

Opinions of Counsel in Commercial Financing Transactions

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I. Introduction

- **Outline assumes corporation as opinion giver's client**
- **Generally required in financing transactions**
- **TriBar Reports**
- **ABA Reports and Guidelines**
- **State Bar Reports**

II. Purposes and Risks of Opinions of Counsel

- **Assurances concerning specific legal issues**
- **Inability to give an opinion alerts recipient of potential issues**
- **Opinion giver as an expert at law**
 - **Not as an insurer**
 - **Risk is departure from professional standards**
- **Assumption of facts**

III. Procedures for Issuing a Legal Opinion

- **Ethical considerations**
- **Client consent**
- **Opinion recipient's form**
 - **“Golden Rule”**
- **Opinion giver's form**
- **Opinion back-up and review**

IV. Formalistic Aspects to an Opinion of Counsel

- Letterhead
- Addressee
- Date
- Status of attorney

“We have acted as [counsel] [special counsel] [local counsel] to the Company.”

- Identification of transaction

“This opinion is provided in connection with that certain [Credit Agreement] (the “Agreement”) dated as of , 20__ , made by and between the Company and , a _____ (the “lender”).”

- Client request

“This opinion is being delivered to the Lender at the request of the Company pursuant to Section ___ of the Agreement.”

IV. Formalistic Aspects to an Opinion of Counsel

- **Description of factual and documentary review.**
 - **Identify documents explicitly**

“In connection with this opinion, we have examined the [documents set forth on Exhibit to this opinion] [the following documents]:”
 - **UCC financing statements**
 - **Certificates, including officers' certificates and organizational documents**
 - **Dragnet clause**

“We have examined such other documents as we have considered necessary and appropriate for the purposes of this opinion.”
- **Assumptions Relating to Documents**

IV. Formalistic Aspects to an Opinion of Counsel

- **“Knowledge.”**

“Our opinions expressed below as to certain factual matters are qualified as being limited “to our actual knowledge,” “known to Us,” or by other words to the same or similar effect. Such words, as used herein, mean that prior to or during the course of this Firm’s representation of the Company in connection with the specific transactions contemplated by the Loan Documents, no contrary information came to the attention of _____ , _____ , or _____ , the attorneys in our firm who have represented the Company in connection with the transactions contemplated by the Loan Documents and the preparation of this opinion. In rendering such opinions, we have not conducted any independent investigation of the Company or consulted with other attorneys in our firm with respect to the matters covered thereby. No inference as to our knowledge with respect to the factual matters upon which we have so qualified our opinions should be drawn from the fact of our representation of the Company.”

IV. Formalistic Aspects to an Opinion of Counsel

- Limitations as to court and public records.

“We have not independently examined the records of any court or public office in any jurisdiction, and our opinion is subject to matters which examination of such records would reveal.”

IV. Formalistic Aspects to an Opinion of Counsel

- **Limitations as to reliance-should reliance be limited to specified named parties on the date of the opinion, or should it include successors and assigns?**
- **Who is entitled to rely on an opinion has been an ongoing discussion that will be covered in more detail.**

IV. Formalistic Aspects to an Opinion of Counsel

- **Limitation as to existing law and circumstances**
“The opinions expressed herein are based on an analysis of existing laws and court decisions and cover certain matters not directly addressed by such authorities. We disclaim any obligation to update this opinion letter for events occurring or coming to our attention, or changes in the law taking effect, after the date hereof.”

V. Customary Opinion Issues

- **Introductory clause.**

“Based on the foregoing, and upon such investigations as we have deemed necessary, and subject to the qualifications set forth below, we are of the opinion that:”

- **Corporate status opinions.**

“The Company is a corporation incorporated, validly existing and, based solely on the [Good Standing Certificate], in good standing under the laws of the State of Minnesota, with corporate power to conduct any lawful business activity.”

V. Customary Opinion Issues cont.

- **Corporate power and authorization related to the transaction.**

“The Company has the corporate power to execute, deliver and perform the Loan Documents executed by it, and the Company has taken all requisite corporate action to authorize the execution, delivery and performance of the Loan Documents executed by the Company.”

V. Customary Opinion Issues cont.

- **Enforceability of agreements.**

“The Loan Documents executed by the Company have been executed and delivered by the Company, and constitute valid and binding obligations of the Company, enforceable against the Company in accordance with their respective terms.”

V. Customary Opinion Issues cont.

- No conflict opinions.

“The execution and delivery of the Loan Documents executed by the Company and the borrowing of and repayment of debt and providing of such security for such borrowing pursuant to the Loan Documents will not (i) violate any statute of the United States or the State of Minnesota, or any rule or regulation of any governmental authority or regulatory body of the United States or the State of Minnesota, or any judgment, order or decree known to us and applicable to the Company, of any court, governmental authority or arbitrator, or (ii) violate any provision of the articles of incorporation or bylaws of the Company.”

