

Liability for Attorneys' Opinion Letters

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Every day attorneys in large law firms represent their clients in complex commercial transactions – mergers, acquisitions, loans and other types of financings. In almost every one of these deals the seller's or borrower's counsel is called upon to provide an opinion letter addressing various matters, such as its client's legal existence, the client's authorization of the transaction and that the client will not be violating any other agreements by entering into the transaction. These opinion letters, moreover, are typically addressed not to the firm's client but to *the other party* to the transaction, *i.e.*, the buyer or lender. Increasingly, when something goes wrong with the transaction, aggrieved buyers and lenders are seeking recourse, not just against the seller or borrower but also against the law firm that wrote the opinion letter. Two recent cases in the Massachusetts Superior Court illustrate this trend and provide some helpful guidance for transactional and litigation attorneys in large law firms seeking to avoid liability.

In *National Bank of Canada v. Hale & Dorr, LLP*² the Bank agreed to provide a Borrower with a credit facility in the amount of \$55 million. The Defendant Law Firm represented the Borrower in the transaction. In the Credit Agreement the Borrower represented that:

There are no actions, suits, proceedings or investigations of any kind pending or, to the knowledge of [the Borrower], threatened against [the Borrower] or any of its Subsidiaries before any court, tribunal or administrative agency or board that, if adversely determined, might, either in any case or in the aggregate, materially adversely affect the properties, assets, financial condition or business of [the Borrower] or materially impair the right of [the Borrower] and its subsidiaries to carry on business substantially as now conducted by it

At the time the Borrower made this representation, there was a patent infringement action pending against it in which the Borrower was represented by litigation partners of the Defendant Law Firm.

In connection with the transaction the Defendant Law Firm provided an opinion letter which stated as follows:

To our knowledge there is no action, suit, proceeding or investigation pending or threatened against [the Borrower] before any court or governmental department, which could prevent the consummation of the transactions contemplated by the Credit Documents or purports by its

terms to challenge the validity or enforceability of the Credit Documents or any action taken or to be taken in connection with the transactions contemplated thereby, or which, if adversely determined, could have a material adverse effect on the business, condition, affairs or operations of [the Borrower] or any material impairment of the right or ability of [Borrower] to carry on its operations as now conducted.

The opinion letter further defined the phrase "to our knowledge" as "the conscious awareness of the attorneys in this firm who have rendered substantive attention to [the Borrower] of the existence or absence of any facts which would contradict our opinions set forth below...." Lastly, the opinion letter listed twenty-seven items that the Law Firm examined for the purposes expressed in the letter, including "such... documents, instruments and certificates... as [the Defendant Law Firm] considered necessary for the purposes of this opinion."

The Borrower defaulted on the loan and eventually filed for bankruptcy. The Banks brought suit against the Defendant Law Firm on the following theories: negligent misrepresentation, negligence, misrepresentation, breach of contract and third-party beneficiary. At the close of discovery cross-motions for summary judgment were filed. In an opinion issued April 28, 2004, the Superior Court (Connolly, J.) denied the Banks' motion for summary judgment in its entirety citing a number of disputed material facts, including whether the outcome of the patent infringement action was likely to have a "material adverse effect" on the Borrower. The Court granted the Defendant Law Firm's motion with respect to the claims for negligent misrepresentation and negligence, holding that no duty of care should be imposed on the Defendant Law Firm in favor of the Banks because to do so would potentially conflict with the firm's duty to its client – the Borrower.³ The Court also dismissed the breach of contract claim because there was no contract between the Defendant Law Firm and the Banks.

The Court, however, denied the Defendant Law Firm's motion for summary judgment on the Banks' claims of misrepresentation and third-party beneficiary status. With respect to the first claim the Court ruled that, by including the phrase "to our knowledge" and a list of twenty-seven items it had reviewed, the Defendant Law Firm implied that it had superior knowledge with respect to the matter, thereby rendering the opinion an actionable misrepresentation. On the second claim, the Court held that the Defendant Law Firm intended that the opinion letter

influence the Banks' behavior in the transaction and, as a result, the Banks were third party beneficiaries of the Firm's contract for legal services with the Borrower.

