U.C.C. Article 9, Filing-Based Authority, and Fundamental Property Principles: A Reply to Professor Plank

*By Steven L. Harris and Charles W. Mooney, Jr.**

Uniform Commercial Code Article 9 generally follows the common-law principle that one cannot give rights in property that one does not have (nemo dat quod non habet). *In many circumstances, however, Article 9's priority rules, including its rule awarding priority to the first security interest that is perfected or as to which a financing statement has been filed, trump* nemo dat *and enable a debtor to grant a senior security interest in property that the debtor previously had encumbered. In this article, Professors Steven Harris and Charles Mooney argue that, properly understood, the first-to-file-or-perfect rule confers upon a debtor the power to create a security interest in accounts and other rights to payment that the debtor has already sold and in which it retains no interest. In doing so, they take issue with Professor Thomas Plank, whose argument to the contrary appeared in the February 2013 issue of* The Business Lawyer.

I. Introduction

In a recent article in these pages, Professor Thomas Plank advanced an approach toward the interpretation of Uniform Commercial Code ("U.C.C.") Article 9 that seeks to reconcile several sometimes-contradictory principles inherent in that Article.[1] In 2011 we published an article that had a similar goal.[2] Professor Plank's article takes exception to some of the conclusions that we reached in ours, and we now wish to respond to those aspects of his article.

The subject at hand is Article 9's priority scheme for resolving conflicts among competing security interests. More precisely, the issue is whether and under what circumstances Article 9's first-to-file-or-perfect ("FTFOP") rule[3] confers upon a debtor the power to create a security interest in collateral in which the

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1. Thomas E. Plank, *Article 9 of the UCC: Reconciling Fundamental Property Principles and Plain Language*, 68 Bus. Law. 439 (2013).

2. 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).

3. U.C.C. § 9-322(a)(1) (2010).

debtor retains no rights. The relevant setting involves security interests in rights to payment: accounts, chattel paper, payment intangibles, and promissory notes.[4] Professor Plank agrees with us that at least one of Article 9's priority rules (namely, section 9-330) does confer such a power on the debtor, although the statutory language is less than clear.[5] Unlike Professor Plank, we believe that, for many of the same reasons, such a power is also conferred by the FTFOP rule.

Professor Plank's article clearly moves the ball forward and further illuminates the operation and underlying policies of Article 9. Because we agree with much of his analysis and many of his conclusions, we address here primarily the points on which we disagree. Following some very brief background on certain of Article 9's underlying principles, we discuss the priority contests whose proper outcome is the subject of Professor Plank's disagreement with us. Along the way we identify the sources and bases of our differences. These priority contests involve somewhat detailed facts and complicated analyses that will be appreciated most by the cognoscenti of Article 9 priorities. For this reason, and in the interests of space and convenience, we proceed on the assumption that the reader has Professor Plank's article and our earlier article readily at hand. We do not repeat in detail the examples on which the relevant priority contests are based. Nor do we replicate here the detailed analyses that our earlier article provided.

II. Article 9's First Principles

Professor Plank identifies and applies to his examples several important principles related to the interpretation and application of Article 9. To facilitate a comparison of our views, in this discussion we adopt his terminology for these principles. Professor Plank first points to the "Plain Language Principle" of statutory interpretation, under which courts normally apply unambiguous statutory language according to its plain meaning.[6] He next raises the "Coherence Principle." Professor Plank explains that, under this second principle, a property-law regime should reflect "both the nature of the specific types of property items and the nature of the specific transactions that the regulatory regime governs."[7] Professor Plank also raises the important property-law principle of *nemo dat quod non habet* (one cannot transfer more than one has) and its corollary, the shelter principle (a transferee receives all that its transferor has).[8] He recognizes the central importance of the exceptions to *nemo dat* such as the

4. For the definitions of these terms, see *id.* § 9-102(a)(2) ("account"), (a)(11) ("chattel paper"), (a)(61) ("payment intangible"), and (a)(65) ("promissory note").

5. Plank, *supra* note 1, at 498.

6. Plank, *supra* note 1, at 441.

7. *Id.* Professor Plank also invokes the "Certainty Principle" as furthering, or as a corollary of, the Plain Language Principle because Article 9 generally "eschews indeterminate elements that increase uncertainty and costs." *Id.* at 447–48.

8. *Id.* at 441–42.

