Agenda for Meeting of the Opinion Standards Committee
of the Business Law Section of the Florida Bar
Wednesday, January 22, 2014
2:00 p.m. to 4:00 p.m.
Reunion Resort & Club
Reunion, Florida

I. **Welcome –** *Robert W. Barron, Chair*
J.C. Ferrer – Vice Chair

II. Pro Bono Reminder

III. Business Law Section Update & Welcome from Section Chair Steph Nagin

IV. Status of Preferred Stock, Limited Liability Company Membership Interests and Margin Stock Supplemental Reports

a. Revised Draft of First Supplement to the Report: Corporations - Issuance of Preferred Shares – Redlined vs. Relevant Report Section

V. Discussion Regarding Enforceability Opinion for Issuance of Preferred Shares

VI. Excluded Laws – Dodd Frank Issue – For Discussion (See Exhibit A attached hereto)

VII. Assignment of Loan During the Existence of a Default

For Discussion: Some law firms are limiting the reliance on their credit transaction opinions to assignees of the lender(s) only if the assignment is made at a time when the loans are not in default. Some have suggested that reliance should be permitted if the assignee did not have knowledge that the borrower was in default at the time of the assignment.

VIII. UCC Opinion – Location to File UCC-1 Financing Statement for Limited Liability Partnership – Page 140 of Report (See Exhibit B attached hereto)

IX. Limitation of Liability in Legal Opinions – Article Published in the Colorado Lawyer – November 2013, Vol. 42, No. 11 – Third Party Opinion Letters: Limiting the Liability of Opinion Givers. (See Exhibit C attached hereto)

X. Good and Welfare

EXHIBIT A

SAMPLE ADDITIONS TO LIST OF "EXCLUDED LAWS"

... we express no opinion as to ... (b) any law, rule, or regulation relating to ... (vii) the Dodd-Frank Wall Street Reform and Consumer Protection Act, as amended (including all requests, guidelines, or directives thereunder or issued in connection therewith);

OR

. . . we express no opinion as to . . . (__) rules and regulations promulgated by the U.S. Commodity Futures Trading Commission; and (__) Federal and state laws, rules and regulations concerning financial accountability and transparency including, but not limited to, the Dodd-Frank Wall Street Reform and Consumer Protection Act and any rules and regulations promulgated thereunder.

Guarantees of Interest Rate Swap Obligations by Non-ECP Guarantors Are Probably Illegal and Unenforceable

Options for Lenders to Consider Until the CFTC Offers Further Guidance
April 22, 2013
By
Richard B. "Rick" Stephens| Eileen Bannon | Barbara M. Yadley

See Alert Article at:

http://www.hklaw.com/publications/guarantees-of-interest-rate-swap-obligations-by-non-ecp-guarantors-are-probably-illegal-and-unenforceable-04-22-2013/

EXHIBIT B

LIMITED LIABILITY PARTNERSHIP UNDER ARTICLE 9

Permanent Editorial Board for the Uniform Commercial Code

PEB COMMENTARY NO. 17
Limited Liability Partnerships under the Choice of Law Rules of Article 9

June 29, 2012

PREFACE TO PEB COMMENTARY

The Permanent Editorial Board (PEB) for the Uniform Commercial Code (UCC) acts under the authority of The American Law Institute and the Uniform Law Commission (also known as the National Conference of Commissioners on Uniform State Laws). In March 1987, the PEB resolved to issue from time to time supplementary commentary on the UCC to be known as *PEB Commentary*. These *PEB Commentaries* seek to further the underlying policies of the UCC by affording guidance in interpreting and resolving issues raised by the UCC and/or the Official Comments. The Resolution states that:

> "A *PEB Commentary* should come within one or more of the following specific purposes, which should be made apparent at the inception of the Commentary: (1) to resolve an ambiguity in the UCC by restating more clearly what the PEB considers to be the legal rule; (2) to state a preferred resolution of an issue on which judicial opinion or scholarly writing diverges; (3) to elaborate on the application of the UCC where the statute and/or the Official Comment leaves doubt as to inclusion or exclusion of, or application to, particular circumstances or transactions; (4) consistent with UCC § 1-102(2)(b),[1] to apply the principles of the UCC to new or changed circumstances; (5) to clarify or elaborate upon the operation of the UCC as it relates to other statutes (such as the Bankruptcy Code and various federal and state consumer protection statutes) and general principles of law and equity pursuant to UCC § 1-103;[2] or (6) to otherwise improve the operation of the UCC."

For more information about the PEB, visit www.ali.org or www.uniformlaws.org.

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[1] Current UCC § 1-103(a)(2).
[2] Current UCC § 1-103(b).

