

IN OUR OPINION

THE NEWSLETTER OF THE LEGAL OPINIONS COMMITTEE

ABA BUSINESS LAW SECTION

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James F. Fotenos, Editor

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ADDENDUM, WGLO 2013 FALL SEMINAR

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FROM THE CHAIR

I hope that you will find this Winter issue of “In Our Opinion” to be useful in keeping you up to date with what is happening in the world of legal opinion practice. We are indebted to a number of our Committee members for this issue, but as usual none more than our editor, Jim Fotenos. This issue contains a comprehensive summary of our Committee’s meeting held at the recent Fall Meeting of the Business Law Section in Washington, D.C., as well as those of other related Section committees and subcommittees – i.e., those dealing with professional responsibility, communications with auditors, and opinions on securities offerings. It also highlights the following recent developments we believe you will find of interest:

- *Enforceability of Provisions Contractually Shortening Statutes of Limitations.* The Delaware Court of Chancery has upheld a contract clause that had the effect of shortening the otherwise applicable statute of limitations. The decision in *ENI Holdings, LLC v. KBR Group Holdings, LLC* adds to a growing body of law that highlights the need to carefully consider the extent to which contractual provisions can (and cannot) alter otherwise applicable statutes of limitation.

- *Lawyers as Gatekeepers.* Stan Keller has prepared a succinct but informative summary of the *Quest Diagnostics* case. This case discusses fundamental issues surrounding the role of the lawyer in a world that increasingly looks to lawyers not just as counselors and advocates, but also as gatekeepers. While both “visions” are of long standing, in recent years the “gatekeeper” notion has perhaps gained ground; the *Quest Diagnostics* decision, however, reminds us that one of the bedrock principles of our profession is loyalty to our clients: we are strictly limited in acting as a whistleblower by the loyalty we owe to our clients, as reflected in the ethics rules governing our profession.

- *Sovereign Debt.* The saga of *NML Capital, Ltd. v. The Republic of Argentina*, is told (at least in part). While that case is definitely of interest to those who work with sovereign debt, it is also of interest to all as an illustration of the issues presented by courts adjudicating disputes involving sovereign parties.

Working Group on Legal Opinions. Twice a year our Newsletter includes an extensive addendum that reports on the last concluded meeting of the Working Group on Legal Opinions. This issue includes the addendum for the WGLO’s Fall 2013 Meeting. While some of you may have attended that meeting, most of you did not; the summaries are a valuable way for all of us to keep abreast of the topics of current interest addressed at the WGLO meeting. While the summaries are the work of many hands (including the various program chairs and reporters), they owe a great deal to the efforts of John Power without whose constant but gentle nudging they would not be timely created, and to Gail Merel, who assists in the editing of the summaries.

While not a topic of the WGLO Addendum, this is a special moment for the WGLO as it officially becomes a nonprofit corporation in its own right. The WGLO was originally formed under the auspices of the ABA Business Law Section to provide a forum to foster discussion of opinion practices among a wide range of interested parties (and not just lawyers who render opinions). These include representatives of opinion recipients (such as rating agencies, underwriters and institutional lenders), professional liability insurers, and those who regularly defend those faced with claims stemming from opinions given. The WGLO also provides a forum for a number of organizations devoted to opinion practice (including various state bar bodies that focus on opinion practice) to interact. The evolution of the WGLO into a standalone body is a testament to its success in promoting a wider dialog among a varied group of participants about opinion practice.

The WGLO's focus — promoting discussion of current issues, and bringing together disparate constituencies — is important, if different in some ways from the focus of this Committee or the TriBar Opinion Committee. Both our Committee and TriBar (and, for that matter, the opinion committees of various state bar organizations) have at their core the role of identifying and articulating customary opinion practice as it evolves, and helping educate the bar about that practice through reports and other activities. We see this in recent years beginning with the *Legal Opinion Principles* themselves, and continuing through the important reports of TriBar and those of many state bar organizations, and most recently in the TriBar report on opinions concerning LLCs and its supplemental report on choice of law (discussed in this issue of the Newsletter). This work continues today in each of these organizations, including the work of this Committee on the cross border opinions report that we hope to complete shortly, and our Committee's work with the WGLO on a new articulation of common opinion practices. In all these endeavors the participants are dedicated to promoting clarity and understanding in opinion practice, and (hopefully) developing an ever increasing and accepted common core of principles that guide that practice.

All of the seminars, reports and newsletters that these bodies collectively produce (and which you can find through the Legal Opinion Resource Center on our Committee's website ¹) result from constant dialog, research, writing and just plain hard work undertaken by a large number of volunteer lawyers. And at its core it requires participation in what is a national conversation about opinion practice. That dialog requires not only active participation and comment, but also patience and the willingness to listen and learn. And (if I can be forgiven a small plug as Committee Chair), the ability to join that dialog at any point in one's career, and

¹ If you haven't visited this resource, take a moment to do so now with a click [here](http://apps.americanbar.org/buslaw/tribar/) (CTRL + click), URL: <http://apps.americanbar.org/buslaw/tribar/>.

to participate in and learn from it, is one of the great advantages available from membership on this Committee.

Spring Meeting, Los Angeles, California (April 10-12). Since I have moved to plugging, I will conclude by saying I hope to see as many of you as can make it in Los Angeles for the Section's Spring Meeting on April 10 – 12. This issue contains information about programs of interest to those of us in the opinions world that will take place at the meeting; you will see that our programs (and our reception) are focused on Friday and Saturday morning. As always, for those who cannot make it to Los Angeles, our Committee meeting will include the ability to participate by phone.

- Timothy Hoxie, Chair
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FUTURE MEETINGS

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

Legal Opinions Committee

Friday, April 11, 2014

Committee Meeting:
3:30 p.m. – 5:00 p.m.

Reception: 5:00 p.m. – 6:30 p.m.

Saturday, April 12, 2014

Program: “How Is the Supreme Court Messing
Around With Third-Party Legal Opinions?”
8:00 a.m. – 10:00 a.m.

Program: “It’s Midnight and the Closing is
Tomorrow: What Do I Need to Know to Give
the Opinion the Other Party (and My Team)
Have Asked Me to Prepare?”
(Jointly sponsored with the Young Lawyers)
2:00 p.m. – 3:30 p.m.

Securities Law Opinions Subcommittee

Friday, April 11, 2014

Subcommittee Meeting:
2:00 p.m. – 3:00 p.m.

ABA Business Law Section Spring Meeting (continued)

Professional Responsibility Committee

Friday, April 11, 2014

Committee Meeting:
2:30 p.m. – 4:30 p.m.

Saturday, April 12, 2014

Program: “Beyond the Attorney-Client
Privilege: The Ethical Duty of Confidentiality
for the Business Lawyer”
10:30 a.m. – 12:30 p.m.

Audit Responses Committee

Saturday, April 12, 2014

Committee Meeting:
10:00 a.m. – 11:00 a.m.

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

FALL 2013 MEETING OF ABA BUSINESS LAW SECTION

The Business Law Section held its Fall Meeting in Washington, D.C., on November 22-23, 2013. The following are reports on meetings and programs at the Fall Meeting of interest to members of the Legal Opinions Committee.

Legal Opinions Committee

The Legal Opinions Committee met on November 22, 2013. The meeting was attended, in person or by phone, by some 40 members of the Committee. There follows a summary of the meeting.

Cross-Border Project. Ettore Santucci, Goodwin Proctor LLP, Boston, the reporter for the Committee's outbound cross-border legal opinions report, gave an update on the status of the report. The final issue being addressed by the editorial group is the scope of the "no violation of law opinion" and whether it addresses, in the cross-border context, such laws as those administered by the Department of Treasury's Office of Foreign Assets Control, anti-money laundering laws, the laws administered by the Committee on Foreign Investment in the United States, and other potential laws that may apply to cross-border transactions but that are not typically addressed in domestic practice. There is no consensus as to whether as a matter of customary practice the no violation of law opinion given in a cross-border transaction addresses such laws. There followed a lively debate on whether an opinion giver of a cross-border opinion should apprise a foreign opinion recipient of such laws or whether the potential application of such laws to a transaction is more appropriately the responsibility of the recipient's counsel.

It is Ettore's expectation that the complete report will be available for review by the Committee at the Business Law Section's 2014 Spring Meeting to be held April 10-12 in Los Angeles.

The members of the editorial group preparing the cross-border legal opinion report, besides Ettore, include J. Truman Bidwell, Jr., Daniel Bushner, Peter Castellon, Sylvia Fung Chin, Edward H. Fleischman, Richard N. Frasch, Donald W. Glazer, Jerome E. Hyman, Stanley Keller, Noël J. Para, John B. Power, James J. Rosenhauer, and Elizabeth van Schilfgaarde.

Joint Project on Common Opinion Practices. Steve Weise, Proskauer Rose LLP, Los Angeles, reported on the status of the joint project undertaken by the Committee and the Working Group on Legal Opinions ("WGLO") in preparing a description of common opinion practices. The group continues to address the treatment of misleading opinions and the appropriateness of tailoring opinion requests and lists of exceptions and qualifications to the opinions actually given in a closing opinion letter. The group working on this project includes Steve as its reporter and Pete Ezell and Steve Tarry as co-reporters, Ken Jacobson, Stan Keller and Vladimir Rossman as co-chairs, as well as representatives of this Committee and a number of state bar associations through the WGLO. The group continues to work through drafts describing common opinion practices.

Steve pointed out that the group's project has particular relevance in light of the effort being undertaken by the American Law Institute to update the Restatement of Torts to address, among other things, negligent misrepresentation, which will deal with opinion letters. Steve has been in contact with the reporter for the project, Professor Ward Farnsworth, University of Texas School of Law, and has been presenting the perspective of transaction lawyers to the reporter.

Working Group on Legal Opinions. Arthur Field reported that WGLO is in the process of

incorporating as a stand-alone entity, although he does not anticipate any material change in its working relationship with this Committee or with the Business Law Section. WGLO's Fall 2013 seminar was held October 28-29 in New York. Summaries of the panels, breakout sessions, and dinner meetings held at the seminar are included in the Addendum to this issue of the Newsletter. The next WGLO seminar will be held May 12-13, 2014 in New York.

WGLO's Spring 2013 seminar focused on a commemoration of Jim Fuld's seminal article, "*Legal Opinions in Business Transactions – An Attempt to Bring Some Order Out of Chaos*," 28 Bus. Law. 915 (1973). Summaries of the panel sessions, concurrent breakout groups, and dinner meetings appeared in the Addendum to the Summer 2013 issue of the Newsletter (volume 12, no. 4). Articles based on the seminar are planned to appear in the May 2014 issue of *The Business Lawyer*.

TriBar Opinion Committee. The TriBar Opinion Committee published its report on LLC third party closing opinions in 2006 (61 Bus. Law. 679), followed by its supplemental report on opinions on LLC membership interests in 2011 (66 Bus. Law 1065). Dick Howe reported on the progress of TriBar's upcoming report on third-party closing opinions delivered for limited partnerships. The report should be completed in 2014. An issue currently being addressed by the Committee is whether a due formation opinion can be rendered for a Delaware limited partnership if there have been defects in the original organization of the limited partnership. While such defects, if cured, should enable counsel to render the "validly existing" opinion for the limited partnership, some members of the Delaware Bar have expressed the view that, in some cases, even if organizational defects are cured, the due formation opinion cannot be given.

Steve Weise reported that TriBar has commenced a project on opinion issues involved in allocation of risk provisions in transaction

documents, such as indemnification and contribution covenants.

The August issue of *The Business Lawyer* (68 Bus. Law issue no. 4), contains two articles on opinion practice, one by the Subcommittee on Securities Law Opinions of the Federal Regulation of Securities Committee, entitled "*Legal Opinions in SEC Filings (2013 Update)*," 68 Bus. Law 1149 (which updates the 2004 Special Report and addresses the October 14, 2011 publication by the staff of the SEC's Division of Corporation Finance of Staff Legal Bulletin No. 19), and TriBar's "*Supplemental Report on Opinions on Chosen-Law Provisions under the Restatement of Conflict of Laws*," 68 Bus. Law 1161. Co-reporters for the TriBar report were Don Glazer, Jerry Hyman, and Stan Keller. Don and Stan summarized the Supplemental Report, and addressed issues raised by the dialogue concerning the Supplemental Report that had just occurred on the Committee's listserve. (See "Notes from the Listserve" in this issue of the Newsletter).

AICPA Project to Revise "True Sale" Opinion Requirements. Steve Weise reported on the status of the effort by the American Institute of Certified Public Accountants to revise the disclosures (and related support) concerning off-balance sheet entities and obligations. Among other proposals the AICPA was exploring whether to require a more extensive "true sale" opinion from the audit client's counsel. The proposal would expand considerably the scope of the required opinion to include all relevant laws, including fraudulent conveyance laws. Representatives of the Committee, including Stan Keller, Steve, and Will Buck of Sidley & Austin LLP, have been in discussions with representatives of the AICPA. In response to input by the Committee and others, the AICPA representatives have proposed to hold the project in abeyance pending consultations with accounting standards setters, including the FASB.

Other Committee Meetings; Program Seminars. Charlie McCallum, Chair of the Professional Responsibility Committee,

previewed the topics to be addressed by his Committee in its meeting the following day. Committee Chair Tim Hoxie noted that the Audit Responses Committee was meeting later that day, and that the Securities Law Opinions Subcommittee was meeting the following morning. Tim noted that later on Friday the Committee would be presenting a program with the Securities Law Opinions Subcommittee, addressing the TriBar supplemental report on choice-of-law provisions and the Subcommittee's planned update of its No Registration Opinion Report to reflect the SEC's Regulation D Rule 506 amendments.

Tim Hoxie closed the meeting by applauding Anna Mills' efforts as Membership Director to expand the Committee's membership, including through the use of social media. Tim encouraged each member of the Committee to invite at least one other colleague to join the Committee.

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Securities Law Opinions Subcommittee; Federal Regulation of Securities Committee

The Subcommittee met on November 23, 2013, and once again discussed the proposed update of the Subcommittee's 2007 report on "No Registration Opinions," 63 Bus. Law 187 (2007). This topic had been previously discussed at the Subcommittee's August 2013 meeting, and on a subsequent conference call. A preliminary discussion draft of the updated report had been circulated in advance of the November meeting.

The updated report would, among other things, address the impact on opinion practice of the recently adopted amendments to SEC Rule 506. Discussion to date has focused particular attention on two aspects of the amended Rule:

- the requirement that in a Rule 506(c) offering, involving "general solicitation," the issuer must take reasonable steps to verify that all purchasers are "accredited investors;" and
- the Rule 506(d) "bad actor" disqualification provisions.

Because these provisions require changes to offering practices, they raise questions as to what additional steps, if any, an opinion giver should be taking in preparation for delivering the opinion, and how, if at all, these new elements should be reflected in the opinion itself. It was noted that the pending further amendments to Rule 506—particularly the proposed changes to Rule 506(b), which would add a disqualification for having failed to file a Form D in a previous offering—could, if adopted, raise additional issues for the opinion giver. It may therefore be preferable to await the outcome of that further rulemaking before attempting to finalize an update of the report. The discussion also touched on ABA Ethics Opinion 335 (1974), which discusses the ethical obligations of a lawyer delivering a no-registration opinion. It was noted that ethical and regulatory expectations of the opinion giver are separate and distinct from drafting conventions commonly followed in these opinions. A lively discussion of these issues is expected going forward.

On an administrative note, it was announced that Tom Kim, of Sidley Austin LLP and former Chief Counsel of the Division of Corporation Finance, has been named Vice Chair of the Subcommittee.