"Good Faith Purchaser Principle."[9] Central to Professor Plank's analysis, as well as to ours, is another exception to *nemo dat*, the "Filing Priority Principle."[10]

The extent to which this principle overrides *nemo dat* is the central disagreement between us and Professor Plank. Before addressing the disagreement, however, it may be useful to consider an application of the FTFOP rule as an exception to *nemo dat* in a setting that is straightforward, clear, and noncontroversial. This example derives from Professor Plank's Example 3.[11]

> On Day 1 SP1 files a financing statement naming D as debtor and covering an item of equipment. On Day 15 D signs a security agreement granting to SP2 a security interest in the item of equipment, SP2 gives value, and SP2 files a financing statement covering the item. At this point in time, SP2 holds a perfected security interest; but inasmuch as SP1 has no interest in the equipment, there is no priority contest between conflicting security interests. However, on Day 30 SP1 acquires a security interest (D signs a security agreement covering the item in favor of SP1 and SP1 gives value), which is perfected by virtue of its Day 1 filing. SP2's security interest was the first to have been perfected. But because SP1 filed before SP2 filed or perfected, SP1's security interest has priority over SP2's under the FTFOP rule.[12]

By the time that SP1 acquired its security interest, D's ownership interest in the equipment had already been diminished by the transfer of a security interest to SP2. But by conferring first priority on SP1, the FTFOP rule nevertheless enables D to effectively transfer more than it had—an exception to *nemo dat*.

III. The Proper Reach of the Filing Priority Principle

The Filing Priority Principle is implemented by the FTFOP rule.[13] Its domain is the resolution of priority contests among holders of conflicting Article 9 security interests. A case for applying the principle exists when, under the FTFOP rule, a financing statement filed in the relevant U.C.C. filing office by one person (SP1) creates a risk to a potential secured party (SP2) that any future security

9. *Id*. at 442–43.
10. *Id*. at 443–44.
11. *Id*. at 457–62.
12. U.C.C. section 9-322(a)(1), the FTFOP rule, provides:

> 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.

U.C.C. § 9-322(a)(1) (2010).

13. In our earlier article, we stated that a debtor's power to transfer more that it has is "implicit in the [FTFOP] priority rule." Harris & Mooney, *supra* note 2, at 304. Professor Plank asserts that, in this setting, "D's power to transfer more rights than D has is expressly stated in the statute" and so our statement is "not correct." Plank, *supra* note 1, at 487. We suspect there is no real disagreement here: Application of the FTFOP rule results in an exception to *nemo dat*. Whereas the priority rule is expressly stated in the statute, a debtor's power to transfer greater rights than the debtor has is not stated in so many words. Rather, it is implicit in the priority rule, in the sense that it follows from the result that the rule dictates.

interest SP2 may acquire will be subordinate to SP1's.[14] In these situations, a prudent SP2 would conduct a search of the records and, if the search revealed a financing statement covering the collateral in question, take steps to address the risk. A potential secured party that fails to search, discover a relevant filing, and take appropriate steps should not be able to defeat an interest acquired by the earlier filer.

A. Professor Plank's Example 8: Pre-filing Secured Party Versus Later-Perfected Buyer

A principal complication in applying the Filing Priority Principle—and one source of our disagreement with Professor Plank—is that holders of Article 9 security interests include outright buyers of receivables in true sale transactions.[15] Consider Professor Plank's Example 8[16]:

> D owns accounts A1 through A10. On Day 1 SP1 files a financing statement covering all accounts. On Day 15 D signs a security agreement pursuant to which D sells A1 to SP2/B2, which gives value in exchange for A1. At this point in time D has no legal or equitable interest in A1; SP2/B2 has become the owner. However, section 9-318(b) makes it clear that because SP2/B2's security (ownership) interest is not perfected, D has the *power* to transfer rights in A1.[17] On Day 16 SP2/B2 files a financing statement covering A1. At that point SP2/B2's security (ownership) interest becomes perfected and D's power under section 9-318(b) vanishes. On Day 30 D signs a security agreement purporting to create a security interest in favor of SP1 in accounts A1 through A10 and SP1 gives value.

Having lost the power conferred by section 9-318, does D retain the power to transfer rights in A1 under the Filing Priority Principle? Professor Plank thinks not. He argues that once D sold account A1 to SP2/B2 and SP2/B2 perfected its interest, D had no interest in account A1 and so SP1 acquired no interest in it. Professor Plank asserts that the plain language of the FTFOP rule does not apply to this example, as FTFOP only applies to "[c]onflicting perfected security interests."[18] Because D had no rights in account A1 and no power to transfer rights to SP1, SP1 never acquired a security interest in that account.

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14. SP1's security interest may already have been created when SP2 enters the picture. Or, it may be created after SP2's, i.e., SP1's filing may have been a pre-filing. The text uses the term "subordinate" loosely. If SP1's senior security interest is that of a buyer of receivables, then SP2 would have no interest in the collateral. Harris & Mooney, *supra* note 2, at 313–17.

15. U.C.C. § 9-102(a)(72)(D) (2010) (defining "secured party" to include "a person to which accounts, chattel paper, payment intangibles, or promissory notes have been sold"); *see also id*. § 9-109 (a)(3) (making Article 9 applicable to sales of accounts, chattel paper, payment intangibles, and promissory notes).

16. *See* Plank, *supra* note 1, at 482–89 (discussing Example 8).

