

**SPECIAL REPORT**  
**OF THE TRIBAR OPINION COMMITTEE**

**U.C.C. SECURITY**  
**INTEREST OPINIONS—**  
**REVISED ARTICLE 9**



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# Special Report of The TriBar Opinion Committee: U.C.C. Security Interest Opinions—Revised Article 9

By The TriBar Opinion Committee\*

## I. INTRODUCTION

At the closing for a personal property secured transaction counsel for the borrower often delivers an opinion<sup>1</sup> to the lender concerning the security interests in the borrower's personal property the borrower has granted to the lender. The focus of this opinion is the Uniform Commercial Code (the "U.C.C."), particularly Article 9. In 1993 the Committee issued a *Report* (the "1993 TriBar U.C.C. Report")<sup>2</sup> on this subject. Since then substantial revisions to Article 9<sup>3</sup> have been adopted<sup>4</sup>

\*The TriBar Opinion Committee (the "Committee" or "TriBar") includes members of the following organizations functioning as a single Committee: (i) Special Committee on Legal Opinions in Commercial Transactions, New York County Lawyers' Association; (ii) Corporation Law Committee, The Association of the Bar of the City of New York; and (iii) Special Committee on Legal Opinions of the Business Law Section, New York State Bar Association. Members of the Allegheny County (Pa.), Atlanta, Boston, Chicago, District of Columbia and Ontario Bar Associations and of the state bars of California, Delaware, North Carolina, and Texas are also members of the Committee. The members of the Committee and the Reporter and Editorial Group for this *Report* are listed in APPENDIX D. In addition to members of this Committee, drafts of this *Report* were provided to a small number of other lawyers with relevant expertise. The Reporter and the members of the Editorial Group express their sincere appreciation to those who provided comments on those drafts.

This *Report* has not been approved by the governing body or membership of any of the bar associations whose committees or members were involved in its preparation. Accordingly, the views expressed are solely those of TriBar. This *Report* states the consensus of the Committee. It does not, however, necessarily reflect the views of individual members or their firms, organizations, or associations on any particular point.

1. The opinion is normally one of several opinions included in a "closing opinion," that is an opinion letter given at the closing of a financial transaction to parties other than the opinion giver's client. See generally TriBar Opinion Committee, *Third-Party Closing Opinions*, 53 BUS. LAW. 591 (1998) [hereinafter the "1998 TriBar Report"]. Unless otherwise specified, terms used in this *Report* have the meanings given to them in the 1998 TriBar Report. See generally 1998 TriBar Report, art. 1., at 595. The 1998 TriBar Report has also been referred to as "TriBar II" because it supersedes the Committee's first report issued in 1979, as well as some of the Committee's other reports. *Id.* at 592. This *Report*, like the 1998 TriBar Report, is substantially based on customary practice. *Id.* § 1.4, at 600–03.

2. *Special Report of the TriBar Opinion Committee: U.C.C. Security Interest Opinions*, 49 BUS. LAW. 359 (1993) [hereinafter 1993 Security Interest Report].

3. Unless otherwise indicated, references to the U.C.C. in this *Report* are to the 2002 Official Text of the U.C.C. (which includes revised Article 9). All emphasis is added, unless otherwise indicated.

4. In addition, Article 8 of the U.C.C. has been substantially revised since the 1993 TriBar U.C.C. Report. The changes to Article 8: (i) moved most provisions concerning security interests in property subject to Article 8 from Article 8 to Article 9, and (ii) changed significantly the substance of those rules.

in each of the fifty states,<sup>5</sup> the District of Columbia, and the United States Virgin Islands. This *Report* discusses closing opinions under revised Article 9<sup>6</sup> and replaces the 1993 *TriBar U.C.C. Report*. A summary of this *Report* is included as APPENDIX C.

While this *Report* provides a detailed discussion of Article 9 and opinions on security interests created under Article 9, opinion preparers who do not regularly work with Article 9 should consider whether to involve a lawyer familiar with Article 9 in the preparation of a U.C.C. security interest opinion.

Revised Article 9 has a broader scope than former Article 9, covering (i) sales<sup>7</sup> of accounts (which are defined more broadly under revised Article 9),<sup>8</sup> (ii) for the first time, sales of payment intangibles and promissory notes, and (iii) for the first time, security interests in deposit accounts. Revised Article 9 also significantly simplifies the process for filing a financing statement to perfect a security interest and contains numerous clarifications and other changes.

Opinions on security interests address the attachment (or creation<sup>9</sup>), the perfection, and on rare occasions the priority, of security interests in personal property. A security interest “attaches” (or is “created”) when a debtor and a secured party satisfy the requirements of the U.C.C. for providing in favor of the secured

Revised Article 8 is in effect in all states, the District of Columbia, Puerto Rico, and the United States Virgin Islands. The changes to Article 8 are reflected in portions of this *Report*. See TriBar Opinion Committee, *An Addendum for Protected Purchasers—U.C.C. Security Interest Opinions*, 54 BUS. LAW. 1261 (1999). See *infra* § 8. Revisions to Article 1 of the U.C.C. were completed in 2001. As of July 25, 2003 the revised version of Article 1 has been adopted in Texas, the United States Virgin Islands, and Virginia.

5. Revised Article 9 broadly defines “state” to mean “a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.” U.C.C. § 9-102(a)(76). For convenience, the balance of this *Report* will use the word “state” as defined in Article 9 even though as of the date of this *Report* revised Article 9 has not yet been adopted in Puerto Rico or any of the territories or insular possessions included in the definition of “state.”

6. State variations may affect the treatment of certain issues discussed in this *Report*. State variations are discussed in P. Christophorou et. al, *Under the Surface of Revised Article 9: Selected Variations in State Enactments from the Official Text of Revised Article 9*, 34 UCC L.J. 331 (Spring 2002)[hereinafter *Under the Surface*].

7. A “security interest” includes the interest of a buyer of accounts, chattel paper, payment intangibles, and promissory notes. U.C.C. §§ 1-201(37), 1-201(b)(37) (revised). U.C.C. § 9-109(d)(4)–(7) excludes some sales of these types of property from Article 9. Revised Article 9 classifies as a “debtor” a person who has an interest (other than a security interest) in the collateral, whether or not that person is an obligor. U.C.C. § 9-102(a)(28). A seller of accounts, chattel paper, payment intangibles, and promissory notes is also a “debtor.” *Id.* § 9-102(a)(28). U.C.C. § 9-102(a)(72) defines who is a “secured party.” See *infra* note 128. Article 9 clarifies that when a security interest has been granted to an agent for the benefit of others, the agent is the “secured party.” *Id.* § 9-102(a)(72)(E). In addition, a buyer of accounts, chattel paper, payment intangibles, and promissory notes is a secured party. *Id.* § 9-102(a)(72)(D). If an obligation is secured by personal property, a person who is liable on the obligation, but is not the primary obligor, is a “secondary obligor” as to the obligation. See *id.* § 9-102(a)(71). If that person provides any collateral to secure its obligation, that person is a “debtor” as to that collateral. See *id.* § 9-102(a)(28), (59), cmt. 2.

8. Article 9 has always covered the sale of accounts. U.C.C. § 9-102(1)(b) (pre-revision). Revised Article 9 has a greatly expanded definition of accounts and as a result revised Article 9 covers a broader range of sales of payment rights. See U.C.C. § 9-102(a)(2). Article 9 continues to cover the sale of chattel paper. Compare U.C.C. § 9-102(1)(b) (pre-revision), with U.C.C. § 9-109(a)(3) (revised).

9. See *infra* § 3.

party a consensual<sup>10</sup> interest in personal property that secures payment or performance of an obligation.<sup>11</sup> “Perfection” affords the secured party statutory protections against the claims of most third parties<sup>12</sup> to the collateral. Usually, perfection results from actions taken (e.g., filing a financing statement in the proper office or taking possession of the collateral) that in legal effect give notice to third parties of the security interest of the secured party.<sup>13</sup> “Priority” is the ranking of the secured party’s security interest in the collateral against competing claims to the same collateral.<sup>14</sup>

This Report addresses closing opinions on security interests covered by Article 9 of the U.C.C.<sup>15</sup> It also touches on the relationship of the U.C.C. to other law. The primary objective of this Report is to provide guidance on the customary<sup>16</sup>

10. Revised Article 9 does apply to one kind of non-consensual lien, referred to as an “agricultural lien.” U.C.C. §§ 9-102(a)(5), 9-109(a)(2). Agricultural liens only arise in connection with “farm products” and are generally limited to goods, such as crops, owned by a person engaged in farming operations. See *id.* § 9-102(a)(34). This Report does not specifically address those liens.

11. A security interest also attaches in connection with the sale of most kinds of payment rights. See *supra* note 7.

12. Third parties may include other creditors (secured and unsecured), holders of judgment, tax, statutory, and other non-consensual liens, transferees of the collateral, and the debtor’s trustee in bankruptcy. See U.C.C. § 9-317.

13. In some circumstances perfection is by control, which (depending on the method of control used) may not provide notice to third parties of the secured party’s security interest in the collateral. U.C.C. § 9-314. In other circumstances perfection of a security interest is “automatic” or temporary and no notice is given to third parties. *Id.* §§ 9-308(d)–(g), 9-309, 9-312(e)–(g), and 9-315. See *infra* notes 93, 111–23 and accompanying text.

14. This Report addresses in a limited way the effect of the transition rules found in Part 7 of revised Article 9. See *infra* § 9. Part 7 of revised Article 9, in part, addresses (i) the effect of revised Article 9 on transactions closed under former Article 9 (or other applicable law) prior to the effective date of revised Article 9, and (ii) the effect of pre-effective date transactions on transactions closed after revised Article 9 became effective. The transition rules may have a limited effect on a security interest opinion concerning a new transaction entered into under revised Article 9.

15. Much has been written on security interest opinions. For a discussion of the effect of revised Article 9 on security interest opinions, see D. GLAZER, S. FITZGIBBON & S. WEISE, GLAZER AND FITZGIBBON ON LEGAL OPINIONS: DRAFTING, INTERPRETING AND SUPPORTING CLOSING OPINIONS IN BUSINESS TRANSACTIONS §§ 12.1–12.10 (2d ed. 2001 & Supp. 2002).

16. See 1998 TriBar Report, *supra* note 1, § 1.4, at 600–03. The *Legal Opinion Principles* (the “Principles”) of the Committee on Legal Opinions of the American Bar Association’s Section of Business Law also emphasize the role of customary practice in the giving of closing opinions. Committee on Legal Opinions, *Legal Opinion Principles*, 53 BUS. LAW. 831 (1998) [hereinafter *Principles*]. Section I.B. of the *Principles* states:

[T]he scope and the nature of the work counsel is expected to perform are based (whether or not so stated) on the customary practice of lawyers who regularly give, and lawyers who regularly advise opinion recipients regarding, opinions of the kind involved.

*Id.* at 832.

The *Guidelines for the Preparation of Closing Opinions* (the “Guidelines”) adopted by the American Bar Association’s Section of Business Law, 57 BUS. LAW. 875 (2002), state in § 1.7:

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.

*Id.* at 876. [hereinafter *Guidelines*]; see also 1998 TriBar Report, *supra* note 1, at 601 n.24; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51(2) cmt. e, § 95 cmt. B (2000).

meaning and scope of U.C.C. security interest opinions,<sup>17</sup> and on the qualifications that are customarily understood to apply.<sup>18</sup> An *Illustrative Security Interest Opinion* is attached to this *Report* as APPENDIX A.

The main body of this *Report* discusses U.C.C. security interest opinions when the only law governing attachment (or creation), perfection, or, when addressed, priority of the security interest is the law covered generally by the opinion letter. APPENDIX B discusses opinions on perfection when the law of more than one state might be applicable.

Preparers of U.C.C. security interest opinions are subject to the same obligations they have in preparing any closing opinion: (i) not to give an opinion if they believe the opinion will, in the circumstance, mislead<sup>19</sup> the opinion

17. Practices under revised Article 9 are still developing. The Committee will monitor practice under revised Article 9 and consider supplements to this *Report* as appropriate.

18. As in the case of all closing opinions, U.C.C. security interest opinions are subject not only to applicable legal standards, but to relevant ethical standards as well. See, e.g., N.Y. Jud. Law App. § 7-102(a)(5), (7); MODEL RULES OF PROF. CONDUCT R. 1.2(d), 2.3, 4.1, 8.4(c) (2003); *Guidelines*, *supra* note 16, § 2.3; GLAZER & FITZGIBBON, *supra* note 15, § 1.7. See generally RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 98.

19. The 1998 *TriBar Report* describes the obligation as follows:

Prior to the delivery of the opinion letter, the opinion preparers must ask themselves whether they believe that the opinions they intend to render will, under the circumstances, be misleading to the recipient. An opinion the opinion preparers believe to be misleading should not be delivered until *disclosures* are made to cure the problem . . . .

When considering if an opinion to be given will mislead the opinion recipient, opinion preparers must think not only about the opinion itself but also about areas excluded from the opinion. Ordinarily, a non-standard exception indicates to the opinion recipient an area of concern. A non-standard exception is thus likely to be informative, rather than misleading. A stated assumption (other than one of general application—see Section 2.3(a)) may also alert the opinion recipient to a problem area.

Common exceptions may mask problems that are different and more serious than the matters they are commonly understood to exclude . . . .

Exclusions from opinions (whether understood without being stated, e.g., insolvency law and local law, or stated in the opinion letter) relate to areas that are left by custom to the opinion recipient and its counsel. The opinion recipient should not assume that the opinion giver does not have significant information about these excluded areas. However, the opinion giver is not expected to disclose any such information to the opinion recipient. Only if the opinion preparers determine that the opinion will, under the circumstances, mislead the opinion recipient will the need for disclosure (or withholding the opinion) arise.

In determining whether an opinion will mislead, the opinion preparers need only consider what the opinion letter (i) states and (ii) omits to state that is relevant to what is stated. Thus, the omission of information not relevant to the opinion given (e.g., information relevant to litigation if no opinion is rendered with respect to the absence of litigation) does not mislead. The question the opinion preparers must consider is whether under the circumstances the opinion will cause the opinion recipient to miscalculate the specific opinion given.

1998 *TriBar Report*, *supra* note 1, § 1.4(d), at 602–03 (footnotes omitted). When considering the relevant circumstances, the opinion preparers may assume (without stating) that the opinion recipient (alone or with its counsel) is familiar with transactions of the type covered by the opinion. See *supra* note 16; see also *Guidelines*, *supra* note 16, § 1.5, stating, “An opinion giver should not render an opinion that the opinion giver recognizes will mislead the recipient with regard to the matters addressed by the opinions given.” (footnote omitted).

recipient, and (ii) not to rely on unreliable<sup>20</sup> information.<sup>21</sup>

## 2. PRELIMINARY MATTERS

### 2.1 BEGIN BY DETERMINING THE SCOPE OF THE SECURITY INTEREST OPINION

#### (a) Discussion between counsel

An initial and critical question in preparing a security interest opinion is its scope. What collateral will the opinion cover? What law will the opinion address? The opinion preparers<sup>22</sup> and the opinion recipient's counsel<sup>23</sup> should discuss these questions early in the opinion process.<sup>24</sup> The starting point for this discussion is the scope of the security interest opinion requested by the opinion recipient. In formulating a request, the opinion recipient should consider carefully the nature of the debtor's business, the nature of the collateral, and the size of the transaction.<sup>25</sup>

#### (b) Effect of limiting the security interest opinion to the U.C.C.

Lawyers often limit security interest opinions to the U.C.C. (or to Article 9 of the U.C.C.) of a specific jurisdiction. This *Report* refers to this limitation as a

20. The 1998 *TriBar Report* indicates that an opinion giver may not rely on "unreliable" information:

The opinion preparers may rely on information provided by an appropriate source . . . unless reliance is unreasonable under the circumstances in which the opinion is rendered or the information is known to the opinion preparers to be false (together "unreliable information"). Some information is false on its face . . . . Other information is so improbable . . . that it would be unreasonable for the opinion preparers to rely on it without further inquiry. Similarly, it would be unreasonable to rely on information that is inconsistent with a representation given in the same transaction or information known to the opinion preparers. If the opinion preparers identify information as "unreliable," they must find other information to establish the facts. Alternatively, they may include an express assumption regarding those facts in order to give the opinion. . . . In some cases disclosure may be required . . . .

1998 *TriBar Report*, *supra* note 1, § 2.1.4, at 610 (footnotes omitted).

21. The 1998 *TriBar Report* also discusses the possibility that giving an opinion may give rise to liability under other laws, even if the opinion is not "misleading":

OPINION GIVERS SHOULD CONSIDER WHETHER APART FROM THE OPINION LETTER THEY ARE EXPOSING THEMSELVES TO LIABILITY AS A RESULT OF THEIR INVOLVEMENT IN THE TRANSACTION UNDER THE ANTI-FRAUD RULES OF THE FEDERAL SECURITIES LAWS OR WHETHER CIVIL OR CRIMINAL FRAUD STANDARDS MAY BE APPLICABLE . . . .

1998 *TriBar Report*, *supra* note 1, § 1.4(d), at 603.

22. The "opinion giver" is the lawyer or law firm in whose name an opinion is given. 1998 *TriBar Report*, *supra* note 1, § 1.9(e), at 606. The "opinion preparers" are the lawyers who prepare the opinion letter for the opinion giver. *Id.* § 1.8, at 605.

23. This *Report* assumes that the recipient of a security interest opinion will be advised by its own counsel, who is familiar with opinions of this type. *Guidelines*, *supra* note 16, § 1.7.

24. *Guidelines*, *supra* note 16, § 2.1.

25. *Id.* § 1.2; RESTATEMENT (SECOND) OF THE LAW GOVERNING LAWYERS § 95, cmt. b.

“U.C.C. Scope Limitation.”<sup>26</sup> U.C.C. Scope Limitations are common and as a general rule acceptable to opinion recipients. If, however, the opinion preparers believe that limiting an opinion to the U.C.C. will be misleading to the opinion recipient, they should consider making appropriate disclosures to the recipient or its counsel concerning the significance of the limitation.<sup>27</sup>

The U.C.C. Scope Limitation excludes from the coverage of the opinion other laws of the specified state and laws of other jurisdictions (including federal law) even if they have an effect on the creation, attachment, perfection, or priority (if covered) of a security interest. An opinion limited to the U.C.C. of a particular state customarily is understood to be subject to each of the following limitations:

- (i) *The opinion covers only security interests created under Article 9 of the U.C.C.* The only law the opinion covers is Article 9<sup>28</sup> of the U.C.C.<sup>29</sup> of the specified state, even when the character of the collateral<sup>30</sup> or the identity of the debtor<sup>31</sup> indicate that non-U.C.C. laws may be relevant.<sup>32</sup>

26. The U.C.C. Scope Limitation applies to the U.C.C. of each jurisdiction whose U.C.C. is stated to be covered. For example, the U.C.C. of one state may apply to the attachment of the security interest, while the U.C.C. of a different state may apply to the perfection of the security interest. See *infra* § 3.2; see also *infra* APPENDIX B (discussing choice of law).

27. See *supra* note 19. For example, the opinion preparers may recognize that the opinion recipient and its counsel are unaware that substantially all the collateral is likely to be subject to the requirements for perfection of non-U.C.C. certificate-of-title laws. See U.C.C. § 9-303 cmt 3; see also *infra* note 33 and accompanying text.

28. Limiting a security interest opinion to Article 9 of the U.C.C. also eliminates consideration of the security interests created by operation of law under other articles of the U.C.C.: Article 2 (U.C.C. §§ 2-401, 2-505, 2-711(3)), 2A (U.C.C. § 2A-508(5)), Article 4 (U.C.C. § 4-210), and Article 5 (U.C.C. § 5-118).

29. The opinion does address other Articles of the U.C.C. to the extent Article 9 looks to those Articles for definitions, procedures, or rules. For example, an opinion containing a U.C.C. Scope Limitation that addresses the perfection of a security interest in securities might involve the definitions of “control” or “delivery” found in Article 8. See U.C.C. §§ 1-201(14), 8-102(a)(15), 8-106, 8-301, 9-106, 9-313, and 9-314; U.C.C. § 1-201(a)(14) (revised). Similarly, an opinion containing a U.C.C. Scope Limitation that addresses the rights of a holder of a security interest in securities might involve the definition of “protected purchaser” in Article 8 and the substantive rights of a protected purchaser under Article 8. U.C.C. §§ 8-303, 9-331(b); see also *infra* § 8. Under former Article 8 security interests in securities were created and perfected under that Article. Under revised Articles 8 and 9 those security interests are created and perfected under Article 9, with some references to Article 8. See *infra* § 8.

30. An FCC broadcast license and an account receivable due from the U. S. government are two examples of collateral in which the enforcement of the security interest is subject to some extent to other (non-U.C.C.) laws. See, e.g., Communications Act of 1934, 47 U.S.C. § 310 (2000) (FCC broadcast license may not be held by a foreign government); *New Bank of New England, N.A. v. Tak Communications, Inc. (In re Tak Communications)*, 138 B.R. 568, 17 U.C.C. Rep. Serv. 2d (Callaghan) 218 (Bankr. W. D. Wis. 1992), *aff’d*, 985 F.2d 916, 19 U.C.C. Rep. Serv. 2d (Callaghan) 869 (7th Cir. 1993) (holding enforcement of security interest in broadcasting license subject to limitations); *MLQ Investors L.P. v. Pacific Quadracasting, Inc.*, 146 F.3d 746 (9th Cir. 1998) (holding security interest in FCC license may be created and perfected under the U.C.C.; enforcement subject to FCC review); see also Assignment of Claims Act of 1940, 41 U.S.C. § 15 (2000); 31 U.S.C. § 3727 (2000) (security interests in receivables subject to Assignment of Claims Act need not be recognized by the federal government in certain circumstances when the government is an account debtor).

31. For example, a security interest granted by an investment company or a public utility holding company may be void if the debtor has not complied with the Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 to 80a-64, or the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79 to 79z-6.

32. Article 9 sometimes expressly defers to the attachment, perfection, and priority rules of other

- (ii) *The opinion covers only U.C.C. collateral or transactions.* Under Article 9 some types of collateral and some types of transactions are not subject to some or all of the rules of Article 9.<sup>33</sup> Security interest opinions limited to the U.C.C. of the specified state cover only that portion of the collateral or transaction that is subject to Article 9 of the U.C.C. in the specified state. Thus, the opinion does not cover collateral or transactions to the extent they are excluded from the scope of Article 9 by U.C.C. section 9-109(c) and (d).
- (iii) *The opinion covers only U.C.C. perfection methods.* The opinion does not cover collateral or transactions to the extent a security interest in the collateral may be perfected under non-U.C.C. law.<sup>34</sup>

### (c) Drafting U.C.C. Scope Limitations

Opinion givers express the U.C.C. Scope Limitation in various ways.<sup>35</sup> The 1993 Report contained a detailed version<sup>36</sup> of the U.C.C. Scope Limitation. As a matter

law as well as the effect of other law on a transaction subject to Article 9. *See, e.g.*, U.C.C. §§ 9-109(c), 9-201(b), (d), 9-311, 9-333. Although the U.C.C. expressly refers to these other laws, they are excluded from the coverage of the opinion by the U.C.C. Scope Limitation.

33. *See generally* U.C.C. §9-109(c), (d). Among the categories of collateral or transactions partially or generally excluded from Article 9 are: (i) collateral to the extent subject to the preemptive effect of a federal statute (such as the Ship Mortgage Act, 46 U.S.C. §§ 31301–31343); (ii) landlords' liens; (iii) collateral subject to liens created by statute or other rule of law in favor of persons providing services or materials except as provided under U.C.C. section 9-333 with respect to priority of those liens; (iv) claims for compensation of an employee; (v) collateral owned by a governmental entity to the extent the security interest granted by the governmental entity is expressly governed by another statute; (vi) claims under and interests in insurance policies (other than as proceeds of other collateral and certain assignments of health-care-insurance receivables); (vii) rights represented by a judgment; (viii) rights of set-off or recoupment (other than with respect to a depository bank and rights of account debtors); (ix) real estate (including a lease or rents thereunder) (other than fixtures); (x) tort claims (other than commercial tort claims and tort claims that are proceeds of other collateral); and (xi) in most cases, deposit accounts in a consumer transaction (other than as proceeds of other collateral). Variations in enactments of revised Article 9 may affect the kinds of property and transactions to which revised Article 9 applies. *See supra* note 6.

34. For example, the perfection of a security interest in a registered copyright appears to require a filing with the federal copyright office under federal law. *Aerocon Eng'g, Inc. v. Silicon Valley Bank (In re World Auxiliary Power Co.)*, 303 F3d 1120 (9th Cir. 2002) (dictum). Although Article 9 refers to filings under other laws, *see, e.g.*, U.C.C. § 9-311(a)(1), an opinion subject to a U.C.C. Scope Limitation would not cover the perfection of the security interest in a registered copyright unless it does so expressly. The opinion would, however, cover issues concerning the security interest in the copyright that are subject to the U.C.C. and not subject to federal law, such as the attachment of the security interest. A secured party may perfect a security interest in a patent or a trademark by the filing of a financing statement under the U.C.C. *See, e.g., In re Cybernetic Servs.*, 252 F3d 1039 (9th Cir. 2001) (patents); *Trimarchi v. Together Dev. Co.*, 255 B.R. 606 (D. Mass. 2000) (trademarks); *see also* U.C.C. § 9-311.

35. Examples are:

- “We express no opinion except to the extent that [Article 9 of] the Uniform Commercial Code in effect in the State of [New York] governs the creation or perfection of the security interests referred to in this opinion letter.”
- “To the extent [Article 9 of] the [New York] U.C.C. is applicable, the security agreement creates in favor of the Secured Party a security interest in the collateral, and the security interest of the Secured Party in the collateral is a perfected security interest.”

36. 1993 Security Interest Report, *supra* note 2, § II.3, at 366–68.

of customary practice, any indication in the opinion letter that reasonably communicates to the opinion recipient that the opinion is limited to the U.C.C. or to Article 9 of the U.C.C. of a particular state<sup>37</sup> is understood to convey the U.C.C. Scope Limitation described above.

**(d) No opinion given on law governing perfection or priority**

Except to the extent it does so expressly, a security interest opinion does not address which state's law governs the perfection, the effect of perfection or non-perfection, or the priority of the security interest.<sup>38</sup>

**2.2 REMEDIES OPINIONS DO NOT INCLUDE SECURITY INTEREST OPINIONS**

By long-standing custom remedies opinions on security agreements and security interest opinions are set forth in separate paragraphs in an opinion letter and address different subjects.<sup>39</sup> Remedies opinions address the formation of a contract and the enforceability of the opinion giver's client's undertakings in that contract.<sup>40</sup> Security interest opinions address satisfaction of the U.C.C.'s require-

37. If the U.C.C. Scope Limitation does not refer to a particular state, it should be understood as referring to the law of the state or states whose law is generally covered by the opinion letter. *See infra* § 3.2.