PEB COMMENTARY NO. 17
Limited Liability Partnerships under the Choice of Law Rules of Article 9

Background

The location of an organization,[1] as "location" is determined under U.C.C. § 9-307, plays an important role in determining the local law that governs perfection, the effect of perfection or nonperfection, and the priority of a security interest. *See* U.C.C. § 9-301(1). As a general matter, a "registered organization" is located, as determined under U.C.C. § 9-307(e), in the State under whose laws the organization is organized while an organization that is not a registered organization is considered under U.C.C. § 9-307(b)(2) to be located in the State in which the organization has its place of business.[2]

The 2010 amendments to Article 9 clarified and expanded the definition of "registered organization" by providing in relevant part that the term "means an organization formed or organized solely under the law of a single State ... by the filing of a public organic record with ... the State...." *See* U.C.C. § 9-102(a)(71)(2010).

The 2010 amendments also added a new definition of "public organic record." The term in relevant part means "a record that is available to the public for inspection and is ... a record consisting of the record initially filed with ... a State ... to form or organize an organization and any record filed with ... the State...which amends or restates the initial record." *See* U.C.C. § 9-102(a)(68)(2010).

Issue

Under the 2010 amendments to Article 9, should a limited liability partnership organized under the law of a State be considered a registered organization or an organization that is not a registered organization?

Analysis

A full survey of the limited liability partnership law of each State is beyond the scope of this Commentary. This Commentary focuses upon the Uniform Partnership Act promulgated by the Uniform Law Commission in 1997 (the "1997 UPA") as a typical example of a State's limited liability partnership law.[3]

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[1] The term "organization" is defined in U.C.C. § 1-201(b)(25) as a "person" other than an individual. The term "person" is defined in U.C.C. § 1-201(b)(27) to include not only an individual but also a corporation, partnership or other legal or commercial entity.

[2] If an organization that is not a registered organization has more than one place of business, it is considered under U.C.C. § 9-307(b)(3) to be located where its chief executive office is located.

[3] The reasoning and conclusions of this Commentary would also apply to legislation similar to the 1997 UPA that has the material attributes of the 1997 UPA discussed in this Commentary, including those provisions (discussed later in the text) that state that a limited liability partnership is a continuation of the pre-existing general partnership.

Under the 1997 UPA a general partnership is formed from the association of the partners and not from any public filing with the State. *See* 1997 UPA § 202. Under Section 1001 of the 1997 UPA a general partnership may become a limited liability partnership by obtaining a vote of its partners to become a limited liability partnership and by filing with the State a statement of qualification. The already existing partnership becomes a limited liability partnership on the date of the filing of the statement or on such later date as is designated in the statement. *See* 1997 UPA § 1001(e). Once the statement of qualification becomes effective, Section 306(c) of the 1997 UPA establishes a liability shield that protects the partnership's partners from vicarious personal liability for all partnership obligations incurred while the partnership is a limited liability partnership. The partnership's status as a limited liability partnership remains in effect until the statement is canceled or revoked. *See* 1997 UPA §§ 105(d), 1001(e), and 1003.

Under the 1997 UPA a limited liability partnership is not a new entity; rather, the original partnership, formed by the association of the partners, continues as a partnership, albeit with the liability shield for its partners. Section 201(b) of the 1997 UPA states categorically: "A limited liability partnership continues to be the same entity that existed before the filing of a statement of qualification under Section 1001." An official comment elaborates:

> [T]he filing of a statement of qualification does not create a "new" partnership. The filing partnership continues to be the same partnership entity that existed before the filing. Similarly, the amendment or cancellation of a statement of qualification under Section 105(d) or the revocation of a statement of qualification under Section 1003(c) does not terminate the partnership and create a "new" partnership. See Section 1003(d). Accordingly, a partnership remains the same entity regardless of a filing, cancellation, or revocation of a statement of qualification.

It follows that the statement of qualification filed with the State and by which a partnership becomes a limited liability partnership under the 1997 UPA is not a "public organic record" under the 2010 amendments to Article 9. The statement of qualification is not a record filed with the State to "form or organize" the partnership. It is the association of the partners that forms the partnership, not any record publicly filed with the State. Both conceptually and legally, a partnership is formed wholly apart from the filing of a statement of qualification with the State.

Because a limited liability partnership is not formed or organized by the filing of a public organic record, it cannot be a "registered organization" under the 2010 amendments to Article 9.[4]

The forgoing analysis does not suggest that a change of law for the characterization of a limited liability partnership, as discussed in this Commentary, was effected by the 2010 amendments to Article 9. Even before giving effect to the 2010 amendments, a limited liability partnership would not be considered a "registered organization." That is because the public filing of a statement of qualification would not be a record that "the State ... must maintain ... showing the organization to have been organized." *See* U.C.C. § 9-102(a)(70)(2009). The statement of

[4] A limited liability partnership should be distinguished from a limited partnership. This Commentary does not address a limited partnership. A limited partnership is ordinarily considered to be a registered organization. *See* U.C.C. § 9-102 cmt. 11.

qualification maintained by the State would show only that the partners have the benefit of the liability shield, not that the partnership itself has been organized.

