained a loss.

Quarles & Brady, LLP, a Wisconsin law firm, represented Crop in the loan transactions. It delivered opinion letters to GemCap at two loan closings in California. GemCap sued the firm and the attorney principally responsible for its work on the loans and related opinion letters (together “Quarles”) in federal court in California. The GemCap claims were based primarily on the Quarles closing opinion letters to GemCap. Typically a plaintiff opinion recipient sues the opinion preparers individually as well as the opinion giver firm. That is because the cause of action can only be proved based on actions of the opinion preparers, as agents of their law firm.

The two Quarles opinion letters contained routine opinions to the lenders. They included opinions on pending litigation and on the creation and perfection of a security interest in the collateral.

Motion for Dismissal. At the outset Quarles moved for dismissal on various grounds including a lack of personal jurisdiction. Quarles is based in Wisconsin, has a number of offices in other states, but had no physical presence in California. The Quarles attorney who prepared the opinion letters, an Illinois resident, represented that he was not present in California for the closings and communicated primarily about the loans and the opinion letters with the New York based attorney for GemCap. The motion to dismiss was denied. Jurisdictional arguments will continue to be made by defendants in similar cases and some may succeed. But opinion preparers and their law firms should be prepared to be sued in the jurisdiction in which their opinions are delivered.

Theories of Liability. No federal issues were involved in the litigation. Most opinion claims are litigated as negligent misrepresentation (rather than malpractice) cases on the theory that malpractice assumes a lawyer-client relationship. The GemCap case was litigated on both malpractice and negligent misrepresentation claims and certain intentional tort theories. While intentional torts are sometimes alleged in legal opinion cases, there...
is typically no insurance coverage for intentional acts. In most claim situations, insurance coverage is the likely source of payment for any judgment or settlement. As a result, even when intentional acts are alleged, plaintiffs seldom make a strenuous effort to prove intentional acts.

GemCap's complaint alleged (i) malpractice, (ii) negligent misrepresentation, (iii) intentional misrepresentation, and (iv) concealment. GemCap also alleged an intention to deceive in connection with the intentional misrepresentation and concealment claims.

Summary Judgment Motions. Typically, neither side knows whether the other side will seek summary judgment. The motion is often made even when the chance of success is small. Because the costs of a trial are typically very high, litigants often contemplate settlement if the matter cannot be resolved before trial. In federal court practice a summary judgment decision is not appealable unless the motion is granted. In state courts that do not follow the federal practice appeals may be permitted on the grant or denial of summary judgment.

Quarles moved for summary judgment and partial summary judgment (i.e., summary judgment on certain issues); GemCap moved for partial summary judgment.

The Opinion Expert Role. If motions for summary judgment may be contemplated by either side, each side typically engages an expert to testify as to customary practice in giving legal opinions to third parties. In some cases the experts provide a detailed report, in others a summary of points to be made by the expert is provided. The expert for each side is typically deposed by the other side prior to any summary judgment hearing.

In the GemCap case I acted as the expert for Quarles and submitted a 50-page expert report, which addressed customary opinion practice with respect to the various GemCap claims. My report addressed customary practice as a national practice, although it also cited to California Bar opinion reports. I am not admitted to practice in California. A California attorney acted as the expert for GemCap.

In connection with a summary judgment motion, it is not unusual for one or both sides to seek disqualification of the expert for the other side. In GemCap my expertise was questioned as one who had no specific California opinion experience. The expert for GemCap was challenged by Quarles on other grounds. In some cases, both national and local experts are presented by one or both sides to avoid the possibility that a court will strike testimony from an expert not admitted in the state whose law is applicable. In the GemCap case the court rejected all challenges to the experts.

