IN OUR OPINION

THE NEWSLETTER OF THE LEGAL OPINIONS COMMITTEE

ABA BUSINESS LAW SECTION

Volume 15 — Number 1 **Fall 2015**

James F. Fotenos and Susan Cooper Philpot, Editors

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FROM THE CHAIR

I am happy to forward to you the Fall 2015 issue of "In Our Opinion." As in the past, we have to thank our editors, Jim Fotenos and Susan Cooper Philpot, for their tireless work.

We have been busy since the Summer 2015 issue of the Newsletter was released. We had a very successful Annual Meeting in Chicago in September. We put on two well-received programs, each touching on aspects of opinion practice relevant to those giving opinions in financing transactions, whether in commercial loan contexts or capital markets transactions such as securitizations. And our Survey Subcommittee held its first meeting under the joint leadership of John Power and Arthur Cohen. I am excited to have the Subcommittee now in full swing as it tackles the task of preparing to launch the Committee's third survey of opinion practices. As noted in this Newsletter, we are continuing our tradition of early morning meetings for this Subcommittee, and hope to see those of you interested in its work on 7:30 a.m. Friday morning, November 20.

That is as good a segue as any to our next event, which is the Fall Meeting in Washington D.C. This meeting takes place November 20 and 21 at the Ritz Carlton in Washington (as it has in recent years). All of our Committee activities take place on Friday, November 20. These include the full Committee meeting at 9:30 a.m., the Subcommittee meeting referenced above at 7:30 a.m., and our reception Friday afternoon at 5:30 p.m. We are fortunate this Fall to have the reception sponsored by The Van Winkle Law Firm

This issue of the Newsletter contains several items of interest. First is a note by Don Glazer and Martin Carmichael on the "no violation of law" opinion. As we all know, customary practice addresses the meaning of words used in our opinions. It also addresses the work we do to support our opinions. While we can vary customary practice through provisions of our opinions, the base line understanding of what the opinions mean is important.

Sometimes the meaning ascribed to an opinion, whether by customary practice or at least by "common" belief, could be better reflected in the language of the opinion. The no violation of law opinion, Don and Martin suggest, may be such a case. We understand that opinion to address violations by the opinion giver's client of laws covered by the opinion that would result from the execution, delivery or performance of the covered agreement(s) by the client; many of us further understand it to address those laws that impose on the client some kind of fine or governmental sanction for the violation. Many believe that, given this scope, as a practical matter the opinion addresses only statutes, rules and regulations (and case law interpreting them), and does not address common law principles. Some believe this because they believe the opinion is simply not intended to cover these principles, and others believe this because, while they may think common law principles are covered by the opinion in theory, they do not believe these principles typically impose "fines or governmental sanctions" on the opinion giver's client of the type addressed in the opinion. Don and Martin suggest that the language commonly used in the no violation of law opinion might be sharpened to make its meaning more clearly reflect the meaning many have ascribed to it, as has been done in some (but not all) recent bar reports. You will find their article a profitable read. And given the divergence of views that have been expressed on the intended meeting of the "no violation of law" opinion, I am confident that you will hear more about this opinion in the future.

I am pleased that this issue of the Newsletter sees the return of the "Litigator's Corner" with a piece by John Villa and Craig Singer of Williams & Connelly that looks at the implications of the recent case of *Peterson v. Katten Muchin Rosenman LLP* for transactional counsel. As is the case for many of us, we take justifiable pride in providing careful legal advice to our clients, whether in the form of legal

opinions given or advice more generally on transaction documents and the terms they reflect. Many of us also provide business advice, not because we consciously look to do so, but because the line between business and legal is not generally as clear as we might like. That said, we do not purport to be business advisors, and we do not believe that we have a professional obligation to provide business counsel. That would be considered by most transactional lawyers to be an expansion of their role.

The discussion of the *Peterson* case reminds us of several things that we all know, but perhaps don't act on sufficiently. One is the interplay between our opinion practices (and the wider transactional practice in which they are given and received) and our business intake process. As the authors of our note suggest, we might take more care in being clear in our engagement letters that our role is to provide legal and not business counsel. But *Peterson* also reminds us that that line is not a sharp one and, while a lawyer need not provide general business advice, the lawyer does need to be mindful of the interplay between the legal issues upon which he or she advises and the broader business context in which that advice is provided. Finally, *Peterson* reminds us that the duty to advise discussed in that case is one owed to one's client and not to a third-party opinion recipient. While both couched in terms of negligence, negligent misrepresentation in the third-party opinion context and professional negligence toward one's own client are not the same things.

Also in this issue you will find an exposure draft of the California Third-Party Legal Opinion Letter for Personal Property Secured Financing Transactions. This proposed sample continues a project started years ago in the California. That project was to create sample forms of opinions which are consonant with both state and national opinion literature, and which illustrated a way to craft an opinion that reflected national customary practice while being faithful to the nuances of local practice. This first of these was the "Transactional" sample opinion; the next was the "Venture Capital" sample (published recently in The Business Lawyer). This current project, spearheaded by Reporter Peter Szurley of Chapman & Cutler, LLP, is the next in the series. We California lawyers hope you will look at the exposure draft and provide any comments you may have. More generally, I hope that you will appreciate this effort for its commitment to pursuing a continuing convergence among all of us in each jurisdiction toward a common understanding of the customary practice that governs the giving and receiving of legal opinions. It is projects like this one, and the work of other bar organizations (like the South Carolina report referred to in the last issue of this Newsletter) that contribute constructively to the national opinion dialogue, and hope make that dialogue a helpful guide to national practice rather than a cacophony of discordant regional voices.

I had the pleasure of seeing many of you last month at the Working Group on Legal Opinions Foundation's Fall Seminar in New York. That seminar was a success (as have those that came before). But I wanted to take a moment to note that this seminar also marks another step in the maturation of WGLO into a growing force for the promotion of legal opinion principles as enunciated in the literature of the TriBar Opinion Committee, our ABA Legal Opinions Committee, and other bar groups that participate in the "big tent" that is WGLO. WGLO also conducted its first board elections under its new governance structure, a structure that reflects its "big tent" orientation, and which promotes involvement across the opinion world. As I write this, a team of dedicated reporters and editors are hard at work on the summaries of the recent WGLO program, and these summaries will appear, as they have in the past, in the Winter issue of the Newsletter.

Lastly, I want to note that at the WGLO Fall Seminar, our former Chair Stan Keller received the Fuld Award. This is a great honor and a recognition of Stan's immense contributions to our evolving national understanding of customary opinion practice. As I have noted in

the past, Stan exemplifies in all I have seen him do the highest traditions of our profession. This award is much deserved, and I commend to you Truman Bidwell's' tribute to Stan in this issue.

I hope to see many of you in Washington later this month.

- Timothy Hoxie, Chair
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FUTURE MEETINGS

ABA Business Law Section
Fall Meeting
Washington, D.C.
The Ritz-Carlton Hotel
November 20-21, 2015

What follows are the presently scheduled times of meetings and programs of the Fall Meeting that may be of interest to members of the Legal Opinions Committee.

Legal Opinions Committee

Friday, November 20, 2015

Survey Subcommittee Meeting
7:30 – 9:30 a.m.[1]
Room: The Boardroom

Committee Meeting:
9:30 a.m. – 11:00 a.m.
Room: The Washington

Reception:
5:30 p.m. – 6:30 p.m.
Room: Plaza Ballroom Plaza II
(Sponsor: The Winkle Law Firm)

[1] Note the earlier start time which may not be reflected in the Fall Meeting program materials; the earlier start time was selected to permit those who want to attend the Law & Accounting Meeting at 8:00 a.m. to participate in the first portion of the Subcommittee meeting.

Law and Accounting Committee

Friday, November 20, 2015

Committee Meeting:
8:00 a.m. – 9:30 a.m.
Room: The Washington

Audit Responses Committee

Friday, November 20, 2015

Committee Meeting:
3:30 p.m. – 4:30 p.m.
Room: The Washington

Professional Responsibility Committee

Saturday, November 21, 2015

Committee Meeting:
8:00 a.m. – 9:30 a.m.
Room: The Boardroom

Securities Law Opinions Subcommittee

Saturday, November 21, 2015

Committee Meeting:
10:00 a.m. – 11:00 a.m.
Room: Ritz Ballroom Salon III A

ABA Business Law Section
Spring Meeting
Montreal, Canada
The Fairmont Queen Elizabeth
Hotel Bonaventure
April 7-9, 2016

Working Group on Legal Opinions
New York, New York
May 9-10, 2016

ABA Business Law Section
Annual Meeting
Boston
The Marriott Copley Place
Westin Copley Place
September 8-10, 2016

2015 FULD AWARD

The Fuld Award is presented annually by the Working Group on Legal Opinions Foundation to a person or group who has made a significant contribution to the field of legal opinions. The award is sponsored by Proskauer Rose LLP, where Jim Fuld was a partner. The 2015 Fuld Award was presented to Stanley Keller on October 27, 2015 during the Fall meeting of WGLO. The previous recipients were Arthur Field, Donald W. Glazer, Judge Thomas Ambro, Jerome E. Hyman, James J. Fuld, and the TriBar Opinion Committee.

The Fuld Committee received, as it does every year, nominations of many worthy recipients. Stan, however, was an obvious choice for the length and breadth of his contributions to the field of legal opinions.

Stan is a member of WGLO and TriBar and served as the reporter for TriBar's reports on remedies opinions and preferred stock opinions and as a co-reporter for TriBar's supplemental choice-of-law report.[2] He currently co-chairs the working group appointed by WGLO and the ABA Legal Opinions Committee that is preparing a Statement on Customary Opinion Practices. He served as Chair of the Legal Opinions Committee from 2010 to 2013. He was co-chair of the Boston Bar Association's Task Force on Revision of the Massachusetts Business Corporation Law, which drafted the current Massachusetts business corporation statute.

Stan is a prolific author: a listing of his articles would fill this entire issue of the Newsletter. He has authored numerous articles on legal opinions and frequently contributes articles and notes for the Newsletter. With Don Glazer, Stan developed the Boston Bar Association's form of streamlined closing opinion, which is frequently cited and used by opinion practitioners.[3] He has also participated in many programs on legal opinions and securities and corporate law matters.

