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Judge van Gestel, who decided *Dean Foods*, was our guest speaker in Chicago. We circulated the *Dean Foods* decision in our June newsletter, and have discussed it in both the June and March newsletters (newsletters can be accessed at our web page, the address of which is included in the immediately following news item). For those of you who have read the decision, you know that Judge van Gestel deferred to customary practice as the standard to which lawyers are held in rendering opinions. Although bar reports are not legally binding with respect to customary practice, both the ALI and Judge van Gestel accept the notion that customary practice is articulated in bar association reports. Judge van Gestel specifically referred to the *1998 TriBar Report* in *Dean Foods*.

In his remarks, the judge began with the observation that litigation paints with a broad brush. The procedure rules and rules of evidence are such that facts an opinion giver thinks important may never get before the finder of fact and facts the opinion giver wishes were not presented may be. Moreover, the quality of the experts may determine the extent to which customary practice is properly presented.

The judge observed that judges are attuned to allegations of misrepresentation and fraud and, therefore, naturally assume that if a closing opinion is delivered, it is intended to convey information and to be supported by due diligence on the part of the opinion giver. Thus, he indicated that when a fact finder sees the phrase “to our knowledge” in an opinion its inclination will be to view it not as a limitation but as a way of underscoring the opinion giver’s special knowledge of the matter being addressed. Similarly, he stated that language such as “we have conducted such investigation as we deemed appropriate” will be viewed as reinforcing the idea that lawyers are expected to look into the matters they are addressing even if they have added a qualifier such as “without investigation.”

The judge also observed that law firms that have adopted policies for giving opinions should be careful to follow them. He indicated that failure to do so does not look good and could “torpedo” an opinion giver’s defense if the case is tried before a jury.

The judge concluded by observing that in giving opinions on very large transactions lawyers, like accountants, have become deep pockets unhappy recipients of these opinions are seeking to access when something goes wrong. He noted that clients often limit their post-closing liability, leaving their lawyer even more of a target. The judge offered no solutions to corporate lawyers other than that in giving opinions they should be mindful of the vagaries of litigation and the risks they run if they give opinions in circumstances that might with hindsight be viewed as involving misconduct.

Paul Storm, one of our members from the Netherlands, indicated that the practice in Europe is quite different. Lawyers give opinions on matters of law and will not give opinions that go to knowledge of litigation or breaches of agreements.

I commend to you the article by Don Glazer and Arthur Field in the July/August 2005 *Business Law Today*, “No-Litigation Opinions Can be Risky Business” in which they set forth eight lessons that they take from *Dean Foods*. You may recall that Arthur and Don were the experts in the *Dean Foods* litigation and, although they do not agree on various aspects of the judge’s decision, they do agree on the lessons which lawyers should take from the case. I commend the article to you if you have not already read it. It can be found on the Business Law Section website. In short, the lessons described by Don and Arthur are as follows:

1. Lawyers are held to a national standard or customary diligence.
2. Opinion preparers need to be familiar with the literature on closing opinions. This would include not only the ABA materials, but also the TriBar materials.

3. When the opinion preparers learn of adverse information, they must consider whether they need to conduct their own inquiry into the facts.

4. Firms should try to avoid giving no litigation opinions, but if they cannot avoid doing so, the opinion language should be carefully and narrowly crafted.

5. When participants in the transaction are at odds, red flags should go up. This is consistent with other opinion cases we have discussed over the last year. In transactions which are contentious or which require unusual structuring in order to be able to deliver the opinion, great care should be taken.

6. Opinion preparers should give more thought as to the questions they need to ask of other lawyers on whom they may rely in preparing an opinion. Specifically, those other lawyers may not understand the scope of customary diligence, or the meaning of customary usage in giving the opinion. The opinion preparers either do or must understand customary practice and what is required in order to be able to give the opinion.

7. Opinions should not include a negative assurance to the effect that nothing has come to the attention of the opinions preparers that would cause them to believe that there are any inaccuracies in the factual representations on which they are relying.

