CURRENT NATIONAL LEGAL OPINION ISSUES

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Andrews Kurth LLP

ARTHUR FIELD, *New York, NY*
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State Bar of Texas
5TH ANNUAL ADVANCED BUSINESS LAW COURSE
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Houston

CHAPTER 2

GAIL MEREL
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Gail Merel practices in the area of corporate finance having represented national, state and foreign banking institutions, asset-based lenders, insurance companies, underwriters, venture capital investors and corporate clients in a variety of finance transactions, including public debt issuances, syndicated loan and letter of credit facilities, debt restructures, project financings, asset securitizations and collateralized mortgage obligations.

EDUCATION AND BAR ADMISSIONS

J.D., magna cum laude, Harvard University
Ph.D., Graduate School of Arts and Sciences, Harvard University
B.S., School of Industrial and Labor Relations, valedictorian, Cornell University

Bar Admissions: Texas, 1988 and New York, 1978

PROFESSIONAL ACTIVITIES

Partner, Andrews Kurth LLP, Houston, Texas
Member, National Legal Opinion Working Group Steering Committee
Past Chair, Legal Opinions Committee of the Business Law Section of the State Bar of Texas
Past Chair, the Business Law Section of the State Bar of Texas
Certificate of Merit Recipient for Outstanding Service to the State Bar of Texas, 2002
Director, Texas Business Law Foundation
Named a Texas Super Lawyer for 2003 - 2007 by *Law & Politics* and *Texas Monthly*
one of Houston's Best Lawyers by Inside Houston, 1988 and 2002
one of The Best Lawyers in America by Woodward/White Publications 1995 - 2007

LAW RELATED PUBLICATIONS AND SPEECHES

Co-editor, Legal Opinion Risk Seminar Handbook, October 2006 and April 2007

Co-author, as a member of the Subcommittee on Legal Opinions Regarding Indemnities of the Legal Opinions Committee of the Business Law Section of the State Bar of Texas, *Statement on Legal Opinions Regarding Indemnification and Exculpation Provisions Under Texas Law*, 41 Texas Journal of Business Law No. 3, Winter 2006

University of Texas School of Law 2006 Partnerships, Limited Partnerships and LLCs Conference, July and September 2006, *Legal Opinions Under the New BOC*

University of Texas CLE Program, January and February, 2006, *Working with Opinions Under the New BOC*

State Bar of Texas 3rd Annual Advanced Business Law Course, November, 2005, *Update on Legal Opinions: BOC*

Co-author, as Co-chair of the Subcommittee on Legal Opinions Regarding Investment Property Collateral, *Supplement No. 2 to the Report of the Legal Opinions Committee Regarding Legal Opinions as to Securities and Other Investment Property*, Texas Journal of Business Law, Spring 2001

State Bar of Texas Business Law Symposium, June, 1999, *Legal Opinions - Their Scope and Relevance in Today's Practice*

State Bar of Texas Business Law Seminar, June, 1997, *Legal Opinions*

Co-author, as Chair of the Subcommittee on Legal Opinions Regarding Usury, *Supplement No. 1 to the Report of the Legal Opinions Committee Regarding Legal Opinions on Usury*, Bulletin of the Business Law Section of the State Bar of Texas, December 1994

ARTHUR NORMAN FIELD

Arthur Norman Field is the Chair of the ABA Working Group on Legal Opinions. He practiced law with Shearman & Sterling in New York for 42 years and served as Chair of its Opinion Committee. He is the co-author (with Jeffrey Smith) of Legal Opinions in Business Transactions (2d ed. PLI 2006). He has had broad experience in corporate, corporate reorganization, financing and acquisition matters. He has been Chair of the TriBar Opinion Committee, the ABA/BLS Opinion Committee and Co-Chairs the 2006-2007 Legal Opinion Risk Seminar programs. He has served on the boards of public and private business enterprises. In recent years, he has had experience in investment matters and is currently President of GXG Management LLC. He has acted as an expert in several malpractice cases. From 1990-1992 Mr. Field was President of the New York County Lawyer's Association and has served as a Vice President of the New York State Bar Association. He is a member of the American Law Institute. Mr. Field has also served on the court-appointed Disciplinary Committee covering New York County. Additionally, Mr. Field has served as Chairman of the federally funded Civil Legal Services Program in New York City (1975-1977).

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David R. Keyes

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David Keyes' practice focuses on finance and commercial law, where he represents companies and financial institutions in secured and unsecured lending or borrowing; structured finance; securitization of financial assets; purchases and sales of receivables, equipment leases, notes, participations and other financial assets; creditors' and debtors' rights; letters of credit; margin regulations; the Uniform Commercial Code and check-clearing and bank-payments systems. He has significant experience in financial and commercial transactions in the aviation, energy, financial institutions and technology industries. He serves as Co-Chair of the Opinion Committee of Winstead PC.

Education

University of Texas School of Law

- LL.B., *with high honors*, 1968
- Chancellors
- Order of the Coif
- Phi Delta Phi

U.S. Court of Appeals, Ninth Circuit

- Law Clerk for The Honorable Walter Ely, 1968-1969

Princeton University, Woodrow Wilson School of Public and International Affairs

- A.B., 1965

Professional Memberships & Affiliations

- South Texas College of Law (Adjunct Professor, Business Transactions, 2007)
- State Bar of Texas (Chair, Legal Opinions Committee, Business Law Section, 2003-present)
- American Bar Association (Uniform Commercial Code Committee, Business Law Section)
- American Bar Foundation (Life Fellow)
- Texas Bar Foundation (Life Fellow)
- Houston Bar Foundation (Life Fellow)
- *Law Firm Advisory Board to the Working Group on Legal Opinions* (2007)

Awards & Recognition

- The Best Lawyers in America, Banking & Corporate Law, 2003-2007
- The International Who's Who of Business Lawyers, Banking Law, 2005-2007
- Chambers USA: America's Leading Business Lawyers, Banking & Finance Law, 2003-2007
- Texas Super Lawyers, Banking Law, *Texas Monthly*, 2004-2007

Admitted to Practice

- Texas, 1968

Presentation Topics

- Loan Agreements: Intercreditor and Subordination Agreements
- Loan Participations and Syndications
- Securities Lending
- Bank and Securities Regulations, including Bank Activities and Margin Regulations
- Rights of Set-off
- Uniform Commercial Code and Security Interests
- Bankers' Acceptances
- Lender Liability
- Conflicts of Laws and Choice of Governing Law
- Bankruptcy Preferences and Fraudulent Transfers
- Arbitration Agreements
- Legal Opinions

Publications

- Resolving Conflicts under the State-Interest Approach to Choice-of-Law Problems (*Texas Law Review*)
- Revised Articles 8 and 9 of the Uniform Commercial Code (Investment Property) (*Texas Journal of Business Law*, Co-Authored)
- Legal Opinions in Business Transactions (Usury; Investment Property Collateral; Indemnities) (*Texas Journal of Business Law*, Co-Authored)
- *Legal Opinion Letters Formbook* (Contributor to Holderness & Wunnicke, Aspen Pub. 2008 Cumulative Supp., publication pending)

Vinson&Elkins

Stephen C. Tarry

Biography

Steve's principal area of practice is domestic and international business transactions, including project finance and secured and unsecured lending transactions. Steve has represented large corporate clients in major U.S. and international project finance, asset securitization and lending transactions. He has also advised clients in many areas of the law relating to financing transactions, including secured transactions law, legal opinions, margin regulation, usury, bankruptcy, foreclosure, consumer credit, and other similar areas.

Representative Experience

- Acted as lead counsel for hedge funds with respect to numerous secured and unsecured financing transactions
- Represented project company in the financing of a 350 MW power project built in the Czech Republic
- Represented project company in the recent financing of a fully integrated merchant power project built in Peru
- Represented Canadian sponsors in the financing of facilities for the development of certain gas fields located in South Sumatra, Indonesia
- Represented lead lenders in the restructuring of the U.S. debt of large Mexican paper manufacturer
- Represented large money center bank in a large financing for an oil field equipment supplier involving the pledge of various assets located in The Netherlands, Canada, Germany, France, Scotland, and Venezuela
- Acted as lead counsel in representing major money center bank in $350 million revolving credit to a large Texas investor
- Acted as lead counsel in several other major financings, including asset securitizations, television station acquisition loans, oil and gas loans, and various inventory and receivables financings

Prior results do not guarantee a similar outcome.

Education and Professional Background

- University of Texas School of Law, J.D. with honors, 1978 (Chancellors; Order of the Coif; Executive Editor, Texas Law Review)
- North Texas State University, B.A. with highest honors, 1975
- Judicial clerk to The Honorable Charles Clark, U.S. Court of Appeals

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Practices

Project Finance and Development

Structured Finance

Syndicated Finance

Industries

Energy

Financial Services

for the Fifth Circuit, 1978-1979

- Admitted to practice: Texas, 1978; New York, 1996

Professional Recognition

- *The Best Lawyers in America* in banking law, 2007-2008

Activities and Affiliations

- Vice Chairman: Legal Opinions Committee, Business Law Section, State Bar of Texas; Houston Commercial Finance Lawyer's Forum; New York State Bar Association
- Fellow: Houston Bar Foundation

Publications and Presentations

- Speaker for various seminars including: American Bar Association's Legal Opinion Risk Seminar in New York; State Bar of Texas Business and Corporate Counsel Sections CLE; State Bar of Texas, Business Law Section's Advanced Business Law Course; The University of Texas Banking Law Institute; The University of Houston Mortgage Lending Institute; South Texas Advanced Real Estate Law Course; and numerous other seminars
- Chairman of the subcommittee responsible for, and principal draftsman of: Legal Opinions Committee of the Business Law Section of the State Bar of Texas, *Statement on Legal Opinions Regarding Indemnification and Exculpation Provisions under Texas Law*, 41 Tex. J. Bus. L. 271 (Winter 2006)

CURRENT NATIONAL LEGAL OPINION ISSUES

This panel discussion will focus on the following legal opinion issues which have been discussed at the Legal Opinion Risk Seminars held on October 17, 2006 and April 17, 2007:[1]

Factual Opinions and Negative Assurance

Responsibilities of Recipient Counsel

Assignability of Opinions

Side Letters

Customary Practice Statement

The materials provided for this panel discussion which follow are listed below:[2]

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1 To purchase copies of the handbook for the April 17 seminar (LORS2 Handbook April, 2007, $199.00) which includes copies of the LORS1 (October 17, 2006) session reports, you may contact the ABA Section of Business Law at (312) 988-5680 or e-mail ruppr@staff.abanet.org.

2 The materials authored by Donald W. Glazer and A. Mark Adcock, as well as the sample policy statements, panel discussion outline on side letters and draft statement on customary practice are reprinted with permission from the Legal Opinion Risk Seminar Handbooks for October 17, 2006 and April 17, 2007.

CURRENT NATIONAL LEGAL OPINION ISSUES (Continued)

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The Working Group
On Legal Opinions

A year ago we established a national forum for discussion of legal opinions. This was done by the ABA Section of Business in cooperation with the Business Law Section of the State Bar of Texas, TriBar and other state and local bars and S&P. We began with two Seminars on Legal Opinion Risk. This fall and next spring there will be seminars that are solely devoted to opinion questions but not necessarily focused solely on the risk aspects.

The attendees at these seminars, more than 100 at each seminar, are chairs or members of opinion committees at law firms and law departments with a substantial business law practice. They come from all over the county. Thus these one-day seminars have one of the most senior CLE audiences one will find. This strength is well utilized by the use of breakout sessions which facilitate small group discussions for more than an hour on specific problem areas.

You might ask how we can look at opinions at a national level when the law is localized state-by-state. Opinions are given in accordance with a custom that has developed. An opinion applies the law to a set of facts. While the law may be local, how we handle facts and the substitutes for them – such as assumptions, follows a more or less national pattern. Thus, the discussions at these seminars are particularly valuable as they consider the diligence required to give an opinion.

It is my honor to Chair the Working Group. Gail Merel has taken a leading role from the outset. Texas has had and will continue to have a strong voice in this national discussion forum. I am particularly grateful for the strong support the Business Law Section of the Texas Bar has provided for this project.

A. N. Field

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DEAN FOODS COMPANY FN1 & others FN2

FN1. Dean Foods Company was formerly known as Suiza Foods Corporation. Thus the docket lists the initial plaintiff as Suiza Foods Corporation.

FN2. Suiza GTL, LLC; Dean Northeast, LLC; and West Lynn Creamery, Inc.

v.

Arthur J. PAPPATHANASI & others.FN3

FN3. Arthur J. Pappathanasi, Trustee; Nicholas Scangas, individually and as Trustee; Christopher Scangas, individually and as Trustee; 330 Scangas Nominee Trust; Rubin and Rudman LLP; Michael L. Altman; Gene T. Barton; and Charles J. Speleotis.

No. Civ.A. 01-2595 BLS.

Dec. 3, 2004.

FINDINGS OF FACT, RULINGS OF LAW AND ORDER FOR JUDGMENT

VANGESTEL, J.

*1 This matter is before the Court after a jury-waived trial on the merits. The Court's findings of fact, rulings of law and an order for judgment follow. Mass. R. Civ. P. Rule 52(a). *Nessralla v. Peck,* 403 Mass. 757, 760, 532 N.E.2d 685 (1989).

The plaintiffs Dean Foods Company; Suiza GTL, LLC; Dean Northeast, LLC; and West Lynn Creamery, Inc. are all now corporately related in a manner that has no substantive effect on this case. Unless greater specificity is needed, they hereafter collectively will be called "WLC." However, since much of what is involved in this case relates specifically to West Lynn Creamery, Inc., it will hereafter be called "West Lynn Creamery."

There has been a resolution before trial of all claims against the following: Arthur J. Pappathanasi ("Pappathanasi"), individually and as Trustee; Nicholas Scangas, individually and as Trustee; Christopher Scangas, individually and as Trustee; and 330 Scangas Nominee Trust. The defendants that remain and are the subject of these findings and rulings are the law firm of Rubin and Rudman LLP ("Rubin and Rudman") and three men who at material times were partners of that firm: Michael L. Altman ("Mr.Altman"), Gene T. Barton ("Mr.Barton"), and Charles J. Speleotis ("Mr.Speleotis").

FINDINGS OF FACT

West Lynn Creamery was a long-time client of Rubin and Rudman. Mr. Speleotis was the originating partner on the West Lynn Creamery account. As such, Mr. Speleotis reviewed essentially all of the Rubin and Rudman invoices to West Lynn Creamery before the bills were sent out.

In early October 1997, West Lynn Creamery received a federal grand jury subpoena seeking any and all records relating to payments made by West Lynn Creamery to Michael Gavriel and Cathy Gavriel (the "Gavriels") or to any entities owned by, operated by or affiliated with the Gavriels. The Gavriels and their entities ran certain Dunkin' Donuts franchises and as such were customers of West Lynn Creamery. The subpoena called upon West Lynn Creamery to produce:

Any and all records of West Lynn Creamery, Inc. for payments made to Michael Gavriel, Cathy Gavriel, Bostonian Bakery and Café Corporation of America, Inc., Federal Foods, Inc., Gavriel Foods, Inc., Gav-Stra Donuts, Inc., K.A.C.Y. Corp., Lampy Corporation and Mica Corporation and any other business owned by, operated by or affiliated with Michael Gavriel or Cathy Gavriel for the period January 1, 1990 to the present to include the documents listed on Attachment A.

Attachment A to the subpoena also required West Lynn Creamery to produce the following documents related to the Gavriels or their entities: (1) records of any contracts, agreements and meetings; (2) all invoices, sales journals, accounts receivable journals, cash receipt journals, accounts payable journals, cash disbursement journals, summaries, original cancelled checks, and any other form of payment; (3) work papers (including accountants work papers); and (4) all correspondence, notes and memoranda.

*2 On October 16, 1997, Rubin and Rudman was retained by West Lynn Creamery to represent it in connection with the grand jury subpoena. Mr. Altman was the Rubin and Rudman partner responsible for the legal services provided to West Lynn Creamery in connection with the grand jury subpoena.

Rubin and Rudman opened a new billing matter for West Lynn Creamery. It was numbered 01869-048 and was entitled "Criminal-Rebate Investigation." FN4 Mr. Altman then set about to learn what he could about the rebate program. His efforts and actions follow.

> FN4. The number "01869" is the general number for West Lynn Creamery as a client. The number "048" stands for the particular matter, e.g., here, "Criminal-Rebate Investigation."

By letter dated October 30, 1997, Mr. Altman delivered certain documents responsive to the grand jury subpoena to Assistant United States Attorney John M. Hodgens, Jr. ("AUSA Hodgens").

By letter dated November 2, 1997, AUSA Hodgens informed Mr. Altman that West Lynn Creamery's response to the grand jury subpoena did not appear to be complete, and that West Lynn Creamery was expected to produce a keeper of records, together with the remainder of the records called for in the subpoena, before the grand jury on November 6, 1997. AUSA Hodgens also asked Mr. Altman to clarify, in writing, the names of the individuals and entities that he represented.

On November 7, 1997, Mr. Altman wrote a memorandum to the file summarizing a November 3, 1997, interview of Ed Beaulieu, a West Lynn Creamery employee. This memorandum states:

On November 3, 1997, I spoke with Ed Beaulieu about West Lynn's rebate programs. He said that he had no particular conversations that he could remember with anyone at West Lynn about the rebate program. He said the program had been in effect since 1981 when he first began working for West Lynn. He said that he thought the person who set up the program was Bob Walsh.

I asked Ed what he knew about the Dunkin Donuts rebate program. He said he didn't know a lot except that the salesmen delivered the rebate checks at some point during the month, and that the program was a pain in the neck. He said that the rebate program was established to serve a legitimate purpose. He said that when the salesmen delivered their checks each month, it was an excuse to visit the customer location, to see whether everything was in order, and whether the customer's needs were being met. One of West Lynn's concerns for the past four or five years was that its customers use the coolers for proper purposes. West Lynn did not want other vendors putting their products in West Lynn coolers. Therefore, by visiting the site on a monthly basis, the salesmen would be able to confirm the proper use of the cooler. In addition, the salesmen would be able to chat up the customer to determine whether they had any other needs or problems. Ed felt that the program was nonetheless a pain in the neck because it was another step in the process that invited possibilities of issues arising. If, for example, there is a question about the amount of a rebate check or whether the rebate check was delivered, that is a source of difficulties. He said that West Lynn is moving away from the rebate program.

*3 Ed said that he had no-knowledge of any funny business by any customers with respect to the rebate checks, and he didn't know the Gavriels. He asked me what was going on, and I told him that I didn't want to tell him. He also asked what I meant by "funny business" and I said that I also wasn't going to fill in the details for his imagination on that subject.

On November 6, 1997, Jim Walsh, Sales Development Manager at West Lynn Creamery, told Mr. Altman that rebates were sometimes paid to customers in cash. According to Mr. Altman's interview memorandum with Walsh:

Jim cashed checks for about 10 owners. They never gave their reasons for cashing checks.

Jim has mentioned to Nick [Scangas] about cashing checks. For example, an irate owner called about 7 or 8 years ago looking for his rebate. Nick wanted to know what was going on. Jim told Nick that the other owner received the rebate in cash. Nick said nothing. Some customers cashed their checks every month; some once in a while. Jim never knew why customers wanted cash....

According to another of Mr. Altman's interview memoranda, Nicholas Scangas, West Lynn Creamery's Executive Vice President of Sales, said the following:

Originally, Dunkin' Donuts owners were entrepreneurs with only a little money. They would come to West Lynn Creamery and ask for a loan. West Lynn could then arrange for a loan with the Credit Union [the Community Credit Union of Lynn] but the Credit Union wanted a guarantee. West Lynn was willing to provide the guarantee only because it could insure payment through rebates.

* * * * *

Cash-Jim Walsh mentioned a long time ago that a customer asked him to cash checks. He told Nick because Nick is his boss. Nick had no knowledge of why customer [sic] would want cash. He said he didn't like the idea but Jim said that the customer (Carlos Andre) insisted. Nick doesn't like cashing checks because that can lead to disputes about whether the cash was received, etc.

On November 19, 1997, Mr. Altman had a telephone conversation with James M. Merberg ("Mr.Merberg"), a criminal defense lawyer representing Michael and Cathy Gavriel the Dunkin' Donuts franchisees identified in the grand jury subpoena. During the conversation with Mr. Merberg, Mr. Altman suggested that their conversation would be subject to a joint defense agreement. Mr. Altman's November 20, 1997, memorandum to the file reads:

The Gavriels are represented by an attorney named James Merberg. His address is 66 Long Wharf, Boston 02110. His telephone number is 723-1990. He called me on November 19, 1997. I assume he called me after Brenda spoke with the Gavriels.

Merberg was mildly hostile. He basically felt that West Lynn and his clients had committed various crimes, including income tax evasion and commercial bribery. Merberg understood that West Lynn Creamery controlled the Credit Union, and its president was also president of West Lynn. He suggested that it was West Lynn's decision to have the Gavriels obtain the loan. He thought the entire transaction smelled, and he was suggesting that West Lynn was bribing the Gavriels in order to retain the business of their Dunkin Donuts.

*4 I told Merberg that he had a distorted view of the situation. I said that it was only West Lynn's goal to help its customers. I said that I had no knowledge of why the Gavriels wanted a loan, but I am sure that if they did, because of the longstanding family relationship between the Gavriels/Karas and West Lynn, that West Lynn would be as helpful as possible so that the Gavriels could obtain a loan for their Dunkin Donuts. Merberg resisted this scenario, and wouldn't share with me all of the details that he had. He realizes that his clients, particularly Mrs. Gavriel, had committed tax evasion, and it is a difficult situation.

It should be noted that Merberg said that he represented both Gavriels "for now." I asked him what he meant by that and he said that for now there was no conflict, but he didn't know how that would play out in the context of this case. He said he might end up only representing Mrs. Gavriel.

Merberg said that he could not see any legitimate reason for West Lynn to be paying rebates. I told him a little bit about the history and the present rationale, and he conveyed that he thought that was a crock.

Merberg and I talked with the agreement that that conversation would be subject to a joint defense agreement. He said that he expected that we would have to part company soon. That may mean that he is going to try to get his clients to testify against West Lynn in exchange for a deal. I told him that this case looked to me as follows:

First, it looks as if the government may have a tax evasion case against the Gavriels. I said that West Lynn had no role to play in that case, but if anyone was going after anyone else for commercial bribery, then the alleged payer and payee of the bribe had a mutual interest in cooperation. I said that furthermore, it seemed to be in neither party's interest to get roped in on a false statement charge, based upon what one says that the other does. Merberg was very skeptical about whether we could work out any kind of joint defense agreement or that he could share any information from his client. He said that he would be in a better position to know at the end of the week.

Merberg said several times that he believed that West Lynn took out loans for its customers. He made it sound as if West Lynn was the initiator of the loan. He wouldn't tell me his basis for that belief. He also said that West Lynn was paying a fixed amount each month of principal and interest on the loan. I told him that I believed we were only paying the rebate amount each month and that I believed that the rebate amount varied each month depending upon the amount of product that was purchased.

Merberg told me that subpoenas had been issued to each of the entities owned by the Gavriels to produce documents. I told him that West Lynn had received a document subpoena as well. Merberg said that the name of the investigator that was snooping around was named George Neal.

At this stage, Merberg is not terribly well versed in the facts. My goal is to try to persuade him that this was a transaction that was done because the customer wanted it done that way. I think I softened him up a little bit but I also believe that he thinks that West Lynn may have been receiving a kickback out of the "supposed" loan from the Lynn Credit Union. I put the word "supposed" in quotes because Merberg doesn't think that there was a real loan here to the customer, but rather that there was a kickback scheme in which, in order to do business with West Lynn, West Lynn told the customer to take out a loan from the Credit Union, gave the customer all of the documents to execute, walked the loan through the Credit Union, which was easy to do because West Lynn controlled the Credit Union, obtained the loan, and split it with the customer. Then, according to the allegation, West Lynn simply paid off the loan.

*5 In November or December 1997, Mr. Altman told his partner, Mr. Speleotis, that he had spoken with Mr. Merberg. Mr. Speleotis recalls that Mr. Altman told him that Mr. Merberg was trying to blame West Lynn Creamery.

Mr. Altman directed a Rubin and Rudman lawyer, Kevin Geaney ("Mr.Geaney"), to conduct legal research. Rubin and Rudman's billing records reflect that Mr. Geaney conducted the following legal research: 1.4 hours on November 18, 1997, on research regarding cases dealing with corporate and individual liability for tax evasion/conspiracy; 1.5 hours on November 19, 1997, on research regarding tax evasion/conspiracy regarding rebates; 2.3 hours on November 20, 1997, on research regarding tax evasion/conspiracy; and 1.7 hours on November 24, 1997, on research regarding "conspiracy/taxes as corporation or individual."

Mr. Geaney also provided Mr. Altman with a folder entitled "Bribery-Commercial" containing copies of G.L. c. 271, sec. 39, entitled "Illegal Gratuities, etc. and Penalty" and 18 U.S.C. sec.1952 entitled "Interstate and foreign travel or transportation in aid of racketeering enterprises."

On November 20, 1997, a West Lynn Creamery employee named Paul Paulsen ("Paulsen") testified before the federal grand jury. After the grand jury appearance, Mr. Altman prepared a memorandum to the file summarizing the areas covered by AUSA Hodgens in his questions to Paulsen before the grand jury. The memorandum states in part: "Hodgens asked about where the original checks were. Paulsen said that the original checks were still in existence, and Hodgens said that he wanted them." Despite this request, the checks were not produced to AUSA Hodgens, and he never again asked for them.

On November 26, 1997, Mr. Altman again spoke with Mr. Merberg by telephone. Mr. Altman prepared another memorandum memorializing this conversation, which states in its entirety as follows:
I spoke with Jim Merberg on Wednesday, November 26, 1977[sic]. He said that he had had an additional conversation with his client. He said that his client was aware of other loans that West Lynn engineered with the Credit Union. He also said that the loan was not for the purpose for which it appeared to be made. He insisted that the Gavriels' interest and West Lynn's interest diverge and therefore he doubted that he could cooperate. Finally, he said that it was his view that the U.S. Attorney's Office was also looking at West Lynn. I said it was my understanding that the Gavriels were a target and because the loan arrangement appeared to be so weird that the U.S. Attorney's Office was taking a side trip to take a look at what that meant.

