

Assignment of Receivables Under Article 9: Structural Incoherence and Wasteful Filing

THOMAS E. PLANK*

Article 9 is a comprehensive and remarkable statute regulating the granting of a security interest in goods and other collateral owned by a debtor to secure a debt. Article 9 also governs both an assignment of receivables to secure a debt and a sale of the receivables. Unfortunately, Article 9's treatment of the assignment of receivables has produced a variety of calamities for both the drafters and the users of Article 9. First, Article 9 incorporates an absolute assignment of receivables, which transfers ownership, into a logically incompatible lien statute that inherently assumes that the grantor retains ownership. Second, Article 9 compounds this structural incoherence by defining the transfer of ownership through the use of misleading defined terms of security. Third, Article 9 mistakenly requires the filing of a financing statement to perfect an assignment. This requirement reflects the faulty assumption that the reasons for requiring notice filing to perfect a security interest in goods, which are tangible, apply equally to the assignment of receivables. The filing requirement imposes costs that are not justified by the putative benefits. This Article describes the calamities that these errors have created and makes a general proposal for a new Article 9A that would govern solely the assignment of receivables using a conveyancing paradigm. In addition, this Article examines the costs and benefits of a notice filing system for the assignment of receivables and proposes the abolition of the filing requirement.

TABLE OF CONTENTS

I. INTRODUCTION	232
II. THE DEFECTS	234
A. <i>Sales in Security</i>	234
B. <i>The Filing Requirements</i>	247
1. <i>Introduction: The Rules for Perfection</i>	247
2. <i>Rationale for the Filing Requirement</i>	249
3. <i>Benefits and Costs</i>	256
III. SOLUTIONS	262
A. <i>Solving the Structural Incoherence</i>	262
B. <i>Elimination of Filing</i>	264
1. <i>Optimal Rules for Perfection</i>	264

* Joel A. Katz Distinguished Professor of Law, University of Tennessee College of Law; A.B. 1968, Princeton University; J.D. 1974, University of Maryland; Of Counsel, McKee Nelson, LLP. I thank Donald Rapson and Kenneth Kettering for their comments on a draft of this Article.

2. Priority.....	268
IV. CONCLUSION.....	270

I. INTRODUCTION

Article 9 of the Uniform Commercial Code (UCC) is one of the most significant and successful legal developments of the twentieth century. In particular, it is a well drafted, uniform regime for creating and regulating security interests in goods—a feat that had eluded legislators for 150 years.¹ However, Article 9's treatment of the assignment of receivables—rights to payment of a monetary obligation evidenced by accounts,² chattel paper,³ promissory notes,⁴ or payment intangibles⁵—has from the beginning and continues to create calamities.

The root of these calamities is Article 9's failure to implement the basic principle that any legal system regulating the transfer of property should reflect the nature of both the property item and transactions involving the

¹ See 1 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY §§ 2–8 (1965) (describing the history of chattel mortgages, conditional sale contracts, trust receipts, factor's liens, field warehousing, and accounts receivables financing). In 1918, the National Conference of Commissioners on Uniform State Laws (NCCUSL) proposed a Uniform Conditional Sales Act, but the Act was adopted in only eleven states, and in 1926, NCCUSL proposed a Uniform Chattel Mortgage Act, but that Act was adopted in only one state. See *infra* note 102 and accompanying text. NCCUSL's Uniform Trust Receipts Act of 1933, limited to security interest in large items such as automobiles, had greater success; it was adopted in thirty-nine states. See *infra* note 93.

² See U.C.C. § 9-102(a)(2) (2003) (defining an “account” to mean “a right to payment of a monetary obligation, whether or not earned by performance, (i) for property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of, (ii) for services rendered or to be rendered,” and for a variety of other enumerated purposes, such as insurance, a secondary obligation, energy, hire of a vessel, credit card charges, and lottery winnings, but excluding chattel paper or instruments and other specialized types of payment obligations, such as commercial tort claims, deposit accounts, investment property, and rights to payment for money or funds advanced other than credit card receivables).

³ See *id.* § 9-102(a)(11) (providing that “chattel paper” is primarily “a record or records that evidence both a monetary obligation and a security interest in specific goods . . . or a lease of specific goods”).

⁴ See *id.* § 9-102(a)(65) (defining “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”).

⁵ See *id.* § 9-102(a)(61) (defining “payment intangible” to mean “a general intangible under which the account debtor's principal obligation is a monetary obligation”). A “general intangible” is any personal property that is not included in another Article 9 type of collateral. See *id.* § 9-102(a)(42).

property item. First, Article 9 treats receivables the same as goods and wrongly assumes that the requirement for the filing of a financing statement to perfect a non-possessory security interest in goods should apply equally to a non-possessory security interest in receivables.⁶ As Part II.B below explains, this filing requirement imposes costs on assignors of receivables and their assignees and creditors that outweigh the benefits.

Second, in addition to governing the transfer of an interest in receivables as security for a loan⁷—what I refer to as a “collateral assignment”—Article 9 governs the sale of receivables.⁸ The initial drafters of Article 9 incorporated the sales of accounts and chattel paper because of their desire to impose a filing requirement on these sales.⁹ The method of incorporating these sales, however, created a fundamental structural defect: Article 9 embodies a security or lien paradigm that inherently assumes that the “debtor,” which includes an assignor of receivables, retains an ownership interest in the collateral subject to a security interest. This security or lien paradigm is not compatible with a sale of receivables that by definition entails the transfer of ownership. Compounding this structural incompatibility, Article 9 incorporates these sale transactions through misleading terms of security. As Part II.A explains, these structural and definitional defects create significant problems in the drafting and interpretation of Article 9.

⁶ See *infra* text accompanying notes 72, 75, 76, 78 (describing the rules for perfecting security interests in the different types of receivables by filing).

⁷ See U.C.C. § 9-109(a)(1) (2003) (providing that “this article applies to: (1) a transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract”); *id.* § 1-201(b)(35) (providing that “‘security interest’ means an interest in personal property or fixtures which secures payment or performance of an obligation”). Personal property consists of the receivables discussed in this Article; goods, see *id.* § 9-102(a)(44), and its subtypes of consumer goods, equipment, farm products, and inventory, see *id.* §§ 9-102(a)(23), (33), (34), (48); other types of rights to payment of a monetary obligation that are more specialized, such as commercial tort claims, see *id.* § 9-102(a)(13), deposit accounts, see *id.* § 9-102(a)(29), investment property, see *id.* § 9-102(a)(49), letter-of-credit rights, see *id.* § 9-102(a)(51), letters of credit, see *id.* § 9-102(b), with a cross reference to § 5-102, and “instruments” (of which promissory notes are a subtype), see *id.* § 9-102(a)(47); documents, see *id.* § 9-102(a)(30); money, see *id.* § 1-201(b)(24); and general intangibles, a catch-all for personal property that does not fit the other Article 9 types, see *id.* § 9-102(a)(29).

⁸ See *id.* § 9-109(a)(3) (2003) (providing that “this article applies to . . . (3) a sale of accounts, chattel paper, payment intangibles, or promissory notes”); see also *infra* notes 31–34 and accompanying text (describing the mechanism by which such sales are incorporated into Article 9).

⁹ Thomas E. Plank, *Sacred Cows and Workhorses: The Sale of Accounts and Chattel Paper Under Article 9 of the U.C.C. and the Effects of Violating a Fundamental Drafting Principle*, 26 CONN. L. REV. 397, 416–20, 423–25 (1994) [hereinafter Plank, *Sale of Accounts*].

Removing the sale of receivables from Article 9 would solve these structural and definitional defects. This solution is not, however, advisable. The nature of the receivables and of transactions transferring receivables requires a single legal regime. Further, even if sales were removed from an Article 9 that retained the current filing requirement for collateral assignments of receivables, buyers of receivables would continue to bear the burdens of the current costly and uninformative filing regime.¹⁰

The best solution to these defects would be a new Article 9A that regulates both sales and collateral assignments through a conveyancing paradigm that eliminates the filing requirement for all assignments of receivables. In Part III of this Article, I describe this solution generally, although I do not present a detailed proposal. Instead, as a prelude to the larger solution, I present a more limited but detailed revision to the filing requirement that will ameliorate the structural and definitional defects in the rules governing assignments of receivables without a completely new Article 9A.

Specifically, as described in Part III, I propose the elimination of the requirement to file a financing statement for the perfection and, with one exception, for priority of assignments of all types of receivables. All assignments would be automatically perfected, and priority for an assignment of any receivable pursuant to an agreement would date from the assignment of the first receivable under that agreement. The only exception would be a permissible filing by an assignee to establish priority over a security interest in receivables as proceeds of collateral—typically goods—in which the secured party perfected its security interest by filing.

II. THE DEFECTS

Although the filing requirement led to the structural and definitional flaws of Article 9's treatment of receivables, the latter flaws create more calamities. Also, the analysis of these flaws provides important background and context for the analysis of the filing requirement. Accordingly, this Part first describes the structural and definitional mistreatment of the assignment of receivables before describing the disutility of the filing requirement.

A. Sales in Security

The basic structure of Article 9 is simple. Under Section 9-203 of the UCC, a security interest “attaches” to collateral when it becomes enforceable

¹⁰ See, e.g., *infra* notes 122 and 130 and accompanying text (discussing how the filing requirement for collateral assignments of payment intangibles and promissory notes adversely affects buyers of these receivables).

against the debtor.¹¹ A security interest becomes enforceable against the debtor when (1) value has been given to the debtor, (2) the debtor has rights in the collateral or the power to transfer rights in the collateral to the secured party, and (3) either the debtor has authenticated a security agreement that describes the collateral, or the secured party has possession or “control” of the collateral.¹² The secured party’s security interest in collateral becomes generally effective against subsequent purchases from and creditors of the debtor—that is, it becomes “perfected”—when the security interest has “attached” and any additional requirements set forth in Sections 9-308 through 9-316 of the UCC are satisfied.¹³ Generally, these sections require the filing of a financing statement,¹⁴ the taking of possession of tangible collateral,¹⁵ or control of certain specialized collateral.¹⁶ In a few instances, no additional steps are required, and the secured party’s security interest is perfected upon attachment.¹⁷ An unperfected security interest will be subordinate to a perfected security interest¹⁸ and to a lien creditor.¹⁹ The

¹¹ See U.C.C. § 9-203(a) (2003).

¹² See *id.* § 9-203(b). The word “control” in most sections of Article 9 has a specialized meaning. See *id.* §§ 9-104, 9-105, 9-107, 9-108 (providing particularized definitions of “control” for deposit accounts, electronic chattel paper, investment property, and letter of credit rights).

¹³ 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”).

¹⁴ 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); *id.* § 9-312(a) (providing that a “security interest in chattel paper, negotiable documents, instruments, or investment property may be perfected by filing”).

¹⁵ See *id.* §§ 9-310(b)(6), 9-313(a) (the latter providing that, except for certain goods subject to certificates of title, “a secured party may perfect a security interest in negotiable documents, goods, instruments, money, or tangible chattel paper by taking possession of the collateral” and “in certificated securities by taking delivery of the certificated securities”).

¹⁶ See *id.* § 9-312(b)(1), (2) (providing that a security interest in a deposit account and a letter-of-credit right may be perfected only by control under Section 9-314); *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”).

¹⁷ See U.C.C. §§ 9-310(b)(2), 9-309 (2003) (providing that certain security interests are perfected upon attachment); see also *infra* text accompanying note 143 (listing the instances of automatic perfection for receivables).

¹⁸ See U.C.C. § 9-322(a)(2) (2003) (subordinating an unperfected security interest to a perfected security interest).

¹⁹ See *id.* § 9-317(a)(2) (providing that “[a] security interest . . . is subordinate to the rights of . . . a person that becomes a lien creditor before the earlier of the time: (A) the security interest . . . is perfected; or (B) one of the conditions specified in Section 9-

priority between perfected security interests is generally determined by the earliest time of the filing of a financing statement covering the collateral or perfection of the security interest.²⁰ Upon default, the secured party may exercise the remedies prescribed by Part 6 of Article 9.²¹

From the beginning, however, the drafters decided that Article 9 should govern the sale of accounts and chattel paper in addition to governing a collateral assignment of receivables.²² The 2001 revision expanded Article 9 to govern the sale of promissory notes and payment intangibles.²³ In incorporating these sale transactions, the drafters made two fundamental mistakes. First, they injected an absolute conveyance of a property interest into a security or lien statute. A statutory scheme regulating absolute conveyances must account for the transfer of ownership from one owner to another, as well as regulate competing claims of ownership. In contrast, a lien statute creates in favor of a lien holder a limited property interest in a property item that dedicates the property item to the payment or performance of an obligation but that does not enable the lien holder to exercise the rights of ownership of the property item. Implicit in a lien statute is the debtor's continued ownership of the collateral unless it is sold at a foreclosure sale after a default.²⁴ A lien statute need only regulate the creation, perfection, priority, and enforcement of a lien. It inherently does not address the problems associated with the transfer of ownership and competing claims of ownership.²⁵

The language that Article 9 uses for the creation of a security interest and

203(b)(3) is met and a financing statement covering the collateral is filed.”).