8. Customary practice does not require firms to follow any specific practice or policy. However if a firm does have an opinion policy or practice, it does need to be followed.

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**Committee News**

Visit our web page at [http://www.abanet.org/dch/committee.cfm?com=CL510000](http://www.abanet.org/dch/committee.cfm?com=CL510000). You will note that we formally have a Subcommittee on Cross Border Legal Opinions and a Task Force on Reliance Issues. You can join either or both at the web page. You will also note our new publication -- *The Collected ABA and TriBar Opinion Reports*. It collects in one handy reference volume the current most important reports on closing opinions issued by our Committee and the TriBar Opinion Committee. Both committees include lawyers from across the country whose practices cover a wide range of business transactions and practice settings, and the reports are among the leading sources of guidance on what constitutes customary practice on a national level.

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**Report on Reliance Project**

Richard R. Howe of Sullivan & Cromwell LLP, who is head of a project to evaluate whether Section 1.7 of the Guidelines with respect to reliance needs further explication, reports that there has been little interest in this project so far. The project was intended to enable members of the Committee to discuss issues they have encountered in cases in which, for example, requests for reliance were made long after
the time an opinion was rendered. In fact, it appears that most lawyers are routinely allowing reliance by assignees in opinions concerning bank loans that are intended to be assigned or syndicated.

However, Lawrence Safran of Latham & Watkins LLP in New York reports that he has developed a slightly different form of reliance language that has now been accepted by many of the large lenders. His opinions now contain the following paragraph:

“At your request, we hereby consent to reliance hereon by any future assignee of your interest in the loans under the Credit Agreement pursuant to an assignment that is made and consented to in accordance with the express provisions of Section [__] of the Credit Agreement, on the condition and understanding that (i) this letter speaks only as of the date hereof, (ii) we have no responsibility or obligation to update this letter, to consider its applicability or correctness to other than its addressee(s), or to take into account changes in law, facts or any other developments of which we may later become aware, and (iii) any such reliance by a future assignee must be actual and reasonable under the circumstances existing at the time of assignment, including any changes in law, facts or any other developments known to or reasonably knowable by the assignee at such time.”

This approach basically incorporates language from the Guidelines into the opinion and thereby helps satisfy any concern that reliance otherwise than in accordance with the Guidelines could occur. Anyone who has had similar experience that might be of interest to the Committee is encouraged to contact Carolan Berkley at berkley@ballardspahr.com or Richard Howe at hower@sullcrom.com.

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

Accompanying the newsletter is a pdf copy of the revised Streamlined Form of Closing Opinion for use by Boston Area Law Firms when acting as Borrower’s Counsel for an Unsecured Loan. We did not have an opportunity to discuss the streamlined form of opinion at our meeting in Chicago because the discussion that followed Judge van Gestel’s remarks filled the full two hour time slot. In response to his remarks, further refinements to the form were made.

Other bar groups may want to consider the approach taken by the Boston Bar, specifically the statement of legal and factual due diligence covered in the third paragraph, the form of no litigation confirmation and the express incorporation of the Legal Opinion Principles issued by this Committee.
Annual Review of the Law on Legal Opinions

The first survey prepared by the Committee on Legal Opinions was published in the May 2005 edition of *The Business Lawyer*. The reporters for the survey were Arthur Field and Donald Glazer. The survey provides a concise discussion of recent decisions on legal opinions, summarizing many of the opinions that we have mentioned in recent newsletters. Also included is an addendum describing major opinion cases decided before 2004. We expect that the survey will be posted to the Legal Opinion Resource Center shortly (http://www.abanet.org/buslaw/tribar/home.shtml).

TriBar Report on Limited Liability Company Opinions

The TriBar Report on Third-Party Closing Opinions: Limited Liability Companies is in final stages of preparation and hopefully will be published in the February issue of *The Business Lawyer*.

