

January 1989

# Legal Opinions in Corporate Transactions: Opinions Relating to Security Interests in Personal Property

Scott T. FitzGibbon  
*Boston College Law School, fitzgisc@bc.edu*

Donald W. Glazer

Follow this and additional works at: <https://lawdigitalcommons.bc.edu/lspf>

 Part of the [Business Organizations Law Commons](#), [Contracts Commons](#), [Family Law Commons](#), [Jurisprudence Commons](#), and the [Securities Law Commons](#)

---

## Recommended Citation

Scott T. FitzGibbon and Donald W. Glazer. "Legal Opinions in Corporate Transactions: Opinions Relating to Security Interests in Personal Property." *Business Lawyer* 44, no.3 (1989): 655-692.

This Article is brought to you for free and open access by Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law School Faculty Papers by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact [nick.szydowski@bc.edu](mailto:nick.szydowski@bc.edu).

# Legal Opinions in Corporate Transactions: Opinions Relating to Security Interests in Personal Property

By Scott FitzGibbon and Donald W. Glazer\*

## INTRODUCTION

Institutional lenders—banks, insurance companies, finance companies—frequently require borrowers to grant them security interests in the borrowers' property.<sup>1</sup> The security interest is ordinarily created by a provision in the loan agreement along the following lines:

3.1. *Security Interests.* As security for the due and punctual payment and performance of the Note and its other obligations hereunder, the Company hereby creates in you, for your benefit and the benefit of the holders from time to time of the Note, a security interest in all of its right, title and interest in and to (but none of its obligations with respect to) the items and types of personal property described or referred to in Sections 3.1.1 through 3.1.6 hereof, whether now owned or hereafter acquired and all proceeds (including insurance proceeds) and products thereof.<sup>2</sup>

\*Messrs. FitzGibbon and Glazer are members of the Massachusetts bar. Mr. FitzGibbon is a professor at Boston College Law School; Mr. Glazer practices law with Ropes & Gray in Boston.

The authors wish to thank the following participants in a series of roundtable discussions held between November 1985 and May 1988: Peter Albrecht, James G. Barnes, Kevin Carome, Thomas Draper, Robin Heiss, Robert Nutt, and Philip Smith. They also are grateful for assistance provided by Jeffrey Gilmore, Susan Oldenberg, and Elizabeth Fu.

*Editor's note:* Thomas Ambro of the Delaware bar and Charles Mooney of the Pennsylvania bar served as reviewers for this article.

1. Security interests are also sometimes given to secure obligations to lessors, suppliers, and customers.

2. The agreement from which this provision was taken goes on to list, in §§ 3.1.1–3.1.3, the following property (among others) as subject to the security interest:

3.1.1. *Tangible Personal Property.* All of its goods, machinery, equipment, inventory, raw materials, work in process, finished parts and products, spare parts, replacement parts, merchandise for resale and all other tangible personal property of any nature whatsoever, wherever located, including without limitation all cassettes, cartridges, discs, videotapes, films, prints and reprint material, kiosk, displays, posters, promotional material, computers, computer equipment, point-of-purchase materials, television monitors and players for cassette, cartridges and discs.

At the closing for a commercial loan, the lender ordinarily requires counsel for the borrower to render an opinion that the loan agreement is "legal, valid and binding" and "enforceable in accordance with its terms," subject to some well-established exceptions.<sup>3</sup> When the loan is secured, the question naturally arises, as to whether this opinion, which could be read to cover a provision such as the one quoted above, passes on the status of the security interest.<sup>4</sup> Because the answer is by no means clear,<sup>5</sup> lenders typically require counsel to address the security interest expressly in a separate opinion clause.

Opinions on security interests are among the most difficult a lawyer regularly is expected to render. In a transaction large enough to call for a legal opinion, the collateral often consists of inventory and accounts receivable and may also include intangibles and equipment or, in some cases, all the debtor's personal property of every type and nature. Some of the collateral is constantly changing: Inventory, for example, is continually being transformed into accounts receivable, accounts receivable into cash, and cash into inventory or other assets. When the borrower is a large company, the collateral may consist of many different items, tangible and intangible, located in many jurisdictions. Because the requirements for creation and perfection of a security interest depend on the nature of the collateral and vary from state to state, opinions on security interests necessarily require qualification and limitation. As a result, a lawyer all too frequently can find himself in the uncomfortable position of attempting to draft an opinion that is narrow enough to cover only matters on which he can properly opine but broad enough to satisfy the lender.<sup>6</sup>

3.1.2. *Rights to Payment of Money.* All accounts and other rights to receive the payment of money, including without limitation receivables, rights to receive the payment of money under present or future contracts, subscriptions or agreements (whether or not earned by performance) and rights to receive payments from customers (all such accounts and other such rights being referred to herein as "Accounts").

3.1.3. *Intangibles.* To the extent that the valid and enforceable terms thereof or any valid and enforceable law or regulation applicable thereto do not prohibit their being subject to a security interest, all rights granted by others which permit the Company to sell or market items of tangible personal property and films, television shows and other artistic properties, common law and statutory copyrights and rights in literary property and rights and licenses thereunder, contracts, franchises, licenses and agreements and all rights thereunder (to the extent not included in Section 3.1.2 hereof), trade names, trademarks, service marks and any registrations thereof, patents and patent applications, computer software, object code, source code, designs, models, know-how, formulas, customer lists, backlog, orders, subscriptions, catalogues, sales material, good will, inventions, processes, leases, royalties, chattel paper, documents, records, permits, negotiable and nonnegotiable instruments, judgments, choses in action and all other general intangibles and intangible property and all rights thereunder (to the extent not included in Section 3.1.2 hereof).

3. See FitzGibbon & Glazer, *Legal Opinions in Corporate Transactions: The Opinion on Agreements and Instruments*, 12 J. Corp. L. 657 (1987), reprinted in 30 Corp. Prac. Commentator 44 (1988).

4. Many lawyers, including the authors of this article, believe that the answer is no.

5. See *infra* text accompanying notes 131-34.

6. An unfortunate practice has developed among some bank lawyers of asking for opinions, especially with regard to the priority of security interest, that they would be unwilling to give

This article recommends an approach to drafting a legal opinion on a security interest in personal property.<sup>7</sup> It also suggests standard interpretations for opinions on secured transactions and discusses the work required to support them. It explores the issues that arise when several states' laws affect the security interest.<sup>8</sup> A sample opinion on security interests is included as an appendix to this article.

The law governing consensual security interests in personal property derives primarily from article 9 of the Uniform Commercial Code ("Code" or "U.C.C."). Some liens, such as mortgages of airplanes and ships, are not fully governed by article 9. Other liens, such as landlords' and mechanics' liens, are created by statute rather than by express agreement and, therefore, are not ordinarily thought of as security interests.<sup>9</sup> In transactions with multinational aspects, some liens may be governed by foreign law. This article deals only with security interests created by contract and governed by article 9 of the Code.<sup>10</sup>

themselves if they were borrower's counsel. Bank counsel can exert enormous pressure on borrower's counsel, especially when the client is in urgent need of funds. If borrower's counsel resists, however, he may be surprised at how often bank counsel will accept a more narrowly drafted opinion.

7. The authors of this article, a law professor and a practicing lawyer, are writing a book on legal opinions in corporate transactions of which this article is a part. The book is to be published by Little, Brown and Company.

8. See *infra* text accompanying notes 122-27.

9. See U.C.C. § 9-104 (1987), which provides that article 9 does not apply to several specified types of interests, including landlords' liens, a "lien given by statute or other rule of law for services or materials" (with certain limitations), and "a security interest subject to any statute of the United States, to the extent that such statute governs the rights of parties to and third parties affected by transactions in particular types of property." Security interests in ships are governed by the Ship Mortgage Act of 1920, 46 U.S.C. §§ 911-984 (1982). U.C.C. § 9-104 Official Comment 1 states: "Where a federal statute regulates the incidents of security interests in particular types of property, those security interests are of course governed by the federal statute and excluded from this Article. The Ship Mortgage Act, 1920, is an example of such a federal act."

Security interests given by states and localities to support their revenue bonds are in most cases excluded from the coverage of article 9 by § 9-104(e), which excludes "a transfer by a government or governmental subdivision or agency." For a discussion of opinions of counsel in state and municipal financings, see National Association of Bond Lawyers, *The Function and Professional Responsibilities of Bond Counsel and Model Bond Opinion Project* (1987).

10. Thus, this article does not cover security interests in real property. For discussion of the opinion problems presented by transactions in real property, see Joint Committee of the Real Property Section of the State Bar of California and the Real Property Section of the Los Angeles County Bar Association, *Legal Opinions in California Real Estate Transactions*, 42 *Bus. Law.* 1139 (1987) [hereinafter *California Real Estate Transactions Report*] and authorities cited therein (discussing article 9 problems). Two commentators have offered some sample language for expressly excluding security interests in real property: "The opinions given above as to the creation and perfection of security interests do not cover real property and other property transactions excluded from the coverage of the Uniform Commercial Code pursuant to Sections 9-102 and 9-104." *Weise & Duncan, Loan Transactions*, in *Opinion Letters of Counsel* 1985, at 367, 424 (PLI 1985). Similarly, this article does not cover security interests in investment securities, since such interests are governed by article 8 of the Code. For a discussion of opinion problems relating to such securities, see A. Field & R. Ryan, *Legal Opinions in Corporate Transactions* 8 (Matthew Bender Business Law Monograph No. 26, 1988).

## COVERAGE OF THE STANDARD OPINION

Although no single form of opinion has gained general acceptance, opinions on security interests almost always address two basic concerns of the lender: the creation of the security interest and its perfection under article 9. Many lenders are also concerned about the priority of their security interest over other interests. For the reasons discussed below, opinions on priority are less common.

The lender's first basic concern is that its contractual arrangements with the borrower are effective as a matter of law to create the security interest. The Uniform Commercial Code uses the term "attach" to refer to the moment when a lender's rights in the collateral become enforceable against the borrower. Experienced lawyers do not ordinarily opine on the attachment of a security interest because, among other things, under the Code attachment does not occur unless the debtor has rights in the collateral. In the case of after-acquired property, the debtor has no such rights at the time the opinion is rendered. In the case of other collateral, the extent of the debtor's rights, if any, is a factual question on which lawyers are ill-equipped to pass. Instead of using the term "attach," therefore, experienced lawyers usually use the term "create," which appears (without definition) in the Code but arguably does not pass on the existence of, or the borrower's rights in, the collateral.<sup>11</sup>

The lender's second basic concern is that it be able to assert its security interest not only against the borrower but also against third party claimants, including a bankruptcy trustee. Under the Code, perfection is the means by which a secured creditor establishes its rights as against other creditors.<sup>12</sup>

11. See *infra* text accompanying notes 16-24.

12. Under section 544(a)(1) [of the Bankruptcy Code], the trustee has the status of a hypothetical lien creditor who, on the date of bankruptcy, extends credit and obtains a judicial lien on all the property of the debtor on which a creditor on a simple contract could have obtained a lien . . . . Under Section 9-301 of the Uniform Commercial Code, an unperfected security interest is subordinate to the rights of a person who becomes a lien creditor before the security interest is perfected. Because the trustee is granted the status of a "lien creditor" by section 544(a)(1) of the Bankruptcy Code, the trustee is given the power to invalidate security interests in personal property which remain unperfected as of the date of bankruptcy. In such a case, the affected secured creditor would be relegated to the status of a general unsecured creditor.

Harter & Klee, *The Impact of the New Bankruptcy Code on the "Bankruptcy Out" in Legal Opinions*, 48 Fordham L. Rev. 277, 286 (1979) (footnotes omitted). Furthermore, the security interest might be avoidable as a preference:

Section 547(e) [of the Bankruptcy Code] defines when a transfer of property is perfected and deemed to have been made for the purpose of section 547 of the Code. In the case of real property other than fixtures, a transfer is deemed to be perfected when "a bona fide purchaser . . . from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in such property superior to the interests of the transferee." . . . These tests are applicable regardless of whether there actually are or were creditors who might have obtained liens or become bona fide purchasers. . . .

The impact of section 547(e) is aptly illustrated if it is assumed that, through an inadvertence such as the improper filing of a financing statement, a seller's security interest in personal property is not properly perfected at the time of closing. Assume also that a year passes before the error is rectified and that the buyer files a petition under the Code within the ninety-day

Therefore, lenders almost always request an opinion confirming that the security interest has been perfected or, at least, that the proper steps have been taken for perfection.<sup>13</sup>

The third concern of the lender is the priority of its security interest over other claims in the event of a default. This concern is understandable, since perfecting a security interest does not assure the lender that other creditors—notably holders of competing security interests—might not be able to step in and use the proceeds from the sale of the collateral to satisfy their own claims. Despite the legitimacy of this concern, however, knowledgeable counsel often refuse to give priority opinions on the grounds that the factual questions and legal rules relating to priority are so complex that the exceptions, qualifications, and assumptions required to make an opinion accurate would render it of little value to the opinion recipient.<sup>14</sup>

In most transactions, the opinion ultimately rendered on the security interest is the product of extended negotiations between counsel for the borrower and counsel for the lender. Different firms have different forms and even the best forms need tailoring to fit the facts of the particular transaction. One form of opinion used by experienced bank counsel states:

The provisions of the Loan Agreement are sufficient to create in your favor a security interest in all right, title and interest of the Company in those items and types of Collateral described in the Loan Agreement in which a security interest may be created under Article 9 of the Uniform Commercial Code as in effect in [refer only to the state the law of which governs the Loan Agreement—not to every state where perfection may be needed].

Financing statements on Form UCC-1 have been duly executed by the Company and have been duly filed in each filing office indicated in Exhibit A hereto under the Uniform Commercial Code in effect in each state in which said filing offices are located.

