SUPPLEMENT

TO

REPORT OF THE LEGAL OPINION COMMITTEE OF THE BUSINESS LAW SECTION OF THE NORTH CAROLINA BAR ASSOCIATION

THIRD-PARTY LEGAL OPINIONS IN BUSINESS TRANSACTIONS, SECOND EDITION

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INTRODUCTION

This Supplement to the Report on Third-Party Legal Opinions in Business Transactions, Second Edition (this "Supplement") was prepared by the Legal Opinion Committee (the "Committee") of the Business Law Section of the North Carolina Bar Association.

The Business Law Section formed the Committee in late 1994, and in January 1999 the Committee issued its initial Report on Third-Party Legal Opinions in Business Transactions (the "1999 Report"). In 2002, the Business Law Section reconstituted the Committee to reexamine the 1999 Report and update it as necessary. The Committee determined that the most useful form of an update was a new edition of the 1999 Report, and in March 2004 the Committee issued the Report on Third-Party Legal Opinions in Business Transactions, Second Edition (the "2004 Report").[1]

In the Fall of 2007, the Business Law Section again reconstituted the Committee and requested that it reexamine the 2004 Report and update it as appropriate to serve the practicing bar in North Carolina. As with its prior compositions, the Committee included North Carolina lawyers with considerable experience in business transactions and in rendering and receiving legal opinions. It included lawyers who were involved in both the 1999 Report and the 2004 Report.

After examining the 2004 Report, the Committee determined that the most useful form of an update was a supplement to the 2004 Report rather than a new, third edition. The Committee submitted this Supplement to the Business Law Section Council, and the Council approved and endorsed it in February 2009. As was the case with the 2004 Report, this Supplement does not necessarily reflect the views of any law firm, institution or individual practitioner, including individual members of the Committee.

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[1] All capitalized terms and abbreviations used in this Supplement without definition shall have the meanings ascribed thereto in the Glossary of Terms set forth in § 1.0 of the 2004 Report.

Specifically, the Committee identified three sections of the 2004 Report in need of updating. Those three sections and the reasons for the revisions are as follows:

Section 2.2: Addressee. Given the frequency of requests by opinion recipients that successors and assigns be permitted to rely on legal opinions in syndicated loan transactions (as well as other transactions in which an assignment may be contemplated), the Committee decided to amend Section 2.2 to address the issue of when and under what circumstances such expanded reliance is warranted. The standard formulation in the Illustrative Form of Opinion remains narrow. The revised Section 2.2 discusses the reasons for the narrow formulation and the circumstances that could justify broadening the scope of permitted reliance on the opinion. The revised Section 2.2 also suggests language when the opinion giver has agreed to permit such expanded reliance.

Section 6.0.g: Delaware Companies. Since the 2004 Report, there has been significant discussion among lawyers, as well as commentary, as to the meaning of a statement in an opinion letter being delivered with respect to a Delaware corporation or limited liability company that the opinion is limited to matters governed by either the Delaware General Corporation Law or the Delaware Limited Liability Company Act. Also, the number of limited liability companies has continued to increase, including Delaware limited liability companies. Therefore, the Committee concluded that an update on opinions on matters of Delaware corporation and limited liability company law would be helpful.

Section 14: Statement of No Litigation. The opinion in the Massachusetts case of *Dean Foods v. Pappathanasi*, No. Civ. A. 01-2595 BLS, 2004 WL 3019442 (Mass. Super. Dec. 3, 2004), which held a law firm liable for more than $9 million in damages and costs in connection with a no-litigation confirmation in a third-party legal opinion, generated concerns among attorneys with an active third-party legal opinion practice beyond the state of Massachusetts.[2] Perhaps the most far-reaching effect of the Dean Foods case is increasing reluctance by firms to provide broad no-litigation confirmations. In North Carolina, this evolution of opinion practice has led to a movement away from the 2004 Report toward the narrower formulation set forth in revised Section 14 as reflected in this Supplement.[3]

Despite the widespread attention that the Dean Foods case has received, the court's holding did not break any new ground. Rather, the court confirmed the applicable standard of care for providing no-litigation opinions as previously articulated by the *TriBar Report* and followed by various state bar association reports regarding third-party legal opinions. Nevertheless, in response to the Dean Foods decision, the Boston Bar Association's Legal Opinion Committee took the approach, in its Streamlined Form of Closing Opinion, of specifically limiting the no-litigation confirmation to litigation affecting the transaction at issue or to litigation with respect to which the law firm giving the legal opinion represents the client addressed by the legal

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[2] *See*, Donald W. Glazer and Arthur N. Field, "No-Litigation Opinions Can Be Risky Business-Looking at the Facts and Beyond," *Bus. L. Today*, July/August 2005.