More Litigation

Highland Crusader Offshore Partners, L.P. and others have filed a complaint alleging fraudulent misrepresentation, negligent misrepresentation, aiding and abetting and conspiracy in connection with a legal opinion delivered by Andrews & Kurth. The plaintiffs allege they purchased approximately $90,000,000 worth of stock of a Delaware corporation in reliance on a legal opinion that the issuer had the power to issue the stock, the stock was properly issued and the issuance of the stock did not violate the Certificate of Incorporation. The stock was nonvoting preferred and was issued at a time when the Certificate of Incorporation indicated that the corporation could not issue any class of non-voting stock.

According to a September 7, 2005 Law.Com article, the firm examined a certificate certified by the company as being correct. In a related suit against the issuer, the plaintiffs allege that a certificate of correction filed after the fact cannot change the nature of the stock

Future Program Topics

Our next meeting will be in Tampa, Florida during the Spring Section Meeting. I propose to discuss the Law Office Opinion Practices Report (available at the Legal Opinion Resource Center) with a panel of lawyers from law firms from various cities. We will discuss current practices and any changes in practices in response to opinion litigation.

It also appears there is sufficient interest in holding a meeting in Hawaii next Summer. Because program slots will be limited, it is likely we will partner with another Committee to present a program, possibly
reprising a program on alternative entity opinions, including discussion of the TriBar Report on Limited Liability Company Opinions.

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**Subcommittee on Securities Law Opinions**

The Subcommittee on Securities Law Opinions, a subcommittee of the ABA Committee on Federal Regulation of Securities, held a meeting in Chicago on August 8, 2005 at which there was a discussion of two forms of “no registration” opinions, i.e., opinions in private placements, Rule 144A and other similar offerings of securities in which registration of the securities is not required. The discussion indicated widely divergent approaches and views on some of the key issues, thereby assuring that there will be continued interest in this project as it develops. The Subcommittee is planning to hold another meeting on November 18, 2005, in connection with the Fall CLE Meeting of the ABA Committee on Federal Regulation of Securities at the Ritz Carlton Hotel in Washington, D.C., to continue the discussion of the “no registration” opinions as well as to discuss changes in negative assurance letters in light of the SEC’s Securities Offering reform proposals, which will become effective on December 1, 2005. Persons who are interested in these subjects should notify Richard R. Howe, the Chair of the Subcommittee, at hower@sullcrom.com, to be included on the mailing list.

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**Circular 230**

Cleary, Gottlieb, Steen & Hamilton and Sullivan and Cromwell Comment Letter on Circular 230 as Applied to Letters and Opinions Issued in Connection with Capital Markets and M&A Transactions dated July 1, 2005 was published on July 26, 2005 in TaxCore. The letter, addressed to the Internal Revenue Service, sets forth an interpretation of Section 10.35 of Circular 230 which the commenting firms and others who regularly advise in capital markets and M&A transactions expect to follow. Specifically, the commenting firms “believe that certain letters and opinions that do no more than (i) refer to the disclosure made in the document provided to investors, (ii) confirm the accuracy of the tax disclosure in particular, or (iii) confirm an opinion described in such tax disclosure need not contain the “opt-out legend” if the underlying tax disclosure itself complies with Section 10.35.”

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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](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 sometime in December. Please forward cases, news and items of interest to berkley@ballardspahr.com.
In 1998, the Legal Opinions Committee of the Boston Bar Association’s Business Law Section issued a statement in which it characterized the TriBar Opinion Committee’s then new report, “Third-Party Closing Opinions” (53 Business Lawyer 591), and the “Legal Opinion Principles” (53 Business Lawyer 831) prepared by the Legal Opinions Committee of the American Bar Association’s Business Law Section as providing a helpful description of the customary practice followed by Massachusetts lawyers in preparing and interpreting closing opinions. That statement also noted the desirability of omitting from closing opinions disclaimers, qualifications and assumptions that are customarily understood to apply whether or not stated expressly and referred to a “more streamlined opinion letter” that omitted needless boilerplate.

