

Cost-Benefit Analysis and Third-Party Opinion Practice

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Practitioner literature and bar association reports frequently exhort lawyers and clients to use “cost-benefit analysis” (“CBA”) to answer important questions about third-party closing opinion practice, including whether to have an opinion in a given transaction at all. Yet, this literature rarely considers seriously what is meant by “cost-benefit analysis” or whether it is in fact an appropriate decision tool in this context. This Article fills that gap by examining what CBA can—and cannot—do for third-party closing opinion practice. Among its benefits, CBA should help to orient discussions about whether to have a closing opinion around an opinion’s economic and informational value rather than claims that an opinion is (or is not) “traditional” or “market” in a particular context. But CBA is an imperfect tool. Cost-benefit analyses can be manipulated to mask costs or to exaggerate benefits. More fundamentally, CBA may treat ethically questionable practices as cost-justified and may fail to account for certain important professionalizing benefits of closing opinion practice. The Article suggests ways that CBA can and cannot help to improve closing opinion practice.

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INTRODUCTION

Third-party opinion practice has never been fun or easy. Third-party opinions are typically rendered at the closing of common financial transactions on legal matters, such as a party's authority to engage in a sale or the enforceability of a transaction. They are given by the lawyer to one party (e.g., the borrower) and addressed to the *other* party (e.g., the lender).¹ While the practice has become more streamlined and standardized over the years, questions persist: When should attorneys “cross the threshold” and render a third-party closing opinion? What should it cover? Who should give it? And, perhaps most difficult—because predicate to all other questions—how should we address these issues?

A seemingly attractive answer is provided by “cost-benefit analysis” (“CBA”). The *Threshold Report* of the Business Law Section of the State Bar of California, for example, has urged that “[t]he key guiding principle for determining the appropriateness of a third-party remedies opinion is that the benefits derived must warrant the time and expense required to prepare the opinion.”² The “most obvious

1. See Tri-Bar Opinions Comm., *Third-Party “Closing” Opinions*, 53 BUS. LAW. 592, 606 (1998) (“At the closing of many business transactions, counsel for one party to the transaction will deliver a letter to the other party expressing its conclusions on various matters of legal concern to that other party.”).

2. BUS. LAW SECTION, STATE BAR OF CAL., REPORT ON THIRD-PARTY REMEDIES OPINIONS app. 4, at 6 (Sept. 2004), available at http://www.calbar.ca.gov/calbar/pdfs/sections/buslaw/opinions/2005-01_remedies-opinion.pdf [hereinafter “*California 2004 Report*”]. Appendix 4 of the *California 2004 Report* is known as the “Threshold Report” because it was prepared by the “Threshold Subcommittee.” See *id.* at 6.

The *California 2004 Report* was not the first to suggest that a kind of CBA be applied to legal opinions. Judge Ambro and Truman Bidwell made a similar proposal in 1989. See Thomas L. Ambro &

‘cost’ of a third-party remedies opinion, under this analysis, is the additional fees of the opinion giver.³ The “benefit” of the third-party remedies opinion, if any, is that it “assist[s] its recipient in evaluating legal risks in the transaction.”⁴ Presumably, a similar analysis could apply to any of the other third-party closing opinions that might be delivered in a corporate or commercial transaction.

This is a valuable suggestion in many respects. It may, among other things, focus attention on the real utility of third-party opinions. It may create grounds for resisting unreasonable opinion requests or, conversely, obtaining an opinion over unreasonable resistance. It should help to orient debates about the use of opinions around their economic value, which would certainly be an improvement over the ego-jousting that sometimes plagues the practice.⁵ It may, in short, create a more objective basis for deciding whether, or to what extent, a legal opinion is appropriate in any given transaction, or even in whole categories of transactions.

If, however, we are to take CBA seriously, we should understand how it can—and cannot—help closing opinion practice. It turns out there is an enormous body of literature on CBA.⁶ CBA is an important, if controversial, decisional tool aimed at compelling public agencies to gather, organize, and analyze information

J. Truman Bidwell, Jr., *Some Thoughts on the Economics of Legal Opinions*, 1989 COLUM. BUS. L. REV. 307, 307 (suggesting that “the necessity for and scope of an Opinion should be measured in part on the basis of a cost/benefit analysis”). For another example, see Am. Bar Ass’n Comm. on Legal Opinions, *Report: Guidelines for the Preparation of Closing Opinions*, 57 BUS. LAW. 875, 877 (2002) (section 2.2) (“An opinion of other counsel should be sought by the opinion recipient only when the opinion’s benefits justify its costs.”). I discuss some of the strengths and weaknesses of this sort of analysis, as well as lawyers’ expressed views on the subject, in Jonathan C. Lipson, *Price, Path & Pride: Third-Party Closing Opinion Practice Among U.S. Lawyers (a Preliminary Investigation)*, 3 BERKELEY BUS. L.J. 59 (2005).

I will assume that readers understand the components of the basic third-party closing opinion, with its statements about authority, the absence of conflicts, and enforceability (also known as “remedies”). I refer those seeking further information to any of the many treatises that provide ample guidance on the construction, use, and interpretation of legal opinions. See, e.g., DONALD W. GLAZER, SCOTT FITZGIBBON, & STEVEN O. WEISE, *GLAZER AND FITZGIBBON ON LEGAL OPINIONS IN BUSINESS TRANSACTIONS* (2d ed. 2001 & Supp. 2006).

3. See *California 2004 Report*, *supra* note 2, app. 4, at 6.

4. *Id.* at 6.

5. See Lipson, *supra* note 2, at 80 n.103.

6. See, e.g., MATTHEW D. ADLER & ERIC A. POSNER, *NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS* (2006) [hereinafter “ADLER & POSNER, NEW FOUNDATIONS”]; STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLES: TOWARD EFFECTIVE RISK REGULATION* (1993); ROBERT W. HAHN, RANDALL W. LUTTER & W. KIP VISCUSI, *DO FEDERAL REGULATIONS REDUCE MORTALITY?* (2000); RISKS, COSTS AND LIVES SAVED: GETTING BETTER RESULTS FROM REGULATION (Robert W. Hahn ed., 1996); RISKS VS. RISKS: TRADEOFFS IN PROTECTING HEALTH AND THE ENVIRONMENT (John D. Graham & Jonathan B. Wiener eds., 1995); CASS SUNSTEIN, *LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE* (2005) [hereinafter “SUNSTEIN, FEAR”]; CASS R. SUNSTEIN, *RISK AND REASON: SAFETY, LAW, AND THE ENVIRONMENT* (2002) [hereinafter “SUNSTEIN, RISK AND REASON”]; Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 165 (1999) [hereinafter “Adler & Posner, Rethinking”]; David M. Driesen, *Is Cost Benefit Analysis Neutral?*, 77 U. COLO. L. REV. 335 (2006); Robert H. Frank, *Why Is Cost-Benefit Analysis So Controversial?*, 29 J. LEGAL STUD. 913 (2000); Edward R. Morrison, Comment, *Judicial Review of Discount Rates Used in Regulatory Cost-Benefit Analysis*, 65 U. CHI. L. REV. 1333, 1333 (1998) (citing statutes requiring cost-benefit analyses); Eric A. Posner & Cass R. Sunstein, *Dollars and Death*, 72 U. CHI. L. REV. 537 (2005); Edward Sherwin, *The Cost-Benefit Analysis of Financial Regulation: Lessons from the SEC’s Stalled Mutual Fund Reform Effort*, 12 STAN. J.L. BUS. & FIN. 1 (2006); Cass R. Sunstein, *The Arithmetic of Arsenic*, 90 GEO. L.J. 2255 (2002) [hereinafter “Sunstein, Arsenic”].

in certain ways before undertaking major projects or regulations.⁷ If the information gathered indicates that the marginal benefit (say, clean air) of a course of action (say, a regulation) exceeds its marginal cost (say, smoke-stack scrubbers), then, other things equal, regulators would know enough to be justified in taking the regulatory action.

Because CBA typically addresses regulatory—that is, public—decision-making, what we know about CBA translates only roughly to the world of closing opinions, where we have (largely) private decision-making by market actors. As translated, it presents three classes of challenges.

First, CBA is not without its problems. Many question its normative and moral foundations.⁸ Moreover, CBA is only as good as the quality of the quantities plugged into its formulas.⁹ If we do not know—or, more likely, we legitimately disagree about—the costs or benefits of a particular course of action, or how to measure them, then CBA may tell us very little. Worse, CBA's malleability can make it a tool of deception, cloaking unprincipled decisions with the appearance of objective precision.¹⁰

Second, we may find that a fulsome cost-benefit analysis produces results that challenge conventional assumptions about, and approaches to, closing opinion practice. It may, for example, indicate that the costs of a third-party closing opinion should include the potential liability exposure of opinion-giving lawyers and the reliance costs of parties remote from the original transaction. It might also tell us that the conventional division of labor—in particular, the current assignment of the task of writing the enforceability (remedies) opinion to the lawyer who has not drafted the underlying contracts—is not cost-justified.

Third, CBA may not be as helpful as we would like at answering certain difficult questions in closing opinion practice, in particular the decision whether to have an opinion at all—the so-called “threshold question.”¹¹ This is because both CBA and closing opinions can broadly be viewed as mechanisms for gathering, sorting, and evaluating information that may be relevant to decision-makers. The problem for closing opinions is that, in many cases, we will not know the benefits of having an opinion until we have already learned the information it was designed to produce. In other words, in certain important respects we may not know the benefits of a closing opinion without incurring the costs. Moreover, closing opinion practice may provide important professional and institutional

7. See, e.g., Driesen, *supra* note 6, at 339–42.

8. See, e.g., *id.* at 335–38; Frank, *supra* note 6, at 913–15; Amy Sinden, *Cass Sunstein's Cost-Benefit Lite: Economics for Liberals*, 29 COLUM. J. ENVTL. L. 191, 201–11 (2004) [hereinafter, “Sinden, *Cost-Benefit Lite*”]; Amy Sinden, *In Defense of Absolutes: Combating the Politics of Power in Environmental Law*, 90 IOWA L. REV. 1405, 1423–30 (2005) [hereinafter “Sinden, *Absolutes*”].

9. EDITH STOKEY & RICHARD ZECKHAUSER, A PRIMER FOR POLICY ANALYSIS 135 (1978) (“Logically, [CBA techniques] can be no more precise than the assumptions and valuations that they employ. . .”).

10. *Id.* (CBA “is especially vulnerable to misapplication through carelessness, naiveté, or outright deception. The techniques are potentially dangerous to the extent that they convey an aura of precision and objectivity.”).

11. *But see California 2004 Report*, *supra* note 2, app. 4, at 4 (urging “cost/benefit analysis” of threshold question regarding remedies opinions).

benefits that CBA may not adequately capture. If, as lawyers frequently say, the value of a closing opinion is ultimately that it is an expression of professional judgment,¹² we have a problem of quantification: Can dollars adequately capture the value of sound legal judgment?

This is not to say that CBA has no role in closing opinion practice. Rather, properly used, it offers at least two benefits.

First, by focusing the threshold question around information production, it should help to sort “easy” cases from “hard” cases. Easy cases will be those where the opinion request (or refusal) is not reasonably related to information relevant to the transaction. For example, an easy case will be one where the request or refusal is based on claims about opinion practice “traditions” or “customs,” without attention to whether the opinion is likely to have informational value. Hard cases, by contrast, will be those where parties reasonably disagree about the informational value an opinion would have.

Second, while CBA is hardly perfect, its market-based rhetoric and aspirations will likely lead parties to tend to view closing opinions more objectively. The benefit would be that it renders the practice more susceptible to coherent and consistent economic and financial analysis across transactions.

If CBA has this effect, it would be ironic: In many cases, the very bar association reports that urge lawyers to use CBA to answer the threshold question do so because it is viewed as a more sensible alternative to the knee-jerk claim that the presence (or absence) of an opinion in a transaction is “market.”¹³ Yet, the reality is that CBA is in many respects about acting *as if* the market applied.¹⁴ The important benefit of CBA may not be that it eliminates the “market” as an answer to the threshold question but rather that it creates a basis for more intelligent market behavior.

The challenge for lawyers engaged in third-party closing opinion practice is to maximize the benefits of CBA while minimizing its costs. This Article, based in part on interviews I conducted in the past several years with lawyers and clients on their views about legal opinion practice,¹⁵ seeks to advance that project. It has three major parts. First, it provides a brief sketch of cost-benefit analysis literature and how that literature might apply to third-party closing opinion practice. Second, it considers how CBA, if taken seriously, would affect certain aspects of closing opinion practice. Third, it considers the costs and benefits of CBA in this context.