17. U.C.C. section 9-318(b) deems that, for certain purposes and with respect to specified types of collateral, a debtor has rights that the debtor has sold. U.C.C. § 9-318(b) (2010). "As a consequence of subsection (b), if the buyer's security interest is unperfected, the seller can transfer . . . the account . . . as if it had not been sold." *Id.* cmt. 3.

18. *See* Plank, *supra* note 1, at 482–83; U.C.C. § 9-322(a)(1) (2010) (governing priorities among conflicting security interests).

The distinction between a debtor having limited rights in collateral (as in Professor Plank's Example 3) and a debtor having no rights in collateral (as in his Example 8) is the foundation of Professor Plank's argument. This distinction, under which the Filing Priority Principle protects a pre-filer against the holder of an earlier-perfected security interest that secures an obligation but not against the holder of an earlier-perfected security interest arising from a sale, derives from *nemo dat*. But, of course, *nemo dat* does not end the inquiry. The proper inquiry is whether and under what circumstances the Filing Priority Principle is sufficient to override *nemo dat* to the end that a debtor acquires the power to transfer more than it has, as section 9-203(b)(2) contemplates. If the principle does indeed supply that power under the facts of Example 8, then D has retained the power to transfer a security interest to SP1, the first-filed secured party, and the FTFOP rule would award priority to SP1.

It is interesting that, in other settings, Professor Plank has little trouble with the idea that a person that has sold receivables, and so retains no rights in the collateral, nevertheless retains the power to transfer an interest in the sold receivables. He readily agrees that a person that has sold tangible chattel paper or an instrument to a buyer that perfects its interest, and so "does not retain a legal or equitable interest in the collateral sold,"[19] retains the power to transfer an interest to a subsequent purchaser that takes possession and otherwise qualifies for priority under section 9-330.[20] Section 9-330 addresses a priority contest between the holder of a security interest and a purchaser, which typically is a competing secured party.[21] Like the FTFOP rule, section 9-330 does not apply unless each of the parties holds a property interest, typically a security interest.[22] Yet, in order to achieve the result that "the drafters of Article 9 undoubtedly intended,"[23] Professor Plank is willing to "boost" the language of section 9-330 with a "liberal interpretation" of the defined term "purchaser."[24] "[I]t is possible," he claims, "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."[25] More specifically, it is possible that the drafters intended the term "purchaser" to encompass a person that would have been a purchaser but for the fact that the collateral had already been sold.

One could, of course, "boost" the language of the FTFOP rule with a similar "liberal interpretation" of the term "security interest." As used in section 9-322(a)(1),

19. U.C.C. § 9-318(a) (2010).

20. Plank, *supra* note 1, at 497–99.

21. A "'[p]urchaser' . . . takes by purchase." U.C.C. § 1-201(b)(30) (2011). "'Purchase' means taking by . . . security interest . . . or any other voluntary transaction creating an interest in property." *Id.* § 1-201(b)(29). "Secured party" includes a person to which chattel paper has been sold." U.C.C. § 9-102(a)(72)(D) (2010).

22. A "'[s]ecurity interest' means an interest in personal property or fixtures" and includes the "interest of a buyer" of receivables "in a transaction that is subject to Article 9." U.C.C. § 1-201(b)(35) (2011).

23. Plank, *supra* note 1, at 498.

24. *Id*. at 499.

25. *Id*. at 498.

"security interest" could be interpreted to mean a security interest that would have attached but for the fact that the collateral had already been sold.[26] This approach, which we advocate and Professor Plank rejects, is consistent with the Official Comments, which take for granted that both section 9-330 and the FTFOP rule confer upon a debtor the power to create a security interest in collateral in which the debtor retains no rights.[27] Ultimately, as Professor Plank acknowledges, his unwillingness to adopt such an interpretation of FTFOP stems from his inability to find a "very strong policy reason[]" for adopting that interpretation.[28]

Professor Plank's Example 7 affords another example of his willingness to derive the power to create rights in collateral from the Article 9 priority rules.[29] This example concerns competing buyers of the same account under former Article 9.[30] The facts are simple: After D sells an account to SP1/B1, D purports to sell the same account to SP2/B2. SP2/B2 files a financing statement; SP1/B1 does not. Under *nemo dat*, D would have been unable to convey to SP2/B2 an interest in the account, which SP1/B1 owned. But, as Professor Plank explains, "[t]his result . . . contradicted the entire purpose of including the sale of accounts in Article 9 and subjecting such sales to the requirements of filing for perfection."[31] Accordingly, Professor Plank agrees that, under a proper reading of former Article 9, SP2/B2 would enjoy priority under the Filing Priority Principle.[32]

26. The drafters occasionally took this "would-have-been" approach with the term "secured party." *See* U.C.C. § 9-513 cmt. 3 (2010) (stating that the term "secured party" is understood to be the person named as secured party in a "bogus" filing even though the person may not actually be a secured party).