Since issuing the statement, the BBA Legal Opinions Committee has been working on a streamlined form of closing opinion. The form that follows, prepared under the supervision of Donald W. Glazer and Stanley Keller (both of whom are past Chairs of the BBA Business Law Section and of its Legal Opinions Committee), is the product of the collective effort of lawyers in many firms in the Boston area to develop a form that could be used by opinion givers and opinion recipients alike. The notes provide guidance but are not meant to be a substitute for the extensive literature on closing opinions that has developed over the years.

This streamlined form of closing opinion has been endorsed by the Boston Bar Association, by vote of its governing Council, as a useful product designed to facilitate the closing opinion process and enhance the efficiency of business transactions.

Thanks are extended to everyone who worked on a project that has been an extraordinarily long time in the making.

September 20, 2005

Elizabeth S. Fries, Co-Chair
Business Law Section

Kenneth F. Ehrlich, Co-Chair
Business Law Section

F. Beirne Lovely, Chair
Legal Opinions Committee
To each Lender party to the Credit Agreement referred to below

Ladies and Gentlemen:

We are furnishing this opinion letter\(^1\) to you pursuant to Section ___ of the Credit Agreement dated as of _____________ (the “Credit Agreement”) among OpCo., Inc., a Massachusetts corporation (the “Company”), HoldCo., Inc., a Delaware corporation of which the Company is a wholly-owned subsidiary (“Holdings”), and the Lenders party thereto. Capitalized terms that are defined in the Credit Agreement and not otherwise defined in this opinion letter are used in this opinion letter as so defined.\(^2\)

We have acted as counsel to Holdings, the Company and Michigan Sub, Inc., a Michigan corporation and wholly-owned subsidiary of the Company (“Michigan Sub”), in connection with the preparation of the Credit Agreement, the Holdings Guaranty, the Subsidiary Guaranty and the Notes being delivered by the Company today under the Credit Agreement (which agreements and instruments are referred to collectively in this opinion letter as the “Credit Documents”). The Company and Michigan Sub are referred to herein collectively as the “Subsidiaries.”

We have reviewed such documents and made such examination of law as we have deemed appropriate to give the opinions set forth below. We have relied, without independent verification, on certificates of public officials and, as to matters of fact material to our opinions, on representations made in the Credit Documents and certificates and other inquiries of officers of Holdings and the Subsidiaries [and others].\(^3\)

The opinions set forth below as to Michigan Sub are given in reliance on the opinion letter dated the date hereof of ______________ with respect to Michigan law.\(^4\) Except to the

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\(^1\) The opinion letter delivered to a third party in connection with the closing of a transaction also is often referred to as a “closing opinion.”

\(^2\) When incorporating definitions by reference, opinion preparers should consider the appropriateness of each definition.

\(^3\) This paragraph is not needed based on the Legal Opinion Principles (referred to in the next to last paragraph of this form) but is customarily included for clarity.

\(^4\) By stating reliance on other counsel’s opinion, the opinion giver is indicating that it is satisfied as to the competence of the other counsel and the coverage of its opinion. Language such as “you are justified in relying” or “the opinion is satisfactory in form and scope” does not add to the opinion giver’s responsibility and for that reason (continued...)
extent of such reliance, the opinions set forth below are limited to Massachusetts law, the Delaware General Corporation Law and the federal law of the United States. [We note that the Credit Documents provide that they are to be governed by New York law. The opinions in paragraphs 3 and 4 below are given as though each of the Credit Documents were governed by the internal law of Massachusetts.]

Based upon the foregoing and subject to the additional qualifications set forth below, we are of the opinion that:

1. Holdings is validly existing as a corporation and in good standing under Delaware law and has the corporate power to execute and deliver the Credit Documents to which it is a party and to perform its obligations thereunder.

2. The Company is validly existing as a corporation and in good standing under Massachusetts law and has the corporate power to execute and deliver the Credit Documents to which it is a party and to perform its obligations thereunder.

(continued...)

5 The enforceability of an agreement is usually governed by the law chosen in that agreement (see note 17 below). When the law chosen is not the law of Massachusetts, an opinion on the enforceability of the agreement “as though” Massachusetts law were the governing law might be given. In that case, the bracketed material should be included. When neither the opinion giver nor counsel for the opinion recipient is familiar with the law the agreement chooses as the governing law (New York in this form), an opinion recipient might require the Company to provide it an opinion of local counsel covering the validity, binding effect and enforceability of the agreement under that law.

