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THE HIERARCHY OF PRIORITY

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SYNOPSIS

Because "priorities" are such an important and difficult issue in Article 9 of the Uniform Commercial Code ("UCC"), most commentators use what might be called an individualized or seriatim approach to priorities. For example, most commentators start by describing the rules of priorities for individual kinds of properties or for individual kinds of transactions. Then the commentators move on to second kinds of properties or transactions and describe the priorities for them, and then to a third, etc. However, because the priority rules are so difficult, the individualized or seriatim approach to discussions of priorities often generates confusion or a lack of full

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understanding. The analysis of priorities here differs. This analysis suggests that there is a hierarchy of priorities in Article 9 of the UCC and that this hierarchy is relatively simple to describe. The analysis here describes this hierarchy by engaging in a two-part analysis. Part I suggests that the rules for priorities in Article 9 come out of the interaction of a number of variables, variables that are well-known to everybody who is familiar with Article 9.[1] Part II suggests that the variables described in Part I allow us to put all of the important rules about priorities into a simple chart that shows how the various different priorities interact with each other.[2]

INTRODUCTION

Everyone who is familiar with the practice of law in connection with Article 9 of the UCC[3] knows that in many cases non-paying debtors have enough money to pay some but not all of their debts. In these very common cases, lines of creditors form to recover from the debtors. Creditors at or near the front will likely collect at least something from the debtors. Creditors at or near the end, however, will not collect at all, or will collect only pennies on the dollar. Thus, when creditors line up to collect from non-paying debtors, creditors always try to position themselves as far forward in the lines of creditors as possible.

Generally speaking, commercial law uses a system of priorities to determine where individual creditors get to stand in the line of creditors.[4] Creditors with high priorities get to stand at or near the front. Creditors with low priorities have to stand at or near the end. Article 9 of the UCC provides most of the rules about priorities; however, the United States Bankruptcy Code ("Bankruptcy Code") adds some important ideas as well.

Most books and commentators on Article 9 priorities use what might be called an "individualized" or "seriatim" approach to priorities. For example, most commentators start by describing the rules of priorities for individual kinds of property or for individual kinds of transactions. Then the commentators move on to second kinds of property or transactions and describe their respective priorities, and then to a third, etc. However, because the priority rules are so difficult, the individualized or seriatim approach to discussions of priorities often generates confusion or a lack of full

[1] *See infra* Part I.

[2] *See infra* Part II.

[3] U.C.C. § 9 (AM. LAW INST. & UNIF. LAW COMM'N 2010).

[4] JAMES J. WHITE, ROBERT S. SUMMERS & ROBERT A. HILLMAN, WHITE AND SUMMERS' UNIFORM COMMERCIAL CODE 1227 (6th ed. 2015).

understanding. Hardly any commentators, it seems, attempt to show how different priority ideas fit together with each other, or where different kinds of priorities have related but different impacts on individual debtors or creditors.[5] For example, discussions of priorities rarely (if ever) show how creditors with attached but not perfected security interests stand in relation to other kinds of creditors. Likewise, discussions of priorities rarely (if ever) show how various liens—like statutory, tax, bankruptcy, or judicial liens—fit into an overall scheme of priority, or fit together with Article 9 security interests. Rather, most discussions of priorities simply state what the priority is for certain kinds of claims and leave it at that. No overall scheme is described.

The analysis here addresses this problem by suggesting that there is an overall hierarchy of priorities articulated in Article 9 of the UCC. A simple chart, reproduced at the end of this analysis, depicts this hierarchy.[6] The higher that individual creditors are in terms of this overall hierarchy (i.e., the higher that individual creditors are on this chart), the farther forward these creditors stand in lines of creditors who are trying to collect from non-paying debtors. On the chart there are several different "layers" or "tiers." Priority claims in the various tiers or layers are mostly treated the same.

A quick introductory point must immediately be made. The ideas discussed in Part I of the analysis here are extremely familiar and known to anybody who works with Article 9.[7] Therefore, the analysis here moves over these ideas very quickly and provides few reference citations. The point of the analysis is *not* to repeat ideas that everybody already knows. Rather, the point of the analysis is to organize these ideas in a way that has not yet been done. So, the organization of the ideas, rather than the ideas themselves, are the key to understanding here.

Before we get to the different kinds of claims to property and the claimants who will go in various layers or tiers of priority, we must start with a couple of basic priority points. These ideas cut across all aspects of priority.

First, generally speaking, secured creditors or lien creditors would stand ahead of unsecured or non-lien creditors in a line of creditors, at least in terms of individual items of property of debtors.[8] Thus, for example, if *C1* has an unsecured claim against *D* dated January 1 and *C2* has a secured claim against *D* dated May 1, *C2* will likely be farther forward in the line of creditors than *C1* because *C2* is a secured creditor and *C1* is an unsecured creditor. So,

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[5] An exception here is Douglas Whaley.
[6] *See infra* tbl. 1.
[7] *See infra* Part I.
[8] *See* U.C.C. §§ 9-201, 9-322(a)(1) (AM. INST. LAW & UNIF. LAW COMM'N 2010).

generally speaking, secured or lien creditors are much more likely to get paid than non-secured, non-lien creditors.

Second, earlier in time liens or interest creditors stand ahead of later in time liens or interest creditors, subject to some very important exceptions (the most important of which is the Purchase Money Interest (PMI) exception).[9] So, for example, if *C1* has a secured claim against *D* dated January 1 and *C2* has a secured claim against *D* dated May 1, *C1* likely will be farther forward in the line of creditors lined up against *D* than *C2*. However, an important exception might apply if *C2* is a PMI creditor and *C1* is *not* such a creditor.

Third, if debtors declare bankruptcy, a trustee (representative) for the debtor will be appointed and instructed to act on behalf of the general creditors collectively. So, if *D* declares bankruptcy, a trustee for *D* will be appointed and that trustee will then represent *all* of the general or unsecured creditors of *D*, for example, *C1*, *C2*, and *C3*. In addition, the Bankruptcy Code states that this bankruptcy trustee will have the status of a lien creditor against the bankrupt debtor.[10] Thus, and again by way of example, though *C1*, *C2*, and *C3* (unsecured creditors) individually may be near the end of the line of creditors trying to collect from *D*, *B* (the bankruptcy trustee for *D* who represents *C1*, *C2*, and *C3*) will get to move forward in the line of creditors against *D* and stand with the other lien creditors against *D*.

I. DIFFERENT KINDS OF CLAIMS TO PROPERTY AND THE PRIORITY OF THE DIFFERENT KINDS OF CLAIMS

As we will see, it is possible to put together a list of seven different kinds of claimants (or different kinds of interests) to particular property of debtors. Claimants early on this list, and at the bottom of our chart of hierarchy, have low priority in the property.[11] If debtors have limited amounts of property, these low-priority claimants will usually get little or nothing. Conversely, claimants late on this list who are high on the chart of priority will likely recover at least something. Claimants who are in individual tiers or layers in this hierarchy of priorities usually will fight it out amongst themselves using the earlier-in-time or earlier-in-line general rule.