27. Comment 4 to U.C.C. section 9-318 explains:

> [I]n certain circumstances a purchaser who takes possession of a promissory note will achieve priority, under sections 9-330 and 9-331, over the security interest of an earlier buyer of the promissory note. It necessarily follows that the seller in those circumstances retains the power to transfer the promissory note, as if it had not been sold, to a purchaser who obtains priority under either of those sections. See section 9-203(b)(3), Comment 6.

U.C.C. § 9-318 cmt. 4 (2010). Comment 6 to section 9-203 indicates that the principle applies to all of the priority rules contained in "Part 3, Subpart 3," including the FTFOP rule:

> Certain exceptions to the baseline rule [of *nemo dat* in § 9-203(b)(2)] enable a debtor to transfer, and a security interest to attach to, greater rights than the debtor has. See Part 3, Subpart 3 (priority rules). The phrase [in § 9-203(b)(2)], "or the power to transfer rights in the collateral to a secured party," accommodates those exceptions.

Id. § 9-203 cmt. 6. The omission from Professor Plank's article of any reference to either of these passages is notable.

28. Plank, *supra* note 1, at 499. We think such a liberal interpretation is wholly consistent with Article 1's mandate that the U.C.C. be "liberally construed and applied to promote its underlying purposes and policies." U.C.C. § 1-103(a) (2011); *see* Harris & Mooney, *supra* note 2, at 305.

29. *Id.* at 476–79.

30. "Former Article 9" refers to the official text of Article 9 that preceded the 1998 revision.

31. *Id.* at 477.

32. *Id.* at 478 ("Choosing the Filing Priority Principle over the Plain Language Principle in these cases would have been justified and appropriate."). Revised Article 9 expressly allows for the correct result. *See* U.C.C. § 9-318(b) (2010) (providing that, as against creditors and purchasers for value, while a buyer's security interest in an account or chattel paper is unperfected "the debtor is deemed to have rights and title to the account or chattel paper identical to those the debtor sold"). "As a consequence of subsection (b), if the buyer's security interest is unperfected, the seller can transfer . . .

We think that just as the first filer in Example 3 (SP1, which pre-filed) and Example 7 (SP2/B2) achieve priority under the Filing Priority Principle and notwithstanding *nemo dat*, SP1, which pre-filed, should achieve priority over SP2/B2 in Example 8. In our earlier article we explained in great detail why this result is essential to the proper functioning of the FTFOP rule; it is essential that SP1 have the ability to fix its priority date by pre-filing.[33]

Consider the *ex ante* situation of SP2/B2 as a prospective buyer of account A1 on the assumption that Professor Plank's analysis of Example 8 is the appropriate interpretation. SP2/B2 knows that if an earlier-filed secured party (such as SP1) has already obtained a security interest (whether to secure an obligation or as a buyer) then SP2/B2 will obtain either a subordinate security (ownership) interest or (if SP1 is a buyer) no interest at all. SP2/B2 also knows that its interest would be subordinate to an earlier-filed secured party's interest that attaches after SP2/B2's interest if the purported "true sale" to SP2/B2 is recharacterized as a security interest that secures an obligation.[34] Under Professor Plank's analysis, SP2/B2 knows that it will achieve a senior position only if it takes under a true sale and if the earlier-filed party's interest attaches after SP2/B2 acquires its interest. Given this situation, we believe that SP2/B2 should (and normally would) conduct a search to determine whether such a potentially priming financing statement covering account A1 has been filed.[35] If SP2/B2 searches the records and discovers SP1's filing, it can refuse to complete the transaction, insist on a termination or subordination as a condition of completing the transaction, or proceed in exclusive reliance on D's representations and warranties.[36]

Our differences with Professor Plank's analysis are grounded not on differing interpretive approaches but on *policy* differences. We base our more expansive view of the Filing Priority Principle on the need to implement the policies underlying the FTFOP rule. Professor Plank's approach, however, is colored by his skepticism regarding Article 9's overall treatment of receivables financing. Professor Plank claims that Article 9's filing regime is unnecessary for addressing

the account . . . as if it had not been sold." *Id.* cmt. 3. This aspect of sales of accounts was "implicit" and "obvious" under former Article 9. *Id.*

33. Harris & Mooney, *supra* note 2, at 318–19. SP1 also should prevail if it is a buyer of account A1, in which case it would cut off SP2/B2's rights entirely. *Id.* at 313–17.

34. The risk that a complex transaction will be recharacterized is not trivial. The case law distinguishing true sales from security interests that secure an obligation is confusing and inconsistent. *See* Kenneth C. Kettering, *True Sale of Receivables: A Purposive Analysis*, 16 Am. Bankr. Inst. L. Rev. 511, 515 (2008) ("The courts have . . . been on their own in true sale analysis, and they have not fared well."); Thomas E. Plank, *The True Sale of Loans and the Role of Recourse*, 14 Geo. Mason U. L. Rev. 287, 313 (1991) ("courts do not use a consistent analytical approach when considering these transactions").