12. See Lipson, *supra* note 2, at 71.

13. See, e.g., *California 2004 Report*, *supra* note 2, app. 4, at 1 (“Lawyers requesting the opinion frequently rely on the overused flippant comment that “it is market” to receive a remedies opinion and believe that this is the only analysis required.”).

14. See Richard A. Posner, *Cost-Benefit Analysis: Definition, Justification, and Comment on Conference Papers*, 29 J. LEGAL STUD. 1153, 1159 (“Cost-benefit analysis is, after all, primarily an effort to introduce market principles into government, or to induce government to simulate market outcomes, or in short to make government more like business.”).

15. A fuller analysis of these interviews and what they tell us about opinion practice appears in Lipson, *supra* note 2. For a discussion of the methodology in conducting these interviews, see *id.* at 127.

I. WHAT IS COST-BENEFIT ANALYSIS?

A. CBA IN THE POLICY WORLD

Cost-benefit analysis has become an increasingly popular, if contentious, decisional tool.¹⁶ At a high level of generality, it advocates a particular methodology for gathering, sorting, and analyzing information about the effects that administrative or regulatory decisions have on social welfare.¹⁷ Because private actors are assumed to engage in some sort of CBA when conducting market transactions,¹⁸ most academic literature about CBA focuses on governmental—not private—decision-making.¹⁹

CBA's intellectual roots are in nineteenth century utilitarianism.²⁰ Jeremy Bentham famously argued that if social planners could simply make those decisions that had the greatest utility for the greatest number, we would have a moral and effective government.²¹ But utilitarianism presented problems. Perhaps the most significant was the inability to compare the “pain” and “pleasure” (or “cost” and “benefit”) that different people would experience from a particular course of action.²² Taking a dollar from an impoverished Mary may “cost” her more than giving that same dollar would “benefit” its transferee, the wealthy John. More controversially, certain forms of utilitarianism have been characterized as capable of justifying offenses such as slavery and murder.²³ Classical utilitarianism was thus

16. See Sunstein, *Arsenic*, *supra* note 6, at 2256; Driesen, *supra* note 6, at 335.

17. See ADLER & POSNER, NEW FOUNDATIONS, *supra* note 6, at 13 (“In simple terms, CBA is a device for converting the utility losses and gains from a project or regulation into dollar values, and aggregating. To each person affected by the project (whether for good or for ill), one can calculate a ‘compensating variation,’ the amount that would make her as well off as she would be in the status quo—based on her actual preferences. If the sum of the compensating variations is positive, the project is approved; otherwise, it is rejected.”). *But see* Adler & Posner, *Rethinking*, *supra* note 6, at 168 (“It is commonly and mistakenly believed that CBA presupposes a particular form of utilitarianism that assumes that the government should maximize the satisfaction of people’s preferences, even when these preferences are uninformed or distorted.”).

18. See, e.g., AVINASH K. DIXIT & ROBERT S. PINDYCK, INVESTMENT UNDER UNCERTAINTY 3–6 (1994); Peter H. Huang, *How Do Securities Laws Influence Affect, Happiness, & Trust?*, 3 J. BUS. & TECH. L. 257, 259–60 (2008); W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 STAN. L. REV. 547, 551 (2000) [hereinafter “Viscusi, *Corporate Risk*”].

19. See Adler & Posner, *Rethinking*, *supra* note 6, at 167 (“Government agencies now routinely use CBA. This was not always the case. Before the 1980s, agencies did not systematically rely on CBA when evaluating regulations and other projects. But executive orders issued by the Reagan and Clinton administrations have since made the use of CBA by agencies common, and Congress has enacted numerous statutes requiring agencies to perform cost-benefit analyses.” (footnote omitted)).

20. ADLER & POSNER, NEW FOUNDATIONS, *supra* note 6, at 9–12.

21. See JEREMY BENTHAM, THE PRINCIPLES OF MORALS AND LEGISLATION 13 (J.H. Burns & H.L.A. Hart eds., Athlone Press 1970) (1823).

22. ADLER & POSNER, NEW FOUNDATIONS, *supra* note 6, at 9 (“The major problem [with utilitarianism] was that of interpersonal comparability: if an apple were taken from John and given to Mary, how would we determine the effect on aggregate utility?”).

23. See, e.g., R.M. Hare, *What Is Wrong with Slavery*, 8 PHIL. & PUB. AFF. 103, 109–11 (1979); H.J. McCloskey, *A Non-Utilitarian Approach to Punishment*, in CONTEMPORARY UTILITARIANISM 239, 244–49 (Michael D. Bayles ed., 1968) (suggesting that a utilitarian theory might tolerate the death of innocent African-Americans falsely accused of rape and murder to prevent vigilante behavior).

largely abandoned by economists and social planners, who today use more pliable techniques, organized around the preferences people are assumed to have.

These more sophisticated techniques are generally associated with academics Pareto, Kaldor, and Hicks, whose work has enabled economists to model the costs and benefits of particular projects. Vilfredo Pareto made the first famous modification to strict utilitarianism by observing that welfare could be maximized even if we did not know the absolute amounts of pleasure or pain a particular project would produce.²⁴ All we needed to know, Pareto observed, was that a project should be approved if at least one person affected by it would be made better off, and no one would suffer because of it.²⁵ The problem with Pareto's test, however, was that it was, in the words of Professors Adler and Posner, "too strong."²⁶ Few projects will satisfy the Pareto standard because "just about every worthwhile government project will hurt people, and compensating those people is usually infeasible."²⁷

Kaldor and Hicks modified Pareto's test, arguing that a project should be approved if its beneficiaries gain enough from the project so that they could, at least hypothetically, compensate those harmed by it.²⁸ Actual compensation, however, is not required. Its hypothetical nature is what distinguishes it from the Pareto test. If a project would take only \$.50 from Mary but award John \$1.00, it should be approved under the Kaldor-Hicks test because aggregate welfare has increased by \$.50. Whether John does in fact compensate Mary is not relevant because that is a political question that CBA does not purport to address.

The work of these economists has formed the intellectual foundation of CBA. Proponents of cost-benefit analysis urge that it has no moral or ethical content.²⁹ It does not tell people *which* decisions to make. Rather, it is said to provide a way of assessing information about the impact of those decisions. "[C]ollecting . . . information is what is meant by cost-benefit analysis as an evaluative tool . . ." Judge Posner has argued.³⁰ It is a "decision procedure . . . a method for achieving desirable results."³¹ It does not—or, according to proponents, should not—be understood to determine what those desirable results might be.³² Yet, most important

24. See generally VILFREDO PARETO, *MANUAL OF POLITICAL ECONOMY* 45–48 (Ann. S. Schwier & Alfred N. Page eds., Ann. S. Schwier trans., Augustus M. Kelley Publishers 1971) (1927).

25. See *id.*

26. Adler & Posner, *Rethinking*, *supra* note 6, at 170.

27. *Id.*

28. See, e.g., J.R. Hicks, *The Foundations of Welfare Economics*, 49 *ECON. J.* 696, 704–06 (1939); Harold Hotelling, *The General Welfare in Relation to Problems of Taxation and of Railway and Utility Rates*, 6 *ECONOMETRICA* 242, 249–56 (1938); Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 *ECON. J.* 549, 550–52 (1939).

29. See Richard O. Zerbe, Jr., *The Legal Foundation of Cost-Benefit Analysis*, 2 *CHARLESTON L. REV.* 93, 94 (2007).

30. See Posner, *supra* note 14, at 1175 ("It is not," he continues, "the equality or inequality sign that marks analysis as cost-benefit but the collection and display of costs and benefits.").

31. Adler & Posner, *Rethinking*, *supra* note 6, at 167–68.

32. See David M. Driesen, *Distributing the Costs of Environmental, Health, and Safety Protection: The Feasibility Principle, Cost-Benefit Analysis, and Regulatory Reform*, 32 *B.C. ENVTL. AFF. L. REV.* 1, 48 (2005).

public policy projects—from setting acceptable levels of arsenic in drinking water to preparing for a terrorist attack—are informed by CBA.³³ Cost-benefit analyses of “lifesaving regulations”³⁴ have become a routine—in many cases mandatory³⁵—feature of government regulation.

B. DOES CBA MATTER TO OPINION PRACTICE?

A reasonable preliminary question is whether the larger body of literature on CBA is even relevant to third-party opinion practice. After all, one might argue, most closing opinion practice involves market transactions by and among private actors.³⁶ In most cases, the government plays little or no role in deciding whether an opinion should be rendered.³⁷ CBA as envisioned in the policy world may be trying to approximate the sorts of calculations rational market actors are already expected to make for themselves.³⁸

If so, the rich literature on CBA may in fact be dealing with a very different set of problems than we encounter in closing opinion practice, problems that the market, by and large, will solve. To the extent there are problems in closing opinion practice, in other words, they would derive not from CBA but from more general economic assumptions that private actors are rational, greedy, and so forth.³⁹ In that case, the real question would thus become: If lawyers in private practice are rational market actors—and who is more rational than a lawyer in private practice?—why should the bar associations need to admonish lawyers and parties to engage in a CBA when considering whether to render an opinion? Would they not already

33. SUNSTEIN, FEAR, *supra* note 6, at 150; Sunstein, *Arsenic*, *supra* note 6, at 2256–60.

34. The term “lifesaving regulation” is associated with the work of Richard Zeckhauser. See Richard Zeckhauser, *Procedures for Valuing Lives*, 23 PUB. POL’Y 419 (1975); Richard Zeckhauser & Donald Shepard, *Where Now for Saving Lives?*, 40 LAW & CONTEMP. PROBS. 5, 6–8 (1976).

35. See Exec. Order No. 12866, § (3)(f)(1), 58 Fed. Reg. 51735 (Sept. 30, 1993), *reprinted as amended* in 5 U.S.C.A. § 601 (West 2007). This order requires federal agencies to provide a cost-benefit analysis for “[s]ignificant regulatory action[s],” defined in part as actions that “[h]ave an annual effect on the economy of \$100 million or more.” *Id.* See also Adler & Posner, *Rethinking*, *supra* note 6, at 239–40 (discussing this executive order). This order has been amended recently to impose further market discipline on regulatory agencies, in particular by requiring that they identify a “market failure” in order to justify their regulatory action. See Exec. Order No. 13258, 67 Fed. Reg. 9385 (Feb. 26, 2002), *reprinted as amended* in 5 U.S.C.A. § 601 (West 2007); Exec. Order No. 13422, 72 Fed. Reg. 2763 (Jan. 18, 2007), *reprinted in* 5 U.S.C.A. § 601 (West 2007) (“Each agency shall identify in writing the specific market failure (such as externalities, market power, lack of information) or other specific problem that it intends to address . . . that warrant[s] new agency action, as well as assess the significance of that problem, to enable assessment of whether any new regulation is warranted.”).

36. In the private context, CBA would indicate that parties should choose projects based on their expected internal rate of return or their net present value. In either case, as will be developed further below, these methods of analysis have the same basic strengths and weaknesses as CBA in the public context. Among other things, they do not tell us how to value the costs and benefits plugged into their formulas.

37. *But see California 2004 Report*, *supra* note 2, app. 4, at 4–5 (collecting various government regulations that require legal opinions in certain types of transactions, such as bilateral netting agreements among banks or the transfer of U.S. Department of Defense procurement contracts).

38. See, e.g., Posner, *supra* note 14, at 1159; DIXIT & PINDYCK, *supra* note 18, at 4–5.

39. See, e.g., RICHARD H. THALER, *QUASI RATIONAL ECONOMICS* 220–35 (1991). Compare with the sources in *supra* note 18.

do this? What purpose would CBA serve that is not already accomplished by the ordinary workings of the marketplace for legal services?

There are at least three responses.

First, opinion practice is not purely a market-based activity. The political economy of private practice in general, and the rendering of third-party closing opinions in particular, are determined by a complex mix of market and non-market forces. Professional ethics, professional integrity, and fiduciary duty are all layered into opinion practice in important, complex, and sometimes troublesome ways. Similarly, one reason closing opinion practice is probably not susceptible to pure market analysis and may benefit from CBA involves the intermediating function of closing opinions. As discussed further below, the chief benefits of closing opinions are informational in a variety of ways. One of the informational benefits of a closing opinion is that it acts as a sort of conduit or link between the “private” actions of contracting parties and the anticipated “public”—judicial or regulatory—consequences of those actions. When a closing opinion says that a party has authority to do a deal or that the contract is enforceable, it is in part making a prediction about public recognition of this private ordering. In this sense, closing opinions straddle the private and public spheres.

