Vanderbilt Law Review

Volume 33
Issue 1 *Issue 1 - January 1980*

Article 1

1-1980

The Reclaiming Seller Under the Bankruptcy Reform Act: Resolution or Renewal of an Old Conflict?

Richard A. Mann

Michael J. Phillips

Follow this and additional works at: https://scholarship.law.vanderbilt.edu/vlr

Part of the Bankruptcy Law Commons

Recommended Citation

Richard A. Mann and Michael J. Phillips, The Reclaiming Seller Under the Bankruptcy Reform Act: Resolution or Renewal of an Old Conflict?, 33 *Vanderbilt Law Review* 1 (1980)
Available at: https://scholarship.law.vanderbilt.edu/vlr/vol33/iss1/1

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

VANDERBILT LAW REVIEW

VOLUME 33 JANUARY 1980 NUMBER 1

The Reclaiming Seller Under the Bankruptcy Reform Act: Resolution or Renewal of an Old Conflict?

Richard A. Mann and Michael J. Phillips***

Among the troubling legal questions confronting Congress when it considered and enacted the Bankruptcy Reform Act of 1978[1] was the conflict between the bankruptcy trustee and the seller who attempts to reclaim goods delivered to an insolvent or nearly insolvent buyer shortly before the buyer's final descent into bankruptcy. This conflict, which began nearly twenty years ago shortly after the first states adopted the Uniform Commercial Code (U.C.C. or Code), has usually pitted the trustee against credit sellers proceeding under U.C.C. section 2-702. Although clashes between the trustee and Code cash sellers utilizing U.C.C. sections 2-507(2) and 2-511(3) have occurred less often, they have also figured prominently in the development of the conflict. It has generated a body of case law notable for its intricacy, its profusion of doctrinal approaches, and its general incoherence, and has also provoked a sizeable amount of scholarly commentary.[2] The changes made by the Bankruptcy Re-

* Associate Professor of Business Law, School of Business Administration, University of North Carolina (Chapel Hill). B.S., 1968 University of North Carolina (Chapel Hill); J.D., 1973, Yale University.

** Assistant Professor of Business Law, School of Business, Indiana University (Bloomington). B.A., 1968, The Johns Hopkins University; J.D., 1973, Columbia University; LL.M., 1975, George Washington University.

1. Pub. L. No. 95-598, 92 Stat. 2549 (codified at 11 U.S.C.A. §§ 101 to 151326 (West Supp. 1979)). The portions of this act relevant here became effective on October 1, 1979. *Id.* § 101. Throughout this article, the terms "Bankruptcy Reform Act," "Reform Act," and "New Act" will be used to refer to the Bankruptcy Reform Act of 1978. The previous Act will usually be referred to as the "Bankruptcy Act."

2. For articles principally devoted to the credit seller, see, e.g., Anderson, *The Reclaiming Seller Under UCC Section 2-702 vs. His Four Horsemen of the Apocalypse,* 8 ST. MARY'S L.J. 271 (1976); Ashe, *Reclamation Under UCC—An Exercise in Futility: Defrauded Seller v. Trustee in Bankruptcy,* 43 REF. J. 78 (1969); Bjornstad, *Reclamation of Goods by Unsecured Sellers in Bankruptcy Proceedings,* 24 DRAKE L. REV. 357 (1975); Braucher, *Reclamation of Goods from a Fraudulent Buyer,* 65 MICH. L. REV. 1281 (1967); Countryman, *Buyers and Sellers of Goods in Bankruptcy,* 1 N.M.L. REV. 435 (1971); Hawkland, *The*

form Act are certain to affect the future course of this dispute.

This Article will assess the impact of the Bankruptcy Reform Act upon the conflict of the Code cash and credit sellers with the trustee in bankruptcy. The article will begin by discussing the legal position of the reclaiming seller[3] at common law, both because the new Act's interaction with the Code cannot be understood without reference to such doctrines, and because these doctrines are often likely to be of continued applicability under the new Act. It will then examine the seller's rights under the U.C.C., and will discuss his relations with certain bankruptcy-relevant Code third parties. Following this, the Article will examine the seller-trustee clash as it developed under the prior Bankruptcy Act. Finally, it will assess the position of the seller under the Bankruptcy Reform Act.

Relative Rights of Lien Creditors and Defrauded Sellers—Amending the Uniform Commercial Code to Conform to the Kravitz Case, 67 COM. L.J. 86 (1962); Henson, *Reclamation Rights of Sellers Under Section 2-702,* 21 N.Y.L.F. 41 (1975); Kennedy, *The Interest of A Reclaiming Seller under Article 2 of the Code,* 30 BUS. LAW. 833 (1975); King, *Voidable Preferences and the Uniform Commercial Code,* 52 CORNELL L.Q. 925 (1967) [hereinafter cited as King, *Voidable Preferences*]; King, *Reclamation Petition Granted: In Defense of the Defrauded Seller,* 44 REF. J. 81 (1970) [hereinafter cited as King, *Reclamation Petition*]; Mann & Phillips, *The Reclaiming Seller and the Bankruptcy Act: A Roadmap of the Strategies,* 18 B.C. INDUS. & COM. L. REV. 609 (1977) [hereinafter cited as Mann & Phillips, *The Reclaiming Seller*]; Mann & Phillips, *In re Federal's Inc., Another Round in the Battle Between the Reclaiming Credit Seller and the Bankruptcy Trustee,* 46 FORDHAM L. REV. 641 (1978) [hereinafter cited as Mann & Phillips, *Federal's*]; Sebert, *The Seller's Right to Reclaim: Another Conflict Between the Uniform Commercial Code and the Bankruptcy Act?* 52 N.D. LAW. 219 (1976); Shanker, *Bankruptcy and Article 2 of the Uniform Commercial Code,* 40 REF. J. 37 (1966) [hereinafter cited as Shanker, *Bankruptcy*]; Shanker, *A Reply to the Proposed Amendment of U.C.C. Section 2-702(3): Another View of Lien Creditor's Rights vs. Rights of a Seller to an Insolvent,* 14 W. RES. L. REV. 93 (1962) [hereinafter cited as Shanker, *Reply*]; Weintraub & Edelman, *Seller's Right to Reclaim Property Under Section 2-702(2) of the Code Under the Bankruptcy Act: Fact or Fancy,* 32 BUS. LAW. 1165 (1977); Note, *Bankruptcy and Article Two of the Uniform Commercial Code: The Right to Recover the Goods Upon Insolvency,* 79 HARV. L. REV. 598 (1966). *See generally* R. DUESENBERG & L. KING, SALES AND BULK TRANSFERS UNDER THE UNIFORM COMMERCIAL CODE § 13.03[4] (1966); R. NORDSTROM, HANDBOOK OF THE LAW OF SALES §§ 167-69 (1970); T.QUINN, UNIFORM COMMERCIAL CODE COMENTARY AND LAW DIGEST ¶ 2-403 (1978); J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 7-15 (1972); *see also* 3, 3A, 4, & 4A COLLIER ON BANKRUPTCY (14th ed. 1978) [hereinafter cited as COLLIER].

For articles on the cash seller, see e.g., Dugan, *Cash-Sale Sellers Under Articles 2 and 9 of the Uniform Commercial Code,* 8 U.C.C. L.J. 330 (1976); Mann & Phillips, *The Reclaiming Seller, supra,* at 642-47; Mann & Phillips, *The Cash Seller Under the Uniform Commercial Code,* 20 B.C. L. REV. 370 (1979) [hereinafter cited as Mann & Phillips, *Cash Sale*]; Mann & Phillips, *The "Bad Check" Seller Under UCC Section 2-511(3),* 16 AM. BUS. L.J. 329 (1979) [hereinafter cited as Mann & Phillips, *Bad Check*]; Wiseman, *Cash Sellers, Secured Financers and the Meat Industry: An Analysis of Articles Two and Nine of the Uniform Commercial Code,* 19 B.C. L. REV. 101 (1977). *See also* R. NORDSTROM, *supra,* §§ 166, 168-69; T. QUINN, *supra,* ¶ 2-283 to 2-290, 2-309 to 2-313.

3. Throughout this Article the term "reclaiming seller" will be used generally to refer to both the cash and the credit sellers.

I. The Credit Seller and the Cash Seller at Common Law

A. *Seller-Buyer Relations*

(1) The Credit Seller

In the typical credit sale, where title ordinarily passed at the time of making the sale contract,[4] the usual pre-Code remedy of an unpaid seller who had transferred possession of the goods was an action for the price.[5] When the seller was induced to enter the contract and deliver the goods because of the buyer's fraud or misrepresentation, however, the situation was different: the seller was able to rescind the contract and retake the goods, the buyer being deemed to have obtained only a voidable title. The parties were restored to their precontractual position by an equitable operation in which full title to the goods was viewed as never having passed from the seller.[6] Basically, a sale induced by fraud or misrepresentation was one involving a material misstatement of fact acted upon by the other party to his detriment,[7] and the rescission remedy was typically available whether the misstatement was intentional and knowing,[8] negligent, or innocent.[9]

This Article is concerned with the defrauded credit seller who conveys goods to an insolvent or nearly insolvent buyer who then goes bankrupt. Subject to numerous state-by-state differences,[10] there seem to have been at least two basic situations giving rise to the seller's common-law right of rescission in this context—(1) where the buyer received goods on credit not intending to pay for them; and (2) where the buyer made material misstatements regarding his financial condition, thereby inducing the sale.[11] In the

4. *See* L. Vold, Handbook of the Law of Sales § 25, at 144-46 (2d ed. 1959).

5. *See id.* § 36, at 215; 3 S. Williston, The Law Governing Sales of Goods § 561 (rev. ed. 1948).

6. *See* L. Vold, *supra* note 4, § 79, at 397-98; Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 Yale L.J. 1057, 1059-60 (1954).

7. The factual misstatement requirement was often said to be satisfied only by a representation as to a past or existing fact, and statements characterized as opinion, promise, or prediction were not always regarded as fraudulent under this rule. *See* L. Vold, *supra* note 4, § 79, at 399-400; 3 S. Williston, *supra* note 5, §§ 628-630. Silence, too, could sometimes constitute a misstatement. *Id.* §§ 631-631a. In addition, the misstatement was required to involve a material fact, *id.* § 627, and had to be both actually and justifiably relied upon, *id.* §§ 633-34. Finally, such reliance had to be to the detriment of the party relying. *Id.* § 624.

8. 3 S. Williston, *supra* note 5, § 624.

9. *Id.* § 632.

10. "Reference should be made to treatises on contracts and to the case law of the jurisdiction in question . . . . [I]t should be remembered that the law of any particular jurisdiction may vary from the general scheme here sketched in." 4A Collier, *supra* note 2, ¶ 70.41, at 484-86.

11. *See* O'Rieley v. Endicott-Johnson Corp., 297 F.2d 1, 5 (8th Cir. 1971); Manly v.

first case, fraud could be found even if the buyer were not insolvent.[12] On the other hand, it was often said that a mere receipt of the goods while insolvent, without anything more, would not constitute fraud.[13] There are, however, numerous cases that regarded the buyer's receipt of goods while insolvent as probative of the intent not to pay for them.[14] In fact, the right to rescind often was available even when the insolvent buyer honestly intended to pay but had no reasonable basis for assuming his ability to do so.[15]

The second type of fraudulent purchase, in which the buyer made material misstatements regarding his financial condition, differed from the first in at least three respects. First, proof of an actual intent not to pay was sometimes held unnecessary.[16] Second, *negligent* misstatements of financial condition or solvency could give rise to the rescission right.[17] This differs from the first situation, in which "[t]he true ground for rescission is the fraudulent intent, of which hopeless insolvency is the sufficient and often the only available evidence."[18] Third, actual insolvency was not necessary in this case.[19]

(2) The Cash Seller

The common-law cash sale is one in which title to goods sold

Ohio Shoe Co., 25 F.2d 384, 385 (4th Cir. 1928). *See also* 3 WILLISTON, *supra* note 5, §§ 636, 637; Annot., 59 A.L.R. 418 (1929). For a schematization of common-law fraud somewhat different from that presented here, see 4A COLLIER, *supra* note 2, ¶ 70.41, at 486-87.

12. *See* 3 S. WILLISTON, *supra* note 5, § 637, at 455-56. Here, the "misstatement" and "past or existing fact" requirements, *see* note 7 *supra*, were handled by Williston as follows: "It may he urged that a mere intention does not amount to a representation of an existing fact by the buyer, but the purchase of goods implies a promise to pay for them even if there is no express promise; and a promise to pay, whether express or implied, involves a representation that the buyer intends to keep his promise." *Id.* at 456-57 (footnote omitted). *See also id.* § 630.

13. *Id.* § 637, at 457; Annot., *supra* note 11, at 424. For instance, a buyer who took the goods with a good faith *reasonable* intent to pay was often regarded as not having defrauded the seller. *E.g., In re* Empire Grocery Co., 277 F. 73 (D. Mass. 1921); 77 C.J.S. *Sales* § 51 (1952). *See also* Annot., *supra* note 11, at 426.

14. *See, e.g.,* California Conserving Co. v. D'Avanzo, 62 F.2d 528, 530 (2d Cir. 1933); *In re* Paper City Mill Supply Co., 28 F.2d 115 (D. Mass. 1928); *In re* Henry Siegel Co., 223 F. 369, 370 (D. Mass. 1915); *In re* Spann, 183 F. 819, 822-23 (N.D. Ga. 1910). *See also* 4A COLLIER, *supra* note 2, ¶ 70.41, at 489-90.

15. *E.g., In re* Gurvitz, 276 F. 931 (D. Mass. 1921); *see* 3 S. WILLISTON, *supra* note 5, § 637, at 457; Annot., *supra* note 11, at 428-30.

16. *See* Annot., *supra* note 11, at 420.

17. *See, e.g.,* Manly v. Ohio Shoe Co., 25 F.2d 384 (4th Cir. 1928). On negligent misstatements as a basis for misrepresentation see, e.g., 4A COLLIER, *supra* note 2, at 487, n.16.

18. 3 S. WILLISTON, *supra* note 5, § 637, at 457 (footnote omitted).

19. "The basis for rescission is falsity of the representation, not the presence of insolvency; it, therefore, is available in the absence of insolvency." 4A COLLIER, *supra* note 2, ¶ 70.41, at 487 n.15.

was to pass from seller to buyer only upon the buyer's payment of the price:[20] that is, when the seller delivers possession to the buyer in the understanding that the price shall be paid at once and title shall not pass until payment.[21] This obviously distinguishes the cash sale from the more general sale situation (exemplified by the credit sale) in which title passed upon formation of the sale contract.[22] What exempted the cash sale from this general rule was the presence of an intention that title was to pass only upon payment.[23] The most common instance of such an intention was the situation where the seller parted with possession of the goods while accepting the buyer's worthless check as payment.[24] Similarly, where the sale agreement expressly stipulated that title would pass only when the price was paid, there usually was no difficulty in concluding the existence of a cash sale.[25] Two other situations almost universally

---

20. *E.g.*, L. VOLD, *supra* note 4, § 29, at 160. The cash sale has also been defined as involving the transfer of both title *and possession* upon payment of the price. *E.g.*, 2 S. WILLISTON, *supra* note 5, § 341. Most courts, however, treat as cash sales transactions in which the seller transfers payment to the buyer in expectation of immediate payment: that is, cases where delivery and payment are to be substantially simultaneous. *See* Vold, *Worthless Check Cash Sales, "Substantially Simultaneous" and Conflicting Analogies*, 1 HASTINGS J. 111, 111-12 (1950). This is an obvious concession to the near impossibility of an exactly simultaneous exchange of possession and payment. *See* L. VOLD, *supra* note 4, § 29, at 161. On the conflict between Vold and Williston, see also note 24 *infra*.

21. J. WAITE, THE LAW OF SALES 33-34 (1921).

22. *See* text accompanying note 4 *supra*. It is more difficult, however, to distinguish the common-law cash sale from the pre-Code conditional sale. Conditional sale contracts usually contained an express provision whereby the seller transferred possession to the buyer while retaining title for himself. *See* J. WAITE, *supra* note 21, at 99-100; 2 S. WILLISTON, *supra* note 5, § 341, at 325. Despite this definitional overlap, the cash sale and the conditional sale were rather different in practice. In the most common form of conditional sale, the seller was not regarded as transferring possession with an expectation of immediate payment, but rather as having extended credit with respect to the possession of the goods, and as having employed a security device allowing retention of title (and a consequent right of reclamation) until the buyer-in-possession completed a series of installment payments. *See id.*; L. VOLD, *supra* note 4, § 57.

23. *See* 2 S. WILLISTON, *supra* note 5, § 343, at 332. *See also* L. VOLD, *supra* note 4, § 29.

24. R. NORDSTROM, *supra* note 2, at 501; L. VOLD, *supra* note 4, § 30, at 169-71. This was severely criticized by Williston, and this criticism provoked a counterattack by Vold. *Compare* 2 S. WILLISTON, *supra* note 5, § 346a *with* Vold, *supra* note 20. However, Williston did admit that "so far as the cases on worthless checks are involved the author's analysis is not supported by the weight of authority." 2 S. WILLISTON, *supra* note 5, § 346B, at 346.