6 The opinions in this form are not intended to be exclusive. Depending on the circumstances, an opinion recipient may request additional opinions (e.g., that the Company is not an investment company; that the transaction complies with margin rules).

In addition, in some transactions, such as the sale by the Company of its stock, opinions on the Company’s capitalization and the status of the stock being sold typically would be included. A form of these opinions in a transaction involving the sale of convertible preferred stock is included in Attachment A. Other opinions, such as compliance with the registration requirements of the Securities Act of 1933, also might be included.

7 Opinion recipients sometimes request that this opinion also cover the Company’s corporate power to own its properties and conduct its business. If given, this broader opinion typically is based on a description, usually in a disclosure document or an officer’s certificate.

8 Opinion recipients sometimes request an opinion that the Company is “duly incorporated.” This opinion may require the opinion preparers to conduct an inquiry into the past that, at least in the loan context, often is not cost justified. Ordinarily, an opinion that a Company has been “duly organized” should be avoided because of uncertainty as to what additional matters, if any, it covers.

9 The practice in Massachusetts in the past was to limit good standing opinions to “good standing with the Secretary of the Commonwealth” because this formulation tracked the provision of the Massachusetts corporation statute that
3. Each of Holdings and the Company has duly authorized, executed and delivered the Credit Documents to which it is a party, and such Credit Documents constitute its valid and binding obligations enforceable against it in accordance with their terms.  

4. The Credit Documents to which Michigan Sub is a party constitute its valid and binding obligations enforceable against it in accordance with their terms.  

5. The execution and delivery by each of Holdings, the Company and Michigan Sub of the Credit Documents to which it is a party do not and the performance by it of its obligations thereunder will not (i) violate Massachusetts or federal law, (ii) violate any court order, judgment or decree [listed in Schedule ___ to the Credit Agreement] [applicable to it and known to us], (iii) result in a breach of, or constitute a default under, or result in the creation of a Lien (continued...) 

was added to obviate the need to address tax good standing (see G.L.c. 156B, §116, succeeded by G.L.c. 156D, § 1.28 as originally enacted). With the amendment of § 1.28 by c.178 of the Act of 2004, and in view of the longstanding practice of addressing only the corporate good standing of Massachusetts corporations, many Massachusetts lawyers now give the good standing opinion without the limitation. Others continue the practice of referring to “good standing with the Secretary of the Commonwealth” or use another formulation such as “good standing on the records of the Secretary of the Commonwealth.” These formulations and the formulation adopted in this form have the same meaning. 

10 Under Massachusetts law, a necessary element of an opinion that a note or credit agreement is a valid and binding obligation is that the loan not violate, and not be subject to avoidance under, the Massachusetts criminal usury statute, G.L. ch. 271 § 49. Therefore, when the rate of interest is a fixed rate above 20% or sufficiently close to 20% that the addition of expenses might bring it over 20%, or when the interest rate floats and is not subject to a cap of 20%, an opinion giver might consider adding the following qualification: 

For the purposes of our opinions in paragraphs 3 and 4, we have assumed that each Lender has complied with, or is exempt from, the notice requirements of Massachusetts General Laws Chapter 271, Section 49. This assumption would not be necessary if the Lender or Lenders are all identified and they (and permitted assignees under the Credit Documents) are clearly banks or other lenders exempt from the filing requirements of the criminal usury statute. 

11 This opinion is based in part on opinions of Michigan counsel on the corporate status of Michigan Sub, its corporate power to enter into and perform its obligations under the Credit Documents and its due authorization, execution and delivery of the Credit Documents. An alternative to relying on local counsel is to include an express assumption regarding these matters. Sometimes, the opinion letter of local counsel also will cover the agreement’s enforceability (see note 5 above), or on occasion it may simply cover enforceability while assuming the foregoing matters. If an opinion is based on an opinion of local counsel, it should be made subject to the same stated limitations, if any, to which local counsel’s opinion is subject. This could be done by stating in the opinion letter that the opinions given in reliance on the opinions of local counsel are subject to the same limitations, exceptions and qualifications as are set forth in local counsel’s opinion letter. 