38. When the debtor is a registered organization, in almost all cases the proper (and only) place to file a financing statement is the state of the debtor's organization. The local law of the physical location of certain types of real-estate-related collateral (such as a security interest in fixtures perfected by a fixture filing, as-extracted collateral, and timber to be cut) continues to govern the perfection, the effect of perfection or nonperfection, and the priority of a security interest in these types of collateral by the filing of a financing statement. Further, the local law of the physical location of certain types of tangible collateral (such as goods, instruments, tangible chattel paper, negotiable documents, and certificated securities) continues to govern the perfection of a security interest by possession or delivery (in the case of a certificated security). In addition, regardless of the method of perfection, the location of such tangible collateral governs the effect of perfection or nonperfection, and the priority of the security interest in such collateral. *See* U.C.C. §§ 9-301(2), (3)(C), (4); *see also infra* APPENDIX B (discussing the effect of the mandatory choice-of-law rules set forth in U.C.C. § 9-301 concerning perfection). The Committee expresses no view on whether it is appropriate to request, or whether an opinion giver should provide, a choice-of-law opinion in any of these circumstances. *See generally* Permanent Editorial Board for the Uniform Commercial Code, *PEB Report: Article 9 Perfection: Choice of Law Analysis Where Revised Article 9 is Not in Effect in All States by July 1, 2001*, 56 *BUS. LAW.* 1725, 1728 n.8 [hereinafter the "PEB Report"].

39. *See 1998 TriBar Report, supra* note 1, § 3.5, at 627 (discussing the presumption against opinions by implication).

40. *1998 TriBar Report, supra* note 1, § 3.1, at 619–21. For example, if a contract containing a security agreement includes a debtor's waiver of notice of foreclosure, or a waiver of the right to pay the debt prior to foreclosure, the remedies opinion may have to be qualified on those matters. *See* U.C.C. §§ 9-602(7) (limitations on waiver of debtor's right to notice); 9-602(11) (limitations on waiver of debtor's right to redeem collateral). *See generally* U.C.C. §§ 1-103, 1-105, 1-301(revised), 1-302(revised), 9-602, 9-603.

ments<sup>41</sup> for establishing and preserving the secured party's interest in the collateral.<sup>42</sup> Standard exceptions<sup>43</sup> to the remedies opinion are not required for security interest opinions.

When a contract includes a security agreement, a remedies opinion on the contract is understood as a matter of customary practice not to express any conclusion on the creation, attachment, perfection, or priority of the security interest purportedly created by the contract, whether the opinion letter contains a security interest opinion or not.<sup>44</sup>

### 2.3 ANALYSIS OF BANKRUPTCY AND EQUITABLE PRINCIPLES IS NOT WITHIN THE SCOPE OF SECURITY INTEREST OPINIONS

Although a secured party understandably wants assurance that it will be treated as a secured party in the event of the debtor's bankruptcy, except to the extent stated in the following paragraph, a security interest opinion is not an opinion on the effect of bankruptcy, fraudulent transfer, or other insolvency laws.<sup>45</sup> Nor does a security interest opinion cover the effect of equitable principles.

Under U.C.C. section 9-317, a holder of a perfected security interest (but not most unperfected security interests) has a claim to the collateral that is superior

41. The remedies opinion covers the enforceability of the security agreement as a contract. It does not cover the creation or attachment of the security interest, its perfection, or its priority. The existence of an enforceable contract is necessary, but not sufficient, to create the security interest. U.C.C. §§ 1-201(3) (definition of "agreement"), 9-102(a)(73) (definition of "security agreement"); 9-203(b)(3) (requirement of "security agreement").

42. U.C.C. § 9-201 states that, except as otherwise provided in the U.C.C., "a security agreement is *effective* according to its terms between the parties, against purchasers of the collateral, and against creditors." In addition, U.C.C. § 9-203(a) and (b) use the word "enforceable" in describing when a security interest attaches to collateral. Use of the words "effective" and "enforceable" has led some to argue (incorrectly in the Committee's view) that the remedies opinion should be interpreted to cover the attachment of the security interest. U.C.C. §§ 9-201(a), (b), and 9-203 establish conditions for the effectiveness and enforceability of a security interest, not of the security agreement that creates that security interest. Under Article 9, the "security agreement" is only that term of an agreement that creates or provides for a security interest. See *id.* § 9-102(a)(73). Although lawyers often refer to the entire agreement as a "security agreement," (a convention generally followed in this Report), strictly speaking for purposes of Article 9 the term "security agreement" is limited to the relevant language creating or providing for the security interest. *Id.* § 9-102 cmt. 3(b). A contract that includes a security agreement may be effective as a contract although it fails to create a security interest, e.g., because its description of the collateral is insufficient under U.C.C. § 9-108. See *id.* § 9-201, cmt. 2. A "term" of an agreement is "that portion of an agreement which relates to a particular matter." *Id.* §§ 1-201(42), 1-201(b)(40) (revised).

43. "Exceptions" include limitations and exclusions. 1998 *TriBar Report*, *supra* note 1, § 1.9(i), at 606.

44. An opinion recipient occasionally will request an opinion stating that a "valid and enforceable" security interest was created or perfected. This language blurs the distinction between a remedies opinion on a contract that includes a security agreement and a security interest opinion, and the Committee recommends that the words "valid and enforceable" not be used. Even when used, however, an opinion on security interests is not customarily understood to address the enforceability of the agreement, except to the extent necessary for the attachment of the security interest.

45. For example, insolvent banks are subject to state or federal receivership (or similar) laws and are not eligible for relief under the Bankruptcy Code. 11 U.S.C. § 109(b)(2), (d) (2000). The discussion in this *Report* about the effect of the Bankruptcy Code on a security interest opinion also applies generally to these other laws.

to the claim of a judgment lien creditor who becomes a lien creditor after the security interest is perfected or certain other acts are taken. A trustee in bankruptcy has the power, under Bankruptcy Code section 544(a),<sup>46</sup> to avoid a security interest in personal property that is voidable as of the commencement of the case by a judgment lien creditor. Thus the bankruptcy trustee may set aside under that section most unperfected security interests, but not a perfected security interest. An opinion that addresses perfection under the U.C.C. provides the recipient the basis it needs to conclude that its security interest in the collateral cannot be avoided by a bankruptcy trustee under Bankruptcy Code section 544(a).

The opinion, however does not itself address other aspects of the status of the secured party's security interest in bankruptcy.<sup>47</sup> Accordingly, limiting a security interest opinion with a bankruptcy qualification serves no purpose and has no effect on the meaning of the opinion.

Similarly, because security interest opinions address compliance only with the U.C.C., the possible effects of equitable principles do not affect security interest opinions. This is so notwithstanding that, under the doctrine of equitable subordination,<sup>48</sup> inequitable conduct by a secured party may result in the subordination of a security interest to the security interests of junior secured parties or even to claims of unsecured creditors. Hence, applying an equitable principles qualification to the security interest opinion also serves no purpose and has no effect on the meaning of the security interest opinion.

#### 2.4 A SECURITY INTEREST OPINION DOES NOT SUBSTITUTE FOR EITHER A "NO BREACH OR DEFAULT" OPINION OR A "NO VIOLATION OF LAW" OPINION

The attachment or perfection of a security interest may violate applicable laws outside the U.C.C. or result in a breach of or default under another agreement that binds the debtor. A security interest opinion does not address these violations, breaches, or defaults. If a recipient is concerned that the grant of a security interest may violate a law or result in a breach of other contractual obligations of the

46. *Id.* § 544(a).

47. Although a perfected security interest is protected from attack under Bankruptcy Code § 544(a), bankruptcy law may still adversely affect a perfected security interest. For example, Bankruptcy Code section 362, provides for an automatic stay against enforcement of security interests; section 364 permits imposition of a super-priority lien on collateral; section 552 limits the effect of a security interest granted and perfected pre-petition in property or proceeds acquired by the debtor post-petition; section 547 provides avoiding powers relating to preferential transfers; sections 548 and 544(b) provide avoiding powers relating to fraudulent transfers; section 506(c) permits collateral to be invaded to pay certain expenses; section 363 permits the sale or use of collateral under certain circumstances; and section 1129(b) permits collateral to be affected in connection with reorganization plans confirmed pursuant to the "cram-down" powers. These consequences of bankruptcy may pertain to all security interests, including those that have been properly created and perfected under the U.C.C.

48. *See id.* § 510; *see also* U.C.C. §§ 1-103; 1-310 (revised).

debtor, such as a negative pledge covenant, the opinion recipient should request a specific opinion on these issues.<sup>49</sup>

### 3. CREATION OR ATTACHMENT OF SECURITY INTERESTS

#### 3.1 INTRODUCTION

An opinion on a security interest typically states that the security agreement “creates” a security interest in the collateral<sup>50</sup> in favor of the secured party or that a security interest has “attached”<sup>51</sup> to the collateral. U.C.C. section 9-203 uses the term “attachment” to describe the event that makes the security interest in collateral enforceable between the debtor and the secured party.<sup>52</sup>

Customarily, the creation or attachment opinion is stated separately from the opinion on the perfection of the security interest. The attachment of the security interest is a step necessary for the perfection of the security interest.<sup>53</sup> Addressing creation or attachment separately from perfection of the security interest provides comfort that the opinion preparers have considered the specific legal elements necessary for creation or attachment. In addition, in some circumstances, the U.C.C. governs the creation or attachment of the security interest, while law outside the U.C.C. governs perfection of the security interest.<sup>54</sup>

49. See generally 1998 TriBar Report, *supra* note 1, §§ 6.5–6.6, at 654–62. The UCC Scope Limitation does not apply to a no-violation-of-law opinion, if given.

50. U.C.C. § 9-102(a)(12) defines “collateral” as “the property subject to a security interest.” Although the attachment opinion commonly uses the present tense, it ordinarily covers after-acquired collateral. See *infra* § 7.1.

51. U.C.C. § 9-102(a)(73) defines a “security agreement” as an agreement that “creates or provides for a security interest.” The word “create” is also found in U.C.C. § 9-109(a)(1) in specifying those transactions to which Article 9 of the U.C.C. applies. Some lawyers believe that the “creation” of a security interest is a necessary, but not sufficient, step for a security interest to attach to collateral. Under that view, an opinion on the “creation” of a security interest covers only some of the steps required for a security interest to “attach to” collateral and an opinion on the “attachment” of a security interest covers all of the steps. Other lawyers believe that no distinction should be made between “creation” and “attachment” opinions. See *infra* § 3.3. Both sides agree that even if a “creation” opinion is narrower than an “attachment” opinion, the additional elements necessary for attachment are implicitly covered when, as is usually the case, a “perfection” opinion is also given in the opinion letter. See *infra* notes 53, 335. However, as noted in section 3.3 *infra*, as a matter of customary practice, a creation or attachment opinion, whether express, or, by virtue of the giving of a perfection opinion, implied, is understood not to cover the question of whether the debtor has rights or the power to transfer rights in the collateral. Some opinion givers do not use either “create” or “attach” but instead state that “the secured party has a security interest in the collateral.” This formulation of the opinion is unobjectionable and is understood to mean that the security interest has attached to the collateral.

52. Attachment also makes the security interest enforceable against some third parties. See U.C.C. §§ 9-201, 9-317.

53. U.C.C. § 9-308(a). If the opinion includes a “perfection” opinion, but neither a “creation” nor an “attachment” opinion, creation and attachment are implicitly covered by the perfection opinion (unless the opinion expressly assumes “creation” or “attachment”). When an opinion includes a “perfection” opinion but not a “creation” or “attachment” opinion and the opinion expressly assumes either the “creation” or the “attachment” of the security interest, the perfection opinion customarily is understood not to cover any of the elements of creation or attachment.

54. See *supra* § 2.1(b).

### 3.2 CHOICE OF LAW—CREATION OR ATTACHMENT OF THE SECURITY INTEREST

The security agreement usually contains a choice-of-law term that selects the law of a specified state as its governing law. If that choice-of-law term is enforceable, the chosen-state's law will govern the attachment, validity, and enforcement of the security interest, and the characterization of the transaction.<sup>55</sup> As discussed below, the parties generally do not have the power<sup>56</sup> to specify the law governing perfection, the effect of perfection or nonperfection, and the priority of a security interest.

A remedies opinion<sup>57</sup> on the security agreement covers the enforceability of the choice-of-law term in the security agreement. The opinion preparers should address the enforceability of a choice-of-law term in a security agreement as they would address a choice-of-law term in any other contract covered by a remedies opinion.<sup>58</sup> An opinion on the enforceability of a choice-of-law term in the security agreement does not address what law governs the perfection, the effect of perfection or non-perfection, or the priority of the security interest.<sup>59</sup>

### 3.3 REQUIREMENTS FOR ATTACHMENT

The Article 9 requirements for attachment are:

- (i) the debtor has authenticated a security agreement that provides a sufficient description of the collateral;<sup>60</sup>

55. U.C.C. § 9-301 cmt. 2. Generally, the parties are free to choose the law applicable to the attachment and enforcement of the security interest if the state whose law is chosen bears a "reasonable relation" to the transaction. *Id.* § 1-105(1). Even if a choice-of-law provision is enforceable between the parties to the security agreement, it may not bind third parties. *Id.* § 9-401 cmt. 3. Revised Article 1, completed in 2002, eliminates the "reasonable relation" requirement in a domestic transaction, giving effect to the law chosen by the parties to govern the attachment and enforcement of the security interest, unless doing so would violate a fundamental public policy of the state whose law would apply in the absence of a choice-of-law clause. *Id.* § 1-301(revised). See generally RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b). Some states have adopted statutes that permit the parties to certain transactions to choose that state's law as the applicable law even in the absence of a reasonable relation to the chosen state. See, e.g., N. Y. GEN. OBLIG. LAW § 5-1401 (McKinney 2001); CAL. CIV. CODE § 1646.5 (West 1997); 6 DEL. CODE ANN. tit. 6, § 2708 (1999). In general, such a statute will be applied only by the courts of the state that has adopted it.

56. Under limited circumstances, for example, the perfection of a security interest in a deposit account or a securities account by control, the parties (which must include the relevant depository bank or securities intermediary) may, in effect, be able to agree on the law governing perfection or priority. See U.C.C. § 9-304, 9-305. This Report generally does not cover those circumstances.

57. See *supra* § 2.2.

58. 1998 *TriBar Report*, *supra* note 1, §§ 4.3–6, at 633–36; *Guidelines*, *supra* note 16, § 4.9. For example, the opinion preparers might (i) cover the choice-of-law term in the opinion, (ii) exclude the choice-of-law term from the remedies opinion, (iii) state that the opinion is given as if the security agreement were governed by the law covered by the opinion, or (iv) address the law specified in the security agreement. See generally APPENDIX B (choice of law).

59. See U.C.C. §§ 9-301 to -307; see generally APPENDIX B (choice of law).

60. U.C.C. § 9-203(b)(3)(A). This requirement may be satisfied without an authenticated agreement if (i) the collateral is in the possession of the secured party pursuant to the debtor's security agreement, (ii) the secured party has control of the collateral pursuant to the debtor's security agreement, or

- (ii) value has been given;<sup>61</sup> and
- (iii) the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party.<sup>62</sup>

The opinion preparers must consider each of these issues.

### (a) Security agreement

*An enforceable agreement.* For a security interest to attach to collateral, the secured party needs a security agreement.<sup>63</sup> Usually, the security agreement will exist in an authenticated<sup>64</sup> record.<sup>65</sup>

To confirm that a security agreement has been properly authenticated, the opinion preparers need to determine, as they would for any other agreement,<sup>66</sup> that the debtor has the power to enter into the transaction and has duly authorized, authenticated,<sup>67</sup> and delivered the security agreement. These issues are ordinarily covered by the remedies opinion.<sup>68</sup> Alternatively, as appropriate, the opinion giver may rely on an express assumption to rely on or refer to the opinion of other counsel<sup>69</sup> on any or all of these matters.

*Grant of security interest.* A “security agreement” is an agreement that “creates or provides for a security interest.”<sup>70</sup> The security interest generally will not attach unless the security agreement “provides a description of the collateral.”<sup>71</sup> The

(iii) the secured party has taken delivery of a certificated security in registered form pursuant to the debtor’s security agreement. *Id.* § 9-203(b)(3)(B)–(D). The “agreement” by which the secured party obtains possession (or control, or has taken delivery) of the collateral must be a “security agreement.” If the secured party has possession (or control, or has taken delivery) under an “agreement” that does not include a “security agreement,” the necessary “security agreement” does not exist. *Id.* § 9-203 cmts. 3, 4. For example, an owner of goods may give possession of the property to a creditor of the owner for the sole purpose of the creditor repairing the goods. In that case, possession would be pursuant to an “agreement,” but would not be pursuant to a “security agreement.” Opinions are rarely given based solely on a “security agreement” that is not stated in an authenticated record and this *Report* does not address opinions given in those circumstances. *See supra* note 51.

61. U.C.C. § 9-203(b)(1).

62. *Id.* § 9-203(b)(2).

63. A “security agreement” is an agreement that “creates or provides for a security interest.” *Id.* § 9-102(a)(73). *See supra* notes 42, 60.

64. “Authenticate” means . . . to execute or otherwise adopt a symbol . . . with the present intent . . . to . . . adopt or accept a record.”, U.C.C. § 9-102(a)(7). “Authentication” does not require a manual signature.

65. Generally, a “record” is information that has been “stored” and “is retrievable in perceivable form.” *Id.* § 9-102(a)(69).

66. *See 1998 TriBar Report, supra* note 1, § 2.3(a), at 615.

67. Authentication would not be required for a security agreement that is not contained in a record. *See supra* note 64.

68. *See supra* § 2.2.

69. *See 1998 TriBar Report, supra* note 1, §§ 5.1–.4, 636–39.

70. U.C.C. § 9-102(a)(73).

71. *Id.* § 9-203(b)(3)(A). If a security interest is created without the authentication of a record, a formal description of the collateral is not required for the security interest to attach to the collateral. *See supra* note 60.

opinion preparers should review the security agreement to confirm that it contains a present<sup>72</sup> grant<sup>73</sup> of a security interest in favor of the secured party.<sup>74</sup>

*Collateral description.* A security interest generally will not attach to collateral unless a "security agreement" "provides a description of the collateral."<sup>75</sup> The opinion preparers should determine whether this description<sup>76</sup> is sufficient<sup>77</sup> satisfy U.C.C. requirements. This may require the opinion preparers to exclude from the attachment opinion particular items or types of collateral that are referred to in the granting clause of the security agreement but are not described in the security agreement in a manner that meets the requirements of Article 9 for the description of the collateral.<sup>78</sup> The opinion requires the opinion preparers to review the granting clause in the security agreement and confirm that the description of the col-

72. A security agreement that "expressly postpones" attachment will not result in the present attachment of the security interest. U.C.C. § 9-203(a). *See, e.g., In re Dolly Madison Industries, Inc.*, 351 F. Supp. 1038 (E.D. Pa. 1972), *aff'd mem.*, 480 F.2d 917 (3d Cir. 1973) (express deferral of attachment of security interest).

73. A security agreement does not have to use the word "grant." For example a "lease" that is characterized as creating a "security interest," see U.C.C. § 1-201(37), inherently "creates or provides" for a security interest as a result of that characterization and no separate "granting" language is necessary. U.C.C. § 9-102 cmt. 3b. Article 9 applies to the sale of certain types of property. *See supra* note 7. The operative "sale" language in the agreement providing for the sale of the property functions as the "granting" language in those circumstances and no separate granting language is necessary.

74. Article 9 does not require that the security agreement specify the obligation secured by the security interest. Security agreements customarily do so. The definition of security interest includes "an interest in personal property . . . which secures payment or performance of an obligation." U.C.C. § 1-201(37), U.C.C. § 1-201(b)(35) (revised). Unless stated otherwise in the opinion, the creation or attachment opinion means that each obligation purported to be secured by the terms of the security agreement is secured. The security interest opinion does not address the enforceability of the secured obligation. The security interest opinion typically does cover (sometimes by express assumption) the giving of value by the secured party. *See infra* notes 81-83 and accompanying text.

75. *See supra* notes 60, 71.

76. Generally a description of collateral is sufficient if it "reasonably identifies what is described." U.C.C. § 9-108(a). U.C.C. section 9-108(e), however, specifies types of collateral (commercial tort claims and certain consumer-related collateral) requiring special collateral descriptions.

77. When determining the sufficiency of the description of collateral, the opinion preparers need only consider the words in the security agreement, i.e., whether the collateral description reasonably identifies the collateral in which the security agreement purports to create a security interest. The opinion preparers have no responsibility to state that the description of the collateral does not describe some types of collateral that could have been covered or that the secured party may have intended to cover. *See infra* note 78. Nor are the opinion preparers responsible for verifying the existence of the collateral. *See infra* note 79. As to after-acquired collateral, see *infra* § 7.1.

78. Revised Article 9 expressly provides that a description of collateral by a "type" of collateral defined in the U.C.C. (e.g., "equipment," "inventory," "accounts," "investment property," and "general intangibles") sufficiently describes any of the collateral that fits within that term. U.C.C. § 9-108(b)(3). When a security agreement describes collateral by Article 9 type, the opinion assumes, without stating, that those words have the meanings given to them in Article 9 definitions. Other specific types of legally sufficient descriptions are also provided. *Id.* § 9-108(b). An all-encompassing "supergeneric" description (e.g., "all assets") is not sufficient for a security agreement, although it is sufficient for a financing statement. *Compare* U.C.C. § 9-108(c), *with* § 9-504(2). Where a description of collateral in a security agreement contains both a description of collateral that satisfies Article 9 for purposes of a security agreement and a supergeneric or other insufficient description of collateral, the opinion does not have to indicate that the supergeneric or other insufficient portion of the description is not sufficient unless the opinion preparers believe that not to do so would be misleading to the opinion recipient. *See supra* note 19. Similarly, a supergeneric description of collateral may include collateral

lateral is *legally* sufficient.<sup>79</sup> Sometimes the opinion preparers find circular, ambiguous, or vague descriptions. In that case, the opinion preparers should work with counsel for the opinion recipient to have the description clarified.<sup>80</sup>

### (b) Value

The secured party's security interest cannot attach until value,<sup>81</sup> as defined in the U.C.C., is given. The U.C.C. expansively defines "value," providing that even an existing claim or a commitment to lend in the future will ordinarily satisfy the requirement.<sup>82</sup> In most cases the question of value is straightforward. Typically, the opinion preparers can easily confirm the borrower's receipt of the loan funds or other value (such as a commitment to lend) at or before the closing.<sup>83</sup>

### (c) Opinion does not cover debtor's rights in the collateral

A security interest cannot attach to collateral unless the debtor has "rights in the collateral or the power to transfer rights in the collateral."<sup>84</sup> A security interest ordinarily can be no better than the debtor's rights in the collateral and will attach

that is not subject to the U.C.C. See *supra* text accompanying note 33. The U.C.C. Scope Limitation would exclude that collateral from the coverage of the opinion.

79. The attachment opinion covers the *legal* sufficiency of the description of the collateral, but not its *factual* accuracy. The factual accuracy of the description is not covered by the opinion. The opinion preparers are expected to determine whether the description of the collateral is, as a matter of law, sufficient, but do not have to inspect the collateral to determine whether the description of collateral is factually correct or accurate. For example, a granting clause in a security agreement purporting to convey a security interest in "all of Farmer Brown's assets" would likely be legally inadequate because of its failure to identify with sufficient specificity the particular assets subject to the security interest. U.C.C. § 9-108(c). An opinion on the legal sufficiency of a collateral description that identifies the collateral as "all of Farmer Brown's Guernsey cows" is sufficient, even if it is later discovered that Farmer Brown owned Hereford bulls and not Guernsey cows. The defect in the description of Farmer Brown's livestock is a matter of factual accuracy, which is not covered by the opinion.

80. If that cannot be accomplished, the opinion preparers should consider taking an express exception identifying that portion of the collateral description that is suspect. For example, "We express no opinion whether the description [ . . . ] contained in § [ ] of the Security Agreement reasonably identifies the collateral for purposes of §§ 9-108 and 9-203 of the U.C.C." A similar exception may be necessary if the secured party expects to perfect its security interest by filing a financing statement. See U.C.C. § 9-504.

81. *Id.* §§ 1-201(44), 1-204 (revised).

82. *Id.* §§ 1-201(44)(a), (b), 1-204(1), (2) (revised). U.C.C. section 9-203(b)(1) requires that value be given, but actual receipt of the value by the person granting the security interest (the "debtor") is not required. Hence, the value requirement of U.C.C. section 9-203(b)(1) can be satisfied even if the person granting the security interest is not the person receiving the value (typically the loan funds). See, e.g., *Putnam Realty, Inc. v. Terminal Moving & Storage Co. (In re Terminal Moving & Storage Co.)*, 631 F.2d 547, 550-51, 29 U.C.C. Rep. Serv. (Callaghan) 679, 682-83 (8th Cir. 1980); RESTATEMENT (THIRD) SURETYSHIP AND GUARANTY § 9 (1996); RESTATEMENT (SECOND) CONTRACTS § 71(4) (1981). The security interest opinion does not address whether the transaction could be subject to avoidance as a fraudulent transfer (or as a preference). See *1998 TriBar Report, supra* note 1, § 3.3.2, at 624; *Guidelines, supra* note 16, § 4.6; see also *supra* § 2.4.

83. Alternatively, the opinion giver may assume, without stating, that the secured party has complied (or will comply) with any contractual obligation to extend credit or otherwise give value. See generally *1998 TriBar Report, supra* note 1, § 2.3(a), at 615. If it is unclear, however, that value has been given, the opinion preparers should consider taking an express exception.

84. U.C.C. § 9-203(b)(2). The U.C.C. does not define "rights in the collateral."

only to those rights.<sup>85</sup> Although the debtor's having rights, or the power to transfer rights, in the collateral is a statutory element of attachment, as a matter of customary practice a security interest opinion is understood as not covering whether the debtor has any rights, or the power to transfer any rights, in the collateral. This is because the existence and extent of those rights is primarily factual. An opinion on the debtor's rights in the collateral is normally impractical,<sup>86</sup> if not impossible, and should not be requested.<sup>87</sup>

Although the debtor's having rights in the collateral or the power to transfer rights in the collateral is not covered by the opinion, some opinion givers qualify their opinions by stating, for example, that no opinion is expressed with respect to the debtor's rights in the collateral<sup>88</sup> or, alternatively, by pointing out that any decrease in the debtor's rights may decrease the secured party's rights.<sup>89</sup> Other opinion givers expressly assume that the debtor has rights in the collateral or the power to transfer rights in the collateral to the secured party. These qualifications are not necessary. Although a debtor must have some rights, or have the power to transfer rights, in the collateral before a U.C.C. security interest can attach to the collateral, a security interest opinion does not cover<sup>90</sup> the nature or extent of those rights.<sup>91</sup>

85. *Id.* § 9-203(b)(2). *But see, e.g., id.* §§ 2-403, 3-302, 7-502, 8-303, 8-502, 8-510, 9-318, 9-330, 9-331, 9-332 under which a security interest in collateral in some circumstances is not limited to the debtor's rights in the collateral to the extent described in those sections. In addition, U.C.C. sections 9-406 to -408 override in some circumstances contractual and statutory limitations on the right to the creation, attachment, perfection, and enforcement of security interests in certain types of collateral.