Dispute as to Material Fact. Under Rule 56 of the Federal Rules of Civil Procedure (and equivalent state civil practice rules), a court cannot grant summary judgment on an issue if there is a genuine dispute as to any material fact required to reach a decision. Customary opinion practice is proven by expert testimony and is thus deemed to be factual in nature. The two experts engaged by opposing sides will typically disagree as to the application of customary opinion practice in the circumstances. That disagreement (unless the testimony of one expert is disqualified) ordinarily is sufficient to create a dispute as to a material fact required to reach a decision. That disputed issue of fact precludes granting summary judgment on the customary practice issue.

Avoiding Disputed Issues of Fact. My expert report related to customary opinion practice only. It was cited several times in the decision of the district court. But in that decision the court stated that it did not rely on any expert testimony to reach its decision. 269 F.Supp.3d at 1028-1029.

The district court avoided the factual issues disputed by the experts. The district court determined that the issues could all be determined as a matter of law, based on existing misrepresentation law case authority. This approach made the expert testimony irrelevant. But a comparison of customary practice (as explained in my report) on the issues involved
and the case authority on misrepresentation cited by the district court indicates that they are compatible on the issues in question.

The District Court Decision. The district court’s summary judgment decision is complex and highly dependent on the facts and the wording of the opinions given. My prediction is that the decision will soon be the most cited case involving third-party legal opinions. That is because the plaintiff raised a number of different questions involving the interpretation of legal opinions and the disclosure responsibilities of an opinion giver.

In ruling on the motion for summary judgment the court considered each claim in detail, referring to both customary practice and to misrepresentation law and in effect reconciling the two.

The first part of the decision relates largely to procedural matters. These matters are typically of limited interest to transactional lawyers. But in these pages the district court makes an important point for transactional lawyers. The arguments of the parties as well as the decision recognize the existence of a national opinion practice. It would have been difficult for the parties to take a different view. While GemCap and Crop were both California based, the GemCap lawyer was based in New York and the Crop lawyer was based in Chicago.

As the defendants’ expert I was deemed qualified under California standards although not a member of the California Bar, over the objection of plaintiff. The court specifically referred to “national standards.” See 269 F.Supp.3d at 1022 n. 5. The decision refers to my and Jeff Smith’s treatise (Legal Opinions in Business Transactions (3d ed. 2014), the Glazer, FitzGibbon & Weise treatise (Glazer and FitzGibbon on Legal Opinions (3d ed. 2008), TriBar reports, and California Bar opinion reports. In the coming years, the GemCap decision and the multi-bar approved Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions (63 Bus. Law. 1277 (2008)) will be cited as support for the proposition that legal opinion practice is a national practice.

The GemCap decision is not an “easy read” because of the complex facts. But the portion of the reported decision dealing with the substantive issues is worth close attention.

A Few Issues Determined in This Case. I have selected a few issues in the case that can be briefly described:

GemCap’s complaint asserted in different ways that Quarles made factual representations that were not explicit in the opinion paragraphs of the Quarles opinion letters. For example, the district court rejected attempts to make Quarles responsible for representations in a Crop disclosure statement which it had helped to prepare. In doing so the Court refers to the principle acknowledged by the U.S. Supreme Court in Janus that “[O]ne who publishes or prepares a statement on behalf of another is not its maker.” Janus Capital Group, Inc. v. First Derivative Traders, 564 US 135, 142 (2011), cited in 269 F.Supp.3d at 1035. The district court also rejected attempts to broaden the meaning of the legal opinions given. For example, the court rejected an assertion that a “no consent required” opinion meant that subagent consent to the assignment of collateral was addressed by that opinion even though the subagents had no contractual arrangement with any party regarding the collateral.

The decision contains a brief but useful discussion of an opinion giver’s obligation to disclose. Plaintiff argued that the responsible Quarles attorney was aware of an agreement and
therefore the firm had a duty to disclose it.\textsuperscript{10} The Quarles attorney conceded that at some time prior to the closing he had heard of the existence of such an agreement but had never seen it. The decision indicates that the plaintiff had (and did not satisfy) the burden of showing that the attorney remembered the agreement, knew it was still in effect, and knew it should be disclosed. See 269 F.Supp.3d at 1036. Even when there is a duty to disclose known relevant facts, the opinion giver will not be charged with knowledge unless there was recollection of the facts and an understanding of their relevance in the situation.

