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

Co-Chair
Christopher B. Capel
Raleigh, North Carolina

Co-Chair
Kenneth M. Greene
Greensboro, North Carolina

Co-Chair
Richard K. Schell
Charlotte, North Carolina

Committee Members

A. Mark Adcock
Charlotte, North Carolina

Diana S. Allen
Durham, North Carolina

David L. Batty
Charlotte, North Carolina

Mark T. Cain
Greensboro, North Carolina

James L. S. Cobb
Raleigh, North Carolina

William B. Gwyn, Jr.
Raleigh, North Carolina

Sean M. Jones
Charlotte, North Carolina

Christopher E. Leon
Winston-Salem, North Carolina

John R. Miller
Charlotte, North Carolina

Alfred L. Purrington, III
Greensboro, North Carolina

Manley W. Roberts
Charlotte, North Carolina

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

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.

---

[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

---

[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.

---

[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:

---

[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.

---

[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

---

[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.

limited to legal proceedings before bodies that can render injunctive relief or binding results on the parties to such legal proceedings. Therefore, a dispute that is the subject of non-binding arbitration or mediation would not be required to be disclosed.

d. *Now Pending or Overtly Threatened Litigation*. The use of the phrase "overtly threatened" may be misinterpreted to include both oral and written threats. Although the Committee believes that the phrase "overtly threatened" does not include oral threats, use of the phrase "overtly threatened in writing" is advisable to avoid any confusion on this point. This phrase does not include unasserted claims, even if in writing, that might arise from an existing state of facts that are better left to the audit process.[20]

e. *Disclosure Schedule*. The broader formulation of the statement of no litigation set forth in paragraph (b) above references a disclosure schedule or officer's certificate to identify the relevant litigation matters. By referencing all such legal proceedings in this manner, the law firm rendering the closing opinion avoids the need to determine the materiality of any particular legal proceeding. The disadvantage of the disclosure schedule or officer's certificate is that it may become so extensive as to make the statement cumbersome. If this occurs, then the opinion recipient and the opinion giver may reduce the list of legal proceedings to material legal proceedings, provided they can establish objective criteria for legal proceedings that are required to be disclosed. *See* § 11.2.a of this Report ("No Breach or Default Under Other Agreements-Agreements Covered"). Of course, equitable proceedings do not present readily identifiable, objective benchmarks. Therefore, if the approach of full disclosure becomes too cumbersome, there may be compelling reasons not to include the statement of no litigation in the opinion letter.

DUE DILIGENCE

The opinion giver generally should:

- Request certificates of officers or managers of the Company listing actions, suits or proceedings pending or overtly threatened against the Company;[21]

[20] The statement of no litigation in an opinion letter should not be confused with a response to auditor's request that a law firm may render to a certified public accounting firm in connection with that accounting firm's audit of the financial statements of a company. *See generally*, ABA Statement of Policy Regarding Lawyers Responses to Auditor's Requests for Information, 31 BUS. LAW. 1709 (1976). The statement of no litigation is not intended to serve the same purpose as a response to an auditor's request. Accordingly, the due diligence that will be undertaken in providing the statement of no litigation may be less extensive than the procedures that a law firm may follow in responding to auditor's requests.

[21] Except with respect to the officer's certificate, the opinion giver should not be required to inquire with the Company about pending or overtly threatened legal proceedings. The opinion giver is not an auditor. Absent the requirement of an audit, the opinion giver should not be required to speculate as to whom in an organization has personal knowledge about legal proceedings to which the Company is a party. Therefore, the opinion giver should be entitled to rely on the information provided to the opinion recipient in the Agreement (normally the Company's representations and warranties) absent information known to the opinion giver that would prevent the opinion giver from justifiably relying upon such information. The opinion recipient and the opinion giver may agree, however, that inquiry should be conducted of Company officers. In that case, an express statement of such reliance should be included in the opinion letter.