Stan chaired the ABA Business Law Section's Federal Regulation of Securities Committee (1999 – 2003) during the height of the Sarbanes-Oxley era. As Chair he liaised with the SEC, other government officials and the stock exchanges on behalf of the private bar. He has also chaired the ABA Business Law Section's Audit Responses Committee from 2003 to 2010. In addition, he was active in the ABA Task Forces dealing with SEC Attorney Conduct Rules, Corporate Responsibility and Attorney-Client Privilege.

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[2] *Special Report of the TriBar Opinion Committee: The Remedies Opinion — Deciding When to Include Exceptions and Assumptions*, 59 Bus. Law. 1483 (2004); *Special Report of the TriBar Opinion Committee: Duly Authorized Opinions on Preferred Stock*, 63 Bus. Law. 921 (2008); *Supplemental Report: Opinions on Chosen-Law Provisions Under the Restatement of Conflict of Laws*, 68 Bus. Law. 1161 (2013).

[3] *A Streamlined Form of Closing Opinion Based on the ABA Legal Opinion Principles*, 61 Bus. Law. 389 (2005).

These are just a few of Stan's many accomplishments. It was with pride and great pleasure that the Fuld Committee presented the 2015 Fuld Award to Stan Keller.

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BUSINESS LAW SECTION 2015 ANNUAL MEETING

The Business Law Section held its Annual Meeting in Chicago on September 17-19, 2015. The Section had a full complement of meetings and programs. The following are reports on meetings held at the Annual Meeting of interested members of the Committee on Legal Opinions.

Legal Opinions Committee

The Legal Opinions Committee met on September 19. The meeting was attended, in person or by phone, by approximately 40 members of the Committee. There follows a summary of the meeting.

Joint Project on Common Opinion Practices. Stan Keller and Steve Weise reported on the status of the joint project undertaken by this Committee and the Working Group on Legal Opinions Foundation ("WGLO") in preparing a description of common opinion practices. The working group 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, through the WGLO, representatives of a number of state bar associations.

The project is intended to serve as an update to the Legal Opinion Principles. Under consideration is whether or not portions of the Guidelines for the Preparation for Closing Opinions should also be included and updated to provide a more comprehensive statement. Stan indicated that a discussion draft might be available by the spring of 2016.

CLE Programs. Chair Tim Hoxie noted the two CLE programs that the Committee sponsored at the annual meeting and asked panel members to comment about the topics.

The first program was "Third Party Opinion Letter Practice and Pitfalls: Security Interest and Perfection, True Sale and Non-Consolidation Opinions". Steve Weise noted that the theme of this program could be described as "don't try this at home". One portion of the program was devoted to consideration of the draft Sample California Third-Party Legal Opinion Letter for Personal Property Secured Financing Transactions and the other portion was focused on the work needed to give true sale and non-consolidation opinions, focusing on the need to understand the true economics of the entire transaction.[4]

The second program, "Impact of Financial Markets Developments on Opinion Practice; Current Issues and Approaches" included topics relating to the Volcker Rule and recent case law. George M. Williams Jr. of Kaye Scholer LLP, New York, led a discussion addressing problems that can arise under the Volcker Rule in a loan securitization. Tim Hoxie noted that a future project will involve formulating opinion language that can be used in this arena and detailing when such opinions can be given.

Model Asset Purchase Agreement. Thomas M. Thompson (Buchanan Ingersoll & Rooney PC, Pittsburgh, Pennsylvania), a member of the Section's Mergers and Acquisitions Committee, reported that the

[4] An exposure draft of the sample opinion has been prepared for review and comment. See "Recent Developments" below.

M&A Committee is revising its Model Asset Purchase Agreement. As with the 2010 revision of the Model Stock Purchase Agreement, the revised Model Asset Purchase Agreement will include one or more illustrative closing opinion(s). Members of the Legal Opinions Committee participated in the preparation of the 2010 illustrative opinion letters, and have again assisted in preparing the illustrative opinion letter(s) to be included with the revised Model Asset Purchase Agreement.

Local Counsel. Tim Hoxie reported that work is continuing on this report.

Cross-Border Opinions Project. Ettore Santucci reported on the Committee's seven-year project in preparing its report on cross-border legal opinions (*Cross-Border Closing Opinions of U.S. Counsel*). The most recent draft of the report can be found on the Committee's website on the front page under "Working Drafts." Ettore thanked the members of the editorial group, who have toiled long and hard on the project. Besides Ettore, as reporter, the group includes J. Truman Bidwell, Jr., Daniel Bushner, Peter Castellon, Sylvia Fung Chin, Edward H. Fleischman, Richard N. Frasch, Donald W. Glazer, Timothy G. Hoxie, Jerome E. Hyman, Stanley Keller, Noël J. Para, John B. Power, James J. Rosenhauer, and Elizabeth van Schilfgaarde. The report should be published in *The Business Lawyer* in the Winter 2015 issue and will be a focus of programming at the Business Law Section's Spring 2016 Meeting in Montreal.

Survey of Law Firm Opinion Practices. In 2010, the Committee conducted its Survey of Law Firm Opinion Practices, published in 2013 in *The Business Lawyer* (68 Bus. Law. 785). Members of the Committee, including Tim Hoxie, Chair, and John Power, reporter of the 2010 survey subcommittee, met prior to the Committee meeting to discuss improvements for the next update of the survey. The group is getting organized and starting work for a projected circulation of a survey in 2017.

TriBar Opinion Committee. Dick Howe, co-chair of the TriBar Opinion Committee, reported on the status of TriBar's report on limited partnership opinions. The focus of the TriBar LP opinions report is on opinions delivered for Delaware limited partnerships. Dick is hopeful that the report will be completed in 2016. TriBar is also undertaking reports on risk allocation provisions and on '40 Act opinions.

WGLO. Andy Kaufman reported that the next WGLO seminar will be held October 26-27, 2015 in New York.

Related Business Section Committees. Chair Tim Hoxie introduced the Chairs from related committees for updates about activities, including the Securities Law Opinions Subcommittee of the Federal Regulation of Securities Committee, Law and Accounting and Audit Responses Committees.

Next Meeting. The next meeting of the Committee will be held at the Section's Fall Meeting in Washington, D.C. on Friday, November 20, 2015.

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Audit Responses Committee

The Committee met on September 19, 2015. The principal discussion points are summarized below.

Update Project. The Committee discussed its Statement on Updates to Audit Response Letters, which was published in the Spring 2015 issue of The Business Lawyer (70 Bus. Law. 489). The Committee noted that the AICPA had adopted a resolution incorporating the Committee's Statement into its auditing standards for non-public companies as Exhibit C to AU-C 501.A72. Some Committee members indicated that they had received audit inquiry letters with an evergreen request asking that the lawyer respond to oral requests for updates; others noted they had received audit inquiry letters asking for the lawyer to provide any

updates within a certain period of days. Some Committee members indicated they would not provide updates pursuant to oral-only requests. It was also noted that some accounting firms appear to have adopted forms for clients to make update requests.

Electronic Audit Letter Platform. Most of the meeting was devoted to discussing Confirmation.com, an electronic audit response letter platform. Representatives from Confirmation.com addressed the Committee at its April meeting in San Francisco. Several Committee members indicated that, as of the meeting date, their firms had received audit request letters via Confirmation.com, but most Committee members had not. Some Committee members have engaged in direct conversations with Confirmation.com. The Committee considered how it could provide constructive feedback regarding the platform to the vendor and inform the Committee's membership about the platform. The Committee discussed various issues regarding the platform:

- *User agreements*. Several Committee members raised questions about the terms and conditions of the Confirmation.com user agreement and privacy policy, which a firm would be deemed to agree to by using the platform to receive and send audit letter correspondence. Among other things, the agreements provide that Confirmation.com would be the "owner" of any information transmitted on the platform and that Confirmation.com could unilaterally change the terms and conditions. Some firms have engaged in direct dialogue with Confirmation.com about the agreements, and, in one case, Confirmation.com has proposed a shorter form user agreement for law firms. The question was raised whether lawyers should have to agree to any user agreement at all.

- *Directing the inquiries to a firm.* Several members noted that, at least initially, audit inquiry letters were being directed by Confirmation.com to individual lawyers within a firm. Many firms, however, prefer to have such electronic communications directed to a centralized address at a firm. Confirmation.com has indicated that it has the capability to do this. Some other firms would like an approach where letters could be directed to different locations within the firm, for example, depending on the office to which the letter was directed.

- *Client authorization*. Some questions were raised about whether the platform required clients to provide specific authorization to the auditors to send a letter to a particular firm, or whether it allowed the client to give an advance blanket authorization to auditors who could then send the letter to law firms. It was agreed that this could be problematic, especially since the clients need to consider whether unasserted claims should be identified in a letter to a particular firm.

- *Confidentiality/data security*. Two questions were raised in this area. The first was whether transmitting responses via the platform would affect the privileged status, if any, of the document. The general view was that such transmittal should not affect privilege. The second question was whether information transmitted via the platform was vulnerable to hacking. Confirmation.com has provided information on its website regarding its data security protections and certifications. Some Committee members would like more information on whether the platform is just a "conduit" or whether responses are "stored" somewhere on the platform and more vulnerable to hacking.

Several members of the Committee agreed to participate in an informal working group to

provide feedback to Confirmation.com and potentially to develop an informational letter that would identify factors for lawyers to consider when evaluating whether to use an electronic audit response letter platform.