In *Dean Foods Company v. Pappathanasi, et al.*⁴ the plaintiff purchased all of the outstanding stock of the West Lynn Creamery. The Stock Purchase Agreement contained a representation that there was no pending or threatened litigation against West Lynn and that West Lynn was not the subject of any continuing government investigations, except as set forth on a schedule attached to the Agreement. The Agreement also required West Lynn's Law Firm to provide the plaintiff/purchaser with an opinion letter, which it did. The letter stated as follows:

To our knowledge, except as set forth in Schedule 2.10 of the Company Disclosure Schedule, there is no claim, action, suit, litigation, proceeding, arbitration or investigation of any kind, at law or in equity (including actions or proceedings seeking injunctive relief), pending or threatened against the Company or any of its subsidiaries and neither the Company nor any of its subsidiaries is subject to any continuing order of, consent decree, settlement agreement or other similar written agreement with, or continuing investigation by, any governmental entity, or any judgment, order, writ, injunction, decree or award of any Governmental Entity or arbitrator, including, without limitation, cease-and-desist or other orders.

The letter also stated that the attorneys rendering the opinion:

have relied upon the representations of factual matters contained in the Purchase Agreement and have made no independent investigation of such factual matters; however, nothing has come to our attention which causes us to doubt the accuracy thereof.

Finally the letter stated that "in rendering our opinions we have examined such materials as we have deemed relevant to those opinions...."

Approximately nine months before the transaction closed and the opinion letter was issued, the Law Firm had undertaken to represent West Lynn in connection with a criminal grand jury investigation. Several months after the closing criminal charges were filed, initially against third parties, and later against West Lynn. West Lynn ultimately pled guilty to the charges and paid a fine of \$7,200,000. The existence of the grand jury investigation was not disclosed in the litigation schedule attached to the Purchase Agreement, despite the fact that the transaction attorneys had discussed the investigation with their litigation partners and recommended that the client disclose it.⁵

The buyer filed suit against a number of defendants, including the selling shareholders and West Lynn's Law Firm. The case against the Law Firm was tried on three theories: negligent misrepresentation, negligence and violations of the Massachusetts Consumer Protection Act, G.L. c. 93A. Following a jury-waived trial, the Superior Court (van Gestel, J.) found in favor of the plaintiff on negligent misrepresentation and in favor of the Law Firm on the Chapter 93A claim.

Contrary to the holding in the *National Bank of Canada* case the Court first ruled that, in rendering the opinion, the Law Firm owed the buyer, a non-client, a duty of care.⁶ Next, the Court found that the statements in the opinion letter about no litigation or pending government investigations were not so much opinions as they were statements of fact. In making such statements, the Court held, lawyers must perform such due diligence as is required by customary practice. Relying on expert testimony, a joint bar committee report on third party opinion letters and a finding that the Law Firm had violated its own internal policies and procedures in issuing the opinion letter at issue,⁷ the Court held that the Firm failed to conform to customary practice and was therefore negligent in failing to disclose the criminal investigation.

The Court nonetheless went on to find that the Law Firm was not liable to the plaintiffs under Chapter 93A, ruling that its actions "were not immoral, unethical, oppressive or unscrupulous..." and that the connection between the Law Firm and the plaintiffs "is not clearly a 'commercial relationship between consumers and business persons,' nor did the situation occur 'in the marketplace.'" Finally, the Court found that the misrepresentations and negligence in rendering the opinion letter "was the collective act or failure to act of the entity" and declined to impose liability on any of the individual attorneys involved.

Both *National Bank of Canada* and *Dean Foods* are trial court decisions, one in the context of a pretrial motion. The decisions, moreover, are inconsistent in several important respects, primarily on the question whether a borrower or seller's attorney owes a duty of care to the lender or buyer in issuing an opinion letter. Nevertheless, there are some lessons law firms can learn from these cases. Let's begin with the good news.