A. Wrongful Possessors of Property

We start with a very quick reference to one of the most important rules of

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[9] *See id.* § 9-322.
[10] 11 U.S.C. § 544(a)(1) (2012).
[11] *See infra* Part II.

property law, the rule of *nemo dat*, also referred to as *nemo dat quod non habet*.[12] No one (*nemo*) gives (*dat*) what (*quod*) he or she doesn't have (*non habet*). The heart of the idea is that *transferors* of property (of any kind) can only give to their *transferees* what the transferors themselves had. Thus, if transferors of property have no title or rights in the property, then those transferors cannot give title or rights in that property to their transferees. The same thing occurs with defective title or defective rights. If transferors have defective title or rights in property, then the transferors can only give to transferees that defective title or those defective rights.

There's good news and bad news about *nemo dat*. The good news is that this rule provides lots of protection to original owners of property or original claimants against property. This is so for a simple reason. If thieves or fraudsters wrongfully take property from the original owners of that property, the thieves or fraudsters have no rights, or defective rights in the property. Thus, if the thieves or fraudsters transfer that property to third parties, the third parties get only what the transferors had, which is little or nothing. Thus, following these kinds of transfers, the original owners can get the property back from the transferees. The bad news is that some transferees of property will have no rights in that property at all. This is so even if these transferees themselves are perfectly innocent possessors of the property and completely unaware of the wrongful things that have happened to the property in the past.

In terms of liens and security interests, the foregoing means that some transferees of property will take property subject to any and all liens and security interests against it. This is so even if these transferees thought that they were getting clean ownership of the property and were totally innocent. We'll just call these transferees wrongful possessors of the property, albeit sometimes innocent wrongful possessors.

Note quickly that we will see *later* that some transferees of property will qualify to be "rightful possessors" of property. Several different kinds of rightful possessors exist, including, most importantly, "good faith possessors" of goods. Because it is quite easy to qualify to be a rightful possessor—it's even easy to qualify to be a rightful possessor who fits into the "good faith

[12] U.C.C. § 1-201(29)–(30) (AM. LAW INST. & UNIF. LAW COMM'N 2001); *Id.* §§ 9-201(a), 9-203(b)(2) (2010); *see also* Steven L. Harris & Charles W. Mooney, Jr., *Using First Principles of UCC Article 9 to Solve Statutory Puzzles in Receivables Financing*, 46 GONZ. L. REV. 297 (2010/2011); Steven L. Harris & Charles W. Mooney, Jr., *U.C.C. Article 9, Filing-Based Authority, and Fundamental Property Principles: A Reply to Professor Plank*, 69 BUS. LAW. 79 (2013); WILLIAM H. LAWRENCE, UNDERSTANDING NEGOTIABLE INSTRUMENTS AND PAYMENT SYSTEMS (2009); WHITE ET AL., *supra* note 4, at 199–200; *The Nemo Dat Quod Non Habet Rule*, LAW TEACHER, http://www.lawteacher.net/free-law-essays/commercial-law/the-nemo-dat-quod-non-habet-rule-commercial-law-essay.php (last visited Nov. 16, 2015).

possessor" subcategory—rightful possessors of property are likely to be much more common in the real world than wrongful possessors.

A. General Creditors

Some credit sellers and credit lenders provide credit sales or loans on an "open account" or "unsecured" or "non-lien" basis, while other creditors do not seek to get non-consensual liens against the property of their debtors at all. These creditors, often called general creditors, do *not* have either consensual security interests or non-consensual liens against the property of their debtors. The best examples of unsecured or open account or non-lien creditors are Visa and MasterCard.

General (i.e., unsecured) creditors have claims against the persons of debtors, because the debtors either have agreed to make payments to the creditors or otherwise have rights against the persons of the debtors. Importantly, however, unsecured (i.e., non-lien, open account creditors), do *not* have claims against any individual property of their debtors. Rather, and to repeat, the claims of these creditors are against the persons of the debtors. To be sure, general creditors may be able to get judgments against their debtors and then turn those judgments into claims against the property of the debtors with the use of judicial liens, which we'll come to in a moment. But, at least initially, general (unsecured) creditors only have claims against the persons of debtors.

And now a quick reminder about what happens in cases where debtors declare bankruptcy. First, as noted before, under the Bankruptcy Code, the bankruptcy trustee (or other representative) of the debtor represents the interests of all the general creditors. So, if a debtor declares bankruptcy, all of the debtor's general creditors will be represented by the debtor's bankruptcy trustee. Second, the Bankruptcy Code says that the trustee (or other representative) of the bankrupt debtor has the status of a lien creditor of the debtor.[13] The widely used terminology in this context is that the trustee (or other representative) of the debtor has a bankruptcy lien against the property of the debtor. This means that debtors' general creditors on an individual basis stand near the end of lines of creditors. But, collectively, the general creditors may be represented by a bankruptcy trustee who gets to stand farther forward in the lines of creditors.[14]

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[13] 11 U.S.C. § 544(a)(1) (2012).

[14] Section 507 of the Bankruptcy Code contains rules that determine priorities among general creditors. Thus, for example, the Bankruptcy Code says that family law debts, alimony, child support, etc., have the highest priority among general creditors. *Id.* § 507(a)(1). Expenses related

It should not be underestimated how many creditors of particular debtors will be unsecured, i.e., general creditors. So, candidly, there will be lots of people and businesses standing in this part of lines of creditors (although, as we'll see soon, these people and businesses in some cases will have a representative standing ahead of them in the line).

One further point must be made about unsecured creditors. Since Article 9 puts all unsecured creditors in the same layer or tier of the hierarchy of priority, unsecured creditors usually beat each other based on the time debts were incurred. Thus, earlier in time usually beats later in time.[15] Note, however, that this applies only to claims in this layer or tier. As we'll see, later in time claims in higher layers or tiers may beat earlier in time claims in this unsecured claimants layer or tier.

B. "Step 1" Secured Creditors—Attached but not Perfected Interests

Those familiar with practice under Article 9 of the UCC know that generally speaking (and leaving aside deemed or operation of law security interests[16]), consensual security interests come into existence and provide full protection to creditors as the result of a two-step process. The first step involves "attachment." The second step involves "perfection."

For the moment, we will focus on Step 1 of the two-step process, the attachment step, because we are only interested in what might be called Step 1 security interests. Later, we'll come back to Step 2 of the two-step process and talk about perfection of security interests, after which we'll talk about Step 2 security interests.

Attachment, the first step in the usual two-step process for security interests, converts claims against the persons of owners of the property into claims against the property itself.[17] Usually, the attachment stage requires

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to bankruptcies themselves are second and third on the list of priorities among general creditors. *Id.* § 507(a)(2)–(3). Employee wages are in the number four slot among general creditors and unpaid contributions to employee benefit plans go fifth. *Id.* § 507(a)(4)–(5). The list goes on and on. However, other than these bankruptcy priorities for general creditors, general creditors usually share among each other on a pro rata basis. *See, e.g.*, *id.* § 726(b) (2012); JUDGE JUDITH K. FITZGERALD, JUDGE ARTHUR J. GONZALEZ & JUDGE MARY F. WALRATH, BANKRUPTCY ¶ 17:1720 (Rutter Group, Nat. Ed. 2015). Often these priorities (and this pro rata rule) among general creditors mean nothing because in many bankruptcy cases, all of the debtors' money is gone by the time the general creditors get to the front of the line of creditors.