National Futures Association Requests. Following up on a recent Committee listserve discussion, the Committee briefly discussed requests by the National Futures Association ("NFA"), a self-regulatory organization, that are not sent in connection with an audit but rather for purposes of a regulatory examination. See a summary of this listserve discussion under "Summary of Recent Listserve Activity (Audit Responses Committee)" below. These letters employ a similar format and make similar requests as those included in a conventional audit inquiry letter. The letters refer to Accounting Standards Codification 450 (Statement of Financial Accounting Standards No. 5), even though that standard only applies in the financial accounting context. Committee members stated that they include disclaimers in their responses to such letters specifically noting that the response is not provided in connection with a financial statement audit. Following the meeting, one member of the Committee provided the following language that he has negotiated with NFA:

> The form of the Fund's NFA Request was provided by the NFA, and generally follows the lines of the "Illustrative Form of Letter of Audit Inquiry" under the 1976 *First Report* of the American Bar Association ("ABA"), Committee on Audit Inquiry Responses, re the 1975 ABA *Statement of Policy Regarding Lawyer's Responses to Auditors' Requests for Information* (the "ABA Statement of Policy"). Such Letter of Audit Inquiry is delivered pursuant to the 1976 American Institute of Certified Public Accountants ("AICPA") Statement on Auditing Standards, *Inquiry of a Client's Lawyer Concerning Litigation, Claims and Assessments* ("AICPA SAS No. 12"), now codified at AU Section 337. The ABA Statement of Policy and AICPA SAS No. 12 are intended to provide procedures and guidance to independent auditors performing financial statement examinations in accordance with generally accepted accounting principles, and to lawyers providing information to their clients' independent auditors.
>
> Accordingly, this response to the Fund's NFA Request has been prepared in accordance with, and shall be governed by and interpreted according to, the customary practice of attorneys and their clients' independent auditors related to audit response letters requested and delivered under the ABA Statement of Policy. In particular, the Fund does not intend to waive the attorney-client privilege or attorney work-product privilege with respect to any communications, information or subject matter, and this response to the Fund's NFA Request should not be construed to effect any such waiver.

In light of the fact that NFA's practice is now well-established and that lawyers have developed disclaimers for the responses, the Committee members present did not see a need to engage with NFA about these requests.

Listserve Activity. A summary of recent discussions on the Committee's listserve was distributed and is included in this issue of the Newsletter under "Summary of Recent Listserve Activity (Audit Responses Committee)" below.

Next Meeting. The Committee's next meeting will be at the Business Law Section's Fall Meeting in Washington, D.C. on Friday, November 20, 2015, at 3:30 p.m. E.S.T.

- Thomas W. White, Chair
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Law & Accounting Committee

The Law and Accounting Committee met on September 19, 2015. The principal items of discussion are summarized below:

PCAOB Update. Mary Sjoquist first provided a summary of current Public Company Accounting Oversight Board ("PCAOB") matters. Ms. Sjoquist discussed the staff consultation paper on Auditing Accounting Estimates. Mary then briefly discussed the Related Parties Project, which was adopted in June 2014 and is awaiting SEC approval. Ms. Sjoquist then discussed the series of projects that the PCAOB is expected to address between the end of the year through March 2016. One project is the Auditor's Reporting Model, which will be subject to a re-proposal. Another project is the Supervision of Other Auditors and Multi-Location Audit Engagements Project, for which a proposal is expected to be issued by March 2016. Ms. Sjoquist then addressed the Use of Specialists Project, which the Committee has discussed at several meetings and for which a staff consultation paper is expected to be issued very soon. We then discussed the Going Concern Project, for which a staff consultation paper is also expected to be issued in the coming months. Ms. Sjoquist then discussed the Improving Transparency Through the Disclosure of Engagement Partner and Certain Other Participants in Audits Project. The PCAOB is expected to issue a supplemental request for comment on this project, which is drawing a lot of attention, in the immediate future.

SEC Comment Letters. The Committee addressed the status of two comment letters to the SEC which the Committee is co-authoring with other committees of the Business Law Section. The first is the SEC's Audit Committee Reporting Concept Release. Linda Griggs discussed the proposed response to this Release, which is being co-authored with the Audit Responses Committee. Second, Randy McClanahan discussed the Committee's work on the comment letter to the SEC's clawback proposal, which the Committee is co-authoring with the Federal Regulation of Securities Committee.

FASB Update. Randy McClanahan then gave a brief update of current FASB developments. There were very few significant pronouncements since the April 2015 meeting of the Committee. He reported that pursuant to the Committee's conversations with the leadership of the FASB, several significant pronouncements are expected before the end of 2015, including a revised standard on lease accounting, a statement on hedge accounting, an exposure draft on credit impairment, and two exposure drafts regarding the disclosure framework project.

Future Projects. The Committee then discussed potential CLE projects for future Business Law Section meetings.

Next Meeting. The next meeting of the Committee will be held at the Section's Fall meeting in Washington, DC on Friday, November 20, 2015.

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Securities Law Opinions Subcommittee Federal Regulation of Securities Committee

The Subcommittee met on September 18, 2015. First, it was noted that the Subcommittee's report, "No Registration Opinions (2015 Update)," is scheduled for publication in the Winter 2015 edition of *The Business Lawyer*.

The meeting then turned to a discussion of a preliminary draft of a report addressing Exchange Act Rule 14e-1 opinions given in connection with debt tender offers. The SEC staff issued a no-action letter on debt tender offers in January 2015 *(Cahill Gordon & Reindel LLP* (Jan. 23, 2015), available at:

http://www.sec.gov/divisions/corpfin/cf-noaction/2015/abbreviated-offers-debt-securities012315-sec14.pdf), and was understood to be working on other form of guidance on the legal requirements applicable to these transactions, although the current status of that effort is unclear. The sense of the meeting was that the Subcommittee should continue working on this report, specifically focusing on the language of the opinion in view of the SEC staff's interpretation and administration of such requirements. Subcommittee members were urged to submit written comments on the draft report.

The balance of the meeting was given over to a further discussion of a possible report addressing opinions delivered in respect of resales of securities conducted in reliance on the "Section 4(1-½)" exemption. A copy of H.R. 1839, a pending bill that would add a new Securities Act Section 4(a)(7) exemption for resales to accredited investors, had been circulated prior to the meeting. Although this bill has now passed the House, the sense of the meeting was that its prospects for enactment remain unclear, and that the Subcommittee should continue to pursue its work on resale opinions.

The next meeting of the Subcommittee will be in Washington, D.C. on Saturday, November 21, 2015.

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

[**Editors' Note**: This summary of Listserve activity during the period April 2015 – August 2015 among members of the Audit Responses Committee does not necessarily represent the views of the Committee or authoritative pronouncements regarding audit response letters practice, but rather reflects views of individual members of the Committee on current practice topics. The comments referred to below may be viewed by clicking on the "Listserve" item on the Audit Responses Committee's web page (http://apps.americanbar.org/dch/committee.cfm?com=CL965000).]

1. Attorneys Required to Respond with Regard to Audit Letters. A Committee member asked about firms' practices with respect to which attorneys are surveyed in order to respond to auditor letters. Specifically, the inquirer asked if all attorneys who worked for the client during the prior year (or other period) were surveyed, or just those who billed more than a minimum number of hours. Most of the members who responded indicated that their firms inquire of all lawyers who worked for client during the period that is the subject of the audit inquiry letter, and do not limit the inquiry to lawyers who worked more than a minimum number of hours. Most firms also ask all lawyers to respond affirmatively to the inquiry, though a short "no knowledge" response is sufficient. Lawyers also can refer to another lawyer who will provide a response on their behalf. Some firms employ "voting buttons" to facilitate the response, and most follow up with lawyers who do not respond within a specified period.

2. Audit Letters in Dubai. A Committee member asked whether there was any guidance for responding to an inquiry letter for a Dubai client for which a firm was handling a loss contingency under UAE law. While no Dubai-specific guidance was identified, it was pointed out that U.S. lawyers have generally followed the policy, if their U.S. office takes responsibility for the response, of responding in accordance with the ABA Statement (and thus under U.S. accounting and auditing standards), and saying they are doing so expressly. So far, this usually has been accepted by foreign auditors. Sometimes, a U.S. firm finds it more appropriate to have the response prepared by its foreign office, which then complies with the standards applicable in its home country. On the substance, many countries, especially those that are or were part of the British Commonwealth, follow the English standards, which are spelled out in City of London Law Society guidance.[5]

3. National Futures Association Inquiries. A committee member received a request from the National Futures Association ("NFA") to issue an audit letter about a client that NFA is examining. The request, signed by the client, is in the form of a standard auditor's request, states that the NFA is engaged in the examination of the client's financial statements, requests information about loss contingencies (including unasserted claims) and billed/unbilled fees as of the end of the audit period, and invokes Statement of Financial Accounting Standards No. 5 (which indicates that they are using an outdated form). This issue came up at the Committee's meeting in August 2013. As explained in the meeting notes,

> The Committee discussed various issues raised by this type of request. These include uncertainties about what is "material" for purposes of a regulatory examination (as opposed to financial statements), potential privilege risks, the inapplicability of references to ASC 450-20 and financial statement disclosure, and concerns that reviewers of such letters (who may not be CPAs or lawyers) will not understand the scope and limitations of the response. There was also a discussion of what was the practical alternative. Declining to provide the letter may not be feasible, and using the ABA format may still be "better than making up something." But lawyers who use the ABA format may wish to provide context for their response in the letter and also advise their clients about the potential privilege waiver issues.

In response to the current inquiry, one member suggested that law firms should consult with the client regarding the request. Another member observed that as a practical matter, law firms would likely have to provide the letter (the member's response follows):

> As counsel for a National Futures Association FCM member, I can advise you that consultation with the client will be perfunctory at most. The client is mandated to cooperate promptly and fully with any NFA examination, Compliance Rule 2-5, and for FCM's, RFED's and IB's must "promptly submit such additional reports and supplemental financial information which NFA deems necessary," Financial Requirements Rule Section 8(a). I would be shocked if any client would request counsel to make the scope of the reply narrower than what the treaty prescribes; it would be delivering oneself into the regulator's wrath.

[5] The standards are described in a 2000 publication of the Law Society of England and Wales entitled "Auditors' Enquiry Letters", available at http://www.lawgazette.co.uk/news/auditors-enquiry-letters/21176.article. The Law Society provided additional guidance in a 2002 FAQ located at http://www.lawgazette.co.uk/news/how-to-avoid-liability-amid-auditors-probe/37339.article.

4. New Form of Audit Inquiry Request. There was a discussion on the Listserve about the Confirmation.com electronic platform for audit inquiry letters and responses. Confirmation.com made a presentation about the platform at the Committee's San Francisco meeting in April 2015, which is reported in the meeting notes for that meeting, and the agenda for the Committee's meeting in September 2015 will include an item on members' experience with the platform.

