ASPEN PUBLISHERS

GLAZER AND FITZGIBBON ON LEGAL OPINIONS

Drafting, Interpreting and Supporting Closing Opinions in Business Transactions

Donald W. Glazer Scott FitzGibbon Steven O. Weise

Third Edition



GLAZER AND FITZGIBBON ON LEGAL OPINIONS

Third Edition

ASPEN PUBLISHERS

GLAZER AND FITZGIBBON ON LEGAL OPINIONS

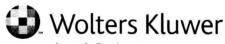
Drafting, Interpreting and Supporting Closing Opinions in Business Transactions

Third Edition

Donald W. Glazer Boston

SCOTT FITZGIBBON Boston College Law School

> STEVEN O. WEISE Heller Ehrman LLP Los Angeles



This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other professional advice is required, the services of a competent professional person should be sought.

— From a *Declaration of Principles* jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations

© 2008 Aspen Publishers. All Rights Reserved.

No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, or any information storage and retrieval system, without permission in writing from the publisher. Requests for permission to reproduce content should be directed to the Aspen Publishers website at *www.aspenpublishers.com*, or a letter of intent should be faxed to the permissions department at 212-771-0803.

Printed in the United States of America

1234567890

Library of Congress Cataloging-in-Publication Data

Glazer, Donald W.

Glazer and FitzGibbon on legal opinions: drafting, interpreting, and supporting closing opinions in business transactions / Donald W. Glazer, Scott FitzGibbon, Steven O. Weise. — 3rd ed.

p. cm.

Includes bibliographical references and index.

ISBN 978-0-7355-6065-9 (alk. paper)

1. Sale of business enterprises — Law and legislation — United

States. 2. Business enterprises — Law and legislation — United

States. 3. Legal opinions — United States. I. FitzGibbon, Scott Thomas.

II. Weise, Steven O. III. Title.

KF1355.F57 2008 346.73'065 — dc22

2008019344

About Wolters Kluwer Law & Business

Wolters Kluwer Law & Business is a leading provider of research information and workflow solutions in key specialty areas. The strengths of the individual brands of Aspen Publishers, CCH, Kluwer Law International and Loislaw are aligned within Wolters Kluwer Law & Business to provide comprehensive, in-depth solutions and expert-authored content for the legal, professional and education markets.

CCH was founded in 1913 and has served more than four generations of business professionals and their clients. The CCH products in the Wolters Kluwer Law & Business group are highly regarded electronic and print resources for legal, securities, antitrust and trade regulation, government contracting, banking, pension, payroll, employment and labor, and healthcare reimbursement and compliance professionals.

Aspen Publishers is a leading information provider for attorneys, business professionals and law students. Written by preeminent authorities, Aspen products offer analytical and practical information in a range of specialty practice areas from securities law and intellectual property to mergers and acquisitions and pension/benefits. Aspen's trusted legal education resources provide professors and students with high-quality, up-to-date and effective resources for successful instruction and study in all areas of the law.

Kluwer Law International supplies the global business community with comprehensive English-language international legal information. Legal practitioners, corporate counsel and business executives around the world rely on the Kluwer Law International journals, loose-leafs, books and electronic products for authoritative information in many areas of international legal practice.

Loislaw is a premier provider of digitized legal content to small law firm practitioners of various specializations. Loislaw provides attorneys with the ability to quickly and efficiently find the necessary legal information they need, when and where they need it, by facilitating access to primary law as well as state-specific law, records, forms and treatises.

Wolters Kluwer Law & Business, a unit of Wolters Kluwer, is headquartered in New York and Riverwoods, Illinois. Wolters Kluwer is a leading multinational publisher and information services company.

ASPEN PUBLISHERS SUBSCRIPTION NOTICE

This Aspen Publishers product is updated on a periodic basis with supplements to reflect important changes in the subject matter. If you purchased this product directly from Aspen Publishers, we have already recorded your subscription for the update service.

If, however, you purchased this product from a bookstore and wish to receive future updates and revised or related volumes billed separately with a 30-day examination review, please contact our Customer Service Department at 1-800-234-1660 or send your name, company name (if applicable), address, and the title of the product to:

ASPEN PUBLISHERS 7201 McKinney Circle Frederick, MD 21704

Important Aspen Publishers Contact Information

- To order any Aspen Publishers title, go to www.aspenpublishers.com or call 1-800-638-8437.
- To reinstate your manual update service, call 1-800-638-8437.
- To contact Customer Care, e-mail *customer.care@ aspenpublishers.com*, call 1-800-234-1660, fax 1-800-901-9075, or mail correspondence to Order Department, Aspen Publishers, PO Box 990, Frederick, MD 21705.
- To review your account history or pay an invoice online, visit www.aspenpublishers.com/payinvoices.



To my mom and dad, Ethel and Julius Glazer. In my unqualified opinion, they are the greatest.

DONALD W. GLAZER

To my mother and father, Miriam and William FitzGibbon, to my wife, Kwan Kew, and to our children, Timothy, Cara and Charles.