At root, these cases do not break any significant new legal ground. They merely re-affirm in the opinion letter context a proposition which is fairly well-established in Massachusetts that, when an attorney is asked by his client to make a representation to another party in a transaction, he has an obligation to speak truthfully.⁸

Second, nothing in these cases suggests that attorneys who write opinion letters will be exposed to unlimited liability to a large class of unidentified persons who may read and rely on the opinion.⁹ In both cases the courts took pains to point out that the opinion letters were prepared for specific, named parties, whose conduct the letters was intended to influence.¹⁰

Third, neither case suggests that, by providing an opinion, the attorney becomes a guarantor of his client's performance. Liability will only be imposed where the precise opinion or factual representation proved to be both the cause-in fact and a proximate cause of the other party's loss.¹¹

In the *Dean Foods* case, the Court also impliedly recognized that opinion letters are highly specialized instruments, written by lawyers for lawyers and using carefully defined terms of art.¹² Both sides introduced expert testimony concerning the proper interpretation of the opinion letter at issue and the degree of due diligence that is required to support a "no litigation" opinion.

Lastly, the Court in *Dean Foods* properly concluded that a law firm's mere negligence in drafting an opinion letter should not and will not give rise to liability under Chapter 93A, thereby exposing the law firm to liability for multiple damages and attorneys fees.¹³

On the other hand, there are aspects of both decisions which are cause for concern. First, it seems clear that the use of limiting and qualifying phrases in opinion letters such as "to our knowledge" will not relieve a law firm from an obligation to conduct reasonable due diligence prior to issuing the opinion. In determining whether a firm has conducted reasonable diligence, the *Deans Food* opinion suggests that a court will consider the collective knowledge of *all* of the firm's attorneys, not just those involved in the pending transaction.¹⁴

This approach appears to be at odds with a report of The TriBar Opinion Committee¹⁵ entitled *Third Party "Closing" Opinions* (hereinafter the "TriBar Report") which states that the purpose of the "no litigation" opinion is to provide confirmation to the opinion recipient that the opinion *preparers* (as distinct from the law firm) do not know that the list of litigation matters referred to in the disclosure schedule is incomplete or unreliable. A review of the law firm's files is not a routine part of the diligence associated with the rendering of such an opinion.¹⁶ The TriBar Report recognizes the impracticability of checking with every lawyer

in the firm in connection with the issuance of an opinion. "A law firm's files may be voluminous and the number of lawyers who have had some involvement with the client may be large [T]he probability is small that anything of value would be revealed by either a search of those files or a broad inquiry of lawyer who may not be knowledgeable about the details of a transaction."¹⁷ Thus, the suggestion that the knowledge of all lawyers in a firm (as opposed to those preparing the opinion) is somehow encapsulated in the "no litigation" opinion is troubling.

Second, lawyers need to be careful to state accurately and with specificity the due diligence they undertook in rendering the litigation opinion. For example, court dockets, internal firm litigation dockets, public filings and firm files can be checked; and other firm attorneys, including those working on the transaction, attorneys who normally handle the client's affairs, litigators who generally handle the client's litigation and attorneys outside the firm who are involved in litigation affecting the client can each be spoken to.¹⁸ The prudent lawyer (and law firm) should be explicit about who has been spoken to and what files, if any, have been checked.

Third, unlike conventional legal malpractice cases, in which plaintiffs face a difficult burden of proving that their attorney's error proximately caused a loss, in the opinion letter context once a loss has occurred it may be somewhat easier for a plaintiff to prove causation. In both *National Bank of Canada* and *Dean Foods* for example, the Courts accepted testimony from the plaintiffs that they "would not have closed the transaction" without an opinion letter containing the representation at issue.

Finally, the Court in *Dean Foods* took the Law Firm to task for violating its own internal policies and procedures regarding the preparation and issuance of its opinion letter. Law firms need to adopt clear procedures for opinion letters, publicize those procedures widely throughout the firm and, most especially, take steps to make sure its procedures are being followed.

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²2004 WL 1049072 (Mass. Super. 2004).

³See generally *Spinner v. Nutt*, 417 Mass. 549, 544-45 (1994) (leading case in which the Massachusetts Supreme Judicial Court held that trustees' attorneys do not owe a duty of care to trust beneficiaries because such a duty potentially would conflict with the duty the attorneys owe to the trustees).

⁴No. 01-2595 BLS, slip op. (Mass. Super. Dec. 3, 2004).

⁵*Id.* at 13. In the discussion, litigation counsel stated that he had not heard from the prosecutor in the past six months and "guesstimated" that the matter had probably gone away. *Id.*

⁶See also RESTATEMENT (THIRD) LAW GOVERNING LAWYERS §§ 95(1), 95(3) (2000) ("In furtherance of the objectives of a client in representation, a lawyer may provide to a non client the results of the lawyer's investigation and analysis of facts or the lawyer's professional evaluation or opinion on the matter" and in providing such information, the lawyer "must exercise care with respect to the non-client.").