86. Moreover, a lawyer's investigation of the title to property that is not a matter of public record is unlikely to be productive.

87. A request for an opinion that the debtor "owns the collateral free and clear of all adverse liens, claims or encumbrances," or that the secured party has priority over all other possible claimants (whether claiming through the debtor or another person), although more oblique than a request for an opinion as to "good and marketable title," is no less a request for a title opinion, and is equally inappropriate. *See Guidelines, supra* note 16, § 4.4; *1998 TriBar Report, supra* note 1, at 629-30.

88. One form of statement is: "We have assumed that each item of the collateral exists or will exist and that the debtor has sufficient rights in each such item for the security interest of the lender to attach, and we express no opinion concerning the nature or extent of the debtor's rights in, or title to, any portion of the collateral." Other forms specifically advise recipients that (i) no investigation has been made concerning the existence or ownership of collateral, (ii) the debtor may not have title, but only a leasehold, consignment, or bailment interest in collateral or, if title is involved, that title may be voidable, (iii) the rights of the debtor may be subject to a constructive trust, (iv) the collateral may be subject to rights of a seller thereof (including rights of reclamation or stoppage in transit), or (v) previous owners and creditors of previous owners of the collateral may have superior rights to it. None of these statements is necessary.

89. For example, the collateral may be diminished by an account debtor or a depository bank exercising a right of set-off or recoupment, or by the rights of a securities intermediary with respect to securities accounts or security entitlements maintained with that intermediary. *See* U.C.C. §§ 9-328(3), 9-340, 9-404(a). Similarly, the debtor's rights under a contract may be subject to provisions in the contract or other laws that limit the debtor's ability to grant an effective security interest in those rights. *But see generally* U.C.C. §§ 9-406 to -409. Where collateral is held by a third person (e.g., a bailee, warehouse, securities intermediary, or agent), the insolvency of that third party may affect adversely the rights of a secured party. A security interest opinion does not cover these issues.

90. If the opinion preparers believe that the opinion will mislead the opinion recipient because the debtor does not have rights, or the power to transfer rights, in important collateral, the opinion preparers should make appropriate disclosure. *See supra* note 19.

91. Even if a title opinion could be given (e.g., where ownership of the collateral is evidenced by a certificate of title), such an opinion is not implied in a security interest opinion.

## 4. PERFECTION OF SECURITY INTERESTS IN ARTICLE 9 COLLATERAL

### 4.1 INTRODUCTION

An opinion on the perfection of a security interest in Article 9 collateral expresses the opinion preparers' professional judgment that the steps required by the U.C.C. to give the secured party's security interest priority over the rights of a lien creditor<sup>92</sup> have been (or will be) accomplished. These steps<sup>93</sup> generally give the secured party protection under the U.C.C. against the claims of third parties.<sup>94</sup>

An opinion on perfection requires the opinion preparers to consider:<sup>95</sup>

- (i) what law<sup>96</sup> governs perfection of the security interest in the collateral;
- (ii) what requirements must be met to perfect the security interest under the governing law; and
- (iii) whether those requirements have been satisfied.

### 4.2 MANDATORY CHOICE-OF-LAW RULES GOVERNING PERFECTION

U.C.C. sections 9-301–307 set out mandatory choice-of-law rules for perfection, the effect of perfection or nonperfection, and priority of a U.C.C. security interest.<sup>97</sup>

92. U.C.C. § 9-102(a)(52) (definition of "lien creditor").

93. The U.C.C. provides that, in certain instances, perfection will occur upon attachment of the security interest without any further act ("automatic" perfection). Examples of automatic perfection are security interests created by assignments of beneficial interests in decedents' estates, U.C.C. § 9-309(13); purchase money security interests in consumer goods, *id.* § 9-309(1); non-significant assignments of accounts and payment intangibles, *id.* § 9-309(2); sales of payment intangibles and promissory notes, *id.* § 9-309(3), (4); security interests in deposit accounts in favor of the applicable depository bank, *id.* § 9-104(a)(1); security interests in investment property created by a broker or securities intermediary, *id.* § 9-309(10); security interests in security entitlements (or securities accounts) in favor of the applicable securities intermediary, *id.* § 8-106(e), 9-314; and, of course, proceeds, *id.* § 9-315(3); *see also id.* § 9-308(d)–(g). In addition, a security interest may be temporarily perfected in some circumstances. *Id.* § 9-312(e)–(h) (automatic perfection for a limited period in instruments, certificated securities, goods in possession of a bailee, and negotiable documents in the stated circumstances). *See also infra* text accompanying notes 111–23. Though lawyers should be aware of those circumstances in which temporary perfection can occur, those circumstances are beyond the scope of this *Report*.

94. *See infra* text accompanying note 159.

95. A security interest in collateral cannot be perfected unless it has also attached to that collateral. U.C.C. § 9-308(a). Hence, when giving an opinion on the perfection of a security interest in collateral, the opinion preparers must also determine (or, if appropriate, expressly assume) that the security interest has attached to that collateral. Even if the opinion does not contain an express opinion on the attachment of the security interest, the elements of the attachment opinion are covered by the perfection opinion (unless expressly assumed). *See supra* notes 51–53.

96. Unless expressly addressed in the opinion letter, no choice-of-law opinion is given on the law that governs perfection of the security interest. *See supra* text accompanying notes 38, 59; *see also* APPENDIX B (choice of law). In the absence of a choice-of-law opinion, the perfection opinion is given under the law covered generally by the opinion.

97. The governing law for perfection is not necessarily the governing law for the attachment or the enforcement of the security interest. The law governing perfection is determined by the mandatory

- (i) *Filing*. When a security interest is perfected by filing a financing statement,<sup>98</sup> perfection<sup>99</sup> is generally<sup>100</sup> governed by the “local law”<sup>101</sup> of the jurisdiction where the *debtor* is located.<sup>102</sup> The U.C.C. contains rules for determining the debtor’s “location.”<sup>103</sup>
- (ii) *Possession or delivery*. When a security interest is perfected by possession or delivery, perfection is governed by the local law of the jurisdiction where the *collateral* is located.<sup>104</sup>
- (iii) *Control*. For most security interests perfected by control, e.g., security interests in deposit accounts, letter-of-credit rights, and certain forms of investment property, perfection is generally<sup>105</sup> governed by the local law of the jurisdiction of a third party.<sup>106</sup>

In formulating its opinion request under former Article 9, the opinion recipient needed to consider all of the states whose laws might govern perfection of the

rules of U.C.C. sections 9-301 to -307, which cannot be altered by agreement. See U.C.C. §§ 1-105(2), 1-301(g)(8) (revised). The law governing attachment and enforcement is generally chosen by the parties to the security agreement. See 1998 *TriBar Report*, *supra* note 1, §§ 4.3–4.6, at 633–36, *Guidelines*, *supra* note 16, § 4.9. See *supra* § 3.2.

98. The location of the debtor also generally governs perfection when perfection is “automatic” or “temporary.” U.C.C. §§ 9-301(1), 9-305(c)(2), (3); see also *id.* §§ 9-309, 9-312(e)–(h).

99. Even when perfection of a security interest is governed by the debtor’s location, for negotiable documents, goods, instruments, money, tangible chattel paper, and certificated securities, the effect of perfection or nonperfection and the priority of the security interest is governed by the local law of the location of the collateral. U.C.C. §§ 9-301(3)(c), 9-305(a)(1).

100. The perfection of a security interest in fixtures by a fixture filing and the perfection of a security interest in as-extracted collateral and timber to be cut are governed by the local law of the physical location of the collateral. U.C.C. § 9-301(3)(A)–(B), (4); see *infra* note 109.

101. As used in revised Article 9 “local law” means the substantive law of a jurisdiction (without giving effect to the choice-of-law rules of that jurisdiction). Compare U.C.C. § 9-301 cmt. 3, with U.C.C. § 9-103(3) (pre-revision); see also 1998 *TriBar Report*, *supra* note 1, § 4.3, at 633 n.89 (choice-of-law provision in agreement refers only to the substantive law of the jurisdiction); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 8 (1971). The 1998 *TriBar Report* uses the term “local law” to refer to law below the level of state law, e.g., municipal law. 1998 *TriBar Report*, *supra* note 1, § 1.9(n), at 607. This *Report* uses the term “local law” in the Article 9 sense (as the law of a jurisdiction without giving effect to its choice-of-law rules).

102. U.C.C. §§ 9-301(1), 9-305(c)(1).

103. *Id.* § 9-307. For registered organizations organized under state law (generally, corporations, limited liability companies, and limited partnerships), this is generally the organization’s state of formation. See *id.* §§ 9-102(a)(70), 9-307(e); see also APPENDIX B (choice of law). Section 9-307 also provides rules for determining the location of other types of debtors, including individuals, non-U.S. debtors, and registered organizations organized under U.S. federal law. Additional rules exist that address changes in the location of the debtor. U.C.C. § 9-316; see also *infra* text accompanying notes 196–97.

104. U.C.C. §§ 9-301(2), 9-305(a)(1).

105. U.C.C. §§ 9-304 to -306. However, perfection of a security interest in electronic chattel paper by control is governed by the law of the location of the debtor. *Id.* § 9-301(1) Perfection of a security interest in a security certificate by delivery or control is governed by the local law of the location of the certificated security. *Id.* § 9-305(a)(1).

106. For example, the depositary bank (deposit accounts), the issuing bank or the nominated party (letter-of-credit-rights), the securities intermediary (security entitlements and security accounts), or the issuer (uncertificated securities). U.C.C. §§ 8-106(f), 9-304, 9-305(a)(2), 9-305(a)(3), 9-305(a)(4), 9-305(b), 9-306; see *id.* §§ 5-116, 8-110(e).

security interest in any part of the collateral. If a transaction involved a wide range of collateral, a debtor with many places of business, or both, a perfection opinion could involve the laws of many states.<sup>107</sup> Unless the transaction warranted an opinion on the laws of all of the applicable states, the opinion recipient under former Article 9 typically had to choose the state(s) for which it would request opinion coverage. This decision ordinarily turned on the value of the collateral in each state.<sup>108</sup>

Revised Article 9 limits the number of states whose laws may govern perfection of a security interest by filing. In most cases the perfection of the security interest by filing will be governed by the law of a single state, determined by the debtor's location.<sup>109</sup> Except as otherwise noted, this *Report* assumes that the law designated for coverage in the opinion letter is also the law governing perfection. Unless it does so expressly, a security interest opinion does not address the question of which state's law governs perfection of the security interest. APPENDIX B discusses opinion issues that arise when the law governing perfection is not the law generally covered by the opinion letter.

### 4.3 METHODS OF PERFECTION

The following table sets forth the principal methods for perfecting a security interest under Article 9 in the listed types of personal property as original<sup>110</sup> collateral:

Type of Collateral <sup>111</sup>	Available methods of perfection			
	Automatic or temporary	Possession	Control	Financing statement
Money <sup>112</sup>		X		

107. U.C.C. § 9-103 (pre-revision).

108. *Guidelines, supra* note 16, § 1.2. Similar issues arise under revised Article 9 when the debtor or the collateral is located in a jurisdiction that has not adopted revised Article 9. *See generally* U.C.C. § 9-307(c) cmt. 3.

109. For certain forms of collateral that have a clear local nexus, e.g., as-extracted collateral, and timber to be cut, perfection is governed by the local law of the jurisdiction where the collateral (or, in the case of as-extracted collateral, the wellhead or minehead) is located. UCC § 9-301(3)(B), (4). Note that once timber to be cut has in fact been cut, it is no longer “timber to be cut” (and instead is normally “inventory” consisting of lumber) and perfection is governed by the local law of the location of the debtor. *Id.* § 9-301 cmt. 5c. In addition, for fixtures, the perfection of a security interest is governed by the local law of the location of the *debtor* when accomplished by the filing of a financing statement and by the local law of the location of the *fixtures* when the security interest is perfected by a financing statement filed as a “fixture filing.” *Id.* §§ 9-301(3)(A) cmt. 5b; 9-502(b).

110. Although not defined or used in the U.C.C., the phrase “original collateral” is understood to refer to collateral (including after-acquired collateral) in which a secured party has a security interest other than as proceeds of other collateral, as a supporting obligation, or as collateral for an obligation that is collateral. *See* U.C.C. §§ 9-102(a)(64), (77), 9-203(f), (g), 9-308(d), (e). Unless otherwise indicated, where this *Report* discusses collateral, it refers to original collateral.

111. Terms used in this column are defined in U.C.C. section 9-102(a) unless otherwise specified.

112. *See id.* §§ 9-312(b)(3) and 9-313(a) (possession). “Money” is the actual medium of exchange (i.e., currency) and does not include, for example, ancient coins (which would be “goods”), funds in

Type of Collateral	Available methods of perfection			
	Automatic or temporary	Possession	Control	Financing statement
Accounts, general intangibles (except sales of payment intangibles), commercial tort claims <sup>113</sup>	X			X
Payment intangibles (sales) <sup>114</sup>	X			
Instruments (except sales of promissory notes) <sup>115</sup>	X	X		X
Promissory notes (sales) <sup>116</sup>	X			
Goods, <sup>117</sup> negotiable documents, <sup>118</sup>	X	X		X
Tangible chattel paper <sup>119</sup>		X		X
Electronic chattel paper <sup>120</sup>			X	X
Deposit accounts, letter-of-credit rights <sup>121</sup>			X	
Investment property (other than certificated securities) <sup>122</sup>	X		X	X
Certificated securities <sup>123</sup>	X	X	X	X

a deposit account, or funds credited to a securities account. *Id.* §§ 1-201(24), 1-201(b)(24) (revised). See *infra* note 153.

113. U.C.C. § 9-310(a). A security interest in health-care-insurance receivables is automatically perfected in connection with its assignment to the provider of the health-care goods or services. *Id.* § 9-309(5). In addition, certain non-significant assignments of accounts and payment intangibles are automatically perfected. *Id.* § 9-309(2).

114. *Id.* § 9-309(3).

115. *Id.* §§ 9-312(a) (filing), (e) (temporary), (g) (temporary), 9-313(a) (possession).

116. *Id.* § 9-309(4).

117. *Id.* §§ 9-309(1) (automatic for purchase-money security interest in consumer goods), 9-310(a) (filing), 9-312(f) (temporary), 9-313(a) (possession). A secured party cannot perfect its security interest in goods in possession of a bailee and covered by a *non-negotiable* document of title by possessing the non-negotiable document. *Id.* § 9-312(d). A security interest in goods covered by a non-negotiable document of title may be perfected by (i) issuance of a document in the name of the secured party, (ii) the bailee's receipt of notification of the security interest, or (iii) filing in the proper place (the location of the debtor) of an appropriate financing statement covering the goods covered by the non-negotiable document. *Id.*

118. *Id.* §§ 9-312(a) (filing), (e) (temporary), (f) (temporary), 9-313(a) (possession). "Document" is defined in U.C.C. section 9-102(a)(30).

119. *Id.* §§ 9-312(a) (filing), 9-313(a) (possession).

120. *Id.* §§ 9-312(a) (filing), 9-314(a) (control).

121. *Id.* §§ 9-312(b)(1), (2) (control).

122. *Id.* §§ 9-309(9), (10), (11) (automatic), 9-312(a) (filing), 9-314(a) (control). See also *id.* § 9-308(f), (g).

123. *Id.* §§ 9-309(10) (automatic), 9-312(a) (filing), (e) (temporary), (g) (temporary), 9-313(a) (delivery), 9-314(a) (control). Possession by the secured party (or certain other persons) in the case of a certificated security is referred to as "delivery" of the certificated security. See *id.* § 8-301 (definition of "delivery").

### (a) Opinions on perfection by filing financing statements

To render an opinion that the filing of a financing statement will perfect the security interest, the opinion preparers must determine whether the requirements for perfection under applicable law have been satisfied.<sup>124</sup>

To be “sufficient” under U.C.C. section 9-502(a), a financing statement must contain only three<sup>125</sup> items of information:<sup>126</sup>

- (i) the name of the debtor;<sup>127</sup>
- (ii) the name of the secured party;<sup>128</sup> and

124. Unless expressly covered in the opinion letter, the opinion does not include a choice-of-law opinion on which state’s law governs perfection by the filing of a financing statement (or any other method of perfection). This *Report* assumes that the opinion will be rendered under the law covered by the opinion generally. See generally APPENDIX B (choice of law).

125. U.C.C. section 9-502(b) requires additional information for a real-property-related financing statement to be sufficient. The requirements for such filings are not addressed in this *Report*.

126. U.C.C. section 9-516(b) requires the filing office to reject a financing statement if it does not contain certain additional information (such as a mailing address of the debtor). Revised Article 9, however, also provides that if the filing office does accept the filing (if it provides or indicates the three items of information required by U.C.C. section 9-502(a)), the financing statement is effective to perfect the security interest even if it lacks some or all of the additional information. *Id.* §§ 9-516 cmt. 3; 9-520(c). Thus, an opinion on the *perfection* of the security interest by the filing of a financing statement may be given if the financing statement contains the three required items of information *and* has been accepted for filing, even if it does *not* contain the additional information. If the financing statement has not yet been accepted for filing by the filing office, unless the financing statement on its face contains all of the additional information necessary to avoid the required rejection of the financing statement, an opinion on perfection by filing should *not* be based on an assumption that the financing statement will be filed and accepted by the filing office or on a statement that “upon filing” the security interest will be perfected. If the financing statement does contain all such information, such an opinion would be appropriate. Except to the extent discussed in this *Report* an opinion on perfection by filing does not cover the accuracy of the information in the financing statement.

127. U.C.C. sections 9-503(a), (b), (c) describe the requirements for providing the debtor’s correct name on the financing statement. A financing statement that does not contain the *exact* name of the debtor as specified in U.C.C. section 9-503 will not be sufficient unless a search of the filing office records under the debtor’s correct name and using the “standard” search logic of the filing office discloses the financing statement containing the incorrect name. *Id.* § 9-506(c). The International Association of Corporation Administrators has suggested “standard” search logic that many states are likely to adopt. See The International Association of Corporation Administrators Web site, at <http://www.iaca.org>.

For a registered organization the opinion preparers ordinarily should obtain a state-certified copy of the debtor’s charter or other similar document to confirm that the name in the financing statement is the debtor’s correct name. This would ordinarily be the same document used to support the corporate status opinion. See 1998 *TriBar Report*, *supra* note 1, § 6.1, at 641–45. For other types of debtors, such as an “organization” (defined in U.C.C. sections 1-201(28), 1-201(b)(28) (revised)), that is not a “registered organization,” the opinion preparers should examine an appropriate document, such as a copy of a general partnership’s partnership agreement certified by a partner. The opinion preparers ordinarily may rely on a certificate of an officer, partner, or other appropriate official in these circumstances. See 1998 *TriBar Report*, *supra* note 1, § 2.2.1, at 611.

128. When a security interest is granted in favor of an agent, the agent is the “secured party” and the agent’s name should be used as the “secured party’s” name on the financing statement. See U.C.C. § 9-102(a)(72)(E) cmt. 2b. Alternatively, the financing statement may provide the name of a representative of the secured party even if the representative is not the “secured party.” *Id.* § 9-502(a)(2). The failure to indicate the representative capacity of a secured party or representative of a secured party does not affect the sufficiency of a financing statement. *Id.* § 9-503(d). Because searches are not made in the name of the secured party, a mistake in the secured party’s name should never cause the financing statement to be seriously misleading. *Id.* § 9-506 cmt. 2. This test provides more leeway than does the “standard search logic” test for the debtor’s name. See *supra* note 127. The secured party ordinarily prepares the financing statement and provides its own name. The opinion

(iii) an indication<sup>129</sup> of the collateral<sup>130</sup> covered by the financing statement.<sup>131</sup>

The opinion preparers should do at least one of the following:

- (i) confirm that an effective filing<sup>132</sup> of the financing statement in the appropriate filing office<sup>133</sup> in the applicable state<sup>134</sup> has occurred or will occur prior to the delivery of the opinion;<sup>135</sup>
- (ii) assume expressly that an effective filing of the financing statement has occurred or will occur in a proper manner; or
- (iii) state that perfection will occur “upon” the effective filing of the financing statement in the specified filing office.<sup>136</sup>

preparers may assume, without stating, that the financing statement accurately sets forth the name of the “secured party.”

129. Article 9 does not require that a financing statement “describe” the collateral (as it does for a security agreement), but only that the financing statement “indicate” the collateral. The more limited requirement is intended to give third parties “notice” that “a person may have a security interest in the collateral indicated.” *Id.* §§ 9-108, 9-203(b)(3)(A), 9-502(a)(2) cmt. 2.

130. U.C.C. section 9-504 provides that for a financing statement an “all assets” (“supergeneric”) indication or an indication meeting the requirements of U.C.C. section 9-108 is sufficient. A “supergeneric” description is not sufficient for the description of the collateral in a security agreement. *Id.* § 9-108(c); *see supra* text accompanying notes 76–80.

131. Revised Article 9 does not require (as did former Article 9) that the debtor sign the financing statement. *Id.* § 9-502 cmt. 3. A filed financing statement, however, even if it is otherwise sufficient under U.C.C. section 9-502(a), is ineffective unless it is filed by a person entitled to file it. *Id.* § 9-510(a); *see id.* § 9-502 cmt. 3. A person is entitled to file an initial financing statement only if the debtor has authorized the filing. *Id.* § 9-509(a). U.C.C. section 9-509(b) provides that a debtor’s authentication of a security agreement automatically authorizes the filing of an initial financing statement covering the collateral described in the security agreement. Thus, in the situations covered by this *Report*, *see supra* note 60, the opinion preparers (once they have satisfied themselves that the debtor has authenticated a security agreement) normally will have no difficulty confirming that the filing of the financing statement has been authorized by the debtor.

132. *See infra* note 212. “Filing” occurs when either a sufficient financing statement (including all additional information necessary to avoid rejection) and applicable filing fee is tendered to the filing office or the filing office accepts a sufficient financing statement (whether or not it includes the additional information). U.C.C. §§ 9-502(a), 9-516(a); *see supra* note 126. A reference in an opinion to the “filing” of a financing statement includes the “acceptance” of the financing statement by the filing office.

133. In almost all cases filing will be in the central filing office. U.C.C. § 9-501. This *Report* does not cover collateral of a type described in § 9-501(a)(1) of the U.C.C., which provides for a local filing (i.e., timber to be cut, as-extracted collateral, fixtures perfected by a fixture filing). *See supra* note 109. Special rules also apply to the perfection of a security interest in the property of a transmitting utility. U.C.C. § 9-501(b). These types of collateral raise unique issues that are beyond the scope of this *Report*.

134. Unless it does so expressly, a perfection opinion does not cover which state’s law governs perfection of the security interest. *See supra* text accompanying notes 38, 59 and 96; *see also supra* § 4.2. If the opinion does not otherwise state, the perfection opinion is given under the law covered generally by the opinion letter. *See generally* APPENDIX B (choice of law).

135. *See* U.C.C. § 9-516; *see also id.* § 9-502(d). If the filing has been accepted, *see supra* notes 126, 132, all that is necessary is that the opinion preparers obtain a time-stamped, or preferably an acknowledgement, copy of the financing statement from the filing office in the jurisdiction in which the filing was made. *See infra* note 209 and accompanying text with respect to time-stamped copies and acknowledgement copies.

136. Frequently, opinion letters are delivered before filing (or before evidence of acceptance of the filing can be obtained). In these cases the opinion should state that perfection will occur “upon the filing of the financing statement” or “when the financing statement is filed” in the stated office. *See* U.C.C. § 9-516(a). The reference to the “filing” of the financing statement includes the acceptance of

**(b) Opinions on perfection by possession<sup>137</sup>**

Sometimes a security interest is perfected by possession of the collateral.<sup>138</sup> Although under revised Article 9 perfection can almost always be accomplished by filing a financing statement,<sup>139</sup> in some cases the security interest in collateral will be perfected by possession (instead of or in addition to perfection by filing or by another method) and the opinion recipient may request an opinion as to perfection by possession.

When perfection is by possession, the opinion preparers should determine whether the secured party obtained possession (directly or through a third party<sup>140</sup>) in a manner that satisfies U.C.C. requirements. Frequently, the opinion preparers are not present when the secured party (or its agent<sup>141</sup> or other third party) obtains possession. In that circumstance they should include in the opinion an express assumption on this issue or state that perfection will occur, for example, “upon the secured party’s obtaining possession of the collateral.”<sup>142</sup>

If perfection is to be accomplished by possession through a third party (other than a third party that is the agent<sup>143</sup> of the secured party), the third party generally

the filing by the filing office. *See supra* note 132. These statements are not appropriate when the financing statement on its face does not contain sufficient information to require the filing office to accept the financing statement. *See supra* note 126, *infra* note 209. Revised Article 9 provides for the electronic filing of financing statements. U.C.C. § 9-101 cmt. 4h. It is expected that procedures will be developed for opinion preparers to confirm these filings, such as receipt of a confirmatory e-mail or other communication from the filing office. *See id.* § 9-102(a)(18).

137. The discussion in this section is also relevant to an opinion on a security interest in a certificated security perfected by “delivery.” *Id.* § 9-313(a). It should be noted, however, that “delivery” of a certificated security does not necessarily mean that the secured party has “control” of the certificated security. *Id.* § 8-106(a), (b); *see infra* at note 268 and accompanying text.

“Delivery” of a certificated security does *not* require the indorsement of the certificated security to the secured party (whether the security is in bearer or registered form). U.C.C. § 8-301(a). An indorsement may be necessary, however, to give the secured party “control” of the certificated security (which is another method of perfection) and to establish its rights as a “protected purchaser,” which could affect the rights of the secured party against the claims of other persons to the certificated security. *See infra* § 8.1(a).

138. *See supra* text at notes 111–23.

139. Money is the only type of collateral in which a security interest can be perfected by possession, but cannot also be perfected by the filing of a financing statement. U.C.C. § 9-312(b)(3). *See also supra* text accompanying notes 112, 115, 117, 118, 119, 123.

140. The debtor cannot qualify as an agent of the secured party or as a bailee for purposes of the secured party’s taking possession of collateral. U.C.C. § 9-313 cmt. 3. If an agent or third party is “closely connected to or controlled by the debtor,” the debtor may still have possession. *Id.* The opinion preparers may assume, without so stating, that an agent or third party is not closely connected with or controlled by the debtor, unless the assumption is unreliable. *See supra* note 20.

141. *See* U.C.C. § 9-313 cmt. 3.

142. When perfection occurs by possession, perfection is governed by the law of the state where the collateral is located. *Id.* § 9-301(c). Unless it otherwise states, an opinion on perfection by possession is given under the law covered by the opinion letter generally. *See supra* text accompanying notes 59, 96. *See generally* APPENDIX B (choice of law).