- Examine representations and warranties of the Company in the Agreement; and

- Make an inquiry of the lawyers in its firm who constitute the "Primary Lawyer Group." *See* § 5 ("Knowledge Qualification") of this Report. If the opinion giver does not incorporate the concept of "Primary Lawyer Group" into the opinion, then the opinion giver's inquiry should include those people in its firm whom the opinion giver reasonably believes would have knowledge of any pending or overtly threatened legal proceedings against the Company. However, this inquiry does not involve reviewing the litigation docket of the firm or such other listing of current legal proceedings that the firm keeps on a regular basis, nor is the opinion giver obligated to inquire of all of the attorneys in the firm or to review all of the files of the firm.

It should be noted that the diligence underlying a statement of no litigation will be based upon customary practice. The diligence required will depend in part upon the scope of the statement of no litigation that is to be delivered. The opinion giver may also limit the factual inquiry that customary practice would otherwise require by describing in the opinion letter the inquiry the opinion giver has conducted.[22] It is important to remember that even though the statement of no litigation is a statement of fact, it is subject to the general prohibition against rendering opinions that "the opinion giver recognizes will mislead the recipient with regard to the matters addressed by the opinions given."[23] Therefore, the opinion giver should complete the diligence review that is reasonably necessary based on the specific facts and circumstances of the particular transaction.[24]

[22] *See* GLAZER, §17.3; ABA Guidelines Section 3.4.

[23] *See* ABA Guidelines § 1.5.

[24] *Cf. Dean Foods v. Pappathanasi*, No. Civ. A. 01-2595 BLS, 2004 WL3019442 (Mass. Super. Dec. 3, 2004).

III. ILLUSTRATIVE FORM OF OPINION

[Date][25]

[Addressee][26]

Ladies and Gentlemen:

We have acted as counsel[27] to _____ (the "Company") in connection with the transaction (the "Transaction") contemplated by the _____ Agreement dated _____ (the "Agreement") between the Company and _____ (the "[Other Party]").[28] This opinion letter is delivered pursuant to Section _____ of the Agreement.[29] All capitalized terms used herein and not otherwise defined herein shall have the same meanings as are ascribed to them in the Agreement.[30]

In rendering the opinions set forth herein, we have reviewed [*insert as applicable*]:

(i) the Agreement;

(ii) _____; and

(iii) _____.

The Agreement and the other documents described and identified in clauses (i) through (iii) are referred to herein for convenience as the "Transaction Documents".

We have reviewed such documents and considered such matters of law and fact as we, in our professional judgment, have deemed appropriate to render the opinions contained herein.[31] With respect to certain facts, we have considered it appropriate to rely upon certificates or other comparable documents of public officials and officers or other appropriate representatives of the Company, without investigation or analysis of any underlying data contained therein.[32]

---

[25] *See* § 2.1 of 2004 Report.

[26] *See* § 2.2 of 2004 Report as modified by the Supplement.

[27] *See* § 2.4 of 2004 Report.

[28] *See* § 2.3 of 2004 Report.

[29] *See* § 2.3 of 2004 Report.

[30] *See* § 2.5 of 2004 Report.

[31] *See* § 3.0 of 2004 Report.

[32] *See* § 3.1 of 2004 Report.

[In addition, we have relied, without investigation, on the following assumptions:][33]

[insert specific assumptions, if applicable]

[*if any opinion is rendered that includes "to our knowledge" or "known to us", insert explanatory paragraph*][34]

The opinions set forth herein are limited to matters governed by the laws of the State of North Carolina [and the federal laws of the United States], and no opinion is expressed herein as to the laws of any other jurisdiction.[35] [For purposes of our opinions, we have disregarded the choice of law provisions in the Transaction Documents and, instead, have assumed that the Transaction Documents are governed exclusively by the internal, substantive laws and judicial interpretations of the State of North Carolina.[36]] We express no opinion concerning any matter respecting or affected by any laws other than laws that a lawyer in North Carolina exercising customary professional diligence would reasonably recognize as being directly applicable to the Company, the Transaction or both.[37]

---

[33] *See* § 4 of 2004 Report, which sets forth a list of standard assumptions. As noted in that section, the Committee believes that these assumptions are implicit and it is not necessary to state them in the opinion. Should the opinion giver prefer to set forth such assumptions in the opinion letter or in an attachment thereto, § 4 of the Report provides sample language. The opinion giver should also set forth here any specific assumptions not covered by the list of standard assumptions.

