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Article 9 of the UCC: Reconciling Fundamental Property Principles and Plain Language

Thomas E. Plank

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Article 9 of the UCC: Reconciling Fundamental Property Principles and Plain Language

*By Thomas E. Plank**

Article 9 of the Uniform Commercial Code, which governs (i) the grant of a security interest in personal property to secure payment or performance of an obligation—a "true security interest"—and (ii) the sale of receivables, incorporates the primary property law principle of nemo dat quod non habet*—one cannot transfer an interest in property that one does not have—and its corollary—a transferee can receive what the transferor has and no more. For good policy reasons, however, Article 9 also enacts the innovative exception to* nemo dat*, the Filing Priority Principle codified in the "first-to-file-or-perfect rule," that permits a secured party who first files a financing statement to obtain a superior security interest over a secured party who first obtains a security interest and would otherwise prevail under* nemo dat*. For true security interests, the plain language of Article 9 effectuates the policies of* nemo dat *and the Filing Priority Principle. For the sale of receivables under Article 9, however, the plain language of Article 9 precludes application of the Filing Priority Principle to many buyers of receivables, and this result has led some scholars and practitioners to advocate the application of the Filing Priority Principle to these buyers by implication despite the plain language of the statute. This article analyzes the interplay in Article 9 among* nemo dat*, the Filing Priority Principle, and the important policy of respecting the plain language of a statute and argues that when the plain language of the statute protects the interests of buyers of receivables under* nemo dat*, the Filing Priority Principle should not be implied as a matter of policy to defeat those interests, but when the language of the statute is ambiguous, the Filing Priority Principle should be applied to further the policy reasons for this exception to* nemo dat.

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Contents

I. Introduction 440
II. Principles of Statutory Interpretation and Drafting and Article 9 444
III. Property Principles: *Nemo Dat* and the Filing Priority Exception 449
A. *Nemo Dat* in Article 9 450
B. The Filing Priority Exception to *Nemo Dat* 455
IV. Limits to the Filing Priority Principle 462
A. Security Interests Created by Different Debtors 462
B. Pre-Filing Does Not Create a Property Interest 465
V. The Coherence Principle and the Filing Requirement for Receivables 469
VI. Sale of Receivables: Incoherence and Conflict in Principles and Language 474
VII. No Filing Priority Against Perfected Buyers of Intangible Receivables 479
A. A Perfected Buyer v. A Pre-filing but Subsequent Intended Secured Party 481
B. Implying Rights from the Filing Priority Principle 485
C. Competing Perfected Buyers of Receivables 489
D. The Strength of the Policy Arguments 491
E. The Fog of Security Interest Language for Sales of Receivables 495
VIII. Filing Priority and Subsequent Buyers of Tangible Receivables 497
IX. Filing Priority Principle: Buyers of Payment Intangibles v. True Secured Parties 499
X. Conclusion 505

I. Introduction

Article 9 of the Uniform Commercial Code (the "UCC") governs both (a) security interests in personal property to secure payment or performance of obligations—a "true security interest"[1]—and (b) the sale of receivables.[2] Overall, Article 9 is a well-crafted statute that has served its purposes well since the 1960s. Although the last major revision of Article 9, which became effective in all of the states between July 1, 2001 and January 1, 2002 (with selected revi-

1. *See* U.C.C. § 1-201(b)(35) (2008) (providing that "'security interest' means an interest in personal property or fixtures which secures payment or performance of an obligation").
2. *See* U.C.C. § 9-109(a) (2010). The section states:

> Except as otherwise provided in subsections (c) and (d), this article applies to:
>
> (1) a transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract; . . .
>
> (3) a sale of accounts, chattel paper, payment intangibles, or promissory notes.

Id.

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sions adopted in 2010 and expected to become effective in 2013),[3] is more complicated than its predecessor versions, the plain language of the statute provides clear guidance for most situations. Accordingly, Article 9 permits and requires the application of an important principle of statutory interpretation, the "Plain Language Principle": the principle that, when the language of a statute is not ambiguous, courts should with rare exception apply the plain meaning of the statute to interpret it and thereby enable readers of the statute to rely on that plain meaning in ordering their affairs.[4]

In addition, Article 9's regulation of true security interests—but not its regulation of the sale of receivables—generally complies with an important principle of statutory drafting that I call the "Coherence Principle." Under the Coherence Principle, both the language and the substance of the particular rules for any regulatory regime for property must adequately recognize and take into account—must "reflect"—both the nature of the specific types of property items and the nature of the specific transactions that the regulatory regime governs.[5] Because legislation attempts to constrain human behavior through words, the better a statute acknowledges and takes into account the particular aspects of that human behavior—in this case, transactions involving personal property—the more successful the statute will be.

As a statute regulating interests in property, Article 9 necessarily is built upon and also codifies several important principles of property law. The base principle is *nemo dat*, which is shorthand for *nemo dat quod non habet*: the principle that

3. *See id*. § 9-701. Revised Article 9 took effect in Connecticut on October 1, 2001, and in Florida, Mississippi, and Alabama on January 1, 2002. *See* Unif. Commercial Code, 3 U.L.A. 1–3 (2010). In 2010, the Uniform Law Commission, formerly known as the National Conference of Commissioners on Uniform State Laws ("NCCUSL"), adopted revisions to specific sections, with the expectation that they will become effective throughout the United States on July 1, 2013. *See* U.C.C. § 9-801 (2010).

4. *See* United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989) ("The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982))). In such cases, the intention of the drafters, rather than the strict language, controls."); *see also* Radlax Gateway Hotel, LLC v. Amalgamated Bank, 132 S. Ct. 2065, 2073 (2012) ("The Bankruptcy Code standardizes an expansive (and sometimes unruly) area of law, and it is our obligation to interpret the Code clearly and predictably using well established principles of statutory construction.").

5. I use the word "reflect" as a metaphor for this process. A mirror that has a smooth and flat surface will produce an image that reflects an object well. A mirror that has a surface that is not smooth or flat will not reflect the object well but will produce a fuzzy or distorted image or no image at all. A good example of a property regime that failed to "reflect" the predominant type of property items and transactions in such property items was the 1978 revision of Article 8, which provided a regime for book entry securities issued directly by an issuer but did not provide for the developing predominant indirect holding system of book entry securities held through securities intermediaries. If one looked into the 1978 revision of Article 8, one could not even see the indirect holding system for securities. The 1994 revision of Article 8 fixed this problem with a comprehensive regime for regulating security entitlements in securities and other financial assets. *See* U.C.C. art. 8, prefatory note, pt. B (1994), Unif. Commercial Code, 2C U.L.A. 431–32 (2005); *see also* Jeanne L. Schroeder, *Is Article 8 Finally Ready This Time? The Radical Reform of Secured Lending on Wall Street*, 3 Colum. Bus. L. Rev. 291, 295–96, 303 (1994) (although expressing reservations on the 1994 revision of Article 8, stating that the 1977 revision was not "ready" and was a "disaster").

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one cannot transfer an interest in property that the transferor does not have, and its corollary, also known as the Shelter Principle, that a transferee receives what the transferor has.[6] This principle promotes the security of property. This important principle allows persons that have an interest in a property item to keep that interest.[7]

The other property principles are appropriate exceptions to *nemo dat*.[8] These exceptions, which apply in a variety of real and personal property regulatory regimes, enable a subsequent transferee to obtain an interest in property that the transferor no longer has because the transferor previously transferred that interest to a prior transferee, with the result that the original owner or a prior transferee may lose some or all of the same property interest.[9] Perhaps the oldest of

6. *See, e.g.*, U.C.C. § 2-403(1) (1962) (providing that a "purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased"); Mitchell v. Hawley, 83 U.S. 544, 550 (1873) (in upholding a limited grant under a patent and affirming an injunction against using a patent after the time stipulated in the assignment, the Court stated: "No one in general can sell personal property and convey a valid title to it unless he is the owner or lawfully represents the owner. *Nemo dat quod non habet*."); BLACK'S LAW DICTIONARY 1066 (6th ed. 2004); GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 229 n.1 (1965) (vol. I) [hereinafter GILMORE, SECURITY INTERESTS]; Carl S. Bjerre, *Secured Transactions Inside Out: Negative Pledge Covenants, Property and Perfection*, 84 CORNELL L. REV. 305, 333 (1999); Steven L. Harris, *Using Fundamental Principles of Commercial Law to Decide UCC Cases*, 26 LOYOLA L.A. L. REV. 637, 638–39 (1993) [hereinafter, Harris, *Fundamental Principles*] (describing as the "shelter principle" the principle that a "transferee of property ordinarily acquires whatever rights the transferor had" and that under *nemo dat* the "transferee acquires whatever rights the transferor had *and no more*" and applying *nemo dat* to criticize two court decisions that failed to take into account *nemo dat*); Charles W. Mooney, Jr., *The Mystery and Myth of "Ostensible Ownership" and Article 9 Filing: A Critique of Proposals to Extend Filing Requirements to Leases*, 39 ALA. L. REV. 683, 736–37 (1988) (noting the importance of *nemo dat* in the treatment of leases and other bailments); Steven L. Schwarcz, *Intermediary Risk in a Global Economy*, 50 DUKE L.J. 1541, 1573 & n.135 (2001) [hereinafter Schwarcz, *Intermediary Risk in a Global Economy*] (noting the long history of the principle dating back to the Justinian Code and the longer Latin formulation of "'*nemo plus iuris ad alium transferre potest quam ipse habet*' [no one can transfer more legal rights than he himself has]").

7. *See* John F. Dolan, *The U.C.C. Framework: Conveyancing Principles and Property Interests*, 59 B.U. L. REV. 811, 812–20 (1979) (arguing that the shelter principle, or *nemo dat*, ensures the security of property and is the primary property principle, and that if the exceptions to *nemo dat*, identified as the good faith purchase principle and the "Twyne Rule" or "ostensible ownership" principle, do not apply, then the security of property should prevail).

8. *See, e.g.*, Grant Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 YALE L.J. 1057 (1954) [hereinafter Gilmore, *Good Faith Purchase*] (discussing development of the good faith purchaser doctrine as it relates to assignment of rights to payments, including negotiable instruments, corporate securities, documents of title, rights to payment secured by security interests, bonds, trust receipts, and consumer paper, but using the concept of good faith purchaser to refer not only to the extent to which a subsequent assignee would take priority over a prior assignee but also the extent to which an assignee would take free of the obligor's defenses against the assignor); Steven L. Harris, *The Interaction of Articles 6 and 9 of the Uniform Commercial Code: A Study in Conveyancing, Priorities, and Code Interpretation*, 39 VAND. L. REV. 179, 183–94 (1986) (analyzing the different policy reasons underlying the requirements for providing notice to enable a purchaser in a bulk sale or a secured party to maintain its property interests against subsequent creditors or purchasers); Steven L. Schwarcz, *Distorting Legal Principles*, 35 J. CORP. L. 697, 698 (2010) (describing the ability of financial institutions to rehypothecate securities as a "distortion" of the legal principle of *nemo dat*).

9. Another exception is the Purchase Money Principle, which favors a subsequent secured creditor that enables the borrower to acquire assets over an earlier or concurrent holder of claims against the assets. *See, e.g.*, GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW § 9.1, at 851–59 (5th ed. 2007) (discussing the priority of purchase-money mortgages); U.C.C. § 9-324 (2010) (providing

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these exceptions is the Good Faith Purchaser Principle, which favors certain subsequent transferees of a property item over the current owner or a prior transferee if the subsequent transferee acquires possession of or control over a property item in good faith, without notice of the earlier interest, and for value,[10] codified in several provisions of the UCC.[11] Another important exception is the Perfection Principle, which favors the subsequent transferee that takes the necessary steps to "perfect" its interest, generally by providing notice of some form to potential purchasers or creditors through a filing of a notice, recordation of documents, or possession of tangible property, over an earlier unperfected transferee.[12]

This article focuses on another important exception, the Filing Priority Principle. The Filing Priority Principle favors a subsequent transferee that provides notice of a potential interest in a property item by filing such notice pursuant to an established filing or recordation regime over an earlier transferee that acquired its interest after the filing but before the subsequent transferee completes the steps necessary to acquire its interest. Although this principle has existed for some time in the form of the lis pendens doctrine,[13] the most prominent and innovative application of the Filing Priority Principle is the relatively new (in the history of personal property security law)[14] "first-to-file-or-perfect rule" for competing perfected security interests of UCC section 9-322(a)(1) discussed below.[15] In 2001, this principle was also applied by Article 9 to a secured party that files a financing statement before another person becomes a lien creditor but that acquires its security interest after the lien creditor obtains its interest.[16]

priority for purchase-money security interests in goods over other security interests); *id.* § 9-317(e) (providing priority for purchase-money security interests in goods over persons that become lien creditors before the purchase-money security interest is perfected).

10. *See, e.g.*, Gilmore, *Good Faith Purchase*, *supra* note 8; *see infra* note 48 (discussing the notice real estate recording acts).

11. *See, e.g.*, U.C.C. § 2-403(2) (1962) (providing that any "entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business); *id.* § 2-403(3) (defining "entrusting" to include "any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence"); U.C.C. § 9-320(a) (2010) (providing that, with certain exceptions, "a buyer in ordinary course of business . . . takes free of a security interest created by the buyer's seller, even if the security interest is perfected and the buyer knows of its existence").

12. *See infra* note 48 (discussing the race-notice real estate recording acts); U.C.C. § 9-322(a)(2) (2010) (providing that, with certain exceptions, "priority among conflicting security interests and agricultural liens in the same collateral is determined according to the following rules: . . . (2) A perfected security interest or agricultural lien has priority over a conflicting unperfected security interest or agricultural lien").

13. *See, e.g.*, Nelson & Whitman, *supra* note 9, § 7.13, at 609–11 ("[The lis pendens] doctrine concerns persons who acquire an interest in real estate which is subject to litigation. If the property is specifically described and within the court's jurisdiction, it is taken subject to the final determination in the action.").

14. The "first-to-file-or-perfect rule" in a more limited form was introduced into Article 9 in the 1950s and enacted throughout the United States beginning in 1962 and revised to its current form in 1972. *See infra* notes 84 & 89.

15. *See infra* notes 70–88 and accompanying text.

16. *See infra* note 99 and accompanying text.

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To facilitate the operation of the notice filing system adopted by Article 9, the first-to-file-or-perfect rule permits a person that has not yet obtained an interest in a property item to create a conditional superior interest in that property item by filing a financing statement that provides relatively accessible notice to subsequent persons of that person's potential property interest. Just as the Good Faith Purchaser Principle does not override the *nemo dat* rights of persons with an interest in property in favor of all good faith purchasers,[17] however, Article 9 does not extend this Filing Priority Principle to all competing interests in personal property. Inevitably, the question will arise whether the Filing Priority Principle should override *nemo dat* when the language of the statute is ambiguous or when the plain language of the statute produces a result that appears contrary to the policies underlying either *nemo dat* or the Filing Priority Principle.

Where Article 9 has followed the Coherence Principle of legislative drafting, there have been few unintended conflicts among these fundamental property principles and the language of the statute. As described in Part IV.A below, one unintended conflict among these principles and the language of former Article 9 was resolved by a new statutory rule under current Article 9.

The failure of Article 9 to follow the Coherence Principle for the sale of receivables, however, has led to significantly more unintended conflicts among the plain language of the statute and these fundamental property law principles.[18] The purpose of this article is to analyze the interplay of these fundamental principles and in Parts VII through IX below to suggest solutions to several issues that Article 9 scholars and practitioner currently face. In particular, this article responds to the argument of Professors Steven Harris and Charles Mooney that an implied Filing Priority Principle should trump the rights of a buyer of receivables under the plain language of Article 9 and *nemo dat*.[19]

II. Principles of Statutory Interpretation and Drafting and Article 9

As a statute regulating true security interests, Article 9 of the UCC is one of the great legal achievements of the twentieth century. The first official text approved in 1952 and its subsequent revisions ended a more than a 150-year struggle to establish an efficient legal regime governing true security interests in personal property and particularly in goods consisting of equipment and inventory.[20]

17. For example, a good faith purchaser from a thief generally does not acquire title to property. *See, e.g.*, Gilmore, *Good Faith Purchase*, *supra* note 8, at 1060.

18. *See infra* Parts V–IX.

19. Steven L. Harris & Charles W. Mooney, Jr., *Using First Principles of UCC Article 9 to Solve Statutory Puzzles in Receivables Financing*, 46 Gonz. L. Rev. 297 (2011), *discussed infra* Part VII.B.

20. *See* Gilmore, Security Interests, *supra* note 6, chs. 2–8 (describing the history of chattel mortgages, conditional sale contracts, trust receipts, factor's liens, field warehousing, and accounts receivables financing). In 1918, NCCUSL proposed a Uniform Conditional Sales Act, but the Act was only adopted in eleven states, and in 1926, NCCUSL proposed a Uniform Chattel Mortgage Act, but that Act was adopted in only one state. *See* 53 Nat'l Conference of Comm'rs on Unif. State Laws, Handbook and Proceedings of the Fifty-Third Annual Conference 67–68, 305, 307 (1943).

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Like any human endeavor, Article 9 is not perfect. Nevertheless, it is one of the best examples of legislative success.

The provisions of Article 9 governing a true security interest in personal property succeed for two reasons. First, they follow the Coherence Principle because the structure, language, and rules reflect both the nature of the specific types of property items regulated by Article 9 and the nature of the specific transactions that Article 9 governs. Second, Article 9 actuates the Plain Language Principle of statutory interpretation because readers of the statute, be they courts or persons structuring secured transactions, can understand and rely on the language of the statute.

Article 9 follows the Coherence Principle and permits the application of the Plain Language Principle in a variety of ways. Through simple rules for creating and perfecting security interests that are relatively easy to comprehend and apply, Article 9 allows borrowers and secured lenders flexibility in structuring a multitude of different transactions using a large variety of different types of personal property items to meet their particular needs. Under section 9-203, an owner of personal property items—misleadingly called a "debtor"[21]—may through a simple security agreement[22] create or provide for a security interest in favor of a secured lender—appropriately called a "secured party"[23]—in some or almost all the debtor's personal property items—appropriately called "collateral"[24]—to secure an extension of credit by the secured party.[25] Section 9-203 merely requires that a secured party give value, that the debtor have rights in the collateral or the power to transfer rights in the collateral, and that the debtor authenticate a security agreement describing the collateral.[26]

21. *See* U.C.C. § 9-102(a)(28)(A) (2010) (providing that "'[d]ebtor' means . . . a person having an interest, other than a security interest or other lien, in the collateral"). Because the word "debtor" connotes a person that owes a debt and not an owner of a property interest or a grantor of a security interest, this definition does violate the Coherence Principle.

22. *See id.* § 9-102(a)(74) (providing that "'[s]ecurity agreement' means an agreement that creates or provides for a security interest").

23. *See id.* § 9-102(a)(73)(A) (providing that "'[s]ecured party' means a person in whose favor a security interest is created or provided for under a security agreement, whether or not any obligation to be secured is outstanding").

24. *See id.* § 9-102(a)(12) (providing that "'[c]ollateral' means the property subject to a security interest").

25. Article 9 does exclude certain transactions, *see id.* § 9-109(d), the most significant of which is the exclusion of transfers of interests in or claims under most insurance policies, *see id.* § 9-109(d)(8).

26. *See id.* § 9-203(b). The section states:

> [With exceptions not relevant], a security interest is enforceable against the debtor and third parties with respect to the collateral only if:
>
> (1) value has been given [by or on behalf of the secured party];
>
> (2) the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and
>
> (3) one of the following conditions is met: (A) the debtor has authenticated a security agreement that provides a description of the collateral . . . [or as provided in subparagraphs (B) through (C) the secured party has possession or "control" of the collateral].

Id.

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When these conditions are met, the security interest "attaches" to the collateral, and an enforceable security interest is created.[27] Section 9-108 provides almost complete flexibility in identifying collateral in the security agreement, including by reference to the "type" of collateral defined in Article 9,[28] save for certain minor exceptions[29] and the questionable prohibition against an "all assets" description.[30] Section 9-204 allows a debtor, in a single transaction, to create a security interest in the debtor's after-acquired property and to provide that the collateral will secure future advances without the necessity for executing and delivering additional documents.[31]

Article 9 adopts a "notice filing" procedure for "perfecting" an enforceable security interest against the claims of future creditors or buyers that is relatively simple in comparison to other recording regimes. "Perfection" occurs when the security interest attaches and the additional requirements of Article 9 are

---

27. *See id.* § 9-203(a) (providing that a security interest "attaches" to collateral when it becomes enforceable against the debtor).

28. *See id.* § 9-108. The section states:

> (a) Except as otherwise provided in subsections (c), (d), and (e), a description of personal or real property is sufficient, whether or not it is specific, if it reasonably identifies what is described.
>
> (b) Except as otherwise provided in subsection (d), a description of collateral reasonably identifies the collateral if it identifies the collateral by:
>
> (1) specific listing;
>
> (2) category;
>
> (3) except as otherwise provided in subsection (e), a type of collateral defined in [the Uniform Commercial Code];
>
> (4) quantity;
>
> (5) computational or allocational formula or procedure; or
>
> (6) except as otherwise provided in subsection (c), any other method, if the identity of the collateral is objectively determinable.

Id. The defined "types" of collateral are set forth in the definition of "general intangibles," *id.* § 9-102(a)(42) (*quoted infra* note 30).

29. *See id.* § 9-108(e) ("A description only by type of collateral defined in [the Uniform Commercial Code] is an insufficient description of: (1) a commercial tort claim; or (2) in a consumer transaction, consumer goods, a security entitlement, a securities account, or a commodity account."). For commercial transactions, the limitation of subsection (e)(1) makes it difficult for a secured party to acquire a security interest in commercial tort claims that arise after the execution of the security agreement.

30. *See id.* § 9-108(c) ("A description of collateral as 'all the debtor's assets' or 'all the debtor's personal property' or using words of similar import does not reasonably identify the collateral."). Of course, secured creditors often take a security interest in all of the assets of the debtor, and it does so by including all of the types of collateral described in Article 9. These types of collateral are set forth in the definition of "general intangibles," *id.* § 9-102(a)(42) (providing that general intangible means "any personal property, including things in action, *other than* accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, money, and oil, gas, or other minerals before extraction" (emphasis added)). To create an all assets description, a secured party need only copy this definition without the words "other than" into the granting clause.

31. *See id.* § 9-204(a) (providing that, with minor exceptions, a security agreement may create or provide for a security interest in after-acquired collateral); *id.* § 9-204(c) (providing that a security agreement may provide that collateral secures future advances or other value).