The description of the Collateral set forth in said financing statements is sufficient to perfect a security interest in the items and types of Collateral described therein in which a security interest may be perfected by the filing

period following the perfection of the security interest. In this case, even though the buyer's bankruptcy occurs more than a year after the actual transaction, the transfer of the buyer's property (the granting of the security interest in favor of the seller) will be deemed to have been made within ninety days of bankruptcy. In addition, the transfer will be treated as though it were for an antecedent debt because of the substantial period of time between the creation of the original obligation and the subsequent perfection of the security interest. If the other elements of a preference are present, the trustee would be able to successfully avoid the security interest.

*Id.* at 289–90 (footnotes omitted). Perfection of a security interest may also establish rights against holders of non-Code interests. *See infra* text accompanying notes 92–121.

13. *See infra* text accompanying notes 52–91.

14. *See infra* text accompanying notes 92–121.

of a financing statement under the Uniform Commercial Code as in effect in such states.

Such filings are sufficient to perfect the security interest created by the Loan Agreement in all right, title and interest of the Company in those items and types of Collateral described in the Loan Agreement in which a security interest may be perfected by the filing of a financing statement under the Uniform Commercial Code in such states.<sup>15</sup>

This form of opinion is carefully crafted to pass only on such matters as the sufficiency of the security agreement to create a security interest, the execution of financing statements and their filing in stated jurisdictions, and the effect of such filings. Even so, this opinion goes much further than lawyers could go prior to adoption of the Code and ordinarily will be acceptable to lenders who understand the breadth of the Code and its complexity. The reasons for this approach are discussed more fully below.

### **THE OPINION ON THE CREATION OF THE SECURITY INTEREST**

Most opinions state that the loan agreement "creates" or that its provisions "are sufficient to create" a security interest or that the security interest "exists."<sup>16</sup> The term "create" is found in section 9-105(1) of the Code, where it is used to define "security agreement."<sup>17</sup>

15. A longer excerpt from this opinion (including an exception relating to fixtures) is set forth in the appendix to this article.

16. See, e.g., A. Field & R. Ryan, *supra* note 10, at 8-1 ("The Security Agreement creates a valid security interest in favor of the secured party in [name collateral] as security for the payment of the obligations."); Ryan, *Legal Opinions to Third Parties, Representations, and Warranties Covering Security Interests in Personal Property*, in 2 Resource Materials: Banking and Commercial Lending Law 123, at 204 (ALI-ABA 1981); Weise & Duncan, *supra* note 10, at 407 ("All actions have been taken to create and to perfect the security interests created by the Loan Documents in the collateral defined in the Loan Documents . . ."); Business Law Section of the State Bar of California, Report of the Uniform Commercial Code Committee Regarding Legal Opinions in Personal Property Secured Transactions 12-13 (1986) [hereinafter California Secured Transactions Report] (The opinion on the creation of the security interest does not provide assurance that the security interest has attached or will attach in the future, but only that a security agreement which contains operative language creating a security interest and contains an adequate description of collateral has been executed and delivered. . . . Historically, lawyers have rarely, if ever, been asked to render an opinion that a security interest in certain collateral has attached.") (A version of the California Secured Transactions Report updated through 1988 appears elsewhere in this issue. 44 Bus. Law. 791).

Some opinions, however, deal with the creation of the security interest only implicitly by stating, for example, that the security interest has been "perfected." Sometimes opinions state instead that the agreement "constitutes a valid security interest," a statement that is literally inaccurate since the agreement itself does not comprise the security interest but is only one of the conditions to its existence.

17. U.C.C. § 9-105(1) provides: "Security agreement' means an agreement which creates or provides for a security interest."

The term “attach” also appears in article 9.<sup>18</sup> An opinion that a security interest has “attached” would confirm, among other things, that the collateral was of a type that could be subjected to a security interest,<sup>19</sup> that a valid security agreement has been entered into,<sup>20</sup> and that the debtor has “rights in the collateral.”<sup>21</sup> Experienced lawyers seldom opine that a security interest has attached because of the “rights in collateral” aspect of attachment. Lawyers are rarely in a position to pass upon rights to personal property.<sup>22</sup> Moreover, the collateral ordinarily includes after-acquired property, in which the debtor by definition has no rights at the time the opinion is rendered. Of course, a lawyer could expressly assume that the debtor has or will acquire rights in the collateral or rely upon a representation to that effect.<sup>23</sup> However, rights in

18. That term appears twice in U.C.C. § 9-203 (“Attachment and Enforceability of Security Interest”).

19. Certain government permits, for example, may not be pledged.

20. *Cf.* U.C.C. § 9-203(1)(a) (A signed security agreement is not required when “the collateral is in the possession of the secured party pursuant to agreement.”).

21. *See* U.C.C. § 9-203(1)(c). The term “rights in the collateral” is not defined in article 9, and courts have often interpreted it broadly. Thus, although mere possession has been said not to be enough, a manufacturer has been held to have sufficient rights to create a security interest in a customer’s tubes and fittings held by the manufacturer for use in constructing equipment for the customer. *See also* Kinetics Technology Int’l Corp. v. Fourth Nat’l Bank, 705 F.2d 396 (10th Cir. 1983); J. White & R. Summers, *Handbook of the Law Under the Uniform Commercial Code* § 23-4, at 916 (2d ed. 1980).

22. A. Field & R. Ryan, *supra* note 10, at 8-4 to 8-5; California Secured Transactions Report, *supra* note 16, at 17 (“[a]n Opinion that debtor had rights in the collateral is almost never appropriate”); Fuld, *Legal Opinions in Business Transactions—An Attempt to Bring Some Order Out of Some Chaos*, 28 Bus. Law. 915, 936 (1973); California Real Estate Transactions Report, *supra* note 10, at 1171 (setting forth sample language stating: “We have not made or undertaken to make any investigation of the state of title to the . . . Personal Property described in the Loan Documents and we express no opinion with respect to the title thereto or to the priority of any liens thereon or security interests therein.”). Some opinions expressly rely on representations in the loan agreement concerning the collateral. Other opinions include an assumption stating, for example, “in rendering our opinion, we have assumed that the debtor has rights in the collateral which is described in the security agreement.” Another approach is for the opinion to state, “we express no opinion as to . . . the Borrower’s right in or title to any Collateral.” Ryan, *supra* note 16, at 208.

23. *But cf.* California Secured Transactions Report, *supra* note 16, at 14 (states that a qualification covering after-acquired property is implicit when not expressed). Even when the opinion is narrowly drafted, a lawyer who knows of a serious problem with the borrower’s title to existing collateral should bring the problem to the attention of the opinion recipient. *See* Ryan, *supra* note 16, at 134:

Of course, if borrower’s counsel knows, or has reason to know, of some problem with the borrower’s title to the Collateral, counsel should disclose it. For example, if the banks are lending to a company which counsel knows to hold and sell its inventory through a subsidiary, counsel should disclose that fact. If the lawyer relies on the borrower’s representations and warranties (as to facts or mixed issues of fact and law), the lawyer should conclude that it is reasonable to do so.

Another limitation relevant to security interests in after-acquired property is contained in § 552(a) of the Bankruptcy Code, 11 U.S.C. § 552 (1982), which provides that, with certain exceptions “property acquired by the estate or by the debtor after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before the commence-



collateral are such a key element of the definition of "attached" that many lawyers fear that reliance on such a far-reaching and fundamental representation or assumption could seriously mislead opinion recipients.

Many lawyers do not sharply distinguish between the words "create" or "exist," on the one hand, and the phrase "sufficient to create," on the other. They believe that "create" and "exist," like "sufficient to create," deal with the steps taken to bring a security interest into existence rather than the application of that interest to any particular existing item of collateral. Still, some ambiguity may remain and "sufficient to create," which most clearly makes the point that the opinion is not intended to pass upon the debtor's rights in the collateral, would therefore appear to be the preferable form.<sup>24</sup> Moreover, to avoid any implication that they are passing on the debtor's ownership of the collateral, many experienced lawyers limit the opinion even further in the manner quoted above by stating that the agreement is sufficient to create a security interest only in whatever "right, title and interest" the debtor has in the collateral.

An opinion on the creation of a security interest means no more than that the necessary steps to bring the security interest into existence have been taken under applicable commercial, corporate, and contract law. The opinion does not address what remedies will be available,<sup>25</sup> even though every well drafted agreement contains remedy provisions.<sup>26</sup>

ment of the case." A. Field & R. Ryan, *supra* note 10, at 8-10, set forth opinion language relating to this limitation:

In the case of property which becomes collateral after the date hereof, Section 552 of the Federal Bankruptcy Code limits the extent to which property acquired by a debtor after the commencement of a case may be subject to a security interest arising from a security agreement entered into by the debtor before the commencement of such case.

24. The excerpt from the California Secured Transactions Report, quoted *supra* note 16 to the effect that the opinion as to the creation of the security interest does not cover attachment would appear to reflect the view of most practitioners. One of the authors of the present article (FitzGibbon) disagrees, observing that a security interest cannot be created without its attaching to something. He notes that some authorities use "attach" and "create" interchangeably. *See, e.g.*, U.C.C. § 9-203 Official Comment 1: "Subsection (1) states three basic prerequisites to the existence of a security interest: agreement, value, and collateral. . . . When all of these elements exist, the security agreement becomes enforceable between the parties and is said to 'attach.'" *See also* J. White & R. Summers, *supra* note 21, § 23-1, at 901 ("Section 9-203 of the 1972 (and 1978) Code lays out the steps a party must take to create an Article Nine security interest. . . . Once these steps are taken the security interest comes into existence. The Article Nine draftsmen label this magic event 'attachment.'"). Professor FitzGibbon would therefore add an assumption or qualification about the debtor's right in the collateral. Mr. Glazer, while finding Professor FitzGibbon's point interesting, regards it as more theoretical than practical in that such an assumption is ordinarily included anyway for other reasons. Mr. Glazer would weigh heavily the views of practitioners who render opinions regularly in this area.

25. *Accord* A. Field & R. Ryan, *supra* note 10, at 8-1.

26. Loan agreements frequently contain aggressive remedies provisions. For example, agreements often contain provisions granting the lender the right to enter the debtor's premises in the event of a default (not limiting the right to "peaceful entry"); the right to remove the collateral and sell it at once; and the right to treat certain collateral, such as securities, as though it were the property of the lender. Such provisions may necessitate a qualification to the standard opinion that

Similarly, the opinion does not pass on the perfection of the security interest or its priority over other interests, matters that are covered, if at all, by other phrases in the opinion.

An opinion that “the provisions of the Loan Agreement create” or “are sufficient to create” a security interest in the property of the debtor confirms:

(i) That the debtor has entered into a written agreement expressing its intention to give a security interest in its property<sup>27</sup> to the lender to secure the indebtedness.<sup>28</sup> Alternatively, the opinion may confirm that the collateral is in the possession of the secured party pursuant to agreement.<sup>29</sup>

(ii) That the agreement has been duly authorized, executed, and delivered by the debtor.<sup>30</sup> Thus, the opinion normally could not be given where

the agreement is a “legal, valid and binding” obligation of the debtor “enforceable in accordance with its terms.”

27. See J. White & R. Summers, *supra* note 21, § 23-3, at 906 (discussion of the requirement that the agreement express the intention to confer the security interest); Pontchartrain State Bank v. Paulson, 684 F.2d 704, 706 (10th Cir. 1982) (“The promissory note in this case provided that it was ‘secured by pledge and delivery of the securities or property mentioned on the reverse . . .’ thereto. The note does not specifically grant a security interest to Bank; thus, under the law of this Circuit interpreting the Oklahoma Commercial Code, it does not satisfy the requirements for the creation of a security agreement.”) (alternative holding). Cf. *In re Amex Protein Development Corp.*, 504 F.2d 1056 (9th Cir. 1974) (sometimes several documents, considered together, are accepted by courts as satisfying the requirement); *Komas v. Future Sys.*, 71 Cal. App. 3d 809, 139 Cal. Rptr. 669 (1977) (“Respondent concedes that the financing statement, standing alone, did not satisfy the requisites for a security agreement because that document does not recite that the parties intended to create a security interest in the collateral. . . . [But] [i]n the present case, the financing statement, loan application, promissory note and other documents, taken together, establish that there was an agreement to create or provide for a security interest.”) *But cf.* *Pontchartrain State Bank v. Paulson*, 684 F.2d at 706 (“although some courts have held that a security agreement may incorporate other documents by reference and thereby satisfy the dictates of Article 9, the doctrine of incorporation by reference is not applicable in this case because the promissory note makes no reference to the list”).

28. Normally the security agreement identifies the secured obligation. See A. Field & R. Ryan, *supra* note 10, at 8-4 (“[c]ounsel should also determine whether the security agreement reasonably describes the secured obligations”). Article 9 may require such a description in the case of future advances. U.C.C. § 9-204 Official Comment 5 provides: “Under subsection (3) collateral may secure future as well as present advances when the security agreement so provides. . . . [T]his subsection validates the future advance interest, provided only that the obligation be covered by the security agreement.” See *In re Bud Long Chevrolet, Inc.*, 39 Bankr. 499, 501 (Bankr. D.N. Mex. 1984) (“where there is no future advance clause it is a simple matter to find no intention that future advances be secured by the collateral in the original agreement”) (dictum); *Idaho Bank & Trust Co. v. Cargill, Inc.*, 105 Idaho 83, 665 P.2d 1093 (Ct. App. 1983); *Texas Kenworth Co. v. First Nat’l Bank*, 564 P.2d 222, 225 (Okla. 1977) (holding that the phrase “all other indebtedness from Buyer to Secured Party” was not sufficient to cover future advances: “in order for a security interest to subject the collateral to future advances, the security agreement must clearly indicate that the obligation covered includes future advances”).

29. U.C.C. § 9-203 requires “a signed security agreement” except where the collateral is “in the possession of the secured party pursuant to an agreement.”