[34] *See* § 5.0 of 2004 Report. The opinions set forth in this illustrative form of opinion purposefully omit any reference to "to our knowledge" or "known to us". If, however, the opinion giver does render an opinion that contains references to any of those phrases, the following explanatory paragraph may be included:

> The phrases "to our knowledge" and "known to us" mean the conscious awareness by lawyers in the primary lawyer group of factual matters such lawyers recognize as being relevant to the opinion or confirmation so qualified. Where any opinion or confirmation is qualified by the phrase "to our knowledge" or "known to us," the lawyers in the primary lawyer group are without knowledge, or conscious awareness, that the opinion or confirmation is untrue. "Primary lawyer group" means any lawyer in this firm (i) who signs this opinion letter, (ii) who is actively involved in negotiating or documenting the transaction, or (iii) solely as to information relevant to a particular opinion or factual confirmation issue, who is primarily responsible for providing the response concerning the particular opinion or issue.

[35] *See* § 2.6 of 2004 Report.

[36] *See* § 10.3.a of 2004 Report. This sentence is used only where the Transaction Documents provide that the law of a jurisdiction other than North Carolina will govern the Transaction Documents. Where the opinion covers the enforceability of such choice-of-law provision, the opinion language set forth in § 10.3.b of the Report may be used. If used as an operative opinion, rather than an assumption, such opinion clause may properly be placed along with the other operative opinion clauses in the main body of the letter.

[37] *See* § 2.7 of 2004 Report.

Based upon and subject to the foregoing and the further assumptions, limitations and qualifications hereinafter expressed, it is our opinion that:[38]

1. The Company is a corporation [limited liability company] in existence under the laws of the State of North Carolina.[39]

2. Company Subsidiary is authorized to transact business in the State of North Carolina.[40]

3. The authorized capital stock of the Company consists of _____ common shares, of which _____ shares are outstanding. [Describe other classes if applicable.] The Shares have been duly authorized and validly issued, and are fully paid and nonassessable.[41]

4. The Company has the corporate [limited liability company] power to execute, deliver and perform its obligations under the Transaction Documents [and to operate its business as currently conducted. For purposes of this opinion, we have assumed that the business presently conducted by the Company consists of _____ and

---

[38] *See* § 2.8 of 2004 Report.

[39] *See* § 6.0 of 2004 Report.

[40] *See* § 7.0 of 2004 Report. Since paragraph 1 of this form of opinion reflects that the Company is a North Carolina entity, this foreign authorization clause is written to cover a subsidiary for illustrative purposes. In actual usage, the subsidiary would need to be identified properly.

[41] *See* § 9.0 of 2004 Report. "Shares" should be defined in the opinion to mean the shares to be issued or transferred in the Transaction or to mean all outstanding shares, as the case may be. The sample opinion applies only to Shares of a corporation; it does not apply to limited liability companies. Because of the wide variations afforded to organizers of limited liability companies in planning LLC ownership arrangements, it is not practicable to formulate a standard opinion regarding the authorization and issuance of LLC membership interests. *See* § 9.0 of 2004 Report at footnote 87. The following formulation is a starting point if a capitalization opinion is given for an LLC:

> The authorized membership interests of the Company consist of _____ [insert appropriate description], of which _____ membership interests are outstanding. All of the Company's membership interests have been duly authorized and validly issued.