[15] U.C.C. § 9-322(a)(3) (AM. LAW INST. & UNIF. LAW COMM'N 2012).

[16] However, with deemed security interests and agricultural liens (which are treated for most purposes like security interests), the interests come into existence by operation of law rather than by attachment. *See id.* § 9-310.

[17] *Id.* § 9-203.

satisfaction of three elements: (1) a security agreement and a record of the agreement; (2) payment of value; and (3) rights by the debtor in the collateral. The need for these three elements indicates that in most cases commercial actors who wish to have fully effective security interests must take some affirmative steps to bring about attachment. Further, the necessary elements for attachment indicate that, in virtually all cases, creditors who have attached security interests know that these interests exist.

Because attached security interests are claims against particular property of debtors, attached claims to particular property have priority over general claims against debtors who own or possess that property. This is because, to repeat, general claims are only claims against the persons of the debtors—*not* claims against particular property of the debtors.

Note now an extremely important point: It is indeed a good thing to have an attached security interest. That's because attached security interests against particular property will generally beat general claims against the owners of the property. But, attached security interests do *not* provide full protection because security interests in property become fully effective—and provide full protection to creditors—only if the interests have also gone through Step 2: Perfection.

As a practical matter, perfection usually follows attachment as a matter of course because most creditors—or certainly their lawyers—know that attached interests do not fully protect creditors. Further, in a significant number of cases— for example, those involving consumer goods—attached interests perfect automatically. In these cases, the creditors need not do anything at all to perfect their interests. Given the foregoing, attached but not perfected interests are relatively rare. However, sometimes creditors forget to perfect, or excessively delay in perfecting, already attached interests. Further, in cases involving deemed security interests, the creditors probably won't even know that they have security interests that need to be perfected. So, failure to perfect already attached security interests does occur.

Given all of the foregoing, a couple of things are clear. First, as noted earlier, Step 1 consensual interests—attached but *not* perfected—beat general claimants because attached interests are claims against property of debtors whereas general claims are claims only against the persons of debtors.[18] Second, Step 1 security interests should be lower in the priority scheme than Step 2 consensual interests, because Step 1 interests are *not* fully effective whereas Step 2 interests are fully effective.[19] Third, since Article 9 puts all

[18] *Id.* § 9-322(a)(3).
[19] *Id.* § 9-322(a)(2).

Step 1 security interests in the same layer or tier of the priority hierarchy, Step 1 security interests compete against each other by time obtained. Earlier in time (among Step 1 interests) usually is earlier in line.[20]

Finally, here are a couple of crucially important ideas. First, it is rare to see a Step 1 consensual lien holder attached but not perfected in court, because as soon as litigation threatens, Step 1 consensual lien holders take steps to perfect their liens. Hence, by the time litigation actually happens, the Step 1 consensual lien holders usually are Step 2 consensual lien holders. Second, Step 1 consensual lien holders have lower priority than Step 2 consensual lien holders.[21] Third, buyers of property that are subject to Step 1 consensual interests (i.e., attached but *not* perfected interests), have priority in the property over the interest attached but not perfected creditors. Finally, as we'll see next, Step 1 consensual liens (attached but *not* perfected) are usually *lower* in priority than non-consensual liens (statutory, tax, judicial and bankruptcy liens).[22]

C. Non-Consensual Lien (P-STJB Lien) Creditors

Anyone who has studied or read about Article 9 security interests and various kinds of liens—the most important kinds of liens being statutory, judicial, bankruptcy, and tax liens—knows that the terminology used in connection with discussions of security interests and liens can be quite confusing. In fact, the terminology used in that context sometimes is flat out contradictory.

That being said, we need to start with some basic definitions, beginning with "lien" and "security interests." The most concise definitions for these terms can be found in section 101 of the Bankruptcy Code. A "lien" is defined as a "charge against or interest in property to secure payment of a debt or performance of an obligation."[23] The term "security interests" is defined as a "lien created by an agreement."[24]

These definitions make it clear that at least in bankruptcy proceedings—where a very large percentage of secured transactions problems work themselves out—the term "lien" includes *all* of the different kinds of property interests described herein. Those interests in property are (1) Article 9

[20] *Id.* § 9-322(a)(3).
[21] *Id.* § 9-322(a)(2).
[22] *Id.* § 9-333.
[23] 11 U.S.C. § 101(37) (2012).
[24] *Id.* § 101(51).

"security interests,"[25] which in almost all cases are "consensual security interests"[26]; (2) "deemed security interests," which are created by operation of law;[27] (3) "agricultural liens,"[28] which are created by statute but for most important purposes are treated like Article 9 security interests;[29] and (4) non-consensual liens (especially possessory-statutory, tax, judicial, and bankruptcy liens).

The terminology problem stems from the fact that Article 9 has different definitions for these same terms. For example, the Bankruptcy Code provides the following definition of "lien creditor":

> (52) "Lien creditor" means:
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> (A) a creditor that has acquired a lien on the property involved by attachment, levy, or the like;
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> (B) an assignee for benefit of creditors from the time of assignment;
>
> (C) a trustee in bankruptcy from the date of the filing of the petition; or
>
> (D) a receiver in equity from the time of appointment.[30]

This Article 9 definition of "lien creditor" clearly excludes possessors of Article 9 security interests, including "deemed" security interests. Rather, this Article 9 definition indicates that lien creditors are solely non-consensual creditors, such as those who have statutory, tax, bankruptcy, and judicial liens.[31] Further, the UCC's definition of "security interests"[32] strongly

[25] U.C.C. § 1-201(b)(35) (AM. LAW INST. & UNIF. LAW COMM'N 2001).

[26] *See* U.C.C. § 9-109 cmt. 2 (AM. LAW INST. & UNIF. LAW COMM'N 2010).

[27] Paul Wangerin, Deemed Security Interests: A Trap for the Unwary (2015) (unpublished manuscript) (on file with author). Deemed security interests come into existence in connection with some lease transactions, some consignments, some "tolling" arrangements, and some transfers of payment rights. *Id.*

[28] U.C.C. § 9-102(a)(5) (AM. LAW INST. & UNIF. LAW COMM'N 2010).

[29] Agricultural liens do *not* come into existence through the normal "attachment" process; rather, agricultural liens "become effective" by operation of law. *See id.* §§ 9-308(b), 9-308 cmt. 2.

[30] *Id.* § 9-102(a)(52).

[31] *See id.* Interestingly, this Article 9 definition of "lien creditor" also excludes possessors of what Article 9 itself calls agricultural liens. *See id.; see also id.* § 9-102(a)(5). This exclusion occurs because Article 9 says that, at least for perfection purposes, agricultural liens are treated like Article 9 security interests. *See id.* § 9-308.

[32] U.C.C. § 1-201(b)(35) (AM. LAW INST. & UNIF. LAW COMM'N 2001).

> "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. "Security interest" includes any interest of a consignor and a buyer of accounts, chattel paper, a payment intangible, or a promissory note in a transaction that is subject to

suggests that security interests in the UCC are *not* "liens" as the Bankruptcy Code defines liens. Likewise, UCC sections 9-109, 9-317, 9-322, and 9-333 suggest the same thing.[33] In the UCC, security interests, either consensual or deemed security interests, are—well—security interests. They are *not* liens.