30. California Secured Transactions Report, *supra* note 16, at 14. The meaning of the “duly authorized, executed and delivered” opinion is discussed in *FitzGibbon & Glazer*, *supra* note 3, at 660-67.

the agreement was not approved by the proper corporate body (usually the directors and, where required by statute or charter, the shareholders<sup>31</sup>) or where it was not signed by the appropriate officer of the debtor.<sup>32</sup>

(iii) That the agreement "reasonably identifies" the collateral.<sup>33</sup> The description of the collateral in the agreement must not be overbroad or so imprecise that it fails to distinguish the intended collateral from other property of the debtor. Security agreements often describe the collateral in the generic terms used in article 9—conferring the security interest in "all accounts, equipment, inventory, and chattel paper," for example. There is some authority indicating that the terms "all equipment" and "all inventory" reasonably identify those types of collateral.<sup>34</sup> However, doubts have been raised about the sufficiency of the term "general intangibles." A leading authority states: "Because the term 'general intangibles' includes property as diverse as partnership interests, patents, contract rights, and trade names without any subcategories defined in the Code, some lawyers are concerned that the term 'general intangible' . . . does not permit reasonable identification."<sup>35</sup> Article 9 uses the term "goods," but "all

31. Preferred stock charter provisions also sometimes require approval by the preferred stockholders before a security interest may be granted in a substantial portion of the company's assets.

32. U.C.C. § 9-203 requires that the debtor have "signed a security agreement which contains a description of the collateral." For a discussion of various problems raised by the requirement that the security agreement be signed by the debtor, see J. White & R. Summers, *supra* note 21, § 23-3, at 912-14.

33. U.C.C. § 9-110 provides: "For the purposes of this Article any description of personal property or real estate is sufficient whether or not it is specific if it reasonably identifies what is described." *Id.* Official Comment states:

The requirement of description of collateral . . . is evidentiary. The test of sufficiency of a description laid down by this section is that the description do the job assigned to it—that it make possible the identification of the thing described. Under this role courts should refuse to follow the holdings, often found in the older chattel mortgage cases, that descriptions are insufficient unless they are of the most exact and detailed nature, the so-called "serial number" test.

Under the Bankruptcy Code, the trustee in bankruptcy may not avoid a transfer under § 547 (preferences) where the transfer creates a security interest "to the extent such security interest secures new value that was . . . given at or after the signing of a security agreement that contains a description of such property as collateral." 11 U.S.C. § 547(c) (1982) (emphasis added).

34. See *In re Bazaar de la Cuisine Int'l*, 20 U.C.C. Rep. Serv. (Callaghan) 1049, 1052 (Bank. S.D.N.Y. 1976) (holding that "the word 'inventory' in the promissory note is an adequate description of the collateral under the Code"); *In re Sarex Corp.*, 509 F.2d 689 (2d Cir. 1975) (holding that where the description of collateral contained the phrase "machinery, equipment and fixtures" (at certain locations) and then went on to specify certain types (molds, tools, etc.) and items, all the debtor's machinery and equipment at the specified locations were covered, not just the specified items or types of items. The court discusses the question of when specifics will be construed as limitations on the general terms; the moral is that counsel should take care to employ the phrase "including without limitation" or something similar.) (The *Sarex* opinion fails to distinguish clearly between descriptions in financing statements and those in security agreements.)

35. California Secured Transactions Report, *supra* note 16, at 15 ("Careful lawyers often use generic code descriptions followed by illustrative but not exclusive lists of common names of collateral which come within those generic Code descriptions. Although such descriptions may be

goods” has sometimes been held overbroad,<sup>36</sup> as has “proceeds of all the debtor’s present and future assets.”<sup>37</sup> Where the debtor intends to grant a security interest in after-acquired accounts and inventory, the agreement should refer expressly to such after-acquired property.<sup>38</sup>

(iv) That “value has been given” as required by U.C.C. section 9-203.<sup>39</sup> Normally, funds will have been extended at the closing pursuant to the loan agreement.<sup>40</sup> This requirement may also be satisfied, however, when a security interest is given in support of a pre-existing loan,<sup>41</sup> by a binding commitment to extend funds,<sup>42</sup> and probably by an immediately available line of credit or similar facility, even though advances are at the lender’s discretion.<sup>43</sup> The “value” requirement may be satisfied even when the loan

the preferred approach, they should not always be necessary in order to enable an attorney to be satisfied that the collateral description is adequate.”) *Accord* A. Field & R. Ryan, *supra* note 10, at 8-3.

36. J. White & R. Summers, *supra* note 21, § 23-3, at 910-12. *But see* *Drysdale v. Cornerstone Bank*, 562 S.W.2d 182, 183 (Mo. Ct. App. 1978) (“All contents of Drysdale Ford Sales, Southwest City, Missouri, including all parts, all shop equipment [sic], all supplies . . . all furniture [sic], all tools and all stock of merchandise” has been held sufficient to cover certain equipment).

37. *In re E.P.G. Computer Servs.*, 20 U.C.C. Rep. Serv. (Callaghan) 1084 (Bankr. S.D.N.Y. 1976). *But see* *Maxl Sales Co. v. Critiques, Inc.*, 796 F.2d 1293, 1295 (10th Cir. 1986) (concluding that the security agreement had attached to the proceeds of debtor’s inventory even though the security agreement referred only to “proceeds . . . of the debtor . . . arising under a certain Consignment Agreement . . . attached hereto as Exhibit ‘A’” and the referenced consignment agreement did not refer to inventory, but rather to “certain items of furniture, household goods, etc.”).

38. Courts have split on whether the terms “accounts” and “inventory” cover after-acquired accounts and inventory. J. White & R. Summers, *supra* note 21, § 23-3, at 912.

39. U.C.C. § 1-201(44) provides:

Except as otherwise provided with respect to negotiable instruments and bank collections (Sections 3-303, 4-208 and 4-209) a person gives “value” for rights if he acquires them

- (a) in return for a binding commitment to extend credit or for the extension of immediately available credit whether or not drawn upon and whether or not charge-back is provided for in the event of difficulties in collection; or
- (b) as security for or in total or partial satisfaction of a pre-existing claim; or
- (c) by accepting delivery pursuant to a pre-existing contract for purchase; or
- (d) generally, in return for any consideration sufficient to support a simple contract.

40. Sometimes opinions include an express assumption as to “[t]he delivery to or for the benefit of the Company at the closing of the funds to be loaned pursuant to the Loan Documents.” *Weise & Duncan*, *supra* note 10, at 395 (footnotes omitted).

41. But note that such a transaction might be challenged as a preference.

42. *See* U.C.C. § 1-201(44)(a); *First Md. Leasecorp. v. M/V Golden Egret*, 764 F.2d 749, 753 (11th Cir. 1985); A. Field & R. Ryan, *supra* note 10, at 8-4 (“the binding commitment to lend, or to issue a letter of credit, or to accept a draft, should be considered ‘value given’”).

43. This is the clear implication of U.C.C. § 1-201(44)(a), which provides that a person “gives ‘value’ for rights if he acquires them . . . in return for a binding commitment to extend credit or for the extension of immediately available credit whether or not drawn upon . . .” (emphasis added). *See* *Weise & Duncan*, *supra* note 10, at 367, 395 n.22:

Some financing agreements provide that the lender may make advances at its “sole discretion” . . . Although this is not a “binding commitment to extend credit,” it may constitute

is extended to some party other than the grantor of the security interest,<sup>44</sup> for example, when a bank loan to a stockholder is supported by a security interest in property of the corporation.<sup>45</sup> The Code requirement that value be "given" is satisfied when funds are committed or advanced regardless of the identity of the borrower.

(v) That the security agreement and the authority of the officers to act on behalf of the corporation remain in effect. This is not much of a problem when the opinion is given at the initial closing under a loan agreement. However, it can be a problem when additional funds are taken down at a subsequent closing. Before delivering an opinion at that closing, the lawyer should confirm that the agreement has not expired by its terms and should satisfy himself, ordinarily by obtaining an officer's certificate, that the debtor has not taken any steps to abrogate the agreement—for example in a subsequent contract with the creditor<sup>46</sup>—and that the officers acting on behalf of the debtor are (or still are) authorized to do so.<sup>47</sup>

Many bank lawyers have been given sleepless nights by the Supreme Court's decision in *Citicorp Industrial Credit, Inc. v. Brock*.<sup>48</sup> In that case, the Court held that a lender could not sell inventory of the borrower that had been produced in violation of the Fair Labor Standards Act, even though the lender had created and perfected a security interest in the inventory and had properly seized it upon default. *Citicorp Industrial Credit* squarely presents the question whether a lawyer can ever give an unqualified opinion on the creation of a security interest in inventory without first confirming compliance with the Fair

"consideration sufficient to support a simple contract," which is also "value." The lender's obligation to act in good faith may sufficiently modify its discretionary power to create enough of an obligation on the part of the lender to make advances to constitute "value." . . . Borrower's counsel in a wholly discretionary advance situation should consider adding the following qualification to the end of the opinion: "the possible effect of the ability of the lender to decline to make advances on the question of whether the lender has given value."

Where the lender's obligations are purely discretionary, questions may also arise as to the portions of the opinion that confirm that the loan agreement is "legal, valid and binding" and "enforceable in accordance with its terms." See FitzGibbon & Glazer, *supra* note 3, at 673-74.

44. A. Field & R. Ryan, *supra* note 16, at 8-4.

45. *In re Reliable Mfg. Corp.*, 703 F.2d 996 (7th Cir. 1983); *In re Terminal Moving & Storage Co.*, 631 F.2d 547 (8th Cir. 1980). Of course, depending on the facts, such a transaction might be subject to attack as a violation of fiduciary duties, as ultra vires or as a fraudulent conveyance.

46. *But cf. In re Bud Long Chevrolet, Inc.*, 39 Bankr. 499, 502 (Bankr. D.N. Mex. 1984):

The November security agreement repeated the security interest in equipment, fixtures, inventory, etc., but there was no evidence of any sort to indicate that this was intended by [the creditor] or the debtor to invalidate or supercede the first security agreement. This Court could as easily conclude that the security was repeated out of an over-abundance of caution by [the creditor] . . . .

47. Similarly, the lawyer may rely on officers' certificates confirming that the debt remains outstanding and that the collateral is still in the hands of the debtor.

48. 107 S. Ct. 2694 (1987).

Labor Standards Act.<sup>49</sup> More generally, it raises the question whether the opinion on the creation of a security interest in collateral can be given without confirming compliance with all laws relating to the acquisition and disposition of the collateral.<sup>50</sup> The answer is, and must be, yes. The opinion on the creation of a security interest should be interpreted to relate only to contract law and the Uniform Commercial Code. Lawyers should not be expected to identify every legal problem that may arise under every law or statute. Rather, when a lender is concerned about a particular type of collateral or a specific law, it should have the burden of requesting a legal opinion that expressly addresses the problem. (When lawyers pass on a transaction's compliance with laws generally, they do so in a separate part of the opinion and then only in carefully qualified terms.) Nevertheless, experienced lawyers who know of a serious legal problem in the enforcement of a security interest will, as a matter of good practice, bring it to the attention of the opinion recipient and, depending upon the circumstances, may decline to render any opinion at all.

Another question is whether the opinion confirms that the debtor, in granting the security interest, has not violated its other contractual obligations, such as "negative pledge clauses" or provisions permitting subsequent liens only if the first creditor is "equally and ratably secured." Article 9 does not condition the attachment of the security interest on the debtor's compliance with such contractual obligations. Therefore, an opinion on the creation of the security interest ought not to be interpreted to pass on such compliance.<sup>51</sup> Often, however, counsel for the debtor will be expected to confirm elsewhere in his opinion that to his knowledge the transaction does not contravene contracts to which the debtor is a party.

## ***THE OPINION ON THE PERFECTION OF THE SECURITY INTEREST***

Under article 9, a lender whose security interest has "attached" can improve his position by "perfecting" the security interest. Perfection gives the lender rights as against third parties such as a bankruptcy trustee and general creditors.<sup>52</sup> In addition, a lender with a perfected security interest has priority over a

49. 29 U.S.C. §§ 1-1906 (1982 & Supp. IV 1986). Some secured lenders may be able to avoid the problem encountered by Citicorp by relying on the exception provided in the Act for "a purchaser who acquired [such goods] . . . in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of this chapter, and who acquired such goods for value without notice of any such violation . . ." 29 U.S.C. § 215(a) (1982).

50. One special circumstance might be that presented by a statute that prohibited the lender from taking a security interest but did not prohibit the borrower from giving one. Counsel who was ignorant of the existence of the statute might be able to render the opinion in reliance on the standard assumption concerning the authority of the opinion recipient and its compliance with laws.

51. Of course the lawyer should not give an unqualified opinion on the creation of a security interest which he knows to constitute a material violation of an important contractual obligation of the borrower, even though the opinion might be literally correct.

52. See *supra* note 12.

lender with an unperfected interest, even if the unperfected interest attached first.<sup>53</sup> If the debtor defaults on both debts, the perfected lender may be able to cause the collateral to be sold in accordance with the provisions of article 9 and to keep the proceeds to the full extent of its unpaid debt; the unperfected lender will be entitled to receive payment only out of any remaining proceeds (and only as a general creditor in the event of a bankruptcy proceeding).

### *NARROWER VERSIONS OF THE PERFECTION OPINION*

If the collateral consists of a specific asset, such as a piece of equipment or rights under a particular contract, the steps required to perfect the security interest ordinarily are obvious, and the parties will perfect the security interest as a matter of course. In such a transaction the lawyer will have no difficulty rendering a flat opinion that the security interest has been perfected in all the collateral.