²⁰ See *id.* § 9-322(a)(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.”). There are exceptions to this first to file or perfect rule, including super-priority for purchase money security interests in goods, see *id.* § 9-324, for security interests in collateral transferred to another debtor, see *id.* § 9-325, for security interests in collateral created by a person that becomes a “new debtor,” see *id.* § 9-326, and for certain possessory interests in chattel paper or instruments, see *id.* § 9-330.

²¹ See *id.* § 9-601(a).

²² See U.C.C. § 9-102(1) (1962).

²³ See U.C.C. § 9-109(a)(3) (2003), quoted *supra* note 8; see also *infra* notes 31–34 and accompanying text (describing the mechanism for including such sales).

²⁴ Upon default, the secured party can sell the collateral. See *id.* § 9-610. Article 9 does not, however, regulate how the purchaser at a foreclosure sale obtains title other than to provide that the purchaser takes free of the security interest and any junior security interests. See *id.* § 9-617.

²⁵ A conveyancing structure can, however, accommodate liens and security interests. See, e.g., WILLIAM B. STOEBUCK & DALE A. WHITMAN, LAW OF PROPERTY §§ 11.9–11.10 at 869–82 (3d ed. 2000) (describing the recording system and those protected by it).

the sale of receivables reflects only the lien structure and generally ignores terms or concepts of absolute conveyance. As noted above, under Article 9, a security interest “attaches” to collateral.²⁶ Attachment is a concept well known in the enforcement of liens in favor of judgment creditors.²⁷ One does not, however, normally think of an ownership interest in property as “attaching.” A buyer acquires an ownership interest from a previous owner by conveyance, not by “attachment.”

Consistent with its use of the concept of attachment, Article 9 “subordinates” an unperfected security interest to a lien creditor²⁸ and provides rules for the “priority” of competing security interests.²⁹ Because concepts of subordination or priority imply the existence of a residual interest in the junior lienholder, they are less well suited to describe the rights of competing purchasers of property in which one purchaser will have all of the rights to the property item and the other will have none of the rights. In contrast, the real estate recording statutes better reflect the underlying nature of the transactions being regulated. They typically provide that an unrecorded conveyance is *void* or *invalid* against a subsequent purchaser or mortgagee that acquires its interest without notice of the earlier conveyance and, in

²⁶ See, e.g., U.C.C. § 9-203(a) (2003), discussed *supra* in text accompanying note 11; see also *id.* § 9-203(f) (providing that the “attachment of a security interest in collateral gives the secured party the rights to proceeds provided by Section 9-315 and is also attachment of a security interest in a supporting obligation for the collateral”); *id.* § 9-203(g) (providing that the “attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien”); *id.* § 9-308(a) (providing that, with some exceptions, “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. A security interest is perfected when it attaches if the applicable requirements are satisfied before the security interest attaches”); *id.* § 9-309 (providing that certain security interests are perfected when they attach); *id.* § 9-315(a)(2) (providing that “a security interest attaches to any identifiable proceeds of collateral”).

²⁷ See, e.g., *id.* § 9-102(a)(52)(A) (defining “lien creditor” to mean “a creditor that has acquired a lien on the property involved by attachment, levy, or the like”); 6 AM. JUR. 2D *Attachment and Garnishment* § 1, at 477–78 (1999) (“The term ‘attachment’ means a remedy by which a plaintiff acquires a lien upon the property or effects of the defendant for the satisfaction of a judgment which the plaintiff may obtain in an action.”); *id.* § 19, at 489 (“The primary purpose of attachment is to secure an interest in property, not itself the subject matter of the action, to have a fund available from which to satisfy any judgment obtained.”); *id.* § 92, at 536–37 (noting the necessity that the debtor have an interest in or right to the property subject to attachment).

²⁸ See *supra* note 19 and accompanying text.

²⁹ See, e.g., U.C.C. § 9-322(a)(1) (2003), quoted *supra* in note 20 (the rule for the priority conflict between perfected security interests); *id.* § 9-322(a)(2), discussed *supra* note 18 (the rule for the priority conflict between perfected and unperfected security interests).

many states, that records its conveyance first.³⁰

Second, Article 9 compounds this juxtaposition of two theoretically incompatible legal regimes by using terms of security to govern the absolute conveyance of receivables. A “security interest” includes any interest of a buyer of receivables;³¹ a “debtor” includes a seller of receivables;³² a “secured party” includes a buyer of receivables;³³ and “collateral” includes receivables that have been sold.³⁴ As I have pointed out elsewhere in some detail,³⁵ this drafting technique violates a fundamental drafting principle and indeed NCCUSL’s own drafting rules: defined terms should convey a sense of the meaning of the term of the definition.³⁶ The use of abnormal or misleading defined terms makes it difficult for both drafters and interpreters to see, analyze, provide for, or articulate the differences between a sale of a receivable and an assignment of a receivable for security.

Like a poorly designed section of a highway or railway system, the insertion of a sale transaction into a lien statute and the use of misleading defined terms in Article 9 inevitably create calamities. The most significant calamities experienced by assignees of receivables result from the failure of Article 9 to inform the public adequately of even the existence of rules governing the sales of receivables. Assignees have sometimes discovered these rules too late, such as when they lose their ownership interest in accounts because of the failure to file a financing statement to perfect their purchase.³⁷

The structural and definitional defects of Article 9 also created calamities in the drafting of Article 9. In a statute as complicated as Article 9, the use of language of security and the absence of language of sale obscured the

³⁰ See, e.g., STOEBUCK & WHITMAN, *supra* note 25, § 11.9, at 871–74.

³¹ See U.C.C. § 1-201(b)(35) (2003) (providing that “[s]ecurity interest’ includes any interest of . . . a buyer of accounts, chattel paper, a payment intangible, or a promissory note in a transaction that is subject to Article 9”).

³² See *id.* § 9-102(a)(28)(B) (providing that “[d]ebtor’ means . . . a seller of accounts, chattel paper, payment intangibles, or promissory notes”).

³³ See *id.* § 9-102(a)(72)(D) (providing that “[s]ecured party’ means . . . a person to which accounts, chattel paper, payment intangibles, or promissory notes have been sold”).

³⁴ See *id.* § 9-102(a)(12)(D) (providing that “[c]ollateral’ means . . . accounts, chattel paper, payment intangibles, and promissory notes that have been sold”).

³⁵ See Plank, *Sale of Accounts*, *supra* note 9.

³⁶ See *id.* at 442–50 (discussing the content and the development of the drafting principle). Reed Dickerson presented the most thorough explanation of the reasons for this rule. See REED DICKERSON, *THE FUNDAMENTALS OF LEGAL DRAFTING* § 2.3.3, at 17–18 (2d ed. 1986).

³⁷ See Plank, *Sale of Accounts*, *supra* note 9, at 472–75 (discussing reported cases of buyers that failed to appreciate Article 9’s applicability to sales of accounts).

implications of numerous provisions for the sale of receivables. Former Article 9 contained numerous drafting mistakes and some questionable policy decisions. The 2001 revision of Article 9 corrected many of these mistakes but it continued some of the drafting mistakes and questionable policy decisions, and introduced new mistakes.

An enduring policy mistake is the limited duration of financing statements filed to perfect a sale of an account. If a secured party has perfected a security interest by filing a financing statement, the financing statement is generally effective for only five years, and a secured party must continue that financing statement by filing a continuation statement.³⁸ Otherwise, the financing statement lapses, and the security interest ceases to be perfected. Further, the unperfected status is retroactive against any previously subordinated purchaser for value.³⁹ If one wanted to limit the amount of information that a public filing system must retain, this requirement makes sense for a collateral assignment to a secured creditor. The secured creditor has by definition a continuing relationship with its borrower, which continues to own the collateral, until the secured creditor's security interest ends when the debt is repaid.

The requirement to file a continuation statement every five years, however, makes no sense for a buyer of property that inherently need not have a continuing relationship with the seller.⁴⁰ If the buyer of an account does not file a continuation statement, the buyer will lose its ownership interest to an intervening perfected secured party⁴¹ or a later lien creditor⁴² or

³⁸ See U.C.C. § 9-515(a) (2003) (providing that, with some exceptions, a filed financing statement is effective for a period of five years after the date of filing); *id.* § 9-515(c) (providing that, at the end of the specified period, the effectiveness of a filed financing statement lapses unless before the lapse a continuation statement is filed); *id.* § 9-515(e) (providing that the timely filing of successive continuation statements continues the effectiveness of the initial financing statement for additional five-year periods). The secured party may also continue its perfected status by perfecting its security interest through any permissible method, such as filing a new financing statement or taking possession of tangible collateral. See *id.* § 9-308(c) (providing that a "security interest or agricultural lien is perfected continuously if it is originally perfected by one method under this article and is later perfected by another method under this article, without an intermediate period when it was unperfected").

³⁹ See *id.* § 9-515(c) ("Upon lapse, a financing statement ceases to be effective and any security interest or agricultural lien that was perfected by the financing statement becomes unperfected, unless the security interest is perfected otherwise. If the security interest or agricultural lien becomes unperfected upon lapse, it is deemed never to have been perfected as against a purchaser of the collateral for value.").

⁴⁰ See Plank, *Sale of Accounts*, *supra* note 9, at 482-93.

⁴¹ See U.C.C. § 9-322(a)(2) (2003), discussed *supra* note 18.

⁴² See *id.* § 9-317(a)(2), discussed *supra* note 19.

bankruptcy trustee of the seller.⁴³ This requirement and the consequences of failing to satisfy it create two potential calamities. First, Professor David Gray Carlson has argued that the requirement for the filing of a continuation statement essentially implies that a seller retains an interest in an account that it has sold and that this interest becomes part of the seller's bankruptcy estate if the seller becomes a debtor in bankruptcy.⁴⁴ I disagree with his analysis, but a bankruptcy court might accept it.⁴⁵

The second type of calamity is more common: The loss of ownership if the buyer fails to file the continuation statement. Many traditional accounts are not outstanding for five years, and buyers of accounts have learned to live with this requirement. Nevertheless, because the 2001 revision broadened the definition of accounts, this policy decision creates a risk for buyers that is inconsistent with a buyer's practical expectations and its theoretical ownership interest.⁴⁶ Although there is a risk that any secured party will fail to file a continuation statement, the nature of the sale transaction makes the risk much greater for buyers than for secured lenders.

Drafting mistakes, many of which have been fixed, also littered former Article 9. For example, a debtor was defined as an owner of the collateral and also a seller of accounts.⁴⁷ A secured party was a person in whose favor there was a security interest and also a buyer of accounts.⁴⁸ Therefore, a buyer of accounts was both the debtor and the secured party. This result, of course,

⁴³ See 11 U.S.C. § 544(a)(1) (2000) (providing that a bankruptcy trustee has the rights of a hypothetical lien creditor).

⁴⁴ David Gray Carlson, *The Rotten Foundations of Securitization*, 39 WM. & MARY L. REV. 1055, 1061–62, 1096–99 (1998).

⁴⁵ Thomas E. Plank, *The Security of Securitization and the Future of Security*, 25 CARDOZO L. REV. 1655, 1716–22 (2004) [hereinafter Plank, *Security of Securitization*].

⁴⁶ Buyers of chattel paper who do not perfect their security interests by possession also face these problems.

⁴⁷ See U.C.C. § 9-105(1)(d) (1972) (providing that “debtor” means “the person who owes payment or other performance of the obligation secured, . . . and includes the seller of accounts or chattel paper. Where the debtor and the owner of the collateral are not the same person, the term ‘debtor’ means the owner of the collateral in any provision of the Article dealing with the collateral”). This formulation has been part of Article 9 since the November 1951 draft of the UCC. See U.C.C. § 9-105(1)(d) (Final Text Edition, Nov. 1951) (adding the language that the debtor “includes the seller of accounts, contract rights or chattel paper” to the existing draft language that provided “[w]here the debtor and the owner of the collateral are not the same person, the term ‘debtor’, unless the context . . . otherwise requires, includes the owner of the collateral as well as the person who owes the obligation secured”).