Note here that Article 9 differentiates between "possessory" statutory liens—where a creditor with a statutory lien has possession of the property—and "non-possessory" statutory liens—where the creditor does *not* have possession of the property. Article 9 concerns itself only with possessory-statutory ("P-S") liens.[34] Non-possessory statutory liens are covered by non-UCC law.[35]

Which brings us to the definitions we need. Because we will mostly be talking about Article 9 issues in this analysis, we'll use the Article 9 terminology herein (even though we'll frequently be talking about bankruptcy cases). Thus, the term "lien" will be used herein only to describe non-consensual liens against property interests such as possessory-statutory, tax, judicial, and bankruptcy liens ("P-STJB") liens. The term "lien" also will from time to time herein be used to describe agricultural liens.[36] This is so even though agricultural liens are treated for many purposes as if they are security interests. On the other hand, the analysis here will use the term "security interest" only to describe consensual security interests in property and "deemed security interests" in property. Said in reverse, consensual interests in property herein and deemed security interests in property will exclusively be called security interests.

A brief word must now be said about priority and non-consensual liens.

> Article 9. "Security interest" does not include the special property interest of a buyer of goods on identification of those goods to a contract for sale under . . . Section 2-505, the right of a seller or lessor of goods under Article 2 or 2A to retain or acquire possession of the goods is not a "security interest" but a seller or lessor may also acquire a "security interest" by complying with Article 9. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer under Section 2-401 is limited in effect to a reservation of a "security interest." Whether a transaction in the form of a lease creates a 'security interest' is determined pursuant to Section 1-203.

Id.

[33] *Compare* U.C.C. §§ 9-109, 9-317, 9-322, 9-333 (AM. LAW INST. & UNIF. LAW COMM'N 2010), *with* 11 U.S.C. § 101(37) (2012).

[34] *See* U.C.C. § 9-333 (AM. LAW INST. & UNIF. LAW COMM'N 2010).

[35] *Id.* § 9-109(c)–(d). However, in some cases, non-UCC statutes about statutory liens sometimes explicitly state that the statutory liens will have priority over other kinds of interests and liens. The UCC respects these explicit statements about the priority of statutory liens. *Id.* § 9-333(b).

[36] *See id.* § 9-109(a)(2).

These liens, which include statutory, tax, judicial and bankruptcy liens, (hereinafter "P-STJB liens") are imposed on debtors by statutes or by court orders. P-STJB liens are NOT consensual. Note, however, that agricultural liens, which are created by statutes, are for the most part treated as if they are security interests. So, to the extent that agricultural liens are mentioned herein, they will be discussed alongside security interests.

Statutory liens – other than agricultural liens (which are created by statute but treated as if they are security interests) – usually protect providers of services to owners of property of non-consensual creditors of the owners of property. Thus, for example, if *P*, a plumber, provides services to *H*'s home, and if *H* then doesn't pay for the services, *P* can complete paperwork that will give *P* an interest in *H*'s home. Thereafter, if necessary, *P* can use judicial proceedings to sell *H*'s home and use the proceeds of the sale to pay down *H*'s debt to *P*. Statutory liens come in an almost infinite variety, all the way from liens such as the plumber's lien, just described, through liens that highly skilled professionals can impose on clients' property, lawyers liens, for example, and architects' liens.

Tax liens are liens against property that government taxing authorities can impose on the property of taxpayers if the taxpayers haven't paid their taxes.[37] After tax liens are imposed on property, the taxing authorities can, if necessary, take the property away from the taxpayers, sell it, and use the proceeds of the sales to pay down the tax debts.

After people or businesses declare bankruptcy, the bankruptcy system appoints trustees or representatives for the bankrupt debtors. These representatives thereafter act on behalf of the bankrupt debtors' general creditors. As was originally stated in Section 70(c) of the Bankruptcy Act, bankruptcy trustees have the status of lien creditors.[38] Unofficially, however, lawyers and judges in these cases usually say that bankruptcy trustees have "bankruptcy liens" against the property of debtors. Once the trustees get these

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[37] 26 U.S.C. §§ 6321–6323 (2012).

[38] Per Section 70(c):

> The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists.

The Hypothetical Creditor and the Trustee in Bankruptcy under Section 70C—Constance v. Harvey Rejected, 2 B.C.L. REV. 372, 372 n.5 (1961), http://lawdigitalcommons.bc.edu/bclr/vol2/iss2/17. Note that U.C.C. section 9-102(a)(52) also states that bankruptcy trustees have the status of lien creditors.

bankruptcy liens, the trustees can take the covered property away from the debtors, sell it, and use the proceeds of the sales to pay off as much as possible of the debtors' debts to general creditors. Thus, though general creditors individually stand very near the back of the line of creditors than line up against debtors, the general creditors collectively get to stand farther forward in the lines of creditors. That's because lien creditors, including the bankruptcy trustee, generally go ahead in lines of creditors than general creditors.

Finally, if people or businesses obtain judgments against others that involve money owed by the judgment defendants, and if the judgment defendants don't pay those judgments, the judgment plaintiffs can take additional steps to obtain "judicial" or "judgment" liens against the judgment defendants' property.[39] Then, if the judgment defendants still don't pay the judgments, the judgment plaintiffs can (with court assistance) take the liened-against property away from the judgment defendants, sell it, and use the proceeds of the sales to pay down the judgments.

Note now a subtle but important point. If you think carefully about this, you will see that in virtually all cases of P-STJB liens, public records are available of the existence of P-STJB liens or some substitute for these public records exist. With tax, judicial and bankruptcy liens, court filings or otherwise accessible public documents there are public records that reveal the existence of the non-consensual liens against property. Usually these records exist in records about the real property of debtors. Further, public paperwork showing statutory liens usually exist. And in other statutory lien cases, the creditors maintain possession or control of the property subject to the liens. Said differently, "secret" liens are not much of a problem with P-STJB liens because of the public records.

It is now extremely important to note that P-STJB liens become fully effective as soon as the requisite steps to create them have been completed. Thus, for example, if a judgment creditor gets a judicial lien against a debtor's property on January 1, that lien is fully effective on January 1. No second step is needed to make these liens fully effective. Likewise, if the taxing authorities get a tax lien against a debtor's property on January 1, the tax lien is fully effective on January 1. Again, no second step is needed. Likewise with bankruptcy liens and possessory-statutory liens (other than agricultural liens).[40] Bankruptcy and possessory-statutory liens are fully effective the date that they are obtained. No second step is needed to complete them.

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[39] U.C.C. § 9-317(a)(2), cmt. 4 (AM. LAW INST. & UNIF. LAW COMM'N 2010)*; see also id.* § 9-333.

[40] For bankruptcy liens, see section 9-102(a)(52) of the U.C.C. For statutory liens, see section 9-333 of the U.C.C.

Because P-STJB become fully effective as soon as they are created, the timing (priority) date for P-STJB liens is the date of creation, or the date of otherwise completion of the process of creating, these liens. There is, to repeat, no second step needed.

