Probate and Property Magazine
January/February 2016 Volume 30 No 1

"Best" Is Not Always Best When It Comes to Knowledge

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The term "knowledge" is used in affidavits, applications, representations and warranties, third-party opinion letters, and in other legal contexts to indicate that statements are not guaranteed to be true but are correct based on the information of the person making the statement, giving the representation, or rendering the opinion. When the term "knowledge" is used, it is very important to determine whether "knowledge" is limited to what the person is aware of at that moment, or whether it applies to what that person knew at any time, or whether it extends to what the person had the ability to find out, or even if it includes what other people may know.

Different information is included within the term "knowledge" depending on whether it is qualified in some manner and what that qualifier is. A person who makes a statement or representation limited by "knowledge" may, but may not, need to take particular steps, perform certain investigations, and check with others to avoid legal liability. Contrary to what many people think, the term "best knowledge" is not always best from the perspective of the recipient.

Types of Knowledge

Using a qualifier with "knowledge" can substantially change the meaning of the term.

"**Actual knowledge**" typically includes only the information of which the person whose knowledge is at issue is consciously aware. It refers only to what the person knows when the statement is made. It does not include facts or information that the person has forgotten or that is in the person's old files or records. See Donald W. Glazer, Scott Fitzgibbon & Steven O. Weise, *Glazer and Fitzgibbon on Legal Opinions* §§ 4.2.3.2 & 4.2.3.4, at 135–38 & 141 (3d ed. 2008). A related concept is "**personal knowledge,**" which is defined by *Black's Law Dictionary* (10th ed. 2014) as "[k]nowledge gained through firsthand observation or experience, as distinguished from a belief based on what someone else has said."

"**Constructive knowledge**" includes matters that a person is supposed to know or could have found out. A person can have constructive knowledge of something even if that

person does not have, and never had, actual knowledge of it. *Black's Law Dictionary* (10th ed. 2014) defines "constructive knowledge" as "[k]nowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person." *Black's* gives as an example that partners of a partnership have constructive knowledge of the partnership agreement, even if they have not read it. As another example, people are deemed to have constructive knowledge of the existence of and the contents of documents in the public records, such as the land records in the applicable jurisdiction.

"**Imputed knowledge**" means knowledge of one person attributed to another person. Knowledge is imputed from one person to another based on their legal relationship. For example, the knowledge of an agent may be imputed to the principal, the knowledge of an employee or officer may be imputed to the employer or company, and the knowledge of a partner may be imputed to other partners and to the partnership.

"**Best knowledge**" is reflected in a statement such as "the following is true to the best of my knowledge," or when a written statement or representation begins with "to the best of the knowledge, information, and belief of the undersigned."

Many commercial lawyers believe that when a person makes a representation in a transactional document to that person's "best knowledge," the representation is based on more information than had that person used the phrase "the following is true to the knowledge of the undersigned." Those lawyers believe that if the phrase "best knowledge" is used, it implies that the knowledge of the person making the representation is based on research, due diligence, or investigation done shortly before the time that the representation is made. But most reported cases about the meaning of "best knowledge" have reached the opposite conclusion and hold that if a person uses the term "best knowledge" in an affidavit, application, or representation the term embodies a level of uncertainty.

If a rule of court requires a statement to the personal knowledge of someone, a statement to the "best knowledge" of a person is insufficient. A statement made to the "best knowledge" of a person does not mean that the person asserts the truth or accuracy of the statement or that the statement is based on that individual's personal knowledge.

"Best Knowledge" When Used in a Statute—The Muskin Case

The Maryland Court of Appeals, Maryland's highest court, discussed the term "best knowledge" in *Muskin v. State Department of Assessments & Taxation*, 30 A.3d 962, 975 (Md. 2011). *Muskin* involved a challenge to the statute that required all ground rent holders to register their ground rents with the Maryland State Department of Assessments and Taxation by a certain date. The applicable form that each ground rent holder had to file stated that the holders were to provide certain information "to the best of the [ground lease holder's] knowledge." Charles Muskin alleged that the costs of preparing the forms would "easily exceed $25 per ground rent, and may exceed $50 per ground rent" because

he would have to conduct a title search for each ground lease to determine the year the ground lease was created. The Court of Appeals rejected this contention and stated:

Muskin's assertion that he was obliged to conduct a title search in each or most of the trusts' ground rents is unfounded in light of the instruction on the registration form which directs the filer to complete this section merely "[t]o the best of the filer's knowledge . . . ." The phrase "to the best of my knowledge" implies an acceptable margin of error in the declarant's statement.