⁴⁸ See U.C.C. § 9-105(1)(m) (1972) (providing that “secured 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”). This formulation has been in Article 9 since 1951. See U.C.C. § 9-105(1)(h) (Proposed Final Draft No. 2, Spring 1951).

was nonsense, and a court could easily resolve this drafting error. Revised Article 9 fixed this particular problem by expressly providing that the definition of debtor excludes a “secured party,” which includes a buyer of receivables.⁴⁹ Nevertheless, this kind of mistake naturally follows the insertion of an absolute conveyance transaction into a lien structure and then disguising the absolute conveyance through the language of the lien structure.

A more significant drafting error arose in the priority rules between a buyer of accounts that failed to perfect its interest and a subsequent buyer or a lien creditor. Article 9 intended that a buyer of accounts must perfect its ownership interest by filing a financing statement. It provided that an unperfected security interest—which includes a buyer’s interest in an account—was subordinate to a subsequent secured party that filed⁵⁰ or to a subsequent lien creditor.⁵¹ As noted by Professor Dan Coenen,⁵² however, a buyer that failed to perfect its security interest had a good technical argument for defeating the subsequent secured party that filed. For a security interest to be perfected under former Article 9, the security interest had to attach.⁵³ A security interest could not attach unless the debtor had rights in the collateral.⁵⁴ Because the debtor had sold the account to the buyer, the debtor no longer had rights in the collateral notwithstanding the lack of perfection. Consequently, no subsequent security interest could attach to the account that had been sold, and the subsequent secured party that filed could not get a security interest at all. Similarly, if the debtor had sold the account, no subsequent lien creditor could obtain a lien on property no longer owned by the debtor.

Accordingly, the language of former Article 9 failed to implement the intent that a perfected secured party or a lien creditor should prevail over an earlier unperfected secured party, including a buyer of accounts or chattel paper. The 2001 revision to Article 9 fixed this technical problem. First, Section 9-318(b) provides that, if a buyer of accounts or chattel paper fails to

⁴⁹ See U.C.C. § 9-102(a)(28)(A) (2003) (providing that “[d]ebtor” means . . . a person having an interest, other than a security interest or other lien, in the collateral”).

⁵⁰ See U.C.C. § 9-301(1)(a) (1972) (providing that “an unperfected security interest is subordinate to the rights of persons entitled to priority under Section 9-312”); *id.* § 9-312(5)(a) (providing that “[c]onflicting 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.”).

⁵¹ See *id.* § 9-301(1)(b) (1972).

⁵² 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).

⁵³ See U.C.C. § 9-303(1) (1972). The language of this section is substantially the same as current Article 9. See U.C.C. § 9-308(a) (2003), quoted *supra* note 13.

⁵⁴ See U.C.C. § 9-203(1)(c) (1972).

perfect its security interest, the debtor is deemed to have the power to transfer to another person the rights that the debtor sold.⁵⁵ Second, Section 9-203(b)(2) now provides that a security interest may attach if the debtor has rights in the collateral “or the power to transfer rights in the collateral to a secured party.”⁵⁶

Former Article 9 contained many other mistakes in the treatment of the sale of accounts and chattel paper that resulted from incorporating the sale of accounts and chattel paper through the use of security terminology, such as applying all of the default provisions to sales of these receivables and imposing duties on buyers of chattel paper that was intended only for secured creditors.⁵⁷ The 2001 revisions to Article 9 corrected many of these glitches by excluding the sale of receivables from the operation of those rules that should only apply to a security interest to secure a debt.⁵⁸

Nevertheless, Article 9 still contains a major problem in the operation of the basic priority rule of Section 9-322(a)(1) that gives priority to the first person that files a financing statement over another person that becomes a secured party after the filing.⁵⁹ In two out of three instances, this first to file or perfect rule does not give priority to the first filer if the debtor sells an account to another person after the filing. To illustrate this point, the following examples contrast how the priority rules work for a true security interest against how the priority rules fail to work when one person is a buyer of accounts.

Example 1: Priority of collateral assignments of existing and after-acquired accounts.

On April 1, while negotiating to make a loan to D secured by D’s accounts then owned or later acquired, SP-1/Lender files an authorized and proper financing statement covering “accounts.” D does not at this time grant SP-1/Lender any security interest in any accounts. D owns Account #1.

On April 10, in exchange for a loan by SP-2, D authenticates a record by which D grants to SP-2/Lender a security interest in all of D’s accounts then owned or later acquired. SP-2/Lender files a proper financing statement covering “accounts.” On April 10, all of the elements for attachment—value,

⁵⁵ See U.C.C. § 9-318(b) (2003).

⁵⁶ See *id.* § 9-203(b)(2), discussed *supra* in note 12 and accompanying text.

⁵⁷ See Plank, *Sale of Accounts*, *supra* note 9, at 482–93.

⁵⁸ See, e.g., U.C.C. § 9-202 (2003) (excepting sales of receivables from the rule that Article 9 applies regardless of who has title to collateral); *id.* §§ 9-207(d), 9-208(b)(3), 9-209(c), 9-210(b), and 9-601(g) (excepting sales of receivables from various obligations of a secured party to the debtor or account debtors); *id.* § 9-323(c) (excepting sales of receivables from the priority rule for future advances).

⁵⁹ See *id.* § 9-322(a)(1), quoted *supra* note 20.

debtor's rights in the collateral, and an authenticated security agreement—have been satisfied,⁶⁰ and SP-2/Lender has taken the steps required to perfect its security interest—filing a financing statement.⁶¹

On April 10, SP-2 has a perfected security interest in Account #1.⁶²

On April 20, in exchange for a loan by SP-1, D authenticates a record by which D grants to SP-1/Lender a security in all of D's accounts then owned or later acquired. On April 20, all of the elements for attachment have been satisfied, and SP-1/Lender had taken the steps required to perfect its security interest.

On April 20, SP-1 has a perfected security interest in Account #1.

Nevertheless, even though SP-2 had a perfected security interest in Account #1 *before* SP-1 acquired its perfected security interest in Account #1, SP-1 has *priority* over SP-2 because SP-1 was the first to file or perfect under Section 9-322(a)(1).

On May 1, D acquires Account #2. On this date, SP-1's security interest and SP-2's security interest attach to Account 2 simultaneously because D acquires rights in Account #2 and therefore satisfies the last requirement for attachment and perfection. Again, even though SP-1 and SP-2 acquire a perfected security interest in Account #2 *at the same time*, SP-1 has *priority* over SP-2 because SP-1 was the first to file or perfect under Section 9-322(a)(1).

The purpose of the first to file rule of Section 9-322(a)(1) is to reduce costs in perfecting security interests and obtaining priority. Once a lender has filed a financing statement, it knows that in most instances it will have both perfection and priority for security interests secured by present and after acquired property to the extent of the first and future loans. It need not do a new search every time it makes another advance or every time the debtor acquires additional collateral.⁶³

Example 2a: Lack of priority against a buyer of an existing account.

On April 1, while negotiating either to make a loan to D secured by D's accounts then owned and later acquired, or to purchase present and future accounts from D, SP-1 files an authorized and proper financing statement covering "accounts." D does not at this time grant SP-1 any security interest in any accounts. D owns Account #1.

On April 10, D authenticates a record by which D agrees to sell accounts to SP-2/Buyer, in exchange for value given by SP-2/Buyer. SP-2/Buyer files

⁶⁰ See *id.* § 9-203(b), discussed *supra* in note 12 and accompanying text.

⁶¹ See *id.* § 9-310(a), discussed *supra* in note 14 and accompanying text.

⁶² See *id.* § 9-308(a), discussed *supra* in note 13 and accompanying text.

⁶³ See *id.* § 9-322 cmt. 4.

a proper financing statement covering “accounts.” Under the sale agreement—which is a “security agreement”—either because the agreement provides for automatic sale, or D has designated Account #1 for sale, D has sold Account #1 to SP-2/Buyer. On April 10, all of the elements for attachment—value, debtor’s rights in the collateral, and an authenticated security agreement—have been satisfied, and SP-2/Lender has taken the steps required to perfect its security interest—filing a financing statement.

On April 10, SP-2 has a perfected “security interest”/ownership interest in Account #1.

On April 20, in exchange for value given by SP-1, D authenticates a record by which D grants to SP-1 a security interest (which could be an ownership interest) in all of D’s accounts then owned or later acquired. However, because D sold Account #1 to SP-2 on April 10, D has no rights in the collateral or any power to transfer rights to SP-1.⁶⁴ Therefore, not all of the elements for attachment have been satisfied, and, even though SP-1 had taken the steps required to perfect a security interest, there is no attachment and therefore no security interest in Account #1 to perfect. Section 9-322, which governs priority among “security interests” does not apply. SP-2 wins under Section 9-201, which provides that, except as otherwise provided in the UCC, a security agreement is effective against the debtor, purchasers, and creditors.⁶⁵

Accordingly, even though SP-1 expected to have priority over subsequent secured parties because of its financing statement, it cannot obtain priority in Account #1 over SP-2/Buyer. As discussed below, depending on the specific wording of its security agreement, it may or may not be able to obtain priority over SP-2 for accounts acquired by D after April 20.

Example 2a raises a policy issue: Should a person who files a financing statement authorized by the debtor be able to prevent the debtor from selling its accounts before the debtor gives that person a security interest in its accounts? On the one hand, if “Equipment #1” were substituted for “Account #1” in Examples 1 and 2a, SP-1 may obtain priority in Equipment #1 over a later secured creditor that acquires a security interest before SP-1 acquires its security interest. SP-1, however, may not get any security interest in Equipment #1 if D sells Equipment #1 to a buyer before D signs a security agreement in favor of SP-1 granting SP-1 a security interest in its “equipment.” One could argue, therefore, that a buyer of an account should be treated as the same as a buyer of equipment.

The counterargument is that Article 9 explicitly requires the buyer of accounts (and non-possessory buyers of chattel paper) to file a financing

⁶⁴ See U.C.C. § 9-318(a) (2003), discussed *infra* in note 70 and accompanying text.

⁶⁵ See *id.* § 9-201.

statement to perfect its ownership interest. The absence of a filing requirement for a buyer of equipment and other collateral to perfect its ownership interest is not relevant to the deliberate decision of Article 9 to govern sales of accounts (and non-possessory sales of chattel paper) and to subject such sales to the entire filing regime. Also, because of this deliberate decision, those involved in the financing of accounts are likely to have the expectation that the priority rules would apply against any subsequent buyer.

Whatever the policy choice, the insertion of a sale transaction into the Article 9 lien paradigm without a special corrective rule prevents a person who files a financing statement, but has not yet given value or received an authenticated security agreement, from obtaining “priority” over a perfected buyer of an account.⁶⁶

Example 2b: Priority or lack of priority against a buyer of after acquired accounts.

Continue with the facts in Example 2a. Assume that on May 1, D acquires Account #2. Whether SP-1 obtains priority in Account #2 depends upon the wording and operation of its security agreement.

(i) When SP-1 has priority over Buyer/ SP-2

If SP-1’s security agreement provides that SP-1’s security interest attaches when D acquires rights in after acquired accounts, SP-1 will obtain a security interest in Account #2 on May 1 when D acquires Account #1. SP-1 will therefore have priority over SP-2 notwithstanding a sale of Account #2 to SP-2/Buyer on May 1. The analysis of the priority in Account #2 is the same as that in Example 1. If there is simultaneous attachment of SP-1’s security interest and SP-2’s “security interest”/ownership interest, SP-1 will have satisfied all of the requirements for attachment and perfection even though the attachment of SP-2’s security interest effects a sale of Account #2 to SP-2/Buyer.⁶⁷

Simultaneous attachment arises in two common circumstances. First, if

⁶⁶ Donald Rapson, a member of the Article 9 drafting committee, was the first person to bring this problem to my attention and to the attention of others who follow developments in Article 9; see also Barkley Clark & Barbara Clark, *Revised Article 9: A Drafting Glitch on Priorities*, CLARKS’ SECURED TRANSACTIONS MONTHLY, May 2006, at 1 [hereinafter Clark and Clark, *Drafting Glitch*].

⁶⁷ See also Barkley 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 (reproducing a discussion of a similar example and the analysis Donald Rapson and Edward Smith conducted). I had independently arrived at my conclusion, which is the same as that of Ed Smith.

SP-1 is a secured lender, the security agreement typically provides that SP-1 obtains a security interest as soon as D acquires rights in the collateral. Second, even if SP-1 is a buyer, it is common for the “security agreement”/sale agreement to provide that the sale occurs the instant that D obtains the account.

(ii) When SP-1 loses priority to Buyer/SP-2

On the other hand, if SP-1’s security agreement does not provide for attachment as soon as D acquires rights in its accounts, SP-1 will never obtain a security interest in Account #2 if D sells Account #2 before the time when SP-1’s interest in Account #2 is to arise. This is a common structure for buyers of accounts. The agreement may provide that the sale of accounts does not take place until D designates the accounts to be sold.