The next meeting of the Subcommittee will be in Los Angeles on April 11, 2014.

- Robert E. Buckholz, Chair
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Audit Responses Committee

The Committee met on November 22, 2013. The principal discussion points are summarized below.

Listserve Activity. The Committee discussed a summary of recent listserve activity, as noted below:

- *Audit firms reviewing legal bills.* It was reported that an audit firm, purportedly citing a new audit standard, was insisting on reviewing full invoices from law firms. No one is aware of such a new standard, though the auditing standard covering inquiries to lawyers (AU 337) identifies invoices as one thing auditors should look at. Typically, auditors look at the invoices to identify the lawyers to whom audit requests should be addressed, but not to gain substantive information about contingencies. Companies provide the one-page invoice, but not the narrative back up or time entries. Listserve commentators observed that providing the full invoices raises potential privilege or other issues. At the meeting, some members reported similar requests, but indicated that ultimately the accountants had backed off if the client objected. It was noted that clients should be alert to the problems raised by a request for the full invoices.
- *Government Accounting Standards Board Statement 62.* A government entity that is a client of a law firm requested that its audit letter response meet GASB 62, paragraph 100, instead of ASC 450. Except for references to GASB 62, the client's letter is otherwise identical to the typical letter. The persons responding to the request instead refer to ASC 450, and the recipients have not questioned it. At the meeting, members emphasized the need for lawyers who respond to these types of requests to understand the context in

which the inquiry is being made, and to consider whether the government agency recipient understands the limitations on the scope and use of the response.

- *Qui Tam.* There was another inquiry regarding how to respond with respect to qui tam cases, which are sealed under federal law. This was the topic of a paper circulated to the Committee by Jack Boese in 2007, which provides some suggestions on how to address the matter (e.g., rely on the materiality limitation in the request letter, disclose an underlying DOJ investigation, or seek DOJ consent to a limited unsealing order). Members of the Committee indicated that qui tam cases continue to present difficult issues and typically have to be addressed on a case-by-case basis.

Updates. The Committee discussed briefly the proposed project to develop guidance for practitioners and others on update requests. The Chair circulated a preliminary outline for the proposed guidance and is looking for additional volunteers for the project.

Recent Court Decision. The Committee discussed a recent decision in the *Bank of America AIG Securities Litigation*, 2013 WL 5878814 (SDNY Nov. 1, 2013), which considered the adequacy of litigation contingency disclosures under ASC 450. The complaint in this class action asserted violations of the securities laws by BofA for failing to disclose the imminence and amount of a potential mortgage-backed securities (MBS) lawsuit by AIG against BofA in its 2011 10-K report filed February 25, 2011, or in subsequent filings, until August 8, 2011, when AIG sued BofA, alleging compensatory damages equaling at least \$10 billion.

The district court held that the alleged omission of information about the potential AIG lawsuit prior to August 8, 2011 did not mislead investors. According to the court, substantial

information about the AIG claim in particular (including the possibility of the lawsuit and the potential amount) was in the public domain through news reports, as well as AIG's own public statements. The court found that BofA's disclosures about litigation risks and MBS exposure in particular were sufficient and the fact that BofA did not specifically mention AIG did not make them misleading in light of the information otherwise available to investors.

The court specifically considered whether BofA was required to disclose the AIG claim in its financial statements under ASC 450. The court noted that plaintiffs had alleged that the AIG suit was a reasonably possible loss that needed to be disclosed publicly. The court accepted BofA's position that even if a loss from the AIG claim was reasonably possible, there was no plausible allegation that BofA could have reasonably estimated the amount of loss. To include a range of \$0-\$10 billion, as plaintiffs suggested, "would be unreasonable and meaningless." The court noted that "BofA adequately disclosed the nature of the contingency at issue—namely, loss from pending and threatened litigation arising from the sales of MBS—and stated that it could not estimate losses for certain litigations that would have included the AIG suit." BofA's disclosures did include an aggregate range for which losses were reasonably estimable, but the court agreed with BofA that it was not necessary to include the AIG claim within the range.

This decision is useful because it found an issuer's description of potential litigation contingencies and estimates of reasonably possible losses, including the use of aggregate ranges, to be sufficient under ASC 450 and the federal securities laws. At the same time, it is clear that the district court's overall view of the case was strongly influenced by its conclusion that substantial public information was available to investors about AIG's potential claim against BofA.

Next Meeting. The Committee's next meeting will be at the Business Law Section's

Spring Meeting in Los Angeles, on Saturday, April 12, 2014, at 10-11 a.m. PDT.

- Thomas W. White, Chair
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Professional Responsibility Committee

The Professional Responsibility Committee met on November 23, 2013. The following topics were discussed:

- *Subcommittee and Other Reports*
 - *Firm Counsel Connection.* In the absence of the Firm Counsel Connection Co-Chairs the Committee Chair reported that regional meetings of firm counsel have been or will shortly be held in 12 metropolitan areas (Boston, Cleveland, Dallas, Los Angeles, Minneapolis/St. Paul, New York City, Philadelphia, Richmond, San Diego, San Francisco, Seattle, and Washington DC).
 - *IT Issues in Ethics and Professional Responsibility.* Juliet Moringiello reported that her Subcommittee will complete in January a set of proposals to the ABA Standing Committee on Ethics and Professional Responsibility to address, through changes in the Model Rules or Comments or through ethics opinions, suggestions made by the Committee to bring greater clarity and guidance to practitioners regarding changes adopted by the House of Delegates pursuant to the recommendations of the Ethics 20/20 Commission.
 - *Law of Lawyering Initiative.* Keith Fisher reported that his Subcommittee had identified a Reporter to undertake work on an initial project that could, when completed, be used to seek funding for the entire initiative, with the

expectation that the Reporter would be compensated for his work if funding were obtained. This initial project would be launched in the first half of 2014.

○ *Multinational Ethics and Professional Responsibility.* Jim Tallon reported for himself and his Co-Chair, Jim Rosenhauer, that their Subcommittee is at work on a questionnaire designed to get input from a number of law firms as to the most common ethics issues encountered in multinational practice.

○ *The Ethical Business Lawyer.* The Committee Chair introduced Newsletter Editor Sarah Warren, who reported that she hoped to publish an issue of the Committee newsletter in December or January.

○ *Ethics Corner.* The Committee Chair also introduced Rob Evans, the Editor of the Committee's new column, *Ethics Corner: Legal Ethics, Professionalism, Civility*, which will appear every other month in the Section's monthly ePublication, *Business Law Today*. The Chair congratulated Rob on the content and style of the first column, in the November 2014 *BLT*, exploring the implications of Model Rule 4.2 (Communication With Person Represented by Counsel) in corporate, securities, or transactional practice.

- *Behavioral Ethics.* The Committee Chair reported that the Committee's new Subcommittee on Behavioral Legal Ethics will be chaired by Michael Herman, a partner in the Toronto office of Gowlings. The Committee's program at the 2013 Annual Meeting was well-received and will be presented as a webinar in December of this year. A program is planned for the new Business Law Section Annual Meeting in September 2014 focusing on what social

psychology, group psychology, and organizational psychology have to teach about the context in which ethical decisions are made.

- *Spring Meeting Programs.* The Committee Chair noted that the Committee would be presenting two programs at the 2014 Spring Meeting: "Beyond the Privilege: Confidentiality, Attorney-Client Privilege, and Work Product Protection for Business Lawyers," and "The Ethics of Whistleblowing by Lawyers under the SEC Rules." In addition, the Committee will co-sponsor at least two other programs at the Spring Meeting: "The Ethics of Internal Anti-Corruption Investigations," being presented by the Corporate Counsel Committee, and "Civility as a Professional Responsibility," being presented by the Business and Corporate Litigation Committee, with support from the Judges Initiative and the ABA Standing Committee on Professionalism.

- *Other Matters.* The Committee Chair reported the Committee will add another meeting to its annual calendar when it meets for the first time at the ABA National Conference on Professional Responsibility, May 29-30, 2014, in Long Beach, California. He reminded the Committee that he is continuing to look for one or more volunteers to take on the job of organizing state and local liaisons to monitor and report on ethics opinions, rule changes, disciplinary rulings, judicial decisions, and other developments in ethics and professional responsibility at the state and local level. Finally, he invited those interested in having a Committee Dinner at the 2014 Spring Meeting to contact him.

- Charles E. McCallum
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**Program on TriBar's
Choice-of-Law Report and the
Impact on Opinion Practice of
the SEC's New Regulation D Rules**

The Committee sponsored a program on November 23, 2013 entitled "On the Cutting Edge: Discussion of TriBar's New Choice of Law Report and the Impact on Opinion Practice of the SEC's New Regulation D Rules." Panelists included Robert Buckholz, Timothy G. Hoxie, Donald Glazer, and Stanley Keller. The focus of the presentation was the TriBar Opinion Committee's "*Supplemental Report: Opinions on Chosen-Law Provisions Under the Restatement of Conflict of Laws*," 68 Bus. Law. 1161 (2013) (the "Supplemental Report") and opinion implications of the SEC's amendments to Regulation D mandated by the JOBS Act. The program materials are on the Business Law Section's website (accessible [here](#) (CTRL + click)).²

For a summary of the Supplemental Report, see Don Glazer's and Stan Keller's note under "Legal Opinion Reports" in the Fall 2013 issue of the Newsletter (vol. 13, no. 1) and the further discussion of the Report summarized under "Notes From the Listserve" in this issue. For a discussion of opinion issues raised by the SEC's Reg. D amendments, see Bob Buckholz's meeting summaries for the Securities Law Opinions Subcommittee of the Federal Regulation of Securities Committee in the Fall 2013 issue (page 8) and in this issue, and see "Notes From the Listserve" in the Fall 2013 issue ("*Attorney Verification of Accredited Investor Status Under Amended Rule 506*").

² The URL is <http://apps.americanbar.org/buslaw/apps/updatedsearch/materials.html>.

**FALL 2013 MEETING
OF THE
WORKING GROUP
ON LEGAL OPINIONS**

On October 28-29, 2013, the Working Group on Legal Opinions ("WGLO") held its semi-annual seminar in New York, featuring dinner meetings, panel discussions, and breakout sessions on current opinion practice issues. Summaries of the dinner discussions, panel sessions, and breakout groups are included as an addendum to this issue of the Newsletter.

The next WGLO seminar is scheduled for May 12-13, 2014.

The Law Firm Advisory Board and Association Advisory Board met on October 29, 2013. The following are reports of these two advisory boards.

Law Firm Advisory Board

The meeting of the Law Firm Advisory Board ("Advisory Board") held October 29, 2013 primarily focused on the litigation involving defaulted Argentine bonds. The discussion was opened by Reade Ryan, Advisory Board President, who welcomed the Advisory Board members and then introduced Henry Weisburg, a litigation partner of Shearman & Sterling LLP, who has been following the Argentine bond default situation. See the discussion of this litigation under "Recent Developments — *NML Capital, Ltd. v. Argentina*" in this issue of the Newsletter.

After completion of the presentation on *NML Capital v. Argentina*, Mr. Ryan proceeded to another topic: legal opinion education by law firms of their partners and associates. He

emphasized how important such education is and, though there was no time to have a full discussion of ways of educating partners and associates, he said he hoped law firms were making efforts to educate their partners and associates in the preparation, and the receiving, of legal opinions. See “*Opinion Committees 2020 – The Next Generation of Opinion Committees*” in the WGLO Addendum to the Newsletter.

Jim Rosenhauer, Advisory Board Secretary, then spoke about legal opinion negotiations, and how he hoped that such negotiations, done in accordance with current bar association commentary, were helpful in making opinion givers and opinion recipients focus on the relevant legal issues involved in the transactions, without rancor and without turning a blind eye.

- Reade H. Ryan, Jr.
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Association Advisory Board

The Association Advisory Board (“AAB”) held a meeting on October 29, 2013, the first meeting of the AAB since the one held on May 2, 2011 in conjunction with the Spring 2011 WGLO seminar. The AAB consists of various state and local bar associations that conduct programs and other activities in the area of third-party closing opinions, as well as a number of affinity associations having similar activities or in which such closing opinions have unique focus. This ninth meeting of the AAB consisted entirely of presentations on various developments impacting opinion practice, some of which were also covered in other portions of the WGLO programs described in the Addendum.

NY Ethics Opinion 969. The first presentation was made by Andrew M. Kaufman of Kirkland & Ellis LLP regarding Ethics Opinion 969 of the New York State Bar Association’s Committee on Professional Ethics

that was issued on June 12, 2013, 2012 WL 3854558, summarized by Arthur Norman Field in the Fall 2013 issue of the Newsletter (under “*Recent Developments*”). The decision arose in a situation in which a law firm sought indemnity from its client for any liability assessed against the law firm for claims brought by a third party co-addressee of a closing opinion. The Professional Ethics Committee concluded that, because the prohibition of Rule 1.8(h)(1) of the New York Rules of Professional Conduct specifically was limited to agreements that require the client to indemnify the lawyer against a judgment in favor of the client against the lawyer, it would not prohibit an agreement for indemnification against a judgment in favor of a third party. The discussion at the meeting focused on whether the decision would have much applicability to regular opinion practice. The general view was that it would probably have only limited impact. Among other things, the decision did not address the situation that was more likely to arise: a lawsuit by a third party against the client who in turn brings a malpractice action directly against the law firm.

The IRB-Brasil Resseguros Decision. The second presentation was made by Lea Haber Kuck of Skadden Arps on the New York Court of Appeals decision in *IRB-Brasil Resseguros, S.A. v. Inepar Investments, S.A.*, 20 N.Y. 3d 310, 958 N.Y.S.2d 689, 982 N.E. 2d 609 (2012) *cert. denied*, 133 S. Ct. 2396 (2013), in which she served as counsel to IRB-Brasil, the respondent.³ The case addressed an issue of first impression for New York’s highest court: (1) whether a choice of law provision selecting New York law, but omitting a “without regard to New York’s choice of law rules” proviso, required a court to look to common law for guidance on choice of law or whether the court could apply substantive New York law based solely on Section 5-1401 of the New York General Obligations Law, and (2) whether the parties’ selection of New York

³ The decision was also addressed at the WGLO Fall Seminar. See “Dinner Meetings and Discussions — Private Financing” in the Addendum to this issue of the Newsletter.

law would be enforced even where neither the parties nor the transaction had any contacts with the State of New York. The Court concluded that the choice of law provision in the contract was sufficient to trigger the coverage of Section 5-1401, which obviated the need for a common law conflicts of law analysis even in the absence of any contact with the State of New York. The discussion at the meeting focused on how that decision conformed with the wording of the contract provision, including whether it was reasonable to expect that the parties did not actually mean to exclude the New York rules of conflicts of law if they merely specified New York law generally. In addition, there was discussion of the absence of any reference in the Court's opinion to the "internal affairs" doctrine, which could have been implicated by the facts of this particular case. There was also discussion of whether a judicial determination of more general application (or even a corresponding one in the applicable jurisdiction) would be required as a basis for changing existing practices on use of the "without regard to choice of law" proviso in contract drafting. Although there was general recognition of the potential importance of this case, there was only limited support expressed at the meeting by non-New York lawyers for viewing the decision as sufficient in itself to cause change in existing practices regarding use of the proviso.

