Legal Opinions—Who May Rely?

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In his seminal article[1] on legal opinions, James J. Fuld anticipated some of the issues present-day opinion givers worry about with respect to whom an opinion letter is addressed and who may rely on an opinion letter.[2] Thus, the issue of reliance on an opinion letter by successors and assigns, and the appropriateness of, and limitations on, such reliance go back to the very first article examining opinion letters.

The general rule is that only addressees of a legal opinion rendered by a lawyer or law firm, together with others whom the lawyer or law firm or (with the lawyer's or law firm's acquiescence) the lawyer's client invites to rely, may rely on such opinion.[3] Today, opinion givers often expressly prohibit reliance by anyone other than the addressee for any purpose, and they prohibit reliance by the addressee for any purpose other than the transaction with respect to which the opinion is rendered.[4] The principal exception to this limitation on reliance has been in syndicated loan transactions and securitizations where the opinion recipients often request that successors and assigns be permitted to rely on the opinion.

Opinion givers have expressed concern about permitting such reliance, citing one or more of the following reasons:

- The possibility of multiple claims being made by syndicate members, requiring the opinion giver to negotiate with a number of different claim-

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1. James J. Fuld, *Legal Opinions in Business Transactions—An Attempt to Bring Some Order Out of Some Chaos*, 28 BUS. LAW. 915 (1973).

2. "If the lawyer knows that another party will be receiving, relying upon, and taking action based at least in part upon, the lawyer's opinion, the doctrine of privity should be unavailing." *Id.* at 920. "[I]t is one thing to give a carefully worded opinion to the underwriters, and another thing to volunteer broad and unclear representations directly to the investing public." *Id.* at 941.

3. ARTHUR NORMAN FIELD & JEFFREY M. SMITH, LEGAL OPINIONS IN BUSINESS TRANSACTIONS § 8.5 (2d ed. 2006); DONALD W. GLAZER, SCOTT FITZGIBBON & STEVEN O. WEISE, GLAZER & FITZGIBBON ON LEGAL OPINIONS: DRAFTING, INTERPRETING AND SUPPORTING CLOSING OPINIONS IN BUSINESS TRANSACTIONS § 2.3.2 (3d ed. 2008 & Supp. 2012) [hereinafter GLAZER AND FITZGIBBON ON LEGAL OPINIONS]. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51 (2000).

4. GLAZER AND FITZGIBBON ON LEGAL OPINIONS, *supra* note 3, § 2.3.2.

ants 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 perception that problem loans may 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.
- A concern that successors and assigns may not appreciate the limitations on the opinion letter (to which the addressee is also subject), or that the correctness of the opinion could vary depending on the status of the new syndicate member (such as whether there is an applicable exemption from usury laws).
- A concern that the assignee's reliance may not be actual or reasonable under the circumstances existing at the time of the assignment.
- The possibility of claims in unknown and distant jurisdictions and uncertainty as to the governing law a court might apply.
- A concern that the assignee may not be familiar with customary practice and may not consult counsel to understand the meaning of the opinion.
- A concern that the opinion may be deemed to be reissued as of the date the new syndicate member acquires its interest in the loan, which could result in different lenders being subject to different statutes of limitations.

Some of these concerns are ameliorated by customary practice as described in the *Guidelines for the Preparation of Closing Opinions*[5] and the accompanying *Legal Opinion Principles*, each published by the ABA Business Law Section Committee on Legal Opinions.[6] Other of these concerns are mitigated by the ap-

5. 57 Bus. Law. 875 (2002). Section 1.7 of the Guidelines provides:

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

Id. at 876–77.

6. 53 Bus. Law. 831 (1998). Section IV of the Principles specifies that "[a]n opinion letter speaks as of its date. An opinion giver has no obligation to update an opinion letter for subsequent events or legal developments." *Id.* at 833.

plicable legal standard for liability[7] in an action for negligent misrepresentation, the cause of action most frequently asserted against opinion givers.[8]

Nevertheless, many opinion givers prefer to state such limitations on the right of assignees to rely expressly in the opinion letter. Several years ago Wachovia Bank, N.A., adopted language[9] that it would accept setting limits on the right of assignees to rely. The Wachovia language has found widespread acceptance among syndicated lenders and has been used by many opinion givers.[10]