Back to the example: Assume that on May 1, D has sold Account #2 to SP-2 and then on May 5 D sells the same Account #2 to SP-1. The sale to SP-2 eliminates both D’s rights in Account #2 and D’s power to transfer rights to SP-1. Notwithstanding its earlier financing statement, SP-1 cannot obtain a security interest in Account #2 and therefore cannot have priority over SP-2. SP-2 takes Account #2 free of SP-1’s intended interest in Account #2 for the same reasons that it takes its interest free of SP-1’s intended interest in Account #1.

In this case, the operation of the Article 9 priority rule is contrary to the expectation of the parties. SP-1 would expect to have priority by virtue of the first to file rule.⁶⁸

There is currently a debate over how to resolve this conflict. Donald Rapson has taken the position that the problem results from the addition of Section 9-318(a) to Article 9.⁶⁹ Section 9-318(a) provides that 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.”⁷⁰ In my

⁶⁸ I believe that I am the first one to identify this specific problem. I consider this problem to be more significant than that identified by Donald Rapson regarding the absence of priority in the case of a sale of an account before the first filer has given value and the debtor has authenticated a security agreement. In this case, the operation of the Article 9 rules contradicts the expectations of the parties. I am not sure that first filers expect to have priority in accounts sold before the first filer closes the transactions, that is, gives value and gets a security agreement.

⁶⁹ See Clark & Clark, *Drafting Glitch*, *supra* note 66, at 1.

⁷⁰ U.C.C. § 9-318(a) (2003). Although this section merely restates the common law, this section is necessary to prevent courts, like the United States Court of Appeals for the Tenth Circuit in *Octagon Gas Systems, Inc. v. Rimmer (In re Meridian Reserve, Inc.)*, 995 F.2d 948 (10th Cir. 1993), from making the ridiculous conclusion that a debtor that had sold an account still retained an interest in the account because Article 9 defined a sale of an account as a secured transaction.

view, however, this technical problem naturally flows from the structure of Article 9, and specifically the requirement in Section 9-203(b)(2) of current Article 9 and Section 9-203(1)(c) of former Article 9 that a debtor have rights in the collateral.

That the debtor have rights in the collateral is a sensible requirement for creating a security interest to secure a debt in collateral that the debtor continues to own. This formulation, however, does not work for conflicting claims to property items that have been sold. To provide for priority in this circumstance, Article 9 should be rewritten using a conveyancing paradigm to provide that the transfer of a receivable to a perfected buyer is void against a buyer that has an authenticated security agreement with D, that has given value, and that is the first to file a financing statement. Alternatively, to fix the statutory glitch under the existing security or lien paradigm, Article 9 must either provide that (a) the seller of an account is deemed to have the power to transfer an account to a buyer that is the first to file a financing statement even though the seller has already sold the account to a buyer that filed later,⁷¹ or (b) the buyer that was the first to file but not the first to attach is deemed to have a security interest notwithstanding the sale of the account to a buyer that was the second to file but the first to attach.

The structural and definitional flaws in Article 9's treatment of the assignment of receivables reflect a failure to appreciate both the differences between receivables and other types of personal property and the differences between transactions involving assignments of receivables and transfers of other kinds of personal property. The requirement to file a financing statement for perfection also reflects this failure. Although the filing requirement is a more particular problem than the structural and definitional flaws, each exacerbates the other. The next Subpart describes the problems with the filing requirement.

B. *The Filing Requirements*

1. *Introduction: The Rules for Perfection*

The current rules for perfecting an assignee's interest in receivables vary according to the type of receivables and the type of transaction. For accounts, filing a financing statement is necessary to perfect both a collateral assignment and a sale.⁷² For chattel paper, either possession (in the case of

⁷¹ This solution is similar to the formulation for § 9-318(b), discussed *supra* in text accompanying note 55. However, there is a concern that, if a seller were to become a debtor in bankruptcy, a bankruptcy trustee for the seller would attempt to use this "deemed" power to recapture accounts that had been sold to a buyer that had perfected.

⁷² See *supra* notes 12–14 and accompanying text (discussing the requirement of

tangible chattel paper)⁷³ or control (in the case of electronic chattel paper)⁷⁴ by the secured party or filing a financing statement⁷⁵ is necessary to perfect both a collateral assignment and a sale. For payment intangibles, filing is necessary to perfect a collateral assignment⁷⁶ and, for promissory notes, possession by the secured party⁷⁷ or filing⁷⁸ is necessary to perfect a collateral. Neither possession nor filing, however, is necessary to perfect a sale of either, and a sale of payment intangibles and promissory notes is automatically perfected upon attachment.⁷⁹ In addition, a purchaser of tangible chattel paper or promissory notes who takes possession, as well as a purchaser of electronic chattel paper who obtains control, in good faith and for value, may obtain priority over a secured party that is perfected by a means other than possession or control.⁸⁰

The rules governing a possessory security interest in tangible receivables work well and do not need revision. The calamities arise from the filing requirement for the perfection of a non-possessory security interest in receivables.⁸¹ Accordingly, the following discussion concerns only the

filing for perfection).

⁷³ See U.C.C. § 9-313(a) (2003), quoted *supra* note 15.

⁷⁴ See *id.* § 9-314(a), quoted *supra* note 16; *id.* § 9-105, quoted in part *infra* note 81 (defining “control” for electronic chattel paper).

⁷⁵ See *supra* notes 12–14 and accompanying text (discussing the requirement of filing for perfection).

⁷⁶ See *supra* notes 12–14 and accompanying text (discussing the requirement of filing for perfection).

⁷⁷ See U.C.C. § 9-313(a) (2003), quoted *supra* note 15.

⁷⁸ See *supra* notes 12–14 and accompanying text (discussing the requirement of filing for perfection).

⁷⁹ See U.C.C. § 9-309(3), (4) (2003), quoted *infra* in text accompanying note 143.

⁸⁰ See *id.* § 9-330.

⁸¹ In addition, I think the concept of “control” of electronic chattel paper is problematic and I would abolish it as a means of perfection. Following the lead of other statutes governing electronic documents, the revisers of Article 9 introduced the concept of “control” of electronic chattel paper to create an analogue to possession of tangible chattel paper. Electronic chattel paper, however, is more analogous to the traditional intangible account or the new payment intangible, and the concept of “control” is unnecessary. Indeed, many large transactions involving the assignment of electronic receivables are done without “control.” See, e.g., Natalie Abrams, *No Additional U.S. Legal Criteria Required for Electronic Contracts*, STANDARD & POOR’S, Sept. 17, 2002, <http://www2.standardandpoors.com> (“Standard & Poor’s is adopting the same approach to electronic signatures and contracts as it does to manually executed paper contracts.”).

The definition of “control” may also be unworkable. A secured party has “control” of electronic chattel paper “if the record or records comprising the chattel paper are created, stored, and assigned in such a manner that: (1) a single authoritative copy of the record or records exists which is unique, identifiable and, except as otherwise provided in

perfection of a non-possessory security interest, that is, perfection by filing or automatic perfection.

The initial drafters decided to include the sales of accounts and chattel paper in Article 9 to subject such sales to the requirement that a financing statement be filed to perfect an assignment of the accounts and chattel paper.⁸² The fallacy in this thinking was the failure to recognize fully the differences between receivables and other types of personal property. Specifically, by requiring the filing of a financing statement to perfect a secured party's security interest to secure a debt, Article 9 treats receivables the same as it treats goods. To be sure, filing a financing statement may be an optimum method for protecting subsequent purchasers and creditors from secret liens encumbering goods. On the other hand, both the nature of receivables and the history of the development of accounts receivables financing suggest that filing a financing statement is not necessary to protect subsequent purchasers of receivables or creditors of the assignor.

This fallacy has become more obvious in the current version of Article 9. The 2001 revision of Article 9 extended the coverage of Article 9 to the sale of payment intangibles and promissory notes but did not subject the sale of payment intangibles or promissory notes to a filing requirement. This expansion reveals that the rules for perfecting the assignment of receivables are logically inconsistent and, more importantly, generate costs that outweigh their benefits.

2. Rationale for the Filing Requirement

An important goal of any legal regime governing the ownership of property items and the transfer of interests in property items—be they an ownership interest, a leasehold interest, a security interest, or a future interest

paragraphs (4), (5), and (6), unalterable.” U.C.C. § 9-105 (2003). “Electronic chattel paper” is “chattel paper evidenced by a record or records consisting of information stored in an electronic medium.” *Id.* § 9-102(a)(31). Attempting to create an electronic record that is “unique” and “unalterable” has been elusive. *See generally* Matthias Hallendorff & Mike Jerbic, *Framework for Control over Electronic Chattel Paper—Compliance with UCC § 9-105*, 61 BUS. LAW. 721, 725 (2006) (“[E]lectronic systems are able to make perfect, identical copies of electronic information. This alone makes compliance with UCC § 9-105 challenging.”).

⁸² *See* Plank, *Sale of Accounts*, *supra* note 9, at 416–20, 423–25. They also wanted to give sales of accounts and chattel paper the benefits of new rules given to collateral assignments of accounts and chattel paper that modernized and standardized the common law. *See id.* at 420–23. These include provisions validating security interests in after acquired property, *see* U.C.C. § 9-204(a) (2003), a security interest to secure future advances, *see id.* § 9-204(c), a security interest notwithstanding the complete dominion and control of the debtor over the collateral, *see id.* § 9-205, and provisions abrogating anti-assignment restrictions, *see id.* § 9-406(d).

in a parcel of real estate, a good, or a receivable—is to maximize the certainty of each holder's interest.⁸³ Each owner of a property interest in a property item wants to ensure that no other person can successfully claim a superior identical property interest, and each transferor and transferee of a property interest similarly wants to ensure that the interest transferred to the transferee will be free of any superior identical interest in favor of a third party. As is obvious from the different rules applying to real property and personal property, the rules governing the transfer of interests should vary according to the nature of the property item.

For example, the real estate recording system requires the recordation of each document that creates or transfers an interest in real estate in the land records of the local jurisdiction in which the real estate is located.⁸⁴ This system is not a practical method of establishing ownership of most kinds of goods. Goods are movable and goods have a limited existence. Instead, documentary evidence of ownership, such as a bill of sale, and possession of the goods is usually sufficient to establish the owner's ownership.⁸⁵ Further, a recording or filing system is not necessary to establish a leasehold interest in goods.⁸⁶ The written lease and possession of the goods is sufficient to establish the lessee's interest. The lack of documentary evidence of ownership is sufficient to prevent the lessee from selling an ownership interest in the leased goods to a third person. Also, the owner of the leased goods has only documentary evidence of ownership but not possession. Accordingly, the owner can sell its lessor's interest in the goods to a third party by displaying the lease agreement, but it cannot sell the goods to a

⁸³ Professors Baird and Jackson noted that requiring the dissemination of information, either through possession of tangible property or a recording or filing system, can increase the value of the property items, and that the choice between possession or filing or between the types of filing or recording systems varies according to the type of property item. See Douglas Baird & Thomas Jackson, *Information, Uncertainty, and the Transfer of Property*, 13 J. LEG. STUD. 299, 301, 303-05 (1984). Baird and Jackson, however, focus primarily on tangible property items, and only discuss patents as intangible property items.

⁸⁴ See STOEBOCK & WHITMAN, *supra* note 25, §§ 11.9-11.11, at 869-97 (describing the recording system). In only a few circumstances will possession of the parcel of real estate be sufficient to establish the ownership of a particular interest. See *id.* § 11.7, at 853-60 (describing the acquisition of title through adverse possession); *id.* § 11.10, at 883-86 (describing the extent to which possession provides notice that would prevent a purchaser from benefiting from the recording acts).

⁸⁵ On the other hand, for some goods, like automobiles, a recording system like the current title registration system may be optimal.

⁸⁶ See 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 (1988) (demonstrating why there should be no requirement for filing a financing statement to perfect a lessor's interest in goods).

diligent third party free of the lessee's interests.

A security interest in goods to secure a debt presents different considerations. The secured party can perfect a security interest by taking possession of the goods. The secured party's possession would publicize the existence of an interest adverse to the owner and prevent the owner from transferring ownership free of the security interest to a diligent third party. Also, the lack of ownership documents would constrain the secured party from selling the goods as an owner.