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satisfied.[32] For most types of collateral, Article 9 requires[33] or allows[34] perfection by the filing of a simple financing statement[35] naming the debtor and the secured party and indicating the collateral[36] in some reasonable way that serves to put subsequent purchasers and creditors on notice of the potential existence of the security interest without requiring the recordation of detailed information about the collateral or the secured loan.[37] Yet, it also crafts sensible rules to account for different types of property items, such as a prohibition on perfecting a security interest in money by the filing of a financing statement,[38] and appropriate rules on perfecting security interests in collateral subject to certificate of title statutes[39] and in different types of investment property.[40]

Furthering the Plain Language Principle, or perhaps a corollary that could be described as the "Certainty Principle," Article 9 in most cases eschews indeterminate elements that increase uncertainty and costs. For example, Article 9 creates

32. *See id.* § 9-308(a) (providing that "a security interest is perfected if it has attached and all of the applicable requirements for perfection in Sections 9-310 through 9-316 have been satisfied").

33. *See id.* § 9-310(a) (providing that, with exceptions set forth in subsection (b), a financing statement must be filed to perfect all security interests).

34. *See id.* § 9-312(a) (providing that a "security interest in chattel paper, negotiable documents, instruments, or investment property may be perfected by filing"). This is permissive because security interests in these types of collateral may also be perfected by possession under U.C.C. section 9-313(a), *quoted infra* note 63, or by control under U.C.C. sections 9-314 and 9-104 through 9-106.

35. *See id.* § 9-501 (setting forth the proper filing office for the filing of financing statements).

36. *See id.* § 9-502 (providing that a non-real-property-related financing statement is "sufficient only if it: (1) provides the name of the debtor; (2) provides the name of the secured party or a representative of the secured party; and (3) indicates the collateral covered by the financing statement"); *id.* § 9-503 (providing specific rules for the names of the debtor and the secured party).

37. *See id.* § 9-504 (providing that a "financing statement sufficiently indicates the collateral that it covers if the financing statement provides: (1) a description of the collateral pursuant to Section 9-108; or (2) an indication that the financing statement covers all assets or all personal property"); *id.* § 9-108, *quoted supra* note 28 (providing flexible guidelines for indicating collateral in a financing statement). This notice filing procedure is different from the common recording procedures for real estate transactions in which the documents creating the interest are recorded, *see* WILLIAM B. STOEBUCK & DALE A. WHITMAN, LAW OF PROPERTY § 11.9, at 871–74 (3d ed. 2000) (describing the different types of recording systems and their operation), and also from earlier personal property security interest regimes, *see* GILMORE, SECURITY INTERESTS, *supra* note 6, § 2.72, at 54. This notice filing procedure originated in New York in 1911. *See* 1911 N.Y. LAWS 762. This notice filing procedure was first adopted on a national basis in the Uniform Trust Receipts Act, promulgated in 1933 and widely adopted in the United States. *See* GILMORE, SECURITY INTERESTS, *supra* note 6, § 15.2, at 468 (noting that the Uniform Trust Receipts Act was the first widely enacted notice filing statute, although acknowledging the New York Factor's Lien Act as a predecessor).

38. *See* U.C.C. § 9-312(b)(3) (2010) (providing that "a security interest in money may be perfected only by the secured party's taking possession under Section 9-313"). This rule makes sense because money is a medium of exchange, and any person taking money should not be required to check public records to determine the existence of a security interest. *See also id.* § 9-332 (providing that transferees of money or funds from a deposit account take free of any security interest unless the transferee colludes with the debtor in violating the rights of a secured party).

39. *See id.* § 9-311(a).

40. *See id.* §§ 9-314(a) & 9-106(a) (providing for perfection of a security interest in investment property by "control"); U.C.C. § 8-106 (2001) (providing different methods of control for different types of investment property); *see also* U.C.C. § 9-328(a) (2010) (providing that a security interest held by a secured party having control has priority over a security interest held by a secured party that does not have control, that is, a security interest perfected by filing under U.C.C. section 9-312(a)).

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priority rules based primarily on easily determinable facts and records and not based on the knowledge or lack of knowledge of some of the parties. In particular, as discussed below,[41] the primary priority rules of section 9-322(a) among competing security interests depend on elements clearly stated in the statute that are objectively verifiable: the timing of filing, perfection, or attachment of the conflicting security interests.[42] Because these priority rules do not depend on lack of knowledge of or notice to a secured party or other purchaser,[43] they avoid the difficulties that still curse the priority rules for competing interests in real estate.[44]

Because these rules are for the most part clear and precise and because Article 9 follows the Coherence Principle, most issues that arise in structuring true secured transactions and in litigating disputes can be resolved on the basis of the language of the statute without resort to application of underlying principles. As discussed below in Parts V through IX, however, in the case of the sale of receivables—accounts, chattel paper, payment intangibles, and promissory notes—Article 9 is less faithful to the Coherence Principle. As a result, ambiguities and inconsistencies in interpreting the plain language of Article 9 plagued former Article 9 and to a lesser extent continue to plague current Article 9.

The UCC states another principle of statutory interpretation that is relevant to resolving these ambiguities. Section 1-103(a) of the UCC states that Article 9 "should be liberally construed and applied to promote its underlying purposes and policies."[45] The issue then becomes what the meaning of "liberally" is and

41. *See infra* notes 70–80 and accompanying text.

42. Other important priority rules, such as the priority between a lien creditor and secured party, *id.* § 9-317(a)(2), between purchase-money and other security interests, *id.* § 9-324, and between other security interests in specified circumstances, *id.* §§ 9-325 through 9-329 & 9-334, depend on the time of perfection or filing or other acts or on other objectively determinable facts but not on lack of knowledge.

43. For some priority contests, knowledge of the existence of a competing property interest is an element. *See id.* § 9-317(b), (c), (d) (providing that certain buyers, lessees, or licensees of certain collateral take free of an unperfected security interest if they give value without knowledge of the security interest before the security interest is perfected); *id.* § 9-320(b) (providing that a consumer buyer of consumer goods may take free of an automatically perfected security interest in the goods if, among other things, it buys without knowledge of the security interest and before the secured party files a financing statement); *id.* § 9-323(b), (d)–(g) (priority for certain future advances against certain lien creditors or purchasers or lessees of goods that, among other requirements, take their interests without knowledge of the future advance). Certain other priority rules contain, as an element, knowledge of a narrower set of facts, such as knowledge that a later purchaser is violating the rights of another. *See id.* § 9-330(b), (d) (purchaser of chattel paper or instrument may have priority over certain secured parties if it takes possession (or control, in the case of electronic chattel paper) without knowledge that the purchase violates the rights of the secured party); *id.* § 9-320(a) & U.C.C. § 1-201(b)(9) (2008) (to qualify as a buyer in ordinary course with priority over a perfected inventory secured lender, the buyer must buy without knowledge that the sale violates the rights of another person).

44. *See, e.g.*, Stoebuck & Whitman, *supra* note 37, §§ 11.9, 11.10, at 870, 882–86 (describing the inadequacies of the recording system, and the requirement for lack of notice or knowledge to achieve protected status).

45. U.C.C. § 1-201(b)(30) (2008) (defining "purchaser" as "a person that takes by purchase"); *id.* § 1-201(b)(29) (defining "purchase" to mean "taking by sale, lease, discount, negotiation, mortgage, pledge, lien, security interest, issue or reissue, gift, or any other voluntary transaction creating an interest in property").

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what are underlying "purposes and policies." The Plain Language Principle is one of those purposes and policies. Important property principles are other "purposes and policies" of Article 9.

III. Property Principles: *Nemo Dat* and the Filing Priority Exception

As property law, Article 9 necessarily is built upon the basic property principle of *nemo dat*.[46] A transferee only receives what the transferor may give.[47] Hence, if O grants a fee simple in Blackacre to A and then grants a fee simple in Blackacre to B, under *nemo dat* A owns Blackacre and B has no interest in Blackacre. On the other hand, all regimes regulating property interests, like Article 9, contain important exceptions to *nemo dat*. Under these exceptions, which may be the Good Faith Purchaser Principle or the Perfection Principle, a transferor that has previously conveyed to a transferee all of the transferor's interests in a property item may nevertheless be able to grant to a second transferee an interest in a property item that the transferor does not have. Under the real estate recording acts throughout the United States, for example, if O grants a fee simple in Blackacre to A and then grants a fee simple in Blackacre to B, and B purchases Blackacre for value without knowledge of the grant to A and records her conveyance first,[48] B has the superior interest in Blackacre. In this case A has no interest in Blackacre, even though under *nemo dat* O conveyed to A all of the interest in Blackacre that O had. The operation of the recording acts and the failure of A to protect his interests under the recording acts give O the power to transfer to B an interest in property—A's fee simple in Blackacre—that O did not have.

These real estate recording acts generally use terminology that voids or invalidates a transfer as against a subsequent purchaser that purchases for value without notice of the earlier conveyance and, in about half of the states, that records first.[49] This language is suitable for the transfer of all types of property interests, not just the transfer of a fee simple. For example, if O first granted a fee simple to A and then a mortgage to B, and B qualifies for protection under the recording act, then A's fee simple is void to the extent of B's mortgage—that is, B's mortgage will be superior to A's fee simple, and A will have a fee simple subject to B's

46. *See, e.g.*, Harris, *Fundamental Principles*, *supra* note 6, at 641–42 (noting that *nemo dat* "forms part of the foundation upon which Article 9 rests").

47. *See supra* note 6 and accompanying text.

48. *See, e.g.*, Stoebuck & Whitman, *supra* note 37, § 11.9, at 871–74 (describing the operation of the different types of recording systems). Under a race-notice system, which implements the Perfection Principle, *see supra* note 12 and accompanying text, an unrecorded conveyance is void as against a bona fide purchaser for value without notice if the subsequent purchaser records the second conveyance first. Under a notice system, which implements the Good Faith Purchaser Principle, *see supra* note 10 and accompanying text, an unrecorded conveyance is void as against a subsequent bona fide purchaser for value without notice, even if the subsequent purchaser does not record his or her conveyance. *See id*. Generally, if the first transferee records its conveyance, then all subsequent purchasers will have at least constructive notice of the first conveyance. Hence, under a notice system, B need not record O's deed to B to have priority over A, but B must record to protect B's interest from a subsequent purchaser for value.

49. *See supra* note 48.

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mortgage. Similarly, if O first granted a mortgage to A and then a fee simple to B, and B qualifies for protection under the recording act, then A's mortgage is void to the extent of B's fee simple, which has the effect of voiding A's entire mortgage. Again, in each of these cases, the operation of the recording acts and the failure of A to protect A's interests under the recording acts give O the power to transfer to B an interest in property that O did not have.

Article 9 also contains a variety of rules that expressly overrule *nemo dat*. The most important of these exceptions is the "first-to-file-or-perfect" rule that codifies the Filing Priority Principle for conflicting true security interests.[50]

This rule, which is primarily a filing priority rule, overrides *nemo dat* for the same reasons that the real estate recording acts do: to promote the "security of property." This rule enables holders of security interests in collateral to have a relatively high degree of certainty that their interests will not be defeated by claims against the collateral asserted by other persons. Accordingly, the rule creates an incentive for these holders to provide public notice of their interest in the collateral. This notice requirement and the concomitant priority rules based on the plain language of the statute enable potential later purchasers of or lenders against that collateral to determine more easily and at lower costs who has what interests. Accordingly, this rule promotes efficiency and certainty in the transfer of property interests. In addition, as discussed below, the filing priority rule promotes efficiency in the granting of security interests in personal property by facilitating automatic grants of security interests in after-acquired collateral and multiple secured borrowings without complying with additional legal formalities.[51]

A. *Nemo Dat* in Article 9

Article 9 implements *nemo dat* in several specific provisions,[52] such as section 9-315(a)(1) that provides that a security interest continues notwithstanding disposition of the collateral,[53] and section 9-322(a)(3), which provides that priority

50. For other rules, see *supra* notes 42–43 and *infra* notes 196–97 and accompanying text (discussing priority provisions). In addition, a perfected secured party with priority based on filing may lose its priority to a previously subordinated secured party perfected by a later filing if the initial filing becomes ineffective. *See* U.C.C. § 9-515 (2010) (providing that the failure of a secured party perfected by the filing of a financing statement to continue its financing statement by filing a continuation statement within six months before the fifth anniversary of the initial filing date will cause the initial financing statement to lapse; upon lapse the security interest will become unperfected, and, more important, will be deemed never to have been perfected as against purchasers for value); *id.* § 9-316(b) (providing that, if a secured party perfected by the filing of a financing statement in one jurisdiction fails to file an initial financing statement in a new jurisdiction within certain time periods (either four months or one year) after (i) a change in the location of the debtor from the former jurisdiction to the new jurisdiction or (ii) a sale of collateral to a buyer (which becomes a "debtor") located in the new jurisdiction, the security interest will become unperfected, and, more important, will be deemed never to have been perfected as against purchasers for value)).

51. *See infra* notes 79 and 82 and accompanying text.

52. *See, e.g.*, UCC § 9-318(a) (2010) (expressing *nemo dat* in the case of the sale of receivables), *quoted and discussed infra* note 163 and accompanying text.

53. *See id.* § 9-315(a)(1) (providing that, with certain exceptions, "a security interest or agricultural lien continues in collateral notwithstanding sale, lease, license, exchange, or other disposition thereof unless the secured party authorized the disposition free of the security interest or agricultural lien").

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among conflicting unperfected security interests is determined by the first to attach.[54] It does not, however, contain any express general statement of *nemo dat*. Nevertheless, the following example illuminates how the principle of *nemo dat* underlies Article 9:

Example 1

(security interest in limited interest in collateral)

D owns one item of equipment, E1, leases another item of equipment, E2, from a lessor L, and has a cotenancy interest as co-owner in another item of equipment, E3, with C. Each item of equipment is worth $1,000, the value of D's interest in the leased equipment E2 is $100 (representing the excess of the present value of the market rental value of E2 over the present value of the contract rent that D must pay L), and the value of D's co-tenancy interest in the item of equipment E3 is $500. D signs a security agreement interest granting to SP a security interest in "all of D's equipment" (not limiting the granting language to "all of D's right, title, and interest in D's equipment"), and SP gives $1,200 value to D. Under section 9-203, SP has satisfied all of the requirements for attachment of a security interest.[55] D has "rights" in all three items of equipment, E1, E2, and E3. To what extent does SP have a security interest in the items of equipment, E2 and E3? Under *nemo dat*, only to the extent of D's limited interests: Although SP has a security interest in D's full ownership interest in E1 valued at $1,000, under *nemo dat* SP would not have a security interest in E2 or in E3 but only in D's leasehold interest in E2 (worth $100) and D's one-half co-tenancy interest in D3 (worth $500). Under *nemo dat*, SP's security interest in E2 and E3 would not extend to L's title to and reversion in E2 or to C's co-ownership interest in E3.[56]

Item	Value of item	D's interest	Value of D's interest	SP's security Interest
E1	$1,000	Ownership	$1,000	≤ $1,000
E2	$1,000	Leasehold	$100	≤ $100
E3	$1,000	Co-tenancy	$500	≤ $500
[total]	$3,000		$1,600	$1,200

Perhaps because the granting of security interests in less than the full ownership interests of a debtor in personal property has been rare, Article 9 does not

54. *See id.* § 9-322(a)(3) (providing that, with certain exceptions, "priority among conflicting security interests and agricultural liens in the same collateral is determined according to the following rules: . . . (3) The first security interest or agricultural lien to attach or become effective has priority if conflicting security interests and agricultural liens are unperfected").

55. *See id.* § 9-203(b), *quoted supra* note 26.

56. *See, e.g.*, Schwarcz, *Intermediary Risk in a Global Economy, supra* note 6, at 1573–74 (noting that if "a debtor owns only a partial interest in a given item of property, its creditors in their capacity as such should be able to reach only that partial interest").

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contain a general rule that a secured party cannot have a security interest in a property item that is greater than the debtor's interest in that property item.[57] As a result, one could argue that the plain language of Article 9 allows SP to enforce its security interest in the full value of E2 against L and in the full value of E3 against C notwithstanding D's limited interests in these items.

The language of Article 9 does create some interpretative issues for upholding the *nemo dat* rights of L and C against SP1. The first issue is the interpretation of the word "collateral." Collateral means "the property subject to a security interest."[58] The meaning of the word "property" in the definition of "collateral" is ambiguous. Does the word "property" mean the "property item," such as the "goods" E2 and E3 in example 1, or the "interests" of the debtor in the property item, D's leasehold interest in E2 and D's co-tenancy interest in E3?[59]

Most people, including courts and scholars, usually think of "property" in terms of particular property items—one's watch, one's car, one's home—and not the legal definition of "property" as the interest of the person in the property item.[60] Usually there is no need to use the more precise property law meaning.

57. *Cf.* U.C.C. § 9-201(a) (2010) (providing that "[e]xcept as otherwise provided in [the Uniform Commercial Code], a security agreement is effective according to its terms between the parties, against purchasers of the collateral, and against creditors"). This section codifies *nemo dat* for a secured party that acquires a security interest under a security agreement, except as otherwise provided in the UCC, but this section extends only to the debtor, creditors and purchasers and would not by itself make the security agreement effective against persons that had interests in a property item that were superior to the interests of the debtor, such as the lessor L or the co-owner C in the example.

58. *See id.* § 9-102(a)(12), *quoted supra* note 24.

59. The United States Bankruptcy Code, 11 U.S.C. §§ 101–1532 (2006 & Supp. IV 2010), solves this problem by defining the "property of the estate" to consist of the "interests of the debtor in property." *Id.* § 541(a)(1). This formulation was a conscious choice by the drafters of the Bankruptcy Code. The initial draft of what became the Bankruptcy Code, proposed by the Commission on the Bankruptcy Laws formed in 1970 and introduced in the 93d and 94th Congresses in 1973 and 1975, had defined the "property of the estate" as the "property of the debtor," following the general use of the word "property of the debtor" of the then-current Bankruptcy Act of 1898, as amended. *See* Thomas E. Plank, *The Outer Boundaries of the Bankruptcy Estate*, 47 EMORY L. REV. 1193, 1216–18 (1998) [hereinafter Plank, *Property of the Estate*]. At the end of the 94th Congress, the congressional staff completely revised the proposed bill, including a revised definition of "property of the estate" to mean the "interests of the debtor in property," which was then introduced in the 95th Congress in 1977 and enacted in 1978. *See id.* at 1219. The Supreme Court in *United States v. Whiting Pools* did not reject the precise definition of property of the estate as the interests of the debtor in property. 462 U.S. 203 (1983). The Court in *Whiting Pools* stated: "Section 541(a)(1) defines the 'estate' as "comprised of all the following property, wherever located: (1) . . . all legal or equitable interests of the debtor in property as of the commencement of the case." *Id.* at 203. But the Court did hold that property of the estate could include more than these interests—specifically the secured creditor's possessory interest in collateral that it has seized to foreclose its security interest. *Id.* at 206.

60. Despite the precise definition of "property of the estate" in the Bankruptcy Code, 11 U.S.C. § 541(a)(1), courts and commentators still frequently refer to a thing owned by the debtor but subject to a security interest as "property of the estate" instead of referring to the debtor's equity interests in the property item as the "property of the estate." *See, e.g.*, Motors Acceptance Corp. v. Rozier (*In re* Rozier), 348 F.3d 1305, 1306 (11th Cir. 2003) (stating that the dispositive issue in the case was "whether a *vehicle* repossessed prior to the filing of a Chapter 13 bankruptcy petition is in fact *property of the estate*" (emphasis added)); Kerr v. Commercial Credit Grp., Inc. (*In re* Siskey & Sons Hauling Co.), 456 B.R. 597, 607–08 (Bankr. N.D. Ga. 2011) (in holding that a transfer of accounts to a factor was not a sale transaction but only a loan transaction, the court held that "the accounts receivable 'purchased' by FleetOne are part of Debtor's estate," although the court properly noted that the accounts were still subject to a perfected security interest in favor of the factor).

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Also, Article 9 frequently uses this more colloquial definition. Consistent with the Coherence Principle, Article 9 classifies all personal property by defined "types," and these definitions describe these types in terms of the property item and not the property interest. For example, section 9-102(a)(44) defines "goods" as all "things" that are movable when a security interest attaches.[61] "Equipment" is a subtype of goods.[62] As another example, section 9-313 states that a secured party may perfect a security interest in negotiable documents, goods, instruments, money, or tangible chattel paper by taking possession of the "collateral."[63] One normally thinks and speaks of taking possession of property items, like a drill press. One does not normally think or speak in terms of taking possession of the debtor's ownership interest in the drill press.

If the word "property" in the definition of "collateral" means the "property item," such as the "goods" E2 and E3 in example 1, then the plain language of Article 9 might allow SP1 to enforce its security interest in all of E2 and E3 notwithstanding the limited interest of D in those property items. This result would contradict *nemo dat* for no good policy reason. Because Article 9 is a property statute, it should not be interpreted to produce this result. Comment 6 to section 203 expressly recognizes this point: SP1 in example 1 is entitled only to a security interest in D's leasehold interest in E2 and D's co-tenancy interest in E3.[64]

The correct result could be achieved by interpreting the word "property" in the definition of collateral—"the property subject to a security interest"—to mean the "interest of the debtor" in the property item. Because Article 9 is a property statute, the legal meaning of the word "property" or "collateral" is an appropriate interpretation.

The use of the legal definition of the word "property" in the definition of "collateral," however, produces a different interpretative problem. The use of the legal definition of "property" complicates the flexible and very frequent means for describing or indicating the "collateral" for purposes of creating a security interest by an authenticated security agreement[65] and, more important, perfecting a security interest by the filing of a financing statement that indicates the "collateral."[66]

61. The "types" of Article 9 collateral are set out in the definition of "general intangibles." *See* U.C.C. § 9-102(a)(42) (2010), discussed *supra* note 30.

62. *Id.* § 9-102(a)(44) (defining "goods"); *id.* § 9-102(a)(33) (defining "equipment" to mean "goods other than inventory, farm products, or consumer goods").

63. *Id.* § 9-313(a) (providing that "[e]xcept as otherwise provided in subsection (b), a secured party may perfect a security interest in negotiable documents, goods, instruments, money, or tangible chattel paper by taking possession of the collateral").

64. *See id.* § 9-203 cmt. 6 ("A debtor's limited rights in collateral, short of full ownership, are sufficient for a security interest to attach. However, in accordance with basic personal property conveyancing principles, the baseline rule is that a security interest attaches only to whatever rights a debtor may have, broad or limited as those rights may be."); *see also infra* note 90 and accompanying text (discussing a case in which the court specifically relied on *nemo dat* to address a priority contest under former Article 9, which current version of Article 9 expressly addresses).

65. *See id.* § 203(b)(3)(A), *quoted supra* note 26.

66. *See id.* § 9-502(a)(3), *quoted supra* note 36; *id.* § 9-504, *quoted supra* note 37; *id.* § 9-108(b)(3), *quoted supra* note 28 (permitting identification of collateral by type).