143. If the agent is not the agent solely of the secured party, the secured party may still be able to obtain possession through possession by a bailee. Possession of the collateral by a third party (such as an escrow holder) that acts as an agent for both the debtor and the secured party does not prevent the third party from possessing the collateral for the secured party (assuming the third party is not controlled by the debtor). *See id.* § 9-313 cmt. 3. When the secured party is perfecting a security interest in a certificated security by “delivery,” Article 8 states its own rules for possession through a third person. *Id.* §§ 8-106 cmt. 7, 8-301(a)(2).

must acknowledge in an authenticated record that it holds the collateral for the secured party's benefit.<sup>144</sup> In this circumstance, the opinion preparers should confirm that the acknowledgement is in an authenticated record, that the form of acknowledgment satisfies the substantive requirements of the U.C.C.,<sup>145</sup> and that on its face the acknowledgement purports to have been properly authenticated by the third party.<sup>146</sup>

### (c) Opinions on perfection by control

When the secured party perfects its security interest by control, in most circumstances perfection will be governed by the local law<sup>147</sup> of the "jurisdiction"<sup>148</sup> of a statutorily-designated third person.<sup>149</sup> Article 9 contains rules for determining the jurisdiction of the third person.<sup>150</sup>

If a security interest is perfected by control, the opinion preparers must determine that the method of control satisfies statutory requirements for the type of collateral that is the subject of the opinion.<sup>151</sup> For example, when a control agreement is used to perfect a security interest in a deposit account, the opinion preparers must confirm that the control agreement satisfies the requirements for a control agreement<sup>152</sup> for deposit accounts.<sup>153</sup>

144. *Id.* § 9-313(c). No acknowledgment is necessary when the person in possession is an appropriate agent of the secured party, when the bailee has issued a negotiable or nonnegotiable document covering goods, or in a mortgage warehousing or similar transactions. *Id.* §§ 9-312(d)(2), 9-313(h) & cmts. 3, 9. Possession by a third party connected with or controlled by the debtor may not be effective. See *supra* note 140.

145. *Id.* § 9-313(c).

146. The opinion preparers may assume, without stating, that the acknowledgement in fact has been properly authorized and authenticated by the bailee and that the bailee in fact has possession of the collateral.

147. See *supra* text accompanying note 101. Unless it does so expressly, the opinion does not cover the question of which state's U.C.C. governs perfection of the security interest. See generally Appendix B (choice of law). Instead, the opinion only covers requirements for perfection under the law of the state whose law is covered by the opinion letter generally. See *supra* text accompanying note 109.

148. In these circumstances, Article 9 refers to the "jurisdiction" of the relevant person and not its "location." U.C.C. §§ 9-304 to -306.

149. *Id.* §§ 9-304 to -306. See *supra* note 106. Unless expressly stated, the opinion does not cover which state's law governs the perfection of the security interest. See *supra* text at notes 59, 96; see generally APPENDIX B (choice of law).

150. See *supra* note 106.

151. See U.C.C. §§ 9-104 to -107, 9-314.

152. *Id.* § 9-104(a)(2). For example, the control agreement used to perfect a security interest in a deposit account must include an agreement by the depositary bank to "comply with instructions originated by the secured party directing disposition of the funds in the deposit account without further consent by the debtor." *Id.* § 9-104(a)(2). The opinion does not cover the authorization, execution, and delivery of the control agreement by parties other than the opinion giver's client. 1998 *TriBar Report*, *supra* note 1, § 2.3(a), at 615. Perfection of a security interest by control, unlike perfection by possession, does not involve common law concepts of "possession." See U.C.C. § 8-106 cmt. 7.

153. The opinion preparers may assume, without stating, that an account characterized by the parties to the transaction as a "deposit account" or as a "securities account" is that type of account for purposes of the opinion. The two are sometimes difficult to distinguish. Compare *id.* § 8-501(a) (securities account), with 9-102(a)(29) (deposit account); see also U.C.C. Article 8, Prefatory Note, III.C.4. If the collateral is a "securities account," the security interest may also be perfected by the filing of a financing statement; if the collateral is a "deposit account," it may not. U.C.C. §§ 9-312(a), (b)(1). If

### (d) Opinions on automatic perfection

Some security interests are “automatically” perfected upon attachment of the security interest.<sup>154</sup> For example, automatic perfection occurs upon the *sale* of a payment intangible or the *sale* of a promissory note.<sup>155</sup> The law of the location of the debtor governs the perfection of a security interest in this circumstance.<sup>156</sup> In a transaction characterized by the parties as a “sale” of these types of personal property, if a perfection opinion is given the opinion preparers are entitled to assume (without stating<sup>157</sup>) that the transaction is in fact a “sale.”<sup>158</sup>

## 5. ARTICLE 9 PRIORITY OPINIONS

### 5.1 INTRODUCTION

The U.C.C. security interest system ranks the rights of the secured party in the collateral as against third parties.<sup>159</sup> Opinions on that ranking—known as “priority opinions”—have long been the subject of intense debate. Those opposed to priority opinions argue that they provide nothing beyond what the recipient knows from its review of U.C.C. search reports. Proponents contend that priority opinions provide the recipient information necessary for a genuine understanding of its position as against other claimants to the collateral. Those who give priority opinions typically do so only after including numerous qualifications and assumptions, which by their nature greatly reduce the value of the opinion.

a bank’s product otherwise similar to a deposit account is represented by a paper-based certificate of deposit that is an “instrument” for purposes of Article 9, the putative deposit account is classified as an “instrument” and not a “deposit account.” *Id.* § 9-102(a)(29). If the collateral is a deposit account, the only method of perfection is “control.” *Id.* § 9-312(b)(1). If the collateral is an “instrument,” perfection by control is not available and the only methods of perfection are the filing of a financing statement or taking possession of the instrument. *Id.* §§ 9-312(a), 9-313(a); *see supra* note 115, 121. If the collateral is described as a “certificate of deposit,” the opinion preparer may assume, without stating, that it is a “certificate of deposit.”

154. U.C.C. § 9-309; *see supra* note 93. Opinions on automatic perfection are sometimes given in structured financings.

155. U.C.C. § 9-309(3), (4). Automatic perfection does not apply to the sale of other kinds of instruments. In addition, a security interest in a supporting obligation and in the debtor’s interest in collateral that secures the primary collateral provided by the debtor is automatically perfected upon the perfection of a security interest in the supported obligation or the primary collateral. *Id.* § 9-308(d), (e).

156. *Id.* § 9-301(1); *see supra* text accompanying notes 102–03. Unless it does so expressly, the opinion does not cover the question of which state’s law governs perfection of the security interest. *See generally* APPENDIX B (choice of law).

157. The opinion preparers, however, may not rely on this assumption if they believe the assumption is unreliable. *See supra* note 20. The opinion preparers have no obligation to analyze whether the transaction is in fact a “sale.” Nor would a remedies opinion cover this issue. 1998 *TriBar Report, supra* note 1, §3.1, at 619–21.

158. An opinion recipient who wants a “true sale” opinion should request one expressly.

159. In effect, the perfection opinion advises the secured party that its rights are “senior” to the rights of a trustee in bankruptcy. U.C.C. §§ 9-102(a)(52)(C), 9-301 cmt. 2, 9-317(a)(2). Part 4 of this *Report* addresses opinions on perfection. *See supra* text accompanying note 92. The security interest opinion does not address other bankruptcy issues. *See generally supra* note 47. An opinion on the “priority” of a security interest does not address any bankruptcy issues. *See generally* The TriBar Opinion Committee, *Opinions in the Bankruptcy Context: Rating Agency, Structured Financing, and Chapter 11 Transactions*, 46 BUS. LAW. 717 (1991).

For collateral in which the security interest is perfected by filing, the Committee's 1993 *TriBar U.C.C. Report* suggested a form of opinion that the Committee believed fairly addressed the concerns of the contending camps and that would be useful in many situations. This opinion is known as a "Filing Priority Opinion" and is the opinion generally given in those rare circumstances in which priority opinions are given for security interests perfected by filing a financing statement.<sup>160</sup>

## 5.2 SCOPE OF PRIORITY OPINION

### (a) U.C.C. Priority Opinion

As stated elsewhere in this *Report*,<sup>161</sup> by adopting a U.C.C. Scope Limitation an opinion giver limits the security interest opinion, and therefore a priority opinion, to the rules (including the priority rules) contained in Article 9. A priority opinion that is limited by a U.C.C. Scope Limitation is referred to in this *Report* as a "U.C.C. Priority Opinion."<sup>162</sup> As noted below, even this form of priority opinion would require many qualifications.<sup>163</sup> In practice, these opinions often include long lists of qualifications that have no relevance to the transaction at hand while still omitting at least some qualifications that may be relevant. A priority opinion that restates at length the limits of the priority of Article 9 security interests is not useful to (and often not welcomed by) the opinion recipient. Because a U.C.C.

160. Due to the simplified perfection rules in revised Article 9 and the limited nature of priority opinions, at least one rating agency has concluded that, for most structured financings, it will rely on the debtor's representations as to the attachment, perfection, and priority of a security interest under Article 9, rather than on legal opinions. See [http://www.standardandpoors.com/ResourceCenter/RatingsCriteria/StructuredFinance/articles/060601\\_article9.html](http://www.standardandpoors.com/ResourceCenter/RatingsCriteria/StructuredFinance/articles/060601_article9.html) (last visited July 19, 2003).

161. See *supra* § 2.1.

162. A U.C.C. Priority Opinion should be distinguished from priority opinions that are not limited to the U.C.C. Two examples are the "Title Opinion" and the "All Laws Priority Opinion." The Title Opinion considers priority against all possible claimants having any type of claim to the collateral (whether claiming through the debtor or through a prior owner of the collateral), including not only common law and statutory liens, but also, for example, lease and set-off rights. The All Laws Priority Opinion considers only claims (i) of other creditors of the debtor who claim an interest in the collateral arising from any law covered by the opinion, and (ii) of subsequent purchasers of the collateral from the debtor.

While it is theoretically possible to give Title Opinions for Article 9 collateral, lawyers rarely do so. That reluctance is rooted in the risks that flow from the many uncertainties that are likely to remain even after the exercise of extraordinary diligence. For these reasons, the Committee is of the view that in virtually no circumstances involving priority of security interests in personal property governed by Article 9 should a Title Opinion be requested or given.

Similarly, when an All Laws Priority Opinion is given, it generally resembles a treatise on liens. This is of limited value to the recipient and burdensome to the opinion giver, especially when measured against its cost. A listing of the possible qualifications would be extremely long. See, e.g., Business Law Section of the State Bar of California, *Report Regarding Legal Opinions in Personal Property Secured Transactions*, 44 BUS. LAW. 791, 820-22 nn. 157 & 158 (1989). Thus, although an All Laws Priority Opinion is also theoretically possible, its use is also strongly discouraged. The creation of a catalog of all of the obscure statutory liens that might apply in limited circumstances to the collateral is normally a practical impossibility. If the opinion recipient has concerns about the priority of a particular lien arising under a statute other than the U.C.C., it should request that a specific priority opinion address that particular lien. For example, lenders sometimes request specific opinions with respect to federal tax or ERISA liens.

163. See *supra* note 162.

Priority Opinion<sup>164</sup> requires a boilerplate list of qualifications that relate to theoretically possible, but rarely applicable, events, most opinion recipients have long since abandoned requests for these opinions.<sup>165</sup> Instead the diligence-based Filing Priority Opinion (described below) has become the form of opinion customarily used in the rare circumstances when an opinion is given on the priority of a security interest perfected by the filing of a financing statement.<sup>166</sup>

### (b) Diligence-based opinion format—Filing Priority Opinions

In those rare transactions when an opinion is requested concerning the priority of a security interest that has been perfected by filing a financing statement, the opinion given today is usually a Filing Priority Opinion. This opinion focuses primarily on the opinion preparers' review of a U.C.C. search report, and unlike a U.C.C. Priority Opinion does not require a long list of qualifications.

When a Filing Priority Opinion is given, the opinion confirms that:

- (i) a U.C.C. search report identifying the correct, current<sup>167</sup> name<sup>168</sup> of the debtor was obtained from the appropriate filing office;<sup>169</sup>

164. Notwithstanding the imprecision of "first priority," opinions sometimes state simply that the secured party has a "first priority" security interest in the collateral. This usage is undesirable because it does not clearly indicate the types of claims (e.g., security interests and judgment creditors) over which the security interest has priority. When an opinion is given on the priority of a security interest perfected by filing over other security interests perfected by filing, if the opinion uses the phrase "first priority" without further explanation and is subject to a U.C.C. Scope Limitation, the most sensible interpretation is that the priority opinion is a Filing Priority Opinion, unless the opinion contains the long list of qualifications that would be used with a U.C.C. Priority Opinion.

165. In limited circumstances, a form of priority opinion may be given on security interests perfected by delivery or control. See discussion *infra*, §§ 5.3, 8.2, 8.3, 8.4.

166. Except for the discussion at notes 162–65, this *Report*, unlike the 1993 *TriBar U.C.C. Report*, does not further address the Title Opinion, the All Laws Priority Opinion, or the UCC Priority Opinion. See 1993 *TriBar U.C.C. Report*, *supra* note 1, §VB., at 380–83. In the hope of reducing the cost of preparing these opinions, the 1993 *TriBar U.C.C. Report* listed priority qualifications the opinion preparers should consider taking when giving a U.C.C. Priority Opinion. These opinions are now rarely, if ever, given, and, therefore, the Committee has not updated the list of qualifications for revised Article 9.

167. The effect of post-closing changes in the name or location of the debtor is discussed below. See *infra* § 5.4(a). If the opinion preparers believe that a search under only the debtor's current name would mislead the opinion recipient, the opinion preparers should make appropriate disclosures. For example, the opinion preparers may know that the debtor has just changed its name. See *supra* note 19.

168. See *supra* note 127 and accompanying text as to the importance under revised Article 9 of using the correct name of the debtor on the financing statement and the factual inquiry appropriate for determining that name. By its terms, the Filing Priority Opinion covers only the current name of the debtor. A security interest perfected by the filing of a financing statement filed against the current debtor under a former name of the debtor or filed against prior owners of the collateral could have priority over the filing that is the subject of the opinion, but would not be identified in the search report and is not covered by the opinion. U.C.C. §§ 9-325(a), 9-507(a), (c).

169. The opinion ordinarily does not cover the question of which state's law governs perfection by filing. See generally APPENDIX B (choice of law). The search report would be obtained from the state where the opinion recipient has decided to file the financing statement for the current transaction. See *supra* text accompanying notes 97–103. If the debtor has changed the jurisdiction of its location within the four months preceding the through date of the search report, a possibility exists that another secured party would have a perfected security interest based on a filing in the debtor's former juris-

- (ii) the search report states that it shows financing statements on file in that office as of an identified date (and, if available, time of day),<sup>170</sup> and
- (iii) based solely on their review of the search report,<sup>171</sup> the opinion preparers have determined that (a) no other still-effective financing statement naming the debtor under its current name remains on file in the filing office, (b) if a still-effective, previously-filed financing statement remains on file, then, subject to any specifically identified exceptions, the security interest perfected by the prior filing would not have priority over the security interest covered by the opinion, or (c) if a still-effective, previously-filed financing statement remains on file that would give the security interest perfected by the prior filing priority over the security interest covered by the opinion, no prior filer against the debtor has priority over the security interest covered by the opinion because appropriate releases, terminations, or subordinations have been obtained.<sup>172</sup>

To give the opinion recipient the best available information on these matters in the most practical way, the Committee recommends that a Filing Priority Opinion read substantially as follows:<sup>173</sup>

The U.C.C. Search Report sets forth the proper filing office and the proper name of the debtor<sup>174</sup> necessary to identify those persons who under the

diction. U.C.C. § 9-316(a)(2). The opinion does not cover the possible existence of these other filings. The effect of the transition rules of Part 7 of revised Article 9 on determining where to conduct a search is discussed below. See *infra* § 9.

170. The “through date” (or “effective date”) should be identified in the opinion letter. The recipient of a Filing Priority Opinion then would be in a position to determine whether the searches on which the opinion is based are as of an acceptable date. The opinion does not cover the period between the through date and the date of the opinion letter.

171. The opinion preparers’ review of filings identified on the report as made before the effective date of revised Article 9 should be based on definitions of collateral used in both former Article 9 and revised Article 9. U.C.C. § 9-705, ex. 7.

172. Under Revised Article 9, a termination statement and a release of collateral is an “amendment” to the initial financing statement. U.C.C. § 9-512(a). Like an initial financing statement, an amendment to a financing statement (including a release or a termination) does not have to be signed or otherwise authenticated by the debtor or the secured party. *Id.* § 9-502 cmt. 3. If, however, the amendment adds another debtor or more collateral, releases collateral or terminates the financing statement, it must be authorized, depending on the kind of amendment, by the debtor or the secured party, *Id.* § 9-509(a), (d). The filing office must retain all financing statements and amendments for at least one year following the date the financing statement would have lapsed in the absence of termination. *Id.* §§ 9-519(g), 9-522(a). Thus, a search report will show financing statements and related releases, termination statements, and other amendments for at least six years after the original filing of the financing statement. The opinion preparers are entitled to assume, without stating, that the releases, termination statements, and other amendments obtained in the search were authorized and therefore validly filed. *Id.* § 9-509; see 1998 *TriBar Report*, *supra* note 1, § 2.2.1(a), at 611. Article 9 refers to the subordination of a security interest, but does not provide for any filing concerning the subordination of a security interest. U.C.C. § 9-339.

173. See *infra* § 6 regarding the extent of information that should be included in the opinion to identify adequately the Financing Statement and the U.C.C. Search Report.

174. The debtor’s name on the search report should match the name of the debtor in the financing statement. See *supra* note 127. Since the search will be obtained using the filing office’s standard search logic, the search report will identify only those financing statements that sufficiently provide the debtor’s name. U.C.C. §§ 9-503(a), 9-506(b), (c).

[name of State]<sup>175</sup> U.C.C. have, as of the Effective Date, financing statements on file against the [Debtor]<sup>176</sup> indicating any of the Filing Collateral, as of the Effective Date. [Except for \_\_\_\_\_,] [T][t]he U.C.C. Search Report identifies no still-effective<sup>177</sup> financing statement naming [Debtor] as debtor and indicating any of the Filing Collateral filed in the Filing Office, prior to the [Effective Date] [filing in the Filing Office of the Financing Statement].<sup>178</sup>

Except for the obvious need to identify previously-filed financing statements indicating interests in the same collateral,<sup>179</sup> no priority qualifications to the Filing Priority Opinion are required because the opinion, by its terms, does not cover other competing interests. This eliminates the time-consuming and often expensive process of identifying theoretical bases from which an attack on priority could be launched.<sup>180</sup> The Filing Priority Opinion thus addresses an issue of significant

175. The state named should be the state where the financing statement has been or will be filed. See *supra* § 4.2.

176. The collateral may have been transferred to the debtor subject to a still-effective and perfected security interest created by the transferor in favor of a different security party and perfected by the filing of a financing statement naming the transferor as the debtor. U.C.C. §§ 9-315(a)(1), 9-316(a)(3), 9-507(a), 9-508(a). The opinion does not cover these other filings. See *infra* § 5.4(a).

177. A financing statement that has lapsed, or has been terminated, or that covered Filing Collateral that has been released, will nonetheless appear on the search report for at least one year following the date on which the financing statement would have lapsed in the absence of a termination. See *supra* note 172. That financing statement is no longer effective (as to the specified property in the case of a release) and need not be referred to if the Search Report identifying the financing statement (i) does not indicate that a continuation statement was timely filed, or (ii) also gives notice of the release or termination of the financing statement. The opinion preparers may rely on the information in the Search Report without any further investigation. See *supra* note 19. Financing statements generally are effective for a period of five years, and may be continued within six months prior to the expiration of the initial filing (and thereafter at five year intervals from the original expiration date). Financing statements filed with respect to certain types of debtors (i.e., transmitting utilities) or certain types of transactions (e.g., public finance and manufactured-home transactions) are effective for longer periods. U.C.C. § 9-515.

178. The first alternative bracketed words constituting the last phrase of this sentence would be appropriate if the Financing Statement was filed prior to the delivery of the opinion and if the U.C.C. Search Report lists the Financing Statement (i.e., if the financing statement was filed prior to the “through date” of the report). The second alternative would be appropriate if where the Financing Statement was not filed (or no evidence of the filing was obtained) prior to the opinion (or if it was filed after the “through date” of the Search Report), and thus the opinion refers to the date (and, if available, time of day) through which the Search Report discloses financing statements of record. In either event, the sentence contemplates an express listing of each prior filer whose still-effective financing statement indicates any of the Filing Collateral.

179. The opinion is limited to collateral “indicated” on the financing statement. See U.C.C. § 9-504. The opinion does not cover the possibility that the priority of a security interest in one type of collateral indicated in a financing statement identified in the search report may extend to another type of collateral *not* indicated in the financing statement as proceeds of the original collateral indicated in the financing statement. For example, a security interest in inventory, perfected by the filing of a financing statement, will have priority in accounts constituting proceeds of the inventory over a security interest in the accounts perfected by a later-filed financing statement. See *id.* § 9-322(b) cmt. 6.

180. A security interest in instruments, investment property, or chattel paper perfected solely by the filing of a financing statement will be junior in some circumstances to a security interest perfected by possession, control, or delivery of the collateral, as appropriate, even if the filing was made first. *Id.* §§ 9-328(1), (5), 9-330(a),(b), (d). The Filing Priority Opinion does not cover these issues. See generally *infra* sections 8.2, 8.3, 8.4 for a discussion of specific opinions that address some of these issues.

concern to the recipient: whether at the outset<sup>181</sup> of the transaction its security interest may be junior to the security interests of other Article 9 secured parties who have perfected their security interests in the same collateral by the filing of a financing statement in the same office.<sup>182</sup>

### 5.3 PRIORITY OPINIONS WHEN PERFECTION IS BASED ON POSSESSION OR CONTROL

A Filing Priority Opinion would, of course, be inappropriate when a security interest in the collateral may be perfected solely by possession or control.<sup>183</sup> Similarly, a Filing Priority Opinion would be of little value where perfection of a security interest in collateral can be by possession, delivery, or control, as well as by the filing of a financing statement. In many circumstances, a secured party that perfects its security interest by possession, delivery, or control of the collateral may have priority over another secured party that perfects solely by the filing of a financing statement.<sup>184</sup> When a security interest is perfected by possession, delivery, or control and the collateral is not an instrument, tangible chattel paper, or a certificated security, the qualifications that would be required are so extensive that a priority opinion would be of very limited value to the opinion recipient.

U.C.C. Priority Opinions with respect to instruments, chattel paper, or certificated securities in which a security interest is perfected by possession, delivery, or control also are of limited value, except in addressing the priority of a security interest perfected by possession, delivery, or control over a security interest perfected solely by another method.<sup>185</sup> Nevertheless, the Committee recognizes that in this situation a U.C.C. Priority Opinion may be given that sometimes will be

181. An opinion generally does not cover the effect of post-closing changes in facts. *See infra* § 5.4(a); *see also* 1998 *TriBar Report*, *supra* note 1, § 1.2(b), at 597; *Principles*, *supra* note 16, § IV.

182. Because a Filing Priority Opinion relates to specific financing statements and search reports, it is given as of the time through which those reports are complete.

183. For example, deposit accounts, letter-of-credit rights, and money. *See* U.C.C. §§ 9-312(b)(1), 9-312(b)(2), 9-312(b)(3).

184. *See id.* §§ 3-303, 5-116, 7-502, 8-303, 8-502, 8-510, 9-328(1), (5), 9-329(1), 9-330(a), (b), (d), 9-331. Note that the perfection of a security interest in goods by possession does not give a secured party priority over a security interest in the goods perfected by the prior filing of a financing statement.

185. Under revised Article 9 the opinion preparers do not have to rely on the holder-in-due-course rules of Article 3, U.C.C. section 3-305 to give an opinion on the priority of a security interest in instruments perfected by possession over other security interests in the instruments perfected by a method other than possession. *See id.* § 9-330(d). The definition of "instrument" in Article 9 is broader than the definition in Article 3. *Compare id.* §§ 3-104(b), *with id.* 9-102(a)(47). This Article 9 priority opinion can be given concerning both negotiable and non-negotiable instruments. The opinion under Article 9 does not mean that the secured party's security interest in a negotiable instrument would be free of adverse claims. An opinion that a security interest in a negotiable instrument is free of claims to the instrument would be rendered under Article 3 and require that the secured party attain holder-in-due-course status. *See id.* § 3-305. *See generally infra* §§ 8.1, 8.3. For a discussion of priority opinions when the collateral is a certificated security, *see infra* §§ 8.2-4.

useful to an opinion recipient.<sup>186</sup> Under revised Article 9, a secured party that takes possession of an instrument and satisfies certain other requirements has priority over a secured party that has perfected its security interest solely by a method other than possession.<sup>187</sup> To obtain priority, the secured party with possession must (i) give value, and (ii) take possession of the instrument in good faith without knowledge that the grant of the security interest violates the rights of a prior secured party. Value is rarely an issue.<sup>188</sup> As for the second requirement, the opinion preparers may assume, without stating, the absence of the required knowledge on the part of the opinion recipient. An assumption regarding the opinion recipient's good faith is implicit in all opinions.<sup>189</sup>

#### 5.4 INHERENT OR OTHERWISE UNNECESSARY QUALIFICATIONS TO PERFECTION AND PRIORITY OPINIONS

##### (a) Subsequent events

Except to the extent discussed below<sup>190</sup> concerning after-acquired collateral and proceeds, opinion givers have no obligation when giving U.C.C. opinions to address the possible effect of subsequent changes in the facts.<sup>191</sup>

The passage of time and changes in facts after the date of a perfection opinion can result in the partial or complete loss of perfection unless additional steps are taken.<sup>192</sup> These steps include:

- (i) filing of proper continuation statements;<sup>193</sup>
  - (ii) filings or other actions required with respect to proceeds of collateral;<sup>194</sup>
  - (iii) filings required within four months of the change of the name of the debtor;<sup>195</sup>
  - (iv) filings required within one year if the collateral is transferred to a person located in another jurisdiction;<sup>196</sup>
  - (v) filings required within four months if the debtor changes its location;<sup>197</sup>
- and

186. This discussion is applicable only in the context of an instrument. U.C.C. § 9-330(d). A similar analysis would apply to a possessory security interest in tangible chattel paper (U.C.C. § 9-330(a), (b)) or to a certificated security that has been delivered to the secured party (U.C.C. § 9-328(1)). A U.C.C. Priority Opinion generally would require extensive qualifications and exceptions and would not be useful to the opinion recipient.

187. U.C.C. § 9-330(d).

188. See *supra* text accompanying § 3.3(b).

189. 1998 *TriBar Report*, *supra* note 1, § 3.3.4, at 625 (assumption regarding opinion recipient's good faith). See generally U.C.C. § 9-331 cmt. 5.

190. See *infra* §§ 7.1, 7.2.

191. See *supra* note 181.

192. See generally Steven O. Weise & Susan R. Goldfarb, *The Dog Ate My Perfection—What Can Go Wrong Post-Closing*, 35 UCC L.J. 1 (Winter 2002–2003).

193. U.C.C. § 9-515(c).

194. U.C.C. § 9-315(d).

195. *Id.* § 9-507(c).

196. *Id.* § 9-316(a)(3).

197. *Id.* § 9-316(a)(2).