12 For the law covered, see part II of the Legal Opinion Principles. 

13 The bracketed material provides alternative approaches. The first alternative, which has become common, contemplates that a list of court orders, judgments and decrees is available. A list prepared for purposes of the opinion also could be used. As for the second alternative, see note 21 below regarding the definition of “known to us.”
or a right of acceleration under,\textsuperscript{14} any agreement or instrument [listed in Schedule \textsuperscript{__} to the Credit Agreement][to which it is a party and known to us]\textsuperscript{15} or (iv) violate its charter or by-laws.

[6. No consent, approval, license or exemption by, order or authorization of, or filing, recording or registration with any governmental authority is required to be obtained or made by Holdings, the Company or Michigan Sub in connection with the execution and delivery of the Credit Documents to which it is a party or the performance by it of its obligations thereunder [other than those that have been obtained or made].\textsuperscript{16}

[7. The choice of New York law as the governing law in the Credit Documents will be given effect under Massachusetts law.]\textsuperscript{17}

\textsuperscript{14} Depending on the circumstances, this clause could be expanded to cover other adverse consequences, such as changes in terms or creation of put rights or rights of termination.

\textsuperscript{15} The bracketed material provides alternative approaches. The first alternative, which has become customary, specifies the documents covered by the opinion by referring to a list or schedule. This form refers to a schedule to the Credit Agreement. Another way to specify the documents covered is to refer instead to a list prepared for purposes of the opinion, particularly when the opinion preparers cannot be sure that no changes will be made in the schedule after they have reviewed it. In the case of public companies, the reference could be to the exhibits in an SEC filing. As for the second bracketed alternative, see note 21 below regarding the definition of “known to us.”

\textsuperscript{16} Although a filing by the lender could be required (see note 10 above), for most borrowers an unsecured loan will not require that they obtain any governmental approvals or make any filings.

\textsuperscript{17} This opinion is sometimes requested when the opinion addresses the law of the state in which the Company is located and the Credit Documents choose the law of another state as their governing law. When given, this opinion provides comfort to the opinion recipient that the chosen law will be applied if it brings an action against the Company in the Company’s own state. This opinion is not necessary when the opinion covers the law chosen as the governing law in the Credit Documents because the opinion on the enforceability of the Credit Documents covers the governing law provision.

Often, this opinion is not given alone but is supplemented by an opinion on the enforceability of the agreements as if the law covered by the opinion (Massachusetts in this form) governed the agreements (see bracketed material at note 5 above). Sometimes, the two opinions are combined by adding the following at the end of the choice-of-law opinion: “but if the internal law of Massachusetts were nevertheless held to be applicable, the Credit Documents to which each of Holdings, the Company and Michigan Sub is a party would constitute its valid and binding obligations enforceable against it in accordance with their terms under Massachusetts law.”

An opinion giver’s ability to give a choice-of-law opinion will depend on the applicable law and the factual context. Massachusetts follows the Restatement approach of applying the law chosen to govern the agreement if the state whose law is chosen has a reasonable relationship to the transaction or the parties and if applying that state’s law would not violate a fundamental policy of a state whose law would apply in the absence of an effective governing law clause and that other state has a materially greater interest in the issue. To give the choice-of-law opinion included in this form, the opinion giver must be satisfied that New York has a reasonable relationship to the transaction or the parties (e.g., the lenders are located in New York) and that the Credit Documents do not violate a fundamental policy of Massachusetts (assuming for this purpose that Massachusetts law would apply in the absence of an effective governing law provision and that Massachusetts has a materially greater interest in the issue). As a matter of customary practice, the opinion giver does not have to (i) ascertain the policies of states other than those whose law is covered by the opinion that might have a relationship to the transaction or the parties (i.e., states other than Massachusetts in this form) or (ii) determine whether a state other than the one whose law the agreement chooses as the governing law (New York in this form) has a greater interest in the issue. When the opinion in paragraph 7 is given, some opinion preparers, to avoid any misunderstanding, choose to assume expressly that a court of the state whose law is covered by the opinion (Massachusetts) would not apply the substantive law of a state

