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Richard Howe Heads Project To Evaluate Section 1.7 Of The Guidelines For The Preparation Of Closing Opinions On Reliance

Richard Howe of Sullivan & Cromwell LLP has agreed to head a project to evaluate whether Section 1.7 of the Guidelines with respect to reliance needs further explication. That Section clarifies that when a closing opinion authorizes persons other than the addressees to rely on it, they may rely to the same extent as – but to no greater extent than – the addressee. Questions have been raised concerning the extent to which parties not involved in the transaction at the time the opinion was delivered, such as future lenders and rating agencies, should be entitled to rely, and also concerning requests for reliance made long after the time the opinions was rendered. Anyone interested in assisting on this project should contact Carolan Berkley at berkley@ballardspahr.com or Richard Howe at hower@sullcrom.com. Specifically, Committee members are encouraged to forward examples of requests to expand reliance language in closing opinions as well as anecdotes regarding requests for reliance after an opinion has been rendered.

Formation Of Subcommittee On Cross Border Legal Opinions

Paul Storm of Nauta Dutilh will head a new subcommittee on cross border legal opinions. The concept was discussed at our August meeting to provide a forum for discussion on issues that arise in rendering and receiving opinions in cross-border transactions, such as understanding the differences in customary practice in the United States and other jurisdictions, and how both the opining and receiving lawyers need to communicate limitations on the meaning of customary practice in different jurisdictions. We are in the process of setting up a separate list serve to be moderated by Paul. Look for information on the Legal Opinions Committee website.

Venture Capital Task Force (Ken Maready)

The Venture Capital & Private Equity Committee of the Business Law Section is forming a task force or working group among that committee, our Committee and the Securities Opinion Subcommittee of the Committee on Federal Regulation of Securities. This group will deal with opinion-related matters that arise regularly in the context of venture capital and private equity transactions. The initial project for the group will be addressing a model opinion for venture capital transactions put together by the National Venture Capital Association. The NVCA model opinion is currently undergoing revisions based on input from groups of lawyers, including members of the VC&PE Committee. Ongoing projects for this working group will include: (i) preparing a set of assumptions, qualifications and limitations that would be appropriate for use with the model opinion, (ii) assisting the VC&PE Committee in the development of annotated form opinions and the description of customary practice related to the giving of legal opinions, (iii) updating the VC&PE Committee on developments impacting legal opinions given in venture capital and private equity transactions, (iv) developing CLE presentations and (v) answering specific questions from members of the VC&PE Committee related to legal opinions. James Rosenhauer of Hogan & Hartson L.L.P. has agreed to serve as our Committee’s liaison to this working group. If you have particular experience and/or interest in this area, please contact Jim at jjrosenhauer@hhlaw.com or Ken Maready of the VC&PE Committee at kmaready@hutchlaw.com.
Securities Law Opinions (Gerald Backman)

The Subcommittee on Securities Law Opinions of the Committee on Federal Regulation of Securities met on November 19, 2004 to consider its future course of action after completion of the two most recent reports published in the August 2004 issue of The Business Lawyer: “Legal Opinions in SEC Filings” and “Negative Assurance in Securities Offerings.” The members present confirmed the conclusion reached at the Atlanta meeting that the Subcommittee should pursue the securities law issues in private placement opinions. A number of members volunteered to participate and additional participants are welcome. The first step will be to collect as many forms of opinions as possible and then try to identify those areas that the Subcommittee believes worthy of comment and guidance. The Subcommittee plans to coordinate with the Venture Capital & Private Equity Committee on this project. The members also concluded that a working group should be formed to explore the desirability of a report on opinions to underwriters in public offerings and Rule 144A transactions, which might follow the report on private placement opinions. Again, volunteers are welcome. We are looking forward to an interesting and thought provoking meeting in Nashville.

New Article on Negative Assurance

Don Glazer has recently published an article on negative assurance in the October 2004 issue of Insights.

Basic Opinion Education (Reminder)

The Committee will sponsor a satellite CLE program on opinion letter basics on April 28, 2005. Carolan Berkley, Donald Glazer and Arthur Field will make the presentations at this program. We are still interested in collecting any training materials that you would be willing to share for such a basics program. Please forward them to Carolan Berkley at Berkley@ballardspahr.com.

California Bar Report

The 2004 Remedies Opinions Report of the Business Law Section of the California Bar is now available and can be downloaded from www.calbar.ca.gov/buslaw. The report includes an executive summary and a number of appendices. The report of the Threshold Subcommittee on when a remedies opinion should be requested is especially thoughtful and addresses the considerations in determining whether to request or give a remedies opinion, including what are the expected benefits to the opinion recipients, do negative consequences flow to the opinion giver’s client or to the opinion recipient from delivery of or receipt of a remedies opinion and can these benefits be obtained in a less costly manner? Appendix VIII
addresses the historic disagreement about the remedies opinion between the New York “each and every contractual undertaking” view and the “essential provisions” of the California view and concludes that opinion practice has evolved to a point where lawyers should cease debating the issue and focus their energies on conforming to customary practice, which is now generally uniform among those who regularly give remedies opinions wherever located. Appendix X is the report of the Exceptions Subcommittee and includes a discussion on limitations, qualifications and other exceptions addressing California specific issues. We are planning to discuss the report at our Spring meeting.