Second, the bar associations’ unusually prominent work here resembles a sort of soft regulation that might, itself, be subject to CBA. While the role of the bar associations in private practice is complex, they do regulate the practice of law directly and indirectly. Here, of course, we would not be considering a cost-benefit analysis of closing opinion practice per se, but rather of the regulation of that practice by the bar associations. Although such an analysis of the bar associations is beyond the scope of this Article, Part III does assess limitations on the use of CBA as proposed in this context.

Third, just because literature on CBA only translates roughly from the public to the private spheres does not mean the insights and concerns of this body of thought have no relevance. As will be discussed below, many of these insights and concerns do apply to closing opinion practice, albeit in slightly different ways than would be expected in the purely public context. For example, closing opinion practice would probably be better if we all agreed on a standard set of metrics about the costs and benefits of the closing opinion. Many disagreements in this context are not about whether to use a kind of CBA but how to assign values to the costs and benefits an opinion might create.

At this point, we cannot fully know the answers to these questions. Indeed, one benefit of CBA is that it would help to identify gaps in our knowledge and suggest ways to fill those gaps. The most we can do at this point is to advance our understanding of the costs and benefits of closing opinion practice and how CBA’s own strengths and weaknesses affect its value in this context. I consider these two points in the next two parts of this Article.

II. THE COSTS AND BENEFITS OF THIRD-PARTY CLOSING OPINIONS

When we talk about cost-benefit analysis in the context of legal opinions, we may have in mind a fairly simple calculation. “For an Opinion to have value,” Ambro and Bidwell observe, “the transaction to which it relates must be worth

more, net of the Opinion's costs, as a result of giving the Opinion."⁴⁰ The CBA to be performed, the California Bar Association's *2004 Report* explains, "involves measuring the cost of preparation against the benefit that the opinion recipient obtains through its reliance on the . . . opinion, taking into account the size and complexity of the transaction."⁴¹ The *California 2004 Report* suggests three sets of questions to ask in order to determine whether a legal opinion is cost-justified:

- (1) What expected benefits are provided to the opinion recipient and under what circumstances are these benefits likely to be actually achieved?
- (2) Do any negative consequences flow to the opinion giver's client or to the opinion recipient from delivery or receipt of a remedies opinion?
- (3) Can the benefits be obtained in ways that are less "costly" than the issuance of a third-party remedies opinion?⁴²

CBA sounds simple, but it is not.⁴³ A full-blown CBA would require several sets of comparisons. A comparison must be made between the status quo, meaning the state of the world without the project, and the state of the world with the project. The comparison must further account for the effect that these varying states would have on the parties involved. Finally, to be intelligible, the comparisons must be reduced to a single unit of measurement, usually dollars.

When regulators think about CBA in the public sphere, the problems can be daunting, as millions of people could be affected. The population affected by the decision to give or not to give a legal opinion, by contrast, should be much smaller, probably reaching only the parties, their anticipated successors and assigns (e.g., loan participants), and the lawyers and third parties potentially affected by it. But even in this more limited universe, a competent CBA would have to plot a set of curves that reflects the preferences of each constituent for the transaction with no opinion versus the state of the world with an opinion. When the aggregate preference for having an opinion exceeds the aggregate preference for not having one, CBA would say the benefit of an opinion outweighs its costs.

40. Ambro & Bidwell, *supra* note 2, at 313. This calculation is, in turn, rooted in Professor Gilson's influential article on "value creation" by lawyers. See Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 *YALE L.J.* 239, 274-77 (1984). See also Lipson, *supra* note 2, at 66-69 (discussing Gilson's formulation as applied to closing opinion practice).

41. *California 2004 Report*, *supra* note 2, app. 4, at 12. The *California 2004 Report* provides further elaboration:

In assessing whether the benefit of a remedies opinion "justifies its cost," the focus should not be simply on measuring cost from the opinion giver's client's perspective—any cost incurred by a party in having its counsel issue a third-party opinion is greater than that person would have otherwise borne. Rather, the inquiry should be whether *the aggregate costs to all parties are greater either because of the duplication of effort (as counsel for both parties may be giving opinions or advising on the same subject), or because of the economic cost of the negotiation over the text of the opinion itself.*

Id. app. 4, at 2 n.7 (emphasis added).

42. *Id.*

43. ADLER & POSNER, *NEW FOUNDATIONS*, *supra* note 6, at 13 ("Some people think that a CBA . . . is conceptually straightforward and that the only problem posed by CBA is the practical difficulty of collecting data.").

It is unlikely that clients and lawyers are going to engage in the sort of rigorous analysis that CBA typically requires. So, what will they do? Probably a kind of “folk CBA,” a rough calculation of the cost of producing the opinion and the estimated benefits of having it. As discussed below, there is intuitive appeal to this. But if we are to take CBA, even the “folk” variety, seriously, we have to recognize that it may ask us to account for closing opinion practice in ways that deviate from current practice. We may not always be happy with those deviations.

A. COSTS

1. Calculating the Costs of Legal Opinions

To perform the rough calculation that would determine the expected utility of a legal opinion requires some knowledge of the costs involved. The California Bar Association’s *2004 Report* focuses on the cost of legal fees associated with the preparation of the opinion.⁴⁴ As in the regulatory context, cost here would be determined by reference to market equivalents: What is the standard charge for a legal opinion of this sort in this context? While cost estimates can vary, lawyers would seem reasonably well-positioned to estimate the cost of an opinion, assuming the transaction is fairly straightforward and no problems arise.⁴⁵

But even when a deal is simple, estimating costs presents some challenges. The principal problem on the cost side of even the simplest transaction would be isolating the costs associated exclusively with the opinion. Ambro and Bidwell, for example, suggest that legal opinions create five classes of costs: (i) negotiation, (ii) diligence, (iii) legal research, (iv) firm process costs (i.e., having the “opinions committee” vet the opinion), and (v) “comfort costs” involved in drafting officers’ certificates and the like that provide factual support for the opinion.⁴⁶ Some of these costs—in particular, negotiation over the opinion and drafting officers’ certificates to support the opinion—would seem to be unique to the opinion itself. Others should be incurred whether or not there was a formal opinion. One hopes that lawyers engage in diligence and legal research relevant to the transaction whether or not they provide a formal opinion on it, although there is reason to believe that requiring a closing opinion heightens attention to these tasks.⁴⁷

Another, ultimately more significant, problem with calculating cost involves prediction when a deal is not simple, in particular the costs of unanticipated problems that come to light only in the course of preparing and negotiating the opinion. Sometimes these efforts are, in hindsight, worthwhile; sometimes they

44. *California 2004 Report*, *supra* note 2, app. 4, at 6 (“The most obvious ‘cost’ [of including an opinion] is the additional fees of the opinion giver.”).

45. See Lipson, *supra* note 2, at 87 n.41 (quoting attorney as saying, “[Y]ou can’t get an opinion out the door, even the simplest authorization opinion, for under \$5,000. . . .” (alteration and omission in original)).

46. See Ambro & Bidwell, *supra* note 2, at 311–12.

47. As discussed below, an important benefit of closing opinion practice—albeit one that may be difficult to quantify—is its role as a “schema” or “template” that guides and standardizes the analysis related to a transaction.

are not. Lawyers frequently complain about negotiations over seemingly trivial details in opinions. Yet, until the issues are raised through the negotiation process, we may not know whether they are trivial or how far to go in negotiating about them.

This suggests an important limitation on the use of CBA in this context: It is not clear how we can use CBA to predict the value of a closing opinion without first incurring the costs of generating the opinion. In other words, to some significant extent, the value of the closing opinion lies in its ability to produce and verify information about the legal consequences of a transaction. The problem is that it is hard to calculate the benefit side of the equation—information about legal effect—until one has actually incurred the cost—that is, gone through the process of producing and verifying the information that would lead to the conclusions expressed in the opinion.

Consider a simple hypothetical. John Corporation (“John”) wants to borrow \$1 million from Mary Bank (“Mary”). Mary wants a “customary” opinion of counsel at closing (e.g., that John has authority to enter into the loan agreement, that there are no legal impediments to entering into the transaction, and that the loan agreement will be enforceable against John). The closing opinion will add \$5,000 to the legal fees, all of which are borne contractually by John. Without the closing opinion, John either cannot get the loan at all or its price (real rate of interest) will be \$7,500 greater than with the opinion. CBA would tell John that the closing opinion is cost-justified, as the opinion “saves” John \$2,500.

What if, however, the process of negotiating the opinion costs more than \$5,000? Assume, for example, that in the process of negotiating the opinion, the lawyers for John and Mary discover that they reasonably disagree about whether a particular provision of the loan agreement would be enforceable against John. The lawyers’ negotiations and analysis lead them to decide that the closing opinion should not cover this particular provision. But the time and expense of these negotiations add an additional \$5,000 to the parties’ legal fees. Now, CBA would tell John that the closing opinion may not be cost-justified—it would have cost \$2,500 more than a loan without an opinion. A rational response in these circumstances would indicate that John and Mary would have been better off without the opinion and splitting the savings. The problem here—which is obviously greatly simplified for purposes of illustration—is that until the lawyers for John and Mary start to negotiate, they will not know whether the opinion is cost-justified.

This is not a problem unique to closing opinions.⁴⁸ In many cases, the real benefit of a regulation or project will not be known—if ever—until the event or condition covered by the regulation comes to pass. The approach in the policy world is that CBA is a game of odds: What is the likelihood that a bad event or condition will occur, and what would the cost be? Policy analysts, economists, and scientists develop both the data and the models needed to make these predictions, which then can be translated (roughly) into dollars.

48. See generally *WHAT’S ECONOMICS WORTH? VALUING POLICY RESEARCH* (Philip G. Pardey & Vincent H. Smith eds., 2004).

In the context of closing opinions, however, lawyers lack both data about the consequences of transacting without an opinion and familiarity with the tools to measure that data. It is, for example, difficult to imagine that John's lawyer—the opinion giver—can marshal evidence that would persuade Mary that she does not need an opinion in this transaction if Mary usually receives an opinion in this type of transaction. John's lawyer probably does not have access to meaningful data about the incidence of serious flaws discovered by the opinion process generally, even though the lawyer may (credibly) believe that such flaws would be discovered without an opinion.⁴⁹ Even if he had access to this data, it is not likely that John's lawyer has training in the sort of quantitative modeling that economists and social planners use when developing cost-benefit analyses. John and his lawyer may have a gut feeling that a third-party closing opinion is not cost-justified in this transaction, but it is difficult to point to more objective data to back up that instinct.⁵⁰ In any case, developing a cost-based argument that an opinion is not warranted may be as time-consuming (and therefore as costly) as rendering the opinion itself. Who is going to pay the lawyer's fee for that?

2. The Cost of No Opinion—Precaution and Ignorance

One way to assess the value of an opinion under a CBA is to consider the costs of transacting without one. Any good CBA should consider all relevant conditions of the world. Thus, there is not only a cost of producing an opinion but also a cost of not doing so. This cost would not simply be a subtraction of the legal fees associated with the opinion. This is because, if we take opinion-giving seriously, the opinion will be evidence of a host of sound procedural practices leading to a legal judgment about the quality of the proposed transaction—in essence, that the opining lawyer has made a reasonable determination that certain legal features of the deal work.

Lawyers and authorities frequently say that the principal purpose of the legal opinion is to assist in the due diligence process.⁵¹ Due diligence is, at bottom, a term of art for the production and verification of information the recipient considers important to the transaction.⁵² The cost to the putative recipient of a transaction without a legal opinion is thus the cost of proceeding without this evidence that the information required to support an opinion was produced. To be sure, there is good reason to believe that most lawyers in most cases would engage in this sort of due diligence even if a legal opinion were not issued. Nevertheless, there

49. It may be true, as discussed further below, that the Marys of the world will waive closing opinions for transactions below a certain amount. But it is not clear that this decision would be based so much on an analysis of the costs and benefits of the opinion as on a generalized presumption that transactions below a certain amount involve so little risk that they warrant little lawyering generally.

50. It will, in short, be difficult to make the sort of Bayesian prediction familiar to social planners. See generally E.T. JAYNES, *PROBABILITY THEORY: THE LOGIC OF SCIENCE* (Cambridge University Press, 2003) (1994).

