Opinion White Paper

(April 25, 2016)

The purpose of this White Paper is to provide guidance to practitioners in their consideration of the application of recent judicial opinions relating to Section 316(b) of the Trust Indenture Act of 1939, as amended (the "TIA"). It was prepared by the law firms named below, but does not necessarily reflect the view of any law firm regarding the proper interpretation of the TIA or the recent judicial opinions discussed below. The guidance set forth in this White Paper is subject to change in light of future judicial opinions interpreting Section 316(b) of the TIA or applicable legislative action. The contents of this White Paper are for informational purposes only. Neither this publication nor the lawyers who authored it are rendering legal or other professional advice or opinions on specific facts or matters, nor does the distribution of this publication to any person constitute the establishment of an attorney-client relationship.

A. BACKGROUND

The recent decisions of the United States District Court for the Southern District of New York in the Marblegate[1] and Caesars Entertainment[2] cases contain language that suggests a significant departure from the widely understood meaning of TIA Section 316(b) that has prevailed among practitioners for decades. These cases have introduced interpretive issues that have disrupted established opinion practice. These opinion issues arise where the relevant indenture is qualified under the TIA. Similar interpretive issues may exist where the relevant indenture or other agreement is not subject to the TIA but includes wording substantially similar to the text of TIA Section 316(b), although the applicable law and interpretive principles may differ.

This White Paper presents a set of general principles that can guide opinion givers until such time as the interpretive questions raised by these recent cases are resolved through future judicial opinions and/or legislative action.

B. GENERAL PRINCIPLES

1. Under the recent cases, TIA Section 316(b) is implicated if (a) there is an amendment to an indenture that affects "core terms" – that is, payment terms – or (b) there is collective action on the part of the issuer and some or all of its creditors that constitutes a "debt restructuring" (also referred to in the cases as a

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[1] *Marblegate Asset Management v. Education Management Corp.*, 2014 WL 7399041, 75 F.Supp. 3d 592 (S.D.N.Y. 2014); *Marblegate Asset Management v. Education Management Corp.*, 2015 WL 3867643 (S.D.N.Y. 2015).

[2] *Meehancombs Global Credit Opportunity Funds, LP v. Caesars Entertainment Corp.*, 2015 WL 221055, 80 F.Supp. 3d 507 (S.D.N.Y. 2015); *BOKF, N.A. v. Caesars Entertainment Corp.*, 2015 WL 5076785 (S.D.N.Y. 2015) ("*Caesars II*").

"debt readjustment plan" or an "out-of-court debt reorganization") that has the effect of impairing the ability of the issuer to make all future payments of principal and interest to non-consenting noteholders when due.

2. Absent unusual circumstances, a law firm should be able to render an unqualified legal opinion to a trustee in connection with proposed amendments to one or more "non-core" terms of an indenture, including amendments to material covenants, either (a) outside the context of a "debt restructuring," or (b) in the context of a debt restructuring where the opinion givers have received evidence satisfactory to them that the issuer will likely be able to make all future payments of principal and interest to non-consenting noteholders when due after giving effect to the Related Transactions (as defined below). Similarly, as discussed below in Section D, absent unusual circumstances, a law firm should be able to render an unqualified legal opinion to other transaction participants in these same circumstances.

    - For these purposes, "non-core" terms include all terms other than payment terms. This conforms to opinion practice prior to the Marblegate and Caesars Entertainment decisions. Since these cases only addressed the application of TIA Section 316(b) in the context of a debt restructuring, opinion givers should be able to rely on this historically understood meaning of TIA Section 316(b) outside the context of a debt restructuring.

    - Whether a transaction or series of transactions constitutes a "debt restructuring" is a factual matter and may be difficult to discern. The cases provide little in the way of guidance; however, they do suggest that a "debt restructuring" is only implicated if the issuer is experiencing sufficient financial distress that, absent debt modifications, it will likely be unable to pay its debts when due or will be likely to file for protection under the bankruptcy code (or any similar regime). Particular attention should be given to transactions that include releases of material guarantors of the subject notes, releases of all or substantially all of the collateral securing the subject notes or a transfer of all or substantially all of the assets of the issuer and its subsidiaries to entities that will not provide ongoing credit support for the subject notes.