[3] *See* A. Mark Adcock and David L. Batty, "Recent Developments in Opinion Letter Practice," *Notes Bearing Interest*, Vol. 28, No. 2 (December 2006) for a more detailed discussion.

opinion.[4] The Committee supports this approach as the trend away from broad no litigation confirmations eliminates many of the difficulties associated with providing a broad no litigation confirmation.[5]

Part III: Illustrative Form of Opinion.

In addition, because of the updated sections in this Supplement, the Committee determined that the Form of the Illustrative Form of Opinion included in Part III of the 2004 Report should be updated.

* * *

In this Supplement, each of these Sections has been restated in its entirety and each such restated Section replaces and supersedes the corresponding Section from the 2004 Report. In addition, the Illustrative Form of Opinion contained in this Supplement replaces and supersedes the Illustrative Form of Opinion contained in Part III of the 2004 Report. Corresponding changes are also applicable to the Illustrative Form of UCC Opinion.[6]

Special note should be made that the restated Illustrative Form of Opinion eliminates, in the suggested opinions, any references to the "knowledge" of the opinion giver. This change was made because a "knowledge" qualification is unavoidably an imprecise limitation on an opinion and could be subject to a dispute. Although a knowledge qualification may be warranted in the context of a specific transaction, the Committee concluded that the general use of a knowledge qualification in the Illustrative Form of Opinion was not warranted. Moreover, as the scope of the specific opinions which previously included a knowledge qualification has been narrowed in the updated Illustrative Form of Opinion, a knowledge qualification was no longer necessary.

In connection with its work, the Committee considered the *Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions*. 63 BUS. LAW. 1277 (2008) (the "Statement of Customary Practice" or the "Statement"). The Committee recommended the Statement of Customary Practice to the Business Law Section of the North Carolina Bar Association and the Section has approved it. The Statement of Customary Practice is attached to this Supplement as an appendix and is reprinted with the permission of the American Bar Association.

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[4] *See* 61 BUS. LAW. 393, at 396 (2005).

[5] *See* TriBar Report § 6.8 (noting that although a no-litigation opinion that "relates to litigation affecting the transaction . . . does not ordinarily raise difficult questions," a no-litigation opinion "that covers litigation generally affecting the Company can be quite challenging.")

[6] It should also be noted that since the publication of the 2004 Report, the second edition of Glazer and Fitzgibbon on Legal Opinions (2d. ed. 2001 & Supp. 2003), referred to as "GLAZER" in the 2004 Report, has been updated by a third edition, Glazer and Fitzgibbon on Legal Opinions (3d. ed. 2008) and all references in this Supplement to GLAZER are to the third edition.

SECTION 2.2. THE ADDRESSEE OF THE OPINION

§ 2.2 **Addressee**. In general, a lawyer owes a duty of care not only to the addressee of an opinion letter but to other nonclients whom "the lawyer or (with the lawyer's acquiescence) the lawyer's client invites...to rely" on the opinion so long as the nonclient does in fact rely and "is not, under applicable tort law, too remote from the lawyer to be entitled to protection."[7] Consequently, it is important from the standpoint of the opinion giver that the addressees be specifically named – if not individually, at least by a description of a group whose members can be ascertained (such as "the Underwriters named in Schedule 1 to the Underwriting Agreement").

To make it clear who may rely on an opinion letter, and for what purposes, the opinion giver often expressly prohibits reliance by anyone other than the addressee for any purpose, and prohibits reliance by the addressee for any purpose other than the transaction with respect to which the opinion is rendered.[8] Given the extensive body of case law concerning who may rely upon opinions and reports of professionals in other fields, especially accountants, the Committee recommends, that opinion letters include an express statement limiting reliance and use of the opinion letter, such as the following:

> **This opinion letter is delivered solely for your benefit in connection with the Transaction and may not be used or relied upon by any other person or for any other purpose without our prior written consent in each instance.**

The principal exception to this limitation[9] on reliance has been in syndicated loan transactions (as well as other transactions in which assignment is contemplated, such as securitizations) where the opinion recipient often requests that successors and assigns (*i.e.*, future members of the syndicate) be permitted to rely on the opinion letter as well, to the same extent as the addressee. Although historically many opinion givers have been willing to allow successors and assigns of the addressee to rely on an opinion letter rendered in connection with a syndicated loan transaction, over the last several years some firms have resisted requests to allow such reliance. The principal reasons for such resistance include:

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[7] GLAZER § 2.3.2, quoting RESTATEMENT OF LAW GOVERNING LAWYERS § 51.