**Litigation Update**

Steve Weise reported on a California arbitration case, *Azteca Construction, Inc. v. ADR Consulting, Inc.*, 2004 WL 1895135 (Cal. Ct. App. 2004). Steve noted that Section 3.6.2 of the TriBar Third Party Closing Opinion Report published in 1998 concludes that an opinion on a contract that contains an arbitration clause does not address the enforceability of the arbitration rules of the organization conducting the arbitration as follows:

> Agreements that contain arbitration provisions usually incorporate by reference the rules of an arbitral tribunal (e.g., “any dispute is to be determined in accordance with the Commercial Arbitration Rules of the American Arbitration Association”). While the remedies opinion addresses the enforceability of the arbitration provision, as a matter of customary usage, the remedies opinion is understood not to address the enforceability of these rules.

The case circulated by Steve shows the importance of this discussion. The decision addressed a contract that included standard language that the parties would arbitrate disputes pursuant to AAA rules. However the AAA rules were inconsistent with a non-waivable California statute on disqualifying arbitrators.

Don Glazer reports on two cases:

After development of the facts, the defendant opinion giver in *Wafra Leasing* (reported on by Don at our August meeting) was granted summary judgment on the plaintiff/opinion recipient’s opinion claims. The court’s opinion is reported at 2004 WL 1977572 (N.D. Ill. Aug. 20, 2004).

The question that concerned us at our meeting was whether, even though the opinion was correct, a recipient had an actionable claim based on a statement in the opinion letter that the opinion giver was unaware that the representations on which he was relying were wrong. The court did not address the opinion issue but rather found that the partner in the opinion giving firm lacked the requisite knowledge regarding the client’s ongoing violations of the securitization agreements and thus had not falsely stated that no information had come to the attention of the opining firm that would give them actual knowledge that the certificates and information on which they had relied were not accurate and complete.

A case before Judge Keeton of the United States District Court for the District of Massachusetts (*Massachusetts Asset Financing Corporation v. Harter Secrest* (February 2002)) illustrates the risk of reading too much into decisions on early motions: the opinion issues may not be properly briefed, or, indeed, even understood by defense counsel. The case involved a claim that an opinion giver, Harter Secrest, knowingly gave an incorrect opinion that execution of a loan agreement would not breach or result in a default under any agreement to which its client, the borrower, was a party. The basis for the
claim was that the opinion preparer knew that a representation in the loan agreement regarding the validity of accounts receivable was false, that the incorrect representation would trigger a default under the loan agreement and that the loan agreement was an agreement covered by this opinion. Judge Keeton denied defendant’s motion to dismiss and motion for summary judgment. He apparently was unaware, and was not told by defendant’s counsel, that the no breach or default opinion is understood to relate only to agreements to which the company is already a party – not the agreement the company is entering into in the transaction being opined upon.

Later, after the parties agreed to have the case tried before a magistrate judge, the magistrate judge granted defendant’s renewed request for summary judgment on the opinion count (the other counts were also tried and defendants prevailed on all of them).

We might consider adding for clarity, the word “other” before “agreements” when a no breach or default opinion refers to “agreements known to us” rather than relying on a list of agreements.

**Opinion Song (by Lynn Soukup)**

And on a lighter note, Lynn Soukup of Alston & Bird LLP forwarded the following:

Opinions (to the tune of Maria from West Side Story)

Spoken: Opinions

Sung:

The hardest part of closing to nail down
Opinions, opinions, opinions, opinions
Negotiating among lawyers til the clock’s run down
Opinions, opinions, opinions, opinions

Opinions
The lender just asked for opinions
Closing’s a day away and now they go and say opine

I’m writing
On issues of law I’m opining
But I won’t cover facts that’s not the way it’s done
These days

Opinions
Follow Principals and the Guidelines
TriBar covers a lot of the sidelines
Opinions
I'll never like giving opinions

The worst part of closing to be found
Opinions

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Membership

If you know anyone who would like to join the Committee and receive our Newsletter, please direct them to the ABA Business Law Section website: http://www.abanet.org/buslaw/home.html, click “Committees” and the Legal Opinions Committee. If you haven’t visited the website lately, I recommend you do so. Our mission statement and prior newsletters are posted there.

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Next Newsletter

The next newsletter will be circulated prior to the Spring meeting. Please forward cases, news and items of interest to berkley@ballardspahr.com.