CURRENT DEVELOPMENTS: LAWYERS' OPINIONS IN BANKING TRANSACTIONS LEGAL LIABILITY OF OPINION GIVERS

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I will refer to my summary which I have distributed during this commentary.

We have had the concept of providing formal legal opinions for quite some time, but it is in some senses a brand new issue in the United States. The literature is filled with articles and reports some of which Suzanne Corcoran has cited to you on the topic. Why? Because the theories of liability are expanding in our country from what they were and because lawyers are no longer immune, if they ever were, from malpractice suits. They happen to come in very large denominations and are threatening to the very viability of outside law firms. Because the Securities and Exchange Commission seeks to put lawyers in our country in a very uncomfortable position - that is attempting to split the duty of a lawyer between the duty to its client and the duty to the public, that the Securities and Exchange Commission insists that lawyers must undertake a special role. Those are the basic reasons why we are spending more time thinking about legal opinions today than we ever have.

How do you go about putting a legal opinion together or even begin thinking about it? For a long time it was a matter of custom. What custom was for you was the last deal you did. You pulled it off the shelf and took a look at what the opinion letter said in that last deal. The legal profession essentially gathered around as this phenomenon of increasing liability started to become apparent and engaged in some collective protection and the result were the kinds of reports mentioned to you by Ms Corcoran.

I think she has given you a good bibliography and I would like to add a couple of reports to that. If you have her outline you might just add a couple of more reports to it - one of which just came out a couple of weeks ago. If you take a look at the State Bar report that Suzanne has cited you can add to it a report called "Legal Opinions in Personal Property Secured Transactions"

and then I was given an interesting article published here in the Australian Business Law Review called "The Use of Formal Legal Opinions in Australia". All of them do the same sort of thing. They take the component parts of a legal opinion and explain to you why each and every word is in there and what the options are.

Well that is one way to do it - you pull it off the shelf. Another way is what I call in the outline "zero based negotiations". You start out with the proposition that the transaction ought not to have any legal opinion at all and you work from there. You decide what elements are absolutely essential to the clients and you do that for two reasons. Legal opinions are expensive. There are transaction costs that are significant in terms of producing them and my guess is that they are not going to get less expensive, they are going to get more expensive. As we as a profession understand that what we are doing is in some sense writing an insurance policy, we are going to start to think about the production of those legal opinions in terms of the premium which we as attorneys have to pay in order to provide that insurance to clients. So, both for the transactional costs and the liability, it is a good idea to think carefully about what it is that you do and the extent of the legal opinion that you provide.

Negotiate the terms of the legal opinion early in the transaction. Don't find yourself negotiating what it is that you as an attorney are going to provide the day before the closing. You will be caught between your client and the other client in a deal that both of them want to conclude and you will be in the middle being asked to provide certain opinions that you believe to be inappropriate and you may be getting pressure from both your client and the other client to provide certain types of statements in a legal opinion. The best time to do it, if you can, is when the agreement is first negotiated. Quite frequently the legal opinion will actually be an exhibit to the agreement when it is reached. It will then be delivered at the time of the closing.

The last piece of advice in terms of the basic approach is, apply the golden rule. Don't ask for a legal opinion that you would not be willing to give yourself.

I have indicated to you the two basic concepts in my outline for theories of liability for attorneys who provide legal opinions. There are contractual grounds and tort grounds for liability in tendering legal opinions. The differences between the two are not much to do with the standard that will be applied to you conduct, to your analysis. In our country at least it has a lot to do with the measure of damages that may be applied if you should be found to have been negligent in providing the legal opinion. The potential tort liability at least under the US system can be essentially unlimited. Contractual damages of course are limited.

With regard to the standard that will be applied in analysing whether you have been negligent or not, it is the garden variety on negligence theory of reasonable skill, prudence, diligence in your community. All I would suggest with regard to that aspect of the analysis is that you have to watch out for the problems of the specialist. That is if you are giving a general opinion on a number of different topics at least in the US we are becoming an increasingly fragmented profession with specialties arising within that profession, and if it is an area for which you should have received the input of a specialist you will be held to the standards of that specialist in providing the opinion. The problem of course is as we become increasingly specialised a given opinion may call for input from a number of different specialists and you may or may not have them in particular law firm, you may have to associate other law firms for the production of a single opinion.