30 A.3d at 975.

Cases That Discuss "Best Knowledge" When Used in Affidavits

A number of cases have held that the phrase "to the best of my knowledge" when used in affidavits suggests a level of uncertainty. See *Pelayo v. J.J. Lee Mgmt Co., Inc.*, 94 Cal. Rptr. 3d 502, 510 (Ct. App. 2009); *Katelaris v. County of Orange*, 112 Cal. Rptr. 2d 556 (Ct. App. 2001).

The Supreme Court of Alabama stated in *Board of Water and Sewer Commissioners v. Spriggs*, 146 So. 2d 872, 873 (Ala. 1962), that when an affiant uses the phrase "true to the best of his knowledge, information and belief," the statement "means nothing 'more than the affiant *believes* the allegations of the bill to be true, though he has neither knowledge nor information of their truth,' and 'an affidavit of belief in their truth simply amounts to nothing.'"

Other courts have found the phrase "best of knowledge" to be "equivocating" or "equivocal." See *Swanson v. Kraft, Inc.*, 775 P.2d 629, 638 (Idaho 1989) (Bistline, J., concurring); *Portee v. State*, 627 S.E.2d 63, 66 (Ga. Ct. App. 2006).

"Best Knowledge" When Used in Connection with Rules of Courts

Cases have held that using the phrase "to the best of one's knowledge" or "to the best of one's knowledge, information, and belief" in affidavits does not rise to the level of personal knowledge, as required by rules of court that require statements to the personal knowledge of the affiant. See, e.g., *Morales v. ICI Paints (Puerto Rico), Inc.*, 383 F. Supp. 2d 304, 314 (D.P.R. 2005), which held that the phrase "to the best of his knowledge" is not sufficient to represent personal knowledge as required by Fed. R. Civ. Proc. 56(e).

In *County Commissioners v. J. Roland Dashiell & Sons, Inc.*, 747 A.2d 600, 610 (Md. 2000), which was decided under Maryland Rule 2-501(c), the Maryland Court of Appeals reviewed Maryland case law that found the language "to the best of his or her knowledge, information, and belief" in an affidavit insufficient to meet the requirement of "personal knowledge." The court wrote:

When an affidavit is required, it must contain language that it is made on "personal knowledge," in order for it to be sufficient to sustain a motion for summary judgment, or a reply to a motion for summary judgment, and that wording such as "to the best of my knowledge, information and belief" is generally insufficient to satisfy this requirement.

Id. at 610.

In *Gayne v. Dual-Air, Inc.*, 600 S.W.2d 373, 375 (Tex. Civ. App. 1980), a Texas appellate court found appellant's counter-affidavit based on the "best of his knowledge" to be equivocal and inadequate. The court stated:

The words "within my knowledge," as used in Rule 185, imply that the affiant has sufficient knowledge of the facts to verify his statement as to the truth and justness of the account. On the other hand, the words "to the best of my knowledge" do not necessarily connote a knowledge of the facts by the affiant sufficient to support the verity of such a statement. As appellant's counter-affidavit is based upon the "best of his knowledge" only, it is equivocal and inadequate.

Id. at 375.

The Supreme Court of Vermont made this same point in *Vermont Department of Social Welfare v. Berlin Development Associates*, 411 A.2d 1353, 1355 (Vt. 1980), when it stated: "[T]he phrase 'to the best of' means 'as far as I know, but I may not have all necessary information.' This is not personal knowledge." Thus, this case held that an affidavit made using the phrase "to the best of my knowledge, information, and belief" does not meet the "personal knowledge" requirement of the Vermont Rules of Civil Procedure.