    - The term "*Related Transactions*" means (1) where one or more indenture amendments are involved, the proposed indenture amendments and all related transactions, including the contemplated transactions facilitated by the proposed indenture amendments, and (2) where no indenture amendment is involved, the relevant transaction or series of related transactions.

    - Whether an issuer will likely be able to make all future payments of principal and interest to non-consenting noteholders when due after giving effect to any particular Related Transactions is a factual matter that will

depend on the issuer's particular circumstances. As with other factual matters, opinion givers "may rely on information provided by an appropriate source . . . unless reliance is unreasonable under the circumstances in which the opinion is rendered or the information is known to the opinion preparers to be false (together, "unreliable information"). . . . If the opinion preparers identify information as "unreliable," they must find other information to establish the facts. Alternatively, they may include an express assumption regarding those facts in order to give the opinion."[3] Opinion givers may, in some cases, conclude that reliance on a customary solvency certificate from a responsible officer of the issuer to the effect that the issuer will be solvent after giving effect to the Related Transactions is sufficient to establish that the issuer will likely be able to make all future payments of principal and interest to non-consenting noteholders when due. In other cases, opinion givers may conclude that reliance on a third-party solvency opinion is more appropriate. The opinion givers are not responsible for independently assessing the accuracy of or analysis underlying the conclusions set forth in such a solvency certificate or third-party solvency opinion.

- If the opinion givers both (a) have reason to believe that the Related Transactions, taken together, constitute a debt restructuring, and (b) have not received evidence satisfactory to them that the issuer will likely be able to make all future payments of principal and interest to non-consenting noteholders when due after giving effect to the Related Transactions, the opinion givers may determine that an unqualified opinion to the trustee or other transaction participants in connection with the Related Transactions is inappropriate or that their opinion should include a discussion of, or reference to, the recent cases.

    - However, even in situations where the opinion givers have reason to believe that the Related Transactions, taken together, constitute a debt restructuring and have not received evidence satisfactory to them that the issuer will likely be able to make all future payments of principal and interest to non-consenting noteholders when due after giving effect to the Related Transactions, if the opinion givers have received evidence satisfactory to them that the issuer's ability to make all future payments of principal and interest to non-consenting noteholders when due is not harmed by, or is improved by, the consummation of the Related Transactions, the opinion givers may conclude that there is no impairment within the meaning of TIA Section 316(b) and that they can therefore deliver an unqualified opinion to the

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[3] TriBar Opinion Committee, *Third-Party "Closing" Opinions: A Report of the Tribar Opinion Committee,* 53 Bus. Law. 591, 610 (1998).

trustee or other transaction participants in respect of the proposed Related Transactions (with or without a discussion of, or reference to, the recent cases).

3. As a matter of customary opinion practice, legal opinions speak as of the date on which they are delivered. We do not believe the decision in Caesars II, in which the court stated that compliance with TIA Section 316(b) can only be determined as of the date on which payment is required, will or should alter customary opinion practice. The determination whether a transaction or series of transactions constitutes a debt restructuring that impairs the issuer's ability to make all future payments of principal and interest to non-consenting noteholders when due must, of necessity, be based solely on the facts in existence on the date of the opinion. Accordingly, the opinion in Caesars II should not prevent opinion givers from providing, or opinion recipients from accepting, opinions that, per customary practice, speak only as of their date.

C. LEGAL OPINIONS TO INDENTURE TRUSTEES

Set forth below is a non-exclusive list of situations in which the general principles stated above should permit law firms to render legal opinions to trustees in respect of indenture amendments. All of the following situations assume that either (a) the opinion givers have reason to believe that the Related Transactions, taken together, do not constitute a debt restructuring or (b) if the opinion givers have reason to believe that the Related Transactions, taken together do constitute a debt restructuring, the opinion givers have received evidence satisfactory to them that the issuer will likely be able to make all future payments of principal and interest to non-consenting noteholders when due after giving effect to the Related Transactions.