In the great majority of transactions requiring legal opinions, however, the borrower grants a security interest in all or a major portion of its assets, consisting of many different types of personal property located in many different jurisdictions. Under those circumstances, the borrower and lender may decide to limit the steps taken to perfect the security interest, with the result that the security interest is not perfected in each and every item of collateral. That decision ordinarily takes into account such factors as the cost of perfection, the value of various types of collateral, the value of the assets located in particular jurisdictions, the riskiness of the loan, and the importance of the collateral to the lender's credit decision. Often a decision is made to limit perfection to assets in which a security interest can be perfected through the filing of financing statements (or, in the case of instruments, the taking of possession).<sup>54</sup> The perfection opinion experienced lawyers render on such transactions necessarily stops short of a flat statement that the security interest in all the collateral has been perfected. One version of such an opinion states:

Financing statements on Form UCC-1 have been duly executed by the Company and have been duly filed in each filing office indicated in Exhibit A hereto under the Uniform Commercial Code in effect in each state in which said filing offices are located. Such filings are sufficient to perfect the security interest created by the Loan Agreement in all right, title and

53. U.C.C. § 9-312(5) provides:

In all cases not governed by other rules stated in this section . . . (a) Conflicting security interests rank according to priority in time of filing or perfection. Priority dates from the time a filing is first made covering the collateral or the time the security interest is first perfected, whichever is earlier . . . .

54. The risk in this approach is that a significant asset may not be covered, for example the trademark protecting the alligator on all the clothing subject to the security interest. Under those circumstances, even though the lender would have a perfected security interest in the clothing, it might find itself unable to sell it.

interest of the Company in those items and types of Collateral described in the Loan Agreement in which a security interest may be perfected by the filing of a financing statement under the Uniform Commercial Code in such states.<sup>55</sup>

55. The phrase "in such states" may be omitted when the filings have been made in all jurisdictions. It may also be omitted when the lawyer has satisfied himself that filings have been made everywhere necessary, based on the location of the debtor and of the collateral. Opinions often rely expressly on officers' certificates attesting to the nature and location of the collateral. A longer excerpt from this opinion is set forth in the appendix to this article. Lawyers are sometimes asked to add, at the end of the first sentence, the phrase "and all fees and taxes in connection with such filings have been paid." *Cf.* note 69, *infra*, and accompanying text.

Another form of opinion states:

A financing statement under the Uniform Commercial Code has been duly filed in the office of the Secretary of the Commonwealth of Massachusetts, and the office of the City Clerk of \_\_\_\_\_, these being the only places provided by the laws of the Commonwealth of Massachusetts for such filing, . . . to perfect all of the security interest granted to you by the Agreement . . . .

Subcommittee on Opinion Writing of the Massachusetts Bar Association Committee on Corporate, Banking & Business Law, *Omnibus Opinion for Use in Loan Transactions*, 60 Mass. L.Q. 193 (1975) [hereinafter *Omnibus Opinion*] (footnotes omitted).

Another version states:

The Financing Statement filed in the office of \_\_\_\_\_ is sufficient in form to perfect the security interest in the Collateral in favor of the secured party to the extent that a security interest in the Collateral can be perfected by the filing of a financing statement in this State.

A. Field & R. Ryan, *supra* note 10, at 8-7. Similar language is set forth in the *California Real Estate Transactions Report*, *supra* note 10, at 1185. Yet another version states:

The proper place to file a financing statement for collateral of the type described in the security agreement, to the extent that a security interest in such collateral may be perfected by the filing of a financing statement in the State of California, is in the Office of the Secretary of State of the State of California.

California Secured Transactions Report, *supra* note 16, at 18. Another, narrower, version states:

The UCC Financing Statements are each in form sufficient for filing with the [filing office] in order to perfect the security interest created by the Mortgage and Security Agreement in the Personal Property and the Fixtures described therein as to which a security interest must be perfected by such filing.

Dunn, *Attorney Opinions in Real Estate Financing Transactions*, in *Commercial Real Estate Financing: Living with Today's Economy and Tax Reform* § VII B8c2 (ALI-ABA 1987). One commentator has raised a question as to the utility of a narrow perfection opinion:

[W]ithout merit are closing opinions which would be factually based except that either relevant fact or applicable law is assumed. A shortened version of this problem would be represented by the following: "We have reviewed the Uniform Commercial Law filings in the office of the Secretary of State, and there is no financial statement on file against the property described as collateral in the security agreement and financing statement except the financing statement in favor of the secured party. Assuming that the appropriate method of perfecting the security interest of the secured party in the collateral is by filing, it is perfected and has first priority . . ." Obviously the lawyer giving the opinion and the lawyer accepting it either didn't care about the real opinion or there was some basic problem as to the proper method of perfection. In either case, why the opinion at all?



This opinion focuses on the filing of financing statements and confirms that, to the extent a security interest can be perfected through the filing of financing statements in the named states and the debtor has rights in the collateral, the lender's security interest has been perfected in those states. The opinion does not confirm that the debtor actually has any rights in the collateral,<sup>66</sup> that any collateral is, in fact, located in the named jurisdictions, or that the security interest can be perfected by filing in those jurisdictions. Nor does the opinion confirm that the collateral is of such a nature that filing is the correct method for perfecting the security interest.<sup>67</sup> These conclusions require factual determinations that raise special difficulties for counsel. When the nature of the collateral is constantly changing, particular assets, such as inventory, are continually being purchased and sold, and assets are regularly moving back and forth from state to state, counsel is in no position to identify precisely the assets owned by the debtor or their location on the day on which he renders his opinion.

Despite the carefully circumscribed character of the opinion, counsel ought not to render it if he knows of facts that would make it misleading to the recipient.<sup>68</sup> For example, an opinion concerning perfection in stated jurisdictions could be misleading if counsel knew that none of the collateral was located

Bermant, *The Role of the Opinion of Counsel: A Tentative Reevaluation*, 49 Cal. St. B.J. 132, 187 (1974). The answer to Bermant's question is set forth at length in the text of this article.

56. One might think it incongruous that experienced lawyers go to great lengths to avoid passing on attachment and nevertheless render perfection opinions, when under the Code perfection cannot take place without attachment. The perfection opinion quoted above solves the problem by focusing on the steps that have been taken to achieve perfection beyond the execution and delivery of the security agreement and the giving of value. The issue of whether the debtor has rights in the collateral (and thus whether the security interest has attached) is carefully avoided by the use of the phrase "all right, title and interest." In addition, the opinion often contains an express assumption regarding the debtor's rights in the collateral.

57. A. Field & R. Ryan, *supra* note 10, at 8-9 states:

A preferred alternative is for counsel to state exceptions in the opinion for those security interests that cannot be perfected by what has been done, but to indicate how such security interests may be perfected. For example, an opinion might state . . . :

"(a) in the case of instruments (as such term is defined in Article 9 of the UCC) not constituting part of chattel paper (as such term is defined in Article 9 of the UCC), the security interests of the secured party therein cannot be perfected by the filing of the financing statements but will be [created and] perfected if possession thereof is in accordance with the provisions of [the security agreement][Article 9 of the UCC];

"(b) in the case of motor vehicles for which certificates of title have been issued and for which the exclusive manner of perfecting a security interest is by noting the secured party's security interest on the certificate of title in accordance with the \_\_\_\_\_ Uniform Motor Vehicle Certificate of Title and Anti-Theft Act, the secured party's security interest therein cannot be perfected by the filing of the financing statements but will be perfected if the secured party's security interest is so noted."

58. See Ryan, *supra* note 16, at 200-01 (includes an "Illustrative Opinion" containing expressions of reliance on certain representations and states: "Counsel's reliance on such representations should be reasonable. If counsel knows that some part of the expected collateral does consist of some of the excluded items, the reliance stated in the opinion would not take away counsel's responsibility." *Id.* at 173.).

there.<sup>59</sup> Similarly, an opinion concerning the filing of financing statements in specified states could be misleading if counsel knew that filing was not the correct method for perfecting the security interest. This would be the case, for example, where the debtor was an investment company whose principal assets were securities or a high technology company in the development stage whose principal assets were patents.

The opinion confirms, first, that the financing statements comply as to form with the requirements of article 9. Section 9-402 states:

(1) A financing statement is sufficient if it gives the names of the debtor and the secured party, is signed by the debtor, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor, and contains a statement indicating the types, or describing the items, of collateral. . . .

....

(8) A financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading.

....

Official Comment

9. Subsection (8) is in line with the policy of this Article to simplify formal requisites and filing requirements and is designed to discourage the fanatical and impossibly refined reading of such statutory requirements in which courts have occasionally indulged themselves.<sup>60</sup>

The lawyer could not opine that the security interest had been perfected when the debtor's name or address was so badly garbled as to be seriously misleading;<sup>61</sup> before rendering an opinion, careful lawyers ordinarily make sure that the debtor's name and address are letter perfect. Similarly, under most circumstances the lawyer could not opine that the security interest had been

59. Often the representations and warranties in the loan agreement will identify the jurisdictions in which the collateral may be located.

60. U.C.C. § 9-402 also contains special rules for financing statements relating to crops, timber, fixtures, and other specified types of collateral.

61. White and Summers urge courts to take a lenient view of errors in the name. They propose that the test should be "whether a reasonably diligent searcher would be likely to discover a financing statement indexed under the incorrect name." J. White & R. Summers, *supra* note 21, § 23-16, at 958. What a court decides may depend upon the procedures of the filing office: where the office maintains a thorough system of cross referencing and responds to search requests by checking the files so carefully that the financing statement will turn up despite its deficiencies, courts are more likely to hold that the security interest was perfected. *See, e.g., Green Mill Inn v. National Cash Register Co.*, 474 F.2d 14 (9th Cir. 1973); *In re Central Wis. AG Supply*, 36 Bankr. 908 (Bankr. W.D. Wis. 1984); *In re Arnold*, 21 U.C.C. Rep. Serv. (Callaghan) 1479, 1484 (W.D. Mich. 1977) (The court held that a financing statement was insufficient to achieve perfection where it identified the debtor as "Arnold, Jack" when in fact his name was (apparently) Hershel Jack Arnold. The court stated, "[I]f the Register of Deeds actually indexes under the correct name or finds the statement on request, the courts will find for the secured party. . . . While the Secretary of State's office and many counties make liberal use of cross-filing, Van Buren County is not one of them.").

perfected when the financing statement contained the debtor's trade name but not its actual name.<sup>62</sup> When the debtor is a corporation, lawyers normally check the debtor's certificate of incorporation to confirm that it bears the same name as that on the financing statement.

Similarly, the lawyer could not opine that a security interest had been perfected when the financing statement failed to include an adequate description of the collateral. In the recent case of *Maxl Sales Co. v. Critiques, Inc.*,<sup>63</sup> the United States Court of Appeals for the Tenth Circuit held that, although "there is a consistent trend of leniency in the determination of the sufficiency of descriptions in financing statements," a financing statement that in relevant part described the collateral only as "proceeds, accounts receivable and intangibles arising from a certain consignment agreement" was not sufficient to perfect a security interest in inventory covered by that agreement and therefore did not perfect a security interest in the proceeds received by the debtor upon disposition of the inventory.

Second, the opinion confirms that the debtor has taken the steps required by applicable corporate law and its charter and by-laws to authorize the execution and filing of the financing statements and an appropriate officer of the debtor has, in fact, executed those statements.<sup>64</sup>

62. U.C.C. § 9-402(7) provides that "[a] financing statement sufficiently shows the name of the debtor if it gives the individual, partnership or corporate name of the debtor, whether or not it adds other trade names or names of partners." The Official Comment states:

In the case of individuals, [subsection (7)] contemplates filing only in the individual name, not in a trade name. In the case of partnerships it contemplates filing in the partnership name, not in the names of any of the partners, and not in any other trade names. Trade names are deemed to be too uncertain and too likely not to be known to the secured party or person searching the record, to form the basis for a filing system.

Courts have held that financing statements that contained only trade names of the debtor did not suffice to perfect the security interest. *See, e.g., In re Leichter*, 471 F.2d 785 (2d Cir. 1972); *In re Thomas*, 466 F.2d 51 (9th Cir. 1972); *Citizens Bank v. Ansley*, 467 F. Supp. 51 (M.D. Ga. 1979), *aff'd*, 604 F.2d 669 (5th Cir. 1980). *But see In re Glasco, Inc.*, 642 F.2d 793 (5th Cir. 1981) (holding, over a vigorous dissent, that where the debtor's name was "Glasco, Inc.," a financing statement that identified it as "Elite Boats, Division of Glasco, Inc.," sufficed to perfect the security interest because the debtor had widely identified itself to the business community under the latter name); *In re Maples*, 33 Bankr. 14 (Bankr. W.D. Mo. 1983) (holding that a trade name suffices where it is "sufficiently related to the name of the bankrupt . . . so as to give notice of a possible prior existing security interest to anyone searching the records"). For a case rejecting the view that a financing statement that contained the debtor's actual name was ineffective because of confusion caused by inclusion of a trade name, see *In re Skinner*, 22 U.C.C. Rep. Serv. (Callaghan) 1286 (Bankr. W.D. Mich. 1977).

63. 796 F.2d 1293, 1298-99 (10th Cir. 1986).