Currently, there appears to be no consensus as to whether opinions on the authorization and issuance of LLC membership interests should be requested or rendered. Depending on the nature of the LLC membership interests, such opinions may be expensive to prepare, and the relative costs and benefits should be weighed prior to requesting or rendering the opinion. *See* GLAZER § 19.5. Unlike corporate stock that is created pursuant to statute and corporate charter, membership interests in an LLC are contractual obligations of the LLC created in the limited liability company operating agreement or by the default rules of the applicable LLC statute. *Id* at n.4. An opinion on the validity of membership interests in an LLC covers both state contract law and the applicable LLC statute. If an opinion is rendered regarding membership interests in an LLC, the opinion giver should consider performing due diligence that confirms (i) completion of the procedural requirements pursuant to both the LLC statute and the contractual provisions of the limited liability company operating agreement, (ii) that the rights, powers, and duties provided in the limited liability company operating agreement are permitted by the LLC statute and the limited liability company operating agreement, and (iii) that any consideration required to be paid for the LLC membership interest to be issued was either received by the LLC, or that such receipt was covered by an express assumption in the opinion. *See* GLAZER § 19.5. With respect to LLCs formed in Delaware, see § 6.0.g *supra*.

activities directly related thereto, as set forth in an officer's certificate rendered to us in connection with this opinion].[42]

5. The Company has authorized the execution, delivery and performance of the Transaction Documents by all necessary corporate [limited liability company] action and has duly executed and delivered the Transaction Documents.[43]

6. The Transaction Documents constitute the legal, valid and binding obligation of the Company, enforceable against the Company in accordance with their respective terms.[44]

7. The execution and delivery by the Company of the Transaction Documents and the performance by the Company of its obligations therein (a) do not violate the articles of incorporation [articles of organization] or bylaws [operating agreement] of the Company, (b) do not breach or result in a default under any Other Agreement, and (c) do not violate the terms of any Court Order. For purposes hereof, (I) the term "Other Agreement" means any of those agreements listed on [the disclosure schedule to the Agreement][an officer's certificate rendered to us in connection with this opinion] and (II) the term "Court Order" means any judicial or administrative judgment, order, decree or arbitral decision that names the Company and is specifically directed to it or its properties and that is listed on [the disclosure schedule to the Agreement] [an officer's certificate rendered to us in connection with this opinion].[45]

8. The execution and delivery by the Company of the Transaction Documents, and performance by the Company of its obligations therein, do not violate applicable provisions of statutory laws or regulations.[46]

9. No consent, approval, authorization or other action by, or filing with, any governmental authority of the United States or the State of North Carolina is required for the Company's execution and delivery of the Transaction Documents and consummation of the Transaction [except . . .].[47]

The opinions expressed above are subject to the following assumptions, qualifications and limitations:[48]

---

[42] *See* § 8.0 of 2004 Report.

[43] *See* § 8.1 of 2004 Report.

[44] See § 10.0 of 2004 Report.

[45] *See* § 11 of 2004 Report.

[46] *See* § 12 of 2004 Report.

[47] *See* § 13.0 of 2004 Report.

[48] *See* §§ 10.1, 10.2, 10.3 and 10.4 of 2004 Report.

(a) This opinion is subject to the effect of applicable bankruptcy, insolvency, reorganization, fraudulent conveyance, moratorium and similar laws affecting the enforcement of creditors' rights generally.

(b) This opinion is subject to the effect of general principles of equity (regardless of whether considered in a proceeding in equity or at law), which may, among other things, deny rights of specific performance.

[Include the following as appropriate:][49]

___ In rendering our opinion that the Company "is a corporation" ["is a limited liability company"] and "is in existence," we have relied solely upon a Certificate of Existence regarding the Company from the North Carolina Secretary of State dated _____.[50]

___ We do not express any opinion as to the enforceability of any provisions contained in the Transaction Documents that (i) purport to excuse a party for liability for its own acts, (ii) purport to make void any act done in contravention thereof, (iii) purport to authorize a party to act in its sole discretion or provide that determination by a party is conclusive, (iv) require waivers or amendments to be made only in writing, (v) purport to effect waivers of constitutional, statutory or equitable rights or the effect of applicable laws, or (vi) impose liquidated damages, penalties or forfeiture or that limit or alter laws requiring mitigation of damages.

___ We do not express any opinion as to the enforceability of provisions of the Transaction Documents concerning choice of forum or consent to the jurisdiction of courts, venue of actions or means of service of process.

___ We do not express any opinion as to the enforceability of provisions of the Transaction Documents purporting to waive the right of jury trial.