The NML Capital Decision. The final presentation was made by Antonia Stolper of Shearman & Sterling LLP on the Second Circuit's decision in *NML Capital v. The Republic of Argentina*, 727 F.3d 230 (August 23, 2013). The decision is the latest in a long-running lawsuit involving bonds issued by Argentina. The issue confronting the Second Circuit was what effect would be given to bonds issued in 1994 in connection with which The Republic of Argentina agreed (i) to adjudicate disputes in New York, and (ii) to treat the bonds at least equally with other external debt. The controversy arose when Argentina defaulted on its bonds (including those issued pursuant to the 1994 Fiscal Agency Agreement) and the plaintiffs did not agree to the resulting restructuring proposed by Argentina. Argentina

had been making payments on the restructured debt but the court enjoined any future payments unless the holdout bondholders were paid ratably. The Second Circuit affirmed the injunction, as a threshold matter specifically rejecting claims by Argentina of the protections of sovereign immunity. Participants at the meeting discussed the implications of the unique Argentine *pari passu* provisions and the role that may have played on the outcome. Discussion was also held on the implications of the term "ratable payment" and how that might be addressed in the context of a closing opinion. For an extensive discussion of this litigation, see "Recent Developments — *NML Capital, Ltd. v. Argentina*" in this issue of the Newsletter.

The members expect to hold the next meeting of the AAB in conjunction with the Spring 2014 WGLO seminar to be held May 12-13, 2014 in New York.

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NOTES FROM THE LISTSERVE

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

Chosen-Law Opinions: Taking an Exception for Fundamental Policies

Background. Assume counsel's client, organized and headquartered in a state other than New York, is entering into a loan agreement that selects New York law as the law to govern the interpretation of the agreement and all disputes that may arise between lender and borrower thereunder. Counsel, who is not competent to render opinions on New York law on a New York loan agreement, is asked for a "choice-of-law" opinion, namely, that, under the law addressed by counsel in its opinion (the "covered law"), the parties' choice in the loan agreement of New York law will be given effect.

New York's General Obligations Law § 5-1401 validates the choice of New York law to govern most commercial agreements. However, even if the covered law jurisdiction has a comparable statute, it likely will be of no assistance to our opinion giver since these statutes usually validate *in-state* choice of law, not the choice of law of another state. Accordingly, in most jurisdictions counsel must look to the Restatement (Second) of Conflict of Laws ("Restatement") § 187(2) (1971) for guidance in preparing the choice-of-law opinion

that counsel has been asked to give on the loan agreement.

Choice-of-law opinions are the subject of the TriBar Opinion Committee's recent "*Supplemental Report: Opinions on Chosen-Law Provisions Under the Restatement of Conflict of Laws*," 68 Bus. Law. 1161 (2013) ("Supplemental Report"), summarized by Don Glazer and Stan Keller in the Fall 2013 issue of the Newsletter (vol. 13, no. 1) under "*Legal Opinion Reports – TriBar's Supplemental Report on Opinions on Chosen-Law Provisions Under the Restatement*."⁴

The Supplemental Report expands upon and replaces the second paragraph of note 70 to the TriBar Committee's 2004 Remedies Opinion Report ("2004 Report").⁵ The 2004 Report focused on the extent to which an opinion giver could give a remedies opinion on an agreement with a choice-of-law provision that chose the covered law to govern the agreement. Note 70 dealt with a choice-of-law opinion when the law of another state was chosen to govern the agreement.

The Supplemental Report states that many lawyers believe that when the covered law is not the chosen law a choice-of-law opinion requires a determination that the covered law state does not have a fundamental policy that would be violated by the agreement, without having to point out that they are not covering the fundamental policies of any other state whose law might be applied (although some choose to do so). Supplemental Report, 68 Bus. Law at 1167 (footnote omitted). The Supplemental Report also points out, however, that, in light of the difficulties in determining which state's policies will be applied under the second

⁴ The Fall 2013 issue of the Newsletter can be accessed [here](http://apps.americanbar.org/dch/committee.cfm?com=CL510000). (The URL is <http://apps.americanbar.org/dch/committee.cfm?com=CL510000>.)

⁵ TriBar Opinion Comm., "*The Remedies Opinion – Deciding When to Include Exceptions and Assumptions*," 59 Bus. Law 1483, 1497-98 (2004).

exception to Section 187(2) of the Restatement and whether under that exception the applicable policies are fundamental, other lawyers are not comfortable giving the opinion without making clear in their opinion letters that the opinion excludes coverage of the fundamental policies of any state other than the covered law state, and some opinion givers exclude the fundamental policies of all states, including the covered law state. *Id.* at 1168.

R. Morris' Listserve Inquiry. By his inquiry to the listserv of November 20, 2013, Bob Morris of Reed Smith LLP noted that the inquiry into fundamental policies can be further complicated by the fact that common contractual language can be *interpreted* differently in different states. Thus, noted Bob, even if he were confident that the choice of New York law to govern the loan agreement of his client would not violate a fundamental policy of Pennsylvania, could not a Pennsylvania court conclude that a New York interpretation of provisions of the agreement violate a fundamental policy of Pennsylvania?

“If a party to the contract sought to invoke the NY choice of law so as to support its assertion that a provision should be interpreted in a particular way under NY authority, is it not possible that such interpretation would be different than the way Pa. authority would interpret the provision? And if so, is it not possible that such difference would be fundamental as a policy matter, such that under Restatement principles as applied in Pa. the parties’ choice of NY law with respect to that issue would not be given effect?”

Bob concluded that it seemed to him to be prudent, were he asked to give a choice-of-law opinion on a New York agreement under Pennsylvania law, to include this qualification: “Except to the extent that application of NY law would violate a fundamental policy of Pa. . . .”

Justin G. Klimko of Butzel Long, P.C., Detroit, noted that the Restatement requires an

analysis, not necessarily of the fundamental policies of the chosen law state (here New York) or of the covered law state, but “of the so-called ‘Default State’ (the state whose law would govern in the absence of the chosen law provision). The Default State may or may not be the Covered [Law] State”

In his reply to Justin, Bob Morris observed that when giving a more common remedies opinion on an agreement selecting the law of the covered law state (*e.g.*, a Pennsylvania lawyer giving a remedies opinion on a Pennsylvania agreement), the opinion giver typically does not qualify the opinion by pointing out that under the choice-of-law rules of the covered law state the agreement might “violate the fundamental policy of another state whose law would govern the contract in the absence of the parties’ choice of [the covered law state]” Bob inquired whether that was not inconsistent: If it is sensible to express the “fundamental policy” qualification when giving a choice-of-law opinion, was it not sensible to include it in the typical remedies opinion?

Both Alan W. Beloff of Bingham McCutchen LLP and Phillip A. Quatrini of Rimon PC observed that they typically exclude *any* coverage of choice-of-law provisions when giving a remedies opinion.

James J. Rosenhauer of Hogan Lovells US LLP noted the difficulty in determining what policies are “fundamental” (“there is no way of telling with certainty which policies are ‘fundamental’ . . .”). Because of this difficulty, Jim pointed to the observation in the Supplemental Report, noted above, that many opinion givers, when giving the choice-of-law opinion, expressly exclude coverage of fundamental policies in their entirety, including those of the covered law state.

[The Editor has invited two of the reporters of the Supplemental Report, Stan Keller and Don Glazer, to comment on the listserv dialogue summarized above and, for that reason,

has not included in the summary Stan's listserve replies to Bob Morris' inquiry.]

Each of the listserve comments is correct as far as it goes, but it is useful to put them in context. The 2004 Report deals primarily with opinions given on the enforceability of agreements that choose the covered law as their governing law. In that case, opinions are routinely given without an exception for the possibility that the governing law clause will not be given effect under the second exception to Section 187(2) of the Restatement. The 2004 Report explains why an exception to that opinion ordinarily is not included in these circumstances, while noting that some opinion givers do include an exception – at least in some situations.

The Supplemental Report focuses on separate choice-of-law opinions when the chosen law is different from the covered law. It describes the difficulties involved in making the determinations called for by state choice-of-law rules based on the Restatement, and then describes the differences in opinion practice as described in the above summary but in considerably more detail.

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

- The Editor

RECENT DEVELOPMENTS

Contractual Shortening of Statutes of Limitation

In *ENI Holdings, LLC v. KBR Group Holdings, LLC*, 2013 WL 6186326 (Del. Ch. Nov. 27, 2013), a recent decision by Vice Chancellor Glasscock, the Delaware Court of Chancery provided important guidance for drafters of contracts with respect to the use of survival clauses to shorten the statute of limitations for breaches of representations and warranties and on the interaction between survival clauses and indemnification provisions. The decision highlights the importance of taking into account when giving an enforceability opinion the limits the state whose law is covered by the opinion places on the ability of the parties to an agreement to change contractually, either directly or by a survival clause, the period provided in the state's statute of limitations for bringing suit.

The dispute in *ENI* arose out of the sale by ENI Holdings, LLC (the “Seller”) of Roberts & Shaefer Co. to KBR Group Holdings, LLC (the “Purchaser”) pursuant to a Stock Purchase Agreement (the “SPA”). The SPA contained a survival clause that stated that the representations and warranties of the Seller would survive the closing and “terminate on” a specific date, subject to certain exceptions. The SPA also contained a notice provision prescribing procedures for bringing and resolving indemnification claims. In construing these provisions, the Court confirmed that, under Delaware law, a survival clause acts as a contractual statute of limitations that can shorten the period specified in Delaware's statute of limitations and cut off any claims that are not

filed before the end of the survival period.⁶ Thus, it held that certain claims that were not filed within the survival period were time-barred. In so holding, the Court rejected the argument that the survival clause at issue simply described the time period for providing notice of an indemnifiable claim in order for the claim to continue beyond the survival period. Accordingly, under Delaware law, in the absence of express language in the contract to the contrary, a survival clause will operate as a contractual statute of limitations and not a notice period. The Court nowhere indicates in its decision what law governed the SPA. That may be because the rules relating to statutes of limitations are procedural in nature and, therefore, its holding was not dependent upon the law the SPA chose as its governing law. Alternatively, it may be because Delaware law, in fact, governed the SPA, so the Court simply applied Delaware law as the chosen law of the contract.

The *ENI* Court separately analyzed whether the Purchaser's fraud allegations were time-barred under the survival clause and held that the SPA was ambiguous with respect to whether the survival clause cut off fraud claims. Relying primarily on the fact that the fraud claims were not expressly subject to the "indemnification provisions" of the SPA, *i.e.*, fraud claims were carved out of the exclusive remedy provision, the Court found that the SPA arguably "contemplates that at least some actions grounded in fraud can be brought outside the SPA's indemnification provisions, and thus, can be timely brought within the statutory — rather than contractual — limitations period." 2013 WL 6186326 at *16. The Court denied the Seller's motion to dismiss with respect to the fraud-based claims and did not address the

Purchaser's argument that fraud claims could not be subject to a shortened contractual limitations period as a matter of public policy.

Finally, the Court considered whether the tolling concepts of fraudulent concealment, equitable tolling and the discovery rule would extend the period for filing claims under the survival clause. With respect to the concepts of fraudulent concealment and equitable tolling, the Court assumed without deciding that such concepts would apply to a contractual limitations period but dismissed the claims because they were unsupported. With respect to the discovery rule concept, which essentially tolls the statute of limitations where the underlying breach is inherently unknowable, the Court found that rule would not apply to a contractual limitations period in circumstances "where the inherent unknowability of a potential claim is itself knowable or predictable, and thus the proper source of negotiation and resolution between the parties to the contract." *Id.* at *14. In support of its ruling, the Court cited decisions to like effect in other states with a "but see" to a 2012 holding to the contrary by the Massachusetts Supreme Judicial Court in *Creative Playthings Franchising, Corp. v. Reiser*, 978 N.E.2d 765 (Mass. 2012).

In *Creative Playthings*, the Court held that "a contractual limitations provision that did not permit operation of the discovery rule would be unreasonable and, therefore, invalid and unenforceable." *Id.* at 770. That decision has generated great concern among lawyers in Massachusetts because it may mean that even a provision in a contract choosing Delaware law that would be upheld by a Delaware court would not be upheld if the party seeking to overturn it brings an action in Massachusetts first (*i.e.*, either because the Massachusetts court views the provisions as procedural or because it applies the second exception to Section 187(2) of the Restatement (Second) of Conflict of Laws). Moreover, even a clause choosing the Delaware courts as the exclusive forum for resolving disputes likely would not help because the Massachusetts court could retain the case on the ground (found in *Bremen*) that transferring it

⁶ A similar conclusion was recently reached by the U.S. Supreme Court in *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 134 S.Ct. 604, 2013 WL 6569594 at *5 (2013) (holding, in the context of an ERISA claim, that the participant and plan "may agree by contract to a particular limitations period, even one that starts to run before the cause of action accrues, as long as the period is reasonable").

would result in the violation of a strong Massachusetts public policy regarding the discovery rule.

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Lawyers as Whistleblowers

There has been a longstanding tension between a lawyer's ethical obligation to maintain client confidences and a lawyer's duty or right to blow the whistle and report out. The obligation to maintain client confidences arises under state ethics rule counterparts of Model Rule of Professional Conduct 1.6. A duty or right to report out can arise under state ethics rules counterparts of Model Rules 1.13 and 4.1(b), among others, and under federal law, such as the SEC's Part 205 Rules of Professional Conduct, 17 C.F.R. § 205.1 *et seq.* The focus on this tension has been heightened by federal whistleblower bounty rules, and the question whether lawyers are eligible to receive such a bounty, which can be substantial.

The U.S. Court of Appeals for the Second Circuit recently addressed this tension, including the issue of federal preemption of state ethics rules, in *United States v. Quest Diagnostics, Inc.*, 734 F.3d 154 (October 25, 2013). This decision followed an October 7, 2013 ethics opinion of the New York County Lawyers Association Committee on Professional Ethics (Formal Opinion 746) that ruled that New York lawyers may not ethically collect a whistleblower bounty with respect to a client matter, even if disclosure of confidential information is permissible under New York ethics rules. The Bar Committee concluded that the prospect of a substantial economic benefit for a lawyer from a whistleblower bounty creates an inherent conflict with a lawyer's duty to faithfully represent his or her client.

Quest Diagnostics involved a qui tam action brought by a partnership against Quest for violation of the federal False Claims Act. The

partnership was formed by three former executives of a lab acquired by Quest for the purpose of bringing the qui tam action. One of the partners was formerly the general counsel of the acquired lab. The U.S. District Court dismissed the action and disqualified the partnership, its partners and its outside counsel from bringing a subsequent qui tam action, and that dismissal and disqualification were upheld by the U.S. Court of Appeals. The dismissal was based upon the former general counsel's violating his ethical obligations under the New York Rules of Professional Conduct by using confidential information of a former client beyond what was necessary under an exception to prevent the commission of a crime. The Court of Appeals determined that the False Claims Act, although encouraging disclosure of fraud against the government, does not preempt state ethics rules regulating the disclosure of client confidences.

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NML Capital, Ltd. v. Argentina

The litigation spawned by Argentina's default under its sovereign debt has resulted in two important decisions by the U.S. Court of Appeals for the Second Circuit, *NML Capital, Ltd. v. The Republic of Argentina*, 699 F.3d 246 (2d Cir. 2012) and *NML Capital, Ltd. v. The Republic of Argentina*, 727 F. 3d 230 (2d Cir. 2013). The Second Circuit's treatment of the debt instrument's *pari passu* clause is of interest to all opinion givers giving enforceability opinions on debt instruments.

The plaintiffs are holders of sovereign bonds issued by the Argentine Republic pursuant to a Fiscal Agency Agreement ("FAA") entered into prior to Argentina's 2001 default on the bonds ("FAA Bonds"). The plaintiff's FAA Bonds are in default, and are the subject of federal court judgments, which are unsatisfied.