64. A document lacking the debtor's signature "is not a sufficient financing statement" even though the omission of the signature is "not seriously misleading." *In re Thibodeau*, 19 U.C.C. Rep. Serv. (Callaghan) 1250, 1252 (Bankr. D. Me. 1976) (dictum). A related area of concern is the corporate status of the debtor. If the debtor's corporate existence has not yet commenced or has been terminated, many fundamental opinion problems arise, including problems with the perfection opinion. *See In re Thomas*, 30 U.C.C. Rep. Serv. (Callaghan) 750 (Bankr. W.D. Va. 1980) (holding that the financing statement did not perfect the security interest where it identified as the

Third, the opinion confirms that the financing statements have been filed in the jurisdictions named in the opinion in all places required by article 9. These places may include not only the office of the secretary of state<sup>65</sup> but also, depending on the version of the Code adopted in a particular state, the office of a county or city clerk or, in the case of fixtures, the office where mortgages on real estate are filed.<sup>66</sup> The proper place to file depends on the nature and location of the collateral and the place of business of the debtor,<sup>67</sup> subject to many special rules such as those which apply to “transmitting utilities.” The lawyer often relies on an acknowledgment copy of the financing statement as evidence of filing.<sup>68</sup>

Counsel need not confirm that any related fees and taxes have been paid even if they are a condition of filing, so long as he bases his opinion on confirmation that the financing statements have been accepted for filing, since the Code provides that “acceptance of the statement by the filing officer constitutes filing” under article 9.<sup>69</sup>

When the collateral consists of “fixtures,” a standard U.C.C. filing will not necessarily protect the fixtures from claimants against the real estate<sup>70</sup> and a

debtor a corporation whose charter had been revoked). Confirming the corporation’s existence for purposes of the security interest opinion will not ordinarily require the lawyer to do anything he has not already done to support the opinion on the corporation’s organization. See FitzGibbon & Glazer, *Legal Opinions on Incorporation, Good Standing, and Qualification to Do Business*, 41 Bus. Law. 461 (1986).

65. Some states, such as Nebraska and Georgia, do not have a central filing system.

66. See *infra* note 70.

67. See U.C.C. §§ 9-103, 9-401.

68. There is some authority holding acknowledgment copies to be sufficient evidence of filing. See *In re May Lee Indus.*, 15 U.C.C. Rep. Serv. (Callaghan) 528 (S.D.N.Y. 1974), *aff’d*, 15 U.C.C. Rep. Serv. (Callaghan) 532 (2d Cir. 1974). But acknowledgment copies are not always available at the closing. Sometimes the lawyer can arrange for the financing statements to be filed well in advance of the closing so that there is sufficient time for the acknowledgment copies to be delivered to him. U.C.C. § 9-402(1) provides: “A financing statement may be filed before a security agreement is made or a security interest otherwise attaches.” Where the acknowledgment copy is not available in time for the closing, the lawyer sometimes opines only that “*where filed* such financing statements *will be* sufficient to perfect the security interest.”

The lawyer need not confirm that the financing statement has been properly indexed by the filing clerk. See U.C.C. § 9-403(1) (“[p]resentation for filing of a financing statement and tender of the filing fee or acceptance of the statement by the filing clerk constitutes filing under this Article”); Ryan, *supra* note 16, at 140 (“The UCC allocates the risk of misindexing to the searcher, not to the secured party.”). The California Secured Transactions Report, *supra* note 16, at 20, suggests that the opinion include the statement, “[T]he opinion set forth below is based on the assumption that the Financing Statement has been duly filed with the Secretary of State.”

69. U.C.C. § 9-403. Lawyers ordinarily base their opinions on acceptance rather than presentation for filing. A lawyer who based his opinion on presentation would have to confirm tender of the filing fee since, under the Code, “[p]resentation for filing of a financing statement *and tender of the filing fee* or acceptance of the statement by the filing officer constitutes filing under this Article.” *Id.* (emphasis added).

70. Goods which “become so related to particular real estate that an interest in them arises under real estate law” are defined as “fixtures” by U.C.C. § 9-313(1)(a). However, they continue to be “goods” as well, *id.* § 9-105(1)(h), and therefore a security interest in them can be perfected, as for goods generally, by a filing with the Secretary of State or other filing office. *Id.* § 9-401(1)(c).

"fixture filing" in the applicable real estate filing system may also be required. If it is, the lawyer should not give an unqualified opinion that the security interest in the fixtures has been perfected unless both filings have been made.

Fourth, the opinion confirms that the security interest has not ceased to be perfected.<sup>71</sup> Under the Code, perfection achieved by filing terminates upon the filing of a termination statement or lapses after five years unless a continuation statement is filed;<sup>72</sup> perfection may lapse sooner if an additional filing is not made to reflect a change in the name,<sup>73</sup> location or "corporate structure" of the debtor,<sup>74</sup> or the location of the collateral.<sup>75</sup>

The opinion does not mean that the security interest will continue to be perfected after the opinion is rendered.<sup>76</sup> However, one leading authority points out:

However, a security interest perfected only in this fashion may be subordinated to the interests of an encumbrancer or owner of the real estate. *Id.* § 9-313(7). Priority over such interests may be obtained, in many instances, by a "fixture filing" in the "office where a mortgage on the real estate would be filed." *Id.* §§ 9-313(1), 9-313(4). The Code refers to such a filing as a method of perfection. *Id.* § 9-313(4)(b). Some opinion language on fixtures is set forth in the *California Real Estate Transactions Report*, *supra* note 10, at 1185: "Regarding fixtures included in the Personal Property, we have assumed that such fixtures are located on the Real Property and that the Borrower had or will have an interest of record in the Real Property at the time of filing and recording of such Fixture Filing." The California Secured Transaction Report, *supra* note 16, at 18, takes the position that "[a]n opinion on the perfection of a security interest in fixtures . . . gives no assurance that the necessary steps have been taken to establish the priority of the security interest against certain persons having claims to the fixtures under real estate law." Exclusionary language relating to fixtures is set forth in paragraph 4 of the sample opinion contained in the appendix to this article.

71. Normally this does not present a difficult question, since perfection occurs at or shortly prior to the closing at which the opinion is rendered.

72. U.C.C. § 9-403 provides: "Except as provided in subsection (6) a filed financing statement is effective for a period of five years from the date of filing. The effectiveness of a filed financing statement lapses on the expiration of the five year period unless a continuation statement is filed prior to the lapse."

73. U.C.C. § 9-402(7) provides:

Where the debtor so changes his name or in the case of an organization its name, identity or corporate structure that a filed financing statement becomes seriously misleading, the filing is not effective to perfect a security interest in collateral acquired by the debtor more than four months after the change, unless a new appropriate financing statement is filed before the expiration of that time.

*See generally* Burke, *The Duty to Refile Under Section 9-402(7) of the Revised Article 9*, 35 *Bus. Law.* 1083 (1980).

74. *See* U.C.C. § 9-103(3)(e).

75. *See id.* § 9-103(2)(d).

76. Dunn, *supra* note 55, § VII B8c(3); California Secured Transactions Report, *supra* note 16, at 21. The California Secured Transactions Report states:

It is an increasingly common practice for lawyers to specify in their opinions circumstances in which a perfected security interest can become unperfected. Because an opinion only addresses the legal consequences of the facts existing or assumed at the time it is rendered, failure to include such disclosures does not render an opinion misleading. Such disclosures,

Since the opinion is dated a certain date, it speaks to the perfection of the security interest on that date. But the opinion also deals with the availability of remedies in the future, and perfection affects remedies. Lenders might therefore be surprised if the opinion did not consider the continuation of perfection during the term of the financing. Counsel could make clear in the opinion that the continuation of perfection is not covered, but normally perfection opinions do consider continuation and its limitations.<sup>77</sup>

This authority suggests that the opinion deal expressly with such matters as the filing of continuation statements<sup>78</sup> and the special problems raised by non-identifiable cash proceeds<sup>79</sup> and changes in the borrower's location,<sup>80</sup> name, identity, or corporate structure.<sup>81</sup>

however, may be useful as a means of highlighting the fragile nature of perfection or of providing the secured party with guidance in future administration of the security interest.

See also *supra* note 28 (discussing the requirement that future advances be referred to in the security agreement).

77. A. Field & R. Ryan, *supra* note 10, at 8-9.

78. *Id.* at 8-10 set forth an exception stating, "In the case of all collateral, Article 9 of the UCC requires the filing of continuation statements within the period of six months prior to the expiration of five years from the date of the original filings, in order to maintain the effectiveness of the filings." Field and Ryan suggest that these and other continuation-of-perfection exceptions "should be understood . . . whether or not expressly stated." *Id.* at 8-10. Another authority sets forth sample language stating:

[C]ontinuation statements complying with the Uniform Commercial Code must be filed with the \_\_\_\_\_ Secretary of State not more than [six months] prior to the expiration of the five-year period dating from the date of filing of the Financing Statement, and not more than six months prior to the expiration of each subsequent five-year period after the original filing, in order to protect the priority of the security interest in any Personal Property.

Schwenke, *Standards of Care in Rendering an Opinion: How Much Investigation is Needed?*, in *Attorney Opinions in Real Estate Financing Transactions* 12, 28 (State Bar of Michigan 1986) (discussing a loan secured on real and personal property). For other sample language, see Weise & Duncan, *supra* note 10, at 426, and *California Real Estate Transactions Report*, *supra* note 10, at 1185.

79. Field and Ryan suggest an exception stating, "In the case of non-identifiable cash proceeds, continuation of perfection of the secured party's security interest therein is limited to the extent set forth in section 9-306 of the UCC." A. Field & R. Ryan, *supra* note 10, at 8-9.

80. See U.C.C. § 9-103(3)(e). Field and Ryan set forth opinion language stating:

We call to your attention that the perfection of the above security interests will be terminated . . . as to any collateral consisting of accounts, general intangibles or mobile goods, four months after the Debtor changes its chief executive office to a new jurisdiction outside the State (or, if earlier, when perfection under the laws of the State would have ceased) unless such security interests are perfected in such new jurisdiction before that termination.

A. Field & R. Ryan, *supra* note 10, at 8-10 to 8-11. When local filing is required, such a qualification should under some circumstances also refer to change of debtor's location to a new county. See U.C.C. § 9-401(3).

81. U.C.C. § 9-402(7). Field and Ryan set forth opinion language stating:

We call to your attention that the perfection of the above security interests will be terminated . . . as to any collateral acquired by the Debtor more than four months after the Debtor so

## *BROAD VERSIONS OF THE PERFECTION OPINION*

Lawyers are sometimes asked to opine broadly (usually subject to a few limitations) that the opinion recipient "has a perfected security interest in all right, title and interest of the debtor in and to all of the collateral described in the security agreement."<sup>82</sup> Unless expressly limited, this opinion confirms the points covered by the narrow form of opinion and, like the narrow opinion, avoids passing on the debtor's rights in the collateral. However, the broad opinion goes beyond the narrow opinion in several important respects. Unless limited, the broad perfection opinion confirms that correct methods have been used in all jurisdictions to perfect the security interest and that the security interest has not ceased to be perfected in any of those jurisdictions.

Broad perfection opinions normally are given when the collateral consists of a single item or type of item located in one or a few places. In such cases, counsel, without too much difficulty, can satisfy himself as to the steps necessary to perfect a security interest in the collateral and then can confirm that those steps have in fact been taken. When many different types of collateral are involved or when the collateral is located in many jurisdictions, the burden on counsel is much greater and a decision must be made as to whether the benefit to the lender of a broad perfection opinion warrants the work (and expense) of preparing it.

The broad form of opinion confirms:

- (i) That the correct method has been employed to perfect the security interest. The requirements for perfecting a security interest under article 9 vary according to the type of collateral. For most types of collateral, perfection is achieved by filing a financing statement with state or local

changes its name, identity or corporate structure as to make the financing statements seriously misleading, unless new appropriate financing statements indicating the new name, identity or corporate structure of the Debtor are properly filed before the expiration of such four months.

...

A. Field & R. Ryan, *supra* note 10, at 8-10. Sample language to similar effect is set forth in Schwenke, *supra* note 78 ("[a]dditional filings with respect to any Personal Property described in the Financing Statement may also be necessary if the Company changes its name or the jurisdiction in which its place of business (or, if it has more than one place of business, its chief executive office) or the Personal Property is located") and in Weise & Duncan, *supra* note 10, at 427.

82. Another, more limited, version states:

The UCC Financing Statements are each in form sufficient for filing with the [filing office] in order to perfect the security interest created by the Mortgage and Security Agreement in the Personal Property and the Fixtures described therein as to which a security interest must be perfected by such filing. . . . No other filing or recording, or refiling or re-recording under the laws of the State of X is necessary or advisable to perfect or maintain the perfection of the mortgage lien on or security interest in the Real Property, the Fixtures or the Personal Property (except the timely filing of continuation statements of UCC-1 Financing Statements).

Dunn, *supra* note 55, § VII B8c2.

officials or both.<sup>83</sup> For some types of collateral, such as negotiable instruments, perfection is achieved by the secured party's taking possession.<sup>84</sup> (Sometimes possession by a bailee or agent satisfies this requirement.)<sup>85</sup> For other types of collateral, such as automobiles and aircraft, perfection is achieved by compliance with a specialized filing system.<sup>86</sup> Specialized filings also may be required for patents, copyrights, and trademarks. On the other hand, for still other types of collateral, such as a purchase money security interest in most consumer goods, perfection takes place automatically without the need for either a filing or possession.<sup>87</sup> Determining the

83. Filings may be made prior to the closing and should be effected as early as possible since priority often depends on the date of filing rather than the date of attachment.

84. U.C.C. § 9-305 provides that "[a] security interest in letters of credit and advices of credit . . . goods, instruments (other than certificated securities), money, negotiable documents, or chattel paper may be perfected by the secured party's taking possession of the collateral." In these instances, the opinion often expressly assumes that the creditor has possession of the collateral.

85. U.C.C. § 9-305 Official Comment 2 ("When Possession by Secured Party Perfects Security Interest Without Filing") states: "Possession may be by the secured party himself or by an agent on his behalf: it is of course clear, however, that the debtor or a person controlled by him cannot qualify as such an agent for the secured party." The California Secured Transactions Report, *supra* note 16, at 21, sets forth the following possible opinion language:

In rendering the opinion set forth below, we have assumed that [name of bailee] which has possession of the collateral has notice of the secured party's security interest, is holding the collateral subject to instructions from secured party in connection with transfer of possession of the collateral, and is not the agent of the debtor.