1. Absent unusual circumstances, a law firm should be able to render an unqualified opinion to a trustee in respect of an amendment to an indenture that releases guarantees or collateral when such amendment is allowed by the terms of the indenture with less than a unanimous vote of noteholders.

2. Absent unusual circumstances, a law firm should be able to render an unqualified opinion to a trustee in respect of a waiver of a change of control offer or an amendment to the definition of "Change of Control" when such waiver or amendment is allowed by the terms of the indenture with less than a unanimous vote of noteholders.

3. Absent unusual circumstances, a law firm should be able to render an unqualified opinion to a trustee in respect of an exit consent for a customary covenant strip or other indenture amendments to non-core terms in connection with a refinancing of outstanding notes implemented by way of a cash tender offer or exchange offer.

- The analysis does not change whether the transaction is financed with cash on hand or the proceeds of, or through the issuance of, new equity or new debt (whether such new debt is *pari passu* with or structurally, contractually or effectively senior to the refinanced debt or matures prior to the stated maturity of the refinanced debt).

4. Absent unusual circumstances, a law firm should be able to render an unqualified opinion to a trustee in respect of one or more amendments to non-core terms of an indenture to facilitate, or in connection with, a leveraged buyout even where that transaction results in an increase in the amount of the issuer's total indebtedness, or in the amount of the issuer's indebtedness that is structurally, contractually or effectively senior to, or that matures prior to the stated maturity of, the notes issued under the indenture.

5. Absent unusual circumstances, a law firm should be able to render an unqualified opinion to a trustee in respect of an indenture amendment to permit an internal reorganization involving asset transfers among the issuer and its subsidiaries.

D. CLOSING OPINIONS

The following additional general principles should be used to determine the appropriateness of customary closing opinions.

1. Absent unusual circumstances, a customary opinion provided to a financing source or underwriter/initial purchaser upon the closing of a new money financing, to a dealer manager in connection with an exchange offer (each, a "*Financial Intermediary*"), or to a trustee under the indenture for newly issued notes, should still be appropriate notwithstanding the recent TIA Section 316(b) cases. For example:

    - Routine opinions with respect to the enforceability of an indenture that is qualified under the TIA (and thus incorporates TIA Section 316(b)) or contains a contractual provision substantially similar to TIA Section 316(b). These opinions only address whether the agreement is enforceable in accordance with its terms, not how it will be enforced.

    - Routine "no conflicts" opinions that a new money financing, debt exchange or other transaction does not violate an existing indenture, or that a new indenture does not violate another financing agreement. These opinions are given on the basis of the facts as they exist on the date of the opinion and should not be impacted by a future contingency such as a hypothetical future amendment or transaction.

2. However, in circumstances where the opinion givers both (a) have reason to believe that the Related Transactions, taken together, constitute a debt restructuring and (b) have not received evidence satisfactory to them that the issuer will likely be able to make all future payments of principal and interest to

non-consenting noteholders when due after giving effect to the Related Transactions, opinion givers delivering “no conflicts” and/or enforceability opinions to Financial Intermediaries may determine that an unqualified opinion is inappropriate or may wish to consider including a discussion of, or reference to, the recent cases.

Baker Botts LLP
Cleary Gottlieb Steen & Hamilton LLP
Chadbourne & Parke LLP
Covington & Burling LLP
Cravath, Swaine & Moore LLP
Davis Polk & Wardwell LLP
Debevoise & Plimpton LLP
Dechert LLP
Fried, Frank, Harris, Shriver & Jacobson LLP
Goodwin Procter LLP
King & Spalding LLP
Kirkland & Ellis LLP
Latham & Watkins LLP
Mayer Brown LLP
Morgan, Lewis & Bockius LLP
Morrison & Foerster LLP
O’Melveny & Myers LLP
Paul Hastings LLP
Pepper Hamilton LLP
Proskauer Rose LLP
Ropes & Gray LLP
Sidley Austin LLP
Simpson Thacher & Bartlett LLP
Shearman & Sterling LLP
Skadden, Arps, Slate, Meagher & Flom LLP
Sullivan & Cromwell LLP
Vinson & Elkins LLP
Weil, Gotshal & Manges LLP