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If the debtor only owns a leasehold interest in equipment, and if the "collateral" were the leasehold interest, would a description of the collateral by "type" of property item other than a general intangible, such as "equipment," be sufficient or, because a "leasehold interest" in the property item, e.g., in the equipment, does not meet the definition of such type, must the leasehold interest in the type of collateral be described as a "general intangible"?[67] Of course, this issue arises for ownership interests in equipment as well. If the "collateral" is the ownership interest in the equipment item, is the proper type "equipment" or a "general intangible"? This issue also exists for participation interests in receivables. For example, is a participation interest in chattel paper a payment intangible, as the court in *In re Commercial Money Center, Inc.*[68] held, or can it be chattel paper, as the new comment added in the 2010 revision to section 9-102 states?[69]

The best solution to this issue is to treat the property item, the equipment, as the "collateral" for purposes of a description in a security agreement and the indication of collateral in the financing statement. One cannot have a property interest in a property item unless one describes the property item. Hence, the word "equipment" provides a sufficient description of a leasehold interest in the equipment as collateral. Similarly, in the case of goods or the subtypes of goods, the sufficient way to put third parties on notice that a secured party has a non-possessory security interest in an item of a particular good, such as equipment, is to identify the item. Hence, the word "equipment" provides a sufficient indication of the possibility of a security interest in a leasehold interest in the equipment.

One way to reconcile this interpretation of the word "property" in the definition of collateral and still respect the limitations in the debtor's property interests is to posit that the word "collateral" in Article 9 has two related meanings depending on the context. Hence, "collateral" means the property item when the rules depend on the nature of the thing being governed, such as rules specifying a collateral description or rules depending on "possession" or "control." But "collateral" could mean the property interest when the rules

67. If the "type" of the leasehold interest is not "equipment," it must fall under the catch-all type of "general intangible." *See id.* § 9-102(a)(42), *quoted supra* note 30. In many cases this issue will not arise if the collateral description in the security agreement and the financing statement is "all of the debtor's right, title, and interest in equipment," which is a fairly common formulation. Nevertheless, it is also not uncommon for a security agreement to describe the collateral as "the debtor's equipment" and the financing statement simply to state "equipment."

68. 350 B.R. 465 (B.A.P. 9th Cir. 2006).

69. U.C.C. § 9-102 cmt. 5.d (2010). The comment states:

> [A]n assignment of the lessor's right to payment under a lease also transfers the lessor's rights with respect to the leased goods under Section 2A-523. If, taken together, the lessor's rights to payment with respect to the leased goods are evidenced by chattel paper, then, contrary to In re Commercial Money Center, Inc., 350 B.R. 465 (Bankr. App. 9th Cir. 2006), an assignment of the lessor's right to payment constitutes an assignment of the chattel paper.

Id.

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depend on the extent of a security interest, such as rules governing foreclosure of a security interest.

A superior interpretative solution would reject this dual interpretation of the word property and would accept that the word "property" in the definition of "collateral" means the property item. This solution would instead incorporate the limits of the debtor's interest in the property in the definition of "security interest" as "an interest in property" to secure an obligation. The word "interest" means "interest in the debtor's interest in property." Hence, if the debtor owns a leasehold interest or a co-ownership interest in an item of equipment and grants a security interest in that equipment to secure a debt, the "security interest" is the "interest in the leasehold interest or co-ownership interest" in the equipment to secure the debt. This solution preserves the simplicity of the definitions of collateral by type and also the underlying principle of *nemo dat*.

B. The Filing Priority Exception to *Nemo Dat*

As noted above, *nemo dat* is not absolute. The "first-to-file-or-perfect rule" of section 9-322(a)(1) for determining, in most cases, the priority between two conflicting perfected security interests is the primary manifestation of the Filing Priority Principle and perhaps the most important exception to *nemo dat* in Article 9. Section 9-322(a)(1) states:

> Except as otherwise provided in this section, priority among conflicting security interests and agricultural liens in the same collateral is determined according to the following rules:
>
> (1) Conflicting perfected security interests and agricultural liens rank according to priority in time of filing or perfection. Priority dates from the earlier of the time a filing covering the collateral is first made or the security interest or agricultural lien is first perfected, if there is no period thereafter when there is neither filing nor perfection.[70]

The first-to-file-or-perfect rule was a great advance in the law governing priority between conflicting personal property interests. The race notice priority rules for real estate property interests have long awarded priority to the first person to perfect its interest by recording the document that created the interest.[71] Most of the earlier personal property security interest regimes relied on the same idea: priority depended on the time of perfection.[72]

Article 9, however, radically expanded the ability of a secured party to establish its priority over other "purchasers," which under the UCC include a buyer of personal property and a secured party under Article 9.[73] Specifically, Article 9

70. *See id.* § 9-322(a).

71. *See supra* note 48 and accompanying text (citing Stoebuck & Whitman, *supra* note 37, § 11.9, at 871–74).

72. *See* Gilmore, Security Interests, *supra* note 6, § 16.1, at 481–83.

73. U.C.C. § 1-201(b)(29), (30) (2008), *quoted supra* note 45.

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permits a secured party in most cases to establish the priority of its security interest in collateral owned or acquired by a debtor over other claimants to the collateral as of the time of the filing of a financing statement, which could and often is before the security interest has attached. This ability to base priority on a filing that precedes attachment and perfection is an essential and distinguishing element of the Filing Priority Principle.

Recall that a security interest is not perfected until it has been created—until it has "attached"—and all of the steps for perfection have been taken.[74] If priority did not relate back to a time before the creation of the security interest, the first-to-file-or-perfect rule of section 9-322(a)(1) would be nothing more than a first-to-perfect rule comparable to that of the race notice real estate recording acts.[75] The following two examples illustrate the significance of priority based on filing. Example 2 illustrates the priority between competing security interests based on the time of filing when the filing of each financing statement perfects security interests created before the filing. Example 3 illustrates the two different ways in which priority is based on a filing that precedes creation and perfection of the competing security interests.

Example 2

(filing as perfection)

On Day 1 D grants an enforceable security interest in an item of equipment, E1, to SP1 (that is, there is value, D has rights in E1, and D signs a security agreement describing D1 as collateral), but SP1 does not file a financing statement. SP1 is not perfected. Then on Day 2, D grants an enforceable security interest in the same item of equipment, E1, to SP2 (that is, there is value, D has rights in E1 [because D is still the owner of E1], and D signs a security agreement describing E1 as collateral). At that time, under section 9-322(a)(3), SP1 with the first unperfected security interest to attach has priority.[76] On Day 3, SP2 files a financing statement. SP2 is now perfected. Under section 9-322(a)(2), SP2's perfected security interest now has priority over SP1's unperfected security interest.[77] Finally, on Day 4, SP1 files its financing statement and becomes perfected. Under section 9-322(a)(1), SP 2 still has priority because it was both the first to file and the first to perfect. In other words, because the filing of financing statements by both SPs occurred after the creation of the respective security interests, the first secured party to perfect by filing, SP2, has priority.

74. *See* U.C.C. § 9-308(a) (2010), *quoted* and *discussed supra* note 32 and accompanying text.

75. There may be circumstances in which a mortgagee may obtain priority over intervening claimants in after-acquired real estate property under an after-acquired property clause in the mortgage that relates back to the date of recording of the mortgage, but those circumstances are limited and uncertain. *See, e.g.*, NELSON & WHITMAN, *supra* note 9, § 9.3, at 864–69.

76. *See id.* § 9-322(a)(3), *quoted supra* note 54.

77. *See id.* § 9-322(a)(2), *quoted supra* note 12.

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Date	Action	Effect
Day 0	D owns equipment E1.	
Day 1	D signs security agreement granting security interest to SP1 in E1; SP1 gives value; no financing statement filed.	SP1 has security interest in E1. SP1's security interest unperfected.
Day 2	D signs security agreement granting security interest to SP2 in E1; SP2 gives value.	SP2 has security interest in E1. SP2's security interest is unperfected. SP1 has priority—first to attach.
Day 3	SP2 files financing statement.	SP2's security interest in E1 is perfected. SP2 has priority—perfected over unperfected.
Day 4	SP1 files financing statement.	SP1 has perfected security interest in E1. SP2 has priority—first to file or perfect.

Article 9, however, authorizes the filing of a financing statement before a security agreement is made or a security interest is otherwise created,[78] and the first-to-file-or-perfect rule gives priority based on that earlier filing. Filing precedes perfection in two common circumstances. First, the debtor may have rights in the collateral at the time of filing, but the debtor has not signed a security agreement or received value. In this case, the filing is commonly referred to as a "pre-filing." Second, the debtor has signed a security agreement and received value but the debtor has not acquired rights in the collateral until after the filing. This circumstance arises for after-acquired collateral. The following simple example, which just about every commercial law teacher employs, illustrates both types of pre-attachment priority:

Example 3

(priority based on filing before attachment)

The debtor, D, and the secured lender, SP1, begin negotiating a loan by SP1 to D to be secured by a security interest in D's equipment. D owns only one item of equipment, E1. On Day 1, with D's authorization, SP1 files a proper financing statement covering all of D's equipment. On this date, SP1 has no interest in D's equipment E1. SP1 moves slowly, however, and D begins negotiating with SP2 for a loan secured by D's equipment. SP2 acts fast. On Day 15, D signs a

78. *See id.* § 9-502(d) (providing that a "financing statement may be filed before a security agreement is made or a security interest otherwise attaches").

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security agreement granting SP2 a security interest in all of D's then owned or after-acquired equipment, and SP2 advances money to D. On the next day, Day 16, SP2 files a proper financing statement covering D's equipment. Accordingly, on Day 15, SP2 has an enforceable security interest in D's equipment E1—attachment—that becomes perfected Day 16. On Day 16, SP1 still has no interest in D's equipment. However, SP1 finally approves the loan to D, and on Day 30, D signs a security agreement granting SP1 a security interest in all of D's then owned or after-acquired equipment, and SP1 advances money to D. Because SP1 had previously pre-filed a proper financing statement covering D's equipment, on Day 1, SP1 now has a perfected security interest in D's equipment E1 as of Day 30. SP1 also now has priority in E1 based on its pre-filed financing statement, even though SP2 is the first to obtain an interest in D's equipment (Day 15) and the first to perfect (Day 16), before SP1 perfects on Day 30. The Filing Priority Principle overrules the priority that the first to perfect, SP2, would have had over the later to perfect, SP1.

Then, on Day 45, D acquires an additional item of equipment, E2. On Day 45, SP1's security interest in E2 and SP2's security interest in E2 attach simultaneously[79] and become perfected simultaneously. Under a pure first-to-perfect priority scheme, SP1 and SP2 would have the same priority and would presumably share a pro rata interest in the collateral.[80] Under the first-to-file-or-perfect rule, however, SP1 has priority based on the earlier filing. Note that in this circumstance, it does not matter whether SP1 "pre-filed" a financing statement—that is, filed a financing statement before D signed the security agreement. All that matters is that SP1 filed before SP2.

79. Neither secured party is required to give new value. Since a debt already exists between D and each of SP1 and SP2 because of the initial value given, the UCC automatically provides by definition that value is given at the time the debtor acquires rights in the collateral. *See* U.C.C. § 1-202(b) (2008) (providing that, with exceptions not relevant here, a person [e.g., a secured party] gives value for rights [e.g., a security interest] if the person [the secured party] acquires them [the security interest]: . . . (2) as security for, or in total or partial satisfaction of, a preexisting claim").

80. Article 9 provides little guidance on the treatment of security interests that have the same priority, and the holders of such security interests face the same issues that co-owners of property do—that is, they must cooperate in realizing the value of their security. For example, if one secured party were to dispose of the collateral, the buyer at the foreclosure sale would take subject to the other secured party's security interest. *See* U.C.C. § 9-617 (2010); *id.* § 9-610 cmt. 6; *see also id.* § 9-615(a)(2) & (3) (providing for distribution of proceeds of a disposition only to subordinate secured parties). Such a buyer would not purchase at the foreclosure sale unless the amount paid took into account the value of the other secured party's claim. Further, consistent with basic property rules, one secured party would not have the right to take possession over the objection of the other secured party, and therefore the secured parties would have to cooperate in the event of a default. *Id.* § 9-610 cmt. 6 (noting that competing secured parties of equal priority each have a right to possession of the tangible collateral and that this right creates a circularity problem, in that each secured party that had possession would be obligated to return possession to the other, and stating that the resolution of the problem "is left to the parties and, if necessary, the courts"). Presumably, however, the secured parties would be entitled to a pro rata share of any cash proceeds of the collateral.

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Date	Action	Effect
Day 0	D owns equipment E1.	
Day 1	SP1 files financing statement.	SP1 has no interest in equipment E1.
Day 15	D signs security agreement granting security interest to SP2 in equipment; SP2 gives value.	SP2 has security interest in equipment E1.
Day 15	SP2 files financing statement.	SP2's security interest is perfected.
Day 30	D signs security agreement granting security interest to SP1 in equipment; SP1 gives value.	SP1 has perfected security interest in equipment E1. SP1 has priority in E1—first to file or perfect.
Day 45	D acquires equipment item E2.	SP1 & SP2 simultaneously acquire perfected security interest in E2. SP1 has priority in E2—first to file or perfect.

This Filing Priority Principle of section 9-322(a)(1) greatly simplifies the acquisition of security interests in most types of personal property. Pre-filing by a secured party, such as SP1 in the above example, produces two related benefits. A financing statement becomes effective when it is filed with the filing office.[81] However, there is generally a lag—often in the range of about two weeks—between the time of filing and the time when a search would reveal the financing statement. Accordingly, at some time before making its advance on Day 30 but a sufficient time after its filing—say, Day 20—SP1 can conduct a search of financing statements to determine that its financing statement had been filed. SP2's financing statement may not yet show up on the search report. Nevertheless, once SP1 determines that there are no financing statements filed before its financing statement, it knows that its priority is relatively secure. Pre-filing a financing statement several weeks before closing the transaction—like SP1's filing on Day 1—helps ensure that no secured party would obtain priority by filing a financing statement before Day 30, as happened when SP2 filed its financing statement on Day 16. Pre-filing eliminates the need for a subsequent search on the date it makes its initial advance and protects against an earlier perfected but later filing secured party.

If Article 9, however, had adopted a first-to-perfect rule, an earlier search by SP1 would not be sufficient to protects its interests. SP1 would be required

81. *See id.* § 9-520(c) (providing that a "filed financing statement satisfying section 9-502(a) and (b) is effective, even if the filing office is required to refuse to accept it for filing under subsection (a) [failure of financing statement to include certain information, such as address of debtor and secured party]").

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to make another search on the date of its advance. Aside from the additional cost of such a search, such a search would not protect it from an earlier perfected secured party, SP2, whose filing had not yet showed up on the search report. Under the Filing Priority Principle expressed by section 9-322(a)(1), however, the first secured party to file, even if it has no security interest at the time of filing, will have priority over the secured party that files later but that perfects first. In the above example, SP1 has priority over SP2 even though SP2 was the first to perfect, as long as SP1 eventually acquires its security interest. The first-to-file-or-perfect rule also benefits SP2. SP2 could have protected itself by searching the public records and if it found that its filing was not first (that is, SP1's financing statement showed up on the search report), it could decline to make any loan. Of course, if SP1 never acquires a security interest in D's equipment, e.g., D does not sign a security agreement in favor of SP1 or SP1 never gives value to D, then there is no priority contest under section 9-322. If SP1 never acquires a security interest and SP2 makes the secured loan, SP2 would have a superior interest under *nemo dat* and also under section 9-201.

The benefits of the Filing Priority Principle expressed in section 9-322(a)(1) become more significant for debtors and their secured lenders that engage in continuous financing of collateral acquired after the authentication of a security agreement and the initial advance. If SP1, having seen that its filing precedes any filing of SP2 (discovered or not), makes future advances secured by after-acquired collateral, it can make those advances secure in the knowledge that its security interest in D's later-acquired collateral will have priority over any security interest of a potential or real SP2 in the same collateral. Further, although the example uses equipment as the collateral, this rule is especially helpful for debtors that acquire and sell inventory for which they need financing, and for secured lenders willing to finance this constantly changing collateral. For such collateral, a more traditional first-to-perfect rule would be problematic because a secured party becomes perfected in an item of inventory only when the debtor acquires rights in it.[82] If Article 9 were limited to a first-to-perfect regime like real estate recording acts,[83] and a debtor acquired inventory monthly or weekly, to ensure that its security interest in new inventory will not share priority with another security interest, a secured party would have to do a new search for filed financing statements before it advanced funds to enable the debtor to acquire the new inventory. The Filing Priority Principle obviates the necessity for such repeated searches.

In conclusion, the Filing Priority Principle is an important principle created by Article 9 to further its policy goals of simplifying secured transactions and enabling

82. *See id.* § 9-308(a), *quoted and discussed supra* note 32 and accompanying text.

83. Generally, a mortgage lender cannot be sure that it has priority over other persons that might claim an interest in the mortgaged property unless it updates its title search immediately before the filing of its own mortgage.

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parties to enter into secured transactions with lower transaction costs.[84] The Filing Priority Principle is undoubtedly an important exception to *nemo dat*. Nevertheless, the source of the Filing Priority Principle is section 9-322(a)(1), and the Filing Priority Principle underlying this section arises only if there are competing security interests.

Example 3 illustrates how the Filing Priority Principle gives a debtor the power to transfer to a subsequent secured party an interest in property that the debtor does not have. When the debtor grants to SP2 a security interest in equipment E1 on Day 15 that is perfected on Day 16, the debtor D no longer has the rights granted to SP2, which is an interest in E1 to secure payment of an obligation. Under *nemo dat*, D cannot transfer those rights to SP1. SP2 has those rights. No person other than SP2 is entitled to be paid out of E1 before SP2 is paid. Nevertheless, because D grants to SP2 only a security interest—not complete ownership—D retains "title" or ownership to E1, subject to SP2's security interest, and D's other rights as owner of E1, such as the right to redeem E1,[85] the right to notice of any foreclosure sale of E1,[86] and the right to any surplus.[87] In short, D retains rights in the collateral E1 under section

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84. The first-to-file rule was introduced in a limited way in the early drafts of Article 9. *See* U.C.C. § 8-406 (Sept. 1949 revisions), *reprinted in* 8 UNIFORM COMMERCIAL CODE DRAFTS 341–42 (Elizabeth S. Kelly ed., 1984) [hereinafter UCC DRAFTS]. That section stated:

> When two or more security interests attach to the same collateral, one or more of the following rules determine order of priority:
>
> > (1) Except as elsewhere provided in this Section, interests rank in the order of perfection but interests attaching after a financing statement has been filed take precedence from the time of filing both as to value then given and as to all advances thereafter made on security of the collateral of the types indicated in the statement.

Id.

The drafters soon revised this section, and continued to revise it through 1952, but retained the concept of priority ranking according to the time of perfection except for after-acquired collateral, for which priority was based on time of filing. U.C.C. § 8-311(2) (Oct. 1949 revisions), *reprinted in* 8 UCC DRAFTS, *supra*, at 516; U.C.C. § 9-312(1) (Official Draft 1952), *reprinted in* 15 UCC DRAFTS, *supra*, at 262.

In 1955, the drafters again revised the priority rules to introduce a general first-to-file-or-perfect rule. *See* U.C.C. § 9-312(5) (Supp. No. 1 to 1952 Official Draft, Jan. 1955), *reprinted in* 17 UCC DRAFTS, *supra*, at 393–94. That section stated:

> [In cases not governed by preceding subsection] priority between conflicting security interests in the same collateral shall be determined as follows:
>
> > (a) in the order of filing if both are perfected by filing, regardless of which security interest attached first under Section 9-204(1) and whether it attached before or after filing.

Id. The 1962 Official Draft enacted throughout the United States used this formulation. *See* U.C.C. § 9-312(5)(a) (1962), *reprinted in* 23 UCC DRAFTS, *supra*, at 461. The 1972 amendments to the Official Text rewrote section 9-312(5)(a) in a way that expanded the first-to-file-or-perfect rule to its current formulation. *See* U.C.C. § 9-312(5)(a) (1972), *quoted infra* note 89.

85. *See* U.C.C. § 9-623 (2010) (right to redeem by tendering fulfillment of all obligations secured by the collateral and the reasonable expenses of retaking, holding, preparing for disposition, processing, and disposing, and, to the extent provided for by agreement and not prohibited by law, reasonable attorney's fees and legal expenses incurred by the secured party).

86. *See id.* §§ 9-611 through 9-614.

87. *See id.* § 9-615(d)(1).

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9-203(b)(2). Therefore, D can create a security interest in favor of SP1 by signing a security agreement and getting value from SP1. Once D grants to SP1 a security interest in E1 on Day 30, both SP2 and SP1 have a perfected security interest in the same collateral E1. Because SP1 files a financing statement covering equipment before SP2 files—before SP1 even obtains a security interest—section 9-322(a)(1) operates to transfer SP2's security interest in E1 to SP1. Once both SP1 and SP2 have a perfected security interest, the first-to-file-or-perfect rule of section 9-322(a)(1) gives D the power to transfer an interest in E1—SP2's security interest—that D did not have to SP1. Similarly, when D acquires ownership of E2 on Day 45, under *nemo dat* each of SP1 and SP2 receives a pro-rata security interest in E2. However, under the first-to-file-or-perfect rule, SP1's interest has priority over SP2's. Section 9-322(a)(1) gives D the power to transfer to SP1 what would otherwise have been SP2's first priority security interest, an interest that D conveyed away.[88] A key element in this analysis, however, is the fact that D retained its own rights in the collateral, E1 and E2, and therefore was able to create competing security interests that would fall under the plain language of the first-to-file-or-perfect rule of section 9-322(a)(1).

IV. Limits to the Filing Priority Principle

A. Security Interests Created by Different Debtors

Despite its utility, the Filing Priority Principle should not always override *nemo dat*. It should override *nemo dat* only when there is a strong policy reason for doing so, such as when the policy favoring providing public notice of an otherwise secret lien ensures the security of property interests and efficiency in secured transactions and the benefits of the policy outweigh the costs associated with is application. Absent a good reason to overrule *nemo dat*, *nemo dat* should prevail. One good example of an exception to the exception to *nemo dat* is section 9-325. Example 4 illustrates how this section works to give primacy to *nemo dat* over the Filing Priority Principle.

Example 4

(double debtor and dual/dueling secured parties)

On Day 1, D2 grants to SP2 a security interest in D2's then-owned or after-acquired assets, including accounts, inventory, and equipment, and this security interest is perfected by the filing of a financing statement on Day 1. On Day 30, D1 grants to SP1 a security interest in D1's then-owned or after-acquired assets,

88. The priority rule effects a transfer of SP2's property interest to SP1 because under SP2's security agreement, SP2 had the exclusive right to be paid out of the collateral before any other person. D no longer had that right. Then, when D authenticated its security agreement with SP1, under *nemo dat*, D granted to SP1 the exclusive right to be paid out of the collateral only after SP2 were paid. Under the first-to-file-or-perfect rule, however, D had the power to transfer SP2's exclusive right to be paid first to SP1, and SP2 is left with a different property interest, a second priority security interest giving SP2 the exclusive right to be paid out of the collateral only after SP1 were paid.

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including accounts, inventory, and equipment, and this security interest is perfected by the filing of a financing statement on Day 30. On Day 60, D1 transfers assets (the "Transferred Assets") to D2. D2 takes these assets subject to SP1's security interest. The Transferred Assets previously owned by D1 and acquired by D2 become subject to SP2's perfected security interest. SP1 and SP2 have conflicting perfected security interests. Which has priority?