See A. Field & R. Ryan, *supra* note 10, at 8-11, setting forth the following language:

In rendering the opinion set forth below, we have assumed that [name of bailee] which has possession of the Collateral has notice of the secured party's security interest, is holding the Collateral subject to instructions from the secured party in connection with transfer of possession of the Collateral, and is not the agent of or otherwise controlled by the Debtor.

86. U.C.C. § 9-302 provides:

(3) The filing of a financing statement otherwise required by this article is not necessary or effective to perfect a security interest in property subject to:

- (a) a statute or treaty of the United States which provides for a national or international registration . . . or
- (b) the following statutes of this state; [list any certificate of title statute covering automobiles, trailers, mobile homes, boats, farm tractors or the like . . . ]

....  
 (4) Compliance with a statute or treaty described in subsection (3) is equivalent to the filing of a financing statement. . . .

The Official Comment to U.C.C. § 9-302 states: "Examples of the type of federal statute referred to in paragraph 3(a) are the provisions of 17 U.S.C. §§ 28, 30 (copyright), [and] 49 U.S.C. § 1403 (aircraft)."

87. See U.C.C. § 9-302 (purchase money security interest in consumer goods). Section 9-302 provides a similar exception for security interests "created by an assignment of a beneficial interest in a trust or a decedent's estate," for certain assignments of accounts, for "a security interest of a collecting bank," or for a security interest "arising under the Article on Sales." *Id.* Special problems may also be presented by collateral located outside the United States or in Louisiana.



categories the collateral falls into is not always easy,<sup>88</sup> especially when the collateral includes all of a debtor's personal property. Counsel may rely on the debtor's representations in the loan agreement as to the nature of the collateral or expressly limit his opinion to certain types or items of collateral.

(ii) When filing is the correct method for perfection, that the requirements set forth above for the narrow perfection opinion have been satisfied. A lawyer could not give the broad opinion if, for example, the financing statements were not in proper form or had not been signed by the debtor. Nor could a lawyer give the opinion without confirming that the financing statements have been filed in the correct offices.<sup>89</sup>

(iii) That the steps required to perfect the security interest have been taken in each jurisdiction in which such steps are required. Determining where the collateral is located is not always easy, and the problem is compounded when the borrower does business in many jurisdictions and has granted a security interest in all its personal property. The lawyer often relies on representations by the borrower in the loan agreement as to the location<sup>90</sup> of the collateral and, in addition, arranges for the filing of financing statements in all places where a filing might conceivably be required.

(iv) When filing is not the correct method for perfection, that the security interest has not ceased to be perfected. For example, perfection achieved by possession may end when the creditor loses possession of the collateral.<sup>91</sup>

88. See J. White & R. Summers, *supra* note 21, § 23-13.

89. See *supra* note 68.

90. Ryan, *supra* note 16, at 170:

Counsel should, of course, determine the jurisdiction the law of which governs perfection. . . . Paragraph (b) in the Illustrative Representations and Warranties for the Equipment, Inventory and Receivables provides the basis for determining that jurisdiction for such Collateral. . . . Counsel would seem to be entitled to rely on such representation unless counsel has reason to doubt its accuracy.

The representation referred to by Ryan states:

All of [the Borrower's] Equipment (as defined in this Security Agreement) and Inventory (as defined in this Security Agreement) are located at the places in the State of New York specified in the Schedule hereto. The chief executive office and chief place of business of the Borrower and the office where the Borrower keeps its records concerning its accounts, contract rights, chattel paper, instruments, general intangibles and other obligations arising out of or in connection with the sale or lease of goods or the rendering of services or otherwise ("Receivables"), and all originals of all leases and other chattel paper which evidence Receivables, are located in the State of New York at the address specified for the Borrower in Section \_\_\_\_ of this Security Agreement.

*Id.* at 194-95.

91. U.C.C. § 9-305 provides: "A security interest is perfected by possession from the time possession is taken without relation back and continues only so long as possession is retained unless otherwise specified in this Article."

Because of all of the foregoing difficulties, experienced counsel are very cautious in rendering broad perfection opinions and in many cases refuse to do so. Since Uniform Commercial Code filings usually will cover a substantial portion of the collateral, in many cases the lender will accept the narrower form of filing opinion referred to above (combined with further perfection language relating to stock and debt instruments). If a lender requests a broad perfection opinion relating to specialized collateral such as aircraft or intellectual property, it may be necessary to arrange for a lawyer who specializes in those areas to pass upon them.

## ***OPINIONS ON THE PRIORITY OF THE SECURITY INTEREST***

Lawyers are sometimes asked to opine that the security interest is “prior” to all other security interests or to a specified security interest.<sup>92</sup> An opinion as to “priority” supplements an opinion as to creation and perfection by confirming that, subject to any limitations in the opinion, the security interest would be given preference under the priority rules contained in article 9. Under the Code, the holder of the “prior” security interest in collateral may be able, in the event of default, to cause the collateral to be sold in accordance with the provisions of

92. The California Secured Transactions Report, *supra* note 16, at 28, observes that lawyers are often asked to opine that the security interest in question has “first priority” and goes on to suggest alternative forms, including: “The security interests so created are prior to any other security interest in the collateral granted by the debtor, that is or would be perfected solely by the filing of a financing statement with the Secretary of State of the State of California.” Other commentators have offered the following forms of opinion:

The security interests so perfected are prior to any other security interest in the Collateral given by the Company, which is or would be perfected solely by the filing of a financing statement with the California Secretary of State.

### **Borrower Preferred Alternative to the Prior Sentence:**

There have been no financing statements filed with the California Secretary of State which are prior to the Financing Statements covering any of the collateral and which are still in effect.

### **Lender Preferred Alternative to Second Prior Sentence:**

The security interests so perfected are prior to any other security interest in the collateral given by the Company.

Weise & Duncan, *supra* note 10, at 408–10. An even narrower opinion states that the filing of the financing statement is sufficient “to preserve the priority of [the security interest] as to subsequent liens or security interests.” Dunn, *supra* note 55, § VII B8c2(b).

One authority recommends the following opinion as an alternative to a priority opinion: “Except for ‘Permitted Liens’ (as defined in the Loan Documents), there are no consensual Liens upon any of the Collateral, and there are no nonconsensual Liens upon any of such Collateral that are known to us.” Wander, Goldstein & Rose, *Issues in Legal Opinions*, 18 Law. Brief No. 20, at 2, 9 (1988). This authority observes that such language “assumes that the Loan Documents contain a comprehensive definition of ‘Permitted Liens’ to include such things as the liens created by the Loan Documents, existing liens and encumbrances reflected on the Search Reports and any title policies, liens for taxes, etc., not yet due and other standard permissible liens.” *Id.*

article 9 and to keep the proceeds to the full extent of the unpaid debt. The holders of subordinate security interests may be able to recover only out of any remaining proceeds.

Lawyers frequently resist rendering opinions as to the priority of security interests.<sup>93</sup> Since a security interest's priority normally depends on whether and when it was perfected, such an opinion may involve all the difficulties involved in a broad perfection opinion.<sup>94</sup> Furthermore, unlike an opinion on perfection, which involves only one security interest (the lender's), an opinion on priority potentially involves the security interests and liens of many other claimants without limit as to jurisdiction.

Identifying all other security interests and liens and determining how, where, and when they may have been created or perfected is no easy matter, especially when the collateral is of many types and is located in many places. The lawyer must worry not only about security interests perfected by filing under the Code, but also about security interests perfected without filing under the Code and liens created apart from the Code such as tax and other liens of government agencies, mechanics' liens, liens for unpaid wages, and judgment liens.

Some security interests created under the Code may have priority even though no filing has been made. This is true, for example, of certain purchase money security interests and certain security interests in letters of credit and beneficial interests in trusts and decedents' estates.<sup>95</sup>

93. California Secured Transactions Report, *supra* note 16, at 28:

[S]ome lawyers refuse to provide any form of priority opinion. Although other lawyers may provide some form of priority opinion, the opinion may be significantly qualified as to the types of collateral and competing interests covered by the opinion and, as a result, a well-drafted opinion will often contain qualifications and assumptions regarding so many items that the substantive meaning of the opinion is very slight or is incomprehensible to anyone who is not a specialist in personal property transactions. When an opinion becomes so qualified as not to be understandable to most readers, the motivating purpose of the opinion, (i.e., to provide assurance to the secured party) is often lost. On the other hand, once the lawyer begins to list all the qualifications and assumptions to an opinion, the possibility of missing one or more possible issues is present. Consequently, priority opinions may be, on the one hand, uninformative because they tell the reader nothing or very little or, on the other hand, may be wrong or misleading because they fail to describe all exceptions.

*See Omnibus Opinion*, *supra* note 55, at 203 n.28 ("In general, opinions as to the priority of a security interest . . . should not be given, although in appropriate cases an opinion may be given that a certain security interest is prior to some other specified security interest or lien."); *California Real Estate Transactions Report*, *supra* note 10, at 1171 (setting forth opinion language stating, "we express no opinion with respect to the title [to the Real Property and the Personal Property] or to the priority of any liens thereon or security interests therein.").

94. *See supra* text accompanying notes 82-91.

95. *See* U.C.C. §§ 9-302(1)(d) (purchase money security interests in consumer goods); 9-312(3), (4) (purchase money security interests perfected at the time the debtor takes possession or, in some cases, within 10 days thereafter); 5-116(2), 9-305 (letters of credit); 9-302(1)(c) (beneficial interests in trusts and decedents' estates). *Weise & Duncan*, *supra* note 10, at 427-28, includes an opinion qualification relating to purchase money security interests. The Code also accords "priority" (using that word) to certain purchasers of chattel paper and negotiable documents. U.C.C. §§ 9-308, 9-309. This should not present an opinion problem: a carefully drafted opinion passes only on priority

Similarly, some liens not created under the Code may have priority under the laws of a particular state. Mechanics' liens are often a problem.<sup>96</sup> A North Carolina statute, for example, provides:

Any person who . . . alters, repairs, stores, services, treats or improves personal property other than a motor vehicle in the ordinary course of his business pursuant to an express or implied contract with an owner or legal possessor of the personal property has a lien upon the property. . . . This lien shall have priority over perfected and unperfected security interests.<sup>97</sup>

Other state statutes allow for liens in support of the rights of unpaid hotelkeepers,<sup>98</sup> common carriers,<sup>99</sup> and other providers of goods and services. A California statute imposes a lien on the cow for the services of a bull.<sup>100</sup> Some states impose liens for the benefit of judgment creditors<sup>101</sup> and certain plaintiffs in pending litigation,<sup>102</sup> and to protect claims for unpaid wages.<sup>103</sup>

In some instances, the statute creating the lien establishes the lien's priority, as in the case of the North Carolina statute quoted above. In other instances, priority may be established by judicial decision. And in still other instances, such as in the case of possessory mechanics' liens, the Code itself may provide for priority of the lien over a perfected security interest:

When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for

over other security interests, and does not address the secured party's rights relative to purchasers. But some commentators have suggested qualifying language on this point. *Weise & Duncan, supra* note 10, at 426. *See also id.* at 428 (setting forth an opinion clause stating that "[b]uyers and purchasers of the Collateral may, under certain circumstances, acquire the Collateral free of Lender's security interest."

96. *See California Real Estate Transactions Report, supra* note 10, at 1173:

[M]echanics liens may present a special factual problem in determining when a work of improvement was commenced, what constituted 'commencement,' when the work was completed, or when it was stopped. These factual matters may be very difficult to ascertain, but a subsequent purchaser or encumbrancer may be bound by whatever he or she could discover upon reasonable investigation and inquiry.

An opinion qualification relating to mechanics' liens is suggested in *Weise & Duncan, supra* note 10, at 428: "[P]ersons who provide materials or services with respect to the Collateral may obtain senior liens on the Collateral in certain circumstances."

97. N.C. Gen. Stat. § 44A-2 (1988).

98. *See, e.g.,* Cal. Civ. Code § 1861 (West 1985).

99. *See, e.g., id.* § 2191 (West 1985).

100. *Id.* § 3062 (West 1972).

101. *See, e.g.,* Cal. Civ. Proc. Code § 697.710-750 (West 1987 & Supp. 1989).

102. *See, e.g., id.* § 708.250 (West 1987).

103. *See, e.g.,* Pa. Stat. Ann. tit. 43, § 221 (Purdon 1987).

such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise.<sup>104</sup>

Federal tax liens deserve special mention. "[A]ll property and rights to property, whether real or personal" of someone who fails to pay his federal taxes upon demand are automatically subject to a lien for the unpaid taxes.<sup>106</sup> When supported by a proper filing, such a lien has priority over unperfected and later-perfected article 9 security interests.<sup>106</sup> Unlike article 9 filings, federal

104. U.C.C. § 9-310. *See also id.* § 9-104, which provides: "This Article does not apply . . . to a lien given by statute or other rule of law for services or materials except as provided in section 9-310. . . ." *Cf.* *First Md. Leasecorp. v. M/V Golden Egret*, 764 F.2d 749, 754 (11th Cir. 1985):

One could interpret the negative pregnant of § 7-9-310 as establishing a rule whereby all nonpossessory, statutory liens are subordinate to a perfected security interest. On the other hand, one could conclude that Article 9 simply does not attempt to establish a system of priorities for nonpossessory, statutory liens. We believe that the latter interpretation is the correct one.

105. Section 6321 of the Federal Tax Lien Act provides: "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." I.R.C. § 6321 (1982). ERISA liens are dealt with in 29 U.S.C. § 1368 (1982 & Supp. IV 1986).

106. Until a notice of such a lien is filed it is not valid against the holders of a "security interest." I.R.C. § 6323(a). "Security interest" is defined as follows:

The term "security interest" means any interest in property acquired by contract for the purpose of securing payment or performance of an obligation or indemnifying against loss or liability. A security interest exists at any time (A) if, at such time, the property is in existence and the interest has become protected under local law against a subsequent judgment lien arising out of an unsecured obligation, and (B) to the extent that, at such time, the holder has parted with money or money's worth.