___ We do not express any opinion as to the enforceability of provisions of the Transaction Documents purporting to reconstitute the terms thereof as necessary to avoid a claim or defense of usury.

___ We do not express any opinion as to the enforceability of provisions of the Transaction Documents purporting to require a party thereto to pay or reimburse attorneys' fees incurred by another party, or to indemnify another party therefor, which provisions may be limited by applicable statutes and decisions relating to the collection and award of attorneys' fees.

---

[49] *See* § 10.2 of 2004 Report. The first paragraph shows how several exceptions may be combined into a single sentence in the opinion.

[50] *See* § 6.0 of 2004 Report (Due Diligence ¶ b).

— We do not express any opinion as to the enforceability of provisions of the Transaction Documents providing for arbitration.

— We do not express any opinion as to the enforceability of provisions relating to evidentiary standards or other standards by which the Transaction Documents are to be construed.

— Enforcement of the Guaranty may be limited by the provisions of Chapter 26 of the North Carolina General Statutes, and we express no opinion as to the effectiveness of any waiver by any Guarantor of his or her rights under that Chapter.

— We do not express any opinion as to the enforceability of provisions prohibiting (i) competition, (ii) the solicitation or acceptance of customers, of business relationships or of employees, (iii) the use or disclosure of information, or (iv) activities in restraint of trade.

— We do not express any opinion as to the enforceability of provisions that enumerated remedies are not exclusive or that a party has the right to pursue multiple remedies without regard to other remedies elected or that all remedies are cumulative.

— We do not express any opinion as to the enforceability of severability provisions.

— We do not express any opinion as to the enforceability of provisions permitting the exercise, under certain circumstances, of rights without notice or without providing opportunity to cure failures to perform.

— We do not express any opinion as to the enforceability of provisions that purport to create rights of setoff otherwise than in accordance with applicable law.

— Certain of the remedies provided under the terms of the Transaction Documents may be further limited or rendered unenforceable by applicable law, but in our opinion such law does not, subject to the other qualifications and exceptions stated elsewhere in this opinion, make the remedies afforded by the Transaction Documents inadequate for the practical realization of the principal benefits purported to be provided thereby.[51]

* * *

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

[51] *See* § 10.4 of 2004 Report.

claimant, that challenges the validity or enforceability of, or seeks to enjoin the performance of, the Transaction Documents [except . . .].[52]

* * *

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.[53] Our opinions expressed herein are as of the date hereof, and we undertake no obligation to advise you of any changes in applicable law or any other matters that may come to our attention after the date hereof that may affect our opinions expressed herein.[54]

Very truly yours,

Signature of Opining Lawyer or Firm[55]

---

[52] *See* § 14.0 of 2004 Report as modified by the Supplement. In the event that the opinion giver and its client conclude that the broader form of the statement of no litigation is warranted, the following 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][the officer's certificate rendered to us in connection with this opinion][follows: _____]].

[53] *See* § 2.2 of 2004 Report as modified by the Supplement. 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 in the context of a Transaction involving a syndicated credit facility by using the following statement:

> At your request, we hereby consent to reliance hereon by any future assignee of your interest in the loans under the Agreement pursuant to an assignment that is made and consented to in accordance with the express provisions of Section [___] of the 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.

[54] *See* § 2.1 of 2004 Report.

[55] *See* § 2.9 of 2004 Report.

APPENDIX – STATEMENT OF CUSTOMARY PRACTICE

August 1, 2008

Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions

At the closing of many business transactions, the lawyers for one party deliver to the other party a legal opinion letter covering matters the recipient has asked those lawyers to address. These opinion letters, also commonly known as closing or third-party legal opinions, are prepared and understood in accordance with the customary practice of lawyers who regularly give them and review them for clients.

Customary practice permits an opinion giver and an opinion recipient (directly or through its counsel) to have common understandings about an opinion without spelling them out. The use of customary practice does this in two principal ways:

1. It identifies the work (factual and legal) opinion givers are expected to perform to give opinions. Customary practice reflects a realistic assessment of the nature and scope of the opinions being given and the difficulty and extent of the work required to support them.
2. It provides guidance on how certain words and phrases commonly used in opinions should be understood. Customary practice may expand or limit the plain meaning of those words and phrases.