35. *See* Steven L. Schwarcz, *Structured Finance: The New Way to Securitize Assets*, 11 Cardozo L. Rev. 607, 626 (1990) ("[I]t is the universally followed procedure for anyone who extends secured credit or is concerned about collateral to search the UCC records."). Of course, a person who is not relying on the filing regime for perfection and priority may choose not to conduct a search. *See, e.g.*, U.C.C. § 9-330 (2010) (specifying circumstances when a secured party or other purchaser of chattel paper or an instrument that takes possession achieves priority over a conflicting security interest).

36. *See* U.C.C. § 9-513(c) (2010) (specifying the circumstances when a termination statement must be sent to the debtor or filed); *id.* § 9-339 (providing that Article 9 does not preclude subordination by agreement).

priority contests involving receivables and that the Filing Priority Principle is "not essential" and not required by—and, indeed, "violates"—his Coherence Principle in the context of receivables transactions.[37] Professor Plank also is highly critical of the structure of Article 9, in that it defines a buyer's ownership interest in receivables as a "security interest" and considers such a buyer to be a "secured party."[38] He is highly critical of applying FTFOP to receivables transactions because a broad filing could hinder and constrain a debtor's ability to enter into later transactions.[39] But this is exactly the result that the FTFOP rule is intended to achieve, so as to enable the first filer to engage in future transactions with the debtor with the comfort that its interest will have priority. The debtor's solution is to decline to authorize such a broad filing. In addition, Professor Plank claims that, in the case of more limited filings, "the filing system is almost useless in providing meaningful notice to subsequent purchasers."[40] He points to the fact that in many situations filings are made against a given debtor by multiple buyers of receivables and that potential buyers consequently rely on their due diligence and on a potential seller's representations and warranties.[41] Nevertheless, the purpose of the FTFOP rule is to protect the first filer.

Professor Plank appears to draw his policy arguments from the Article 9 that he would prefer to exist rather than from the principles underlying Article 9 as it actually exists. Article 9 applies to sales of receivables chiefly to provide essentially the same treatment for sales of receivables and security interests in receivables that secure obligations for purposes of perfection and priority.[42] Professor Plank's preferred analysis of Example 8 would introduce strikingly different treatment for sales in the context of the FTFOP rule. Given his skepticism about the Filing Priority Principle for receivables, it is hardly surprising that Professor Plank takes a narrow view of that principle as a means to confer the power to transfer receivables to a first-filed party.

Although Professor Plank questions the utility of filing with respect to accounts, the drafting history of Revised Article 9 suggests that the receivables financing industry disagrees.[43] Former Article 9 applied to sales of only chattel paper and accounts, the latter being limited to rights to payment for goods sold

37. Plank, *supra* note 1, 444–45, 448, 469–73, 479, 493, 505.

38. *Id.* at 474–76; 495–97; *see* U.C.C. § 1-201(b)(35) (2011) (defining "security interest"); U.C.C. § 9-102(a)(73)(D) (2010) (defining "secured party").

39. Plank, *supra* note 1, at 492–93.

40. *Id.* at 494.

41. *Id.*

42. We note, of course, that sales of payment intangibles and promissory notes are perfected upon attachment. U.C.C. § 9-309(3), (4) (2010). One benefit of providing the same treatment is that it reduces the number of cases in which a transaction must be characterized as a true sale or a security transaction. Drawing the distinction has proven difficult. *See*, *e.g.*, *id.* § 9-109 cmt. 4 (referring to the "difficult problems" of drawing the distinction, which in many commercial financing transactions "is blurred").

43. For a fuller discussion of the drafting history, see Paul M. Shupack, *Making Revised Article 9 Safe for Securitizations: A Brief History*, 73 AM. BANKR. L.J. 167 (1999), and Steven L. Harris & Charles W. Mooney, Jr., *How Successful Was the Revision of UCC Article 9?: Reflections of the Reporters*, 74 CHI.-KENT L. REV. 1357, 1369–73 (1999).

or leased or for services rendered.[44] Not very long after former Article 9 became widely enacted, Homer Kripke, who had extensive experience in the financing world, observed that the exclusion of non-sales- and non-service-related rights to payment from the definition of "account" was an anomaly and did not reflect the policy goals of the drafters.[45] The Article 9 Study Committee of the early 1990s recommended that the scope of Article 9 be expanded to include the sale of general intangibles for money due,[46] and the Article 9 Drafting Committee made the decision to apply Revised Article 9 to sales of these receivables early and easily.[47] As we have observed elsewhere, "[b]ringing [general intangibles for money due] into Article 9 proved to be popular with those departments of a financial institution which handle securitization and other financing transactions such as sales of credit card receivables. It would enable these transactions to proceed with greater certainty, less risk, and less cost."[48]