[8] Id.

[9] Other common situations in which the opinion giver may expressly permit persons other than the addressee to rely on the opinion are when (i) counsel for the opinion recipient needs to rely on the opinion in connection with such counsel's own opinion that is being rendered as part of the same transaction, and (ii) a lender providing acquisition financing to a company that is acquiring another company requests that the lender be permitted to rely, for the purposes of the loan transaction, on the opinion delivered by seller's counsel to the buyer in connection with the acquisition. In those instances, the statement limiting reliance will typically be modified to add the phrase "except that _____ [name of law firm] may rely on this opinion letter in connection with its opinion letter of even date being delivered to _____ in connection with the Transaction" or "except that the Lender may rely on this opinion letter in connection with the transactions contemplated by the Agreement ".

- A perception that problem loans are likely to be assigned to so-called "vulture funds" that are more likely than traditional lenders to view the opinion giver as a deep pocket and to make a claim on the opinion giver in an attempt to recover a portion of the defaulted loan amount.

- The possibility of multiple claims being made by syndicate members, requiring the opinion giver to negotiate with a number of different claimants and making it difficult to resolve claims expeditiously or with finality, since settling with one claimant would not prevent another syndicate member from bringing a later claim.

- A concern that successors and assigns may not appreciate the limitations on the opinion letter (to which the addressee is also subject), that the opinion may be deemed to be re-issued as of the date the new syndicate member acquires its interest in the loan, or that portions of the opinion could differ depending on the status of the new syndicate member (such as whether there is an applicable exemption from usury laws).[10]

- The possibility of claims in unexpected and distant jurisdictions and uncertainty as to the governing law.

Syndicated lenders have nonetheless generally insisted that the opinion letter permit successors and assigns to rely on the opinion, arguing that failure to authorize such reliance hinders the loan syndication, and that future syndicate members must be allowed to rely on the opinion to the same extent as the original lenders. The Loan Syndications and Trading Association, a not-for-profit organization that promotes the development of an efficient trading market for corporate loans and other similar private debt, requires administrative agents in syndicated loan transactions to "request, on behalf of the lenders, that the borrower's counsel's legal opinion permit reliance by assignees."[11]

Section 1.7 of the ABA Guidelines addresses, in part, the concerns of opinion givers with respect to reliance by successors and assigns. Section 1.7 provides as follows:

> 1.7 Reliance
>
> An opinion giver is entitled to assume, without so stating, that in relying on a closing opinion the opinion recipient (alone or with its counsel) is familiar with customary practice concerning the preparation and interpretation of closing opinions. On occasion, a closing opinion expressly authorizes persons to whom it is not addressed (for example, assignees of notes) to rely on it. Those persons are

[10] "Special Joint Committee of the Maryland State Bar Association and the Bar Association of Baltimore City," 45 BUS. LAW. 720 (1990).

[11] *LSTA Primary Market and Agent Transfer Practices* (May 2005), Retrieved February 9, 2009, from http://www.lsta.org/.

permitted to rely on the closing opinion to the same extent as – but to no greater extent than – the addressee.

Opinion givers who permit their opinions to be relied upon by third parties, consistent with customary practice as articulated in Section 1.7 of the ABA Guidelines, often do so by including language to the following effect:

> **This opinion letter is delivered solely for your benefit, and that of your successors and permitted assigns, in connection with the Transaction and may not be used or relied upon by any other person or for any other purpose without our prior written consent in each instance.**

On the other hand, some opinion givers prefer to state with more specificity the limitations on reliance implicit under such customary practice. A formulation that has gained wide-spread acceptance[12] reads as follows:

> **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 any person 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.**

Occasionally an opinion recipient in a loan transaction will request that purchasers of loan participation interests also be permitted to rely on the opinion letter. The purchaser of a loan participation interest is not in privity of contract with the borrower, and has no rights except those that are derivative of, and that must be asserted by, the holder of the loan. Moreover, sellers of loan participation interests generally make no warranties about the loan documents evidencing or securing the loans or any other aspect of the loan transaction, and the loan participation purchasers acknowledge in the underlying participation agreement that they are relying solely upon their own due diligence and investigation in closing the purchase and sale of the loan participation interest. Given these limitations on the holders of loan participation interests, and the potential risks to opinion givers of allowing such reliance (which risks are exacerbated by the potential number of loan participants), the Committee believes that it is generally inappropriate for an opinion recipient to request that loan participants be permitted to rely on the opinion letter.