SCOTT FITZGIBBON

ABOUT THE AUTHORS

DONALD W. GLAZER is advisory counsel to the Boston law firm of Goodwin Procter LLP and adviser to that firm's Legal Opinions Committee. He formerly was a partner at the Boston law firm of Ropes & Gray and a Lecturer on Law at Harvard Law School. Mr. Glazer is the author of numerous articles on legal opinions and besides this book is co-author of *Massachusetts Corporation Law and Practice*. He is co-chair of the TriBar Opinion Committee and past chair of the Committee on Legal Opinions of the American Bar Association's Business Law Section, currently serving as a member of the Council of that Section. Mr. Glazer is past chair of the Business Law Section of the Boston Bar Association and past co-chair of that Section's Legal Opinions Committee. Mr. Glazer has chaired and served as a participant in numerous programs on closing opinions and acted as an expert witness and consultant in many cases involving legal opinions.

Mr. Glazer served as co-reporter (with Mr. Weise, a co-author of this book) for the ABA Business Law Section's "Legal Opinion Principles." He also served as co-reporter for the TriBar Opinion Committee's 1998 report, "Third-Party Closing Opinions" and 2006 report, "Third-Party Closing Opinions: Limited Liability Companies" and as editor-in-chief of the TriBar Opinion Committee's 2004 Special Report on the Remedies Opinion. As a member of the Members Consultative Group for the American Law Institute's Restatement (Third) of the Law Governing Lawyers, Mr. Glazer was involved in the drafting of the portion of the Restatement dealing with closing opinions.

Mr. Glazer was graduated *summa cum laude* in 1966 from Dartmouth College, where he was a Senior Fellow and Rufus Choate Scholar, and *magna cum laude* in 1969 from Harvard Law School, where he was an editor of the *Harvard Law Review*. He received an L.L.M. in 1970 from the University of Pennsylvania Law School, where he was a fellow at the Center for the Study of Financial Institutions.

SCOTT FITZGIBBON is a professor at Boston College Law School, a member of the American Law Institute, and a member of the International Society of Family Law.

Professor FitzGibbon practiced corporate and securities law for five years at the law firm of Ropes & Gray in Boston and is the author of several articles on related subjects. His most recent publication in this area is an article entitled "True Human Community: Business Company Structure and Catholic Moral Theology" (St. Louis University Law Journal, 2001).

Professor FitzGibbon has a major interest in jurisprudence and legal philosophy, with special attention to friendship and marriage in the Aristotelean tradition. He is the author of "Marriage and the Good of Obligation" (American Journal of Jurisprudence, 2002), "Marriage and the Ethics of Office" (Notre Dame Iournal of Law, Ethics, and Public Policy, 2004), "A City Without Duty, Fault or Shame," in Reconceiving the Family: Cri-TICAL REFLECTIONS ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION (Robin Fretwell Wilson, ed., Cambridge University Press, 2006), and "The Seduction of Lydia Bennet: Toward a General Theory of Society, Marriage and the Family" (Ave Maria Law Review, 2006). His recent talks include "The 'Beautiful City' of Plato's Republic: How the Legal and Social Promotion of Divorce and Same-Sex Marriage Contravenes the Philosophy and Undermines the Projects of the Universal Declaration of Human Rights" (Geneva, Switzerland, August, 2004); "Divorce and the Decline of Obligation: Towards a Recovery of the Philosophy of Marital Fidelity" (Beijing, China, July, 2004); "Procreative Justice and the Recognition of Marriage" (Provo, Utah, September, 2006); and "Marriage Law: Selected Topics" (Padua, Italy, May, 2007).

Professor FitzGibbon is a graduate of Harvard Law School where he was an Articles Officer of the Harvard Law Review, and of Oxford University (B.C.L.), where he studied legal philosophy.

About the Authors

STEVEN O. WEISE is a shareholder in the Los Angeles office of Heller Ehrman LLP. Mr. Weise is past chair of the Business Law Section of the American Bar Association and past chair of that Section's Committee on Legal Opinions. He was reporter for the Revised ABA Guidelines for the Preparation of Closing Opinions and, with Mr. Glazer, was co-reporter for the ABA Legal Opinion Principles. He also is a member of the TriBar Opinion Committee and was reporter for that Committee's Report on UCC Security Interest Opinions.

Mr. Weise practices in all areas of commercial law with an emphasis on financings, including structured financings. He is a member of the Permanent Editorial Board for the Uniform Commercial Code and was the American Bar Association's Advisor to the Uniform Commercial Code Article 9 Drafting Committee. He is the American Bar Association's Representative to the UN Commission on International Trade Law's Working Group on Security Interests and is the reporter for National Conference of Commissioners on Uniform State Laws — American Law Institute Drafting Committee to Harmonize North American Law with Regard to the Assignment of Receivables in International Trade Convention.

Mr. Weise is the former chair of the Executive Committee of the Business Law Section of the California State Bar and is the past chair of its Committee on the Uniform Commercial Code. He is the author of extensive Annual Updates on Commercial Law published by the American Bar Association and the State Bar of California. He also publishes articles on personal property secured transactions in *The Business Lawyer* and lectures widely on commercial law topics and legal opinion letters.

