

## **Navigating U.C.C. Issues in Real Estate Finance Opinions: The ABA/ACMA/ACREL/ACCFL U.C.C. Opinion Report**

Necessary Background for Rendering and Receiving Opinion Letters for Transactions Beyond Real Property

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# Navigating U.C.C. Issues in Real Estate Finance Opinions: The ABA/ACMA/ACREL/ACCFL U.C.C. Opinion Report

Strafford Webinar

March 24, 2021

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# INTRODUCTION

The Report that is the focus of this presentation was recently published:

*Uniform Commercial Code Opinions in Real Estate Finance Transactions*, 53 REAL PROP. TR. & EST. L.J. 164 (2018/2019)

It is posted at:

[https://www.americanbar.org/content/dam/aba/publications/real\\_property\\_trust\\_and\\_estate\\_law\\_journal/v53/ucc-real-estate-finance-report-v53-02.pdf](https://www.americanbar.org/content/dam/aba/publications/real_property_trust_and_estate_law_journal/v53/ucc-real-estate-finance-report-v53-02.pdf)

# INTRODUCTION (cont'd)

It is a Report of:

- the American Bar Association Section of Real Property, Trust and Estate Law, Committee on Legal Opinions in Real Estate Transactions (**ABA RPTE**),
- the American College of Mortgage Attorneys (**ACMA**), and
- the American College of Real Estate Lawyers, Attorneys' Opinions Committee (**ACREL**)

The Report was reviewed and approved by the American College of Commercial Finance Lawyers (**ACCFL**).

# INTRODUCTION (cont'd)

The U.C.C. Report is the third recent opinion report of ABA RPTE, ACMA, and ACREL.

*See Real Estate Finance Opinion Report of 2012,*  
47 REAL PROP. TR. & EST. L. J. 213 (2012),

*and Local Counsel Opinion Letters in Real Estate Finance Transactions,*  
51 REAL PROP. TR. & EST. L. J. 167 (2016)

# I. U.C.C. CONCEPTS APPLICABLE TO OPINIONS

- a) Creation
- b) Attachment
- c) Collateral Description
- d) Perfection
- e) Priority

All cites are to the UCC

## (a) Creation

A security agreement will “**create**” a security interest if the security agreement:

- (i) is **authenticated** by the debtor,
- (ii) contains a sufficient **description** of the collateral,  
and
- (iii) contains language that a security interest in the collateral is being **granted**.

## (a) Creation (cont'd)

- A U.C.C. security interest may be created -- and a creation opinion given - **whether or not the borrower has rights or powers** with respect to collateral.
- When an **attachment opinion** is given, it **subsumes a creation opinion**, and there would be no need for a separate creation opinion.

## (b) Attachment

Under U.C.C. §9-203(a), a security interest **attaches when it becomes enforceable against the debtor** as to the collateral, which requires that:

- (i) **value** has been given,
- (ii) the **debtor has rights or the power** to transfer rights in the collateral, and
- (iii) either a security agreement has been **authenticated** or special conditions regarding investment property of **deposit accounts** apply.

## (c) Collateral Description

- For a creation or an attachment opinion, description of collateral **must be legally sufficient**. §9-108(b).
- A supergeneric collateral description is insufficient for a **security agreement**. §9-108(c).
- . . . but permitted for a financing statement. §9-504.
- Legal sufficiency does not mean that it is factually accurate. The completeness, adequacy, or factual accuracy of the description [for opinion purposes] may be assumed.
- A description of timber to be cut must include a description of the land. §9-203(b)(3)(A).

## (d) Perfection

Perfecting a security interest is usually **required to establish effectiveness against a lien creditor.**

Filing a financing statement is the most common way to perfect a security interest.

A financing statement must sufficiently:

- (i) provide the **names of the debtor and secured party;**
- (ii) indicate the collateral;
- (iii) fixture filing must include real estate description;
- (iv) check the box for fixture filing:

□



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## (d) Perfection (cont'd)

### **Where to file the financing statement:**

- For real estate collateral, based on the location of collateral (for fixture filing).
- For non-real estate collateral (and for real estate collateral in addition to or in place of a fixture filing), based on the location of the debtor.
- Location of fixture filing may depend on the debtor's business; *e.g.*, a transmitting utility
- Consider trusts and “location” of trustees
- Consider series LLCs or series LPs - *see* coming Permanent Editorial Board for the Uniform Commercial Code Commentary

## (e) Priority

In **real estate finance transactions**, it is accepted that opinions as to the **priority** of a lien or a security interest in real estate collateral **will not be given**.

Giving of a priority opinion as to **personal property** collateral is “**rare.**”

## (f) Alternative to U.C.C. Legal Opinions

Commercially available title insurance will insure attachment, perfection, and priority of a secured party's Article 9 security interest in personal property and fixtures.