The only claim of GemCap based on an explicit opinion related to the existence of material litigation. Here the court dismissed the claim because GemCap was fully aware of the litigation it claimed was not disclosed. The court concluded that “Plaintiff could not have relied on any alleged omissions because Plaintiff had actual knowledge of the Litigation.” 269 F.Supp.3d at 1038. GemCap also claimed reliance on a pre-opinion phone conversation between a GemCap officer in which it was alleged that the Quarles opinion preparer advised the officer “not to worry” about certain litigation. The district court characterized such a statement as a prediction (rather than a representation) that was not actionable. 269 F.Supp.3d at 1038.

The GemCap district court opinion represents a careful and detailed attempt to assess opinion claims based on both opinion customary practice and misrepresentation law. It will be a source of guidance for opinion givers and recipients for years to come.

- Arthur Norman Field
  anf@fieldconsult.net

\textsuperscript{10} For a summary of plaintiff’s argument for disclosure, see 269 F.Supp.3d at 1030-1032.

---

Mylan Settlement Shows
Continuing SEC Focus on Disclosure of Government Investigations

In a recent settlement with pharmaceutical company Mylan N.V., the Securities and Exchange Commission has again signaled its views with respect to the timely accounting for, and disclosure of, government investigations. Without admitting or denying liability, Mylan agreed to pay $30 million to settle SEC charges that Mylan failed to follow Accounting Standards Codification (“ASC”) 450-20 in connection with a Department of Justice (“DOJ”) investigation of possible violations of the False Claims Act that ultimately resulted in a $465 million settlement.\textsuperscript{11}

\textbf{Background.} The investigation concerned whether Mylan overcharged Medicaid for purchases of Mylan’s EpiPen Auto-Injector, a treatment for severe allergic reactions. As set forth in an SEC complaint filed in the United States District Court for the District of Columbia on September 27, 2019, when Medicaid patients purchased EpiPen, Mylan was paid from taxpayer-funded Medicaid, and Mylan was required to rebate a portion of these revenues to the government.\textsuperscript{12} Mylan classified EpiPen as a

\textsuperscript{11} \textit{Editor’s Note:} For prior articles addressing accounting for loss contingencies associated with government investigations and audit letter responses related to such matters, see Stanley Keller, “\textit{Update on Dealing with Government Investigations in Audit Responses},” In Our Opinion (Spring 2018, vol. 17 no. 3, at 17-19); Thomas W. White, \textit{SEC Enforcement Case Applies Loss Contingency Accounting Standards to Government Investigations}, 32 Insights 3 (Feb. 2018); Stanley Keller, “\textit{Dealing with Government Investigations in Audit Responses},” In Our Opinion (Fall 2016, vol. 16 no. 1, at 14-17).

“generic” or “non-innovator” drug under the Medicaid Drug Rebate Program. Mylan thereby paid much lower rebates than if it had classified EpiPen as a “branded” or “innovator” drug. Classification of EpiPen as a generic drug also enabled EpiPen to avoid paying additional rebates when it increased the price of EpiPen.

As outlined in the complaint, the key events include:

- **October 2014**—The Centers for Medicare and Medicaid Services (“CMS”) informs Mylan that it has misclassified EpiPen.
- **November 2014**—Mylan becomes aware of a DOJ investigation of Mylan for potential violations of the False Claims Act for overcharging the government for EpiPen when DOJ serves subpoenas for documents concerning Mylan’s classification of EpiPen. Over the next nine months, DOJ issues additional document subpoenas, seeks information relating to the government’s potential damages and takes testimony from a Mylan employee.
- **August 2015**—Mylan signs a tolling agreement. The investigation continues to move forward.
- **October 2015**—Mylan produces an analysis showing potential damages for one quarter of 2015 ranging from approximately $12 to $42 million.
- **June-July 2016**—Mylan provides additional damages data and consents to an extension of the tolling agreement. At a meeting on July 12, 2016, DOJ makes a detailed presentation setting forth the bases for its claims, provides its damage estimates and indicates it was prepared to sue Mylan unless Mylan made a settlement offer. On July 29, 2016, Mylan makes a settlement offer of $50 million, which DOJ rejects and counters. Settlement negotiations continue.
- **October 2016**—Mylan and DOJ reach a settlement in principle for $465 million.
- **October 7, 2016**—Mylan publicly discloses for the first time the DOJ investigation and Mylan’s liability resulting from its misclassification of EpiPen.