Normally, however, the owner of the goods that grants a security interest must retain possession. Since *Twyne's Case*⁸⁷ in 1601, the law has long frowned on a secured party retaining a "secret lien" on goods in the possession of the owner because the owner "ostensibly" owns the goods free and clear of the secret security interest.⁸⁸ Although some have questioned the significance of the "ostensible ownership" problem or the importance of possession of goods by the debtor as the basis for extending credit,⁸⁹ the conventional wisdom is that the owner must provide other creditors and purchasers notice of a secured creditor's interest in goods.⁹⁰

The real estate recording model, adopted by the chattel mortgage acts of the nineteenth century, did not provide a workable method of publicizing a secured party's security interest in goods, especially for inventory that the mortgagors constantly bought on credit and sold to customers.⁹¹ A notice filing system, first used in the 1911 New York Factor's lien act,⁹² later used

⁸⁷ 3 Coke 80, 76 Eng. Rep. 809 (Star Chamber 1601) (holding that a secret transfer by Pierce of all of Pierce's property, worth approximately £300, to Twyne to satisfy a debt of £400—after another creditor "C" brought an action against Pierce on a debt of £200—was fraudulent against C, in part because Pierce continued to retain possession of some of his sheep).

⁸⁸ See generally Jonathan C. Lipson, *Secrets and Liens: The End of Notice in Commercial Finance Law*, 21 EMORY BANKR. DEV. J., 421, 429–51 (2005).

⁸⁹ See, e.g., Mooney, *supra* note 86, at 725–43. Professor Mooney questions the conventional wisdom on the primacy of the doctrine of "ostensible ownership" and notes that courts and commentators have failed to distinguish a concern about ostensible ownership from a concern about fraud on the part of debtors and some secured creditors. He also demonstrates that the filing requirement for a security interest in goods serves more purposes than simply to cure a putative "ostensible ownership" problem.

⁹⁰ See, e.g., Douglas G. Baird & Thomas H. Jackson, *Possession and Ownership: An Examination of the Scope of Article 9*, 35 STAN. L. REV. 175, 179–87 (1983).

⁹¹ See GILMORE, *supra* note 1, §§ 2.1–2.7, at 24–54 (describing the difficulties of secured creditors under the chattel mortgage statutes, including the hostility of courts to recognizing a security interest in after-acquired property and the courts' willingness to abrogate chattel mortgages because of the mortgagors' freedom to dispose of goods).

⁹² N.Y. PERS. PROP. LAW § 45 (Baldwin 1938), enacted by 1911 N.Y. Laws ch. 326 § 1. This act provided that non-possessory liens on then existing or after acquired merchandise or the proceeds thereof created by agreement to secure loans shall not be

in the Uniform Trust Receipts Act,⁹³ and now used in Article 9, appears a better system. An Article 9 financing statement merely provides notice that a secured party may have an interest in the goods “indicated” in the financing statement.⁹⁴ The indication of the collateral, however, need not be specific. It may be by type (“inventory”), category (“motor vehicles”), or other general means of description of collateral.⁹⁵

Article 9 initially applied this “ostensible ownership” rationale to security interests in accounts and to non-possessory security interests in chattel paper by requiring the filing of a financing statement to perfect such security interests (which from the beginning included a buyer’s ownership interest). Neither the nature of these receivables nor the history of accounts receivables financing dictated this result.

First, unlike goods, receivables do not create an ostensible ownership problem. Goods are tangible property items. Hence, if Pierce, as the owner of sheep, grants a security interest in the sheep to Twyne to secure a debt but retains possession of the sheep and continues to shear the sheep, it is difficult for third parties to discover the security interest if there is no requirement for Twyne to provide notice of his interest through a notice filing or recording regime. If, however, Pierce is owed \$100 by AD for sheep that Pierce sold on account, the resulting account is intangible. Third parties can only determine its existence by inspecting Pierce’s financial statements, books, and records. By inspecting those financial statements, books, and records, third parties can also determine whether Pierce has assigned that account.⁹⁶

AD’s obligation to pay \$100 to Pierce could be evidenced by a promissory note. A promissory note transforms the intangible obligation of

void or be presumed to be fraudulent or void as against creditors or invalid so long as (1) a sign is posted at the building where the merchandise is located naming the “lienor” (the secured party) and (2) a notice is filed stating the names of the lienor and the person creating the lien and the “general character of merchandise subject to the lien, or which may become subject thereto,” in addition to the time during which loans may be made. *Id.*

⁹³ See 1 GILMORE, *supra* note 1, § 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 as a predecessor). By the time of the adoption of the UCC, the Uniform Trust Receipts Act had been adopted in thirty-nine states. See NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS SEVENTY-THIRD YEAR 303–04 (1964).

⁹⁴ The financing statement identifies the debtor and the secured party and indicates the collateral. See U.C.C. § 9-502 (2003). It must be authorized by the debtor, *see id.* § 9-509(a), and must be filed in the designated filing office, *see id.* § 9-501(a).

⁹⁵ *See id.* §§ 9-504, 9-108.

⁹⁶ *See infra* note 150 and accompanying text (describing why the nature of receivables enables third parties to discover assignments).

AD into a tangible form, that is, it “reifies” the intangible obligation. Nevertheless, the value of the note depends upon AD’s ability and willingness to pay, including the absence of defenses to payment from the transaction that gave rise to the note. Accordingly, determining the value of the note depends upon understanding Pierce’s business in a way that determining the value of sheep owned by Pierce does not. Also, unlike the sheep, Pierce can retain the benefit of owning the note while delivering it to Twyne as security for a debt. Hence, to the extent that possession of the note creates an “ostensible ownership” problem, any future secured creditor or buyer of the note can solve the problem by taking possession of the note.

Second, rights to payment under a contract became generally assignable during the nineteenth century, and accounts receivable financing developed in the United States during the first four decades of the twentieth century⁹⁷ without any necessity to publicize the assignments of receivables. In the case of multiple assignments of the same account, under the law of New York and some other jurisdictions, an assignee of an account automatically prevailed against any subsequent assignees. This rule is known as the “American Rule.” Other jurisdictions followed the “English Rule”: the first assignee of an account that notified the obligor on the account prevailed over other assignees of the same account.⁹⁸

Despite the differences between goods and accounts, some business interests, including the American Bankers Association—a latecomer to accounts receivable financing—proposed requiring public notice for assignments of accounts because of a general concern about the possibility of double assignments of the same accounts and “secret liens.”⁹⁹ For example,

⁹⁷ Grant Gilmore stated that accounts receivable financing began in the 1920s, 1 GILMORE, *supra* note 1, § 8.1, at 250, but other sources indicate that accounts receivable financing existed in the first decades of the twentieth century. See Raymond W. Burman, *Practical Aspects of Inventory and Receivables Financing*, 13 LAW & CONTEMP. PROBS. 555, 555–56 (1948) (citing RAYMOND J. SAULINER & NEIL H. JACOBY, ACCOUNTS RECEIVABLE FINANCING 4 (1943)); *Home Bond Co. v. McChesney*, 239 U.S. 568, 575 (1916) (holding that the sale of open accounts receivable in 1911 through the indirect collection, non-notification method constituted a loan transaction subject to the relevant usury statutes rather than a true sale); see also Grant Gilmore, *On the Difficulties of Codifying Commercial Law*, 57 YALE L.J. 1341, 1350–51 (1948) (describing the assignment of conditional sales contracts to financing companies beginning between 1900 and 1910).

⁹⁸ See, e.g., Elliot Axelrod, *Successive Assignments—Conflicting Priorities*, 14 U. DAYTON L. REV. 295 (1989) (explaining the two rules); Maximilian Koessler, *Assignment of Accounts Receivable: Confusion of the Present Law, the Impact of the Bankruptcy Act, and the Need for Uniform Legislation*, 33 CAL. L. REV. 40, 46–47, 63–72 (1945) (same, but noting that the application of the rules in different jurisdictions was more complicated than the simple statement of the rules implied).

⁹⁹ See, e.g., Koessler, *supra* note 98, at 57–58 n.49 (quoting a resolution of the

in addition to codifying the filing requirements for chattel mortgages on goods, the Uniform Chattel Mortgage Act, proposed in 1926 by the National Conference of Commissioners of Uniform State Laws,¹⁰⁰ required filing of a "mortgage" of book accounts.¹⁰¹ Only one state, however, adopted this Uniform Act, and NCCUSL withdrew it in 1943 pending development of the UCC.¹⁰² Further, the enterprises most involved in taking assignments of accounts—the factors who bought accounts on a non-recourse basis and who notified the account debtors of the assignment, and the receivables finance companies who lent against accounts on a full recourse, non-notification basis—opposed a recording or filing requirement.¹⁰³ Professor John Hanna of Columbia University criticized the extension of public recording to accounts on several grounds.¹⁰⁴ First, he questioned the entire concept of "ostensible ownership" and argued that lenders lent not on the basis of possession of goods but only after reviewing financial statements and performing other due diligence of the borrower's business activities and reputation. More importantly, he argued that the costs of the filing requirement outweighed the benefits.¹⁰⁵

American Bankers Association adopted in 1918 urging the adoption of uniform state legislation "to prevent fraud in the transfer of accounts receivable by secret transfers" and an excerpt from a 1944 report of a committee on state legislation of the Association recommending a filing of notice statute instead of a validation statute).

¹⁰⁰ See NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS THIRTY-SIXTH YEAR 417-56 (1926).

¹⁰¹ See UNIFORM CHATTEL MORTGAGE ACT § 42, *in id.* at 438-39 (1926) (providing that the interests of a mortgagee of book accounts shall be "defeated" by certain purchasers and creditors if the mortgage is not filed as required by the Act); *id.* § 9.1, at 422 (defining a "mortgage" to include any transaction by which a property interest in book accounts is created to secure performance of an obligation); *id.* § 46, at 442 (containing additional provisions regarding the filing of a mortgage of book accounts).

¹⁰² NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS FIFTY-THIRD YEAR 67-68, 305, 307 (1943). The Uniform Conditional Sales Act, adopted in 1918, which had been enacted in only 11 states, was also withdrawn. See *id.* at 67, 307.

¹⁰³ See, e.g., Koessler, *supra* note 98, at 55 n.43.

¹⁰⁴ John Hanna, *The Extension of Public Recordation*, 31 COLUM. L. REV. 617, 623-30 (1931).

¹⁰⁵ Professor Hanna maintained his opposition to notice filing for accounts throughout the continuing debate. See John Hanna, *Foreword*, in Koessler, *supra* note 98, at 41 (arguing that the only benefit of recording or filing systems for personal property is to prevent fraudulent back dating of assignments and transfers and that this limited benefit did not justify a "disproportionate burden on the honest" or the increase of government personnel); John Hanna, *Some Unresolved Problems under Section 60A of*

The debate over requiring public notice for assignments of account moved from the theoretical to the practical as the result of the 1943 Supreme Court's decision in *Corn Exchange National Bank v. Klaunder*.¹⁰⁶ In that case, the Court held that a contemporaneous assignment of an account for security was nevertheless an assignment on account of an antecedent debt under Section 60a of the Bankruptcy Act of 1898, as amended by the Chandler Act in 1938,¹⁰⁷ because the assignor had not perfected the assignment by notifying the obligor of the assignment as required by the law of Pennsylvania, which followed the English Rule.¹⁰⁸ Accordingly, the bankruptcy trustee for the assignor could avoid the assignment as a preferential transfer. Thereafter, proponents and opponents of a public filing requirement battled in the legislatures to enact a statute that would enable contemporaneous perfection.¹⁰⁹

By 1946, fifteen states enacted "validation" statutes that adopted the American Rule—that is, provided that an assignment of accounts was automatically perfected when it became effective, and only eight states adopted statutes requiring public filing to perfect an assignment.¹¹⁰ In

the Bankruptcy Act, 43 COLUM. L. REV. 58, 69 (1943) ("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.").

In addition, the Committee on Uniform State Laws of the Association of the Bar of New York proposed enactment of a uniform act automatically perfecting assignments of accounts. See John Hanna, *Foreword*, in Koessler, *supra* note 98, at 45–46.

¹⁰⁶ 318 U.S. 434, 436–37 (1943).

¹⁰⁷ Act of June 22, 1938, ch. 575, 52 Stat. 840, 869–70.

¹⁰⁸ Section 60a provided that a transfer of property was not made until it was so "perfected" that a bona fide purchaser for value could not defeat the rights of a transferee. 11 U.S.C. § 96a (1946). Until notification of the account debtors, a second assignee could prevail under the English Rule over the initial assignee. Accordingly, an assignment subject to the English Rule would be deemed "made" not when it was actually made in exchange for a loan but at the time of notification of the assignment to the account debtor (or, if the assignor filed a bankruptcy petition before notification, at the time of the filing) and therefore would be an assignment on account of the antecedent debt, regardless of whether there were ever a second assignee. In 1950, Congress amended the Bankruptcy Act to eliminate the problematic provision that a transfer had to be perfected against a purchaser for value and only required perfection against lien creditors. Act of March 18, 1950, ch. 70, § 1, 64 Stat. 24, 24–25 (amending 11 U.S.C. § 96a (1946)).

