IN OUR OPINION

THE NEWSLETTER OF THE LEGAL OPINIONS COMMITTEE

ABA BUSINESS LAW SECTION

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James F. Fotenos and Susan Cooper Philpot, Editors

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FROM THE CHAIR

This issue of "In Our Opinion" arrives not long after the recent Spring Meeting of the Business Law Section in San Francisco. I was thrilled to see so many of you at the meeting. I will assume the draw was the Legal Opinions Committee, and not our fair City by the Bay. But even if you came for the town, I was stunned by the number of you that chose to spend part of your time at the Committee's meeting, or attending one of the two CLE programs that it co-sponsored. We had upwards of 50 people at our meeting (standing room only) and some 75 counting those who dialed in.

For those who didn't get to participate, Jim Fotenos has included in this issue a detailed summary of the meeting. We were treated to a preview of an in-process TriBar report on risk allocation provisions in agreements (and what opinion givers might and might not say about them) by Reporter Steve Weise of Proskauer. And we had an overview of recent experience with Delaware's new Sections 204 and 205 of the General Corporation Law (the provisions that permit ratification of corporate acts) led by Anna Mills of The Van Winkle Law Firm. It appears practitioners are beginning to use these provisions to remedy defects discovered during diligence, and to get to a position to render opinions on the ratified acts.

We co-sponsored two programs during the Spring Meeting. One (co-sponsored with the Private Equity and Venture Capital Committee) looked at developments in opinion practice in venture financing transactions. The program was fully subscribed notwithstanding its "kick off" time of 8:30 a.m. on Thursday. It addressed recent developments of note, including Sections 204 and 205 (recapped at our meeting the next day), developments in rules relating to, and opinions given on, exempt offerings under the Securities Act, and the California Venture Capital Sample Opinion recently published in The Business Lawyer (70 Bus. Law. 177 (2015)).

Our second program (co-sponsored with the Audit Responses Committee) brought up the rear of the Spring Meeting on Saturday afternoon, and addressed how audit responses are given by in-house lawyers. The panel discussed how in-house lawyers approach audit responses, the applicability of the 1976 Statement of Policy to these responses (as with those by outside lawyers) and some of the unique issues faced by in-house counsel.

I hope you will find this issue of In Our Opinion informative. You will find summaries of our own Committee meeting and those of the Law and Accounting Committee and the Securities Law Opinions Subcommittee of the Federal Regulation of Securities Committee. You will also find a pair of articles on the Supreme Court's recent *Omnicare* decision, and what it might mean (or not mean) for opinion givers. These articles also mark the return of our "Litigator's Corner" as one of the two pieces is written from the litigation perspective. They also demonstrate that the Supreme Court continues to produce opinions in many areas (including forum selection, arbitration and now securities law) that are (or at least may be) of interest to opinion givers.

As this issue arrives, I will be seeing many of you in New York at the upcoming WGLO Spring Program. And for those of you who cannot be there, we will have the traditional full set of summaries as an Appendix to our next issue.

A special thank you to our editors, Jim Fotenos and Susan Cooper Philpot, for bringing us yet another great issue.

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FUTURE MEETINGS

Working Group on Legal Opinions
New York, New York
May 11-12, 2015

ABA Business Law Section
Annual Meeting
Chicago
Hyatt Regency
September 17-19, 2015

BUSINESS LAW SECTION 2015 SPRING MEETING

The Business Law Section held its Spring Meeting in San Francisco on April 16-18, 2015. The Section had a full complement of meetings and programs. The following are reports on meetings held at the Spring Meeting of interest to members of the Legal Opinions Committee.

Legal Opinions Committee

The Committee met on Friday, April 17. The meeting was attended, in person or by phone, by approximately 75 members of the Committee. There follows a summary of the meeting.

Introduction. Tim Hoxie, the Chair of the Committee, called the meeting to order shortly after 3:30 p.m. Pacific Time. Tim stated his intention, following brief reviews of the status of several ongoing projects and a brief presentation by representatives of the Business Law Section's Publications Committee, to spend the bulk of the meeting on a discussion of a pending TriBar report on risk allocation provisions, and a review of recent experiences with Delaware GCL Sections 204 and 205.

Publications. Marilyn Maloney and Juliet Moringiello, representing the Publications Committee, emphasized the interest of the Business Law Section in publishing material generated by the Committee. Mr. Hoxie responded by noting that the Committee intended to publish the Cross-Border Opinions Report (discussed immediately below) later this year and an updated collection of opinion reports.