The foregoing combination of facts brings us to an absolutely critical idea. Because P-STJB liens are fully effective as soon as they are created and because consensual security interests that have completed only Step 1 are NOT yet fully effective, in terms of priority (timing), P-STJB non-consensual liens are superior to Step 1 consensual security interests. Again, that's because non-consensual P-STJB liens are fully effective upon creation, but Step 1 consensual liens are NOT fully effective (because they have not yet gone through Step 2). This means that P-STJB liens will be higher in hierarchy of priority than Step 1 consensual liens.

One last point must be made about P-STJB non-consensual liens. Since Article 9 puts these kinds of liens together in the same layer or tier of its hierarchy of priority, P-STJB liens have priority against each other based on time obtained. Thus, consistent with the general rule that earlier in time is earlier in line, earlier in time P-STJB liens beat later in time P-STJB liens.[41]

D. "Step Two" Secured Creditors – Attached AND Perfected Security Interests

As noted earlier, security interests only become fully effective following the completion of a two-step process. Step 1, attachment, converts claims that creditors have against the persons of debtors into claims against particular property of the debtors. Step 2, perfection, extends the effect of the claims

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[41] Some supplemental timing ideas for P-STJB liens must also be mentioned:

Statutory: Timing for statutory liens differs in different jurisdictions. Usually, the time will be the time that providers of services retain possession of the property or submit appropriate paperwork to government officials. Important Note: In construction cases, the general rule is that all statutory liens on the construction take effect at the time of beginning of construction. Thus, later service providers in construction cases will have the same timing date for liens as earlier service providers.

Tax: The time tax authorities file tax lien paperwork in the U.C.C. or real property recording systems.

Judicial: Timing for judicial liens differs in different jurisdictions. Usually, the timing date for judicial liens is the date when copies of judgments are filed with public records for real property and / or in the U.C.C. filing system. In some jurisdictions, however, the timing date for judicial liens is the time government officials physically seize the property that is subject to the judicial liens or make symbolic gestures of seizing the property. Timing dates may also be the date of service of process of citations to discover assets.

Bankruptcy: The time debtors file for bankruptcy.

against property to the rest of the world.

Usually (but not always), perfection requires affirmative conduct by the interest possessor, with that affirmative conduct usually being either the taking possession or control of the property that is the collateral or the creation of a public record of the security interest (by filing). In some cases, however, the law says that security interests perfect automatically. In automatic perfection cases, security interests perfect as soon as attachment occurs. Another "not always" situation, but one that won't concern us in this analysis, is perfection by placing notification on vehicle titles.

Automatic perfection of security interests occurs in several different situations. The best known of those situations, of course, is automatic perfection of security interests in consumer goods. Automatic perfection also exists, however, in a couple of Article 2 instances and in connection with transfers of some payment rights. Further, some security interests created in connection with securitizations also perfect automatically, as do some security interests created in connection with loan syndications. In addition, security interests in "indispensable paper" also perfect automatically, albeit only for a temporary period of time.[42] Finally, security interests in a "motley lot" of different situations – using Professor White's terminology – also perfect automatically.

However, perfection occurs for particular security interests. Once perfection has occurred, the subject liens are fully effective. This fact, in turn, has important priority consequences. First, since Step 2 security interests and P-STJB non-consensual liens are both fully effective, Article 9 treats Step 2 security interests and P-STJB non-consensual liens as equivalents in terms of priority timing. Said differently, Article 9 puts Step 2 security interests and P-STJB non-consensual liens in the same tier or layer of the hierarchy of priority.[43] Second, since Article 9 treats Step 2 security interests and P-STJB liens as equivalents, these kinds of security interests and liens fight it out amongst themselves based on time obtained.[44] Usually, earlier in time is earlier in line. But this is, again, only within this tier. Both kinds of claims in this layer or tier can beat earlier in time claims in lower layers or tiers. Third, since Article 9 puts these kinds of claims together in the same tier, these kinds of claims usually fight it out amongst themselves based on time obtained.[45]

[42]U.C.C. § 9-312(e) (AM. LAW INST. & UNIF. LAW COMM'N 2010). Indispensable paper is usually said to include chattel paper, instruments, documents of title and investment security papers.

[43] *Id.* §§ 9-317(a)(2), 9-333; 26 U.S.C. §§ 6321–6323 (2012).

[44] U.C.C. § 9-322(a)(1) (AM. LAW INST. & UNIF. LAW COMM'N 2010).

[45] *See generally id.* § 9-322.

Earlier in time usually means earlier in line.

A quick word must here be stated about a phenomenon that might be called "sucked in later collateral." In many cases, the consensual security interests that creditors have in the property of debtors (a) describe a category into which the collateral fits (e.g., inventory) and contains an "after-acquired property clause" (also known as a "floating lien). In these cases, if collateral that fits into a described category later comes into the possession of the debtor, that later-arriving collateral is sucked into the earlier lien.[46] The later arriving collateral then gets the perfection status and timing date of the original security interest.[47] Further, security interests on collateral generally extend into collateral that are the "proceeds" of the disposition of earlier collateral.[48] When collateral goes out, proceeds comes in. In these cases, including in bankruptcy, the security interest in the later arriving proceeds gets the perfection status of the earlier collateral and the timing date of the original security interest. Similar "sucked in later" rules apply to "commingled property.[49]

E. "Purchase Money Interests" and the Notion of Super Priority

Purchase money security interests ("PMIs") are interests in property that creditors take in property to secure future payment of the money borrowed to purchase the particular property.[50] Thus, for example, if *D* purchases an automobile and gives *C*, the car-finance company, an interest in the car to secure payment of the loan taken out to purchase the car, the security interest is a PMI. Likewise, of the purchaser of a house gives the finance company a mortgage in the house to secure payment of the mortgage, the mortgage is a PMI. On the contrary, if somebody *already owns* a car or a house and puts up that car or house to secure payment of a loan taken out to do something other than purchase the car or house, then the loan is a non-PMI. Further, if a person

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[46] *Id.* § 9-336 (a)–(c).

[47] *Id.* § 9-336(d).

[48] *Id.* § 9-315. The general rule about proceeds being sucked into earlier liens is different when the filing for a security interest in the later-arriving collateral would generally have to be made in a different location than the location for the filing of the original collateral. *Id.* § 9-315(d)(1). This is called the "new office" rule. There also are special rules for when the proceeds of the disposition of collateral are "cash proceeds." *Id.* § 9-315(d)–(e). In particular, when the proceeds are cash proceeds, perfection automatically exists for 20 days. *Id.* However, if filing does NOT occur in the 20 days, the perfection for the cash proceeds interests goes away. *Id.* Further, perfection for cash proceeds automatically occurs only if the cash proceeds are identifiably connected to the original collateral. *Id.* § 9-315.

[49] *Id.* § 9-336(a).