- (vi) filings that may be required if the debtor transfers all or substantially all of its assets to another person or merges into or otherwise combines with another organization.<sup>198</sup>

Because these U.C.C. requirements for subsequent filings generally involve changes in facts that occur after the date of the opinion letter, the opinion does not cover them and express reference to them in the opinion letter is not necessary.

Changes in facts after the date of the opinion letter (e.g., failure of the secured party (directly or through a third party) to maintain possession of collateral (or the occurrence of events that cause collateral to cease to be subject to an effective control agreement) can also adversely affect perfection by possession or control. The opinion does not require an express assumption that no change will occur in the underlying factual basis for perfection by possession or control. Nor does the opinion have to state that:

- (i) other creditors or purchasers might gain priority by subsequently obtaining possession, delivery, or control when the opinion recipient has perfected its security interest solely by the filing of a financing statement or by “automatic” perfection;<sup>199</sup> or
- (ii) certain security interests subsequently perfected by filing (e.g. a purchase money security interest) may have priority.<sup>200</sup>

An opinion does not have to assume expressly that the factual requirements for continued perfection or priority will continue to be satisfied.<sup>201</sup>

#### **(b) Other interests**

A Filing Priority Opinion is limited to the priority of a security interest perfected by a secured party<sup>202</sup> only by the filing of a financing statement over other security interests perfected only by the filing of a financing statement. Hence, a Filing Priority Opinion does not require many of the qualifications that would be used in a U.C.C. Priority Opinion. The rules of priority contained in Article 9 that are based on information obtained from the Article 9 filing system cover *only* a “secured party.” Thus, the opinion does not cover the interest of, and does not require

198. *Id.* § 9-508.

199. Persons who subsequently may obtain possession, delivery or control and thereby defeat the priority of the secured party if the secured party did not have possession, delivery or control include: (i) subsequent purchasers of chattel paper or instruments, U.C.C. § 9-330; (ii) holders in due course of instruments (as defined in Article 3, i.e., negotiable instruments) and protected purchasers of securities (as defined in Article 8), U.C.C. §§ 3-305, 8-303, 9-331; (iii) collecting banks, U.C.C. § 4-210; (iv) good faith purchasers of instruments for value without notice that the purchase violates the secured party’s rights, U.C.C. § 9-330(d); (v) secured parties who take delivery of certificated securities, U.C.C. § 9-328(5); and (vi) secured parties who obtain control of investment property, U.C.C. § 9-328(1).

200. *Id.* § 9-324.

201. Proceeds of collateral and after-acquired property present special concerns. *See infra* §§ 7.1, 7.2.

202. A “secured party” generally is a person who holds a “security interest” that has been “created or provided for” under a security agreement. U.C.C. § 9-102(a)(72); *see also supra* note 7.

an exception for priority over the interest of, a person who is not a “secured party.”<sup>203</sup> These other persons, who in some instances may have priority, include persons who:

- (i) are neither creditors of the debtor nor subsequent buyers of the collateral from the debtor (except when Article 9 applies to a sale of collateral);<sup>204</sup> or
- (ii) obtain superior rights under law other than the U.C.C.<sup>205</sup>

An exception is also unnecessary for persons who may obtain priority over a secured party based solely upon the secured party’s agreement.<sup>206</sup> For example, if a secured party executes and delivers a subordination agreement or other intercreditor agreement (either before or after the delivery of the opinion), other persons may obtain rights in the collateral senior to the secured party’s rights.<sup>207</sup>

## 6. REFERENCES TO FINANCING STATEMENT AND SEARCH REPORTS IN OPINION LETTERS

### 6.1 DESCRIPTION OF FINANCING STATEMENT

Because of the importance to a perfection opinion of the financing statement in favor of the secured party (where perfection is based on filing), opinion letters typically specify:

203. Some states provide for a filing in the filing office by a “lien creditor.” *See, e.g., CAL. CIV. PROC. CODE* §§ 697.510–670 (West 1987 & Supp. 2003); *see also* U.C.C. § 9-102(a)(52) (definition of lien creditor). If a Filing Priority Opinion is given and if those interests appear in the search report, the opinion giver should disclose these interests even though they are not “security interests.” *See supra* note 19.

204. Persons who may obtain superior rights in the collateral, but whose rights are not within the scope of a priority opinion because they are neither creditors of the debtor nor subsequent purchasers of the collateral, include: (i) existing or future “true” lessees (in the ordinary course of business) of goods, U.C.C. § 9-321(e); (ii) existing or certain future (non-exclusive) licensees (in the ordinary course of business) of general intangibles, U.C.C. § 9-321(b); (iii) beneficiaries of implied or constructive trusts to the extent the collateral is (or is deemed to be) the property of those trusts; (iv) certain persons claiming rights of set-off or recoupment against certain types of collateral, U.C.C. §§ 9-340, 9-406(a); (v) persons whose liens or other interests (including ownership) were granted by persons other than the debtor (including prior owners of the collateral), U.C.C. § 9-325; (vi) certain statutory possessory liens, U.C.C. §§ 7-209, 9-333; and (vii) persons having rights of resale and stoppage with respect to goods under U.C.C. Article 2. U.C.C. §§ 2-403(1), 9-110 cmt. 5.

205. For example, unless otherwise separately addressed in the opinion letter, the opinion preparers need not identify other liens (whether common law or statutory, such as federal tax liens or ERISA liens) under which persons in some circumstances may take priority over a perfected U.C.C. security interest. For example, a federal tax lien filing will occur in the state of the debtor’s principal executive office (for corporations and partnerships), which may not be the same state as the debtor’s location for purposes of Article 9. I.R.C. § 6323(f)(2) (2003). In addition, when former Article 9 was in effect, courts found a federal tax lien filing effective even if it did not provide the debtor’s exact name, if the name in the federal tax lien filing was not “seriously misleading” under rules similar to those applied under former U.C.C. section 9-402(8). *See, e.g., Allstate Financial Corp v. United States*, 109 F3d 1331 (8th Cir. 1997) (holding Federal tax lien filing was not seriously misleading).

206. *See* U.C.C. §§ 9-207 cmts. 5, 6, 9-315(a)(1) (secured party may authorize debtor to dispose of collateral free of the security interest); *Id.* § 9-339 (secured party may agree to subordinate its security interest in the collateral).

207. *Id.* § 9-339.

- (i) the exact names of the debtor and secured party as they appear on the financing statement;<sup>208</sup>
- (ii) the particular filing office where the financing statement is or will be filed; and
- (iii) the filing status of the financing statement reviewed (e.g., unfiled, a time-stamped copy, or a copy from the filing office acknowledging its acceptance of the filing).<sup>209</sup>

Sometimes an opinion letter does not refer to any particular financing statement or identify adequately the financing statement actually reviewed. In these situations the opinion recipient justifiably may assume that the opinion preparers reviewed<sup>210</sup> the financing statement used in the transaction. If the opinion letter does not identify the financing statement, the opinion recipient is entitled, absent knowledge to the contrary,<sup>211</sup> to assume that the opinion is based on the financing statement that is being used in the transaction and its filed or unfiled status as of the date of the opinion letter.<sup>212</sup>

208. Some opinions refer instead to a copy of the financing statement attached to the opinion letter.

209. U.C.C. § 9-516(a). If the opinion is based on an unfiled financing statement or a time-stamped financing statement, the opinion letter should make clear that an acknowledgement copy was not reviewed. That can be done by describing the U.C.C. financing statement as an “unfiled copy” or a “time-stamped copy” or, alternatively, by making express assumptions or stating conditions with respect to filing. For example, the perfection opinion could state: “Upon the filing of the Financing Statement in the Filing Office, the Secured Party will have a perfected security interest in . . . .” See also *supra* note 136 (as to when an opinion giver should *not* use language such as “upon filing” with respect to an unfiled financing statement.). See also note 134 on the meaning of “filing.”

210. The review would confirm that the information in the financing statement is not substantively inconsistent with the corresponding information in the security agreement (e.g., the name of the debtor and the secured party, and the description of the collateral in the security agreement and the indication of the collateral in the financing statement). Secured parties sometimes draft the indication of collateral in the financing statement more broadly than the description in the security agreement. This does not expand the collateral to which the security interest attaches under the security agreement (and therefore the collateral in which the security interest can be perfected). For example, if the granting clause in the security agreement adequately identifies as collateral “copying machines and computers (each used in the debtor’s business),” the indication of the collateral in a financing statement would be sufficient if it referred to “all equipment.” U.C.C. §§ 9-102(a)(33), 9-108(b)(3), 9-504(1). A financing statement that indicates a broader set of collateral than that described in the security agreement is effective and perfects a security interest *to the extent* the collateral indicated in the financing statement is the same as the collateral described in the security agreement. *Id.* § 9-504 cmt. 2. The financing statement would not perfect a security interest in more than the copying machines and computers, even if the debtor authorized the filing with the broader description. Note that a secured party may file a financing statement indicating particular collateral only if the secured party has been “authorized” to do so. *Id.* §§ 9-509 cmt. 3, 9-510(a). Accordingly, if an indication of collateral in a financing statement includes collateral as to which the debtor did *not* authorize the secured party to file a financing statement, the financing statement is (to that extent) ineffective to perfect a security interest in that collateral. *Id.* § 9-510(a) cmt. 2, ex. 1.

211. *Principles, supra* note 16, § I.E, at 832.

212. If the financing statement is unfiled, the opinion recipient understandably may be concerned that the filing office may reject the financing statement. Filing officers may reject a financing statement that has the three items of information required by U.C.C. section 9-502(a) only for the limited reasons stated in U.C.C. section 9-516(b) and (d). If the only U.C.C. financing statement relied on is one that might be rejected later (i.e., it is unfiled or time-stamped), leaving the secured party to rely on U.C.C. section 9-516(d) to assert that the financing statement is “effective,” prudence suggests that the status of the financing statement actually reviewed should be disclosed in the opinion letter. See *supra* note

## 6.2 NEED TO IDENTIFY SEARCH REPORTS

Opinion letters that contain a Filing Priority Opinion typically describe the U.C.C. search reports that form the basis of the Filing Priority Opinion. Describing those reports is important because, as to factual matters, the opinion is limited by its terms to a review of *only* the information disclosed in them.

The description should specify:

- (i) the person or entity conducting the search;<sup>213</sup>
- (ii) the date of the report;<sup>214</sup>
- (iii) the name of the debtor<sup>215</sup> identified in the report; and
- (iv) the effective or “through date” (and, if available, time of day) of the search.<sup>216</sup>

## 6.3 NO NEED TO STATE QUALIFICATIONS AS TO ACCURACY OF SEARCH REPORTS

Opinion givers have understandably been concerned that the U.C.C. search reports on which an opinion is based may be inaccurate, whether through mis-indexing or other mistake by the filing officer.<sup>217</sup> The opinion does not cover that risk.<sup>218</sup> Opinion preparers are entitled to rely, without verification, on the factual

126 A filer whose financing statement is wrongfully rejected has a perfected security interest under U.C.C. § 9-516(a), which provides in part as follows: “[C]ommunication of a record to the filing office and tender of the filing fee . . . constitutes filing [under Article 9 of the U.C.C.]” *Id.* § 9-516(a). The secured party will have a perfected security interest, but the filing office will not have a record of the financing statement in its records and the financing statement therefore will not appear on a U.C.C. search report. In this case, the secured party will not have priority against another, subsequent, secured party that obtains and perfects a security interest in the same collateral in reasonable reliance on the absence from the filing office records of the wrongfully-rejected financing statement. *Id.* § 9-516(d) cmt. 3. The opinion does not cover the accuracy of the information referred to in U.C.C. § 9-516(b)(5) nor does it cover the risk that any of this information is incorrect. *See supra* note 136.

213. In the illustrative language above, this would be included in the definition of U.C.C. Search Report.

214. In the illustrative language above, this would be included in the definition of U.C.C. Search Report.

215. *See supra* notes 127, 168.

216. In the Illustrative Security Interest Opinion, the search report is dated July 28 but refers only to financing statements on file in the particular filing office as of a stated time on July 1. If the opinion recipient did not file its financing statement until the date of the closing (August 1) and if a competing U.C.C. financing statement were filed during the thirty-one day “gap” between the effective date of the search (“effective date” or “through date”) and the closing, the security interest of the competing creditor would rank prior to the security interest of the opinion recipient even if the opinion recipient closed its transaction first. U.C.C. § 9-322(a)(1), 9-322 cmt. 4, ex. 1. As a result, the through date is of great importance to the opinion recipient. A Filing Priority Opinion need not include a qualification with respect to possible “gap” filers because a Filing Priority Opinion is limited, by its terms, to secured parties identified in the search reports described in the opinion. *See supra* note 169.

217. A private person conducting the search may also make a mistake. *See Puget Sound v. Unisearch*, 47 P.3d 940 (Wash. 2002) (private search firm that reported incorrect information in a U.C.C. financing statement search report may enforce limitation-of-liability term of its agreement with its customer).

218. A secured party whose properly-filed financing statement is accepted, but mis-indexed, will have priority over a secured party that perfects its security interest by the subsequent filing of a financing statement unless the other secured party can establish its priority on a different basis. U.C.C. § 9-517.

accuracy of certificates of public officers, such as filing officers<sup>219</sup> and on written reports of third parties in the business of preparing U.C.C. search reports.<sup>220</sup>

A priority opinion based on search reports assumes, without stating,<sup>221</sup> the accuracy and completeness of those reports. Therefore, an opinion need not point out the possibility that prior security interests have erroneously been omitted from the search report, that mistakes were made by public filing officers, or that public records are incomplete.<sup>222</sup>

The opinion also need not identify priority risks arising from still-effective financing statements filed:

- (i) using prior names of the debtor;<sup>223</sup>
- (ii) when the debtor was located in a different jurisdiction;<sup>224</sup>
- (iii) against a prior owner of collateral that has transferred the collateral to the debtor subject to a perfected security interest;<sup>225</sup> or
- (iv) naming an "original debtor" for whose obligations the debtor, as a "new debtor," has become bound.<sup>226</sup>

219. 1998 *TriBar Report*, *supra* note 1, § 2.2.1(a), at 611 & n. 43.

220. The filing office must make available to the public information on all records filed with the filing office. U.C.C. § 9-523(c).

221. Sometimes a member of the opinion giver's staff or a person who is not a search professional conducts a search (e.g., an on-line computer search of a data base) that does not use the filing office's standard search logic. An opinion letter should point out expressly if either of these types of searches forms the basis of a priority opinion, thus putting the opinion recipient on notice that the U.C.C. Search Report might not identify all filings that an official search might have identified.

222. This is so even though, under U.C.C. section 9-517, another secured creditor will have priority if its financing statement was accepted for filing by the filing officer, but was lost, never indexed, or improperly indexed by the filing officer and therefore did not appear on the search report. Under U.C.C. section 9-516(d), however, another secured creditor who presented a sufficient financing statement for filing and tendered the correct filing fee, but whose financing statement the filing office wrongfully refused to accept and thus does not appear on the search report, will be perfected, but junior to another secured party who reasonably relies on the absence of the wrongfully-rejected financing statement from the public record. *See supra* note 212.

223. Unless otherwise expressly stated, the priority opinion is based solely on a search under the debtor's current correct name, determined as provided in U.C.C. section 9-503(a), and does not need to exclude security interests perfected by the filing of a financing statement against the debtor using a name of the debtor other than the current correct name. When a debtor changes its name, a financing statement with the prior name remains effective to perfect a security interest in collateral in which the debtor had rights on the date of the name change and in collateral in which the debtor acquires rights within the following four months. U.C.C. § 9-507(c)(1). *See supra* note 167.

224. Filings made in the appropriate state under revised Article 9 on the basis of facts that were correct when the filing was made will remain effective for specified periods following a change in the applicable facts. U.C.C. section 9-316(a)(2) provides that a financing statement filed in the jurisdiction where the debtor was located at the time of the filing (see U.C.C. § 9-307) remains effective for up to four months after the change of the debtor's location to another jurisdiction (e.g., a filing made in Pennsylvania against a general partnership with its chief executive office in Pennsylvania at the time of the filing will remain effective for up to four months after the partnership moves its chief executive office to New York). A debtor that is a registered organization is generally not able to change its location. A merger or other similar event is generally governed by the rules described in note 226.

225. A financing statement properly filed against a prior owner of collateral generally remains effective to perfect the security interest following the disposition. U.C.C. § 9-315(a)(1). There are exceptions to this rule. *See, e.g., id.* §§ 9-315(a)(1) (secured party authorizes disposition free of security interest), 9-316(a)(3) (transfer of collateral to a person located in another jurisdiction), 9-320 (transfer of goods to a buyer in ordinary course of business), 9-321 (non-exclusive license of general intangible and lease of goods in ordinary course of business).

226. If the debtor is a successor to a prior owner of collateral (e.g., a successor by merger, incor-

## 7. PROPERTY NOT IN EXISTENCE ON THE DATE THE OPINION IS DELIVERED

Security agreements typically cover after-acquired property and proceeds—in both cases collateral not in existence on the date of the opinion is delivered.<sup>227</sup> Although an opinion ordinarily speaks only as of its date,<sup>228</sup> as a matter of customary practice the opinion is generally understood to cover after-acquired collateral and, to a limited extent, proceeds.

### 7.1 AFTER-ACQUIRED PROPERTY

#### (a) Attachment opinion is presumed given

The creation or attachment opinion is understood to cover after-acquired collateral<sup>229</sup> if after-acquired collateral is included<sup>230</sup> in the collateral description.<sup>231</sup>

poration of a sole proprietorship, or similar transaction), security interests created by the predecessor debtor in that collateral and perfected by the filing of a financing statement may continue to be perfected by filings made against the predecessor debtor. *Id.* §§ 9-203(d)–(e), 9-508. If a “new debtor,” as defined in U.C.C. section 9-102(a)(56), “becomes bound” as debtor by a security agreement entered into by another person, the agreement generally will create a security interest with respect to existing and after-acquired property of the new debtor to the extent the property is described in the agreement and another agreement is not necessary to make a security interest in the property enforceable. *See id.* §§ 9-203(d)–(e), 9-203 cmt. 7, 9-508 cmts. 2, 3. Different rules apply to a secured party of a transferor whose transferee does not become bound by the transferor’s security agreement. *See supra* note 224. U.C.C. § 9-508(a) provides that a filing against the original debtor, as defined in U.C.C. § 9-102(a)(60), generally is effective to perfect a security interest in collateral that the new debtor has at the time it becomes bound by the original debtor’s security agreement and collateral that it acquires after the new debtor becomes bound. *See* U.C.C. §§ 9-316(a)(3) cmt. 2, ex. 5, 9-508 cmt. 4. This general rule is subject to significant limitations. For example, if the original debtor and the new debtor are located in different jurisdictions, a filing against the original debtor would not be effective to perfect a security interest in collateral that the new debtor has acquired from a person other than the original debtor or acquires in the future, and the secured party must file a financing statement in the appropriate jurisdiction against the new debtor to perfect its security interest in that collateral. *See id.* § 9-508, cmt. 4. U.C.C. section 9-508 does not apply to collateral transferred by the original debtor to the new debtor. For that collateral the filing against the original debtor continues to be effective until it lapses or perfection is lost for another reason. *Id.* § 9-508(c) cmt. 5; *see id.* §§ 9-316, 9-507(a). In some circumstances, the entity formed under the law of one state may “convert” into an entity under the law of another state and continue to be the “same” entity. *See, e.g.,* DEL. CODE ANN. tit. 6, § 18-214(g) (1999); CAL. CORP. CODE § 17540.9(a) (West). In that circumstance, the rules applicable to a debtor’s change in location would apply because the debtor’s identity has not changed. *See supra* note 224.

227. Because opinions often use terms defined in the security agreement, such as “Collateral,” “Trust Estate,” “Stock,” or “Pledged Securities,” opinion givers should be mindful that the defined terms may include after-acquired property or proceeds.

228. *See supra* § 5.4(a).

229. Article 9 expressly permits a security agreement to provide for a security interest in after-acquired collateral. U.C.C. § 9-204(a). Whether a security agreement covers after-acquired collateral is a matter of interpretation of the security agreement under contract law. *Id.* § 9-108 cmt. 3. A security interest cannot attach to after-acquired consumer goods in most circumstances and never attaches to an after-acquired commercial tort claim. *Id.* § 9-204(b). Bankruptcy can affect the attachment of a security interest to after-acquired property acquired after the commencement of the bankruptcy case. *See, e.g.,* Bankruptcy Code, 11 U.S.C. § 552 (2000). These limitations on attachment are not covered by the opinion.

230. The opinion does not cover whether a secured party should have included an after-acquired collateral clause in a security agreement.

231. A financing statement does not have to refer to after-acquired property of the type indicated in

It is understood that the security interest will not attach to the after-acquired collateral until the debtor has acquired rights or the power to transfer rights in the after-acquired collateral.<sup>232</sup>

**(b) Perfection opinion and priority opinion (when given) are presumed given as to after-acquired collateral in which security interest is perfected by filing**

For collateral in which a security interest is perfected by filing, if the security agreement refers to after-acquired collateral,<sup>233</sup> a filing perfection opinion is understood to cover not only collateral existing on the date of the opinion, but also the after-acquired collateral when the security interest later attaches to the collateral. This is so because the factual predicates for the perfection opinion on existing filing collateral—a properly-drafted and authenticated security agreement and properly-completed and filed U.C.C. financing statements—also provide the basis for an opinion on the creation, perfection, and, when given, priority of a security interest in after-acquired collateral of the same type perfected by the filing of the financing statement.<sup>234</sup> Immediately upon the acquisition by the debtor of “rights,” or the “power to transfer rights,” in the collateral, the security interest will attach to those interests in the collateral and will then be perfected.<sup>235</sup> If an opinion giver does not intend to provide an opinion on after-acquired property, the opinion giver should include an express statement to that effect in the opinion letter.<sup>236</sup>

When perfection occurs through the filing of a financing statement, the delay in attachment of the security interest to the after-acquired property generally has no effect on priority under Article 9,<sup>237</sup> even though attachment (and therefore perfection) will not occur until the debtor acquires rights in (or the power to transfer rights in) the after-acquired property.

Although often less than ideal from a grammatical standpoint, the filing perfection opinion is generally understood to cover after-acquired property whether the opinion speaks in the past, present, or future tense. For example, when the collat-

the financing statement to perfect a security interest in the after-acquired property of that type if the security agreement creates a security interest in the after-acquired property. U.C.C. § 9-502 cmt. 2.

232. The opinion need not state expressly that attachment cannot occur until the debtor acquires rights or the ability to transfer rights in the collateral. *See id.* § 9-203(b)(2); *see also supra* § 3.3(a).

233. If the security agreement does not create a security interest in after-acquired property, no security interest in the after-acquired property can be perfected. U.C.C. § 9-308(a).

234. *Id.* §§ 9-204(a) (creation), 9-308(a) (perfection), 9-322(a)(1) (priority). The same is true for certain security interests perfected by control. *Id.* §§ 9-203(b)(3)(D), 9-312(b)(1), (2), 9-314(a), 9-328(1). *See infra* § 8.

235. *See* U.C.C. §§ 9-203(b)(2) (requirement that debtor has rights in the collateral), 9-204(a) (creation of a security interest in after-acquired property), 9-308(a) (requirements for perfection).

236. A security interest does not attach to an after-acquired consumer goods or commercial tort claims, and the opinion does not cover that issue. *See supra* note 229.

237. *See* U.C.C. § 9-322(a)(1) (generally priority over other security interests dates from *earlier* of filing or perfection).

eral includes after-acquired property, an opinion that the security interest in the collateral “was perfected” upon the filing of a financing statement would be understood to cover the after-acquired property. To the extent the opinion expressly refers to, or is understood to cover, the after-acquired property, it means that the security interest will attach (and will be perfected) only when the debtor has acquired rights (or the power to transfer rights in) the after-acquired property.<sup>238</sup>

**(c) No perfection opinion or priority opinion (when given) is presumed given as to after-acquired collateral in which security interest is perfected by possession**

The result is different for an opinion based on perfection by possession of the collateral. Neither a perfection opinion nor a priority opinion addresses after-acquired property of this type because the predicate for perfection *and* priority—possession—does not exist on the date of the opinion.<sup>239</sup>

**(d) Perfection opinion and priority opinion (when given) are presumed as to certain after-acquired collateral in which security interest is perfected by control**

For a securities account (and for security entitlements with respect to financial assets credited to the securities account<sup>240</sup>) in which a secured party has perfected its security interest by obtaining “control,”<sup>241</sup> a secured party that “obtain[s] control” of a securities account before another secured party “obtain[s] control” has priority as to after-acquired, as well as existing, collateral.<sup>242</sup> When the debtor later obtains rights in the after-acquired collateral (i.e., security entitlements with respect to financial assets later credited to the securities account), the secured party’s priority would ordinarily relate back to the completion of the appropriate acts necessary to “obtain control.” Thus, when a secured party obtains control of a securities account and the debtor later acquires additional security entitlements

238. The opinion need not state expressly that attachment (and therefore perfection) cannot occur until the debtor acquires rights or the power to transfer rights, in the collateral. *See id.* § 9-203(b)(2); *see also supra* § 3.3(c).

239. Perfection as to after-acquired property would not occur until the debtor acquired rights in the property *and* the secured party (directly or through a third party) acquired possession. *Id.* § 9-308(a); *see supra* § 3.3 (c). Priority of a security interest perfected by possession would date from time of possession (assuming the security interest has attached to the collateral). *See* U.C.C. § 9-322(a)(1). The same is true for perfection of a security interest in a certificated security by delivery or control. *Id.* § 9-328(5). Because either means of perfection of a security interest in a certificated security requires delivery of the security, an opinion is not presumed given as to perfection by delivery or control as to after-acquired certificated securities. *See id.* § 8-106(a)–(b) (defining control of certificated security). A perfection opinion could be given in these circumstances by stating that “upon the secured party’s [taking possession][obtaining delivery][obtaining control] of the [collateral], the security interest in the [collateral] will be perfected.”

240. *See infra* note 296.

241. Priority is also based on obtaining control for certain types of collateral where control is a (or the only) method of perfecting a security interest. The method of obtaining control varies according to the type of collateral. *Id.* §§ 9-104 to -107.

242. *See id.* §§ 9-328 cmt. 5, ex. 6; 9-329(2). *But see infra* note 311.

based on the crediting of additional financial assets to the account,<sup>243</sup> the secured party's priority depends on when the secured party obtained control of the securities account. A perfection opinion as to a securities account in which a security interest is perfected by control is understood as a matter of customary practice to cover after-acquired collateral that consists of security entitlements relating to financial assets later credited to that securities account.<sup>244</sup>

## 7.2 PROCEEDS OF COLLATERAL

A security interest opinion typically covers proceeds only to a very limited extent. Proceeds do not exist on the date of the opinion. Under U.C.C. section 9-102(a)(64), “[p]roceeds’ . . . means (A) whatever is acquired upon the sale, lease, license, exchange, collection or other disposition of collateral. . . .” U.C.C. sections 9-203(f) and 9-315(a)(2) provide that a security interest in collateral attaches to identifiable proceeds<sup>245</sup> of the collateral. While those sections provide for the continued attachment of the security interest, U.C.C. section 9-315(c) provides further that the security interest in proceeds is perfected if the secured party's security interest in the original collateral was perfected. U.C.C. section 9-315(d), however, provides that perfection lapses after 20 days unless the proceeds are “identifiable” cash proceeds or certain other kinds of proceeds, although in some circumstances further action must be taken before the end of the 20 day period to maintain perfection.<sup>246</sup> While U.C.C. section 9-203 provides for the continuation of a security interest in identifiable proceeds, other provisions of U.C.C. section 9-315 place significant restrictions on this security interest, affecting nearly every aspect of the security interest opinion. Since the limitations imposed by section 9-315 are well understood, the security interest opinion does not cover and does not have to state that it is limited by U.C.C. section 9-315.