The FAA contains a *Pari Passu* Clause, which provides, in two sentences, as follows:

- [1] The Securities will constitute . . . direct, unconditional, unsecured and unsubordinated obligations of the Republic and shall at all times rank *pari passu* and without any preference among themselves.
- [2] The payment obligations of the Republic under the Securities shall at times rank at least equally with all its other present and future unsecured and unsubordinated External Indebtedness

No payments have been made on the FAA Bonds since 2001.

In 2005 and again in 2010, Argentina made exchange offers to holders of FAA Bonds, pursuant to which bondholders who tendered FAA Bonds received new bonds (the “Exchange Bonds”). As a result of the two exchange offers, approximately 91% of the FAA Bonds were tendered, and the Exchange Bonds have been kept current by Argentina. The plaintiff’s FAA Bonds were not tendered into either exchange offer.

Argentina has made it clear that it does not intend to make any further payments on the plaintiff’s unexchanged FAA Bonds. Further, Argentina adopted legislation, referred to as the “Lock Law”, that prohibited the Argentine state from making any arrangement to pay the unexchanged FAA Bonds: “The national State shall be prohibited from conducting any type of in-court, out-of-court or private settlement with respect to [unexchanged FAA Bonds].”

The plaintiffs applied to the United States District Court for the Southern District of New York for a determination that Argentina’s conduct in making full payment on the Exchange Bonds while making no payments on the FAA Bonds constituted a breach of the *Pari Passu* Clause. (The matter was referred to Judge Thomas Griesa, who has been assigned to hear

all matters arising out of Argentina’s 2001 default.) In a series of rulings running from December 2011 through March 2012, Judge Griesa agreed, holding that Argentina breached the *Pari Passu* Clause “by lower[ing] the rank of [the plaintiffs’] bonds in violation of [the *Pari Passu* Clause] of the FAA when it made payment currently due under the Exchange Bonds, while persisting in its refusal to satisfy its payment obligations currently due under the [plaintiffs’] Bonds” and through enactment of the Lock Law.

The District Court then issued the following injunction (the “Injunction”):

- Whenever the Republic pays any amount due under terms of the bonds or other obligations issued pursuant to the Republic’s 2005 or 2010 Exchange Offers . . . the Republic shall concurrently or in advance make a “Ratable Payment” . . . to [Plaintiffs]
- Such “Ratable Payment” . . . shall be an amount equal to the “Payment Percentage” . . . multiplied by the total amount currently due to [Plaintiffs] . . .
- Such “Payment Percentage” shall be the fraction calculated by dividing the amount actually paid or which the Republic intends to pay under the terms of the Exchange Bonds by the total amount then due under the terms of the Exchange Bonds.

The District Court also prohibited Argentina from “altering or amending the processes or specific transfer mechanisms by which it makes payments on the Exchange Bonds” Further, the District Court ordered Argentina to provide copies of its Injunction “to all parties involved, directly or indirectly, in advising upon, preparing, processing or facilitating any payment on the Exchange Bonds (collectively, ‘Agents and Participants’),” and further provided that “such Agents and Participants shall be bound by the terms of this ORDER”

Argentina appealed, and the District Court suspended the effectiveness of its Injunction pending the Second Circuit's disposition.

On appeal to the U.S. Court of Appeals for the Second Circuit in 2012, Argentina argued that the District Court had misconstrued the *Pari Passu* Clause, which Argentina argued has been “universally understood for over 50 years” to provide bondholders only with protection from “discriminatory legal ranking” and the creation of unfavorable “legal priorities.” However, the Second Circuit in its 2012 decision, 699 F.3d 246, was “unpersuaded”:

“Instead, we conclude that in pairing the two sentences of its *Pari Passu* Clause, the FAA manifested an intention to protect bondholders from more than just formal subordination. . . . The first sentence . . . prohibits Argentina, as bond issuer, from formally subordinating the bonds by issuing superior debt. The second sentence . . . prohibits Argentina, as bond payor, from paying on other bonds without paying on the FAA bonds. Thus, the sentences of the *Pari Passu* Clause protect against different forms of discrimination: the issuance of other superior debt (first sentence) and the giving of priority to other payment obligations (second sentence).”

699 F. 3d at 258-59 (citation & footnote omitted).

The Second Circuit went on to say that the *Pari Passu* Clause was particularly important to holders of sovereign bonds:

“When sovereigns default they do not enter bankruptcy proceedings where the legal rank of debt determines the order in which creditors will be paid. Instead, sovereigns can choose for themselves the order in which creditors will be paid. In this context, the [*Pari Passu* Clause] prevents Argentina as payor from discriminating against the

FAA Bonds in favor of other unsubordinated, foreign bonds.”

699 F. 3d at 259.

Finally, the Second Circuit endorsed the District Court's determination that “Argentina effectively has ranked its payment obligations to the plaintiffs below those of the exchange bondholders.” *Id.* The Court went on to say that as the result of Argentina's refusal to pay the FAA Bonds, its announcements that it would not pay those bonds and the enactment of the Lock Law, “we have little difficulty concluding that Argentina breached the *Pari Passu* Clause of the FAA.” *Id.* at 260.

The Second Circuit then addressed the terms of the Injunction issued by the District Court. Argentina advanced many arguments against the terms and scope of the Injunction, all of which the Second Circuit held to be “unpersuasive”. One such argument was that the plaintiffs were limited solely to the “contractually agreed upon remedy of acceleration” of the FAA Bonds. In rejecting this argument, the Court held that, in the absence of limiting language in the FAA, “the full panoply of appropriate remedies remains available.” *Id.* at 262.

In addition, Argentina argued that the Injunction constituted a *de facto* attachment, and was thus prohibited by the Foreign Sovereign Immunities Act (*see* 28 U.S.C. §1609). The Court rejected this argument, holding that the Injunction can be complied with “without the court's ever exercising dominion over sovereign property.” *Id.*

However, the Circuit Court was concerned about at least two aspects of the Injunction. First, the Second Circuit pointed out that the “ratable payment” mechanism contained in the Injunction was unclear and appeared to be ambiguous, as it could be read to provide for vastly different scales of payment to FAA bondholders. Second, the Court stated that it was concerned that the application of the Injunction to “pure intermediaries” potentially violated the protections in favor of

intermediaries provided for in UCC Article 4A. The Court noted that “Plaintiffs claim that the Injunction does not encompass intermediaries, but they fail to offer a satisfactory explanation for why intermediary banks would not be considered indirect[] . . . facilitate[ors], apparently covered by the Injunction.” 699 F. 3d at 264.

Accordingly, the Circuit Court remanded the case back to the District Court for additional proceedings with respect to the terms of the Injunction.

On November 21, 2012, District Judge Griesa issued orders resolving the issues remanded to him by the Second Circuit. In what appeared to be a total victory for the plaintiffs, Judge Griesa ruled:

- That the plaintiffs were entitled to a “ratable payment” from Argentina equivalent to “100% of what is currently due to plaintiffs” if Argentina pays 100% of what is due to the Exchange Bondholders;
- That Bank of New York Mellon (BNY Mellon), the Paying Agent on the Exchange Bonds (which are not in default), is subject to his Injunction – meaning that funds paid to BNY Mellon for payment to the Exchange Bondholders are potentially available for payment instead to the plaintiffs; and
- That the stay of his Injunction previously in place is lifted.

NML Capital, Ltd. v. The Republic of Argentina, 2012 WL 5895786 (November 21, 2012).

The Second Circuit had asked Judge Griesa to clarify the precise amount that the plaintiffs were entitled to be paid pursuant to his construction of the *Pari Passu* Clause. Judge Griesa then made it clear that the plaintiffs are to be paid 100% — all principal and all interest — currently due on their FAA Bonds.

“The amount that is currently due is the amount of the unpaid principal, the due date of which has been accelerated, and accrued interest.

The total of these amounts due to plaintiffs is approximately \$1.33 billion. Thus, at some time in December 2012, when Argentina makes the interest payments on the Exchange Bonds, amounting to a total of about \$3.14 billion, Argentina will be required to pay plaintiffs approximately \$1.33 billion

In order to comply with the terms of the Injunctions, Argentina must pay plaintiffs 100% of that \$1.33 billion concurrently with or in advance of the payments on the Exchange Bonds

These provisions [of the Injunctions] properly start with the fact that if 100% of what is *currently due* to the exchange bondholders *is paid*, then 100% of what is currently due to plaintiffs must also be paid

But the fact is that the amount owed to plaintiffs by Argentina is the accelerated principal plus accrued interest. Argentina owes this and owes it now.”

2012 WL 5895786 *2-*4.

A critical issue remanded to Judge Griesa by the Second Circuit was the extent to which the Injunctions apply to third parties. “To avoid” payment by Argentina on the Exchange Bonds without payment to plaintiffs, rendering the Injunctions “entirely for naught,” Judge Griesa explained that it is “necessary that the *process* for making payments on the Exchange Bonds be covered by the Injunctions, and that the parties participating in that process be so covered.” Although “the indenture trustee, the registered owners, and the clearing system . . . are . . . probably not all agents of Argentina, . . . they surely are ‘in active concert or participation’

with Argentina in processing the payments from Argentina to the exchange bondholders” and thus, according to Judge Griesa, within the proper scope of an injunction under Federal Rule of Civil Procedure 65(d). 2012 WL 5895786 at *4-5.

In response to the Circuit Court’s concern that an injunction against certain intermediary banks would violate UCC Article 4A, Judge Griesa observed that “[p]laintiffs are also not requesting that the financial institutions receiving funds from the DTC be bound by the Injunctions” and carved “such intermediary banks” out of the Injunctions. With that carve-out, Judge Griesa concluded that “plaintiffs have requested that a reasonable set of parties be bound by the Injunctions, and this is in compliance with Rule 65(d).” 2012 WL 5895786 at *5.

The most significant third party that plaintiffs sought to enjoin is BNY Mellon, which acts as the Paying Agent on the Exchange Bonds, and is a fiduciary for the Exchange Bond holders. BNY Mellon objected to the application of the Injunctions against it on the ground that its duties as indenture trustee “should be the beginning and the end of its responsibilities.” Judge Griesa rejected BNY Mellon’s arguments, saying that they “miss the point”:

“If Argentina complies with the rulings of the Court of Appeals, there will be no problem about funds destined for exchange bondholders being deposited with BNY and going up the chain until they arrive in the hands of such bondholders. But if Argentina attempts to make payments to the exchange bondholders, contrary to the ruling of the Court of Appeals and thus contrary to law, this would not involve the normal and proper situation dealt with by BNY under the indenture, and dealt with by others in the chain. Under these circumstances, these third parties should properly be held responsible for making sure that their actions are not

steps to carry out a law violation, and they should avoid taking such steps.”

2012 WL 5895786 *5.

Judge Griesa lifted the stay pending appeal.

Argentina again appealed to the U.S. Court of Appeals for the Second Circuit; and, on August 23, 2013, the Second Circuit issued its long-awaited opinion on Argentina’s appeal from Judge Griesa’s amended injunction requiring that Argentina make “ratable payment” to the plaintiffs when it next makes payment to holders of its Exchange Bonds. 727 F.3d 230 (“August 23 Opinion”). Argentina lost comprehensively, in a carefully written and unanimous decision that is highly critical of Argentina’s treatment of its creditors and is quite clearly designed to minimize Argentina’s prospects for a successful petition for *certiorari* to the Supreme Court.

While relatively short and highly succinct, the August 23 Opinion appears to decimate every argument — whether based in law or policy — advanced by Argentina and the other parties that filed papers in its support. In summary:

- The Second Circuit strives to portray the case as involving the unique conduct of Argentina, not typical of the conduct of other financially-troubled sovereigns, and Argentina’s unique *pari passu* clause.
- The August 23 Opinion catalogs and then rejects all of the multiple arguments advanced by Argentina and the other entities (primarily BNY Mellon) that supported Argentina’s position.
- However, the Court also stayed the effectiveness of its August 23 Opinion “pending the resolution by the Supreme Court of a timely petition for a writ of *certiorari*.”

In what certainly appears to be an effort to cast this case as unique and fact-bound, reducing the prospect of *certiorari*, the Court identifies Argentina as a “uniquely recalcitrant debtor.” 727 F. 3d at 247.

The August 23 Opinion also criticized Argentina’s refusal to negotiate, to respond to the Court’s own inquiries, and to continually threaten defiance:

“Recognizing the unusual nature of this litigation and the importance to Argentina of the issues presented, following oral argument, we invited Argentina to propose to the appellees an alternative payment formula and schedule for the outstanding bonds to which it was prepared to commit. Instead, the proposal submitted by Argentina ignored the outstanding bonds and proposed an entirely new set of substitute bonds. In sum, no productive proposals have been forthcoming. To the contrary, notwithstanding its commitment to resolving disputes involving the FAA in New York courts under New York law, at the February 27, 2103 oral argument, counsel for Argentina told the panel that it ‘would not voluntarily obey’ the district court’s injunctions, even if those injunctions were upheld by this Court. Moreover, Argentina’s officials have publicly and repeatedly announced their intention to defy any rulings of this Court and the district court with which they disagree.”

727 F. 3d at 238 (footnotes omitted).

The Court also made clear its view that this case is limited by the particular contract held by the plaintiffs:

“But this case is an exceptional one with little apparent bearing on transactions that can be expected in the future. Our decision here does not control the interpretation of all *pari*

passu clauses or the obligations of other sovereign debtors under *pari passu* clauses in other debt instruments. As we explicitly stated in our last opinion, we have not held that a sovereign debtor breaches its *pari passu* clause every time it pays one creditor and not another, or even every time it enacts a law disparately affecting a creditor’s rights. . . . We simply affirm the district court’s conclusion that Argentina’s extraordinary behavior was a violation of the particular *pari passu* clause found in the FAA.”

727 F. 3d at 247.

Consistent with the Court’s past practice in this case, the Court, even when ruling against Argentina, continues to extend Argentina procedural courtesies. In the August 23 Opinion, the Court, without being asked, stayed the enforcement of its decision pending resolution of a timely petition to the Supreme Court for a writ of *certiorari*. 727 F. 3d at 248.

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LEGAL OPINION REPORTS

Supplements No. 3, 4, 5 and 6 to the Report of the Texas Legal Opinions Committee Regarding Legal Opinions in Business Transactions⁷

In 1994, the Legal Opinions Committee of the Business Law Section of the State Bar of Texas adopted its Report Regarding Legal Opinions in Business Transactions. The Committee has been active in publishing Supplements to that Report on topics of current interest. The first two Supplements were adopted in 1994 and 2001, respectively; the first Supplement addresses certain usury issues, while the second Supplement deals with security interests in securities and other types of investment property.

Since 2006, the Texas Legal Opinions Committee has issued four additional Supplements to the Report, which are summarized in more detail below.

Supplement No. 3 to Texas Legal Opinions Report: Statement on Legal Opinions Regarding Indemnification and Exculpation Provisions under Texas Law (adopted March 14, 2006). The Texas Legal Opinions Committee adopted Supplement No. 3 in order to clarify Texas legal opinion practice as it relates to enforceability opinions rendered under Texas law on contractual indemnification and exculpation provisions. The Supplement contains a summary of Texas law regarding indemnification and exculpation provisions and concludes that, in the Committee's experience, it

is customary in Texas for a remedies opinion under Texas law to include a specific qualification as to the enforceability of indemnification and exculpation provisions. The Supplement also contains examples of legal opinion qualifications that Texas lawyers may use with respect to enforceability opinions on contractual indemnification and exculpation provisions, including a sample qualification that completely excludes contractual indemnification and exculpation provisions from a Texas law enforceability opinion.

