In this issue:

Committee Meeting Friday April 1 10:30 – 12:30 in Nashville

Dean Foods

Arthur Field on Dean Foods

Committee Publications

Legal Opinion Education

Bar Reports

Litigation Update

Ad Hoc Committee on Audit Responses

Membership

Next Newsletter
Committee Meeting Friday April 1 10:30 – 12:30 in Nashville

We will present two mini-programs during our regularly scheduled committee meeting. Steve Weise, John Power and Carolan Berkley will discuss the 2004 Remedies Opinions Report of the Business Law Section of the State Bar of California. The report was described in the December 2004 newsletter. The thoughtful report of the Threshold Subcommittee on when a remedies opinion should be requested is of interest to opinion givers in all jurisdictions. We will also have what promises to be an interesting and lively discussion of the Dean Foods case by Don Glazer and Arthur Field, the experts in the case, and Robert Creamer, Vice President -- Loss Prevention Counsel, Attorneys’ Liability Assurance Society, Inc.

Dean Foods

Dean Foods Company, 2004 WL 3019442 (Mass. Super.), a decision of the business division of the Massachusetts Superior Court (the trial court), resulted in seven figure liability to Rubin and Rudman as a result of rendering a third party closing opinion to the purchaser of the stock of the firm’s existing client.

Rubin and Rudman was retained by a long standing client in the fall of 1997 to represent the client in connection with a grand jury subpoena concerning rebate payments made by the client to a customer and tax evasion by that customer. The customer was the target of the investigation, not the client. There were a number of conversations between the litigator and counsel for the customer during which the possibility that the rebate program constituted illegal kickbacks implicating the client was raised. After December 1997, the Rubin and Rudman litigator heard nothing more from the U.S. attorney or counsel to the customer nor did the litigator inquire of counsel to the customer before the firm issued the opinion described below.

There were negotiations in the late fall of 1997 and the winter of 1998 regarding a sale of the client. Because of internal shareholder issues, the transaction was delayed. In June 1998, the client was purchased in a stock transaction. The selling company made the following representation in the stock purchase agreement:

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

An opinion was delivered by Rubin and Rudman in connection with the closing. The opinion included the following regarding litigation:

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

The opinion letter also stated that the firm had "relied upon the representations of factual matters contained in the Purchase Agreement" and "made no independent investigation of such factual matters; however, nothing has come to our attention which causes us to doubt the accuracy thereof." The opinion also included a definition of knowledge and a limitation regarding independent investigation, but again stated that nothing had come to their attention which caused them to doubt the accuracy of exhibits and schedules on which they were relying.

The litigation partner, the client relationship partner, the corporate partner handling the stock sale and a selling shareholder met to discuss whether the grand jury subpoena was required to be included in the disclosure schedules. The litigation partner said they had not heard from the U.S. attorney in nearly six months, and it was his "guesstimate" that the matter had probably gone away. The relationship partner and corporate partner advised that it would be wise to include the grand jury subpoena/investigation in the schedule. However, the client representative was afraid it would incite family members and interfere with the sale. The matter was not disclosed. The litigator testified that he did not know that he was also being asked about the investigation for purposes of a firm opinion. The final bad fact is that the internal firm opinion policy was not followed.

In September, after the deal closed, the litigation partner was informed by the U.S. attorney that the company was a target of a federal grand jury investigation. The buyer of the stock testified the deal would not have been consummated had he known of the grand jury subpoena/rebate investigation. The company paid a fine of $7,200,000, the minimum fine under the federal Sentencing Guidelines.

The court's opinion is lengthy and cites to the Restatement (Third) of the Law Governing Lawyers. To demonstrate that the firm failed to exercise reasonable care or competence in communicating the no litigation opinion required the plaintiff to demonstrate that Rubin and Rudman failed to conform to customary practice in the scope of diligence required for the no litigation opinion. This led the court to review the 1998 TriBar Report on Third-Party Legal Opinions. The court concluded that given the facts known to the firm, the corporate partner who prepared the opinion did not engage in the factual inquiry he was required to make by customary practice. "The confirmation they gave, grounded as it was on errors of fact, created for the recipients the comfort that an ongoing investigation did not exist and that nothing had come to the attention of Rubin and Rudman that cast doubt about the accuracy of that report."