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MENDING WORDS A LITTLE: SOME SUGGESTIONS ON HOW TO DRAFT THE NO VIOLATION OF LAW OPINION[6]

The illustrative opinion letter in the TriBar Opinion Committee's 1998 Report on Closing Opinions contains the following no violation of law opinion:

> The execution and delivery by the Company of the [Agreement] do not, and the performance by the Company of its obligations thereunder will not, result in any violation of any law of the United States or the State of New York, or any rule or regulation thereunder.[7]

Although TriBar's form of opinion uses the word "law" and not the more specific word "statute," we have always understood "law" as used in the opinion to mean "statute." After all, the TriBar 1998 Report says the opinion complements the remedies opinion by covering legal consequences, such as fines and governmental sanctions, that would not require an exception to the remedies opinion.[8] And the reference to a rule or regulation "thereunder" clearly indicated to us that "any law" meant "any statute."

During a panel discussion at a recent WGLO program, a panelist took the position that "law" in the TriBar 1998 Report's illustrative opinion should be understood to include not only statutes but also uncodified decisional law (for example, the rule against perpetuities when not codified in a statute). That caught us by surprise. Clearly, a contractual provision may be unenforceable if it violates a judge-made rule. But we did not see how a violation of a common law rule presented the sort of issues the no violation of law opinion is meant to address.[9]

In any case, for many law firms the issue raised during the panel discussion is not an issue. Today, following the lead of many

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[6] *See* Donald W. Glazer, "Mend Your Speech … Lest You May Mar Your Fortunes": Some Thoughts on the Drafting of Closing Opinions, 69 Bus. Law. 949 (2014) (quoting William Shakespeare, King Lear act 1, sc. 1 (the words "a little" have been omitted from the quotation) and observing at page 950 that over time the language of many standard opinions has been narrowed and sharpened).

[7] TriBar Opinion Committee, "*Third-Party 'Closing' Opinions*" 53 Bus. Law 591, 668 (1998).

[8] While the no violation of law opinion typically complements the remedies opinion, as the forthcoming ABA Report on Cross-Border Closing Opinions of U.S. Counsel makes clear, the meaning of the opinion is the same whether or not it accompanies a remedies opinion.

[9] The panelist offered in support of the panelist's position on what "law" means the general definition of "law" that includes decisional law appearing near the beginning of the TriBar 1998 Report. We, however, view that definition as being overridden by the specific discussion of the no violation of law opinion appearing later in that report. That later discussion uses "law" and "statute" interchangeably, apparently treating the two words as if they were synonymous.

recent bar association reports,[10] many firms have made clear the intended coverage of the opinion by replacing the word "law" with the word "statute" in their no violation opinions or, as is done in the Accord, replacing "law" with the words "statutory law." Although we continue to believe that the word "law" when used in the no violation opinion means "statute," we also believe that it makes sense to make that clear in the opinion. Therefore, one purpose of this article is to suggest to firms that have not yet done so that they consider making this simple change. In our experience recipients do not object to use the word "statute" instead of "law," and should litigation over the issue ever ensue, this change could save a firm the expense, trouble -- and risk -- of having to convince a judge what "law" is intended to mean.

Another potential problem with the TriBar 1998 Report's illustrative no violation of law opinion is that it does not specify that the violations of law it is covering are violations by the *Company*, even though that clearly is how the opinion is understood as a matter of customary practice. Thus, the wording of the opinion leaves open the question whether the opinion might also cover violations by the recipient.[11]

The assertion that the no violation of law opinion included in the TriBar 1998 Report covers judge-made rules has led us to believe that, to avoid any doubt about its coverage, lawyers using that Report's version of the opinion should sharpen its language – and we believe that they could do so with just a few words. Our suggested changes are indicated below in italics.

> The execution and delivery by the Company of the [Agreement] do not, and the performance by the Company of its obligations thereunder will not, result in any violation *by the Company* of any *statute* of the United States or

[10] *See, e.g.*, Legal Opinion Committee of the Business Law Section of the North Carolina Bar Association, Report on Third-Party Legal Opinions in Business Transactions, Second Edition (2004) §12.0 [App. 38A at 38:109]; Business Law Section of the Pennsylvania Bar Association, Model Closing Opinion Letter (annotated) (2007) Revision) §7 [App. 40 at 40:30]; Tennessee Bar Association Report on Third party Closing Opinions (2011), §7.6 [App. 48 at 48:77]. (Citations in brackets above and in note 11 below are to appendices in Glazer and FitzGibbon on Legal Opinions (3d edition) as supplemented.)

[11] Logically, without any clarifying words the opinion should be understood to cover only violations by the Company, and that is how it is consistently interpreted in bar association reports. In addition to the reports cited in note 10 (the Tennessee report makes the point clear in the wording of its illustrative opinion), *see, e.g.*, Corporations Committee of the Business Law Section of The State Bar of California, 2005 Report on Legal Opinions in Business Transactions (Excluding the Remedies Opinion) §V.C.4a [App. 22 at 22:80]. Thus, when the Company is the borrower, the opinion is understood, as a matter of customary practice, not to cover a violation of a criminal usury statute because the lender and not the borrower is the party to the agreement who violates the statute and hence is the party subject to criminal sanctions. This reading of the opinion illustrates its complementary nature: even though a violation of a criminal usury statute would not require an exception to a no violation of law opinion, it would require an exception to the enforceability opinion, thereby alerting the recipient to the issue.

> the State of New York, or any rule or regulation thereunder.[12]

One final note. We would be remiss if we were not to point out that violations of statutes, rules or regulations may result in "governmental sanctions" other than fines and penalties. A governmental sanction also can take the form of a governmental body's revocation of a license or denial of a right to engage in a particular activity. In addition, it can take the form of a court or administrative order enjoining a party to a contract from performing its obligations or requiring it to undo obligations it has performed. To be sure, in some cases violations by the Company of a statute, rule or regulation, for example, agreeing to sell a regulated substance to an unlicensed purchaser, not only will expose the Company to a fine, penalty or governmental sanction but also render the Company's contractual obligations unenforceable.[13] In those cases, the no violation of law opinion and the enforceability opinion will overlap, both requiring an exception. In many cases, however, an exception would be needed only for the enforceability opinion. Take for example a violation of a statutory prohibition on advance waivers of the right to a jury trial. A party to a contract who agrees to such a waiver will not be subjecting itself to a fine, penalty or other governmental sanction, but the other party will not be able to enforce the waiver.

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[12] This language tracks the TriBar illustrative opinion. A more streamlined version might read as follows:

> Execution and delivery of the Agreement by the Company do not, and its performance of its obligations under the Agreement will not, result in a violation by the Company of a federal or [specify state] statute or rule or regulation thereunder.

[13] One way to test whether a contractual provision that is not enforceable against the Company due to a violation of a statute, rule or regulation requires an exception not only to the remedies opinion but also to the no violation of law opinion is to ask whether, if the Company were to do voluntarily what the provision calls for, for example repaying a loan violating a usury statute (civil or criminal), the Company would be exposing itself to a fine, penalty or governmental sanction. If not, the no violation of law opinion would not require an exception whatever the consequences of the Company's performance might be for the recipient.

THE LITIGATOR'S CORNER

Legal Advice or Business Advice? The Recent Case of *Peterson v. Katten Muchin Rosenman LLP* and Its Implications for Opinion Givers

Background

You have represented your client in a transaction and delivered a closing opinion. The opinion is letter-perfect and your legal advice was error-free. But the client loses money on the transaction, and claims that you should have recommended a different structure for the transaction that would have presented less business risk. Does the client have a malpractice claim against you? Most likely not, but a recent decision from the Seventh Circuit may lead some aggressive plaintiffs to test the waters and claim that your duty to your client did not stop at giving (or receiving) a correct opinion — you should have warned your client that the transaction entailed business risks that might have been reduced had it been structured differently.

In legal malpractice cases, a distinction between "legal advice" and "business advice" is often significant, and may be dispositive. A

lawyer has a duty to give competent advice to his client on matters within the scope of his engagement. This has traditionally meant only *legal* advice: A lawyer is engaged to advise on legal matters, not to tell a client how to run his business. Although nothing precludes the lawyer from offering his opinion on business matters, a lawyer typically has no duty to volunteer business advice. Most lawyers, in any event, do not claim to have business expertise, and clients understandably do not want to pay for the lawyer's time to develop non-expert opinions on such matters.

For these reasons, it is often assumed that lawyers do not commit malpractice when they do not offer advice on matters of business judgment. In the words of the comments to the Model Rules of Professional Conduct, "[w]hen constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province." Rule 1.13 cmt. 3. On the other hand, the Rules also make clear that the lawyer is not limited to discussing purely technical matters and, in advising the client, "may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." Rule 2.1.

From the perspective of a malpractice case, which turns on whether the lawyer has breached a standard of reasonable care for the legal profession, determining the outer boundaries of a lawyer's duty to advise the client often becomes important. After all, many malpractice cases arise because a client has suffered a loss in its business, which it attributes to the lawyer's poor advice or sometimes the lawyer's failure to render advice.

Sometimes the matter is straightforward: If a lawyer is asked to represent a bond issuer, advising the client on whether the bonds need to be registered with the SEC is a legal matter that, absent some other restriction on the scope of the engagement, falls within the ambit of the lawyer's duties. On the other hand, it would be surprising to see a malpractice case survive a motion to dismiss if all it alleges is that the lawyer failed to advise the client about the proper pricing of the bonds.

Peterson Decision

A recent Seventh Circuit decision illustrates that the line between matters of law and matters of business is not always straightforward. In *Peterson v. Katten Muchin Rosenman LLP*, 792 F.3d 789 (7th Cir. July 7, 2015), the Seventh Circuit reversed the district court's decision dismissing a complaint against a law firm for giving what the firm described as "business advice." Katten Muchin's client, the Lancelot funds, lent money to entities controlled by Thomas Petters, a Minneapolis businessman. Petters promised to use the funds to purchase consumer goods and resell them to the retailer Costco for a profit. The proceeds of the sales were supposed to flow directly from Costco to a lockbox account that the Lancelot funds could draw on. But Petters later claimed that Costco had insisted on paying to the Petters entity and not to the lockbox; so, the monies were then supposed to flow to the lockbox account from the Petters entity.