On December 5, 1997, Mr. Altman wrote another memorandum to the file summarizing a conversation with Attorney Milton Schwartz. The memorandum states:
On December 4, 1997, Greg Demakis telephoned me and told me to call Milton Schwartz. I did so. His telephone number is 227-0508. He said that he represented the Gavriels in the lawsuit that the Stratises brought against them. He said that on four separate occasions the Gavriels received $10,000 in loans from the Credit Union-a total of $40,000. He said that the Gavriels testified that they split the checks with the Stratises. The Stratises denied that and the jury believed the Stratises and not the Gavriels. Schwartz said that Stratis is a very sleazy guy. Apparently, he was having sex with his employees and stealing money from the till of the Dunkin Donuts. Schwartz said that he brought in a young woman who worked in one of the Dunkin Donuts shops who testified how Stratis came on to her and how he was taking money out of the till. Schwartz said that she was the only witness that was totally believable in the case and the Judge rejected it. During the course of my conversation with Schwartz, he continued to refer to the payments received by the Gavriels from the Credit Union as kickbacks. I asked him why he called them kickbacks and he said "because that's what they are." I said, "Well, where are you getting that from?" He said, "Well, because those are kickbacks," I said, "Well, West Lynn calls them rebates." He said, "Well, I'm not must of a businessman; okay, they're rebates."
*6 Schwartz is a nice guy who was pretty talkative. He may be the reason that Merberg, the Gavriels' criminal attorney, has a skewed version of what went on here. Schwartz says that the Gavriels have been longtime friends of West Lynn, and have not pointed the finger at anyone at West Lynn. He said that the Gavriels never told him that West Lynn did anything wrong. Schwartz says that there were a lot of issues in the lawsuit between the Gavriels and Stratis. He said that he would send me all of the non-privileged documents pertaining to the checks and the loans and so forth. He said that he wouldn't send stuff relating to other issues, such as the boat and the car and whether Stratis could force the Gavriels to give up

their 50 percent ownership of the Dunkin Donuts shop to Stratis. Schwartz conceded that the Gavriels did not pay taxes on the monies received from the Credit Union. He mentioned Merberg's name, and I didn't want to press that point until I got his full story and the documents.

In December of 1997, Mr. Altman "was aware that there were issues outstanding that could go in any direction."

After early December of 1997, Mr. Altman heard nothing further from AUSA Hodgens until September of 1998. Mr. Altman did no more work on this matter after December 12, 1997. until September of 1998.

There were negotiations in the late fall of 1997 and winter of 1998 between Scangas Bros. Holding, Inc. ("SBHI") and Garelick Farms Inc. ("Garelick") concerning the sale of the stock of SBHI to Garelick, SBHI was a holding company that held all of the capital stock of West Lynn Creamery. The negotiations, however, were terminated in a letter from Garelick's president, Alan J. Bernon ("Bernon"), dated February 4, 1998. Bernon's letter stated:

In light of that certain demand letter dated January 29, 1998 from Anthony M. Doniger, counsel to Katherine M. Diamond, to you, that we received yesterday from your counsel, Michael Altman, and the apparent ongoing disputes among the stockholders of SBHI, we believe that continuing discussions between SBHI and Garelick under the above referenced Memorandum of Intent regarding the proposed acquisition of SBHI by Garelick would no longer be productive. Therefore, we hereby request the termination of the Memorandum of Intent, which by its terms will expire on February 16, 1998. As we indicated before. Garelick is not prepared to move forward with the threat and uncertainty of stockholder litigation against SBHI and its directors and officers.

The history of the second-generation ownership of West Lynn Creamery through SBHI has been very litigious. It has been the nature of the dissident cousins who held minority interests in SBHI to oppose nearly every proposal made by Pappathanasi. Janice Scangas and Katherine Diamond have been the most combative.

Later, after the issues among the SBHI stockholders were resolved, negotiations for the purchase of SBHI resumed. Ultimately, on June 30, 1998, Suiza Foods Corporation ("Suiza"), through its wholly-owned subsidiary Garelick Farms, Inc., purchased all outstanding stock in SBHI, the parent company of West Lynn Creamery. Rubin and Rudman represented SBHI. West Lynn Creamery and the selling shareholders in connection with the sale. In the Stock Purchase Agreement, the West Lynn Creamery sellers made the following representations to Suiza:

*7 *Absence of Litigation.* Except as set forth in *Schedule 2.10* of the Company Disclosure Schedule, there is no claim, action, suit, litigation, proceeding, arbitration or investigation of any kind, at law or in equity (including actions or proceedings seeking injunctive relief), pending or, to the Company's knowledge, threatened against the Company or any of its subsidiaries, and neither the Company or any of its subsidiaries is subject to any continuing order of, consent decree, settlement agreement or other similar written agreement with, or continuing investigation by, any Governmental Entity, or any judgment, order, writ, injunction, decree or award of any Governmental Entity or arbitrator, including, without limitation, cease-and-desist or other orders.

The Stock Purchase Agreement also required the West Lynn Creamery sellers to deliver an opinion of counsel to Garelick/Suiza. Thus, on June 30, 1998, Rubin and Rudman issued an Opinion Letter to Garelick. Paragraph 9 of the Opinion Letter-the particular paragraph of greatest significance to this case-stated:

9. To our knowledge, except as set forth in *Schedule 2.10* of the Company Disclosure Schedule, there is no claim, action, suit, litigation, proceeding, arbitration or, [sic] investigation of any kind, at law or in equity (including actions or proceedings seeking injunctive relief), pending or threatened against the Company or any of its subsidiaries and neither the Company nor any of its subsidiaries is subject to any continuing order of, consent decree, settlement agreement or other similar written agreement with, or continuing investigation by, any Governmental Entity, or any judgment, order, writ, injunction, decree or award of any Governmental Entity or arbitrator, including, without limitation, cease-and-desist or other orders.

The Opinion Letter also stated that, for the purposes of the foregoing opinion, Rubin and Rudman "have relied upon the representations of factual matters contained in the Purchase Agreement and have made no independent investigation of such factual matters; however, nothing has come to our attention which causes us to doubt the accuracy thereof." The Opinion Letter stated that "[i]n rendering our opinions we have examined such materials as we have deemed relevant to those opinions...."

There also is a separate paragraph in the Opinion Letter that reads as follows:

With respect to matters stated to be "to our knowledge," we call your attention to the fact that we have not made any independent review or investigation of agreements (other than those expressly referred to herein), instruments, orders, writs, judgments, rules, regulations or decrees by which our clients or any of their properties may be bound, nor have we made any investigations as to the existence of actions, suits, investigations or proceedings, if any, pending or threatened against our clients, except to the extent that any of the above is disclosed in any exhibit or schedule to the Purchase Agreement. However, nothing has come to our attention which causes us to doubt the accuracy of such exhibits or schedules.

*8 The Opinion Letter closes with the following:

This opinion letter is rendered solely to you and for your benefit in connection with the transaction described herein and may not be relied upon in any manner or for any other purpose by, or circulated or delivered to, [sic] other person or entity, except your successors and assigns, without our prior written consent.

Mr. Barton was the corporate lawyer at Rubin and Rudman in charge of the stock transaction.

In early June 1998, during a brief discussion about the disclosures to be made in *Schedule 2.10* to the Stock Purchase Agreement, Mr. Altman told Mr. Barton that West Lynn Creamery had received a grand jury subpoena in October 1997. Mr. Barton told Mr. Altman that they should discuss the matter with the clients.

Later, at a meeting on June 16, 1998 (the "June 1998 meeting"), Mr. Barton, Mr. Altman, Mr. Speleotis and Pappathanasi, a selling shareholder, discussed whether the October 1997 grand jury subpoena was required to be included in *Schedule 2.10.* Another selling shareholder, Nicholas Scangas, also was present at the June 1998 meeting.

Also, at the June 1998 meeting, when discussing whether to include the matter on *Schedule 2.10* as a prudent course to avoid future claims, Mr. Altman, in responding to a question from Mr. Barton, said that he had not heard from AUSA Hodgens for nearly six months and that it was his "guesstimate" that the Gavriel matter had probably gone away, with Gavriel paying a civil fine with heavy penalties for tax evasion. This "guesstimate" was consistent with Mr. Altman's experience in representing clients in tax evasion cases.

At the June 1998 meeting, both Mr. Barton and Mr. Speleotis advised Pappathansi that it would be wise to include the grand jury subpoena/investigation in *Schedule 2.10.* However, Pappathanasi professed fear that such a disclosure would incite family members who frequently disagreed with him to interfere with the sale, and for that reason he did not want the matter included on *Schedule 2.10.* The closing of the transaction took place on June 30, 1998, with the Opinion Letter as part of the closing documents, and the grand jury subpoena/rebate investigation was not disclosed in *Schedule 2.10.*

In June 1998, Rubin and Rudman had a written policy concerning the issuance and preparation of opinion letters. The policy stated in part (with emphasis in the original):

3. *Approval of Opinions.* Our Firm's policy is that certain partners must approve opinion letters covered by this policy.

The person who proposes to issue the opinion letter must bring the draft opinion to a partner authorized to approve opinion letters in the particular area, *with the completed back-up file or binder.* It is the responsibility of the reviewing partner (the "countersigning partner") to review the opinion letter, satisfy himself or herself as to its propriety and also the existence and completeness of the contents of the opinion file or binder. If there is no such back-up, the opinion cannot be approved or issued.

*9 If the countersigning partner reviews the opinion and back-up and finds it in order, he or she should approve it. This may be signified by both signing the opinion letter itself or, if two signatures on a letter seems odd or out of place, the countersigning partner may merely sign the copy of the opinion in our back-up file. Only partners may sign opinion letters. Obviously, if the countersigning partner does not agree with the substance of the opinion, the Practice Area Leader, the Managing Partner, the Assistant Managing Partner or the Firm Chairman ought to be consulted immediately to resolve the disagreement.

The countersigning partner should keep a copy of the opinion he has approved for his or her own file.

As of June 30, 1998, Jason A. Sokolov ("Mr.Sokolov"), a partner at Rubin and Rudman, was asked by Mr. Barton to countersign the Opinion Letter. In actuality, however, the Opinion Letter was not signed by any individual lawyer. Rather, it was signed:

Very truly yours,
/s/ Rubin and Rudman LLP
Rubin and Rudman LLP

Mr. Sokolov, at that time, was the countersigning partner for Rubin and Rudman opinion letters. Ordinarily, before he would countersign a Rubin and Rudman opinion letter, he would generally inquire of the person who handled litigation for the client/company as to whether there was anything else they had to discuss relative to the opinion. He did not do so in this matter.

Mr. Sokolov had participated extensively in drafting the Opinion Letter. Among other things, Mr. Sokolov was responsible for adding the nothing-has-come-to-our-attention-which causes-us-to-doubt-the-accuracy-thereof language in the two places that it appears in the Opinion Letter.

When Mr. Sokolov reviewed and approved the Opinion Letter, he was totally unaware of any grand jury investigation. He had not been told about it by Mr. Altman, Mr. Barton or Mr. Speleotis. Nor was he told about Mr. Altman's conversations with Mr. Merberg, nor did he see any of Mr. Altman's memoranda.

Mr. Sokolov said he "would have sat down with [Mr. Altman] and ... would have reviewed the entire situation from the beginning and discussed what the potential was for a real issue developing" if he had been told about Mr. Altman's conversations with Mr. Merberg.

At trial, Mr. Altman testified that he was not familiar with corporate transactions like that involved in the sale of West Lynn Creamery. He further claimed that at the June 1998 meeting, he was unaware that the information asked of him about the 1997 grand jury subpoena and matters related to it was going to be considered in connection with a Rubin and Rudman opinion letter. He apparently thought that he was only being asked about matters to be included in *Schedule 2.10* that was to be a part of the Stock Purchase Agreement. Indeed, he said that he never knew about or even saw the Opinion Letter in issue until the time that this lawsuit was filed.

At the June 1998 meeting, what Mr. Altman reported was accurate, as far as it went. However, his report did not include the following facts: there was another grand jury subpoena to the Community Credit Union of Lynn, which was the credit union that made the loans to the Gavriels and others, that sought, among other things, bank records of Pappathanasi, and Paul Spiliotis and Robert G. Walsh, two other West Lynn Creamery employees; AUSA Hodgens had told him in the fall of 1997 that it was too early to say whether West Lynn Creamery was a target or a subject of the investigation; AUSA Hodgens had suggested that West Lynn Creamery enter into a proffer practice that would enable West Lynn Creamery to provide information about its rebate program and not be charged as a result of what was revealed; the Gavriels' attorney, Mr. Merberg, had indicated that Michael Gavriel was going to cooperate with the AUSA and implicate West Lynn Creamery in the matter; while some of the rebate payments were made in cash, most others were made by checks that did not reveal that West Lynn Creamery was the payor; or the results of any of the legal research on criminal issues performed by Mr. Geaney.

*10 On September 10, 1998, Mr. Altman received a letter from AUSA Hodgens, (Exhibit 58), advising him that a Criminal Information was filed that day charging Michael Gavriel "in a conspiracy to defraud the Internal Revenue Service, in violation of Title 18, United States Code, Section 371."

The Criminal Information, which was enclosed, made reference to a certain "Vendor X." AUSA Hodgens's letter to Mr. Altman "advised that the unnamed Vendor 'X' in the Information is West Lynn Creamery ." He further "advised that West Lynn Creamery is a *target* of a Federal grand jury investigation." (Emphasis in original.)

The Criminal Information describes the manner and means by which the conspiracy charged was carried out. It included "cash infusions to operate" the Gavriels' donut shops with Vendor X "act[ing] as a conduit for obtaining loans through a North Shore credit union," and included arrangements to have Vendor X "repay the credit union loans by generating a stream of income through an invoicing and commercial kickback scheme set up by Vendor X, which is commonly referred to as a 'Rebate Program.'"

The Criminal Information further recited that Gavriel "ordered certain quantities of products from Vendor X, which, in turn, generated materially false and inflated sales invoices and caused those invoices to be sent to" Gavriel through the U.S. mails.

Bernon, president of Garelick, made clear that he would not have done the deal to buy West Lynn Creamery if he had known about the Gavriel grand jury subpoena/rebate investigation. Before the closing, he had examined *Schedule 2.10* and was satisfied with the lack of impact of any of the matters included thereon on Garelick's purchase of West Lynn Creamery.

On March 26, 2001, West Lynn Creamery entered into an agreement to plead guilty to a Criminal Information charging it with a conspiracy to defraud the United States by impeding, impairing, obstructing and defeating the lawful government functions of the Internal Revenue Service, in violation of 18 U.S.C. sec. 371. This was the same charge as brought against Michael Gavriel in September 1998. The plea agreement came after extensive negotiations with the U.S. Department of Justice, acting through the U.S. Attorney's Office in Boston. It resulted in West Lynn Creamery paying a fine of $7,200,000 and a special assessment of $400.

The amount of the fine came about as a result of the application of the U.S. Sentencing Guidelines to the crime charged. The Guideline Fine Range produced a minimum fine of $7,200,000 and a maximum fine of $14,400,000. Consequently, West Lynn Creamery was assessed the minimum fine permitted under the Guidelines. The agreement was approved by Judge Saris on June 5, 2001.

In addition to the fine and special assessment, West Lynn Creamery received from the U.S. Attorney's Office a commitment to write a letter on West Lynn Creamery's behalf that would state that these actions took place under prior ownership and that the current ownership had cooperated fully, and that the government did not have any issues or concerns with existing management. This letter then could be taken to the U.S. Department of Agriculture and help insure that the WLC did not get debarred and would be able to keep its government business. At that time the WLC group was doing about $330,000,000 annually in government business.

*11 The plaintiffs presented expert testimony from Attorney Jeffrey E. Stone ("Mr.Stone"), an experienced "white-collar" criminal defense attorney and a former federal prosecutor, to the effect that the plea agreement and the amount of the fine were reasonable under the circumstances. The grounds for that opinion took into consideration the strength of the government's case; the weakness of the defense; the good result in the bargain over the amount of the fine; and the favorable collateral issues, particularly the avoidance and assistance on the potential for debarment on government business. The Court finds Mr. Stone's opinions to be credible.

Attorneys' fees in the amount of $2,021,400.75 and costs of $149,953.86, aggregating $2,171,354.50, are said to have been incurred by the WLC group in responding to and resolving the criminal charges against West Lynn Creamery. This information was presented at the trial in summary form and marked as Exhibit 93.[FN5]

FN5. At the time of the entry of Exhibit 93, the defendants' attorneys reserved their rights to check the mathematical accuracy of the summary and to challenge the reasonableness of the fees and expenses. Because Exhibit 93 is merely in gross summary form, the Court, post trial, will permit the plaintiffs to support their fee claims and the defendants to challenge them in the usual fashion with affidavits and other supporting and opposing documentation and, if necessary, a hearing. At that time, the Court will have in mind the testimony of the plaintiffs' expert, Mr. Stone, to the effect that the fees and expenses were reasonable. It is, however, the Court that must make the ultimate decision on this issue.

RULINGS OF LAW

The plaintiffs' three claims against the defendants are: [FN6] negligent misrepresentation, common law negligence, and violations of G.L. c. 93A. The claims for negligent misrepresentation and for common law negligence, in the context of this case, are essentially overlapping. Thus, the Court will focus primarily on the negligent misrepresentation claim.

FN6. In addition to the earlier resolution of the claims against Pappathanasi and the two Scangas brothers, on October 6, 2004, the remaining parties stipulated to the dismissal, with prejudice, of Count II, Count IV, and any claim for willful or knowing conduct or trebling damages under Count VII. What remained thereafter to be tried were: Count VI against the Rubin and Rudman defendants for negligent misrepresentation; Count VII against the Rubin and Rudman defendants for violation of G.L. c. 93A for single damages, attorneys' fees and costs; and Count VIII against the Rubin and Rudman defendants for negligence.

"In order to recover for negligent misrepresentation[,] a plaintiff must prove that the defendant (1) in the course of his business, (2) supplie[d] false information for the guidance of others (3) in their business transactions, (4) causing and resulting in pecuniary loss to those others (5) by their justifiable reliance upon the information, and (6) with failure to exercise reasonable care or competence in obtaining or communicating the information." *Nota Constr. Corp. v. Keyes Assocs., Inc.*, 45 Mass.App.Ct. 15, 19-20, 694 N.E.2d 401 (1998). *Golber v. BayBank Valley Trust Co.*, 46 Mass.App.Ct. 256, 257, 704 N.E.2d 1191 (1999).
Sayers Property & Casualty Insurance Company v. Admiral Insurance Agency, Inc., 61 Mass.App.Ct. 158, 169, 807 N.E.2d 842 (2004).

Because this is a business transaction, it is Section 11 of G.L. c. 93A that applies. That section creates a cause of action for
[a]ny person who engages in the conduct of any trade or commerce and who suffers any loss of money or property, real or personal, as a result of the use or employment by another person who engages in any trade or commerce of an unfair method of competition or an unfair or deceptive act or practice....

This is the general framework in which the Court must assay the acts of the parties to this litigation.

The specific context in which this case must be examined is the rendering of an opinion or report by a law firm to an entity that is not its client. The particular kind of opinion involved here is often referred to as a "no litigation" opinion.

In this situation, the Restatement (Third) of the Law Governing Lawyers ("Restatement") provides guidance. "In furtherance of the objectives of a client in representation, a lawyer may provide to a nonclient the results of the lawyer's investigation and analysis of facts or the lawyer's professional evaluation or opinion on the matter." Restatement, sec. 95(1). "In providing the information, evaluation, or opinion under Subsection (1), the lawyer must exercise care with respect to the nonclient ... and not make any false statements prohibited under sec. 98." Restatement, sec. 95(3).

*12 To prevail, the plaintiffs here must demonstrate that the Rubin and Rudman defendants failed to conform to customary practice. "Custom and practice determining the scope of diligence in represented situations is articulated in bar-association reports, treatises, and articles." Restatement, sec. 95, Comment a. This leads the Court to an extensive report of several bar association experts on the customs and practices surrounding the rendering of "no litigation" and other types of opinions by lawyers to third parties in the context of a sale or other transfer of a business client. The report is entitled "Third-Party 'Closing Opinions' * * * A Report of the TriBar Opinion Committee," [FN7] (referred to hereafter as the "TriBar Report"). The TriBar Report may be found at 53 Bus. Law 591-679 (1998). All parties in this case agree that the TriBar Report is the appropriate reference for the situation at issue. Indeed, experts presented on each side in this trial were leading participants and contributors to the TriBar Report.

FN7. The TriBar Opinion Committee now consists of designees of the following organizations functioning as a single Committee: Special Committee on Legal Opinions in Commercial Transactions, New York County Lawyers' Association; Corporation Law Committee, The Association of the Bar of the City of New York; and Special Committee on Legal Opinions of the Business Law Section, New York State Bar Association. Members of the Allegheny County (Pa.), Atlanta, Boston, Chicago, Delaware and Ontario Bar Associations and of the State Bar of Texas are also members of the Committee.

The opinion recipient has a right to rely upon the opinion. This "means that a professional duty is owed by the third-party opinion giver to the opinion recipient. As a result ... if the opinion is negligently given and results in damage to the opinion recipient, the opinion recipient has a claim against the opinion giver." TriBar Report, p. 604, n. 29. See, e.g., *Nycal Corp. v. KPMG Peat Marwick LLP*, 426 Mass. 491, 493-499, 688 N.E.2d 1368 (1998).

Sec. 552 of the Restatement (Second) of Torts describes the tort of negligent misrepresentation committed in the process of supplying information for the guidance of others as follows:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

That liability is limited to

loss suffered (a) by a person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

The SJC in Nycal, supra, 426 Mass. at 497, 688 N.E.2d 1368, particularly adopted Comment h to Sec. 552 of the Restatement, which reads as follows:

[I]t is not required that the person who is to become the plaintiff be identified or known to the defendant as an individual when the information is supplied. It is enough that the maker of the representation intends it to reach and influence either a particular person or persons, known to him, or a group or class of persons, distinct from the much larger class who might reasonably be expected sooner or later to have access to the information and foreseeability to take some action in reliance upon it.... It is sufficient, in other words, insofar as the plaintiff's identity is concerned, that the maker supplies the information for repetition to a certain group or class of persons and that the plaintiff proves to be one of them, even though the maker never had heard of him by name when the information was given. It is not enough that the maker merely knows of the ever-present possibility of repetition to anyone, and the possibility of action in reliance upon it, on the part of anyone to whom it may be repeated.

*13 "An opinion is not a guaranty of an outcome, but rather an expression of professional judgment. That professional judgment is necessarily limited by a variety of factors discussed in [the TriBar] Report." TriBar report, p. 596.

"Factual information that is the subject of an opinion (e.g., no litigation) ... must be established in a way that meets the needs of the parties to the transaction." TriBar Report, p. 598. In actuality, what Rubin and Rudman provided was not so much an opinion as it was a confirmation of facts relating to its knowledge of what litigation and investigations may have been pending or threatened against its client, West Lynn Creamery.FN8

FN8. "Some opinion givers believe that statements dealing with factual matters should be referred to as 'confirmations' rather than opinions." TriBar Report, p. 598, n. 16.

"Opinion givers must of necessity use their own judgment as to their conformity with customary practice in the circumstances they face." TriBar Report, p. 600. Both "the Restatement (Second) of Torts and the Restatement (Third) of the Law Governing Lawyers indicate that the customary practices of lawyers similarly situated is a key factor in determining liability." *Id.*

It is equally important that the opinion giver (Rubin and Rudman here) avoid misleading the opinion recipient (the plaintiffs here). "When considering if an opinion to be given will mislead the opinion recipient, opinion preparers must think not only about the opinion itself but also about areas excluded from the opinion." TriBar Report, p. 602.

"Inclusion of the phrase 'to our knowledge' in an opinion does not by itself ... state a limitation on the investigation required by customary diligence." TriBar Report, p. 619.

An opinion letter is usually written on a law firm's letterhead and signed in the name of the firm. It thus purports to express the opinion of the firm, not merely that of the opinion preparers. The fact that an opinion letter is signed in the name of a law firm has given rise to confusion over the obligations of a law firm in preparing an opinion letter. A law firm practices only through the lawyers who work on its behalf. The opinion preparers determine the content of the opinion letter and are responsible to perform the work required to support the opinions being expressed. The law firm fulfills its obligations to the opinion recipient through the performance by the opinion preparers of customary diligence in preparing and delivering the opinion letter.

TriBar Report, p. 605.Opinion preparers ... may have occasion to make ... inquiries directed to specific issues raised by the opinion, particularly when they are aware that a lawyer in the firm who is not involved in the preparation of the opinion has information obtained through representation of the client in other matters that is likely to have a material bearing on the opinion issue. The timing and content of these inquiries will vary; they will usually be informal. The opinion preparers must take into account the responses to these inquiries in determining the reliability of the information being used to support the opinion.

*14 TriBar Report, p. 614.The no litigation opinion is intended to elicit information regarding the *existence* of pending and threatened actions and proceedings ... that might be of concern to the opinion recipient.... The presence or absence of the phrase "to our knowledge" does not change the meaning of the opinion. With or without "to our knowledge." the opinion does nothing more than provide comfort to the opinion recipient that the opinion preparers do not know the list of litigation referred to in the opinion letter to be incomplete or unreliable.

TriBar Report, p. 664.

The Rubin and Rudman defendants presented as one of their expert witnesses Boston attorney Donald Glazer ("Mr.Glazer"). Mr. Glazer is highly qualified to speak on the subject of opinion writing. He is, among other things, one of two Co-Reporters of the TriBar Report. The other Co-Reporter was one of WLC's experts, New York attorney Arthur Field ("Mr.Field").

When discussing the no litigation opinion, Mr. Glazer agreed with the following statement; in fact it is included in a book that he wrote on the subject:
The no-litigation opinion is based on the assumption that the opinion giver has a special awareness of pending or threatened actions, a special ability to verify their existence or nonexistence through client records, or special ability to ask the right questions of the appropriate people to determine that the certificate provided by the officers of the company includes and appropriately describes all pending actions.

Transcript, Vol. 7, p. 62, ll. 12-21.

The Court next considers in more detail the teachings of *Nycal*. That case involved the duties of accountants to third parties for audit reports of financial statements of their clients. The situation, however, is similar in many respects to when lawyers render opinions or confirmations about facts relating to their clients to third parties. "[T]here is no reason to arbitrarily limit the potentially liable defendants to that class [-accountants-] of professionals." *Prudential Ins. Co. of America v. Dewey, Ballantine, Bushby, Palmer & Wood*, 80 N.Y.2d 377, 381, 590 N.Y.S.2d 831, 833, 605 N.E.2d 318 (1992).

In *Nycal*, the Supreme Judicial Court addressed, for the first time. "the scope of liability of an accountant to persons with whom the accountant is not in privity." 426 Mass. at 493, 688 N.E.2d 1368. In doing so, it adopted the test taken from Sec. 552 of the Restatement (Second) of Torts. *Id.*, at 497-498, 688 N.E.2d 1368.

Also, in *Nycal*, the SJC concurred with the California Supreme Court's holding in *Bily v. Arthur Young & Co.*, 3 Cal. 4th 370, 394, 3 Cal.4th 370, 11 Cal.Rptr.2d 51, 834 P.2d 745, 769 (1992), that Sec. 552 appropriately recognizes the commercial realities in play. *Nycal, supra*, 426 Mass. at 497, 688 N.E.2d 1368. In *Bily*, the California court spoke of both negligent misrepresentations and intentional fraud in the preparation and dissemination of an audit report. *Bily, supra*, 11 Cal.Rptr.2d 51, 834 P.2d at 747.

*15 As noted above, the purpose of the "no litigation" opinion is to do nothing more than provide comfort to the opinion recipient, the plaintiffs here, that the opinion preparers, Mr. Barton, with some help from Messrs. Altman, Speleotis and Sokolov, all acting for Rubin and Rudman, did not know the list of pending or threatened litigation and investigations "set forth in *Section 2.10* of the Company Disclosure Schedule" to be incomplete or unreliable. Further, that comfort was reinforced by Rubin and Rudman's statement that "nothing has come to [its] attention which causes [it] to doubt the accuracy thereof."

Thus, an initial question here is whether what Rubin and Rudman knew about the Gavriels' grand jury subpoena and the rebate investigation as of June 30, 1998, constituted an investigation threatened against West Lynn Creamery or constituted a "continuing investigation by[ ] any Governmental Entity."