¹⁰⁹ See Plank, *Sale of Accounts*, *supra* note 9 at 412–16 for a more detailed discussion of this history.

¹¹⁰ See *id.* at 415. Interestingly, a majority of a special committee charged by NCCUSL to develop a Uniform Act on Assignment of Accounts Receivables recommended a validation statute, and a minority recommended a recording or filing act. See *Report of the Special Committee on Uniform Act on Assignment of Accounts Receivable*, in NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS,

addition, after a lengthy study by the New York Law Revision Commission that recommended against a public filing requirement, New York declined to change its common law American Rule.¹¹¹ The year of 1946, however, marked the political high water mark for automatic perfection. Thereafter, other states adopted filing statutes, and as of 1958 fourteen states had validation statutes and twenty-three states required notice filing.¹¹² Nevertheless, given New York's continued adherence to the American Rule, the question of filing versus automatic perfection remained a close one. Against this background, as one opponent of the filing requirement noted,¹¹³ the drafters of Article 9 had to pick a uniform rule for all states, and they chose filing. The important factor, in the words of Allison Dunham, a co-reporter for Article 9, was the unanimous desire for a filing requirement to perfect a security interest in inventory and the assertion that "there was no difference between a loan on a man's inventory and a loan secured by his accounts."¹¹⁴

3. *Benefits and Costs*

That the drafters of Article 9 chose filing to perfect the assignment of accounts over automatic perfection does not necessarily dictate that, as a theoretical matter, the rationale for filing supports the requirement. Nevertheless, if the filing regime produced optimum benefits, then there would be no need for any change in the requirement. In my view, however, the current system for the non-possessory perfection of an assignment of receivables imposes costs on assignors and their assignees and creditors that outweigh the benefits of the current system. Eliminating the requirement for filing for assignments of receivables will benefit most of these affected parties, although it may produce some initial transition costs for some of

HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS FIFTY-FOURTH YEAR 90-91, 169-89 (1944).

¹¹¹ *Communication and Study Relating to Assignments of Accounts Receivable 6*, in N.Y. LAW REVISION COMMISSION, COMMUNICATION AND STUDY RELATING TO ASSIGNMENT OF ACCOUNTS RECEIVABLE, Leg. Doc. No. 65(k), at 356 (1946).

¹¹² Comment, *Multistate Accounts Receivable Financing: Conflicts in Context*, 67 YALE L.J. 402, 410 n.33 (1958).

¹¹³ See Milton P. Kupfer, *Accounts Receivable, Trust Receipt, and Related Types of Financing Under Article 9 of the Uniform Commercial Code*, 27 TEMP. L.Q. 278, 280 (1953). Grant Gilmore stated that by the time Article 9 came to be drafted, there was no serious opposition to the filing requirement among those involved in the drafting process. See 1 GILMORE, *supra* note 1, § 8.7, at 275.

¹¹⁴ See 1 A.L.I., PROCEEDINGS OF THE TWENTY-SIXTH ANNUAL MEETING at 357, 360 (May 19, 1949); see also *id.* at 357-76 (discussing the concerns and benefits from a filing requirement for accounts).

these parties.

There are three potential benefits of a notice filing system for assignments of receivables. It could enable third parties to determine that receivables owned by a person have been sold or collaterally assigned to another person. It could also provide a means of determining priority between conflicting claimants to the same receivables. Finally, it could prevent an assignor of receivables, in collusion with an assignee, from defeating the interests of an intervening claimant by back dating an assignment to the colluding assignee. In my view, however, the current notice filing requirement fails to provide the first of these potential benefits and is not necessary to provide the other benefits.

Presumed Benefits: Notice. The filing of a financing statement is intended to provide public inquiry notice of the assignment. For receivables, there are three kinds of collateral descriptions in financing statements: (a) all receivables then owned or later acquired by the debtor/assignor; (b) some but not all receivables, typically indicated by reference to a particular security agreement or other record;¹¹⁵ and (c) a particular account specifically identified in the financing statement. The first two kinds of financing statement predominate. The third kind of financing statement identifying specific receivables is not common and is impractical.

In the case of the first and third kinds of collateral description, the “all receivables” description and the description of the particular receivables, a financing statement produces some information about the assigned receivables that may be meaningful to a subsequent searcher. The question for these types of financing statements is whether the costs of the filing system justify the benefits.

For the great many financing statements that use the second kind of collateral description, that is, a discrete batch of receivables that are less than all of the debtor’s receivables, the financing statement produces little meaningful information. Often, for example, this kind of financing statement covers all receivables sold to a named secured party pursuant to a particular security agreement of a particular date. Alternatively, it may indicate all receivables representing rights to payment from a particular set of obligors as described in a particular record. These financing statements do not allow a subsequent searcher to identify which accounts owned by the assignor have

¹¹⁵ See U.C.C. § 9-504(1) (2003) (providing that a financing statement “sufficiently indicates the collateral that it covers if the financing statement provides a description of the collateral pursuant to Section 9-108”); see *id.* § 9-108(a), (b)(6) (providing that with some minor exceptions a “description of personal or real property is sufficient, whether or not it is specific, if it reasonably identifies what is described”); see *id.* § 9-108(b)(6) (providing that with the exception of an “all assets” description, “a description of collateral reasonably identifies the collateral if it identifies the collateral by . . . any other method, if the identity of the collateral is objectively determinable”).

been assigned. A subsequent searcher would need to perform further due diligence, such as search the records of the assignor or obtain a list of the assigned receivables, and have the assignee of record confirm the list.

For owners of receivables that have filed financing statements to perfect a few assignments of less than all of their receivables, potential subsequent assignees may perform sufficiently this due diligence to identify which receivables had been previously assigned. Once an owner of receivables has engaged in more than a few discrete assignments, however, the financing statements, other than blanket assignments, produce no meaningful information about which receivables have been previously sold or encumbered. For example, a financial institution contemplating purchasing or taking a collateral assignment of a particular batch of receivables will often find ten or more financing statements, all of which refer to the assignments of particular receivables. An attempt to identify the receivables actually assigned in the previous transactions is costly and impractical.

If there are hundreds or thousands of such financing statements—not uncommon for large originators of receivables—it is not even feasible for the subsequent assignee to review or even to obtain a search report for financing statements. Accordingly, each subsequent assignee must, and does, rely on a certification by the assignor that the particular receivables to be assigned to it have not been assigned to an earlier assignee. In sum, subsequent secured parties operate as if there were no filing system at all. Similarly, even if unsecured creditors use the filing system to obtain information about the debtor before extending credit, they face the same hurdles in obtaining information from the notice filing.

Further, assignees of payment intangibles do not receive any of these putative benefits. As discussed above, the sale of a promissory note or payment intangible is perfected automatically upon attachment.¹¹⁶ Accordingly, subsequent assignees cannot ascertain from the filing system whether a debtor has sold receivables in the form of a promissory note or payment intangible. Only an examination of the operations, books, and records of the debtor by the assignees and lien creditors will answer this question or reveal any fraudulent back dating of assignments. Similarly, unsecured creditors cannot ascertain from the filing system whether the debtor owns promissory notes or payment intangibles and must rely on its due diligence of the debtor before extending credit.

Benefits: Priority and Fraudulent Back Dating. A filing regime perhaps could lessen both the cost of determining priority among multiple assignees and the risk of fraudulent backdating.¹¹⁷ In a contest between two assignees,

¹¹⁶ See *supra* text accompanying note 79.

¹¹⁷ Steven L. Schwarcz, *Towards a Centralized Perfection System for Cross-Border Receivables Financing*, 20 U. PA. J. INT'L ECON. L. 455 (1999) (arguing that a filing

both of whom filed “all receivables” financing statements, the time of filing fixes the priority,¹¹⁸ and the time and priority of filing may not be the same as the time of attachment or perfection. In a contest between an attaching lien creditor and an assignee, the filing requirement for the assignee prevents the assignee from colluding with the debtor fraudulently to date its assignment at a time before the lien creditor attached.

In any priority contest between contending assignees or lien creditors, however, the assignees or lien creditors must establish the debtor’s ownership of the receivables and their own perfected security interests or liens. Accordingly, in the case of competing assignees perfected by a financing statement (even an “all asset” financing statement), the filing produces no more meaningful information—other than the date of the filing—than the information that parties must gather and produce to establish their claims. In the case of disputes about either priority based on the first assignment or fraudulent back dating, the actual timing of the assignment can be established by other information. This presumed benefit of a notice filing regime is minimal.

In addition, there is some uncertainty whether a buyer of payment intangibles or promissory notes can rely on filing a financing statement to establish priority for subsequent purchases over an intervening secured creditor that files a financing statement. Under Section 9-322(a)(1), the secured party that is the first to file or perfect has priority over conflicting perfected security interests.¹¹⁹ Comment 4 to this section repeats the rule: “When there is more than one perfected security interest, the security interests rank according to priority in time of filing or perfection.”¹²⁰ The comment adds: “‘Filing,’ of course, refers to the filing of an effective financing statement.”

Because of this comment, the first to file or perfect rule may not apply to a security interest in payment intangibles or promissory notes that is perfected upon attachment. To illustrate this point, contemplate the following example:

On Day 1, D enters into a continuing sale agreement of newly originated federally insured student loans¹²¹ and sells pool #1 of loans to SP-1/Buyer

system is necessary for the determination of priority).

¹¹⁸ See *supra* text accompanying note 20 (discussing the priority among perfected security interests for the first to file or perfect).

¹¹⁹ See U.C.C. § 9-322(a)(1) (2003), quoted *supra* note 20.

¹²⁰ See *id.* cmt 4. Richard Newman of Mayer, Brown, Rowe & Maw LLP was the first person to bring this problem to my attention and to the attention of others who follow developments in Article 9.

¹²¹ Federally insured student loans are evidenced by “master promissory notes,” the form of which is dictated by the Secretary of Education. See Higher Education Act, 20 U.S.C. § 1082(m)(1)(D)(i) (2000), amended by Pub. L. No. 106-554, 114 Stat. 2763

pursuant to a sale agreement. SP-1/Buyer files an authorized and proper financing statement covering all student loans sold by D to SP-1/Buyer pursuant to the sale agreement. SP-1/Buyer has a first-priority perfected ownership interest in pool #1.

On Day 15, D obtains a loan from SP-2/Lender, signs a security agreement granting SP-2/Lender a security interest in all of D's student loans now owned or hereafter acquired, and files a financing statement covering all student loans owned by D.

Between Day 16 and Day 30, D originates a pool of student loans, pool #2. SP-2/Lender's security interest attaches to each student loan as soon as D originates the student loan.

On Day 30, D sells pool #2 to SP-1/Buyer.

SP-1/Buyer's "security interest"/ownership interest in pool #2 is perfected on Day 30, after SP-2/Lender's security interest is perfected. Nevertheless, on the basis of the first to file or perfect rule, SP-1/Buyer would have priority in pool #2. Because filing is not necessary to perfect SP-1/Buyer's "security interest"/ownership interest, however, arguably the earlier filing does not count for purposes of Section 9-322(a)(1), and therefore SP-1/Buyer's priority only dates from perfection of its interest in pool #2 on Day 30. Hence, despite the filing by SP-1/Buyer, SP-2/Lender would have priority because of its filing on Day 15.¹²²

(2006). Because these "master promissory notes" evidence an amount of indebtedness not shown on the notes but reflected in the records of the lender, they do not qualify as instruments under either Article 3 or Article 9 and are therefore payment intangibles.

¹²² In my view, this analysis would not comport with the intent and structure of Article 9's priority rules. SP-1/Buyer's financing statement should give it priority. Certainly, SP-2/Lender could have searched the UCC financing statement records and found SP-1/Buyer's financing statement. If SP-1/Buyer cannot take advantage of filing, then SP-1/Buyer must search the financing statement records before it makes each purchase. This result is exactly the opposite of the result dictated by the entire structure of Article 9 that permits a security agreement to cover after-acquired property and future advances and that gives priority to the first secured party to file or to perfect. So long as the financing statement complies with the requirements for a "financing statement" set forth in Part 5 of Article 9, that is, is filed in the correct filing office, contains the required information, and is authorized by the debtor, filing for the sale of promissory notes or payment intangibles should be effective to the same extent that a filing would be effective to perfect a security interest to secure a debt.