V. Customary Opinion Issues cont.

- No consent, approval, etc. required.
- **“No consent, approval, authorization of, or registration or filing with, any Minnesota or federal governmental authority is required to be obtained or made by the Company in connection with the execution, delivery and performance of any Loan Document, except those which have been obtained or made, and except for each filing and recordation required to perfect the Lender’s security interest in collateral and other property of the Company securing the Company’s obligations to the Lender.”**

V. Customary Opinion Issues cont.

- **Perfection of security interests**

“The [Security Agreement] creates a valid security interest in the Collateral, as such term is defined in the [Security Agreement] in favor of the Lender to secure the Obligations, as such term is defined in the [Security Agreement]. [Assuming the Exhibit A attached to the financing statement does not exceed four pages[,] [T]he Financing Statement in the form attached as Exhibit ___ is sufficient in form for filing with the Minnesota Secretary of State and, upon such filing, will perfect the Lender’s security interest in the Collateral to the extent a security interest in the Collateral may be perfected under the Uniform Commercial Code as enacted in the State of Minnesota, Minn. Stat. " 336.9-101 et seq. (1996) (the “UCC”) by filing financing statements in the State of Minnesota.”

V. Customary Opinion Issues cont.

- **Perfection outside of lawyer's jurisdiction**

- • **Operative paragraph**

“The Financing Statement is sufficient in form for filing with the [] Secretary of State and, upon such filing, will perfect the Agent's and the Lenders' security interest in the Collateral to the extent a security interest in the Collateral may be perfected under the Uniform Commercial Code as enacted in the State of [], [citation], et seq. as set forth in 1 Secured Transactions Guide (CCH) (the “CCH Secured Transaction Guide”) at [] ([date]) (the “[] UCC”) by filing financing statements in the State of [].”

V. Customary Opinion Issues cont.

- • Qualification re: Scope of law

“Our opinions are limited to the laws of the state of Minnesota, the Delaware Limited Liability Company Act, and the federal laws of the United States of America. Solely with respect to the opinion set forth in Paragraph 9, our opinion is based on the [] UCC, as compiled in the CCH Secured Transactions Guide as updated in our records through [date] No opinion is given with respect to the constitution or statutes, other than the [] UCC, with respect to cases decided under the [] UCC or other laws of the State of [], or with respect to any provision of the [] UCC that has been amended subsequent to, or differs from, the compilations thereof in the CCH Secured Transactions Guide as updated in our records through [date]. We assume no responsibility as to the applicability to this transaction, or the effect thereon, of the laws of any other jurisdiction.”

VI. Qualifications and Limitations to Opinions

- Purpose
- Introductory clause

“Our opinions set forth above are further subject to the following additional qualifications and exceptions:”

- Jurisdictional limitations

“Our opinions expressed above are limited to the law of the State of Minnesota and the federal laws of the United States of America.”

- Include CCH, statutory or other jurisdictional limitations as necessary

VI. Qualifications and Limitations to Opinions cont.

- **Governing law provisions outside lawyers' jurisdiction – not recommended**

“We call the Lender’s attention to the fact that the Loan Documents state that they are governed by law. We have not examined the question of what law would govern the interpretation or enforcement of the Loan Documents, and our opinion as to enforceability in paragraph _____, above, is based on the assumption, for purposes of this opinion, that the internal laws of the State of Minnesota would govern the provisions of the Loan Documents and the transactions contemplated thereby.”

VI. Qualifications and Limitations to Opinions cont.

- **Enforceability qualification**

“Our opinions are subject to the effect of bankruptcy, insolvency, reorganization, arrangement, moratorium, fraudulent transfer, statutes of limitation, or other similar laws and judicial decisions affecting or relating to the rights of creditors generally, are further subject to the effect of general principles of equity, including, without limitation, concepts of materiality, reasonableness, good faith and fair dealing, estoppel, election of remedies and other similar doctrines affecting the enforcement of agreements generally (regardless of whether enforcement is considered in a proceeding at law or in equity), and the availability of specific performance, injunctive relief, the appointment of a receiver or other equitable remedies is subject to the discretion of the tribunal before which any proceeding therefor may be brought.”

VI. Qualifications and Limitations to Opinions cont.

- **Qualifications as to enforceability of certain provisions.**
- **Qualifications as to perfection of security interest.**
- **Limitation as to title matters and priority**

“Except as set forth in paragraph ___ above, we express no opinion concerning the Company’s rights in or title to, or the priority or perfection of any security interest, pledge, lien, mortgage or other similar interest in, any real or personal property.”