The SEC complaint alleges that Mylan failed to timely disclose and accrue for potential material losses from the investigation under ASC 450-20. The complaint articulates the standard as follows:

“Under GAAP, an issuer must disclose a material loss contingency—such as a liability resulting from the claims that Mylan incorrectly classified EpiPen—if a loss is at least reasonably possible. A loss is considered ‘reasonably possible’ when the chance of the future event or events occurring is more than remote but less than likely. A loss is considered ‘remote’ when the chance of the future event or events occurring is slight. Additionally, an issuer must record an accrual for a material loss contingency, as a charge against income in its financial statements, if a loss is probable and reasonably estimable. See ASC 450-20-25-2. ‘Probable’ means the future event or events is likely to occur.”

Complaint ¶ 31.

Applying this standard, the SEC alleged that by at least the filing of its Form 10-Q for the third quarter of 2015 (on October 30, 2015), Mylan knew or should have known that the likelihood of a material loss was reasonably

---

13 The complaint also alleges that Mylan’s risk factor disclosure in its 2014 and 2015 annual reports was misleading in stating that CMS “may” take the position that Mylan’s submissions to Medicaid were incorrect. In fact, by the time of these reports, CMS had told Mylan that it was misclassifying EpiPen as a generic drug. See Complaint ¶ 5.
possible, and Mylan should have disclosed the nature of the contingency and its best estimate of the range of loss resulting from the contingency. Complaint ¶ 32. In addition, by at least the filing of its Form 10-Q for the second quarter of 2016 (on August 9, 2016), Mylan knew or should have known that a material loss was probable and the loss was reasonably estimable, and Mylan should have taken an accrual for the loss. Complaint ¶ 33.

**Observations.** The SEC’s articulation of the standard for disclosure of government investigations does not take into account the distinction between “asserted” and “unasserted” claims for purposes of disclosure under ASC 450-20. With respect to unasserted claims, ASC 450-20-50-6 provides:

“Disclosure is not required of a loss contingency involving an unasserted claim or assessment if there has been no manifestation by a potential claimant of an awareness of a possible claim or assessment unless both of the following conditions are met:

a. It is considered probable that a claim will be asserted.

b. There is a reasonable possibility that the outcome will be unfavorable.”

Thus, in the case of unasserted claims, ASC 450-20 requires an assessment of both the likelihood of assertion of the claim and the likelihood of a loss if the claim is asserted. In most cases, disclosure is required only where it is probable that the claim will be asserted. However, recent court decisions in the context of government investigations have focused on the phrase, “if there has been no manifestation by a potential claimant of an awareness of a possible claim or assessment.” The decisions conclude that if the government has manifested an awareness of a possible claim, assertion need only be reasonably possible for disclosure to be triggered (assuming that the probability of a loss in that circumstance is also reasonably possible).\(^\text{14}\)

A government investigation involves unasserted claims, unless and until an enforcement proceeding is initiated or the government threatens to initiate a proceeding. Under ASC 450-20-50-6, if the probable assertion standard applies (and a material loss is reasonably possible), disclosure is required only if it is likely that a claim will be asserted, which is a relatively high threshold. However, if the reasonably possible standard applies to assertion (and a material loss is reasonably possible), disclosure is mandated if the likelihood a claim will be asserted is more than remote, a much lower threshold. A determination of when the government has “manifested awareness” and therefore shifted the standard for likelihood of assertion from probable to reasonably possible can be a difficult analysis.