In reality, Petters was running a Ponzi scheme, one of the largest in history, and the payments the Lancelot funds received did not come from Costco. After the Ponzi scheme was revealed, the Lancelot funds went bankrupt. The bankruptcy trustee, Peterson, sued Katten Muchin, which had represented the funds in connection with their loans to Petters. As described by Judge Easterbrook, in his opinion for the Seventh Circuit: "The Trustee's complaint contends that Katten violated its duty to its clients by not telling [Lancelot's principal] that the actual arrangement (no checks from Costco, no money directly from Costco) posed a risk that Petters was not running a real business. Katten had been engaged to structure transactions, the Trustee asserts, and part of that duty entails telling the client what contractual devices are appropriate to the situation." 792 F.3d at 790.

Katten Muchin had moved to dismiss the case on the ground that the risk of fraud by Petters was a business risk and the advice Peterson claimed should have been given was outside the scope of the firm's duty to its client. The district court had agreed and dismissed the complaint, but the Seventh Circuit reversed. It held that the Trustee's complaint stated a claim, at least at the pleading stage, and that the Trustee could seek to prove that a competent lawyer in Katten's position would have advised its client of "the risk of allowing repayments to be routed through Petters." *Id.* at 791. Addressing the district court's conclusion that this was a business risk, not a legal risk, Judge Easterbrook wrote: "It is hard to see how any such bright line [between business advice and legal advice] could exist, since one function of the transactions lawyer is to counsel the client how different structures carry different levels of risk, and then to draft and negotiate contracts that protect the client's interests." *Id.*

Judge Easterbrook's statement that "one function of the transactions lawyer is to counsel the client how different structures carry different levels of risk" has caused some consternation in the legal malpractice defense bar and among transaction lawyers generally; some have viewed it as a significant expansion of lawyers' duties. Read separately, the statement is jarring, but the remainder of the opinion softens its impact. Notably, the quoted language was not the court's only word on the subject. Judge Easterbrook's reasoning was more nuanced:

> We take the point that a transactions lawyer's task is to propose, draft, and negotiate contractual arrangements that carry out a client's business objective, not to tell the client to have a different objective or to do business with a different counterparty. A lawyer is not a business consultant. But within the scope of the engagement a lawyer must tell the client which different legal forms are available to carry out the client's business, and how (if at all) the risks of that business differ with the particular legal forms.

Id. at 793 (internal citation omitted).

In other words, while a "bright line" between business advice and legal advice may sometimes be difficult to draw, a line does exist. See, for example, the recent decision of the New York Court of Appeals in *Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft LLP*, ___ N.E. 3d ___, 2015 WL 6180983 at 7-9 (Oct. 22, 2015) (law firm issuing opinion on the status of a pool of mortgage loans as a REMIC trust has no generalized duty to review all of the underlying appraisals — review of the appraisals was "beyond the scope of [the firm's] representation").

On the facts of *Peterson*, we find the court's ruling somewhat discordant with the role of business lawyers. Even at the pleading stage, it appears implausible that a sophisticated investment fund engaged in a multimillion dollar transaction would have looked to its lawyer to inform it that the likelihood of a Ponzi scheme by Petters was greater if Petters rather than Costco paid the funds directly to the lockbox. The claim against the law firm is all the more extraordinary because it alleges that the lawyers were negligent, not because they gave bad advice but because they failed to affirmatively offer advice that was never solicited.

Impact of the Peterson Decision

Ultimately, the most significant impact of the *Peterson* case, for those courts that choose to follow it (as a federal court decision applying Illinois state law it will not be binding on many), is that it may make it more difficult for malpractice defendants to prevail at the motion to dismiss stage on the theory that the claim is barred by a bright line distinction between business and legal advice. Some claims – such as our bond-pricing hypothetical discussed above – presumably would still qualify for early dismissal, but in others the plaintiff might succeed in characterizing its claim as a failure to give advice that a reasonable lawyer would give concerning the risks and benefits of certain

transaction structures. This does not mean the claim in *Peterson* will ultimately prevail – if the facts show that the advice that allegedly should have been given is the province of a business consultant, not a lawyer, then the Katten Muchin firm should win summary judgment or at trial. In addition, claims like Peterson's have enormous problems of causation, as the plaintiff would have to show (among other things) that if the lawyer gave the advice on structure the client would have accepted it and changed its negotiating position, and that the resulting negotiations with the opposing party would have avoided the loss for the client. This would be purely speculative and would present considerable problems of proving causation. As we have previously written in the Newsletter, however, obtaining an early dismissal at the motion to dismiss stage can be critical because of the enormous cost of a longer-term defense.[14] To the extent the *Peterson* decision makes a dismissal at this stage more difficult to obtain, it is an important development.

What does this mean for opinion givers in particular? *Peterson*, it bears noting, involves first-party or client advice: the plaintiff was the firm's former client. Legal opinion practice consists primarily of the preparation and delivery of *third-party opinions*. This is a crucial distinction: the obligations of a lawyer to its client are broader than the obligations of a lawyer to a third party when delivering a closing opinion to that third party. A lawyer's duty of competence and diligence to his or her client requires the lawyer to caution the client about certain legal risks within the scope of the engagement; no such obligation applies to a lawyer rendering a third-party legal opinion to the recipient of a closing opinion. See A. Field and J. Smith, Legal Opinions in Business Transactions ch. 13 (3d ed. 2014).[15]

Though *Peterson* is not a case about third-party opinions, it is not without implications for opinion givers and counsel for opinion recipients. Because closing opinions are commonly given and reviewed for opinion recipients by business lawyers who have advised their clients as parties to the transaction, the principles discussed in *Peterson* (again, to the extent courts follow them) will apply to those lawyers in their capacity as advisers to their clients in malpractice claims brought by the clients. In addition, opinions commonly come to the fore in malpractice cases brought by clients (against their lawyers) because clients will argue that the lawyers who gave or who reviewed the opinion for the opinion recipient should have investigated or understood certain facts in the course of delivering or reviewing the opinion. Whatever the merits of such a claim as a matter of customary opinion practice, we would expect

[14] John K. Villa and Craig D. Singer, *Say What You Mean and Mean What You Say: How Explicit Language or Incorporation by Reference in Legal Opinions Can Affect Litigation Risk*, In Our Opinion (vol. 13, no. 4, Summer 2014, at 8-9).

[15] See also the New York Appellate Division's decision in *Fortress Credit Corp. v. Dechert LLP*, 80 A.D. 3d 615, 934 N.Y.S. 2d 119 (2011), one of the rare cases involving an opinion recipient's lawsuit against an opinion giver over a closing opinion. Fortress alleged, among other things, negligent misrepresentation against the law firm. The Appellate Division concluded that Fortress had not alleged sufficient facts to support the claim since Fortress had failed to allege that it informed Dechert that the firm was to do anything other than review relevant and specified documents or that Dechert was to investigate, verify and report on the legitimacy of the transaction. Absent such an allegation by Fortress, and because Dechert, in its opinion, expressly assumed the genuineness of all signatures and the authenticity of documents, Fortress' claim of negligent misrepresentation had to be dismissed. For a discussion of the *Dechert* decision, see Joel Miller's note in "Recent Developments — New York Appellate Court Dismisses Claims Against Dechert LLP Arising Out of Legal Opinion and Marc Dreier Fraud," In Our Opinion (then titled "Legal Opinion Newsletter") (vol. 11, no. 2, Winter 2011) at 11-12; and Don Glazer's and Stan Keller's article under "Recent Developments — Opinion Practice Implications of the *Fortress* Decision," In Our Opinion (vol. 11, no. 3, Spring 2012) at 8-10.

plaintiffs' lawyers to use the *Peterson* decision as further leverage in that regard, contending that the lawyers who prepared (or advised a recipient regarding) an opinion had a duty to advise their client on matters relating to the subjects of the opinion. Whether such claims will gain traction remains to be seen.

Business lawyers should consider the risk of a *Peterson*-like claim in drafting their engagement letters. A lawyer may reduce the risk of a claim such as that asserted in *Peterson* by making clear in the engagement letter that the lawyer is undertaking to advise only with respect to the legal aspects of the transaction and is not advising on its business risks.

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RECENT DEVELOPMENTS

Exposure Draft, Sample California Third-Party Legal Opinion Letter for Personal Property Secured Financing Transactions

One of the trends in opinion literature over the last decade is the development of sample forms of third-party closing opinions that reflect the precepts of national and state bar opinion reports. *See, e.g.*, the detailed illustrative language of a real estate finance closing opinion in chapter three of the 2012 Real Estate Finance Opinion Report published by the Opinions Committees of the ABA's Real Property, Trust and Estate Law Section, the American College of Real Estate Lawyers, and the American College of Mortgage Attorneys (available on the Legal Opinion Committee's website at http://apps.americanbar.org/buslaw/tribar/ under "State and Other Bar Reports"). California has embraced this trend with its Sample California Third-Party Legal Opinion for Business Transactions, first published in 2010 and revised in 2014, and its Sample California Third-Party Legal Opinion for Venture Capital Financing Transactions (2014) (70 Bus. Law. 177 (Winter 2014/2015)) (both also available on the California Opinions Committee's website (see "Opinion Resources" at http://businesslaw.calbar.ca.gov/publications.aspx).

The California Opinions Committee is now circulating an exposure draft of a sample opinion for personal property secured financing transactions. An unannotated version of the exposure draft is included as Annex A to this issue of the Newsletter. This sample opinion, the culmination of a three-year effort of the California Opinions Committee, provides an illustration of what an opinion letter following the precepts of the opinion reports of the California State Bar's Business Law Section might look like. As the basis for the opinion, the California Opinions Committee has chosen a secured lending transaction involving a California corporation as the borrower and a California limited liability company as the guarantor. It also assumes that the transaction documentation is governed by California law. The form of opinion is intended as a sample and should not be construed as prescriptive.