Supplement No. 4 to Texas Legal Opinions Report: Statement on ABA Principles and Guidelines (adopted April 20, 2009). In Supplement No. 4, the Texas Legal Opinions Committee approved the *Legal Opinion Principles* and the *Guidelines for the Preparation of Closing Opinions* as previously published by the Committee on Legal Opinions of the Business Law Section of the American Bar Association. In approving the *Principles* and *Guidelines*, the Committee also adopted certain notes that are set forth in seven numbered paragraphs; these notes address a variety of matters and include a statement that the *Principles* and *Guidelines* are in all respects subject to, and should be understood and applied consistently with, the professional responsibilities and ethical obligations of Texas attorneys, including rules regarding client confidentiality.

Supplement No. 5 to Texas Legal Opinions Report: Statement on Entity Status, Power and Authority Opinions Regarding Pre-Code Texas Entities and Pre-Code Registered Foreign Entities under the Texas Business Organizations Code (adopted September 5, 2012). Supplement No. 5 discusses certain issues that arose as a result of the adoption of the Texas Business Organizations Code. When the Code initially became effective on January 1, 2006, it did not apply to Texas entities that had been formed under a predecessor statute or to non-Texas entities that had received a certificate of authority to transact business in Texas before the initial effective date of the Code. However, effective as of January 1, 2010, the Code

⁷ The Texas Legal Opinions Report and all of the Supplements thereto are available on the website of the Business Law Section of the State Bar of Texas: <http://texasbusinesslaw.org/committees/legal-opinions>.

mandatorily became applicable to the Pre-Code Texas entities and the Pre-Code registered foreign entities described in the preceding sentence. Supplement No. 5 addresses whether the Code's application had affected certain opinions commonly given in commercial transactions insofar as such opinions relate to Pre-Code Texas entities and Pre-Code registered foreign entities. In adopting Supplement No. 5, the Texas Legal Opinions Committee concluded that the application of the Code, by itself, would not affect the rendering of customary legal opinions addressing a Pre-Code entity's existence (or authority to transact business, in the case of a Pre-Code registered foreign entity), good standing, and entity power and authority to execute, deliver and perform obligations under a contract.

Supplement No. 6 to Texas Legal Opinions Report: Statement on Changes to the Procedure for Good Standing Certificates Issued by the Texas Comptroller of Public Accounts (adopted July 25, 2013). Supplement No. 6 addresses an announcement by the Texas Comptroller of Public Accounts stating that the Comptroller had revised the definition of "good standing" for Texas franchise tax purposes and that Certificates of Good Standing would no longer be available from the Comptroller's office. Instead of issuing Certificates of Good Standing, effective as of May 5, 2013, the Comptroller now provides information regarding an entity's Texas franchise tax status through an online search mechanism. In Supplement No. 6, the Texas Legal Opinions Committee concluded that, without further inquiry and without obtaining any additional certificate or other writing (other than a Certificate of Fact from the Texas Secretary of State showing that the entity is in existence) and without taking any related qualification or exception in a legal opinion, a Texas opinion giver may rely on the Comptroller's new online search mechanism to determine the status of an entity's Texas

franchise tax account and to render a Texas good standing opinion if the search mechanism expressly states that the entity's right to transact business in Texas is "active"

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Chart of Published and Pending Reports

[Editor's Note: The chart of published and pending legal opinion reports below has been prepared by John Power, O' Melveny & Myers LLP, Los Angeles, and is current through December 31, 2013.]

A. Recently Published Reports⁸

ABA Business Law Section	2007	No Registration Opinions – Subcommittee on Securities Law Opinions
	2009	Effect of FIN 48 – Committee on Audit Responses
	2009	Negative Assurance – Subcommittee on Securities Law Opinions
	2010	Sample Opinion – Committee on Mergers and Acquisitions
	2011	Diligence Memoranda – Task Force on Diligence Memoranda
	2013	Survey of Office Practices – Committee on Legal Opinions Legal Opinions in SEC Filings (Update) – Subcommittee on Securities Law Opinions
ABA Real Property Section (and others) ⁹	2012	Real Estate Finance Opinion Report of 2012
Arizona	2004	Comprehensive Report
California	2007	Remedies Opinion Report Update
	2007	Comprehensive Report Update
	2009	Venture Capital Opinions
	2010	Sample Opinion
Florida	2011	Comprehensive Report Update
City of London	2011	Guide
Maryland	2009	Restatement of 2007 Comprehensive Report
Michigan	2009	Statement
	2010	Report

⁸ 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/>.

⁹ This Report is the product of the Committee on Legal Opinions in Real Estate Transactions of the Section of Real Property, Trust and Estate Law, Attorneys' Opinions Committee of the American College of Real Estate Lawyers, and the Opinions Committee of the American College of Mortgage Attorneys (collectively, the "Real Estate Opinion Committees").

Recently Published Reports (continued)

New York	2009	Substantive Consolidation – Bar of the City of New York
	2012	Tax Opinions in Registered Offerings – New York State Bar Association Tax Section
North Carolina	2009	Supplement to Comprehensive Report
Pennsylvania	2007	Update
Tennessee	2011	Report
Texas	2006	Supplement Regarding Opinions on Indemnification Provisions
	2009	Supplement Regarding ABA Principles and Guidelines
	2012	Supplement Regarding Entity Status, Power and Authority Opinions
	2013	Supplement Regarding Changes to Good Standing Procedures
TriBar	2008	Preferred Stock
	2011	Secondary Sales of Securities
	2011	LLC Membership Interests
	2013	Choice of Law
Multiple Bar Associations	2008	Customary Practice Statement

B. Pending Reports

ABA Business Law Section	Outbound Cross-Border Opinions – Committee on Legal Opinions Revised Handbook – Committee on Audit Responses No-Registration Opinions (Update) – Subcommittee on Securities Law Opinions
Real Estate Opinions Committees ¹⁰	Local Counsel Opinions
California	Sample Venture Capital Opinion Opinions on Partnerships & LLCs Sample Personal Property Security Interest Sample Opinion
South Carolina	Comprehensive Report
TriBar	Limited Partnership Opinions

¹⁰ See note 9.

Pending Reports (continued)

Texas	Comprehensive Report Update
Washington	Comprehensive Report
Multiple Bar Associations	Commonly Accepted Opinion Practices

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](#).¹¹ 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 the Spring of 2014. Please forward cases, news and items of interest to Tim Hoxie (thoxie@jonesday.com) or Jim Fotenos (jfotenos@greeneradovsky.com).

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

Addendum
Working Group on Legal Opinions
Fall 2013 Opinion Seminar Summaries

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**WORKING GROUP ON LEGAL OPINIONS
FALL 2013 OPINION SEMINAR SUMMARIES**

The following summaries have been prepared to provide an overview of the subjects covered at the dinner meetings and discussions, panel sessions, and at the concurrent discussions and breakout groups, all held in New York on October 28 and 29, 2013. The summaries were prepared by panelists, leaders of the concurrent sessions, or by members of the audience. The next WGLO seminar is scheduled to be held on May 12 – 13, 2014 in New York.

We extend a special thanks for assisting in editing the summaries to Gail Merel of Andrews Kurth LLP (gailmerel@andrewskurth.com), who is the editor of the WGLO seminar handbooks.

DINNER MEETINGS AND DISCUSSIONS (OCTOBER 28, 2013)

1. Alternative Entity Opinions
(Summarized by Barry J. Bendes)

Kenneth Chin, Kramer Levin Naftalis & Frankel LLP, New York, Co-Chair
Norman M. Powell, Young Conaway Stargatt & Taylor, LLP, Wilmington, Co-Chair
Barry J. Bendes, Edwards Wildman Palmer LLP, New York, Reporter

This breakout session on alternative entity opinions continued the discussion begun at the WGLO meeting in May 2013, focusing in more detail on the contractual nature of LLCs and other alternative entities, and the implications of the relevant enabling statute, contract law, and applicable case law in rendering third party legal opinions for alternative entities.¹ The participants included opinion givers as well as counsel to opinion recipients. The discussion included references to local bar association reports that focus on third-party opinions concerning LLCs. The opinions discussed included status, power, execution and delivery, enforceability, validity, admission of members who acquire membership interests by purchase, and the personal liability of members and purchasers of LLC membership interests to third parties.

Participants discussed the significant difference between merely acquiring an LLC interest and actually becoming a member of the LLC. They also considered that there is no antecedent in most enabling statutes to permit opining that membership interests are “*fully paid and non-assessable*” - the phrasing contemplated by Item 601(b)(5)(i) of the SEC’s Regulation S-K -- whereas that usually is not the case in opinions involving corporations. Also discussed were LLC agreements that sometimes have “call” or delayed payment capital requirements that may become the responsibility of the purchasers of LLC interests. Various approaches were discussed in some detail, including the suggestion that opinion givers should consider an approach “*limiting their statements to liability arising solely by reason of being a member of the LLC or a holder of an LLC interest.*”

The discussion also touched upon issues relating to limitations on the scope of the alternative entity opinion, and, in particular, what is meant by and understood when a proffered opinion includes a

¹ The May 2013 seminar is summarized at pages A-6—A-7 of the WGLO Addendum to the Summer 2013 issue of the Newsletter (vol. 12, no. 4).

scope limitation to the effect that the “*opinion is limited to the LLC Act*” under which the relevant entity has been formed, and whether such a scope limitation should be acceptable to opinion recipients. Though some felt strongly to the contrary, many expressed the view that status, power, and action opinions concerning LLCs cover not only the applicable LLC Act but may also cover other applicable state law, including contract law and generally applicable case law. Generally, the participants were in accord with the approach taken in the TriBar LLC opinion reports issued in 2006 and 2011 as they apply to alternative entity opinions.²

A substantial portion of the session related to opinions on “series” LLCs (LLCs formed under laws that permit the establishment of separate series within the parent LLC entity). While a number of states have provisions in their LLC act that permit the formation of series LLCs, there is little case law or guidance available on the subject. Other than a very limited number of states where the LLC statute specifically addresses the issue of separateness or the autonomy of the various series of a series LLC for certain purposes, it remains unclear how individual series will be addressed in situations where the use of series LLCs intersect with various divergent substantive areas of law. These may include bankruptcy law, real property law, UCC Article 9 security interests, foreclosure of security interests and mortgages (including identifying the separate series as a separate entity, single action statutes, and perfection of security interests in the assets of one or more series), FIN 46, tax separateness, SEC filing fee calculations, IP related recording acts, governance, voting on mergers, election or removal of managers, diversity of citizenship, etc. One participant related that the American Bankruptcy Institute is addressing some of the bankruptcy issues presented by series LLCs.

It was agreed that a recognized common business practice with respect to series LLCs and the members of an LLC that are associated with a particular series would be helpful, if not necessary. Among the issues that will need to be addressed are:

- Series do not have members *per se*. Instead, certain members of an LLC may be associated with a particular series. Thus it appeared to the participants that opinion givers should not speak in terms of admission of members to a series.
- While LLCs are generally “*formed*,” series are generally “*established*.” Opinion givers should consider refraining from opining using language without adequate antecedents in the enabling statute or the relevant LLC agreement, particularly where such language invokes concepts neither intended nor warranted (e.g., status as an entity).
- Just how does a series come into existence, and once in existence, how is it governed?
- How are assets of a series isolated from the assets of the “*parent*” LLC and from other series?
- Can assets associated with a series be “*owned*” by such series and, if so, how is title to such assets to be documented, held or transferred (e.g., titled vehicles, patents, copyrights, trademarks, real estate)?
- What titling or record keeping is necessary to effectively isolate and protect assets associated with a given series from the liabilities of the “*parent*” LLC and those of other series?

² See *Third Party Closing Opinions: Limited Liability Companies*, 61 Bus. Law 679 (2006); *Supplemental TriBar LLC Opinion Report: Opinions on LLC Membership Interest*, 66 Bus. Law 1065 (2011).

- How are conflict issues to be dealt with when the governing body for each series is the same?
- Can a separate series be a “debtor” under UCC Article 9 (which contemplates that all UCC Article 9 debtors be either individuals or organizations)?
- While the IRS now recognizes the separateness of series and permits the issuance of separate tax identification numbers for separate series, in November, 2010 it issued a Notice of Proposed Rulemaking Series LLCs and Cell Companies recognizing the need for clarity in this area. There remain many issues surrounding how series within LLCs will be treated by state and federal taxing authorities.
- Whether a series established under a LLC – as contrasted with the parent LLC with series - can be a “debtor” under the Bankruptcy Code, and, if it can, who has the ability to file a voluntary petition on behalf of a series?
- How are representations and warranties of a series to be interpreted and isolated from facts that might apply to other series or to the LLC itself and how do “knowledge” modifiers work in this context?

The participants then shared their recent experiences and concerns in both giving and receiving third party opinions involving LLCs. Among the issues considered were the admission of purchasers as members following foreclosure of security interests; whether upon foreclosure of a security interest in an LLC interest a charging order should be the sole remedy, or whether it might be possible to give other relief to the purchaser of the interest; personal liability of purchasers of LLC interests for the failures of the original owners to abide by the LLC Agreement (including making all capital contributions); valid issuance of LLC interests; enforceability of LLC Agreements; and personal liability of members (including members of single member LLCs) to creditors and to taxing authorities.

2. Local Counsel – Should We Have Our Own Rulebook?

(Summarized by Philip B. Schwartz)

Frank T. Garcia, Fulbright & Jaworski LLP, Houston, Co-Chair

William A. Yemc, Richards Layton & Finger, P.A., Wilmington, Co-Chair

Philip B. Schwartz, Akerman Senterfitt, Miami, Reporter

This breakout session built upon the discussion begun at the Spring 2013 WGLO meeting on particular issues faced by local counsel in rendering third-party legal opinions. See “*The Limited Knowledge and Role of Local Counsel*” in the WGLO Addendum to the Summer 2013 issue of the Newsletter (vol. 12, no. 4). Since many participants in the breakout session regularly render third-party legal opinions while acting as local counsel, there was a full airing of viewpoints regarding the issues considered.

Model Rule 1.7. The first issue considered was the impact of Model Rule 1.7 (Conflict of Interest: Current Clients) on local counsel opinion practice when one or more recipients of a local counsel opinion are clients of the opinion giver firm in unrelated matters. Under ABA Model Rule 1.7, a lawyer cannot represent a client if the representation involves a "concurrent conflict of interest," which, in particular, the rules define as the representation of one client in a situation where such representation is *directly adverse* to another client without the consent of both clients.

It was noted that local counsel face practical difficulties in dealing with Model Rule 1.7. In many cases, local counsel are hired near the end of a transaction and do not learn who will be the recipients of their opinion letter until right before the closing (they might know, for example, the identity of the agent bank, but they do not learn the identity of the lenders who will participate in the financing transaction and will therefore be recipients of the opinion letter until right before the issuance of the opinion letter). There was a consensus that firms acting as local counsel should consider performing a conflict search when they are retained and seeking a waiver, if necessary, of any potential conflict that may exist. However, there was a general consensus that it is impractical for firms acting as local counsel to update conflict searches on syndicate lenders and seek waivers of any such conflicts under the circumstances. There was also a discussion on whether a conflict exists at all under Model Rule 1.7 in the context of local counsel opinions, during which participants briefly discussed reasons why they believe that local counsel who render a third-party legal opinion should never be viewed as being *directly adverse* to a syndicate member opinion recipient.

There was a consensus that, as a practical matter, this issue is not likely to create liability for law firms engaging in local counsel opinion practice, but that getting clarity on how the rule works in the context of a local counsel opinion (for example, by obtaining an ethics opinion on the subject that provides clarity as to local counsel's responsibility under the circumstances) would add comfort to that viewpoint. There was also a further discussion (following up on a discussion of the same topic at the breakout session held at the Spring 2013 WGLO meeting) on the question of whether this issue could be solved by having lenders (rather than borrowers) hire local counsel (paid for by the borrower) to opine to the lenders regarding the various legal issues that are typically covered in a local counsel opinion letter.