Of course, we recognize that the Filing Priority Principle should create the power to transfer and override *nemo dat* "only when . . . necessary to promote the policy underlying the [FTFOP] rule."[49] For example, it would not apply to override *nemo dat* in the case of a priority contest between a security interest

44. U.C.C. § 9-102(1) (1995) (specifying the scope of Article 9); *id.* § 9-106 (defining "account").

45. Homer Kripke, *Suggestions for Clarifying Article 9: Intangibles, Proceeds, and Priorities*, 41 N.Y.U. L. REV. 687, 690–93 (1966). Mr. Kripke served as Assistant General Counsel at The CIT Group, Inc. for seventeen years and as President of the Association of Commercial Finance Attorneys, Inc., from 1963 to 1965.

46. PEB STUDY GRP., UNIFORM COMMERCIAL CODE ARTICLE 9: REPORT 43 (Dec. 1, 1992) (recommendation 1.A.).

47. The biggest problem that the Drafting Committee faced with respect to this expansion was finding a way to draft a narrow exclusion for loan participations. The two-fold solution was (1) to define as an "account" nearly every type of payment stream the Drafting Committee could think of and (2) to provide for automatic perfection of security interests in the residual category, which was denominated "payment intangibles." *Compare* U.C.C. § 9-106 (1995) (defining "account"), *with* U.C.C. § 9-102(a)(2) (2010) (defining "account"). *See* U.C.C. § 9-102(a)(61) (2010) (defining "payment intangible").

48. Harris & Mooney, *supra* note 43, at 1371. Professor Paul Shupack, chair of the ABA Securitized Asset Financing Task Force, which advised the Article 9 Drafting Committee concerning securitization issues, concludes that Revised Article 9 "accommodates the needs of those who do asset securitization." Shupack, *supra* note 43, at 181. He includes the application of the Article 9 filing system among the principal benefits that the Article affords to buyers of receivables, *id.* at 169, observing that "[c]ompeting claimants to sold accounts will be resolved by the simple rule that the first to file is first in right[,]" whereas "[c]ompeting claims to sold payment intangibles," which are perfected without filing, "will lack the evidence given by a filing system." *Id.* at 179 (footnote omitted); *see also* Steven L. Schwarcz, *The Impact on Securitization of Revised UCC Article 9*, 74 CHI.-KENT L. REV. 947, 950–51 (1999) (praising Revised Article 9 for "[e]stablishing clear and pragmatic rules for perfection and priority" of securitized receivables). Professor Schwarcz's favorable reaction to Revised Article 9's treatment of receivables is tempered by his concern about the decision to deal with the special problems posed by sales of loan participations by (1) defining as an "account" nearly every type of payment stream the Drafting Committee could think of and (2) providing for automatic perfection of security interests in the residual category, which was denominated "payment intangibles." *Id.* at 955 (characterizing this "practical solution" as "imperfect"); Steven L. Schwarcz, *Automatic Perfection of Sales of Payment Intangibles: A Trap for the Unwary*, 68 OHIO ST. L.J. 273, 276–77 (2007) ("Automatic perfection makes it difficult, if not impossible, to know one's priority in purchased or pledged payment intangibles[,]" which in turn "undermines the market for selling intangible rights and increases costs where sales do occur.")

49. Harris & Mooney, *supra* note 2, at 318.

and a buyer of goods.[50] Article 9 distinguishes between buyers of goods and buyers of accounts in several ways. Most relevant to the current discussion is that buyers of accounts are secured parties, whose fate is intimately tied to the filing system and to which the FTFOP rule applies. They can be expected to appreciate fully both the need to search the public record before entering into a transaction and the legal and practical implications of finding a financing statement filed by a third party. Buyers of goods do not stake their claims in the filing office. Their interests can be fully protected against subsequent claimants without filing. Thus, where accounts are concerned, we would apply the Filing Priority Principle to yield consistent results in Example 8, in which a pre-filer competes with a security interest that secures an obligation, and Example 3, in which the competing claim is a security interest arising from a sale. Professor Plank, on the other hand, would reject consistency in this setting but maintain consistency between buyers of different types of collateral.