(continued...)
[Except as disclosed in Schedule __ to the Credit Agreement,] we are not representing Holdings or either of the Subsidiaries in any pending litigation in which it is a named defendant, or in any litigation that is overtly threatened in writing against it by a potential claimant that challenges the validity or enforceability of, or seeks to enjoin the performance of, the Credit Documents.

(continued...)

other than the states whose law is covered by the opinion or selected in the agreement as the governing law (Massachusetts and New York) notwithstanding that state’s law and its relationship to the transaction or the parties. (If the opinion preparers are aware, however, that another state whose law otherwise would be applied by a Massachusetts court has a fundamental policy that is violated by a provision in the Credit Documents, they should consider whether giving the opinion would be misleading to the opinion recipient.) If an opinion giver is able to give without qualification the opinion in paragraph 3 regarding the enforceability of the Credit Documents if Massachusetts law applied, it normally will be able to give the opinion in paragraph 7 because no fundamental policy would exist under Massachusetts law that would prevent the Massachusetts courts from giving effect to the agreement’s choice of New York law as the governing law.

Some opinion preparers do not number this paragraph so as to emphasize that, unlike the paragraphs that precede it, it is not an opinion but rather a factual confirmation.

In view of the expansion of law firm size and geographic diversity, the limited nature of many client relationships and other factors, many firms are questioning whether a no litigation confirmation, even if justifiable at one time, is justified today. The form set forth in the text is included in brackets to make clear that firms using this opinion form may properly choose not to include it.

If included, this form, by focusing on matters that the firm is handling for the Company and that bear directly on the transaction, covers what a firm might realistically be asked to address. Opinion recipients may sometimes ask that the no litigation confirmation be expanded to cover material litigation that could adversely affect the Company. Even firms that are willing to address litigation affecting the transaction may well decline such a request. If, however, a firm decides to expand the confirmation to cover litigation affecting the Company, the opinion preparers should carefully consider the internal review procedures they will follow and the wording of the confirmation.

Opinion preparers sometimes are asked to refer to “action, suit or proceeding” instead of simply “litigation.”

When this phrase is used, it is understood to mean that a potential claimant has manifested in writing to the Company its intention to assert a claim against the Company that could reasonably be expected to result in litigation.

Although this form obviates the need for the phrase “to our knowledge” or a variant of it, other forms normally include that phrase. When they do, a definition of “knowledge” normally should be included to avoid misunderstanding as to the meaning of the term. (See also bracketed material at notes 13 and 15 in paragraph 5.) An example of a definition that is derived from the Legal Opinion Principles (and that would apply if no definition were included) is:

When the phrase “to our knowledge” or an equivalent phrase is used in this opinion letter, its purpose is to limit the statements it qualifies to the actual knowledge of the lawyers in this firm responsible for preparing this opinion letter after such inquiry as they deemed appropriate.

Some opinions preparers include in the definition in place of “this opinion letter” the phrase “the particular opinion or confirmation containing that reference.” Also, some opinion preparers refer to “conscious awareness” instead of “actual knowledge.”

(continued...)
Our opinions above are subject to bankruptcy, insolvency, fraudulent transfer, reorganization, moratorium and other similar laws of general application affecting the rights and remedies of creditors and to general principles of equity.\(^\text{22}\)

We express no opinion as to. . . .\(^\text{23}\)

[This opinion letter shall be interpreted in accordance with the Legal Opinion Principles issued by the Committee on Legal Opinions of the American Bar Association’s Section of Business Law as published in 53 Business Lawyer 831 (May 1998).]\(^\text{24}\)

This opinion letter is being furnished only to you for your use solely in connection with the transaction described above and may not be relied on without our prior written consent for any other purpose or by anyone else other than your participants and assignees permitted by the Credit Agreement.