25. L. VOLD, HANDBOOK OF THE LAW OF SALES 169 (1931). However, at this point the cash sale begins to take on some of the attributes of the conditional sale. *See* note 22 *supra*. Also, the use of contract language like "terms cash" or "cash sale" sometimes was not regarded as amounting to an express provision for a cash sale. L. VOLD, *supra* note 4, § 29, at 161-62; 2 S. WILLISTON, *supra* note 5, § 343, at 335. In addition, "cash on delivery" sales have often been held not to be cash sales. F. BURDICK, THE LAW OF SALES OF PERSONAL PROPERTY (3d ed. 1913); 2 S. WILLISTON, *supra* note 5, § 345.

regarded as cash sales were the "over-the-counter" sale[26] and the self-service store sale.[27] In all such cases, the usual remedy available to the seller who had transferred possession without receiving payment[28] was reclamation of the goods conveyed on the theory that title to them still resided in the seller.[29] This reclamation right could be waived, however, ordinarily by failure to object to nonpayment or to attempt reclamation within a reasonable time.[30]

B. Rights Against Third Parties

Despite the ability of the defrauded credit seller and the unpaid cash seller to reclaim the goods he conveys to a nonpaying buyer, both types of sellers occasionally encountered difficulty at common law when third parties acquired interests in the goods after their delivery to the buyer. For instance, the defrauded credit seller could not repossess where a good faith purchaser for value acquired the goods from the buyer.[31] Similarly, despite a considerable and longstanding disagreement regarding the relative rights of the cash seller and such a good faith purchaser, the trend seems to have been in favor of the purchaser.[32] However, both cash and credit sellers

---

26. L. VOLD, *supra* note 4, § 29, at 160; 2 S. WILLISTON, *supra* note 5, § 343, at 333.

27. 2 S. WILLISTON, *supra* note 5, § 343, at 333-34. For other instances found to be cash sales, see F. BURDICK, *supra* note 25, at 60; R. NORDSTROM, *supra* note 2, at 501.

28. It should be noted that if there is too long a delay between transfer of the goods and payment a transaction intended to be a cash sale may change into a credit sale. L. VOLD, *supra* note 4, § 29, at 166-67.

29. J. WAITE, *supra* note 21, at 79; R. NORDSTROM, *supra* note 2, at 501 n.96.

30. L. VOLD, *supra* note 4, § 29, at 167-69. The case most often cited in this regard is Frech v. Lewis, 218 Pa. 141, 67 A. 45 (1907) (2½ month delay). *See also* Note, *Right to Reclaim Delivered Goods in a Cash Sale,* 36 DICK. L. REV. 276 (1932). This situation obviously overlaps somewhat with that described in note 28 *supra.*

31. *See* L. VOLD, *supra* note 4, § 79, at 400-02; 3 S. WILLISTON, *supra* note 5, § 650; Gilmore, *supra* note 6, at 1060. Since both the seller and the purcbaser could be regarded as equally innocent parties in this case, the purchaser's superior claim was often based on the policy of promoting transferability of goods. *See* L. VOLD, *supra* note 4, § 79, at 401. Also, it was sometimes held that the defrauded credit seller would lose to a secured party such as a chattel mortgagee or a pledgee if such a party was able to qualify as a good faith purchaser for value. *See* 14 C.J.S. *Chattel Mortgages* § 23, at 618, § 307 (1939); 72 C.J.S. *Pledges* § 26 (1951). From all that has been said already, it should be clear that tbe nondefrauded credit seller also lost to such good faith purchasers, since this seller transferred full title to the buyer, and since the buyer was ordinarily regarded as capable of transferring such title as he received.

32. This trend culminated in § 2-403 of the U.C.C. *See* text accompanying note 113 *infra.* For commentary on the pre-Code confusion, see Collins, *Title to Goods Paid for with Worthless Check,* 15 S. CAL. L. REV. 340 (1942); Corman, *Cash Sales, Worthless Checks and the Bona Fide Purchaser,* 10 VAND. L. REV. 55 (1966); Gilmore, *supra* note 6, at 1060-62; Vold, *supra* note 20; Note, *The "Cash Sale" Presumption in Bad Check Cases: Doctrinal and Policy Anomaly,* 62 YALE L.J. 101 (1952); 3 HASTINGS J. 162 (1951); 42 MICH. L. REV. 328 (1943).

Also, if the chattel mortgagee or pledgee could qualify as a good faith purchaser for value,

usually defeated an attaching lien creditor[33] of the buyer,[34] although in the case of the defrauded credit seller there was a minority view which permitted the lien creditor to succeed.[35] Most importantly here, both the defrauded credit seller[36] and the cash seller[37] were able to defeat the claim of a bankruptcy trustee administrating the estate of an insolvent buyer who had entered bankruptcy after receiving the goods. Finally, it seems to have been suggested by some

such a secured party could sometimes defeat the cash seller. *See* 72 C.J.S. *Pledges* § 26 (1951). In addition, there seems to be some authority for the proposition that the cash seller could defeat such common-law secured parties because the failure of title to pass to the buyer precluded the existence of the pledgor or chattel mortgagor property rights necessary for the existence of a security interest. *See* Ison v. Cofield, 261 Ala. 296, 74 So. 2d 484 (1954); Franklin Bank v. Boeckeler Lumber Co., 83 Ind. App. 94, 147 N.E. 722 (Ct. App. 1925); 17 MINN. L. REV. 105 (1932); 14 C.J.S. *Chattel Mortgages* § 305 (1939).

33. Throughout this article, the term "lien creditor" will be employed in accordance with the U.C.C. definition contained in § 9-301(3); that is, as a party acquiring by attachment, levy or the like. This definition seems to exclude consensual interests such as those created by pledge, chattel mortgage arrangements, or otherwise under Article 9 of the Code.

34. As for the cash seller, *see* L. VOLD, *supra* note 4, § 30, at 170-71; Note, *supra* note 30, at 284-85; 16 MICH. L. REV. 557 (1918). As for the defrauded credit seller, see, e.g., L. VOLD, *supra* note 4, § 79, at 402-03. In both cases, the basic rationale for seller recovery seemed to be tbat, since the seller never transferred full title to the buyer, the lien creditor effectively had notbing to attach. A different result presumably would have obtained in the case of the nondefrauded credit seller who did transfer title to his buyer.

35. Such cases appear to have proceeded on the theory that an attaching creditor who extended credit to the buyer *after* the transfer of the goods to him was to be treated like a good faith purchaser for value, who would be able to defeat the seller. *See, e.g.,* Schwartz v. McCloskey, 156 Pa. 258, 263-64, 27 A. 300, 301-02 (1893); Smith v. Smith, Murphy & Co., 21 Pa. 367, 373 (1853); Mann v. Salsberg, 17 Pa. Super. 280, 285 (1901). This argument seems to rest on the buyer's apparent absolute ownership of the goods and the creditor's consequent right to rely on his possession of them as evidencing ownership. *See* Schwartz v. McCloskey, 156 Pa. 258, 263-64, 27 A. 300, 301-02 (1893). However, as the preceding note states, the nearly unanimous common-law view was that the lien creditor should not be given good faith purchaser status and should not defeat the defrauded seller. *See* J. BENJAMIN, LAW OF SALES OF PERSONAL PROPERTY 477-78 (7th Am. ed. 1899); F. BURDICK, *supra* note 25, at 205; 2 F. MECHEM, THE LAW OF SALE OF PERSONAL PROPERTY § 924 (1901); F. TIFFANY, HANDBOOK OF THE LAW OF SALES § 56, at 194 (2d ed. 1908). The reason for this view was that the attaching creditor gave no new value for his taking and therefore could not qualify as a good faith purcbaser for value. Thus, the attaching creditor lost to the defrauded credit seller because of the buyer's inability to acquire full title.

36. *See, e.g.,* Jones v. H.M. Hobbie Grocery Co., 246 F. 431 (5th Cir. 1917) (seller prevails under provision giving trustee rights of a lien creditor); Fisher v. Shreve, Crump & Low Co., 7 F.2d 159 (D. Mass. 1925) (repossession not voidable preference). *See generally* 3 COLLIER, *supra* note 2, ¶ 60.18; 4A *id.*, ¶ 70.41, at 485; L. VOLD, *supra* note 4, § 79, at 403. *See also* Annot., *supra* note 11. However, in tbe ordinary, nonfraud credit sale situation a recovery by the seller bas been held a voidable preference. *See* Marks v. Goodyear Rubber Sundries, Inc., 238 F.2d 533, 534 (2d Cir. 1956); Plummer v. Myers, 137 F. 660 (E. D. Pa. 1905). This presumably reflects tbe fact that in such a sale the seller transferred full title to tbe buyer, a title which the trustee was able to assume.

37. *See* L. VOLD, *supra* note 4, § 30, at 171. This was presumably based on the fact that, no title moving to the nonpaying buyer in a cash sale, the trustee had no right to the goods, which remained the seller's property.

authorities that "fraud" priority rules should apply where a bad check sale was induced by the buyer's fraudulent behavior,[38] but the preferred view has been that the presence or absence of fraud did not limit that seller's somewhat greater powers to recover from third parties.[39]

II. The Reclaiming Seller Under the Uniform Commercial Code

A. *Seller-Buyer Relations*

(1) The Credit Seller

Under Article 2 of the Uniform Commercial Code,[40] the credit seller who has delivered goods but has not received payment, has, like his common-law counterpart,[41] an action for their price.[42] The seller can also recover the specific goods sold under U.C.C. section 2-702(2), which provides:

> Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery the ten day limitation does not apply. Except as provided in this subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.

Section 2-702(2) is generally[43] regarded as a qualified re-enactment

---

38. *See, e.g.*, 2 S. Williston, *supra* note 5, § 346a, at 344-45. In fact, Williston might be read as suggesting that the "bad check" situation is inherently fraudulent. This would lead to the view that the defrauding buyer in a cash sale would have taken voidable title or something like it, with lessened chances of recovery against the good faith purchaser and the lien creditor, and perhaps against pre-Code secured parties. *See* notes 31-32, 34-35 *supra* and accompanying text.

39. *See* Gilmore, *supra* note 6, at 1060.

> Cash sale theory developed quite differently [than did credit sale theory]. A reasonable man might suppose that if taking goods on credit without the intention or ability to pay for them is fraud, then the same practice where the buyer is supposed to pay cash would be the same kind of fraud. The courts have held, however, in the cash sale situation that something more serious than "mere" fraud is involved, something approaching theft—"larceny by trick or device" as the time-honored phrase runs—and that consequently the defaulting cash sale buyer gets no title, and can transfer none to a good faith purchaser.

Id.

Also, accepting the idea that in a "cash sale-fraud" case the buyer gets voidable title and the somewhat greater ability to transfer full title with which this seems to be associated creates an anomalous situation in which the cash seller who was *not* defrauded would have greater rights against third parties than one who was.

40. The U.C.C. basically applies to sales of goods. U.C.C. § 2-102. Its rules generally supersede analogous common-law rules. *See* U.C.C. § 1-103.

41. *See* notes 4-5 *supra* and accompanying text.

42. *See* U.C.C. §§ 2-703, 2-709. The seller may also be able to recover incidental damages. *See* U.C.C. §§ 2-709, 2-710.

43. *See, e.g.*, T. Quinn, *supra* note 2, at 2-405 to 2-406.

of the common-law remedy of rescission for fraud.[44] For instance, Comment 2 to the section states that "[s]ubsection (2) takes as its base line the proposition that any receipt of goods on credit by an insolvent buyer amounts to a tacit business misrepresentation of solvency and therefore is fraudulent as against the particular seller."[45] Its "misrepresentation of solvency in writing within three months before delivery" language similarly appears to be rooted in common-law fraud.[46] Finally, the last sentence of section 2-702(2) seems to block any recourse to pre-Code rules by the seller.[47]

In order to make use of the 2-702(2) reclamation right, the seller must meet a number of technical requirements imposed by the section and by judicial interpretations of it. First, the seller must discover that the buyer had received the goods while insolvent. An insolvent party is defined by the Code as one "who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due or is insolvent within the meaning of the federal bankruptcy law."[48] Second, the seller must demand the goods within ten days of their receipt by the buyer unless there is a written misrepresentation of solvency within three months of delivery. This ten day period has been held to run from the day after the goods have been received until the tenth day after such receipt.[49] It appears that actual physical repossession of the goods within the ten day period is not required,[50] but there is disagreement as to what minimum action must be taken by the seller. One case has suggested that "an act of demanding or asking"[51] may be enough. Another case appears to have considered a telephone call to be sufficient.[52] Some decisions, however, have treated a bare oral demand as unsatisfactory, and have required some sort of "follow-up" in

44. *See* notes 6-19 *supra* and accompanying text.

45. This seems to codify the common-law rule that receipt of goods while insolvent could prove intent to defraud. *See* notes 14-15 *supra* and accompanying text. However, the Comment says that such a receipt of goods is instead a tacit business *misrepresentation* of solvency, thus suggesting reference to the second branch of the common-law fraud remedy. *See* notes 11, 16-19 *supra* and accompanying text.

46. This seems clearly to relate to the second branch of the common-law fraud remedy. *See* notes 11, 16-19 *supra* and accompanying text.

47. For situations in which this assertion may not be true, *see* notes 258-63, 294 *infra* and accompanying text.

48. U.C.C. § 1-201(23).

49. *In re* Behring & Behring, 5 U.C.C. Rep. Serv. 600, 606 (N.D. Tex. 1968), *aff'd*, 445 F.2d 1096 (5th Cir. 1971), *cert. denied*, 404 U.S. 991 (1971).

50. *See* J. White & R. Summers, *supra* note 2, § 7-15, at 242.

51. *In re* Childress, 6 U.C.C. Rep. Serv. 505, 507 (E.D. Tenn. 1969) (dictum quoting Webster's dictionary as to the meaning of the term "demand").

52. Metropolitan Distribs. v. Eastern Supply Co., 21 Pa. D. & C.2d 128, 134 (Ct. C.P. Allegheny County 1959) (dictum).

addition to the demand.[53] It is uncertain exactly what this involves,[54] but one case has implied that a reclamation petition in bankruptcy, even if entered more than ten days after receipt of the goods, may be sufficient to satisfy this requirement.[55]

Section 2-702 provides that the ten day demand limitation has no application "if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery." Comment 2 to section 2-702 states that in order for this exception to come into effect "the statement of solvency must be in writing, addressed to the particular seller and dated within three months of the delivery." However, the "dating" requirement has been ignored by one case which held that the writing need only have been *presented to* the seller within three months of the delivery.[56] Courts have also held a signed purchase order[57] and a letter virtually admitting insolvency while setting out a schedule of payments[58] not to be "writings." A check, on the other hand, has often been treated as meeting this requirement.[59] Despite their absence in the language of section 2-702(2), courts have grafted common-law fraud requirements[60] onto that section in "written misrepresentation" cases by holding that the seller must have relied upon the writing and must have been acting with the prudence of an ordinary businessman in

---

53. *In re* Colacci's of America, Inc., 490 F.2d 1118, 1120-21 (10th Cir. 1974); *In re* Behring & Behring, 5 U.C.C. Rep. Serv. 600, 606 (N.D. Tex. 1968), *aff'd*, 445 F.2d 1096 (5th Cir. 1971), *cert. denied*, 404 U.S. 991 (1971).

54. In *In re* Colacci's of America, Inc., 490 F.2d 1118, 1121 (10th Cir. 1974), the court inferred that this meant "a regaining of possession or a bona fide attempt to do so." In *In re* Behring & Behring, 5 U.C.C. Rep. Serv. 600, 606 (N.D. Tex. 1968), *aff'd*, 445 F.2d 1096 (5th Cir. 1971), *cert. denied*, 404 U.S. 991 (1971), the referee stated:

> I am not prepared to say that the actual regaining of possession of the goods is required to constitute the exercise of a right of reclamation, but it seems to me that something more is required than a bare oral demand, which is not followed up by any type of legal action or effort to regain peaceable repossession without legal action.

The referee in *Behring* did not discuss the derivation of the "follow-up" requirement. Obviously, § 2-702 does not contain any language that would support the requirement. However, it is conceivable that the requirement is derived from Comment 3 to § 2-507. *See* notes 81-83 *infra* and accompanying text. The *Colacci's* case, it might be noted, involved both § 2-702(2) and § 2-507(2), and probably derived this requirement from the latter.

55. *See In re* Behring & Behring, 5 U.C.C. Rep. Serv. 600, 606-07 (N.D. Tex. 1968), *aff'd*, 445 F.2d 1096 (5th Cir. 1971), *cert. denied*, 404 U.S. 991 (1971).

56. *In re* Bel Air Carpets, Inc., 452 F.2d 1210, 1212 (9th Cir. 1971).

57. *See In re* Regency Furniture, Inc., 7 U.C.C. Rep. Serv. 1381 (E.D. Tenn. 1970).

58. *See In re* Units, Inc., 3 U.C.C. Rep. Serv. 46 (D. Conn. 1965).

59. *See, e.g., In re* Creative Bldgs. Inc., 498 F.2d 1 (7th Cir. 1974); Amoco Pipeline Co. v. Admiral Crude Oil Corp., 490 F.2d 114, 117 (10th Cir. 1974); *In re* Bar-Wood, Inc., 15 U.C.C. Rep. Serv. 828 (S.D. Fla. 1974); *In re* Fairfield Elevator Co., 14 U.C.C. Rep. Serv. 96, 107-08 (S.D. Iowa 1973); Theo. Hamm Brewing Co. v. First Trust & Sav. Bank, 103 Ill. App. 2d 190, 195, 242 N.E.2d 911, 915 (1968).

60. *See* note 7 *supra*.

so relying.[61] Finally, courts have explicitly stated that the Code's requirement of good faith applies to the seller in this situation.[62]

(2) The Cash Seller

In situations involving the sale of goods,[63] the common-law "cash sale" doctrines discussed above[64] would not, of course, be applicable if they conflicted with U.C.C. provisions on this subject.[65] Although there are no Code sections specifically identified as "cash sale" provisions[66] and the Code strongly deemphasizes the concept of "title" which was so crucial to the common-law "cash sale doctrine,"[67] two U.C.C. provisions—sections 2-507(2) and 2-511(3)—are obvious Code counterparts of this doctrine.