Cross-Border Opinions Report. The Committee's Report on Cross-Border Closing Opinions of U.S. Counsel was approved in substance for publication at the Committee's September 2014 meeting in Chicago. The report is now in final editing with a view to its publication in The Business Lawyer later this year. Ettore Santucci (Goodwin Procter LLP, Boston), reporter, updated the Committee on the progress of the final editing of the report. An exposure draft of the report has been posted on the Committee's website under "Working Drafts."[1] The exposure draft contains an appendix (Appendix B) that includes illustrative opinions, assumptions and exceptions for use in cross-border closing opinions. Members are encouraged to review the exposure draft and provide any comments to Ettore (esantucci@goodwinproctor.com).

Volcker Rule Opinions. George Williams of Kaye Scholer LLP, New York, provided an update on developments with respect to Volcker Rule opinions. Volcker Rule opinions are variations on the standard "not required to register as an investment company" closing opinion, and are requested by banks and nonbank financial companies subject to the Volcker Rule (12 U.S.C. § 1851) to provide assurance to such recipients that any interest they acquire in the opinion giver's client is not an "equity, partnership or other ownership interest in … a hedge fund or a private equity fund." 12 U.S.C. § 1851(a)(1)(B). The opinions being discussed, requested and sometimes delivered include both those given as third-party opinions and those given as "first-party" opinions by counsel to its client. These opinions typically conclude (i) that the interest being acquired by the recipient is not an "ownership" interest in a covered fund, (ii)that, if the interest is such an interest, the issuer is not an investment company and is *not* relying on either Section 3(c)(1) or 3(c)(7) of 40 Act to reach this conclusion, or (iii) that the issuer may rely on a particular exclusion, such as the loan securitization exclusion, from the definition of "covered fund.". Most of the opinions being delivered are reasoned opinions.

Transactions are also being structured to avoid application of the Volcker Rule.

Working groups are being organized to address Volcker Rule opinions and the diligence appropriate to giving such opinions. Interested parties include, in addition to the Legal Opinions Committee, the Securitization and Structured Finance Committee of the Business Law Section. The TriBar Opinion Committee is also studying these opinions, and the Working Group on Legal Opinions Foundation ("WGLO") will address these opinions in its seminar to be held May 11-12, 2015 in New York. Members interested in participating in the Committee's review of Volcker Rule opinions should contact George (george.williams@kayescholer.com). For a summary of George's presentation on Volker Rule opinions given at the November 21, 2014 meeting of the Committee in Washington, D.C., see the Winter 2014 issue (vol. 14, no. 2) of the Newsletter (page 8).

Joint Project on Common Opinion Practices. Stan Keller reported on this project, which is being sponsored by WGLO and this Committee. A draft of a "Statement on Customary Opinion Practices" based on the Committee's *Legal Opinion Principles* (53 Bus. Law. 831 (1998)) and selected *Guidelines for the Preparation of Closing Opinions* (57 Bus. Law. 875 (2002) was reviewed at the Committee's meeting held November 21, 2014 in Washington, D.C. As a result of the comments received at that meeting, an alternative approach under which the Statement would be more comprehensive, with the objective being that the Statement, once approved, would replace the *Principles* and *Guidelines*, is being evaluated. The Joint Project will be the subject of a WGLO panel presentation on May 12, 2015. Stan and Steve Weise (Proskauer Rose LLP, Los Angeles) (reporter) were hopeful that a revised draft might be available for review by the Committee at the Business Law Section's Annual Meeting to be held in Chicago on September 17-19, 2015.

[1] See http://apps.americanbar.org/dch/committee.cfm?com=CL510000.

Local Counsel Opinions Report. Phil Schwartz noted that the working group had begun work on a draft of the report on local counsel opinions (see discussion of this topic in the summary of the Committee's meeting held November 21, 2014 in the Winter 2014 issue (vol. 14, no. 2) of the Newsletter, at page 7). Members interested in assisting in that effort should contact Phil at philip.schwartz@akerman.com.

WGLO Update. Andrew Kaufman noted that WGLO would hold its next meeting in New York on May 11-12, 2015.

TriBar Report. Dick Howe updated the Committee on current TriBar projects, including an anticipated report on opinions relating to limited partnerships, and a report on risk allocation. The latter report was the subject of Steve Weise's discussion, which immediately follows.

TriBar Report on Risk Allocation Provisions. The bulk of the meeting was taken up with presentation by Steve Weise, reporter, of TriBar's report in progress on risk allocation provisions. Risk allocation provisions include indemnities, disclaimers, waivers, non-reliance provisions, and choice-of-law provisions. The subject is complex, in large part because of inconsistencies in case law on such provisions. Indemnity provisions are often drafted to address not only indemnification for third-party claims (the traditional scope of an indemnity provision) but also to address damages one party may claim against another for breach of an agreement's representations, warranties and covenants.