Conclusion

The 2010 amendments to Article 9 did not change the law on whether a limited liability partnership should be characterized as a registered organization under Article 9. Whether before or after giving effect to the 2010 amendments to Article 9, a limited liability partnership organized under the law of a State that has adopted the 1997 UPA, or similar legislation having the material attributes of the 1997 UPA discussed in this Commentary, is an organization that is not a "registered organization" as defined by U.C.C. § 9-102(a).

Official Comment 11 to U.C.C. § 9-102 is amended by adding at the end of the penultimate sentence of the second paragraph of the Official Comment (the fifth paragraph after giving effect to the changes to the Official Comment made in connection with the 2010 amendments to Article 9):

> Likewise, a limited liability partnership, which is a form of general partnership under the Uniform Partnership Act (1997), is not a "registered organization" even if it has filed a record that is a statement of qualification under Section 1001 of the Uniform Partnership Act (1997). The filing of the record does not form or organize the partnership. The filing only provides the partners in the general partnership with a limited liability shield and evidences that the general partnership has limited liability partnership status. See PEB Commentary No. 17. As discussed in PEB Commentary No. 17 the same conclusion would apply to a limited liability partnership formed under the law of state that has not adopted the Uniform Partnership Act (1997) but has adopted for limited liability partnerships similar legislation having the material attributes of that Act. Also as discussed in PEB Commentary No. 17, the same conclusion would apply whether before or after giving effect to the 2010 amendments to this Article.

EXHIBIT C

THE COLORADO LAWYER ARTICLE

The Colorado Lawyer

The Official Publication of the Colorado Bar Association

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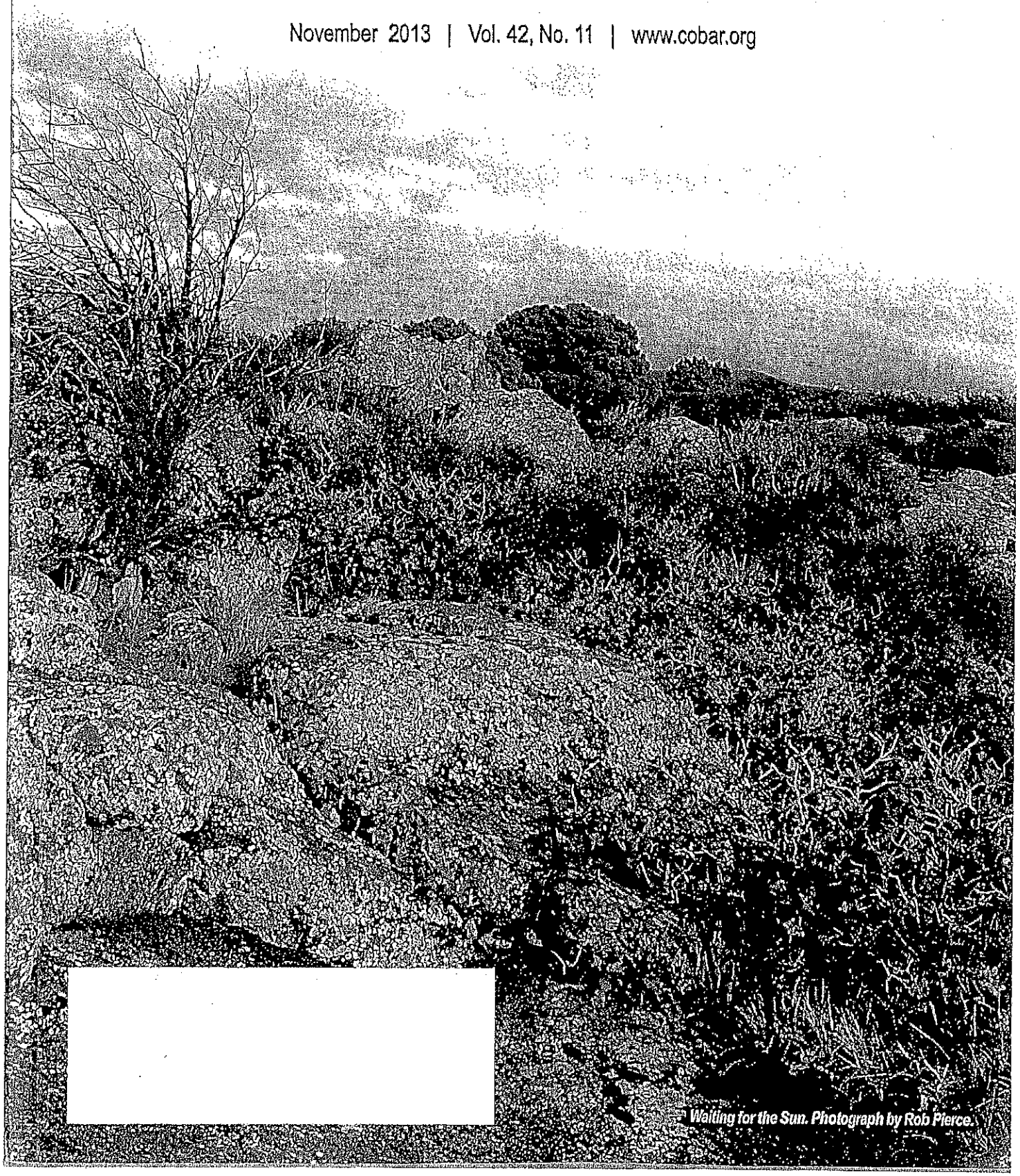