Section 2-507(2) of the U.C.C. provides that: "Where payment is due and demanded on the delivery to the buyer of goods or documents of title, his right as against the seller to retain or dispose of them is conditional upon his making the payment due." Like the common-law cash sale, this section envisions a situation in which a nearly simultaneous exchange of goods and payment is intended. Moreover, making the buyer's rights against the seller conditional on payment states a rule functionally equivalent to the common-law transfer of title only upon payment.[68] The relevant portion of section 2-511(3) states that "payment by check is conditional and is defeated as between the parties by dishonor of the check on due presentment."[69] Although, unlike section 2-507(2), this section fails explicitly to describe the status of goods conveyed to the buyer in a "bad check" transaction, it is difficult to see how the buyer could have the right to retain the goods if his payment by check is "conditional" and "defeated . . . by dishonor."

Despite occasional statements to the effect that the common-law "cash sale" doctrine is of little or no importance under the

---

61. *See In re* Creative Bldgs. Inc., 498 F.2d 1, 4 (7th Cir. 1974); *In re* Fairfield Elevator Co., 14 U.C.C. Rep. Serv. 96, 107-08 (S.D. Iowa 1973); Theo. Hamm Brewing Co. v. First Trust & Sav. Bank, 103 Ill. App. 2d 190, 195, 242 N.E.2d 911, 915 (1968).

62. *See, e.g., In re* Creative Bldgs. Inc., 498 F.2d 1 (7th Cir. 1974); Theo. Hamm Brewing Co. v. First Trust & Sav. Bank, 103 Ill. App. 2d 190, 195, 242 N.E.2d 911 (1968).

63. *See* U.C.C. § 2-102.

64. *See* notes 20-30 *supra* and accompanying text.

65. *See* U.C.C. § 1-103.

66. *But see* note 113 *infra.*

67. *See* U.C.C. § 2-401.

68. Section 2-507(2) is routinely regarded by commentators as a "cash sale" provision. *See, e.g.,* R. NORDSTROM, *supra* note 2, at 501.

69. Also, Comment 4 to § 2-511(3) states that: "This Article recognizes that the taking of a seemingly solvent party's check is commercially normal and proper and, if due diligence is exercised in collection, is not to be penalized in any way."

U.C.C.,[70] the Code cases arising under sections 2-507(2) and 2-511(3) display many of the incidents of, and doctrines surrounding, their common-law counterparts. First, like many common-law cash sale decisions, almost all of the Code litigation involves "bad check" cases.[71] Most of these "bad check" decisions do not proceed under section 2-511(3) alone,[72] but rather under both section 2-507(2) and section 2-511(3),[73] or even solely under section 2-507(2).[74] Second, decisions under both sections explicitly recognize a right of reclamation in the unpaid seller, and in doing so basically seem to reaffirm the reclamation right accorded the cash seller at common law.[75] However, since neither section 2-507(2) nor section 2-511(3) contains an explicit reclamation provision, there has been some disagreement regarding the source of this right. Some 2-507(2) decisions[76] have established the power to reclaim through an effective grafting of the reclamation right contained in U.C.C. section 2-702(2)[77] onto section 2-507(2).[78] Other 2-507(2) cases, however, have not adopted this approach, but seem to regard the ability to reclaim as more or less inherent to the section.[79] Similarly, most of the

70. *See, e.g.,* Gross v. Powell, 288 Minn. 386, 391-92, 181 N.W.2d 113, 117-18 (1970); Evans Prods. Co. v. Jorgenson, 245 Or. 362, 365-66, 421 P.2d 978, 980 (1966). *See also* U.C.C. § 2-401 & Comment 1. *But see* Stumbo v. Paul B. Hult Lumber Co., 251 Or. 20, 444 P.2d 564, 571 (1970) (2-507(2) "represents whatever remains of the 'cash sale' doctrine under the code.").

71. Only one U.C.C. cash sale case has not involved payment by check. *See* Evans Prods. Co. v. Jorgenson, 245 Or. 362, 421 P.2d 978 (1966). *Cf.* First National Bank & Trust Co. v. Jim Payne Pontiac GMC, Inc., 20 U.C.C. Rep. Serv. 768 (Okla. Ct. App. 1976) (sight draft).

72. For "bad cbeck" cases which *do* proceed solely under § 2-511(3), see, e.g., *In re* Bar-Wood, 15 U.C.C. Rep. Serv. 828 (S.D. Fla. 1974); Gicinto v. Credithrift of America, 219 Kan. 766, 549 P.2d 870 (1976). *See also* Mann & Phillips, *Bad Check, supra* note 2, at 343-51.

73. *See, e.g., In re* Lindenbaum's, Inc., 2 U.C.C. Rep. Serv. 495 (E.D. Pa. 1964); *In re* Mort Co., 208 F. Supp. 309 (E.D. Pa. 1962).

74. *See, e.g.,* United States v. Wyoming Nat'l Bank, 505 F.2d 1064 (10th Cir. 1974).

75. On the pre-Code reclamation right granted the unpaid cash seller, see text accompanying note 29 *supra.*

76. *See In re* Kee Lox Mfg. Co., 22 U.C.C. Rep. Serv. 938, 941 (E.D. Pa. 1977) (dictum); *In re* Richardson Homes Corp., 18 U.C.C. Rep. Serv. 384 (N.D. Ind. 1975); *In re* Kirk Kabinets, Inc., 15 U.C.C. Rep. Serv. 746, 748-49 (M.D. Ga. 1974); *In re* Fairfield Elevator Co., 14 U.C.C. Rep. Serv. 96, 106-07 (S.D. Iowa 1973); Greater Louisville Auto Auction, Inc. v. Ogle Buick, Inc., 387 S.W.2d 17, 20 (Ky. 1965). *See also* United States v. Wyoming Nat'l Bank, 505 F.2d 1064 (10th Cir. 1974) (stating that § 2-507(2) should not apply where tbe rights of third parties are involved, and seeming to regard § 2-702(2) as the appropriate provision in such cases); B & P Lumber Co. v. First Nat'l Bank, 147 Ga. App. 762, 250 S.E.2d 505 (1978) (2-507(2) and 2-702(2) do not govern recoveries against third parties). For a discussion of this, *see* note 112 *infra.*

77. *See* the text following note 42 *supra.*

78. This is to some degree based upon Comment 3 to section 2-507. *See* the text accompanying note 81 *infra.*

79. *See In re* Helms Veneer Corp., 287 F. Supp. 840, 845-46 (W.D. Va. 1968); *In re* Mort

section 2-511(3) decisions that affirm such a right do so without reference to section 2-702(2), again appearing to regard the reclamation right as inherent to the operation of section 2-511(3).[80]

Whatever applicability section 2-702(2) has also pervades case law elaborations of the procedural requirements for the operation of the 2-507(2) and 2-511(3) reclamation rights. Comment 3 to section 2-507 continues and supplements pre-Code waiver-by-delay doctrines[81] when it states that:

> Should the seller after making such a conditional delivery fail to follow up his rights, the condition is waived. The provision of this Article for a ten day limit within which the seller may reclaim goods delivered on credit to an insolvent buyer is also applicable here.

Thus, two separate (but hardly distinct)[82] waiver requirements seem applicable under this section—first, a requirement that the seller "follow up" his rights or waive the condition under which the buyer may retain or dispose of the goods;[83] and second, the "ten day demand" requirement of section 2-702(2).[84] Also, at least one court[85] has found section 2-702(2)'s "written misrepresentation" option[86] to the ten day demand requirement applicable in the 2-507(2) context.[87] As for reclamations proceeding solely under section 2-511(3), most of the relevant cases simply do not discuss 2-702(2) "demand"

Co., 208 F. Supp. 309, 310 (E.D. Pa. 1962). *See also In re* Lindenbaum's, Inc., 2 U.C.C. Rep. Serv. 495 (E.D. Pa. 1964); Peck v. Augustin, 279 N.W.2d 397, 400 (Neb. 1979) (replevin statute used by a 2-507(2)/2-111(3) seller; 2-702 not mentioned).

80. *See* Gicinto v. Credithrift of America, 219 Kan. 766, 770, 549 P.2d 870, 873 (1976); Conyngham & Co. v. Frank, 72 Pa. D. & C.2d 762, 20 U.C.C. Rep. Serv. 83 (Ct. C.P. Luzerne County 1975). *But see In re* Bar-Wood, Inc., 15 U.C.C. Rep. Serv. 828, 829 (S.D. Fla. 1974) (recognizing an inherent right of reclamation in § 2-511(3), but stating that this section only operates as between the parties, and suggesting that § 2-702(2) must be utilized in third-party cases). For further discussion of this, see note 112 *infra*.

81. *See* note 30 *supra* and accompanying text.

82. The one decision discussing both of these requirements manages to blur them fairly effectively. *See In re* Colacci's of America, Inc., 490 F.2d 1118, 1120-21 (10th Cir. 1974).

83. The one case discussing this requirement has regarded it as necessitating "a regaining of possession or a bona fide attempt to do so." *In re* Colacci's of America, Inc., 490 F.2d 1118, 1121 (10th Cir. 1974). *See also* notes 53-55 *supra* and accompanying text.

84. *See In re* Samuels & Co., 526 F.2d 1238, 1245 (5th Cir. 1976); *In re* Helms Veneer Corp., 287 F. Supp. 840, 845-46 (W.D. Va. 1968); *In re* Richardson Homes Corp., 18 U.C.C. Rep. Serv. 384, 387 (N.D. Ind. 1975); *In re* Kirk Kabinets, Inc., 15 U.C.C. Rep. Serv. 746, 748-49 (M.D. Ga. 1974); *In re* Fairfield Elevator Co., 14 U.C.C. Rep. Serv. 96, 106-07 (S.D. Iowa 1973). On the details of this requirement in tbe 2-702(2) context, see notes 49-52 *supra* and accompanying text.

85. *See In re* Fairfield Elevator Co., 14 U.C.C. Rep. Serv. 96, 106-08 (S.D. Iowa 1973).

86. *See* notes 56-62 *supra* and accompanying text.

87. Although the close linkage of the "ten day demand" and "written misrepresentation" aspects of section 2-702(2) creates some justification for this application of 2-702(2) requirements to 2-507(2), it clearly goes beyond the express command of Comment 3, and, moreover, tends to mix "fraud" and "cash sale" rationales to an undesirable degree.

or "written misrepresentation" requirements.[88]

These cases, notwithstanding, any extension of section 2-702(2) in the cash sale context beyond Comment 3's explicit imposition of the ten day demand requirement is improper and unwarranted. Thus, the reclamation right granted the unpaid section 2-507(2)/2-511(3) seller should be viewed as inherent to these sections. One reason for this conclusion is the difficulty of finding an express statutory link between these two sections and section 2-702(2).[89] While Comment 2 to section 2-507 does provide some connection with section 2-702(2), to limit, as it does, the unpaid 2-507(2) seller's reclamation right is certainly not to create such a right in the first place. More importantly, the "follow-up" limitation of Comment 3, which is in no way linked to section 2-702 but is similar to common-law waiver doctrines, clearly implies the preexistence of a reclamation right, while its conjunction with section 2-507 strongly suggests that the right somehow inheres in the language of section 2-507(2).

The difficulty of conjoining sections 2-507(2) and 2-511(3) with section 2-702(2) is compounded by a consideration of the historical antecedents of these provisions. As has been argued at some length, sections 2-507(2) and 2-511(3) are obviously rooted in and related to the common-law doctrines surrounding the "cash sale."[90] Section 2-702(2), on the other hand, is clearly prefigured by the common-law remedy of rescission for fraud.[91] As has been suggested above, these two situations were analytically distinct at common law, and sometimes led to different results in cases in which third parties were involved.[92] Finally, it ought to be noted that U.C.C. section 1-103[93] should provide a more than adequate statutory basis for allowing the common-law cash sale reclamation right to accompany sections 2-507(2) and 2-511(3).

---

88. Presumably, common-law waiver requirements, or something like them, would apply in this situation. *See* note 30 *supra* and accompanying text. One decision, however, has held both 2-702(2) requirements applicable in what may be a 2-511(3) context. *See In re* Bar-Wood, Inc., 15 U.C.C. Rep. Serv. 828 (S.D. Fla. 1974). In this case, the judge stated that 2-511(3) would apply as between the parties in a bad check case, but seemed to feel that it could provide no reclamation right in a "third party" situation, and went on to utilize § 2-702(2). In the application of this section, he concluded that there had been no demand by the seller within the ten day period, and also that the buyer's check did not (on these facts) constitute a written misrepresentation of solvency. *See also* note 112 *infra*.

89. This problem is especially severe in the case of § 2-511(3), whose only conceivable link to § 2-702(2) is the statement in its Comment 6 to the effect that post-dated check sales are to be governed by § 2-702(2).

90. *See* notes 68-69 *supra* and accompanying text.

91. *See* notes 43-46 *supra* and accompanying text.

92. *See* notes 6-9, 20-23, 31-37 *supra* and accompanying text.

93. U.C.C. § 1-103 provides that: "Unless displaced by the particular provisions of this Act, the principles of law and equity . . . shall supplement its provisions."

Even if this limitation of section 2-702(2)'s applicability to cash sale cases is accepted, the practical position of the most common type of cash seller—the seller who receives a bad check in payment—is still perilous, because the seller often will not even discover the buyer's failure to pay within ten days. At bottom, the choice of a ten day limitation reflects an ignorance of modern banking parties.[94] One way to resolve this problem without unduly disturbing the case law linking 2-702(2)'s ten day demand requirement to section 2-507(2)[95] and the command of that section's Comment 3 is, as has been argued elsewhere,[96] to make section 2-511(3) alone the applicable "cash sale" provision in bad check cases, and to leave for section 2-507(2) the residual cash sale categories.[97] This statutory allocation would make the ten day limitation of 2-702(2) inapplicable to bad check cases, since there is virtually nothing[98] to link this requirement to section 2-511(3). The conclusion that section 2-511(3) alone should govern bad check situations flies in the face of much existing case law,[99] but it is an eminently rational division of responsibility between sections 2-507(2) and 2-511(3). First, the language of the two sections clearly suggests this result.[100] Second, some decisions have taken just this approach.[101] Third, the language of U.C.C. section 2-403(1) strongly implies this conclusion by explicitly distinguishing the two cash sale situations.[102] If this approach is followed and the seller is given adequate time to discover the buyer's non-payment and to take appropriate action, the seller still will not be able to delay unduly in doing so. Section 2-511(3) ex-

94. As one commentator has put it:

> a ten-day period for reclaiming under section 2-507(2) may be unduly short in situations in which a check has been returned for insufficient funds. Such a check may have passed through several indorsers and banks, not being returned to the seller until after the buyer has had the goods for more than ten days. A seller who has negotiated or transferred a check in the ordinary course of his business ought not be held to have waived his demanded payment solely because the banking process requires more than ten days to inform the seller that the check was dishonored.

R. NORDSTROM, *supra* note 2, at 503.

95. *See* note 84 *supra* and accompanying text.

96. *See* Mann & Phillips, *Bad Check*, *supra* note 2, at 349.

97. *See* notes 25-27 *supra* and accompanying text.

98. The only reference to § 2-702(2) in § 2-511(3) and the Comments to § 2-511 is Comment 6's reference to situations in which a credit instrument is post-dated.

99. *See* notes 71-74 *supra* and accompanying text.

100. *See* notes 68-69 *supra* and accompanying text. Also, the last sentence of Comment 6 to § 2-511, which seems to link §§ 2-507(2) and 2-511(3) for bad check cases, is almost certainly limited to post-dated check situations where the dispute is between the two parties to the sale.

101. *See* note 72 *supra.*

102. *See* note 113 *infra.*

pressly requires "due presentment,"[103] and the seller who is thus notified of the buyer's failure to pay should be subject to pre-Code waiver doctrines[104] incorporated by U.C.C. section 1-103.

B. *Third Party Rules*

As was the case at common law,[105] the seller's ability to reclaim goods may be affected by the rights of third parties with interests in them. Third parties will generally fall into one of three groups:[106] good faith purchasers, those with an Article 9 security interest, and attaching lien creditors. This subsection will explore the reclaiming Code seller's rights against each type of third party. This discussion will have numerous implications for the subsequent examination of the seller's rights when the buyer has entered bankruptcy.

(1) Good Faith Purchaser

The unpaid seller's right to reclaim the goods will be terminated if the buyer transfers the goods to a good faith purchaser for value. In the credit sale situation this subordination occurs either directly by section 2-702(3) or indirectly by section 2-403(1). Section 2-702(3) states that "[t]he seller's right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course or other good faith purchaser under this Article (Section 2-403)."[107] One interpretation of this subsection is that it directly subordinates the seller to a good faith purchaser.[108] The other view is that it simply subjects the seller to the "rights," whatever they may be, of a good faith purchaser and refers to section 2-403 for the determination of what those rights are.[109] Section 2-403(1) provides in relevant part that "[a] person with voidable title has power to transfer a good title to a good faith purchaser for value."[110] Given the strong resemblance of the section 2-702(2) reclamation right to the common-law remedy of rescission for fraud,[111] it is plausible to conclude that the credit seller's immediate buyer has received voidable title and that section 2-403(1) therefore operates to cut off the right of recla-

103. Presumably, U.C.C. § 3-503 will govern here.

104. On these, *see* note 30 *supra* and accompanying text.

105. *See* notes 20-30 *supra* and accompanying text.

106. It should be noted that these three types of third parties are not necessarily mutually exclusive. For example, it will be seen that holders of Article 9 security interests may be deemed purchasers for value. *See* notes 116-23 *infra* and accompanying text.

107. U.C.C. § 2-702(3) (1972 version).

108. *Cf.* notes 157-58 *infra* and accompanying text.

109. *Cf.* notes 152-53 *infra* and accompanying text..