Finally, Professor Plank also argues that one reason for rejecting the power to transfer to SP1 in the setting of Example 8 is that actual priority contests in that context "will rarely arise."[51] He surmises that a security agreement in favor of SP1 typically would cover receivables "now owned or hereafter acquired" by D and explains that D no longer owned account A1 when D entered into the security agreement with SP1. We do not follow the reasoning that because the contests would rarely occur the power should be rejected. In any event, we doubt that Professor Plank's point withstands scrutiny. We do not think the phrase just quoted must be read to *exclude* from the collateral receivables that D has the power to transfer, thereby limiting the collateral to that in which D has actual rights. Courts construe security agreements under ordinary contract principles to give effect to the intentions of the parties,[52] and transactions in "all" a debtor's receivables typically are meant to be as inclusive as possible. We believe that a court called upon to resolve this interpretive question might well do so in light of section 2-403(1)'s version of the shelter principle ("A purchaser of goods acquires all title which his transferor had *or had power to transfer* . . . .") and section 9-203(b)(2)'s reference to the debtor's "*power* to transfer rights in the collateral to a secured party."[53]

50. *Id.* at 318–19 (discussing the case in which a buyer buys and takes delivery of goods after a financing statement covering the goods has been filed but before a security in the goods has attached and observing that the applicable priority rule is section 9-317(b) and not FTFOP).

51. Plank, *supra* note 1, at 492.

52. *See, e.g.*, 9A William D. Hawkland & Frederick H. Miller, Uniform Commercial Code Series [rev.] § 9-108:2 (2001) ("To a large degree, description issues arising from the terms of the security agreement involve contract interpretation.").

53. U.C.C. § 2-403(1) (1962) (first sentence) (emphasis added); *id.* § 9-203(b)(2) (2010) (emphasis added). We note that Professor Plank cites section 2-403(1) as an example of the shelter principle. Plank, *supra* note 1, at 442 n.6. The shelter principle is not limited to goods. *See*, *e.g.*, Steven L. Harris, *Using Fundamental Principles of Commercial Law to Decide UCC Cases*, 26 Loy. L.A. L. Rev. 637, 638 (1993) (explaining that the shelter principle is a "fundamental conveyancing principle that predates the UCC"); U.C.C. § 9-207 cmt. 6 (2010) (referring to the application of the shelter principle to investment property).

B. Professor Plank's Example 9: Pre-filing Perfected Buyer versus Perfected Buyer

Professor Plank's Example 9 is a variation on his Example 8.[54] The facts relevant to this discussion are as follows:

> On Day 1 D signs a sale agreement providing for the sale to SP1/B1 of accounts to be designated by D, D designates account A1 for sale under the agreement, and SP1/B1 gives value and files a financing statement covering all accounts sold by D to SP1/B1 under the agreement. On Day 15 D signs a sale agreement providing for the sale to SP2/B2 of accounts to be designated, and SP2/B2 files a financing statement covering all accounts sold by D to SP2/B2 under the agreement. On Day 25 D acquires account A2. On Day 30 D designates account A2 for sale under the sale agreement with SP2/B2, and SP2/B2 gives value. On Day 35 D designates account A2 for sale under the sale agreement with SP1/B1, and SP1/B1 gives value.

As with Example 8, Professor Plank's analysis of Example 9 relies on *nemo dat*: Notwithstanding SP1/B1's earlier filing, once account A2 has been sold to SP2/B2 and SP2/B2 has filed, D has no more rights in the account and SP1/B1 accordingly acquires no rights in it.[55] Under this analysis the first buyer to acquire a perfected security interest—here, SP2/B2—achieves priority. Professor Plank correctly surmises that we would take the position that, by virtue of SP1/B1's earlier filing, D retained the power to transfer account A2 to SP1/B1 and SP1/B1 achieves priority under the FTFOP rule.[56] As Professor Plank noted, we did not address a scenario identical to Example 9 in our earlier article. However, we did consider a similar hypothetical as a variation of our Example D.[57] In that variation we posited essentially this:

> At T-1 SP1 pre-filed a financing statement covering all of D's payment intangibles. At T-2 D sold specific payment intangibles to SP2, whose attached security (ownership) interest became perfected automatically. At T-3 D sold the same specific payment intangibles to SP1.

In our view SP1 obtained its security (ownership) interest in the payment intangibles free of SP2's interest by virtue of D's power to transfer pursuant to the FTFOP rule.[58]

54. *See* Plank, *supra* note 1, at 489–91 (discussing Example 9).

55. *Id.* at 490–91.

56. *Id.* at 491.

57. The discussion of Example D and its variations appears in Harris & Mooney, *supra* note 2, at 309–18. The hypothetical referred to in the text appears at page 313.

58. Example D and the variation discussed in the text also raise an additional issue that is distinct from the one under discussion: whether a pre-filing by a buyer of a payment intangible fixes the "time of filing" under the FTFOP rule. We conclude that it does, *id.* at 309–18, and Professor Plank, in his discussion of his Example 10, agrees. Plank, *supra* note 1, at 500–04. In both our initial iteration of Example D and Professor Plank's Example 10, SP-2 acquired a security interest securing an obligation instead of the ownership interest of a buyer. Professor Plank concludes, through an analysis similar to ours, that in this situation SP-1's interest would have priority over that of SP-2. Plank, *supra* note 1, at 500–04. Because SP-1 is a buyer, however, SP-1 *takes free* of SP-2's interest in the payment intangibles by virtue of its priority. Harris & Mooney, *supra* note 2, at 313.

