Does the *Fortress* Decision Offer Any Lessons for Opinion Givers?

*By Norman M. Powell**

It has been forty years since Jim Fuld wrote his seminal article on legal opinion practice.[1] As we reflect on how customary opinion practice has developed, the recent *Fortress* decision[2] is an important reminder of the risks inherent in rendering third-party opinions. Counsel bringing suit alleging liability in the opinion context may have little familiarity with customary opinion practice. A trial judge may have a different understanding of the meaning and purpose of any opinion and the scope of an opinion giver's obligation to conduct a factual investigation of the transaction addressed by the opinion than do sophisticated opinion givers and recipients (and their counsel). In short, even as we who regularly give and receive opinions gather with greater frequency and form a more consistent and coherent statement of customary opinion practice, we would do well to remember that others, not in the room, may have very different understandings than we do.

The facts of the *Fortress* case are as follows. Dechert had been contacted by then-lawyer Marc Dreier to provide an opinion for the borrower in connection with a $50 million loan by Fortress Credit Corp. to companies controlled by Sheldon Solow (collectively, "Solow Realty").[3] Solow Realty was a Dreier client, and Dreier himself was a party (as guarantor) to the transaction.[4] Alas, Solow Realty knew nothing of the transaction—Dreier had falsified documents and forged signatures on Solow Realty's behalf,[5] and has since pled guilty to criminal fraud charges and been disbarred, and is currently serving a twenty-year prison term.[6] Fortress sought to recover the "loan" from Dechert.[7]

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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. Fortress Credit Corp. v. Dechert LLP, 934 N.Y.S.2d 119 (App. Div. 2011). This litigation began in the Supreme Court of the State of New York, New York County. The decision of that court by Judge Charles E. Ramos was entered on October 4, 2010, but was not reported. The docket number is 603819.

3. *Id.* at 121.

4. *Id.* at 122.

5. *Id.* at 121.

6. Edward J. Levin, Commentary, *Lessons from* Fortress v. Dechert, DAILY REC. (BALT.) (Jan. 16, 2012), http://thedailyrecord.com/2012/01/16/edward-j-levin-lessons-from-fortress-v-dechert/.

7. *Id.*

Fortress alleged fraud, legal malpractice, negligence, and negligent misrepresentation against Dechert.[8] The trial court denied Dechert's motion to dismiss, and Dechert appealed.[9] Late in 2011, the New York Supreme Court, Appellate Division, reversed.[10] In its unanimous decision, the Appellate Division summarily dismissed the fraud and legal malpractice claims, but considered at some length the claims of negligence and negligent misrepresentation.[11] In June 2012, the New York Court of Appeals denied leave for further appeal, concluding this litigation two-and-one-half years after it began.[12]

The Appellate Division of the court concluded that the allegation of recklessness did not sufficiently allege scienter, a necessary element of a cause of action for fraud.[13] The allegation of legal malpractice failed for want of an attorney-client relationship between Dechert and the opinion recipient—Fortress.[14] Though there was no contractual privity, the "near privity" between Dechert and Fortress was sufficient to support the claims of negligence and negligent misrepresentation.[15] But these claims, too, ultimately failed—the complaint did not allege that Dechert was informed that its obligations were to extend beyond a review of the documents specified in the opinion letter, nor that Dechert was to investigate and report on the bona fides of the transaction.[16] The Appellate Division noted that Dechert's legal opinion was limited by express assumptions as to the genuineness of signatures and the authenticity of the documents, and disclaimed the undertaking of any independent inquiry or investigation.[17] The opinion had also been reviewed by Fortress's counsel prior to its acceptance.[18]

It is fair to say the Appellate Division reached the conclusion that most, if not all, opinion practitioners believe to be the right one. In that sense, perhaps, the case offers no lessons (other than an unsettling reminder that ours is a litigious society). On the other hand, it took two years and an appeal to get there. The *Fortress* decision demonstrates that opinion recipients may assert claims that are contrary to, or enlarge, the purpose and terms of the opinion letter, or that are based on alleged oral communications made during negotiations of the opinion letter. In defending such claims in a lawsuit, the opinion giver will need to negate such assertions or prove the customary meaning of certain terms. Doing so may present issues of fact that would prevent the dismissal of the action by means of an early motion. The case suggests that opining counsel may want to de-

8. *Fortress*, 934 N.Y.S.2d at 121–22.
9. *Id.* at 121.
10. *Id.*
11. *Id.* at 121–22.
12. Fortress Credit Corp. v. Dechert LLP, 19 N.Y.3d 805 (2012) (mem.). Miller & Wrubel, P.C. handled Dechert's defense. The author gratefully acknowledges Joel M. Miller's collaboration on discussion papers from which this work is derived.
13. *Fortress*, 934 N.Y.S.2d at 121.
14. *Id.*
15. *Id.* at 122.
16. *Id.*
17. *Id.*
18. *Id.*

velop, and include in closing opinions, additional language that could increase the chance for dismissal by an early motion, thereby avoiding discovery and trial.

Chillingly, the trial court rejected the argument that Dechert was not negligent based on the opinion's explicit assumptions. As the court said during oral argument on Dechert's motion to dismiss:

> [Y]ou're reducing an opinion letter to a worthless document.
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> . . . .
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> . . . If the opinion letter is supposed to mean anything, there must be some validity to the transaction, that yes, this is a transaction between my client and the lender.
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> . . . .
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> But they [the loan documents] weren't enforceable. They weren't enforceable because they were total frauds.[19]

Thus the trial court ignored, or proceeded with an unsettling (mis)understanding of, Dechert's assumption of the genuineness of signatures and its disclaimer of the conduct of any investigation.

Should they wish to anticipate and better facilitate early dismissal of such claims, opinion givers might consider adding certain specific statements to opinion letters. First, inclusion of an "integration" clause, similar to that found in most commercial contracts, might avoid a court's looking beyond the "four corners" of the opinion letter. Of course, in including any such statement, care must be taken so as not to preclude resort to customary practice. Second, to avoid the need for proof of what constitutes customary practice, an opinion letter also might more explicitly specify what is (and, more to the point, what is not) meant by "duly executed" and "valid, binding and enforceable," thereby eliminating the need for testimony as to their meanings in customary practice. Third, in situations where the opinion giver has been engaged by referring counsel and has not had direct contact with the borrower, an opinion letter might explicitly indicate that such is the case.

Discussion at recent meetings of the Working Group on Legal Opinions revealed a diversity of views. Some believe that no re-visitation of opinion language is necessary or warranted. Some caution that greater specificity in one part of an opinion letter carries the risk of stricter, less fluid interpretation of other parts of the opinion letter where there is less specificity. Still others believe that modest revisions to aid opinion givers in defending claims may be advisable, but question just what to revise and how.

Given the *Fortress* decision and other claims that have been asserted in connection with third-party opinions, these issues deserve further consideration by opinion practitioners.

19. Transcript of Oral Argument at 17–18, Fortress Credit Corp. v. Dechert LLP, No. 603819/09 (N.Y. Sup. Ct. June 10, 2010), *available at* http://www.nylj.com/nylawyer/adgifs/decisions/061610dechert.pdf.