110. U.C.C. § 2-403(1). For the relevant text of this section, *see* note 113 *infra.*

111. *See* notes 43-46 *supra* and accompanying text.

mation in favor of a good faith purchaser for value.

Neither of the cash sale sections purports to address the question of third party priorities,[112] but Comment 3 to section 2-507 refers to section 2-403 for resolution of this problem.[113] Section 2-403(1) enables a buyer of goods to transfer good title to a good faith purchaser for value in the two cash sale situations discussed above.[114] The first, addressed by section 2-403(1)(b), is the situation in which delivery is in exchange for a check which is later dishonored. The second, covered by section 2-403(1)(c), is the situation in which the parties agreed that the transaction was to be a "cash sale." These two factual settings together comprise all of the cash sale cases, thus precluding an unpaid cash seller from recovering the goods from a good faith purchaser for value. There have been few reported opinions involving those who take other than by lien or security interest, but all of these permitted the cash seller to recover because of the failure of the purchaser to establish his "good faith for value" status.[115] However, it is clear that once a third party

112. U.C.C. § 2-507(2) states: "Where payment is due and demanded on the delivery to the huyer of goods or documents of title, *his right as against the seller* to retain or dispose of them is conditional upon his making the payment due" (emphasis added). U.C.C. § 2-511(3) provides in relevant part: "payment by check is conditional and is defeated as *between the parties* by dishonor of the check on due presentment" (emphasis added). This failure of §§ 2-507(2) and 2-511(3) to deal with third-party situations has been noted by various courts; this failure has sometimes led them to conclude that § 2-702(3) has a role to play in this regard. *See* notes 76, 80, 88 *supra*. For a view that § 2-702(3) should not serve this function, *see* notes 160-63, 165 *infra* and accompanying text. In fact, § 2-403 alone should govern cash sale priorities. For a more detailed treatment of this view, *see* Mann & Phillips, *Cash Sale*, *supra* note 2, at 385-95.

113. U.C.C. § 2-403 provides in relevant part that

> (1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though
>
> . . .
>
> (b) the delivery was in exchange for a check which is later dishonored, or
>
> (c) it was agreed that the transaction was to be "cash sale" . . . .

U.C.C. § 2-507, Comment 3 states in relevant part: "Subsection (2) deals with the effect of a conditional delivery by the seller and in such a situation makes the buyer's 'right as against the seller' conditional upon payment. These words are used as words of limitation to conform with the policy set forth in the bona fide purchase sections of this Article."

114. *See* notes 68-69 *supra* and accompanying text. Much the same result would obtain if § 2-702(2) were the source of the cash sale reclamation right. *See* notes 107-111 *supra* and accompanying text.

115. Ranchers & Farmers Livestock Auction Co. v. Honey, 552 P.2d 313, 316, 19 U.C.C. Rep. Serv. 1337, 1343 (Colo. Ct. App. 1976) (subsequent purchaser had notice of unpaid cash seller's § 2-507 claim); Conyngham & Co. v. Frank, 72 Pa. D. & C.2d 762, 20 U.C.C. Rep. Serv. 83 (Ct. C.P. Luzerne Co. 1975) (sub-purchaser did not contract or pay for goods after delivery to buyer.) The court in the second case reached this result despite the fact that

proves that he is a good faith purchaser for value, he will inevitably prevail over the cash seller.

(2) Article 9 Secured Party

(a) *Perfected Security Interest*

If an unpaid reclaiming seller[116] attempts to reclaim the goods from his buyer he may discover that another type of third party has terminated his right to them—a creditor of the buyer with a perfected Article 9 security interest in the goods,[117] whose priority results from the Code's broad definitions of "purchase" and "purchaser."[118] Moreover, since the definition of "value" under the Code includes security for a pre-existing claim,[119] a secured party with an after-acquired property clause would be considered a purchaser for value.[120] Thus, so long as the secured party acts in good faith[121] he will be deemed a good faith purchaser for value, and therefore immune from the reclamation claims of an unpaid reclaiming seller.[122]

U.C.C. § 1-201(44) defines "value" to include accepting delivery pursuant to a pre-existing contract for purchase. For the definitions of "good faith," "purchaser," and "value" see U.C.C. §§ 1-201(19), (32), (33), (44), 2-104(1). *See also* Gus Z. Lancaster's Stock Yards, Inc. v. Williams, 37 N.C. App. 698, 246 S.E.2d 823 (1978) (alleged good faith seller actually agent of buyer for resale of goods).

116. Since this portion of the Article is concerned primarily with the secured party as a good faith purchaser for value, its discussion should be equally applicable to §§ 2-702(2), 2-507(2), and 2-511(3). *See* notes 107-15 *supra* and accompanying text.

117. For conclusions contrary to those developed in this subsection, see e.g., Wiseman, *supra* note 2.

118. U.C.C. § 1-201(32), (33) provide in part:

> "Purchase" includes taking by sale, discount, negotiation, mortgage, pledge, lien, issue or re-issue, gift or any other voluntary transaction creating an interest in property.
>
> . . . .
>
> "Purchaser" means a person who takes by purchase.

119. U.C.C. § 1-201(44)(b).

120. *See, e.g., In re* Daley, Inc., 17 U.C.C. Rep. Serv. 433, 435 (D. Mass. 1975); *In re* Haywood Woolen Co., 3 U.C.C. Rep. Serv. 1107, 1111-12 (D. Mass. 1967); Stumbo v. Paul B. Hult Lumber Co., 251 Or. 20, 41-43, 444 P.2d 564, 574-75 (1968).

121. For a case in which the secured party did not show good faith, see *In re* American Food Purveyors, Inc., 17 U.C.C. Rep. Serv. 436, 441-44 (N.D. Ga. 1974). The various opinions in *In re* Samuels & Co., 483 F.2d 557 (5th Cir. 1973), *rev'd sub nom.* Mahon v. Stowers, 416 U.S. 100 (1974), *modified,* 510 F.2d 139 (5th Cir. 1975), *rev'd en banc,* 526 F.2d 1238 (5th Cir. 1976), *cert. denied,* 429 U.S. 834 (1976), provide contrasting views of what constitutes "good faith" in the cash seller versus secured party situation.

122. In the credit sale instance, see, e.g., *In re* Daley, Inc., 17 U.C.C. Rep. Serv. 433, 435 (D. Mass. 1975). *See also* B & P Lumber Co. v. First Nat'l Bank, 147 Ga. App. 762, 250 S.E.2d 505 (1978). In the cash sale instance, see, e.g., *In re* Samuels & Co., 526 F.2d 1238, 1242-44 (5th Cir. 1976); United States v. Wyoming Nat'l Bank, 505 F.2d 1064, 1067-68 (10th Cir. 1974); First Nat'l Bank & Trust Co. v. Jim Payne Pontiac GMC, Inc., 20 U.C.C. Rep. Serv. 768, 774-76 (Okla. Ct. App. 1976); Stumbo v. Paul B. Hult Lumber Co., 251 Or. 20, 444 P.2d 564 (1968).

(b) *Unperfected Security Interest*

An unpaid cash seller who attempts to recover goods delivered to the buyer may also be frustrated if an unperfected security interest has been acquired in the goods. Since the Code does not distinguish between unperfected and perfected security interests with respect to the requirements of purchase, value, and good faith, the holder of an unperfected security interest should be a good faith purchaser for value who should take free of the claims of an unpaid reclaiming seller.[123] That a party with an unperfected security interest also should prevail over a reclaiming seller if a perfected security interest is entitled to do so comports with good policy, for the filing or possession required for perfection is designed to protect parties who might rely upon the debtor-buyer's possession of the goods. A reclaiming seller, on the other hand, in no way needs such protection.

(3) Lien Creditor

The relative priorities of a reclaiming seller and a lien creditor[124] were well established at common law: in most states the reclaiming credit seller prevailed[125] while the cash seller nearly always defeated the lien creditor.[126] The outcome under the U.C.C., however, is far from clear. The discussion below will examine the judicial authority that subordinates the reclaiming seller to a lien creditor. Cases suggesting this conclusion do so on three different bases: (1) that a lien

123. One case, although taking a different tack on this priority question, has reached this result by basing the superiority of the unperfected security interest on § 9-301 of the Code. Guy Martin Buick, Inc., v. Colorado Springs Nat'l Bank, 184 Colo. 166, 519 P.2d 354 (1974). The court stated:

> The declared policy of the Colorado Uniform Commercial Code requires that a security agreement shall be effective between the parties and against other parties, except as is specifically provided otherwise in the Code [U.C.C. § 9-201]. The priority provisions of the Code delineate which interests in goods are superior to unperfected security interests. [U.C.C. § 9-301]. The right to reclaim goods conveyed as part of a cash sale transaction created by [U.C.C. § 2-507(2)], is not one of the interests which is listed as having priority over an unperfected security interest. Therefore, the bank's unperfected security interest, under the facts presented in this case, had priority over Guy Martin Buick's right to reclaim the automobiles.

Id. at 175-76, 519 P.2d at 359-60. This reasoning should apply with equal force to a reclamation right arising under § 2-702(2) or § 2-511(3) since neither is mentioned by § 9-301. *Cf.* United States v. Wyoming Nat'l Bank, 505 F.2d 1064, 1067-68 (10th Cir. 1974) (unclear whether security interest perfected or not).

124. The Code's definition of a lien creditor is contained in § 9-301(3): "A 'lien creditor' means a creditor who has acquired a lien on the property involved by attachment, levy or the like and includes . . . a trustee in bankruptcy from the date of the filing of the petition . . . ."

125. *See* notes 34-35 *supra* and accompanying text.

126. *See* note 35 *supra* and accompanying text.

creditor is a good faith purchaser for value whose rights are superior to the seller's under section 2-403(1); (2) classification of the reclamation right as an unperfected security interest which is subordinate to the rights of a lien creditor under section 9-301(1)(b); and (3) subordination of the reclaiming seller through the operation of section 2-702(3). The details of these approaches for the credit seller and the cash seller will be discussed in this order.

(a) Lien Creditor as Good Faith Purchaser

If a lien creditor were considered to be a good faith purchaser for value, his rights would be superior to those of a reclaiming seller by the operation of sections 2-702(3) and/or 2-403(1).[127] There appear to be only three cases discussing this possibility, one of which clearly holds that a lien creditor is not a purchaser for value under section 2-403,[128] and one of which states that a trustee in bankruptcy is not a good faith purchaser but is a lien creditor.[129] The third case may imply that a lien creditor could be considered a good faith purchaser.[130]

It is analytically unsound, however, to consider a lien creditor a good faith purchaser. First, section 2-403(1) states that a person with voidable title has power to transfer a good title to a good faith purchaser for value, leaving the definition of such a party to section 1-201. But in subsection 2-403(4) the Code states: "The rights of other purchasers of goods and of lien creditors are governed by the Articles on Secured Transactions (Article 9), Bulk Transfers (Arti-

---

127. *See* notes 107-15 *supra* and accompanying text. For the text of § 2-403(1), see note 113 *supra*.

128. *In re* PFA Farmers Mkt. Ass'n v. Wear, 583 F.2d 992, 997-98 (8th Cir. 1978).

129. *In re* Kirk Kabinets, Inc., 15 U.C.C. Rep. Serv. 746, 749 (M.D. Ga. 1974).

130. *In re* Samuels & Co., 526 F.2d 1238 (5th Cir. 1976). The court stated:

> The fact that the holder of a voluntary lien—including an Article Nine interest—is a "purchaser" under the Code is of great significance to a proper understanding and resolution of this case under Article Two and Article Nine. The Code establishes that purchasers can take from a defaulting cash buyer, [section 2-403(1)]. Lien creditors are included in the definition of purchasers, [sections 1-201(32), (33)]. A lien *is* an Article Nine interest, [Comments to sections 9-101, 9-102]. The existence of an Article Nine interest presupposes the debtor's having rights in the collateral sufficient to permit attachment [section 9-204(1)]. Therefore, since a defaulting cash buyer has the power to transfer a security interest to a lien creditor, including an Article Nine secured party, the buyer's rights in the property, however marginal, must be sufficient to allow attachment of a lien. And this is true, even if, *arguendo*, I were to agree that the cash seller is granted reclamation rights under Article Two.

Id. at 1242-43 (emphasis in original). It is not especially clear whether this rather garbled language intends, or should be taken to mean, that a lien creditor is a good faith purchaser. But even if that meaning is given the quoted passage, its language would be no more than dictum since in this case the "lien-holder" was in fact an Article 9 secured party, not a lien creditor.

cle 6) and Documents of Title (Article 7)." This language manifestly implies that section 2-403(1) itself governs the rights of good faith purchasers for value, whereas the rights of parties that are not good faith purchasers for value (for example, lien creditors) are *not* governed by section 2-403. Second, lien creditors under the Code definition[131] are not holders of voluntary or consensual liens, and therefore should not be included in the Code definition of "purchasers."[132] Third, U.C.C. section 9-104 provides that "[t]his Article does not apply . . . to a right represented by a judgment . . . ." Consequently, Article 9 does not apply to judgment liens or judicial liens such as "the lien of an unsecured creditor who arms himself with a judgment and levies"[133] —in brief, the lien possessed by a lien creditor. Hence, it is clear that lien creditors are excluded from being considered good faith purchasers for value by section 2-403.[134] For these reasons, and because lien creditors do not rely upon the ostensible ownership or voidable title of the buyer,[135] they should not be granted good faith purchaser for value status and thereby acquire rights superior to the reclamation right of the seller.

(b) Characterization of the Reclamation Right as a Security Interest

If the seller's reclamation right were classified as an Article 2 security it would be subordinate to the rights of a lien creditor under section 9-301(1)(b) of the Code.[136] This result can be avoided only by the seller's perfecting his security interest.[137] The Code itself provides no clear answer regarding the classification of the seller's reclamation right as a security interest, and while there is considerable judicial authority to the effect that section 2-702(2) is *not* an

131. *See* notes 33 & 124 *supra.*

132. *See* U.C.C. §§ 1-201(32), (33) ("any other voluntary transaction creating an interest in property").

133. J. White & R. Summers, *supra* note 2, at 758 n.14; *see id.* at 757-58.

134. Another argument can be made based upon the 1962 version of 2-702(3), which states that the seller's right to reclaim under § 2-702(2) "is subject to the rights of a buyer in ordinary course or other good faith purchaser or lien creditor under this Article (Section 2-403)." This clearly shows that the Code considers good faith purchasers and lien creditors to be distinctly different parties.

135. *See* U.C.C. § 2-403, Comments 1, 3.

136. U.C.C. § 9-301(1) provides in part: "Except as otherwise provided in subsection (2), an unperfected security interest is subordinate to the rights of . . . (b) a person who becomes a lien creditor before the security interest is perfected."

137. By the terms of U.C.C. § 9-113 the holder of an Article 2 security interest need not utilize Article 9 perfection procedures so long as he retains possession of the goods. If possession is lost the holder must perfect according to Article 9 procedures. U.C.C. § 9-113, Comment 3. This would basically involve obtaining a written security agreement signed by the buyer, and perfecting by one of the methods specified in Article 9. *See* U.C.C. § 9-302.

Article 2 security interest,[138] the scanty judicial authority with regard to the cash sale is divided.[139]

Analytically, neither the credit sale nor the cash sale reclamation right should be characterized as a security interest. First, sections 2-702(2), 2-507(2), and 2-511(3) are not included in the listing of Article 2 security interests contained in Comment 1[140] to section 9-113.[141] Moreover, the seller's reclamation rights differ fundamentally from many of the rights mentioned in that Comment: the very operation of these rights contemplates and depends upon possession of the goods by the holder of the Article 2 security interest. Also, section 9-113 by its terms provides that an Article 2 security interest is exempt from Article 9 perfection requirements as long as the holder of the interest retains possession: that is, the interest is effectively "perfected" while the holder retains possession. The reclamation rights available under sections 2-702(c), 2-507(2), and 2-511(3), however, cannot by the terms of these sections arise until *after* the seller gives up possession to the buyer. Thus, these Code reclamation rights are basically dissimilar to many of the Article 2 security interests listed in Comment 1 to section 9-113, and they cannot be exercised in a manner that entitles them to the section 9-113 exemp-

---

138. *See, e.g., In re* PFA Farmers Mkt. Ass'n v. Wear, 583 F.2d 992, 998-99 (8th Cir. 1978); *In re* Mel Golde Shoes, Inc., 403 F.2d 658, 660 (6th Cir. 1968); *In re* American Food Purveyors, Inc., 17 U.C.C. Rep. Serv. 436, 440 (N.D. Ga. 1974); English v. Ralph Williams Ford, 9 U.C.C. Rep. Serv. 437, 444 (Cal. Ct. App. 1971); Ranchers & Farmers Livestock Auction Co. v. First State Bank, 531 S.W.2d 167, 169 (Tex. Ct. Civ. App. 1975).

139. *Compare In re* Samuels & Co., 526 F.2d 1238, 1245-48 (5th Cir. 1976) (§ 2-507(2) reclamation right is a security interest) *with* Guy Martin Buick, Inc. v. Colorado Springs Nat'l Bank, 184 Colo. 166, 519 P.2d 354 (1974) (not a security interest). There have heen no cases dealing with the § 2-511(3) reclamation right as a security interest.

140. In relevant part, U.C.C. § 9-113, Comment 1 states that:

> Under the provisions of Article 2 on Sales, a seller of goods may reserve a security interest (see, e.g., Sections 2-401 and 2-505); and in certain circumstances, whether or not a security interest is reserved, the seller has rights of resale and stoppage under sections 2-703, 2-705 and 2-706 which are similar to the rights of a secured party. Similarly, under such sections as sections 2-506, 2-707 and 2-711 a financing agency, an agent, a buyer or another person may have a security interest or other right in goods similar to that of a seller. The use of the term "security interest" in the Sales Article is meant to bring the interests so designated within this Article. This section makes it clear, however, that such security interests are exempted from certain provisions of this Article.