A further question is whether Rubin and Rudman misled the plaintiffs by rendering its opinion without disclosing the Gavriel grand jury subpoena and the rebate investigation. In other words, given Rubin and Rudman's collective knowledge, could it so unequivocally avoid reference to the grand jury subpoena/rebate investigation?

The Court will assess the first question at two times. First the Court will examine what Rubin and Rudman, mostly through Mr. Altman, knew in December 1997. Then the Court will consider whether the passage of five or six months in the run-up to the June 30, 1998, closing without any communication from AUSA Hodgens made any difference. In this process, the Court is not looking to see if Rubin and Rudman correctly predicted the future, but rather whether what it knew, in and of itself, should have been disclosed.

The Court begins by observing what occurred on September 10, 1998, over two months after the June 30, 1998, closing. It was then that the Criminal Information filed against Michael Gavriel, and the included charges therein relating to him and to "Vendor X," known to be West Lynn Creamery, became known to Mr. Altman. Of course, neither Mr. Altman nor anyone else at Rubin and Rudman knew of this Criminal Information at any time prior to September 10, 1998. Thus, in and of itself, the Criminal Information was not a reportable piece of information in the June 30, 1998, Opinion Letter. At the same time, however, the charges laid out in the Criminal Information are precisely what Mr. Altman became aware of in his representation of West Lynn Creamery when responding to the grand jury subpoena in 1997. Those charges are set forth in the "Manner and Means" section of the Criminal Information, (Exhibit 58), and include the following:
6. GAVRIEL periodically needed cash infusions to operate his donut shops and learned that Vendor X would act as a conduit for obtaining loans through a North Shore credit union ("Credit Union A"), whose identity is known to the United States Attorney.
*16 7. GAVRIEL arranged with Vendor X to repay the Credit Union A loans by generating a stream of income through an invoicing and commercial kickback scheme set up by Vendor X, which was commonly referred to as a "Rebate Program."
8. As part of the scheme, GAVRIEL ordered certain quantities of products from Vendor X, which, in turn, generated materially false and inflated sales invoices and caused those invoices to be sent to GAVRIEL through the United States Mails.
9. GAVRIEL, in turn, caused the various entities that he controlled to issue checks made payable to Vendor X in satisfaction of the materially false and inflated invoices.
10. Thereafter, as part of the scheme, Vendor X remitted and caused to be remitted to Gavriel and/or to Credit Union A, on behalf of Gavriel and/or the foregoing entities controlled by Gavriel, certain monies and funds through "rebate" checks, which represented the difference between the actual prices of products, as reflected on the materially false invoices, in the approximate amounts, as follows: [here was an aggregated listing showing a grand total of $431,401].
11. GAVRIEL and Vendor X caused these remitted monies and funds to be applied to the GAVRIEL Credit Union A loans. At various times, after the loans were paid off, GAVRIEL and Vendor X caused the remitted monies and funds to be made payable to the foregoing entities controlled by GAVRIEL.
12. GAVRIEL caused the remitted monies and funds to be diverted from the foregoing entities that he controlled to himself and others, whose identities are know to the United States Attorney.
13. For the years 1992 through 1996, GAVRIEL caused the foregoing entities that he controlled to file materially false U.S. Corporation Income Tax returns (Forms 1120S) in that approximately $431,401 of the remitted monies and funds was not reported as receipts of the businesses.

Expert testimony from Mr. Stone, an attorney with substantial experience in handling white-collar criminal defense work, whose testimony this Court credits, concludes that Mr. Altman should clearly have been alerted that West Lynn Creamery was in serious trouble with the rebate investigation. Further, Mr. Stone opined that it was not within the standard of care for a white-collar criminal defense lawyer to conclude as early as June of 1998 that the investigation had gone away.

On the latter point about whether the investigation had gone away, the defendants' expert, Mr. Glazer, was asked to assume that Mr. Altman said to Mr. Barton that it was his "guesstimate" that the investigation had gone away. Mr. Gazer responded:
I think if Altman sa[id] it was his guesstimate, it's a much tougher issue, and I think Barton said as much. In Barton's testimony he indicated, too, that he thought that would have been a much tougher issue, which led me to conclude that is not what he heard Mr. Altman say.

Transcript, Vol. 7, pp. 83-83, II. 23-24, 1-5.

But on this point, Mr. Glazer was mistaken in his conclusion about what Mr. Altman said to Mr. Barton. Mr. Altman twice told this Court that he told Mr. Barton that his best "guesstimate" was that the entire investigation had gone away. Transcript, Vol. 2, p. 143, ll. 11-12, and Vol. 3, p. 139, ll. 2-8.

*17 This Court concludes and rules that the information that Mr. Altman provided to Mr. Barton at the June 16, 1998, meeting regarding the status of the Gavriel grand jury subpoena and the rebate investigation as it related to West Lynn Creamery, had Altman known that the information was for the purpose of an opinion stating that Rubin and Rudman knew of no threatened governmental investigation of West Lynn Creamery, would have fallen below the standard of a reasonably competent white-collar criminal defense lawyer.

It does not excuse the situation for Mr. Altman to say he did not understand corporate transactions or for Mr. Barton to say he relied solely on Mr. Altman's expertise regarding the handling of the grand jury subpoena and its significance for purposes of the opinion being rendered. A see-no-evil, hear-no-evil, speak-no-evil approach cannot be what the TriBar Report is teaching the opinion-writing bar.[FN9] Both sides' experts were in agreement on this point.

> FN9. This Court particularly does not accept Rubin and Rudman's expert's view-apparently strongly held, and certainly strongly stated-that trial lawyers are unable to comprehend the elegant nuances of corporate opinion letters or that matters relating to grand jury subpoenas are too "arcane" for corporate lawyers to be expected to divine.

The plaintiffs' expert, Mr. Field, said:
Now, it would make no sense to me if we are going to run a fair system, and that's what we intend to do, to ignore these facts. Now, if somebody ... coming in off the street were to say: "Oh, somebody is going to sue you," you have no reason to believe them, perhaps that's different. But we need to look at the nature of the facts, the credibility of what comes before you.
There is no license here to avert your eyes, to ignore the realities.

Transcript, Vol. 5, pp. 65-66, ll. 21-24 and 1-6.

The Rubin and Rudman defendants' expert, Mr. Glazer, said essentially the same:
I said a lawyer can't simply close his or her eyes and cover his or her ears and ignore things that are right there that they know about.

They can't do that. They have to make a responsible-they have to make a good-faith judgment as to that. They can't be-in the securities law, we have the context of scienter. It can't be reckless. That's another way ...

Transcript, Vol. 7, p. 112, ll. 7-16.

Mr. Altman, however, was not the opinion preparer. Indeed, he testified that he did not even know that what he was being asked about at the June 16, 1998, meeting was to be considered for inclusion in a Rubin and Rudman opinion letter. He claims not to have known about the opinion letter until the commencement of this lawsuit. This surprised the Court, but it accepts the testimony as given. This testimony suggests not so much a failure on Mr. Altman's part, but rather a significant breakdown in the careful process established at Rubin and Rudman regarding opinion letters. Mr. Barton did not carry his investigation far enough; and Mr. Sokolov seems to have overlooked the firm's policy on opinion letters.

There is a dramatic difference in asking a lawyer in Mr. Altman's position whether he thinks a grand jury investigation has gone away, and asking him whether his law firm can decline to reveal the grand jury investigation in an opinion letter that confirms the absence of pending or threatened investigations, while being embroidered with the nothing-has-come-to-ourattention-which-causes-us-to-doubt-the-accuracy-thereof language.

*18 It cannot be consistent with the customary practice relating to opinion letters, so elaborately expressed in the TriBar Report, to permit the opinion preparer to avoid his obligations to the opinion recipient by the simple artifice of blindly adopting the report of a fellow attorney's handling of a criminal grand jury subpoena for the client in question when that fellow attorney does not even know that he is providing grist for an opinion letter mill.[FN10]

> FN10. All that either Mr. Altman or Mr. Barton had to do was place a telephone call to Mr. Merberg. If either of them had done so, they would have learned that the rebate investigation had not gone away. Rather, Gavriel, on March 25, 1998, had entered a plea agreement that included a provision that he would cooperate fully with law enforcement and government attorneys in an ongoing investigation. See Exhibit 41.

Gavriel's March 25, 1998, plea agreement makes clear that there did *exist* an ongoing investigation. See footnote 10 below. Rubin and Rudman, however, professed not to know about it. In its Opinion Letter, however, Rubin and Rudman not only failed to list in *Schedule 2.10* the Gavriel grand jury subpoena/rebate investigation, it went a significant step further when it affirmatively said: "nothing has come to our attention which causes us to doubt the accuracy thereof." These words-"nothing has come to our attention which causes us to doubt the accuracy thereof"-appear in the Opinion Letter not just once, but twice.

The Court repeats the words of the TriBar Report, p. 602, stated above. "When considering if an opinion to be given will mislead the opinion recipient, opinion preparers must think not only about the opinion itself but also about areas *excluded* from the opinion." (Emphasis added.)

The Court agrees with Mr. Field when he said:
Mr. Barton should have either decided that he could not give the opinion because he had some bad facts and chose not to dispel them or he should have disclosed these facts to the purchaser. Opinion Letters, after all, are communication; and the question is: Are you communicating the facts as they have been requested in a fair and objective way?

Transcript, Vol. 5, pp. 67-68, ll. 20-24 and 1-3.

Another relatively recent case, albeit dealing with a different kind of attorney's opinion, sheds some light on the situation presented here. In *Williams v. Ely*, 423 Mass. 467, 668 N.E.2d 799 (1996), Justice Wilkins made the following comments at p. 476, 668 N.E.2d 799:
It does not matter that the opinion that the disclaimers would generate no adverse gift tax consequences was a reasonable view of the law in 1975. The problem is not that Gaston Snow gave reasonable advice that in time proved to be wrong. The problem is that the apparent certainty of the opinion given, at a time when the issue was not conclusively resolved, denied the plaintiffs the opportunity to assess the risk and to elect to follow alternative estate planning options. If, as the judge found, attorneys in the estate planning and tax field would have advised clients of the risk, the failure of Gaston Snow to advise the plaintiffs of the risk was negligent.

Here, even more so than in *Williams,* the problem is that the apparent certainty of the confirmation given by Rubin and Rudman-that there was no threatened investigation involving West Lynn Creamery-came in an affirmative statement; it was not an oversight. And the confirmation was made at a time when it was not correct, thereby denying the plaintiffs the opportunity to assess the risk and to elect to follow alternative options with regard to the purchase of West Lynn Creamery.

*19 In making the foregoing ruling, the Court has applied an objective standard to the actions of Rubin and Rudman. It is not basing its conclusions on, or finding liability because of, mere errors of judgment.

The Rubin and Rudman defendants did not conduct the inquiry that they were required to make by customary practice. The confirmation they gave, grounded as it was as on errors of fact, created for the recipients the comfort that an ongoing investigation did not exist *and* that nothing had come to the attention of Rubin and Rudman that cast doubt about the accuracy of that report.

The Court turns now to the subjects of whether the plaintiffs were (a) persons or one of a limited group of persons for whose benefit and guidance Rubin and Rudman intended to supply the information; and (b) through reliance upon it in a transaction, that Rubin and Rudman intended the information to influence the recipients. Restatement (Second) of Torts, Sec. 552.

The plaintiffs were definitely "one of a limited group of persons for whose benefit and guidance Rubin and Rudman intended to supply ... information."

What remains is whether Rubin and Rudman intended the plaintiffs to rely upon the Opinion Letter in the West Lynn Creamery acquisition and whether Rubin and Rudman intended the information therein to influence the plaintiffs in the matter. Two things confirm this: (1) Rubin and Rudman's own words; and (2) the June 30, 1998, closing.

The last sentence of the Rubin and Rudman Opinion Letter contains Rubin and Rudman's intent: "This opinion letter is rendered solely to you and for your benefit in connection with the transaction described herein and may not be relied upon in any manner or for any other purpose by, or circulated or delivered to, [sic] other person or entity, except your successors and assigns, without our prior written consent."

Further, the Opinion Letter was a condition of the closing; it was present at the closing; and the closing was accomplished.FN11 See *Prudential Ins. Co., supra,* 80 N.Y.2d at 384-385, 590 N.Y.S.2d at 834-835, 605 N.E.2d 318.

FN11. The Court does not accept the implication in the closing argument for the Rubin and Rudman defendants that the Opinion Letter was just an extraneous, perhaps redundant, piece of paper lying unnoticed and uncared for in a rack of documents at the closing, or that its existence as a requirement of closing was somehow-no evidence showed how-waived by the plaintiffs.

[I]n *Yorke v. Taylor,* 332 Mass. 368, 374, 124 N.E.2d 912 (1955), [the Supreme Judicial Court] adopted the rule of the Restatement of Torts sec. 540 (1938), which states: "The recipient in a business transaction of a fraudulent misrepresentation of fact is justified in relying on its truth, although he might have ascertained the falsity of the representation had he made an investigation...." The Restatement (Second) of Torts sec. 540 states: "The recipient of a fraudulent misrepresentation of fact is justified in relying upon its truth, although he might have ascertained the falsity of the representation had he made an investigation." Restatement (Second) of Torts sec. 541 states: "The recipient of a fraudulent misrepresentation is not justified in relying upon its truth if he knows that it is false or its falsity is obvious to him." There is thus a distinction between a falsity that could only be uncovered by way of "investigation" and a falsity that was readily apparent or "obvious." Comment a to Restatement (Second) of Torts sec. 540, *supra,* states that, "if a mere cursory glance would have disclosed the falsity of the representation, its falsity is regarded as obvious under the rule stated in sec. 541."

*20 *Kuwaiti Danish Computer Co. v. Digital Equipment Corporation,* 438 Mass. 459, 467-468, 781 N.E.2d 787 (2003).

In the matter before the Court, the Rubin and Rudman defendants assert that they had no knowledge of the continuing nature of any investigation resulting from the Gavriel grand jury subpoena or that West Lynn Creamery might be involved as a target or subject thereof. Accepting that as true,FN12 the Court notes that the same defendants cannot successfully argue that any falsity in their Opinion Letter was readily apparent or obvious. The plaintiffs were justified in relying on the Opinion Letter and the recitation contained in *Schedule 2.10* made a part thereof.

FN12. In doing so, the Court is not ignoring the significant fact that something certainly should have come to Rubin and Rudman's collective attention that would have caused doubt about the accuracy of such a confirmation.

The Court finds the amount of the fine and special assessment-$7,200,400-to be an appropriate amount for assessment as an element of damages as a direct consequence of the Opinion Letter's misleading failure to warn of the grand jury subpoena/rebate investigation. The amount of the fine came, after all, from the mandatory application of the U.S. Sentencing Guidelines, not from some vague opinion of an economic expert. Further, the amount of the fine was at the low end of the Guideline Fine Range.

The Court also agrees that those reasonable attorneys' fees and expenses that were incurred after the June 30, 1998, closing and were responsive to the matter as it became known on September 10, 1998, are the only other element of damages. As noted above, the amount and reasonableness of those fees and expenses remains for further proceedings.

The defendants argue that there was a failure on the part of the plaintiffs to mitigate their damages. In pressing this argument, they point to the provision of the Stock Purchase Agreement that makes their former clients, Pappathanasi and the two Scangas brothers, indemnitors with regard to any representations and warranties contained in the agreement, particularly *Schedule 2.10.* No claim for indemnification was made by the WLC group within the time limits provided in the Stock Purchase Agreement and the plaintiffs, before that time expired, had more than enough knowledge to proceed with an indemnification claim.

The plaintiffs did not just ignore Pappathanasi and the Scangas brothers, however. They were named as defendants in this law suit. Nine of the eleven counts in the Second Amended Complaint are directed at Pappathanasi and the Scangas brothers. These counts are as follows: Count I and Count III for fraud/misrepresentations; Count IV for civil conspiracy; Count V for unjust enrichment; Count VI for negligent misrepresentation; Count VII for violation of G.L. c. 93A; Count IX for reimbursement of indemnification advances; Count X for rescission;

and Count XI for breach of contract.

On July 20, 2004, all parties to this action entered into a stipulation, pursuant to Mass. R. Civ. P. Rule 41(a)(ii), dismissing, with prejudice, all of the plaintiffs' claims against Arthur Pappathanasi, Nicholas Scangas and Christopher Scangas, and the dismissal, with prejudice, of all of the Scangas defendants' counterclaims against the plaintiffs. See Paper # 108. The stipulation of dismissal was signed by counsel for all parties, including counsel for the Rubin and Rudman defendants.

*21 The stipulation of dismissal does not describe in any way what was involved in the resolution of these claims, e.g., whether anything of value was paid or delivered by the Scangases or Pappathanasi to any of the WLC entities. The signatories to the stipulation are presumed to know what was involved and the significance of what was being signed, and they are fully bound by the stipulation.

The defendants here presented no evidence at the trial of this case suggesting in any way that anything about the resolution of the claims with Pappathanasi and the Scangases needs to be considered with regard to the proper measure of damages due against the Rubin and Rudman defendants; and it will not be. See, e.g., *Wadsworth v. Boston Gas Co.*, 352 Mass. 86, 94, 223 N.E.2d 807 (1967); *Anti v. Boston Elevated Ry. Co.*, 247 Mass. 1, 6, 141 N.E. 598 (1923). The Court rules that there was no failure to mitigate damages by the plaintiffs.

Next, the Court focuses specifically on the count seeking relief against the Rubin and Rudman defendants for alleged violation of G.L. c. 93A, sec. 11.

There is no question but that the conduct in issue here occurred primarily and substantially in Massachusetts. The "center of gravity of the circumstances that give rise to the claim" is clearly in the Commonwealth. *Kuwaiti Danish Computer Co., supra*, 438 Mass. at 473, 781 N.E.2d 787. Nor is there any doubt that the plaintiffs suffered a loss of money resulting from the actions of the Rubin and Rudman defendants. See, e.g., *Baldassari v. Pub. Fin. Trust*, 369 Mass. 33, 45, 337 N.E.2d 701 (1975).

There is, however, at least some question as to whether the actions by the Rubin and Rudman defendants met the "trade or commerce" requirement of c. 93A. See, e.g., *First Enters., Ltd. v. Cooper*, 425 Mass. 344, 347, 680 N.E.2d 1163 (1997). Were this a legal malpractice case the answer seems clear. See *Brown v. Gerstein*, 17 Mass.App.Ct. 558, 569-571, 460 N.E.2d 1043 (1984). The WLC group, however, were not Rubin and Rudman's clients and Rubin and Rudman's obligations or duties to the WLC group arise only from those factors that are required by custom and practice in issuing opinion letters to nonclients.

The "trade or commerce" issue notwithstanding, a further and more significant issue on the c. 93A claim is whether the plaintiffs have met the greater burden that the appellate courts have instructed must apply to claims-like that here-filed under sec. 11. See, e.g., *Madan v. Royal Indemn. Co.*, 26 Mass.App.Ct. 756, 763 n. 7, 532 N.E.2d 1214 (1989). "One can easily imagine cases where an act might be unfair if practiced upon a commercial innocent yet would be common practice between two people engaged in business." *Spence v. Boston Edison Co.*, 390 Mass. 604, 616, 459 N.E.2d 80 (1983).

It has been said that in determining whether the conduct of the Rubin and Rudman defendants was unfair, this Court "should ... focus on the nature of the challenged conduct and on the purpose and effect of that conduct." *Stagecoach Transp., Inc. v. Shuttle, Inc.*, 50 Mass.App.Ct. 812, 817, 741 N.E.2d 862 (2001). See also *Mass. Employers Ins. Exch. v. Propac-Mass, Inc.*, 420 Mass. 39, 42-43, 648 N.E.2d 435 (1995). More recently, however, the SJC appears to have reverted back to a more objective standard:

*22 We have stated that "a practice or act will be unfair under G.L. c. 93A, sec. 2, if it is (1) within the penumbra of a common law, statutory, or other established concept of unfairness; (2) immoral, unethical, oppressive, or unscrupulous; or (3) causes substantial injury to competitors or other business people." *Heller Fin. v. Insurance Co. of N. Am.*, 410 Mass. 400, 408, 573 N.E.2d 8 (1991).... We have stated that "[t]he purpose of G.L. c. 93A is to improve the commercial relationship between consumers and business persons and to encourage more equitable behavior in the marketplace." *Poznik v. Massachusetts Med. Professional Ins. Ass'n*, 471 Mass. 48, 53 (1994).

Morrison v. Toys "R" Us, Inc., Massachusetts, 441 Mass. 451, 457-458, 806 N.E.2d 388 (2004).

Here, the Court rules that the actions of the Rubin and Rudman defendants clearly were not "immoral, unethical, oppressive, or unscrupulous." *PMP Assocs. v. Globe Newspaper Co.*, 366 Mass. 593, 596, 321 N.E.2d 915 (1975). Further, the connection between

Rubin and Rudman and the plaintiffs is not clearly a "commercial relationship between consumers and business persons," nor did the situation occur in "the marketplace."

Also, the plaintiffs are hardly lacking in sophistication about the matter in issue. The WLC parties, on a regular basis, made acquisitions countrywide of milk and other dairy product producers, and were represented throughout the transaction in issue by sophisticated Texas counsel. "[N]ot every negligent act is unfair or deceptive and thus unlawful under G.L. c. 93A. sec. 2." *Swanson v. Bankers Life Co.*, 389 Mass. 345, 349, 450 N.E.2d 577 (1983).

Given all of the foregoing, this Court rules that the greater burden to show a c. 93A, sec. 11 claim has not been met.

Finally, the Court observes, as it did in its findings, that the Opinion Letter is that of Rubin and Rudman LLP as a firm, not that of the individual attorneys who may have played a role in its creation. Based solely on the inclusion of the letters "LLP" in the firm's name, and not upon any evidence presented, this Court presumes that Rubin and Rudman is a limited liability partnership. See G.L. c. 108A, sec. 46; S.J.C Rule 3:06(2)(c). Nothing presented indicates that any of Messrs. Altman, Barton or Speleotis were themselves individually practicing in some entity form. See, e.g., S.J.C. Rule 3:06(2)(a), last sentence. Thus, the Court further assumes that defendants Messrs. Altman, Barton and Speleotis, at all material times, were among the "owners" of Rubin and Rudman, having been designated as partners thereof.

"Each owner of the entity shall be personally liable for the damages which arise out of the performance of legal services on behalf of the entity and which are caused by his or her own negligent or wrongful act, error, or omission." S.J.C. Rule 3:06(3)(a). Here, although the Court finds the entity Rubin and Rudman LLP liable pursuant to Count VI for negligent misrepresentation and Count VIII for common law negligence, it does not find any of the three individual Rubin and Rudman defendants separately liable therefor. The misrepresentations and the negligence was the collective act or failure to act of the entity. No individual act or failure to act of any of the individual owners, standing alone, was directed at the plaintiffs or caused the plaintiffs harm. As to Messrs. Altman, Barton or Speleotis, none individually made any representations to any of the plaintiffs, nor did any of them individually commit any negligent acts toward any of the plaintiffs. It was the firm itself that had the duty and acted collectively with regard to the WLC group.

ORDER FOR JUDGMENT

*23 The plaintiffs are directed, within 20 business days from the date hereof, to serve upon the Rubin and Rudman defendants an appropriately supported request for assessment of reasonable attorneys' fees and reasonable costs consistent with the foregoing findings and rulings. Upon such service, the Rubin and Rudman defendants, within 20 business days from the date of such service, shall serve their response upon the plaintiffs. Thereafter, plaintiffs' counsel shall file the total package, much like a Superior Court Rule 9A motion filing, with the Court for action.

After resolution of the attorneys' fees and costs issues, final judgment against Rubin and Rudman LLP only shall enter for the plaintiffs on Count VI and Count VIII of the Second Amended Complaint. The Second Amended Complaint shall be dismissed on Count VII and as against Michael L. Altman, Gene T. Barton and Charles J. Speleotis.

Mass.Super.,2004.
Dean Foods Co. v. Pappathanasi
Not Reported in N.E.2d, 18 Mass.L.Rptr. 598, 2004 WL 3019442 (Mass.Super.)

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3/21/07
Donald W. Glazer

CHAPTER EIGHTEEN

NEGATIVE ASSURANCE*

§18.1 INTRODUCTION

The lawyers representing the company and the underwriters in an underwritten public offering registered under the Securities Act of 1933 (the "Securities Act") have long been expected to provide the underwriters so-called negative assurance[1] regarding the accuracy and adequacy of the disclosures in the registration statement and prospectus.[2] More recently, the practice has developed of also providing negative assurance in certain types of unregistered offerings, such as some Rule 144A[3] and Regulation S offerings.[4]

Negative assurance is not a legal opinion.[5] It expresses no legal conclusions[6] but simply provides the recipient comfort that, while working on an offering, nothing came to the attention of the lawyers involved in the preparation of the disclosure document that caused them to believe that, as of its date, it contained any materially untrue or misleading statements.[7] Use of the word "believe" distinguishes negative assurance from the legal opinions contained in a traditional closing opinion. Negative assurance expresses a subjective belief not a professional judgment.[8]

Underwriters, placement agents, and other financial intermediaries who assist companies in raising capital have good reason to be concerned about the possibility of being sued by disappointed investors. Not only do the securities laws expose them to liability for disclosures they may not have known to be untrue or misleading,[9] but the liability to which those laws expose them is potentially enormous. The securities laws, however, do provide defenses,[10] and the desire to ensure the availability of those defenses has given rise to negative assurance.[11]

Section 4.4 of the Revised ABA Guidelines states that lawyers normally should not be asked to confirm their lack of knowledge of particular factual matters.[12] Requests for negative assurance in securities offerings[13] are an exception to Section 4.4. The exception applies, however, only when receipt of negative assurance has the potential of helping the recipient in a meaningful way establish a defense from liability under the securities laws.

To be meaningful, the belief negative assurance expresses must be informed. Otherwise, that belief would merit no more weight than the belief expressed by a stranger to the offering. In practice, counsel's belief is regarded as informed when counsel represented the company or financial intermediary in a registered public offering of securities or in an unregistered offering in which the disclosure document was similar to a prospectus and the process for preparing it akin to that typically followed in preparing a prospectus for a registered public offering.[14]

Today, the practice of requesting negative assurance in certain types of offerings is so well-established that receipt of negative assurance may itself be regarded as part of a recipient's required due diligence.[15] Nevertheless, requests for negative assurance are not always appropriate, and, when they are, issues remain as to who the recipient should be, who should give it, what it should cover, and how it should be drafted. Those issues are addressed in the following sections.

§18.2 WHEN SHOULD NEGATIVE ASSURANCE BE GIVEN?

As indicated in Section 18.1, requests for negative assurance are appropriate only when its receipt has the potential of helping the recipient in a meaningful way to defend itself from liability under the securities laws. Thus, requests are appropriate only when the document to which negative assurance is directed is a formal disclosure document, either a registration statement and prospectus under the Securities Act or an information statement containing comparable disclosures. In addition, the belief expressed, while subjective, must be an informed belief, reflecting what the lawyers involved learned while participating in the extensive drafting and redrafting of the disclosure document, in depth review of company documents and probing inquiry of company executives that are characteristic of the process of preparing a registration statement and prospectus for a registered underwritten public offering of securities.[1]

At one time, whenever a company wished to sell its securities publicly, it was required to prepare a lengthy prospectus containing a detailed description of the company's business and management and a full set of audited financial statements.[2] The use of long-form prospectuses continues for initial public offerings and, often, follow-on offerings by smaller public companies. For larger public companies with substantial public floats, however, lengthy prospectuses describing in great detail the company's business and management are largely a thing of the past.