[50] *Id.* § 9-103.

or business has a right to receive a payment from a debtor, and if the person or business which has that payment right puts up that right as security for a loan or credit purchase, then the security interest in the payment right will be a non-PMI. In Article 9, only goods and software can be the subject of PMIs.[51]

For complicated reasons involving "after-acquired property" clauses (aka "floating liens") and "category descriptions" and "proceeds" and the security interests that can exist in connection with those things—Article 9 says that properly perfected PMIs usually will have "super-priority."[52] Super-priority means that later-in-time PMIs usually will beat earlier in time non-PMIs.[53] Thus, for example, if *C1* has a non-PMI on some of *D*'s property that was perfected on January 1, and if *C2* has a PMI on the same property of *D* that was perfected on May 1, *C2* probably will beat *C1* even though *C1*'s security interest in the property is earlier in time than *C2*'s interest. Again, the reasons for this are quite complicated.

It should immediately be clear that claimants who have properly perfected PMIs[54] in debtors' property will have very high priority in that property. Hence, PMI claimants to property usually will beat all non-PMI creditors in connection with their claims to that property.[55] Among PMI

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[51] *Id.* § 9-103(a)(1).

[52] *Id.* § 9-324.

[53] 11 U.S.C. § 364(c)(1) of the Bankruptcy Code says that Debtors in Possession (DIP) can, under some circumstances, have priority in bankrupt debtors' property. Commentators on the Bankruptcy Code sometimes talk about this idea as involving "super-priority." The super-priority described herein – Article 9 super priority – is completely different from DIP super priority in the Bankruptcy Code.

[54] Perfection occurs in various ways for different PMIs. For example, consumer goods PMIs perfect automatically. This is an important fact because, historically, lots and lots of consumer goods PMIs existed. However, this isn't a particularly important idea today because individual buyers at the present time usually don't buy goods on "store credit." Rather, individual buyers usually buy on unsecured credit with Visa, MasterCard, etc. Second, with non-inventory / non-live stock PMIs, creditors have a 20-day "grace period" to perfect security interests in the property. If the creditors perfect within the 20 days, the perfection becomes permanent. Otherwise, the perfection goes away. U.C.C. § 9-324(a) (AM. LAW INST. & UNIF. LAW COMM'N 2010). Finally, with inventory / livestock PMIs – which category problem incorporates the vast majority of PMIs – creditors have super priority if they perfect (a) before the debtors take possession of the property and (b) have notified other creditors of the debtors of the new PMI. *Id.* §§ 9-324(b), 9-324(d).

[55] Not surprisingly, some complicated rules come into play in the context of super priority. First, Article 9, specifically section 9-324(b), says that creditors who wish to take PMIs in non-inventory / non-livestock collateral get super priority only if they perfect their interests—usually by filing—within 20 days of attachment of the liens to the non-inventory/non-livestock collateral. This 20-day grace period gives inventory / livestock PMI creditors a short, but certainly not-too-short time frame in which to achieve perfections (and accompanying super-priority) in property. Besides, filing itself takes essentially no time nowadays because filing in most jurisdictions can

creditors, credit sellers usually will have priority over credit lenders.[56]

F. Rightful Possessors of Property

Recall that we started by stating the "wrongful possessors" of property have no rights in the property at all. Hence, some people or businesses that have property should not even be allowed to possess the property. Further, if these persons or business can possess the property, they certainly will possess that property subject to any consensual security interests or non-consensual liens that exist against that property. Recall also that it was said at the outset that wrongful possessors of property probably are relatively rare in the real world. Rather, in many, many cases, possessors of property can be classified as "rightful possessors" of property.

Rightful possessors of property go at the very top of our hierarchy of priorities. Rightful possessors have the right to possess the property. Just as importantly, however, rightful possessors of property in many cases have the right to possess that property free of consensual security interests and non-consensual liens that may encumber that property. Hence, in many cases, rightful possessors of property will have priority in that property over any interest or lien claims to the property.

Rightful possessors of property come in several distinct varieties. First,

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easily be done over the Internet. *Id.* § 9-324(b). Second, a different methodology exists for perfecting PMIs in inventory and livestock and for getting super priority in these instances. PMIs in inventory / livestock are perfected (and get super-priority) only if the creditors (1) notify other creditors of the planned PMI and (2) file financing statements about the inventory and do ***both*** of those things ***before*** the purchasers take possession of the inventory / livestock. This process gives earlier inventory lenders double protection. First, because of the notification requirement, new inventory creditors of debtors must inform other inventory creditors of the debtors of the planned PMIs and must do this ***before*** the debtors get possession of the new inventory. This notification solves the advances problem. Second, because of the filing requirement and the fact that the filing must occur ***before*** the purchasers take possession, earlier creditors can check the filing records before they make advances to the debtors. The filing records will show the new PMI. Thus, again, these special rules for perfection of inventory (and livestock) PMIs solve the advances problem. Third, it is not uncommon for already encumbered debtors to obtain and perfect PMIs in the same property from ***both*** a credit seller and a credit lender and to do this on the same days, or within the same 20 day grace periods. This is, of course, totally unethical and illegal in many jurisdictions. But, desperate people sometimes do desperate things. There is no really good solution to the problem just described. So, the UCC just flips a coin and says the following: If credit sellers and credit lenders both have perfected PMIs in the same property with the same priority date (or within the same 20 day grace period), the credit sellers will beat the credit lenders. *Id.* § 9-324(g). Credit lenders, the UCC says (sort of randomly), are better able to take the loss in these rare cases than credit sellers.

[56] *Id.* § 9-324(g) cmt. 13.

in many cases, creditors who have consensual security interests in some of the property of debtors authorize the debtors to dispose of the property. This is particularly so if the property that is the subject of the security interest is inventory to the debtors. If debtors then dispose of this property—which, again, the debtors do with permission of the creditors—the third parties to take the possession of the property do so free of the interests in it.[57] Second, in two instances, Article 2 of the UCC says that a buyer or seller who has possession of property has the highest priority in that property.[58] These two instances, which are principally designed to defeat claims brought by bankruptcy trustees of a buyer or seller, involve shipments of property under reservation and rightful rejections or revocations of acceptance of the property by the non-bankrupt buyer or seller. Third, Article 9 says that possessors of property who have perfected security interests by "control of" the property have priority, in some cases, over claimants who have perfected security interests in the property by methods other than control.[59]

Fourth, in some cases that sound obscure but cover many real world cases, buyers of goods—these are *not* "buyers in the ordinary course of business" (who we will get to in a moment) but just "buyers" of such goods[60]—take the goods free of security interests that creditors get in the goods if the security interests arise in connection with "advances" that the creditors make on earlier loans.[61] Buyers will take the property free of these advances interests if the creditors get the interests after they learn that the buyers bought the goods or, more importantly, if the creditors take the interests more than forty-five days after the buyers buy the goods.[62] A similar advances rule exists for leased goods.[63] To repeat, the buyers or lessees here are *no*t "buyers in the ordinary course of business".

Collectively, the most important examples of rightful possessors of

[57] *Id.* § 9-315(a). In these cases, the creditors usually get security interests in the "proceeds" of the disposition of the property, with proceeds often being money or other forms of payment. The security interests in the proceeds then take the place of the interests in the property itself.

[58] U.C.C. §§ 2-505, 2-711 (AM. LAW INST. & UNIF. LAW COMM'N 2002).

[59] *Id.* § 9-328 (2010); *see also id.* §§ 9-312, 9-104, 9-107, 9-312(b) to 9-314.