Waiting for the Sun. Photograph by Rob Pierce.

Third-Party Opinion Letters: Limiting the Liability of Opinion Givers

by Ronald Garfield

This article addresses ethical and practical considerations as well as drafting suggestions for attorneys wanting to incorporate limitations on potential liability and exposure to damages with respect to opinion letters provided for the benefit of third parties.

This article discusses how attorneys may attempt to limit their liability for damages to non-client recipients of legal opinions in business transactions.[1] In discussing limitations on attorney liability for opinion letters, this article examines (1) general ethical and other considerations in delivering opinion letters to third parties in commercial transactions; (2) arguments favoring limiting an opinion giver's liability for damages; and (3) suggested provisions for liability limitations in opinion letters.

Ethical Considerations

Colorado Rule of Professional Conduct (Rule) 1.8(h)(1) prohibits an opinion giver from limiting liability to a client absent strict compliance with Rule 1.8(h)(1), which requires that a client must be independently represented in such situations.[2] The fact that the ethical rules prohibit attorneys from prospectively limiting liability to a client suggests that the ethical rules have no bearing on the enforceability of an attorney's prospective limitation of liability to a non-client.[3] Furthermore, in at least one jurisdiction, the state bar association has issued a formal ethics opinion to the effect that attorneys may ask for indemnification from a client for potential liability in connection with opinion letters addressed to non-clients.[4]

Rule 2.3 addresses an attorney's obligations with respect to an "evaluation for use by third persons."[5] A comment to this rule states:

> [w]hen the evaluation is intended for the information or use of a third person, a legal duty to that person *may or may not arise* [and] that legal question is beyond the scope of this Rule.[6]

It is interesting to note that law firms that allow their due diligence reports to be relied on in Europe often insist on an express cap on liability.[7] Other sources provide that when drafting opinion letters, attorneys do

> not function as an advocate for the legal or factual position of the attorney's client but . . . provide the recipient an opinion that is fair and objective and that has been prepared with the competence and diligence normally exercised by attorneys in similar circumstances.[8]

When issuing an opinion for the benefit of a non-client, attorneys owe duties more limited than those that apply when attorneys act as advocates for their clients. However, ethical considerations caution against an opinion giver attempting to limit liability for fraud or intentional nondisclosure. Indeed, Rule 4.1 provides that an attorney shall not knowingly make a false statement of material fact or law to a third party.[9] These ethical considerations have the potential to expose an attorney to disciplinary action, but that is different from being liable for damages, either to the client or to a third party. Regardless of whether any disciplinary action is involved, an attorney rendering an opinion to a non-client may be exposed to claims for fraud and false statements if the attorney knew the statements were false.

Delivery of an opinion letter to a third party is almost always intertwined with an attorney's representation of his or her own client, and therefore, various duties that are owed to the client, such as Rules 1.1 (Competence), 1.3 (Diligence), and 1.6 (Confidentiality of Information) may be implicated. For example, an attor-

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About the Author

Garfield & Hecht, P.C. is a full-service law firm with offices in Aspen, Avon, Basalt, Glenwood Springs, and Rifle. Ronald Garfield is a founder and the firm's managing shareholder and specializes in business, real estate, and loan transactions—garfield@garfieldhecht.com. He thanks Donald Glazer, advisory counsel to Goodwin Procter, LLP's Legal Opinions Committee, dwglazer@goodwinprocter.com, and Ross Pulkrabek, ethics counsel to Garfield & Hecht, P.C., rpulkrabek@jonekeller.com, for their encouragement and insightful comments in the preparation of this article. He also thanks Avery Simpson, associate at Garfield & Hecht, P.C., asimpson@garfieldhecht.com, for her legal research and editing contributions to the article.