Today, larger public companies normally register their securities on so-called short-form registration statements[3] that include prospectuses that incorporate by reference information contained in reports filed by the company under the Securities Exchange Act.[4] By eliminating the need to draft the many disclosures already contained in Securities Exchange Act filings, short forms have compressed the preparation time for registration statements and prospectuses.[5] They have not, however, led to a decline in requests for negative assurance.[6] Instead, the negative assurance that is given is understood to be based on the work done and inquiries made in the limited time available, supplemented by counsel's existing knowledge of the company.[7] Normally, when lawyers representing a company provide negative assurance in these circumstances, they have had a relationship with the company, have kept abreast of the company's affairs on an ongoing basis, and are familiar with the disclosures in the company's Securities Exchange Act reports (and, often, participated in their preparation).[8]

No hard and fast rules exist on when lawyers should decline to provide negative assurance on offerings of securities registered on short-form registration statements. Lawyers need to be concerned, however, if they have not represented the company before and are not knowledgable about its business and the disclosures in its Securities Exchange Act reports. Lawyers also need to be concerned that the information in those reports that is incorporated by reference is current and complete (as it may not be, for example, if material financial information circulated in a press release has not yet been filed with the Securities and Exchange Commission).[9]

Another development that has complicated the giving of negative assurance has been the introduction of new ways for companies to offer securities without registration under the Securities Act. These new types of offerings, which developed following the adoption by the Securities and Exchange Commission of Rule 144A and Regulation S,[10] often involve a disclosure document that looks very much like a statutory prospectus[11] and a process for preparing it that is similar to the process followed in preparing the prospectus for a registered underwritten public offering. In addition, they typically involve a financial intermediary whose role is analogous to that of an underwriter in a registered public offering. When these offerings were introduced, financial intermediaries requested negative assurance along the lines they were accustomed to receiving in registered offerings. Many lawyers, however, resisted, some vehemently, on the grounds that the practice of giving negative assurance had developed as a way of helping underwriters establish a defense from liability under Section

11 of the Securities Act and Section 11 applied only to registered offerings. Their response did not sit well with financial intermediaries, who countered -- correctly -- that receipt of negative assurance had the potential of helping them avoid liability for unregistered offerings under provisions of the securities laws other than Section 11. Although some lawyers backed down only grudgingly, ultimately most lawyers conceded the point, and today counsel in these types of offerings routinely provide negative assurance when the disclosure document is comparable to a statutory prospectus and the process followed in preparing it is similar to the process that would have been followed had the offering been registered.[14]

The fact that negative assurance is now given in some unregistered offerings does not mean that requests for negative assurance are appropriate in all offerings.[15] The touchstones are the nature of the offering document and the process followed in its preparation. Thus, requests for negative assurance normally are inappropriate in a traditional private placement in which a placement agent, using an offering document prepared with only limited involvement of company counsel, seeks to sell a company's securities privately in an unregistered offering. For each offering the questions to be asked in deciding whether a request for negative assurance is appropriate are whether the disclosure document is comparable to a prospectus and whether the process by which it was prepared and the lawyers' role in that process were sufficient to make the negative assurance being provided meaningful.[17] Apart from some Rule 144A and Regulation S offerings,[16] the answers to these questions for most unregistered offerings will be "No."[18]

When the process for preparing the disclosure document in an unregistered offering is different from that followed in a registered underwritten public offering, financial intermediaries sometimes offer to accept a modified version of negative assurance that describes counsel's limited role in the preparation of the disclosure document. Modifying the form of negative assurance, however, does not make an inappropriate request appropriate. The limited role played by counsel in preparing the disclosure document falls short of what is needed to make the belief expressed by negative assurance an informed belief. Hence, negative assurance in those circumstances is not meaningful and experienced lawyers routinely -- and properly -- decline requests for it.[19]

§18.3 To Whom Should Negative Assurance Be Given?

In a registered underwritten public offering negative assurance serves its purpose when it helps the underwriters establish a defense from liability under the securities laws.[1] In an unregistered offering it serves its purpose when it helps a financial intermediary establish that it lacked the scienter required for liability under Rule 10b-5 of the Securities Exchange Act.[2]

Negative assurance does not serve its purpose when its recipients have no exposure to liability under the securities laws or cannot use it to bolster a defense from liability.[3] Thus, requests for negative assurance by the ultimate purchasers in an offering (as opposed to the underwriters or other financial intermediaries) are inappropriate.[4] So too are requests for exclusion as negative assurance by trustees, transfer agents, custodians and others who may play a role in an offering but who do not participate in the preparation of the disclosure document and are not responsible for any untruths or omissions it might contain.[5]

Historically, negative assurance normally appeared in a separate, unnumbered paragraph near the end of a standard closing opinion. Today, it often is provided in a separate letter.[6] A standard closing opinion can have many addressees. By permitting an opinion giver to tailor who receives negative assurance, the separate letter approach affords opinion givers a convenient way to exclude as recipients everyone other than the underwriters or financial intermediaries.[7] In addition, the separate letter approach helps to emphasize that, unlike the numbered paragraphs in a traditional closing opinion, negative assurance is not a legal opinion but merely a statement of subjective belief.

§18.4 Who Should Give Negative Assurance?

The lawyers who oversee the preparation of the disclosure document for the company and the lawyers who represent the underwriters normally are both expected to give negative assurance.[1] In each case their giving negative assurance is justified by their active involvement in the offering process, their familiarity with the disclosure document as a whole and their understanding of the disclosure requirements of the federal securities laws.

Other lawyers who assist in an offering, for example, lawyers retained to advise on patents, trademarks, or regulatory matters, ordinarily should not be asked for negative assurance, even on the portion of the disclosure document on which they worked.[2] Instead, if they are required to give an opinion at all, that opinion should be in the form typically used when an opinion is given on the descriptions in a disclosure document of laws and contracts.[3] Asking lawyers who have played only a limited role in the preparation of a disclosure document to provide negative assurance normally is inappropriate because they do not have a full picture of the disclosures being made or the expertise required to assess what is and is not required to be disclosed. Thus, the belief they would be expressing would not be an informed belief and their providing negative assurance would not serve the purpose that makes requests for negative assurance appropriate.[4]

§18.5 COVERAGE

When lawyers give negative assurance, they ordinarily cover everything in a disclosure document except for the financial statements and other financial and accounting data (or, sometimes, "information" instead of "data").[1] Lawyers do not give negative assurance on the audited financial statements because the audited financial statements are the subject of the report of the company's independent public accountants[2] and on the unaudited financial statements and other financial and accounting data because they normally are addressed in the accountants' comfort letter.[3]

Some lawyers routinely seek to exclude coverage of statistical data, such as industry information (or, for that matter, historical percentages of annual book supplements returned). Often, however, recipients object. Lawyers who seek to exclude statistical data argue that they have no particular competence to evaluate it.[4] Recipients, on the other hand, respond that statistical data is not addressed by the auditors' report or comfort letter and argue that statistical data is no different in kind from the many other types of technical information that often appear in a disclosure document and that negative assurance normally covers.

Whether or not statistical data is covered should depend on the statistical data at issue. If the nature of the data is such that a lawyer cannot be expected to understand or evaluate it, the belief counsel is expressing would not be informed, and negative assurance is unlikely to be of any real help to the recipient in establishing that it exercised an appropriate level of diligence with regard to that data. On the other hand, if the data is of a type that a lawyer can comprehend, its coverage may be helpful to the recipient. Recognizing that reason does not always carry the day and that statistical data sometimes might be covered in circumstances when logically it should not, the ABA Report on Negative Assurance puts the significance of covering statistical data into context by pointing out in a carefully worded footnote that "Even if statistical data . . . [is] not excluded, it is understood that there are limitations on what lawyers can provide in areas outside their expertise."[5]

As discussed in §18.4, counsel retained to advise on a particular matter ordinarily should not be asked to provide negative assurance. In the unusual circumstance in which that counsel does provide negative assurance,[6] the lawyers who are overseeing the preparation of the disclosure document may properly exclude from the negative assurance they give whatever is covered by the negative assurance provided by that other counsel. In the more usual case in which other counsel does not provide negative assurance, the lawyers giving negative assurance should not exclude from its coverage the matter for which other counsel was retained. Instead, in giving negative assurance, those lawyers may base their belief regarding that matter on the advice of that other counsel and, if they choose, state their reliance expressly.[7]

§18.6 MEANING OF "WE BELIEVE"

As a statement of subjective belief, negative assurance covers everything the lawyers whose belief it expresses are consciously aware of.[1] Thus, negative assurance requires those lawyers to take into account all the facts they recognize to be applicable no matter how they may have learned them. Conversely, as a statement of subjective belief, negative assurance does not cover facts those lawyers may have known at one time but have forgotten or facts lodged deep in the recesses of memory that did not come to mind when negative assurance was given. Nor does negative assurance cover connections between facts these lawyers might have drawn, inferences they might have made or conclusions they might have reached but in each case did not.

When given by a law firm (as opposed to an individual), negative assurance normally is couched in the first person, "us." A law firm, however, cannot itself have a state of mind,[2] and, therefore, inherent in the use of the word "us" is the question of whom "us" refers to when negative assurance is given by a law firm. The answer is that "us" refers to the lawyers in the firm who participated actively in the preparation of the disclosure document.[3] Those are the only lawyers in the firm who, through their participation in the offering, have become sufficiently familiar with the company and the disclosure document to have developed the informed belief required to help recipients in a meaningful way establish a defense from liability under the securities laws.

Section 18.2 of this chapter describes the process by which counsel's belief becomes sufficiently informed. In that process negative assurance is the tail, not the dog. The fact that lawyers who work on a securities offering are expected to provide negative assurance does not change the scope or nature of the services they perform.[4] Instead, in offerings in which requests for negative assurance are appropriate, negative assurance is provided on the basis of what would have been done anyway even if negative assurance was not being provided. The essentially passive role negative assurance plays in the work lawyers perform in a securities offering is underscored by negative assurance's[1] customary lead-in, which, in delineating the services performed, typically describes what lawyers normally do in securities offerings whether or not they provide negative assurance and, in introducing its conclusion, states that on the basis of what was learned in performing those services "nothing came to our attention that caused us to believe . . . ."[5]

§18.7 DRAFTING

Because of negative assurance's unusual nature and lawyers' understandable desire to limit its scope as much as possible,[1] negative assurance looks nothing like the numbered paragraphs in a standard closing opinion. Instead of briefly stating a legal conclusion, negative assurance typically goes on and on, its long and prolix paragraphs[2] of densely written, difficult to parse prose introducing, qualifying and explaining a carefully couched and highly stylized statement of belief: that nothing came to counsel's attention while working on the offering that caused counsel to believe[3] that the disclosure document contained an untrue statement of a material fact or omitted to state a material fact required to be stated or necessary to make the statements made not misleading.[4] The ABA Report on Negative Assurance offers a form of negative assurance that, while characterized by that report as merely illustrative,[5] has been accepted as a model by both givers and recipients[6]

In drafting negative assurance, some lawyers include additional limitations that do not appear in the ABA form but are alluded to in the notes. One such limitation states that counsel has relied for matters of a non-legal nature on the judgment of management or others regarding the basis for the disclosures on which negative assurance is being given.[7] Lawyers who include this limitation view it as a self-evident elaboration of a statement appearing in the ABA form (and in most other forms) that many of the determinations required to be made in preparing the disclosure document were of a non-legal nature.[8] Recipients, however, not infrequently object to counsel's limiting negative assurance in this way. The basis for that objection usually is more visceral than substantive, reflecting little more than an ill-defined discomfort with language perceived to be outside the ordinary. Nevertheless, lawyers who include such a statement in their first draft usually regard it as not worth fighting for and willingly drop it when they encounter resistance.

Another limitation lawyers sometimes include that does not appear in the ABA form derives from the practice many lawyers follow of including in their closing opinions an express definition of the phrase "to our knowledge."[9] Analogizing to that definition, some lawyers, when giving negative assurance, state expressly that the words "attention" and "believe" in the phrase "nothing came to our attention that caused us to believe" mean "conscious awareness" and that the words "our" and "us" in that phrase refer not to everyone in the firm but only to those who have actively participated in the preparation of the disclosure document.[10] Some recipients have been willing to accept this definition, recognizing that, like the standard definition of "to our knowledge," it simply makes clear what, as a practical matter, negative assurance must mean when it is provided by a large law firm.[11] Others, however, have refused to accept it, a few vehemently. Now that the ABA Report on Negative Assurance confirms that the words "attention" and "believe" and "one" and "us" have the meaning an express definition would have provided, many lawyers, having rued the day they opened Pandora's box by broaching the issue,[12] have discontinued their efforts to define those words expressly. [13]

§18.8 Inadvertent Negative Assurance

Closing opinions, including opinions on bank loans and other transactions not involving the sale of securities, often contain language to the effect that for certain factual matters the opinion giver has relied without independent investigation on representations by the company in the agreement and on certificates of officers of the company (among others).[1] As a condition to accepting this language, opinion recipients sometimes ask that the opinion preparers confirm in the opinion that they have no knowledge that any of the representations or certificates on which they are relying are untrue.[2]

On its face such a confirmation seems innocuous enough in that it appears to be simply an affirmation that the opinion preparers are acting in accordance with customary practice.[3] In reality, however, it is a wolf in sheep's clothing, providing an opinion recipient a basis for bringing an action against the opinion giver even if all the opinions given by the opinion giver are true.[4] The purpose of a closing opinion is to express an opinion giver's legal conclusions with regard to the matters addressed. It is not to verify facts. Thus, requests that lawyers confirm their lack of knowledge of particular factual matters are *inappropriate*,[5] and experienced lawyers resist them even when they are framed narrowly to cover only the factual representations and certificates being relied on for opinion purposes.

§18.1

* This chapter greatly benefited from comments furnished to Mr. Glazer at a roundtable discussion held in Boston in July 2004. Thanks are extended to the participants, who included Constantine ("Gus") Alexander, William Asher, Stephen Carr, Stanley Keller, Robert Nutt, James Smith, and Jeffrey Somers. Thanks also are extended to Gerald Backman (reporter for the ABA Report on Negative Assurance), Martin Carmichael, Keith Higgins (co-chair with Mr. Backman of the ABA Task Force on Securities Law Opinions), and Richard Howe for their helpful comments.

[1] Negative assurance is sometimes referred to as a "10b-5 opinion." That, however, is a misnomer. As discussed below, negative assurance is not an opinion, and its principal purpose, at least historically, has not been so much to address concerns under Rule 10b-5 of the Securities Exchange Act of 1934 (the "Securities Exchange Act") as to assist recipients in establishing a defense from liability under the Securities Act. The California 2005 Report at 17 [App. 22 at 22:XX] expresses the belief that "use of the term 'Rule 10b-5 opinion' should . . . be discontinued."

[2] In 2004 the Task Force on Securities Law Opinions of the American Bar Association's Section of Business Law published a report on negative assurance in securities offerings (the ABA Report on Negative Assurance). That report, which is reproduced as Appendix Six, reflects the considered views of experienced lawyers who both give negative assurance and represent the financial intermediaries who receive it. The ABA Report on Negative Assurance currently is the most authoritative work on negative assurance in securities offerings and well worth consulting whenever questions arise. The report contains an Illustrative Form of Negative Assurance that has caught on in practice and is widely used. ABA Report on Negative Assurance at 1518 [App. 6 at 6:9]. Apart from the ABA Report on Negative Assurance, little has been written on negative assurance. The most notable works are §4.5 of the Revised ABA Guidelines [App. 4 at 4:9–10], which replaced §I.B(6) of the ABA Guidelines; Boston Bar Report on Securities Law Opinions at 6 [App. 30 at 30:XX]]; California 2005 Report at 16-18 [App. 22 at 22:XX]; and Quaintance, How to Stop Arguing About 10b-5 Opinions in Exempt Offerings, 51 Bus. Law. 703 (1996).

[3] For a brief description of Rule 144A offerings, *see* ABA Report on Negative Assurance at 1514 n.8 [App. 6 at 6:3].

[4] Revised ABA Guidelines §4.5 at 880 [App. 4 at 4:9-10]; ABA Report on Negative Assurance at 1514 [App. 6 at 6:3]; California 2005 Report at 17 n.71 [App. 22 at 22:XX].

[5] ABA Report on Negative Assurance at 1514 [App. 6 at 6:2]; California 2005 Report at 17 [App. 22 at 22:XX].

[6] In this sense negative assurance is similar to the no litigation "opinion." *See* §17.1, *supra.*

[7] *See* ABA Report on Negative Assurance at 1518 [App. 6 at 6:9-10]. Sometimes, negative assurance is given not only as of the date of the disclosure document but also as of the date on which the negative assurance is given. *Id.* at 1518 & 1518 n.6 [App. 6 at 6:10]. **[Martin?]**

[8] One court, in denying a motion to dismiss a claim under Securities Exchange Act Rule 10b-5, has adopted a magistrate's report reaching the contrary conclusion—i.e., that negative assurance does not merely confirm the absence of a subjective belief but is subject to a reasonableness standard (what a lawyer had reason to believe). *See* Pioneer Ins. Co. v. Chase Sec., No. 99-CV-919-K(J) (consolidated with 00-CV-837), 2002 U.S. Dist. LEXIS 7562 (N.D. Okla. Mar. 28, 2002) (adopting and affirming in its result Report and Recommendations of United States Magistrate Judge, 2001 Extra LEXIS 425, at *152, *169-*175). The ABA Report on Negative Assurance expressly disagrees with this conclusion. ABA Report on Negative Assurance at 1515 n.17 [App. 6 at 6:5].

[9] The principal sources of liability are Sections 11 and 12(a)(2) of the Securities Act and Rule 10b-5 under the Securities Exchange Act.

[10] For defenses under the Securities Act, *see* §18.3 note 1, *infra.* By its terms Rule 10b-5 does not provide for any defenses. The courts, however, have interpreted it to require scienter. *See* §18.3 note 2, *infra.*

[11] *See* ABA Report on Negative Assurance at 1513-1514 [App. 6 at 6:2].

[12] *See* Revised ABA Guidelines §4.4 at 880 [App. 4 at 4:9].

[13] The exception for negative assurance is unique to securities offerings. Or at least it should be. *See* §18.8, *infra.*

[14] For a description of that process, *see* the first paragraph of §18.2, *infra.*

[15] *See* Boston Bar Report on Securities Law Opinions at 9 [App. 30 at 30:10] ("an underwriter's failure to obtain [negative assurance] . . . might itself be evidence of insufficient diligence").

§18.2

[1] ABA Report on Negative Assurance at 1514-1515 [App. 6 at 6:4].

The Boston Bar Report on Securities Law Opinions describes the process for preparing the disclosure document for a registered public offering as follows:

> The basis for giving [negative assurance] . . . in a public offering is the process of extensive legal, business and financial due diligence conducted before a company can go public . . . [Counsel's knowledge] . . . about the issuer's business and that of its competitors . . . does not come from the sole efforts of the lawyer or the issuer, but rather from the group effort—the questioning, third party checks, and other due diligence activities conducted during the registration process. Underwriters ordinarily make a significant contribution to the process through their familiarity with similar companies and technologies.

Boston Bar Report on Securities Law Opinions at 9 [App. 30 at 30:10].

[2] The form of registration statement normally used for initial public offerings is Form S-1.

[3] The form most commonly used is Form S-3, which for primary offerings is available to only the largest public companies. Form S-3 relies on information incorporated by reference from a company's Securities Exchange Act reports. Prospectuses on Form S-3 are often just a few pages long, consisting of little more than a description of the securities being registered, the plan of distribution and similar matters. Because the prospectus included in a Form S-3 registration statement is updated automatically by subsequent Securities Exchange Act filings, Form S-3 is the form of choice when a company, pursuant to Securities Act Rule 415, registers securities for future issuance. **[Martin?]**

[4] Integration of the disclosure requirements of the Securities Act and Securities Exchange Act took many years. Its history is described in L. Loss & J. Seligman, Securities Regulation 599-627 (3d ed. 1999). *See also* Committee on Federal Regulation of Securities, Report of Task Force on Sellers' Due Diligence and Similar Defenses Under the Federal Securities Laws, 48 Bus. Law. 1185, 1200 (1993) ("ABA Report on Due Diligence").

[5] That time has been even further compressed by the introduction in the early 1980s of shelf registration, which permits a company to register securities under the Securities Act for future sale and to take those securities "off the shelf" and sell them promptly when they view the market as favorable. For a discussion of the impact of shelf registration on the due diligence process, *see* ABA Report on Due Diligence, *supra* note 4, at 1206-1208, 1218-1224.

[6] Indeed, in light of the short period of time underwriters have to conduct their due diligence, underwriters may regard receipt of negative assurance on a short-form registration statement as even more important.

[7] ABA Report on Negative Assurance at 1515 [App. 6 at 6:4].

[8] When companies regularly engage in offerings using short forms, they sometimes designate a law firm other than their own regular counsel to stay current in their affairs so that it can act as counsel for the underwriters regardless of which underwriting firm is selected for a particular offering. The ABA Report on Negative Assurance contains a separate section specifically directed to the giving of negative assurance by underwriters' counsel. ABA Report on Negative Assurance at 1516 [App. 6 at 6:6-7].

[9] Moreover, even if an earnings release is included in a Form 8-K report filed with the Commission under the Securities Exchange Act, the release would not be treated as "filed" for purposes of incorporation by reference into a Securities Act registration statement if it is furnished under item 12 of Form 8-K.

[10] *See* C. Johnson, Jr. & J. McLaughlin, Corporate Finance and the Securities Laws §§7.08, 7.09[A], 9.01[F] (4th ed. 2006).

[11] The disclosure document may be comparable to a traditional long-form prospectus or to a short-form prospectus on Form S-3. If comparable to a short-form prospectus, the disclosure document normally incorporates Securities Exchange Act reports by reference. **[Martin?]** *See* note 3, *supra.*

[12] *See* §18.3 note 1, *supra.*

[13] The white flag was formally raised in 2001 when the ABA Legal Opinions Committee decided, after lengthy debate, to include an acknowledgement in a note to §4.5 of the Revised ABA Guidelines that requests for negative assurance are "appropriate . . . in many Rule 144A and Regulation S offerings." Revised ABA Guidelines §4.5 n.17 at 880 [App 6 at 6:10]. The California 2005 Report at 17 n.71 [App. 22 at 22:XX] supports the position taken in the Revised ABA Guidelines but turns it on its head, citing with approval "the position implicit in the ABA Guidelines" that opinion givers are justified in refusing requests for negative assurance outside the context of registered offerings and "certain types of unregistered offerings (e.g., some Rule 144 A and Regulation S offerings").

[14] *See* ABA Report on Negative Assurance at 1514-1515 [App. 6 at 6:4].

[15] Like the ABA Report on Negative Assurance, this chapter does not address the giving of negative assurance in specialized areas such as asset-backed and structured financings. Although many of the same principles apply, the scope of the investigation counsel customarily conducts often differs depending on the type of transaction, and a consensus regarding the investigation counsel should conduct has not developed to the same extent as it has for more traditional securities offerings.

[16] Requests for negative assurance also are often appropriate in public offerings of municipal securities in reliance on the exemption from registration provided by Section 3(a)(2) of the Securities Act. *See* ABA Report on Negative Assurance at 1514 n.9 [App. 6 at 6:3].

[17] *See* California 2005 Report at 82 [App. 22 at 22:XX].

[18] *See* California 2005 Report at 81-82 [App. 22 at 22:XX] ("providing negative assurance in an exempt offering is generally not appropriate"). The Boston Bar Report on Securities Law Opinions, which was written in 1986, antedated the adoption of Rule 144A and Regulation S and was directed to requests for negative assurance in private placements effected in reliance on the §4(2) exemption from the registration requirements of the Securities Act. Its analysis, however, of the reasons why requests for negative assurance are often inappropriate is as apt today as it was when it was written:

> Private offerings in which a placement agent participates ordinarily utilize a written disclosure document, but the process in which that document is prepared is very different from the public offering process. The issuer and the placement agent write that document with relatively little input from counsel for the issuer or the placement agent or from the issuer's accountants. . . . Few or no third party checks are made, and the group line-by-line review of disclosure materials usual in public offerings is absent or greatly reduced. . . . Lawyers should not be asked to [provide negative assurance] . . . if the background work necessary to support [it] . . . will not be done, and in the private offering context such work is rarely performed.

Boston Bar Report on Securities Law Opinions at 9-10 [App. 30 at 30:11-12].

[19] *See* Boston Bar Report on Securities Law Opinions [App. 30 at 30:12] ("Placement agents sometimes request "modified" [negative assurance]. . . . In the Committee's view, there is no acceptable modified [negative assurance]").

§18.3

[1] Section 11(b)(3) of the Securities Act provides underwriters a defense from liability if they can sustain the burden of proof that "after reasonable investigation" they had "reasonable ground to believe and did believe" that the information contained in the registration statement was "true" and that the registration statement did not omit "to state a material fact." *See generally* ABA Report on Due Diligence, *supra* §18.2 note 4, at 1188-1196. Section 12(a)(2) of the Securities Act provides a defense to those who "did not know, and in the exercise of reasonable care could not have known," of a material untruth or omission in the prospectus. **[Martin?]** Besides helping recipients establish defenses under the Securities Act, negative assurance helps them demonstrate that they did not have the scienter required for them to be liable under Rule 10b-5 of the Securities Exchange Act. *See* note 2, *infra.*

The ABA Report on Negative Assurance does not discuss the giving of negative assurance to independent directors of companies engaged in registered public offerings, even though the Securities Act subjects those directors to liability and, like the underwriters, affords them a due diligence defense. Independent directors normally do not receive negative assurance because what they need to do to establish their exercise of due diligence usually is thought to be addressed in other ways. Nevertheless, in some circumstances receipt by independent directors of negative assurance might be helpful, such as when their company is being acquired in a merger for securities of an acquiring company registered under the Securities Act and they are recommending the transaction to their stockholders.

[2] The need for scienter was articulated by the United States Supreme Court in Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976). "Recklessness" is sufficient to meet that requirement. *See* L. Loss & J. Seligman, Fundamentals of Securities Regulation 1025 n.327 (5th ed. 2004). Financial intermediaries view the receipt of negative assurance as evidence that they were not reckless in providing investors the information contained in the disclosure document.

[3] *See* ABA Report on Negative Assurance at 1514 [App. 6 at 6:3-4].