Under *nemo dat*, SP2's security interest in the Transferred Assets would be subordinate to SP1's security interest because D2 acquired the Transferred Assets subject to SP1's security interest. Under the Filing Priority Principle expressed in section 9-322(a)(1), however, SP2 would have priority over SP1 because SP2 was the first to file. Which principle should prevail?

Date	SP1	SP2
Day 1	D1 owns equipment.	D2 signs security agreement granting security interest to SP2 in D2's equipment; SP2 gives value. SP2 files financing statement.
Day 30	D1 signs security agreement granting security interest to SP1 in equipment; SP1 gives value. SP1 files financing statement. Neither D1 nor SP1 have knowledge of D2 or SP2.	Neither D2 nor SP2 have knowledge of D1 or SP1.
Day 60	D1 transfers equipment E1 to D2. SP1's security interest in transferred equipment E1 continues and remains perfected.	SP2 acquires security interest in transferred equipment E1.
	SP1 has priority under *nemo dat*.	SP2 has priority under Filing Priority Principle.

Before 2001, there was no explicit rule resolving the conflict between *nemo dat* and the Filing Priority Principle enacted by section 9-312(5)(a) of former Article 9,[89] the predecessor to section 9-322(a)(1). Under former Article 9, the answer was uncertain. Section 9-201 of former Article 9, which (like section 9-201 of current Article 9) stated that, unless otherwise provided in the UCC, a security agreement is effective against purchasers. Therefore, unless otherwise provided in the UCC, SP1's security agreement would be effective against D2 and SP2, and SP1's security interest would have priority over SP2. On the

89. *See* U.C.C. § 9-312(5)(a) (1995) ("[With exceptions not relevant here] priority between conflicting security interests in the same collateral shall be determined according to the following rules: (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.").

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other hand, the Filing Priority Principle enacted by section 9-312(5)(a) of former Article 9 gave priority to the first to file a financing statement. This section could easily be interpreted as the exception that overrules the rights of SP1 under the security agreement. Nevertheless, one case under former Article 9 did resolve this ambiguity in favor of SP1. In 1988, the U.S. Court of Appeals for the Ninth Circuit applied the *nemo dat* principle to preserve the priority of an SP1 in transferred assets notwithstanding the first-to-file-or-perfect rule of former article 9.[90]

The 2001 revision of Article 9 added section 9-325 which expressly adopted the *nemo dat* principle over the Filing Priority Principle by subordinating SP2's security interest in the Transferred Assets to SP1's security interest in those assets.[91] In this situation, *nemo dat* prevailed because there is no policy reason justifying the Filing Priority Principle exception to *nemo dat*. The Filing Priority Principle is not necessary here to provide the necessary public notice of SP1's and SP2's security interest or to protect the integrity of the filing system. As noted by the comment to section 9-325, SP2 could protect itself by searching and finding SP1's financing statement, but SP1 could never protect itself from becoming subordinate to an earlier filing SP2 because it would not likely know of the transfer to D2 before the fact, and even if it did know of the financing statement it could not prevent becoming subordinate to SP2.[92]

There are likely other double debtor problems that are not addressed by Article 9. Professor Philip Lacy has shared with me a problem that pits the *nemo dat* rights of a secured party with a non-purchase-money security interest in goods granted by a debtor who then transferred the goods to a buyer who makes the goods a fixture and thereby causes the goods to become subject to a mortgage entitled to priority under section 9-334 of the UCC. Simplified, the facts are as follows:

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90. *See* Bank of the West v. Commercial Credit Fin. Servs., Inc., 852 F.2d 1162, 1174 (9th Cir. 1988) (noting that the transferee, a debtor that had granted a security interest to an SP2 that had filed first, "cannot acquire any greater rights in the [collateral] than its transferor," a debtor that had granted the initial security interest to an SP1 that had filed later).

91. *See* U.C.C. § 9-325(a) (2010). This section states:

> (a) Except as otherwise provided in subsection (b), a security interest created by a debtor [here, D2] is subordinate to a security interest in the same collateral created by another person [here, D1] if:
>
> (1) the debtor [D2] acquired the collateral [the transferred assets] subject to the security interest created by the other person [D2];
>
> (2) the security interest created by the other person [D1] was perfected when the debtor [D2] acquired the collateral; and
>
> (3) there is no period thereafter when the security interest is unperfected.
>
> (b) Subsection (a) subordinates a security interest only if the security interest (1) otherwise would have priority solely under Section 9-322(a) or 9-324.

Id.

92. *See id.* § 325 cmt. 3. After the transfer, SP1 could perhaps accelerate D1's secured debt and exercise its default remedies, but those remedies do not prevent the automatic subordination caused by the application of the Filing Priority Principle under section 9-322(a)(1).

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On Day 1, D1 grants a security interest to SP1 in D1's then-owned and after-acquired equipment. On Day 2, SP1 perfects that security interest by filing a proper financing statement. On Day 3, without SP1's authorization, D1 sells a piece of equipment to D2, which installs it at D2's manufacturing facility. D2 had granted a mortgage to M1 on Day 0. Section 9-334(c) states the general rule for fixtures: "In cases not governed by subsections (d) through (h), a security interest in fixtures is subordinate to a conflicting interest of an encumbrance."[93] For most pieces of equipment, the exceptions would not apply.[94] Accordingly, M1 has priority over SP1.

However, when D2 acquired the fixture, it only acquired D1's equity interest in the fixture. It did not acquire SP1's security interest in the fixture, which could exceed the value of the fixture or have no value, depending on the amount of the secured debt owed to SP1 and relative values of D1's other assets serving as collateral for the secured loan. Neither M1 nor SP1 are purchase-money lenders, although they may have relied on the equipment before deciding to make other advances to their respective debtors. This example presents a clash between (i) the Plain Language Principle that favors M1 and (ii) *nemo dat* and the security of property policy that favors SP1. Both M1 and SP1 provided public notice of their interests, but neither party could take advantage of that fact. Therefore, the fact that M1 was the first to do so does not seem sufficient reason to override SP1's *nemo dat* rights. Accordingly the Filing Priority Principle and the related publicity principles of the real estate recording acts would not appear to have much relevance in resolving the conflict.

B. Pre-Filing Does Not Create a Property Interest

The Filing Priority Principle permits a person that later obtains a security interest to have priority relate back to an earlier date, the date of the pre-filing of a financing statement, as against another perfected secured party. The language of section 9-322(a)(1) that codifies the Filing Priority Principle, however, does not operate to create an encumbrance on or interest in property of the debtor at the time of the filing. Specifically, section 9-322(a)(1) provides a priority rule for *conflicting perfected security interests* created after the filing. Accordingly, the contending parties must have security interests, and to have security interests in the same collateral, the debtor must have had rights in the collateral as of the date that all of the requirements for attachment are satisfied. Whether the debtor has rights at the time of the earlier pre-filing of the financing statement is not relevant. The following two examples, which are slight variations

93. *See id.* § 9-334(c).

94. See *id.* § 9-334(e)(2), which would give SP1 priority for the fixtures that are "readily removable (A) factory or office machines; (B) equipment that is not primarily used or leased for use in the operation of the real property; or (C) replacements of domestic appliances that are consumer goods."

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of Example 3, illustrate the limits of the extent to which the Filing Priority Principle overrules *nemo dat*.

Example 5

(pre-filer v. later buyer of equipment)

D owns ten items of equipment. On Day 1, with D's authorization, SP1 files a proper financing statement covering all of D's equipment. SP1 has no interest in D's equipment. On Day 15, D sells one item of equipment, E1, to a buyer, P2, for a price. P2 takes delivery. SP1 approves the loan to D, and on Day 30, D signs a security agreement granting SP1 a security interest in all of D's equipment. Further, the security agreement specifically lists all items by name, that is, items E1 through E10. SP1 advances money to D. SP1 now has a security interest in D's equipment, E2 through E10, that D owned on Day 30, and because SP1 had previously filed a proper financing statement covering D's equipment, SP1 simultaneously perfected its security interest in those items of D's equipment. However, a security interest does not attach until all of the requirements of section 9-203(b) are met—(1) value, (2) rights, and (3) security agreement or possession.[95] Therefore, SP1 does not have a security interest in E1. D had sold E1 to P2 on Day 15, before all of the elements for attachment were satisfied. On Day 30, D had no "rights" in E1, and there is no provision of law that gives D the "power to transfer rights" in E1.

Further, this result occurs regardless of the wording of SP1's security agreement. If the security agreement on Day 30 had granted a security interest in all of D's equipment "now owned or hereafter acquired"—a common form of granting clause—then as a matter of conveyancing language, SP1 would still have no security interest in E1. More important, even if the granting clause specifically listed E1, SP1 would still not have a security interest because D neither owned E1 nor, under applicable property law, had the power to transfer rights in E1 to a secured party when D authenticated the security agreement.

Date	Action	Effect
Day 0	D owns equipment, E1 through E10.	
Day 1	SP1 files financing statement covering equipment.	D owns equipment unencumbered.
Day 15	D sells E1 to P2.	P2 owns E1.
Day 30	D signs security agreement granting security interest to SP1 in equipment items E1–E10; SP1 gives value.	a) SP1 has perfected security interest in equipment E2 through E10. b) SP1 has no interest in E1.

95. *See id.* § 9-203(b), *quoted supra* note 26.

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In example 5, the mere filing of a financing statement does not act to encumber D's equipment as against a subsequent buyer of equipment. In this case, the judgment of the drafters of Article 9 from the beginning was that pre-filing a financing statement, by itself, does not encumber a debtor's property items.[96] In this case, the Filing Priority Principle does not overrule *nemo dat*, and the operation of section 9-203(b) respects *nemo dat*. Because D did not own E1 on Day 30, SP1 does not get a security interest in E1. Article 9 imposes the burden on the secured party to determine the extent of the debtor's assets on the later of when the debtor authenticates the security agreement or the secured party gives value.

This result is similar in the case of a creditor that becomes a lien creditor after a secured party pre-files a financing statement but before the debtor signs a security agreement and the secured party gives value. This situation is illustrated by the following Example 6.

Example 6

(pre-filer v. lien creditor)

As in Example 5, D owns ten items of equipment. On Day 1, with D's authorization, SP1 files a proper financing statement covering all of D's equipment. SP1 has no interest in D's equipment. On Day 10, LC, a creditor of D, gets a judgment against D for an unpaid unsecured debt. On Day 15, the sheriff levies on one item of equipment E1 pursuant to a writ of execution and begins the process of selling E1 at a sheriff's sale. The levy gives LC a judicial lien on the item of equipment seized. Before the sheriff's sale (which would terminate D's ownership interest), on Day 30 D signs a security agreement granting SP1 a security interest in all of D's equipment. SP1 advances money to D. SP1 now has a security interest in D's equipment, E1 through E10, that D owns on Day 30. D still owns E1 even though it is subject to a lien of the lien creditor LC, and therefore D has rights in E1. Because SP1 had previously filed a proper financing statement covering D's equipment, SP1's security interest is simultaneously perfected in those items of D's equipment. Nevertheless, under section 9-317(a)(2), LC has a superior interest in D1 over SP1's security interest because LC became a lien creditor before SP1 perfected its security interest.[97]

96. Before 1955, priority was based on perfection, except that for after-acquired collateral, priority was based on filing; beginning in 1955, priority based on filing only applied to conflicting security interests perfected by filing. The first-to-file provisions of the Official Text of Article 9 from 1955 until 1972 also referred to the attachment of the security interests. *See supra* notes 84 & 89.

97. *See id.* § 9-317(a)(2) (2010). The section states:

> A security interest or agricultural lien is subordinate to the rights of:
>
> . . . (2) except as otherwise provided in subsection (e), a person that becomes a lien creditor before the earlier of the time:
>
> (A) the security interest or agricultural lien is perfected; or
>
> (B) one of the conditions specified in Section 9-203(b)(3) is met and a financing statement covering the collateral is filed.

Id.

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Date	Action	Effect
Day 0	D owns equipment E1 through E10.	
Day 1	SP1 files financing statement.	D owns equipment unencumbered.
Day 15	LC obtains execution lien on E1.	LC and D each have interest in E1.
Day 30	D signs security agreement granting security interest to SP1 in equipment items E1–E10; SP1 gives value.	a) SP1 has perfected security interest in equipment E1 through E10. b) SP1's security interest in E1 is subordinate to LC.

Again, in this case, the judgment of the drafters of Article 9 was that pre-filing a financing statement, by itself, does not encumber a debtor's property as against a subsequent lien creditor, and the Filing Priority Principle does not overrule the interests of LC under *nemo dat*.[98] Also, in this case, a lien creditor is not a reliance lender—that is, it did not rely on specific items of the debtor's property in extending credit and it only gets to be paid out of whatever property the debtor has at the time that it can get an execution lien. It therefore is not relying on the filing system to advance its interests. Nevertheless, the burden remains on the secured party SP1 to determine the extent of the assets of the debtor D at the time of intended attachment of the security interest.

In 2001, the drafters of Article 9 did extend the Filing Priority Principle to overrule the *nemo dat* rights of a lien creditor in a limited instance. Pre-filing a financing statement can give priority to a secured party that had not yet created a security interest in collateral over a lien creditor that has an execution lien on the same collateral, but only when the debtor had authenticated a security agreement before the other creditor had become a lien creditor. In this instance, the only reason for the lack of attachment and perfection of SP1's security interest was a delay in giving value.[99] This extension is consistent with one of the purposes of the Filing Priority Principle to simplify secured transactions and to lower costs. A debtor will authenticate a security agreement only after the parties

98. The results would have been the same under former Article 9. *See* U.C.C. § 9-301(1) (1995) (providing that, with exceptions that are not relevant, "an unperfected security interest is subordinate to the rights of . . . (b) a person who becomes a lien creditor before the security interest is perfected"); *id*. § 9-301(5) (providing that a "lien creditor" means a creditor who has acquired a lien on the property involved by attachment, levy or the like").

99. *See* U.C.C. § 9-317(a)(2)(B) (2010), *quoted supra* note 97. Subparagraph (b) refers only to the filing of a financing statement and the satisfaction of one of the requirements of section 9-203(b)(3), which is the requirement for the authentication of a security agreement, or delivery, possession, or control of the collateral, *see id.* § 9-203(b)(3), *quoted supra* note 26. Because a person that becomes a lien creditor does not acquire ownership of the property items subject to the lien, the debtor retains rights in the collateral. Therefore, the only element for creation of an enforceable security interest that remains unsatisfied is the giving of value. *See id.* § 9-203(b)(1), *quoted supra* note 26.

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have agreed upon the terms of the secured loan. Such authentication is also a more formal requirement for the creation of a security interest than the giving of value, which can be done by an electronic funds transfer. At this point—the time of the execution of the security agreement—the secured party should be secure in its priority over lien creditors.[100]

Of course, if we reverse the timing of the transactions described in the preceding two examples and SP1 obtains a security interest in equipment and files a financing statement before buyer P2 buys a particular item of equipment or the lien creditor LC gets a lien on the equipment, SP1 will have priority over P2 or LC. This result is consistent with—indeed, it implements—*nemo dat*.

V. The Coherence Principle and the Filing Requirement for Receivables

The notice filing provisions of Article 9 solved the long standing "ostensible ownership" problem of how to allow a debtor that owns goods to retain possession and control of its goods and still grant to another person a security interest in the goods to secure a loan to the debtor.[101] The filing of a financing statement cures this "ostensible ownership" problem. The Filing Priority Principle naturally follows from the notice that filing provides. The provisions of Article 9 governing the creation, perfection, and priority of security interests in goods adhere to the Coherence Principle because they reflect both the nature of goods as property items and the nature of the wide variety of financing transactions for goods.

Accounts, however, do not present the "ostensible ownership" problem that goods present.[102] Accounts are intangibles, and they exist only by virtue of records of transactions between the debtor and the obligor—the "account debtor" in Article 9 terms.[103] Accordingly, during the first half of the twentieth century, factoring of accounts—the absolute assignment of accounts to a buyer and notification to the account debtor of the assignment—and accounts receivables financing—lending secured by an assignment of accounts without notification to the account debtor of the assignment—developed without any requirement

100. *See id.* § 9-317 cmt. 4 (explaining the reason for expanding the rights of the secured party when the only step left for attachment and perfection when the other creditor becomes a lien creditor was the making of the first advance).

101. *See* Gilmore, Security Interests, *supra* note 6, at 24–61 (discussing the history of the chattel mortgage).

102. *See* Thomas E. Plank, *Assignment of Receivables Under Article 9: Structural Incoherence and Wasteful Filing*, 68 Ohio St. L.J. 231, 251–53 (2007) [hereinafter Plank, *Assignment of Receivables*]; John Hanna, *Some Unsolved Problems Under Section 60a of the Bankruptcy Act*, 43 Colum. L. Rev. 58, 69 (1943) (in criticizing proposals to require filing for accounts receivable financing, stating: "To overlook the fact that book accounts are not displayed in windows nor on store shelves, where in contemporary existence is credit extended on the basis of visible possessions? Credit is allowed primarily on the basis of financial statements.").

103. *See* U.C.C. § 9-102(a)(3) (2010) (defining "account debtor" to mean "a person obligated on an account, chattel paper, or general intangible [but not including] persons obligated to pay a negotiable instrument, even if the instrument constitutes part of chattel paper").

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for filing public notice of the financing.[104] A purchaser, including a secured lender, was perfected[105] either automatically upon the assignment—the so-called American rule in effect in New York—or upon notification of the account debtor of the assignment—the English rule in effect in Pennsylvania.[106]

Nevertheless, for interesting historical reasons,[107] the drafters of Article 9 decided to require notice filing for security interests in accounts and chattel paper to secure an obligation, and also to extend that rule to sales of accounts and chattel paper.[108] Further, as of 2001, Article 9 now also governs the sale of payment intangibles and promissory notes.[109] Accordingly, Article 9 required and still requires (a) the filing of a financing statement to perfect a "security interest"—both a true security interest and a buyer's interest—in accounts[110] and (b) either the filing of a financing statement or possession by the secured party to perfect a security interest in tangible chattel paper.[111] Beginning in 2001, Article 9 expanded its scope (i) to provide for perfecting a security interest in electronic chattel paper, a new subtype of chattel paper,[112] by "control"[113]

104. *See generally* Thomas E. Plank, *Sacred Cows and Workhorses: The Sale of Accounts and Chattel Paper Under the U.C.C. and the Effects of Violating a Fundamental Drafting Principle*, 26 CONN. L. REV. 397, 406–12 (1994) [hereinafter Plank, *Sale of Accounts and Chattel Paper*] (describing the drafting of the pre-2001 revisions of Article 9 and the inclusion of the sale of accounts and chattel paper and criticizing the use of misleading defined terms to incorporate the sale of accounts and chattel paper under former Article 9 and the many drafting errors in former Article 9 resulting from such use).

105. Although Article 9 uses the term "perfection," the term originated with the Bankruptcy Act of 1898. *See* GILMORE, SECURITY INTERESTS, *supra* note 6, at 435–36. Gilmore used the term to mean that the security interests could not be defeated by lien creditors or unsecured creditors. *Id.* at 436; *see also* 11 U.S.C. § 547(e)(2)(B) (2006) (providing that "a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee").

106. *See* Plank, *Sale of Accounts and Chattel Paper*, *supra* note 104, at 410 & n.48; Maximilian Koessler, *Assignment of Accounts Receivable*, 33 CAL. L. REV. 40 (1945) (describing these two rules but noting that the application of the rules in different jurisdictions was more complicated than the simple statement of the rules implied).

107. *See* Plank, *Assignment of Receivables*, *supra* note 102, at 253–56; Plank, *Sale of Accounts and Chattel Paper*, *supra* note 104, at 413–25, 436–39 (providing a more detailed description of the historical development); *see also* Kenneth Kettering, *True Sale of Receivables: A Purposive Analysis*, 16 AM. BANKR. INST. L. REV. 511, 514–15 & n.10 (2008) (providing a succinct summary).

108. *See* U.C.C. § 9-102(1)(a) (1995) (providing that "this Article applies . . . (b) to any sale of accounts or chattel paper").

109. *See* U.C.C. § 9-109(a)(3) (2010), *quoted supra* note 2.

110. *See id.* § 9-310(a), *discussed supra* note 33; U.C.C. § 9-302(1) (1995) (providing that a "financing statement must be filed to perfect all security interests except [specified exemptions not relevant here]").

111. *See* U.C.C. § 9-312(a) (2010); *id.* § 9-313(a); U.C.C. § 9-305 (1995); *id.* § 9-304 (providing that a "security interest in chattel paper or negotiable documents may be perfected by filing").

112. *See* U.C.C. § 9-102(a)(31) (2010) (providing that "'[e]lectronic chattel paper' means chattel paper evidenced by a record or records consisting of information stored in an electronic medium").

113. *See id.* § 9-314(a) (providing that a "security interest in investment property, deposit accounts, letter-of-credit rights, or electronic chattel paper may be perfected by control of the collateral under Section 9-104, 9-105, 9-106, or 9-107"); *id.* § 9-105 (providing a definition of control). Achieving "control" over an electronic record, which can be perfectly copied numerous times, in a way that mirrors possession of tangible chattel paper, is complicated and difficult though possible. *See* Working Group on Transferability of Elec. Fin. Assets, ABA Section of Bus. Law & Open Grp. Sec. Forum, *Framework for Control Over Electronic Chattel Paper—Compliance with UCC § 9-105*, 61 BUS. LAW. 721, 725 (2006) (noting that "electronic systems are able to make perfect, identical cop-

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and (ii) to cover the sale of payment intangibles,[114] a new subtype of general intangibles which are essentially receivables that do not meet the definition of an account, chattel paper, or payment intangible,[115] and the sale of promissory notes,[116] a new subtype of "instrument."[117] For these receivables, Article 9 (x) requires the filing of a financing statement to perfect a true security interest in receivables that constitute payment intangibles,[118] (y) requires either the filing of a financing statement or possession by the secured party to perfect a true security interest in promissory notes,[119] but (z) provides that a sale of payment intangibles or promissory notes is automatically perfected upon attachment.[120]

The requirement for the filing of a financing statement to perfect a security interest in receivables arguably has questionable utility.[121] Such filing is not necessary to cure the "ostensible ownership" problem presented by goods. Rather, a potential purchaser of intangible receivables—accounts and payment intangibles—can only determine the existence of those receivables by reviewing the records of the debtor. Because the receivables represent the obligation of an account debtor—a person separate from the debtor—to pay money to the debtor, the potential purchaser can use the records of the debtor to verify the existence of the receivables and to determine whether another prior purchaser has an interest in those receivables.[122] Filing is not necessary because of the nature of these intangible receivables. Accordingly, a filing requirement can be justified only if the net benefit of such filing exceeds the net benefit of the common law methods of perfection.