*Id.* § 6323(h). Based on this definition, some courts have held that "[t]o obtain a 'security interest' sufficient to defeat an unfiled federal tax lien, the creditor must perfect its security interest against a hypothetical judgment lien creditor prior to the time the United States files a Notice of a Federal Tax Lien." *Valley Bank v. City of Henderson*, 528 F. Supp. 907, 912 (D. Nev. 1981). Thus, "unperfected security interests are subordinate to a federal tax lien." *United States v. Trigg*, 465 F.2d 1264, 1270 (8th Cir. 1972), *cert. denied*, 410 U.S. 911 (1973). The *Trigg* court also stated: "Under the basic federal priority standard, 'first in time is first in right,' a federal tax lien takes priority over a state-created lien unless the state lien is . . . perfected . . . before the federal tax lien arises." *Id.*, 465 F.2d at 1269.

Complicated questions arise when the property is acquired by the debtor after the federal tax lien filing, after the article 9 filing or after both of those filings. Other difficult questions arise when the creditor extends funds after the article 9 filing or the tax obligation arises or is assessed after the tax lien filing. For a discussion of such sequence-of-events problems, see *Texas Oil & Gas Corp. v. United States*, 466 F.2d 1040 (5th Cir. 1972); *Gold Coast Leasing Co. v. California Carrots, Inc.*, 26 U.C.C. Rep. Serv. (Callaghan) 997 (Cal. Ct. App. 1979) (after-acquired accounts receivable). For discussions of tax lien priority problems generally, see Coogan & Mansfield, *Federal Tax Lien and the Uniform Commercial Code*, in 1B P. Coogan, W. Hogan, D. Vagts & J. McDonnell, *Secured Transactions Under the Uniform Commercial Code 12A* (Bender's U.C.C. Service 1988); Gallo, *Conflict Between the Uniform Commercial Code and the Federal Tax Lien Act*, 7 Whittier L. Rev. 1009 (1985); Overman, *Federal Tax Liens: A Guide to the Priority System of Section 6323 of the Internal Revenue Code*, 16 B.C. Indus. & Comm. L. Rev. 729 (1975).

tax lien filings normally are not required to be made in the state where the property is located. When the taxpayer is a corporation, a federal tax lien filing relating to personal property is required to be made in the state where the corporation has its "principal executive office."<sup>107</sup> The place where a filing must be made in a state depends upon the laws of that state.<sup>108</sup> Many states require that federal tax lien filings be made in the same filing system as that for article 9 security interests.<sup>109</sup> But this is not always the case: Illinois, for example, requires that the filing be made in the office of the "recorder of the county within which the property subject to lien is situated."<sup>110</sup> To compound the problem, a check—even a thorough check—in all the right places under the name of the debtor will not necessarily reveal all prior tax liens. If the debtor has acquired property from someone who has been subjected to a tax lien, the acquired property in many cases will continue to be subject to the tax lien even though the filing is only in the name of the prior owner.<sup>111</sup>

State and local tax liens (and liens of government agencies) may present similar problems.<sup>112</sup> Such liens may be reflected by filings in obscure places, such as county judgment docket.<sup>113</sup>

Identifying prior security interests is not always straightforward even for security interests that can be perfected only by filing under the Code. A filing may not be readily discoverable through a U.C.C. search. This would be true, for example, if the financing statement had been misindexed, lost, or ignored by

107. See I.R.C. § 6323(f) (1982).

108. *Id.*

109. The Uniform Federal Tax Lien Registration Act § 1(b)(i) (1966) and the Uniform Federal Lien Registration Act § 2 (1978) call for filing with the Secretary of State if the "person against whose interest" the lien applies is a corporation. See also *id.* § 4 (makes it clear that the Secretary of State is to process such filings as if they were article 9 filings). Many states have adopted one or both of those acts. For listings showing which states have adopted which acts, see 7A U.L.A. 373, 359 (1985 & Supp. 1988). However, a few states that have adopted uniform acts have modified the place of filing so as to require that filings relating to corporate taxpayers be made in an office other than that of the secretary of state, for example, in Maryland with the "clerk of the circuit court of the county where the principal executive office is located," Md. Real Prop. Code Ann. § 3-401 (1988), and in Virginia in the "office of the clerk of the State Corporation Commission," Va. Code Ann. § 55-142.1 (1986). States that have not adopted either uniform act sometimes require that such filings be made with the secretary of state, see, e.g., N.Y. Lien Law § 240(2)(a) (McKinney Supp. 1988), and sometimes in some other location, see, e.g., Ill. Rev. Stat. ch. 82, para. 66 (1987).

110. See *supra* note 109.

111. See Coogan & Michaels, *The Effect of the Federal Tax Lien Act of 1966 Upon Security Interests Created Under the Uniform Commercial Code*, in 1B P. Coogan, W. Hogan, D. Vagts & J. McDonnell, *Secured Transactions Under the Uniform Commercial Code 12B-8* (Bender's U.C.C. Service 1988).

112. See, e.g., N.Y. Tax Law § 692(c), (d) (McKinney 1987) (imposing a lien "upon the title to and interest in real, personal and other property of the taxpayer"). See also A. Field & R. Ryan, *supra* note 10, at 8-20 n.80 (relating to liens for local taxes):

113. Prior to 1985, New York tax liens on personal property were not required to be filed with the department of state: the researcher had to check the files in county judgment dockets. See Ryan, *supra* note 16, at 137.

the clerk in the filing office,<sup>114</sup> if it had been filed in a jurisdiction where the property or the debtor was formerly located<sup>115</sup> or if it contained errors in the debtor's name.<sup>116</sup> Similarly, the lawyer must be concerned about filings under the name of a prior owner of the collateral. Section 9-402(7) of the Code provides that "[a] filed financing statement remains effective with respect to collateral transferred by the debtor even though the secured party knows of or consents to the transfer."<sup>117</sup> The Official Comment notes that as a result of this provision the searcher "must make inquiry as to the debtor's source of title, and

114. See *In re Skinner*, 22 U.C.C. Rep. Serv. (Callaghan) 1286, 1292 (W.D. Mich. 1977) (holding that a security interest was perfected even though the filing office had placed the financing statement in its files under the debtor's trade name but not its real name; the court stated that "the secured party does not bear the risk of improper indexing by the filing officer"); *In re Flagstaff Foodservice Corp.*, 16 Bankr. 132 (Bankr. S.D.N.Y. 1981) (holding that where there was no evidence that the clerk ever indexed the financing statement, the security interest was nevertheless perfected, as evidenced by documents such as a copy of the letter forwarding the statement to the clerk and a certified mail receipt for the letter).

Many of these concerns may be addressed by an express assumption along the following lines:

In our examination of the UCC search certificate described above, we have assumed that all financing statements, other than the financing statements in favor of the secured party described above, have been properly filed and indexed with the Secretary of State of the State of California; such certificate is accurate and complete; and you do not have knowledge of the contents of any other financing statements covering the collateral or the existence of other security interests (perfected or unperfected) in the collateral.

California Secured Transactions Report, *supra* note 16, at 30. The final clause is prompted by U.C.C. § 9-401(2).

115. See U.C.C. §§ 9-103(1)(d) (change of location of documents, instruments, and "ordinary goods"); 9-103(2)(d) (change of location of goods where new state issues certificate of title); 9-103(3)(e) (change of location of debtor when security interest was perfected under the law of the location of the debtor). Each of these provisions affords continued perfection for only four months after the move—but if the secured party files in the new jurisdiction before the four months expire, it perpetuates its perfected interest.

Similar problems may be created if the borrower has changed its name. See U.C.C. § 9-402(7) ("Where the debtor so changes its name or in the case of an organization its name, identity, or corporate structure that a filed financing statement becomes seriously misleading, the filing is not effective to perfect a security interest in collateral acquired by the debtor more than four months after the change, unless a new appropriate financing statement is filed before the expiration of that time."). As a result of this provision, opinions sometimes contain the following qualification: "Our opinion below as to the priority of security interests does not apply to security interests in the collateral created by the debtor and perfected by the filing of a financing statement under any name other than the present name of the debtor." California Secured Transactions Report, *supra* note 16, at 30. When the debtor is a corporation, another approach is for the lawyer to confirm with the secretary of state that the debtor has not changed its name within the previous four months.

116. Courts are sometimes lenient in holding that a security interest is perfected despite such errors. See, e.g., *In re Maples*, 33 Bankr. 14 (Bankr. W.D. Mo. 1983) (holding that where the debtors' names were Loren Lea Maples and Grace Carolyn Maples, a financing statement which identified the debtor as "Maples Machine Shop and Welding" sufficed to perfect the security interest). See generally sources cited *supra* note 62.

117. See also U.C.C. § 9-306(2) ("Except where this Article otherwise provides a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof unless the disposition was authorized by the secured party in the security agreement or otherwise . . .").

must search in the name of a former owner if circumstances seem to require it."<sup>118</sup>

When lawyers do pass on priority, they should do so in carefully qualified terms. Opinions on priority often are limited to the priority of one security interest over another specified security interest and typically are given only when perfection of those interests requires filing under article 9. One authority suggests the following language: "The security interests so perfected are prior to any other security interest in the collateral granted by the debtor, that is or would be perfected solely by the filing of a financing statement with the Secretary of State of the State of . . ." <sup>119</sup> An even more limited form of opinion states: "At the time of the filing of such financing statements in each of the foregoing filing offices, the Collateral was subject to no liens or security interests properly recorded or filed in such filing office showing the Borrower or any predecessor of the Borrower as debtor."

Opinions along such lines often expressly rely upon the accuracy of U.C.C. search reports and the absence of misfiled forms<sup>120</sup> or forms using other names for the debtor.<sup>121</sup> Opinions that venture further and pass on priority over other security interests in general require exceptions relating to such matters as liens of governmental agencies, purchase money security interests, interests of consignees, security interests perfected at some earlier time when the collateral was located in another jurisdiction, security interests of creditors of previous owners, and rights of purchasers in the ordinary course of business. An opinion as severely qualified as this may be confusing and unhelpful to the recipient.

## **APPLICABILITY OF THE LAWS OF OTHER STATES**

Lawyers opining on security interests must consider the extent to which their opinions involve the laws of other jurisdictions.

The opinion on the creation of the security interest typically presents no special problems in this regard. The law specified in the choice-of-law provision

118. U.C.C. § 9-402 Official Comment 8.

119. California Secured Transactions Report, *supra* note 16, at 28. For similar forms of opinion, see A. Field & R. Ryan, *supra* note 10, at 8-18 to 8-22, and Weise & Duncan, *supra* note 10, at 408-10.

120. Some lawyers believe that it is wiser to rely expressly on (and expressly to assume the accuracy of) a report of the filing office in response to a search request or a report from a filing service company such as C/T Corporations System. The alternative is to check the files himself (or have someone from his firm do a check), and expressly to assume that the filing office had not lost or misfiled any relevant financing statements. This alternative is risky because, should the filing office later correct its error and place a relevant financing statement in the correct location, the lawyer will have no way to demonstrate that the financing statement had been lost or misfiled at the time of his check.

121. Even this limited and carefully qualified opinion may contain traps for the opining lawyer. A purchase money security interest, for example, may have priority even over a prior-perfected security interest under some circumstances.



in the loan agreement normally governs the creation of the security interest,<sup>122</sup> and the law of the state in which the borrower is incorporated governs the corporate power of the borrower to grant the interest and the procedural steps for authorizing and executing the agreement. Thus, a lawyer passing on the creation of a security interest normally will have no difficulty identifying which states' laws apply and in all likelihood will have to deal with the laws of at most two states. He almost always will be able to opine on the law of at least one of those states, and if necessary, he ought to have little trouble obtaining the opinion of local counsel for the other.<sup>123</sup>

The opinion on the perfection of the security interest is more problematic. The general rule under section 9-103 of the Code is that questions of perfection and "the effect of perfection or non-perfection" are governed by the jurisdiction where the collateral is located.<sup>124</sup> However, that general rule is subject to many complex exceptions; for example, when the collateral consists of accounts or general intangibles, the law of the jurisdiction where the debtor is located may

122. U.C.C. § 1-105(1) provides that, with certain exceptions, "when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties." See also U.C.C. § 9-102 Official Comment 3 ("In general, problems of choice of law in this Article as to the validity of security agreements are governed by Section 1-105."); U.C.C. § 9-103 Official Comment 1 ("The general rules on choice of law between the original parties in section 1-105 apply to this Article"). U.C.C. § 1-105 provides that, when the parties have not selected the law of a particular state, "this Act applies to transactions bearing an appropriate relation to this State." Official Comments 2 and 3 leave the definition of "appropriate relation" to the courts, while setting forth a number of relevant considerations. Usually the lawyer will be doing himself and the parties a favor by seeing to it that a choice-of-law provision is included in the agreement.

123. Field and Ryan discuss the situation in which an Illinois lawyer for the borrower is asked to opine on the status of the loan documents, which select the law of New York—the state where the lender and its lawyer are located:

Most lawyers not admitted in New York do not offer opinions on financing documents governed by New York law and lenders are not used to accepting such opinions.

In years past, the solution was to hire special New York financing counsel to provide either the primary opinion letter or a New York law opinion supporting the primary opinion letter. Such an approach is still frequently utilized. However, particularly in simpler agreements (such as unsecured loan agreements) of shorter duration, other solutions are sometimes found acceptable.

... [T]here are limited situations in which the borrower's lawyer will be allowed either (1) to rely on the opinion of the lender's lawyer as to the New York law aspects of the documentation or (2) to omit any opinion on the New York law aspects of the documentation. Another solution that is gaining acceptance is to allow the corporation's Illinois counsel to give an opinion on how the documentation would be dealt with if presented in an Illinois court.

A Field & R. Ryan, *supra* note 10, a 3-4 to 3-5 (footnote omitted).