141. U.C.C. § 9-113 provides in part:

> A security interest arising solely under the Article on Sales (Article 2) is subject to the provisions of this Article except that to the extent that and so long as the debtor does not have or does not lawfully obtain the possession of the goods
>
> (a) no security agreement is necessary to make the security interest enforceable; and
>
> (b) no filing is required to perfect the security interest; and
>
> (c) the rights of the secured party on default by the debtor are governed by the Article on Sales (Article 2).

tion from the perfection requirement of Article 9. In short, these Code sections do not create the sort of interest contemplated by section 9-113. Second, even in the event that interests arising under sections 2-702(2), 2-507(2), or 2-511(3) were deemed security interests, one might plausably argue that a defaulting buyer "does not lawfully obtain possession of the goods" under section 9-113. If so, the seller's rights under the "security interest" would be governed solely by Article 2, and the arguments contained in this subsection would not apply.[142]

(c) Subordination via Section 2-702(3)

The third basis for subordinating the reclaiming seller to the lien creditor involves the 1962 version of section 2-702(3), which states: "The seller's right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course or other good faith purchaser or lien creditor under this Article (Section 2-403)." As one court has observed, "interpretation of this subsection has confounded courts and commentators—the only consensus to be found is that there are numerous respectable, if somewhat unsatisfactory, readings of the quoted language."[143]

The controversy regarding section 2-702(3)[144] was touched off in 1960 when the Third Circuit issued its well-known decision in *In re Kravitz.*[145] In that case, the court did not directly subordinate the 2-702(2) seller to the lien creditor via 2-702(3), but undertook instead a roundabout journey through section 2-403 to Article 9, at which point it concluded that the Code did not resolve the credit seller-lien creditor priority question, and thus resorted to pre-Code Pennsylvania rules[146] under which the lien creditor prevailed over

---

142. *See* Braucher, *supra* note 2, at 1290. Also, classifying the Code cash sale reclamation right as a security interest is at odds with the nature of the underlying transaction. The typical situation involving the retention of a security interest is a credit transaction where the seller or the lender retains an interest in the goods as security for the price while the buyer completes a series of installment payments. The typical cash sale, on the other hand, does not contemplate an extension of credit, and the Code cash seller's reclamation right upon the buyer's failure to pay is more like a power to undo the transaction than a recovery based on the retention of title. This is true even when a check is accepted as payment, since acceptance of a check (unless post-dated) does not change a cash sale into a credit transaction. *See, e.g.*, U.C.C. § 2-511, Comment 6, R. NORDSTROM, *supra* note 2, at 502-03.

143. *In re* PFA Farmers Mkt. Ass'n v. Wear, 583 F.2d 992, 995 (8th Cir. 1978).

144. For a more complete discussion of this matter, see Mann & Phillips, *The Reclaiming Seller*, *supra* note 2, at 619-24. Almost all of the cases discussed below involve § 70(c) of the Bankruptcy Act, which gives the trustee the status of an "ideal lien creditor." *See* notes 177-78 *infra* and accompanying text.

145. 278 F.2d 820 (3rd Cir. 1960).

146. These rules constituted a distinctly minority position, the usual common-law view

the seller.[147] In reaction to *Kravitz,* the Permanent Editorial Board for the Uniform Commercial Code amended section 2-702(3) by deleting its "or lien creditor" language in 1966.[148] This amendment has since been adopted by approximately one-third of the states.[149] Taken in its historical context,[150] this amendment was almost certainly intended to assist the seller, and its most likely effect is to compel resolution of the credit seller-lien creditor controversy under the pre-Code rules that generally favor the seller.[151]

In states which still retain the 1962 version of section 2-702(3), a variety of approaches to this problem has emerged. The first of these, which has been adopted by three of the four circuit-level cases decided to date,[152] utilizes reasoning similar to that found in *Kravitz* to compel recourse to common law.[153] As has been suggested, this

being that the defrauded credit seller would defeat the lien creditor. *See* notes 34-35 *supra* and accompanying text.

147. *Kravitz* involved the competing rights of the seller and the trustee to goods delivered on credit to the buyer three days before his involuntary petition in bankruptcy. One day after the petition was filed the seller attempted to reclaim the goods under § 2-702(2). Both the bankruptcy referee and district court rejected the seller's claim. In affirming this decision, the Third Circuit did not interpret § 2-702(3) as directly subordinating a credit seller to a lien creditor or a trustee. Instead, the court noted that § 2-702(3) refers to § 2-403 in defining the relative rights of a seller and a lien creditor. The only reference in § 2-403 to lien creditors is that "[t]he rights of . . . lien creditors are governed by the [Article] on Secured Transactions (Article 9) . . . ." 278 F.2d at 821-22. The court then referred to § 9-301(3), which regards a lien creditor as "a trustee in bankruptcy from the date of the filing of the petition." The court interpreted this section as recognizing that the rights of a trustee as lien creditor are governed by the Bankruptcy Act. The Third Circuit then stated: "It is perfectly clear that, while Section 70, sub. c of the Bankruptcy Act makes the trustee an ideal lien creditor, what such a lien creditor gets is determined by the law of the state involved . . . ." *Id.* at 822. However, in referring to state law, the court apparently did not regard the Code as dispositive with respect to the rights of a lien creditor as against the reclaiming seller. Instead, it resorted to pre-Code Pennsylvania law finding that the reclaiming seller, even if defrauded, could not triumph over certain lien creditors. *See* note 35 *supra* and accompanying text. Then, after holding that nothing in the U.C.C. changed this rule, it found for the trustee, affirming the district court decision. It ought to be noted that *Kravitz* proceeded under a version of § 2-702 slightly different from that quoted by the toxt following note 42 *supra. See* U.C.C. § 2-702(1) (1952 version).

148. Permanent Editorial Board for the Uniform Commercial Code, Report No. 3, at 3 (1967). This has been incorporated in U.C.C. § 2-702(3) (1972 version).

149. For a more or less current listing, see UNIFORM LAWS ANNOTATED, *Uniform Commercial Code* § 2-702, at 350 (1976). According to that listing, 16 states have adopted the new language. It has been suggested that the original inclusion of the "or lien creditor" language was simply a drafting error. *See* T. QUINN, *supra* note 2, at 2-410 to -411.

150. *See, e.g.,* Hawkland, *supra* note 2, at 88.

151. There appear to have been no seller-lien creditor cases brought under the 1972 version of § 2-702(3).

152. *In re* Federal's, Inc., 553 F.2d 509, 511-12 (6th Cir. 1977); *In re* Mel Golde Shoes, Inc., 403 F.2d 658, 659-60 (6th Cir. 1968); *In re* Kravitz, 278 F.2d 820 (3rd Cir. 1960). *See also In re* Kee Lox Mfg. Co., 22 U.C.C. Rep. Serv. 938 (E.D. Pa. 1977); *In re* Royalty Homes, Inc., 8 U.C.C. Rop. Serv. 61, 64 (E.D. Tenn. 1970).

153. Actually, there seem to be three more or less distinguishable approaches here, all

approach will usually favor the seller. The second approach, taken by the remaining circuit court,[154] also favors the seller, but, unlike the first, remains wholly within the confines of the U.C.C. The decision appears to be based upon the "revealed intent" of the Code. On this view, the reference to the rights of lien creditors in section 2-702(3) both requires that these rights be determined by the Code itself and displaces pre-Code law.[155] This view concludes that the Code's purpose of simplification and expansion of the seller's right to reclaim via section 2-702(2), and its policies of uniformity and avoidance of state-by-state variations in the law, dictate that the reclaiming seller's rights under 2-702(2) not be cut off by a lien creditor.[156] The third view is similar to the second in avoiding refer-

---

of which reach the same result. First, there is the *Kravitz* rationale, with its progression through §§ 2-702(3), 2-403(4), and 9-301(3), with a final conclusion that the Code is basically supportive of § 70(c) of the Bankruptcy Act. *See* notes 145-47 *supra*.

The second approach is basically similar, but differs in the details of its application. Crucial to it is the assertion tbat § 2-702(3) does not itself define the lien creditor rights to which it refers, and that reference to § 2-403 must be made to determine these rights. Since only subsection 2-403(4) refers to these rights, and since it merely makes a reference to Article 9, that section must be consulted to determine their content. Unlike *Kravitz,* however, this approach does not look to § 9-301(3), but rather to § 9-301(1)(b), which states that the holder of an unperfected security interest is subordinate to the interest of a lien creditor. However, since the § 2-702(2) reclamation right is presumably not a security interest, recourse to pre-Code law must be made to determine the relative rights of the seller and lien creditor-trustee. At least three cases have followed this approach. *See In re* Federal's, Inc., 553 F.2d 509, 511-12 (6th Cir. 1977); *In re* Mel Golde Shoes, Inc., 403 F.2d 658, 659-60 (6th Cir. 1968); *In re* Reyalty Homes, Inc., 8 U.C.C. Rep. Serv. 61, 64 (E.D. Tenn. 1970).

The third approach is simply to view § 2-702(2) as a codification of the common-law remedy of rescission for fraud, and thus to avoid its confusing relations with §§ 2-702(3), 2-403, and 9-301. *See* King, *supra* note 2, at 82. *See also In re* Royalty Homes, Inc., 8 U.C.C. Rep. Serv. 61, 63-64 (E.D. Tenn. 1970) (citing the King article with approval).

154. *In re* PFA Farmers Mkt. Ass'n v. Wear, 583 F.2d 992 (8th Cir. 1978).

155. *Id.* at 1000.

156. *Id.* The court's language was as follows:

> After careful consideration, we hold that the reference to the rights of lien creditors in § 2-702(3) directs that those rights be found exclusively under Article 2 or in the articles to which Article 2 cross references such as § 2-403 refer. Section 2-702(3) specifically displaces pre-Code law on the subject. We also hold that the trustee acquires no rights under the facts existing in this case from §§ 2-403, 2-326, or 9-301. We do not decide whether the trustee would have prevailed had the seller reserved an unperfected security interest or if the sale had been governed by § 2-326 provisions for "sale or return" arrangements. In sum, we hold that under Missouri law, no lien creditor could cut off Bassett's right to reclaim under § 2-702(2). By the same token, we hold that the trustee is not entitled under § 70(c) to cut off Bassett's reclamation petition. We favor this analysis because, unlike that of the district court, it is consistent with the most common understanding of the purpose of § 2-702(2)—to simplify and expand the seller's right to reclaim. And, unlike the analyses of *Kravitz* and *Federal's,* our interpretation comports with the Code's policy of uniformity and avoids dependence upon obscure variations in state common law.

Id. This language was virtually the only justification the *PFA* court gave for its decision, although it had previously devoted much space to a detailed discussion and refutation of a

ence to common law, but concludes that the lien creditor should defeat the seller.

The court adopting this approach ignored the reference in section 2-702(3) to section 2-403 (and hence to Article 9).[157] Instead, it regarded section 2-702(3) itself as expressly subordinating the seller to the lien creditor.[158] This approach obviously can only benefit the lien creditor in states which have not adopted the 1966 amendment to section 2-702(3).

Overall, the statutory and judicial trend has been toward favoring the 2-702 seller over the lien creditor who relies upon section 2-702(3). With respect to the cash seller, however, there has been a sharper division of authority. Some decisions flatly hold that the cash seller should prevail,[159] while others have favored the lien creditor.[160] The decisions favoring the lien creditor expressly or tacitly seem to adopt the following reasoning: (1) unpaid Code cash sellers find a right of reclamation in section 2-702(2); (2) since the 2-702(2) reclamation right applies in the cash sale context, its limitations[161] should also apply in that context; (3) one of these limitations is the seller's subordination to a lien creditor through the operation of section 2-702(3). This line of reasoning has a number of serious flaws. First, it assumes that the cash sale reclamation right is not

---

number of other approaches, *see id.* at 995-999. The scanty justification for its broad approach left the court open to a charge of bootstrapping. A concurring opinion seemed to recognize this problem, preferring instead the analysis used by the other circuits. *See id.* at 1003-07 (Henley, J., concurring). It should be noted that the majority's approach, which relies upon the broad policies and goals of § 2-702, would apply to both the 1962 and 1972 versions of that section.

157. *See* notes 147 & 153 *supra* and accompanying text.

158. *See* Countryman, *supra* note 2, at 457; Shanker, *Reply, supra* note 2, at 96-98; Shanker, *Bankruptcy, supra* note 2, at 40-42. This view seems to have been followed in several cases. *See In re* Goodson Steel Corp., 10 U.C.C. Rep. Serv. 387, 391-93 (S.D. Tex. 1968), *aff'd,* 445 F.2d 1096 (5th Cir. 1971), *cert. denied,* 404 U.S. 991 (1971); *In re* Behring & Behring, 5 U.C.C. Rep. Serv. 600, 606-07 (N.D. Tex. 1968); *In re* Units, Inc., 3 U.C.C. Rep. Serv. 46, 48-49 (D. Conn. 1965); *In re* Eastern Supply Co., 1 U.C.C. Rep. Serv. 151, 153-54 (W.D. Pa. 1963), *aff'd,* 331 F.2d 852 (3d Cir. 1964). Professor Shanker has also argued that the § 2-702(2) seller should be subordinated to the trustee because the goods sold should be deemed "on sale or return" under U.C.C. § 2-326. Shanker, *Reply, supra* note 2, at 98-102. For a discussion and rejection of this approach see *In re* PFA Farmers Mkt. Ass'n v. Wear, 583 F.2d 992, 998 (8th Cir. 1978).

159. *See In re* Mort Co., 208 F. Supp. 309 (E.D. Pa. 1962); *In re* Lindenbaum's, Inc., 2 U.C.C. Rep. Serv. 495 (E.D. Pa. 1964). *See also In re* Helms Veneer Corp., 287 F. Supp. 840, 845-46 (W.D. Va. 1968).

160. *In re* Richardson Homes Corp., 18 U.C.C. Rep. Serv. 384, 387 (N.D. Ind. 1975); *In re* Kirk Kabinets, Inc., 15 U.C.C. Rep. Serv. 746, 749 (M.D. Ga. 1974). *See also* Greater Louisville Auto Auction, Inc. v. Ogle Buick, Inc., 387 S.W.2d 17, 20 (Ky. 1965).

161. *Cf.* notes 81-87 *supra* and accompanying text (discussing the applicability of § 2-702(2)'s "ten day" demand and "written misrepresentation" provisions in the context of §§ 2-507(2) and 2-511(3)).

inherent to sections 2-507(2) and 2-511(3) but depends instead upon section 2-702(2). As suggested above,[162] this is an entirely unjustified conjunction of the cash sale sections and section 2-702. Second, as the preceding discussion has indicated,[163] it is by no means clear that the seller will be subordinated to the lien creditor even if section 2-702(2) is the source of the seller's power to reclaim. Finally, this line of reasoning could not be effective in states which have adopted the 1966 amendment to section 2-702(3). If section 2-702(2) does apply to cash sales, courts will probably look to common-law rules, much as they do in most of the "credit sale" cases. Such a resolution of the cash seller-lien creditor controversy would virtually always favor the cash seller.[164] Finally, subordination of the cash seller to the lien creditor seems especially inappropriate where the reclamation is based on section 2-511(3), for this section is devoid of express relationship to section 2-702.[165] In fact, no decision has applied section 2-702(3) in the 2-511(3) context.[166]

III. The Reclaiming Seller and the Bankruptcy Act

Besides conflicting with the rights of various Code third parties, the reclamation rights possessed by the seller of goods also clash[167] with the rights and powers of the buyer's trustee in bankruptcy. The most common occurrence of such a conflict is when the seller delivers goods to an insolvent buyer who soon thereafter goes into bankruptcy. The seller must then file a reclamation petition in order to retake his goods. Such a conflict can also arise when the seller repossesses the goods shortly before the buyer is formally adjudicated a bankrupt. Most[168] of the litigation involving such seller-trustee colli-

162. *See* notes 89-93 *supra* and accompanying text. The reclamation right granted unpaid sellers under §§ 2-507(2) and 2-511(3) should be viewed as inherent to the sections and not as dependent upon § 2-702(2). This being so, there is no reason to look to § 2-702(3) on the question of lien creditor priorities. The preferable view is that § 2-403 alone should govern this question. *See* note 112 *supra*.

163. *See* notes 145-57 *supra* and accompanying text.

164. *See* note 34 *supra* and accompanying text.

165. *See* notes 88-89 *supra* and accompanying text.

166. *But see* notes 80 & 88 *supra*.

167. Throughout this part of the Article the Bankruptcy Act will be referred to in the present tense, although it was largely superseded by the Bankruptcy Reform Act as of October 1, 1979. This is done solely to simplify the prose by avoiding convoluted past tense, past perfect tense, and past participle constructions.

168. Also, there has been some seller-trustee litigation under § 64(a) of the Bankruptcy Act, 11 U.S.C. § 104(a) (1976). *See* note 204 *infra*. However, as that note indicates, there is a virtual consensus among the courts which suggests that this line of attack on the seller is no longer available to the trustee.