[4] *Id.* [App. 6 at 6:4]; California 2005 Report at 18, 82 n.255 [App. 22 at 22:XX, XX]. By giving negative assurance directly to ultimate purchasers, lawyers expose themselves to suit by a class of plaintiffs against whom they may not have the same defenses they would have in suits brought against them by underwriters or other financial intermediaries. In addition, when given to underwriters or other financial intermediaries, negative assurance exposes lawyers to possible liability only if the underwriters or other financial intermediaries themselves incur a loss—and they may have defenses

that the lawyers do not. For a case in which a law firm gave negative assurance to the investors (as well as the financial intermediaries) in an unregistered offering (a structured financing involving securitization of credit card receivables) and the investors later sued, *see* Pioneer Ins. Co. v. Chase Sec., No. 99-CV-919-K(J) (consolidated with 00-CV-837), 2002 U.S. Dist. LEXIS 7562 (N.D. Okla. Mar. 28, 2002) (adopting and affirming in its result Report and Recommendations of United States Magistrate Judge, 2001 Extra LEXIS 425 at *152). For a proceeding brought by the Securities and Exchange Commission against a lawyer who provided investors negative assurance on the disclosures in the Official Statement for an offering of purportedly tax exempt notes, *see* In the Matter of Ira Weiss, Securities Act Rel. No. 8641 (Dec. 2, 2005) (finding that lawyer violated §17(a) of Securities Act by negligently delivering unqualified opinion that notes issued by school district were tax exempt). To assure that negative assurance is used only for the purpose intended, in Rule 144A offerings experienced lawyers often state that they are providing negative assurance to the investment bankers solely in their capacity as financial intermediaries and sometimes also state that the investment bankers may not rely on the negative assurance to the extent they retain for their own account a portion of the securities being offered. **[Martin?]**.

[5] *See* ABA Report on Negative Assurance at 1516 n.19 [App. 6 at 6:6]. The ABA Report on Negative Assurance also takes the position that a request for negative assurance by the issuer of the securities being offered is inappropriate. *Id.* at 1514 [App. 6 at 6:4]. Section 11 of the Securities Act does not provide issuers a defense from liability for materially defective registration statements, and thus the reasons that justify the giving of negative assurance do not apply. In addition, in both registered and exempt offerings, negative assurance is not thought to be helpful to a company offering its securities because of the company's ultimate responsibility for the information in the disclosure document.

[6] California 2005 Report at 17 [App. 22 at 22:XX] (expressing support for separate letter approach).

[7] *See* ABA Report on Negative Assurance at 1516 n.19 [App. 6 at 6:6].

§18.4

[1] ABA Report on Negative Assurance at 1515, 1516 [App. 6 at 6:5,6].

[2] *Id.* at 1515 n.16 [App. 6 at 6:5].

[3] *Id.* at 1515 [App. 6 at 6:5]. Although this opinion is worded in various ways, one form the authors of this book particularly like is:

> The Statements in the Prospectus under the captions [insert headings], insofar as such statements contain descriptions of laws, rules or regulations, and insofar as they describe the terms of agreements, are correct in all material respects.
>
> When given by a lawyer retain to advise on a particular matter, this opinion could be drafted to address all the statements under a particular heading or only specifically-identified statements under the heading.

[4] The ABA Report on Negative Assurance suggests, nevertheless, that a request for negative assurance from a lawyer who does not oversee the preparation of the disclosure document might be appropriate if that lawyer "has been retained to advise the client regarding the disclosure in a specific legal area material to the Company . . . is sufficiently versed in applicable securities law standards and has had sufficient involvement in the process of preparing the overall disclosure document." ABA Report on Negative Assurance at 1515 n.16 [App. 6 at 6:5]. These conditions are likely to be met only rarely (and to meet them normally would require planning early in the transaction on how they are to be satisfied).

§18.5

[1] ABA Report on Negative Assurance at 1517 n.25 [App. 6 at 6:8]; *see* California 2005 Report at 17 n.70 [App. 22 at 22:XX].

[2] *See* ABA Report on Negative Assurance at 1517 [App. 6 at 6:8].

[3] *See id.* at 1517 [App. 6 at 6:8]. The financial and accounting data that is excluded is data that is not included in the financial statements but appears instead in sections of the disclosure document that are headed, for example, "Capitalization", "Selected Financial Information" and "Management's Discussion and Analysis of Financial Condition and Results of Operation ("MD&A")". Sometimes, recipients seek to limit the exclusion to data derived from the financial statements so as to avoid a gap between coverage of the negative assurance provided by counsel and the comfort letter provided by the accountants. *See id.* at 1517 n.25 [App. 6 at 6:8].

Recently, critical accounting policies, which are now required to be identified and discussed in MD&A, have become an area of concern. Some lawyers are seeking to exclude critical accounting policies from their negative assurance on the grounds that critical accounting policies are not within a lawyer's expertise. Practice, however, in this area is evolving, and how successful those lawyers will be remains to be seen. **[Martin?]** The ABA Report on Negative Assurance does not expressly address the treatment of critical accounting policies.

[4] *Id.* at 1517 n.25 [App. 6 at 6:8]. Without offering any elaboration, the California 2005 Report at 17 n.70 [App. 22 at 22:XX] states that lawyers "typically" disclaim coverage of statistical data. That statement may be more accurate in describing what lawyers seek to do than in describing what, in practice, they end up doing.

[5] ABA Report on Negative Assurance at 1517 n.25 [App. 6 at 6:8]. As part of their work on an offering, many lawyers as a matter of course inquire into the basis for the statistical data included in a disclosure document, asking, for example, where it came from, how it was derived and whether it provides a fair picture of its subject matter. Lawyers, however, do not normally double check actual calculations.

[6] *See* §18.4 note 4, *supra.*

[7] ABA Report on Negative Assurance at 1515 n.16 [App. 6 at 6:5]. Often, the advice of other counsel will take the form of the standard opinion typically given at closing on the accuracy of the description in the disclosure document of the matters for which other counsel was retained. *See* §18.4 note 3, *supra.* The advice of other counsel, however, need not take the form of a traditional opinion. Nor does it necessarily have to have been given specifically to counsel providing negative assurance (as opposed, for example, to the company or to another party to the transaction).

§18.6

[1] ABA Report on Negative Assurance at 1515-1516 [App. 6 at 6:5-6]. Interpreting "belief" as used in negative assurance to mean conscious awareness is consistent with what "knowledge" customarily is understood to mean when, as part of "to our knowledge," it is not defined in a standard closing opinion. *See* §4.4, *supra.* Because negative assurance communicates a subjective belief, those providing it are subject to a good faith standard, as discussed below, and not a "should have known" or other objective standard.

[2] *See* Pioneer Ins. Co. v. Chase Sec., No. 99-CV-919-K(J) (consolidated with 00-CV-837), 2002 U.S. Dist. LEXIS 7562 (N.D. Okla. Mar. 28, 2002) (adopting and affirming in its result Report and

Recommendation of United States Magistrate Judge, 2001 Extra LEXIS 425, at *152, *170-*175) (noting that parties had not addressed "how it is that a legal entity, as opposed to a human being, can form a subjective belief about anything," and rejecting argument that law firm should not be subject to liability because plaintiff had alleged a state of mind that law firm was "incapable of forming"). **[Don: Check]**

[3] ABA Report on Negative Assurance at 1515-1516 [App. 6 at 6:5]. The lawyers who participated in the preparation of the disclosure document are also the lawyers covered by the word "our" in the phrase "our attention" that usually appears just before the statement of belief ("nothing came to our attention that caused us to believe"). This interpretation of "we" and "our" is similar to the interpretation of "our" when the phrase "to our knowledge" is included without definition in a standard closing opinion. *See* §4.4, *supra* (stating that "'our' customarily is understood to refer only to the lawyers involved in preparing the opinion").

[4] *See* ABA Report on Negative Assurance at 1516 [App. 6 at 6:5-6]. The process of preparing a disclosure document normally turns up many issues that bear further inquiry and typically involves consultation with lawyers in the firm who are not working on the offering. Good faith requires that the lawyers who provide negative assurance not close their eyes to a problem by intentionally ignoring something that, if pursued, might require disclosure (or a change in what is being disclosed). *See* §4.2.3, *supra* (stating that conscious awareness for purposes of a standard closing opinion is subject to a "good faith" standard). *See also Pioneer*, 2001 Extra LEXIS 425, at *181 ("When a statement of belief is based on underlying materials which on their face, or under the circumstances, suggest that they cannot be relied on without further inquiry, the failure to investigate further supports an inference that the speaker did not genuinely hold the belief expressed.").

[5] This lead-in can take various forms, all of which are similar. *See* §18.7 note 5, *infra.*

§18.7

[1] Lawyers have long been concerned about the risk they run in providing negative assurance. Contributing to that concern has been the *Pioneer Insurance Company* case (cited in §18.6 note 2, *supra*), which involved a suit for over $1 billion against a law firm that provided negative assurance on a structured financing. In a 2003 article lawyers on the staff of ALAS, the insurance carrier for many large law firms, identified negative assurance as one of the sources of claims involving legal opinions

in which ALAS has incurred a loss. Redding & Gralen, Lawyer Liability for Opinions—Formal and Informal—Where Are We?, ALAS Loss Prevention J. 6, 7 (Fall 2003).

[2] Indeed, the Illustrative Form of negative assurance in the ABA Report on Negative Assurance consists of more than 250 words spread over five sentences. *See* ABA Report on Negative Assurance at 1518-1519 [App. 6 at 6:9-10].

[3] Sometimes, the word "conclude" is used instead of "believe." *Id.* at 1517 n.26 [App. 6 at 6:8]. "Believe," the authors of this book believe, better captures the subjective nature of negative assurance. However, "believe" and "conclude" are understood, as a matter of customary practice, to mean the same thing. *See id.* [App. 6 at 6:8]. The California 2005 Report at 18 [App. 22 at 22:XX] uses "led" instead of a "caused." The use of "led" is a common variant that is understood to have the same meaning as "caused." *See* ABA Report on Negative Assurance at 249 n.26 [App. 6 at 6:XX].

[4] For a full statement of the standard language (which varies depending on whether the disclosure document is a registration statement or a prospectus or other offering document), *see id.* at 1518 [App. 6 at 6:9-10].

[5] The ABA Report on Negative Assurance takes pains to point out that the form "is included solely for illustrative purposes" and that the Task Force that prepared the Report "is not recommending any particular form of negative assurance." *Id.* at 1516 n.21 [App. 6 at 6:7].

[6] Note 4 to the form contains a cross-reference to note 26 of the Report, which offers several alternative formulations. As the Report points out:

> The form makes explicit a number of matters that are understood as a matter of customary practice whether or not stated. In whatever way expressed, negative assurance should be read in light of customary practice except as it expressly varies that practice.

Id. at 1516 n.21 [App. 6 at 6:7]. Differences in the various formulations offered in note 26 should not be interpreted as changing customary practice or, as stated in note 26, the subjective nature of the belief being expressed.

[7] *Id.* at 1518 n.4 [App. 6 at 6:9].

[8] *See id.* at 1518 [App. 6 at 6:9].

[9] *See* §4.4, *supra.*

[10] ABA Report on Negative Assurance at 1515 and 1518 n.4 [App. 6 at 6:5, 9].

[11] Construing negative assurance to cover the belief of lawyers in the firm who did not work on the disclosure document presumably would require each of those lawyers not only to review the disclosure document, itself a time consuming task, but also to assess the adequacy of the disclosure, which they normally would not be in a position to do and, to the extent they are not securities lawyers, would not have the expertise to do in any event. *See id.* at 1516 n.18 [App. 6 at 6:5].

[12] Sometimes, underwriters, in response to a proffered definition, have insisted that it be modified to include everyone in the firm who performed services for the company during a specified period. As noted in note 11, *supra,* lawyers normally resist expanding the definition, for reasons of both cost and practicality.

[13] In deciding to abandon efforts to delineate expressly whose knowledge is covered, lawyers may take comfort in the standard statement appearing in virtually all forms of negative assurance that the belief being expressed is based on "the information we gained in the course of performing the services referred to above." That statement can be read as indicating that the belief being expressed is only the belief of those who worked on the offering.

§18.8

[1] *See* TriBar 1998 Report at 667 [App. 9 at 9:99-100]. *See generally* §4.2.2, *supra* (second paragraph).

[2] The request also may be prompted by a definition of "knowledge," with the recipient agreeing to accept the definition if the opinion preparers will confirm that they have no "knowledge," as defined, that the representations on which they are relying are untrue.

[3] Customary practice does not permit opinion preparers to rely on factual information they know to be untrue. *See §4.2.3, supra.*

[4] *See* Wafra Leasing Corp. 1999-A-1 v. Prime Capital Corp., 192 F. Supp. 2d 852 (N.D. Ill. 2002). Following development of the facts, the defendent law firm's motion for summary judgment was granted. *Wafra Leasing,* No. 01 c 4314, 2004 WL 1977572 (N.D. Ill. Aug. 30, 2004). *See also* Dean Foods Co. v. Pappathanasi, No. 01-2595 BLS, 2004 WL 3019442 at *15, *17-*18 (Mass. Super. Dec. 3, 2004) (observing that opinion provided to recipient "was reinforced" by statement that nothing had

come to opinion giver's attention that caused it to doubt the accuracy of the exhibits and schedules in agreement; also describing opinion as "being embroidered by" that statement, noting that statement appears "not just once, but twice" in opinion letter and characterizing statement as constituting a "significant step").

[5] ABA Revised Guidelines §4.4 at 880 [App. 6 at 6:9]. As discussed in Chapter 17, besides negative assurance the other principal exception is the so-called no-litigation "opinion." For a discussion of a different form of negative assurance that also presents difficult problems for opinion givers, *see* §10.10A, *supra* **(Revise cite).**

Sample Opinion Letter Excerpts Regarding "Knowledge"—Is the sample language below effective in limiting "knowledge" to "actual knowledge" of certain individuals, and in disclaiming the making of any investigation? To what extent are these approaches consistent with customary practice?

Example 1:

Opinion or Confirmation

We confirm to you that **to our knowledge** there are no actions, suits or proceedings by or before any arbitrator or Governmental Authority pending against or threatened against or affecting any Opinion Entity (a) as to which there is a reasonable possibility of an adverse determination and that, if adversely determined, could reasonably be expected, individually or in the aggregate, to have a Material Adverse Effect or (b) that involve the Transaction Documents or the Transactions.

Related Qualification

When used herein, the phrase "to our knowledge" and similar phrases are, with your permission, limited to the conscious awareness of those attorneys presently employed in our office who have directly participated in representing the Opinion Entities in the transactions contemplated by the Transaction Documents or in the preparation of this opinion letter, and does not include constructive, implied, imputed, presumed, or assumed notice or knowledge of matters or information. Except as expressly set forth herein, we have not undertaken any independent investigation to determine the existence or absence of any facts upon which the opinions set forth herein are based. Furthermore, references to the phrase "to our knowledge" and similar phrases mean only that we do not know of any fact or circumstance contradicting the statement that precedes or follows, as the case may be, and does not imply that we know the statement to be correct or have any basis for that statement.

* * *

Example 2:

Opinion or Confirmation

The execution and delivery of the Credit Agreement by the Company and the consummation by the Company of the transactions contemplated thereby do not (a) violate the Delaware General Corporation Law or any New York or Federal statute or law to which the Company is subject, or any New York or Federal rule or regulation, or, **to our knowledge,** any judgment, order or arbitration award to which the Company is subject, (b) breach the provisions of the Company's Certificate of Incorporation or Bylaws, or (c) breach the provisions of, or cause a default under, [list specific indentures or agreements].

Related Qualifications

We have made no investigation for the purpose of verifying the assumptions set forth herein.

As to matters of fact relevant to the opinions expressed herein, we have relied on (and assumed the accuracy of) the representations and warranties of the parties and other statements in the Credit Agreement, including, without limitation, compliance by the Loan Parties with the covenants set forth in Articles III, V and VI thereof and the representations set forth in Article IV thereof, **without any further inquiry or verification by us.**

Where statements in this opinion are qualified by expressions such as "known to us," "to our knowledge," "of which we are aware" or words of similar effect, such expressions refer to the actual knowledge, but not constructive or imputed knowledge, of the attorneys in our firm who have given substantive attention to the transaction that is the subject of this opinion, without any representation or implication that any inquiry has been made with respect to such statements.

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<u>Example 3</u>

Opinions or Confirmations

The execution, delivery, and performance by each Opinion Entity of the Transaction Documents, as applicable, do not violate any provision of any law or other rule, regulation or order of any governmental body, agency or court applicable such Opinion Entity or result in any breach of any of the provisions of or constitute a default under the provisions of its Constituent Documents, or any of the agreements or other instruments identified in the attached Schedule A to this opinion, which Schedule includes, **to our knowledge without conducting an audit**, all of the material agreements and other instruments to which any of the Opinion Entitites are bound.

Except as disclosed in the Offering Memorandum, there are no legal or governmental actions, suits, or proceedings pending or, **to our knowledge**, [after inquiry with those attorneys in our firm responsible for] [based solely on our review of our internal client-matter list regarding] litigation matters for the Opinion Entities, threatened against or affecting any of the Opinion Entities or to which any of their respective properties are subject in any court or before any governmental authority or arbitration board or tribunal which, if adversely determined, (i) individually or in the aggregate could reasonably be expected to have a Material Adverse Effect or (ii) would materially adversely affect the ability of any Opinion Entity to perform its obligations under any of the Transaction Documents or the legality, validity or enforceability of such Opinion Entity's obligations under any of the Transaction Documents.

No approval, consent, authorization, order, registration, qualification, or withholding of objection on the part of, or filing, registration, or qualification with, any governmental body, federal or state, or, **to our knowledge**, any court is necessary in connection with the issuance of the Notes and the execution, delivery, and performance of any of the Transaction Documents, except for the filings and recordings described herein with respect to the Collateral.

Related Qualification

In each instance in this Opinion Letter in which reference is made to any factual matter known to or within the knowledge or information of this firm, we wish to advise that no special investigation of the relevant facts or circumstances has been made, and that any such statement means, and is expressly limited to, the actual knowledge of the lawyers in this firm involved in the representation of the Opinion Entities and their affiliates.

RECIPIENT COUNSEL
RESPONSIBILITIES AND CONCERNS

Lawyers have been concerned for years about their liability in connection with rendering legal opinions, both to clients and to non-clients. There are lots of good reports and treatises covering the *giving* of legal opinions.[1] However, not much has been written about lawyer responsibilities in *receiving* legal opinions on behalf of a client opinion recipient. Should lawyers be concerned about liability to their clients in connection with receiving on behalf of such clients legal opinions from other counsel? The answer is a resounding *yes*.

Law of Malpractice. Let us consider the law of malpractice.

Proof of a claim for attorney malpractice generally involves three elements: (1) the attorney must have a duty of care to the person or entity claiming malpractice; (2) the attorney must have breached that duty of care; and (3) the breach must have proximately caused the claimed damages.[2]

A lawyer owes a client the duty of care "in pursuing the client's lawful objectives in matters covered by the representation."[3] For example, in the case of a client that is a lender, the lender's objectives covered by the representation of the lender's counsel usually includes not only the preparation, or review and approval, of enforceable credit documents, but also the discernment of important legal issues and the resolution of those issues. The representation would typically include the review and approval of a third-party "closing" opinion given by

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1 *See, e.g.*, TriBar Opinion Committee, *Third-Party "Closing" Opinions: A Report of the TriBar Opinion Committee*, 53 Bus. Law. 591 (February 1998) (hereinafter referred to as the "1998 TriBar Report"); ABA Principles: Committee on Legal Opinions, American Bar Association, *Legal Opinion Principles*, 53 Bus. Law. 591 (1998) (hereinafter referred to as the "ABA Principles"); ABA Guidelines: Committee on Legal Opinions, American Bar Association, *Guidelines for the Preparation of Closing Opinions*, 57 Bus. Law. 875 (2002) (hereinafter referred to as the "ABA Guidelines"); TriBar Opinion Committee, *Special Report of the TriBar Opinion Committee: U.C.C. Security Interest Opinions – Revised Article 9*, 58 Bus. Law. 1451 (August 2003) (hereinafter referred to as the "U.C.C. Revised Article 9 Report"); TriBar Opinion Committee, *Special Report of the TriBar Opinion Committee: The Remedies Opinion – Deciding When to Include Exceptions and Assumptions*, 59 Bus. Law. 1483 (August 2004) (hereinafter referred to as the "TriBar Remedies Opinion Report"); Opinion Committee, California State Bar Business Law Section, *Toward a National Opinion Practice: The Californian Remedies Opinion Report*, 60 Bus. Law. 907 (2005) (hereinafter referred to as the "California Remedies Opinion Report"); A. N. Field, Legal Opinions in Business Transactions (Practicing Law Institute, July 2004) (hereinafter referred to as "Field, Legal Opinions"); D. Glazer, S. FitzGibbon & S. Weise, FitzGibbon and Glazer on Legal Opinions (2d ed. 2001 & Cum. Supp. 2006) (hereinafter referred to as "Glazer and FitzGibbon on Legal Opinions").

2 *See* Ocean Ships, Inc. v. Stiles, 315 F.3d 111 (2d Cir. 2002); Coastal Orthopaedic Institute, P.C. v. Anthony Borgiorno and McDermott, Will & Emery, P.C., 61 Mass. App. Ct. 55, 807 N.E.2d 187 (2004). *See also* Collas v. Garnick, 425 Pa. Super. 8, 624 A.2d 117 (1993) ("The elements which must be alleged in order to state a cause of action for legal malpractice are: 'the employment of the attorney or other basis of duty; the failure of the attorney to exercise ordinary skill and knowledge; and that such negligence was the proximate cause of damage to the plaintiff.' (citation omitted)

3 *See* Restatement (Third) of the Law Governing Lawyers § 50 (2000).

counsel for the borrower. In receiving the opinion on behalf of the lender, counsel for the lender has a duty of care to the lender to see that the important legal issues are favorably covered or, if not, are brought to the attention of the lender. Counsel for the lender has a duty of care also to communicate with the lender about any noted lack of opinion diligence, any opinion omission, or any opinion assumption or qualification that departs from customary practice or from the requirements of the credit documents or that raises an issue that the lender is concerned about. In fulfilling that duty of care, the lawyer must "exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession."[4] Or, as the Restatement (Third) of the Law Governing Lawyers says, "a lawyer who owes a duty of care must exercise the competence and diligence normally exercised by lawyers in similar circumstances."[5] In Camarda v. Danziger, Bangser & Weiss,[6], the court held that an attorney's failure to advise his client of the possibility that a highly leveraged buy-out could be viewed as a fraudulent conveyance under the New York Debtor and Creditor Law could constitute a breach of the attorney's duty if the failure to advise was unreasonable. The denial of the attorney's motion for summary judgment was affirmed because there were questions of fact as to the reasonableness of the attorney's conduct. In Spector v. Mermelstein,[7] the court held that there was substantial evidence to support the finding of the trial court that the attorney's failure to advise his client, a lender, of facts and documents tending to show that the borrower was in precarious financial condition constituted a breach of the attorney's duty of care to the client.

To be sure, once the counsel has advised the client of relevant legal considerations and pertinent facts that are not known to the client but are known to the attorney, the attorney has no duty to prevent the client from undertaking a transaction that entails serious risk. Comment 3 to Rule 1.13 of the American Bar Association's Model Rules of Professional Conduct (2003) states:

> When 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.

In connection with a malpractice lawsuit involving a settlement, the Supreme Court of Pennsylvania stated: "We recognize that a disappointed client may be inclined to subject his or her attorney to the standard that only hindsight may provide, and as a general policy there should be judicial reluctance to relitigate suits in the guise of legal malpractice."[8]

Nevertheless, the lawyer is expected to disclose to the client that information, and to conduct that measure of research, sufficient to allow the client to make an informed decision.

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4 McCoy v. Feinman, 99 N.Y.2d 295, 785 N.E.2d 714, 755 N.Y.S.2d 693 (2002).

5 Restatement (Third) of the Law Governing Lawyers § 52(1) (2000).

6 167 A.2d 152, 561 N.Y.S. 2d 233 (N.Y. App. Dir. 1990).

7 485 F.2d 474 (2d Cir. 1973).

8 Rizzo v. Haines, 520 Pa. 484, 555 A.2d 58 (Pa. Sup. Ct. 1989).

For example, consistent with ordinary skill and knowledge, it is incumbent upon an attorney, as a matter of law, to communicate and investigate all settlement offers to the client.[9] Furthermore, "[i]n order for a lawyer to advise a client adequately, he or she is obligated to scrutinize any contract which the client is to execute, and thereafter must disclose to the client the full impact of the instrument and any possible consequences which might arise therefrom."[10] Ethical Considerations (EC) 7-8 of the New York Lawyers' Code of Professional Responsibility states:

> A lawyer should exert best efforts to insure that decisions of the client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice of a lawyer to the client need not be confined to purely legal considerations. A lawyer should advise the client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his or her experience as well as the lawyer's objective viewpoint ....

The lawyer's duty of care has limits, however. The attorney's duty to act is "defined and limited by the scope of the overall attorney-client relationship".[11]

With regard to a lawyer's duty in reviewing opinions from other counsel, the common wisdom is that the recipient of a third-party opinion, together presumably with its counsel, is entitled "... to rely on the opinions expressed without taking any action to verify those opinions. If an opinion is qualified or reasoned (or both), the opinion recipient must decide whether to proceed with the transaction in view of the qualification or reasoning set forth in the opinion letter."[12]

Yet "the lawyer's responsibility to its client is not limited to what is said in the opinion letter (as it would be in the third-party situation). Instead, the responsibility is determined by the context in which the assignment is undertaken."[13] For example, it may be important for a lawyer to advise the client of the possibility that a highly leveraged buy-out could be viewed as a fraudulent conveyance.[14] Also, it may be the obligation of a lawyer "not to withhold information material to a client's decision."[15]

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9 Rizzo v. Haines, *supra* note 8.

10 Collas v. Garnick, *supra* note 2.

11 Macawber Engineering v. Robson, 47 F.3d 253 (8th Cir. 1995). *See also* FDIC v. Ferguson, 982 F.2d 404 (10th Cir. 1992) (holding that the attorney did not breach his duty of care by failing to perform certain acts because he "only had an obligation to provide those services for which he was hired.").

12 1998 TriBar Report, *supra* note 1, §1.6 at 604.

13 Field, *supra* note 1, § 15.8, at 15-16.

14 *See* Camarda v. Danziger, Bangser & Weiss, *supra* note 6.

15 *See* Spector v. Mermelstein, *supra* note 7.

An attorney's liability is for all damages directly and proximately caused by the attorney's negligence.[16] Damages may not, however, be based on sheer speculation.[17] The amount of the attorney's liability for compensatory damages can be reduced to the extent that the attorney can prove, by way of an affirmative defense, contributory negligence or assumption of risk.[18]

Examples. Let us take some examples where a lawyer represents a client receiving an opinion from other counsel.

Suppose your bank client tells you, in connection with a secured financing, that the bank is relying on its security interest in the collateral being perfected and being "first priority", but the opinion of the debtor's counsel covers only perfection?

For another example (hereinafter referred to as the "Negligent Opinion Example"), suppose in connection with a bank financing you, as lending bank counsel, receive an opinion of borrower's counsel that is responsive on its face, but borrower's counsel confides to you at the closing that he has not really reviewed the credit documents but rather has relied on your expertise not to prepare unenforceable credit documents?

For another example (hereinafter referred to as the "Incorrect Opinion Example"), suppose in connection with a secured bank financing you, as lending bank counsel, receive an opinion of debtor's counsel to the effect that the bank's security interest in the debtor's inventory and accounts is perfected by filing a UCC financing statement in State A, the state of the debtor's chief executive office, whereas you know that such perfection can only be accomplished by filing in State B, the state of the debtor's corporate organization?

In the context of the last three examples, the bank client could claim that you were negligent in accepting on its behalf the opinion of borrower's counsel without disclosing to your client the issues raised by the opinion process.