By providing content to abbreviated opinion language, customary practice permits the omission from an opinion letter of descriptions of the procedures that the opinion giver has performed and of many definitions, assumptions, limitations, and exceptions. Thus, it reduces the number of words needed to communicate complex thoughts. As a matter of customary practice, the explicit inclusion in an opinion letter of some but not all of these matters does not exclude others customarily understood to apply. A departure from customary practice is not implied and should not be inferred unless the departure is clear in the opinion letter.

The role of customary practice in third-party legal opinion practice is well established. The American Law Institute's *Restatement (Third) of the Law Governing Lawyers*[56] states:

> In giving "closing" opinions, lawyers typically use custom and practice to provide abbreviated opinions that facilitate the closing. Such opinions may not recite certain assumptions, limitations, and standards of diligence because they are understood between counsel.

The *Restatement* also refers to customary practice as an element in determining the "meaning of the opinion letter."

---

[56] The references to the *Restatement* in this statement are to Sections 51, 52, and 95 of the *Restatement*. The references also include the following Comments, Illustrations, and Notes to those sections: Section 51, Comment *e*; Section 52, Comment *b*, Comment *e*, Illustration 2; and Section 95, Reporter's *Note* to Comment *b*, Reporter's *Note* to Comment *c*. The *Restatement* sometimes refers to "custom and practice." The *Restatement* uses the phrases "custom and practice" and "customary practice" to mean the same thing.

The *Restatement* identifies customary practice as a source of the criteria for determining whether the opinion giver has satisfied its obligations of competence and diligence. Under the *Restatement* the "professional community whose practices and standards are relevant" in making that determination is that of "lawyers undertaking similar matters." That professional community may vary based on, among other things, the subject of the opinion and the relevant jurisdiction.

The *Restatement* treats bar association reports on opinion practice as valuable sources of guidance on customary practice. Customary practice evolves to reflect changes in law and practice.

Some closing opinions refer to the application of customary practice. Others do not. Either way, customary practice applies.

* * * * *

This Statement is approved by the following bar and lawyer groups:

- Legal Opinions Committee of the Section of Business Law of the American Bar Association
- Legal Opinions in Real Estate Transactions Committee of the Real Property, Trust and Estate Law Section of the American Bar Association
- American College of Commercial Finance Lawyers
- American College of Mortgage Attorneys
- Attorneys Opinions Committee of the American College of Real Estate Lawyers
- Business and Finance Section of the Atlanta Bar Association
- Business Law Section of the Boston Bar Association
- Business Law Section of the California State Bar
- Commercial Law Section of the Delaware State Bar Association
- Real & Personal Property Section of the Delaware State Bar Association
- Corporate Law Committee of The Bar Association of the District of Columbia
- Business Law Section of The Florida Bar
- Real Property, Probate and Trust Law Section of The Florida Bar
- Real Property and Financial Services Section of the Hawaii State Bar Association
- Business Law Section of the Maryland State Bar Association
- Real Property Section of the Maryland State Bar Association
- State Bar of Michigan Business Law Section
- TriBar Opinion Committee (consisting of members of (i) the Special Committee on Legal Opinions in Commercial Transactions, New York County Lawyers' Association; (ii) the Corporation Law Committee, The Association of the Bar of the City of New York, (iii)

the Special Committee on Legal Opinions of the Business Law Section, New York State Bar Association, and (iv) other state and local bar associations)

- Business Law Section of the North Carolina Bar Association
- Corporation Law Committee of the Ohio State Bar Association
- Business Law Section of the Oregon State Bar
- Business Law Section of the Pennsylvania Bar Association
- Business Law Section of the Philadelphia Bar Association
- Corporate, Banking and Securities Law Section of the South Carolina Bar
- Business Law Section of the State Bar of Texas
- Real Estate, Probate and Trust Law Section of the State Bar of Texas
- Business Law Section of the Washington State Bar Association
- Business Law Section of the State Bar of Wisconsin