DEFENDER
THE NADC NEWSLETTER

So You Want To Be An Insurance Company?

Oren Tasini

For you computer savvy people, or anyone with a teenager, you know that "IMO" stands for "in my opinion," in internet-speak. (If you have a teenager and don't know this, you need to spend more time with him/her.) After all, why go through the effort to spell all those words, when three letters will adequately communicate your thinking to the recipient.

The same cannot be said of rendering a legal opinion in connection with a sale and purchase transaction, loan agreement or other transaction where your client is asked to deliver an opinion of counsel (which means you). Less is not more. What you deliver, and what you do before you deliver it, may have far reaching implications. The Florida Supreme Court recently extended the liability of an attorney for malpractice to investors in a private placement, adding another exception to the long standing requirement that there be privity between the client and the lawyer as a predicate to a lawyer's liability. (*Cowan Liebowitz & Latman, P.C. v. Kaplan*, 2005 WL 610162 (Fla. 2005))(Holding lawyers preparing private placement have duty to third party investors and malpractice claim could be assigned to third party investors.) So lawyer beware.

A legal opinion is an insurance policy. Your written opinion may result in

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Dealers who still offer demonstrators must have a procedure for employee signature and proper maintenance of demonstrator agreements. Demonstrator agreements must be kept in a permanent location, for example in personnel files.

A demonstrator agreement is important for many reasons.

1. Business Reasons

   Whether it is in the demonstrator agreement or in the employee's pay plan, the dealer must be sure that the employee has acknowledged that the dealer has a right to designate the car for the employee's use or terminate the right to use it at any time. For business reasons, the dealer may decide that it wishes to change the type of vehicle being driven by the employee or to simply eliminate the employee's right to a demonstrator. There should be a signed acknowledgement by the employee that the employee understands that this may be done.

2. Insurance Reasons

   The dealership's insurance company may have limitations on demonstrator use. Those limitations should be included in a demonstrator agreement.

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President's Letter

Jonathan P. Harvey

Greetings to almost three hundred members of the NADC. I hope you are all enjoying the summer weather and that you have been able to combine nourishment of the body and the soul with economic productivity.

As for the NADC, I am pleased to announce that we are planning a late fall seminar focusing on dealer buy-sell agreements. In addition to a great deal of encouragement and support regarding the Atlanta conference, we received a lot of helpful and much appreciated criticism. As a result, we intend to work on changes that will make this seminar worthwhile. It is our intent to have five sessions dealing with various aspects of acquisition agreements, and we are hoping to have five speakers talk in depth about hot topics in this area of dealer representation. We will investigate and discuss both sides of a transaction and anticipate a good amount of audience participation. We are considering some workshops to go along with the presentations to enhance the program.

It would be extremely helpful if those who wish to attend this seminar would send a letter to Jack Tracey, Oren Tasini, Chair of the Buy-Sell Section, or to me, with suggestions for areas you would like to see covered in the sessions. This will not be an annual meeting, but rather the first in a series of seminars we are planning to target single topics, with in depth presentations and analyses. This format is something new for us as we fast approach our one-year anniversary. I urge you to consider attending this seminar and to call or write me if you would like to become more involved in the organizational side of NADC.

Have a restful summer. The brevity of this letter is a result of my not having one. Regards to all of you.

Jonathan P. Harvey of Harvey and Mumford LLP is President of the NADC and can be reached by e-mail at jpharvey@harveyandmumford.com

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an assertion by a third party that they relied to their detriment on your opinion or, worse yet, that you had a fiduciary duty to that third party.

Note: For an excellent, though somewhat dated review of this topic, direct your browser to **www.clarkhill.com/law_media/liabilit.html**. In addition, the American Bar Association website on legal opinions is also instructive in the world of legal opinions. Although, to date there has not been wide acceptance of the ABA's Tribar opinion form (see **www.buslaw.org**).

So if insurance is about risk, to reduce the risk, your opinion requires sufficient underwriting before you "issue" it. Your first form of underwriting is to determine the scope of the legal opinion itself. Often a transaction document will ask for a legal opinion in "form and substance" acceptable to buyer or lender's counsel. This requirement is usually hidden in the conditions to closing, so you might be inclined to gloss right over it. Stop reading, pick up the phone, or dash off an e-mail to your opposing counsel, and ask for the actual form of opinion to be sure that you can render it. You can choose to ignore this issue until closing, but when the opinion arrives with the other fifty closing documents and then you tell your client you cannot render it, it tends to make a happy client, a former client. Alternatively, if the form of opinion is delivered to you, review it in the early stages of the transaction and promptly identify those areas that may create a problem.