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ney drafting an opinion letter to a non-client for the benefit of a client must draft the opinion letter in a competent and diligent manner to fulfill the duty to the client. By way of further example, if an attorney has knowledge that his or her client is involved in a confidential arbitration proceeding but is also required to disclose such proceedings in the legal opinion, disclosing such information in the opinion will require obtaining a consent from the client and perhaps even the other party to the arbitration where consent is necessary to waive the confidentiality.

The focus of this article, however, is prospectively limiting liability for opinion letters to third parties. It does not provide an exhaustive recitation of potential ethical considerations in drafting opinion letters to third parties.[10]

Policy Reasons for Limiting Liability

Opinion letters are not a form of insurance permitting a recipient to recover losses on a transaction.

> [A] benefit sometimes ascribed—wrongly—to a closing opinion is that it serves as an insurance policy. . . . Lawyers may be liable for negligence, recklessness or intentional misconduct, but they are not liable merely for being wrong.[11]

Attorneys who issue opinion letters are not sureties or underwriters.[12] An opinion giver should not be liable for mistakes if the recipient does not reasonably rely on the opinion, or if the opinion did not cause the recipient's losses.[13] This is a key difference from an insurance policy where, simply by virtue of maintaining the policy, an insured may file a claim for a loss suffered. Although important, opinion letters simply provide recipients another level of comfort on matters that, more often than not, already are the subject matter of a contractual representation by the client. Recipients take comfort that the opinion giver has performed due diligence in preparing the opinion, but the duty owed to a third-party recipient is more limited than that owed to a client and, thus, is all the more reason attorneys should consider limiting the extent of their potential liability to third-party recipients of opinion letters.[14]

Decisions to enter into business transactions are made by the principals involved—for example, a lender and a borrower—and the opinion letter, if required, typically is delivered long after the business decision is made. However, the delivery of an opinion letter nonetheless often is expected and, in many transactions, appears as a boilerplate requirement. For example, many forms for loan term sheets or loan commitments include a requirement for an opinion letter from the borrower's counsel. After the attorneys are done jousting about the language and billing the clients for their time, in many transactions, the opinion letter becomes nothing more than an item on the checklist that goes into the recipient's file without much thought (or reliance) on the part of the recipient. This is especially true where the attorney is willing to give reasonably clean, unqualified, and customary opinions. If an attorney is unwilling to provide a customary opinion, or insists on an unusual qualification, that will undoubtedly create issues that must be dealt with before closing.

In theory, if the loan or other transaction goes bad and the loss is attributable to a matter covered by an opinion letter, the opinion giver could be liable for the entire loss if the opinion was wrong and the opinion giver is guilty of negligent misrepresentation in delivering the opinion.[15] The devastating effects of potentially unlimited liability may be felt not only by a law firm issuing an opinion letter but—perhaps even more so—by the individual attorneys who prepared and signed the opinion letter.[16] Even though an opinion letter is signed on behalf of the firm, personal liability may attach to the attorneys responsible for the preparation.[17] In some circumstances, therefore, unless the opinion giver receives a limitation of liability, it may not make business sense for the law firm to expose the attorney and the firm to the liability of the transaction.

Mehaffy, Rider, Windholz & Wilson v. Central Bank of Denver, N.A. suggests that negligence alone is not sufficient to create liability, but that opinion letters may contain mixed issues of fact and law, which may give rise to the claim of negligent misrepresentation.[18] Although a best practice is to avoid opining as to facts as opposed to legal issues, this is not always possible. For example, a no-litigation opinion is factual. In some circumstances, however, unless the attorney receives a limitation of liability, it may not make business sense for the law firm to expose the attorney and the firm to the liability of the transaction.

Practical Considerations

Usually, the legal fees received for an opinion do not warrant the liability to which an opinion exposes the opinion giver. Unfortunately, most law firms, if they want to keep a client, do not have a choice about whether to deliver an opinion letter; instead, the firm delivers the opinion letter or the client goes elsewhere.

Limiting Liability for Losses

As an initial matter, there is a significant body of authority on the various assumptions, exceptions, and customary usage terms that should be acceptable to recipients.[19] Additionally, procedural avenues, such as a requirement that disputes be resolved by binding arbitration, also may be available for prospectively limiting liability of opinion givers to third-party recipients.[20] As stated, however, in Glazer and Lipson's *Courting the Suicide King*, procedural approaches may decrease litigation costs but they will not, in and of themselves, protect an opinion giver from potentially ruinous damage awards if a plaintiff proves a claim for negligent misrepresentation against the attorney in connection with the drafting of the opinion letter.[21]