The Editors have selected the sample opinion for inclusion as Annex A to this issue of the Newsletter not only to illustrate the increased focus of opinion committees on the preparation of sample opinions but also because the sample is a comprehensive form that addresses not only UCC opinions but also foundational, no-conflicts and remedies opinions under California law from the prior California sample opinions. The form of the UCC opinions (opinion nos. 10 – 19 of the sample opinion) conform to the form of opinions included in the illustrative security interest opinion attached as Appendix A to the TriBar UCC opinions report, "*Special Report of*

the TriBar Opinion Committee: U.C.C. Security Interest Opinions — Revised Article 9," 58 Bus. Law. 1449, 1504-1509 (2004). (While there is substantial similarity between the states' UCCs, the UCC opinions of the California sample opinion should not be used where the covered law of the opinion is that of a state other than California without a review of the relevant UCC provisions of the chosen law state.)

Readers interested in reviewing the annotations and notes to the sample opinion, which are extensive, can do so by this link (http://goo.gl/hGk2qJ). Readers who have comments on the exposure draft are encouraged to submit them to the Reporter, Peter S. Szurley of Chapman and Cutler, LLP, San Francisco, at szurley@chapman.com.

- The Editors

NOTES FROM THE LISTSERVE

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

The Due Formation and Validly Existing Opinion for Trusts

By his email to the Listserve of October 19, 2015, Ed Wender of Venable LLP, Baltimore, asked the Listserve whether his firm could give a duly formed and validly existing opinion on behalf of an irrevocable trust (in Ed's case, under Maryland law). A colleague had put the question to Ed and, for purposes of his inquiry, Ed assumed that a trust is "duly formed" when the trust agreement is executed (after determining, or assuming, due execution, competency, etc.) and that assets had been transferred to the trust. Ed asked what "validly existing" means in the context of a trust.

Jim Gadsden of Carter Ledyard & Milburn LLP, New York, responded that, under New York law, a common law trust is not a separate entity. The assets of the trust are held by the person acting as trustee, in that person's capacity as trustee. Assuming Maryland law to be the same, Jim concluded that "entity" opinions for the trust would be inappropriate, although the opinion giver could opine that the transfer of the assets to the trustee was effective and that the trustee now holds them.

Phil Schwartz of Akerman LLP, Fort Lauderdale, directed the Listserve to Florida's comprehensive 2011 opinions report, "Report on Third-Party Legal Opinion Customary Practice in Florida" (available on the Legal Opinion Committee's website http://apps.americanbar.org/buslaw/tribar/), which includes an extensive discussion on rendering opinions relating to trusts. With the possible exception of Florida land trusts, Florida's position is the same as that of New York, as articulated by Jim Gadsden, namely, that "a Florida trust is not a separate statutory entity under Florida law." Florida Report at 52. Accordingly, ". . . for purposes of rendering an opinion regarding a Florida trust, the Client is really not the trust itself, but rather the person or persons serving as the trustee or trustees of the trust for the benefit of the beneficiaries. As such, the proper status inquiry in the context of a trust should be based on whether the trustee or trustees is or are properly organized and existing and has or have active status." *Id.* Sample trust opinions from the Florida Report include:

> "The Client(s) [is/are] the trustee(s) of a trust pursuant to the provisions of that certain trust agreement dated _____."

Id.

> "The Client(s), as trustee(s) of the trust, has/have the trust power to execute and deliver the [Transaction Documents] and to perform the Client(s)' obligations thereunder."

Florida Report at 72.

> "The Client, as trustee of the trust, has authorized the execution, delivery and performance of the [Transaction Documents] by all necessary action."

Florida Report at 85.

Joseph Heyison of Daiwa Capital Markets America captured the essence of the trust relationship by noting that a trust (other than a business trust) is fundamentally "a conveyance of property to a fiduciary by the settlor for the benefit of others." The trust relationship exists "when the conveyance is made and the trustee accepts the conveyance subject to the trust," subject to other applicable legal requirements.

Norm Powell of Young Conaway Stargatt & Taylor, LLP, Wilmington, concurred that a common law trust "is a relationship, not a person, entity, or organization."

Jim Borchers of InNovare Law LC, St. Charles, Missouri, noted that, under Missouri's version of the Uniform Trust Code, trustees typically sign, in connection with financial transactions, an "affidavit & certificate of trust." The affidavit must include a copy of or recite the trustee's powers. Representing lenders, Jim noted that only if the powers stated "are not clear do I ask for a modified Affidavit or a counsel opinion." Counsel for trusts often seek to convince the lender to accept solely the affidavit, without requiring an opinion of counsel. At a minimum, the affidavit is used to support any opinion of counsel.

Alan Dubin of Arent Fox LLP, Washington, D.C., concluded the discussion by responding that Ed Wender should not give the opinion as requested. Rather, the opinion that should be considered is one that concludes that the trustee (if an individual) executed and delivered the contract in question and that the contract is valid, binding and enforceable (subject to the normal qualifications). "Implicit in these opinions," noted Alan, "is the conclusion that the trust instrument is effective to create a relationship under which the trustee owns the assets in trust for the benefit of the beneficiaries." Alan would, if requested, state that conclusion expressly (subject to customary due diligence).

[**Editors' Note**: As several of the responders noted, while common law trusts are not deemed legal entities, statutory business trusts are. *See, e.g.*, Delaware's Statutory Trust Act § 3801(g)(2) (defining a statutory trust under the Act as an unincorporated association "and a separate legal entity"). *See also* the Treasury Department's discussion of trusts as entities in Treas. Regs. § 301.7701-4.]

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.

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LEGAL OPINION REPORTS

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

Chart of Published and Pending Reports

[Editors' Note: The chart of published and pending legal opinion reports below has been prepared by John Power, O' Melveny & Myers LLP, Los Angeles, and is current through October 31, 2015.**]**

A. Recently Published Reports[16]

ABA Business Law Section	2009	Effect of FIN 48 – Audit Responses Committee
		Negative Assurance – Securities Law Opinions Subcommittee
	2010	Sample Stock Purchase Agreement Opinion – Mergers and Acquisitions Committee
	2011	Diligence Memoranda – Task Force on Diligence Memoranda
	2013	Survey of Office Practices – Legal Opinions Committee
		Legal Opinions in SEC Filings (Update) – Securities Law Opinions Subcommittee
		Revised Handbook – Audit Responses Committee
	2014	Updates to Audit Response Letters – Audit Responses Committee
	2015	No Registration Opinions (Update) – Securities Law Opinions Subcommittee
		Cross-Border Closing Opinions of U.S. Counsel*
ABA Real Property Section (and others)[17]	2012	Real Estate Finance Opinion Report of 2012
Arizona	2004	Comprehensive Report
California	2007	Remedies Opinion Report Update
		Comprehensive Report Update
	2009	Venture Capital Opinions
	2014	Sample Venture Capital Financing Opinion
	2015	Revised Sample Opinion
Florida	2011	Comprehensive Report Update
Georgia	2009	Real Estate Secured Transactions Opinions Report

[16] 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/. Reports marked with an asterisk have been added to this Chart since the publication of the Chart in the last quarterly issue of this Newsletter.

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

Recently Published Reports (continued)

City of London	2011	Guide
Maryland	2009	Update to Comprehensive Report
Michigan	2009	Statement
	2010	Report
National Association of Bond Lawyers	2011	Function and Professional Responsibilities of Bond Counsel
	2013	Model Bond Opinion
	2014	501(c)(3) Opinions
National Venture Capital Association	2013	Model Legal Opinion
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
South Carolina	2014	Comprehensive Report*
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	Sample Asset Purchase Agreement Opinion – Merger and Acquisitions Committee Updated Survey – Legal Opinions Committee* Debt Tender Offers – Securities Law Opinions Subcommittee* Resale Opinions – Securities Law Opinions Subcommittee* Third-Party Closing Opinions of Local Counsel*[18]
California	Opinions on Partnerships & LLCs Sample Personal Property Security Interest Opinion
Florida	Supplement to Comprehensive Report*
Real Estate Opinions Committees (Among Others)[19]	Local Counsel Opinions
South Carolina	Comprehensive Report
Texas	Comprehensive Report Update
TriBar	Limited Partnership Opinions Opinions on Clauses Shifting Risk
Washington	Comprehensive Report
Multiple Bar Associations	Commonly Accepted Opinion Practices

[18] A joint project with WGLO and other groups.

[19] See note 17.

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.[20] 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 January 2016. Please forward cases, news and items of interest to Tim Hoxie (tghoxie@jonesday.com), Jim Fotenos (jfotenos@greeneradovsky.com), or Susan Cooper Philpot (philpotsc@cooley.com)

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

ANNEX A

EXPOSURE DRAFT
OCTOBER 2015
(Subject to Completion)

SAMPLE CALIFORNIA

THIRD-PARTY LEGAL OPINION LETTER FOR

PERSONAL PROPERTY SECURED FINANCING TRANSACTIONS

PREPARED BY

THE OPINIONS COMMITTEE

OF THE BUSINESS LAW SECTION OF THE STATE BAR OF CALIFORNIA

[_____ 2015]

SAMPLE CALIFORNIA THIRD-PARTY LEGAL OPINION LETTER
FOR PERSONAL PROPERTY SECURED FINANCING TRANSACTIONS

[DATE]

TALL OAKS BANK, N.A.
101 California Street
San Francisco, CA 94111

Ladies and Gentlemen:

We have acted as counsel to SPIRIT'S WILLING, INC., a California corporation (the "*Borrower*"), and FLESH'S WEAK, LLC, a California limited liability company (the "*Guarantor*"), in connection with the negotiation, execution and delivery of the Loan Agreement, dated as of [DATE] (the "*Loan Agreement*"), between the Borrower and TALL OAKS BANK, N.A., a national banking association (the "*Lender*"). The Borrower and the Guarantor are sometimes referred to in this letter individually as a "*Loan Party*" and collectively as the "*Loan Parties*." This letter is delivered to you pursuant to Section [__] of the Loan Agreement. Each capitalized term used but not otherwise defined herein has the meaning given to it in the Loan Agreement. Subject to the preceding sentence, each term used but not otherwise defined herein has the meaning given to it in Division 9 of the California Uniform Commercial Code (the "*Code*")[or, if not defined therein, in Division 8 of the Code].