The same considerations of the questionable utility of the filing requirement for intangible receivables apply to tangible chattel paper and promissory notes when the secured party does not take possession of the tangible chattel paper or promissory notes, which are evidenced by writings. In particular, it is com-

ies of electronic information. This alone makes compliance with UCC § 9-105 challenging."). The provision of Article 9 relating to "control" represents a failure to adhere to the Coherence Principle.

114. *See* U.C.C. § 9-109(a)(3) (2010), *quoted supra* note 2.

115. *See id.* § 9-102(a)(61) (defining a "payment intangible" to mean "a general intangible under which the account debtor's principal obligation is a monetary obligation"); *id.* § 9-102(a)(42), *quoted supra* note 30 (defining a "general intangible" to mean "any personal property, including things in action, other than" all of the other Article 9 types of collateral).

116. *See id.* § 9-109(a)(3), *quoted supra* note 2.

117. *See id.* § 9-102(a)(65) (defining a "promissory note" to mean "an instrument that evidences a promise to pay a monetary obligation, does not evidence an order to pay, and does not contain an acknowledgment by a bank that the bank has received for deposit a sum of money or funds").

118. *See id.* § 9-310(a), *discussed supra* note 33.

119. *See id.* § 9-312(a), *quoted supra* note 34; *id.* § 9-313(a), *quoted supra* note 63.

120. *See id.* § 9-309 (providing that the "following security interests are perfected when they attach: . . . (3) a sale of a payment intangible; [and] (4) a sale of a promissory note").

121. Plank, *Assignment of Receivables*, *supra* note 102, at 249–62.

122. *Id.* at 267 (noting that the records of the owner of receivables, including the financial and accounting records, should identify and account for the obligors on the receivables, the consideration received for the receivables, the collections on the receivables, the proceeds of any assignment of receivables, and if the owner as assignor is collecting them on behalf of the assignee, payments to the assignee). To be sure, a review of the debtor's records may not reveal very recent originations or assignments of receivables, but because most receivables either provide for monthly payments or payment in full within a short period of time—sixty to ninety days—the lag would not likely be significant.

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mon for established originators of these types of receivables to retain possession of tangible chattel paper because of the significant costs in transferring such possession. In the case of these receivables, one could argue that the retention of such possession creates an "ostensible ownership" problem comparable to that for goods.

There is an important distinction, however, between goods and receivables evidenced by tangible chattel paper or promissory notes. The primary value of most types of goods derives from the debtor's possession and use of the goods. Indeed, a primary motivating force behind the development of Article 9 was the need to provide for a simpler method by which the debtor could grant perfected security interests in goods while retaining possession of goods. On the other hand, the primary value of tangible chattel paper and promissory notes does not derive from the value of the tangible form—the value of the paper. The debtor need not retain possession to have the benefits of those receivables—the interest earned and any increase in value from changes in interest rates or other factors. Instead, the value of chattel paper and promissory notes depends primarily on the existence of another person who is obligated to make payments. The piece of paper or other tangible medium embodying the monetary obligation may provide marginally more precise information about the specific terms of the monetary obligation, and its existence in tangible form may increase its negotiability and hence its value. Nevertheless, a potential purchaser of such receivables must rely on the owner's records and its own due diligence of the debtor and the obligor on these receivables to determine most of the value of these receivables.[123]

In the case of a debtor that finances all of its receivables with a single secured party, the filing requirement is a simple and perhaps relatively inexpensive way for the secured party to ensure that it has priority over competing claimants. There are costs to a filing requirement: filing fees, the cost of preparing the financing statement and determining the proper filing office, the cost of mistakes that leave a secured party unperfected, the costs of maintaining the filing office, and the costs of future searches and the review of such searches. For a secured transaction covering "all receivables," these costs may be less than the marginal increase in the costs of due diligence (that is, the increased cost above the necessary due diligence to ascertain the existence and value of the receivables and the financial condition of the debtor) that was required under the common law methods of perfection and the costs arising from the risk of undetected double assignments.

Many originators of a wide variety of receivables, however, do not rely on a single financing source. This is especially true for originators that securitize their receivables. For these originators and their secured parties, the filing system imposes significant costs without providing any meaningful benefit. Each of these originators engages in numerous transactions with different secured parties in which the originator grants to a specified secured party a security interest (typically a buyer's interest) in the specific receivables transferred (or to be trans-

123. *See supra* note 122.

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ferred) pursuant to a specified security/sale agreement. For each transaction, the secured party will file a financing statement indicating that it has a security interest in those receivables identified in the specified security agreement.[124] Each secured party will perform a search of filing office records and will find numerous financing statements each providing notice that the debtor had granted a security interest in those receivables transferred to the identified secured party pursuant to the specified agreement.

These financing statements provide very little meaningful information. Without extensive due diligence to determine the actual receivables covered by each specified security agreement, a potential secured party who has done a search cannot determine whether any of the receivables in which it proposes to take a security interest is subject to any other security agreement. In this case, such potential secured party must rely on representations from the debtor or its own due diligence. Accordingly, even though the debtor and the secured parties must incur the costs of the filing system, they generally operate as if the filing system did not exist.[125]

To the extent that a filing system is not necessary for the regulation of security interests in receivables, the filing requirement for receivables would not be required by the Coherence Principle. The fact that factoring and accounts receivable financing developed and thrived during the first half of the twentieth century without any notice filing regime is strong evidence that the nature of receivables does not require a filing system for the effective regulation of property interests in receivables. Whether a filing system is nevertheless useful then becomes an empirical question. For example, Article 9 does not impose a filing requirement for purchase-money security interests in consumer goods. Although subsequent purchasers could not determine the existence of secret liens on consumer goods without a filing system, the drafters of Article 9 determined that, because of the nature of transactions in consumer goods, the benefits of a filing requirement were not justified by the costs.[126]

124. There has been a debate on whether an indication of the collateral as "all property" transferred pursuant to a specified agreement is sufficient. On the one hand, this formulation does not give any indication of the type of collateral involved. On the other hand, it does provide a means of identifying the collateral through examination of the records under the specified agreement. If an "all assets" filing is acceptable, *see* U.C.C. § 9-504(2) (2010), *quoted supra* note 37, then an "all assets sold pursuant to" a specified agreement should be sufficient. In any event, financing statements in these transactions almost always identify the specific receivables or types of receivables sold pursuant to a specified agreement, e.g., "all automobile loans" or "all student loans" or "all promissory notes," and these are undoubtedly sufficient indications of the collateral.

125. The filing system does provide the name of the secured party and may provide additional information that may assist subsequent purchasers in their due diligence. Nevertheless, even if the subsequent purchaser were to do the due diligence of examining the records of the debtor, there is a question of whether this benefit justifies the costs of the filing requirement.

126. *See* U.C.C. § 9-309(2) (2010) (providing that the "following security interests are perfected when they attach: (1) a purchase-money security interest in consumer goods [except for goods subject to a certificate of title statute]"). To be sure, the cost-benefit analysis for this exception is entirely different from the cost-benefit analysis for eliminating the filing requirement for receivables. The point is that whether to require filing depended on a cost-benefit analysis.

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If there were no filing requirement for perfecting a security interest in receivables and priority did not depend on filing, there would be no conflict between the Filing Priority Principle—an important principle for security interests in goods—and *nemo dat*. However, Article 9 does require filing for perfection of most security interests in receivables and applies the Filing Priority Principle to determine priority between conflicting security interests in receivables. Nevertheless, in resolving conflicts between the Filing Priority Principle and *nemo dat*, courts should take into account the fact that the filing requirement for receivables is not required by the Coherence Principle, whereas a filing requirement is necessary for most goods, and financing statements for many transactions in receivables provide little meaningful information. These limitations should cause courts to be reluctant to expand by implication the Priority Filing Principle beyond the plain language of Article 9 that implements the Filing Priority Principle to override the *nemo dat* rights of the buyers of receivables. On the other hand, despite any disutility in the filing system for receivables, courts should comply with the Plain Language Principle and apply the Filing Priority Principle when the language of the statute so requires.

VI. Sale of Receivables: Incoherence and Conflict in Principles and Language

As noted above, in addition to governing security interests to secure an obligation, Article 9 also governs the sale of accounts, chattel paper, payment intangibles, and promissory notes. Unfortunately, the incorporation of the sale of these receivables was flawed. The original drafters of Article 9 included the sale of accounts and chattel paper, and current Article 9 includes the sale of these receivables as well as payment intangibles and promissory notes, through language that is appropriate for true security interests but that fails to reflect adequately the substance of a sale transaction.[127] Specifically, Article 9 incorporates the sale of receivables through misleading terms of security. More broadly, Article 9 incorporates a sale in a statute that uses a lien paradigm, not a sale paradigm, and that is based conceptually on the transfer of only a limited, not an absolute, interest in property.

The misleading nature of the defined terms used to include the sale of receivables is quite remarkable. Specifically, under former and current Article 9, a "security interest" includes the interest of a buyer of these receivables,[128] a "debtor" includes a seller of receivables,[129] a "secured party" includes the person

127. *See* Plank, *Assignment of Receivables*, *supra* note 102, at 238; Plank, *Sale of Accounts and Chattel Paper*, *supra* note 104, at 402–06.

128. *See* U.C.C. § 1-201(b)(35) (2008) (providing that a "security interest" includes "any interest of . . . a buyer of accounts, chattel paper, a payment intangible, or a promissory note"); U.C.C. § 1-201(37) (1995) (providing that a "security interest" includes "any interest of a buyer of accounts or chattel paper").

129. *See* U.C.C. § 9-102(a)(28)(B) (2010) (providing that "debtor" means "a seller of accounts, chattel paper, payment intangibles, or promissory notes"); U.C.C. § 9-105(1)(d) (1995) (providing that "'[d]ebtor' . . . includes the seller of accounts or chattel paper").

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to whom receivables have been sold,[130] and "collateral" includes receivables that have been sold.[131] The use of these misleading defined terms violates the Plain Language Principle in a general sense[132] as well as the Coherence Principle. It is difficult for both drafters and readers of the statute to keep in mind the substance of the sale transaction because the language used does not reflect the substance. The phrase "security interest" does not convey the concept of a buyer's interest; the word "debtor" does not connote "seller"; "secured party" does not connote "buyer"; "collateral" does not connote property that has been sold. When one reads or writes the words "security interest," one does not easily perceive or think that these words mean "buyer's interest." Because of the use of these misleading terms, drafters and readers of former Article 9 inevitably failed to account for the differences between a sale transaction and the granting of a true security interest.[133]

Second, Article 9 uses a "lien" paradigm that rightly assumes that the "debtor" retains title to the personal property subject to a security interest. Therefore, a debtor can create more than one security interest in the personal property that it owns. In the case of a sale of receivables, however, the "debtor" does not retain any ownership interest. So, while a true security interest does attach to collateral owned by the debtor, a buyer's interest in receivables does not really "attach" to the receivable. Instead, a buyer's interest severs the debtor's interest in the receivable that is sold. For this reason, as I have argued elsewhere,[134] Article 9's treatment of the sales of receivables violates the Coherence Principle.

As a result of the failure to comply with the Coherence Principle and the Plain Language Principle, the treatment of the sale of receivables in the original Article 9 contained many drafting errors,[135] most of which appeared to have been corrected in current Article 9. For example, the default provisions of part 5 of former Article 9 literally applied to buyers and sellers of receivables, even though the concept of default in the performance of an obligation is not inherent in a completed sale transaction. One of these drafting errors had the effect of neutralizing the proper application of another exception to *nemo dat* created by Article 9,

130. *See* U.C.C. § 9-102(a)(73)(D) (2010) (providing that "secured party" means "a person to which accounts, chattel paper, payment intangibles, or promissory notes have been sold"); U.C.C. § 9-105(1)(m) (1995) (providing that "'[s]ecured party' means a lender, seller or other person in whose favor there is a security interest, including a person to whom accounts or chattel paper have been sold").

131. *See* U.C.C. § 9-102(a)(12) (2010) (providing that "'[c]ollateral' means the property subject to a security interest or agricultural lien. The term includes: . . . (B) accounts, chattel paper, payment intangibles, or promissory notes that have been sold"); U.C.C. § 9-105(1)(d) (1995) (providing that "'[c]ollateral' means the property subject to a security interest, and includes accounts and chattel paper which have been sold").

132. In a technical sense, one could argue that the definitions do not violate the Plain Language Principle because a reader can figure out the meaning of the statute by close analysis of the words used.

133. *See* Plank, *Assignment of Receivables*, *supra* note 102, at 238–47; Plank, *Sale of Accounts and Chattel Paper*, *supra* note 104, at 450–75, 482–93.

134. *See* Plank, *Assignment of Receivables*, *supra* note 102, at 236–40.

135. *See* Plank, *Sale of Accounts and Chattel Paper*, *supra* note 104, at 462–70, 482–93.

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the Perfection Principle,[136] to the sale of accounts. Although this drafting error has been corrected in Article 9, and it does not directly implicate the Filing Priority Principle, the existence of the drafting error and its specific solution provide important background for the issue of the extent to which the Filing Priority Principle should be applied to priority contests involving certain perfected buyers of receivables discussed in Parts VII and VIII. The following example 7 illustrates the problem under former Article 9.

Example 7

(unperfected buyer v. later perfected secured party)

The debtor D in the ordinary course of its business assigned large numbers of accounts to secured creditors and buyers in multiple transactions. D owned ten accounts, A1 through A10. On Day 1, D sold one account A1 (which would be considered "a significant part of the assignor's outstanding accounts")[137] to a buyer SP1/B1 pursuant to a sale agreement signed by D for value given by SP1/B1. At this point, under *nemo dat*, D had no rights in A1 because it transferred all of its interest in A1. SP1/B1 had satisfied all of the requirements of section 9-203 of former Article 9 to create an enforceable "security interest" that in this case is a "buyer's" interest—D as debtor had rights, SP1/B1 gave value, and D signed a security/sale agreement.[138] SP1/B1 did not, however, perfect its security/ownership interest. Then, on Day 15, D signed a security agreement granting SP2 a security interest in all of D's accounts, specifically listing accounts A1–A10, and SP2 advanced money to D. SP2 expected to acquire a security interest—which could be either a true security interest or buyer's interest—in the account A1. On Day 16, SP2 attempted to perfect its security interest in D's accounts by filing a financing statement covering accounts.[139] There is no doubt that SP2

136. *See supra* note 12 and accompanying text.

137. This and subsequent examples use a small number of accounts or payment intangibles to simplify the discussion. The examples are intended to represent debtors that engage in the financing of their receivables as a commercial business and are intended not to include the "casual or isolated" assignments of accounts or payment intangibles the assignment of which was automatically perfected under former Article 9, *see* U.C.C. § 9-302(1)(e) (1995), or is automatically perfected under current Article 9, *see* U.C.C. § 9-309(2) (2010), *quoted supra* note 126; *id.* § 9-309 cmt 2.

138. *See* U.C.C. § 9-203(1) (1995). This section stated:

> [Subject to exceptions not relevant here] a security interest is not enforceable against the debtor or third parties with respect to the collateral and does not attach unless:
>
> > (a) the collateral is in the possession of the secured party pursuant to agreement, or the debtor has signed a security agreement which contains a description of the collateral and in addition, when the security interest covers crops growing or to be grown or timber to be cut, a description of the land concerned;
> >
> > (b) value has been given; and
> >
> > (c) the debtor has rights in the collateral.

Id.; *see also id.* § 9-203(2) ("A security interest attaches when it becomes enforceable against the debtor with respect to the collateral. Attachment occurs as soon as all of the events specified in subsection (1) have taken place unless explicit agreement postpones the time of attaching.").

139. *Id.* § 9-302(1).

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acquired a perfected security interest in A2 through A10. But what interest did SP2 have in A1 and what were the relative rights of SP2 as against SP1/B1 under former Article 9?

Date	Action	Effect
Day 0	D owns accounts, A1–A10.	
Day 1	D sells A1 to SP1/B1; no financing statement filed.	SP1/B1 owns account A1.
Day 15	D signs security agreement granting A1–A10 to SP2; SP2 gives value; D has no rights in A1.	a) SP2 has no interest in A1. b) SP2 has security interest in A2–A10.
Day 16	SP2 files financing statement covering accounts.	a) SP1/B1 unperfected, but SP2 has no interest in A1; first-to-file-or-perfect rule does not apply. b) SP2 has perfected security interest in A2–A10.

Under section 9-312(5)(a) of former Article 9, a perfected security interest had priority over an unperfected security interest.[140] Further, former Article 9 unquestionably included the sales of accounts and chattel paper to subject such sale transactions to the same requirements for perfection and priority as applied to the grant of true security interests.[141] The original drafters of Article 9 intended that, in this example, the Filing Priority Principle would override *nemo dat* and give priority to SP2 over SP1/B1. However, the plain language of former Article 9 failed to implement this intent. Section 9-312 of former Article 9 governed conflicts between contending security interests. SP2 did not acquire a security interest in A1 because it did not satisfy all of the conditions for attachment of the security interest to A1. Specifically, on Day 15, D had no rights in A1. The plain language of former Article 9 respected the common law *nemo dat* rights of SP1/B1 and awarded priority to SP1/B1 over SP2 even though SP1/B1 did not perfect its interest. This result, however, contradicted the entire purpose of including the sale of accounts in Article 9 and subjecting such sales to the requirements of filing for perfection.[142]

140. *Id.* § 9-312(5)(a), *quoted supra* note 89.

141. *See* Plank, *Sale of Accounts and Chattel Paper*, *supra* note 104, at 423–25.

142. Former Article 9 also contained a similar though more ambiguous inconsistency between the plain language and the clear policy of Article 9 to require notice filing for the sale of accounts. Assume in example 7 that, instead of SP2 that attempted to acquire a security interest in A1 on Day 15, LC became a lien creditor and obtained a lien on A1 pursuant to levy or garnishment. Under the clear policy of former Article 9 as expressed in section 9-301(1)(b), the unperfected secured party, SP1/B1, should be subordinate to LC. U.C.C. § 9-301(1) (1995), *quoted supra* note 98 (providing the priority rule); *id.* § 9-301(5), *quoted supra* note 98 (providing the definition of "lien creditor"); *id.* § 9-201. But under the express language of former Article 9—section 9-201, to be exact—unless otherwise provided in the UCC, the security agreement by which SP1/B1 acquired its security/ownership was effec-

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This anomaly was not the result of ambiguity in the statute. The language was precise. Thus, this fact pattern illustrated a stark conflict between the result of the plain language of former Article 9 and the clear policy preferences of the drafters of former Article 9.[143]

There was no reported case law resolving the conflict between the plain language of former Article 9 and the policy of former Article 9 to require notice filing and to override the statutory rights of persons under *nemo dat* who did not comply with the notice filing requirements. The lack of cases may be attributable to the fact that the security agreement in favor of the second secured party would typically only grant a security interest in the accounts the debtor then owned or later acquired. By the terms of the grant, SP2 would not get a security interest in the account previously sold. Still, this hypothetical illuminate a conflict between the Plain Language Principle (which respected *nemo dat*), on the one hand, and the Filing Priority Principle. In this particular case, however, the language of the statute producing this result can fairly be considered a mistake. The drafters of Article 9 undoubtedly intended that the Filing Priority Principle apply to subordinate the *nemo dat* rights of buyers of accounts (and non-possessory buyers of chattel paper) that did not perfect their interests. Choosing the Filing Priority Principle over the Plain Language Principle in these cases would have been justified and appropriate.[144]

The 2001 revision of Article 9 resolved the conflicts and ambiguities in favor of the Filing Priority Principle to elevate subsequent secured parties or lien creditors over the earlier unperfected buyer of the accounts and chattel paper. First, the drafters of revised Article 9 expanded the element of attachment in section 9-203(b)(2) that "the debtor has rights in the collateral" to include the phrase "or the power to transfer rights in the collateral to a secured party."[145] Second, the drafters of revised Article 9 added section 9-318(b), which states:

> For purposes of determining the rights of creditors of, and purchasers for value of an account or chattel paper from, a debtor that has sold an account or chattel paper, while the buyer's security interest is unperfected, the debtor is deemed to have rights and title to the account or chattel paper identical to those the debtor sold.[146]

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tive as against LC. Under the security agreement and *nemo dat*, D had no interest in A1 when LC attempted to obtain a lien on A1. Now, here, there was an ambiguity in the statute. Section 9-301 (1)(b) of former Article 9 stated that an unperfected security interest—in this example, SP1/B1's security interest—was subordinate to LC's execution lien on "the property involved." An interpretation that reconciles the ambiguity in favor of the Filing Priority Principle would have given primacy to the language of section 9-301(1)(b), the specific lien creditor priority provision, as an exception to the more general statement of section 9-201.

143. Professor Dan Coenen first identified this problem in 1993. *See* Dan T. Coenen, *Priorities in Accounts: The Crazy Quilt of Current Law and a Proposal for Reform*, 45 VAND. L. REV. 1061, 1076–80 (1992). I tied this erroneous result to the flawed methodology by which the sale of accounts and chattel paper were included in Article 9. *See* Plank, *Sale of Accounts and Chattel Paper*, *supra* note 104, at 489–90.

144. Professor Coenen argued that the significance of the notice policy should prevail. *See* Coenen, *supra* note 143, at 1079.

145. *Compare* U.C.C. § 9-203(b)(2) (2010), *quoted supra* note 26, *with* U.C.C. § 9-203(1) (1995), *quoted supra* note 138.

146. *See* U.C.C. § 9-318(b) (2010).

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This subsection fully implements the notice filing provisions of Article 9 and gives effect to the Filing Priority Principle exception to *nemo dat* when the first transferee has failed to perfect its security interest. Revised Section 9-203(b)(2) and new section 9-318(b) also implement the Plain Language Principle, even if it adds to the Rube Goldberg nature of the incorporation of the sale of receivables in Article 9 in violation of the Coherence Principle.

VII. No Filing Priority Against Perfected Buyers of Intangible Receivables

In this Part, I analyze an issue that had not been addressed during the revision of former Article 9's treatment of the sale of receivables: the extent to which the Filing Priority Principle applies to override the *nemo dat* rights of a perfected buyer of an account or payment intangible. Section 9-322(a)(1) governs conflicts among "security interests." Therefore, that section *does* subordinate a perfected buyer of an account or payment intangible to a secured party that files a financing statement before the buyer becomes perfected *if*, before the buyer becomes perfected, the secured party satisfies all of the elements for attachment of a security interest in the account or payment intangible.[147] Before the buyer becomes perfected, the debtor must acquire rights in or the power to transfer rights in the account or payment intangible, and the secured party must become a secured party under a security agreement and give value. In this instance, both the first filing secured party and the perfected buyer acquire a security interest. Under the Plain Language Principle, the Filing Priority Principle codified in the first-to-file-or-perfect rule of section 9-322(a)(1) applies and the first filer prevails.