"Best Knowledge" When Used in Warranties

Use of the phrase "to the best of my knowledge" in a warranty has not typically imposed a duty of investigation on the person making the statement. In the contract at issue in *Hoffer v. Callister*, 47 P.3d 1261, 1265 (Idaho 2002), the seller warranted "[t]o the best of her knowledge" that the property, which was a mobile home park, did not violate any local law or ordinance. In fact, there were zoning violations. The Supreme Court of Idaho agreed with the district court, which held, "[the contract] states that the warranties are made to the best of seller's knowledge. It does not say the seller has searched the public record, or that no actual violation exists, or that the buyer may rely on this warranty to stop researching on his own." Id.

In a stock purchase agreement at issue in *Rocky Mountain Helicopters, Inc. v. Air Freight, Inc.*, 773 P.2d 911 (Wyo. 1989), the sellers made representations and warranties to the best of their knowledge. The sellers were found not liable for fraud for any inaccuracy in representations and warranties because there was no evidence they had knowledge of such inaccuracy or that they did not believe that information in financial

statements and lists of accounts receivable furnished to them by a certified public accountant were true and accurate.

"Best Knowledge" When Used in Insurance Applications

Similarly, for insurance contracts or in applications for insurance policies, using the phrase "to the best of my knowledge" rarely imposes a duty of investigation.

Under Fla. Stat. § 627.409, an insurer can void a policy for misstatements or omissions on an application without regard to whether they are intentional or accidental. In *Ocean's 11 Bar & Grill, Inc. v. Indemnity Insurance Corp. of DC*, 522 F. App'x 696, 698 (11th Cir. 2013), the Eleventh Circuit agreed with the district court that under Florida law an insurer who includes the modifier "to the best of his knowledge and belief" in an insurance application has agreed to a lesser knowledge standard than the one in Fla. Stat. § 627.409.

The Supreme Court of Florida held in *Green v. Life & Health of America*, 704 So. 2d 1386, 1392 (Fla. 1998), that questions qualified by a "best of the insured's 'knowledge and belief'" provision could not be the basis to void an insurance policy so long as there were no knowing misstatements on the insurance application. The court described "best of knowledge and belief" as a "lesser knowledge standard" than contained in Fla. Stat. § 627.409. Id. at 1391.

In *Sterling Insurance Co. v. Dansey*, 81 S.E.2d 446 (Va. 1954), the insured sued an insurance company for denial of disability benefits. The Supreme Court of Appeals of Virginia determined that the "best knowledge" language on the application excused any prevailing duty (statutory or otherwise) to investigate the accuracy of the warranty and that an incorrect statement, innocently made, will not void the policy.

Cases That Extend "Best Knowledge" in a Warranty or Affidavit

A few cases hold that the phrase "to the best of [my] knowledge" requires investigation by the person making the statement.

In *In re Grausz*, 302 B.R. 820 (D. Md. 2002), aff'd, 63 F. App'x 647 (4th Cir. 2003), the U.S. District Court for the District of Maryland found that a debtor's statement in a settlement agreement with creditors that he would list his assets "to the best of his knowledge" coupled with a statement that he would disclose his assets "to the best of his ability" imposed a duty of inquiry on the debtor. According to the court:

[T]o the extent that every contract contains an element of good faith performance, a party to a contract who undertakes to act "to the best of his knowledge" at a minimum implies that he will make a good faith effort to ascertain the true state of the facts.

302 B.R. at 825.

In *Crofton Ventures Ltd. Partnership v. G & H Partnership*, 116 F. Supp. 2d 633, 645 (D. Md. 2000), aff'd in part, vacated in part, 258 F.3d 292 (4th Cir. 2001), the district court held that there was no breach of contract when the contract contained "to the best of its knowledge" language and plaintiff failed to show "by a preponderance of the evidence that [defendant] knew, or should have known" about hazardous waste. In *American Transtech Inc. v. U.S. Trust Corp*., 933 F. Supp. 1193, 1200 (S.D.N.Y. 1996), the court held that a party could be liable under a "best knowledge" warranty if, at the time of representation, it had actual knowledge or, based on documents to which it had access, should have known. In *Slotkin v. Citizens Casualty Co. of New York*, 614 F.2d 301, 314 (2d Cir. 1979), the Second Circuit found that an attorney who makes a representation "to the best of his knowledge" is responsible for the contents of documents in his possession.