Exhibit 5 Opinions. The next issue discussed related to problems encountered by local counsel who are retained to render opinions on the laws of their jurisdiction that will be filed with the U.S. Securities and Exchange Commission under the Exhibit 5 requirement, particularly in connection with public debt offerings. It was noted that since the publication of Staff Legal Bulletin No. 19 (October 14, 2011) by the Division of Corporation Finance, there has been pressure from the staff of the SEC to remove certain qualifications, assumptions and limitations from opinion letters that include a remedies opinion, even in situations where such qualifications, assumptions and limitations would commonly be accepted by opinion recipients in financing transactions. There was also a view that there is limited ability to negotiate with the SEC staff on these opinions and that there is often pressure to "fall in line" with other local counsel.

Cross-Border Opinions. The third issue discussed related to the topic of rendering local counsel opinions in cross-border transactions because of the significant differences in customary legal opinion practices between U.S. and non-U.S. jurisdictions. There was a view expressed that the issues faced by local counsel in a cross-border transaction are similar to those faced by the principal transaction counsel in the same transaction, but are exacerbated in the local counsel context by the lack of client contact and limited information, and by the unreasonable time pressures that often accompany local counsel assignments.

Some of the suggested strategies for dealing with these issues in cross-border transactions included the following: (i) using standard language accepted under U.S. customary practice in the opinion letter and ignoring unusual opinion requests; (ii) expressly stating in the opinion letter that it is governed by U.S. customary third-party opinion practice; and (iii) limiting the scope of the opinions rendered to those commonly given by local counsel generally or to those generally given in cross-border transactions. There was a consensus that the work being done by the ABA Business Law Section's Legal Opinions Committee in preparing a report on cross-border opinions of U.S. counsel will provide meaningful

guidance regarding how counsel (including local counsel) should deal with particular third-party legal opinion requests in cross-border transactions.

Scope Limitations. In addition, there was a discussion about ways that local counsel often limit their opinions in light of the narrow scope of their role as local counsel. Some of the suggestions included the following: (i) limiting the scope of the engagement in the opinion letter, including limiting the documents reviewed and the diligence performed; (ii) assuming the substance of predicate opinions that are necessary to provide the state-specific opinions; (iii) limiting the jurisdictional coverage of the opinion letter to state law issues and expressly not covering U.S. federal law issues; and (iv) not rendering opinions on certain issues (such as a no litigation confirmation or a no breach or default of agreements opinion) where local counsel has had little or no contact with the client.

Next Steps. Finally, there was a brief discussion on possible follow-up considerations of this topic. There was a consensus that local counsel would benefit if the organized third-party legal opinions bar were to prepare a report on common local counsel opinion practices in order to give guidance to practitioners on how to deal with the particular issues often associated with rendering third-party legal opinions while acting as local counsel.

3. Private Financing

(Summarized by Reade H. Ryan, Jr.)

Andrew M. Kaufman, Kirkland & Ellis LLP, Chicago, Co-Chair

Reade H. Ryan, Jr., Shearman & Sterling LLP, New York, Co-Chair

A. Mark Adcock, Moore & Van Allen, Charlotte, Reporter

At the private financing dinner, three topics were discussed: (1) the recent New York Court of Appeals case, *IRB-Brasil Resseguros S.A. v. Inepar Investments S.A.*, 20 N.Y. 3d 310, 958 N.Y.S.2d 689, 982 N.E. 2d 609 (2012), *cert. denied*, 133 S. Ct. 2396 (2013), (2) advance conflicts-of-interest waivers, in light of *In re Rail Freight Fuel Surcharge Antitrust Litigation*, No. 07-0489 (PLF), 2013 WL4714334 (D.D.C. Sept. 3, 2013), and (3) law firm “gatekeeper” practices, in light of ABA Comm. On Ethics and Prof’l Responsibility, Formal Opinion 463 (2013) (discussing client due diligence, money laundering and terrorist financing) and the ABA’s *Voluntary Good Practice Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing* (2010).

Resseguros case. This case is important to opinion practice because the court applied Section 5-1401 of the New York General Obligations Law to uphold the parties choice of New York law to govern their agreement – a guarantee – notwithstanding that (a) the governing law clause was *not* drafted to select New York law “without regard to [New York’s] conflict of laws principles”, (b) the parties had no contacts with the State of New York, and (c) a related agreement – a fiscal agency agreement governing the subject global notes – *was* drafted to select New York law “without regard to conflict of laws principles.” The New York Court of Appeals held: “Express contract language excluding New York’s conflict-of-laws principles is not necessary. The plain language of General Obligations Law §5-1401 dictates that New York substantive law applies when parties include an ordinary New York choice-of-law provision, such as appears in the Guarantee, in their contracts.” The guarantor, a Brazilian corporation, had argued that the “whole” of New York laws should apply to its guarantee, including New York’s conflict-of-laws principles, and so its guarantee was void under Brazilian law because it was never

authorized by the guarantor's board of directors and the "internal affairs" doctrine should apply to have the issue of due authorization governed by Brazilian law.³

The lower New York courts, the New York Supreme Court (Trial Court) and the New York Supreme Court (Appellate Division) held that the guarantee was fully authorized under the doctrine of "apparent authority" and "ratification", since the guarantee had been executed and delivered by officers of the guarantor and the guarantor accepted the benefits of the transaction under New York law. 2009 WL 2421423 (2009) and 83 A.D.3d 573, 922 N.Y.S. 2d 308 (2011). The New York Appellate Division affirmed the judgment of the Supreme Court, holding that the guarantee was valid under New York law, and modifying only the rate of post-judgment interest to the statutory rate of 9% per annum. The New York Court of Appeals affirmed the order of the Appellate Division, emphasizing that "the parties are not required to expressly exclude New York conflict-of-laws principles in their choice-of-law provision in order to avail themselves of New York substantive law."

Advance conflicts-of-interest waivers. A law firm typically has a problem in accepting one client's small matter that might present a future conflict of interest when another client's large matter arrives. What to do? Reject the small matter? Sometimes. However, a potential solution may be for the law firm to insert into the firm's engagement agreement with a small matter client a broad advance conflicts-of-interest waiver. That solution was offered, considered, but not ultimately used in the *Rail Freight Fuel Surcharge* case, in which a law firm took on a client in litigation that was against the interest of another client. The Court found that such representation did not, under the circumstances of the case, violate conflicts-of-interest Rule 1.7(b)(1) of the D.C. Rules of Professional Conduct, and in the Court's footnote 12 indicated that though the advance conflicts waiver contained in the firm's engagement agreement with the complaining client was offered to, and considered by, the court, the waiver by its terms bound only one entity, but did not bind other affiliated entities that might be adversely affected by the litigation.

In the engagement letter, the advance conflicts waiver provided: "We thus ask you in connection with this engagement to consent in advance to our acceptance of future matters (including litigation matters) adverse to Oxbow [the firm's client], providing that those matters are not substantially related to the work that we have done for you. By entering into this [engagement] agreement, you consent to such adverse representations."

The official comment (¶ 22) to Rule 1.7 does contemplate advance conflicts waivers by clients:

"Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b) [of Rule 1.7]. The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent

³ The "internal affairs" doctrine provides that issues such as the authorization by all required corporate actions of the execution, delivery and performance of the agreement in question are governed by the law of the country of incorporation of the corporation in question and not by the stipulated law. See *Edgar v. MITE Corp.*, 457 U.S. 624, 645-46 (1982).

ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. *On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation.*” (Emphasis added)

So, there you are. Some law firms add broad advance conflicts waivers to all of their engagement agreements – or at least try to. And some opinion recipients — as the representatives of a major opinion recipient in attendance at the dinner indicated — do not accept engagement agreements that contain broad advance conflicts waivers.

Lawyers as “gatekeepers”. On September 23, 2011, the ABA’s Task Force on Gatekeeper Regulation and the Profession sent a letter to the Chair of the ABA’s Committee on Ethics and Professional Responsibility, seeking the input of the Committee on the contours of a lawyer’s ethical obligations to perform client due diligence at both client intake and periodically throughout the lawyer-client relationship, in light of the ABA’s Voluntary Good Practice Guidance. On May 23, 2013, the Committee issued Formal Opinion 463, which concluded that the Model Rules of Professional Conduct and the Voluntary Good Practice Guidance “are consistent in their ethical principles, including loyalty and confidentiality”, and advised that “by implementing the risk-based control measures detailed in the Good Practice Guidance where appropriate, lawyers can avoid aiding illegal activities in a manner consistent with the Model Rules.” As a final piece of advice, Formal Opinion 463 states that “lawyers should be conversant with the risk-based measures and controls for clients and legal matters with an identified risk profile [as outlined in the Voluntary Good Practice Guidance] and use them for guidance as they develop their own client intake and ongoing client monitoring processes.”

4. Public Financing
(Summarized by Richard R. Howe)

Julie M. Allen, Proskauer Rose LLP, New York, Co-Chair
Stanley Keller, Edwards Wildman Palmer LLP, Boston, Co-Chair
Richard R. Howe, Sullivan & Cromwell LLP, New York, Reporter

The discussion at this dinner meeting was devoted to the effect on legal opinions given in routine securities transactions of the changes made by the JOBS Act and the SEC’s implementing rules thereunder, including the revisions to Rule 506 that became effective on September 23, 2013.

A significant issue discussed was whether an opinion giver can make an assumption as to the absence of a “bad actor” disqualification, added to Rule 506 by the revisions. There are various legal issues involved in making that determination, such as who is covered by the “bad actor” disqualification provisions, what is a voting security, and how far up the chain the lawyer should go to determine who has voting power. These questions must be answered based on the circumstances of each particular case.

The general opinion literature says that an opinion giver may make assumptions as an alternative to satisfying itself as to the matter being assumed, but this does not necessarily satisfy the lawyer’s obligations under the Federal securities laws. The SEC regards lawyers as “gatekeepers” who have the

duty to be diligent in transactions in which securities are issued without registration under the Securities Act. This is reflected in ABA Ethics Opinion 335 (1974), which discusses the ethical obligations of a lawyer giving a no-registration opinion.

Another issue discussed was whether an opinion giver, when giving an opinion in connection with an offering conducted in reliance on Rule 506(c) (offerings made through the use of general solicitation or advertising), can make an assumption that the issuer has taken “reasonable steps to verify” the accredited investor status of purchasers without doing any further work. In transactions prior to the revisions effected to implement the JOBS Act, if a placement agent was involved, many people would rely on the placement agent’s representation that it offered the securities only to accredited investors. Again, when giving a securities law opinion, an assumption alone may not suffice.

It was noted that clients are unlikely to understand many of the nuances in opinions in this area and that they often will be reluctant to verify whether participants in the offering are “bad actors” or whether proposed purchasers are accredited investors. They are likely to ask others to perform the verification and rely on those persons. Some lawyers are willing to perform accredited investor verification procedures.⁴ It was noted that a lawyer formerly with Goodwin Proctor is setting up a business to perform verification procedures that issuers can rely on and others are likely to do the same.

It also was recognized that securities opinions are given in different contexts, such as transactions involving hedge funds, angel investor networks and institutional investors, and the context of the specific transaction is likely to affect what lawyers do. In addition, there are usually blue sky issues involved in these transactions as well as Federal securities law issues.

A new report on “no registration” opinions is being prepared by the ABA Subcommittee on Securities Law Opinions of the Federal Regulation of Securities Committee, and while it will recognize the issues referenced above, it will not provide guidance to lawyers on all that they should do to satisfy themselves as to what has been done to meet the bad actor and accredited investor requirements.

One person present would be willing to rely on a certificate stating what the issuer did to verify accredited investor status. If so, this lawyer recognized that it would be necessary to make the judgment that the steps were reasonable and would also be prepared to advise the client on what steps it should take to verify accredited investor status. This lawyer would not rely on a certificate that just stated the conclusion that the issuer “has taken reasonable steps to verify.” Others said that they would accept a certificate spelling out what steps the client took to verify accredited investor status, and they would make the judgment that the steps were satisfactory.

Another person gave an example of the issue of an “affiliated issuer” as a covered person under the “bad actor” provision, referring to when a private equity fund signs a questionnaire covering all funds that it owns a controlling interest in. This applies to portfolio companies of private equity funds as well as the fund itself. [**Editor’s Note:** Subsequent to the dinner, the SEC confirmed that an “affiliated issuer” is only an “affiliate” of the issuer that is issuing securities in the same offering. *See* C&DI § 260.16.]

Another person referred to investment banking firms checking their own records to verify that clients were “qualified purchasers.” Many people have advised on issues relating to qualified purchaser status.

⁴ For a discussion of verification of accredited investor status by an attorney under the safe harbor provided by Rule 506(c), *see* “Notes From the Listserve” in the Fall 2013 issue of the Newsletter (vol. 13, no. 1).

Another said a client refused to fill out a questionnaire but was prepared to certify to issues that were on their face inadequate (e.g., “only the Fund is the beneficial owner of the securities” when the general partner, for example, would also be a beneficial owner). There was general agreement that a lawyer cannot rely on a clearly inadequate certificate.

There seemed to be general agreement that lawyers cannot give opinions in securities transactions without having a reasonable basis for any assumptions they make. The opinion itself does not necessarily have to say anything about this –the opinion preparers may just make an assumption – but they actually may do more. Reliance on express assumptions without more may work for opinions outside the securities area, but in the securities area a lawyer should have a reasonable basis for believing the assumptions made. And there should not be any red flags bringing into question the reliability of the assumptions.

The co-chairs wrapped up by asking some questions of those present:

- How many people would make an assumption in the opinion as to the absence of bad actors? Most people said they would do so.
- How many people would make an assumption that the issuer had taken reasonable steps to verify accredited investor status, as opposed to relying on just general representations? A majority of those present said they would. One person would not say anything about bad actors or reasonable steps to verify in the opinion but would rely on representations and warranties by the issuer on these issues and would supplement this by performing diligence on the issues without saying anything about this in the opinion.

One person noted that the SEC is an enforcement agency and will always evaluate what people did after the fact and decide whether what they did was reasonable, with the benefit of hindsight. This is just a fact of life under the securities laws. But this person also said that the SEC, if present at the dinner meeting, would have found the discussion most interesting.

INTRODUCTORY ADDRESS:

SEC Enforcement and Disciplinary Focus on Legal Opinions

(Summarized by Anna Mills)

Dixie L. Johnson of Fried, Frank, Harris, Shriver & Jacobson LLP, the current ABA Business Law Section Chair, opened the October 29th WGLO session with remarks about SEC enforcement and disciplinary focus on legal opinions. After noting her support of WGLO and its mission, she spoke about opinion letters in the context of her practice area, SEC enforcement and disciplinary actions. Using the fact pattern in *S.E.C. v. Greenstone Holdings, Inc.*, 2013 WL 3481551 (S.D.N.Y., July 10, 2013) (attorney liable for Securities Act Section 5 violation for delivering a false Rule 144 opinion letter) as an example, Ms. Johnson emphasized that opinion givers should consider implementing protocols to document the facts they rely upon and their legal analysis. In the same vein, she suggested that attorneys should be skeptical, be alert for red flags, and consider that, when deals fall apart, attorneys may be a target for litigation and enforcement actions. Her closing advice was to remind everyone that, if the SEC calls, attorneys should politely decline to answer its questions and instead request a follow-up call, allowing time to consult with an attorney experienced in SEC enforcement proceedings.