Unlike the case of an unperfected buyer of an account, however, the plain language of the first-to-file-or-perfect rule of section 9-322(a)(1) does *not* subordinate a perfected buyer of an account or payment intangible to an intended secured party (including an intended buyer) that (i) files a financing statement *before* the buyer becomes perfected but (ii) either does not become a secured party under a security agreement or does not gives value in either case until *after* the buyer had become perfected. In this instance, the perfected sale by the debtor divested the debtor of any rights in the sold account or payment intangible. Further, there is no express provision of Article 9 (or other property law) that gives D the power to transfer rights in an account or payment intangible that it has sold. Accordingly, the first filing, intended secured party cannot satisfy all of the requirements for attachment under section 9-203 and therefore cannot acquire a security interest.[148] Section 9-322(a)(1), which governs priority among security interests, never applies, and the rights of the perfected buyer are protected under section 9-201.

147. *Id.* § 9-203(b), *quoted supra* note 26.
148. *Id.*

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Of course, to the extent that a court would, despite the absence of any express statutory provision, imply that D has the power to transfer rights in the account as Professors Harris and Mooney and others have argued, as discussed in Part VII.B, then the intended secured party could acquire a security interest in the sold account, and the first-to-file-or-perfect rule of section 322(a)(1) would apply. Such power to transfer rights, however, must be inferred from a policy of Article 9—presumably from the Filing Priority Principle. Such power cannot be deduced from the plain language of any provision of Article 9. The first-to-file-or-perfect rule does not supply the requisite language because the plain language of that rule requires the existence of competing security interests. Rights in collateral or the power to transfer rights in the collateral is a precondition to the existence of a security interest. The plain language of the rule of section 9-322(a)(1) awarding priority to one of several competing perfected security interests cannot be read to give a debtor the power to create one of the competing security interests.

The absence from Article 9 of any plain language giving D the power to transfer rights in an account that D sold in a perfected sale contrasts sharply with other provisions of Article 9 that do give debtors the power to transfer rights that they do not have. These express provisions give the following debtors the power to transfer rights that they do not have: debtors that have sold an account in an unperfected sale,[149] debtors that retain possession of tangible chattel paper or promissory notes discussed in Part VIII below, debtors that grant unperfected security interests in collateral,[150] and debtors that have sold inventory to buyers in ordinary course.[151] Even the language of the real estate recording acts give grantors of unperfected interests in real property the power to transfer rights that they do not have by declaring the unperfected transfer void or of no effect as against certain purchasers.[152] In contrast, there is no express provision of Article 9 that gives the seller of an account that has been sold in a perfected sale the power to transfer rights to a subsequent perfected buyer. Accordingly, under the Plain Language Principle, section 9-201 of Article 9, which unless otherwise provided in the UCC makes a security agreement/sale agreement for the perfected sale of accounts effective between the parties, against purchasers of the "collateral"—the sold accounts—and creditors, governs the rights of the subsequent perfected buyer, not the first-to-file-or-perfect rule of section 9-322(a)(1).

This result arises in two different factual patterns. In one fact pattern, discussed in Part VII.A below, the intended secured party pre-files a financing statement covering some or all of the debtor's accounts or payment intangibles but becomes an intended secured party under a security agreement or gives value only after the debtor has sold some or all of the same accounts or payment intangibles to a buyer that promptly perfected its interest. The failure under the Plain Language Principle of the pre-filing intended secured party to prevail in

149. *See supra* notes 135–45 and accompanying text, including example 7.
150. *See* U.C.C. § 9-322(a)(2), *quoted supra* note 12.
151. *See id.* § 9-320(a), *quoted supra* note 11.
152. *See supra* notes 48–49 and accompanying text.

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this instance differs from the application of the Filing Priority Principle to true security interests as illustrated by example 3, although it is consistent with the application of *nemo dat* illustrated by example 5 in the case of the sale of equipment before the intended attachment of the security interest. For this reason, this example has generated much discussion. Subpart A below analyzes this fact pattern, and then Subpart B addresses the arguments that seek to imply a priority for the intended secured party.

The second instance of the failure of section 9-322(a)(1) to implement the Filing Priority Principle arises when a debtor has entered into two or more security/sale agreements for the sale of discrete batches of receivables on a continuous basis to different buyers, each of which files a financing statement and is perfected, and then the debtor (typically inadvertently) makes a double assignment of the same receivable to two buyers. Under the plain language of Article 9, the buyer that prevails is the buyer that is the first to perfect, not the first to file. Subpart C analyzes this situation. This example is much more likely to arise in commercial transactions, and policy reasons more strongly justify the application of *nemo dat*, as implemented by the Plain Language Principle, to the current wording of section 9-322(a)(1) and rejection of the application of the Filing Priority Principle, whether by implication or amendment to the statute.

Subpart D discusses the policy considerations for the two situations presented in Subparts A and C. Finally, Subpart E below analyzes how the current wording of section 9-322(a)(1) might induce a reader to imply Filing Priority Principle, whereas a revision of that section using terms of ownership would more easily make a reader conscious of the nature of the transaction. This greater transparency would therefore permit a more fully informed consideration of the pros and cons of applying the Filing Priority Principle to the perfected buyers of accounts and payment intangibles as against a pre-filing but subsequent intended secured party that under the Plain Language Principle fails to obtain a security interest.

A. A Perfected Buyer v. A Pre-filing but Subsequent Intended Secured Party

The revisions to Article 9 were intended to resolve the inconsistencies that existed in former Article 9 dealing with the sale of accounts and chattel paper.[153]

153. In 1994, I analyzed these failures and suggested that former Article 9 be revised to use language appropriate for a sale, with a draft of such a revision. *See* Plank, *Sale of Accounts and Chattel Paper*, *supra* note 104, at 482–93, 497–520. I was advised by a member of the drafting committee for revised Article 9 that it considered but finally decided to reject my proposals and to retain the existing use of misleading defined terms. However, at the drafting committee's request, I prepared a memorandum that identified the problematic provisions and suggested drafting language to solve them. *See* Memorandum from Thomas E. Plank, Annotated Version of Current Article 9 with Notes and Suggested Amendments (Using Current Methodology for Incorporating Sale of Payment Rights (June 15, 1995) (copy on file with *The Business Lawyer*), which the reporters kindly acknowledged. *See* Reporters' Prefatory Notes, Uniform Commercial Code Revised Article 9, at 1–2 (Council Draft Nov. 17, 1995). My proposed draft identified the problem for the unperfected described in example 7 but did not identify the problem presented by example 8.

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However, in 2006, the late Don Rapson identified what he considered a glitch in revised Article 9. He first pointed out that the language of Article 9 fails to give priority to an intended secured party that pre-files a financing statement covering receivables before a buyer of receivables perfects its interests but that receives an authenticated security agreement and gives value after the buyer becomes perfected.[154]

The following example 8 illustrates the conflict between the pre-filing intended secured party that never gets a security interest versus the perfected buyer of an account or payment intangible:

Example 8

(pre-filer v. later perfected buyer)

D owns ten accounts, A1 through A10. On Day 1, with D's authorization, SP1 files a proper financing statement covering all of D's accounts. SP1 has no interest in D's accounts. On day 15, D sells account A1 to buyer SP2/B2 pursuant to a sale agreement (which is a "security agreement") signed by D for value given by SP2/B2. After this sale, under *nemo dat*, D no longer has rights in A1 because it transferred all of its interest to SP2/B2. Because SP2/B2's interest is not yet perfected,[155] however, D retains the power to transfer rights under section 9-318(b).[156] On Day 16, SP2/B2 perfects its interest by filing a financing statement covering A1. Under *nemo dat* and also under the express provisions of section 9-318(a),[157] D does not have any rights in A1, and there is no express provision of Article 9 (or other property law) that gives D the power to transfer rights under section 9-203(b)(2).[158] Then, on Day 30, D signs a security agreement granting SP1 a security interest in D's accounts A1 through A10, and SP1 advances money to D. SP1 now has a security interest in D's accounts, A2 through A10, that D owned on Day 30. Because SP1 had previously filed a proper financing statement covering D's accounts, SP1's security interest is simultaneously perfected in those accounts on Day 30.

However, because a security interest does not attach until all of the requirements of section 9-203(b) are satisfied, including the requirement that the debtor have rights in the collateral or the power to transfer rights in the collateral, under the Plain Language Principle, SP1 does not acquire a security interest

154. Plank, *Assignment of Receivables*, *supra* note 102, at 246 & n.69 (citing Barclay Clark & Barbara Clark, *Revised Article 9: A Drafting Glitch on Priorities*, CLARKS' SECURED TRANSACTIONS MONTHLY, May 2006, at 1); Harris & Mooney, *supra* note 19, at 303–04. I then noted that this potential "glitch" in Article 9 also would preclude the application of the Filing Priority Principle to multiple perfected buyers of accounts, discussed in Subpart C below.

155. Again, this and subsequent examples use a small number of accounts or payment intangibles to simplify the discussion, and are intended not to include the "casual or isolated" assignment of accounts or payment intangibles the perfection of which is automatic under U.C.C. section 9-309(2) (2010), *quoted supra* note 126; *id.* § 9-309 cmt. 2.

156. *See supra* notes 135–47 and accompanying text, including example 7.

157. U.C.C. § 9-318(a) (2010), *quoted infra* note 163.

158. As discussed in Part VII.B, some argue that the pre-filing gives D this power. The plain language of Article 9 does not support such an argument.

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in A1.[159] D had sold A1 to SP2/B2, and SP2/B2's buyer's interest became perfected on Day 16. The plain language of section 9-201 provides that SP2/B2's security agreement/sale agreement is effective against purchasers unless otherwise provided in the UCC, and under *nemo dat* and section 9-318(a), D had no "rights" in A1 on Day 30. Further, because no express provision of Article 9 (or other property law) gives D the power to transfer rights in an account that it has sold in a perfected sale, under the Plain Language Principle D does not have the "power to transfer rights" in A1.

Date	Action	Effect
Day 0	D owns accounts, A1 through A10.	
Day 1	SP1 files financing statement.	D owns accounts unencumbered.
Day 15	D signs security agreement selling A1 to SP2/B2, which gives value.	a) SP2/B2 owns A1. b) D has no rights in A1 but has power to transfer rights in A1.
Day 16	SP2/B2 files financing statement covering A1.	a) SP2/B2's interest is perfected. b) D has no rights or power to transfer rights in A1.
Day 30	D signs security agreement granting security interest to SP1 in accounts A1 through A10; SP1 gives value.	a) SP1 has perfected security interest in accounts A2 through A10. b) SP1 has no interest in A1.

In example 8, the plain language of the first-to-file-or-perfect rule of section 9-322(a)(1) does not apply to account A1. That subsection governs conflicts only between perfected security interests. Because under the express provision of Article 9, D has no rights in A1 or the power to transfer rights in A1, under section 9-203(b)(2), which conditions attachment on a debtor having rights in the collateral or the power to transfer rights in the collateral, SP1 never acquires a security interest in A1.

Don Rapson and other commentators have decried this result.[160] Under this result, any intended secured party seeking to take a security interest in a debtor's accounts or payment intangibles cannot rely on pre-filing a financing statement to obtain a priority security interest in accounts or payment intangibles sold by the debtor before the pre-filer closes its financing transaction by obtaining

159. *See* U.C.C. § 9-203(b) (2010), *quoted supra* note 26.

160. Plank, *Assignment of Receivables*, *supra* note 102, at 246 & n.69 (citing Barclay Clark & Barbara Clark, *Revised Article 9: A Drafting Glitch on Priorities*, CLARKS' SECURED TRANSACTIONS MONTHLY, May 2006, at 1); Harris & Mooney, *supra* note 19, at 303–04, *discussed in* text accompanying *infra* notes 169–75; Kettering, *supra* note 107, at 536–37 & n.106.

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a security agreement and giving value. In the case of accounts, the pre-filer would need to conduct a search on the eve of the closing to ascertain whether a buyer of accounts had filed a financing statement. In the case of payment intangibles, the pre-filer would lose against the buyer of a payment intangible, which is perfected upon attachment. The necessity for a search in the case of accounts and the inability to use the filing system to learn of the sale of payment intangibles suggests that this result is inconsistent with the Filing Priority Principle that the first-to-file-or-perfect rule seeks to advance. On the other hand, the result for SP1 and A1 is exactly the same as the result for SP1 and E1 in example 5 above. Moreover, as discussed below, the policy reasons for implying a Filing Priority Principle not based on statutory language in this case are not sufficient to overrule the Plain Language Principle as implemented by the precise language of sections 9-201, 9-203(b), and 9-322(a)(1).

Furthermore, if SP1 failed to acquire a security interest in A1 (or any other accounts) because D did not sign a security agreement or SP1 did not give value, then section 9-322(a)(1) also would not apply. SP1 would not have acquired a security interest, and under section 9-201 and *nemo dat*, SP2/B2 would retain its ownership interest in A1.

There is an important analytical point to be made on the result described in example 8. Don Rapson attributed this result to the addition of section 9-318(a) in the 2001 revision of Article 9, and he believed that this result would not have occurred under former Article 9.[161] That position is not correct.[162] True, section 9-318(a) expressly enacted *nemo dat* as it relates to the sale of receivables. It provides: "A debtor that has sold an account, chattel paper, payment intangible, or promissory note does not retain a legal or equitable interest in the collateral sold."[163] But this language is not necessary to produce the result described in example 8.

Section 9-201 in effect under both current Article 9 and former Article 9 states that, unless otherwise provided in the UCC, a security agreement is effective against the debtor, purchasers of collateral, and creditors.[164] When SP2/B2 perfects its buyer's interest in A1 on Day 16 in example 8, its sale agreement is therefore effective against the pre-filing SP1. Under Section 9-201 and *nemo dat*, because SP2/B2 has the interest of a buyer in A1, D was divested of any property interest in A1. There is no express provision of Article 9 (or other property law) that gives D the power to transfer rights in A1 to anyone. Therefore, under section 9-203(b)(2) of current Article 9 and section 9-203(1)(c) of former Article 9, SP1 cannot satisfy the requirement for attachment of a security interest that D have rights in A1 or, under section 9-203(b)(2) of current Article 9, the

161. Plank, *Assignment of Receivables*, *supra* note 102, at 246 & n.69 (citing Barclay Clark & Barbara Clark, *Revised Article 9: A Drafting Glitch on Priorities*, CLARKS' SECURED TRANSACTIONS MONTHLY, May 2006, at 1).

162. Plank, *Assignment of Receivables*, *supra* note 102, at 246–47 (citing the requirements).

163. *See* U.C.C. § 9-318(a) (2010).

164. *See id.* § 9-201(a), *quoted supra* note 57; U.C.C. § 9-201 (1995).

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power to transfer rights in A1.[165] SP1 cannot obtain a security interest in A1 on Day 30. Under section 9-322(a)(1) of current Article 9 and section 9-312(5)(a) of former Article 9, the first-to-file-or-perfect rule only applies to conflicting "security interests."[166] If section 9-318(a) were deleted from Article 9, the result in example 8 would remain the same under current Article 9, just as the result would have been the same under former Article 9 without any provision comparable to section 9-318(a).

To illustrate this point further, reverse the facts in example 8: SP1 buys an account A1 from D on Day 1 (D signs a security/sale agreement and SP1 gives value) and perfects its interest on Day 1 by filing a financing statement. Then, on Day 15, D grants to SP2 a security interest in account A1, after which SP2 files a financing statement. Because D sold the account A1 on Day 1, SP2 never acquires a security interest in A1, and the first-to-file-or-perfect rule of section 9-322 does not apply. SP2 does not have a security interest in A1 and there are therefore no competing "security interests." Instead, section 9-201 of current and former Article 9 provides that the security agreement effecting the sale of A1 to SP1 is effective against SP2. Although this result is consistent with section 9-318(a), this analysis would be the same under former Article 9 and under current Article 9 without section 9-318(a).

B. Implying Rights from the Filing Priority Principle

In 2010, the American Law Institute and the Uniform Law Commission, formerly NCCUSL, approved revisions to Article 9 that had been proposed by the Joint Review Committee appointed by the Uniform Law Commission and the American Law Institute in 2008. During the deliberations on these changes, in response to a memorandum prepared by Professor Kenneth Kettering,[167] the Joint Review Committee initially added a comment to section 9-318 to the effect that the Filing Priority Principle of section 9-322(a)(1) should give a person that pre-files a financing statement priority over a perfected buyer of an account when the debtor later purports to grant to the pre-filing person a security interest in the account.

I objected to the inclusion of this comment. My principal concern was not so much the specific result but the use of a comment that contradicts the plain language of section 9-322(a)(1)—governing conflicts between security interests—and section 9-203(b)(2), which requires that a debtor have rights in collateral or the power to transfer rights to create a security interest. I stated that, if the Review Committee wanted to obtain the result suggested by the comment,

165. *See* U.C.C. § 9-203(b)(2) (2010), *quoted supra* note 26; U.C.C. § 9-203(1)(c) (1995), *quoted supra* note 138.

166. *See* U.C.C. § 9-322(a)(1) (2010), *quoted* in text accompanying *supra* note 70; U.C.C. § 9-312(5)(a) (1995), *quoted supra* note 89.

167. *See* Memorandum from Kenneth C. Kettering to Edwin E. Smith & Steven Harris (Oct. 7, 2008) (on file with *The Business Lawyer*); *see also* Memorandum from Kenneth C. Kettering, Assoc. Professor, N.Y. Law Sch., to Lance Liebman et al. (June 21, 2006) (on file with *The Business Lawyer*); Kettering, *supra* note 107, at 536 n.106.

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then it should amend Article 9 to implement the result.[168] At the meeting of Joint Review Committee in Minneapolis on September 25–26, the Joint Review Committee decided to delete the comment and not to propose an amendment to Article 9 to address the issue.

In their 2011 law review article, Professors Harris and Mooney argue that, like the proposed and then deleted comment to section 9-318, the Filing Priority Principle should apply to the pre-filing secured party notwithstanding the plain language of section 9-322(a)(1), section 9-203(b)(2), and section 9-318(a)—the express statement of *nemo dat* as it relates to the sale of receivables. They argue that the first-to-file-or-perfect rule of section 9-322(a) gives, by implication, a debtor that has sold an account or payment intangible to a perfected buyer after an intended secured party has pre-filed a financing statement the power to transfer that receivable to the intended secured party:

> Implicit in the [first-to-file-or-perfect] rule is that a debtor retains "the power to transfer rights" (as that phrase is used in section 9-203(b)(2)) that the debtor previously assigned, even though the debtor retains no legal or equitable interest in the sold accounts under section 9-318(a).[169]

As discussed above, the language of the section 9-322(a)(1) rule does not support this argument. The first-to-file-or-perfect rule is clearly and precisely drafted. It specifies a rule for resolving priority contests between perfected security interests. It is part of a section that specifies rules for resolving priority contests between or among a variety of security interests. There is nothing in the language of the first-to-file-or-perfect rule from which to imply a power by the debtor/seller to transfer rights that the debtor/seller does not have and thereby create a competing security interest that would become subject to section 9-322(a)(1).[170]

They build their argument on an accurate and sophisticated analysis of how the first-to-file-or-perfect rule allows a debtor that had previously transferred a first priority perfected true security interest to one secured party to transfer a first priority perfected security interest to another secured party that was the second to perfect its interest but was the first to file a financing statement. They present an example ("Example A") of a factual pattern that is substantially the same as example 3 above, only it uses an account as collateral. They point out that, when D grants to SP2 a security interest in the collateral—the equipment or account—on Day 15, D no longer has the rights represented by that security interest, which is an interest in the collateral to secure payment of an obligation. Under *nemo dat*, D cannot transfer those rights to SP1, and SP2 has those rights.

168. *See* Memorandum from Thomas E. Plank to Edwin E. Smith (Chair, UCC Article 9 Review Comm.), Steven L. Harris (Reporter, UCC Article 9 Review Comm.), and Stephen L. Sepinuck (ABA Advisor) re March 2009 Draft—Proposed Comment 5 for Section 9-318 (June 28, 2009) (on file with *The Business Lawyer*) [hereinafter Plank Memorandum]. I also proposed specific language, a new subsection (c), to provide the statutory basis for implementing the result.

169. Harris & Mooney, *supra* note 19, at 304; *see also id*. at 308–09 (applying the same analysis for payment intangibles).

170. *See supra* notes 157–59 and accompanying text.

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No person other than SP2 is entitled to be paid out of the collateral item before SP2 is paid. Nevertheless, the first-to-file-or-perfect rule of section 9-322(a) gives D the power—not the right—to transfer SP2's rights in the collateral—SP2's security interest—to SP1 if SP2 does not file its financing statement before SP1. In this case, the Filing Priority Principle enacted by section 9-322(a)(1) overrules SP2's rights—its security interest—under *nemo dat*.

Professors Harris and Mooney then apply this effect to the contest between a perfected buyer of an account and an intended secured party that filed first but that gave value second:

> [1] The application of FTFOP [the first-to-file-or-perfect rule] in the context of a sale (Example B) [comparable to example 8 above] overrides nemo dat in precisely the same manner as it does when two competing collateral assignments [that is, grants of true security interests] are involved (Example A) [comparable to the security interest in E1 in example 3 above). [2] In each case D's power to transfer more than D has is implicit in the priority rule.[171]

The first statement, sentence [1], is not correct. Their more sophisticated description of the effect of the Filing Priority Principle on the *nemo dat* rights of a first-to-perfect-but-second-to-file SP2 should not distract from the source of this effect—the plain language of the statute. In their Example A and my example 3 as modified to substitute an account A1 for an item of equipment E1, D grants to SP2 only a security interest, not complete ownership. D retains "title" or ownership to the collateral, subject to SP2's security interest, and D's other rights as owner of the collateral discussed above.[172] The debtor D retains rights in the collateral under section 9-203(b)(2) and therefore can create a security interest in favor of SP1, which is the second security interest to attach and to become perfected. Significantly, SP1's later security interest relies on this element, the debtor's rights. The debtor's rights precede the creation of the security interest. Once SP2 and SP1 have a security interest, section 9-322(a)(1) then applies to permit, retroactively, the transfer of SP2's security interest to the first filing SP1. D has the power to transfer other rights in the collateral, SP2's security interest, to SP1 because D retains its own rights in the account (or equipment) that permit D to create a security interest that becomes subject to section 9-322(a)(1). Hence, their second statement is also not correct. In the case of competing collateral assignments, D's power to transfer more rights than D has is expressly stated in the statute, whereas in the case of the perfected buyer against a pre-filing intended secured party, the express language of the statute requiring the existence of conflicting perfected security interests precludes such power.

The authors continue: "The proper *result* is that SP1's security interest attaches to the accounts previously bought by SP2, and SP2 now owns the accounts subject to SP1's security interest."[173] This statement reveals the real argument.

171. Harris & Mooney, *supra* note 19, at 304.
172. *See supra* notes 78–81 and accompanying text.
173. Harris & Mooney, *supra* note 19, at 304.

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Essentially, the authors believe that the *policy* behind the first-to-file-or-perfect rule—the Filing Priority Principle—justifies applying the rule to a situation that is precluded by the express language of the rule.