[60] *Id.* § 9-320(a). In this analysis, buyers in the ordinary course of business here are classified as "good faith possessors" of property. We will come to these kinds of possessors of property in a moment.

[61] Generally speaking, creditors who make "advances" on earlier loans automatically get security interests in property that debtors bought. These advances interests generally have the perfection status and timing dates of the original interests. Creditors who make advances such as in the present case are an exception to that general rule.

[62] U.C.C. § 9-323(d)–(e) (AM. LAW INST. & UNIF. LAW COMM'N 2010).

[63] *Id.* § 9-323(f).

property can be called "good faith possessors" of the property. Under Article 9, and other sources of law, these good faith possessors have been given extraordinary rights in the property. In most cases, good faith possessors of property have the highest claim to a property. Furthermore, these possessors of property generally take the property free of existing security interests in it. Examples of "good faith possessors" of property, i.e. possessors of property who have the highest priority in the property, are:

(1) Good Faith Purchasers of Goods;[64]

(2) Buyers in the Ordinary Course of Business;[65]

(3) Holders of Article 7 Documents of Title (Bills of Lading and Warehouse Receipts);[66]

(4) Holders in Due Course of Article 3 Payment Instruments;[67]

(5) Assignees of Accounts Where Underlying Contracts Include Waivers of Defenses;[68]

(6) Consumer Buyers from Consumer Sellers (The Garage Sale Rule);[69]

(7) Some Possessors of Some Kinds of Chattel Paper.[70]

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[64] *Id.* § 2-403 (2002).
[65] *Id.* § 9-320(a) (2010); *see also id.* §§ 2-201(9), 2-403 (2002).
[66] *Id.* § 2-201(21) (2002); *see also id.* § 7-502 (2003).
[67] *Id.* § 3-302 (2002); *see also id.* § 9-316 (2010).
[68] *Id.* § 9-403 (2010).
[69] *Id.* § 9-320(b).
[70] *Id.* § 9-330. The UCC says that there are two different kinds of chattel paper. First, in a very large number of cases, retailers who purchase inventory from wholesalers or manufacturers give the wholesalers or manufacturers of that inventory interests in the inventory that they purchase. The wholesalers and manufacturers in these cases also take "proceeds" interest from the retailers' disposition of the inventory. (Proceeds are the product of the disposition of other collateral.) Later, the retailers sell this inventory to third parties (customers) and in exchange for the inventory get chattel paper from the third parties. The chattel paper in these cases is "merely [the] proceeds" of the retailers' disposition of the inventory collateral. Since the original creditors have proceeds interests in this chattel paper, the original creditors claim this paper. The UCC Permanent Editorial Board calls this "Type A" chattel paper, or "merely proceeds" chattel paper. Second, in some rare cases, original creditors take interests in chattel paper that is *not* merely the proceeds of the disposition of inventory. Rather, in these cases, the chattel paper in which the

Quick analysis reveals that it is remarkably easy to qualify as a good faith possessor of property. Indeed, only three elements are necessary to so qualify. First, the transferees must give value for the property or rights they receive.[71] So, gift transferees cannot have the status of good faith possessor of property. Second, the transferees must act in good faith regarding the transfers.[72] Good faith in this context means that the transferees have used their industry's normal business practices. Lastly, the transferees cannot have knowledge of the problems with the property or rights that they are taking by

original creditors take interests has value independent of the debtors' sales of inventory. The UCC Permanent Editorial Board calls this "Type B" chattel paper or "other than merely proceeds" chattel paper; it is hard to come up with even a single example.

In connection with both Type A and Type B chattel paper, the chattel paper creditors sometimes later transfer the chattel paper to second financers, usually in exchange for immediate cash. These second financers then also take interests in the chattel paper. In these cases, conflicting claims to the paper can arise: The original creditors can claim the paper either as proceeds of the disposition of inventory collateral (Type A chattel paper) or as original collateral (Type B chattel paper). But, the second financers also claim the paper because of their interests in it.

Lots of confusion exists among lawyers, commentators, and judges about the impact of the foregoing, and even if the foregoing is an accurate statement of the law. However, White and Summers give us what perhaps is the best explanation for what is going on here generally, and why the difference between Type A and Type B matters. First, with *both* Type A paper (merely proceeds) *and* with Type B paper (other than merely proceeds), original creditors who have claims against the chattel paper can defeat claims against it by second financers simply by stamping a "legend" on the face of the paper. A legend states that that paper is subject to the original creditors' security interest. In effect, this stamp or legend makes it impossible for the second financers to assert that they do not have knowledge of the original creditors' interests in the paper. The paper itself describes the original interests. Second, if the chattel paper is *not* stamped or legended, then the paper will be treated differently depending on whether it is Type A or Type B. With unstamped Type A chattel paper, the second financers will have priority over the original creditor *even if* the second financer knew—from a source other than the paper itself (often a publicly recorded financing statement)—that somebody else already has a security interest in the paper. The second financer, in this situation, is a good faith possessor of the chattel paper property. However, with unstamped Type B chattel paper, the second financer will have priority in the paper only if the second financer was unaware that the paper was subject to an already-existing security interest in it. The bottom Line is if original creditors stamp or legend chattel paper in which they claim a security interest, the original creditors will have priority in that paper over second financers whether the paper is Type A or Type B paper. However, if original creditors do *not* stamp or legend chattel paper, then different rules apply to Type A and Type B chattel paper. Type A paper (knowledge by second financers from sources other than the paper itself of the earlier interest in the paper *does not* defeat the second financers' claims) provides less protection to original creditors than Type B.

[71] *See generally* U.C.C. §§ 9-317 to 9-339.

[72] *Id.*

transfer.[73] This does not mean that there are no problems, it just means that the transferees do not know about the problems.

It will be easy, in many cases, for transferees of property to show all three of these elements. So, in many cases, transferees of property or rights will qualify as good faith possessors of property and will have the highest priority in particular property.[74] This highest priority means, among other things, that these claimants will take the property free of third party security interests and liens.

II. THE HIERARCHY OF ARTICLE 9 PRIORITY: A GRAPHICAL REPRESENTATION

As noted at the outset, it is possible to put together a list of seven different kinds of claimants (or different kinds of interests) to particular property of debtors. Claimants early on this list—claimants graphically at the bottom of our chart of hierarchy—have low priority in the property. If debtors have limited amounts of property, these low-priority claimants usually will get little or nothing. Conversely, claimants late on this list—claimants who are high on the chart of priority—usually will recover at least something. Claimants within the individual tiers or layers of this hierarchy of priorities usually will fight it out amongst themselves using the earlier-in-time (earlier-in-line) general rule.

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[73] *Id.*
[74] *Id.*

TABLE 1: The Hierarchy of Article 9 Priorities

“RIGHTFUL POSSESSORS” OF PROPERTY

Rightful possessors of property include possessors of property who are the beneficiaries of authorized disposition of collateral, two instances of Article 2 possession (2-505, 2-711), plain vanilla buyers of goods, in some cases involving “advances” on earlier loans, and possessors of property who have perfected interests in property by possession or control of that property (rather than through other methods of perfection). Most importantly, rightful possessors include possessors who can be called “good faith possessors” of the property. This category includes: (1) Good Faith Purchasers of Goods; (2) Buyers in the Ordinary Course of Business; (3) Holders of Article 7 Documents of Title (Bills of Lading and Warehouse Receipts); (4) Holders in Due Course of Article 3 Payment Instruments; (5) Assignees of Accounts Where Underlying Contracts Include Waivers of Defenses; (6) Consumer Buyers from Consumer Sellers (The Garage Sale Rule); and (7) Some Possessors of Some Kinds of Chattel Paper.