The case highlights the need to exercise care in drafting litigation confirmations. The form of confirmation, addressing investigations of any kind, was unusual. Furthermore, while not suggesting any particular inquiry for the confirmation, the case does suggest that when opinion preparers are on notice of matters that may be adverse, they need to look into them further rather than simply averting their eyes. The inclusion in the third party opinion in two separate places of a statement of no knowledge of facts that would cast doubt about the accuracy of the litigation disclosure by the client surely did not make the firm’s defense any easier.

Arthur Field and Don Glazer are writing an article on Dean Foods to be published in a future edition of Business Law Today.
Arthur Field on Dean Foods

THIRD PARTY LEGAL OPINIONS — WHAT DUTY DOES AN OPINION PREPARER HAVE TO CONSULT WITH OTHERS IN THE SAME FIRM WHO DO NOT WORK ON THE OPINION? DOES “TO OUR KNOWLEDGE” OR “WITHOUT INVESTIGATION” LANGUAGE IN AN OPINION LETTER JUSTIFY A FAILURE TO CONSIDER ADVERSE INFORMATION THAT IS ACTUALLY KNOWN BY THE OPINION PREPARER? THE RECENT “DEAN FOODS” CASE IN MASSACHUSETTS CONFIRMS CUSTOMARY PRACTICE OBLIGATIONS AS TO FACTS

The recent Dean Foods case (Dean Foods v. Pappathanasi C.A. No. 01-2595 B.L.S. Mass. Super.Ct. Dec 3, 2004) is an unreported decision that in a month has achieved much attention from opinion committees of law firms and malpractice insurers. The decision is a thoughtful one that carefully follows customary practice. It makes no new law, merely confirming established customary practice obligations. The decision has mistakenly been viewed by a few as novel and possibly threatening.

In this case the acquirer of a company received a closing opinion of seller’s counsel that (a) there was no investigation of any kind pending against the company being sold (an opinion not in question) and (b) the company being sold was not “subject to any... continuing” governmental investigation (the opinion in question). Three months later the acquired company received a “target letter” arising out of the investigation referred to below. Subsequent negotiations resulted in a guilty plea and a $7.2 Million fine.

At issue in the Dean Foods case was whether the limited knowledge of the opinion preparer required the preparer to find out more before issuing an opinion. Others in the same firm knew much more than the opinion preparer did about the opinion in question; the opinion preparer knew that.

The 1998 Report of the TriBar Opinion Committee (53 Bus. Law. 591) (“TriBar II”) specifically deals with the question of the knowledge to be attributed to the opinion giver firm that gives a third party closing opinion. Opinion preparers (those who work on the opinion) are only charged with their own actual knowledge. See sec. 2.2.2(a). TriBar II coined the term “opinion preparer” to indicate the lawyers whose knowledge was relevant as compared to the term “opinion giver”, the firm that is professionally responsible for the work product.

In the Dean Foods case, the parties agreed that customary practice, as described in TriBar II, was applicable. The judge specifically followed that approach. Thus (contrary to some comments on the case), he did not impute the knowledge of a partner (the “other partner”) who did not work on the opinion (but consulted briefly about the opinion and was known by the opinion preparer to have relevant information about it) to the opinion preparer. However, the judge held (in a bench trial) that in view of the adverse information the opinion preparer actually had, issuance of the opinion by the opinion preparer without further investigation (through further questioning of the other partner or otherwise) was negligent misrepresentation.