For proceeds, security interest opinions are interpreted as a matter of customary practice as follows:

- (i) they do not cover the application of U.C.C. sections 9-203 and 9-315 (and, accordingly, do not address the requirement that such proceeds be identifiable);
- (ii) if qualified by a U.C.C. Scope Limitation, they only cover proceeds subject to Article 9 of the U.C.C.; and
- (iii) they only cover the perfection or priority of the secured party's interest in the proceeds, if (i) the perfection and priority sections of the opinion

243. See U.C.C. § 8-501(a) (defining securities account).

244. For other types of collateral in which a security interest may be perfected by control (such as deposit accounts), the opinion preparers should examine the relevant priority rules. See *id.* §§ 9-327 to -329.

245. Section 9-315(a)(2) establishes the limitation that a security interest continues only in “identifiable” proceeds, and § 9-315(b) addresses when commingled proceeds (including cash proceeds) will be identifiable.

246. U.C.C. § 9-315(a)(2), (c)–(e).

expressly refer to proceeds, or (ii) the proceeds are after-acquired property of the same type as original collateral<sup>247</sup> covered by the perfection opinion and any priority opinion.<sup>248</sup>

Sometimes a secured party requests an opinion that it will be in the same position as to proceeds regardless of whether the debtor sells, leases, licenses, exchanges, collects, or otherwise disposes of the original collateral. Such an opinion is inappropriate because it depends on facts—whether the proceeds will be “identifiable” or the security interest in the proceeds will be perfected or have first priority—that cannot be determined at the time the opinion is delivered. For example, if the proceeds are identifiable cash proceeds in the form of a check and the check is in the possession of a holder in due course under U.C.C. Article 3, the holder in due course will take free of the secured party’s security interest in the check as proceeds.<sup>249</sup>

## 8. “PRIORITY” OPINIONS ON CERTIFICATED SECURITIES, SECURITY ENTITLEMENTS, AND SECURITIES ACCOUNTS

When the collateral is investment property<sup>250</sup> additional statutory rules apply. Although investment property can take many forms,<sup>251</sup> this *Report* is limited to “priority” opinions relating to security interests in certificated securities, security entitlements, and securities accounts.<sup>252</sup> These rules are complex and (as discussed below) different sets of “priority” rules apply to:

- (i) securities (whether certificated or uncertificated); and
- (ii) security entitlements and security accounts.

247. See *supra* note 110 (as to the meaning of “original collateral”).

248. Although a perfection or priority opinion typically covers “proceeds” in only a limited way, particular collateral that is “proceeds” of original collateral may be covered by the opinion because the collateral that is proceeds may also be after-acquired property that is described as original collateral, depending on the terms of the security agreement. If the security agreement and financing statement describe or indicate as original collateral the property that is the proceeds, the opinion covers that property in the sense that it is original collateral. For example, assume the collateral described in the security agreement and indicated in the financing statement includes all of Farmer Brown’s now existing and after-acquired cows and chickens. The opinion giver delivers perfection opinions covering both cows and chickens based on the filing of a financing statement describing both “cows” and “chickens.” The fact that Farmer Brown thereafter trades two cows for a truckload of chickens (and the chickens therefore are “proceeds” of the cows) does not mean that no opinion was given with respect to the perfection of the security interest in the newly-acquired chickens as original collateral. In this example, the chickens were not only “proceeds” of the cows, but also after-acquired property (because the security agreement described after-acquired “chickens” as original collateral). Although no opinion was given with respect to the perfection of the security interest in newly-acquired chickens as “proceeds,” an opinion was given concerning the perfection of the security interest in newly-acquired chickens as after-acquired original collateral.

249. U.C.C. §§ 3-305, 3-306, 9-331(a). Other persons that take possession of the check may also have priority over the secured party. *Id.* § 9-330(d).

250. See *id.* § 9-102(a)(49) (definition of “investment property”).

251. E.g., certificated securities, uncertificated securities, securities accounts, or security entitlements (including security entitlements with respect to federal book-entry securities).

252. The use of other kinds of investment property (such as commodity contracts and commodity accounts) as collateral is less common and beyond the scope of this *Report*.

## 8.1 ARTICLE 8 PROTECTED PURCHASER OPINIONS<sup>253</sup>

### (a) Elements of protected purchaser opinions

Article 8 accords special status to a “protected purchaser” of a certificated<sup>254</sup> security.<sup>255</sup> An opinion on the protected purchaser status of a secured party under Article 8 is an alternative<sup>256</sup> to a “priority” opinion under Article 9.

The term “purchaser” includes a person who obtains a security interest in property.<sup>257</sup> Protected purchaser status is thus available to secured parties as well as to owners of securities. Pursuant to U.C.C. section 8-303, a protected purchaser of a certificated security “takes free”<sup>258</sup> of any “adverse claim”<sup>259</sup> with respect to the

253. A similar approach can be taken for a priority opinion involving a negotiable instrument based on the holder-in-due-course rules of Article 3. U.C.C. §§ 3-305, 9-331(a). *See supra* note 185.

254. The protected purchaser rules also apply to an uncertificated security. *Id.* § 8-303. The definition of “control” is different, however, for an uncertificated security. *Compare id.* § 8-106(a), (b), *with id.* § 8-106(c). The “protected purchaser” rules do not apply to a purchase of (including a security interest in) a *security entitlement*. Similar, but distinct, rules concerning adverse claims apply to some purchasers of security entitlements. *See id.* §§ 8-502, 8-510; *see infra* § 8.3.

255. “Certificated security” is defined in U.C.C. § 8-102(a)(4). The status of collateral as a “certificated security” may be addressed by examining the certificate and the organizational documents of the issuer to determine that the security is represented by the certificate. For example, the certificate may recite that it is issued to evidence an entry on the records of the issuer (and does not represent the security). The determination of whether an interest in an entity (whether or not certificated) is in fact a “security” for purposes of Articles 8 and 9 is often straightforward, but may involve a complex factual analysis that opinion preparers ordinarily cannot be expected to make. The analysis of whether an interest is a “security” under other law, such as federal securities law, is generally not relevant to the analysis for purposes of Article 8 and Article 9. *See generally* U.C.C. § 8-102(d). Ordinarily an interest in a limited liability company or a partnership is not a “security.” *Id.* § 8-103(c). The opinion preparers may assume, without stating, that a document or interest that appears on its face to be a “security” is a “security.” Under U.C.C. definitions, debt instruments may be “securities” or “instruments.” *Id.* §§ 3-104, 8-102(b)(15) (definition of security), 9-102(a)(47) (definition of instrument). For purposes of Article 9, however, a debt instrument cannot be both. *Id.* § 9-102(a)(47).

256. The alternatives are not identical. *See infra* § 8.3.

257. U.C.C. §§ 1-201(33). *See also id.* § 1-201(b)(30) (revised). The definition of “purchaser” is based on the definition of “purchase” in U.C.C. §§ 1-201(32) and 1-201(b)(29) (revised).

258. Although U.C.C. section 8-303 speaks in terms of a “protected purchaser” (which may include a secured party) “taking free” of adverse claims to (including another security interest in the same security, a secured party that obtains “protected purchaser” status does not “take free” of a previously-acquired security interest in the security. Rather that secured party obtains only a senior security interest in the certificated or uncertificated security, the other security interest remains attached to the security with junior priority, and the other secured party retains its status as such. *Id.* § 9-331 cmt. 2. If the secured party later forecloses its security interest pursuant to part 6 of Article 9, the foreclosure sale may have the effect of discharging the junior security interest. *Id.* § 9-617(a)(3). The purchase of a security by a *buyer* of the security who qualifies as a protected purchaser would “cut off” the security interest of a secured party that has previously acquired a security interest in the security. *Id.* § 9-331 cmt. 2. The opinion preparers may assume, without stating, that the opinion recipient (with its counsel) understands these distinctions. *See Guidelines, supra* note 16, § 1.7.

259. An adverse claim is “a claim that a claimant has a property interest in a financial asset and that it is a violation of the rights of the claimant for another person to hold, transfer or deal with the financial asset.” U.C.C. § 8-102(a)(1) & cmt. 1. “Financial asset” includes a security. *Id.* § 8-102(a)(9). An “adverse claim” includes a security interest in favor of another. *Id.* § 8-102 cmt. 1. A secured party that has possession or control of collateral may grant a security interest in the collateral. *See id.* § 9-207(c)(3) cmts. 5, 6. Unless a secured party has agreed with the debtor that the secured party

security, including a claim that another person is the owner or has a property interest (including a security interest) in the security. Article 9 recognizes and defers to the rights of a protected purchaser under Article 8.<sup>260</sup>

The requirements of U.C.C. section 8-303<sup>261</sup> for becoming a protected purchaser of a certificated security are straightforward. The purchaser must:

- (i) obtain control<sup>262</sup> of the certificated security;
- (ii) give value;<sup>263</sup> and
- (iii) not, at the time<sup>264</sup> control is obtained and value given, have notice<sup>265</sup> of any adverse claim<sup>266</sup> to the certificated security.<sup>267</sup>

To obtain control, the secured party must:

- (i) if the certificated security is in bearer form, take delivery<sup>268</sup> of the certificated security;<sup>269</sup> or
- (ii) if the certificated security is in registered form, take delivery of the certificated security and have the security either (a) registered in the name of

will not grant a security interest in investment property collateral provided by the debtor, if the secured party grants to a third party a security interest in that collateral, the first debtor's rights of redemption in the collateral do not constitute "adverse" claims. The third party's knowledge of those rights thus would not prevent the third party's security interest in the investment property collateral from being senior to such rights.

260. U.C.C. § 9-331(a). A similar provision applies to security entitlements. *Id.* § 9-331(b).

261. *Id.* §§ 8-110(a)(5), (b)(4), and (c) establish choice-of-law rules with respect to the assertion of adverse claims. Unless it does so expressly, a perfection opinion does not cover which state's law governs perfection. *See supra* text accompanying notes 59, 96. *See generally* APPENDIX B (choice-of-law).

262. The "control" necessary to establish protected purchaser status is the same "control" that is one of the ways to perfect the security interest in the certificated security. U.C.C. §§ 8-106, 9-106, 9-314(a); *see also supra* text accompanying § 4.3(c).

263. The "value" required for protected purchaser status is the same "value" required for attachment of the security interest. *See supra* § 3.3(b); *see also* U.C.C. §§ 1-201(44), 8-303 cmt. 2, 9-203(b)(1).

264. *See id.* § 8-303 cmt. 2.

265. "Notice of an adverse claim" for this purpose is defined in U.C.C. section 8-105. *Compare id.* § 8-105, *with id.* § 1-201(26), (27).

266. Notice of any adverse claim to a certificated security will disqualify the purchaser from being a protected purchaser as to all adverse claims to a certificated security. *Id.* § 8-303. A different rule applies when the collateral is a security entitlement. *See infra* text accompanying notes 299–304.

267. The good faith component for "bona fide purchaser" status under the former version of Article 8 has been dropped. *See* U.C.C. § 8-303 cmt. 4; *see also id.* § 8-302 (pre-revision).

268. *Id.* § 8-301(a). "Delivery" of a certificated security requires that the person taking delivery have possession of the certificate representing the certificated security (directly or through an appropriate third party). "Delivery" of a certificated security is sufficient to perfect a security interest in the certificated security, but is only one of the elements required for a secured party to qualify as a protected purchaser. *Id.* §§ 8-106(a)–(c), 9-313(a); *see supra* note 137. A "protected purchaser" opinion is based on an unstated assumption that the secured party (or its agent) will maintain continuous possession of the certificate representing the security in the same manner and at the same location. *See supra* text accompanying notes 199–200. "Delivery" of the certificated security does not require that the debtor indorse the certificated security to the secured party. *See infra* note 284. An indorsement may be necessary, however, for the secured party to obtain "control" of a certificated security. *Compare* U.C.C. § 8-301, *with* § 8-106(b)(1); *see infra* notes 272–75 and accompanying text.

269. U.C.C. § 8-106(a).

the secured party,<sup>270</sup> or (b) indorsed<sup>271</sup> to the secured party or in blank by an effective<sup>272</sup> indorsement<sup>273</sup> of the security.<sup>274</sup>

The opinion preparers can address the delivery, registration, and indorsement requirements by attending the closing (or otherwise witnessing delivery to the secured party), obtaining appropriate certificates from the debtor or others, relying on appropriate express or implied assumptions, expressing a conditional opinion, or some combination.<sup>275</sup>

Value for purposes of a protected purchaser opinion under Article 8 has the same meaning as it does for purposes of an attachment opinion under Article 9.<sup>276</sup>

The final element, lack of notice of adverse claims, however, requires additional analysis.

### (b) Assumptions regarding notice

The secured party's lack of notice of adverse claims<sup>277</sup> is basic to the protected purchaser opinion and normally cannot be verified by the opinion preparers.<sup>278</sup> Moreover, the secured party by definition will neither be, nor be acting on behalf of, the opinion preparers' client. The opinion preparers, therefore, are permitted to rely on assumptions, whether stated or not, concerning the secured party's lack of notice of an adverse claim.<sup>279</sup>

270. If the certificated security is in the possession of a securities intermediary and is indorsed to the securities intermediary or in blank, then the collateral is a "security entitlement" and not a "security." *Id.* § 8-301(a)(2) & cmt. 2; see *infra* note 296.

271. The indorsement of a certificated security may be on the security itself or on a separate document (e.g., a stock power). See U.C.C. § 8-102(a)(11).

272. *Id.* Article 8 separates the meaning of "indorsement" from the effectiveness of the indorsement. *Id.* § 8-102(a)(11) cmt. 11. The facts necessary for an "effective indorsement," such as the authority of the person making the indorsement, are not ordinarily readily accessible to the opinion preparers. Thus, when a "protected purchaser" opinion depends on the existence of an effective indorsement, the opinion is based on assumptions regarding those facts, whether or not stated, and any reference in the opinion to an indorsement is understood to assume the "effectiveness" of the indorsement.

273. *Id.* § 8-107; see also *id.* § 8-303 cmt. 3.

274. *Id.* § 8-106(b).

275. The technical "delivery" requirements for the type of transfer necessary to establish protected purchaser status are set forth in U.C.C. section 8-301; see also *id.* § 8-301 cmt. 2. If the additional requirements to qualify for protected purchaser status are not met, the only opinion that could be given on the priority of the security interest would be an opinion on priority under Article 9. See *infra* § 8.2.

276. U.C.C. §§ 1-201(44), 8-102(c), 8-303, cmt. 2, 9-102(c); see *supra* § 3.3(b).

277. U.C.C. section 8-105 establishes whether a person has notice of an adverse claim.

278. The opinion preparers are not expected, for example, to make inquiry of the Securities Information Center or to determine whether the secured party has made that inquiry. The Securities Information Center is a national data bank established by the Securities and Exchange Commission to process reports and inquiries pertaining to missing, lost, counterfeit or stolen securities. See 11 C.F.R. § 240.17f-1; see also *First Nat'l Bank v. Lewco Sec. Corp.*, 860 F.2d 1407, 7 U.C.C. Rep. Serv. 2d (Callaghan) 10 (7th Cir. 1988); *Hollywood Nat. Bank v. IBM Corp.*, 38 Cal.App. 3d 607 (Cal. Ct. App. 1974). The definition of notice of an adverse claim, as applied to certain types of purchasers, includes information the purchaser would have obtained by inquiring of these sources. See U.C.C. § 8-105 cmt. 5.

279. The opinion preparers may not rely on an unreliable assumption. See *supra* note 19. For example, if an inspection of the stock certificate reveals an adverse claim, reliance on the assumption would not be appropriate. Similarly, a review of a U.C.C. filing search may show a filing covering the

### (c) Qualifications

If the secured party is a protected purchaser,<sup>280</sup> the opinion preparers may render an opinion that the secured party acquired its interest “free of adverse claims,”<sup>281</sup> and no qualifications are required.<sup>282</sup>

As with other U.C.C. opinions, the opinion need not state expressly that it does not generally cover proceeds of (including distributions on) securities.<sup>283</sup>

## 8.2 ARTICLE 9 PRIORITY OPINIONS ON CERTIFICATED SECURITIES

When perfection is based on delivery or control of a certificated security, an opinion giver may provide a “priority” opinion under Article 9 instead of a “protected purchaser” opinion under Article 8. A priority opinion addresses only competing security interests under Article 9 and not “adverse claims” generally.<sup>284</sup>

securities and give notice of an adverse claim. The existence of a filed, but unreviewed, financing statement does not give notice. U.C.C. § 8-105(e). Although notice of an adverse claim would prevent the secured party from obtaining its security interest free of any adverse claim, notice of an adverse claim would not prevent the secured party from obtaining priority by obtaining control of the certificated security. See *infra* note 288. Note that a different rule may apply if the collateral is an “instrument.” U.C.C. § 9-330(d); see *supra* notes 187–89 and accompanying text.

280. See *supra* note 258 and accompanying text.

281. Opinions are sometimes requested that the secured party will acquire its security interest “free and clear of adverse claims.” The “and clear” language does not appear in Article 8 and does not have a generally accepted meaning. It should not be used. If used, it adds nothing to the “free of adverse claims” language. See *supra* note 258 as to the meaning of “free of” in this context. The “free of adverse claims” language is not appropriate for a purchaser obtaining an interest in a security entitlement. U.C.C. § 8-502. See *infra* text accompanying note 288.

282. An opinion that the secured party acquired its security interest “free of adverse claims” addresses the secured party’s rights at a particular point in time (i.e., when the secured party gave value and obtained control). It does not address the interests of claimants whose rights, if any, could arise in the future. Hence, as noted above, the possibility of future interests does not require a qualification to a “free of adverse claims” opinion. By way of contrast, an opinion on “priority” under Article 9 does cover some of these issues. See *infra* § 8.2 (regarding an Article 9 priority opinion as to a certificated security). Some opinion givers prefer, when the secured party meets the requirements to be a protected purchaser, to give an opinion that the secured party is a protected purchaser, rather than an opinion that the secured party’s security interest is “free of adverse claims.” In the case of opinions subject to a U.C.C. Scope Limitation, the Committee believes that either form of opinion is acceptable. Note that, due to the U.C.C. Scope Limitation, neither form of opinion addresses the secured party’s priority with respect to interests in, or claims to, the collateral that are not governed by the U.C.C. See *supra* § 2.1.

283. Distributions with respect to a security (or any other collateral) are “proceeds.” U.C.C. § 9-102(a)(64)(B). This reverses the rule of some oft-criticized decisions under prior law. See, e.g., *FDIC v. Hastie*, 2 F.3d 1042 (10th Cir. 1993) (ordinary dividends on common stock not proceeds, based on former U.C.C. § 9-306 definition of “proceeds” before 1994 modification to that definition as part of the 1994 revisions to Article 8); *In re Mintz*, 192 B.R. 313 (Bankr. D. Mass. 1996) (payments not “proceeds” of rights to distributions associated with a partnership interest); see *supra* § 7.2 (regarding opinions on proceeds).

284. Both the “protected purchaser” and “priority based on control” opinions require that the secured party have “control” of the security. In addition, a “protected purchaser” opinion (unlike a “priority-based-on-control” opinion under Article 9 (as described in this *Report*) requires that the secured party not have notice of an adverse claim. See *supra* notes 265–66 and accompanying text. Both opinions require that the secured party (i) receive delivery (acquire possession) of the security

In addition to filing a financing statement,<sup>285</sup> a secured party may perfect its security interest in a certificated security by taking delivery<sup>286</sup> or obtaining control of the certificated security.<sup>287</sup> A secured party that obtains control of a certificated security has priority over another secured party that has perfected only by filing a financing statement, or receiving delivery,<sup>288</sup> or both,<sup>289</sup> or that is subsequently perfected by control.<sup>290</sup>

Because perfection by control<sup>291</sup> of a certificated security requires physical possession of the security certificate,<sup>292</sup> generally only one secured interest at a time<sup>293</sup> will be perfected by this method.<sup>294</sup>

certificate (directly or through an appropriate third party), (ii) give value, and (iii) satisfy the other requirements of control (i.e., re-registration or indorsement). A "priority-based-on-delivery" opinion would require that the secured party (i) receive delivery (acquire possession) of the security certificate (directly or through an appropriate third party), and (ii) because only an attached security interest can be perfected, give value. *See supra* note 95. Neither the secured party's lack of notice of an adverse claim nor an indorsement or re-registration is required for the secured party to have perfected its security interest by delivery.

285. Priority opinions where the competing security interests are perfected only by the filing of a financing statement are addressed elsewhere in this *Report*. *See supra* § 5.2.

286. "Delivery" of a security certificate is generally equivalent to the secured party obtaining possession of other tangible collateral. U.C.C. §§ 8-301(a)(1), 9-313(a). "Delivery" of a security certificate does not require an indorsement of the security certificate (as does control in the case of a registered certificated security), except in limited circumstances. *See id.* § 8-301(a)(3).

287. *Id.* §§ 9-313(a), 9-314(a); *see supra* § 4.3(c).

288. A secured party that has perfected its security interest in a certificated security in registered form by taking delivery or obtaining control of the security certificate has priority over a secured party that has perfected its security interest by a method other than by taking delivery or obtaining control. U.C.C. § 9-328(5). Unlike the priority, under U.C.C. section 9-330(d), of a secured party that takes possession of instruments over a secured party that has perfected its security interest solely by the filing of a financing statement, the priority of a secured party that takes delivery of a certificated security over a secured party that has perfected its security interest solely by the filing of a financing statement is not dependent on the secured party's lack of knowledge that its transaction does not violate the rights of the other secured party. *See id.* § 9-328(5). A priority opinion based on delivery (as against a secured party that has perfected its security interest solely by the filing of a financing statement) would be similar to a priority opinion based on control. This section of this *Report* addresses only a priority opinion based on control.

289. *Id.* § 9-328(1).

290. *Id.* § 9-328(2)(A); *see supra* § 4.3(c).

291. *Id.* §§ 8-106(a), (b), 8-301, 9-106.

292. Control of a certificated security requires "delivery" of the security to the secured party. *Id.* §§ 8-106(a), (b). "Delivery" requires possession of the certificated security by the secured party (directly or through an appropriate third party). *Id.* § 8-301(a)(1), (2); *see supra* § 4.3(b).

293. More than one secured party may have control of the same certificated security. For example, a secured party could have possession on behalf of itself *and* another secured party or a third party could have possession for both secured parties and therefore the certificated security could have been "delivered" to both secured parties. U.C.C. §§ 8-301(a)(2), 9-313(c). In that case, the first secured party to have obtained control would have priority. *Id.* § 9-328(2)(A). The opinion preparers may assume (without so stating) that the secured party or third party in possession does not have possession on behalf of a person other than the secured party that is the opinion recipient. *See id.* § 9-328 cmt. 5, ex. 6.

294. As with other collateral, the opinion (i) covers proceeds only to a limited extent, and (ii) generally does not cover the effect of a change in the facts that would result in a loss of perfection. *See supra* §§ 5.4(a), 7.2.

## 8.3 ARTICLE 8 “NO ADVERSE CLAIM” OPINIONS FOR A SECURITY ENTITLEMENT

### (a) Introduction

Article 8 does not provide for characterizing a purchaser (including a secured party<sup>295</sup>) of a security entitlement<sup>296</sup> as a “protected purchaser.”<sup>297</sup> Instead, without using that label, U.C.C. section 8-502 provides a purchaser<sup>298</sup> of a security entitlement who becomes the entitlement holder<sup>299</sup> with respect to the security en-

295. See *supra* note 257 (definition of “purchaser” includes secured party).

296. A “security entitlement” consists of “the rights and property interest of an entitlement holder with respect to a financial asset specified in Part 5 [of Article 8].” U.C.C. § 8-102(a)(17). An “entitlement holder” is “a person identified in the records of a securities intermediary as the person having a security entitlement against the securities intermediary.” *Id.* § 8-102(a)(7). A “securities account” is “an account to which a financial asset is . . . credited . . .” *Id.* § 8-501(a). A “security entitlement” includes personal rights against the applicable securities intermediary and a co-property right (with other entitlement holders holding security entitlements in respect of fungible financial assets through securities accounts maintained with the same securities intermediary) in the interests in financial assets of the applicable type held by the securities intermediary. It does not include a specific property interest in a particular financial asset held by the securities intermediary. See *id.* §§ 8-102(a)(17) & cmt. 17, 8-503(b) & cmt. 1. “Financial assets” include (i) securities and certain other types of property held by a securities intermediary for another in a securities account, and (ii) other property that the securities intermediary and the entitlement holder have agreed will be treated as a “financial asset.” *Id.* §§ 8-102(a)(9), 8-103. A description of collateral as a “securities account” includes all security entitlements carried in the account. *Id.* § 9-108(d) cmt. 4; see *id.* §§ 9-203(h) (“attachment of a security interest in a securities account is also attachment of a security interest in the security entitlements carried in the securities account”), 9-308(f) (same for perfection). The discussion of “security entitlements” in sections 8.3 and 8.4 of this *Report* applies to security interests in “securities accounts.” *Id.* § 9-308(f). A reference in an opinion to a “securities account” includes all security entitlements with respect to financial assets credited to the account.

297. The concept of “protected purchaser” in U.C.C. section 8-303 applies only to direct holdings of certificated and uncertificated securities. The concept does not apply to persons having security entitlements, including security entitlements with respect to certificated and uncertificated securities. See U.C.C. § 8-502 cmt. 1.