51. See, e.g., *California 2004 Report*, *supra* note 2, app. 4, at 2 (“[T]he primary purpose of a remedies opinion is to assist in due diligence for the transaction . . .”).

52. See Gilson, *supra* note 40, at 278–90.

is reason to believe that the opinion is treated as a “market signal” of the quality of the transaction, a kind of “good housekeeping seal of approval.”⁵³ To the extent this fairly characterizes the function of the opinion, there will be a knowledge cost in a transaction without one. The cost of that ignorance may have little correlation to the savings from having dispensed with the opinion. “We don’t know what we don’t know,” lawyers sometimes say. For lawyers concerned about the informational integrity of a transaction, this is more than a mere tautology.

Consider the hypothetical involving Mary’s \$1 million loan to John. If the negotiations over the closing opinion produced information that called into question the enforceability of the loan agreement, this would be relevant to Mary. She can respond to this information in a variety of ways, each of which has its own costs and benefits. She may want to restructure the transaction to adjust for this problem or to obtain other protections (e.g., a personal guarantee, collateral, etc.). She may not want to proceed with the transaction at all. Yet, without the process of negotiating over the opinion, she may never know that these potential problems exist.

The closing opinion is thus some precaution against ignorance of the risk of loss due to serious legal failure in the transaction. Precaution is doubtless a good thing. Indeed, it has special meaning in the world of CBA. According to Professor Sunstein, the “precautionary principle” holds that “when there is scientific uncertainty as to the nature of [the] damage or the likelihood of the risk” posed by some activity, “then decisions should be made so as to prevent such activit[y] . . . unless and until scientific evidence shows that the damage will not occur.”⁵⁴

Closing opinion practice is obviously not science. But Sunstein’s precautionary principle would suggest that when there is meaningful uncertainty about the risk of loss from legal failure in a transaction, an opinion is presumptively an appropriate precaution. Thus, if Mary’s transaction with John takes a novel legal form, or the parties are unknown to one another, or there is some other legitimate basis for concern about the legal effectiveness of the deal, an opinion would presumptively be appropriate. Conversely, if Mary’s transaction is one in which she has engaged a number of times, and John is well known, or there is otherwise no reason to doubt the legal viability of the transaction, the opinion may add little value.

3. The Cost to Whom?—Whose CBA?

Thus far, we have considered the costs of third-party closing opinions only from the perspective of the parties—the subject and recipient of the opinion. This is a sensible starting point. But the decision whether to have an opinion will have costs and benefits for others not parties to the transaction, including lawyers and other professionals, as well as successors and assigns of the parties to the deal. CBA teaches us that we should consider the costs and benefits of a closing opinion to these parties. At minimum, we should expect that these parties will also engage

53. See Lipson, *supra* note 2, at 81–82.

54. See SUNSTEIN, FEAR, *supra* note 6, at 19.

in their own cost-benefit analyses when thinking about the role that a closing opinion would play in a transaction.

a. The Costs to Lawyers

Let's start with the lawyers. I have noted elsewhere that rendering opinions can impose a variety of costs on lawyers.⁵⁵ Some of these are more obviously economic and thus susceptible to CBA; others are not. The first involve the prospect that clients may balk at paying for the work that goes into the legal opinion. Clients may not understand the role that an opinion plays, or believe that being a mere letter, it should involve little attorney time or expense.⁵⁶ It would appear that more sophisticated clients are not likely to make these objections, but not all clients are sophisticated.

The second, and more important, costs to lawyers will involve legal liability in the event the deal fails and a claim is made by the recipient that there was some problem with the legal opinion. Liability on legal opinions is, not surprisingly, a contentious issue, with lawyers frequently saying that they should have no liability to a third party recipient in the absence of serious wrongdoing.⁵⁷

Anecdotally, it would appear that in fact lawyers are not likely to be liable merely for an opinion error. Rather, there would have to be a whole cascade of bad events to create real exposure. The subject of the opinion would probably have to have failed to perform its obligations in the underlying transaction *and* be insolvent *and* there would have to be an actionable defect in the closing opinion. Courts have historically appeared inclined to protect lawyers from third-party claims on a variety of theories, including the absence of reliance on the opinion, the absence of privity of contract, and a relaxed standard of care.⁵⁸ Nevertheless, recent high-profile lawsuits involving disallowed tax shelters suggest that in the right (or wrong) circumstances, legal opinion problems can spell serious trouble—i.e., death—for a law firm.⁵⁹ Even if closing opinion liability does not destroy a firm, it can be extremely costly.⁶⁰

55. See Lipson, *supra* note 2, at 102–14.

56. *Id.* at 101–02.

57. See Lipson, *supra* note 2, at 102–09.

58. *Id.* at 103.

59. Consider, for example, the fate of Dallas-based *Jenkins & Gilchrist*, which got into the business of offering tax shelter opinions which, in the short term, proved extremely lucrative for the firm. See Katie Fairbank & Terry Maxon, *How Jenkins & Gilchrist Lost Its Way*, DALLAS MORNING NEWS, Apr. 1, 2007, <http://www.dallasnews.com/sharedcontent/dws/bus/stories/040107dntjenkens.3e099d1.html>. The shelters were ultimately challenged, and the firm was sued by former clients who claimed the firm knew or should have known that the shelters were ineffective. The firm was also investigated by the Internal Revenue Service and the U.S. Department of Justice. The firm settled with Justice in March 2007, paying a \$76 million penalty “for its ‘promotion of abusive and fraudulent tax shelters, with fraudulent tax opinions.’” *Id.* Shortly thereafter, hemorrhaging attorneys, the firm announced that it was dissolving. *Id.*

60. See, e.g., *Dean Foods Co. v. Pappathanasi*, Civ. A. No. 01-2595 BLS, 2004 WL 3019442, at *11 (Mass. Super. Ct. Dec. 3, 2004); *Nat'l Bank of Can. v. Hale & Dorr, LLP*, No. 2000-000296, 2004 WL 1049072, at *3 (Mass. Super. Ct. Apr. 28, 2004); *Reich Family L.P. v. McDermott, Will & Emery*, No. 101921-03 (N.Y. Sup. Ct. Oct. 29, 2003), available at <http://www.abanet.org/buslaw/news>

The difficult question is whether the lawyers' own cost-benefit analyses adequately reflect the costs of providing a third-party opinion. Historically, the answer would appear to have been that they did, in the sense that lawyers' fees apparently covered the cost of their malpractice premiums and, in any event, it appears that lawyers were rarely sued on their closing opinions. So far as we know, opinion-based liability rarely put law firms out of business or otherwise imposed material costs on a firm.⁶¹

Yet, there is anecdotal evidence that lawyers are increasingly targets when a deal goes bad, and the closing opinion may be the bull's eye. "[O]therwise respectable [transaction] participants are . . . now more willing to be plaintiffs . . .," one lawyer told me.⁶² "[P]eople are trying all sorts of wild ways to pull lawyers into the transaction," another lawyer observed,

almost [as] aiders and abettors, if you will, of whatever bad thing has happened to them because you gave an opinion that says this was okay, and it turned out not to be okay, and therefore we were harmed. . . . I . . . think there's a much higher degree of potential litigation risk that surrounds being part of that opinion.⁶³

Cost-benefit analysis presents two challenges here. First, the incidence of lawyer liability on closing opinions appears, at least anecdotally, to be rare. While the damages payable because of such liability could be enormous—due simply to the increasing size of transactions on which opinions are rendered—lawsuits against lawyers continue to be unusual events.⁶⁴ Thus, the CBA here should reflect a very small likelihood that the cost would be incurred, multiplied by a very large number in the event that liability is established. Because we have so little data on the incidence of liability (or settlement payouts), this is necessarily a difficult—indeed, speculative—undertaking. But the fact that this is difficult or speculative does not mean the liability risk does not exist or that lawyers should ignore it.

Second, a CBA that includes lawyer liability will expose—and possibly exacerbate—any underlying tension between the opinion-giving lawyer and her client. This

letter/0018/materials/20031001000000.pdf; *Royal Indem. Co. v Pepper Hamilton LLP*, 479 F. Supp. 2d 419, 425 (D. Del. 2007). Although closing opinions were not necessarily the only basis for claims made against the law firms in these cases, the underlying transactions involved them, and their presence was important to the gravamen of the plaintiffs' claims. In all cases but *Dean Foods*, the law firms lost motions to dismiss. In *Dean Foods*, the law firm actually lost at trial.

61. Indeed, the closing opinions of some very prominent firms have been challenged in court or otherwise, and yet the firms apparently remain strong. See Lipson, *supra* note 2, at 109–11.

62. Interview with Attorney K-2 (May 17, 2004) (transcript on file with *The Business Lawyer*).

63. *Id.* That said, another attorney observed:

If you have a crook for a client who is defrauding someone, it doesn't make any difference how well you write the opinion, you're still going to get nailed. And conflicts of interest—if you allow yourself to be identified with too many parties where they can claim they thought you were their lawyer and then the wheels come off the deal and people get disadvantaged—they'll start looking around for people to sue, and they'll sue the lawyer for having a conflict. You favored the other guy over me.

Interview with Attorney F-1 (May 20, 2004) (transcript on file with *The Business Lawyer*).

64. See Donald W. Glazer & Jonathan C. Lipson, *Courting the Suicide King*, 17 *BUS. L. TODAY*, Mar./Apr. 2008, at 59, 60.

is because there will be an approximately inverse relationship between the CBA performed by the opinion-giving lawyer and that done by her client. The prospect that the lawyer may be liable on the opinion should increase the value of the transaction from the perspective of the client, since it creates (at least in theory) an additional source of potential recovery for the recipient. This prospect of liability should reduce the price of the loan or increase the value of the asset sold because the lender or purchaser is obtaining an additional source of potential recovery. Yet, it will increase the costs of rendering the opinion to the lawyer in ways that may be hard to quantify (much less pass on) but which could be devastating. For a lawyer to do a CBA may, ironically, make the decision whether to cross the opinion threshold more—not less—contentious.

Thus, the important question from the lawyers' perspective—to which we really have no good answer—is whether lawyers charge properly for their liability exposure. If lawyers (and their malpractice carriers) continue to experience growing losses due to third-party opinions, we can expect the price of the opinion—and lawyers' insurance—to go up.⁶⁵ Clients may resist; the market or regulators (or quasi-regulators, such as the bar associations) may generate adjustments. In any of these cases, CBA can help by guiding a more rigorous and objective analysis of the costs of closing opinions to opinion-giving lawyers.

b. Nonparties

Cost-benefit analysis should also factor in the costs to others of the decision to give (or not to give) a legal opinion. In many cases—structured financings, tax transactions—the impetus for the opinion is not (or not solely) to provide legal assurance to a “third party” in a conventional sense (e.g., a lender or purchaser). Rather, in many transactions, the opinion is rendered to provide some information to a person not a party to the transaction. This person may not be the primary recipient of the opinion. This non-party may, instead, be a regulatory or rating agency or a professional such as an accountant who will consider the legal opinion when making some other judgment with respect to the transaction (or the party who is the subject of the opinion).⁶⁶

The cost here involves the possibility that the legal opinion is wrong, but the non-party nevertheless relied on it in forming its own (erroneous) conclusion. For example, although we do not know exactly what happened in *Enron*, it may be the case that Enron's accounting firm of Arthur Andersen relied detrimentally on legal opinions in deciding to support “true sale” accounting treatment for many

65. Donald Glazer and I have proposed that one solution may be for the opinion giver and the recipient to negotiate caps on the opinion giver's liability. See Glazer & Lipson, *supra* note 64, at 61. Perhaps, instead, law firms will adopt the solution proposed by Professor Cunningham to the prospect of failure by one of the four remaining major audit firms: insurance funded by firm-issued “catastrophe bonds.” See Lawrence A. Cunningham, *Securitizing Audit Failure Risk: An Alternative to Caps on Damages*, 49 WM. & MARY L. REV. 711, 713–16 (2007).

66. See, e.g., *California 2004 Report*, *supra* note 2, app. 4, at 9 (“Rating agencies very frequently require remedies opinions concerning material documents that support the credit being rated, for example, the indenture and the key contracts that provide credit or liquidity enhancement.”).

of Enron's transactions.⁶⁷ It is certainly possible that Andersen was justified in its position or that it was independently in error. But to the extent it could show it relied reasonably on legal opinions that later proved flawed, it would have suffered a cost attributable to the legal opinions. The cost-benefit analysis we currently think about in opinion practice would not account for this cost.

c. Remote Parties

We can cast the net even wider. By orienting the analysis around costs and benefits, CBA would have us look to the broader population likely affected by a legal opinion. That population will certainly be smaller than it would be in the case of public policy-making, but it may well be larger than the initial parties to the deal.