Previous speakers have mentioned the issue of opinions of fact creeping into the legal opinion. If you can exorcise them that is the best route to follow. Unfortunately, particularly with respect to securities issuances the pressure is significant in our country to impose upon lawyers the duty to essentially opine, to make statements of factual issues. If there is any ground for liability particularly in the securities area, it is there, not in the analysis of the law itself, but in validating/confirming that certain facts either do or do not exist.

I have indicated to you in the outline what the traditional rule in our country is and it still is that you are liable for a false opinion if you will only to those with which you have contractual privity - your client assumedly. That is the standard rule. That rule goes back to a Supreme Court case of about 130 years ago. That is not the rule in California. It is not the rule in an increasing number of states in our country where you liability will extend certainly to the addressee of the opinion, that is not your client but the person, the institution, to whom the opinion is being provided, and it will also likely extend to any parties to whom the opinion is likely to be provided and who could be expected to rely on the opinion. That can be frightening in a public securities offering for instance. That concept is a matter of statute with respect to securities issuance at least in the State of California and I have given you the cite to our Corporation Code that creates that result.

So how can you try to limit your liability? One, you can enter into an agreement with your client with regard to the uses that will be made of your opinion and I will give you a real life example of how that can work and sometimes not work. We have a terrible law called the Truth in Lending Act which has "created" something approximately numbering about 15,000 cases in the United States alleging violations of hyper technical disclosure principles to consumers in a lending context. Massive liability follows from breaches of the statute. Complying with that Act is very expensive. So a company decided to issue forms particularly

so that small lenders could use these forms and not have to spend the very large amounts that would otherwise be required to generate them and to retain the legal assistance to do that.

They asked for our legal opinion. We agreed, but only for its use. So far as we are concerned those forms need to be reviewed by counsel associated with the individuals who will buy and use those forms. We do not want that legal opinion circulated and have the purchasers of these forms relying on our legal opinion. The potential liability would have been massive. They agreed. We actually had an agreement. Six months later we found that their salesmen were out on the street peddling these forms and saying: "Look! We have got an opinion from ..." with the name of our law firm. So it was a question of not only an agreement, but enforcing that agreement because there was a very good chance that we would have been held liable, since the party getting the opinion would have no notion that we had asked for a restricted use. The next thing one should do is put a flat statement in the opinion if you can get away with it in terms of your client's wishes that this opinion is for the use of - and you name your client - and no other person should rely on this opinion. You may still not be able to limit your liability if you know that your opinion is going to in fact be used and offered to others - that statement in your opinion may not protect you.

Internally, because of the massive potential liability, we have adopted a number of procedures. I would like to tell you about them very briefly because you may be thinking about them as well. Some of them may be very obvious. We do not allow opinions out of our office unless they are signed by a partner. We actually have an opinion committee. People who sit and worry and wring their hands about the potential liability of the firm, and we intentionally choose the greatest worriers in the firm to serve on this committee. One of the principles we have is that when you are ready to deliver the opinion you bring it to one of the members of this committee who has not participated in the transaction. Why do we do that? Why do we bring in somebody who knows nothing at all about the transaction? Because that person will not have been subjected to the pressures, the deal pressures, that might cause one of our attorneys to knuckle under and give an opinion that our firm really ought not to give. So we have somebody who is more objective perhaps with respect to this particular opinion and serve as a last check before anything goes out the door with our firm's name on it.

Lastly, the advice if you can follow it, is to be sure that you are insured. That is a problem. I understand it is a similar problem in Australia to that in the United States. Premiums have skyrocketed. They are almost literally incredible. But further, we have not been able to buy the insurance at least for some period of time. The insurers or carriers have simply left the market, they feel that their actuarial statistics are not reliable enough for them to take the loss shifting responsibility that goes with serving as an insurer. One of the responses that

our firm has had is in league with about ten of the other major law firms in California we have created an offshore insurance carrier, a captive carrier, of our own. We are essentially self insured therefore, but we have at least a pool that consists of these ten major law firms. In the meantime I am going to see either about resigning from my law firm quickly or incorporating because in a partnership form as you all I am sure know every bit of your personal wealth and income, whatever that may be, is on the line if your law firm should be sued for one of these cases in which the liability can be quite massive.