In several important contexts, property that is not in the possession of debtors at the time of initial security interests, but that later comes into the possession of debtors, can be sucked into the initial (and earlier-in-time) security interests. This usually happens in connection with after-acquired property (AAP) clauses, clauses that run alongside category descriptions of collateral. “Proceeds” also are sucked into earlier interests. With comingled property, the interests share pro rata.

Outside of bankruptcy, interests in AAP that are in category descriptions get the perfection status and time of the initial interests.

In bankruptcy, interests on proceeds get the perfection times of the initial interests. In other instances of sucked-in-later collateral and bankruptcy, however, and leaving aside comingled property, the timing dates for the interests in the later-arriving collateral is the later time of the debtors’ possession of the property rather than the earlier time of the initial interests. With comingled property, the competing interests share pro rata.

Article 9 also has some specialized priority rules not described on this chart, rules involving, for example, “local law” (U.C.C. § 9-301 et seq.) and specialized financing methods (U.C.C. § 9-326 et seq.)

PERFECTED PMIS

Perfected purchase money interests (PMIs) get super-priority. This means that later-in-time PMIs can beat earlier-in-time non-PMIs and P-STJB liens.

Reminder: PMIs are NOT a rare exception in terms of security interests. Rather, many perfected security interests—probably even a large majority—are PMIs. So, many perfected security interests go in this PMI level rather than the level below, non-PMIs and P-STJB liens.

The Process for Getting PMIs

Except in connection with inventory and livestock, PMI holders get super-priority if they file within twenty days of attachment of the interests to the property. This idea exists mostly to protect later potential credit sellers or lenders from earlier-in-time AAP clauses and proceeds interests.

With inventory and livestock, PMI holders get super-priority if they *file and notify* other interest creditors *before* taking possession of the property. This rule exists mostly to protect earlier-in-time inventory lenders.

In rare cases where competing PMIs exist in the same property, PMI credit sellers generally beat PMI credit lenders.

ATTACHED AND PERFECTED NON-PMIS AND P-STJB LIENS

Perfected Non-PMIs and Possessory-Statutory, Tax, Judicial and Bankruptcy liens (P-STJB) beat Step 1 consensual liens and general claims. PMIs do NOT go here.

Perfected Non-PMIs and P-STJB liens compete with each other on an equal basis. Earlier-in-time liens in this level beat later-in-time liens in this level. Again, PMIs *do not* go here.

Reminder: Many perfected consensual interests—perhaps most perfected consensual interests in percentage numbers—are PMIs. So, many (and perhaps most) perfected consensual interests *do not* go in this level. Rather, many perfected consensual interests go in the next higher level.

Timing for Non-PMIs and P-STJB Liens

Non-PMIs: The timing date for Non-PMIs is the date of perfection of the Non-PMIs.

Statutory Liens: Timing for statutory liens differs in different jurisdictions. Usually, the time will be the time providers of services retain possession of the property or submit appropriate paperwork to government officials. *Important Note:* In construction cases, the general rule is that all statutory liens on the construction take effect at the time of beginning of construction. Thus, later service providers in construction cases will have the same timing date for liens as earlier service providers.

Tax Liens: The time tax authorities file tax lien paperwork in the U.C.C. or real property recording systems.

Judicial Liens: Timing for judicial liens differs in different jurisdictions. Usually, the timing date for judicial liens is the date when copies of judgments are filed with public records for real property or in the U.C.C. filing system. In some jurisdictions, however, the timing date for judicial liens is the time government officials physically seize the property that is subject to the judicial liens or make symbolic gestures of seizing the property. Another useful timing date may be the date of service of process of citations to discover assets.

Bankruptcy Liens (bankruptcy trustee has "status of a lien creditor"): The time debtors file for bankruptcy.

ATTACHED BUT NOT PERFECTED SECURITY INTERESTS

Step 1 security interests—attached but *not* perfected—beat general claimants because these are claims against specific property rather than just claims against the persons of debtors. However, Step 1 security interests—attached but *not* perfected—lose to perfected security interests and to non-consensual STJB liens. Bankruptcy liens—the "status of" a lien creditor—pulls all the general creditors, collectively, into this level of the hierarchy.

GENERAL CLAIMANTS

General claimants against debtors—also known as unsecured claimants—beat wrongful possessors of the property. Among general claimants, those earlier-in-time beat those later-in-time. *Important Note:* When debtors file for bankruptcy, debtors' bankruptcy trustees become representatives for all of the debtors' general creditors. The bankruptcy trustees then get the "status of" lien creditors. Thus, the bankruptcy trustees, who, to repeat, represent all the general creditors collectively, move into the next higher hierarchy level.

WRONGFUL POSSESSORS OF PROPERTY

Wrongful possessors of property (including, most importantly, "innocent converters" of property) have no right to the subject property at all. Thus, wrongful possessors lose to everybody. They may not be able to possess the property generally. Further, if they can possess it, they will take it subject to its interests in it. *Note:* Innocent converters might have claims against their transferees for the wrongful transfers.

CONCLUSION

Because "priorities" in claims encompass such an important issue in connection with debtors and creditors, many commentators spend lots of time discussing priorities. Unfortunately, however, most of these discussions use what might be called an individualized or seriatim approach to priorities. The commentators start out by describing the priorities for an individual kind of property or an individual kind of transaction. Then the commentators move on to a second kind of property or transaction and talk about the priority rules for those cases. After finishing the discussion of priorities for this second kind of property or transaction, the commentators move on to a third kind of property or transaction, and then on to a fourth, *etc*. Hardly any commentators, it seems, attempt to show how different priority ideas fit together with each other, or where different kinds of priorities have related but different impacts on individual debtors or creditors. Discussions of priorities, for example, rarely (if ever) show how creditors with "attached but not perfected" security interests stand in relation to other kinds of creditors. Likewise, discussions of priorities rarely (if ever) show how various liens—for example, possessory-statutory, tax, bankruptcy, and judicial liens—fit into an overall scheme of priority. Rather, most discussions of priorities simply state what the priority is for certain kinds of claims and state nothing further. No overall scheme is described.

The above analysis addressed this problem by suggesting that there is an overall "hierarchy of priorities" articulated in Article 9 of the UCC, a hierarchy that consists of seven distinct layers or tiers. Creditors who are in layers or tiers at or near the bottom of this hierarchy have very low priority. They, likely, will get little or nothing from debtors if the debtors have limited assets. Conversely, creditors who are in tiers or layers at or near the top of this hierarchy have high priority. These creditors will likely get at least something from debtors when different creditors assert claims against the debtors. Within the different tiers or layers in the hierarchy, creditors usually fight it out amongst themselves using the earlier-in-time or earlier-in-line rule.