CONCURRENT BREAKOUT SESSIONS I:

1. Discussion with Recipients About Third-Party Closing Opinions II – Private Financing Opinions

(Summarized by Erik W. Hepler)

Dina J. Moskowitz, Standard & Poor's Ratings Services, New York, Co-Chair

Reade H. Ryan, Jr., Shearman & Sterling LLP, New York, Co-Chair

Erik W. Hepler, Kirkland & Ellis LLP, New York, Reporter

This session focused on the concerns and expectations of opinion recipients in connection with third-party closing opinions given in private financings.

The discussion started with representatives of a major opinion recipient discussing the value they see in the U.S. practice of borrower's counsel opining on the enforceability of agreements that are often prepared by recipient's counsel. An opinion from borrower's counsel, in their view, ensures that responsible legal professionals have reviewed and given some thought to the agreements, and that a fresh pair of eyes, which are not as familiar with the agreements as recipient's counsel may be, has reviewed the agreements.

The discussion then moved to some problems with the normal "golden rule" construct, as in many instances attorneys either almost always give opinions or almost always receive opinions, and therefore the idea of asking for only what one would give does not hold the same applicability. This concern is heightened in the middle market area, where some lenders' counsel may not have much awareness of customary opinion practices.

It was suggested that it might be helpful if major recipients could set forth a list of major areas of concern or at least a list of areas of no concern. The recipients did not think this was workable, because (a) different recipients have different areas of concern, (b) different deals require different approaches, and (c) recipients would be loath to reveal exactly what their most important points are.

It was then suggested that the participants in the discussion send to the co-chairs a list of the "pain points" (those opinion issues which are typically the major points of contention), in order to advance the discussion on these issues, and move towards a more general resolution of them.

The discussion then turned to the assignability of opinions. Given the continuing expansion of the secondary market, as well as the rise of more non-traditional lenders, there is rising concern from opinion givers on allowing reliance by additional parties, as well as concern from recipients that want to make the market for future assignees as liquid as possible.

Various ways to limit assignability (including the Wachovia exception, not allowing loan participants to rely on the opinion, and requiring any claims against the opinion giver to be made by the administrative agent) were discussed. The group also noted that other limitations on liability, which can serve a similar role as the limits on assignability, were being discussed in a different concurrent session.

The apparent recent requirement by a major recipient to require any law firm that represents it to promise not to put restrictions on assignability to which the recipient objects in any opinion such firm may deliver to it in a transaction in which it represents the other side (and how far this request actually goes) was discussed. It was reported that in an actual recent financing transaction with this recipient, it did allow the legal opinions to include a Wachovia-type assignment restriction.

The representatives of the major opinion recipient in attendance did express the importance to their institution of the assignability of opinions given by the borrower's counsel, though they indicated that their institution could live with reasonable assignability restrictions like the Wachovia limitation including, those that preclude an assignee from having any greater rights than the original lenders (as set forth, for example, in what has become known as the "Wachovia expanded" formulation).⁵

Near the end of the session, the representatives of the major opinion recipient did inject a measure of reality: they said that, for the bankers, ultimately an opinion that is deficient is only one more risk of the loan, and that the banking officer overseeing the loan will normally accept an otherwise deficient opinion if the financial rewards are large enough. The bank loan officer *can*, and does, overrule the bank's inside counsel. The bank loan officer is concerned with increasing the institution's financial returns on the loan and reducing the costs for the client borrower by, among other things, generally resisting any significant increased costs for a third-party legal opinion. However, noted the representatives, if the bank ignores good market practice for legal opinions too much, the bank may confront regulatory issues.

In the end, it was concluded that getting more input directly from recipients is crucial to resolving most of the opinion problems discussed. As the trend is for these institutions to exert more control over their outside counsel (who are generally the ones dealing with the opinion disputes), having them take a greater role in determining the necessary opinion points will be very important.

⁵ [Editor's Note: The following is the text of the Wachovia "expanded" formulation that was included in the summary of a breakout session ("Assignability Issues in Third-Party Opinions") held at WGLO's Spring 2012 seminar (see the Summer 2012 issue of the newsletter (vol. 11, no. 4) at pages A-7—A-8):

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

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

2. **Mending One's Words: Drafting Opinion Letters to Limit Liability (Act II)**
(Summarized by Douglas R. Davis)

Donald W. Glazer, Newton, Massachusetts, Co-Chair

Timothy G. Hoxie, Jones Day, San Francisco, Co-Chair

Douglas R. Davis, Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, Reporter

This breakout session followed a similarly titled session from the Spring 2013 WGLO meeting. (See the WGLO Addendum to the Summer 2013 issue of the Newsletter (vol. 12, no. 4), at pages A-23–A-26.) The earlier session focused on “traditional” (at least from a U.S. perspective) ways of limiting liability for opinions: establishing firm policies and procedures for their preparation and review, sharpening their wording, and narrowing the coverage of particular opinions. This session considered additional means of limiting liability that, while utilized in other jurisdictions, are not common in the United States. These include express limitations (such as caps on liability), client indemnities, and procedural limitations (such as express choice of law and forum selection and dispute resolution provisions). The session also touched on ways of implementing these ideas, whether in engagement letters, transaction documents, or opinion letters themselves. Of course, where a provision should be included depends in part on whom it is intended to bind: liability limits and procedural rules intended to bind third parties could simply be included in opinion letters (with the obvious risk of objection); indemnities from clients could be included in engagement letters; and in many cases limitations might be included in transaction documents where client liabilities are already limited.

Discussion focused on several of the above ideas:

Choice of Law. Some firms, almost exclusively outside the United States, include provisions specifying the law governing the opinion letter itself and the forum in which disputes are to be resolved. Given that general principles of liability, such as the elements of negligent misrepresentation, do not vary greatly by jurisdiction, a number of participants expressed the view that negotiating a choice-of-law provision is not likely to be worthwhile. Rather, the focus might better be placed on incorporating by reference particular bar association materials (such as the ABA’s Legal Opinion Principles), which provide more precise guidance as to how an opinion is meant to be interpreted.

Choice of Forum. The group took a more favorable view of choice-of-forum provisions, particularly when the opinion giver is in a state with a business court, which may be more likely to appreciate the significance of customary practice in interpreting opinions. One participant noted that insurers generally do not look favorably on arbitration provisions for resolving claims against law firms.

Client Indemnity. In most U.S. jurisdictions a lawyer may not limit liability to a client and therefore cannot obtain indemnification from a client for the lawyer’s malpractice in representing the client. However, in its recently issued Ethics Opinion (no. 969), the New York State Bar Association’s Professional Ethics Committee makes clear that no such limitation prevents a lawyer from requesting that a client indemnify the lawyer for liability to a third-party recipient of the lawyer’s opinion. See “*Recent Developments – NYSBA Ethics Opinion 969, Client’s Indemnity to Its Lawyer as to a 3d Party Opinion*” in the Fall 2013 issue of the Newsletter (vol. 13, no. 1). Of course, the utility of any such indemnity would vary depending on the circumstances: if the claim involves an error that exposes the client (as well as the third party) to a loss, it might be viewed as an improper attempt to limit liability to the client. In cases where the alleged error does not cause loss to the client, indemnity could be effective. And in some

circumstances (such as seller diligence reports produced at a client's request to facilitate a sale) a request for indemnity might more likely be entertained than in other cases. However, the sense was that few clients would be prepared to accede to indemnity requests.

Caps on Liability. Caps on liability for an opinion were thought to be more promising, both because they directly address liability and because they may be better received than indemnity proposals since they are directed to the third party rather than to the client. In the mergers and acquisitions area, it seems anomalous that a lawyer can have uncapped liability for an opinion matter also covered by a client representation in the transaction agreement, where the agreement contains a cap on the client's liability. As a practical matter, damages from an erroneous opinion will not ordinarily exceed an opinion giver's insurance, but in at least one recent case a firm, acting as local counsel, was sued by a major bank for an amount vastly in excess of the fees it received for rendering the opinion and well in excess of its insurance coverage. In various jurisdictions outside the United States, express caps on liability are routinely included in opinions, either at specified amounts or at the firm's policy limits.

Limitations on Suing Individual Lawyers. Outside the United States, as well as in other service arrangements (such as in accounting engagements), law firm opinion givers frequently limit a party's right to sue individual professionals within the firm. There was, perhaps unsurprisingly, considerable receptivity to this idea if it could be implemented, with participants remaining confident that it would not diminish the incentive for lawyers to render accurate opinions. This idea also did not generate the same degree of skepticism over the reaction of third parties or clients as did some of the other ideas discussed.

The group recognized that it was too early to conclude whether or to what extent some of these ideas will gain traction. Some, like choosing the governing law, are likely not worth pursuing from the standpoint of limiting liability. Others, like liability caps or limitations on individual (as opposed to firm) liability, more directly address the problem and may also be more palatable to clients and third-party opinion recipients, at least in certain circumstances, and therefore may have more promise. Further consideration of these ideas was thought to be merited.

3. The Role of the Opinion Committee in Risk Management (Summarized by Julie M. Allen)

Julie M. Allen, Proskauer Rose LLP, New York, Co-Chair
Joel M. Miller, Miller & Wrubel P.C., New York, Co-Chair
Shannon B. Gray, Carlton Fields, P.A., Tampa, Reporter

This breakout session continued the discussion from a panel presentation at the Spring 2013 WGLO meeting on the role of opinion committees in law firm risk management, utilizing hypotheticals to prompt discussion.⁶ At the outset of the session, participants were asked how many of their firms have a risk management officer or committee separate from their general counsel. Approximately one-half indicated that their firms have a separate risk management committee. Of those, only a small minority have the opinion committee chair or other opinion committee member sit on the risk management committee. Nevertheless, most participants acknowledged that the opinion committee plays at least an *ad hoc* role in risk management, acknowledging that the opinion committee is often the first to identify

⁶ See "Perceiving and Acting on Opinion Risk," at pages A-16 – A-17 of the WGLO Addendum to the Summer 2013 issue of the Newsletter (vol. 12, no. 4).

potential risk management issues, even those that do not directly involve opinions. Participants generally acknowledged that, given their role in reviewing opinions, they are often able to identify high-risk areas of their firm's practice, as well as partners who are more likely to engage in high-risk matters.

Processes and procedures for elevating risk issues to firm management varied widely among the breakout session participants, depending on their firm's culture and management structure. Participants discussed concerns about attorney-client privilege in this context, with many acknowledging that their firm's general counsel is not always consulted in the early stages of resolving identified risk issues. Many participants acknowledged that the resolution of these matters is rarely documented.

The breakout discussion then focused on the importance of creating a culture where lawyers are encouraged to seek help and escalate risk issues to those able to assist. It was generally recognized that it is not possible, in the opinion review process itself, to identify all potential risks. Accordingly, opinion committees and risk managers must rely on their colleagues to bring issues forward. However, participants also generally recognized that many of their colleagues may not appreciate all of the risks involved in opinion practice, nor are they all equally sensitive to the increasing frequency of claims arising out of opinion practice. At least one participant noted that it could be helpful to provide risk management training for partners to assist them in identifying red flags.

PANEL SESSIONS I:

Obligations of Opinion Givers and Recipients to Gate Keep Against Money Laundering

(Summarized by Susan Cooper Philpot)

Philip H. Schaeffer, White & Case LLP, New York, Chair

Ellen Hayes, Linklaters LLP, New York

Jennifer Paradise, White & Case LLP, New York

Lawrence S. Spiegel, Skadden, Arps, Slate, Meagher & Flom LLP, New York

The Financial Action Task Force (the "FATF") is an organization of two international associations and 34 countries, including the United States, formed in 1989 for the purpose of defending against both international money laundering and the financing of terrorist activities. The primary work product of the FAFT is the promulgation of the policies it recommends be adopted by individual countries. For the most part these policies are based on the regulation of "gatekeepers" who can inhibit anti-money laundering and terrorist financing activities ("AML") in their daily conduct of business. All European countries and the majority of other jurisdictions have AML regulations mandating that lawyers act as financial gatekeepers. Perhaps influenced by a culture that prizes privacy, a country without mandated national identity cards, lawyer regulation that for the most part is at the state level, and ethical rules mandating lawyer confidentiality, to date the United States has not extended its AML regulations to cover lawyers. However, it is under increasing international pressure to do so.

The panel's Linklaters representative outlined AML regulation in the United Kingdom, which is considered the "gold standard" of AML regulation of lawyers. U.K. law firms are subject to a broad array of requirements that mandate due diligence on all clients and client prospects, including their beneficial owners (each with on-going updates), and on the nature of all transactions undertaken by U.K. lawyers on behalf of their clients. This diligence primarily utilizes a risk-based approach, involving judgment and proportionality, categorizing clients and transactions as requiring low, medium or high levels of scrutiny, as appropriate. A U.K. lawyer has an obligation to follow-up on any red flags that the lawyer becomes aware of as a result of the due diligence process and, in certain circumstances, may be required to report

directly to government authorities without advising the lawyer's client. This regulatory regime, enforced by criminal sanctions, is very expensive and time consuming for both large and small law firms to conduct and maintain. It typically involves periodic training of all lawyers and legal staff, enhanced client in-take procedures, subscriptions to multiple informational services that provide data on clients and prospective clients. It also often involves a new dedicated internal AML Compliance Officer together with a compliance department staffed with highly-trained analysts, and extensive additional law firm policies, documentation and related record keeping. The Skadden representative on the panel put this discussion into an even broader context by describing the enormous challenges facing firms that have offices around the globe, each having to comply with the different AML laws of each country in which the firm has offices.

Despite this complex and expensive regulation, the panel pointed out that to date there has been no real empirical evidence as to whether AML regulation of lawyers reduces incidents of money laundering or terrorist financing. U.S. lawyers already do a substantial amount of client due diligence, both for the purposes of complying with ethical rules prohibiting client conflicts and prohibiting the aiding of client criminal activity, as well as for lawyer and law firm reputational concerns. Faced with the complexity, expense and costly delays of mandatory AML regulation of lawyers, with its criminal sanctions for violations and the inevitable exposure of lawyers and law firms to potential liability for money damages for irregularities not detected, the ABA is encouraging more robust client in-take and due diligence procedures by U.S. lawyers in the hopes of eliminating any perceived need for mandatory U.S. legislation in this area. To this end, the ABA adopted, in August 2010, its "Voluntary Good Practices Guidance for Lawyers To Detect and Combat Money Laundering and Terrorist Financing," and on May 23, 2013, the ABA's Standing Committee on Ethics and Professional Responsibility released Formal Opinion 463, "Client Due Diligence, Money Laundering, and Terrorist Financing," opining that compliance with the ABA Good Practices Guidance is consistent with a lawyer's ethical standards, including those relating to loyalty and confidentiality. The panelists concluded by urging lawyers and law firms to focus on voluntarily improving their existing client diligence efforts aimed at deterring and combating money laundering and terrorist financing in order to negate the need for mandatory AML legislation in the United States.

CONCURRENT ASSOCIATION & LAW FIRM ADVISORY BOARD MEETINGS:

1. Association Advisory Board (Summarized by Steven K. Hazen)

Leonard H. Gilbert, Holland & Knight, Tampa, Chair
Andrew M. Kaufman, Kirkland & Ellis LLP, Chicago,
Lea Haber Kuck, Skadden, Arps, Slate, Meagher & Flom LLP, New York
Antonia Stolper, Shearman & Sterling LLP, New York

The summary of the meeting of the Association Advisory Board is in the Newsletter under "Fall Meeting of the Working Group on Legal Opinions — Association Advisory Board."

2. **Law Firm Advisory Board**
(Summarized by Reade H. Ryan, Jr.)