Finally, suppose you are representing a bank in connection with an asset securitization. The asset, a promissory note, is owned by Corporation C, an indirect subsidiary of Corporation A, and is being transferred by Corporation C to a bankruptcy remote vehicle that is being financed by your bank client. Corporation A is indirectly supporting the financing by way of a total return swap. Your bank client tells you that it wants to receive from counsel for the vehicle a "true sale" opinion and a non-substantive consolidation opinion. You, as a good asset securitization lawyer, know that the "true sale" opinion should say that, in the event of a bankruptcy proceeding of the "transferor" of the asset to be securitized, the transfer of the asset by the transferor to the bankruptcy remote vehicle in accordance with the transfer agreement constitutes a sale or absolute transfer, and not a secured loan. Accordingly, the asset so

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16 Ferguson v. Lieff, Cabraser, Heimann & Bernstein, 30 Cal. 4th 1037, 69 P.3d 965, 135 Cal. Rptr.2d 46 (2003).

17 Id.; Kituskie v. Corbman, 552 Pa. 275, 714 A.2d 1027 (1998).

18 Caiati v. Kimel Funding Corp., 154 A.D. 2d 639, 546 N.Y.S.2d 877 (N.Y. App. Div. 1989).

transferred and the proceeds thereof would not constitute "property of the estate" of the transferor for purposes of Section 541 of the Bankruptcy Code and would not as a result of the bankruptcy of the "transferor" be subject to the automatic stay of Section 362(a) of the Bankruptcy Code. You would also know that the non-substantive consolidation opinion should say that, in the event of a bankruptcy proceeding of the "transferor", a court would not grant an order substantively consolidating the assets and liabilities of the bankruptcy remote vehicle with those of the transferor. In connection with the asset securitization, you have been told that the asset was originally owned by Corporation A, the ultimate parent of Corporation C, which transferred the asset to Corporation B, a subsidiary of Corporation A, which transferred the asset to Corporation C, a subsidiary of Corporation B. When you receive a draft of the opinion, you see that the opinion renders the proper opinions but assumes that Corporation C is the "transferor" and that Corporation A, the original owner of the asset, and Corporation C, the assumed "transferor" of the asset, are separate entities and would not, in the event of a bankruptcy proceeding of Corporation A, be substantively consolidated.

As an asset securitization lawyer you would know that the most important factor considered by courts in determining whether a transfer of assets is a true sale or secured loan is the level and nature of recourse against the transferor retained by the transferee.[19] However, you should also know that it is not only the nature of the recourse that is determinative but also the identity of the person that is obligated for the recourse. If, after the purported sale of the assets, the "transferor" of the transferred asset still bears the risks of the value of the assets, then the transaction would likely be a (secured) loan.[20] Thus, you should see that the opinion assumption that Corporation C is the "transferor" and that Corporation A and Corporation C are separate entities avoids the important issue of the separation of Corporation A and Corporation C. The bank client could complain that, although the opinion on its face is responsive to the legal opinion requirements, the opinion is inadequate, in that it fails to address the important issue of the separateness of Corporation A and Corporation C.

Customary Practice. Another factor that could determine the responsibility of a lawyer in accepting a legal opinion on behalf of a client is *customary practice*. As the 1998 TriBar Report says: "Customary practice affects not only the conduct of the opinion giver but also that of the opinion recipient."[21] Various bar association reports purport to set forth "customary practice" in their respective jurisdictions.[22] These reports directly or indirectly suggest that recipient counsel should understand customary practice and in appropriate circumstances advise its client as to the customarily understood meaning and scope of the opinion, as well as any noted deviation by the opinion giver from customary diligence.

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19 *See* Major's Furniture Mart, Inc. v. Castle Credit Corp., 602 F.2d 538 (3rd Cir. 1979).

20 *See* Major's Furniture Mart, Inc. v. Castle Credit Corp., 602 F.2d at 545; In re Executive Growth Investments, Inc., 40 B.R. 417, 422 (Bankr. C.D. Cal. 1984); and In re S.O.A.W. Enterprises, Inc., 32 B.R. 279 (Bankr. W.D. Tex. 1983).

21 1998 TriBar Report, *supra* note 1, § 1.6 at 604.

22 *See, e.g.*, 1998 TriBar Remedies Opinion Report; California Remedies Opinion Report; and Glazer and FitzGibbon on Legal Opinions, Appendices One through Twenty-eight.

As noted above, the recipient of an opinion letter is generally entitled to rely on the opinions expressed without taking any action to verify those opinions. However, the opinion recipient has no right to rely on an opinion if reliance is unreasonable under the circumstances (as in the case of the Negligent Opinion Example above) or if the opinion is known by the opinion recipient to be incorrect (as in the case of the Incorrect Opinion Example above).[23]

There is some controversy concerning customary practice. On the one hand, the official view of many bar associations is that the practices of giving and receiving legal opinions are measured, to a great extent, by customary practice. The 1998 TriBar Report is emphatic:

> Customary practice establishes the ground rules for rendering and receiving opinions and thus allows the communication of ideas between the opinion giver and counsel for the opinion recipient without lengthy descriptions of the diligence process, detailed definitions of the terms used and laborious recitals of standard, often unstated, assumptions and exceptions. Thus, in opinion practice, customary practice is an important professional tool.
>
> Unless otherwise indicated, an opinion recipient is entitled to assume that the opinion giver has followed customary practice in rendering an opinion. Reciprocally, an opinion giver is entitled to assume that the opinion recipient understands customary practice and recognizes that it has been followed in preparing the opinion letter.[24]

The 1998 TriBar Report goes on to explain that customary practice relates not only to the extent of the factual and legal investigation an opinion giver undertakes to support particular opinions but also "to how words are used in opinion letters."[25] Customary practice allows an opinion to be expressed in fewer words and permits the opinion preparers to rely on unstated exceptions, assumptions, and limitations. By amplifying the meaning of abbreviated opinion language, customary practice provides the framework for preparing and interpreting the opinion, thus facilitating the process by which opinions are given and received and reducing cost.[26]

The American Law Institute's Restatement (Third) of the Law Governing Lawyers confirms that customary practice can be applied to determine the scope of the opinion (including the opinion limitations, qualifications and disclaimers) and the standard of care in connection with factual and legal diligence in connection with legal opinions.

> The parties' ultimate agreement as to the nature and extent of the opinion coverage in a particular transaction and the acceptability of limitations, qualifications, and disclaimers will normally follow customary practices for transactions of the kind in question.

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23 *See* 1998 TriBar Report, *supra* note 1, § 1.6 at 604.

24 1998 TriBar Report, *supra* note 1, § 1.4(a) at 600-1.

25 1998 TriBar Report, *supra* note 1, § 1.4(b) and (c) at 601.

26 TriBar Remedies Opinion Report, *supra* note 1, at 1484.

Similarly, once the form of the opinion has been agreed on, customary practice will also determine the nature and extent of the factual and legal diligence to be employed by the opinion giver in connection with its issuance.[27]

Though the Restatement does not make clear that customary practice can also be used to determine the meaning and interpretation of the words and phrases in an opinion, the use of customary practice to determine such meaning and interpretation would seem consistent with the Restatement's emphasis on customary practice for determining the acceptability of a legal opinion.

On the other hand, some lawyers and judges are concerned that the use of customary practice to determine the meaning and interpretation of opinion words and phrases creates a problem: It may not be safe for lawyers to assume that customary practice will amplify opinion words and phrases in ways that are inconsistent with or beyond their literal or plain meaning. A judge or jury will expect that an opinion says something – if not, why is it asked for and why negotiated. And if the meaning of an opinion is not determined in a courtroom by reference to customary practice, the judge or jury may assume that the opinion giver will be held to the literal meaning of the opinion words and phrases. For example, when an opinion says "we have made such investigation as we have deemed appropriate", it may be assumed that the opinion giver really did an investigation; judges and juries may not expect from that language that there was no investigation other than relying on a client's certificate. For another example, if an opinion refers to "the federal law of the United States", a judge or jury may assume that such expression means all federal laws; and if the case turns on whether tax, insolvency, antitrust or securities laws were covered, the opinion giver who did not investigate those laws,[28] and did not make clear such lack of investigation, may face a valid complaint.

There is another concern. In general, customary practice works for opinions only if all the relevant parties understand customary practice the same way. Is customary practice in California the same as customary practice in New York? Fortunately, although there used to be substantive differences, they are being eliminated over time.[29]

Does Customary Practice Really Create a Problem? Let us analyze some more examples.

If a third-party closing opinion is being given by a sophisticated opinion giver to a sophisticated lender which would be expected to know customary practice in the giving and receiving of opinions, then each can safely assume that the other understands customary practice

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27 Restatement (Third) of the Law Governing Lawyers § 95 cmt. e (2000).

28 *See* 1998 TriBar Report, § 3.5.2(c) at 630), which states that "Custom is that (in the absence of language indicating the contrary) the [third-party "closing"] opinion does not cover the tax laws, insolvency laws, antitrust laws, securities laws (except . . . [for the Investment Company Act of 1940 when preparing an opinion on the binding effect of an agreement on a registered or 'inadvertent' investment company] and the Exon-Florio amendment."

29 *See, e.g.*, California Remedies Opinion Report, *supra* note 1.

in interpreting the legal assurances in the opinion on which the lender is relying. Even if the sophisticated lender retains counsel who is given limits by the lender in the counsel's review of the opinion, the opinion giver could safely render an opinion based on customary practice. A knowledgeable institutional client can set limits on what its counsel ought to do in reviewing opinions and other closing documents. If that client does set limits, there is no malpractice in its counsel following those limits, even if those limits include doing no review of the legal opinions.

If the opinion is being given to an unsophisticated lender who does not know customary practice but has retained counsel who does know customary opinion practice, then the opinion giver could also safely use customary practice in preparing the opinion. The opinion giver is entitled to assume, unless otherwise indicated, that the lender's counsel understands customary practice.[30] Of course, the lender's counsel may have an additional burden to explain customary practice to the client if important for the client's understanding of the transaction. A written explanation should not be necessary. (As an illustration, however, as to what a lawyer might say to explain customary practice, attached are two letters, one letter from the opinion giver as Annex A hereto and the other letter from recipient counsel as Annex B hereto.)

If the opinion is being given to a bank syndicate many of whose members are unsophisticated lenders who do not know customary practice and who may or may not have retained counsel, sophisticated or not, then what? The traditional – and, in the author's opinion, entirely reasonable – approach of the opinion giver and the recipient counsel is to rely on the agent bank to be sophisticated and knowledgeable about customary practice and to act for the bank syndicate in receiving the opinion. Despite the exculpatory provisions in the agent bank provisions of a normal multi bank credit agreement, bank syndicate members do rely, as a practical matter, on the agent bank to receive proper closing documents that are responsive to the requirements of the credit agreement, including closing documents comprising legal opinions. The opinion giver can make clear its reliance on the agent bank by addressing the opinion only to the agent bank, in its capacity as agent for the bank syndicate; and the recipient counsel can make clear its representation of, and its reliance on, the agent bank by calling itself "counsel for the Administrative Agent" (or words of similar effect).

If the opinion is being given to an unsophisticated lender which does not know customary practice and has not retained counsel, then the opinion giver might not be safe in relying on customary practice in giving the opinion. However, the opinion giver could strongly suggest to the lender to retain such counsel and could hold off rendering any opinion until the lender did retain such counsel. Conversely if recipient counsel knows that the opinion giver has not done the proper opinion diligence required by customary practice (as in the Negligent Opinion Example above), then in the exercise of prudence that would normally advise its client of the lack of diligence and explain the significance of that lack.

What if the opinion is to be rendered to a lender who does not know customary opinion practice and who has retained counsel who also does not know customary opinion practice? To have the opinion giver prepare an opinion that "spells out" all the limitations, qualifications and disclaimers of customary practice is not a practical solution. Such an opinion

30 *See* 1998 TriBar Report, § 1.4(a) at 601.

would undoubtedly fall short of spelling out all of the applicable customary practices. And such an opinion, including so-called "kitchen sink" exceptions, qualifications and assumptions, would be, at best, confusing to the lender and its counsel. The safest course for the opinion giver is to hold off rendering any opinion until the lender retains adequate counsel; but that course in many cases may not be practical. In going forward with the transaction, the opinion recipient and its counsel have no duty to the opinion giver to be knowledgeable about customary opinion practice. While in an ideal case both the opinion giver and the opinion recipient, together with its counsel, are knowledgeable about customary practice, the opinion giver need not inquire into the sophistication of the opinion recipient and its counsel, even if the opinion recipient and its counsel are not United States persons. However, recipient counsel should advise the opinion recipient that it (recipient counsel) is not knowledgeable about the applicable customary opinion practice and thus that there is significant risk of miscommunication (as, for example, in a non-bankruptcy lawyer's review of a bankruptcy opinion or an English lawyer's review of a New York lawyer's opinion). The lack of knowledge by the opinion recipient and its counsel then becomes a *business* issue for the opinion recipient. Does the opinion recipient want to risk the disappointment that may result from a lack of communication?

Another problem arises, as noted above, if the opinion giver's understanding of customary practice differs from the opinion recipient's understanding. For example, the opinion giver believes that it is customary practice to assume without so stating that a limited liability company (LLC) manager that is not a natural person is the type of entity it purports to be and is authorized to approve the transaction for the LLC and that those acting on behalf of the manager have the required approvals to act.[31] On the other hand, the recipient counsel believes that the opinion giver is covering those issues unless the opinion states the contrary. What to do here? One answer to this problem is for customary opinion practice to be *national* -- that is, to be the same in *all states*. That calls for an effort, similar to the effort involved in getting all states to accept and adopt the revised UCC Article 9, for national bodies to persuade lawyers, their clients and bar groups throughout the country to accept a uniform customary opinion practice. So far, lawyers have often relied on individual state bar reports to justify their understanding and use of customary practice, and state bar reports have not been altogether uniform in their summaries of customary practice, although I do not think that there are many major differences.

What if you are unsure of your client's expectations with regard to opinions? The question of whether or not a lawyer can safely assume the client understands, and accepts, customary practice in connection with legal opinions leads to the bigger question: Does the lawyer know what opinions the client expects to receive in connection with a transaction and what opinions the client considers important? A lawyer should ask himself or herself in each transaction: Am I asking the other counsel the right questions? If the lawyer has doubts in this regard, then it seems prudent for the lawyer to ask the client for instructions on what legal opinions the client expects and why such opinions are, or are not, important.

As an illustration, take the fourth (that is, the final) opinion-receiving example set forth above in this article – the example relating to an asset securitization. In that example,

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31 *See* TriBar Opinion Committee, *Third-Party Closing Opinions: Limited Liability Companies*, 61 Bus. Law. 679 (February 2006) at 689 n.52.

counsel for the bank client could have asked its client whether the bank was relying as a credit matter on the isolation of the asset from the bankruptcy of Corporation A or whether the bank was relying as a credit matter on the total return swap by Corporation A. If the bank answered that it was relying on the isolation of the asset from Corporation A, then counsel would know clearly that the "true sale" and non-substantive consolidation bankruptcy opinions were of paramount importance, and so would focus hard on the adequacy of those opinions. And if recipient counsel missed the important issue of the separation of Corporation A and Corporation C, the bank client would have cause for complaint. If, on the other hand, the bank answered that it was really relying on the total return swap by Corporation A, then counsel would know that the bankruptcy opinions were not so important and that his or her job would be to focus hard on the effectiveness of the total return swap; and in that case the bank client would have little reason to complain about the bankruptcy opinions. It is, of course, sometimes difficult, especially as a closing deadline approaches, for the recipient counsel to communicate with its lending client about legal issues; but when important legal issues are at stake it may be critical for the recipient counsel to insist on that communication.

Reade H. Ryan, Jr.

February 16, 2007

ANNEX A

[Letterhead of
ABC Law Firm]

____________, 2006

Dear Opinion Recipient:

Our opinion letter (the "opinion letter") addressed to you dated today is given at the request of our client X in connection with the sale to you of membership interests in the limited liability company described herein. You have requested that we explain the statement in the opinion letter that

> "This opinion has been prepared and given in accordance with the customary practice of lawyers who regularly give and lawyers who regularly advise recipients regarding opinions of this kind."

We understand that you are represented by DEF law firm in this matter. You understand that the ABC Law Firm represents the seller of certain interests that you are purchasing. By accepting the opinion letter from us you do not become our client, even if you are required to pay us for all or a portion of the cost of the opinion letter. This firm cannot ethically represent you in this transaction and does not do so. It presents you with the limited advice contained in the opinion letter as part of our services to our client. We provide the opinion letter to you as a fair and objective opinion as to the matters covered by it. We have provided no advice to you other than that contained in the opinion letter. We do not represent that the advice given is adequate for your purposes. The matters covered by the opinion letter are not meant to be expanded by inference. Thus, if you expect an opinion on a matter that is not referred to in the opinion letter you should raise that question with your counsel.

The opinion letter does not cover certain matters that are excluded by customary practice. Thus, for example, matters pertaining to the securities laws, tax laws and antitrust laws (among others) are understood to be excluded except to the extent specifically referred to. In addition, only laws that would ordinarily be known by lawyers involved in transactions of this type are covered by this opinion letter.

While this firm is responsible for the opinion letter, it is the product of a limited group of lawyers who worked on it (referred to as the opinion preparers). The knowledge of the opinion preparers, but not of any broader group of lawyers in the firm, was considered in giving the opinion letter.

You should understand that in giving the opinion letter it was necessary for us to "establish" certain facts. In doing so we did not attempt to do so by our own investigation. Instead, we relied on representations of our client and its officers and others. These representations were to some extent informally given, were in the agreements involved in the transaction or in certificates we obtained from individuals related to the client and others. Thus, for example, we did not examine court dockets (but at your specific request did examine our own internal dockets as described in the opinion letter) to determine if there is pending litigation. In dealing with facts, we relied on our client using care, having integrity and good intentions in providing facts to us. In certain instances assumptions of fact were used to avoid the time and cost of establishing facts. Use of the phrase, "to our knowledge" in an opinion does not indicate that we have made a special examination of fact or have knowledge. Instead, it is intended to convey the idea that as to factual matters the opinion is limited by what is known after customary attempts to establish fact.

As to matters of law, we do not give opinions unless in our professional judgment they are correct. If there are limitations applicable, we point them out by stating "exceptions" or making assumptions.

Our opinions are limited to the laws specified in the opinion letter, which in this case are the laws of New York, the Delaware General Corporation Law and the federal laws of the United States. To the extent documents in the transaction are governed by other laws, they are not covered by the opinion letter.

An opinion letter is a professional judgment, not a guaranty. The law may change by judicial, legislative and in some cases even administrative action.

The opinion letter attempts to predict how the highest court of the applicable jurisdiction will rule if the case is presented to it. There is no prediction as to how lower courts or an arbitration panel will rule. The opinion letter does not predict how the courts of another state before which the case may be tried will act. Any prediction assumes that the facts relied upon in making the judgment are correct. In any litigation those facts may be challenged and may prove to be wrong.

Any description of customary practice is necessarily incomplete. However, we believe that this explanation, when considered together with the views of your counsel, should provide you with a reasonable basis upon which to consider the acceptability of the above quoted language in our opinion letter. This letter is an explanation of the opinion letter but does not expand or otherwise modify the opinion letter in any way.

Very truly yours,

ABC Law Firm

By________________________

ANNEX B

[Letterhead of DEF Law Firm]

__________, 2006

Dear Client Y:

You have received a proposed opinion letter today form ABC Law Firm together with a letter from that firm to you explaining language in the opinion letter as to its preparation in accordance with "customary practice". We have reviewed the opinion letter with you and believe that it is acceptable in form subject to a decision as to acceptability of the language as to customary practice. You have asked for our comments about that usage.

We believe that the usage is technically correct. However, we were concerned that you may not understand the full meaning of the usage. Thus, we agreed to seek an explanatory letter from the opinion giver law firm. That explanatory letter is now in hand. We declined to provide or join in that letter since it is the opinion giver's view that is critical to you.

Customary practice makes the opinion letter a surface study. It will uncover irregularities on the surface of relevant documents, but the opinion letter does not ordinarily go beneath the surface in the absence of an irregularity. This custom has arisen because factual investigation by lawyers is very expensive. In most cases, the parties on both sides do not want more done in the absence of some irregularity, at least not by lawyers. Anyone receiving an opinion letter must understand that preparation of an opinion letter is unlikely to uncover fraud or any other level of a failure to disclose.

Ordinarily only the knowledge of the lawyers who actually participate in preparing the opinion is considered in giving the opinion. This seems to us undesirable. Although it is impractical to include the knowledge of all lawyers in the firm, we have recommended that both the partner in charge of the client and the partner in charge of litigation for the client review the opinion. This suggestion has been accepted by ABC Law Firm and the opinion letter so states.

In this transaction we have pointed out to you that two agreements are governed by Pennsylvania law and thus are largely uncovered by the opinion letter given. With our assistance you have obtained an opinion of Pennsylvania counsel covering these matters.

The opinion of Pennsylvania counsel is not a part of the ABC Law Firm opinion letter. Its conclusion is assumed by ABC Law Firm to allow it to give its opinion. That means that in this case, or as a matter of policy, ABC Law Firm has declined to rely on the Pennsylvania lawyer's opinion. In most cases that is not of practical importance to you. In this case, the Pennsylvania firm is experienced in commercial matters and has examined the relevant documents (rather than making assumptions as to their contents). Even if ABC Law Firm had relied on the Pennsylvania counsel's opinion, it would ordinarily not be responsible for any mistake of Pennsylvania counsel. Were there reliance, ABC Law Firm would only be responsible for selecting appropriate counsel and seeing that such counsel answered the relevant questions. It would be inappropriate to make ABC Law Firm responsible for the Pennsylvania opinion since the very reason for obtaining such an opinion was that ABC Law Firm was not willing to be responsible for matters of Pennsylvania law because it does not have expertise in it.

Generally, factual materials relied upon in opinions are a weak link. Sometimes the other party to a deal does not fully understand a question, but answers it; sometimes the answer is not fully known, but the question is answered to further the deal. Sometimes representations are not honest. You can reduce but not eliminate risks here by your own diligence or by requiring further work by the opinion giver. In this case we recommended that counsel state that it reviewed its own docket to determine if it was handling litigation for its client. This suggestion has been accepted by ABA Law Firm and the opinion letter so states. There are now a variety of on-line dockets. While they may be incomplete, you may wish to have them examined or to examine them yourself.

The phraseology "to our knowledge" as used in the opinion is intended to limit the opinion, but without a definition it is ordinarily not effective to do so.

The law applicable to opinion letters is a lesser problem, but one cannot dismiss the possibility of changed attitudes in courts or a change in law. Also the lack of fidelity of a jury to instructions of a judge may result in a decision that seems wrong but may not be upset on appeal. Similarly, arbitration awards can be less predictable than a judicial determination. We have pointed out that one of the agreements involved contains an arbitration provision. While the documents contain waivers of jury trial, such waivers may not be acceptable in certain jurisdictions. The documents limit the jurisdictions in which suit may be brought but there is always some question as to the circumstances in which such provisions will be given effect.

Because of the various limitations necessarily applicable to opinion letters, the opinion letter should in most cases be viewed as very helpful but hardly determinative of the issues addressed in them. In the adversary judicial system no judicial decree is available until there is a dispute. Thus, opinion letters are used because they constitute a useful source of information.

No description of customary practice can be complete or anticipate all questions that can be encountered in the future. However, we consider the explanation given by ABC Law Firm to be a responsible one that is accurate as far as it goes.

We believe that you are sufficiently informed by this letter and the letter of ABC Law Firm to accept the "customary practice" language in the opinion. You will recognize that even in the absence of such language the same principles are highly likely to be applied by a court since one measures the appropriateness of a lawyers performance by what other lawyers similarly situated would do.

Very truly yours,

DEF Law Firm

By______________________________

<u>Issues With Respect to Assignable Opinions</u>

A. Mark Adcock

In syndicated loan transactions (as well as other transactions in which assignments are contemplated, such as securitizations) the opinion recipient often requests that successors and assigns (<u>i.e.,</u> future members of the syndicate) be permitted to rely on the opinion. Allowing such reliance, either in the opinion letter itself or by permission granted subsequently, gives rise to a number of issues not only for the opinion giver but for the opinion recipient and such successors and assigns as well.

The threshold question is "Why is it important to an agent bank (or other initial opinion recipient) that successors and assigns be permitted to rely on the opinion?" Presumably, agent banks believe that the ability of successors and assigns to rely is important to at least some of such parties, and that the marketability of the loan would be impaired if successors and assigns were not permitted to rely on the opinion.

The next question, then, is whether this belief is accurate. Is it in fact important to successors and assigns that they be permitted to rely on the opinion? It seems reasonable to presume that it is important to at least some successors and assigns that they be permitted to rely.

The next question is whether, in practice, successors and assigns do in fact rely on the opinion. In syndicated loan transactions, the anecdotal evidence is that they do not. The experience of many lenders participating in a loan syndication is that, because of the rapid pace at which the loan documentation is examined and the decision to purchase a loan is made, the new lender does not review the opinion letter as part of its diligence in deciding whether to buy the loan.

Assuming that the new lender does not review the opinion letter prior to purchasing the loan, then the next question is, "If the opinion letter turns out to be wrong, that the opinion giver was negligent in rendering such opinion, and the new lender is damaged, does the new lender have a cause of action against the opinion giver?" One example of such a situation would be an opinion that the loan transaction did not violate the usury laws of a particular state at the time the loan transaction closed. If it turns out that the loan did violate the usury laws, resulting in damages to the new lender, would the new lender have a cause of action against the opinion giver if the new lender did not examine (and thus rely upon) the opinion letter in deciding whether to purchase the loan?

It is likely that the new lender (<u>i.e.,</u> the assignee) would not have a cause of action against the opinion giver. Unless the assignee relied on the opinion letter (and in this example, unless the assignee relied on the erroneous usury opinion) in deciding to buy the loan, then the erroneous opinion did not cause the damages suffered by the assignee – a necessary element in almost any cause of action which the assignee might assert against the opinion giver. The cause of action most frequently asserted against opinion givers is negligent misrepresentation. Jeffrey M. Smith, <u>A Legal Opinion Malpractice Primer</u> © 2005, printed in <u>The Legal Opinion Committee Workshop 2005</u>. In summarizing this cause of action Section 552(1) of the Restatement (Second) of Torts provides that:

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

When the assignee fails to rely on the opinion letter in deciding to purchase the loan, it is doubtful that the assignee will have any cause of action against the opinion giver even if the opinion was in error and such error was due to the negligence of the opinion giver.

Having considered the fundamental issue of whether an assignee is likely to have a cause of action on which to recover against the giver of an erroneous opinion, when the assignee does rely on the opinion (or until the court has determined that the assignee did not rely), the following is a consideration of some of the issues that may arise:

- **Opinion letters are typically given in accordance with customary practice. What if the assignee is not familiar with customary practice?**

This issue, although often mentioned as a concern for opinion givers giving an assignable opinion, may be more imagined than real. Section I.B. of the Legal Opinion Principles adopted by the American Bar Association Committee on Legal Opinions provides:

> The matters usually addressed in opinion letters, the meaning of the language normally used, and the scope and nature of the work counsel is expected to perform are based (whether or not so stated) on the customary practice of lawyers who regularly give, and lawyers who regularly advise opinion recipients regarding, opinions of the kind involved. The *Legal Opinion Principles* are intended to provide a ready reference to selected aspects of customary practice.