Although no reclaiming seller-bankruptcy cases appear to have mentioned this point, § 17(a)(2) of the Bankruptcy Act, 11 U.S.C. § 35 (1976), may provide the seller who is unable

sions has proceeded under two Bankruptcy Act provisions—section 70(c)[169] and section 67(c).[170] In addition, two[171] other Bankruptcy Act provisions—section 60[172] and section 70(e)[173]—are potentially available to the trustee in certain instances, although neither ha occasioned much litigation.[174] This section will discuss the seller's position vis-a-vis the trustee proceeding under sections 70(c), 67(c), 60, and 70(e) respectively. It will also discuss the seller's possible recourse to pre-Code remedies upon the invalidation of his Code reclamation right by one or more of these provisions. The preceding discussion, especially that involving the conflicting rights of the seller and Code third parties, is referred to frequently. It is also likely to have considerable relevance to the examination of the Bankruptcy Reform Act.[175]

A. *Section 70(c)*

Section 70(c) of the Bankruptcy Act provides in relevant part that

> [t]he trustee shall have as of the date of bankruptcy the rights and powers of: (1) a creditor who obtained a judgment against the bankrupt upon the date of bankruptcy, whether or not such a creditor exists, (2) a creditor who upon

---

to reclaim the goods in bankruptcy the opportunity to pursue the debtor after bankruptcy. Section 17(a) provides in relevant part:

> a. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as
>
> . . . .
>
> (2) are liabilities for obtaining money or property by false pretenses or false representations, or for obtaining money or property on credit or obtaining an extension or renewal of credit in reliance upon a materially false statement in writing respecting his financial condition made or published or caused to be made or published in any manner whatsoever with intent to deceive, or for willful and malicious conversion of the property of another . . . .

See Squillante, *Uniform Commercial Code Annual Survey—General Provisions, Sales, Bulk Transfers and Documents of Title*, 34 BUS. LAW. 1491, 1506 (1979). This section would appear particularly relevant to the § 2-702 cases involving a written misrepresentation. The successor to § 17(a) in the Bankruptcy Reform Act parallels the previous provision closely enough that the seller probably retains whatever rights he had under the former statute to pursue the debtor after hankruptcy. *See also* 11 U.S.C.A. § 523 (West Supp. 1979).

169. 11 U.S.C. § 110(c) (1976).

170. 11 U.S.C. § 107(c) (1976).

171. *See also* note 248 *infra* (discussing Bankruptcy Act § 67(a), 11 U.S.C. § 107(a) (1976)).

172. 11 U.S.C. § 96 (1976).

173. 11 U.S.C. § 110(e) (1976).

174. An interesting instance of the "law in action," one rather dissimilar to the technical "law in the books" discussed in this section, is the tendency for some bankruptcy referees to avoid all the legal questions developed herein and simply to create a special bankruptcy priority for all sellers shipping goods to the buyer within ten days of the bankruptcy petition. *See* Weintraub & Edelman, *supra* note 2, at 1175.

175. *See* notes 313-28 *infra* and accompanying text.

> the date of bankruptcy obtained an execution returned unsatisfied against the bankrupt, whether or not such a creditor exists, and (3) a creditor who upon the date of bankruptcy obtained a lien by legal or equitable proceedings upon all property . . . upon which a creditor of the bankrupt upon a simple contract could have obtained such a lien, whether or not such a creditor exists.[176]

Section 70(c) has been called the "strong-arm" clause of the Bankruptcy Act. By its terms the trustee becomes an "ideal creditor . . . armed cap-a-pie with every right and power which is conferred by the law of the state upon its most favored creditor who has acquired a lien by legal or equitable proceedings."[177] As this statement suggests, the rights of a lien creditor assumed by the trustee under 70(c) are defined by state law.[178] As it also suggests, section 70(c) does not require the trustee to locate an actual, existing creditor who could have or did obtain a lien; the lien holder whose rights and powers the trustee assumes is purely hypothetical.[179] This hypothetical lien holder is regarded as having obtained his lien on the date of bankruptcy; the obligation giving rise to that lien probably must be seen as having been incurred at that time as well.[180]

From this introduction it is apparent that the fate of the re-

---

176. 11 U.S.C. § 110(c) (1976).

177. *In re* Waynesboro Motor Co., 60 F.2d 668, 669 (S.D. Miss. 1932), *quoted in In re* Kravitz, 278 F.2d 820, 822 (3rd Cir. 1960). For present purposes, the most significant status assumed by the trustee is that given him by the third subdivision of 70(c). This tends to mesh with tbe definition of a lien creditor contained in U.C.C. § 9-301(3). *See* notes 33 & 124 *supra*.

178. *E.g., In re* PFA Farmers Mkt. Ass'n v. Wear, 583 F.2d 992, 994 (8th Cir. 1978).

179. *See* 4A Collier, *supra* note 2, ¶ 70.50, at 609-14. *But see* Pacific Fin. Corp. v. Edwards, 304 F.2d 224, 228-29 (9th Cir. 1962).

180. The purpose of this is to preclude the trustee from reaching back into the time period before the date of bankruptcy and picking his optimum lien creditor. *See* Lewis v. Manufacturers Nat'l Bank, 364 U.S. 603, 609 (1961):

> [I]f we construe § 70c as petitioner does, there would be no period of repose. Security transactions entered into in good faith years before the bankruptcy could be upset if the trustee were ingenious enough to conjure up a hypothetical situation in which a hypothetical creditor might have had such a right.

However, while § 70(c) clearly requires that the *obtaining of the hypothetical lien* must take place on the date of bankruptcy, it is uninformative as to the time when the *obligation giving rise to this lien* must have been incurred. One 70(c) case seems tacitly to have assumed that this obligation could predate the date of bankruptcy. *See In re* Kravitz, 278 F.2d 820 (3rd Cir. 1960); Mann & Phillips, *Federal's, supra* note 2, at 664 & n.169. A subsequent Supreme Court decision appears to have concluded that both the underlying obligation and the obtaining of the lien were to be treated as taking place on the date of bankruptcy. *See* Lewis v. Manufacturers Nat'l Bank, 364 U.S. 603, 604, 607 (1961). Despite this, § 70(c) and *Lewis* have been read as requiring that the underlying debt not be regarded as having been incurred at any particular time at all. *See In re* Federal's, Inc., 553 F.2d 509, 513-14 (6th Cir. 1977). *See also* Mann & Phillips, *Federal's, supra* note 2, at 663-64. This view of § 70(c), however, might make it impossible to determine seller-trustee priorities. *See id.* at 664 n.169. But the purpose of tbe In re *Federal's* holding may have been substantially to diminish the trustee's rights, to make him "about the lowest form of creditor." *In re* Federal's, Inc., 553 F.2d 509, 514 (6th Cir. 1977).

claiming seller in a bankruptcy proceeding in which the trustee employs section 70(c) depends upon how such a seller would fare as against an attaching lien creditor under state law. As indicated above,[181] this question has occasioned much disagreement and vast theoretical confusion in the twenty years preceding enactment of the Bankruptcy Reform Act. Despite this, however, a substantial consensus in favor of the 2-702 seller has emerged in the federal appeals courts.[182] No similar consensus is apparent in the case of the cash seller,[183] but, since the decisions favoring the lien creditor-trustee rest on spurious premises,[184] the cash seller should also prevail. Thus, despite the controversy surrounding it, section 70(c) of the Bankruptcy Act has tended over time to pose less and less of an obstacle to the seller's ability to reclaim goods in bankruptcy.[185]

B. *Section 67(c)*

Section 67(b)[186] of the Bankruptcy Act validates a broad range of statutory liens as against the trustee. However, section 67(c)(1)(B) of the Act carves out a wide exception to section 67(b) by stating that "every statutory lien which is not perfected or enforceable at the date of bankruptcy against one acquiring the rights

181. *See generally* notes 124-66 *supra* and accompanying text.

182. *See In re* PFA Farmers Mkt. Ass'n v. Wear, 583 F.2d 992 (8th Cir. 1978); *In re* Federal's, Inc., 553 F.2d 509 (6th Cir. 1977). *See also In re* Kravitz, 278 F.2d 820 (3rd Cir. 1960) (held for the trustee but did so on a common-law basis which would have favored the seller in most states); notes 128, 138, 152-56 *supra* and accompanying text. Also supporting the seller is *In re* Royalty Homes, Inc., 8 U.C.C. Rep. Serv. 61 (E.D. Tenn. 1970). *See also In re* Mel Golde Shoes, Inc., 403 F.2d 658 (6th Cir. 1968) (not involving bankruptcy). *But see In re* Goodson Steel Corp., 10 U.C.C. Rep. Serv. 387 (S.D. Tex. 1978); *In re* Behring & Behring, 5 U.C.C. Rep. Serv. 600 (N.D. Tex. 1968), *aff'd,* 415 F.2d 1096 (5th Cir. 1971), *cert. denied,* 404 U.S. 991 (1971); *In re* Units, Inc., 3 U.C.C. Rep. Serv. 46 (D. Conn. 1965); *In re* Eastern Supply Co., 1 U.C.C. Rep. Serv. 151 (W.D. Pa. 1963), *aff'd,* 331 F.2d 852 (3rd Cir. 1964).

183. *See In re* Lindenbaum's, Inc., 2 U.C.C. Rep. Serv. 495 (E.D. Pa. 1964) (holding for the seller); *In re* Mort Co., 208 F. Supp. 309 (E.D. Pa. 1962). *See also In re* Helms Veneer Corp., 287 F. Supp. 840, 845-46 (W.D. Va. 1968) (distinguished *Mort* because of the absence of a ten day demand, and because the actual bankruptcy section at issue was uncertain, but in which the court seemed willing to find for the cash seller in an appropriate case). *But see In re* Samuels & Co., 526 F.2d 1238, 1246-48 (5th Cir. 1976); *In re* Richardson Homes Corp., 18 U.C.C. Rep. Serv. 384 (N.D. Ind. 1975); *In re* Kirk Kabinets, Inc., 15 U.C.C. Rep. Serv. 746, 749 (M.D. Ga. 1974); Greater Louisville Auto Auction, Inc. v. Ogle Buick, Inc., 387 S.W.2d 17, 20 (Ky. 1965).

184. Specifically, these unfounded assertions are that (1) the lien creditor is a good faith purchaser entitled to defeat the seller via U.C.C. § 2-403; (2) the cash and credit sale reclamation rights are security interests which, if unperfected, will be defeated by a lien creditor under U.C.C. § 9-301(1)(b); and (3) that the cash and credit sellers are subordinated to a lien creditor via U.C.C. § 2-702(3). *See generally* notes 124-66 *supra* and accompanying text.

185. This trend has probably been furthered by the 1966 amendment to U.C.C. § 2-702(3) deleting its "or lien creditor" language. *See* notes 148-51 *supra* and accompanying text.

186. 11 U.S.C. § 107(b) (1976).

of a bona fide purchaser from the debtor on that date, whether or not such a purchaser exists, . . . shall be invalid against the trustee."[187] Since the reclaiming Code seller clearly is subordinate to such a purchaser,[188] characterization of the seller's reclamation right as a "statutory lien" would subordinate him to the buyer's trustee.[189] There has been no litigation regarding the status of either section 2-507(2) or section 2-511(3) as a statutory lien.[190] However, several courts have held that section 2-702(2) is a statutory lien invalidated by section 67(c)(1)(A) of the Bankruptcy Act,[191] although every federal appellate case considering this issue has held that section 2-702(2) is *not* a statutory lien.[192] Since there seems to be little difference between the Code cash and credit sale reclamation rights for "statutory lien" purposes, they will be considered together below.

Section 1(29a) of the Bankruptcy Act defines a statutory lien as "a lien arising solely by force of statute upon specified circumstances or conditions . . . ."[193] While sections 2-702(2), 2-507(2), and 2-511(3) would plainly seem to qualify as "statutes," the Bankruptcy Act definition speaks of a lien "arising *solely* by force of statute"; some courts, noting section 2-702(2)'s close relationship with the common-law remedy of rescission for fraud, have argued that section 2-702(2) is not "solely statutory," since it is for the most part a codification of common-law rules.[194] Other courts, while not

187. *Id.* § 107(c)(1)(B).

188. *See* notes 107-15 *supra* and accompanying text.

189. Also the § 2-702(2) credit seller is covered by § 67(c)(1)(A) of the Bankruptcy Act, which provides that "every statutory lien which first becomes effective upon the insolvency of the debtor" is "invalid against the trustee." 11 U.S.C. § 107(c)(1)(A) (1976).

190. *But cf.* Dugan, *supra* note 2, at 368-69 (arguing that the cash seller should lose to the trustee under section 67(c)).

191. *See In re* Neisner Bros., 25 U.C.C. Rep. Serv. 157, 159-60 (S.D.N.Y. 1978); *In re* Kee Lox Mfg. Co., 22 U.C.C. Rep. Serv. 938, 942-43 (E.D. Pa. 1977); *In re* Perskey & Wolf, Inc., 19 U.C.C. Rep. Serv. 812 (N.D. Ohio 1976); *In re* Giltex, Inc., 17 U.C.C. Rep. Serv. 887 (S.D.N.Y. 1975); *In re* Wetson's Corp., 17 U.C.C. Rep. Serv. 423 (S.D.N.Y. 1975); *In re* Good Deal Supermarkets, Inc., 384 F. Supp. 887, 889 (D.N.J. 1974). *See also In re* J.R. Nieves & Co., 446 F.2d 188 (1st Cir. 1971); *In re* Trahan, 283 F. Supp. 620 (W.D. La.), *aff'd*, 402 F.2d 796 (5th Cir. 1968) (interpreting civil codes).

192. *See In re* PFA Farmers Mkt. Ass'n v. Wear, 583 F.2d 992, 1000-3 (8th Cir. 1978); *In re* Federal's, Inc., 553 F.2d 509, 516-17 (6th Cir. 1977); *In re* Telemart Enterprises, Inc., 524 F.2d 761, 763-64 (9th Cir. 1975). *See also In re* National Bellas Hess, Inc., 17 U.C.C. Rep. Serv. 430 (S.D.N.Y. 1975).

193. 11 U.S.C. § 1(29a) (1976).

194. As the court stated in *In re* Federal's, Inc., 553 F.2d 509, 516 (6th Cir. 1977):

> [W]e must agree with the district court's observation that § 2-702 is more than a mere codification of common law. Nevertheless, we are persuaded that the right asserted by the seller under § 2-702(2) is a valid state-created right of ownership. Because that right conceptually has its antecedents in the historical and equitable right of a defrauded seller to reclaim the goods he has sold to an insolvent buyer, we hold it cannot be said

rejecting the framework of this argument, have contended that the differences between section 2-702(2) and its common-law counterparts are sufficiently great to put section 2-702(2) within the reach of the section 1(29a) definition.[195] As for sections 2-507(2), and 2-511(3), without inquiring into the obscure question whether these sections are "really" closer to their pre-Code analogues than is section 2-702(2) to its forbears, it ought to be reiterated that sections 2-507(2) and 2-511(3) are quite closely related to the common-law "cash sale doctrine."[196]

The term "lien" is not defined by the Code or the Bankruptcy Act. Generally, a lien is regarded as a hold on property for the payment of some debt, obligation, or duty.[197] Obviously, the Code reclamation rights could fit within the confines of this rather broad definition. However, the seller's right under the "cash sale" doctrine was not termed a "lien" at common law, and was distinguished from lien-like devices such as the conditional sale.[198] In addition, it has been argued that section 2-702(2) should not be regarded as a lien, because a lien holder can sell the encumbered property and still recover any remaining debt from the debtor, while the 2-702(2) reclaimant is limited to recovery of the goods.[199] Although this argument is based to some degree on the exclusivity provision of section 2-702(3),[200] it should also be valid in the 2-507(2) or 2-511(3) context, since under neither section does the seller have a remedy beyond repossession of the goods sold. On the other hand, it has been argued that the section 2-702(2) right should indeed be regarded as a lien, since both a lien and the 2-702(2) reclamation right terminate upon payment of the debt.[201] But, while this argument would also apply to sections 2-507(2) and 2-511(3), it would further seem to control most of the unpaid seller's general Code remedies, few of which are

to arise *"solely* by force of statute" under § 1(29).

(empbasis added). *See also In re* PFA Farmers Mkt. Assn., 583 F.2d 992, 1002-03 (8th Cir. 1978); *In re* National Bellas Hess, Inc., 17 U.C.C. Rep. Serv. 430, 431-32 (S.D.N.Y. 1975).

195. *See In re* Giltex, Inc., 17 U.C.C. Rep. Serv. 887, 889-90 (S.D.N.Y. 1975); *In re* Wetson's Corp., 17 U.C.C. Rep. Serv. 423, 426 (S.D.N.Y. 1975).

196. *See* notes 68-69 *supra* and accompanying text.

197. *See, e.g.,* 51 AM. JUR. 2d *Liens* § 1 (1970); BLACK'S LAW DICTIONARY 832 (5th ed. 1979). For a compendium of definitions of the term, see Note, *Uniform Commercial Code—§ 2-702: Conflict with 67c(1)(A) of the Federal Bankruptcy Act,* 53 N.C.L. REV. 169, 172-73 (1974).

198. *See* note 22 *supra.*

199. *See In re* National Bellas Hess, Inc., 17 U.C.C. Rep. Serv. 430, 432-33 (S.D.N.Y. 1975).

200. U.C.C. § 2-702(3) provides that: "Successful reclamation of goods excludes all other remedies with respect to them."