Professor Kenneth Kettering has put forth a different rationale, that of alternative perfection. See Memorandum from Kenneth C. Kettering *Re* Donald J. Rapson's Memorandum Proposing the Formation of a Committee by the Permanent Editorial Board for the UCC Regarding Various Issues Relating to Sales of Receivables (June 21, 2006) (on file with author). In his view, although the sale of a promissory note or payment intangible is automatically perfected, there is nothing in Article 9 that precludes a filing as an alternative method of perfecting a sale. Indeed, Section 9-312 specifically states that a security interest in an instrument can be perfected by filing. Accordingly, a

Costs. Weighed against any putative benefits are the costs of the filing system. The legal fees for preparing and reviewing financing statements and determining the proper place of filing are a significant cost. Even if these were small in any particular transaction, across all of the financing transactions that take place, these costs add up. There is also the cost of obtaining and reviewing UCC search reports for financing statements, even though the information is not useful. Many assignees incur these costs to defend themselves from criticism for a failure to obtain search reports if the particular transaction develops problems.¹²³ In addition, there is the cost of maintaining the filing system for these financing statements. Finally, there is the cost incurred by a failure to file a financing statement¹²⁴ or, more commonly, from mistakes in the financing statement that render the financing statement ineffective.¹²⁵ These mistakes produce a calamity for the unperfected secured party that loses its interest in the assigned receivables to a later perfected secured party,¹²⁶ lien creditor,¹²⁷ or bankruptcy trustee of the assignor.¹²⁸

One of the reasons for excusing the sale of payment intangibles and promissory notes from the filing requirement was to avoid these costs.¹²⁹ Because filing a financing statement is necessary to perfect a collateral assignment of payment intangibles and a non-possessory collateral assignment of promissory notes, however, many buyers of these receivables

sale of a promissory note—which is an instrument—can be perfected by filing. This Section provides explicit authority that a financing statement filed in connection with the sale of a promissory note is an “effective financing statement.” Although there is no explicit statement that a security interest in general intangibles can be perfected by filing a financing statement, everyone has understood that filing is both sufficient and necessary to perfect a collateral assignment of a payment intangible.

¹²³ See Peter A. Alces, *Abolish the Article 9 Filing System*, 79 MINN. L. REV. 679, 689–92 (1995) (reporting one study of the attorneys fees attributable to the filing requirement generated by one law firm in over 100 transactions, which suggested an average cost of 5.52% of the secured amount, or over \$25,000).

¹²⁴ See *supra* note 14 and accompanying text (discussing the requirements for filing).

¹²⁵ The financing statement must identify the debtor and the secured party and indicate the collateral. See U.C.C. § 9-502 (2003). Mistakes in the debtor’s name or in the description of the collateral will often make the financing statement ineffective.

¹²⁶ See *id.* § 9-322(a)(2), *supra* text accompanying note 18.

¹²⁷ See *id.* § 9-317(a)(2)(A), *supra* text accompanying note 19.

¹²⁸ See 11 U.S.C. § 544(a)(1) (2000) (providing that a bankruptcy trustee has the rights of a hypothetical lien creditor).

¹²⁹ See, e.g., Steven L. Schwarcz, *Automatic Perfection of Sales of Payment Intangibles: A Trap for the Unwary*, 68 OHIO ST. L.J. 273 (2007); Paul M. Shupack, *Making Revised Article 9 Safe for Securitizations: A Brief History*, 73 AM. BANKR. L.J. 167, 171 n.18 (1999).

require the filing of a financing statement to protect themselves from the risk that a bankruptcy court would recharacterize the transaction as a collateral assignment instead of a sale.¹³⁰ Hence, even transactions that do not require the filing of a financing statement generate many of the same costs as those transactions for which filing is a requirement. Further, as discussed above,¹³¹ buyers of payment intangibles may not get the priority benefit that other assignees of receivables obtain.

III. SOLUTIONS

In preparing this Article for this symposium, I initially focused on the costs of the filing requirements under Article 9 and my judgment that the benefits of filing did not justify those costs. In thinking about the problems caused by the filing requirements, however, I began to understand better the structural incoherence of Article 9's treatment of the assignment of receivables. I also began to appreciate the relationship between the filing requirement and both the structural incoherence of Article 9's treatment of the assignment of receivables and the use of misleading definitions to incorporate the sale of receivables in Article 9, which I had previously criticized.¹³² Instead of presenting a detailed revision of Article 9 or a draft of a revised Article 9A, I describe a general solution for the structural and definitional incoherence of Article 9's treatment of receivables and then present a more particular proposal to eliminate the filing requirement.

A. Solving the Structural Incoherence

One way to correct the structural incoherence of Article 9 would be to limit Article 9 to only collateral assignments of receivables, that is, to "true" security interests in receivables. This approach would solve the problem of trying to regulate sales of receivables through a lien structure. This solution, however, raises the difficulty of distinguishing a sale of receivables from a collateral assignment of receivables. This is not an insurmountable problem. These determinations are necessary in the securitization of receivables, a

¹³⁰ See *Levin v. City Trust Co. (In re Joseph Kanner Hat Co.)*, 482 F.2d 937 (2d Cir. 1973). This case held that a purported sale of a claim for relocation costs payable by a local redevelopment agency that was a general intangible was, in substance, a collateral assignment subject to the filing requirement, and, therefore, the failure to file a financing statement rendered the assignment avoidable by the bankruptcy trustee for the assignor. Although this case was decided under former Article 9, the result would be the same under current Article 9 because of the automatic perfection of a sale of a payment intangible versus the requirement for filing to perfect a collateral assignment.

¹³¹ See *supra* text accompanying notes 119–22.

¹³² See generally Plank, *Sale of Accounts*, *supra* note 9.

multi-trillion dollar industry,¹³³ and the leasing industry has lived with this distinction for many years.

If, however, Article 9 retained a filing requirement to perfect collateral assignments, eliminating sales from Article 9 would not eliminate the costs of the filing requirement that would be imposed on buyers. Most buyers would insist on the filing of a financing statement to ensure that their interest does not become unperfected if a court were later to recharacterize the intended sale as a collateral assignment for which filing is necessary.¹³⁴ Also, an Article 9 limited to collateral assignments of receivables would have to provide rules for priority of subsequent sales against intervening security agreements as described above in the case of sales of payment intangibles.¹³⁵

In addition, as the initial drafters of Article 9 recognized, a single statutory regime for sales and collateral assignments does reflect the essential similarities of the two types of transfers as “financing transactions” in which the assignee in either transaction receives similar benefits.¹³⁶ There is a big difference between a grant of a security interest in real estate or goods to secure a debt and the sale of real estate or goods. In the case of a true security interest, the transferee is a lender whose purpose is to lend money and receive a yield on the debt over time. The buyer of real estate or goods seeks to obtain the use of the real estate.

In the case of an assignment of receivables, however, in both a collateral assignment to secure a debt and a sale of the receivables, the essential purpose of the assignee is to advance money in the form of a loan or a purchase price and to earn yield over time on that advance. To be sure, there are differences between a collateral assignment and a sale, but those differences reflect variations in the calculation of the yield to be received by the assignee and in the allocation of risks that affect the yield. The essence of the two transactions—the earning of yield—is the same.

Accordingly, the best solution to the structural calamity of Article 9 would be to create a new Article 9A for the transfer of receivables that uses a conveyancing structure.¹³⁷ This approach would entail a huge revision of

¹³³ Plank, *Security of Securitization*, *supra* note 45, at 1673–78 (discussing the importance of distinguishing a sale and a collateral assignment of receivables in securitizations). As of September 30, 2006, issuers of asset backed securities held approximately \$3 trillion in receivables. See BD. OF GOVERNORS OF THE FED. RESERVE SYS., STATISTICAL RELEASE Z.1, FLOW OF FUNDS ACCOUNTS OF THE UNITED STATES, tbl. L-126, ll. 5, 9, and 10 (Dec. 7, 2006), available at <http://www.federalreserve.gov/releases/z1/Current/z1.pdf>.

¹³⁴ See *supra* text accompanying note 130.

¹³⁵ See *supra* text accompanying notes 119–22.

¹³⁶ See Plank, *Sale of Accounts*, *supra* note 9, at 436–39.

¹³⁷ In 1994, I proposed a similar approach that would have eliminated the definitional calamity in Article 9's treatment of the assignment of receivables. See

current Article 9. Nevertheless, such a new article would more accurately reflect the nature of transactions involving receivables, whether a sale or a collateral assignment: the fact that the assignee seeks yield. To be effective, it would require the same rules for perfecting a non-possessory assignment of all receivables.¹³⁸ This uniformity could probably be achieved only by eliminating the filing requirement for all receivables. It is unlikely that a filing requirement for sales of all receivables would be acceptable.¹³⁹

B. *Elimination of Filing*

As a prelude to a new Article 9A for assignments of receivables, I propose (i) the elimination of the requirement for filing a financing statement to perfect a non-possessory security interest, (ii) the automatic perfection of assignments upon attachment, and (iii) the elimination of filing for priority except in one instance. This proposal has two benefits. On the practical side, it would eliminate the unjustified costs of the filing requirement. On the theoretical side, although it would not remove the explicit structural and definitional defects in Article 9's treatment of assignment of receivables, it would eliminate many of its specific consequences.¹⁴⁰

1. *Optimal Rules for Perfection*

As discussed above,¹⁴¹ the most significant defect in the notice filing system is its failure to provide any meaningful information in the case of multiple assignments of different batches of receivables to multiple assignees. Accordingly, I initially thought that eliminating the filing requirement for all of these discrete assignments but retaining it for blanket assignments would be sufficient. This idea, however, has several

generally Plank, *Sale of Accounts*, *supra* note 9, at 494–520. I understand from discussions with representatives of the Article 9 drafting committee that my proposal received some consideration but that it was rejected because such a revision would make Article 9 too cumbersome.

¹³⁸ In this Symposium, Professor Steven Schwarcz proposes requiring filing to perfect a sale of payment intangibles. See Schwarcz, *supra* note 129, at 277.

¹³⁹ See *supra* text accompanying note 79 (describing the automatic perfection of sales of payment intangibles and promissory notes without filing a financing statement) and note 129 and accompanying text (describing the reasons why sales of these receivables were excluded from the filing requirement).

¹⁴⁰ See Example 2a, *supra* text accompanying notes 64–66, and Example 2b(ii), *supra* text accompanying note 68 (both describing the current failure of Article 9 to implement fully the policy of giving priority to the first to file in the case of a buyer of accounts).

¹⁴¹ See *supra* text accompanying and following note 115.

deficiencies. First, it presumably would preserve the difference between automatic perfection of blanket sales of payment intangibles or promissory notes and filing for all other blanket assignments. It would also require that assignees of even discrete assignments be allowed to obtain priority by filing.¹⁴²

Finally, it would require assignees to make difficult distinctions between a “discrete assignment” and a blanket assignment. For example, how should an assignee treat an assignment of all receivables other than an assignment to a specified assignee? Instead of agonizing over such issues, assignees or their counsel will insist on filing. This defensive filing and any filing for priority would produce search results for subsequent searchers that are as uninformative as the search results produced by the current system. Hence, although a total abolition of the filing requirement will put additional due diligence burdens on those assignors and assignees that only engage in blanket assignments, my judgment is that automatic perfection of all assignments and priority based on the time of the first assignment under any assignment agreement produces the best balance of costs and benefits.

My proposed perfection rule is simple: Section 9-309 currently provides:

The following security interests are perfected when they attach:

...

(2) an assignment of accounts or payment intangibles which does not by itself or in conjunction with other assignments to the same assignee transfer a significant part of the assignor’s outstanding accounts or payment intangibles;

(3) a sale of a payment intangible;

(4) a sale of a promissory note;

(5) a security interest created by the assignment of a health-care-insurance receivable to the provider of the health-care goods or services.¹⁴³

I would delete subsections (2) through (5) and replace them with:

(2) all assignments of receivables.¹⁴⁴

In connection with this amendment, I would add a new defined term “receivable” to mean an account, chattel paper, payment intangible, and promissory note. There is no need for a defined term for assignment because

¹⁴² See *supra* text accompanying notes 119–22 (describing the question of whether a buyer of payment intangibles, whose interest is automatically perfected upon attachment, may obtain priority by filing a financing statement).

¹⁴³ See U.C.C. § 9-309 (2003).

¹⁴⁴ I would also provide for perfection upon attachment of a “commercial tort claim” for the same reasons as automatic perfection of receivables.

Article 9 currently uses the term “assignment” to include both a sale and a collateral assignment of receivables.¹⁴⁵ I would also eliminate the current exclusion of certain assignments from Article 9,¹⁴⁶ which subjects these assignments to the common law of assignments, including the uncertain requirements for perfection of such assignments.¹⁴⁷

Eliminating the filing requirement for assignments would eliminate the costs of the filing system discussed above, but it would impose the costs of additional due diligence by purchasers and creditors. The net cost savings from eliminating the filing requirement would vary among different types of business transactions. The degree of any savings or the existence of net cost savings is, undoubtedly, an empirical question which requires further study. Nevertheless, I will offer the following judgments on this empirical question.