Committee on Legal Opinions, Legal Opinion Principles, 53 BUS. LAW 831 (1998). Section 1.7 of the Guidelines for the Preparation of Closing Opinions adopted by the American Bar Association Committee on Legal Opinions provides:

> An opinion giver is entitled to assume, without so stating, that in relying on a closing opinion the opinion recipient (alone or with its counsel) is familiar with customary practice concerning the preparation and interpretation of closing opinions. On occasion, a closing opinion expressly authorizes persons to whom it is not addressed (for example, assignees of notes) to rely on it. Those persons are permitted to rely on the closing opinion to the same extent as – but to no greater extent than – the addressee.

Committee on Legal Opinions, Guidelines for the Preparation of Closing Opinions, 57 BUS. LAW 875 (2002).

Assuming that the initial opinion recipient was familiar with customary practice, whether or not the assignee is familiar with customary practice is rendered further irrelevant by Section IV of the Legal Opinion Principles, which states "[a]n opinion letter speaks as of its date. An opinion giver has no obligation to update an opinion letter for subsequent events or legal developments." 53 BUS. LAW 831 (1998). Finally, many opinion letters by their terms expressly provide that the opinions are rendered as of the date of the opinion letter and that the opinion giver expresses no opinion as to circumstances or events or change in applicable law that may occur subsequent to such date. To remove any remaining doubt, some opinion letters even expressly provide that they are to be construed in accordance with customary practice.

- **Some opinions, such as an opinion that a loan does not violate the usury laws, may depend on the character of the lender (*e.g.*, it may be necessary for the lender to be a bank to qualify for an exemption from the usury statute). What if an assignee does not**

qualify for the applicable exemption, so that the opinion is no longer accurate when addressed to the assignee?

Although more problematic than the first issue (because even a sophisticated lender might be misled), this issue should also be resolved by the principle articulated in the Legal Opinion Principles that an opinion letter speaks as of its date and the opinion giver has no obligation to update the letter for subsequent events, and/or the express limitation found in many opinion letters that the opinion letter speaks only as of its date and that the opinion giver expresses no opinion as to circumstances or events that may occur subsequent to such date.

- **The opinion letter might be assigned to multiple assignees in multiple jurisdictions, thereby subjecting the opinion giver to multiple claims or lawsuits, possibly in multiple jurisdictions under the substantive laws of multiple jurisdictions.**

This issue is a real concern for all parties: the opinion giver, the opinion recipient, and the successors and assigns of the opinion recipient.

It is a concern for the opinion giver because of the expense and uncertainty caused by being sued by multiple parties in multiple jurisdictions. As a result, the opinion giver (or its malpractice carrier) may be reluctant to settle with any claimant unless it is able to settle with all claimants. The added expense of litigating multiple claims in multiple jurisdictions also means that more money will be spent on attorneys' fees by all parties, with less money remaining for any settlement payment.

The concerns for the opinion recipient and the successors and assigns are the same. A reluctance to settle by the opinion giver, and more money spent on attorneys' fees by all parties in multiple suits, is in no one's interest.

In the syndicated loan transaction, this problem could be avoided by addressing the opinion letter only to the agent bank on behalf of the lenders. Any cause of action would then be brought only by the agent bank on behalf of all the lenders, avoiding the uncertainty and expense (on all sides) of multiple lawsuits in multiple jurisdictions. This solution should also eliminate the issue of whether the new lenders (i.e., the assignees) actually relied on the opinion in deciding whether to buy the loan, thereby enhancing, rather than impairing, the marketability of the loans.

- **If the opinion giver, after issuing the opinion, expressly allows an assignee to rely on the opinion, the statute of limitations may restart with respect to such assignee as of the date the opinion giver gives such permission.**

This issue may simply be unavoidable. By authorizing the assignee to rely on the earlier opinion, it may be argued that the opinion giver committed a new act of negligent misrepresentation, starting a new statute of limitations period.

This article has attempted to consider some of the issues raised by the assignable opinion, particularly in a syndicated loan transaction. Other suggestions that have sometimes been made to at least partially address these issues have been for the opinion giver to include in the opinion letter a choice of law and choice of forum (or an arbitration provision) to eliminate the uncertainties as to choice of law and so that all claims would have to be brought in the same forum. In the syndicated loan context, the most comprehensive solution to the issues raised by the assignable opinion, which would appear to benefit all parties, would be to address the opinion to the agent bank on behalf of all lenders.

Sample Policy Statements with Respect to Assignability of Opinions

1. Opinion language approved by Wachovia Bank, N.A. as of January 2006:

"At your request, we hereby consent to reliance hereon by any future assignee of your interest in the loans under the Credit Agreement pursuant to an assignment that is made and consented to in accordance with the express provisions of Section 10.06 [__] {Reference to the assignment Section of the Credit Agreement}of the Credit Agreement, on the condition and understanding that

(i) this letter speaks only as of the date hereof,

(ii) we have no responsibility or obligation to update this letter, to consider its applicability or correctness to any person other than its addressee(s), or to take into account changes in law, facts or any other developments of which we may later become aware, and

(iii) any such reliance by a future assignee must be actual and reasonable under the circumstances existing at the time of assignment, including any changes in law, facts or any other developments known to or reasonably knowable by the assignee at such time."

2. Policy of The Loan Syndications and Trading Association, Inc.:

"*Borrower's Counsel's Legal Opinion*. In connection with preparation and negotiation of the Transaction Documents (as defined below), the administrative agent shall request, on behalf of the lenders, that the borrower's counsel's legal opinion permit reliance by assignees."

OPINION PRACTICES WITH RESPECT TO SIDE LETTERS

This panel will frame the issues that arise in opinions relating to transactions in which there are side letters. It will focus particularly on legal opinions relating to side letters entered into in fund formation transactions and will attempt to differentiate legal opinion issues in fund formation transactions (where the use of extensive side letters in the negotiation of the terms of each investor's investment in the fund have become prevalent) from the broader context of the use of side letters in business transactions generally.

1. What are current opinion practices with respect to side letters.

   A. In business transactions generally, side letters are usually ancillary to the main agreement.

   B. In fund formation transactions, side letters may be ancillary to the main agreement, but more often then not they are a separate agreement between two contracting parties (the general partner/manager and the investor) with respect to the terms of that particular investor's investment in the fund.

      (1) in private equity transactions, where investors are locked in for extended periods of time, opinions are often requested.

      (2) in hedge fund transactions, investors have not historically requested opinions. However, as lead investors in hedge funds have become more institutional (pension funds, governmental entities, etc.), requests for opinions have become more prevalent.

   C. One reason why concerns have arisen regarding opinion practices with respect to the use of side letters in fund formation transactions is because the use of side letters in this business area is different than the use of side letters in other types of business transactions, including other types of capital formation transactions.

2. In fund formation transactions, what opinions are most often requested:

   A. due organization of the partnership, the general partner and the advisor

   B. limited liability of the limited partners/members

   C. enforceability of the fund's constituent documents against the general partner (particularly making sure that there is enabling language in the constituent documents to allow for the adoption of side letters with respect to a particular investor's investment in the fund).

      (1) without the enabling language, there is an argument that many side letter provisions would be amendments to the constituent documents and therefore require approval in the manner set forth in the constituent documents.

(2) concerns have been expressed as to whether the enabling language makes the partnership agreement illusory.

D. enforceability of particular side letter provisions

(1) In the fund formation context, side letters are often lumped into the following categories:

(i) limitations, sometimes contrary to the basic agreement, on the fees that the general partner will receive (basically affecting the general partner/manager as distinguished from affecting other investors)

(ii) provisions addressing a particular investor's regulatory concerns, such as the nature of the partnership's investments (often in cases where the matter at issue is within the general partner's discretion);

(iii) "Most favored nation" treatment (some of which require notice when better terms are given or at least allow the other investors to see the side letters as they are entered into and elect to benefit from those side letters);

(iv) provisions that raise conflicts among investors or provide one investor with benefits that might be to the detriment of other investors;

(v) preferential access to portfolio information; and

(vi) advance notice and redemption rights for one party.

This grouping results from the focus, for disclosure purposes, of the types of provisions often contained in side letters that could adversely affect other investors (because of the way the fund is managed or because the rights given to a particular investor may give that investor advantages over other investors) vs. those types of provisions that substantively don't impact other investors.

(2) For opinion purposes, it is better to group side letters in the following manner:

(i) provisions that describe how the general partner will exercise its discretion under the partnership agreement (i.e., consenting to a transfer; agreeing to consider particular investments) – these are things that are usually within the general partner's discretion under the partnership agreement;

(ii) provisions that supplement (but do not amend) the partnership agreement (i.e., providing additional information and additional notice);

(iii) provisions that alter the terms of the partnership agreement for one investor (i.e., reductions in fees; carve outs to confidentiality);

(iv) provisions that alter the terms of the partnership agreement for one investor that have an incidental effect on other investors, but do not change the rights of the other investors (i.e., additional excuse rights and additional withdrawal rights); and

(v) provisions that alter the terms of the partnership agreement for all investors (i.e., increasing the vote to remove the general partner, changes to key man provisions; changes to the purpose of the partnership).

E. No breach or default

(1) execution, delivery and performance of the side letter does not conflict with the partnership agreement

(2) execution, delivery and performance of the partnership agreement does not conflict with other agreements

(3) execution, delivery and performance of the side letter does not conflict with other agreements

F. Other opinions often seen in fund formation transactions – these are not particularly different than opinions given generally in substantive areas where side letters are not as prevalent:

(1) power and authority of entity to enter into and perform the partnership agreement and the side letter

(2) approval of the partnership agreement and the side letter(s) by all necessary corporate or partnership action

(3) A tax opinion from fund counsel that the treatment of the fund as a partnership will be upheld

(4) no consent required to execute, deliver and perform the partnership agreement and/or the side letter(s)

3. Diligence and role of particular counsel in the process

A. what is the role of fund counsel.

B. what is the role of local counsel.

C. What is the role of recipient counsel, specifically in the context of fund formation transactions where the parties are sophisticated and expected to be in a position to protect themselves.

D. Is it acceptable to opine on the documents provided for consideration, even if local counsel is aware that one or more side letters may exist that have not been provided to them.

E. Is there a risk that opinions will be misleading if the side letters are not addressed in the opinion.

4. Would the fund formation practice be easier if omnibus side letters were entered into or if the provisions most often contained in side letters were drafted into the constituent documents of the fund.

Sample third-party closing opinion in a loan transaction secured by management agreement fees involving "Side Letters"

_____________, 2007

[Bank A]
[Bank B]
c/o [Bank B],
as Administrative Agent
[address]
[address]

Re: Agreement (referred to below)

Ladies and Gentlemen:

We have acted as special counsel to [**the borrower—a registered investment advisor pledging management agreement fees for advisory services to mutual funds and hedge funds, where fee concessions under management agreements are typically granted in side letters**]., a limited partnership organized under the laws of the State of Delaware (the "Company"), in connection with the transactions contemplated by that certain Credit Agreement dated as of January 26, 2007 (the "Agreement"), among the Company, as the Borrower, [list Borrower's affiliates party to the Agreement], [Bank B], as Administrative Agent and L/C Issuer and the other Lenders party thereto. This opinion letter is furnished to you pursuant to Section [___] of the Agreement. Unless otherwise defined in the body of this opinion letter, capitalized terms used herein shall have the meanings assigned to such terms in the Agreement. Other terms that are defined in the Uniform Commercial Code as in effect in the State of New York (the "NY UCC") have the same meaning when used herein unless otherwise indicated by the context in which such terms are so used.

In rendering the opinions set forth below, we have reviewed an execution copy of the following documents and instruments:

(i) the Agreement;

(ii) two Notes dated as of January 26, 2007 executed by the Company (one Note in favor of [Bank A] and one Note in favor of [Bank of America]);

(iii) the Security and Pledge Agreement, dated as of January 26, 2007 (the "Security Agreement"), among the Company, the Guarantors and the Agent;

(iv) the Organizational Documents of the Company and the Guarantors; and

(v) copies of those certain [management agreements] listed on Schedule 6.22 to the Agreement (the "Applicable Contracts"). **We have not reviewed any of the Company Side Letters.**

The documents listed in clause (i) through (iii) above are referred to herein as the "Opinion Documents". Additionally, in rendering the opinions set forth below, we have reviewed such other records, certificates and documents as we have deemed appropriate for the purposes of such opinions. As to any facts material to our opinion, we have made no independent investigation of such facts and have relied, to the extent that we deem such reliance proper, upon statements of public officials and officers or other representatives of the Company and the Guarantors and on the representations and warranties relating to factual matters set forth in the Opinion Documents.

In rendering the opinions expressed below, we have assumed the legal capacity of all natural persons, the genuineness of all signatures, the authenticity of all documents submitted to us as originals, and the conformity to authentic original documents of all documents submitted to us as copies, which assumptions we have not independently verified.

Based upon the foregoing, having regard for such legal considerations as we have deemed relevant, and subject to the assumptions, qualifications, exceptions and limitations set forth herein, it is our opinion that:

1. The Company is a limited partnership existing and in good standing under the laws of the State of Delaware. The Company is duly qualified to do business as a foreign limited partnership under the laws of the States of New York and Texas. Each of the Guarantors is a limited liability company existing and in good standing under the laws of the State of Delaware.

2. The Company has the limited partnership power and authority to execute and deliver each Opinion Document to which it is a party and to perform its obligations thereunder. The execution and delivery by the Company of each Opinion Document to which it is a party and the performance by the Company of its obligations thereunder have been duly authorized by all requisite partnership action on the part of the Company. Each Guarantor has the limited liability company power and authority to execute and deliver each Opinion Document to which it is a party and to perform its obligations thereunder. The execution and delivery by each Guarantor of each Opinion Document to which it is a party and the performance by such Guarantor of its obligations thereunder have been duly authorized by all requisite limited liability company action on the part of each such Guarantor.

3. Each Opinion Document to which the Company is a party has been duly executed and delivered by the Company. Each Opinion Document to which the Guarantors are a party has been duly executed and delivered by each Guarantor.

4. Each Opinion Document to which the Company is a party is enforceable against the Company in accordance with its terms. Each Opinion Document to which the Guarantors are a party is enforceable against each such Guarantor in accordance with its terms.

5. The execution and delivery by the Company of each Opinion Document to which it is a party do not, and the performance by the Company of its obligations thereunder will not, (a) violate the Company's Organizational Documents; (b) result in any violation by the

Company of any Applicable Law (as defined below); (c) **breach or result in a default under any Applicable Contract**. The execution and delivery by each Guarantor of each Opinion Document to which it is a party do not, and the performance by each such Guarantor of its obligations thereunder will not (a) violate such Guarantor's Organizational Documents; (b) result in any violation by such Guarantor of any Applicable Law; or (c) **breach or result in a default under any Applicable Contract.**

"Applicable Laws" means (a) the Delaware Limited Liability Company Act, the Delaware Revised Uniform Limited Partnership Act, and (b) laws of the State of New York and the United States of America and the rules and regulations adopted thereunder.

6. The provisions of the Security Agreement are effective to create in favor of the Agent to secure the Secured Obligations (as defined therein) to the Lenders, a valid security interest in all of the Company's and each Guarantor's right, title and interest in and to that portion of the Collateral (as defined therein) in which a security interest may be created under Article 9 of the NY UCC (the "Article 9 Collateral").

7. Assuming that the Company will comply with the provisions of the Agreement relating to the use of proceeds, the execution and delivery of the Agreement by the Company and the making of the Loans thereunder and the application of the proceeds thereof does not violate Regulation U or X of the Board of Governors of the Federal Reserve System.

8. No Governmental Approval (as defined below) that has not been obtained or taken and is not in full force and effect, is required to be obtained or taken by the Company or either Guarantor to authorize, or is required in connection with, the execution and delivery by the Company or either Guarantor of each Opinion Document to which it is a party or the performance by the Company or either Guarantor of its obligations thereunder except Governmental Approvals not required to consummate the transactions occurring on the date hereof but required to be obtained or made after the date of this opinion letter to enable the Company and the Guarantors to comply with requirements of Applicable Law including those required to maintain existence and good standing as applicable of the Company and the Guarantors.

"Governmental Approvals" means any consent, approval, license, authorization or validation of, or filing, recording or registration with, any Governmental Authority pursuant to any Applicable Laws (as defined in paragraph 5 above).

In rendering the foregoing opinions, we have also assumed, with your permission, and without independent investigation on our part, the following:

A. With respect to our opinion set forth in paragraph 6 above, we have assumed that each of the Company and the Guarantors has, or has the power to transfer, rights in the properties in which it is purporting to grant a security interest sufficient for attachment of such security interest within the meaning of Section 9-203 of the NY UCC.

B. With respect to our opinion set forth in paragraph 6 above, we have assumed that the Agent has acquired its interests in the Article 9 Collateral for value within the meaning of Section 9-203 of the NY UCC.

C. With respect to our opinion set forth in paragraph 6 above, we have assumed the descriptions of collateral contained in or attached as schedules to, the Security Agreement sufficiently describe (for the purposes of the attachment of security interests) the collateral intended to be covered thereby.

The opinions set forth above are subject to the following qualifications and exceptions:

(a) The opinions in paragraphs 1 through 3 above are limited in all respects to the Delaware Revised Uniform Limited Partnership Act and the Delaware Limited Liability Company Act.

(b) The enforceability of each Opinion Document and the provisions thereof may be limited by bankruptcy, insolvency, reorganization, fraudulent transfer, moratorium or other laws now or hereafter in effect relating to or affecting enforcement of creditors' rights generally and by general principles of equity (including, without limitation, concepts of materiality, reasonableness, good faith and fair dealing), regardless of whether such enforcement is considered in a proceeding in equity or at law.

(c) With respect to our opinion set forth in paragraph 4, we express no opinion with respect to the validity or enforceability of the following provisions to the extent that they are contained in the Opinion Documents: (i) provisions releasing, exculpating or exempting a party from, or requiring indemnification or contribution of a party for, liability for its own negligence or to the extent that the same are inconsistent with public policy; (ii) provisions purporting to waive, subordinate or not give effect to rights to notice, demands, legal defenses or other rights or benefits that cannot be waived, subordinated or rendered ineffective under applicable law; (iii) provisions purporting to provide remedies inconsistent with applicable law; (iv) provisions purporting to render void and of no effect any transfers of the Company's and either Guarantor's rights in any collateral in violation of the terms of the Opinion Documents; (v) other than with respect to our opinion set forth in paragraph 6 above, provisions relating to the creation, attachment, perfection or enforceability of any security interest; (vi) provisions relating to powers of attorney, severability or set-offs; (vii) provisions stating that a guarantee will not be affected by a modification of the obligation guaranteed in cases in which that modification materially changes the nature or amount of such obligation; (viii) provisions restricting access to courts or purporting to affect the jurisdiction or venue of courts (other than the courts of the State of New York with respect to Opinion Documents governed by the laws of the State of New York); (ix) provisions purporting to exclude all conflicts-of-law rules; (x) provisions pursuant to which a party agrees that a judgment rendered by a court or other tribunal in one jurisdiction may be enforced in any other jurisdiction; (xi) provisions providing that decisions by a party are conclusive or may be made in its sole discretion; and (xii) provisions providing for liquidated damages to the extent that they may be deemed a penalty.

(d) In the case of property which becomes Article 9 Collateral after the date hereof, our opinion in paragraph 6 above, as to the creation and validity of the security interests therein described, is subject to the effect of Section 552 of the Federal Bankruptcy Code, which limits the extent to which property acquired by a debtor after the commencement of a case under the Federal Bankruptcy Code may be subject to such security interest arising from a security agreement entered into by the debtor before the commencement of such case.

(e) With respect to our opinion set forth in paragraph 6 above, we express no opinion as to Article 9 Collateral consisting of commercial tort claims.

(f) In rendering the opinion expressed in paragraph 5(c) above: (i) **we have not reviewed, and express no opinion with respect to, documents other than the Applicable Contracts, irrespective of whether they secure, support or otherwise relate to or are referred to in the Applicable Contracts or might under certain circumstances result in an event of default or require early payment under any of the Applicable Contracts**; (ii) we have made no examination of, and express no opinion with respect to, any financial, accounting or similar covenant or provision contained in the Applicable Contracts to the extent that any such covenant or provision would require a determination as to any financial or accounting matters; (iii) we express no opinion as to any breach of any confidentiality provision contained in any Applicable Contract caused by any Opinion Document or the Company's actions pursuant thereto or in contemplation thereof; and (iv) our opinion in paragraph 5(c) is limited to the laws of the State of New York. In every case, we have assumed that a court would enforce the Applicable Contracts as written and we have limited our opinion to matters readily ascertainable from the face of the Applicable Contracts.

(g) We express no opinion herein regarding the enforceability of any provision in a Opinion Document that purports to prohibit, restrict or condition the assignment of the Company's and either Guarantor's rights or obligations under such Opinion Document to the extent that such restriction on assignability is governed by Sections 9-406 through 9-409 of the NY UCC.

We express no opinion as to the laws of any jurisdiction other than the Applicable Laws.

This opinion letter is rendered as of the date set forth above. We expressly disclaim any obligation to update this letter after such date.

This opinion letter is given solely for your benefit in connection with the transactions contemplated by the Opinion Documents and may not be furnished to, or relied upon by, any other person or for any other purpose without our prior written consent or as provided in the next sentence. At your request, we hereby consent to reliance hereon by any Lender in addition to you (each such Lender, an "Additional Lender"), on the condition and understanding that (i) this opinion letter speaks only as of the date hereof, (ii) we have no responsibility or obligation to update this opinion letter, to consider their applicability or correctness to any person other than their addressees, or to take into account changes from the date hereof in law, facts or any other developments of which we may become aware, and (iii) any such reliance by an Additional Lender must be actual and reasonable under the circumstances existing at the time such Additional Lender becomes a Lender, including any changes in law, facts or any other developments known to or reasonably knowable by the Additional Lender at such time.

Very truly yours,

Excerpts from a sample Credit Agreement relating to "side letters":

DEFINITION

"Side Letter" means a side letter in connection with the [Management Agreements] that is entered into in the ordinary course of business and that does not, when taking into account all consequences or ramifications of such modification or amendment, materially adversely affect the Lenders, the Collateral, or the rights and benefits afforded to the Administrative Agent and the Lenders pursuant to the Loan Documents.

REPRESENTATION

Set forth in Schedule [___] is a list of all the [Management Agreements] (including the name of such agreements, the execution date, the parties thereto and identification of any amendments thereto) except any Side Letters.

COVENANT

Without in each instance the prior written consent of the Administrative Agent, which consent may be withheld by the Administrative Agent in its sole and absolute discretion, permit [Material Management Agreements] to be amended, modified, canceled, released, assigned, transferred or terminated, or otherwise allow the terms of [Material Management Agreements] to be waived, diluted or altered other than (a) a modification or amendment by means of a Side Letter . . . .

DRAFT

Proposed
October 1, 2007

Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions

Legal opinions that lawyers give to non-clients in business transactions, commonly known as third-party legal opinions, are prepared and understood in accordance with the customary practice of lawyers who regularly give or review them.

Customary practice permits an opinion giver and an opinion recipient (with its counsel) to have common understandings about an opinion without stating them in the opinion.

The use of customary practice does this in two principal ways:

1. It identifies the work (factual and legal) required to be undertaken to give the particular opinion. In so doing, it reflects a realistic assessment of the nature and scope of the opinion and the difficulty and extent of the work required.
2. It explains how certain of the words and phrases commonly used in an opinion are understood in the specialized context of an opinion. These explanations may expand or limit the plain meaning of the words and phrases used.

By providing content to abbreviated opinion language, customary practice significantly reduces the number of words needed to communicate complicated matters. As a result, an opinion may omit lengthy lists of diligence procedures, definitions, exceptions, limitations, and assumptions where customary practice supplies this content. As a matter of customary practice, the inclusion in an opinion of some but not all of this information does not mean that other information customarily understood to apply does not apply. Departures from customary practice, to be effective, must be indicated in the opinion.

The role of customary practice in third-party legal opinion practice is well established. The American Law Institute's *Restatement (Third) of the Law Governing Lawyers,* Section 95 (Reporter's *Note* to Comment *c*) states:

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

The Reporter's *Note* also refers to customary practice as an element in determining the "meaning of the opinion letter."

The *Restatement* refers to customary practice as a source of the criteria for applying the duty of competence to the opinion giver. *Restatement* Section 52, Comment *e*, Illustration 2. The *Restatement* states that the relevant community "whose practices and standards are relevant in applying this duty of competence" is that of "lawyers undertaking similar matters" in the relevant jurisdiction, which may, depending on the circumstances, be a "national practice with national standards." *Restatement* Section 52, Comment *b*.

Customary practice continues to evolve over time to reflect changes in the law and practice. Bar association reports are an "instrumental" source of descriptions of customary practice. *Restatement* Section 95 (Reporter's *Note* to Comment *b*). They also describe principles derived from customary practice that an opinion giver and the opinion recipient may use to resolve opinion issues.

Some opinions refer to the application of customary practice. Others do not. Either way, customary practice applies.

* * * * *

This Statement is jointly issued by the following entities:

[The approval by each entity is subject to that entity's approval of the changes in made in the Statement since the draft of February 14, 2007; in addition the specific expression of the name of each entity is subject to review by that entity]

- Section of Business Law of the American Bar Association
- Business Law Section of the Boston Bar Association
- Business Law Section of the California State Bar
- Corporate Law Committee of The Bar Association of the District of Columbia
- Real Property and Financial Services Section of the Hawaii State Bar Association
- TriBar Opinion Committee (including members of the (i) Special Committee on Legal Opinions in Commercial Transactions, New York County Lawyers' Association; (ii) Corporation Law Committee, The Association of the Bar of the City of New York, (iii) Special Committee on Legal Opinions of the Business Law Section, New York State Bar Association, and (iv) members of other state and local bar associations)
- Corporation Law Committee of the Ohio State Bar Association
- Business Law Section of the Pennsylvania Bar Association

- Corporate, Banking and Securities Law Section of the South Carolina Bar
- Business Law Section of the Washington State Bar Association
- Business Law Section of the State Bar of Wisconsin

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LEGAL OPINIONS UPDATE

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State Bar of Texas
BUSINESS LAW AND
CORPORATE COUNSEL SECTIONS CLE
State Bar of Texas Annual Meeting
June 21, 2007
San Antonio, Texas

CHAPTER 7

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LEGAL OPINIONS UPDATE

I. INTRODUCTION

There has been a significant amount of recent activity in that Bar's continuing discussion of legal opinion practices. In October of last year and April of this year, a number of the leading opinion experts participated in two ABA Legal Opinion Risk Seminars ("LORS") in New York. The LORS Seminars were well received, and it has been decided that the work of the LORS Seminars will be continued in a newly-formed ABA Working Group on Legal Opinions, with the goal of holding two legal opinion seminars per year. The Bar Associations have also been active on the legal opinions front; I understand that the Maryland Bar is about to issue a new legal opinions report and that the Florida Bar is in the process of preparing a report on legal opinions. In 2004, both the California[1] and North Carolina[2] Bars issued new legal opinion reports. Finally, in 2006, the Legal Opinions Committee of the Business Law Section of the Texas State Bar issued a statement regarding legal opinions on indemnification and exculpation provisions.[3]

This Article will discuss a few significant topics that have been the subject of recent discussion at the LORS Seminars and among legal opinion practitioners.