201. *See In re* Giltex, Inc., 17 U.C.C. Rep. Serv. 887, 890-91 (S.D.N.Y. 1975); *In re* Wetson's Corp., 17 U.C.C. Rep. Serv. 423, 426-27 (S.D.N.Y. 1975).

likely to characterized as "liens."[202]

In view of the disagreement and uncertainty regarding the "solely statutory" and "lien" questions, many courts have looked to the legislative history of section 67(c) in an attempt to resolve the question of section 2-702(2)'s status. Prior to 1938, the Bankruptcy Act accorded recognition to state-created priorities, thus allowing the states substantial power to determine which creditors' claims should be recognized after the satisfaction of certain other interests.[203] In that year, however, the Act was amended to eliminate this recognition.[204] Following this amendment, some states tried to further certain interests by casting what seemed to be priorities in the form of liens, thus ensuring their predominance under section 67.[205] In response, Congress amended section 67 in 1966 to expand the list of statutory liens specifically declared invalid in bankruptcy,[206] including the section 67(c)(1)(A) and 67(c)(1)(B) invalidations at issue here. Thus, the legislative history of this section can be seen as an ongoing process whereby Congress has specifically and repeatedly rebuffed the efforts of the states to subvert federal bankruptcy standards. Some courts have relied on this history to support the holding that section 2-702(2) is one of the classes of statutory liens intended to be invalidated by section 67(c)(1)(A).[207] Similar reasoning could easily apply with respect to section 67(c)(1)(B) and sec-

---

202. *See* U.C.C. § 2-703. This section makes the listed seller's remedies dependent upon (among other things) the buyer's failure "to make a payment due on or before delivery." Presumably, the seller's action for the price, at least, would terminate upon payment of the price. And it is not obvious how this remedy could be regarded as a "lien," since it does not seem to involve any sort of hold or claim on the good sold. *See* U.C.C. § 2-709.

203. Act of July 1, 1898, ch. 541, § 64, 30 Stat. 563.

204. Act of June 22, 1938, ch. 575, § 64, 52 Stat. 874. This elimination of certain "state-created priorities" has caused some courts to conclude that § 2-702 qualifies as such a priority and thus is invalid in bankruptcy under § 64(a), 11 U.S.C. § 104(a) (1976). *See, e.g., In re* Neisner Bros., Inc., 25 U.C.C. Rep. Serv. 157, 161-62 (S.D.N.Y. 1978); *In re* Perskey & Wolf, Inc., 19 U.C.C. Rep. Serv. 812, 816-17 (N.D. Ohio 1976); *In re* Federal's, Inc., 12 U.C.C. Rep Serv. 1142, 1151-52 (E.D. Mich. 1973), *aff'd,* 402 F. Supp. 1357, 1365-67 (E.D. Mich. 1975). The *Federal's* decision was reversed, however, in *In re* Federal's, Inc., 553 F.2d 509, 518 (6th Cir. 1977), and this decision should dispose of *Perskey* as well. Also, the two other circuits considering this question have ruled that § 2-702 is not an invalid state-created priority. *In re* PFA Farmers Mkt. Ass'n., 583 F.2d 992, 1000-03 (8th Cir. 1978); *In re* Telemart Enterprises, Inc., 524 F.2d 761, 764 (9th Cir. 1975). Thus, only the *Neisner* case can now be said to stand for this proposition, and the idea that § 2-702 is a "state-created priority" is probably a dead letter.

205. *See, e.g., In re* Giltex, Inc., 17 U.C.C. Rep. Serv. 887, 892 (S.D.N.Y. 1975).

206. Act of July 5, 1966, Pub. L. No. 89-495, §§ 3-4, 80 Stat. 268-69 (codified in 11 U.S.C. § 107(c)(1)(A), (B), (C) (1976)). The general recognition of statutory liens in bankruptcy was retained in the new § 67(b). *See* 11 U.S.C. § 107(b) (1976).

207. *See In re* Giltex, Inc., 17 U.C.C. Rep. Serv. 887, 892-95 (S.D.N.Y. 1975); *In re* Wetson's Corp., 17 U.C.C. Rep. Serv. 423, 427-29 (S.D.N.Y. 1975); *In re* Good Deal Super Mkts. Inc., 384 F. Supp. 887, 889 (D.N.J. 1974).

tions 2-507(2) and 2-511(3).

There are problems with this line of reasoning, however. First, it by no means enjoys unanimous support, and has been rejected by the three circuit courts considering the question.[208] Second, since the common-law analogues of sections 2-702(2), 2-507(2), and 2-511(3) existed before the post-1938 developments which the 1966 amendments addressed, these sections do not seem to be the evils at which those amendments were directed.[209] Supporting this contention is the fact that the legislative history of the 1966 amendments is devoid of reference to section 2-702(2), and seems not to refer to sections 2-507(2) and 2-511(3).[210] However, one of the relevant Senate Reports stated that section 67(c)(1)(B)

> strikes at a lien which is so tenuous that it can be defeated by transfer to a bona fide purchaser. The holders of such liens have reason to know that their security is extremely vulnerable. It would seem that if, apart from bankruptcy, a lien is not good against a bona fide purchaser, then it should not he valid against the trustee.[211]

While this language is of course limited to "liens," it does suggest that any sort of seller interest which is subordinate to a good faith

---

208. *In re* PFA Farmers Mkt. Ass'n., 583 F.2d 992, 1000-03 (8th Cir. 1978); *In re* Federal's, Inc., 553 F.2d 509, 516-17 (6th Cir. 1977); *In re* Telemart Enterprises, Inc., 524 F.2d 761, 763-64 (9th Cir. 1975).

209. *See In re* Telemart Enterprises, Inc., 524 F.2d 761, 764 (9th Cir. 1975):

> Section 67c is thus a remedial trimming-back of the special exemption conferred on statutory liens by section 67b. It was not intended to serve as a new tool by which the trustee could cut down provisions of state law obviously not entitled to the henefits of section 67b.

The court in *In re* PFA Farmers Mkt. Ass'n., 583 F.2d 992, 1002-03 (8th Cir. 1978), stated as follows:

> Section 2-702 is not an attempt to elevate a group of creditors that have historically found themselves in the general distribution of a bankrupt's estate. It is the exclusive substitute for the long respected right to reclaim. Viewed realistically, it is not more objectionable to bankruptcy policy than its pre-Code antecedent . . . . [W]e think it likely that Congress continues to prefer the equities of sellers under § 2-702(2) to those of general creditors for much the same reasons that it permitted a seller to reclaim under pre-Code law.

210. This is at least true of the Senate Reports accompanying that legislation. *See* S. REP. No. 999, 89th Cong., 2d Sess. (1966); S. REP. No. 1159, 89th Cong., 2d Sess. (1966), *reprinted in* [1966] U.S. CODE CONG. & AD. NEWS 2442-68. In *In re* Federal's, Inc., 553 F.2d 509, 516-17 (6th Cir. 1977), the court said:

> We conclude that the right of reclamation under § 2-702(2) is not the kind of lien which Congress intended to invalidate by § 67c(1)(A). We note the total lack of reference to § 2-702 in the legislative history of the 1966 amendments. So extensive a provision of state law would hardly escape notice if it were one of the legitimate targets of the amendment. We attribute this absence of reference not to oversight, but to the more likely explanation that the Congress viewed the Code provision as did its authors: a basic updating of the equitable remedies of rescission.

211. S. REP. No. 1159, 89th Cong. 2d Sess. *reprinted in* [1966] U.S. CODE CONG. & AD. NEWS 2456, 2461.

purchaser's rights might be invalidated by section 67(c). This must, however, be read in its context—section 67(c)'s enumeration of exceptions to section 67(b)'s general recognition of statutory liens. Thus, if sections 2-702(2), 2-507(2), and 2-511(3) are not deemed "statutory liens," this language should be of no consequence. The same Senate Report also suggests that the 1966 amendments were aimed in part at "liens creating a noncontingent property interest in a specific asset."[212] While the reclaiming seller's interest is certainly "in a specific asset," it would clearly seem to be "contingent" upon factors such as the buyer's failure to pay, the ten day limitation or other waiver requirements, and so forth.[213]

To conclude, the status of sections 2-702(2), 2-507(2), and 2-511(3) as "statutory liens" invalidated in bankruptcy by sections 67(c)(1)(A) or 67(c)(1)(B) of the Bankruptcy Act is at best uncertain. Given the history and the common-law antecedents of these Code provisions, however, it is highly doubtful whether they can be considered "solely statutory," or as "liens," or as the sort of state-created rights intended to be affected by the 1966 amendments to section 67 of the Bankruptcy Act. In fact, it is unclear whether section 67 of the Act is directed to such Code reclamation rights at all. In the 2-702(2) context, characterization of the section as creating a statutory lien often appears to be little more than a referee-inspired contrivance for avoiding the pro-seller implications of *In re Kravitz*.[214] Finally, as has been mentioned, the most authoritative precedent on this question flatly rejects the notion that section 2-702(2) should be considered a statutory lien subject to section 67. There seems to be no reason to treat the Code cash seller differently.

C. *Section 60*

Section 60 of the Bankruptcy Act is intended to invalidate certain "preferential" transfers from the debtor to favored creditors before the date of bankruptcy.[215] For our purposes, its key provision is section 60(a)(1), which defines a "preference" as

---

212. *Id.* at 2457.

213. *See* Sebert, *supra* note 2, at 224-31.

214. *See* notes 145-74 *supra* and accompanying text.

215. One author has stated:

> Early attacks upon the Bankruptcy Act of 1898 were soundly repulsed on the floor of Congress by harking back to the evils of grab-law which had led to the almost ceaseless search for a satisfactory Bankruptcy Act during the two decades preceding 1898. Besides the evils of the disturbance of business due to the race of diligence with its accompanying midnight attachments and all the other paraphernalia of the race, Congress was reminded of the chilling effect upon credit of the practice of insolvents transferring their assets to friends and relatives.

See J. MacLachlan, Handbook of the Law of Bankruptcy 284 (1956).

> a transfer, as defined in this title, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this title, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class.[216]

Under section 60(b), a preference can "be avoided by the trustee if the creditor receiving it or to be benefited thereby . . . . has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent."[217]

Although pre-bankruptcy repossessions by cash sellers and defrauded credit sellers were not regarded as preferential before the advent of the Code,[218] there have been only two U.C.C. cases directly dealing with these questions.[219] Given this scarcity of authority, it is necessary to consider the elements of a voidable preference in an attempt to ascertain whether these U.C.C. reclamation rights might be so regarded. Some of these elements—such as the fact of a "transfer,"[220] the four month time period, and the effect of giving the creditor a greater percentage of his debt than other creditors of the same class[221]—should not pose major problems for such an effort.

---

216. 11 U.S.C. § 96(a)(1) (1976) (no longer in force). *See also* 3 COLLIER, *supra* note 2, ¶ 60.02, at 758-61.

217. 11 U.S.C. § 96(b) (1976) (no longer in force).

218. For the case of the defrauded credit seller see note 36 *supra* and accompanying text. However, the *nondefrauded* credit seller seems to have been unable to recover. *See id.* No case seems to deal clearly with the competing rights of a pre-Code cash seller and a trustee proceeding under § 60. There is little doubt, however, regarding the cash seller's general ability to defeat the trustee. *See* note 37 *supra* and accompanying text. Also, the seller was usually able to prevail in consignment or bailment cases involving a similar retention of title by the seller. *See* Kemp-Booth Co. v. Calvin, 84 F.2d 377, 380-81 (9th Cir. 1936); *In re* Wright-Dana Hardware Co., 205 F. 335 (N.D.N.Y. 1913), *aff'd,* 211 F. 908 (2d Cir. 1914). *See also* notes 232, 234, 239 *infra* and accompanying text.

219. *See In re* PFA Farmers Mkt. Ass'n., 583 F.2d 992, 1003 (8th Cir. 1978) (concluding that a § 2-702 reclamation was not a voidable preference under § 60). However, this case clearly involved a post-bankruptcy reclamation petition. *See id.* at 993-94; Peck v. Augustin, 279 N.W.2d 297, 400-01 (Neb. 1979) (cash seller victorious). The only other § 2-702 case mentioning § 60 is *In re* Telemart Enterprises, Inc., 524 F.2d 761 (9th Cir. 1975). *See* note 237 *infra.* This case, however, involved a trustee proceeding under Bankruptcy Act §§ 64 and 67(c). The only cases mentioning § 60 in the Code cash sale context are *In re* Colacci's of America, Inc., 490 F.2d 1118 (10th Cir. 1974) and *In re* Helms Veneer Corp., 287 F. Supp. 840 (W.D. Va. 1968) (which was not clearly a § 60 case), but neither addressed the clash between § 60 and these Code sections.

220. The Bankruptcy Act definition of the term "transfer," *see* 11 U.S.C. § 1(30) (1976), easily encompasses the physical repossession of goods. In addition, the seller might be deemed to have repossessed the goods even where he merely made a demand for them. *See In re* Bel Air Carpets, Inc., 452 F.2d 1210, 1211 (9th Cir. 1971).

221. Here, since general creditors rarely realize their full claim in bankruptcy, a seller who manages physical repossession of goods prior to bankruptcy would almost always obtain a greater percentage of his claim than an otherwise-similarly-situated creditor who failed to repossess.

Four others, however, deserve more discussion. First, section 60(b) requires that the creditor have reasonable cause to believe the debtor to be insolvent when he repossesses.[222] Since the 2-702(2) reclamation right is premised on the seller's discovery of the buyer's insolvency, this requirement should not give the trustee any difficulty when he confronts a credit seller.[223] This conclusion is somewhat less certain in the case of the Code cash seller,[224] however, because of the range of factors relevant to resolution of the "reasonable cause" question.[225] In particular, neither a simple seizure of the goods[226] nor the receipt of a bad check[227]—the two factors common to almost all cash sale repossessions—is regarded as necessarily dispositive on this point. Of course, in the typical cash sale repossession case both these factors are present in such a fashion as to suggest strongly the seller's knowledge that all was not well with the buyer financially, since the seller ordinarily would not repossess merely upon learning that the check has been dishonored. As a result, it is likely that only a few Code cash sellers will be able to escape the trustee by arguing the absence of reasonable cause to believe in the buyer's insolvency.

Second, it is possible that the reclaiming seller might not qualify as a "creditor" under section 60(a). The Bankruptcy Act defines a "creditor" as "anyone who owns a debt, demand or claim provable in bankruptcy,"[228] a definition within which the Code cash and

222. This requirement should usually be satisfied under either the Code definition of insolvency contained in U.C.C. § 1-201(23) or the Bankruptcy Act definition contained in 11 U.S.C. § 1(19) (1976). However, it is possible that the broader Code definition may create a situation where the buyer is insolvent for U.C.C. purposes, but not for bankruptcy purposes. *But see* 4 COLLIER, *supra* note 2, ¶ 67.281 [2.1], at 419-20, where it is suggested that the state law definition of insolvency should apply in case of a discrepancy.

223. It should be noted, however, that the § 60(b) test is objective (reasonable cause to believe) and the § 2-702(2) test is subjective (actual discovery by the seller).

224. If the Code cash sale reclamation right is based on § 2-702(2), *see* notes 76-78 *supra* and accompanying text, this difference should disappear; this Article has rejected that view of the Code cash sale reclamation right. *See* notes 89-93 *supra* and accompanying text.

225. *See generally* 3 COLLIER, *supra* note 2, ¶ 60.52-.56.

226. *Compare* Brown v. Tru-lite, Inc., 398 F. Supp. 800, 804-05 (W.D. La. 1975) (seizure of goods by itself does not necessarily create finding of reasonable cause or a duty to investigate; each case must be considered on own facts) *with* Bossak & Co. v. Coxe, 285 F. 147 (5th Cir. 1922) (recovery of goods then worth 50% of their sale price sufficient to establish reasonable cause).

227. *Compare* C. A. Swanson & Sons Poultry Co. v. Wylie, 237 F.2d 16, 18 (9th Cir. 1956) (NSF check one factor among many to be considered) *and* Dinkelspiel v. Weaver, 116 F. Supp. 455, 462-64 (W.D. Ark. 1953) (NSF check not conclusive; must consider other circumstances) *with* Robie v. Myers Equip. Co., 114 F. Supp. 177 (D. Minn. 1953) (dishonored check plus subsequent offer of postdated checks enough to create finding of reasonable cause) *and* Conners v. Bucksport Nat'l Bank, 214 F. 847, 849-50 (D. Me.), *aff'd*, 216 F. 990 (1st Cir. 1914) (bad checks plus other information enough for finding of reasonable cause).

228. 11 U.S.C. § 1(11) (1976).

credit sellers would seem easily to fit. However, there is a substantial line of authority to the effect that one whose property is stolen, misappropriated, converted, or fraudulently obtained is not a "creditor" under 60(a) if he stands on his rights as owner and demands return of the goods without in any way treating the buyer as a debtor.[229] The cases announcing this rule generally seem to involve fraud-like situations, and section 2-702(2), of course, is a direct descendant of the seller's common-law right of rescission for fraud.[230] In fact, some commentators have put considerable emphasis on this common-law antecedency in arguing that section 2-702(2) should not create a voidable preference.[231] The Code cash seller might be treated similarly, since some "bad check" situations can easily be regarded as involving fraud or something quite like it.[232] In the absence of any authority dealing with this argument under the Code, however, it must be regarded as uncertain at best.

Third, both the cash and credit sellers might argue that the repossession did not involve "the property of a debtor." This would be based on the assertion that in each case full title[233] did not pass to the buyer because of his failure to pay or his failure to receive the goods while solvent, respectively. At common law, such an argument would have been almost sure to succeed in both cases.[234] On

---

229. 3 COLLIER, *supra* note 2, ¶ 60.18. One case, citing this section, has applied this reasoning to a cash sale. *See* Peck v. Augustin, 279 N.W.2d 397, 401 (Neb. 1979).

230. *See* notes 43-46 *supra* and accompanying text.

231. *See, e.g.*, R. NORDSTROM, *supra* note 2, at 511; King, *Voidable Preferences*, *supra* note 2, at 939-40; Note, *supra* note 2, at 612.

232. *See* notes 38-39 *supra* and accompanying text. The idea that the reclaiming cash seller was not to be treated as a "creditor" is also suggested by the following:

> The fact should be observed that modern business practice regards checks as cash. Accordingly, the holder of a check given for a cash sale by him does not become a creditor merely by waiting a week or two to cash it, and even if such a check is returned insufficient funds, he may not be treated as a creditor, at least the first time he has the experience with a particular debtor, when there is nothing else to put him on enquiry. But it has been held that *taking property other than the property sold in satisfaction of a bad check* is an election to treat the buyer as a debtor.