Professors Harris and Mooney also state that section 9-318(b) "has no bearing on the analysis." Actually, the background for the enactment of section 9-318(b) and its language undercut the implied application of the first-to-file-or-perfect rule to the perfected buyer. As example 7 discussed above illustrates,[174] former Article 9 did contain a significant "glitch." The plain language of sections 9-312(5)(a) and 9-203(1)(c) of former Article 9 collectively protected an unperfected buyer of an account from an intended secured party (a) to whom the debtor/seller subsequently attempted to grant a security interest in the same account and (b) that had filed a financing statement. Unquestionably, this result would have been contrary to the entire purpose of subjecting sales of accounts to the filing requirements of Article 9. Therefore, this result was a drafting error, one of many drafting errors in former Article 9 regarding the sale of accounts and chattel paper.[175]

Significantly, the addition of section 9-318(b) specifically addressed this particular drafting error. The drafters of revised Article 9 adopted a plain language statutory resolution of the conflict between the plain language of former article 9 (and its underlying principle of *nemo dat*) and the important Filing Priority Principle. Similarly, the drafters of revised Article 9 could have overruled the plain language of Article 9 to allow, in effect, a pre-filer of a financing statement to encumber an account owned by the debtor at the time of the filing of the financing statement but not at the time that the debtor signs a security agreement and receives value. Undoubtedly they did not do so because no one perceived the result in example 8 as a problem to be solved. Nevertheless, that the drafters of the current version of Article 9 crafted a specific statutory provision in section 9-318(b) to implement the Filing Priority Principle against an unperfected buyer of accounts and chattel paper to solve a problem that had not been perceived in the original drafting of former Article 9 suggests that the proper course of action, if the Filing Priority Principle is to be applied to buyers that first perfect their security interests in accounts, is amendment[176] of the express language of Article 9 to achieve this result and not the implication of a result that is not expressed in the statute.

To address Professors Harris and Mooney's policy arguments, Subpart D analyzes the extent to which the policy supporting the Filing Priority Principle should overrule the Plain Language Principle and *nemo dat* in the case of the pre-filing intended secured party and the first-to-perfect buyer of accounts. However, there is another, more significant, instance in which there is a conflict

174. *See supra* notes 135–45 and accompanying text.

175. *See* Plank, *Sale of Accounts and Chattel Paper*, *supra* note 104, at 462–70, 482–93.

176. Professor Stephen Sepinuck has suggested that Article 9 should be amended to provide for the specified result. *See* Stephen Sepinuck, *Perfecting Article 9: A Partial Prescription for the Next Revision*, 46 GONZ. L. REV. 555, 557–59 (2011).

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between the application of an implied Filing Priority Principle espoused by Professors Harris and Mooney, on the one hand, and *nemo dat* and the Plain Language Principle, on the other hand, that Professors Harris and Mooney do not address. This is the case of competing perfected buyers of intangible receivables. Subpart C below analyses this conflict. Thus, Subpart D can analyze the policy implications of applying the Filing Priority Principle in the situations presented by both Subpart A above and Subpart C below.

C. Competing Perfected Buyers of Receivables

If a debtor has signed security agreements in favor of two secured parties that include a security interest in D's after-acquired property, and D then acquires collateral, the security interests of both secured parties will attach simultaneously, and the first-to-file-or-perfect rule of section 9-322(a)(1) will determine the priority of these security interests. However, if a debtor has signed in favor of two secured parties security agreements that provide for delayed attachment—as is the case for most sales of receivables—the first-to-file-or-perfect rule does not apply to protect the first filer against the first buyer that perfects. In this type of priority contest, the plain language of section 9-201 and section 9-203(b)(2) create a "first-to-perfect" rule based on the "first to attach." Further, this result obtains even without regard to pre-filing by one intended secured party. Example 9 illustrates the point:

Example 9

(contest between perfected buyers)

D owns and originates accounts. On Day 1, D signs a sale agreement providing for the sale of accounts to SP1/B1 designated by D. D designates account A1 for sale, and SP1/B1 gives value and files a financing statement covering accounts sold to SP1/B1 pursuant to its sale agreement with D dated as of Day 1. Then, on Day 15, D signs a sale agreement providing for the sale of accounts to SP2/B2 designated by D. D by mistake designates account A1 for sale to SP2/B2, and SP2/B2 gives value and files a financing statement covering accounts sold to SP2/B2 pursuant to its sale agreement with D dated as of Day 15. Because SP1/B1 acquired a perfected buyer's interest (which is a security interest) in A1 on Day 1, D did not have rights in A1 and there is no express provision of Article 9 (or other property law) that gives D the power to transfer rights in A1 to SP2/B2 on Day 16. Therefore, SP2/B2 never acquires a security interest in A1. Although SP1/B1 was the first to file a financing statement, the first-to-file-or-perfect rule does not award priority to SP/B1 because there are no competing security interests. SP1/B1 has ownership and SP2/B2 has nothing by virtue of section 9-201 and *nemo dat*. Hence, although SP1/B1 was the first to file, the filing was relevant only to achieve perfection and was not independently relevant for priority as against SP2.

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Then, on Day 25, D originates and acquires account A2. On Day 30, D sells account A2 to SP2/B2 by designating it for sale to SP2/B2, which gives value. Then, on Day 35, D by mistake sells account A2 to SP1/B1 by designating it for sale to SP1/B1, which also gives value. Again, because SP2/B2 acquired a perfected buyer's interest in A2 on Day 30, under section 9-201 and *nemo dat*, D did not have rights in A2 on Day 35. There is no express provision of Article 9 (or other property law) that expressly gives D the power to transfer rights in A2 to SP1/B1 on Day 35. Therefore, SP1/B1 never acquires a security interest in A2. Although SP1/B1 was the first to file a financing statement, SP2/B2 will own A2. Here, SP1's prior filing was not relevant for priority as against SP2.

Date	Action	Effect
Day 1	D signs sale agreement providing for sale of accounts to SP1/B1 designated by seller; D designates account A1, which it owns, for sale; SP1/B1 gives value and files financing statement covering accounts sold pursuant to sale agreement with SP1/B1. D no longer has rights or power to transfer rights in A1.	SP1/B1 has perfected buyer's interest in A1.
Day 15	D signs sale agreement providing for sale of accounts to SP2/B2 designated by seller; D designates account A1, which it does not own; SP2/B2 gives value and files financing statement covering accounts sold pursuant to sale agreement with SP1/B1.	SP2/B2 has no interest in A1. SP1/B1 retains ownership interest under section 9-201.
Day 25	D acquires account A2.	D owns account A2 unencumbered.
Day 30	D designates account A2 for sale to SP2/B2 under its sale agreement; receives value. D no longer has rights or power to transfer rights in A2.	SP2/B2 has perfected buyer's interest in A2.
Day 35	D designates account A2 for sale to SP1/B1 under its sale agreement; receives value.	SP1/B1 has no interest in A2. SP2/B2 retains ownership interest under section 9-201.

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In Example 9, SP1/B1's financing statement covered the account A2 that D had sold to SP2/B2 on Day 30. Under the plain language of Article 9, however, that financing statement is not effective to give D rights in A2. Filing is important for both SP1/B1 and SP2/B2, but only to perfect the security interest/buyer's interest in accounts that either SP1/B1 or SP2/B2 acquire. Accordingly, between SP1/B1 and SP2/B2, the first to attach and to perfect wins. Such attachment and perfection deprives the debtor D of any rights in the same account and there is no express provision of Article 9 (or other property law) that gives D the power to transfer rights in the same account that it has sold in a perfected sale to any other intended secured party. Therefore, the first of SP1/B1 or SP2/B2 to attach and perfect prevents the other from acquiring any interest in the accounts.

Professors Harris and Mooney do not address this particular operation of the Plain Language Principle in contradiction to the Filing Priority Principle in the case of account A2. Presumably, the logic of their argument would apply to give SP1/B1 as the first filer priority in A2 over SP2/B2 as the first to attach and therefore to perfect. As I understand their argument, the filing of the first financing statement by SP1/B1 and the Filing Priority Principle give D an "implied" power to transfer rights to SP1/B1 that it did not have under the express and plain language of Article 9. The policy basis for this argument, however, appears to be much weaker than that for protecting a pre-filing intended secured party as described in example 8 in Subpart A above.

D. The Strength of the Policy Arguments

As noted above, section 1-103(a) of the UCC states that Article 9 "should be liberally construed and applied to promote its underlying purposes and policies."[177] The Plain Language Principle, *nemo dat*, and the Filing Priority Principle are all important "purposes and policies" of Article 9. Courts should follow the plain language of the statute and should not amend the plain language of a statute for policy reasons unless those reasons are compelling.[178] Nevertheless, when the failure of the plain language to implement a very strong and clear policy of the drafters, be it the Filing Priority Principle, *nemo dat*, or some other important principle, is a demonstrable error, then a court should apply the policy.

The error in former Article 9 that would have enabled an unperfected buyer of accounts to have priority over an intended secured party under a signed security agreement that gave value and filed a financing statement, illustrated in example 7 and discussed in Part VI above,[179] is one such case. Following the plain language of the statute in that case would have defeated the entire purpose of including sales of accounts and chattel paper in Article 9. Another example of resolving the conflict in principles is the court's solution to the double debtor problem under former Article 9, in which the court elevated the *nemo dat* principle over the Plain Language Principle because the plain language of the

177. U.C.C. § 1-201(b)(29), (30) (2008), *quoted supra* note 45.

178. *See supra* note 4 and accompanying text.

179. *See supra* notes 135–45 and accompanying text.

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first-to-file-or-perfect rule of section 9-312(5)(a) did not serve the purpose of the Filing Priority Principle.[180]

However, the priority contest between a perfected buyer of a receivable and an earlier filer of a financing statement who does not acquire a security interest in a receivable—SP1 in example 8 with respect to account A1 and SP1/B1 in example 9 with respect to account A2—because the debtor sells the receivables to the perfected buyer—SP2/B2 in both examples[181]—does not raise the same policy concerns. In addition, implying a result in the case of the pre-filing intended secured party as against a perfected buyer would have different ramifications than the ramifications of implying a result for the competing buyers of receivables. For this reason alone, having the courts imply a result different from the express language of the statute is less desirable than a legislative process to analyze and address the conflicting policy concerns of the different situations.

This Subpart first addresses the policy concerns arising from example 8, in which an intended secured party SP1 pre-files a financing statement, the debtor then sells an account to SP2/B2 in a perfected sale, and then SP1 becomes an intended secured party under a security agreement but never acquires a security interest. An initial reason for not implying that the first-to-file-or-perfect rule gives the debtor D rights or powers it does not otherwise have is the fact that the actual issue will rarely arise. Recall example 8. The priority conflict arises only if on Day 30 D grants to SP1 a security interest in a specific receivable identified by name—A1 in example 8—that D has sold to SP2/B2 on Day 15. If, however, the security agreement states that D grants to SP1 a security interest in D's receivables "now owned or hereafter acquired"—a typical formulation for security agreements—then by the terms of the security agreement itself SP1 would have no claim to the receivable A1 sold by D to SP2/B2 on Day 15. Similarly, if the security agreement states that D grants to SP1 a security interest in all of D's "right, title, and interest in the receivables listed on schedule A"—another typical formulation for security agreements—and receivable A1 is mistakenly listed on schedule A, again by the terms of the security agreement, SP1 would have no claim to receivable A1 sold by D to SP2/B2 on Day 15.[182]

The operation of the Plain Language Principle does put the burden on the pre-filing SP1 to do due diligence to ascertain that debtor D still owns the receivables on Day 30. This is a burden that all secured parties share—to determine whether the debtor owns the collateral that it purports to pledge or sell to an intended secured party.

One argument for giving the pre-filer priority is the ability of the buyer to do a search for the pre-filed financing statement. This argument, however, is not enough to justify giving a pre-filer priority over a buyer of equipment that takes delivery, as in example 5 in Subpart IV.B above. There is a good reason

180. *See supra* notes 89–90 and accompanying text.

181. *See supra* Parts VII.A & C.

182. The debtor D would have likely breached an express or implied warranty that it owned the receivable that had been sold, but that breach of warranty does not give SP1 a property interest in the receivable.

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for this lack of priority that applies equally to a debtor intending to grant a security interest in equipment and one granting a security interest in intangible receivables. If the pre-filing indicates as the collateral "all receivables," and the buyer can find the financing statement,[183] then no buyer could buy receivables even though the originator/debtor has not obtained the benefit of any financing from the pre-filing intended secured party unless the buyer and the debtor obtained a financing statement amendment releasing the receivables to be sold, a cumbersome process in practice. Accordingly, pre-filing would hinder the ability of originators/debtors to sell receivables so long as the financing statement remains of record.

More important, if the pre-filing indicates as the collateral only receivables transferred to the pre-filer pursuant to a specific agreement with the pre-filer, then a buyer would not be able to determine from the financing statement what receivables would be so encumbered. It would know, however, that it would nevertheless always be subordinate if the debtor inadvertently or fraudulently made a double assignment to the pre-filer. Again, this rule would constrain both the buyer and the originator.

The policy question then is whether, in the case of receivables (for which the Filing Priority Principle is not essential) and unlike the case of goods (for which the Filing Priority Principle is essential), we should apply the Filing Priority Principle to allow a potential intended secured party to encumber the debtor's receivables as of the date of the pre-filing. Answering the first policy question in the affirmative produces the second policy question—whether we should implement this policy choice by amending the statute to give effect to the Filing Priority Principle through the Plain Language Principle or by asking a court to overrule the Plain Language Principle and imply the Filing Priority Principle.

The result presented by example 8 also has a very limited scope for a pre-filing intended secured party that expects to take a typical true security interest in the receivables. If the security agreement between the debtor D and SP1 signed on Day 30 grants a true security interest in receivables then owned or thereafter acquired, and D thereafter sells future receivables to SP2/B2 under the security/sale agreement between the debtor D and SP2/B2 signed on Day 15, SP1 would have priority in any receivables acquired by D after Day 30. D would have rights in those receivables, and SP1 would have a security interest in those receivables governed by the first-to-file-or-perfect rule in section 9-322(a)(1). Hence, if in example 8, D originates an account A11 on Day 31 and thereby acquires rights in account A11 on Day 31, SP1's security interest attaches simultaneously. If D sells account A11 to SP2/B2 on that day, SP1's security interest has priority over SP2/B2 by virtue of its financing statement filed on Day 1. The first-to-file-or-perfect rule gives SP1 priority.[184]

183. *See supra* note 81 and accompanying text (discussing the lag between the time of filing and the time a financing statement would appear on a search report).

184. Plank, *Assignment of Receivables*, *supra* note 102, at 245–46 (example 2(b)(i)); Barclay Clark & Barbara Clark, *A Dialogue Between Two UCC Gurus on a Drafting Glitch Under Revised Article 9*, CLARKS' SECURED TRANSACTIONS MONTHLY, July 2006, at 4–5.

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In the case of competing buyers of intangible receivables, the interests of the parties and the policy considerations differ. The application of the Plain Language Principle to create a first-to-perfect priority rule among competing buyers of intangible receivables instead of a first-to-file priority rule may appear to be a major shortcoming in Article 9's implementation of the Filing Priority Principle.[185] However, a first-to-perfect priority rule becomes upon closer examination the more desirable result as a matter of policy. In this case, the policy reasons for upholding the Plain Language Principle over an implied Filing Priority Principle are much stronger than the policy reasons for upholding the Plain Language Principle over an implied Filing Priority Principle in the case of the pre-filing intended secured party.

In the case of competing buyers, there is little justification for privileging the Filing Priority Principle, which is designed to encourage public notice though a filing regime, because in fact the filing system is almost useless in providing meaningful notice to subsequent purchasers. In example 9, SP1/B1's financing statement covers only accounts that D sells to SP1/B1. There are a huge number of transactions in which originators of receivables sell different batches of receivables to different buyers. Any buyer can find previously filed financing statements naming other buyers. Without extensive diligence, however, a buyer cannot determine that the particular batch of receivables it is purchasing is *not* covered by a previously filed financing statement.[186] Yet, buyers routinely buy receivables despite this risk. They are willing to rely on representations from the debtor and their own due diligence of the debtor's operations.[187] In the case of multiple discrete sales of receivables to different buyers, the Filing Priority Principle should not apply.

Indeed, in the case of multiple buyers of receivables, each buyer would most likely prefer to rely on being the first to perfect. In the case of inadvertent double assignments, each subsequent buyer has a chance to be the superior buyer. If the first to file were always to have priority, however, then subsequent filing buyers would always be subordinate. In the past, commentators had raised concerns about the ability of a lender to obtain a blanket lien on most of the debtor's assets, which the lender can do by being the first to file a financing statement.[188]

185. *See* Plank, *Assignment of Receivables*, *supra* note 102, at 246 & n.8 (calling this result a greater problem than the result first identified by Don Rapson regarding the ineffectiveness of a pre-filed financing statement against a subsequent perfected secured party that buys an account before the pre-filer obtains a security interest in the account).

186. *See supra* notes 124–25 and accompanying text.

187. It is typical for opinion letters opining that the sale of a large variety of receivables created a first priority perfected security interest to include an assumption that none of the financing statements that showed up on a search report of prior UCC1 financing statements for the seller of these receivables covered the specific receivables that were the subject of the opinion letters. The only meaningful statement that can be given on financing statements naming a debtor in multiple transfers of receivables is either (a) that there are no blanket lien financing statements or (b) that certain financing statements only cover discrete items or categories of collateral other than the receivables subject to the opinion letter, such as financing statements covering specific items of equipment or types of collateral other than the type of receivables covered by the opinion.

188. *See* Thomas Jackson & Anthony Kronman, *Secured Financing and Priorities Among Creditors*, 88 YALE L.J. 1143, 1167–68, 1180 (1979) (discussing the "situational monopoly" that the use of after-

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One of the antidotes to this concern is the ease by which a debtor can refinance the first priority true security interest. In the case of multiple buyers of receivables of discrete pools of intangible receivables, however, there is no comparable antidote to giving the first filer priority, especially when the filing system does not provide meaningful information about the extent of the first filer's security interest.

Although initially I was not strongly opposed to a legislative solution that applies the Filing Priority Principle in example 8 to protect pre-filers who have not yet acquired a security interest against a subsequent perfected buyer,[189] during the course of writing this article my views have changed. Similarly, unlike my earlier thoughts,[190] I now have a strong view that the Filing Priority Principle should not override *nemo dat* in the case of multiple discrete buyers of receivables in example 9. In any event, the best forum for resolving these issues is a legislative forum (a drafting committee or legislative committee) where numerous interested parties can express their views and advocate their solutions. I also have a strong aversion to overruling the plain language of the statute to implement the Filing Priority Principle by implication. Readers of Article 9 should be able to rely on the plain language of the statute. Unless there is an egregious error in the plain language that contradicts an overwhelmingly obvious policy of the statute, as was the case with the problem solved by section 9-318(b),[191] we should eschew fixes based on implication.

A further consideration is the implication of implying a Filing Priority Principle over the Plain Language Principle. Who will do the implying that Professors Harris and Mooney advocate? It will be the courts deciding individual specific cases that will not deal comprehensively with all of the different likely factual situations. I do not think that this is the best forum for working out all of the ramifications. If this issue ever comes before a court, I hope it will respect the plain language of the statute.

E. The Fog of Security Interest Language for Sales of Receivables

The language of sections 9-201, 9-203(b)(2), and 9-322(a)(1) logically produces the result that (i) a pre-filer intended secured party does not obtain priority over a subsequent perfected buyer of an account or payment intangible and (ii) a first filing intended buyer does not obtain priority over the first perfected buyer of an account or payment intangible. Professors Harris, Mooney, and Kettering argue that the language of section 9-322(a)(1) somehow gives a debtor that

acquired property clauses and the competitive advantage given to the first filer under the first-to-file-or-perfect rule).

189. Plank, *Assignment of Receivables*, *supra* note 102, at 244–45; Plank Memorandum, *supra* note 167, at 8–9 (pointing out the policy questions but stating that I had no strong views on the point).

190. Plank, *Assignment of Receivables*, *supra* note 102, at 246–47 (stating that the plain language result is contrary to the intentions of the parties but otherwise taking no position on the policy resolution).

191. *See supra* notes 135–46 and accompanying text, including example 7.

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has transferred an absolute ownership interest to a perfected buyer of an account or payment intangible the power to transfer rights to a second intended secured party. Section 9-322(a)(1) does use the words "security interest," and these words do imply that a debtor retains an interest in the collateral. It is the technical definition of "security interest" as an interest of a "buyer" that removes the debtor's rights in the transferred receivables. Perhaps the real resistance to applying the technical meaning of "security interest" as an interest of a "buyer" is that this reading makes the language of section 9-322(a)(1) appear to be inelegant at best or absurd at worst, which thought naturally produces abhorrence in Article 9 aficionados.

Recasting the language of section 9-322(a)(1) to reflect the substance of the sale transaction reveals the problematic wording of the section:

> Except as otherwise provided in this section, priority among conflicting *ownership* interests in the same collateral is determined according to the following rules:
>
> (1) Conflicting perfected *ownership* interests rank according to priority in time of filing or perfection. Priority dates from the earlier of the time a filing covering the collateral is first made or the *ownership* interest is first perfected.[192]

At first blush, this may seem fine, but a careful reader and drafter will discover that the use of the term "ownership interest" creates a logical problem. In the case of true security interests, which are limited interests with respect to which the debtor retains title and ownership, more than one person can have a security interest. There can be, however, only one owner.[193] If O grants a fee simple in Blackacre to A and then grants a fee simple in Blackacre to B, only one person—A or B—will have a fee simple. We would not speak about how to "rank" A's or B's ownership interest or whether one person's ownership interest is subordinate to another's. It is all or nothing—either/or.

Perhaps we could revise the section to use the approach of section 9-330:

> A person that is a secured party under a security agreement providing for a security interest in receivables and that gives value has priority over a buyer's perfected interest in the receivables if a financing statement naming the debtor and the secured party and indicating the receivable is filed before the buyer perfects its ownership interest.[194]

Revising section 9-322(a)(1) expressly to identify or specify the rights of a perfected buyer against a prior filer that has not yet acquired a security interest would flush out the issue. In any appropriate forum for drafting such a section, participants in the process, including originators and potential buyers, could

192. A revision of U.C.C. section 9-322(a) (2010), *quoted supra* text accompanying note 70, but substituting "ownership" for "security interest."

193. Of course, in the case of co-ownership, more than one person can be the owner.

194. I avoid the term "purchaser" for the reasons set forth in Part VIII below. *See infra* note 198 and accompanying text. I use the term "secured party" because, by definition, a "secured party" is not limited to a person that acquires a security interest. A secured party need only be a person in whose favor a security agreement provides for a security interest. *See* U.C.C. § 9-102(a)(73)(A), (74) (2010), *quoted supra* notes 22, 23 (providing definitions of "secured party" and "security agreement").

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argue and assess the desirability of allowing such a prior filer with no interest in the receivables (whether a pre-filer or a subsequent intended buyer) to have priority over a perfected buyer if the prior filer later becomes a secured party under a security agreement and gives value. Originators of receivables, secured lenders, and buyers of receivables could assess the different risks and costs in the cases of a prior filing of a financing statement that indicates as the collateral "all receivables" or of a prior filing that indicates as the collateral only receivables transferred to the prior filer pursuant to the agreement with the prior filer discussed in Subpart VII.C above.[195] The drafters of such a rule may determine that, unlike competing true security interests in goods, which do present the "ostensible ownership" problem, a prior filer that has no interest at the time of the filing should not be able to acquire an interest superior to a perfected buyer.