Let us return to the hypothetical involving Mary's loan to John. Assume that John borrows money from Mary, and that Mary obtains a legal opinion on all the usual matters (John's authority to borrow, etc.). Assume further that John's lawyer negligently opines that the loan agreement is enforceable, when in fact it is not. Unaware of this, Mary sells the loan along with a number of other loans to Paul Corp. ("Paul"), an entity that issues securities to the public backed by the stream of payments generated by loans like John's. After Paul purchases the loan, John encounters financial trouble and declares bankruptcy. John's bankruptcy trustee determines that the loan agreement is unenforceable and sets this up as a defense to paying Paul's claim. Paul, in turn, wants to recover from John's lawyers for negligently misrepresenting the enforceability of the loan agreement.

Lawyers can and do limit their liability to distant parties, such as Paul. Legal opinions typically "speak" only as of a certain date and run only to a limited number of persons. Moreover, the U.S. Supreme Court in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, limited lawyers' (and other professionals') risks of liability in private suits under federal securities laws when they are not primary actors.⁶⁸ Now we know that, at least under the securities laws, a professional's wrongdoing must rise to an extremely high level, a point Judge Harmon seemed to make in her *Enron* pleadings decision.⁶⁹

But just because lawyers may have no liability does not mean there is no cost. The legal opinion Mary obtained from John's lawyer was likely a signal (an erroneous one) of the enforceability of John's legal obligations. If Paul made its investment

67. See Lipson, *supra* note 2, at 85 (discussing role of legal opinions in Enron). In the interest of full disclosure, I note that I was a consulting expert on matters involving closing opinions in the *Enron* case.

68. 511 U.S. 164, 188–92 (1994). The Court held that there can be no private causes of action for aiding and abetting a violation of the federal securities laws. *Id.* More recently, the Court held that non-parties cannot be treated as primary actors on a "scheme" liability theory. See *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 772–74 (2008).

69. In *Enron*, Judge Harmon refused to dismiss a shareholder lawsuit against Enron's principal outside counsel, Vinson & Elkins, because, among other reasons, the firm "drafted 'true sales' opinions that Lead Plaintiff asserts were essential to affect many of the allegedly fraudulent transactions." *In re Enron Corp. Sec. Litig.*, 235 F. Supp. 2d 549, 704 (S.D. Tex. 2002). Vinson & Elkins was later dismissed by the lead plaintiff from the major shareholder class action. See *In re Enron Corp. Sec., Derivative & ERISA Litig.*, C.A. No. H-01-3624, 2007 WL 209923, at *4 (S.D. Tex. Jan. 24, 2007).

decisions based in part on John's lawyer's negligent legal opinion and the deal fails, Paul (and Paul's investors) will suffer a loss (cost). CBA tells us we cannot turn a blind eye to these sorts of costs experienced by third parties. These costs may be remote and difficult to estimate. But they are costs nevertheless.

What if, instead, there is no opinion? Do remote parties experience a cost if a transaction lacks an opinion? Here we enter a somewhat speculative realm. If the opinion is viewed as a signal of procedural regularity, those who are remote from the transaction—for example, loan purchasers—may be concerned if there is no opinion. The initial parties to the transaction may well have a reasonable handle on what happened, since they negotiated the deal. Later parties, by contrast, may not. They must rely on other evidence—including a closing opinion.

The cost of no opinion to these remote parties would thus likely take one of two forms. Either the remote purchaser (e.g., Paul) would incur additional due diligence costs, or he would take greater risk regarding the enforceability of the underlying transaction. If so, we would expect Paul to pay less for the loan (or other assets) he purchases. Since additional diligence would be costly and difficult—what good reason would the borrower, John, have for going through *that* again?—it would be more plausible to expect a reduction in the purchase price paid for the loan. The initial lender (that is, Mary, from our hypothetical) undoubtedly understands this, which is why she may insist on having legal opinions that she believes the “market” (i.e., Paul) wants in the first place. The cost of proceeding without an opinion might be a deeper discount rate in subsequent sales of the loan (or other assets).

4. Division of Labor

One of the chief economic complaints about third-party opinions involves not the threshold question *per se*—whether to have an opinion—but the division of labor in their rendering. Lawyers and clients often express frustration with the fact that the “wrong” (or less efficient) lawyer is asked to provide certain opinions, in particular the enforceability (remedies) opinion.

As with the other third-party closing opinions, the enforceability opinion is often written by the lawyer (i.e., for the borrower) who did not draft the underlying documents. While this lawyer may be in the best position to offer the authority and no-violations opinion—where she is opining about her client—the enforceability opinion asks the lawyer to opine on documents likely written by opposing counsel, perhaps governed by law with which she is not familiar.⁷⁰ As one lawyer who typically represented lenders explained:

When it comes to enforceability, in most cases, you [e.g., the bank's lawyer] drafted the document, so you're asking me to tell you that a document which probably you

70. The enforceability opinion is “the toughest opinion to give and often the toughest one that I've ever thought to justify,” one attorney observed, “because in essence what you're asking is for the lawyer for the borrower or the lawyer for the seller or whatever to say that the document prepared by the lender's lawyer is or isn't enforceable.” Interview with Attorney S-1 (May 7, 2004) (transcript on file with *The Business Lawyer*).

have drafted, used in various variations a hundred times in the past, you're asking me to tell you that it works. I've never understood the justification for that.⁷¹

Another attorney expressed the same point in dollars and cents: “[L]ook, you’re paying your [recipient’s] lawyers [to draft the documents], . . . why do you need [company counsel] to tell you they are enforceable?”⁷² Nor was this view confined to lawyers who represented borrowers. “[I]f I’m representing the lender,” one lawyer with a lending practice observed, “I’ve drafted the damn documents—they’re my documents. I’ve used them over and over again. I do know, or should know, whether or not they work.”⁷³

CBA would appear to be a weapon against this allegedly inefficient division of labor. If we take seriously what the lawyers—and our intuitions—tell us about legal opinions, the remedies opinion should not come from borrower’s counsel but from counsel to the party that drafted the contracts whose enforceability is in question. For a variety of reasons, drafting counsel will usually be in a better position to opine on enforceability than non-drafting counsel. They should be admitted to practice under the governing law chosen in the contract (e.g., New York law) and should know whether the contract will work under that law.

Lawyers sometimes try to justify the current division of labor on the ground that the recipient’s lawyer (often New York counsel) wants to make sure that the loan and other agreements would be enforceable as if the local law of the borrower (rather than the chosen law) applied.⁷⁴ The fact that the chosen law (e.g., New York) will almost certainly apply, however, draws this argument into question.

Similarly, lawyers sometimes say that the division of labor is justified by the “estoppel” effect of having borrower’s counsel render the enforceability opinion. The theory seems to be that the subjects of the opinion, or counsel, would be too embarrassed to argue that the opinion was wrong. But this theory has a host of problems. First, it just does not seem plausible. As the *California 2004 Report* observes, clients will not typically be bound by their counsel’s statements in this context.⁷⁵ The lawyer’s opinion should have little effect on whether a court in hindsight concludes the loan agreement was enforceable—especially if the opinion came from non-drafting counsel.

Second, some lawyers express concern about the ethics of this division of labor. Having non-drafting counsel opine on enforceability may simply make it more difficult—and costly—for the borrower to use deal counsel in a later workout or

71. Interview with Attorney H-1 (May 1, 2004) (transcript on file with *The Business Lawyer*).

72. Interview with Attorney V-1 (May 25, 2004) (transcript on file with *The Business Lawyer*).

73. Interview with Attorney C-1 (May 13, 2004) (transcript on file with *The Business Lawyer*).

74. See Interview with Attorney B-1 (May 7, 2004) (transcript on file with *The Business Lawyer*) (“[W]hat I have done on occasion is gotten the borrower’s counsel to give an opinion that would say something like, let’s say the company’s in Kansas, to say that if an action was brought on the agreement in the courts of Kansas, the courts of Kansas would respect the New York governing law provision and provided, however, that if the courts of Kansas, notwithstanding the New York governing law provision chose to apply Kansas law, the agreement would be legal, valid, binding and enforceable.”).

75. See *California 2004 Report*, *supra* note 2, app. 4, at 5 (“[I]t is doubtful that an estoppel could be asserted successfully against the opinion giver’s client based on its counsel’s third-party remedies opinion.” (emphasis in original)).

bankruptcy that might involve a challenge to the loan or similar agreements.⁷⁶ As one lawyer interviewed for this project sarcastically asked, “Why don’t you put a covenant in the agreement that A) the company will not contest the legality of anything; [and] B) that somebody has secured the agreement of its counsel that it won’t contest?”⁷⁷ This may be ethically questionable in the sense that it creates a contractual barrier to the attorney-client relationship, and it may add to the borrower’s costs. But it is not clear how it creates aggregate value for the parties.

In any event, notice what is going on here. The question is not *whether* the opinion itself is cost-justified, only whether it is issued in the most cost-effective way. These would seem to be two different questions. There appear to be few who suggest that we should dispense entirely with the remedies opinion. It would be striking if a bank made a loan without some assurance—formal or otherwise—that its loan agreement was enforceable against the borrower. Rather, the important economic battle is over who prepares—and pays for—it. CBA can probably help address the latter question, telling us that it is presumptively more costly to have non-drafting (e.g., borrower’s) counsel prepare the opinion than recipient’s (e.g., lender’s) counsel. CBA may be better at telling us *who* should cross the threshold than it is at telling us *whether* to cross it.

We could take the division-of-labor point further. Not only will certain lawyers be in a better position to offer certain opinions than others, but certain questions will simply be more susceptible to legal analysis than others. Thus, it would seem that an opinion will make more economic sense when it presents a legal question within the lawyer’s area of expertise rather than a purely factual question, or a question of law with which the lawyer is less familiar. Some features of legal opinions would seem inefficient in this respect. To the extent that officers’ certificates duplicate representations in the contract or obvious states of affairs—e.g., that the corporation is in good standing—they may not be cost-justified. They may be cheap to prepare, and so may wash out. But if they do add cost, the cost will be hard to justify.

B. BENEFITS

Taking cost-benefit analysis seriously may change the way we account for closing opinions because it would require us to consider a variety of costs, from a

76. The recent bankruptcy of SonicBlue tells us that the mere fact that bankruptcy counsel rendered closing opinions on behalf of a borrower in a prebankruptcy deal will not of itself create an estoppel-type problem. In that case, counsel for the debtor represented SonicBlue before bankruptcy. The firm issued an opinion letter in connection with certain bonds that apparently contained an error implying the bonds would be enforceable even if the debtor went into bankruptcy. After this came to light, the United States Trustee sought to have the law firm disqualified, its fees disgorged, and the case converted to a liquidation under Chapter 7 of the Bankruptcy Code. Although Bankruptcy Judge Marilyn Morgan did not convert the case, she did disqualify the firm and appoint a Chapter 11 trustee. See *In re SonicBlue Inc.*, Nos. 03-51775, 03-51776, 03-51777, 03-51778-MM, 2007 Bankr. LEXIS 1057, at *41–42 (Bankr. N.D. Cal. Mar. 26, 2007). She reserved the question of fee disgorgement for review by the Chapter 11 trustee. *Id.* at *42. For a further discussion of this case, see Zusha Elinson, *Trustee Wants Pillsbury to Repay \$4 Million*, LAW.COM, Mar. 7, 2007, <http://www.law.com/jsp/article.jsp?id=1173175410463>.

77. Interview with Attorney H-1 (May 4, 2004) (transcript on file with *The Business Lawyer*).

variety of perspectives, that are not currently part of the analysis. But it would also help to identify (and perhaps to quantify) important benefits of closing opinions. This part describes two: (i) CBA helps identify the real—informational—benefits of a closing opinion; and (ii) it provides guidance to address the presumptive division of labor in third-party opinion issuance.