124. U.C.C. § 9-103(1)(b) provides that, with respect to documents, instruments, and ordinary goods:

Except as otherwise provided in this subsection, perfection and the effect of perfection or non-perfection of a security interest in the collateral are governed by the law of the jurisdiction where the collateral is when the last event occurs on which is based the assertion that the security interest is perfected or unperfected.

govern.<sup>125</sup> Thus, when the collateral is of many types and is located in many jurisdictions, counsel is faced with the formidable task first of identifying which states' laws apply, and second of determining that the technical requirements imposed by each state for perfecting a security interest have been satisfied. Although widespread adoption of the Code has resulted in similar requirements in many states, differences do exist and, therefore, experienced lawyers rarely will render an opinion concerning perfection in many different jurisdictions without obtaining opinions from local counsel.<sup>126</sup> Because the cost and burden of obtaining such opinions can be substantial,<sup>127</sup> the lender and borrower should

125. U.C.C. § 9-103(2)(b).

126. Occasionally a lawyer in one state is asked to render an opinion on the perfection of a security interest when . . . perfection is governed by the laws of another state. . . . If the lawyer is not [admitted to practice in such other state] . . . the lawyer might base the opinion on review of the UCC Article 9 of such state as reported by the official codes for such state, or by any looseleaf service reporting the UCC law of such state. The opinion would then state that it is based solely on Article 9 of the UCC of such other state . . . . Some lawyers state that their perfection opinion is based on a state's UCC 'as reported by' a certain UCC service updated through a specific date. That opinion does not provide the lender with much assurance. The further qualification, sometimes seen, that the opinion is based on the UCC as reported by a specified service 'to the extent correctly updated by the library personnel' of the counsel's law firm actually seems unprofessional. Lawyers should take responsibility for their own internal library administration.

A. Field & R. Ryan, *supra* note 10, at 8-7.

Despite the relative uniformity of the Uniform Commercial Code, lawyers tend not to give secured lending opinions for states in which they are not admitted; moreover, such an opinion would not readily be accepted. Opinions limited to the Uniform Commercial Code of a particular state are not normally acceptable, since case law and other statutes of the state as well as the state constitution may bear on the opinion.

*Id.* at 3-5.

When a definitive opinion on perfection under the laws of the other jurisdiction is crucial to the secured party, such an opinion should be obtained from lawyers practicing in that jurisdiction. If, however, a secured party desires only the limited assurance that can be provided about the laws of the other jurisdiction by a California lawyer, the opinion should be limited to the review of specific provisions of that jurisdiction's law and limited inferences therefrom. Such an opinion could take the following form:

"Based solely upon a review of the provisions of sections \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_ of the Uniform Commercial Code as reported by [name of publisher] to be in effect in the State of [name of state], the financing statements being filed by the secured party in the offices of the [name of appropriate office] appear to be in appropriate form to perfect a secured interest in that state in the collateral described therein."

California Secured Transactions Report, *supra* note 16, at 19 (footnote omitted).

127. In substantial multi-state transactions, local counsel is usual. The expense and delay involved will be significant. While any guideline is arbitrary, where more than two local counsel are involved, the client should be carefully warned about expense and delay. Each local counsel does need to understand all relevant documents even though the opinion may be limited to a security agreement. . . . The tension between the cost of review of multiple drafts and a longer time schedule resulting from miscommunication is clear.

A. Field & R. Ryan, *supra* note 10, at 3-4.

consider early in a transaction whether to limit the perfection opinion to key jurisdictions.

### **THE OPINION THAT DEBT INSTRUMENTS ARE “ENTITLED TO THE BENEFITS AND SECURITY OF THE AGREEMENT”**

Sometimes opinions also state that the notes or other debt instruments are “entitled to the benefits and security of the Agreement.”<sup>128</sup> Lawyers view this phrase simply as a cross-reference necessitated by the fact that the note and the security agreement are separate documents. They intend it to mean that the holders of the notes have rights under the agreement as well as under the notes.

Lawyers do not intend such opinions to pass upon the validity of all rights conferred in the agreement, for example, the acceleration clause<sup>129</sup> or the negative pledge covenant. Rather, they intend to confirm only that those rights, to the extent they are enforceable, may be exercised by the noteholders. The validity and enforceability of the agreement is covered, in carefully qualified terms, in another section of the standard opinion.<sup>130</sup> Similarly, lawyers do not intend such opinions to pass on the language in the agreement purporting to create a “first” or “prior” lien in the collateral; questions of priority are addressed, if at all, in another, carefully qualified, portion of the security interest opinion.

The limits of this opinion are not obvious from its wording, and a better formulation might state that “the security interest secures the Debt Obligations as defined in the Loan Agreement.” However, this formulation is not yet in general use, and in light of current practice lawyers are justified in attributing to the “entitled to the benefits” opinion, the narrow interpretation described in this section.

### **THE EXTENT TO WHICH THE OPINION THAT THE SECURED LOAN AGREEMENT IS “LEGAL, VALID AND BINDING” AND “ENFORCEABLE IN ACCORDANCE WITH ITS TERMS” PASSES UPON THE STATUS OF THE SECURITY INTEREST**

A separate clause of the standard opinion on a commercial loan normally states that the loan agreement is “duly authorized, executed and delivered and constitutes a legal, valid and binding obligation of the Company, enforceable

128. Often this opinion follows the portion of the opinion that confirms that the notes are duly authorized, executed, and delivered.

129. Acceleration clauses can pose problems for the lawyer opining that the loan agreement and notes are “legal, valid and binding” and “enforceable in accordance with their terms.” See FitzGibbon & Glazer, *supra* note 3, at 682–83.

130. See A. Field & R. Ryan, *supra* note 10, ch. 7; FitzGibbon & Glazer, *supra* note 3.

against the Company in accordance with its terms,” subject to qualifications relating to bankruptcy law and equitable doctrines.<sup>131</sup>

A question naturally arises whether, when the loan agreement confers a security interest, the “legal, valid and binding” and “enforceable in accordance with its terms” opinion passes on the creation and perfection of the security interest.<sup>132</sup> There are a number of good reasons for answering this question in the negative. First, a general opinion clause should not be interpreted to cover matters dealt with in a separate clause in specific and carefully qualified terms. Second, the “legal, valid and binding” and “enforceable in accordance with its terms” clause passes on the portions of the agreement in which the company promises to take action after the closing, such as the promise, frequently included in secured loan agreements, to maintain insurance on the collateral. It does not pass on the portions of the agreement relating to steps taken at or prior to the closing. Creation and perfection of the security interest normally are accomplished at (or prior to) the closing and are, therefore, properly the subject of a separate opinion clause.<sup>133</sup> Third, the contracts opinion, properly drafted, refers only to “obligations of the Company” and to enforceability “against the Company.” Perfection, by way of contrast, is intended to give the lender rights against third parties. Fourth, interpreting the contracts opinion to pass on the status of the security interest would necessitate lengthy and duplicative qualifi-

131. An extensive discussion of the meaning of these portions of the opinion is contained in FitzGibbon & Glazer, *supra* note 3.

132. An enforceability opinion with respect to the security agreement does not give assurance to the secured party that attachment of the security interest to particular collateral has occurred, that the security interest has been perfected, or that the secured party has priority over third parties with respect to the collateral. . . . [But it does mean] that the prerequisites for the creation of a security interest are present in the security agreement. Specifically, the enforceability opinion does give assurance that the security agreement contains language sufficient to grant or reserve a security interest to the secured party in the collateral.

California Secured Transactions Report, *supra* note 16, at 8. If the legal, valid, and binding opinion and the enforceability opinion were interpreted to pass on the creation and perfection of the security interest, they also might be interpreted to pass on a priority provision in the loan agreement.

Where the security agreement declares its priority status (as distinguished from a warranty by the debtor that it grants a priority status), it may be appropriate to limit the enforceability opinion, either with an assumption that all steps have been taken to carry out the intention of the parties to obtain such priority as thereby granted, as to which the opining lawyer has made no independent investigation . . . or, to expressly state that no opinion is given as to the priority of the security interest.

Schwenke, *supra* note 78, at 83.

133. An analogous case is presented by opinions on the sale of stock. The opinion that the stock purchase and sale agreement is “legal, valid and binding” and “enforceable in accordance with its terms” does not mean that the stock has been validly issued or that good title or rights in the stock are being conveyed (even if the agreement contains representations to those effects): those points are covered by another clause in the opinion. See FitzGibbon & Glazer, *Legal Opinions on Secondary Sales of Stock*, 1988 Colum. Bus. L. Rev. 149 (1988); FitzGibbon & Glazer, *Legal Opinions in Corporate Transactions: The Opinion that Stock is Duly Authorized, Validly Issued, Fully Paid and Nonassessable*, 43 Wash. & Lee L. Rev. 863 (1986).

ers along the lines employed in the security interest opinion and create uncertainty as to what was intended when those qualifiers were omitted.<sup>134</sup>

Thus, the better view is that an opinion that the agreement is "legal, valid and binding" and "enforceable in accordance with its terms" does not pass on the creation or perfection of the security interest.<sup>135</sup>

## **CONCLUSION**

The practice of passing on a security interest in a separate opinion clause has become well established. A standard form of security interest opinion has not yet developed, however, and, in light of differences in the location, value, and nature of the collateral from transaction to transaction, probably never will. Whenever a lawyer passes on a security interest, he must consider whether, and the extent to which, he should opine on the creation of the security interest, its perfection, and its priority over other security interests. These complex questions require not only a close reading of the Uniform Commercial Code but also a familiarity with the collateral in which the security interest is being created. This article is intended to help counsel draft an appropriate opinion and to identify the work needed to support his conclusions.

134. Sometimes lawyers, in an abundance of caution, introduce such qualifiers even when they are not expressly passing on the security interest; in introducing such qualifiers, they risk making the further error of leaving gaps in the qualifying language.

135. When the opining does not include a separate clause passing on the security interest, some lawyers add an express limitation to the "legal, valid and binding" and "enforceability" opinion stating that those clauses do not pass on the creation, perfection, or priority of the security interest.

## APPENDIX

### SAMPLE OPINION

This appendix sets forth a longer excerpt from the opinion quoted in the text accompanying notes 15 and 55.

In rendering the opinions set forth in paragraphs 4 and 5 below, insofar as such opinions involve conclusions under the laws of the states of [insert states], such opinions are based solely on our review of Article 9 of the Uniform Commercial Code as in effect in such respective states as it appears in the Secured Transactions Guide published by Commerce Clearing House, Inc. as of the date hereof.

. . . .

Based on the foregoing, we are of the opinion that:

. . . .

2. The Loan Agreement has been duly authorized, executed and delivered by the Company, constitutes the legal, valid and binding obligation of the Company and (subject to the qualifications set forth in the penultimate paragraph hereof) is enforceable against the Company in accordance with its terms.

3. Term Notes in the aggregate principal amount of \$\_\_\_\_,000,000 have been duly authorized, executed and delivered by the Company, constitute the legal, valid and binding obligations of the Company entitled to the benefits of the security contemplated by the Loan Agreement and (subject to the qualifications set forth in the penultimate paragraph hereof) are enforceable against the Company in accordance with their terms.

4. The provisions of the Loan Agreement are sufficient to create in your favor a security interest in all right, title and interest of the Company in those items and types of Collateral described in the Loan Agreement in which a security interest may be created under Article 9 of the Uniform Commercial Code as in effect in [refer only to the state the law of which governs the Loan Agreement—not to every state where perfection may be needed]. Financing statements on Form UCC-1 have been duly executed by the Company and have been duly filed in each filing office indicated in Exhibit A hereto under the Uniform Commercial Code in effect in each state in which said filing offices are located. The description of the Collateral set forth in said financing statements is sufficient to perfect a security interest in the items and types of Collateral described therein in which a security interest may be perfected by the filing of a financing statement under the Uniform Commercial Code as in effect in such states. Such filings are sufficient to perfect the security interest created by the Loan Agreement in all right, title and interest of the Company in those items and types of collateral described in the Loan Agreement in which a security interest may be perfected by the filing of a financing statement

under the Uniform Commercial Code in such states, except that we express no opinion as to personal property affixed to real property in such a manner as to become a fixture under the laws of any state in which the Collateral may be located and we call your attention to the fact that your security interest in certain of such Collateral may not be perfected by filing financing statements under the Uniform Commercial Code.

Our opinions that each of the Loan Agreement and the Term Notes is enforceable in accordance with its terms are subject to (i) bankruptcy, insolvency, reorganization, moratorium and similar laws of general application affecting the rights and remedies of creditors and secured parties and (ii) general principles of equity regardless of whether such enforcement is sought in proceedings in equity or at law.

We express no opinion as to the existence of, or as to the title of the Company to, any item of collateral referred to above or as to the priority or (except as set forth in paragraph 4 above) the perfection of any security interest referred to above. We call your attention to the fact that

(i) the effectiveness of each financing statement referred to in paragraph 4 above terminates five years after the date of filing unless a continuation statement is filed prior to such termination in accordance with Section 9-403 of the Code;

(ii) Section 9-402(7) of the Code provides that if the Company so changes its name, identity or corporate structure that a filed financing statement becomes seriously misleading, the filing is not effective to perfect a security interest in collateral acquired by the Company more than four months after the change unless a new appropriate financing statement is filed before the expiration of that period;

(iii) if certain tangible Collateral is moved to a state in which a financing statement has not been filed or if the company's location changes to a state in which a financing statement has not been filed, Section 9-103 requires that a new appropriate financing statement be filed in such new state within four months after such move to continue perfection of the security interest;

(iv) under certain circumstances described in Section 9-306 of the Code, the rights of a secured party to enforce a perfected security interest in proceeds of collateral may be limited; and

(v) under certain circumstances described in Sections 9-307 and 9-308 of the Code, purchasers of collateral may take the same free of a perfected security interest.