The SEC complaint does not address the “manifestation of an awareness” language and therefore does not shed much new light on what facts and circumstances would “manifest an awareness” of a claim in the context of a government investigation. The SEC’s allegations suggest that mere initiation of an investigation or investigatory activities, such as serving document requests or taking testimony, do not amount to a manifestation of awareness of a possible claim by the government. Mylan became aware of the DOJ investigation in November 2014, when DOJ served a document subpoena, and DOJ appears to have engaged in substantial investigatory activities thereafter. But the SEC does not allege that a disclosure obligation was triggered before Mylan’s Form 10-Q filing on October 30, 2015. The complaint does not detail the specific events that should have resulted in disclosure at that point. However, in August 2015, the DOJ had requested that Mylan enter into a tolling

agreement. Requesting a tolling agreement would, depending on the other facts and circumstances, seem to be a relevant factor in a determination that the government had manifested awareness of a claim. Notably, the SEC does not allege that accrual was required until the Form 10-Q was filed on August 9, 2016. By that point, DOJ had overtly threatened suit, so the standards for asserted claims applied. The parties had estimated damages and begun negotiating a settlement, so, in the SEC’s view, ASC 450-20’s requirements for accrual—probable and reasonably estimable material loss—were satisfied.

The Mylan case again illustrates the challenges that government investigations can present in responding to audit inquiry letters. The case does not affect a lawyer’s responsibilities to disclose pending or overtly threatened claims. However, the lawyer’s professional responsibilities, which he or she confirms in an audit letter response, require the lawyer to consider the client’s disclosure obligation with respect to an unasserted claim under ASC 450-20, and to consult with the client with respect to the requirements of ASC 450-20.

Conclusion. The Mylan settlement shows that the SEC continues to look askance at situations in which the first public disclosure of a material loss contingency arising from a government investigation comes not long before, or contemporaneously with, a settlement of the government’s claim. In Mylan, the government’s investigation had been under way for almost two years before the $465 million settlement was announced. During the course of the investigation, the government took actions that, the SEC appears to assert, triggered disclosure and/or accrual at earlier points. These actions included tolling agreements, damages calculations, threats of litigation and settlement negotiations. Lawyers who advise companies regarding their disclosure obligations in this context should carefully consider whether the investigation has evolved to a point where ASC 450-20’s disclosure and/or accrual requirements have been triggered. Because government

---

15 See American Bar Association, Statement of Policy Regarding Lawyers’ Responses to Auditors’ Requests for Information ¶ 5 (1975), 31 Bus. Law. 1709 (1976). Under the Statement of Policy, the lawyer only provides information with respect to asserted claims, i.e., pending or overtly threatened litigation, unless the client specifically asks the lawyer to comment on an unasserted claim. “Overtly threatened” means “a potential claimant has manifested to the client an awareness of and present intention to assert a possible claim or assessment unless the likelihood of litigation (or of settlement when litigation would normally be avoided) is considered remote.” Id. Under this definition, it is not enough for the government to have “manifested an awareness” of a potential claim; the government must also have indicated a “present intention” to assert the claim. See also ABA Business Law Section Committee on Audit Inquiry Responses, “Second Report of the Committee on Audit Inquiry Responses Regarding Initial Implementation,” 32 Bus. Law. 177, 185 (1976) (“Treatment of Pending Investigation Involving a Client When No Charges Against the Client Have Been Overtly Threatened”).

16 As explained in the ABA Statement of Policy, “The auditor may properly assume that whenever, in the course of performing legal services for the client with respect to a matter recognized to involve an unasserted possible claim or assessment which may call for financial statement disclosure, the lawyer has formed a professional conclusion that the client must disclose or consider disclosure concerning such possible claim or assessment, the lawyer, as a matter of professional responsibility to the client, will so advise the client and will consult with the client concerning the question of such disclosure and the applicable requirements of [ASC 450-20].” Id. ¶ 7 & n.3, citing the precursor to ASC 450-20-50-6.
investigations develop over time, this analysis should be made in connection with each periodic filing and other events (such as a securities offering) that could trigger disclosure.