Steve noted that the report should serve as an educational tool for practitioners on the proper scope of these provisions and the case law addressing their enforceability. The report will include suggested forms of qualification for use by opinion preparers concerned over the enforceability of one or more of these provisions, from a broad form to narrower forms of the qualification addressing specific concerns over enforceability. Steve's expectation is that an exposure draft of the report should be available later this year.

DGCL Section 204 Opinions. The prior day, April 16, the Committee and the Private Equity and Venture Capital Committee jointly presented a program entitled "Recent Developments for Opinions in Venture Finance: The California Venture Capital Sample Opinion and Recent Changes in Private Offering Rules." The panel included Tim Hoxie, Rick Frasch, Ken Linhares (Fenwick & West LLP, Mountain View), Mike Kendall (Goodwin Procter LLP, Boston), and Anna Mills (The Van Winkle Law Firm, Charlotte). Anna led a discussion about recent experiences using Sections 204 and 205 as part of opinion diligence based on her presentation at the seminar. Effective April 1, 2014, Delaware added Sections 204 and 205 to the Delaware General Corporation Law permitting ratification of defective corporate acts and putative stock. Section 204 addresses ratification by the corporation; section 205 addresses applications brought by Delaware corporations or other parties to the Court of Chancery to determine the validity and effectiveness of defective corporate acts, including review of ratifications taken by the corporation under § 204. See Don Glazer's article on Section 204 opinions in the Spring 2014 (vol. 13, no. 3) issue of the Newsletter (*Opinions on DGCL Section 204 Stock: A Rose is a Rose is a Rose).*

Anna reported that, based on her survey, Delaware firms are giving Section 204 opinions addressing defective prior stock issuances, although the statutory provisions are broadly drafted to permit ratification of any defective corporate acts. These opinions are both given directly to recipients and to lead counsel who then gives the opinion to recipients, either expressly relying on Delaware counsel's opinion or using it for comfort without express reliance. Non-Delaware lawyers are tending not to give opinions alone based on Section 204, at least for now.

Anna reported that Delaware is currently considering clarifying amendments to Section 204. The amendments include an amendment to

Section 204(g) that would permit public companies to give the shareholder notice required by that subsection by filing or furnishing a Current Report on Form 8-K.

Other Committee Reports. The Committee also heard brief reports from chairs of other Business Law Section committees whose activities relate to those of the Committee. Bob Buckholz, chair of the Subcommittee on Securities Law Opinions of the Federal Regulation of Securities Committee, reported on the meeting of the Subcommittee held earlier that day, including the decision to publish the Subcommittee's Updated Report on No Registration Opinions and to undertake new reports on opinions on the resale of securities and on debt tender offer opinions (see Bob's summary of the meeting below); Tom White, chair of the Audit Responses Committee, reported that his Committee would meet the following day and that it would give a program Saturday afternoon on in-house counsel and responses to outside auditors; Keith Fisher, chair of the Professional Responsibility Committee, reported on its meeting held that afternoon, which included a lively discussion on the application of ABA Model Rule of Professional Conduct 1.2(d) to practitioners counseling distributors and sellers of marijuana and other participants in the marijuana industry, which may be legal under some state laws but is not under federal law.[2]

Next Meeting. The next meeting of the Committee will be held at the Section's Annual Meeting in Chicago September 17-19, 2015.

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[2] Rule 1.2(d) provides: "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of a law."

Law and Accounting Committee

The Law and Accounting Committee met on Saturday, April 18, 2015. The principal items of discussion are summarized below:

PCAOB Update. Mary Sjoquist briefly addressed the Committee on the status of ongoing Public Company Accounting Oversight Board ("PCOAB") projects.

1. Recognition of Standards. This project is expected to be effective by December 31, 2016.

2. Use of Work of Specialists. The PCAOB is continuing to focus on this project. A staff consultation paper is expected during the second quarter of 2015.

3. Fair Value Accounting. In August 2014, the PCAOB issued a discussion paper on fair value accounting. This paper generated approximately 40 comment letters. A standard possibly will be issued by the end of 2015.

4. Supplemental Information. The PCAOB's proposal for supplemental information will probably be issued in the second quarter of 2015.

5. Auditor's Reporting Model. The auditor's reporting model was issued a while ago and there have been many comments on this proposal. The PCAOB's work is ongoing.

6. Subsequent Events Project. The subsequent events project is in the drafting stages.

7. Audit Quality Indicators Project. The PCAOB is still waiting to issue a proposal.

The Committee resolved to provide a comment letter when the PCAOB issues its going concern proposal.