The difference between imputation of information held by a partner who is not an opinion preparer to the opinion preparers and imposing a duty on an opinion preparer to obtain facts is important. Had there been no reason for the opinion preparer to obtain additional information, the opinion would have been wrong but not actionable. By contrast, had there been imputation, the opinion preparer would have been charged with all the facts known to the other partner even if the opinion preparers knew none of them.
The opinion preparer knew from discussions with the other partner (and a third partner) that a criminal tax fraud investigation involving a client of the company being sold had been initiated by the U.S. Attorney and that records of the company being sold had been produced by the client as a result of a subpoena. He also had the other partner’s “guesstimate” that the investigation “had probably gone away, with the customer paying a civil fine with heavy penalties for tax evasion”. Disclosure was discussed by three of the four partners involved, but ultimately rejected. The opinion preparer believed (mistakenly) that the investigation had ended. The Court in Dean Foods concluded that the opinion preparer knew too much to deliver the opinion without a factual inquiry. Under some circumstances a factual inquiry will dispel the adverse information in hand (but we know that in this case a factual inquiry would not have done so). Without the factual inquiry, the Court concluded that providing the opinion was negligent misrepresentation. In this situation the only choices available to the opinion preparer were to give the opinion disclosing the adverse information or to withhold giving the opinion. The opinion preparer issued the opinion without further inquiry.

Defendant argued that language in the opinion letter that limited the opinion to “knowledge” and relieved the opinion preparer of responsibility for any independent investigation to establish fact were relevant. The Court saw these limitations as irrelevant. The opinion preparer had actual knowledge without having undertaken any independent factual inquiry.

A recent insurer newsletter, ALAS LOSS PREVENTION HOTLINE BULLETIN No. 2004-25, December 21,2004), misreads the facts (stating that the opinion preparer was “unaware of the criminal investigation” and presumably unaware of other adverse facts). It then suggests that a prudent reaction to the Dean Foods case is for third party opinion givers to make a “firm-wide inquiry regarding the matters covered in the opinion.” This suggestion appears to be based on a misreading of Dean Foods as requiring imputation of information. The newsletter suggestion that parenthetically refers to such a firm-wide inquiry as complying with or exceeding obligations under TriBar II, is instead inconsistent with TriBar II. The ALAS suggestion is both impractical (there is no time to poll an office of any size and the costs of a poll cannot be justified) and unjustified by the language of the Dean Foods case. The Dean Foods decision is entirely consistent with TriBar II and current customary practice. It raises no new concerns for opinion givers. ALAS supplemented its analysis in its Bulletin 2004-26 entitled “MORE ON DEAN” on December 28, 2004. This supplement corrects the prior letter to indicate that the opinion preparer knew of the investigation.

In its follow-up letter ALAS refers to a non-existent “doctrine of imputation” even as it concedes that the opinion preparer had knowledge of the investigation. ALAS sees the case as illustrating what happens “if the authors of the opinion … do not know the full extent of a law firm’s work for a particular client.” Missing from the ALAS analysis is any recognition that the need to know was created by information the opinion preparer had about the investigation. To add to the confusion, the ALAS supplement cites to the ABA Accord, which is now outdated and largely unused and which never purported to state customary practice on this issue.

What is new in the Dean Foods case is a judicial weighing of the quantum and type of adverse information an opinion preparer may have before being required to make inquiries within his own office of a person known to have relevant information. If the person is known to have relevant information, the duty to inquire may well exist even without any adverse information. See TriBar II at sec. 2.2.2(b) that states:

“The lawyers in a firm who represent a client in a transaction will ordinarily consider whether they should make general inquiries of others in the firm who are more familiar with the client’s affairs in order to facilitate the handling of the transaction . . . . Opinion preparers also may
have occasion to make . . . inquiries directed to specific issues raised by
the opinion, particularly when they are aware that a lawyer in the firm
who is not involved in the preparation of the opinion has information
obtained through representation of the client in other matters that is likely
to have a material bearing on the opinion issue.”

While, ordinarily inquiries within a firm are not required, in Dean Foods an inadequate inquiry of the
other partner was made. The Court’s decision details the many matters not disclosed by the other partner
to the opinion preparer. This occurred because only a very brief inquiry directed to a sale agreement
disclosure schedule (rather than the opinion) was made by the opinion preparer. The Court’s decision
states “It does not excuse the situation for . . . [opinion preparer] to say he relied solely on [other lawyer’s]
expertise. A see-no-evil, hear-no-evil, speak-no-evil approach cannot be what the TriBar Report is
teaching the opinion-writing bar . . . . There is no license to avert your eyes, to ignore the realities.” The
Court rejects reliance on the conclusions of the other partner. He was not in the opinion preparer group
and thus his inquiry and conclusions were not subject to customary practice standards. If reliance of the
opinion preparers on the inquiry or conclusions of the other partner were permissible, the door to opinions
that avoid customary practice standards without liability would be open.

