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Committee Meeting Sunday August 7 9:00-11:00 in Chicago

We will again present two mini-programs during our regularly scheduled committee meeting. We are privileged to have Judge Van Gestel, the author of the Dean Foods decision, as our guest. He will discuss the decision in which he held a law firm liable for over $7M for failing to disclose an investigation in a third-party closing opinion containing a no litigation paragraph.

Don Glazer and Stan Keller will discuss the Boston Bar streamlined opinion, which is based on the ABA legal opinion principles. In view of the increasing litigation in the opinion area, it is critical that the ABA Committee on Legal Opinions, TriBar and other state bar opinion committees speak with one voice in articulating national customary practice in the giving and receiving of opinions. The streamlined opinion illustrates an approach in this direction.

Nashville Report

Dean Foods, which will be reprised in Chicago from the judge’s perspective, was the focus of one of the Committee mini-programs in Nashville. Don Glazer, expert for the defendant law firm, and Arthur Field, expert for the plaintiff, discussed the case. Robert Creamer from ALAS added the perspective of a litigator. One of the critical points made at the meeting was that if you have an opinion policy and do not follow it, plaintiff’s counsel will use that failure in any opinion litigation. You may want to refer to the Committee’s report on law office opinion practices, which is available at the Legal Opinion Resource Center at the Business Law Section website. As articulated in that report, there is no one way to address opinion practice; however, it is critical that if you have a policy it be followed.

Steve Weiss, John Power and I discussed the new California Report and the TriBar Remedies Opinion Report. The TriBar Remedies Opinion Report is also available at the Legal Resource Center. In due course, additional resources will be added to the Resource Center, but in the meantime, the California Report is available at www.calbar.ca.gov. Go to the California Business Law Section and you will find it. The TriBar Remedies Opinion Report, which discusses a process for analyzing whether exceptions or assumptions in addition to the bankruptcy exception and equitable principles limitation are necessary when giving a remedies opinion, and the California’s report’s discussion of the legal diligence that lawyers customarily undertake in order to give the remedies opinion were reviewed, and these reports are to a great extent in harmony.

Dean Foods

Inserted here is a pdf copy of the Dean Foods decision. If you have difficulty opening it, please e-mail Berkley@ballardspahr.com and I will send it to you directly.
Commentary on Dean Foods Decision (Richard R. Howe)

At the meeting of the Committee in Nashville, there was a discussion among Arthur Field, Don Glazer and Robert Creamer about the implications of the Dean Foods case. Among the points they made were the following:

- Lawyers should be familiar with the literature on legal opinions, which increasingly reflects a uniform nationwide practice. The judge in this case was very interested in the TriBar Opinion Committee’s 1998 report on Third-Party “Closing” Opinions, 53 Bus. Law. 591, describing customary practice.

- When a lawyer working on a matter becomes aware that a client’s representations are not necessarily accurate or complete and the representations are important in connection with the lawyer’s opinion, the lawyer has an obligation to do something further. In this case the lawyers should have not made a “guesstimate” that the proceeding had gone away but should have checked that further.

- Although there has been some discussion about whether this case in effect held the firm liable because of its “collective knowledge” and not because of the knowledge of any single person, the case is really about negligence in failing to obtain knowledge requisite to giving an opinion.

- Lawyers should consider making changes in the language of opinion letters on “no litigation” confirmations. One idea was that such confirmations should be limited to litigation affecting the transaction, such as a suit for an injunction, and not cover ordinary routine litigation against the company. Another was that they should never cover investigations or “threatened” litigation unless it is “overtly threatened in writing by a potential claimant who manifests a present intention to sue.” Another view expressed was that lawyers should not refer to “knowledge” at all in opinion letters.

- The judge noted in his opinion that the law firm did not faithfully follow its own opinion practice manual in giving the opinion, so the lesson is, if a law firm has procedures, it must follow them.

Although I agree with many of the above points, I have some additional observations. First, the case is one of the first in which the judge actually read the available opinion literature and based his analysis of the case on it. This has rarely happened before, but the judge’s efforts were admirable and should set the standard for future cases. Good litigators will cite this case and follow its approach.