FASAC Update. Linda Griggs gave an update of the recent Financial Accounting Standards Advisory Council ("FASAC") meeting. Linda noted that it would be helpful if

Committee members could provide input on any evidence of the structuring of transactions in a particular way primarily for accounting purposes. Linda also discussed the cost benefits project.

Audit Responses Update. Tom White gave a brief update of the activities of the Audit Responses Committee and described the presentation at its committee meeting by representatives of "Confirmation.com" regarding an automated service for assembling audit response confirmations. Additionally, the updated audit response report ("Statement on Updates to Audit Response Letters") is going to be published in The Business Lawyer [70 Bus. Law. 489 (2015)].

FASB Update. Randy McClanahan then introduced an update of current Financial Accounting Standards Board ("FASB") pronouncements.

1. Consolidations. In February 2015, the FASB issued Accounting Standards Update No. 2015-2, which is an amendment to the consolidation analysis. This update modifies the current analysis for consolidating a variable interest entity. The update is extremely complicated and will likely require additional clarifications.

2. Extraordinary Items. In January 2015, the FASB issued Accounting Standards Update No. 2015-1, which eliminated the concept of extraordinary items from GAAP.

3. Revenue Recognition. The FASB recently decided to delay the effective date of this standard by one year. For public entities the standard will be effective for annual reporting periods beginning after December 15, 2017. For private entities, the standard will be effective for periods beginning after December 15, 2018. Early application is permitted but not before annual periods beginning after December 15, 2016. It remains to be seen whether or not the one year deferral will be sufficient, as the FASB still has to issue clarifying guidance for the following matters:

(i) Sales tax reporting;
(ii) Contract modifications;
(iii) Transition disclosures;
(iv) Non-cash consideration;
(v) Collectability;
(vi) Identifying performance obligations; and
(vii) Licenses.

4. Leases. The FASB is continuing to work on the leases project and anticipates issuing a revised standard prior to the end of 2015.

5. Insurance Contracts. The FASB is continuing its deliberations.

6. Financial Instruments — Credit Impairment. The FASB is continuing to work on its credit impairment update and expects to issue a final update in 2015.

Additional Discussion Topics. Jeffrey Rubin then began a discussion of current international accounting standards ("IFRS") and the interplay between IFRS and the European viewpoint of IFRS. The Committee also briefly discussed the comments of SEC Commissioner Stein in March regarding the presentation of an accounting system that implemented the best of GAAP and IFRS.

The next meeting of the Law and Accounting Committee will be held at the annual meeting in Chicago on September 19, 2015.

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Securities Law Opinions Subcommittee Federal Regulation of Securities Committee

The Subcommittee met on April 17, 2015. First, there was a discussion of whether the Subcommittee's draft report "No Registration Opinions (2015 Update)" should be submitted for publication in The Business Lawyer. The Subcommittee had been holding off on publishing, pending further developments relating to the proposed amendments to Rule 506 (which could, if adopted, raise additional issues for opinion givers similar to those addressed in the draft report). The consensus view was to proceed now to publish the report.

The meeting then turned to the question, which has been discussed before, of a possible future project addressing Rule 14e-1 opinions given in connection with debt tender offers. The SEC staff recently issued a no-action letter (Cahill Gordon & Reindel LLP (January 23, 2015), 2015 WL 295011), and is understood to be working on other guidance, addressing the substantive legal requirements applicable to these transactions. . While the substantive standards remain potentially in flux, the sense of the meeting was that a project specifically focused on the opinion practice aspects (in light of the largely informal nature of the legal guidance on the substantive standards being addressed) would be worth pursuing.

The largest portion of the meeting was given over to a very interesting further discussion, led by Vice Chair Tom Kim, of a possible future project addressing opinions delivered in respect of resales of securities. The discussion focused on the "Section 4(1-½)" exemption, and its application in different contexts (for example, in the context of resales by affiliates). It was suggested that a necessary first step in this project would be to develop a consensus view of appropriate practice under this exemption. The sense of the meeting is that the Subcommittee should continue to pursue this topic.

The next meeting of the Subcommittee will be in Chicago in September 2015.