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[12] *See* GLAZER § 2.3.1, n.3.

SECTION 6.0.g: THE STATUS OPINION FOR A DELAWARE COMPANY

g. Delaware Companies. It has become commonplace for lawyers not admitted to practice in Delaware to be asked to opine on routine matters of Delaware corporation and limited liability company law, such as the status of a Delaware corporation or limited liability company. The Committee approves of this practice, so long as the opinion giver has sufficient knowledge of Delaware corporation law and limited liability company law, as applicable. The opinion giver has the responsibility to determine whether he or she is competent to render a particular Delaware law opinion, on a case-by-case basis.[13] The due diligence involved in giving a Delaware company status opinion and other matters of Delaware law are beyond the scope of this report.[14]

Opinion letters by non-Delaware lawyers on Delaware corporations or Delaware LLCs often state that the opinion is limited to matters governed by the Delaware General Corporation Law or the Delaware Limited Liability Company Act, as the case may be, or contain a similar statement as to covered law. This raises the question whether the opinion being rendered covers any matters beyond the text of these statutes. The Committee believes that an opinion letter limitation that refers to the Delaware General Corporation Law or the Delaware Limited Liability Company Act should be interpreted to cover not only the text of the statutes but also reported judicial decisions construing these statutes, unless the opinion letter states that it does not cover such matters. This view is widely held.[15]

In the case of an opinion on a Delaware LLC, another question is raised: whether the opinion being rendered covers Delaware contract law issues. The terms of a Delaware limited liability company agreement (also known as an operating agreement) may have a significant bearing on the opinion being rendered – such as whether the LLC has the requisite power to enter into a transaction, whether a transaction has been duly authorized, or whether a transaction agreement has been duly executed. The Committee believes that an opinion letter limitation that refers to the Delaware Limited Liability Company Act should also be interpreted to cover Delaware contract law issues that may apply to the matters addressed by the opinion being rendered,[16] such as "power," "authority" and "due execution" opinions, unless the opinion letter indicates that it does not cover contract law.[17] The Committee observes that such contract law issues and

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[13] *See* TriBar Report §4.1 n.85; Third-Party Closing Opinions: Limited Liability Companies, 61 BUS. LAW. 679 (2006) (the "TriBar LLC Report") §1.0, at 681; GLAZER §2.7.3.

[14] The Committee notes that non-Delaware lawyers who advise Delaware companies may be subject to being sued in Delaware courts. *See Sample v. Morgan*, 935 A. 2d 1046 (Del. Ch. 2007).

[15] *See, e.g.*, Special Report of the TriBar Committee: The Remedies Opinion – Deciding When to Include Exceptions and Assumptions, 59 BUS. LAW. 1483 (2004), at 1487 n.25; TriBar LLC Report §1.0, at 681.

[16] *See* TriBar LLC Report, §1.0 n.19 and accompanying text.

[17] If contract law is excluded, the Committee notes that the opinion recipient will need to evaluate the consequences of such a limitation on the usefulness of the opinion in light of "the central role the operating agreement, a contract, plays in establishing the rights and obligations of participants in an LLC and in setting the rules by which it is governed." GLAZER §19.6.

interpretation may be relatively straight-forward in some cases and more complex in others, depending on the applicable provisions of the operating agreement.[18]

If the opinion giver wishes to limit the coverage of the opinion to the text of the relevant Delaware statute and exclude judicial decisions and other areas of Delaware law, the Committee recommends that the opinion letter contain language substantially similar to the following:

> **The opinion set forth in paragraph __ is limited to matters governed by the Delaware General Corporation Law [Delaware Limited Liability Company Act], and we do not express any opinion as to any judicial decisions construing the Delaware General Corporation Law [Delaware Limited Liability Company Act] or on any others matters of Delaware law other than the text of the Delaware General Corporation Law [Delaware Limited Liability Company Act].**

In the case of an opinion on a Delaware LLC, the Committee believes that the foregoing language is sufficient also to exclude Delaware contract law matters.

[18] The Committee notes that opinions as to "power," "authority" and "due execution" for a Delaware LLC do not address the enforceability of the operating agreement of the company, and that an enforceability opinion generally is significantly more difficult to render.