- Thomas W. White
  thomas.w.white@aol.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 October 31, 2019.]

#### A. Published Reports Available From Legal Opinions Resource Center

| ABA Business Law Section | 2009 | Effect of FIN 48 – Audit Responses Committee  
|                          |      | Negative Assurance – Securities Law Opinions Subcommittee  
|                          | 2010 | Sample Stock Purchase Agreement Opinion – Mergers and Acquisitions Committee  
|                          | 2011 | Diligence Memoranda – Task Force on Diligence Memoranda  
|                          | 2013 | Survey of Office Practices – Legal Opinions Committee  
|                          |      | Legal Opinions in SEC Filings (Update) – Securities Law Opinions Subcommittee  
|                          |      | Revised Handbook – Audit Responses Committee  
|                          | 2014 | Updates to Audit Response Letters – Audit Responses Committee  
|                          | 2015 | No Registration Opinions (Update) – Securities Law Opinions Subcommittee  
|                          |      | Cross-Border Closing Opinions of U.S. Counsel  
|                          | 2016 | Report on the Use of confirmation.com – Audit Responses Committee  
|                          | 2017 | 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  
|            |      | Comprehensive Report  
|            | 2009 | Venture Capital Opinions  
|            | 2014 | Revised Sample Opinion  
|            | 2014 | Sample Venture Capital Financing Opinion  
|            | 2016 | Third-Party Closing Opinions: Limited Liability Companies and Partnerships  
|            | 2019 | Sample Personal Property Security Interest Opinion*  

---

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, [https://www.americanbar.org/groups/business_law/migrated/tribar/](https://www.americanbar.org/groups/business_law/migrated/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”).
<table>
<thead>
<tr>
<th>Location</th>
<th>Year</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>Florida</td>
<td>2011</td>
<td>Comprehensive Report Update</td>
</tr>
<tr>
<td>Georgia</td>
<td>2009</td>
<td>Real Estate Secured Transactions Opinions Report</td>
</tr>
<tr>
<td>City of London</td>
<td>2011</td>
<td>Guide</td>
</tr>
<tr>
<td></td>
<td>2017</td>
<td>Guide Update</td>
</tr>
<tr>
<td>Maryland</td>
<td>2009</td>
<td>Update to Comprehensive Report</td>
</tr>
<tr>
<td>Michigan</td>
<td>2009</td>
<td>Statement Report</td>
</tr>
<tr>
<td></td>
<td>2010</td>
<td>Report</td>
</tr>
<tr>
<td>Multiple Bar Associations</td>
<td>2008</td>
<td>Customary Practice Statement</td>
</tr>
<tr>
<td></td>
<td>2019</td>
<td>Statement of Opinion Practices and related Core Opinion Principles*20</td>
</tr>
<tr>
<td>Multiple Law Firms</td>
<td>2016</td>
<td>White Paper – Trust Indenture Act §316(b)</td>
</tr>
<tr>
<td>National Association of</td>
<td>2011</td>
<td>Function and Professional Responsibilities of Bond Counsel</td>
</tr>
<tr>
<td>Bond Lawyers</td>
<td>2013</td>
<td>Model Bond Opinion</td>
</tr>
<tr>
<td></td>
<td>2014</td>
<td>501(c)(3) Opinions</td>
</tr>
<tr>
<td></td>
<td>2017</td>
<td>Update of Model Letter of Underwriters’ Counsel</td>
</tr>
<tr>
<td>National Venture Capital</td>
<td>2013</td>
<td>Model Legal Opinion</td>
</tr>
<tr>
<td>Association</td>
<td></td>
<td></td>
</tr>
<tr>
<td>New York</td>
<td>2009</td>
<td>Substantive Consolidation – Bar of the City of New York</td>
</tr>
<tr>
<td></td>
<td>2012</td>
<td>Tax Opinions in Registered Offerings – New York State Bar Association Tax Section</td>
</tr>
<tr>
<td>North Carolina</td>
<td>2009</td>
<td>Supplement to Comprehensive Report</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>2007</td>
<td>Update</td>
</tr>
<tr>
<td>South Carolina</td>
<td>2014</td>
<td>Comprehensive Report</td>
</tr>
<tr>
<td>Tennessee</td>
<td>2011</td>
<td>Report</td>
</tr>
</tbody>
</table>