298. A “purchaser” includes a secured party. See *supra* text accompanying note 257.

299. U.C.C. section 8-502 only applies when the purchaser becomes the “entitlement holder.” One way a secured party can perfect a security interest in a security entitlement is to obtain “control” of the security entitlement. U.C.C. § 9-314(a). One of the ways to obtain “control” is for the secured party to become the “entitlement holder” with respect to the security entitlement. *Id.* §§ 8-106(d)(1), 9-106(a). Other methods of obtaining “control” of the security entitlement (such as entering into a control agreement among the debtor, the secured party, and the securities intermediary), will suffice to perfect the security interest and provide the secured party with priority over other secured parties that have been perfected by a method other than control. Those methods, however, will not provide the secured party with rights under U.C.C. section 8-502. See *id.* §§ 8-106, 9-106, 9-314. Thus, U.C.C. section 8-502 is relevant to an opinion concerning the priority of a security interest in investment property *only* when the secured party perfects a security interest in a security entitlement by becoming the entitlement holder and not when the secured party obtains control by another method or perfects its security interest by another method. U.C.C. section 8-510(c) addresses the relative rights under Article 8 of competing claims to a security entitlement where the debtor remains the entitlement holder. By its own terms, U.C.C. section 8-510(c) does *not* apply to a case “covered by the priority rules in Article 9.” Thus, an opinion addressing the “priority” over other secured parties of a security interest in a security entitlement perfected by a method other than the secured party’s becoming the entitlement holder (such as by obtaining control by another method) would be given under Article 9. See *supra* § 8.3(c). Even in that case, U.C.C. section 8-510 governs the rights of a secured party as against the adverse claims of persons not covered by Article 9’s priority rules. U.C.C. § 8-510 cmt. 2, exs. 1, 2.

titlement with protection against the assertion of adverse claims<sup>300</sup> against the security entitlement if specified conditions are met. If a purchaser meets the requirements of U.C.C. section 8-502 with respect to “an” adverse claim,<sup>301</sup> then “the”<sup>302</sup> adverse claim<sup>303</sup> cannot be asserted against that purchaser with respect to the security entitlement. Article 9 recognizes and defers to the rights of the purchaser under U.C.C. section 8-502.<sup>304</sup>

### **(b) Elements of the “no assertion of adverse claim” opinion for a security entitlement**

Under U.C.C. section 8-502, to be protected against the assertion of an adverse claim to a security entitlement, a purchaser of the security entitlement must:

- (i) acquire the security entitlement by becoming the entitlement holder in accordance with U.C.C. section 8-501;<sup>305</sup>
- (ii) give value;<sup>306</sup> and
- (iii) not have notice<sup>307</sup> of the relevant adverse claim at the time of acquiring the security entitlement and giving value.

In general U.C.C. § 8-501 provides that a purchaser (including a secured party) acquires a security entitlement with respect to a financial asset when the securities intermediary credits<sup>308</sup> the financial asset to the securities account of the purchaser (secured party).

### **(c) Qualifications**

As previously discussed,<sup>309</sup> a secured party with a security interest in a security entitlement perfected by the secured party’s becoming the entitlement holder may

300. An “adverse claim” includes a claim that another person is the owner of or has an interest, including a security interest, in the security entitlement. *See supra* note 259.

301. *See* U.C.C. § 8-502. When U.C.C. section 8-510 is relevant, *see supra* note 299, the same rule applies.

302. A purchaser of a certificated or uncertificated security with notice of any adverse claim will take the security subject to all adverse claims. U.C.C. § 8-303(b). A purchaser of a security entitlement with notice of “an” adverse claim will take subject to that adverse claim, but not other adverse claims of which it does not have notice. *Id.* §§ 8-502, 8-510.

303. *Id.* § 8-102(a)(1). An “adverse claim” includes a security interest in favor of another secured party. *See supra* note 259.

304. U.C.C. § 9-331(b).

305. *See supra* note 296.

306. The “value” required under U.C.C. section 8-502 is the same as the “value” required for the attachment of the security interest under U.C.C. section 9-203(b)(1). *See supra* § 3.3(b).

307. The requirement of lack of notice of a relevant adverse claim has the same meaning as for the Article 8 protected purchaser opinion. *See supra* § 8.1(b).

308. The opinion assumes, without stating, that any relevant financial assets have been credited to the securities account of the secured party. U.C.C. § 8-501(a).

309. *See supra* text accompanying notes 299–304.

have rights similar to those of a protected purchaser of a certificated security. An opinion that an adverse claim cannot be asserted against a secured party does not require any qualifications<sup>310</sup> because under U.C.C. Section 8-502 an adverse claim to a security entitlement may not be asserted against the secured party.<sup>311</sup>

As with other U.C.C. opinions, the opinion need not state expressly that its coverage of proceeds of (including distributions on) the security entitlements is limited.<sup>312</sup> Likewise, the opinion is based on an unstated assumption that the secured party will continuously maintain its status as the entitlement holder of the security entitlement for purposes of U.C.C. sections 8-502 and 9-314.<sup>313</sup>

#### 8.4 ARTICLE 9 PRIORITY OPINIONS ON SECURITY ENTITLEMENTS<sup>314</sup>

When perfection is based on control (whether through the secured party's becoming the entitlement holder or otherwise) of a security entitlement, a "priority" opinion based on Article 9<sup>315</sup> can be given instead of a "no assertion of adverse claims" opinion under U.C.C. section 8-502.<sup>316</sup> The priority opinion

310. See *supra* notes 280–82.

311. See *supra* notes 298–304. It should be noted, however, that while the secured party's security interest in the security entitlement is free from adverse claims, if the requirements of U.C.C. section 8-502 are met, the security entitlement itself includes a co-property interest in underlying financial assets of the applicable type that is shared with the other holders of security entitlements in identical financial assets. See U.C.C. §§ 8102(a)(17) & cmt. 17, 8-502 cmt. 1, 8-503(b) & cmt. 1; see also *supra* note 300. The security interest is also junior to the claims of creditors of the applicable securities intermediary that have control with respect to such financial assets. See U.C.C. § 8-511(b). The opinion does not cover these issues.

312. See *supra* § 7.2.

313. See *supra* text accompanying note 294.

314. The approach used for opinions on securities accounts and security entitlements may be adapted for an opinion on a security interest in a deposit account. U.C.C. §§ 9-104, 9-314; see APPENDIX A (Illustrative Opinion). A security interest in a deposit account as original collateral may be perfected only by the secured party's obtaining control of the deposit account. *Id.* § 9-312(b)(1). The requirements for "control" of a deposit account are similar to those for control of a securities account. *Id.* §§ 8-106, 9-104. A security interest in a deposit account perfected by control will have priority over a security interest perfected by another method (such as a security interest in proceeds perfected by the filing of a financing statement indicating other collateral as the original collateral). *Id.* § 9-327(1). If more than one security interest is perfected by control, the priority of the secured parties generally depends on the temporal order in which they "obtain[ed]" control. *Id.* § 9-327(2). A security interest in favor of the depository bank where the deposit account is maintained has priority over a security interest in favor of another person, even if that security interest was perfected by control before the depository institution obtained control, U.C.C. § 9-327(3), unless the other person has perfected by becoming a customer of the depository bank. *Id.* §§ 9-104(a)(1), 9-327(4).

315. A Filing Priority Opinion could also be given if perfection is obtained by filing a financing statement. See *supra* § 5.2(b).

316. Both the "no-adverse-claim" and "priority-based-on-control" opinions require that the secured party have "control" of the security entitlement. In addition a "no adverse claim" opinion (unlike a "priority based on control" opinion under Article 9 (as described in this *Report*)) requires that the secured party not have notice of an adverse claim. See *supra* notes 264–66, 277–79 and accompanying text. Both opinions require that the secured party (i) obtain control and (ii) give value.

would address only competing security interests<sup>317</sup> under Article 9 and not “adverse claims” generally.<sup>318</sup>

## 9. REVISED ARTICLE 9 TRANSITION RULES

Part 7 of revised Article 9 provides rules concerning the transition from former Article 9 to revised Article 9.<sup>319</sup> These rules have no effect on the attachment or perfection of an Article 9 security interest for transactions first<sup>320</sup> closing<sup>321</sup> *on or after* the effective date of revised Article 9.<sup>322</sup>

The transition rules could, however, have an effect on the priority of an opinion recipient’s security interest in a transaction closing on or after the effective date of revised Article 9. For example, under the transition rules, a financing statement filed and effective under former Article 9 remains effective under revised Article 9 for specified periods<sup>323</sup> and that financing statement might not be filed in the same state<sup>324</sup> as a financing statement filed under revised Article 9.<sup>325</sup> Thus, the financing statement filed under former Article 9 would not be identified in a search report obtained from the appropriate filing office in the appropriate state under revised Article 9, but may still establish priority in favor of another secured party under the revised Article 9 transition rules.<sup>326</sup>

A Filing Priority Opinion by definition would be based solely on a review of the search report identified in the opinion<sup>327</sup>—presumably a report from the state

317. A security interest in a security entitlement perfected by control will have priority over a security interest perfected by a method other than control. U.C.C. § 9-328(1). A security interest in a security entitlement perfected by control would be junior to a security interest held by a secured party who already has control and to a security interest in favor of the applicable securities intermediary (even if it attaches in the future), unless the secured party has perfected by becoming the entitlement holder. *Id.* § 9-328. The opinion preparers may assume, without stating, that no other secured party already has control. If the securities intermediary, in the control agreement (or another document), does not waive or agree to subordinate any security interest it may have, the opinion preparers should consider qualifying an Article 9 priority opinion to note the securities intermediary’s possible priority.

318. *See supra* § 8.3.

319. U.C.C. §§ 9-701 to -709. For thorough discussions of the transition rules, see B. Smith, *New Article 9 Transition Rules*, 74 CHI. KENT L. REV. 1339 (1999); H. Sigman & Edwin E. Smith, *Revised U.C.C. Article 9’s Transition Rules: Insuring a Soft Landing*, 55 BUS. LAW. (2000); *see also supra* note 14.

320. *See supra* § 7.1.

321. This assumes that perfection is not based on an effective financing statement filed under former Article 9. *See* U.C.C. § 9-705(c).

322. Opinions addressing the effect of revised Article 9 (including the transition rules) on transactions that closed *prior* to the effective date of revised Article 9 are beyond the scope of this *Report*. Similarly, the effect of the adoption of revised Article 9 with delayed effective dates in five jurisdictions (Alabama, Connecticut, Florida, Mississippi, and the U.S. Virgin Islands) and lack of adoption in some jurisdictions (including Puerto Rico) is beyond the scope of this *Report*. *See PEB Report, supra* note 38.

323. U.C.C. § 9-705(c).

324. In addition, the financing statement may not have been filed in the same office within the state where the financing statement would be filed under revised Article 9. *Compare* U.C.C. § 9-401 (pre-revision), *with* U.C.C. § 9-501 (revised).

325. U.C.C. §§ 9-103, 9-401 (pre-revision); *see generally* APPENDIX B (choice of law); U.C.C. §§ 9-301 to -307, 9-501.

326. U.C.C. § 9-709(a).

327. *See supra* text accompanying note 173.

where the secured party has filed or will file a financing statement under revised Article 9.<sup>328</sup> As such, unless the opinion expressly refers to a search report obtained from the filing office in the appropriate state(s) and office(s) for the filing of a financing statement under former Article 9, a Filing Priority Opinion inherently does not address filings made under former Article 9 and affecting priority under the transition rules.

In view of the potentially significant effect of a filing in another jurisdiction under former Article 9 and the significant departure in revised Article 9 from the place-of-filing rules of former Article 9, if the opinion preparers believe that a Filing Priority Opinion based solely on a search report from the state where the filing occurs under revised Article 9 will mislead<sup>329</sup> the opinion recipient, the opinion preparers should consider either:

- (i) disclosing to the opinion recipient that a search report was not obtained from any state where a filing might have been appropriate under former Article 9; or
- (ii) obtaining search reports in those states, identifying them in the Filing Priority Opinion, and covering them in the Filing Priority Opinion.<sup>330</sup>

## 10. CONCLUSION

This *Report* is intended to provide guidance to lawyers who are asked to give U.C.C. security interest opinions. Broad principles of general application overlay the giving of security interest opinions. Opinions under Article 9 also call for familiarity with Article 9. While this *Report* provides a detailed discussion of Article 9 and opinions on security interests created under Article 9, opinion preparers who do not regularly work with Article 9 should consider whether to involve a lawyer familiar with Article 9 in the preparation of a security interest opinion.

This *Report* continues the TriBar tradition of attempting to combine theory with practice. If it has succeeded, the process of crafting U.C.C. security interest opinions will be simpler and their scope and meaning will be clearer.

July 25, 2003

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TriBar Opinion Committee

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328. See *supra* note 169.

329. See *supra* note 19.

330. The determination of the state or states in which to search for a financing statement filed under former Article 9 would be based on assumptions stated in the opinion letter on the location of tangible collateral or the debtor as those terms were used under former Article 9 or on a determination by the opinion recipient. See U.C.C. § 9-103 (pre-revision). The opinion preparers are not obliged to give a choice-of-law opinion when deciding where to search. See text accompanying note 39. When reviewing financing statements filed under former Article 9, the opinion preparers should consider the effect of a change in the definition of terms in revised Article 9. See U.C.C. §§ 9-703 cmt. 3, 9-705 cmt. 6, ex. 7; see generally APPENDIX B (choice-of-law).

## APPENDIX A

### ILLUSTRATIVE SECURITY INTEREST OPINION<sup>331</sup>

Law Offices  
Wise, Safe & Solvent LLP  
One Thousand Wall Street  
New York, New York 10005

August 1, 2003

Careful Lending Bank  
Two Thousand Wall Street  
New York, New York 10005

Ladies and Gentlemen:

We have acted as counsel to Rock Solid Corporation (“Borrower”), a New York corporation, in connection with the preparation, execution, and delivery of, and borrowing under, the Credit Agreement, dated August 1, 2003, between you (“Secured Party”) and Borrower (the “Credit Agreement”), the Security Agreement, dated August 1, 2003, between Secured Party and Borrower (the “Security Agreement”), and the other documents identified below. This opinion letter is delivered to you pursuant to Section [ ] of the Credit Agreement.

References in this opinion letter to the “New York U.C.C.” are to the Uniform Commercial Code currently in effect in the State of New York. Capitalized terms used but not defined in this opinion letter have the meanings given to them in the Security Agreement. All terms in opinions 2-[12] that are defined in the New York U.C.C. and that are not capitalized have the meaning given to them in the New York U.C.C.

For purposes of this opinion letter, we have reviewed the following documents:

- (a) [Insert in appropriate lettered items the documents reviewed for non-security interest opinions, such as a certified copy of articles or certificate of incorporation];
- (b) the Credit Agreement;
- (c) the Security Agreement;
- (d) the Pledge Agreement, dated August 1, 2003 (the “Pledge Agreement”), between Secured Party and Borrower;<sup>332</sup>

331. This Illustrative Security Interest Opinion is only a suggested starting point. It is not intended to be prescriptive, but only to provide a context for the commentary in the Special Report. The hypothetical transaction addressed here is one in which the debtor, in order to secure both existing indebtedness and future advances, has granted to the secured party a security interest in all of the debtor’s existing and after-acquired personal property. The collateral includes instruments, certificated securities, security entitlements, and deposit accounts. The debtor is incorporated in New York. The U.C.C. search report with respect to filings with the New York Secretary of State naming the debtor indicates only one other secured creditor—Due Diligence Factoring Company—that filed a financing statement that includes collateral in which a security interest is granted to Careful Lending Bank, the secured party.

332. If the security interest in any of the collateral is perfected through the possession of the collateral by a bailee, perfection may involve an acknowledgement from the bailee that it is holding the collateral for the benefit of the secured party. *See supra* note 144.

- (e) the Securities Account Control Agreement (the “Securities Account Control Agreement”), dated August 1, 2003, among Secured Party, Borrower, and Good Advice Broker;
- (f) the Deposit Account Control Agreement (the “Deposit Account Control Agreement”), dated August 1, 2003, among Secured Party, Borrower, and Safe Deposit Bank;
- (g) an [acknowledgment] [time-stamped] [unfiled] copy of a financing statement (the “Financing Statement”) naming the Borrower as debtor and the Secured Party as secured party, [filed] [to be filed] in the Office of the Secretary of State of the State of New York (the “Filing Office”); and
- (h) the report of Prompt and Efficient Document Services Corp., dated July 28, 2003, as to U.C.C. financing statements naming the Borrower as debtor (the “U.C.C. Search Report”) and on file in the Filing Office as of 5:00 p.m. on July 1, 2003 (the “Effective Date”<sup>333</sup>).

For purposes of this opinion letter we have also reviewed such additional documents, and made such other investigation as we have deemed appropriate.

Based on the foregoing and subject to the other paragraphs of this opinion letter, we express the following opinions:

1. [Insert in appropriately numbered paragraphs non-security interest opinions].<sup>334</sup>
2. *First Alternative:* The Security Agreement is effective to create<sup>335</sup> in favor of Secured Party [, as security for the Obligations,]<sup>336</sup> a security interest (the “Article 9 Security Interest”) in the collateral described in the Security Agreement<sup>337</sup> (the “Article 9 Collateral”).<sup>338</sup>

333. The “Effective Date” includes the time of day (if given) of the search report.

334. See, e.g., 1998 *TriBar Report*, *supra* note 1, at 667–74 (providing examples of Illustrative Opinion Letters).

335. Some lawyers believe that a “creation” opinion is narrower than an “attachment” opinion, while others believe that there is no difference. Both sides agree that all of the elements of attachment must be satisfied for a security interest to be perfected. Accordingly, a perfection opinion requires the opinion preparers to satisfy themselves that all of the elements of attachment have been satisfactorily addressed. Nevertheless, as noted in section 3.3(c) *supra*, as a matter of customary practice, a creation or attachment opinion, whether express or, by virtue of the giving of a perfection opinion, implied, is understood not to cover the question of whether the debtor has rights or the power to transfer rights in the collateral. If, however, an opinion expressly assumes either “creation” or “attachment” of the security interest for purposes of giving a perfection opinion, the perfection opinion as a matter of customary practice is understood not to cover any of the elements of creation or attachment. See *supra* notes 51–53.

336. See note 74. This bracketed language would be implied in a creation opinion unless the opinion letter contains a contrary statement.

337. If the U.C.C. Scope Limitation set forth below (see *infra* text at note 368) is not used, language similar to the following should be included: “in which a security interest may be created under Article 9 of the [state] U.C.C.”

338. The creation and attachment opinions in paragraph 2 define the broad term *Article 9 Collateral*. The perfection opinions in subsequent paragraphs divide the Article 9 Collateral into additional sub-categories.

2. *Second Alternative*: A security interest (the “Article 9 Security Interest”) in favor of Secured Party [, as security for the Obligations,]<sup>339</sup> has attached<sup>340</sup> to the collateral described in the Security Agreement<sup>341</sup> (the “Article 9 Collateral”).<sup>342</sup>
3. [Upon the filing<sup>343</sup> of the Financing Statement with the Filing Office,] [the Article 9 Security Interest in that portion of the Article 9 Collateral in which a security interest may be perfected by the filing of a financing statement under the New York U.C.C. (the “Filing Collateral”) will be perfected.<sup>344</sup>
4. The U.C.C. Search Report sets forth the proper filing office and the proper name of the debtor necessary to identify those persons who under the New York U.C.C. have, as of the Effective Date, financing statements on file against the Borrower indicating any of the Filing Collateral. Except for the financing statement naming Due Diligence Factoring Company as secured party, the U.C.C. Search Report identifies no still-effective financing statement naming Borrower as debtor and indicating any of the Filing Collateral filed in the Filing Office, prior to the [Effective Date] [filing in the Filing Office of the Financing Statement].<sup>345</sup>
5. The Article 9 Security Interest in that portion of the Article 9 Collateral consisting of the instruments<sup>346</sup> identified on Schedule 1 to the Security Agreement (the “Pledged Instruments”) [is perfected by] [will be perfected upon] Secured Party taking possession<sup>347</sup> of the Pledged Instruments.<sup>348</sup>
6. The Article 9 Security Interest in the Pledged Instruments [is] [will be] prior to any other security interest created under Article 9.<sup>349</sup>

339. See *supra* note 74. This bracketed language would be implied in an attachment opinion unless the opinion letter contains a contrary statement.

340. See *supra* § 3.3.

341. If the U.C.C. Scope Limitation set forth below (see *infra* text at note 367) is not used, language similar to the following should be included: “in which a security interest may be created under Article 9 of the [state] U.C.C.”

342. The creation and attachment opinions in paragraph 2 define the broad term *Article 9 Collateral*. The perfection opinions in subsequent paragraphs divide the Article 9 Collateral into additional sub-categories.

343. “Filing” includes the “acceptance” of the financing statement by the filing office. See *supra* notes 132–36.

344. Because the hypothetical transaction that is the subject of this opinion letter involves a blanket security interest in all types of collateral including some (e.g., deposit accounts) in which a security interest may not be perfected by filing a financing statement, the opinion in this paragraph states that it is limited to collateral in which a security interest may be perfected by filing.

345. See *supra* § 6.2. If the financing statement has not yet been filed or was filed after the Effective Date, the first set of bracketed words (and not the second set) would be used. If the financing statement was filed and is identified in the U.C.C. Search Report, the second set of bracketed words (and not the first set) would be used.

346. For related assumptions (stated and unstated) and exceptions see *supra* § 4.3(b).

347. The opinion does not have to specify the state in which the secured party has taken possession. See *supra* note 142.

348. If the Pledged Instruments are indicated as collateral in the Financing Statement, the Financing Statement would also perfect a security interest in the Pledged Instruments and this paragraph may be omitted unless opinion number 6 is also being given.

349. This opinion should be given *only* if secured party has perfected by possession. See *supra* opinion number 5; see also notes 187–89 and accompanying text. Note that this opinion is based on an unstated assumption that Secured Party took possession of the instruments in good faith without

7. *First Alternative*: The Article 9 Security Interest<sup>350</sup> in that portion of the Article 9 Collateral consisting of the [shares of stock] [bonds] [other certificated securities] represented by the certificates identified on Schedule A to the Pledge Agreement (the “Pledged Securities”) [is perfected by] [will be perfected upon] delivery of the certificates to the Secured Party.<sup>351</sup>
7. *Second Alternative*: The Article 9 Security Interest<sup>352</sup> in that portion of the Article 9 Collateral consisting of the [shares of stock] [bonds] [other certificated securities] represented by the certificates identified on Schedule A to the Pledge Agreement (the “Pledged Securities”) [is perfected by] [will be perfected upon] indorsement and delivery of the certificates to Secured Party.<sup>353</sup>
8. *First Alternative*: Secured Party [acquired] [will acquire] the Article 9 Security Interest<sup>354</sup> in the Pledged Securities free of adverse claims.<sup>355</sup>
8. *Second Alternative*: The Article 9 Security Interest in the Pledged Securities [is] [will be] prior<sup>356</sup> to any other security interest created under Article 9.<sup>357</sup>

knowledge that the grant to it of the security interest in the instruments violates the rights of a prior secured party. For a discussion of this and other related assumptions (stated and unstated) and exceptions, see *supra* section 5.3. Note also that if the related perfection opinion is qualified by reference to Secured Party’s “taking possession of the Pledged Instruments” (see opinion number 5), the qualification also applies equally to the opinion in this paragraph, which is understood as being similarly premised on Secured Party’s taking possession.

350. This is an opinion on perfection based on Secured Party’s receiving “delivery” of the Pledged Securities. For related assumptions (stated and unstated) and exceptions, see *supra* § 4.3(b).

351. If the Pledged Securities are indicated as collateral in the Financing Statement, the Financing Statement would also perfect a security interest in the Pledged Securities and this paragraph may be omitted unless the opinion in opinion number 8, *Second Alternative*, is being given.

352. This is an opinion on perfection based on Secured Party’s obtaining “control” of the Pledged Securities. For related assumptions (stated and unstated) and exceptions, see *supra* § 4.3(c).

353. If the Pledged Securities are indicated as collateral in the Financing Statement, the Financing Statement would also perfect a security interest in the Pledged Securities and this paragraph could be omitted unless one of the opinions in opinion number 8 is being given.

354. For related assumptions (stated and unstated) and exceptions, see *supra* § 8.1. If the opinion preparers have not satisfied themselves that one or more of the following actions has occurred, the following assumptions should be set forth in the opinion: “Assuming that each Pledged Security either is in bearer form or, if in registered form, is registered in the name of Secured Party or is indorsed to Secured Party or in blank”. The opinion preparers may assume, without stating, that the indorsement is effective. See *supra* note 272.

355. This opinion should be given only if Secured Party has perfected by obtaining control (see opinion number 7, *Second Alternative*) and the other elements for Secured Party to qualify as a protected purchaser have been met. U.C.C. § 8-303; see *supra* § 8.2. If this opinion is given, it requires that the opinion preparers satisfy themselves that Secured Party has obtained control of the Pledged Securities. Note that this opinion is based on an unstated assumption that Secured Party does not have notice of an adverse claim to the Pledged Securities. Sometimes an opinion giver will not give a “free-of-adverse-claims” opinion, but will give an opinion that Secured Party is a “protected purchaser,” which is the predicate for the “free-of-adverse-claims” opinion. Note also that if the related perfection opinion is qualified by reference to the “delivery of the certificates to Security Party” (see opinion number 7, *First Alternative*), the qualification is understood to apply equally to the opinion in this paragraph.

356. See *supra* § 8.2.

357. For related assumptions (stated and unstated) and exceptions, see *supra* § 8.2. This opinion should be given only if Secured Party has perfected by delivery (see opinion number 7, *First Alternative*) or control (see opinion number 7, *Second Alternative*). See *supra* § 8.2 (priority of security interest perfected other than by delivery or control). Note also that if the related perfection opinion is qualified by reference to the “indorsement and delivery of the certificates to Secured Party” (see opinion number 7, *Second Alternative*), the qualification is understood to apply equally to the opinion in this paragraph.

9. The Article 9 Security Interest in the Securities Account<sup>358</sup> [is perfected by] [will be perfected upon] the execution and delivery<sup>359</sup> of the Securities Account Control Agreement.<sup>360</sup>
10. *First Alternative*: The Article 9 Security Interest in the Securities Account [is] [will be] prior<sup>361</sup> to any other security interest created under Article 9.<sup>362</sup>
10. *Second Alternative*: No action based on an adverse claim to a financial asset credited to the Securities Account<sup>363</sup> may be asserted against Secured Party.<sup>364</sup>
11. The Article 9 Security Interest in the Deposit Account<sup>365</sup> [is perfected by] [will be perfected upon] the execution and delivery of the Deposit Account Control Agreement.<sup>366</sup>

358. *See supra* note 296.

359. If Secured Party obtains control by becoming the entitlement holder, the Securities Account Control Agreement would not be necessary for Secured Party to obtain control. *See supra* note 299.

360. If the Securities Account is indicated as collateral in the Financing Statement, the Financing Statement would also perfect a security interest in the Securities Account (including any security entitlement with respect to financial assets credited to the Securities Account) and this paragraph could be omitted unless one of the opinions in opinion number 10 is being given..

361. Article 9 (and not Article 8) provides the priority rules. *See supra* § 8.3.

362. Note that this opinion is based on an assumption, which need not be stated, that Secured Party does not have notice of an adverse claim to the relevant financial asset. For a discussion of this and related assumptions (stated and unstated) and exceptions, see *supra* § 8.3. The opinion set forth in this paragraph should be given only when Secured Party has perfected its security interest in the Securities Account and related security entitlements by obtaining control (see opinion number 9). If (i) Secured Party has not obtained control by becoming the entitlement holder, and (ii) the securities intermediary has not waived any security interest that it has or may come to have in the securities account and related security entitlements or subordinated that security interest to the Secured Party's security interest (see U.C.C. § 9-328(3)), the opinion preparers should consider noting the security intermediary's possible priority under U.C.C. section 9-328(3) and the possible priority of security interest perfected by earlier-obtained control under U.C.C. section 9-328(2)(B)(ii). *See supra* note 319. Note also that if the related perfection opinion is qualified by reference to the "execution and delivery of the Securities Account Control Agreement" (see opinion number 9), the qualification is understood to apply equally to the opinion in this paragraph.