Statutory Definitions of "Knowledge"

Statutes may provide definitions of "knowledge." For example, the Maryland Revised Uniform Partnership Act (Title 9A of the Corporations and Associations Article of the Maryland Code) states that for purposes of that act, "A person knows a fact if the person has actual knowledge of it." It also provides, "A person has notice of a fact if the person: (1) Knows of it; (2) Has received a notification of it; or (3) Has reason to know it exists from all of the facts known to the person at the time in question." Md. Code Ann., Corp. & Ass'ns § 9A-102.

Defining "Knowledge" in Commercial Transactions and Opinions

In commercial transactions, the term "knowledge" is often defined within documents. In September 2012, Practical Law Company analyzed the definition of "knowledge" for the seller or target company in the prior 50 deals that were added to the PLC What's Market private acquisition database. Of those 50 deals, 48 deals defined knowledge. Of the 48 deals:

- 35 deals limited "knowledge" to actual knowledge;
- 12 deals specifically included constructive knowledge;
- 30 deals included some standard for inquiry or investigation; and
- 43 deals limited "knowledge" to the knowledge of certain individuals (including two deals that also specified certain officer titles rather than just naming the individuals).

PLC What's Market Wrap-up for the Week Ending September 14, 2012, Practical Law (Sept. 13, 2012), http://us.practicallaw.com/7-521-3696.

If a word or phrase is defined in an agreement, it is important to use that word or phrase in the text of the document and not a similar term that may have a different meaning. In *Hitachi Credit American Corp. v. Signet Bank*, 166 F.3d 614, 624–25 (4th Cir. 1999), the Fourth Circuit entirely disregarded the "to the best of" qualifier in a contract and looked to the contract definition of "knowledge" because the term "knowledge" was defined in the applicable agreement. Although "best knowledge" was not defined separately in the

agreement, the knowledge definition covered "any reference to 'Assignor's knowledge', *and any similar reference*." The court found that "best knowledge of the Assignor" fell within the "any similar reference" clause. Id. at 625 (emphasis added).

Imputation of Knowledge in Commercial Transactions and Opinions

The knowledge of various people in an organization may be imputed to the person making a representation or rendering an opinion, unless a provision in the applicable document specifically limits how, or if, knowledge may be imputed. For example, *Cromeans v. Morgan Keegan & Co*., 69 F. Supp. 3d 934 (W.D. Mo. 2014), involved whether the law firm Armstrong Teasdale LLP might be liable for information in an official statement that was false. Armstrong Teasdale hired Edward Li, a nonlawyer based in China, to aid in the firm's fulfillment of a contract with the Missouri Department of Economic Development, which was interested in attracting Chinese businesses to Missouri. Li knew of information that was contrary to that published in the official statement, but the lawyers at Armstrong Teasdale did not. The district court held that Li's knowledge was attributable to the firm because under Missouri law the knowledge of an agent obtained in the course of employment is attributed to the company.

But, in a case in which the sole shareholder of a corporation warranted "[t]hat to the best of Seller's knowledge, the Corporation has complied with all applicable laws, rules, and regulations of the city, county, state, and federal governments," the Supreme Court of Minnesota held that the warranty was not breached even though the corporation was in violation of Civil Aeronautics Board regulations regarding escrow accounts and the office manager of the corporation knew of this. *Specialized Tours, Inc. v. Hagen*, 392 N.W.2d 520, 530 (Minn. 1986). The court reached this conclusion because the "best knowledge" warranty only extended to the shareholder's personal knowledge, and although the knowledge of the agent may be imputed to the corporation, it may not be imputed to the individual shareholder.

To limit the imputation of knowledge in connection with a representation or warranty of an entity, a definition of "knowledge" that specifically mentions the person or persons in an organization whose knowledge is included may be used, such as the following:

When used in this Agreement, the terms "the knowledge of Seller" or "the best knowledge of Seller" shall refer only to the actual present knowledge of _____, the manager of Seller, without investigation by the manager.