Professor Plank disagrees with our conclusion[59] for the same reasons discussed in connection with Example 8.

IV. A Legislative Solution?

Professor Plank's view is that "the best forum for resolving these issues [concerning the Filing Priority Principle and the power to transfer] is a legislative forum (a drafting committee or legislative committee) where numerous interested parties can express their views and advocate their solutions."[60] He also expresses a "strong aversion to overruling the plain language of the statute to implement the Filing Priority Principle by implication."[61] But we are quite skeptical that a legislative solution is practical or likely, at least in the short to medium term.

The U.C.C.'s sponsors recently completed a revision of Article 9 that culminated in the 2010 amendments to the Article.[62] The bulk of the work was devoted to issues that appeared on a list formulated by an Article 9 Review Committee.[63] The list included only one priority issue considered here: "Whether an Official Comment should clarify how the priority rules apply to a security interest that, under § 9-309(3) or (4), is perfected upon attachment and without filing, but as to which a financing statement nevertheless has been filed."[64] Moreover, the general approach of the Joint Review Committee, which was responsible for drafting the amendments, was to limit the number of changes and, where feasible, to change the comments rather than the statute itself.[65] The Joint Review Committee originally drafted a comment to make it clear that a pre-filing secured party would win under facts similar to Example 8.[66] It "later abandoned any effort to deal with the issue,"[67] in part because one of us (Harris, who was serving as the Reporter to the Committee) expressed concern that a comment might give rise to unintended consequences.[68] Perhaps it would be feasible to

59. Plank, *supra* note 1, at 494–95.

60. *Id.* at 495.

61. *Id.*

62. For a summary of the amendments, which were approved in 2010, see *UCC Article 9 Amendments (2010) Summary*, Unif. L. Commission, http://uniformlaws.org/ActSummary.aspx?title=UCC%20Article%209%20Amendments%20(2010) (last visited July 8, 2013).

63. Article 9 Review Comm., Statutory Modification Issues List (June 24, 2008), *available at* https://www.law.gonzaga.edu/files/Article9-StudyGroup.pdf.

64. *Id.* at 17. Professor Plank generally agrees with us that a pre-filing by a buyer of a payment intangible fixes the "time of filing" under the FTFOP rule. *See* Harris & Mooney, *supra* note 2, at 309–18; Plank, *supra* note 1, at 500–04.

65. *See* Nat'l Conference of Comm'rs on Uniform State Laws, Amendments to Uniform Commercial Code Article 9, at 1 (May 27, 2009) (specifying standards suggested by the Chair of the Joint Review Committee for proposing revisions of the official text of Article 9).

66. Stephen L. Sepinuck, *Perfecting Article 9: A Partial Prescription for the Next Revision*, 46 Gonz. L. Rev. 555, 559 (2011).

67. *Id.*

68. The concern was prompted in part by the fact that the addition of section 9-318, discussed above in connection with Professor Plank's Example 3, created its own unintended consequences. Read literally, subsection (b) would have precluded the application of section 9-330. These consequences were addressed in the addition to section 9-318, comment 4, that is quoted in *supra* note 27. *See* Executive

attempt a resolution by means of a PEB Commentary,[69] but the Permanent Editorial Board for the U.C.C. has shown little inclination to address the issue.[70] Perhaps an evolving movement toward consensus and consistent analysis through the academic literature is the most that reasonably might be expected. We are happy to participate in that process.

V. Conclusion

In this brief rejoinder to some of the points made by Professor Plank in his recent article, we have reiterated our view that the FTFOP rule supports the implication of a broad power to transfer. The power embraces a transfer to an earlier-filed secured party in a way that overcomes the limitations of *nemo dat*, which otherwise would protect the interest of an intervening buyer of receivables that is perfected by a later filing or that is automatically perfected. While we have referred readers to our earlier article for much of the detail of our analyses, we appreciate the opportunity to respond in this journal.

Comm. of Nat'l Conference of Comm'rs on Uniform State Laws & Permanent Editorial Bd. for the Unif. Commercial Code, Uniform Commercial Code Article 9 Modifications to Official Text and Comments (Dec. 2001). It may well be that teasing out the sale-related provisions and treating them separately, as Professor Plank advocated, would have been more successful. However, the Drafting Committee for Revised Article 9 rejected this approach.

69. *See* Permanent Editorial Bd. for the Unif. Commercial Code, *PEB Resolution on Purposes, Standards and Procedures for PEB Commentary to the UCC*, in Selected Commercial Statutes 1060 (Carol L. Chomsky et al. eds., 2013) (providing for the issuance of PEB Commentary).

70. The PEB received a draft of such a Commentary from Professor Kenneth Kettering some seven years ago. Memorandum from Kenneth C. Kettering, Assoc. Professor, N.Y. Law Sch. to Lance Liebman et al. (June 21, 2006).