Aside from the assumptions, exceptions, and customary usage for opinions mentioned above and any procedural avenues for limiting litigation costs, an important question to be addressed is the extent to which an opinion giver should seek to limit liability by including in the opinion letter a liability cap. One suggestion is to limit liability to a dollar amount related to the amount of professional liability insurance coverage. In such a scenario, the dollar amount can be of such magnitude that most recipients should accept the limitation. It is not suggested that opinion givers be able to eliminate their liability, but rather that their financial exposure be limited to a manageable and predictable amount. Besides protecting an opinion giver from disproportionate exposure, a reasonable limit on the opinion giver's liability could make negotiations of the language of the opinion letter less contentious. The opinion giver can feel that giving the opinion is no longer a practice-threatening event, and tedious language negotiations without much substantive value could be resolved more quickly, thus saving the client attorney fees.

When the first draft of the opinion letter is submitted to the recipient's legal counsel for review, the response to the limitation

of liability can vary. Some accept the limitation without comment, others will accept the limitation after some discussion or negotiation as to the final language, and some will be adamant that no limitation, however crafted, will ever be acceptable.

Another important issue to be resolved is whether the statement in the opinion letter that the recipient, by acceptance of the letter and subsequent closing on the contemplated transaction, assents to the limitation on the opinion giver's liability is sufficient to limit the opinion giver's liability. Because recipients do not sign an opinion letter or otherwise execute a document acknowledging their acceptance, assent and acceptance of the limitations on liability must be implied. The argument to be made here is that the funding of the loan or closing of the transaction implies that all assumptions and limitations, along with the rest of the opinion letter, are acceptable to the recipient.[22] Typically, the language of the opinion letter is negotiated before closing, and delivery of the signed opinion letter is one of many closing conditions. Any objection to the acceptance of the limitation on liability, if not raised before closing, should be considered waived, the limitation having been accepted by the recipient.[23] Furthermore, if an argument is to be made that the recipient is not bound by the limitation, then the opinion giver also should be able to argue that the recipient did not rely on the opinion.

Professional Liability Concerns

Attorneys should always be certain that their professional liability insurance coverage extends to opinion letters delivered to nonclients. Typical policies cover services provided by the attorney in the state or states where the attorney maintains a license to practice law. This definition is broad enough to cover third-party opinions delivered in the course of representing the client. Most policies have extensive exclusions that should be reviewed carefully to determine whether any of them apply to third-party opinion letters. Professional liability insurers are reluctant to make statements as to whether a policy covers a hypothetical situation, so there is no substitute for carefully reviewing the terms of the policy.

A Suggestion to the Drafter

An example of liability limitation language for opinion letters may read as follows:

> Limitations of Liability. Notwithstanding anything to the contrary herein, the recipient hereof, by acceptance of this letter, and in closing of the transaction contemplated herein, with the exception of a claim for fraud, agrees that:
>
> (a) Any claims in connection with this letter and the opinions expressed herein shall be asserted only against [name of firm] as the signer of this letter and shall not be asserted against any of its shareholders, attorneys, or other employees.
>
> (b) Our aggregate maximum liability (whether arising from one event or set of circumstances or from multiple events and sets of circumstances) in connection with this letter and the opinions expressed herein shall not exceed $___. While those portions of the Transaction Documents that are the subject of the opinions expressed herein remain in effect, we agree to maintain professional liability insurance equal to the dollar amount of the foregoing limitation. In no event shall any punitive damages be available in any civil action or arbitration proceeding.
>
> (c) We may be liable for a claim in connection with this letter or the opinions expressed herein only to the extent that our professional liability insurance carrier covers the claim (that is, we shall not be liable for any claim that is finally determined not to be covered by insurance).
>
> (d) In the event of any dispute arising in connection with this letter or the opinions expressed herein, before the commencement of any litigation, arbitration, or the pursuit of any claim, you shall first submit the dispute to nonbinding confidential mediation before the Judicial Arbiter Group in Denver, Colorado to be conducted in accordance with the provisions of CRS §§ 13-22-301 *et seq.*[24]

The above language can be used in its entirety or can be cherry-picked. The lowest level of liability protection would result from using only paragraphs (a) and (d). This protects individuals involved in the preparation of the opinion letters and provides a forum where a confidential resolution of any claims might be achieved before litigation. Paragraph (d) can be changed to require mandatory arbitration in lieu of mediation. However, paragraphs (a) and (d) alone do not limit a firm's liability. To get the monetary limitation, the opinion letter must include paragraph (b), and to limit liability to some portion of the firm's professional liability insurance, the opinion letter must also include paragraph (c).

Conclusion

It is urged that more law firms in the United States begin adopting limitations on liability and be willing to accept the limitations

when reviewing opinion letters on behalf of their own clients and recipients. Should this occur, perhaps local, state, and national bar associations and prominent organizations like the American College of Real Estate Lawyers or the American College of Mortgage Attorneys will begin to advocate for such limitations on liability or include such language in their model opinion letters.