The quantum and type of adverse information requiring an inquiry is likely to continue to be a murky area
for opinion preparers. However, as to information known to be available within the same law office the
standard for requiring an inquiry should be very low.

We seldom see judicial decisions that deal directly with customary practice issues. The Dean Foods
decision will not be appealed. A further clarification on how to deal with “adverse information” through
judicial decision is thus unlikely in the near term. Caution is therefore important if the opinion preparer
has any information about an opinion to be given that in retrospect may be seen as adverse, and
particularly so when further information is known to be available in the same law office.

The initial ALAS letter states that “it has paid significant money on claims involving imputation of one
lawyer’s knowledge to another in other contexts.” It is difficult to evaluate this statement without
knowing the context of each case. Payments are sometimes made to avoid the risk that a jury will not
believe that the opinion preparer did not know certain facts. There are no reported decisions on
imputation that I am aware of. Imputation of information within a firm improperly makes the opinion
giver firm a guarantor. That is because there is no practical way for all lawyers (or even groups of them)
in a firm, large or small, to be fully familiar with the facts relevant to the work of others in the firm,
unless they are actively working together on the same project. Law practice is too factually intensive to
make familiarity with the facts applicable to the work of others a rational goal.

The ALAS memos and the reaction of a few law firms to the Dean Foods case suggests that it is time to
“do something” to protect opinion giver firms. Careful and fairminded compliance with TriBar II is all
that the Dean Foods decision requires. Establishing a system that goes beyond customary practice will be
protective only if (a) the system is actually followed and (b) the actions of the opinion preparers are (in
retrospect) deemed credible by the trier of fact. Before making changes in opinion procedures, law firms
should consider how opinion preparers in their firm would have dealt with the Dean Foods facts. Would
it have been clear to the opinion preparer that reliance on conclusions of someone who was not an opinion
preparer was not permissible? Would it have been clear to the opinion preparer that an in-depth inquiry as
to the investigation was required and why? Would it have been clear to the opinion preparer that failing to
obtain information that is known to be relevant and is easily available is likely to be viewed as “averting
your eyes”? Would it have been proper for the opinion preparer to conclude that the investigation had
terminated based solely on the passage of time and absence of other information? Would your firm’s
procedures have required a written memo on any aspect of the opinion and would those procedures have
been followed? The first step in any firm opinion standards program should be an assessment of internal education programs.

Arthur Norman Field is the author of PLI’s “Legal Opinions in Business Transactions”; he is a past chair of both the TriBar Opinion Committee and the ABA Section of Business Law Legal Opinions Committee. He is the Reporter of the ABA Committee’s latest report “Law Office Opinion Standards” 60 Bus. Law. 327 (2004). Mr. Field is a retired Shearman & Sterling partner. He can be reached at Field Consulting Services LLC; anfield@IGXG.com. In the Dean Foods case Mr. Field acted as an expert witness for the plaintiff.

---

**Committee Publications**

The Committee’s Law Office Opinion Practices report was published in the November 2004 issue of *The Business Lawyer*.

Arthur Field and Don Glazer are preparing a survey of recent opinion cases and other developments for an upcoming issues of *The Business Lawyer*.

---

**Legal Opinion Education**

The ABA is presenting a satellite CLE program sponsored by the Committee on opinion letter basics on April 28, 2005. Carolan Berkley, Don Glazer and Arthur Field will be the presenters. This is a basics course and is specifically geared to associates and others new to opinion practice.

Arthur Field and Don Glazer are presenters at the PLI Legal Opinion Committee Workshop 2005 on March 18, 2005 in New York. Firm and department opinion standards and practices will be the principal focus.

---

**Bar Reports**

The Corporations Committee of the Business Law Section of the State Bar of California has published an Exposure Draft of its 2005 Report: Legal Opinions in Business Transactions (Excluding the Remedies Opinion) available at:

2005 Report (Word version)
The report is intended to reflect customary practice in California and cites to the TriBar reports as well as the ABA Principles and Guidelines. It includes typical opinion language and the diligence necessary to support the opinion.