Mr. Weise was graduated with Departmental Honors in 1971 from Yale University and in 1974 from University of California School of Law (Boalt Hall).

SUMMARY OF CONTENTS

CHAPTER ONE	Introduction	1
CHAPTER TWO	The Opinion Framework	55
CHAPTER THREE	Unqualified, Qualified and	
	Reasoned Opinions	103
CHAPTER FOUR	Establishing the Factual Basis	
	for the Opinion	115
CHAPTER FIVE	Responsibility of Principal	
	Counsel for Opinions of	
	Other Counsel	173
CHAPTER SIX	Opinions on Company's Status	
	as a Corporation:	
	Formation, Existence	
	and Good Standing	191
CHAPTER SEVEN	Opinions on Qualification to Do	
	Business and Good Standing	
	in Jurisdictions Other Than	
	the State of Incorporation	221
CHAPTER EIGHT	Opinions on Corporate Power	233
CHAPTER NINE	The Enforceability Opinion	249
CHAPTER TEN	Opinion That Stock Is Duly	
	Authorized, Validly Issued,	
	Fully Paid and Nonassessable	407
CHAPTER ELEVEN	Opinions on Secondary Sales	
	of Stock	479
CHAPTER TWELVE	Opinions on Security Interests	
	in Personal Property	493
CHAPTER THIRTEEN	No Violation of Law Opinions	533
CHAPTER FOURTEEN	Opinions on Compliance with	
	Court Orders	555

Summary of Contents

CHAPTER FIFTEEN	Opinions on Governmental	
	Approvals and Filings	565
CHAPTER SIXTEEN	"No Breach or Default" and	
	Related Opinions	577
CHAPTER SEVENTEEN	No Litigation Opinions	613
CHAPTER EIGHTEEN	Negative Assurance	645
CHAPTER NINETEEN	Opinions on Limited Liability	
	Companies	671
Appendices One thro	ough Forty-Four App. 1:1 –	App. 44:1
Table of Cases		TC:1
Selected Bibliography		SB:1
Index		I:1

TABLE OF CONTENTS

CHAPTER ONE

	Introduction	1		
§1.1	What Is a Closing Opinion?	1		
§1.2	What a Closing Opinion Says	7		
§1.3	How a Closing Opinion Fits into the			
	Transaction: Its Function and Purpose	9		
	§1.3.1 Closing Opinion as Part of the			
	Recipient's Diligence	9		
	§1.3.2 Other Benefits of a Closing Opinion	13		
§1.4	Exegesis: How to Interpret a Closing Opinion	19		
§1.5	Deciding Which Opinions to Include: The			
	Opinion Hierarchy	26		
§1.6	Supporting a Closing Opinion; Liability	29		
	§1.6.1 Duty of Care; Role of Customary			
	Practice	29		
	§1.6.2 Opinions by Outside Law Firms			
	and Inside Counsel	36		
	§1.6.3 Liability	39		
§1.7	Ethical Considerations			
§1.8	Good Opinion Practice: Timeliness, Relevance,			
	Golden Rule; Duty to Avoid Misleading			
	Opinion Recipient	50		
	CHAPTER TWO			
	The Opinion Framework	55		
§2.1	Introduction	56		
1000 1000				

 $\mathbf{x}\mathbf{v}$

Table of Contents

$\S 2.2$	Date		58	
	§2.2.1	Effect of the Date; Why It Is Usually		
		the Closing Date	58	
	$\S 2.2.2$	Steps Lawyers Take to Ensure That		
		a Closing Opinion Is Correct as		
		of Its Date	61	
§2.3	Address	sees	63	
	§2.3.1	To Whom Should a Closing Opinion		
		Be Addressed?	63	
	§2.3.2	Liability to Addressees and Others	67	
$\S 2.4$	Why a	Closing Opinion Is Being Delivered		
§2.5		nces to Counsel and Its Participation in		
		ction; Disclosure of Counsel's Financial		
	Interest	t in Client	73	
	$\S 2.5.1$	Description of Counsel's		
		Relationship with Client	73	
	$\S 2.5.2$	Identification as "General Counsel"		
		or "Special Counsel"	74	
	$\S 2.5.3$	Description of Counsel's		
		Participation in Transaction	76	
	$\S 2.5.4$	Client's Request that Counsel		
		Give the Opinion: "Bank		
		of Kuwait Language"	78	
	§2.5.5	Disclosure of Counsel's Financial		
		Interests In and Other Relationships		
		with Client	80	
$\S 2.6$		g Important Terms	86	
$\S 2.7$		ge Limitation	90	
	$\S 2.7.1$	Limiting Coverage to Law		
		of Stated Jurisdictions: What the		
		Coverage Limitation Says	90	
	$\S 2.7.2$	Effect of Coverage Limitation	93	
	$\S 2.7.3$	Coverage of Delaware Law	95	
	$\S 2.7.4$	Effect of Coverage Limitation		
		on "No Breach or Default" and "No		
		Litigation" Opinions	96	

xvi