The facts are difficult and somewhat unreal in terms of the experience of most lawyers. The lawyers involved in Dean Foods appear to have missed clues that indicated their client may already have been a target of the investigation at the time it received the subpoena. But in any event, whenever lawyers become aware of a matter that arguably should be disclosed on a schedule to an acquisition agreement, but the client resists making disclosure, the lawyers must consider the matter in greater detail than was done in Dean Foods. Under some circumstances, the lawyers must consider whether they are aiding and
abetting or otherwise participating in a fraud with their client, and if they so conclude they must resign the engagement unless the client permits disclosure. In this case, I do not think the gravity of the undisclosed item rose to this high a level. However, a lawyer should never give negative assurance on the accuracy of disclosure when the lawyer is aware of a matter that falls within the description of an item to be disclosed but has not been disclosed. In this case, once the client resisted disclosure of the investigation the lawyers should either have declined to give any no litigation opinion or should have modified the opinion (as well as the representation, if possible) so as to delete the reference to investigations, even if doing so might well tip off the other side that something was being withheld from it. Failure to do this in effect made the lawyers guarantors of their client’s representation.

Although law firms may be able to resist giving these kinds of confirmations, I am more skeptical that lawyers generally will be able to refuse to give “no litigation” confirmations in standard opinions, particularly because of the “added value” that such confirmations provide, as illustrated in this case. Lawyers are hired by clients to conduct investigations and confirm what they find, or in transactions like this, what they fail to find. In this case the lawyers actually succeeded in identifying a material fact that was of interest to the buyer and that the buyer had a legitimate interest in knowing, and without the lawyers’ involvement the sellers would surely never have disclosed it. Indeed, the sellers were not even aware of the implications of the investigation, which had already impaired the value of their business. Unfortunately, the lawyers’ failure to deal with the subpoena appropriately was a costly error, but buyers of privately held businesses will learn from this case that they should ask for factual confirmations from third parties whenever it is reasonable to do so, as it was here since the matters were within the lawyers’ area of expertise. If so, lawyers will need to develop procedures to follow in order to be sure that they can give these kinds of confirmations with confidence. So my view is that the critical message of this case is that lawyers who give no-litigation confirmations must have procedures to do so and must follow them. In this case, if the lawyers had faithfully followed the procedures that they had and followed up on the red flags that they discovered, I venture to surmise that they would not have been held liable.

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**Circular 230**

On June 20, new standards for written federal tax advice, published by the United States Treasury Department in a regulation known as “Circular 230,” became effective. Circular 230 focuses on the exercise of diligence required in ascertaining facts in order to give tax advice. Circular 230 requires law and accounting firms to have internal compliance policies for delivery of tax advice. This has lead to a number of firms reviewing file opening policies and implementing disclosure in e-mails and other written communications. A number of groups are focusing on this issue; however, no consensus has been reached. If you have a policy that you would be willing to share, or if you are a member of a bar group that is studying the issue and formulating policy, please forward any policies to me at Berkley@ballardspahr.com. I will collect the policies and share them with the Committee.

The ABA has a Task Force on Tax Shelter Ethical Responsibilities on which Sylvia Chin, Arthur Field and I serve as representatives of the Business Law Section. Our first task has been to propose to the ABA Standing Committee on Ethics and Professional Responsibility the issuance of an opinion addressing issues that arise in the context of tax shelter opinion practice of assuming the presence of a non-tax business purpose for the transaction in preparing and delivering the tax opinion.
**Legal Opinion Education**

Carolan Berkley, Don Glazer and Arthur Field presented a satellite CLE program sponsored by the Committee on *Fundamentals of Third Party Closing Opinions*. The materials, as well as either a video or audio presentation of the program, are available at the ABA store. The feedback received was positive and you may want to consider purchasing the video to use for internal CLE on opinion practice.

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**Streamlined Form of Closing Opinion, Boston Bar Association Business Law Section**

Inserted is a pdf copy of the Streamline Form of Closing Opinion that will be discussed at the Annual Meeting:

[Annual-Streamline Form.pdf](Annual-Streamline Form.pdf)

**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.

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**Next Newsletter**

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