"Knowledge" When Used in Third-Party Opinion Letters

Certain of the opinions contained in third-party opinion letters that are factually based are frequently expressed as being to the knowledge of the opinion giver. These opinions may include references to the absence of breach or default of agreements, existence or violation of court orders, and pending or threatened litigation. (If an "opinion" is actually a statement of fact, it may be more appropriately denominated a confirmation.) If an opinion letter contains a limitation that an opinion is to the knowledge of the opinion

giver, the questions posed are what diligence, if any, was performed by the opinion giver to render the opinion and whose knowledge is included. These questions are often answered by including a definition of "knowledge" in an opinion letter that addresses them.

An argument can be made that under customary practice in connection with the giving and receiving of third-party opinion letters, the term "knowledge" has an accepted meaning, and it is unnecessary to define it in such letters. See Robert A. Thompson, *Real Estate Opinion Letter Practice* § 3.6, at 84–86 (3d ed. 2014). For example, the *Real Estate Opinion Letter Guidelines* by the American College of Real Estate Lawyers Attorneys' Opinions Committee and the ABA Section of Real Property, Probate and Trust Law Committee on Legal Opinions in Real Estate Transactions, 38 Real Prop. Prob. & Tr. J. 241, § 3.4.a, at 250 (2003), provides:

The term "actual knowledge" (or words to that effect) means that the opinion in question is being limited to the conscious awareness of the identified persons, with no other investigation or inquiry having been made . . . , and such limitations will be given effect.

As a matter of customary practice in the rendering and receiving of third-party opinion letters, a lawyer is deemed to know only the facts of which the lawyer is consciously aware, as opposed to information that the lawyer has forgotten or did not connect to the opinion letter. Glazer & Fitzgibbon, supra, § 4.2.3.2, at 135.

Despite this, it is helpful to define the term "to our knowledge" in opinion letters. Within a definition, the opinion giver can provide that "our" knowledge is limited to the knowledge of only the lawyers who worked on the opinion letter or on the underlying transaction and perhaps those lawyers who have a particular relationship with the borrower or guarantor. By doing this, the opinion giver clarifies that it does not have to check with all of the lawyers in the law firm before issuing an opinion letter to determine if any of them have knowledge about the issues, as is required for responses by law firms to accountants preparing audit letters for clients. Also, the definition of "knowledge" can clarify that it is limited to actual knowledge or the conscious awareness of the subject lawyers and does not include constructive knowledge or even knowledge of information in the files of the opinion giver.

An example of a definition of "knowledge" that can be included in an opinion letter is set forth in *Real Estate Finance Opinion Report of 2012*, 47 Real Prop., Tr. & Est. J. 213, ch. 2, § 4.7(c), at 257–58 (2012), as follows:

As used in this Opinion Letter, "Actual Knowledge" means, without investigation, analysis, or review of court or other public records or our files, or inquiry of persons, with respect to the undersigned law firm (the "Opinion Giver"), the conscious awareness of facts or other information by the Primary Lawyer or Primary Lawyer Group. "Primary Lawyer" means [the lawyer in the Opinion Giver's organization who signs the Opinion Letter;] any lawyer in the Opinion Giver's organization who has active involvement in negotiating the Transaction, preparing the Transaction Documents, or preparing the

Opinion Letter; and, solely as to information relevant to a particular opinion issue or confirmation regarding a particular factual matter (*e.g.*, pending or threatened legal proceedings), any lawyer in the Opinion Giver's organization who is primarily responsible for providing the response concerning that particular opinion issue or confirmation. "Primary Lawyer Group" means all of the Primary Lawyers when there is more than one.

Conclusion

The meaning of "knowledge" when used in affidavits, in representations and warranties, in insurance applications, or in third-party opinion letters may vary greatly based on whether there is a qualifier to it and what that qualifier is. Moreover, the meaning of "knowledge" as qualified, and particularly the meaning of the term "best knowledge," may differ from what many people think. It is, therefore, prudent to define the term "knowledge" in documents in which it is used to specify whether "knowledge" is limited to personal awareness, what due diligence (if any) has been undertaken, and whose knowledge is included.