Your next step in the underwriting process is to reduce or eliminate any obligation to opine on factual matters. For example, a standard opinion requested is that the agreement executed by the client does not conflict with, nor contravene, any agreement or contract of the client already in existence. To render this opinion would require you to have the client produce every agreement to which it is a party, and to inquire of the client regarding any oral agreements. You would then have to read each and every agreement to determine whether your opinion is correct and also potentially receive some affirmative assurance from the other party to an oral contract that the terms of the contract are as your client describes them. Obviously, this is not practical and is cost prohibitive. Incidentally, it is not an acceptable practice for another attorney to ask for this level of inquiry.

Contrast this with a more limited opinion. For example, one that opines the transaction document does not contravene nor conflict with the corporate organizational documents of the client (e.g., the articles of incorporation and by-laws). Pretty simple. First, get a copy of the document(s) and have the client certify it is true and correct (or provide in the opinion that you have assumed all documents provided to you by the client are true and correct, thus eliminating any factual issue). Next, read it. Lastly, apply your legal knowledge.

The key is to clearly delineate the level of your due diligence and knowledge as to all factual matters. Our firm practice is to rely solely on the client's factual assertions set forth in an officer's certificate and to affirmatively state that our opinions are based solely on our

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Message From Executive Director

Jack Tracey, CAE

I am taking this opportunity to bring you up-to-date on a number or things:

List Archive

At last count, 243 NADC members are on the list serve. Messages are now being archived automatically. Follow the arrow from the login page or click on "list archive" in the navigation bar. If you are eligible for the list serve, you can view the archive (even if you do not participate in it).

The archive is searchable by date or key words, such as a topic of interest or a sender's name. Since the archive is automatic, the format is a bit rough. When you view the messages, please remember:

- Messages sent from e-mail programs that incorporate graphic elements and HTML commands contain a lot of "computer trash" in the archive
- Attachments do not save into the archive

NADC Member Conference CLE Update

Applications have been sent to all states requested by attendees. Georgia, the state in which the program was held, has approved the conference for 10 hours of CLE credit. Indiana, Ohio, Pennsylvania, Tennessee and Texas have done the same. Colorado and Missouri have accredited the conference for 12 hours. Certificates of Attendance have been sent to some of those who requested credit in states where there is no mandatory continuing education requirement. We are in the process of sending Certificates of Attendance to everyone else who attended the conference.

Next time, applications for credit will be sent prior to the conference to those states you request. Please contact me if you have questions about credit for the April conference:

jtracey@dealercounsel.com.

Website Events Page

In response to requests that materials from the conference be available online, we have added links to PDFs for each session. We are adding the handout materials for each session. You will have to be logged in to gain access to the materials.

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actual knowledge with no inquiry of any kind.

Oh Yeah, and Don't Forget About the Law

An opinion often sought is one that asks you to state an agreement is fully enforceable according to its terms. A very common provision in a legal opinion is that the opinion as to the "enforceability" of the transaction document does not mean that any particular portion of the agreement is specifically enforceable, rather, the recipient will be able to realize the benefit of his or her bargain (a/k/a "a carve out"). This is a pretty good reduction in risk, but it is not always enough.

What if the state of the law is simply unclear? In Florida, we have a statute that governs non-competes (which are common in sales transactions and often a significant consideration to a buyer). There is probably at least one case per month on this statute and all are difficult to reconcile into a coherent legal theory. Thus, it is not possible to opine without equivocation that a non-compete is fully enforceable under Florida law largely because it may not be! We specifically state so in our legal opinions.

So based on the law, you may not be able to give the opinion requested, but rather will have to explain the state of the law and the issues confronting the recipient if it seeks to enforce a portion of the transaction document.

Always remember that you may not be able to render the opinion. For example, you may be asked to render an opinion on the validity of a dealer's franchise agreement. Are you qualified to do this? This raises a number of ethical issues, including the fact that a lawyer is not permitted to undertake work for which he or she is not qualified. Special counsel may be required (but for lack of space I won't address the issue of relying on the opinions of local counsel).