A. DOCUMENTS EXAMINED

We have reviewed the following documents:

(i) the Loan Agreement;

(ii) the Promissory Note, dated [DATE] (the "*Promissory Note*"), in the original principal amount of [$_____], executed by the Borrower to the order of the Lender;

(iii) the Guaranty, dated as of [DATE] (the "*Guaranty*"), by the Guarantor in favor of the Lender;

(iv) the Security Agreement, dated as of [DATE] (the "*Security Agreement*"), between the Borrower and the Lender;

(v) the Acknowledgement, dated as of [DATE] (the "*Acknowledgement*"), between GIVE-AN-INCH BAILEE, INC., a California corporation (the "*Bailee*"), and the Lender;

(vi) Certificate No. C-1 (the "*Stock Certificate*"), representing 100 common shares of 222 COMPANY, INC., a California corporation (the "*Issuer*"), and reflecting the Borrower as the holder thereof, together with a stock power endorsed by the Borrower {[in blank] [in the name of the Lender]} (the "*Stock Power*");

(vii) Certificate No. C-2 (the "*Bearer Stock Certificate*"), representing 100 common shares of the Issuer and issued in bearer form;

(viii) the Deposit Account Control Agreement, dated as of [DATE] (the "*Deposit Account Control Agreement*"), among the Borrower, PENNYWISE BANK, N.A., a national banking association (the "*Depository Bank*"), and the Lender;

(ix) the Customer Agreement, dated [DATE] (the "*Customer Agreement*"), between GIFT HORSE BANK, N.A., a national banking association (the "*Depository Bank*"), and the Lender;

(x) the Uncertificated Securities Control Agreement, dated as of [DATE] (the "*Issuer Control Agreement*"), among the Borrower, the Issuer, and the Lender;

(xi) the Third Party Acknowledgement, dated as of [DATE] (the "*Third Party Acknowledgement*"), between FRIEND INDEED, INC., a California corporation ("*Third Party*"), and the Lender;

(xii) the Securities Account Control Agreement, dated as of [DATE] (the "*Securities Account Control Agreement*"), among the Borrower, MANY ARE CALLED BROKER, INC., a California corporation (the "*Securities Intermediary*"), and the Lender;

(xiii) the Commodity Account Control Agreement, dated as of [DATE] (the "*Commodity Account Control Agreement*"), among the Borrower, FEW ARE CHOSEN BROKER, INC., a California corporation (the "*Commodity Intermediary*"), and the Lender;

(xiv) the Assignment and Consent, dated as of [DATE] (the "*Assignment and Consent*"), among the Borrower, PAID PIPER BANK, N.A., a national banking association (the "*Letter of Credit Issuer*"), and the Lender;

(xv) the Notification of Security Interest, dated as of [DATE] (the "*Notification*"), executed by the Lender[, and acknowledged by the Borrower,] and addressed to AN OUNCE OF PREVENTION INSURANCE COMPANY, INC., a California corporation (the "*Insurer*");

(xvi) a[n] [acknowledgement] [time-stamped] [unfiled] copy of the financing statement in the form of Exhibit 1 hereto [naming the Borrower as debtor and the Lender as secured party] (the "*Financing Statement*"), [filed as Instrument Number [_____]] [to be filed] in the Office of the Secretary of State of the State of California (the "*Filing Office*");

(xvii) the articles of incorporation of the Borrower, as amended to date, certified by the California Secretary of State as of [DATE] and certified to us by an officer of the Borrower as being complete and in full force and effect as of the date of this letter (the "*Articles*");

(xviii) the bylaws of the Borrower, as amended to date, certified to us by an officer of the Borrower as being complete and in full force and effect as of the date of this letter;

(xix) records certified to us by an officer of the Borrower as constituting the records of proceedings and actions of the board of directors and the shareholders of the Borrower relevant to the opinions set forth in this letter;

(xx) a Certificate of Status – Domestic Corporation with respect to the Borrower, issued by the California Secretary of State on [DATE];

(xxi) the articles of organization of the Guarantor, as amended to date, certified by the California Secretary of State as of [DATE], and certified to us by an [officer] of the Guarantor as being complete and in full force and effect as of the date of this letter;

(xxii) the [limited liability company operating agreement] of the Guarantor, dated as of [DATE], as amended to date, certified to us by [an officer] of Guarantor as being complete and in full force and effect as of the date of this letter;

(xxiii) records certified to us by [an officer] of the Guarantor as constituting all records of proceedings and actions of the [manager(s) and members] of the Guarantor relating to the Loan;

(xxiv) a Certificate of Status – Domestic Limited Liability Company with respect to the Guarantor, issued by the California Secretary of State on [DATE];

(xxv) a certificate of the [Chief Financial Officer, General Counsel or other appropriate officer] of the Borrower identifying certain agreements and instruments to which the Borrower is a party or by which the Borrower's properties or assets are bound (the "*Certificate Relating to Agreements*");

(xxvi) a copy of each of the agreements and instruments identified in the Certificate Relating to Agreements, certified to us as being a true and correct copy of the original (the "*Scheduled Agreements*");

(xxvii) a certificate of the [Chief Financial Officer, General Counsel or other appropriate officer] of the Guarantor identifying certain agreements and instruments to which the Guarantor is a party or by which the Guarantor's properties or assets are bound (the "*Guarantor's Certificate Relating to Agreements*");

(xxviii) a copy of each of the agreements and instruments identified in the Guarantor's Certificate Relating to Agreements, certified to us as being a true and correct copy of the original (the "*Guarantor Scheduled Agreements*"); and

(xxix) a certificate of each of [the Chief Financial Officer, General Counsel or other appropriate officer] of the Borrower and the Guarantor as to certain factual matters relevant to this letter.

Each of the documents identified in the foregoing items (i) through ([___]) is sometimes referred to herein as a "*Loan Document.*"

We have also examined such other documents and made such further legal and factual examination and investigation as we deem necessary for purposes of giving the following opinions.

B. CERTAIN ASSUMPTIONS

We have assumed, for purposes of our opinions expressed herein, that:

(a) (i) the Lender is (A) a subsidiary of a bank holding company (as such terms are defined in Section 1287 of the California Financial Code) or is a bank organized under the laws of the United States or any State thereof, (B) a foreign (other nation) bank described in Section 1768 of the California Financial Code meeting the criteria for exemption set forth therein, (C) licensed under the California Finance Lenders Law (Cal. Fin. Code § 22000 *et seq*.), or (D) a lending institution otherwise belonging to an exempt class of persons and, as a result thereof, that the Lender is exempt from the restrictions of Section 1 of Article XV of the Constitution of the State of California relating to rates of interest upon the loan of money;

(ii) the Loan will be made by the Lender for its own account or for the account of another party that qualifies for an exemption from the interest rate limitations of California law; and

(iii) there is no agreement by the Lender to sell participations or any other interest in the Loan to be made under the Loan Agreement to any person other than a party that qualifies for an exemption from the interest rate limitations of California law;

(b) value has been given for the security interest granted in the security agreement;

(c) the Financing Statement correctly states the name of the Borrower;

(d) the Bailee is not a securities intermediary with respect to the securities described in Opinion {[13] OR [15]} of this letter;

(e) the Third Party is not a securities intermediary with respect to the securities described in Opinion 15 of this letter; and

(f) the Borrower is the registered owner of the securities described in Opinion 15 of this letter.]

C. OPINIONS

Based on the foregoing and subject to the qualifications set forth in Section E of this letter, we are of the opinion that:

1. The Borrower is a corporation validly existing and in good standing under the laws of the State of California.

2. The Borrower has the corporate power to enter into and perform its obligations under each of the Loan Documents to which it is a party.

3. The Borrower has taken all corporate action necessary to authorize the execution and delivery of, and the performance of its obligations under, each of the Loan Documents to which it is a party, and the Borrower has duly executed and delivered the Loan Documents to which it is a party.

4. The Guarantor is a limited liability company formed and [validly] existing and in good standing under the laws of the State of California.

5. The Guarantor has the limited liability company power to enter into and perform its obligations under the Guaranty.

6. The Guarantor has taken all limited liability company action necessary to authorize the execution and delivery of, and the performance of its obligations under, the Guaranty, and the Guarantor has duly executed and delivered the Guaranty.

7. Each of the Loan Documents to which the Borrower or the Guarantor is a party is a valid and binding obligation of the Borrower or the Guarantor, as the case may be, enforceable against it in accordance with its terms.

8. All consents, approvals, authorizations or orders of, and filings, registrations and qualifications on the part of the Borrower or the Guarantor with, any United States federal or California state regulatory authority or governmental body pursuant to any Covered Law (as defined in Section E of this letter) required to execute and deliver, and to perform its obligations under, the Loan Documents have been obtained or made.

9. The execution and delivery by the Borrower or the Guarantor of the Loan Documents to which it is a party do not, and the performance by them of their respective obligations under those Loan Documents will not:

(a) violate the Articles of Incorporation or the Bylaws of the Borrower or the Articles of Organization or the Operating Agreement of the Guarantor;

(b) result in a breach of or constitute a default under any Scheduled Agreement or Guarantor Scheduled Agreement or result in the creation of a security interest in, or lien upon, any of the Borrower's or the Guarantor's properties or assets under any Scheduled Agreement or Guarantor Scheduled Agreement, but excluding (i) financial covenants and similar provisions therein that require financial calculations or determinations to ascertain compliance

and (ii) provisions relating to the occurrence of a "material adverse effect" or "material adverse change" or words or concepts to similar effect;

(c) violate any judgment, order or decree of any court or arbitrator [identified on Schedule [__] to the Loan Agreement] [or] [applicable to either of them and known to us]; or

(d) violate any Covered Law (as defined in Section E of this letter) to which either the Borrower or the Guarantor is subject.

[*Note: The opinions that follow cover issues arising under the Uniform Commercial Code and, for convenience, have been labeled. If an opinion preparer desires to use any of the following samples, care should be taken not to include any of the labels (although doing so should not alter the substance of the opinion.*]

10. **[Attachment Opinion.]**

First Alternative: The Security Agreement is effective to create in favor of the Lender[, as security for the obligations described in the Security Agreement to be secured thereby,] a security interest in the collateral described in the Security Agreement.