The Boston Bar Opinion Committee is putting final touches on a simplified form of opinion. Don Glazer and Stan Keller are working on the project.

---

**Litigation Update (Steve Weise)**

Lawyers giving third-party legal opinions are often concerned about how to address choice-of-law issues. The recent “Special Report of the TriBar Opinion Committee: The Remedies Opinion—Deciding When to Include Exceptions and Assumptions,” 59 The Business Lawyer 1483, 1495-98 (August 2004) gave considerable attention to this issue. A recent decision from California on the application of choice-of-law rules to attorneys fees provision highlights this issue for third-party opinion letter purposes and confirms that TriBar took the right approach in its treatment of this issue. In *ABF Capital Corp. v. Grove Properties*, 126 Cal. App. 4th 204; 2005 Cal. App. LEXIS 125 (2005) a contract provided for one party to pay attorneys fees in connection with the other party’s enforcement of the agreement. The provision was not reciprocal. The agreement also provided for the application of New York law.

California Civil Code § 1717 provides that if a contract provides for attorneys fees the provision is made mutual as a matter of law in favor of the “prevailing party” in circumstances where the party named in the contract as entitled to payment of its attorneys fees would have a right to recover them. The court applied Restatement (Second) of Conflict of Laws § 187 and California case law applying the Restatement rule to consider whether the California Civil Code provision would apply in the face of the New York choice-of-law term of the contract. The court first concluded that New York had a “substantial” relationship to the transaction and that, as an initial matter, the choice-of-law term was enforceable. However, a choice-of-law term is not enforceable as to a particular provision if (i) the application of the term would be contrary to a “fundamental” public policy of the state whose law would apply in the absence of the choice-of-law term, and (ii) that state has a materially greater interest in applying its law on that issue than does the chosen-law state. The court concluded that (i) California law would apply in the absence of the choice-of-law clause, (ii) California Civil Code § 1717 represented a “fundamental” public policy of California, and (iii) California had a materially greater interest than did New York in applying its (California’s) law to this issue.

The TriBar Report takes a nuanced approach to the question of whether a legal opinion that says that a choice-of-law provision is enforceable addresses the fundamental public policy issue. First, either as a matter of customary practice or the opinion letter’s coverage limitation, the opinion giver does not have to address whether a non-covered state might have a fundamental public policy that would be offended by a term of the contract. The opinion does not have to make an express statement concerning this limitation. Some lawyers do choose to address this expressly when the transaction or the parties do have a “significant” relationship with another state. The opinion giver cannot ignore the law of its own state, assuming the opinion covers the law of that state and that the opinion giver is giving a general remedies
opinion under the law of that state (even though the agreement provides for the application of the law of another state) as is often done. If there is no need in giving the remedies opinion on that provision to take an exception, then inherently there is no “fundamental” public policy issue. If an exception to the remedies opinion concerning the relevant provision is taken, it speaks for itself. In any event, the opinion giver is not engaging in an analysis of whether the provision is “fundamental” under the law of the covered state nor whether the chosen law state would have a materially greater interest in applying its law to the particular provision.

So, had a California lawyer given a California remedies opinion on the ABF contract, the opinion would likely have included an exception addressing the effect of California Civil Code § 1717, as is commonly done in California. If a New York lawyer had given a New York remedies opinion on the same contract, the opinion would not have to address the possible application of California’s mutuality rule.

---

**Ad Hoc Committee on Audit Responses**

Many of our members also are interested in issues relating to lawyer’s responses to auditor’s requests for information in connection with client audits. The Section has an Ad Hoc Committee on Audit Responses that addresses these issues. That committee has an active listserv, which its members can access through the committee website – www.buslaw.org/cgi-bin/controlpanel.cgi?committee=CL965000. You can join the Ad Hoc Committee online at its website or by e-mailing its chair, Stan Keller, at skeller@palmerdodge.com. In addition, the Section’s February eSOURCE electronic newsletter features the material from the Ad Hoc Committee’s Fall Meeting program, which includes the current version of the ABA’s Auditor’s Letter Handbook.

---

**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](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.

---

**Next Newsletter**

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