SECTION 14. STATEMENT OF NO LITIGATION

§ 14.0 Standard Formulation. The following is a standard formulation of the statement of no litigation:

* * *

In addition, we advise you that, we do not represent the Company in any action, suit or proceeding now pending at law or in equity, or by or before any governmental instrumentality or agency or arbitral body, or overtly threatened in writing against the Company by a potential claimant, that challenges the validity or enforceability of, or seeks to enjoin the performance of, the Transaction Documents [except . . .].

* * *

COMMENTARY

a. *Nature of Statement*. The statement of no litigation is a statement of fact. The language used is intended to reflect that the statement is a confirmation of fact and not a legal opinion which requires legal analyses and conclusions. For that reason, the statement is set forth in a separate, unnumbered paragraph and may be offset from the rest of the opinion by asterisks.

b. *Purpose and Scope of Statement*. Typically, an opinion recipient requests the statement of no litigation primarily as additional assurance of the nonexistence of pending or threatened litigation. Such a statement is requested of the opinion giver because of the belief that the opinion giver would be involved in the representation of the Company in connection with any legal proceedings to which the Company is a party. Of course, this premise is questionable in cases where the opinion giver is not the primary outside counsel which regularly handles legal matters (including matters other than the transaction contemplated by the Transaction Documents) for the Company. In instances where the opinion giver is merely acting as local counsel or is otherwise only engaged with respect to a limited aspect of the transaction, a no litigation confirmation is not appropriate.

The scope of the standard formulation of the statement of no litigation is limited in two ways. First, the statement of no litigation applies only to litigation matters where the law firm rendering the closing opinion represents the Company. Second, only litigation affecting the transaction or the validity of the Transaction Documents is covered by the standard formulation of the statement of no litigation. A broader form of the statement of no litigation, *i.e.*, a statement as to the absence of any pending or threatened litigation generally against the Company, is sometimes requested. This request is significantly more expansive than the standard formulation in two ways. First, it covers any litigation involving the Company where the law firm rendering the closing opinion is not representing the Company. Second, it covers all litigation involving the Company – not just litigation affecting the transaction or the validity of the Transaction Documents. As

discussed below, this broader form of the statement of no litigation may require more extensive due diligence, and may involve greater risk for the law firm rendering the closing opinion, than the narrower, standard formulation. Because the statement of no litigation is entirely a factual confirmation and does not involve any legal analysis or professional judgment, it does not add anything to the Company's representations and warranties in the Transaction Documents other than additional assurance from the Company's counsel. Accordingly, a law firm rendering a closing opinion and its client should weigh the costs and benefits of including the statement of no litigation in the closing opinion. In the event that the law firm rendering the closing opinion and its client conclude that the broader form of the statement of no litigation is warranted, the following formulation of the statement of no litigation may be used:

* * *

> **In addition, we advise you that, to our knowledge without any independent investigation (including without limitation any search of court records, the files of this firm or the files of the Company), there is no action, suit or proceeding now pending at law or in equity, or by or before any governmental instrumentality or agency or arbitral body, or overtly threatened in writing against the Company by a potential claimant [, except as [listed on the disclosure schedule to the Agreement][listed on an officer's certificate rendered to us in connection with this opinion][follows: _____]].**

* * *

The broader scope of this formulation of the statement of no litigation justifies the inclusion of a knowledge qualification. Although the TriBar Report states that "[t]he presence or absence of the phrase 'to our knowledge' does not change the meaning of the [no litigation confirmation]" (*see* TriBar Report § 6.8), the Committee believes that the "to our knowledge" qualification emphasizes that the statement is fact-based and establishes the scope of the inquiry necessary to meet the due diligence obligations of the opinion giver. *See* § 5 of this Report ("Knowledge Qualification").[19] As discussed there, the guiding principle underlying the statement and its knowledge qualification is that the benefits associated with the statement should outweigh the costs associated with the scope of the required due diligence.

c. *No Action, Suit or Proceeding at Law or in Equity*. The phrase "no action, suit or proceeding at law or in equity" encompasses all legal proceedings regardless of whether the requested relief is of an equitable or legal nature. The language of the statement is

[19] Note that "[a]s a matter of customary diligence the [no litigation confirmation] does not require that the opinion giver check court or other public records or review the firm's files (and an express disclaimer to that effect is not necessary)." The purpose of the statement is to elicit factual information already known by counsel, not factual information that might be uncovered by outside research. *See* TriBar Report § 6.8. Nevertheless, an express statement of the scope of due diligence review is not inappropriate.