363. *See supra* § 8.3.

364. Note that this opinion is based on an assumption, which need not be stated, that Secured Party does not have notice of an adverse claim to the relevant financial assets. For a discussion of this and other relevant assumptions (stated and unstated) and exceptions, see *supra* § 8.3. The opinion set forth in this paragraph should be given only when Secured Party has perfected its security interest in the Securities Account and related security entitlements by obtaining control (see opinion number 9). The opinion in the *Second Alternative* is based on U.C.C. section 8-502, which applies only when Secured Party is the entitlement holder with respect to the Securities Account. *See supra* note 299. When Secured Party obtains control by the use of a control agreement, the opinion in the *Second Alternative* is not appropriate and a priority opinion, if given, should use the *First Alternative*. The opinion preparers should consider noting the security intermediary's possible priority under U.C.C. § 9-328(3). *See supra* note 360. When Secured Party obtains control by becoming the entitlement holder with respect to the Securities Account, the rules of U.C.C. § 8-502, as well as the rules of Article 9, may be relevant. *See supra* note 299.

365. *See supra* note 314. Note that, unlike security interests in instruments, certificated securities, and security entitlements, which can be perfected either by the filing of a financing statement or by possession, delivery, or control (as appropriate), security interests in deposit accounts can only be perfected by control. *See* U.C.C. § 9-312(b)(i); *supra* note 121 and accompanying text.

366. If Secured Party obtains control by becoming the customer of the depository bank with respect to the Deposit Account, the Deposit Account Control Agreement would not be necessary for Secured Party to obtain control. *See supra* note 314.

12. The Article 9 Security Interest in the Deposit Account [is] [will be] prior<sup>367</sup> to any other security interest created under Article 9.<sup>368</sup>

Our opinions above are subject to the following additional exceptions, assumptions, limitations, and qualifications:

A. [Insert assumptions and exceptions applicable to non-security interest opinions].<sup>369</sup>

The opinions expressed in this opinion letter are limited to the federal law of the United States, and the law of the State of New York. Our opinions in paragraphs 2-[12] are limited to Article 9 of the New York U.C.C.<sup>370</sup>

This opinion letter is being delivered to you in connection with the above described transaction and may not be relied on by you for any other purpose. This opinion letter may not be relied on or furnished to any other person without our prior written consent.<sup>371</sup>

Very truly yours,<sup>372</sup>

367. For related assumptions (stated and unstated) and exceptions, see *supra* note 318; see also *supra* § 8.3.

368. If (i) Secured Party has not obtained control by becoming the customer of the depository bank with respect to the Deposit Account, and (ii) the depository bank has not waived or subordinated any security interest that it has or may come to have in the Deposit Account to Secured Party's security interest (see U.C.C. § 9-327(3)) the opinion preparers should consider noting the depository bank's possible priority rights under U.C.C. section 9-327(3) and the possible priority of security interests perfected by earlier-obtained control under U.C.C. section 9-327(2). See *supra* note 314. Note also that if the related perfection opinion is qualified by reference to the "execution and delivery of the Securities Account Control Agreement" (see opinion number 11), the qualification is understood to apply equally to the opinion in this paragraph.

369. Note that the equitable principles limitation and bankruptcy exception should not be made applicable to security interest opinions. See *supra* § 2.3.

370. See *supra* § 2.1(b) (U.C.C. Scope Limitation).

371. See *Guidelines*, *supra* note 16, § 1.7.

372. Customarily, the opinion would be signed in the name of the opinion giver. 1998 *TriBar Report*, *supra* note 1, § 1.8, at 605.

## APPENDIX B

### PERFECTION OPINIONS UNDER THE LAW OF ANOTHER STATE<sup>373</sup>

#### GENERAL

The main body of this *Report* addresses U.C.C. opinions when the law applicable to the U.C.C. issues covered in the opinion is the same as the law generally covered by the opinion letter.<sup>374</sup> This APPENDIX B addresses opinions on:

- (i) the perfection of a security interest when perfection is governed by the local<sup>375</sup> law of a state whose law is *not* covered generally by the opinion letter; and
- (ii) what state's law governs the perfection, the effect of perfection or nonperfection, or the priority<sup>376</sup> of a security interest.

An opinion could be given that covers:

- (i) neither set of issues;
- (ii) the first set of issues and not the second set of issues;
- (iii) the second set of issues and not the first set of issues; or
- (iv) both sets of issues.

An opinion could also:

- (i) assume conclusions concerning one or more of these issues, or
- (ii) be phrased using a conditional statement of the applicable law<sup>377</sup> as discussed below.

*The Committee takes no position on whether an opinion recipient should request these opinions or whether an opinion giver should be willing to provide them.*<sup>378</sup>

#### LIMITED OPINIONS ON THE U.C.C. OF OTHER JURISDICTIONS ARE NOT INAPPROPRIATE WHEN GIVING A PERFECTION OPINION

The jurisdiction whose law governs the perfection of a security interest frequently is not the jurisdiction whose law is covered generally in the opinion letter.<sup>379</sup> Nonetheless, the opinion recipient and the opinion giver may agree that the opinion recipient should receive an opinion that the security interest has been perfected under the law of the state whose law governs perfection.<sup>380</sup> One alter-

373. This discussion would also apply to a priority opinion given under the law of another state.

374. *See supra* § 2.1(d).

375. *See supra* note 101 (meaning of "local law").

376. In some instances, the law of the state whose law governs the perfection of the security interest does not also govern the effect of the perfection of the security interest or the priority of the security interest. U.C.C. § 9-301(3)(c); *see supra* note 99.

377. For example, an opinion could state, "If the law of [state] governs the perfection of a security interest in the Filing Collateral by the filing of a financing statement . . ."

378. *See supra* § 3.2.

379. *See supra* § 4.2.

380. An opinion that an act (such as the filing of a financing statement) under the law of a designated state would be sufficient to perfect the security interest under the law of that state is *not* an opinion that the law of the identified state is the law that governs the perfection of the security interest. An opinion does not cover which state's law governs perfection unless it does so expressly. *See supra* § 4.2.

native would be to obtain this opinion from local counsel. For cost/benefit or other reasons, however, that may not be desirable.<sup>381</sup> Thus, counsel for the debtor may decide to give an opinion on the perfection of a security interest under the law of a state on which it would not generally render an opinion.<sup>382</sup> This departure from normal practice would be possible because the U.C.C. has been enacted in substantially similar form in all states.<sup>383</sup>

If given, the opinion should describe the limited extent of the opinion preparer's review of the law governing perfection (e.g., the review is limited to the text of U.C.C. as it appears in the official statutory compilation or a recognized reporting service).<sup>384</sup> By making clear that the opinion preparers have not conducted the same degree of review (for example reviewing case law) that lawyers who regularly render opinions on the law of the state in question would conduct<sup>385</sup> the opinion preparers, will be putting the recipient on notice that the opinion is not the equivalent of an opinion of local counsel.

#### CHOICE-OF-LAW OPINION FOR SECURITY INTEREST PERFECTED BY THE FILING OF A FINANCING STATEMENT

The choice-of-law opinion, if given, would cover which state's law governs the perfection<sup>386</sup> of a security interest by the filing of a financing statement. If that opinion is given, the opinion preparers may have to review the law of two states:<sup>387</sup>

381. See *Guidelines*, *supra* note 16, § 2.2.

382. See *infra* text accompanying note 384.

383. See *Under the Surface*, *supra* note 6.

384. This approach is similar to that commonly taken when giving opinions on the client's compliance with corporate formalities under the law of a jurisdiction other than the jurisdiction covered generally by the opinion letter when the opinion giver has concluded that it is competent to provide the opinion. See *1998 TriBar Report*, *supra* note 1, § 4.1, at 631. Unlike the corporate opinion, however, as a matter of customary practice, the opinion concerning the law of another jurisdiction would not be understood to cover the decisional law under the U.C.C. of the other jurisdiction nor any filing office rules of the other jurisdiction. See U.C.C. § 9-526. Because a U.C.C. opinion is narrower, is based on general U.C.C. expertise, and the U.C.C. has been adopted in a substantially uniform manner in all of the states, the opinion preparers often may reasonably conclude that they are competent to provide an opinion on these issues under the law of another state. The same would be true for a review of search reports when a Filing Priority Opinion is given. See *supra* text accompanying notes 168-84. The giving of an opinion on the law of a state where the opinion preparers are not licensed is not the "practice of law" in that state. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 3 cmt. e (2003); MODEL RULES OF PROF'L CONDUCT, R. 5.5(c)(4) (multijurisdictional practice of law).

385. This discussion assumes that the opinion is subject to a U.C.C. Scope Limitation and, therefore, that the opinion preparers do not have to determine whether the collateral is subject to the U.C.C. as adopted in the state whose law governs perfection. See *supra* § 2.1(b).

386. Where the security interest is perfected by the filing of a financing statement, the law of the same state would also govern the *effect* of perfection or nonperfection of the security interest and the priority of the security interest (except where the collateral is negotiable documents, goods, instruments, tangible chattel paper, or investment property). U.C.C. § 9-301(3)(c).

387. Under former Article 9 opinion givers normally did not give opinions on which state's law governed the perfection of the security interest. This reflected the fact that under former Article 9 the law of many states could govern the perfection of the security interest, depending on the location of the debtor and the location of tangible collateral. U.C.C. § 9-103 (pre-revision). Under revised Article 9 the law of only one state governs the perfection of a security interest perfected by the filing of a financing statement. Although an opinion on which state's law governs perfection does not raise the same issues under revised Article 9 as it did under former Article 9, the Committee takes no position on whether an opinion on which state's law governs perfection should be requested or given.

- 1) the law of the state whose law is generally covered by the opinion letter; and
- 2) the law of the state of the “location” of the debtor, which is the law that governs perfection by the filing of a financing statement.<sup>388</sup>

The opinion expresses the opinion preparers’ professional judgment only on how the highest court of the state whose law is covered by the opinion would rule on the issue.<sup>389</sup> A court making a choice-of-law analysis must begin<sup>390</sup> its analysis with the choice-of-law rules of the forum. Thus, the opinion preparers begin with the choice-of-law rule found in U.C.C. section 9-301<sup>391</sup> of the state whose law is covered generally by the opinion letter.<sup>392</sup> The opinion preparers do *not* begin with the law governing perfection because they have not yet reached that point in their legal analysis.<sup>393</sup>

The opinion preparers should use the following sequence of steps in making their choice-of-law analysis. First, they should determine the “location” of the debtor under the law generally covered by the opinion. That determination requires a determination of the type of “person”<sup>394</sup> the debtor is for purposes of revised Article 9, again under the law generally covered by the opinion. The determination of what type of “person” the debtor is under revised Article 9 is a necessary step in determining the “location” of the debtor.

If the debtor is a “registered organization” organized under state law (generally a corporation, limited liability company, or limited partnership<sup>395</sup>), the debtor is “located” in its state of organization and the perfection of a security interest by the filing of a financing statement is governed by the law of that state.<sup>396</sup> Other types of entities, such as business trusts and real estate investment trusts,<sup>397</sup> may

388. See *supra* § 4.2. The law of that state also governs perfection in the absence of any special rule providing that the law of another state governs perfection. U.C.C. § 9-301(1).

389. 1998 *TriBar Report*, *supra* note 1, § 1.2(a), at 595–96.

390. A state court would of course apply its own state’s choice of law rules. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(1) cmt. a. When applying state law, a federal court exercising diversity jurisdiction must apply the choice-of-law rules in effect in the forum state. See *generally*, *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941); *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3 (1975). *Klaxon* also requires that a bankruptcy court exercising federal jurisdiction apply the choice-of-law rules of the forum state “where no significant federal policy, calling for the imposition of a federal conflicts rule, exists.” *Bianco v. Erkins (In re Gaston & Snow)*, 243 F.3d 599, 607 (2d Cir. 2001).

391. There are related definitions in U.C.C. section 9-102 and in Article 1.

392. Of course, litigation concerning the perfection of the security interest could occur in a different state. The opinion does not cover these matters. The highly uniform adoption of the relevant provisions of revised Article 9 means that a court of another state should make the same analysis and come to the same conclusion as to the location of the debtor and, thus, the same conclusion on which state’s law governs perfection. See *supra* note 6.

393. See *generally* U.C.C. § 9-101 cmt. 4(c). Any litigation involving the perfection of the security interest could, of course, take place in yet another state. See *Under the Surface*, *supra* note 6. The opinion letter, as a result of its statement of the law covered by the opinion letter, does not cover that possibility.

394. U.C.C. §§ 1-201(30), 1-201(b)(27) (revised).

395. *Id.* § 9-307 cmt. 4.

396. *Id.* § 9-301(1).

397. See *id.* 9-503 cmt. 2.

also be registered organizations, depending on the law of the state where they were organized.

To determine if the debtor is a “registered organization” under the law of the state whose law is generally covered by the opinion letter, the opinion preparers must look to the law of the jurisdiction of organization of the debtor for certain information. A “registered organization” is “an organization organized solely under the law of a single state or the United States and as to which the state or the United States must maintain a public record showing the organization to have been organized.”

The determination of whether the debtor can be organized under the law of more than one state<sup>398</sup> and whether the state must maintain the requisite public records would require a review of the law of the state of organization. Unlike Article 9 itself, these non-U.C.C. aspects of state law are not uniform. In some states these issues will not pose a problem.<sup>399</sup> In others, the opinion preparers may want to include in the opinion an express assumption (i) concerning the status of the debtor as a “registered organization” under the law of the state whose law is covered by the opinion, or (ii) regarding the relevant non-U.C.C. aspects of state law under the law of the state of organization.<sup>400</sup> If the opinion preparers determine that the debtor is a “registered organization,” then, under the law generally covered by the opinion letter, the state of the debtor’s organization is its “location.”<sup>401</sup>

Determining the proper state in which to file a financing statement when the debtor is an organization other than a registered organization (e.g., a general partnership or common law trust) or an individual is less clear-cut. An organization other than a registered organization is generally located in the state of its chief executive office.<sup>402</sup> If a trustee of a common law trust<sup>403</sup> owns the collateral under applicable non-U.C.C. law,<sup>404</sup> the trustee is the “debtor”<sup>405</sup> and the rules applicable to the type of person the trustee is (e.g., individual, corporation) determine where to file a financing statement.<sup>406</sup> U.C.C. section 9-307(b)(1) provides that an individual debtor is generally “located at the individual’s principal residence.”

398. The opinion giver may assume, without so stating, that the debtor is not organized in more than one state.

399. U.C.C. § 9-102(a)(70), cmt. 11; *see, e.g.*, Revised Model Business Corporations Act §1.28 (“anyone” may obtain copy of certificate of existence); DEL. CODE ANN. tit. 6, § 103(c)(6) (1999) (expressly requiring that the state maintain the requisite public record).

400. For example, the opinion preparers will often expressly assume that the state of organization is required to maintain the requisite public record because the state may not have an express requirement.

401. Some opinion givers may be willing to give an opinion that the debtor is a “registered organization” under the U.C.C. of the state of its organization, but might not also give an opinion (based on that conclusion) under the law of the state whose law is generally covered by the opinion that the debtor is “located” in that state and therefore that the law of that state governs perfection.

402. U.C.C. § 9-307(b)(2), (3).

403. This may also apply to a business trust if the statute under which the statutory business trust is formed vests the property in the trustee.

404. Under non-U.C.C. choice-of-law rules, ordinarily this issue would be governed by the law that governs the trust. *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 267–75.

405. U.C.C. § 9-102(a)(28).

406. U.C.C. section 9-307. U.C.C. section 9-307 contains additional rules to determine the location

The determination of whether a debtor is a registered organization (and the related determination of the "location" of the debtor) is a legal issue that (subject to the considerations discussed above)<sup>407</sup> requires a review of statutes, organizational documents, and other public records. The determination of the location of other types of debtors is in part a factual issue that is customarily based on express assumptions or reliance on factual statements made by the debtor (e.g., the location of its chief executive office).

### PERFECTION OPINION

*Filing of financing statement.* To give a perfection opinion under the law of the state where the debtor is located,<sup>408</sup> the opinion preparers must determine<sup>409</sup> whether:

- (i) the state of the debtor's<sup>410</sup> location provides for the filing of a financing statement to perfect a security interest in collateral;<sup>411</sup>
- (ii) the financing statement meets the requirements of U.C.C. section 9-502(a) as adopted in that state;<sup>412</sup>
- (iii) on its face,<sup>413</sup> the financing statement includes the information listed in U.C.C. section 9-516(b)(5);<sup>414</sup> and
- (iv) the financing statement has been properly filed<sup>415</sup> in that state (or is expected to be filed).<sup>416</sup>

These determinations would each be made under the law of the state of the *debtor's* "location." Unless the opinion expressly covers which state is the state of the debtor's location,<sup>417</sup> however, the perfection opinion would be given under

of additional entities, such as entities formed under federal law. *See, e.g.*, U.C.C. § 9-307(f). For a limited number of categories of collateral, the location of the debtor is not the place of filing. *See id.* § 9-301(3); *supra* notes 100, 109, 133.

407. *See supra* notes 394–401 and accompanying text.

408. A filing in another state may be required to the extent collateral includes fixtures that are the subject of a fixture filing, timber to be cut, or as-extracted collateral. U.C.C. § 9-301(3)(A), (B), (4); *see supra* notes 100, 109, 133. This *Report* does not address those filings.

409. As noted, one or more of these issues may be covered by the wording of the opinion, an assumption, or other exception. *See supra* notes 393–94 and accompanying text.

410. This opinion is *not* an opinion that the law of the state where the financing statement is being filed is the "location" of the debtor and that it therefore governs the perfection of the security interest by the filing of a financing statement.

411. U.C.C. § 9-307(c); *see supra* § 4.2. This assumes that the opinion is subject to a U.C.C. Scope Limitation and therefore, that the opinion preparers do not have to determine whether the collateral involved in the transaction is subject to the U.C.C. as adopted in the state where the debtor is located. *See supra* § 2.1(b).

412. *See supra* § 4.3(a).

413. This determination is not necessary if the financing statement has already been accepted by the filing office. *See supra* note 126 and accompany text.

414. *See supra* note 126 and accompanying text. If the financing statement has already been filed, this information would not be necessary.

415. *See supra* note 132 and accompanying text.

416. *See supra* note 136 and accompanying text.

417. *See supra* § 2.1(d).

the law of the state where the financing statement has been (or will be) filed. Once again, it is not inappropriate for the opinion giver to address the issue of perfection<sup>418</sup> of the security interest by filing of a financing statement in that state even though:

- (i) it generally would be unwilling to render an opinion on that state's law; and
- (ii) the opinion does not address the question whether the state where the filing has occurred is the correct state for the filing of a financing statement.<sup>419</sup>

*Possession.* When the secured party perfects its security interest by possession, the local law of the location of the *collateral* generally governs perfection.<sup>420</sup> If the collateral is located in a state other than a state whose law is generally covered by the opinion, to give an opinion on the perfection of a security interest by possession the opinion preparers must consider the U.C.C. of the state where the collateral is located.<sup>421</sup> It is not inappropriate for the opinion preparers to render an opinion on that state's U.C.C. even though they generally would be unwilling to render an opinion on the law of that state.<sup>422</sup>

The opinion preparers should satisfy themselves that:

- (i) the relevant collateral is the kind of collateral in which a security interest may be perfected by possession under the Article 9 of the state where the collateral is physically located;<sup>423</sup> and
- (ii) the secured party (directly or through a third party) has taken "possession" of the collateral as defined under Article 9 as adopted in the state where the collateral is located.<sup>424</sup>

*Control.* When the secured party perfects its security interest by control, a similar set of issues arises. As noted, perfection by control is governed by the "jurisdiction" of a specified third party for deposit accounts, securities accounts, se-

418. This opinion is not a choice-of-law opinion that the state where the financing statement was filed is the state of the "location" of the debtor and therefore the state whose law governs perfection of the security interest by the filing of a financing statement.

419. See *supra* § 2.1(d).

420. U.C.C. §§ 9-301(2), 9-305(a)(1). An opinion on the perfection of the security interest does not include an opinion on the law that governs the perfection of the security interest unless it does so expressly.

421. The opinion preparers have no obligation to determine the actual location of the collateral. They may assume, therefore, without stating, that the collateral is located in the state whose law is covered generally by the opinion. Some lawyers prefer to state this assumption expressly.

422. See *supra* note 384.

423. See *supra* § 4.3 (discussion of methods of perfection). As with other matters discussed in this APPENDIX B, one or more of the elements of this opinion may be assumed or otherwise excluded. See *supra* note 400 and accompanying text.

424. The opinion preparers do not, in fact, determine that the secured party has possession. See *supra* text accompanying note 146.

curity entitlements, uncertificated securities, and letter-of-credit rights.<sup>425</sup> If an opinion is given on perfection by control, the opinion preparers should consider whether the determination of the jurisdiction of the third party is a matter of the law of the state covered by the opinion.<sup>426</sup> The U.C.C. of the state whose law is covered generally by the opinion initially governs the question of the kind of collateral that is being considered for purposes of the application of that state's choice-of-law rules. The U.C.C. of the jurisdiction of the third party (i.e., the jurisdiction whose law governs perfection of the security interest by control pursuant to the choice-of-law rules of the state whose law is covered generally by the opinion) will also characterize the collateral to determine which of its local law substantive perfection rules will apply, whether it is the kind of collateral in which a security interest may be perfected by control and whether the requirements for control have been met. It is not inappropriate for opinion preparers to conduct that review even though they would not generally render an opinion on the law of that state.<sup>427</sup>

425. U.C.C. §§ 9-304, 9-305(a)(2), (3), 9-306; *see supra* notes 107, 151. Perfection by control of a certificated security is governed by the law of the jurisdiction where the security certificate is physically located. U.C.C. 9-305(a)(1).

426. *See supra* note 149 and accompanying text.

427. *See supra* note 384.

## APPENDIX C

### SUMMARY

*General.* This is a summary of some of the matters discussed in the 2003 TriBar Opinion Committee *Special Report on U.C.C. Security Interest Opinions—Revised Article 9*. This summary is qualified in its entirety by the more detailed discussion in the *Report*.

The *Report* provides guidance on closing opinions that address security interests covered by Article 9 of the U.C.C. The primary objective of the *Report* is to provide guidance on the customary meaning and scope of U.C.C. security interest opinions, and on the qualifications that are customarily understood to apply. An *Illustrative Security Interest Opinion* is attached to the *Report* as APPENDIX A. The main body of the *Report* discusses U.C.C. security interest opinions when the only law governing attachment (or creation), perfection, or, when addressed, priority of the security interest is the law covered generally by the opinion letter.

Preparers of U.C.C. security interest opinions are subject to the same obligations they have in preparing any closing opinion (i) not to give an opinion if they believe the opinion will, in the circumstances, mislead the opinion recipient, and (ii) not to rely on unreliable information.

Opinions under Article 9 call for familiarity with Article 9. While the *Report* provides a detailed discussion of Article 9 and opinions on security interests created under Article 9, opinion preparers who do not regularly work with Article 9 should consider whether to involve a lawyer familiar with Article 9 in the preparation of a U.C.C. security interest opinion.

*Choice-of-Law.* Except to the extent it does so expressly, a security interest opinion does not address which state's law governs the perfection of the security interest. APPENDIX B discusses issues that may arise when the law that governs the perfection of the security interest may not be the law covered generally by the opinion letter.

*U.C.C. Scope Limitation.* An opinion limited to the U.C.C. of a particular state customarily is understood to be subject to the following limitation, which the *Report* refers to as a "U.C.C. Scope Limitation:"

- (i) The opinion covers only security interests created under Article 9 of the U.C.C.;
- (ii) The opinion covers only U.C.C. collateral or transactions; and
- (iii) The opinion covers only U.C.C. perfection methods.

As a matter of customary practice, any indication in the opinion letter that reasonably communicates to the opinion recipient that the opinion is limited to the U.C.C. or to Article 9 of the U.C.C. of a particular state is understood to convey the U.C.C. Scope Limitation.

*Assumptions.* Opinions on Article 9 security interests are based on many assumptions. Some assumptions must be stated. As a matter of customary practice, others do not need to be stated.

*Remedies.* Opinion letters typically contain separate security interest opinions and remedies opinions on security agreements (when a remedies opinion on the

security agreement is given). Remedies opinions are understood not to cover security interest issues and security interest opinions are understood not to cover the matters addressed by a remedies opinion (except to the extent necessary to cover the effectiveness of the security agreement as a contract).

*Attachment.* Customarily the opinion on the creation or attachment of a security interest is stated separately from the opinion on the perfection of the security interest. The Article 9 requirements for attachment in most circumstances are:

- (i) the debtor has authenticated a security agreement that provides a sufficient description of the collateral;
- (ii) value has been given; *and*
- (iii) the debtor has rights in the collateral *or* the power to transfer rights in the collateral to a secured party.

The opinion preparers should review the security agreement for compliance with the first requirement. They either may confirm satisfaction of the second requirement or assume it expressly. They may assume satisfaction of the third requirement without stating.

*Perfection generally.* An opinion on the perfection of a security interest in Article 9 collateral expresses the opinion preparers' professional judgment that the steps required by the U.C.C. to give the secured party's security interest priority over the rights of a lien creditor have been (or will be) accomplished.

*Perfection by filing.* The opinion preparers should review the completed financing statement to:

- (i) confirm the accuracy of certain of the information in the financing statement; and
- (ii) determine that the financing statement is complete.

The opinion preparers should then:

- (i) confirm that an effective filing of the financing statement in the appropriate filing office in the applicable state has occurred or will occur prior to the delivery of the opinion;
- (ii) assume expressly that an effective filing of the financing statement has occurred or will occur in a proper manner; or
- (iii) state that perfection will occur "upon" the effective filing of the financing statement in the specified filing office.

*Perfection by possession, delivery, or control.* An opinion on these subjects requires attention to the special perfection rules for those methods of perfection.

*Priority.* In those rare transactions when an opinion is given concerning the priority of a security interest perfected by the filing of a financing statement, opinion givers and recipients generally use a Filing Priority Opinion, based on a review of a search report from the applicable U.C.C. filing office. For instruments, certificated securities, securities accounts, security entitlements, and deposit accounts, certain other kinds of "priority" opinions may be given in particular circumstances.

*Inherent or Otherwise Unnecessary Qualifications to Perfection and Priority Opinions.* Because as a matter of customary practice an opinion is understood not to cover changes in the facts following the closing of the transaction, opinion givers are not required in an opinion letter to describe how a post-closing change in the facts may affect the Secured Party's rights. Certain other matters also are customarily understood and need not be stated in the opinion letter.

*Transition Rules.* Part 7 of revised Article 9 provides rules concerning the transition from former Article 9 to revised Article 9. These rules have no effect on the attachment or perfection of an Article 9 security interest for a transaction first closing *on or after* the effective date of revised Article 9. They can, however, affect the priority of a security interest created or perfected under revised Article 9 as against a security interest created or perfected under former Article 9.

## APPENDIX D

### MEMBERS OF TRIBAR OPINION COMMITTEE

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