For assignors that engage in multiple assignments of receivables to multiple assignees, elimination would impose no additional burdens on those assignors’ purchasers and creditors. As discussed in Part II.B above, the current filing system provides no benefits other than the identification of the multiple assignees. Accordingly, the benefit of eliminating the costs of the filing system would outweigh the costs of automatic perfection.

For assignments by assignors of all of the assignor’s receivables to a particular assignee, eliminating the filing requirement would eliminate the information in the filing system indicating the existence of this financing arrangement. This would impose additional due diligence burdens on all

¹⁴⁵ See, e.g., U.C.C. § 9-309(d)(3), (4), (5) (2003), quoted *supra* note 143; *id.* § 9-209(b), (c) (describing a collateral assignee’s obligation to release an account debtor who has received notification of assignment from paying the assignee under certain circumstances); *id.* § 9-309(2), quoted *supra* in text accompanying note 143; *id.* § 9-330(a)(2), (f) (referring to notice of assignment of chattel paper); *id.* § 9-403(b) (permitting account debtors to agree not to assert claims or defenses against assignees); *id.* § 9-404 (providing that assignees take receivables subject to the terms of the receivable and the claims and defenses of the account debtor against the assignor); *id.* § 9-405 (permitting modification of an assigned receivable by the assignor); *id.* § 9-406 (providing that an account debtor may discharge its obligation under a receivable (other than a promissory note) by paying the assignor until it receives notification of an assignment and invalidating anti-assignment provisions in certain assignments of receivables); *id.* § 9-408 (invalidating to a limited extent anti-assignment provisions in certain assignments of receivables).

¹⁴⁶ See U.C.C. § 9-109(d) (2003) (providing that Article 9 does not apply to “(4) a sale of accounts, chattel paper, payment intangibles, or promissory notes as part of a sale of the business out of which they arose; (5) an assignment of accounts, chattel paper, payment intangibles, or promissory notes which is for the purpose of collection only; (6) an assignment of a right to payment under a contract to an assignee that is also obligated to perform under the contract; [or] (7) an assignment of a single account, payment intangible, or promissory note to an assignee in full or partial satisfaction of a preexisting indebtedness”).

¹⁴⁷ See *supra* note 98 and accompanying text.

assignees to ensure that the assignor had not entered into a previous “all receivables” financing arrangement. This burden, however, already exists for assignees of payment intangibles and promissory notes because of the automatic perfection of sales of these receivables.¹⁴⁸ For example, even if a subsequent searcher finds an “all receivables” financing statement in the financing statement records, it still cannot determine from the filing system whether the assignor has sold these receivables before or after the filing of the financing statement. In the case of assignments of these receivables, the savings from eliminating the costs of the filing system would almost certainly exceed the costs of such elimination.

In the case of assignments of accounts and chattel paper, the question is a closer one. Since filing is necessary for all assignments, subsequent searchers can find an “all receivables” financing statement. Without the filing system, subsequent purchasers and creditors will need to rely on the due diligence of the assignor. Nevertheless, assignees that engaged in the business of accounts receivable financing and factoring of accounts lived happily with this task without any need for a filing regime for approximately 50 years before the adoption of Article 9 in the 1960s.¹⁴⁹

This history reflects the difference between receivables and goods in the possession of the owner. In the case of goods, purchasers or creditors cannot determine simply from the existence of the goods the existence of a security interest in the goods. Receivables, however, only exist because there is a third person, the obligor to whom a loan was made (either cash, property, or services provided to the obligor) and from whom payment is owed. The owner of a receivable must account for the cash, property, or services provided, and if the obligor makes payments on the receivable to the owner, the owner must account for such payments. If the owner of the receivable assigns the receivable, the assignor must account for the proceeds of the assignment. Further, if an assignor has assigned receivables but is collecting them on behalf of the assignee, the assignor must collect the cash received and pay some or all of it to the assignee, and it must account for these receipts and payments. These cash flows provide a reliable source of information for subsequent purchasers and creditors. Therefore, although there may be some additional costs involved for subsequent purchasers and creditors, it is my judgment that in the aggregate, even if not on an individual basis, the costs of this due diligence would be less than the costs imposed by the filing system.¹⁵⁰

¹⁴⁸ See *supra* text accompanying note 79.

¹⁴⁹ See *supra* text accompanying notes 97–111.

¹⁵⁰ Professor Lipson has expressed a concern that the lack of a filing requirement for security interests in deposit accounts (as discussed *supra* note 16) allows the creation of a secret lien on proceeds of inventory that will be superior to the security interest of an

2. Priority

The premise for abolishing the filing requirement for assignments of receivables is that in many cases such filing provides no meaningful information to subsequent searchers and in other cases any minimum informational benefits for some subsequent searchers do not outweigh the costs imposed by the filing requirement. Accordingly, any rule for determining priority among multiple assignees of the same receivable should not rely upon filing except for those instances when the filing system does provide meaningful information.

Therefore, the filing system should not be relied upon for determining priority among multiple assignees of receivables that are original collateral. As a starting point, with the exceptions described below for certain receivables that are proceeds of other collateral, priority among multiple assignees of receivables should be determined by the first to perfect. In other words, priority is to be determined by the first to attach. In those cases in which the interests of multiple assignees attach at the same time, the assignees should share pro-rata.

Priority based solely on first to attach would present difficulties for assignors and assignees that enter into an agreement for the sale of receivables over time. At the time of each transfer, the assignee must either have confidence that the assignor had not previously assigned receivables to another assignee or must repeat its due diligence of the assignor. To obviate this necessity, the priority for subsequent assignments of receivables pursuant to an authenticated agreement should date from the initial assignment of receivables pursuant to the agreement. This rule would protect the initial assignee that had committed to fund the assignment of future receivables from the risk of the double assignment of future receivables. Potential subsequent assignees would, through their due diligence, discover the existing financing arrangement and would know not to take an assignment unless they obtained a release or subordination of the first assignee's interest.

Any priority rule must also account for multiple assignees of receivables that are proceeds of collateral in which a secured party has a security interest.¹⁵¹ The filing system should play a role in such a priority contest only

inventory financier. See Lipson, *supra* note 88, at 462–67. In my view, however, due diligence of the type that I have described would ameliorate this problem because an inventory seller must account for its cash proceeds. I expect that the aggregate costs of the non-public control of deposit accounts would be less than the costs of a filing requirement.

¹⁵¹ See U.C.C. § 9-102(a)(64) (2003) (defining “proceeds” to include “(A) whatever is acquired upon the sale, lease, license, exchange, or other disposition of collateral; [and] (B) whatever is collected on, or distributed on account of, collateral”).

for a secured party that has relied upon the filing system. The most typical example is an inventory financier that perfects a security interest in inventory by filing a financing statement. Often the debtor will sell the inventory in exchange for an account, chattel paper, or a promissory note, which are proceeds of the inventory.

Currently, if a receivables financier SP-1 takes a perfected security interest in receivables, and an inventory financier SP-2 takes a security interest in inventory or other goods, the priority between the receivables financier SP-1 and the inventory financier SP-2 in any receivables that are proceeds of the sale of inventory would be determined by the first to file or perfect rule.¹⁵² An inventory financier (or other lender against goods) would search the UCC financing statement filing records to determine if other secured parties had a security interest in the same collateral. If the receivables financier SP-1 has filed a financing statement covering receivables, the inventory financier SP-2 would understand that it would have a subordinate security interest in receivables that were proceeds even if it had a superior interest in the inventory. The inventory financier may, however, accept this subordinate position because it expects to be paid from the funds generated by the assignment of the receivables that are proceeds of the sale of the inventory.

Under the proposed automatic perfection rule, if the receivables financier SP-1 had agreed to purchase all receivables generated by a debtor from the sale of its inventory, it would not be reasonable to expect the inventory financier SP-2 that wanted priority in the receivables to do the necessary due diligence to ensure the absence of an earlier receivables financing arrangement. The inventory financier would also expect to establish its priority in any receivables that were proceeds of the sale of inventory by filing. Accordingly, solely for purposes of establishing priority in receivables that are proceeds of goods in which a security interest may be perfected by filing, the receivables financier SP-1 should be allowed to file a financing statement and be entitled to have priority date from the time of the filing. Hence, if the inventory financier SP-2 searches and finds the financing statement, it can determine whether it is willing to be subordinate to the receivables financier SP-1. If the inventory financier SP-2 finds no financing statement covering assignments to the receivables financier SP-1, then the inventory financier SP-2 is entitled to priority over the receivables financier SP-1 in receivables that are proceeds of the sales of inventory.

Even in this circumstance, however, priority among assignees of receivables should still depend on time of initial perfection. Assignees of receivables need only search for secured parties who must perfect by filing a

¹⁵² See *supra* text accompanying note 20 (discussing the priority among perfected security interests for the first to file or perfect).

financing statement, such as inventory financiers, and they need not search for other assignees of receivables. Indeed, we do not want to create any benefit from searching because we do not want to create an incentive for filing except in those cases in which filing provides meaningful information.

The priority for the proceeds of receivables that consist of receivables should be the same as the priority for the original collateral.¹⁵³ For proceeds of the receivables that do not consist of receivables, we would need special rules to the extent that these proceeds are of a type in which a security interest can be perfected by filing, such as a check used to pay a receivable. If a secured party has a security interest perfected in the type of collateral represented by the proceeds by filing, the secured party should not have priority over the assignee of the underlying receivables by virtue of an earlier filing. Accordingly, assignees of receivables should be entitled to a subordination rule similar to that of Section 9-325 that addresses the “double debtor” problem.¹⁵⁴ The secured party perfected in the receivables as proceeds should be subordinate to the receivables assignee. Again, except as described above, we do not want to create any reason for an assignee to search the financing statement records. Otherwise, assignees will file financing statements to protect their interests and other assignees will be compelled to search for those financing statements.

IV. CONCLUSION

The incorporation of the sale of receivables into a security regime for security interests in goods and the requirement to file a financing statement for the perfection and priority of an assignee’s interest have created a variety of calamities. Receivables are a distinct type of property item, substantially different from other types of property items, such as real estate, goods,

¹⁵³ See U.C.C. § 9-322(b)(1) (2003) (providing that for the purposes of the priority rules of Section 9-322(a)(1), “the time of filing or perfection as to a security interest in collateral is also the time of filing or perfection as to a security interest in proceeds”).

¹⁵⁴ See *id.* § 9-325 and cmts. If a debtor D1 creates a security interest in collateral other than inventory in favor of SP-1 perfected by filing on April 1, and then sells the collateral to another person, D2, SP-1’s perfected security interest would often continue. See *id.* § 9-315(a), (c), (d)(1). D2 becomes a debtor because it has an interest in the collateral. See *id.* § 9-102(a)(28), quoted *supra* note 49. If D2 had granted a security interest in similar after-acquired collateral in favor of SP-2, perfected by filing on March 1, the normal operation of the first to file rule would give SP-2 priority over SP-1. Section 9-325 overrides the first to file rule in this case by expressly subordinating SP-2 to SP-1. On the other hand, we should keep the current rule giving a secured party that has control over a deposit account or investment property priority over a secured party that has a security interest in the deposit account or investment not perfected by control, which would include an assignee of receivables with a perfected security interest in proceeds. See *id.* §§ 9-327(1), 9-328(1).

investment property, and deposit accounts. Transactions involving receivables also represent substantially different interests from transactions involving other types of property items. Receivables deserve their own regulatory regime apart from the regulatory regimes governing the transfer of land, sales or leases of or grants of security interests in goods, and the issuance and transfer of investment property.¹⁵⁵ The optimum solution for these calamities would be a new Article 9A governing assignments of receivables. Short of that, elimination of the filing requirement would greatly reduce the costs for assignors and their assignees and creditors. It would also ameliorate the adverse consequences of incorporating sales transactions in a security regime.

¹⁵⁵ The rules governing the granting of security interests in investment property and deposit accounts in Article 9 are sufficiently distinct as to create a de facto separate regulatory regime. See U.C.C. § 9-203(b)(3)(C), (D) (permitting “delivery” of a certificated security and “control” of a deposit account or investment property in lieu of an authenticated security agreement describing the collateral); *id.* § 9-312(b)(1) (providing that “a security interest in a deposit account may be perfected only by control under Section 9-314”); *id.* § 9-314 (permitting perfection of a security interest in investment property and deposit accounts by “control”); *id.* § 9-104 (providing a particularized definition of “control” for deposit accounts); *id.* §§ 9-106(a) and 8-106 (providing a particularized definition of “control” for investment property); *id.* §§ 9-327, 9-328, 9-332(b), and 9-340 through 9-342 (providing a particularized priority and related rules for security interests in deposit accounts and investment property).