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THE LITIGATOR'S CORNER

The Supreme Court's Omnicare Decision: Potential Implications for Litigation Concerning Closing Opinions

On March 24, 2015, the Supreme Court decided *Omnicare Inc. v. Laborers District Council Construction Industry Pension Fund*, 135 S. Ct. 1318, which concerns the liability of securities issuers under Section 11 of the Securities Act of 1933 for statements of opinion.[3] While the Supreme Court did not discuss attorney opinion letters, many practitioners are considering the implications of the *Omnicare* decision on opinion practice. As we discuss in this article, some aspects of *Omnicare* regarding the interpretation of statements of opinion likely will be important in determining what is or is not false and misleading, but there is a serious question whether the obligations of disclosure discussed in *Omnicare* are applicable to legal opinions a lawyer gives to a non-client. This article provides a litigator's perspective on how courts and litigants might or perhaps should apply *Omnicare* in future litigation concerning third-party legal opinions. Stan Keller provides a transaction lawyer's perspective on the decision

[3] Williams & Connolly LLP represented Omnicare in the Supreme Court, but the authors of this article were not involved in that matter. This article reflects only the individual views of the undersigned authors and does not purport to speak for Omnicare or the lawyers who represented it.

in "It is Only My Opinion" (*Omnicare* Decision) below.

The Omnicare Decision

Omnicare, a provider of pharmacy services, issued common stock pursuant to a registration statement. The registration statement contained representations that the company believed it was in compliance with legal requirements, for example: "We believe our contract arrangements with other healthcare providers, our pharmaceutical suppliers and our pharmacy practices are in compliance with applicable federal and state laws." 135 S. Ct. at 1323. The Supreme Court described these representations as "legal opinions." The registration statement also expressed caveats, including that several states had initiated enforcement actions against Omnicare and that the federal government had expressed "significant concerns" about certain rebates pharmacies had received from pharmaceutical manufacturers. The federal government later sued Omnicare for allegedly violating federal health care fraud statutes. Purchasers of shares sold pursuant to the registration statement then sued the company under Section 11, claiming that Omnicare's stated belief, in the registration statement, that it was in compliance with law was not based on "reasonable grounds" and was therefore false or misleading.

To appreciate fully the applicability of the decision, one must first understand the legal standard that applies in Section 11 claims. Section 11 imposes liability on securities issuers and some other persons if a registration statement "contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading."[4] Unlike many other securities statutes, Section 11 does not require a purchaser to allege and prove fraudulent or even negligent conduct.[5] Thus, in *Omnicare*, the central issue before the Supreme Court was when, if ever, an issuer's statement of subjective belief can be false or misleading if the maker of the statement honestly holds the stated belief. Justice Kagan's opinion for the Court addressed separately the questions (a) whether Omnicare's statements of belief were "untrue" and (b) whether Omnicare "omitted to state a material fact . . . necessary" to make those statements "not misleading." On the first issue, the Court reasoned that a statement of belief is "untrue" only if the speaker did not actually hold the stated belief. In short, "a sincere statement of pure opinion is not an 'untrue statement of material fact,' regardless of whether an investor can ultimately prove the belief wrong." 135 S. Ct. at 1327. The Court also allowed for the possibility that a statement of belief may include a statement of fact that is itself untrue: for example, "We believe we are in compliance with federal law because [untrue fact]," in which case the statement may be untrue – not because the speaker's expression of belief is false but because the stated predicate fact is false. *Id.* Plaintiffs in *Omnicare* did not allege that Omnicare's officers and directors lacked an honest subjective belief that the Company was in compliance with the law, and the challenged statements in Omnicare's registration statement did not express other allegedly untrue facts; accordingly, these statements of belief were not "untrue." The statements therefore were only actionable if they omitted material facts necessary to make the statements not misleading.

Turning to that latter question, the Court held that an opinion is not misleading merely because it is wrong, or because facts exist that cut against the opinion. Rather, it is misleading only if it "omits material facts about the issuer's inquiry into or knowledge concerning a statement of opinion, and if those facts conflict with what a reasonable investor would take from

[4] 15 U.S.C. § 77k(a).

[5] Although there are reasonableness defenses available to some Section 11 defendants, *see* § 77k(b)(3), those are affirmative defenses that the defendant must prove.

the statement itself." 135 S. Ct. at 1329. Importantly, the reasonable investor's reading of the opinion will take account of "all its surrounding text, including hedges, disclaimers and apparently conflicting information," as well as "the customs and practices of the relevant industry." 135 S. Ct. at 1330. The Supreme Court remanded the *Omnicare* case to the lower courts for a decision based on these principles.