## II. OPINIONS AS TO U.C.C. COLLATERAL

U.C.C. Collateral may be divided into:

- ❖ Real Estate Collateral and
- ❖ Personal Property, or Non-Real Estate Collateral

## A. Real Estate Collateral

“**Fixtures**” are goods that have become **so related to particular real property** that an interest in them arises under local real property law. U.C.C. §9-102(a)(41).

Real property law and the U.C.C. apply to fixtures.

The **law of the jurisdiction** where fixtures are physically located **will govern** perfection of a security interest in fixtures by a fixture filing. §9-301(2) and (3).

# (1) Creation

Sample Opinion:

**The [*security instrument*] is in form sufficient to create a security interest in [all right, title, and interest of the Borrower in] that portion of the [Collateral] that is fixtures [or goods that are to become fixtures] under Article 9 of the State Uniform Commercial Code.**

Alternative Opinion:

**The [*security instrument*] creates a security interest in [all right, title, and interest of the Borrower in] that portion of the [Collateral] that is fixtures [or goods that are to become fixtures]...**

## (2) Attachment

Sample Opinion:

The security interest has attached to the [Collateral].

Alternative Opinion:

The [*security instrument*] creates an attached security interest in [all right, title, and interest of the Borrower in] the [Collateral]....

To give either opinion:

Assume value has been given, and

Assume Borrower has rights in the collateral.

### (3) Perfection

Sample Opinion:

The [mortgage] [financing statement] to be filed as a fixture filing is in form sufficient for filing in the Recording Office [*the land records*];

and when recorded in the Recording Office will be sufficient to perfect the security interest of the Lender as Secured Party in the interest of the Borrower as Debtor in that portion of the [Collateral] consisting of goods that are or that become fixtures under the real property law of the State [to the extent a security interest in the fixtures has attached].

### (3) Perfection (cont'd)

Lenders sometimes request an opinion as to the effect of filing the financing statement as a fixture filing (not just that it is in form to create a perfected interest):

**The financing statement to be filed as a fixture filing is in form sufficient for filing in the Recording Office; and when filed in the Recording Office the security interest of the Lender . . . in the interest of the Borrower . . . in . . . the [Collateral] . . . constituting goods that are or are to become fixtures . . . will be perfected [to the extent a security interest in the fixtures has attached].**

### (3) Perfection (cont'd)

To give the perfection opinion:

Opinion giver must assume the real estate description in the fixture filing is correct.

### (3) Perfection (cont'd)

When a record of the security instrument (the mortgage) itself is to serve as a fixture filing, the opinion would be expressed as follows:

**Upon recording of the mortgage in the Recording Office, the security interest created by the mortgage that is fixtures related to the Mortgaged Property will be perfected [to the extent a security interest in the fixtures has attached].**

~ ~ ~

When a mortgage is filed as a fixture filing, it must state that it is filed as a fixture filing.

## (4) Priority

### Priority opinions

- are **never implied**
- **should not** be requested or given as to **real estate** collateral security interests
- should only **rarely** be given as to **personal property** security interests

## (5) Title

Opinions about title to real estate collateral including fixtures **should not be requested and consequently are not given** in a third-party opinion letter. If requested, the opinion giver should strongly resist

Although it is customary practice to assume expressly that the borrower or debtor has requisite title and rights (or, for U.C.C. purposes, the power to transfer rights) in any property involved in the transaction, **the assumption is implicit.**

## (6) Non-Fixture Real Estate Collateral

### (a) *As-Extracted Collateral.*



## (6) Non-Fixture Real Estate Collateral

### (a) *As-Extracted Collateral*.

- A security interest in **minerals in the ground** and the right to extract them is governed by **real property law**, not the U.C.C.
- **When extracted**, minerals become **personal property**.
- A debtor with an interest in minerals before extraction may grant a security interest that will attach to the minerals when extracted.
- Perfection of the security interest in minerals once extracted (and accounts from their sale at the wellhead or minehead) becomes subject to the U.C.C. under rules pertaining to “*as-extracted collateral*.”

## (6) Non-Fixture RE Collateral (cont'd)

### (a) As-Extracted Collateral (cont'd).

- If the debtor does not have an interest in the minerals before they are extracted but only after they are extracted, the extracted minerals are not “as-extracted collateral.”
- Perfect a security interest in the debtor’s interest in them as personal property; e.g., as goods or inventory.

## (6) Non-Fixture RE Collateral (cont'd)

### (a) *As-Extracted Collateral (cont'd)*.

Assumptions:

1. **Debtor has rights** in the collateral prior to extraction
2. **Location** of the wellhead or minehead is in the Opinion Jurisdiction.