Second Alternative: The Security Agreement is effective to create in favor of the Lender[, as security for the obligations described in the Security Agreement to be secured thereby,] a security interest in that portion of the collateral described in the Security Agreement that consists of [(in each case, as defined in the California Uniform Commercial Code)] [specify collateral covered by opinion either by type (*e.g.*, accounts, deposit accounts, general intangibles, equipment, inventory, chattel paper, investment property, negotiable documents and instruments) or specifically (*e.g.*, the Stock Certificate)].

11. **[Perfection-by-Filing Opinion.]**

First Alternative: The security interest in that portion of the collateral described in the Security Agreement in which a security interest may be perfected by the filing of a financing statement under the California Uniform Commercial Code {[will be] OR [is]} perfected {[upon the filing of the Financing Statement with the Filing Office] OR [by the Financing Statement filed with the Filing Office]}.

Second Alternative: The security interest in that portion of the collateral described in the Security Agreement that consists of [specify collateral covered by opinion by type (*e.g.*, accounts, general intangibles, equipment, inventory, chattel paper, investment property, negotiable documents and instruments) or specifically (*e.g.*, the Stock Certificate)] {[will be] OR [is]} perfected {[upon the filing of the Financing Statement with the Filing Office] OR [by the Financing Statement filed with the Filing Office]}.

12. **[Perfection-by-Possession Opinion Concerning Collateral Other Than Certificated Securities.]** The security interest in that portion of the Collateral described in the Security Agreement that consists of [specify collateral covered by opinion that can be perfected by possession either by type (*e.g.*, goods, instruments, money, negotiable documents, tangible chattel paper) or

specifically] {[will be] OR [is]} perfected {[upon the {[Lender] OR [Bailee]} obtaining possession] OR [assuming the {[Lender] OR [Bailee]} has possession]} of [specify collateral].

13. **[Perfection-by-Possession Opinions Concerning Certificated Securities).]**

First Alternative: The security interest in the {[Stock Certificate] OR [Bearer Stock Certificate]} {[will be] OR [is]} perfected {[upon the {[Lender's] OR [Third Party's]} obtaining] OR [assuming the {[Lender] OR [Third Party]} has]} possession of such collateral [pursuant to the Third Party Acknowledgment].

Second Alternative: The security interest in the Stock Certificate {[will be] OR [is]} perfected {[upon the Third Party's obtaining possession of the Stock Certificate and the registration of the Stock Certificate in the name of the Lender] OR [assuming the Third Party has possession of the Stock Certificate and the Stock Certificate has been registered in the name of the Lender] pursuant to the Third Party Acknowledgment}.

14. **[Perfection-by-Control Opinion Concerning Deposit Accounts.]**

First Alternative: The security interest in that portion of the collateral that consists of deposit accounts maintained with the Lender is perfected by control.

Second Alternative: The security interest in [specify account] is perfected by control pursuant to the Deposit Account Control Agreement.

Third Alternative: The security interest in [specify account] maintained by the Lender as a customer of [specify depository bank] is perfected by control.

15. **[Perfection-by-Control Opinion Concerning Uncertificated Securities.]**

First Alternative: The security interest in that portion of the securities described [on Schedule 1 to the Security Agreement] will be perfected by control {[pursuant to the Third Party Acknowledgement upon registration by the Issuer of the Third Party] OR [upon registration by the Issuer of the Lender]} as the registered owner of such securities.

Second Alternative: The security interest in that portion of the securities described [on Schedule 1 to the Issuer Control Agreement] is perfected by control pursuant to the Issuer Control Agreement.

16. **[Perfection-by-Control Opinion Concerning Securities Accounts/Security Entitlements.]**

First Alternative: The security interest in the account established in the name of the Lender and described [on Schedule 1 to the Security Agreement] will be perfected by control upon the Securities Intermediary crediting financial assets to such account.

Second Alternative: The security interest in {[the security entitlements with respect to financial assets credited to the account described [on Schedule 1 to the {[Securities Account Control

Agreement] OR [Third Party Acknowledgement] OR [Security Agreement]}] OR [that portion of [specify security entitlements to particular financial assets] credited to the account described [on Schedule 1 to the {[Securities Account Control Agreement] OR [Third Party Acknowledgement] OR [Security Agreement]}] is perfected by control.

17. **[Perfection-by-Control Opinion Concerning Commodity Contracts/Commodity Account.]** The security interest in {[the account specified [on Schedule 1 to] the {[Commodity Account Control Agreement] OR [Security Agreement]}] OR [that portion of the contracts specified [on Schedule 1 to] the {[Commodity Account Control Agreement] OR [Security Agreement]} is perfected by control pursuant to the {[Commodity Account Control Agreement] OR [Security Agreement]}.

18. **[Perfection-by-Control Opinion Concerning Letter-of-Credit Rights.]** The security interest in the letter-of-credit rights with respect to [letter of credit identified on Schedule 1 to the Assignment and Consent] {[is] OR [will be]} perfected by control pursuant to the Assignment and Consent.

19. **[Perfection-by-Notification Opinion.]** The security interest in [specify policy of insurance] {[is] OR [will be]} perfected [upon the giving of notice to the Insurer] pursuant to the Notice.

D. CONFIRMATION

We are not representing the Borrower or the Guarantor in any action or proceeding that is pending, or overtly threatened in writing by a potential claimant, that seeks to enjoin the transaction or challenge the validity of the Loan Documents or the performance by the Borrower or the Guarantor of its respective obligations thereunder.

E. CERTAIN QUALIFICATIONS

Our opinions are limited to the federal law of the United States and the law of the State of California, but in each case only to laws that in our experience are typically applicable to transactions of the type exemplified by the Loan Documents. We express no opinion with respect to compliance with any law, rule or regulation that, as a matter of customary practice, is understood to be covered only when an opinion refers to it expressly. Without limiting the generality of the foregoing [and except as specifically stated herein,] we express no opinion on local or municipal law, antitrust, unfair competition, energy, environmental, land use, securities or "blue sky," tax, pension, labor, employee benefit, occupational safety, health care, insurance, insolvency, fraudulent transfer, privacy, national security, antiterrorism, money laundering, racketeering, criminal and civil forfeiture, foreign corrupt practices, foreign asset or trading control, broker-dealer, margin regulation or investment company laws. The laws covered by this letter are referred to herein as the "Covered Law."

Our opinions are subject to the following additional qualifications:

(1) Our opinions are subject to: (a) bankruptcy, insolvency, reorganization, arrangement, moratorium and other similar laws of general applicability relating to or affecting creditors' rights generally; and (b) general principles of equity, including, without limitation, concepts of

materiality, reasonableness, good faith and fair dealing, regardless of whether considered in a proceeding in equity or at law.

(2) [Where a statement is qualified by "to our knowledge" or any similar phrase, that knowledge is limited to the actual knowledge of lawyers currently in this firm who have been actively involved in representing the Borrower or the Guarantor in connection with the Loan Documents. Except as otherwise expressly indicated, we have not undertaken any independent investigation to determine the accuracy of any such statement, and no inference as to our knowledge of any matters bearing on the accuracy of any such statement should be drawn from the fact of our representation of the Borrower or the Guarantor.]

(3) We advise you that, on statutory or public policy grounds, waivers or limitations of the following may not be enforced: (a) broadly or vaguely stated rights; (b) the benefits of statutory, regulatory or constitutional rights; (c) unknown future defenses; and (d) rights to one or more types of damages.

(4) The enforcement of Section [__] of [the Loan Agreement], relating to the payment of attorneys' fees and costs, is subject to the effect of Section 1717 of the California Civil Code.]

(5) We express no opinion regarding the enforceability of [Section __] of the [Loan Agreement], which purports to fix the venue of proceedings relating to the Loan.]

(6) [We express no opinion regarding the enforceability of [Section __] of the [Loan Agreement], which purports to waive the parties' rights to a jury trial.]

(7) [We express no opinion regarding the enforceability of [Section __] of the [Loan Agreement], which purports to submit disputes to arbitration.]

(8) We advise you of California statutory provisions and case law to the effect that a guarantor may be discharged, in whole or in part, if the beneficiary of the guaranty alters the obligation of the principal, fails to inform the guarantor of material information pertinent to the principal or any collateral, elects remedies that may impair either the subrogation or reimbursement rights of the guarantor against the principal or the value of any collateral, fails to accord the guarantor the protections afforded a debtor under Division 9 of the California Uniform Commercial Code or otherwise takes any action that prejudices the guarantor, unless, in any such case, the guarantor has effectively waived such rights or the consequences of such action or has consented to such action. While California Civil Code Section 2856 and case law provide that express waivers of a guarantor's right to be discharged, such as those contained in the Guaranty, are generally enforceable under California law, we express no opinion regarding the effectiveness of the waivers in the Guaranty.

(9) We express no opinion regarding the enforceability of any provisions of the Loan Documents imposing or providing for the collection of liquidated damages, late charges, prepayment charges, increased interest rates, premiums or other amounts, or accelerating future amounts due (other than principal) without appropriate discount to present value, to the extent they constitute a "penalty" or "forfeiture."]

(10) [We express no opinion as to the enforceability of any exculpation, exoneration, indemnification or contribution provisions in the Loan Documents to the extent that the enforceability of such provisions is limited by public policy or statutory provisions.]

(11) [[We express no opinion as to the creation or perfection of any security interest except to the extent that Division 9 of the Code governs either such matter.] OR [The law covered by the security interest opinions set forth in paragraphs [specify opinion paragraphs] is limited to Division 9 of the Code.]]

(12) We express no opinion as to the perfection of any security interest referenced herein other than by the filing of the Financing Statement with the Filing Office.

This letter may be relied upon solely by the Lender for use in connection with the transactions contemplated by the Loan Agreement. No other party may rely upon this letter or the opinions expressed herein without our prior written consent.

Very truly yours,

BETTER SAFE THAN SORRY LLP

Exhibit 1

UCC-1 Financing Statement

[*Attached.*]