The *Omnicare* Court went out of its way to emphasize that the scope of liability for omissions is quite narrow, even at the pleading stage of a case. To state a claim under Section 11 for a materially misleading omission, "[t]he investor must identify particular (and material) facts going to the basis for the issuer's opinion – facts about the inquiry the issuer did or did not conduct or the knowledge it did or did not have – whose omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly or in context." 135 S. Ct. at 1332. The Court emphasized: "That is no small task for an investor." *Id.* The Court further threw a specific lifeline to issuers: "[T]o avoid exposure for omissions under §11, an issuer need only divulge an opinion's basis, or else make clear the real tentativeness of its belief." *Id.*

Omnicare's Section 11 Context

Practitioners should not presume that the *Omnicare* decision's reasoning automatically governs cases concerning closing opinions. *Omnicare* was decided under Section 11 of the Securities Act, and the Supreme Court's reasoning was based in part on the policies of that particular statute. Lawyers typically are not (and cannot be) sued under Section 11 (unless they expertise a portion of the registration statement), which applies to issuers of securities and other specified parties. Claims against opinion givers usually are based on common law tort theories such as negligent misrepresentation or fraud, on Section 10(b) of the Securities Exchange Act of 1934 (the general antifraud provision of the federal securities laws), or on state "Blue Sky" securities laws. Unlike Section 11, most of those causes of action require multiple elements including misrepresentation – *i.e.*, an untrue or misleading statement; and most importantly scienter or negligence, as the case may be. The *Omnicare* decision at most speaks to the first element, misrepresentation, and not to the others. This is significant to keep in mind, as many lawsuits against lawyers, including those based on closing opinions, will be defended principally on the scienter, negligence or other elements of the claim, such as causation. Put another way, a lawyer's opinion might be found false or misleading under the *Omnicare* standard but still not lead to liability because the lawyer was not negligent in preparing the opinion and/or the lawyer did not act with reckless or fraudulent intent.

Regarding the element of an untrue or misleading statement, while courts in non-Section 11 cases are not bound to follow *Omnicare*, it is likely that federal and state courts addressing claims of misrepresentation based on statements of opinion, including in legal opinion letters, will read *Omnicare* and at least consider whether its reasoning should apply to the cases before them. Anticipating that exercise, we set forth two alternative ways of thinking about *Omnicare*: first, that *Omnicare*'s reasoning should not apply to closing opinions at all; and second, that *Omnicare*'s reasoning can be harmonized with current law and policies concerning closing opinions.

Paradigm 1:
Omnicare Inapplicable to Closing Opinions

Omnicare was decided under the federal securities laws which, in the words of the *Omnicare* court favor "full and fair disclosure of information relevant" to the offering. The speaker, in this instance the issuer of securities, is required to disclose certain categories of information but is not prohibited from disclosing other true facts. In other words, the issuer, if it chose, could provide a very broad array of facts relating to the subjects in the registration statement. For example, in the *Omnicare* case itself, the issuer could voluntarily have recited any facts that it believed were contrary to the stated opinion without violating any legal or ethical restriction. And, consequently, the issuer

could not defend against an omission claim by arguing that it was not permitted by law or rule from disclosing the allegedly omitted fact.

Lawyers giving opinions to third parties operate in an entirely different legal environment. If the lawyer's client permits the lawyer to express an opinion to a third party (*e.g.*, that an agreement between the lawyer's client and the third party is enforceable in accordance with its terms), the lawyer is authorized to give that opinion and no more. The lawyer is not free, without the client's consent, to disclose to the opinion recipient other confidential information about the client. Such information is confidential under the ethical rules, or protected by the attorney-client privilege, or both. This is fundamentally different from the issuer situation discussed in *Omnicare*, where no such restrictions apply to the issuer.

For this reason, we would argue that omission-based liability that sometimes arises in federal securities litigation is simply inapplicable to lawyers expressing opinions to third parties. We would defend against *Omnicare*-omission claims on the ground that the opinion giver is not free to volunteer privileged and confidential information about the client. This assumes, of course, that the opinion was genuinely believed and does not include an express false statement.

Paradigm 2:
Omnicare Applied to Closing Opinions

Supposing that our argument above were rejected and a court sought to apply *Omnicare*'s reasoning to determine whether a closing opinion is misleading by omission. Even in this scenario, *Omnicare* may in some instances be useful in defending opinion givers. *Omnicare* reinforces that if the opinion preparer honestly believed her legal opinion was accurate, the opinion letter is not "untrue." This is a point that many courts simply overlook. While we believe that securities law-omission based analysis should not be applied to third party legal opinions for the reasons set forth above, if a court were to do so then arguably the *Omnicare* standard is more demanding on plaintiffs than a traditional negligent misrepresentation standard, under which the court might find the "misrepresentation" element satisfied simply because the opinion turned out to be wrong, and move to the question of negligence – i.e., whether the lawyer's opinion satisfied the standard of care.