## (6) Non-Fixture RE Collateral (cont'd)

(b) **Standing Timber to Be Cut.**



## (6) Non-Fixture RE Collateral (cont'd)

### (b) *Standing Timber to Be Cut.*

- Before being cut, timber to be cut is considered “goods” and is subject to the U.C.C.
- Perfection of a security interest in timber to be cut by **local filing of a financing statement** ceases to be effective once the timber is cut.
- Once cut, the timber becomes ordinary goods.

B. Personal Property  
(Non-Real Estate Collateral)

## (1) Creation, Attachment, Perfection

Sample Opinion:

**The [*security instrument*] is in form sufficient to create a security interest in the U.C.C. Collateral to the extent a security interest may be created in that collateral under Article 9 of the State U.C.C.**

## (1) Creation, Attachment, Perfection (cont'd)

Alternative Opinion:

- A security interest has attached to the [Collateral] pursuant to the [*security instrument*].
- The [*security instrument*] creates an attached security interest in [*all right, title, and interest of the Borrower in*] the U.C.C. Collateral.

## **(1) Creation, Attachment, Perfection** **(cont'd)**

Another Alternative Opinion:

**The Financing Statement is in proper form for filing under the U.C.C. Upon the filing of the Financing Statement at the [office of the Secretary of State], the secured party will have a perfected security interest in the Collateral of a type in which a security interest can be perfected under Article 9 of the U.C.C. and which may be perfected through the filing of a financing statement under Article 9 [*to the extent a security interest in the Collateral has attached*].**

**Review debtor name and collateral indication (including in or attached to financing statement).**

## (2) Priority

Have we said this before?:

“Actual priority opinions should not be requested or given”  
(except in very limited situations).

### (3) Title

**Opinions about title to, rights in, or power to transfer rights in, with respect to U.C.C. collateral should be neither requested nor given.**

**It is customary practice to assume that the debtor has requisite title and rights in any property involved in the transaction**

**The assumption is implicit.**

### III. SPECIFIC U.C.C. PERSONAL PROPERTY COLLATERAL IN REAL ESTATE FINANCE TRANSACTIONS

Certain types of U.C.C. collateral (**deposit accounts and investment property**) require **special attention** when giving opinions.

## A. Deposit Accounts

“**Deposit accounts**” are often involved in real estate financing transactions. These include:

- **lockbox** and other cash management arrangements,
- **operating accounts**,
- accounts containing **proceeds of leases and rents**, and
- accounts containing **reserves**.

## (1) Attachment

An opinion regarding attachment of a security interest in a deposit account requires the **same analysis** as for an opinion regarding any personal property collateral.

## (2) Perfection

A security interest in deposit accounts (as original collateral) can be **perfected only by control**.

1. When the **secured party is the depository bank**, the secured party has **automatic control**.
2. The debtor, the secured party, and the depository bank enter into a “**deposit account control agreement**” (or “**DACA**”). U.C.C. §9-104(a)(2).
3. The secured party may become the depository bank’s customer as to the deposit account.

## (2) Perfection (cont'd)

Sample opinions:

- The security interest in the deposit account described in the [*applicable document*] will be perfected upon the secured party's becoming the bank with which the deposit accounts are maintained.
- The security interest in the deposit accounts described in the DACA will be perfected upon the execution and delivery of the DACA by all parties thereto.
- The security interest in the deposit accounts described in the [*applicable document*] will be perfected upon secured party's becoming the bank's customer with respect to the deposit accounts.

## B. Investment Property

***“Investment property”*** is a security, security entitlement, or securities account under Article 8 of the U.C.C. This includes equity interests in an obligor, which is the collateral for mezzanine (“mezz”) loans.

Lender securing loans with pledged equity interests may require that issuers of LLC or partnership interests intended to serve as collateral for the loan **“opt in”** to Article 8.

## (1) Attachment

An **opinion regarding attachment** of a security interest in investment property requires the **same analysis** as would be made for an opinion regarding a U.C.C. security interest in any other personal property collateral.

## (2) Perfection of a Security Interest in Investment Property

A security interest in investment property may be perfected:

- a) by filing a financing statement,
- b) by “control”, or
- c) by delivery (possession), in the case of certificated securities

## (3) Priority

**The priority of a security interest in investment property depends on how the security interest is perfected.**

A secured party having **control** of investment property has priority over another secured party that perfects only by possession or filing (or both).

A security interest perfected by **delivery** of a certificated security in registered form (even without the necessary indorsements) has priority over a security interest perfected only by filing.

## (4) Law Governing Perfection

The determination of what law controls perfection involves both Articles 8 and 9 of the U.C.C.