James J. Rosenhauer, Hogan Lovells US LLP, Washington, D.C., Co-Chair
Reade H. Ryan, Jr., Shearman & Sterling LLP, New York, Co-Chair
Henry Weisburg, Shearman & Sterling LLP, New York

The summary of the meeting of the Law Firm Advisory Board is in the Newsletter under “Fall Meeting of the Working Group on Legal Opinions — Law Firm Advisory Board.”

CONCURRENT BREAKOUT SESSIONS II:

1. **Common Qualifications to a Remedies Opinion in U.S. Commercial Loan Transactions: Exposure Draft**
(Summarized by Willis R. Buck, Jr.)

Gail Merel, Andrews & Kurth LLP, Houston, Co-Chair
Reade H. Ryan, Jr., Shearman & Sterling LLP, New York, Co-Chair
Willis R. Buck, Jr., Sidley Austin LLP, Chicago, Reporter

This session considered the most recent exposure draft of a paper entitled “Common Qualifications to a Remedies Opinion in U.S. Commercial Loan Transactions” included in the materials for this Seminar. An earlier draft of the paper was distributed for comment at the WGLO Spring 2013 Seminar. The paper is co-authored by a working group of eleven WGLO participants, practicing in seven different commercial states, and describes the extent to which, in the authors’ experience – and despite variations in law firm practice and applicable state law – a surprisingly common approach has developed as to certain qualifications to the remedies opinion that are regularly taken by opinion givers and accepted by institutional lenders in the U.S. commercial loan context.⁷ In the paper the authors identify a number of factors which they believe account for this development.

As an introduction to the session, the co-chairs described the background and purpose of the paper and the co-authors’ desire for feedback and comment. The co-chairs also underscored that, in concluding that certain qualifications have become “common,” the authors of the paper are not attempting to establish standards of practice or address which qualifications should or should not be taken in any particular transaction. More important, the paper expressly does not address what either does or should constitute customary legal opinion practice. Instead, as the authors make clear in their introduction to the exposure draft: “Simply because certain qualifications to the remedies opinion have become “common” or “frequent” in a given context – whether as a consequence of cost-benefit considerations, law firm policies and procedures, time constraints or other factors unrelated to the extent to which provisions of an agreement are enforceable as a matter of law – the use or acceptance of such common or frequent qualifications should not be viewed as constituting or establishing customary legal opinion practice.” Moreover, the paper also does not address the question of whether an opinion recipient should request or

⁷ The authors of this paper are Gail Merel (Chair), a member of the New York and Texas bars; A. Mark Adcock, a member of the North Carolina bar; Robert W. Barron, a member of the Florida bar; Willis R. Buck, Jr., a member of the Illinois bar; Jerome A. Grossman, a member of the California bar; Louis G. Hering, a member of the Delaware bar; Timothy G. Hoxie, a member of the California bar; Andrew M. Kaufman, a member of the Illinois bar; Reade H. Ryan, Jr., a member of the New York bar; Philip B. Schwartz, a member of the Florida bar; and Stephen C. Tarry, a member of the New York and Texas bars.

require any particular set of opinions, or whether an opinion giver should take an unnecessary or overly broad qualification when the opinion recipient does not object.

The co-chairs also pointed out that many variations exist in the forms of expression of these qualifications and each sample presented in the paper is posited as one of a number of possible formulations.

The following sample qualifications were selected from the exposure draft for discussion during this session. Throughout the discussion, the session participants generally concurred (sometimes by a show of hands) that the types of qualifications set out below – though often formulated somewhat differently (and sometimes formulated even more broadly) – are in their experience commonly found in the opinions they see in the U.S. commercial loan context.

1. Choice of Law

Sample qualification where no opinion is rendered on the choice of governing law under the agreement:

We express no opinion with respect to any provision purporting to choose the [law of any jurisdiction to govern any matter][law of [chosen governing law] to govern the agreement].

Sample qualification often taken in states where an opinion is given in reliance on Section 187 of the Restatement (Second) of Conflict of Laws (and applicable case law applying the Restatement in those states) – rather than based on a statutory safe-harbor supporting the contractual choice of law:

In a properly presented proceeding in a court of competent jurisdiction in this State for the enforcement of the agreement [and based on (factual statements or assumptions as to the reasonable relationship of the transaction to the chosen jurisdiction)], the court [would][should] give effect to the provision of the agreement selecting the law of [chosen jurisdiction] as the governing law, except to the extent (i) that any provision of the agreement is determined by the court to be contrary to a fundamental policy of the jurisdiction whose law would apply in the absence of that choice-of-law provision, and (ii) that jurisdiction has a materially greater interest in the determination of the particular issue than does the jurisdiction whose law is chosen.

2. Jury Trial Waivers

We express no opinion with respect to waivers of the right to trial by jury.

3. Submission to Jurisdiction in the Absence of a Statutory Safe Harbor

We express no opinion with respect to agreements to submit to the jurisdiction of any particular court or other governmental authority (either as to personal jurisdiction or subject matter jurisdiction).

2. Ethics Considerations for Responses to the Audit Inquiry Letter
(Summarized by Lori S. Gordon)

William Freivogel, Chicago, Co-Chair
James A. Smith, Foley Hoag LLP, Boston, Co-Chair
Lori S. Gordon, Chicago, Reporter

The group discussed confidentiality issues that may arise in connection with the preparation and delivery of responses to auditors under the ABA Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information" (the "ABA Statement") when there is pending litigation or unasserted claims that may be highly significant to the client, either because of the potential effect on its business or the potential for extremely large damages. In that context, the group considered: the hazards of oral responses by lawyers to requests for updates; the extent (if any) to which the attorney-client privilege protects lawyers' responses and the need to protect that privilege absent a knowing waiver by the client; the duty to resign where the client refuses to make disclosures pursuant to Paragraph 6 of the ABA Statement; the need to push back on non-standard auditors' requests; and the extent, if any, to which a claim's being extremely large may affect the lawyer's ability to characterize the claim as "remote" so long as there is any chance whatsoever of an adverse outcome.

The consensus of the group was that the ABA Statement has worked extremely well over the nearly forty years of its existence, thus justifying lawyers' insistence on conforming their responses to auditors to the ABA Statement. The group noted that in those relatively rare "special circumstances" noted in Paragraph 5 of the ABA Statement, in which the lawyer and accountant might discuss a specific disclosure through a conference, it is critical to maintain the same standards under the ABA Statement that apply to the response letter and to guard against disclosure of any information protected by the attorney-client privilege absent the client's knowing waiver.

3. Opinion Committees 2020 - The Next Generation of Opinion Committees
(Summarized by Cynthia A. Baker and Susan Cooper Philpot)

Cynthia A. Baker, Chapman and Cutler LLP, Chicago, Co-Chair
Steven O. Weise, Proskauer Rose LLP, New York, Co-Chair
Susan Cooper Philpot, Cooley, LLC, San Francisco, Reporter

This session considered issues relating to the recruitment and training of firms' legal opinion committees of the future, and getting younger partners involved in opinion committee matters. A few statistics about the seniority of WGLO members were presented. The average WGLO member has been a member of the bar 32.9 years (median is 33), with the most-senior members admitted to the bar 54 years ago, and the most-junior members admitted 14 years ago. If one assumes bar admission at age 25, that puts the average age of WGLO members at 57.9 (58 median), with 14 or more members in their 70s and more than 20% of the organization aged 65 or older. Several participants in the discussion noted generational issues in the recruitment and involvement of younger partners in opinion committees and opinion review. Those who indicated that their firms do not have generational issues or gaps in their opinion committee also observed that their opinion review process is substantially integrated into their practice management.

The discussions considered how to choose recruits for opinion committee membership. Session participants identified the following personality/intellectual characteristics as being common among the "best" legal opinion committee members: responsive to questions and requests for help; likes teaching others; a problem-solver; knows the underlying substantive law and is confident in his/her analysis;

intellectually curious with an inquiring mind (wants/needs to look up the answer); writes well and with precision; has a diplomatic style, but with the gravitas/analytical ability to make an answer “stick”; and is an intellectual leader. Suggestions were made that firms with generational transition issues with respect to their opinion committees (*e.g.*, age gaps in committee membership) might have the best success recruiting new partners in their mid-30s with the above characteristics, as committee service can provide a needed role for new partners at a time when their plates may not be full with client work.

Finally, participants also considered whether WGLO might provide some sort of training or cram-course for new opinion committee members to help them get up to speed on legal opinion literature and become more conversant with the risk and liability issues facing law firms in their opinion practices (and the management of those issues), and to help that “next generation” meet and work with their opinion committee counterparts at other transactional firms. The concept was met favorably, both in the smaller breakout session, and by a show of hands in the full WGLO session. Work is under way to make preliminary plans for such a course, including an outline of topics. Meeting participants interested in contributing to the development of such a program or materials were invited to share their thoughts with Cynthia Baker, cbaker@chapman.com.

PANEL SESSIONS II:

Recent Opinion Developments

(Summarized by John B. Power)

John B. Power, O’Melveny & Myers LLP, Los Angeles, Moderator

Arthur Norman Field, Field Consulting, New York

Donald W. Glazer, Boston

Louis G. Hering, Morris, Nichols, Arsht & Tunnell LLP, Wilmington

Stanley Keller, Edwards Wildman Palmer LLP, Boston

Steven O. Weise, Proskauer Rose LLP, Los Angeles

This panel touched on a number of recent developments.

Securities Act of 1933: Rule 506. Stan Keller summarized the recently proposed and adopted rules of the SEC affecting the preparation and delivery of no-registration and other opinions. See the summary of the meeting held November 23, 2013 by the Subcommittee on Securities Law Opinions, Committee on Federal Regulation of Securities, in this issue of the Newsletter.

Recent Amendments to the Delaware General Corporation Law. Lou Hering summarized recent amendments to the Delaware GCL, effective in 2014, to add Sections 204 and 205 to permit remedial actions to validate corporate acts by Delaware corporations that might otherwise be invalid, such as a defective stock issuance not preceded by the requisite board or stockholder approval. One validation method is to obtain board or stockholder approval after the fact that should have occurred at or before the time of the corporation’s act in question and to provide notice of that remedial action to the stockholders. The other method is to obtain a Delaware Court of Chancery order validating the corporate act. Achieving validation using either method should in appropriate cases facilitate the giving of third-party opinions on the acts of Delaware corporations that would otherwise be difficult or impossible to give.

Client Indemnification of Opinion Giver Against Liability to Non-Client Co-Addressee of Opinion Letter. Arthur Field reported on Ethics Opinion 969 of the New York State Bar Association’s Committee on Professional Ethics, which concluded that a lawyer may ethically ask a client to indemnify the lawyer

against potential malpractice or other claims by a third-party co-addressee of an opinion letter also addressed to the client. The third party was not the lawyer's client, and therefore the request did not run afoul of the New York rule prohibiting prospective limitations on a lawyer's liability to a client for malpractice. In this case, the client was also an addressee of the letter and retained its rights to make a malpractice claim against the lawyer based on the same opinion letter. (See Mr. Field's note on this Ethics Opinion in the Fall 2013 (vol. 13, no. 1) issue of the Newsletter under "*Recent Developments — NYSBA Ethics Opinion 969, Client Indemnity to Its Lawyer as to a 3d Party Opinion*").

Arbitration Clauses: American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013). Steve Weise reported on this case, in which the Supreme Court enforced under the Federal Arbitration Act an arbitration clause that included a contractual waiver of class arbitration. The case originated as a class action in a federal district court for violation of federal antitrust laws. The plaintiffs argued that enforcement of the waiver contravened policies of the antitrust laws and that the high costs of arbitration would preclude an individual litigant from vindicating federal statutory rights. The Supreme Court rejected that argument and enforced the arbitration clause. Steve stated that in his view this case, together with earlier Supreme Court cases, should put to rest most generic concerns of opinion givers about giving enforceability opinions on arbitration clauses, given that the Supreme Court has consistently enforced arbitration clauses under the FAA.

Don Glazer, however, noted that some state courts have looked for creative ways to narrow or distinguish these Supreme Court precedents, including finding that particular clauses are unconscionable, and suggested that transactional lawyers preparing opinions covering the enforceability of arbitration provisions should consider whether to consult with someone familiar with the relevant cases in their state before delivering the opinion. He also noted that prior to the Supreme Court's decision in *American Express* many firms added a standard exception for arbitration provisions to their opinion letters, and he speculated that, in light of the uncertainty over what any particular state court might hold, those firms may well retain the exception notwithstanding *American Express* and earlier Supreme Court decisions affirming the validity of arbitration clauses.

TriBar Opinion Committee Reports: Opinions on Choice of Law Provisions and on Limited Partnerships. Don Glazer reported on a recently published supplemental report of TriBar on opinions on choice of law provisions, "*Supplemental Report: Opinions on Chosen-Law Provisions Under the Restatement of Conflict of Law,*" 68 Bus. Law. 1161 (2013). The report principally discusses the situation where (i) the agreement chooses the law of a state other than the state whose law is covered by the opinion, and (ii) the state whose law is covered by the opinion (the "covered law state") has adopted choice-of-law rules based on Section 187 of the Restatement (Second) of Conflict of Laws. The report discusses a difference of view among opinion givers about whether, when giving an opinion that the choice of law provision is enforceable, the opinion preparers need to include in the opinion letter an express statement that they have not considered the substantive law of any state other than the covered law state. It concludes by pointing out that, to avoid misunderstandings, many opinion givers make clear in their opinion letters that they are not covering the possibility that the choice-of-law rules of the covered law state might require consideration of the fundamental policies of some other state, and that some opinion givers also expressly exclude coverage of the fundamental policies of the covered law state. The analysis of this issue is complex, and a careful reading of the report is suggested.

Don also discussed a report on opinions on limited partnerships on which TriBar is now working. He focused on a TriBar Committee discussion in progress on whether a "duly formed" opinion can be given on a limited partnership when the requirements for its formation were not satisfied until long after its certificate of limited partnership was filed and, if so, whether a "duly formed" opinion on the

partnership would add anything to the opinion that almost always follows it that the partnership is “validly existing.”

Opinions on Choice of Forum Clauses. Steve Weise reported that he had read the transcript of the oral arguments before the *U.S. Supreme Court* in *In Re Atlantic Marine Construction Company*, 701 F.3d 736 (5th Cir. 2012), *cert. granted*, 133 S. Ct. 1748 (2013) in which the Fifth Circuit denied a writ of mandate to require a Texas federal district court to transfer venue to a district court in Virginia under 28 U.S.C. § 1404(a) as called for in a contractual forum selection clause. (See Steve’s discussion of this case as summarized in the report on the August 11, 2013 meeting of the Committee in the Fall 2013 issue of the Newsletter (vol. 13, no. 1) at pages 6-7.) Based on the oral argument, Steve predicted that the Supreme Court would reverse the Fifth Circuit and give effect to the contractual choice of forum. On December 3, 2013 the Supreme Court reversed the Fifth Circuit, vindicating Steve’s prediction, 2013 WL 6231157.

“True Sale” Opinions. Steve also reported that discussions by a task force of the ABA Business Law Section with the AICPA on its proposals to broaden the scope of true sale opinions are temporarily on hold, but undoubtedly will be resumed in 2014. (See the summary of Steve’s report on AICPA’s proposals in the report on the Committee’s August 11, 2013 meeting in the Fall 2013 issue of the Newsletter at pages 4-5.)

Restatement of Torts. Steve further reported that he is consulting with the reporter of the proposed revision of the ALI’s Restatement of Torts on issues relating to third-party legal opinions. So far Steve is comfortable with the proposed revision’s treatment of legal opinions.