Very truly yours,

[Boston Area Law Firm]

(continued...)

In preparing the confirmation, the opinion preparers normally would conduct an inquiry of those lawyers in their firm who the opinion preparers believe are reasonably likely to have information not otherwise known to them that is called for by the confirmation. As a matter of customary practice, the confirmation is understood not to cover information known to other lawyers in the firm. Depending on the circumstances and the formulation of the confirmation, the opinion preparers also might make inquiry of appropriate officials of the Company. In preparing a no litigation confirmation, the opinion preparers are not required as a matter of customary diligence to check court or other public records. Although not necessary, some opinion preparers choose to make this clear, for example, by stating expressly that they did not examine court or other public records.

If the opinion preparers are aware that a material legal proceeding is being handled by another firm, they should consider whether providing a confirmation (however worded) regarding litigation without noting the existence of that legal proceeding would be misleading to the opinion recipient.

\(^\text{22}\) These exceptions, although usually stated in the opinion, are understood to apply whether or not stated.

\(^\text{23}\) Include any additional exceptions to the opinions that may be necessary.

\(^\text{24}\) Many firms choose to include this paragraph to emphasize the application of the Legal Opinion Principles (which state that they apply whether or not expressly incorporated).
The authorized capital stock of the Company consists of (i) __________ shares of Common Stock, $0.01 par value, of which _________ shares are issued and outstanding, and (ii) _________ shares of Preferred Stock, $0.01 par value, of which ___________ shares have been designated Series A Preferred Stock, __________ shares of which are issued and outstanding, and __________ shares have been designated Series B Preferred Stock, none of which are issued and outstanding. [All such issued and outstanding shares have been duly authorized and validly issued and are fully paid and nonassessable.]

The Series B Shares [shares of Series B Preferred Stock to be issued pursuant to the Purchase Agreement] have been duly authorized, and when issued, delivered and paid for in accordance with the Purchase Agreement, will be validly issued, fully paid and nonassessable. The Conversion Shares [shares of Common Stock issuable upon conversion of the Series B Preferred Stock] have been duly authorized and, upon issuance in accordance with the Company’s articles of organization upon conversion of the Series B Shares, will be validly issued, fully paid and nonassessable. [The issuance and sale of the Series B Shares and the issuance of the Conversion Shares upon conversion of the Series B Shares are not subject to any preemptive rights under Chapter 156D of the Massachusetts General Laws or the Company’s articles of organization or by-laws.]

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a The appropriateness of an opinion on the number of outstanding shares will depend on the circumstances. For example, in the case of a public company, the opinion usually adds little to a certificate from the transfer agent; in the case of a private company, the opinion preparers may be able to base the opinion on applicable Company records. Some law firms, even if they are willing to cover the number of outstanding shares, will do so only if they also are giving an opinion on the valid issuance of those shares (see note b) to avoid any misunderstanding over the meaning of an opinion on the number of outstanding shares.

b Whether an opinion on the valid issuance of all the outstanding shares is appropriate similarly will depend on the circumstances. Because the opinion will require a review of each issuance of shares, in many situations it will not be cost justified. See “Third-Party ‘Closing’ Opinions: A Report of The TriBar Opinion Committee,” 53 Bus. Law 591, 651–652 (1998).

Opinion recipients sometimes ask for an opinion whether, to the opinion giver’s knowledge, the Company has any outstanding options, warrants or other rights to acquire stock other than as disclosed in the transaction documents. Many law firms decline to give this opinion because it constitutes negative assurance on a factual matter they rarely are in a position to confirm. If, however, a firm is willing to give it, the opinion should describe what the opinion preparers have done to support it.

c Even though a valid issuance opinion could not be given on shares issued in violation of preemptive rights granted by statute or the charter or by-laws, opinion recipients sometimes request an opinion that expressly addresses the absence of those rights. Such an opinion does not cover contractual rights.