The portion of the *Omnicare* opinion that seems to us most likely to resonate in cases of closing opinions is the Court's emphasis on the *context* of the statements of opinion, including any limiting language contained in the document. According to *Omnicare*, whether an opinion is misleading depends on what knowledge or inquiry a reasonable investor would expect of the opinion giver under the circumstances. That expectation may depend not only on the affirmative language of the opinion itself, but also on "the surrounding text, including hedges, disclaimers, and apparently conflicting information," and on "the customs and practices of the relevant industry." 135 S. Ct. at 1330. Closing opinions typically include many disclaimers and limitations, which recipients of such opinions understand to be important. And, the *Omnicare* court's reference to "customs and practices" will be familiar to opinion practitioners from the literature, including the ABA *Guidelines*, which provide that "[a]n 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."[6] The problem, however, is that a court unfamiliar with opinion letters may, when confronted with an argument about the context of the opinion outside of its text, find that the argument cannot be decided upon a motion to dismiss and requires discovery. That, as we have observed, may lead to extensive and expensive discovery.

[6] *Guidelines for the Preparation of Closing Opinions*, 57 Bus. Law. 875, 876 § 1.7 (2002).

Thus, in a prior article in this Newsletter, we explained that, "from a litigation perspective there are advantages to spelling out known limitations, conditions and definitions, either in the letter itself or by reference to authoritative written pronouncements of opinion practice."[7] *Omnicare* reinforces that conclusion, as courts relying on that decision should give particular force to express limiting language in an opinion letter. Indeed, the Court specifically emphasizes that issuers can protect themselves from Section 11 liability by clearly stating the basis of their statements of opinion. The same may well be true of lawyers in tort cases. We would caution, however, that a practice of stating the basis for a lawyer's statements is not the same thing as a duty to disclose client information to the opinion recipient. As we have also previously written, we are opposed to a rule that would impose any such duty, and we do not read *Omnicare* to impose such a duty. [8]

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

[8] John K. Villa & Craig D. Singer, *The Opinion Is What the Opinion Says: Understanding So-Called "Duties of Disclosure" to Non-Clients*, In Our Opinion (vol. 14 no. 1, Fall 2014, at 14).

RECENT DEVELOPMENTS

"It Is Only My Opinion" (*Omnicare* Decision)

Recently, in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, 135 S.Ct. 1318 (Mar. 24, 2015), the United States Supreme Court considered when a statement of opinion in the prospectus for a registered offering of securities gives rise to liability under Section 11 of the Securities Act of 1933. In *Omnicare* the Court was addressing statements of belief regarding factual matters by an issuer of securities in a prospectus and not the kind of opinions we deal in when we give legal opinions, which are statements of professional judgment. Nevertheless, the discussion in the majority and concurring opinions of the common law of misrepresentation and their references to the Restatements of Tort and Contract do have relevance to closing opinions.

Omnicare involved statements in a prospectus that the company believed that its contract arrangements in the health-care industry were in compliance with applicable law. Subsequently, however, the U.S. Government brought claims that certain contracts violated anti-kickback rules. Investors brought a class action claiming the issuer was liable under Section 11, a provision that does not condition an issuer's liability on its state of mind or due diligence in misstating or omitting a material fact. The Court first ruled that a statement of opinion does not constitute a misrepresentation if it is honestly believed even if the statement is substantively incorrect. The Court then went on to hold, however, that an issuer still could be liable under Section 11 for the omission of a material fact if a reasonable investor would expect that the issuer had a reasonable basis for its belief and, if it did not, it did not disclose that fact. Under *Omnicare*, therefore, for Section 11 purposes a statement of belief that is honestly

held will not serve as a basis for liability even if it is wrong; rather the basis for liability for such a statement is the failure to disclose that the issuer lacked a basis for the opinion that a reader would reasonably expect.[9]

Omnicare's approach to determining when a statement of belief should give rise to liability is different from the approach traditionally taken in deciding whether an incorrect legal opinion constitutes a negligent misrepresentation. Under the traditional approach the fact that an opinion is wrong has been characterized as a misrepresentation and the failure to perform customary diligence or to exercise reasonable professional judgment has constituted the negligence required to establish liability. The concurring opinion of Justice Scalia provides a bridge between the two approaches by referring to the common law principle, citing the Restatement of Torts and Prosser & Keeton, that expressions of opinion made by an expert in his or her capacity as an expert (for example, a lawyer on a point of law) allow a recipient to deal with those special expressions of opinion as though they were facts. 135 S. Ct. at 1334. I doubt, though, that liability for an incorrect legal opinion would be different under either the *Omnicare* approach or the approach traditionally applied by courts to claims for negligent misrepresentation.