II. CUSTOMARY PRACTICE

Many of the most recent legal opinion reports take the position that the factual and legal diligence required to deliver a legal opinion and that the meaning of the words used in the opinion should be governed by the customary practice of lawyers similarly situated.[4] The TriBar Report describes customary practice as follows:

> Customary practice establishes the ground rules for rendering and receiving opinions and thus allows communication of ideas between the opinion giver and counsel for the opinion recipient without lengthy descriptions of the diligence process, detailed definitions of the terms used and laborious recitals of standard, often unstated, assumptions and exceptions. Thus, in opinion practice, customary practice is an important professional tool.[5]

According to certain of the legal opinion reports, customary practice allows an opinion giver to omit a statement of certain "standard" qualifications and exceptions, such, as for example, the bankruptcy exception and equitable principles limitation for remedies opinions.[6] Moreover, if an opinion giver wishes to vary the customary meaning of an opinion, the opinion giver should generally include an express statement in the opinion letter to that effect.[7] In addition, many of the legal opinion reports impose a duty upon opinion recipients to be familiar with customary practice.[8]

In an attempt explicitly to recognize the role of customary practice in rendering and receiving legal opinions, a "Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions" has been circulated to a number of state bar business law sections and legal opinion committees. A copy of this Statement is attached as Appendix A to this Article. The Statement

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[1] State Bar of California, Business Law Section, Report on Third-Party Remedies Opinions (September 2004) (hereinafter referred to as the "California Remedies Opinion Report"), which is available electronically at the website of the Business Law Section of the State Bar of California, http://www.calbar.ca.gov/state/calbar/calbar_sections_generic.jsp?cid=10701&id=7041.

[2] Legal Opinion Committee of the Business Law Section of the North Carolina Bar Association, Third Party Legal Opinions in Business Transactions, Second Edition 55-56, 57 (March 30, 2004); this report is available electronically at the website of the Business Law Section of the North Carolina Bar Association: http://business.ncbar.org/

[3] Legal Opinions Committee of the Business Law Section of the State Bar of Texas, Statement on Legal Opinions Regarding Indemnification and Exculpation Provisions under Texas Law, 41 TEX. J. BUS L. 271 (Winter 2006).

[4] E.g., TriBar Opinion Committee, Third-Party Closing Opinions, A Report of The TriBar Opinion Committee, 53 BUS. LAW. 591, 600 (1998) (herein referred to as the "TriBar Report"); American Bar Association Committee on Legal Opinions, Guidelines for the Preparation of Closing Opinions, 57 Bus Law. 875, Appendix (Legal Opinion Principles) Part I.B. (2002) (herein referred to as the "ABA Principles and Guidelines").

[5] TriBar Report, § 1.4(a) at 600-601. See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 95 cmt. c, reporter's note ("In giving 'closing' opinions, lawyers typically use custom and practice to provide abbreviated opinions that facilitate the closing. Such opinions may not recite certain assumptions, limitations, and standards of diligence because they are understood between counsel.").

[6] "[The bankruptcy exception and the equitable principles limitation] are understood to be applicable to the remedies opinion even if they are not expressly stated." TriBar Report, § 3.3.1 at 623.

[7] ABA Principles and Guidelines, Appendix (Legal Opinion Principles) Part I.C.

[8] "[A]n opinion giver is entitled to assume that the opinion recipient understands customary practice and recognizes that it has been followed in preparing the opinion letter." TriBar Report, § 1.4(a) at 601.

has not yet been finalized and remains subject to comment.

Some law firms have now begun including in their legal opinions an express statement about the role of customary practice, such as the following:

> This opinion has been prepared in accordance with the customary practice of lawyers who regularly give and lawyers who regularly advise recipients regarding opinions of this kind.

While customary practice is certainly a useful idea in rendering and receiving legal opinions, the concept does raise certain issues, a few of which will be discussed in the following parts of this Article.

A. How is customary practice determined?

It is generally recognized that customary practice should be determined by reference to legal opinion treatises, law review articles and bar association reports. But what if these authorities differ as to particular issues? For example, the Business Law Section of the California Bar has for years espoused the view that a remedies opinion addresses the enforceability of only the "essential provisions" of a contract,[9] while legal opinion reports from most other states (including Texas[10] and New York[11]) have stated that a remedies opinion addresses each and every undertaking in a contract.

While some commentators have argued for a national standard based mainly on the TriBar Report and on the ABA Principles and Guidelines, in a situation in which a Texas lawyer located in Texas is opining on Texas law documents it is reasonable to require that the Texas lawyer know customary practice as reflected in the TriBar Report? If, in such a situation, the opinion recipient sues the Texas lawyer in Texas court with regard to the opinion, would the Texas court really apply the TriBar Report and the ABA Principles and Guidelines as establishing customary opinion practice in Texas?

As of today, there is no definitive answer to these questions.

B. What if the opinion recipient is unfamiliar with customary practice?

As is noted above, an opinion giver is generally entitled to assume that an opinion recipient is familiar with customary practice. But what if the opinion recipient is not represented by counsel or is clearly unsophisticated? In connection with this issue the TriBar Report states the following:

> Parties to transactions in which opinions are rendered normally are advised by counsel as to the scope and acceptability of those opinions. Opinion givers should consider whether an opinion recipient who is not represented by counsel is familiar with customary practice applicable to opinion letters. A sophisticated party that regularly requests opinion letters in the course of its business may ordinarily be assumed to understand customary practice concerning the opinion letter it receives, whether or not it is represented by counsel in connection with the transaction.[12]

If an opinion giver permits assignees or other third parties to rely on an opinion, the opinion giver may not be in a position to know whether the opinion recipient is familiar with customary practice. In the case of assignees, it is also possible that some of the assignees will not be represented by counsel.

C. Will the courts apply customary practice as the liability standard?

While legal opinion practitioners and commentators may agree that the preparation and interpretation of legal opinions should be governed by customary practice, it would complicate matters if the courts apply a different standard in court cases analyzing the liability of opinion givers. In this connection, the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS states that a lawyer owes a duty of care to a nonclient "when and to the extent that . . . the lawyer . . . invites the nonclient to relay on the

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[9] California Remedies Opinion Report at 7. While continuing to affirm the "essential provisions" approach to remedies opinions, the California Remedies Opinion Report concludes that the differing California and New York treatment of remedies opinions is not likely to result in a meaningful difference in the standard of care owed by an opinion giver. Id. At 8-9.

[10] Legal Opinions Committee of the Business Law Section of the State Bar of Texas, Report of the Legal Opinions Committee Regarding Legal Opinions in Business Transactions, BULLETIN OF THE BUSINESS LAW SECTION OF THE STATE BAR OF TEXAS, June-September 1992, at 67, Part VII.A. (herein referred to as the "Texas Legal Opinion Report"). The Texas Legal Opinion Report (and the Supplements to it) are available at the website of the Business Law Section of the State Bar of Texas, http://www.texasbusinesslaw.org/legaloptions.html.

[11] TriBar Report, § 3.1 at 621.

[12] TriBar Report, § 1.4(a) at 601 n.24.

lawyer's opinion . . . and the nonclient so relies . . . ."[13] Under the RESTATEMENT, the duty of care owed to a nonclient in such circumstances is the same as the duty of care that is generally owed to clients—the duty to "exercise competence and diligence normally exercised by lawyers in similar circumstances."[14]

In asserting claims against lawyers based on opinion letters, many non-clients have based such claims on the tort of negligent misrepresentation.[15] Insofar as I have been able to determine, the Texas courts have never expressly referred to (much less adopted) customary practice as the standard by which claims of negligent misrepresentation would be evaluated, although a few courts in other states have adopted the customary practice standard.[16]

III. "NO LITIGATION" OPINIONS AND OTHER "TO OUR KNOWLEDGE" OPINIONS

A. Description

Opinion givers are sometimes asked to render "no litigation" opinions, such as the following:

> To our knowledge, there are no actions or proceedings against the Company, pending or threatened in writing, before any court, governmental agency or arbitrator that (a) relate to the Transaction Documents, or (b) could reasonably be expected to have a material adverse effect on the business, operations or financial condition of the Company.

Although a number of law firms now generally refuse to deliver such "no litigation" opinions, some of the opinion reports do address the delivery of such opinions.[17] A recent case illustrates the risks to a law firm that can result from rendering a "no litigation" opinion.

B. Cautionary tale: The Dean Foods Case

In Dean Foods Co. v. Pappathanasi[18] (herein referred to as "Dean Foods"), West Lynn Creamery ("West Lynn") was a long time client of the Boston, Massachusetts law firm of Rubin & Rudman ("R&R"). In early October of 1997, West Lynn received a grand jury subpoena, and West Lynn retained an R&R lawyer (herein referred to as the "Litigation Partner") to represent West Lynn in connection with the subpoena. Based on the subpoena and on other facts known to the Litigation Partner (who wrote several memoranda on the subject), it was apparent that West Lynn might be involved in a criminal rebate and tax fraud investigation. After dealing with the subpoena, between December of 1997 and September of 1998, the Litigation Partner did not do any further work on the rebate investigation.

At the end of June 1998, the stock of the parent of West Lynn was sold to a purchaser. In connection with the stock sale, R&R issued an opinion letter which opined that "[t]o our knowledge . . . there is no claim . . . proceeding . . . or investigation of any kind . . . pending or threatened against [West Lynn] . . . ." The opinion letter also stated that nothing had come to the attention of R&R which caused it to doubt (a) the accuracy of the representations and warranties in the transaction documents or (b) the accuracy of the exhibits and schedules to the Stock Purchase Agreement, one of which was a litigation disclosure.

In connection with closing the stock sale, the Litigation Partner informed the R&R corporate lawyer who was in charge of the stock sale transaction (herein referred to as the "Corporate Partner") that West Lynn had received a grand jury subpoena in October of 1997. Later, the Litigation Partner, the Corporate Partner, two of the selling stockholders, and the partner at R&R who was responsible for the West Lynn client relationship (herein referred to as the "Relationship Partner") had a meeting to discuss whether the grand jury subpoena should be disclosed in the litigation

[13] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51.
[14] Id. At § 52.
[15] Section 552(l) of the RESTATEMENT (SECOND) OF TORTS provides as follows:

> One who, in the course of his business, profession or employment, or in any transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

The Texas Supreme Court has held that a non-client may sue an attorney for negligent misrepresentation, even though there is no privity between the attorney and the non-client. McCamish, Martin Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787 (Tex. 1999.)
[16] See, e.g., Dean Foods Co. v. Pappathanasi, 2004 Mass. Super. LEXIS 571 (Mass. Super. Ct. Dec. 3, 2004), which is discussed at Part III.B. infra.

[17] See, e.g., TriBar Report, § 6.8 at 663-65; ABA Principles and Guidelines, § 3.4.
[18] 2004 Mass. Super. LEXIS 571 (Mass. Super. Ct. Dec. 3, 2004).

schedule to the Stock Purchase Agreement. At that meeting, the Litigation Partner stated that, for nearly six months, he had not heard anything from the Assistant U.S. Attorney that was handling the investigation and, for that reason, the Litigation Partner stated that it was his "guesstimate" that the grand jury investigation had gone away. Although the Corporate Partner and the Relationship Partner subsequently advised the clients that it would be "wise" to include the grand jury subpoena/investigation on the litigation schedule, the clients did not want to follow that advice, and there was no such disclosure on the final litigation schedule.

In accordance with R&R policy, another R&R partner (herein referred to as the "Opinion Partner") was asked to countersign the legal opinion for the Stock Purchase Agreement, but no one told the Opinion Partner about the grand jury investigation. The Litigation Partner subsequently testified when he participated in the discussion of the grand jury investigation for the purposes of determining whether the investigation should be listed on the disclosure schedules, he was not aware that essentially the same issue would need to be addressed in the R&R opinion letter.

Less than three months after the closing of the stock purchase and the delivery of the opinion letter, West Lynn was informed that it was one of the targets of a federal grand jury investigation, and West Lynn subsequently pled guilty to conspiracy charges and paid a fine of $7.2 million. West Lynn also paid approximately $2.1 million in legal fees and costs relating to the grand jury investigation. The parties who had relied on the R&R legal opinion then filed suit alleging, among other things, negligent misrepresentation. After the case was tried to the court (a jury trial having been waived), the court entered judgment in favor the plaintiffs and against R&R, awarding the plaintiffs $7.2 million plus attorneys' fees.

The court began its analysis by noting that, in order to prevail, "the plaintiffs here must demonstrate that the Rubin and Rudman defendants failed to conform to customary practice."[19] The court relied principally on the TriBar Report to determine customary practice and concluded that R&R had failed to abide by customary practice:

> It cannot be consistent with the customary practice relating to opinion letters, so elaborately expressed in the TriBar Report, to permit the opinion preparer to avoid his obligations to the opinion recipient by the simple artifice of blindly adopting the report of a fellow attorney's handling of a *criminal* grand jury subpoena for the client in question when the fellow attorney does not even know that he is providing grist for an opinion letter mill.[20]

In reaching its conclusion, the court relied heavily on the language in the opinion letter (which appeared in two places) stating that "nothing had come to [R&R's] attention with caused [R&R] to doubt" the accuracy of the client's representations and warranties in the transaction documents or the accuracy of the disclosure schedules to the Stock Purchase Agreement.

C. Factual diligence and the "to our knowledge" qualifier

Under customary practice, what is the factual diligence that an opinion giver is expected to conduct in rendering a "no litigation" opinion? If the opinion giver is a member of a law firm, must the opinion giver consult the law firm's files or any of the other lawyers in the firm? In connection with these questions, the ABA Principles and Guidelines state as follows:

> As a matter of customary practice the lawyers preparing an opinion letter are not expected to conduct a factual investigation of the other lawyers in the firm or a review of the firm's files, except to the extent the lawyers preparing the opinion letter have identified a particular law or file as being reasonably likely to have or contain information not otherwise known to them that they need to support an opinion.[21]

On of the issue of factual due diligence in "no litigation" opinions the TriBar Report states:

> As a matter of customary diligence the opinion does not require that the opinion preparers check court or other public records or review the firm's files (and an express disclaimer to that effect in the opinion letter is not necessary). . . . Nevertheless, the opinion preparers may check the firm's litigation docket (if one exists)

[19] Id. at *12.

[20] Id. at *17.

[21] ABA Principles and Guidelines, Appendix (Legal Opinion Principles) Part II.B.

> and, if they are not themselves familiar with the litigation the firm is handling for the Company, may seek the advice of a litigator or other lawyer in the firm who is.[22]

If an opinion giver relies on a "to our knowledge" qualifier in rendering a "no litigation" opinion, some of the opinion reports recommend that the opinion giver either define "to our knowledge" or expressly set forth the scope of his or her factual diligence.[23] On the other hand, the TriBar Report takes the position that a knowledge qualifier is unnecessary:

> The presence or absence of the phrase "to our knowledge" does not change the meaning of the opinion. With or without "to our knowledge", the opinion does nothing more than provide comfort to the opinion recipient that the opinion preparers do not know the list of litigation referred to in the opinion letter to be incomplete or unreliable.[24]

If an opinion giver elects to render a "no litigation" opinion and wants to use a knowledge qualification, something like the following might be considered:

> In rendering our opinion set forth in paragraph [__] above, we have not undertaken any investigation whatsoever or conducted any searches or reviews of the records of any court or other Governmental Authority or reviewed any of our Firm's files or records. Rather, our opinion in paragraph [__] above is limited solely to the conscious awareness of the lawyer who signs this opinion letter and any other lawyer in our Firm who has devoted substantive attention to the matters evidenced by the Transaction Documents.

D. "No litigation" language as a statement of fact rather than a legal opinion

Some opinion givers have sought to avoid having the "no litigation" statement characterized as a legal opinion by inserting the statement at the end of the opinion letter and not in the part of the letter containing the legal opinions and the qualifications and exceptions relating thereto. An example of such language taken from a recent opinion letter is as follows:

> Except as listed on Schedule 8.5 to the Credit Agreement, we advise you that we are not representing the Company in any litigation, arbitration, governmental investigation or proceeding, pending or threatened in writing against the Company or any of its properties with respect to the Transaction Documents or that could reasonably be expected to result in a Material Adverse Effect.

E. Other "to our knowledge" opinions

In the past, some opinion givers have rendered opinions like the following:

> To our knowledge, the execution and delivery by the Company of each of the Transaction Documents to which it is a party do not, and the performance by the Company of its obligations thereunder will not, (a) breach or result in a default under any material agreement or instrument (collectively, the "Material Contracts") to which the Company or any of its properties is subject, (b) result in any violation of any order, writ, judgment or decree to which the Company or any of its property is subject, or (c) result in the creation or imposition of any lien on any properties of the Company pursuant to any Material Contract, other than as may be contemplated by the Transaction Documents.

The ABA Guidelines and Principles and the TriBar Report[25] both recognize that the current trend is away

[22] TriBar Report, § 6.8 at 664.

[23] ABA Principles and Guidelines, § 3.4.

[24] TriBar Report, § 6.8 at 664.

[25] Footnote 12 to the ABA Principles and Guidelines provides as follows:

> "To our knowledge" is also sometimes used in opinions that address other factual matters, such as the no breach or default opinion. The trend today in many types of transactions is away from using "to our knowledge" to limit the scope of the opinion. Instead, for example, when giving a no breach or default opinion lawyers often prefer to identify the contracts covered by referring expressly in the opinion to an existing list

from using "to our knowledge" formulations in giving these opinions and instead merely opining on a specific list, such as in the following language:

> The execution and delivery by the Company of each of the Transaction Documents to which it is a party do not, and the performance by the Company of its obligations thereunder will not, (a) breach or result in a default under any agreement or instrument listed in Schedule I hereto ("Applicable Contracts"), (b) result in any violation of any order, writ, judgment or decree listed in Schedule II hereto, or (c) result in the creation or imposition of any lien on any properties of the Company pursuant to any Applicable Contract, other than as may be contemplated by the Transaction Documents.

IV. ASSIGNABLE OPINIONS

A. Description

In many syndicated bank loan transactions and other financing transactions, it is not unusual for the agent's counsel to request that language similar to the following be included in the opinion letter of the borrower's counsel so that assignees of the lenders may be permitted to rely on the opinion:

> This opinion letter is being delivered to you in connection with the above described transaction and may not be relied on by you for any other purpose. This opinion letter may not be relied on by or furnished to any other Person without our prior written consent. Notwithstanding the foregoing, we agree that the Lenders (as such term is defined in the Credit Agreement) and any permitted assignee of any Lender (as described in Section 12.04(a) of the Credit Agreement) may rely on this opinion letter.

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or a list prepared specifically for opinion purposes.

See also TriBar Report, § 6.5.5 at 658-660.

Some large, well-know New York law firms that act as borrower's counsel are now evidently refusing, as a matter of policy, to include language allowing assignees of the lenders to rely on the opinion, even in the context of syndicated bank loans. The following concerns have been cited in allowing assignees to rely on opinions:

1. The loans may ultimately be assigned to so-called "vulture funds" that specialize in acquiring defaulted loans and that may then look for anyone in the transaction (including borrower's counsel) against which they might potentially assert a claim and extract a settlement. The thought is that such a "vulture fund" might be much more likely to asset a claim than a large money center agent bank with which borrower's counsel may have a pre-existing relationship.

2. An assignee may be unsophisticated, may not be represented by counsel and may not be familiar with customary practice.

3. The original opinion letter may not be correct as applied to an assignee—for example, in some jurisdictions (such as California), usury exemptions may apply only to certain types of lenders.

4. The assignees may be located in different jurisdictions, thus potentially exposing the borrower's counsel to claims in more than one jurisdiction.

Notwithstanding the evident refusal of some high-profile New York law firms to permit assignee reliance, in recent statements at LORS and in other contexts, in-house counsel to some large money center banks have indicated that the language permitting assignees to rely on the legal opinion of the borrower's counsel is both customary and expected in syndicated bank loan transactions.

B. Certain alternatives for addressing the assignee reliance issue

Various proposals have been made to address the assignee issue, including the following.

1. Limit the time period during which assignees could come into reliance to between 30 and 90 days after the original closing. In-house counsel representing some large money center banks have indicated that such a

limitation may not be acceptable in the syndicated loan market.

2. Allow only the agent bank, on behalf of the lenders and their successors and assigns, to rely on the opinion.

3. Include express language stating that opinion has been prepared in accordance with customary practice.[26]

4. Include language developed by Wachovia, as follows:

> At your request, we hereby consent to reliance hereon by any future assignee of your interest in the loans under the Credit Agreement pursuant to an assignment that is made and consented to in accordance with the express provisions of Section 12.04(a) of the Credit Agreement, on the condition and understanding that (a) this letter speaks only as of the date hereof, (b) we have no responsibility or obligation to update this letter, to consider its applicability or correctness to any person other than its addressee(s), or to take into account changes in law, facts or any other developments of which we may later become aware, and (c) any such reliance by a future assignee must be actual and reasonable under the circumstances existing at the time of assignment, including any changes in law, facts or any other developments known to or reasonably knowable by the assignee at such time.

[26] See supra Part II.

V. CAUTIONARY TALE: IN RE: SONICBLUE

A recent case illustrates the potential pitfalls of making even minor errors in rendering legal opinions. In In re: SONICblue Inc.,[27] Pillsbury Winthrop Shaw Pittman LLP ("Pillsbury") had acted as long time counsel to SONICblue Incorporated ("SONICblue"). In April of 2002, SONICblue issued in a private placement $75 million in 7¾% senior secured subordinated convertible debentures (the "Debentures"). Three hedge funds (the "Bondholders") acquired the Debentures at a discount for $62.5 million. In its capacity as counsel to SONICblue, Pillsbury issued to the holders of the Debentures a legal opinion as to the enforceability of the Debentures and the other transaction documents. Numbered paragraph 2 of the opinion letter addressed the enforceability of the Purchase Agreement, the Registration Rights Agreement, the Indenture, the Pledge and Security Agreement and the Option Agreement, while numbered paragraph 3 of the letter addressed the enforceability of the Debentures. Pillsbury took a standard bankruptcy/insolvency qualification as to enforceability, but this qualification stated that "[o]ur opinion in paragraph 2 above is subject to and limited by the effect of applicable bankruptcy . . . laws . . .". As the bankruptcy court noted, "[i]n what may have been a scrivener's error, the bankruptcy limitation referenced only paragraph 2 and not paragraph 3 of the opinion letter."[28]

On March 21, 2003 (less than a year after the Debentures were issued), SONICblue and its subsidiaries filed a Chapter 11 bankruptcy petition. Pillsbury was hired to represent SONICblue as debtor's counsel in the bankruptcy proceedings. In its capacity as debtor's counsel, Pillsbury subsequently notified the Bondholders that their bankruptcy claims for payment of an original issue discount of approximately $43 million (significantly more than half of the Bondholder's total $75 million in claims) might be subject to partial disallowance under the federal Bankruptcy Code.

Counsel to the Bondholders then notified Pillsbury that, since the bankruptcy/insolvency exception in the legal opinion did not by its terms apply to the opinion paragraph covering the enforceability of the Debentures, the opinion letter should be interpreted to mean that the Bondholders' claims for the original issue discount would be allowed in bankruptcy. Based on this analysis of Pillsbury's opinion letter, the Bondholders also demanded in writing that Pillsbury indemnify them for any losses

[27] 2007 Bankr. U.S. Dist. LEXIS 1057 (Bankr. N.D. Cal. March 26, 2007)

[28] Id. at *4.

resulting from the partial disallowance of the original issue discount. Pillsbury denied the Bondholders' claims for an indemnity from Pillsbury, but immediately turned over to the law firm representing the creditors' committee the task of objecting to the Bondholders' claim for the original issue discount.

More than six months later, Pillsbury filed a supplemental disclosure advising the bankruptcy court of the potential conflict of interest resulting from the Bondholders' claims against Pillsbury. Based on the alleged conflict of interest, the U.S. Trustee moved to disqualify Pillsbury as counsel for the debtor and for an order requiring Pillsbury to disgorge the attorneys' fees it had received for acting as debtor's counsel in the bankruptcy.

In the introduction to its decision, the bankruptcy court noted that the genesis of the alleged conflict of interest "arose from the pre-petition issuance of an opinion letter, undisclosed by debtor's counsel, assuring payment to certain bondholders who effectively controlled the creditor's committee."[29] Relying heavily on Pillsbury's failure to make a timely disclosure of the conflict of interest resulting from the Bondholders' indemnity claim, the court held that the U.S. Trustee had "satisfied its burden of establishing that [Pillsbury] must be disqualified from its representation in this case . . . ."[30] The court reserved for a later hearing the issue of whether Pillsbury should be required to disgorge its fees.

In connection with analyzing the In re: SONICblue decision, it should be noted that TriBar Report[31] and the ABA Principles and Guidelines[32] both recognize that, as a matter of customary practice, a remedies opinion is subject to the standard bankruptcy/insolvency qualification even if that qualification is not expressly stated in the opinion.

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[29] Id. at *2-3.
[30] Id. at *12.
[31] TriBar Report, § 3.3.1 at 623 (the bankruptcy and equitable principles qualifications "are understood to be applicable to the remedies opinion even if they are not expressly stated").
[32] ABA Principles and Guidelines, Appendix (Legal Opinion Principles) Part II.D. ("[e]ven when they are generally recognized as being directly applicable, some laws (such as securities, tax, and insolvency laws) are understood as a matter of customary practice to be covered only when an opinion refers to them expressly").

APPENDIX A

Statement on the Role of Customary Practice in the Preparation and Understanding of Legal Opinions

[The current draft of the Statement is attached.]

Proposed
February 14, 2007

Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions

Legal opinions that lawyers give to non-clients in business transactions are known as third-party legal opinions. These opinions are prepared and understood in accordance with the customary practice of lawyers who regularly give or review them.

Customary practice permits an opinion giver and an opinion recipient to have common understandings about an opinion without stating them in the opinion.

The use of customary practice does this in two principal ways:

1. It establishes the diligence (factual and legal) required to be undertaken to give an opinion. In so doing, it reflects a realistic assessment of the nature and scope of the opinion and the difficulty and extent of the diligence required.
2. It explains how certain of the words and phrases commonly used are understood in the specialized context of an opinion. These explanations may expand or limit the plain meaning of the words and phrases used.

By providing content to abbreviated opinion language, customary practice significantly reduces the number of words needed to communicate complicated matters. As a result, an opinion may omit lengthy lists of diligence procedures, definitions, exceptions, limitations, and assumptions where customary practice supplies this content. Under customary practice, the inclusion in an opinion of some but not all of this information does not mean that other information customarily understood to apply does not apply. Departures from customary practice, to be effective, must be indicated in the opinion.

The role of customary practice in third-party legal opinion practice is well established. The American Law Institute's *Restatement (Third) of the Law Governing Lawyers,* Section 95 (Reporter's *Note* to Comment *c*) states:

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

The Reporter's *Note* adds that customary practice covers the "meaning of the opinion letter including all such assumptions, limitations, and diligence standards."

Customary practice evolves over time to reflect changes in the law and practice. Treatises, law review articles, and bar association reports describe customary practice. They also describe principles derived from customary practice that an opinion giver and the opinion recipient may use to resolve opinion issues.

Some opinions refer to the application of customary practice. Others do not. Either way, customary practice applies.