- (a) Filing. If perfection is obtained by filing a financing statement, the law of the jurisdiction in which the debtor is located governs perfection.
- (b) Possession or Control. If perfection is obtained by possession or control, the analysis is more complicated.

## (5) Perfection Opinions (by other than by filing)

### (a) For certificated securities

#### 1. Sample perfection by delivery opinion:

**Upon delivery** of the [certificated securities] to the secured party in [State X][the Opinion Jurisdiction], the secured party **will have a perfected security interest** in the [certificated securities]

#### 2. Sample perfection by control opinion:

The secured party will have a perfected security interest in the [certificated securities] when they have been delivered to the secured party in [State X][the Opinion Jurisdiction] **and are either indorsed** to the secured party or in blank, **or registered** in the name of secured party by the issuer.

## (5) Perfection Opinions (by other than by filing) (cont'd)

### (b) For uncertificated securities

#### 1. Perfection by control through registration opinion:

The secured party will have a perfected security interest when such securities are **registered** by the issuer in the name of the secured party.

#### 2. Perfection by control through control agreement opinion:

The security interest in the uncertificated securities described in the [*name of uncertificated securities control agreement or other relevant document*] will be perfected **upon execution and delivery** of the document by the issuer and other parties.

## (5) Perfection Opinions (by other than by filing)(cont'd)

(c) Sample opinions for security entitlements in a securities account, depending upon method of perfection:

- The security interest in the security entitlements described in the [*securities account control agreement*] will be perfected upon the execution and delivery of that agreement by all parties to it.
- The security interest in the security entitlements described in the [*applicable document*] will be perfected upon the secured party becoming the security intermediary's account holder with respect to the securities account.

## (6) Limited priority opinions for certificated securities

A “**protected purchaser**” is a purchaser (including a secured party) of a certificated or uncertificated security, which -

- i. gives value,
- ii. does not have notice of an adverse claim to the security, and
- iii. obtains control of the security.

(The opinion letter always assumes ii, often assumes i, and may assume or cover iii.)

### **Sample opinion:**

The security interest of the secured party in the certificated securities is **prior to** any other security interest created under Article 9 of the U.C.C.

### **Alternative opinion:**

The security interest of the secured party in the certificated securities is **free of any adverse claim.**

## IV. OTHER CONTENT OF THE OPINION LETTER

## A. Summary of Perfection Choice of Law Rules

Be very careful and very clear about determining what law controls and providing advice on this in an opinion letter.

## B. Express or Unstated Assumptions and Limitations

Is it more appropriate to:

A. Set forth in an opinion letter a U.C.C. mini-treatise describing all of the circumstances in which perfection may be affected by **subsequent events**,

or

B. Have the opinion giver rely on **customary practice** to consider that many limitations are included implicitly?

# V. ADDENDUM

## Illustrative Opinion Letter

# Outline of Illustrative Opinion Letter

*[Law firm Letterhead]*

*[Date]*

*[Recipient's name and address]*

Re: *[Describe transaction]*

Ladies and Gentlemen:

We have acted as counsel to \_\_\_\_\_ in connection with \_\_\_\_\_.

- I. **Background** (Role; Transaction Documents; Defined Terms; Authority Documents; Opinion Jurisdiction(s); Definition of Law; Scope of Review; Reliance on Other Sources)
- II. **Assumptions**
- III. **Opinions**
- IV. **Certain Limitations** (includes Qualifications)
- V. **Use of this Opinion Letter** (Use; Effective Date; No Obligation to Update; Governing Law; Disclaimer of Implied Opinions; Expression of Professional Judgment)

Very truly yours,

*Opinion Giver LLC*

## VI. ELECTRONIC SIGNATURES AND OPINION LETTERS

## A. Electronic Signatures may be used in Commercial Transactions

The federal Electronic Signature in Global and National Commerce Act, 15 UCCA § 7001 *et seq.* (“E-SIGN”) permits state law to control, if similar.

Every state has a “similar law” that controls - in most cases it is the Uniform Electronic Transactions Act (“UETA”).

**These statutes provide:**

- (a) if a law requires a record to be in writing, an electronic record satisfies the law, and
- (b) if a law requires a signature, an electronic signature satisfies the law.

## B. Opinions where Electronic Signatures are used

- Electronic signatures may be used if the parties agree to use them.
- Opinion giver must confirm that the agreement does not prohibit electronic signatures.
- The implicit assumption that all signatures are genuine applies to electronic signatures.
- Need to confirm law of formation of entity as to permissibility of electronic signatures.
- The opinion letter itself may be rendered with an electronic signature.

## C. Comment on Electronic Signatures and Opinion Letters

*See* TriBar Opinion Committee,  
“Comment concerning use of Electronic Signature  
and Third-Party Opinion Letters”  
dated March 24, 2020.

# QUESTIONS?



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