*20 A joint project of the ABA Legal Opinions Committee and the Working Group on Legal Opinions, each of which has approved the documents, along with many other bar and lawyer groups. For a list of the approving groups, see https://www.americanbar.org/content/dam/aba/administrative/business_law/buslaw/tribar/materials/schedule_of_approving_organizations.pdf
### Published Reports Available From Legal Opinions Resource Center (continued)

<table>
<thead>
<tr>
<th>State</th>
<th>Year</th>
<th>Report Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Texas</td>
<td>2006</td>
<td>Supplement Regarding Opinions on Indemnification Provisions</td>
</tr>
<tr>
<td></td>
<td>2009</td>
<td>Supplement Regarding ABA Principles and Guidelines</td>
</tr>
<tr>
<td></td>
<td>2012</td>
<td>Supplement Regarding Entity Status, Power and Authority Opinions</td>
</tr>
<tr>
<td></td>
<td>2013</td>
<td>Supplement Regarding Changes to Good Standing Procedures</td>
</tr>
<tr>
<td>Virginia</td>
<td>2018</td>
<td>Comprehensive Report</td>
</tr>
<tr>
<td>Washington</td>
<td>2018</td>
<td>Comprehensive Report</td>
</tr>
<tr>
<td>TriBar</td>
<td>2008</td>
<td>Preferred Stock</td>
</tr>
<tr>
<td></td>
<td>2011</td>
<td>Secondary Sales of Securities</td>
</tr>
<tr>
<td></td>
<td>2011</td>
<td>LLC Membership Interests</td>
</tr>
<tr>
<td></td>
<td>2013</td>
<td>Choice of Law</td>
</tr>
<tr>
<td></td>
<td>2017</td>
<td>Opinions on Limited Partnerships</td>
</tr>
</tbody>
</table>

### B. Pending Reports

- **ABA Business Law Section**
  - Sample Asset Purchase Agreement Opinion – Merger and Acquisitions Committee
  - Updated Survey – Legal Opinions Committee
  - Resale Opinions – Securities Law Opinions Subcommittee
  - Opinions on Risk Retention Rules White Paper – Securitization and Structured Finance Committee & Legal Opinions Committee

- **ABA Real Property Section (and others)**
  - UCC Opinions in Real Estate Transactions

- **California**
  - Exceptions and Other Qualifications to the Remedies Opinion
  - Third-Party Opinions Comprehensive Report Update

- **Multiple Bar Associations**
  - Local Counsel Opinions

- **Florida**
  - Comprehensive Report Update

- **Texas**
  - Comprehensive Report Update

- **TriBar**
  - Opinions on Provisions Allocating Risk
  - Bring Down Opinions
  - Opinions on LLCs (Update)

---

21 See note 19.
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 Committee Chair Rick Frasch at rnfrasch@gmail.com.

NEXT NEWSLETTER

We expect the next newsletter to be circulated in the Winter of 2019-2020. Please forward cases, news and items of interest to Rick Frasch (rnfrasch@gmail.com) or Jim Fotenos (jfotenos@greeneradovsky.com).

RECENT DEVELOPMENTS ON TWITTER
@abalegalopinion

Stay current on legal opinion developments @ABALegalOpinion. If you are a novice on Twitter, you can learn all about Twitter and join and follow our tweets by going to the Internet and downloading a podcast at: https://www.howcast.com/videos/149055-how-to-use-twitter/.

22 The URL is https://www.americanbar.org/groups/business_law/committees/opinions/.