Finally, two heads are always better than one. Adopt a legal opinion policy which requires another lawyer, or more than one, if feasible and cost efficient, to review all legal opinions rendered by anyone in your firm. If you are a solo practitioner, I highly recommend you review the ABA Tribar opinion reports (although I would not recommend the opinion form itself, as few practitioners use it) and the other myriad continuing legal education materials dealing with legal opinions.

Now back to the beginning. I was taught that your conclusion is just a restatement of your introduction. IMO, an ounce of prevention is, well, you know the rest.

Oren Tasini is shareholder with Haile, Shaw & Pfaffenberger in Palm Beach, FL. He acts as corporate counsel to large and small businesses with a concentration in the automotive industry. He is a member of the NADC board of directors and Chairman of the Buy/Sell Agreements section.

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3. Liability Reasons

   If a demonstrator vehicle is driven by someone other than the employee to whom it is assigned without the dealership's permission, or if it is being used by the employee outside of the appropriate scope of use, the dealership may want to take the position that it is not liable for damages caused by the driver of the vehicle. The dealer's case will be very difficult without a written demonstrator agreement signed by the employee to whom it is assigned setting forth the limits of use, including the permissible drivers. A demonstrator agreement that strictly limits the use of the vehicle and the drivers of the vehicle can be a very valuable tool to defeat a serious lawsuit against the dealer arising from an auto accident.

4. IRS reasons

   If the dealer wishes to exclude all or a part of the value of the demonstrator use from the taxable income of the employee, the IRS requires that the dealership have a written demonstrator agreement with the employee. And the written agreement must have the following provisions:

   • Prohibit the use of the vehicle outside of normal business hours by individuals other than full-time salespeople.

   • Prohibit the use of the vehicle for personal vacation trips.

   • Prohibit use outside of the sales area in which the dealership's sales office is located.

   • Prohibit storage of personal possessions in the vehicle.

   Under the IRS guidelines, the dealer must reasonably believe that the salesperson complies with the written policy to justify exclusion of demonstrator value from compensation.

Michael Charapp. is a partner with Charapp & Weiss, LLP in McLean, VA. He is Second Vice President of the NADC and serves as Chairman of the Membership and Advancement Committee.

To the Editor of Automotive News:

As I perused, with great interest, the Automotive News All-Stars for 2005, I noticed a category of executive that is missing from your "dream team." Conspicuously absent from your list was a "legal" category.

Perhaps many would prefer not to have a lawyer on their team. However, as many executives have learned, a failure to consult with legal counsel is often met with serious, if not catastrophic consequences.

In the same issue where the All-Stars were announced, there were three articles devoted to significant lawsuits impacting both dealers and manufacturers. In fact, I can't remember the last time I read the Automotive News without coming across an article that at least mentioned litigation.

As top CEO, if Dieter Zetsche is to be the manager of your dream team, I bet you he's going to want a third base coach who will tell your runners to stop before they get thrown out at home. That is how I see the role of corporate counsel.

Lawyers tirelessly protect the interests of corporations and executives alike, often without much fanfare. From managing complex litigation to driving compliance efforts, corporate attorneys are responsible for ensuring that the success of a corporation is not squandered by unscrupulous employees or usurped by plaintiff attorneys and regulators.

Next year, perhaps you can introduce a category to honor a top legal mind. Who knows, maybe it will help improve the collective reputation of those of us that work hard to defend the automotive industry.

Rob Cohen

Associate Member Spotlight: MD Johnson, Inc.

MD Johnson, Inc. is a highly specialized mergers and acquisitions firm that solely concentrates on the acquisition and divestiture of automobile dealerships and dealership platforms. The company maintains offices in Seattle, Washington and West Palm Beach, Florida.

The company receives success fees only upon successfully executing transactions and is compensated by either the company's buyer or seller client, never both. The company does not act in capacity as a dual consultant.

The company authors a detailed memorandum of sale and executes a list of approximately 45 tasks, which includes the management of the entire transaction from the exit planning stage through 24 months past closing.

The company has a 100% closing ratio on its engagements.

The company has represented Asbury Auto Group and sold numerous dealerships to AutoNation, including Lexus of Palm Beach, Schooley Cadillac and Borton Volvo Volkswagen.

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