Notes

1. In a 1995 decision, the Colorado Supreme Court broke with long-standing precedent when it held that a non-client could maintain a claim for negligent misrepresentation against attorneys in connection with alleged misrepresentations contained in opinion letters drafted by the attorneys. *Mehaffy, Rider, Windholz & Wilson v. Central Bank of Denver, N.A.*, 892 P.2d 230 (Colo. 1995) (Rovira, C.J., dissenting). Before *Mehaffy*, Colorado courts followed the general rule that an attorney's liability to a non-client was limited to cases involving fraud or malice. *See Schmidt v. Frankewich*, 819 P.2d 1074, 1079 (Colo.App. 1991). *See also* Anderson, "The Attorney's Liability to Third Parties: An Update," 25 *The Colorado Lawyer* 61 (Dec. 1996) ("In general, the rule that an attorney is not liable to a third party for damages resulting from attorney's negligence, absent conduct that is fraudulent, malicious, or intentionally tortious, is still the law in Colorado.").

2. *See* Colo. RPC 1.8(h) ("A lawyer shall not: (1) make an agreement prospectively limiting the lawyer's liability *to a client* for malpractice unless the client is independently represented in making the agreement. . . .") (emphasis added). Opinions given to a client, however, are outside the scope of this article.

3. *See id.*

4. The New York State Bar Association Committee on Professional Ethics issued a recent opinion stating that: "[a] lawyer may ethically ask a client to indemnify the lawyer against potential malpractice or other claims by a third-party addressee of an opinion letter to the client." *See* New York State Bar Association Committee on Professional Ethics, Op. 969 (June 12, 2013), *citing* "Report of the ABA Business Law Section Task Force on Delivery of Document Review Reports to Third Parties," 67 *The Business Lawyer* 99, 101 (Nov. 2011). As a practical matter, however, seeking an indemnification from a client for potential liability to a third party arising out of an opinion letter may be difficult.

5. Colo. RPC 2.3(a) provides:

> A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

6. Colo. RPC 2.3, cmt. 3 (emphasis added).

7. *See* Report of the ABA Business Law Section Task Force on Delivery of Document Review Reports to Third Parties, *supra* note 4.

8. Glazer *et al.*, *Glazer and FitzGibbon on Legal Opinions: Drafting, Interpreting and Supporting Closing Opinions in Business Transactions* § 1.6.1 (3rd ed., Aspen Publishers, 2008), *citing Restatement of the Law Governing Lawyers* § 52(1).

9. *See* Colo. RPC 4.1 ("In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person. . . .).

10. *See* Thompson, "Real Estate Opinion Letter Practice," *Real Property, Trust and Estate Law* Chapter 2 at §§ 2.1-2.8 (ABA 2009). *See also* Glazer, *supra* note 8 at § 1.7.

11. *See* Glazer, *supra* note 8 at § 1.3.2 (emphasis added) (internal citations omitted).

12. In disagreeing with the majority opinion from Colorado's leading case holding that a non-client could maintain a claim for negligent misrepresentation in connection with opinion letters, Chief Justice Rovira wrote:

> While counsel was aware that the opinions would be relied upon to evaluate the merit of the existing lawsuit and the risk of harm, nowhere in the record nor the letters does it indicate that counsel knew the purpose of the opinion was to transform them from advisors to insurers.

Mehaffy, 892 P.2d at 243 (Rovira, C.J., dissenting).

13. *See Restatement (Second) of Torts* § 552 (1977):

> One who, in the course of his business, profession or employment . . . supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their *justifiable reliance* upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information. . . . (emphasis added).

14. *Restatement (Second) of Torts* § 552, cmt. a:

> When the harm that is caused is only pecuniary loss, the courts have found it necessary to adopt a more restrictive rule of liability, because of the extent to which misinformation may be, and may be expected to be, circulated, and the magnitude of losses which may follow from reliance upon it . . . when there is no intent to deceive but only good faith coupled with negligence, the fault of the maker of the misrepresentation is sufficiently less to justify a narrower responsibility for its consequences.

15. Glazer and Lipson, "Courting the Suicide King," 17 *Business Law Today* 59, 60 (March/April 2008) ("The consequence has been to expose opinion givers to defense costs of potentially tens of millions of dollars and damages claims that far exceed what they can afford to lose."). *See also* Paddock, "Torts—Negligent Misrepresentation—Liability of Attorneys to Third Parties Through Opinion Letters—A Well Intentioned Rule Which May Stifle the Legal Profession if Not Modified—*Mehaffy, Rider, Windholz & Wilson v. Central Bank Denver, N.A.*, 892 P.2d 230 (Colo. 1995)," 38 *South Texas L.Rev.* 325 (March 1997) (discussing potential negative consequences and burdens that unlimited exposure to liability to third parties for opinion letters may create in the legal profession).