The law firm's policy required that all opinion letters, with appropriate backup materials, be reviewed and approved by a partner authorized by the firm to approve opinion letters in the particular practice area (referred to as the "countersigning partner"). See *Deans Foods Co.*, No. 01-2595 BLS, at 13-14. Although the countersigning partner did review and approve the letter, he was not told about the grand jury investigation. *Id.* at 14.

⁷See MASS. R. PROF. CONDUCT 4.1 (In representing a client, a lawyer shall not knowingly "make a false statement of material fact or law to a third person."); see also *Kirkland Construction Co. v. James*, 39 Mass App. Ct. 559, 561, 563 (1995) (acknowledging the duty to refrain from relaying information that a lawyer knows or should know is untrue or misleading to a third party).

⁸See RESTATEMENT (THIRD) LAW GOVERNING LAWYERS § 51(2)(a) (a lawyer owes a duty of care to a non-client when the lawyer or the lawyer's client invites the non-client to rely on the lawyer's opinion or provision of other legal services and the non-client so relies, and the non-client is not too remote from the non-lawyer); see also *Nycal Corp. v. KPMG Peat Marwick LLP*, 426 Mass. 491, 496-500 (1998) (adopting the test taken from § 552 of the RESTATEMENT (SECOND) OF TORTS in evaluating the professional liability of an accountant to a person with whom he is not in privity, and limiting recovery to those persons an accountant actually knows will receive and rely on the audit report at issue).

⁹See also *Kirkland Construction Co.*, 39 Mass App. Ct. at 562-63 (finding that letters to non-client providing assurances from lawyers about their client are "the stuff of liability" when lawyers knew and intended that non-clients would rely on the representations in the letters).

¹⁰See also *Prudential Ins. Co. of America v. Dewey, Ballentine, Bushby, Palmer & Wood, et al.*, 80 N.Y.2d 377, 381-82, 387 (N.Y. App. 1992) (concluding that attorneys who provide opinion letters to third parties at the behest of their clients should not be immune from professional liability to those third parties, while affirming grant of summary judgment for law firm because it made neither procedural nor substantive misrepresentations to third party).

¹¹See also RESTATEMENT (THIRD) LAW GOVERNING LAWYERS § 95, cmt. e ("The details of the opinions, including factual assumptions, and qualifications, limitations, and disclaimers are matters which, when the participants are all represented, are negotiated *between the lawyers* for both the client and the intended recipient.") (emphasis added).

¹²See also *National Bank of Canada*, 2004 WL 1049072, at *12. Without much discussion, the Court in *National Bank of Canada* also dismissed the Banks' Chapter 93A claim insofar it related to their claims of negligent representation, negligence and breach of contract. *Id.*

¹³See *Dean Foods Co.*, No. 01-2595 BLS, at 22-24, 25 (expressly referring to the firm's "collective knowledge"), 28-30.

¹⁴The TriBar Opinion Committee was formed more than twenty years ago for the purpose of exchanging information about, discussing and providing guidance on customary practices in giving and receiving legal opinions. See The TriBar Opinion Committee, *Third Party "Closing" Opinions*, 53 BUS. LAW. 592 (Feb. 1998). The TriBar Opinion Committee now consists of designees of the following organizations that function as a single Committee: (i) Special Committee on Legal Opinions in Commercial Transactions, New York County Lawyers' Association; (ii) Corporation Law Committee, The Association of the Bar of the City of New York; and, (iii) Special Committee on Legal Opinions of the Business Law Section, New York State Bar Association. Members of the Allegheny County (Pa.), Atlanta, Boston, Chicago, Delaware and Ontario Bar Associations and of the State Bar of Texas also are members of the Committee. *Id.* at n. 1.

¹⁵See *Id.*, 53 BUS. LAW. at 664.

¹⁶*Id.* at 614.

¹⁷Indeed, the *Dean Foods* opinion suggests that confirmation of the status of the pending investigation could have been obtained from counsel to another party involved in the pending investigation. See *Dean Foods Co.*, No. 01-2595 BLS, at 30, n. 10.