1. What Constitutes a Benefit?—Informational and Symbolic Value

Identifying with precision the benefits of third-party closing opinions turns out to be a challenging task. At a high level of generality—which is to say, imprecisely—we can imagine many benefits that might flow from the production of a legal opinion. The chief economic benefit associated with a legal opinion will, as discussed above, be precautionary and thus necessarily somewhat speculative. It is, as the California State Bar Association's *2004 Report* suggests, the benefit from the "due diligence" supposedly evidenced by the legal opinion.⁷⁸

Precaution may be beneficial, but it may not add "value" to the deal in ways that make the parties happy. A number of lawyers I interviewed observed that they had seen transactions collapse or change materially because of information that they believed would not have been produced but for the opinion.⁷⁹ This does not mean that the transaction is cheaper; it may mean that it ends up being priced more accurately in light of additional, better information generated through the opinion process. Sometimes, the greatest benefit will be in killing a deal early. There is no question that a loss avoided is a benefit, and one that may be justified by the cost of the opinion process that ultimately killed or altered the deal. Nevertheless, this can be a hard sell for clients. What lawyer wants to tell her client that he should pay for a closing opinion because it might kill the deal?

We should not overstate the informational benefits of the legal opinion. First, and most obvious, the opinion itself will not say much, given its many qualifications, exceptions, and limitations. This is not a strong objection. More important will be the fact that, in most cases, important information would come to light even without an opinion. My sense is that most lawyers are sufficiently diligent most of the time that they would catch most problems with the transaction, even if no opinion were required. Of course, a party that wanted to conceal serious problems could do so, with or without an opinion. Moreover, recipient's counsel will likely review the same information as the opinion giver and so could, at least in theory, provide the same opinion to her own client. The closing opinion itself, in other words, may produce valuable information at the margins, but that is not guaranteed.

If so, the principal informational benefits of the opinion will be symbolic and procedural. On the symbolic side, the opinion will be evidence—a "market signal"—of

78. See *California 2004 Report*, *supra* note 2, at 2 ("[T]he primary purpose of a remedies opinion is to assist in due diligence for the transaction....").

79. See Lipson, *supra* note 2, at 78.

the formation of a legal judgment. This legal judgment will—or at least should—be the product of a variety of processes that the lawyer determined, in her professional judgment, to be relevant in forming and issuing the opinion. The opinion is not exactly the judgment itself, however. Rather, it is merely material evidence that a legal judgment was formed. It is, in this sense, analogous to the relationship between a negotiable instrument and the underlying right to payment: a “reification” of a more complex set of rights and relations.⁸⁰

This is not guaranteed, of course. Lawyers frequently note that they have been involved in transactions with unsophisticated or overworked lawyers who simply regurgitate on their letterhead the requested opinion, without any negotiation and, therefore, without any evidence that the lawyer really considered the opinion.⁸¹ Such opinions are understandably viewed skeptically.

But this suggests the second benefit of the opinion: When duly negotiated, it indicates that processes probably occurred that render the opinion acceptable. Ironically, this means that in opinion practice an attorney may not actually want what she initially asked for. Rather, what one should want is some push back from the opining lawyer, some give and take. This give and take may or may not produce additional information about the deal. But it should be evidence that the lawyer has thought about the opinion and the transaction, thus suggesting that the lawyer did form a legal judgment.

What it means to form a legal judgment is beyond the scope of this Article. It is worth noting, however, that a related benefit of opinion practice would appear to be the standardization of these opinion writing processes. As opinion practice has become more standardized and more fully analyzed by practitioners and bar associations, a consensus has emerged about “best practices.” We know from reading bar association reports and the treatises of Donald Glazer and Arthur Field, among others, a great deal about how to prepare an opinion.⁸² And we know more: When we receive an opinion that has been duly negotiated, we can reasonably infer that something approaching these procedures was followed.⁸³ By lawyering the deal, we can expect certain procedures will have been followed, even without an opinion. But the benefit of the opinion may be that it channels and standardizes these procedures in important ways.

Opinions may be unique in this regard. I am not aware of any studies on this, but we know that legal opinions are highly stylized writings and the subject of an exceedingly large number of bar association and similar reports.⁸⁴ Although this stylization may not enhance the readability of the opinion, it does suggest a level of standardization that may be unusual, and perhaps unique, among legal

80. See, e.g., Dale A. Whitman, *Reforming the Law: The Payment Rule as a Paradigm*, 1998 BYU L. REV. 1169, 1169 (noting that a “negotiable instrument is a reification of the obligation it describes”).

81. See Lipson, *supra* note 2, at 100–01.

82. See *id.* at 115–20.

83. Attempts to standardize legal opinion practice have not always succeeded. The “Legal Opinion Accord,” for example, appears to have met significant resistance from attorneys who disagreed with its approach. See *id.* at 118–19.

84. See *id.* at 119.

documents. If legal opinions are more standardized due to the work of the bar associations and practitioner-authors, then legal opinions may be a tool for channeling and disciplining practice in a variety of ways. They may be what the cognitive scientists call a “schema”—a sort of template that tells lawyers what to expect and how to think about a variety of questions relevant to a transaction.⁸⁵ Closing opinions may form a set of protocols that help transactional lawyers do their jobs—and to know that their counterparts on the other side of the table are probably doing theirs too.

2. Division of Labor—Fee Splitting

CBA can, as noted above, help address questions about the division of labor. While it is easy to come up with arguments for having an enforceability opinion in a transaction, it is much harder to justify having the borrower’s lawyer (or equivalent non-drafting counsel) render the opinion. CBA creates a presumption against this division of labor. Even if parties are unlikely to alter the practice anytime soon, CBA can help here by creating a way for parties to share costs.

For example, counsel to the borrower may be asked to give an enforceability opinion and object on the usual grounds that he does not practice under the chosen law, did not draft the contract, and so forth. Rather than joust about who should give this opinion—whether there is economic benefit in “estoppel,” for example—CBA would suggest that the parties focus on the actual cost of borrowers’ counsel producing the enforceability opinion. If lender’s counsel can produce it for less than borrower’s counsel—and, in theory, that should be the case—then the borrower can ask the lender to absorb the cost of borrower’s counsel above the amount that lender’s counsel would have incurred in rendering the enforceability opinion. This would require borrower’s counsel to keep careful track of the costs attributable solely to the remedies portion of the opinion, which may be difficult. Nevertheless, if we are to take seriously complaints of inefficiency in this division of labor, it must be possible to document to some rough extent its costs.

Lenders—and their lawyers—may resist. It is hard to imagine a lender today agreeing to absorb any transaction cost, much less the cost of a closing opinion. But the logic of CBA may help to break down this resistance. If a borrower can show that the transaction cost \$10,000 more to have her lawyer—rather than the lender’s lawyer—write the remedies opinion, the lender will be forced to develop some economic response. In many cases, it will likely be a shrug of indifference—at that point in the transaction, the borrower is not likely to walk away. But if borrowers and, more important, their counsel become disciplined about documenting and challenging the excess costs associated with this division of labor, we might see real change here, a change CBA could make possible.⁸⁶

85. See Mark P. Higgins & Mary P. Tully, *Hospital Doctors and Their Schemas About Appropriate Prescribing*, 39 *MED. EDUC.* 184, 185–86 (2005).

86. A commentator on a draft of this Article observed that one result of this sort of cost-shifting might be to have lenders’ own lawyers provide the enforceability opinion which could, in turn, result

III. THE COSTS AND BENEFITS OF COST-BENEFIT ANALYSIS

While CBA can offer new and (perhaps) improved ways to understand third-party closing opinions, we should also remember that it contains its own problems. It has been accused of producing results that are unprincipled, indeterminate, and manipulable.⁸⁷ Some of these criticisms resonate here. Yet, CBA also has important benefits, which indicate that we should continue to think creatively about how it can improve closing opinion practice.

A. THE COSTS OF CBA

1. Normative Issues

Cost-benefit analysis, like its utilitarian progenitor, has been attacked for producing or permitting results that are normatively unacceptable. Critics observe that many things we value—some of which are embodied in rights recognized at law—are simply too important to be “cashed out” in a CBA. We do not, for example, say that constitutional protections of speech or religious liberty, or constitutional prohibitions on slavery, should be subjected to a CBA. If we did, we might not like the result.⁸⁸ There is, to many, something repugnant about reducing lives or other intangible goods to a dollar value and comparing that value to the cost of action or inaction.⁸⁹

Closing opinions are not likely to involve the matters of life and death that are the steady diet of CBA. Nevertheless, CBA may produce results that we find normatively troubling. Consider *Enron*. Many have argued that Enron’s lawyers and their closing opinions were somehow at fault in the development and implementation of Enron’s complex financings.⁹⁰ Presumably, these critics would have had Enron’s lawyers refrain from issuing them. The problem

in the elimination of the opinion entirely. This is possible, although history suggests otherwise. Lawyers I interviewed indicated that in the past—the 1950s, for example—the lender’s lawyer did provide her client with a formal enforceability opinion. See Lipson, *supra* note 2, at 90. The practice apparently stopped when lender’s counsel was able to push the task of writing the enforceability opinion to borrower’s counsel. If, however, borrower’s counsel were able to push the responsibility for this opinion back to lender’s counsel, it is not obvious why lender’s counsel would not simply resume writing these opinions, if sought by the client.

87. See *supra* notes 8–10 and accompanying text.

88. See Steven Kelman, *Cost-Benefit Analysis: An Ethical Critique (with Replies)*, AEI J. GOV’T & SOC. REG. 33, 35 (1981) (“We would not permit rape even if it could be demonstrated that the rapist derived enormous happiness from his act, while the victim experienced only minor displeasure. We do not do cost-benefit analyses of freedom of speech or trial by jury.”).

89. See, e.g., FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 66–67 (2004); see Sinden, *Cost-Benefit Lite*, *supra* note 8, at 194 (expressing concern about regulators “entering the dangerous territory of attempting to monetize intangible values like life and death”).

90. See, e.g., John C. Coffee, Jr., *Understanding Enron: “It’s About the Gatekeepers, Stupid,”* 57 BUS. LAW. 1403, 1404 (2002); Keith R. Fisher, *The Higher Calling: Regulation of Lawyers Post-Enron*, 37 U. MICH. J.L. REFORM 1017, 1090–96 (2004); Susan P. Koniak, *When the Hurlyburly’s Done: The Bar’s Struggle with the SEC*, 103 COLUM. L. REV. 1236, 1242–43 (2003); Nathan Koppel, *Wearing Blinders*, AM. LAW., July 2004, at 75, 164; Milton C. Regan, Jr., *Teaching Enron*, 74 FORDHAM L. REV. 1139, 1140–43 (2005). For a defense of Enron’s lawyers, see Steven L. Schwarcz, *The Limits of Lawyering: Legal Opinions in Structured Finance*, 84 TEX. L. REV. 1, 50–53 (2005).

is that, in hindsight, there is an argument that the lawyers' actions were cost-justified.

According to the final report of Neal Batson, the court-appointed examiner of Enron, Andrews Kurth LLP ("AK"), one of Enron's outside firms, delivered dozens of closing opinions on the "true sale" of assets or the "true issuance" of securities in complex and questionable transactions.⁹¹ According to the Examiner, in certain cases these opinions may have been inappropriate.⁹² AK issued these opinions despite the fact that there were, according to the Examiner, "concern[s] about several terms in these transactions that created questions about whether a sale had occurred."⁹³ Based on these concerns, the Examiner concluded that a fact-finder could determine that AK committed malpractice under Texas law and aided and abetted breaches of fiduciary duties by Enron officers.⁹⁴

If the Examiner and those who are critical of Enron's lawyers are correct, one might think that a cost-benefit analysis would show that AK should not have issued these opinions: The expected liability costs of doing so should have outweighed their benefit to AK. Yet, if we look only at what AK earned for this work (the benefit to the firm) and compare that to the costs of which we know (settlement costs), it would appear that issuing these opinions was cost-justified: AK apparently earned about \$28 million for this work⁹⁵ but paid only \$18.5 million in settlement, netting an amount in excess of \$9 million.⁹⁶

Of course, this glosses over a host of complexities that CBA might capture. A more fulsome analysis would factor in AK's defense costs, increased insurance premiums and deductibles, lost productivity, and the reputational effects of negative publicity from its role in *Enron*, among many other things.⁹⁷ In any case, it is

91. Final Report of Neal Batson, Court-Appointed Examiner, at 50, *In re Enron Corp.*, No. 01-16034 (AJG) (Bankr. S.D.N.Y. Nov. 4, 2003) (on file with *The Business Lawyer*) [hereinafter "*Enron Final Report*"]. See also First Interim Report of Neal Batson, Court-Appointed Examiner, at 37-38, *In re Enron Corp.*, No. 01-16034 (AJG) (Bankr. S.D.N.Y. Sept. 21, 2002) (on file with *The Business Lawyer*).