The concerns expressed by participants in the Working Group on Legal Opinions ("WGLO") seminars have been sufficiently strong that, since WGLO's inception, six programs have been devoted to the subject of reliance on opinion letters by successors and assigns. At the May 2012 WGLO session, a group proposed language that sought to include the concepts in the Wachovia language and make explicit that: (1) consent to reliance does not constitute reissuance of the opinion or otherwise extend any statute of limitations period, (2) additional lenders have no greater rights than the original addressees, (3) additional lenders that take by assignment have no greater rights than their assignors, and (4) all rights under the opinion may be asserted only in a single proceeding.[11] The

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7. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 552(1) (1965). That section provides:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for the pecuniary loss caused *to them by their justifiable* reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Id. (emphasis added).

8. Jeffrey M. Smith, *A Legal Opinion Malpractice Primer*, in THE LEGAL OPINION COMMITTEE WORKSHOP 2005, at 165, 178 (Arthur Norman Held & Donald W. Glazer eds., 2005).

9. The Wachovia language 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 [___] (Reference to the assignment Section of the Credit Agreement) 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.

10. GLAZER AND FITZGIBBON ON LEGAL OPINIONS, *supra* note 3, § 2.3.1, at 63 n.3.

11. The proposed language, as modified to reflect drafting suggestions during the May 2012 WGLO session, is as follows:

> The opinions expressed in this letter are solely for the benefit of the addressees and for the benefit of any successor to the Administrative Agent pursuant to Section __ of the Credit Agreement, in each case in connection with the Subject Documents. We consent to reliance on the opinions expressed herein, solely in connection with the Subject Documents, by any party that becomes a Lender subsequent to the date of this opinion letter in accordance with the provisions of the Credit Agreement (each an "**Additional Lender**") as if this opinion letter were addressed and delivered to such Additional Lender on the date hereof, on the condition and understanding that: (i) in no event shall any Additional Lender have any greater rights with respect hereto than

use of this language is not yet as widespread as the use of the Wachovia language, but some or all of these concepts have been accepted by a number of lenders, both in delivered opinions and in discussions with in-house counsel for lenders as to whether they found such language to be acceptable.

Another approach, which has met with more limited acceptance, is to permit assignees or new lenders to rely on the opinion only if they acquire the debt within some stated time period (often between 60 and 180 days) sufficient to complete the initial syndication. This approach deprives later lenders of the benefit of the opinion altogether, and it may make some cautious potential assignees reluctant to take an assignment. A variation of this approach that lenders might find more acceptable would be to permit assignees to rely after the stated time period only with the express written permission of the opinion giver, such permission not to be unreasonably withheld.

Forty years after Fuld raised the issue of who may rely on an opinion letter, the issue continues to vex opinion givers, as evidenced by the numerous panels, breakout sessions, and papers produced for WGLO on the subject.[12] With the advent of securitizations and the increased size of loan syndications, the issue has, if anything, become more acute for present-day opinion givers. The approaches described above at least ameliorate some concerns of opinion givers, but the issue of who should be permitted to rely may be one for which there is no perfect solution.

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the original addressees of this letter on the date hereof nor, in the case of any Additional Lender that becomes a Lender by assignment, any greater rights than its assignor, (ii) in furtherance and not in limitation of the foregoing, our consent to such reliance shall in no event constitute a reissuance of the opinions expressed herein or otherwise extend any statute of limitations period applicable hereto on the date hereof, and (iii) any such reliance also must be actual and reasonable under the circumstances existing at the time such Additional Lender becomes a Lender, including any circumstances relating to changes in law, facts or any other developments known to or reasonably knowable by such Additional Lender at such time.

[Include other typical language as to the opinion speaking as of its date, disclaiming any responsibility to update, and limiting publication of the opinion.] Furthermore, all rights hereunder may be asserted only in a single proceeding by and through the Administrative Agent or the Required Lenders.

Assignability Issues in Third-Party Opinions, Legal Opinions News (ABA Section of Bus. Law, Comm. on Legal Opinions, Chicago, IL), Summer 2012, at A-3.

12. The topic was considered at sessions led by one or more of the authors of this paper at the October 2006 and April 2007 Legal Opinion Risk Seminars (conducted by the predecessor organization to WGLO) and the Fall 2007, Spring 2008, Fall 2011, and Spring 2012 WGLO Seminars.