16. In *Mehaffy*, 892 P.3d 230, both the individual attorneys and the firm were sued. *See also Allen v. Steele*, 252 P.3d 476 (Colo. 2011) (nonclient sued attorney and law firm for negligent misrepresentation).

17. *See Sanford v. Kobey Bros. Constr. Corp.*, 689 P.2d 724, 725 (Colo. App. 1984):

> Neither the doctrine of *respondeat superior* nor the fiction of corporate existence bars imposition of individual liability for individual acts of negligence, even the individual is acting in a representative capacity. (citations omitted).

Furthermore, in Colorado, CRCP 265 states that owners of a professional company organized to render legal services

> shall be deemed to agree, by reason of the rendering of legal services by any attorney through the professional company, that each of them who is an owner at the time of the commission of any act, error, or omission in the rendering of legal services by any owner or other person for whose acts, errors, or omissions the professional company is liable, assumes, jointly and severally to the extent provided by this Rule the liability of the professional company for such act, error, or omission.

This exception may not apply, however, if the owner does not directly participate in the act, error, or omission for which liability is incurred. *See* CRCP 265(a)(2).

18. In a divided opinion, the Colorado Supreme Court found that the opinion letters at issue in *Mehaffy* "[made] statements that may constitute statements of fact, not merely representations of law." 892 P.2d at 238. In a spirited dissent, Chief Justice Rovira expressly disagreed with the majority's conclusion stating that the letters "contain[ed] no such specific representation regarding the adoption of the factual findings" and that "no doubt exists that the required factual findings were made by both the voters and the Town council." *Mehaffy*, 892 P.2d at 245 (Rovira, C.J., dissenting). Therefore, the opinion letters were not representations of fact but mere representations of law. *Id.*

19. *See* "Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions," 63 *The Business Lawyer* 1277 (Aug. 2008):

> The role of customary practice in third-party legal opinion practice is well established. The American Law Institute's *Restatement (Third) of*

the Law Governing Lawyers states: "In giving 'closing' opinions, lawyers typically use custom and practice to provide abbreviated opinions that facilitate closing. Such opinions may not recite certain assumptions, limitations, and standards of diligence because they are understood between counsel."

TriBar also has published extensive materials on opinion letter drafting, including customary usage and practice, assumptions, and presumptions. *See, e.g.*, "Third-Party 'Closing' Opinions: A Report of the TriBar Opinion Committee," 53 *The Business Lawyer* 591 (Feb. 1998). Furthermore, the ABA, through its Legal Opinions Committee of the ABA Section of Business Law, also has a website dedicated to legal opinion drafting that provides "access to reports and other materials useful in opinion practice. . . ." *See* Legal Opinion Resource Center, apps.americanbar.org/buslaw/tribar. For example, the Legal Opinions Committee recently issued its "Report on the 2010 Survey of Law Firm Opinion Practices," regarding law firm practices for opinion letters. This survey included standard limitations in opinions such as "Opinions on Law of Another State" and "No-Litigation Confirmations." Legal Opinions Committee of the ABA Section of Business Law, "Report on the 2010 Survey of Law Firm Opinion Practices," 68 *The Business Lawyer* 785 (May 2013). The Report does not include any information or survey questions regarding law firms limiting liability in opinion letters. The above-referenced authorities and publications do not appear to have addressed specific limitations on liability in opinions.

20. *See* Glazer and Lipson, *supra* note 15 at 60 (suggesting a provision for mandatory arbitration may limit costs to defend); Loo, "Liability for Opinion Letters," 725 *PLI/Corp.* 573 (PLI/Corp. Law & Proc. Course Handbook Series No. B4-6961, 1991) (discussing procedural aspects to limiting attorney liability).

21. *See supra* note 12.

22. *See* 17A *Am.Jur.2d Contracts* § 34 (Feb. 2003) (consent may be implied from acts). *See also Northern Maine Transport, LLC v. OneBeacon Am. Ins. Co.*, 820 F.Supp.2d 139 (D.Me. 2011) (courts determine whether parties have assented to terms of an agreement based on their conduct and words); *I.M.A., Inc. v. Rocky Mountain Airways, Inc.*, 713 P.2d 882, 888 (Colo. 1986):

> [E]vidence of the parties' conduct, their oral statements and their writings, and other evidence illuminating the circumstances surrounding the making of an agreement are admissible to clarify the intent and purpose of the parties.

23. *See id.*

24. The references in this suggested provision to Judicial Arbiter Group and the Colorado statute should be replaced appropriately for practitioners outside Colorado. ■