92. See *Enron Final Report*, *supra* note 91, at 49-50.

93. *Id.* at 50.

94. *Id.* at 48-49.

95. The Enron Examiner noted that Enron paid fees to AK of \$991,053 in 1997, \$2,355,399 in 1998, \$6,644,267 in 1999, \$9,740,414 in 2000, and \$9,269,594 in 2001. *Id.* app. C, at 25 (citing Letter from Paul E. Coggins, Fish & Richardson, P.C., to James C. Grant, Alston & Bird (Oct. 13, 2003)).

96. Kristin Hays, *Law Firm's Enron Settlement Is \$18.5 Million*, HOUS. CHRON., Jan. 19, 2007, <http://www.chron.com/disp/story.mpl/special/enron/4483464.html>.

97. The reputational issues are especially thorny. We might think that having closing opinions challenged in such a public way would have dire consequences for the firm. But, like other firms whose opinions have been prominently challenged—White & Case and Hale & Dorr come immediately to mind—it may be that AK's problems in *Enron* have had no material effect on its reputation. See Lipson, *supra* note 2, at 110 (discussing reputational effect of lawsuits against White & Case and Hale & Dorr involving challenges to closing opinions). AK continues to promote its expertise in securitization and structured finance transactions, which are similar in many respects to those involved in *Enron*. See Andrews Kurth, LLP, Practices, Securitization, <http://www.andrewskurth.com/practices-Securitization.html> (last visited June 2, 2008) (stating that "[t]he number and total dollar volume of the [securitization] deals we close each year are consistently ranked by legal and financial publications such as *The American Lawyer*, *Asset-Backed Alert*, and *Commercial Mortgage Alert* as among the most by any law firm

possible that the additional costs of its work in *Enron* exceeded \$9 million, thus showing that, from AK's perspective, the opinions it issued for Enron were not cost-justified. Moreover, this is purely an ex post analysis. An ex ante analysis may reasonably have led AK to conclude that the *potential* costs of liability were far greater than any fees they could earn.

But it is equally possible that the lesson from AK's experience in *Enron* is that CBA cannot adequately account for what was really wrong with the lawyers' performance in the case. If we believe that AK's performance was a failure of professional integrity, we have to ask how it could nevertheless have been cost-justified. There are many answers, but one may be that CBA cannot do a very good job of answering the threshold question in the face of hard normative or ethical questions.

2. Manipulability

Critics also argue that CBA can be manipulated for instrumental ends. Under CBA in the public context, costs are said to be exaggerated and benefits discounted. For example, those who may be burdened by regulation are said to inflate costs in order to avoid or limit the impact of regulation.⁹⁸ The cost of adding scrubbers to a smokestack, for example, may vary considerably. We would expect industries being forced to add them to state the costs to be as high as possible. Benefits, by contrast, are said to be undercounted because it can be difficult to agree on what constitutes a "benefit" of regulation. How much does "society" benefit from preserving the snail darter?⁹⁹

In the closing opinion context, it is more likely that benefits—not costs—will be manipulated. The claim that a closing opinion is "market" or "traditional" or "on the closing checklist" may suggest the opinion lacks informational value and so should not count for much under cost-benefit analysis. Yet, those who have historically received closing opinions—institutional lenders and investors, for example—can probably come up with *some* information-based arguments to justify the receipt of a third-party closing opinion. They may, for example, argue credibly that the secondary market will not purchase a loan without a supporting opinion, even if there is no particular reason to believe either that the loan would be sold or that the market in fact cares about the opinion. They may argue that the absence of an opinion permits too much legal risk because it may (or may be perceived to) relieve the lawyer of the disciplining effect of the opinion process.

These benefits of closing opinions are, as discussed above, important, but they are hard to quantify and thus manipulable. This means that CBA is not insurance against inflation or manipulation of those factors that go into deciding whether a

in the country"). AK was ranked ninth in the *American Lawyer's* league tables for representations of issuers in mortgage-backed securities transactions in 2007. See Nate Raymond, *At Last, the Other Shoe Drops*, *Am. Law.*, Apr. 2008, at 141, 142.

98. See Driesen, *supra* note 6, at 339 (noting that estimates of cost "usually prove too high").

99. See Snail Darter Controversy, http://en.wikipedia.org/wiki/Snail_darter_controversy (last visited June 25, 2008).

transaction should be supported by a closing opinion. CBA tells us that we should collect and analyze information in certain ways; it does not, however, tell us what values to assign to the data in the first place.

3. Indeterminacy

Related to the problem of manipulability is the very real possibility that CBA simply cannot provide meaningful answers because it depends on too many unknown values and variables. In some cases, the indeterminacy derives from a lack of objective (scientific) data about the world. Moreover, some things are simply beyond our knowledge. There is, for example, a legitimate debate about whether fixed (“cardinal”) values can be assigned to any individual’s utility functions; John may be willing to pay more for clean air than Mary for reasons, and in ways, that are beyond our current capacity to measure.¹⁰⁰ There are similar questions about the “discount rate” that should apply to future benefits.¹⁰¹ How are we to select the discount rate for dollars spent today to reduce carbon emissions that will have no observable benefit (if any) for fifty years? The answer clearly matters.¹⁰²

CBA’s indeterminacy has at least two implications for closing opinion practice. First, as discussed above, in many cases, the benefit of the opinion will be known only by actually incurring the cost—at which point it is obviously too late. To some extent, this is always true of cost-benefit analysis. But this sort of indeterminacy may be more acute in the context of closing opinions because of what is essentially their informational function. We cannot decide whether to have an opinion without a CBA, but we cannot perform the CBA without the information developed by the opinion process. The fact that both CBA and the closing opinion itself are informational devices suggests a decisional hall of mirrors, an infinite regress.

Second, and more practically, we lack data needed to perform a useful CBA. If we are to take the costs of closing opinion practice seriously—in particular, costs to lawyers and problems with the division of labor—we should know something about the dollars involved. Unfortunately, while there is anecdotal evidence that lawyers—and their closing opinions—are increasingly attractive targets in

100. Compare John C. Harsanyi, *Cardinal Utility in Welfare Economics and in the Theory of Risk-taking*, 61 J. POL. ECON. 434, 434–35 (1953) (distinguishing cardinal (fixed) utility functions from ordinal (relative) utility functions), with Daniel A. Farber, *What (if Anything) Can Economics Say About Equity?*, 101 MICH. L. REV. 1791, 1812 (2001) (noting “it is very unclear whether, even in principle, there is a convincing way of converting . . . individual preference rankings into a shared numerical scale”).

101. See Douglas A. Kysar, *Sustainable Development and Private Global Governance*, 83 TEX. L. REV. 2109, 2118–28 (2005).

102. See Sinden, *Cost-Benefit Lite*, *supra* note 8, at 208 (“Since even small differences in the [discount] rate can yield dramatically different results, the problem of discount rates is a significant source of indeterminacy for CBA.” (footnote omitted)). An entire symposium issue of the *University of Chicago Law Review* was recently devoted to what may be the most difficult discounting problem presented by CBA—intergenerational discounting. See Symposium, *Intergenerational Equity and Discounting*, 74 U. CHI. L. REV. 1 (2007). For further discussion of this problem, see Richard L. Revesz, *Environmental Regulation, Cost-Benefit Analysis, and the Discounting of Human Lives*, 99 COLUM. L. REV. 941, 1015–16 (1999) (discussing differing discount rates for valuing long-term, intergenerational projects).

litigation,¹⁰³ there is little public data on actual liability or settlement rates. Perhaps a malpractice insurer will someday share some nonproprietary data on this. Similarly, just because it would seem that non-drafting counsel is unlikely to be an efficient provider of an enforceability opinion does not mean that we have data to support that. It may be that the cost here is inconsequential, or that it depends on the type of transaction or law firm involved. Any number of variables may affect the costs of dividing the labor of giving opinions. In the absence of data on this, cost-benefit analysis will necessarily have limited value.

4. Monetization

One reason CBA is often criticized for producing indeterminate results is that the analysis requires a standard quantum, usually dollars.¹⁰⁴ Yet, it is obvious that some things do not translate smoothly into dollars.¹⁰⁵ We may all agree that personal well-being is a good thing, that the Grand Canyon should be smog-free, and that we should minimize arsenic in drinking water. But we may legitimately disagree that these benefits can be expressed in monetary terms. Some things are absolute, beyond the grip of the rules and rhetoric of the market.¹⁰⁶

Here, the problem will be that certain attributes of a closing opinion will simply be too difficult to express in dollar terms. We know this by considering what the monetized alternative to a closing opinion would probably look like: a transactional insurance policy. This is hardly far-fetched. In the context of personal property secured transactions, products such as First American's Eagle 9 insurance purport to insure the attachment, perfection, and priority of a security interest.¹⁰⁷ Indeed, the whole edifice of title insurance on real property can be seen as an alternative to a legal opinion disclosing exceptions to title revealed by a review of real estate records. These insurance products are fairly good evidence that we can monetize protection against certain legal risks.

Yet, just because some legal risks are insurable (and thus can be monetized) does not mean that all third-party closing opinions are insurance substitutes or that all of their benefits can be articulated in dollars. Consider, for example, the procedural and symbolic benefits of a closing opinion. If I am correct that an important benefit of closing opinion practice is that it has helped to establish standard protocols for transactional lawyering, CBA would have us develop some way to quantify this benefit. Yet, it is simply not clear how we can do this in one transaction, much less across whole sets of transactions. Every loan may have benefited

103. See *supra* notes 59–63 and accompanying text.

104. See Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis for Environmental Protection*, 150 U. PA. L. REV. 1553, 1564–65 (2002).

105. See Driesen, *supra* note 6, at 340 (“Monetization requires very controversial value assumptions and in many cases proves impossible.”).

106. See, e.g., Sinden, *Absolutes*, *supra* note 8, at 1408–13.

107. See First American Title Insurance Company, UCC Division, UCC Eagle 9, <http://www.eagle9.com/policydescriptions.html> (last visited June 28, 2008).

a little bit from the development of closing opinion practice, but it is unlikely that money can express that benefit.

Similarly, if the purpose of these procedures is to lead to the formation of a legal judgment, we must ask what sort of price captures the value of that judgment. In other words, we may have no greater success monetizing the symbolic value of closing opinions than we do the process. Moreover, to do so may cause us to commodify this feature of closing opinions. Legal judgments—like the closing opinions that evidence them—are not smokestack scrubbers, and we should think twice before treating them as such.

5. Backfire Costs

A final set of criticisms is that even if CBA may provide decisional guidance, the procedural costs of engaging in this sort of analysis may outweigh any advantages it confers. For example, some argue that federal regulations requiring cost-benefit analyses only “ossify” a federal rulemaking system that is already complex and cumbersome.¹⁰⁸ The same may be true here. It seems unlikely that lawyers will develop the sophisticated mathematical models used in the public policy sphere. But even the more modest folk variety requires time and attention. Clients are already said to find the opinion process frustrating.¹⁰⁹ Are lawyers really going to bill for the time spent to develop a CBA? If not, how much time will they spend doing it?

A related criticism is that CBA in the private sector—by automakers, for example—can actually backfire, producing outsized punitive damage awards for conduct rendered “despicable” by the very fact that it was undertaken with foreknowledge of the risks of loss provided by a CBA.¹¹⁰ Kip Viscusi has argued that jurors are more likely to punish auto manufacturers who have conducted a CBA before placing an allegedly defective vehicle into the stream of commerce.¹¹¹ To conduct a CBA and then put a potentially harmful product into the stream of commerce is, juries seem to think, more callous than blindly causing the same (or worse) harm.¹¹² How much more did Ford pay for its flammable Pinto because management had previously weighed the costs and benefits of building a defective car?¹¹³

108. See Thomas O. McGarity, *Media-Quality, Technology and Cost-Benefit Balancing Strategies for Health and Environmental Regulation*, LAW & CONTEMP. PROBS., Summer 1983, at 159, 232–33. See also Robert V. Percival, *Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency*, LAW & CONTEMP. PROBS., Autumn 1991, at 127, 127–28 (criticizing White House Office of Information and Regulatory Affairs).

109. See Lipson, *supra* note 2, at 100–01.

110. See Viscusi, *Corporate Risk*, *supra* note 18, at 551 (quoting Wayne McLean, *Suit-Happy California? It's a Myth*, S.F. CHRON., Mar. 8, 1995, at A21).