The majority opinion's emphasis in *Omnicare* on the particular facts and circumstances and the relevant context provides strong support for customary practice as providing the context in which legal opinions and what is done to support them are to be understood. Customary diligence helps align the expectations of opinion givers and opinion recipients as to what a lawyer needs to do to support an opinion. Moreover, *Omnicare* makes clear that the expectations of recipients must be reasonable under the circumstances and can be adjusted, and customary practice varied, by express disclosure. Thus, we in the legal opinion community can take great comfort in the *Omnicare* approach, even if it is not directly on point.

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[9] "Thus, if a registration statement omits material facts about the issuer's inquiry into or knowledge concerning a statement of opinion, and if those facts conflict with what a reasonable investor would take from the statement itself, then § 11's omissions clause creates liability." 135 S.Ct. at 1329 (footnote omitted).

LEGAL OPINION REPORTS

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

Chart of Published and Pending Reports

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

A. Recently Published Reports[10]

ABA Business Law Section	2009	Effect of FIN 48 – Audit Responses Committee
		Negative Assurance – Securities Law Opinions Subcommittee
	2010	Sample Stock Purchase Agreement Opinion – Mergers and Acquisitions Committee
	2011	Diligence Memoranda – Task Force on Diligence Memoranda
	2013	Survey of Office Practices – Legal Opinions Committee
		Legal Opinions in SEC Filings (Update) – Securities Law Opinions Subcommittee
		Revised Handbook – Audit Responses Committee
	2014	Updates to Audit Response Letters – Audit Responses Committee
	2015	No Registration Opinions (Update) – Securities Law Opinions Subcommittee
ABA Real Property Section (and others)[11]	2012	Real Estate Finance Opinion Report of 2012
Arizona	2004	Comprehensive Report
California	2007	Remedies Opinion Report Update
		Comprehensive Report Update
	2009	Venture Capital Opinions
	2014	Sample Venture Capital Financing Opinion
	2015	Revised Sample Opinion
Florida	2011	Comprehensive Report Update
Georgia	2009	Real Estate Secured Transactions Opinions Report
City of London	2011	Guide

[10] These reports are available (or soon will be available) in the Legal Opinion Resource Center on the web site of the ABA Legal Opinions Committee, http://apps.americanbar.org/buslaw/tribar/.

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

Recently Published Reports (continued)

Maryland	2009	Update to Comprehensive Report
Michigan	2009	Statement
	2010	Report
National Association of Bond Lawyers	2011	Function and Professional Responsibilities of Bond Counsel
	2013	Model Bond Opinion
	2014	501(c)(3) Opinions
National Venture Capital Association	2013	Model Legal Opinion
New York	2009	Substantive Consolidation – Bar of the City of New York
	2012	Tax Opinions in Registered Offerings – New York State Bar Association Tax Section
North Carolina	2009	Supplement to Comprehensive Report
Pennsylvania	2007	Update
Tennessee	2011	Report
Texas	2006	Supplement Regarding Opinions on Indemnification Provisions
	2009	Supplement Regarding ABA Principles and Guidelines
	2012	Supplement Regarding Entity Status, Power and Authority Opinions
	2013	Supplement Regarding Changes to Good Standing Procedures
TriBar	2008	Preferred Stock
	2011	Secondary Sales of Securities
	2011	LLC Membership Interests
	2013	Choice of Law
Multiple Bar Associations	2008	Customary Practice Statement

B. Pending Reports

ABA Business Law Section	Outbound Cross-Border Opinions – Legal Opinions Committee Sample Asset Purchase Agreement Opinion – Merger and Acquisitions Committee
California	Opinions on Partnerships & LLCs Sample Personal Property Security Interest Opinion
Real Estate Opinions Committees (Among Others)[12]	Local Counsel Opinions
South Carolina	Comprehensive Report
Texas	Comprehensive Report Update
TriBar	Limited Partnership Opinions Opinions on Clauses Shifting Risk
Washington	Comprehensive Report
Multiple Bar Associations	Commonly Accepted Opinion Practices

[12] See note 11.

MEMBERSHIP

If you are not a member of our Committee and would like to join, or you know someone who would like to join the Committee and receive our newsletter, please direct him or her here.[13] If you have not visited the website lately, we recommend you do so. Our mission statement, prior newsletters, and opinion resource materials are posted there. For answers to any questions about membership, you should contact our membership chair Anna Mills at amills@vwlawfirm.com.

NEXT NEWSLETTER

We expect the next newsletter to be circulated in July 2015. Please forward cases, news and items of interest to Tim Hoxie (tghoxie@jonesday.com), Jim Fotenos (jfotenos@greeneradovsky.com), or Susan Cooper Philpot (philpotsc@cooley.com)

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