VIII. Filing Priority and Subsequent Buyers of Tangible Receivables

In the case of a debtor that retains possession of tangible chattel paper or promissory notes that the debtor sells to a perfected buyer, the provisions of Article 9 could produce different results for an earlier filing secured party than for a debtor that sells intangible receivables. A "liberal" interpretation of section 9-330 of Article 9, which is intended to overrule the Filing Priority Principle, could be interpreted as activating the Filing Priority Principle against a perfected buyer of tangible chattel paper or promissory notes.

Section 9-330 provides that a "purchaser" of chattel paper[196] or promissory notes[197] that takes possession in good faith has priority over a security interest in the chattel paper or promissory notes if the other requirements of that section are met. The key word in these provisions is "purchaser." A "purchaser" is a per-

195. *See supra* note 186 and accompanying text.

196. *See* U.C.C. § 9-330 (2010). The section states:

> (a) A purchaser of chattel paper has priority over a security interest in the chattel paper which is claimed merely as proceeds of inventory subject to a security interest if:
>
> > (1) in good faith and in the ordinary course of the purchaser's business, the purchaser gives new value and takes possession of the chattel paper or obtains control of the chattel paper under Section 9-105; and
> >
> > (2) the chattel paper does not indicate that it has been assigned to an identified assignee other than the purchaser.
>
> (b) A purchaser of chattel paper has priority over a security interest in the chattel paper which is claimed other than merely as proceeds of inventory subject to a security interest if the purchaser gives new value and takes possession of the chattel paper or obtains control of the chattel paper under Section 9-105 in good faith, in the ordinary course of the purchaser's business, and without knowledge that the purchase violates the rights of the secured party.

Id.

197. *See id.* § 9-330(d) ("Except as otherwise provided in Section 9-331(a), a purchaser of an instrument has priority over a security interest in the instrument perfected by a method other than possession if the purchaser gives value and takes possession of the instrument in good faith and without knowledge that the purchase violates the rights of the secured party."). A promissory note is an "instrument." *See id.* § 9-102(a)(65).

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son that "takes by sale, . . . security interest . . . or any other voluntary transaction creating an interest in property."[198]

When the non-possessory "security interest" that can be subordinated is a true security interest, the language of this section produces the intended result. After granting a non-possessory true security interest to a secured party, the debtor still retains an ownership interest in the chattel paper or promissory note. Therefore, the debtor can make a voluntary transfer of an interest in the chattel paper or promissory note to a subsequent person that thereby becomes a "purchaser." If the non-possessory security interest, however, is a buyer's perfected interest in the chattel paper or promissory note, the debtor cannot transfer to or create any interest in property in favor of a transferee other than transferring wrongful possession. Is the transferee a "purchaser"? Again, this section reveals how the use of the language and structure of "security" obscure the effects of an absolute assignment of property.

Despite the problematic definition of "purchaser," the drafters of Article 9 undoubtedly intended that a person who takes possession of chattel paper or promissory notes in good faith and for value (or new value in the case of chattel paper) should have priority over a buyer, as well as a secured creditor, that perfected its interest without taking possession. Also, unlike the very specific statutory requirement for the creation of "security interest," it is possible that the drafters meant the word "purchaser" to include persons that attempt to take an interest in property, even if the attempt is not successful.[199] Accordingly, the best interpretation of section 9-330 would give priority to the person taking possession over a prior perfected buyer of chattel paper or promissory notes.

Under this interpretation of section 9-330, therefore, a debtor that has sold chattel paper or promissory notes to a perfected buyer but that has been allowed to retain possession—a common occurrence in the case of chattel paper evidencing automobile loans—has the power to transfer rights in the chattel paper or promissory notes to a subsequent secured party within the meaning of section 9-203(b)(2). If the debtor has the power to transfer rights, then notwithstanding a perfected sale to a buyer, the debtor can create an enforceable security interest in favor of a subsequent secured party even without delivering possession. Accordingly, the competing security interest between a buyer of chattel paper or promissory notes that is the first to perfect against (i) a pre-filing but subsequent secured party illustrated by example 8 in Part VII.A above or (ii) a first filing but subsequent buyer illustrated by example 9 in Part VII.C above will be subject to the first-to-file-or-perfect rule of section 9-322(a)(1).

One might argue that if pre-filing is effective against a perfected non-possessory buyer of chattel paper and promissory notes then pre-filing should be effective against a perfected buyer of accounts and payment intangibles.

198. *See* U.C.C. § 1-201(b)(29), (30) (2008), *quoted supra* note 45.

199. This use of the word "purchaser" is common in the real estate recording acts. *See, e.g.*, Stoebuck & Whitman, *supra* note 37, § 11.9, at 873–74 (providing examples of recording acts).

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These different results, however, follow from the plain language of Article 9,[200] with a boost for a liberal interpretation of the word "purchaser." Further, recall that in this case, the buyer of the tangible receivables has agreed to allow the seller to retain possession. The buyer is already taking the risk that the seller may transfer possession to another good faith person for value. The risk that a non-possessory buyer would also be trumped by the Filing Priority Principle is just another associated risk that the buyer could eliminate if it took possession. If the buyer took possession, then the debtor would not have the power to transfer rights under section 9-330 and there is no other express provision of Article 9 that gives the debtor such power. Therefore, the first-to-file-or-perfect rule of section 9-322(a)(1) would not apply.

In any event, there is no requirement that perfected buyers of intangible receivables become subject to an implied Filing Priority Principle simply because the statutory language does subject perfected non-possessory buyers of tangible receivables to an express Filing Priority Principle. Again, we should honor the Plain Language Principle unless there are very strong policy reasons for overruling the principle. A desire for consistency of treatment between intangible and tangible receivables is not a sufficient policy reason to overrule the plain language of the statute. Further, the policy reasons supporting the buyer of intangible receivables that first perfects discussed in Part VII apply to the perfected non-possessory buyer of tangible receivables. A case can be made that, because section 9-330 was intended to protect actual possessors of tangible chattel paper and promissory notes and not secured parties that were the first to file, courts by implication should limit the debtor's power to transfer rights under section 9-203(b)(2) to the actual transfer of possession of these receivables and not extend that power to the transfer of a non-possessory interest in those receivables the effect of which is only to permit the creation of a competing security interest and the resulting application of the Filing Priority Principle under section 9-322(a)(1).

IX. Filing Priority Principle: Buyers of Payment Intangibles v. True Secured Parties

The revision of Article 9 that became effective generally in 2001 expanded the scope of Article 9 to include the sale of payment intangibles and promissory notes, and it provided that such sales were perfected automatically upon attachment. These changes introduced an ambiguity in the statute that creates a conflict between *nemo dat* and the Filing Priority Principle. In this particular instance, unlike the issues presented in Part VII, it is appropriate to use the Filing Priority Principle to resolve the ambiguity. Example 10 illustrates the issue:

200. *See supra* notes 147–48 and 157–58 and accompanying text.

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Example 10

(pre-filing buyer of payment intangibles v. later secured party)

D owns payment intangible I-1. On Day 1, D signs a security/sale agreement agreeing to sell to SP1/B1 payment intangible that D owns (I-1) or later acquires and that D designates pursuant to the agreement, and SP1 advances money to D. SP1/B1's buyer's interest is perfected automatically.[201] Nevertheless, SP1/B1 files a proper financing statement[202] covering all payment intangibles sold by D to SP1/B1 pursuant to the sale agreement between D and SP1/B1 dated as of Day 1. On Day 10, D originates payment intangible I-2. On day 15, D signs a security agreement granting to SP2 a security interest in D's payment intangibles to secure a debt, and SP2 advances money to D. On Day 16, SP2 files a financing statement covering all of D's payment intangibles. On Day 16, SP2 has a perfected true security interest in payment intangible I-2. Then, on Day 30, D sells payment intangible I-2 to SP1/B1 pursuant to its existing security/sale agreement. Because D has granted SP2 a true security interest, D retains an ownership interest in payment intangible I-2 and therefore can transfer to SP1/B1 a security/buyer's interest in I-2 which becomes perfected on Day 30 automatically upon attachment. Then, on Day 40, D acquires payment intangible I-3 and on Day 50, D sells payment intangible I-3 to SP1/B1 pursuant to its existing security/sale agreement, and SP1/B1's security interest is perfected upon attachment. Does SP1/B1 have priority in payment intangibles I-2 and I-3 against SP2 because it was the first to file a financing statement, even though a financing statement is not necessary for perfection, or does SP2 have priority because it filed before SP1/B1 was perfected?

Date	Action	Effect
Day 0	D owns payment intangible I-1.	
Day 1	D signs security/sale agreement for the sale of payment intangibles to SP1/B1 and sells payment intangible I-1 to SP1/B1; SP1/B1 gives value. SP1/B1 files financing statement.	SP1/B1 has perfected security interest in payment intangible I-1. Perfected upon attachment. Filing not necessary for perfection.
Day 10	D originates/acquires payment intangible I-2.	

201. *See supra* note 120 and accompanying text.

202. For some types of transactions, such as the sale of participation interests in commercial loans, the parties do not file financing statements. For other types of transactions, however, such as the sale of student loans or the right to reimbursement for servicing advances, the parties almost always file financing statements to ensure that if the sale were recharacterized as a true security interest, the buyer/secured party would still be perfected.

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Day 15	D signs security agreement granting true security interest in payment intangibles to SP2, which gives value.	SP2 has security interest in payment intangible I-2. D has rights in payment intangible I-2.
Day 16	SP1 files financing statement covering payment intangibles.	SP2 has perfected security interest in payment intangible I-2.
Day 30	D sells payment intangible I-2 to SP1/B1; SP1/B1 gives value.	SP1/B1 has perfected security/ buyer interest in payment intangible I-2. Perfected upon attachment.
Day 40	D acquires payment intangible I-3.	SP2 has perfected security interest in payment intangible I-3.
Day 50	D sells payment intangible I-3 to SP1/B1 pursuant to security/sale agreement.	SP1/B1 has perfected security/ buyer's interest in payment intangible I-3.

Under the Filing Priority Principle, SP1/B1 would have priority over SP2 in all of the payment intangibles that it bought after SP2 had obtained its security interest—I-2 and I-3—because it filed on Day 1, before SP2 filed on Day 16. There is a question, however, whether SP1/B1 can take advantage of the first-to-file-or-perfect rule of section 9-322(a)(1). Filing is not necessary to perfect a buyer's interest in payment intangibles.[203] Comment 4 to section 9-322 states that: "'Filing,' of course, refers to the filing of an effective financing statement." If filing a financing statement is not necessary to perfect SP1/B1's security interest, is the filing by SP1/B1 "effective"? If filing is not effective to perfect the buyer's interest, then arguably SP1/B1's financing statement filed on Day 1 is not a "filing" for purposes of the first-to-file-or-perfect rule of section 9-322(a)(1). If so, for buyers of payment intangibles, their priority dates only from the date of attachment, and, in example 10, SP2 would have priority—dating from Day 16—over SP1/B1 in the payment intangible I-2 sold to SP1/B1 on Day 30 and in the payment intangible I-3 sold to SP1/B1 on Day 50. These results are consistent with *nemo dat*. SP2 was the first to attach in I-2 and I-3 subsequently purchased by SP1/B1.

One could take the view that the plain language of section 9-322(a)(1) solves this problem. SP1/B1 filed a financing statement, and this is a filing, and the comment is an erroneous intrusion. If so, the Plain Language Principle and the Filing Priority Principle defeat the *nemo dat* rights of SP2. In context, however, the language is not "plain" and the comment is a fair characterization of the use of the term "filing" throughout Article 9. Accordingly, the statute is ambiguous. Nevertheless, a fair reading of the statute supports the conclusion that a filing by a buyer of payment intangibles that meets the requirements of

203. *See* U.C.C. § 9-309(3) (2010), *quoted and discussed supra* note 120.

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Article 9—a financing statement filed in the correct filing office, correctly naming the debtor and secured party, indicating the collateral, and authorized by the debtor—is a "filing" for purposes of section 9-322(a)(1).

Indeed, a slight change in the facts in the example illustrates why a contrary interpretation would be unreasonable. If instead of acquiring a buyer's interest in I-2 on Day 30 and in I-3 on Day 50, SP1 acquired a true security interest, which can only be perfected by filing. Under section 332(a)(1), SP1 would have priority over SP2. Hence, if a buyer's financing statement is not treated as "filed" for purposes of section 9-322(a)(1), SP1 would be treated better by acquiring a lesser interest—a security interest to secure a debt—instead of a buyer's interest in I-2 and I-3. This is an absurd result that a proper interpretation of the statute should strive to avoid if possible.

Professors Harris and Mooney present a thorough review of the statutory analysis and reach the same conclusion.[204] I will not repeat the analysis here, but I do have a few comments on their analysis. First, Professors Harris and Mooney state that: "A filing also does not 'count' for purposes of [the first-to-file-or-perfect rule] if the security interest in question cannot be perfected by filing."[205] In making this statement, they rely on the fact that under Article 9 a secured party can be perfected in certificate-of-title goods only by compliance with the applicable certificate-of-title statutes, in deposit accounts only by control, and in money only by possession (except if deposit accounts or money are proceeds).[206] On the basis of this view, Professor Harris and Mooney rely—and must rely—on a theory of alternative perfection for the sale of payment intangibles first advanced by Professor Ken Kettering.[207]

While I do not disagree with this theory, I do not think we are restricted by it. It is reasonable to interpret a "filing" as a filing of a financing statement filed in accordance with section 9-301 and section 9-501 (governing the proper office for filing) that meets the requirements of section 9-502 (governing the content of the financing statement) and that is authorized pursuant to section 9-506. Article 9 expressly contemplates that an "effective" financing statement includes a financing statement that is effective for purposes of either perfection or priority. Specifically, under section 9-320(b), a buyer of consumer goods from a consumer takes free of a secured party's perfected purchase-money security interest—which will be perfected automatically upon attachment[208]—only if, among other requirements, the buyer buys before the filing of a financing statement.[209] It is also appropriate to make an exception for those very specific pro-

204. Harris & Mooney, *supra* note 19, at 311–18.

205. *Id.* at 311 & n.54.

206. Harris & Mooney, *supra* note 19, at 311 & n.54.

207. *See* Plank, *Assignment of Receivables*, *supra* note 102, at 260 n.22.

208. *See* U.C.C. § 9-309(2) (2010), *quoted supra* note 126.

209. *See id.* § 9-320(b). The section states:

> Except as otherwise provided in subsection (e), a buyer of goods from a person who used or bought the goods for use primarily for personal, family, or household purposes takes free of a security interest, even if perfected, if the buyer buys:

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visions of Article 9 that expressly preclude filing as a means of perfecting a security interest, as in the case of money. This analysis is functionally the same as the alternative perfection theory since alternative perfection requires the compliance with location, content, and authorization.

One curious aspect of this controversy is that it also applies to security interests in goods. A secured party must file a financing statement to perfect a security interest unless, among other things, the security interest is perfected by possession.[210] Section 9-312 provides an express alternative method of perfection by filing a financing statement for all types of tangible collateral *other than money and goods*.[211] So, SP1 pre-files a financing statement against goods on Day 1, and then on Day 15 D grants to SP2 an enforceable security interest in the same goods, which files a financing statement to perfect its security interest, and on Day 30 SP1 obtains an enforceable security interest in the goods when D transfers possession of the goods to SP1 pursuant to an agreement and SP1 give value. Is it plausible to argue that SP1 is not entitled to priority over SP2 under the first-to-file-or-perfect rule because it perfected its security interest by possession and therefore its financing statement was not "effective" for perfection? I think not.

There is another curious aspect of this issue. Like a sale of a payment intangible, a sale of a promissory note is perfected upon attachment, that is, a buyer's interest in the promissory note (when the buyer does not take possession) is perfected without possession or filing. However, section 9-312(a) expressly authorizes the perfection of a security interest in instruments—which by definition includes a buyer's interest in a promissory note—to be perfected by filing. This provision serves a specific purpose,[212] and there should be no negative inference drawn from an express provision for instruments and not for payment intangibles. For purposes of the Filing Priority Principle, there is no basis for different treatment of the sales of payment intangibles and promissory notes.

The foregoing discussion shows that, while well drafted for the most part, Article 9 is not perfect and does not provide clear answers to all questions. It would not be reasonable to expect it to do so. Accordingly, in this instance the Plain Language Principle does not come into play in construing Article 9

(1) without knowledge of the security interest;

(2) for value;

(3) primarily for the buyer's personal, family, or household purposes; and

(4) before the filing of a financing statement covering the goods.

Id.

210. *See id.* § 9-310(a), *discussed supra* note 33; *id.* § 9-310(b) (providing that the "filing of a financing statement is not necessary to perfect a security interest: . . . (6) in collateral in the secured party's possession under Section 9-313").

211. *See id.* § 9-312(a), *quoted supra* note 34.

212. Under former Article 9, the only way to perfect a security interest in promissory notes was by possession. Under revised Article 9, a true security interest can be perfected solely by filing a financing statement. This provision eliminates the requirement for the costly transfer of possession of promissory notes.

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"to promote its underlying purposes and policies" and it is appropriate to look to the policies behind the Filing Priority Principle.

If the Filing Priority Principle does not apply to the interests of buyers of payment intangibles against subsequent true security interests, these buyers will face risks that other secured parties do not. A buyer of a single batch of payment intangibles after pre-filing a financing statement can protect itself by doing a search immediately before buying the payment intangibles. This kind of buyer does face the risk that a competing secured party that acquires a true security interest will have filed a financing statement shortly before the purchase that will not show up on a UCC search because of the lag between when the financing statement was filed and when the filing would show up on a UCC search, a risk that pre-filing was designed to reduce.[213]

For a buyer that buys on a continuous basis, however, the inability to fix priority against an intervening true security interest perfected by a filing after the buyer's filing but before the buyer buys future payment intangibles produces significantly higher costs. This result is inconsistent with the protection of perfected continuous buyers of accounts and non-possessory buyers of chattel paper as against later filing secured parties that take an intervening true security interest.[214] Although there may be a question about the utility of a filing requirement for receivables, the plain language of Article 9 imposes this filing requirement and the application of the Filing Priority Principle to protect these buyers.[215] There is no policy reason for treating continuous buyers of payment intangibles differently. Affording such buyers protection against intervening true security interests by a fair interpretation of the plain language of the statute is desirable. On the other hand, it is not desirable to overrule the plain language of the statute and the resulting ownership interests under *nemo dat* of (i) a perfected buyer against a pre-filing but non-attached true secured party, discussed in Part VII.A, or (ii) competing perfected buyers of accounts and payment intangible, discussed in Part VII.C.

Accordingly, because there is no clear conflict with the Plain Language Principle, as I had previously stated,[216] and in agreement with Professors Harris, Mooney, and Kettering,[217] the policies of the Filing Priority Principle adopted by Article 9, whatever the shortcomings there may be for a filing regime for receivables, should trump *nemo dat*. Article 9 should be read, as it can fairly be read, to implement the Filing Priority Principle in favor of buyers of payment intangibles that pre-file against subsequent secured parties that acquire perfected true security interests.

213. *See supra* note 81 and accompanying text (discussing the lag between the time of filing and the time a financing statement would appear on a search report).

214. *See supra* note 147 and accompanying text.

215. *See supra* notes 80–83 and accompanying text.

216. Plank, *Assignment of Receivables*, *supra* note 102, at 260 n.122.

217. *See* Harris & Mooney, *supra* note 19, at 309–16; Plank, *Assignment of Receivables*, *supra* note 102, at 260 n.122.

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X. Conclusion

The security of property that is the basis for both *nemo dat* and the exceptions to *nemo dat* is important for owners and potential purchasers of interests in property. How does a potential purchaser of a property interest ensure that it is acquiring the interest it expects to acquire? How can an owner of a property interest be sure that it has that property interest it believes it has and how can that owner convince potential purchasers of any kind of property interest that the owner can convey such an interest? Both *nemo dat* and the exceptions to *nemo dat* enacted in the real estate recording acts and Article 9, such as the Filing Priority Principle, are intended to provide this assurance. The Filing Priority Principle also furthers other policies of Article 9 of simplifying secured transactions and reducing costs of implementing secured transactions.

Another important principle of Article 9 is the Plain Language Principle. This principle also furthers the goals of Article 9 of simplifying secured transactions and reducing costs of implementing secured transactions. In general, in the case of true security interests Article 9 follows the Coherence Principle that a statutory regime regulating property interests and transactions in property should reflect the nature of the property interests and the nature of the transactions. Accordingly, Article 9 has had little difficulty in reconciling the *nemo dat* principle, the Filing Priority Principle, and the Plain Language Principle in ways that appear sensible.

Article 9's incorporation of the sale of receivables into a statutory scheme based on a security paradigm, however, violates the Coherence Principle. Accordingly, the drafters have had to struggle to make the statute work for sales of receivables. It is not surprising that, despite their best efforts, Article 9 fails to reconcile the *nemo dat* principle, the Filing Priority Principle, and the Plain Language Principle in ways that are satisfactory to those who deal with such sales.

When the plain language of Article 9 fails to implement either *nemo dat* or the Filing Priority Principle that has a strong policy basis because the language represents a significant drafting error, courts should imply from the statutory language a result that the language will not bear. Two good examples of such drafting errors are the double debtor problem discussed in Part IV.A and the contest between an unperfected buyer and a later perfected secured party under former Article 9 discussed in Part VI—both fixed in compliance with the Plain Language Principle. These are good examples of privileging the *nemo dat* principle, in the case of the double debtor problem, and Filing Priority Principle, in the case of the unperfected buyer, over a Plain Language Principle. Similarly, courts should adopt a reading of Article 9 that applies the Filing Priority Principle to a pre-filing buyer of payment intangibles over a later secured party that is the first to perfect a true security interest in the face of an ambiguity in the statute that represents a failure of the Plain Language Principle discussed in Part IX.

The case of a perfected buyer of accounts and payment intangibles against a pre-filing intended secured party that never gets a security interest in those receivables is a different type of challenge. The precise language of the statute

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produces a result that seems to some to be contrary to the result that obtains for true security interests. If the statute had been written in express terms of ownership, however, it is not clear that the drafters would have chosen a result produced by the Filing Priority Principle. The policy reasons for applying the Filing Priority Principle in the case of perfected buyers against earlier filers are different from and weaker than the reasons for applying the Filing Priority Principle to true security interests in goods as well as in receivables.

Article 9 is precisely and substantially well drafted. We should not expect it to be perfect in producing complete consistency in the unusual cases. We should not try to provide for such consistency by implying results that the language of the statute will not bear. We should be content to follow the plain language of the statute wherever it takes the reader with the knowledge and comfort that, whatever the policy preferences, the parties planning transactions and courts litigating disputes can rely on that plain language.

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