111. See Viscusi, *Corporate Risk*, *supra* note 18, at 548 (discussing \$4.8 billion punitive damages award against General Motors in 1999 and citing Andrew Pollack, *Paper Trail Haunts GM After It Loses Injury Suit: An Old Memo Hinted at the Price of Safety*, N.Y. TIMES, July 12, 1999, at A12).

112. See Viscusi, *supra* note 18, at 550–52.

113. See *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (Cal. Ct. App. 1981). In *Grimshaw*, a thirteen-year-old was killed when the Pinto in which he was a passenger burst into flames after being rear-ended by a car traveling approximately thirty miles per hour. *Id.* at 359. The plaintiff claimed that

While this may say more about the jury system than it does about CBA, it is easy to imagine that lawyers would face similar problems if the cost-benefit analyses they conducted were placed before juries in suits over alleged errors in closing opinions.

Indeed, the critical question for lawyers concerned about liability is whether the presence of a CBA would increase or decrease their likelihood of success *prior* to trial in a suit on a third-party closing opinion.¹¹⁴ After all, like most defendants, lawyers would like to escape lawsuits as early as possible, meaning at the pleadings stage or summary judgment. Viscusi's work suggests that judges may be subject to many of the same distorting biases as jurors, although he makes this claim based not on actual judicial decisions but rather on surveys of judges.¹¹⁵ Nevertheless, if judges, like juries, believe a cost-benefit analysis can magnify culpability, lawyers sued for their closing opinions may regret engaging in the sort of analysis I have thus far encouraged.

Consider the Mary and John example, from above. If John's lawyers are asked to provide a difficult opinion, they might engage in a cost-benefit analysis of whether to give the opinion. This CBA should take into account, among other things, their liability in the event that the opinion is later challenged. The liability analysis should, in turn, account for doubts they have about the viability of the opinion. If, however, they give the opinion and it is later challenged, what effect would evidence of this CBA have on a court considering a motion to dismiss or for summary judgment? Might it not be considered evidence of doubt that indicates triable issues on professional negligence, backfiring like Ford's CBA of its flammable Pinto? Do lawyers really want cost-benefit analyses evidencing doubts and concerns about their opinions to be available in a later litigation?¹¹⁶

B. THE BENEFITS OF CBA

At this point, one may think that the costs of CBA outweigh its benefits as applied to third-party opinion practice. That, however, would be a mistake. CBA has problems but is, to paraphrase Churchill's view of democracy, doubtless better than many alternatives.¹¹⁷ This part summarizes two important benefits of CBA:

Ford's decision to place the gas tank behind the rear axle was a design defect that created the risk of fire. *Id.* at 358. Grimshaw's estate was awarded more than \$2.5 million in compensatory damages and \$125 million in punitive damages, which was later reduced to \$3.5 million. *Id.* The case is legendary in CBA discussions because it appears that the jury punished Ford in part because its engineers had done a CBA. See generally Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013 (1991).

114. See discussion *supra* note 60.

115. See W. Kip Viscusi, *How Do Judges Think About Risk?*, 1 AM. L. & ECON. REV. 26, 27 (1999) ("Since judges are individuals, they may be prone to the same types of irrationalities as are other people.").

116. In *Enron*, for example, it appears that the Examiner believed that concerns expressed by Vinson & Elkins attorneys about their opinions may have been evidence that they were improperly qualified. See Lipson, *supra* note 2, at 98–99 (discussing analysis of Vinson & Elkins' attorneys provided by the Examiner's report).

117. "[I]t has been said that democracy is the worst form of government except all the others

(i) it can help to sort easy cases involving the threshold question from hard ones, and (ii) it can make it even easier to dispose of the threshold question in those easy cases.

1. Sorting Easy Cases from Hard Cases

If CBA leads attorneys to orient their answer to the question whether to produce an opinion at all—the so called “threshold” question—around the opinion’s informational value, it may then help to sort easy cases from hard cases. Easy cases will be those where the parties (or their lawyers) request (or refuse) an opinion without considering its informational value to the transaction. These cases may involve “path dependence” or what I have called “pride.”

Path dependence means that something is done a particular way because it has long been done that way, and no one is willing or able to change it, even if the practice no longer makes sense.¹¹⁸ This appears to be a recurrent theme in closing opinion practice. In many cases, lawyers have indicated that closing opinions were rendered simply because it was “traditional” or “customary” to do so—not because anyone considered *ex ante* whether the opinion would produce information of value to the transaction.¹¹⁹ Lawyers often say the closing opinion is rendered simply because it is “on the closing checklist” and to ask to remove it would require the approval of someone “above the pay level” of those involved in negotiating the transaction.¹²⁰ As one attorney noted, “What bank loan officer is ever going to say, ‘Oh, I didn’t get the opinion from the other counsel.’”¹²¹ The implication here is that parties—perhaps especially institutional parties—are going to be uncomfortable deviating from a standard transactional template, even if the transaction (probably) does not justify every feature of the template.

Similarly, lawyers sometimes indicate that a closing opinion is rendered due to what I have called “pride.”¹²² Pride is an admittedly vague term that refers to the loose collection of social and emotional forces that appear to influence the way closing opinions are written and some of the purposes they serve.¹²³ It reflects the

that have been tried from time to time.” Winston Churchill Speech Before the House of Commons (Nov. 11, 1947).

118. See Lipson, *supra* note 2, at 113–20.

119. See Lipson, *supra* note 2, at 113–15 & n.288 (“[T]he ultimate answer[] to why lawyers write third-party closing opinions,’ one lawyer observed, ‘is a little bit like Tevyah: It’s tradition. It’s the way it’s done.’” (quoting Interview with Attorney W-3 (May 5, 2004)).

120. Interview with Attorney W-3 (May 5, 2004) (transcript on file with *The Business Lawyer*).

121. Interview with Attorney S-1 (May 7, 2004) (transcript on file with *The Business Lawyer*).

122. See Lipson, *supra* note 2, at 120–24.

123. Theoretical discussions of this phenomenon can be found in, for example, ROBERT MERTON, *SOME THOUGHTS ON THE PROFESSIONS IN AMERICAN SOCIETY* 11 (1960) (explaining that professional organizations do not require members to “feel altruistic . . . it only requires them to act altruistically”); ROBERT K. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* 224–26 (Free Press 1968) (1949); *The Professions and Social Structure*, in TALCOTT PARSONS, *ESSAYS IN SOCIOLOGICAL THEORY* 34, 43–46 (Free Press 1964) (1949) (discussing roles that the desire for success, self-interest, and altruism play in professional institutional structure).

assertion of self in a social setting even when doing so may produce no net economic gain for oneself or one's client.

One form of "pride" is significant imbalance in negotiating power between the parties. A number of lawyers—especially those representing borrowers—asserted that there was a strong link between the leverage associated with being the financing (e.g., lending) party and the power to demand a third-party closing opinion from the other party's (e.g., borrower's) lawyer.¹²⁴ This was sometimes simply chalked up to what several lawyers called the "golden rule."¹²⁵ As one lawyer explained, "[T]o the borrower, the money is essential. To the lender, sure he wants to do a deal and make some money, but if he doesn't lend money to me, he can lend it to you. If I don't get it from you, I may not be able to get it from anybody else."¹²⁶

To the extent that a closing opinion would not in these instances have produced and verified information reasonably relevant to the legal expectations of the parties, a CBA would indicate that the closing opinion was not appropriate. To be sure, in many cases, parties may well demand closing opinions on grounds of custom or tradition or entitlement, and the opinion will in fact perform an important informational function. But that will only be a happy byproduct of the opinion process. It will not reflect that a CBA has occurred. CBA would likely tell us that tradition and pride are not, themselves, grounds to decide whether to have an opinion.

Similar reasoning shows that CBA can also help to identify "hard" cases. Hard cases are those where the parties reasonably disagree about the informational value of the closing opinion. These disagreements may arise—and be reasonable—because of transactional complexity or novelty, because the parties may be foreign or opaque to one another, or because there are legitimate questions about the legal consequences of the transaction. When parties agree on these informational benefits, the CBA will be easy and indicate that a closing opinion would likely outweigh its costs of preparation. But if parties do disagree because one party values the information generated by a closing opinion more than the other, there may be a problem. As discussed above, it is a problem that may be solved in a number of ways, including by adjusting the payment of legal fees associated with the opinion. But CBA cannot make hard cases disappear. It can only help distinguish them from the easy cases.

2. Making Easy Cases Easier

CBA may not make the hard cases easier. But by orienting the negotiation around whether the opinion has informational value, CBA can help to isolate characteristics of transactions or parties (or some combination) that cause the parties to dispense with the opinion because they believe their informational needs have been satisfied in other ways. This may, for example, be because either or both parties

124. See Lipson, *supra* note 2, at 122.

125. See *id.*

126. Interview with Attorney H-1 (May 1, 2004) (transcript on file with *The Business Lawyer*).

are reporting companies under the securities laws, because the parties are familiar to one another, or the deal has become highly standardized.

A variant of this seems to be occurring already. There is anecdotal evidence that there is a kind of deal inflation associated with the threshold question. The *California 2004 Report* notes that a remedies opinion may not be required in loans under \$100 million or merger and acquisition transactions under \$10 million.¹²⁷ Lawyers I spoke with indicated that these numbers have grown over time, and that opinions had previously been required in smaller-denomination transactions.¹²⁸ Thus, one type of “easy” case may be where the dollar values simply do not warrant the informational rigor that a closing opinion would add.

But note that, to the extent this is occurring, it only indirectly reflects the more pure form of CBA discussed here. The analysis in these cases does not really involve the “costs” of the closing opinion itself, or even its informational benefits, but rather the benefit in relation to the size of the transaction.¹²⁹ The inference is that a transaction below a certain dollar amount will presumptively involve so little risk, or warrant so little cost, that the benefits of a legal opinion are unlikely to be justifiable. There is, of course, no guarantee that the relative benefit of a legal opinion will be any less in a small dollar transaction.

Nevertheless, what CBA has done here is help to create certain “bright line” tests around which the parties can orient their negotiations about whether to produce an opinion. CBA can create a dollar-denominated presumption for or against a legal opinion. Mostly, this means that CBA will give a borrower (or borrower’s counsel) negotiating leverage in smaller or “easier” transactions to resist a request for an opinion by arguing that there is a number that signals whether an opinion is cost-justified—e.g., a loan valued in excess of \$100 million or whatever the number may be in the future.

The mechanisms of CBA give lawyers a more objective metric to point to when negotiating the threshold question. It may be somewhat illusory, in the sense that it may exaggerate the certainty of the costs or benefits of precautionary discovery associated with the process of producing an opinion. Nevertheless, in those cases that might already be easy because the closing opinion plays no important informational role, CBA will make the decisions that much easier because it will offer a comparatively objective basis for negotiating the threshold question.

CONCLUSION

Closing opinions and cost-benefit analysis have more in common than we may at first glance think. Like closing opinions, cost-benefit analysis provides a way of gathering, sorting, and analyzing information. But, like closing opinions, CBA cannot tell us conclusively what to do with that information. Just as a closing

127. *California 2004 Report*, *supra* note 2, app. 4, at 1 n.4.

128. See Lipson, *supra* note 2, at 88–90.

129. See *California 2004 Report*, *supra* note 2, app. 4, at 12 (noting that the closing opinion CBA “involves measuring the cost of preparation against the benefit that the opinion recipient obtains through its reliance on the . . . opinion, taking into account the size and complexity of the transaction”).

opinion cannot tell the parties whether to consummate a transaction, CBA cannot answer many of the hard questions we face in closing opinion practice, including, to some important extent, the threshold question.

Yet, properly understood, CBA can improve closing opinion practice in a number of ways. It can help us understand the broader costs associated with third-party closing opinions, especially costs to lawyers. It can help lawyers and clients focus on the informational benefits of a closing opinion and filter out the less rational noise that sometimes plagues discussions about closing opinions. It can help remedy what many lawyers say is the inefficient division of labor in the production of the remedies opinion.

Yet, for CBA to be meaningful, we need more data. Among other things, we do not currently know:

- The discount, if any, attributable to closing a transaction without a third-party opinion;
- The liability and payout rates for lawyers sued on closing opinions; or
- The cost of having non-drafting counsel opine on enforceability.

Perhaps the most important contribution CBA can make is by telling us that if we want to generate better answers to the threshold question—and the many other questions posed by closing opinion practice—we need to start asking and answering these sorts of questions.