J. MACLACHAN, *supra* note 215, at 292 (emphasis added).

While the body of the passage speaks of the "simultaneous" exchange of goods and payment, *see* note 238 *infra* and accompanying text, its last sentence seems to suggest that a repossession of the actual property sold would not be preferential.

233. *See* 3 COLLIER, *supra* note 2, ¶ 60.07, at 791 (stating that the § 60(a) "property of the debtor" requirement is basically the same as the test for the trustee's acquisition of the bankrupt's title under § 70(a), 11 U.S.C. § 110(a) (1976)).

234. This is because in the cash sale the non-paying buyer was regarded as not acquiring title to goods delivered to him, and because in a credit sale characterized by the buyer's fraud, the buyer took only a voidable title which was subject to a retroactive divestment by the seller. *See* notes 6, 21, 29 *supra* and accompanying text. *See also* 4A COLLIER, *supra* note 2, ¶ 70.19[5], at 242-44, which states the general rule that the trustee does not acquire title to the debtor's property under § 70(a), 11 U.S.C. § 110(a) (1976), where the bankrupt buyer obtains goods in a cash sale (including a bad check sale).

the other hand, sections 2-507(2), 2-511(3), and 2-702(2) do not specifically refer to title, and the Code generally deemphasizes the "title" concept.[235] As with the "creditor" concept, it could be argued that Code cash and credit sellers are sufficiently similar in substance to their common-law counterparts to justify the pre-Code result.[236] It may be possible, however, to utilize the Comments to U.C.C. section 2-401 to avoid recourse to common-law analogies and to defeat the reclaiming seller. Comment 1 to section 2-401 states an instance in which considerations of "title" may be relevant: where the "applicability of 'public' regulation depends upon . . . location of 'title' without further definition . . . [i]t is . . . necessary to state . . . when title passes under this Article in case the courts deem any public regulation to incorporate the defined term of the 'private' law." U.C.C. section 2-401(1)-(3) specifies when the time title passes becomes relevant. For example, U.C.C. section 2-401(2) states that title usually passes upon the completion of the seller's performance with respect to the goods. Thus, if the Bankruptcy Act is regarded as the appropriate sort of "public regulation," the passage of title in a 2-702(2), 2-507(2), or 2-511(3) case might be deemed to have taken place at the time of delivery, at least for purposes of section 60. If so, the seller's reclamation of goods would involve a transfer of the property of a debtor. If all the other elements of a preference are met, the reclamation would be a voidable preference under section 60. Again, the absence of case law authority makes this argument somewhat tentative, but it presents a way to avoid resorting to common-law analogies to determine the status of the Code seller.

Finally, there is some question whether a U.C.C. or common-law cash sale reclamation could be regarded as "for or on account of an antecedent debt" under section 60(a). In a sale involving the extension of credit, either the buyer's payment or the seller's reclamation upon the buyer's failure to pay would clearly be based upon a preexisting debt.[237] In a cash sale, however, the buyer's transfer of

235. *See* U.C.C. § 2-401.

236. *See* notes 230-32 *supra* and accompanying text.

237. This follows from the general nature of a credit transaction, which involves the transfer of title (and, presumably, creation of a debt) at the completion of the contract of sale, thus making the subsequent payment or retransfer of the goods "for or on account of an antecedent debt." *See* note 4 *supra* and accompanying text. For instance, it is generally conceded that any transfer from the buyer to the seller in a nonfraud credit transaction is for or on account of an antecedent debt. *See, e.g., In re* Helms Veneer Corp., 287 F. Supp. 840, 843 (W.D. Va. 1968). However, there is dictum in one § 2-702 case which conflicts with this conclusion:

> [u]nder section 2-702(2) receipt of goods on credit while insolvent is deemed a fraud on the creditor rendering the sale voidable. The sale thus is defective from its inception.

consideration in exchange for the goods sold has traditionally been viewed as essentially simultaneous with the transfer of the goods, and thus as not "for or on account of an antecedent debt."[238] This reasoning does not apply as neatly to the situation in which the seller transfers goods in exchange for the buyer's check, the check is not paid upon presentment, and the seller then reclaims the goods. In that case, there is a considerable lapse of time between the creation of the buyer's obligation and the seller's repossession, and repossession there could easily be regarded as based upon a preexisting debt. This line of reasoning puts the seller in an impossible position, however, since he obviously cannot reclaim the goods at the exact moment the check is dishonored, or at whatever other time the debt is deemed to have arisen.[239] In fact, acceptance of this argument makes the cash sale reclamation right a nullity in the prebankruptcy context,[240] rendering the cash seller indistinguishable from the credit seller. For these reasons, it might be preferable to regard the cash seller's repossession as relating back to the time the right of reclamation arose[241]—that is, the time the debt was created—assuming that the seller makes a due presentment and

---

> Clearly no new security has been given for an antecedent debt; the "lien," if it is conceived as such, attached at the instant the debt was created. Because no transfer is made on account of an antecedent debt, section 60 could never be applicable.

In re Telemart Enterprises, Inc., 524 F.2d 761, 764 (9th Cir. 1975). What this language seems to suggest is that the § 2-702 reclamation right should be regarded as having come into effect at the time of creation of the debt, and that any subsequent repossession should he treated as relating back to that time. *Telemart* involved Bankruptcy Act §§ 64 and 67(c), but much of its reasoning proceeded via § 60.

238. *See* 3 COLLIER, *supra* note 2, ¶¶ 60.19, 60.23, at 847-49, 872-73. It is often said that any extension of credit, no matter how brief, can change a cash sale into a credit sale and render any transfer by the buyer to the seller preferential, *see, e.g., In re* Helms Veneer Corp., 287 F. Supp. 840, 843 (W.D. Va. 1968), but this should not include the situation in which the seller delays for a reasonable time in presenting a check for payment. *See* note 103 *supra* and accompanying text.

239. It should be noted that the argument made here in terms of the U.C.C. cash seller is broad enough to encompass the pre-Code cash seller as well. It is likely, however, that the common-law cash seller would have defeated a trustee proceeding under § 60, *see* note 218 *supra* and accompanying text, but probably on the basis of the trustee's failure to show that the repossession involved the property of the debtor. *See* note 234 *supra* and accompanying text. In the case of the Code cash seller, this title-based argument is probably not applicable. *See* text accompanying note 236 *supra*. Attention is thus forced to the "antecedent debt" issue discussed here.

240. Consider, for instance, the by no means hypothetical situation in which the seller who conveys goods to the buyer on "cash" terms in expectation of immediate payment is not paid, and immediately repossesses the goods. Is the very brief lapse of time between the creation of the "debt" (assuming that this time can be exactly specified) and the repossession to be regarded as making that repossession "for or on account of an antecedent debt" and thus preferential?

241. *See* note 237 *supra*. This argument should apply with even greater force to the cash sale situation, for the reasons discussed above.

then acts swiftly enough to satisfy 2-507(2) "demand" and "waiver" requirements.[242] Under this line of reasoning, if the seller reacts with sufficient speed his reclamation would be treated as occurring at substantially the same time as the creation of the debt, and not "for or on account of an antecedent debt." Again, however, the absence of case authority renders this argument inconclusive. It is apparent, then, that for all the reasons suggested above the prospects of the repossessing seller confronted by section 60 of the Bankruptcy Act obviously are far from certain.[243]

D. *Section 70(e)*

Another possible weapon for the trustee to use against the reclaiming seller is section 70(e) of the Bankruptcy Act.[244] This section, conceivably the most damaging, provides:

> A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this title which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this title, shall be null and void as against the trustee of such debtor.

This language would appear to apply either to a reclamation completed before bankruptcy ("any transfer of an interest of the debtor") or to a demand for reclamation made after the filing ("any obligation incurred by the debtor").[245]

Section 70(e) requires that the trustee locate an *actual* creditor who can avoid the seller's reclamation.[246] It would appear that a general creditor, who by definition does not have an interest in specific property, would not have the power to avoid a reclamation

242. *See* notes 81-88, 103-04 *supra* and accompanying text. One case, stating that there is no transfer on account of an antecedent debt because "the title is voidable," has held for the cash seller on similar facts. Peck v. Augustin, 279 N.W.2d 397, 401 (Neb. 1979).

243. The general uncertainty surrounding the relative rights of the repossessing seller and the trustee who proceeds under § 60 might suggest an anomalous strategy for the unpaid seller: never to attempt reclamation before bankruptcy, but instead to file a postbankruptcy reclamation petition. In that case, the trustee would be required to employ Bankruptcy Act provisions (e.g., §§ 67(c) and 80(c)) relatively less advantageous to him. The anomaly in this strategy is that on this theory the seller who acts less promptly would have greater chances of success. The seller might turn this anomaly to his advantage, by arguing that his rights when he acts promptly to repossess the goods should be no less than when he delays his efforts.

244. 11 U.S.C. § 110(e) (1976). To date, no trustee seems to have employed this section in the context of §§ 2-702, 2-507(2) or 2-511(3). *See* note 257 *infra*.

245. In this context, § 70(e)'s "transfer" language would limit the trustee to attacking prebankruptcy repossessions because they are the only kinds of physical reclamations relevant here. The "any obligation incurred by the debtor" language would not appear to be so limited, and would appear to give the trustee the power to stand in the shoes of an appropriate creditor who could avoid the buyer's obligation to return the goods to the seller.

246. *See* 4B COLLIER, *supra* note 2, ¶ 70.90, at 1029-30.

by the seller. An actual secured party or an actual lien creditor, however, might be more useful to the trustee. In this regard, section 70(e) also requires that the actual creditor have a provable claim. The Article 9 secured party and the lien creditor certainly meet the literal requirements imposed by the Bankruptcy Act for satisfaction of this requirement.[247] Despite this, however, it has been asserted that in order to assume the position of an actual lien creditor[248] or secured party[249] the trustee must himself be able to avoid either party's claim in bankruptcy. If this hurdle is overcome, section 70(e) will subrogate the trustee to the rights of the creditor, and render the debtor's transfer or obligation "null and void against the trustee" if the creditor could defeat the seller. The trustee attempting to stand in place of an actual lien creditor of the debtor will confront problems similar to those faced by the trustee utilizing section 70(c)

---

247. 11 U.S.C. § 103(a) (1976). *See* 4A COLLIER, *supra* note 2, ¶ 70.90, at 1034-35.

248. *See* J. WHITE & R. SUMMERS, *supra* note 2, § 24-8, at 890-91. The trustee would ordinarily be able to defeat the lien creditor under § 67(a) of the Bankruptcy Act, 11 U.S.C. § 110(a) (1976). Section 67(a)(1) grants the trustee the right to avoid liens obtained by attachment, judgment, levy, or other legal or equitable process or proceeding within four months before tbe filing of a petition in bankruptcy if at the time tbe lien was obtained tbe person against wbom it was obtained was insolvent. In addition, under § 67(a)(3) the trustee could then preserve the lien for the benefit of the estate, and thereby gain whatever rights the lien creditor bad.

In states where the lien creditor has rights superior to those of the reclaiming seller, § 67(a) might also be of some use to the trustee. *See* Braucher, *supra* note 2, at 1292. Under its provisions, if an actual creditor of an insolvent buyer obtains an appropriate lien against him subsequent to delivery of the goods and within four months of bankruptcy, the trustee could avoid that lien and preserve it for the benefit of the estate, thereby gaining whatever rights the lien creditor had. In the case of the reclaiming seller, the trustee should prevail over the seller to the extent of the lien.

Section 67(a) should not assist the trustee in states where the seller will defeat the lien creditor, since the lien the trustee avoids and preserves is of no effect against tbe seller under state law. It has also been suggested that § 67(a) may only apply to liens attaching to property to which the trustee succeeds under § 70(a), 11 U.S.C. § 110(a) (1976), which grants the trustee the title of the bankrupt as of the date of bankruptcy. *See* 4 COLLIER, *supra* note 2, ¶ 67.03, at 66.2. If so, and if the seller regains full title to the goods by reclaiming before bankruptcy, then § 67(a) would be of no help to a trustee.

249. Professor Kennedy has argued strenuously that a trustee should not be permitted to use the claim of a secured creditor unless the trustee could himself avoid the secured creditor's claim. Kennedy, *The Trustee in Bankruptcy as a Secured Creditor Under the Uniform Commercial Code*, 65 MICH. L. REV. 1419, 1428-34 (1967). *See also* J. MACLACHLAN, *supra* note 215, at 335-36; J. WHITE & R. SUMMERS, *supra* note 2, § 24-8, at 890-91. This issue has not been resolved by the courts, *see id.*, but appears to be settled by the new Act. *See* notes 342-45 *infra* and accompanying text. Professor Kennedy's argument, if accepted by a court, would help the reclaiming seller if the secured party had perfected his interest, for the trustee usually could not avoid this interest. *See, e.g.*, J. WHITE & R. SUMMERS, *supra* note 2, § 24-1, at 865-66. If, however, the Article 9 security interest were unperfected, the trustee could himself displace it under U.C.C. § 9-301(1)(b) and thereby, even under Professor Kennedy's limitation, defeat the reclaiming seller.

and often will be unable to defeat the seller.[250] A creditor with a perfected Article 9 security interest in after-acquired property could avoid the reclamation, however, because such creditors have been deemed good faith purchasers for value,[251] and because the Code cash and credit sale reclamation rights are subordinate to the rights of a good faith purchaser by section 2-403(1) or section 2-702(3).[252] Thus, if the trustee is allowed to assume the position of an Article 9 secured party, and if he can locate such a party,[253] he should be able to prevail over the reclaiming seller. Moreover, under the much-critized doctrine of *Moore v. Bay,*[254] the trustee is empowered to displace the entire claim of the reclaiming seller, even if the value of the goods sold exceeds the creditor's claim.[255] Thus, while the trustee's ability to assume the position of an actual lien creditor may seldom prove advantageous to him, his power to utilize the rights of an existing Article 9 secured party could be a very potent weapon against the seller,[256] especially in light of *Moore.*

E. Reversion to Common Law

If the trustee proves successful in employing one or more of

---

250. *See* notes 181-85 *supra* and accompanying text. Section 70(e) might be redundant in this case, since § 70(c) would obviate the need for an actual lien creditor. Section 70(c) is of no use, bowever, when tbe seller repossesses before bankruptcy. *See* Mann & Phillips, *The Reclaiming Seller, supra* note 2, at 633-34. Moreover, § 70(e) does not limit the trustee to the position of a lien creditor who obtained his lien on the date of bankruptcy. *See* J. MacLachlan, *supra* note 215, at 329. *See also* note 180 *supra.* Note that, given the usual time period between delivery of tbe goods and either their reclamation or the date of bankruptcy, the probability of an actual creditor attaching or levying is not great.

251. *See* notes 116-22 *supra* and accompanying text.

252. *See* notes 107-15 *supra* and accompanying text.

253. A creditor with an Article 9 security interest in after-acquired property would, of course, suffice. *See* Dugan, *supra* note 2, at 330-34.

254. 284 U.S. 4 (1931). *See* J. MacLachlan, *supra* note 215, at 330-33; Kennedy, *supra* note 249, at 1421. Professor Kennedy notes that the result of *Moore* "contravenes a fundamental attribute of subrogation—that the person subrogated acquires no greater rights than those of the person to whose position he is subrogated." *Id.*

255. Thus, if, for instance, the creditor had a claim of only $100, the trustee could totally avoid a seller's rigbt of reclamation even though the goods sold were worth $10,000.

256. One possible limitation on the trustee's use of an actual secured party, a limitation mentioned in note 249 *supra,* is that a secured party who perfects will ordinarily defeat the trustee. J. White & R. Summers, *supra* note 2, § 24-1, at 865-66. This may negate the trustee's ability to deploy the secured party's rights against the seller. In any event, it may remove any practical incentive for the trustee to contest the seller unless the debt secured is less than the value of tbe goods sold the buyer, in which event the trustee should be able to satisfy the secured party and still retain the balance for the estate. The trustee will, however, defeat a security interest unperfected as of the date of bankruptcy, *id.* § 24-3, and perhaps even a secured party with a "floating lien" on after-acquired property of the debtor. *See id.* § 24-5. In such cases it may be worth the trustee's while to assume the secured party's position in order to recover or retain tbe goods.

these provisions of the Bankruptcy Act, a crucial question arises: can the reclaiming Code seller still avail himself of his pre-Code remedies? Several fairly recent cases[257] have permitted the seller to employ whatever pre-Code remedies he may have had when the 2-702 reclamation right had been invalidated under sections 67(c) and/or 64(a) of the Bankruptcy Act. This recourse to the common law was allowed despite the exclusivity provision of section 2-702(2).[258] Two courts avoided the operation of this subsection by basing their decisions upon equitable considerations:

> Equitable considerations require that I reject the argument that since § 2-702 is by its final sentence, made an exclusive remedy, once it is invalidated by § 67c(1)(A), the seller is left without a remedy. I find the argument specious and the notion abhorrent to a court of equity. Surely § 2-702 must be read together and the last sentence of subsection (2) must be taken to mean that § 2-702 is the exclusive remedy *if* it survives attack by the trustee, and if invalidated by § 67c(1)(A) the seller is not to be deprived of any pre-Code remedy he may have had.[259]

The effect of these cases on other Bankruptcy Act provisions is unclear since the case deal only with the invalidation of section 2-702(2) under sections 67(c), and 64(a).[260] Nor is it clear whether these cases should apply beyond the section 2-702(2) context. There is, however, every reason to extend to the section 2-507(2)/2-511(3) seller the opportunity to use pre-Code remedies in the event his Code reclamation right fails under the Bankruptcy Act. This is especially true given the total absence of any exclusivity provision in both sections.[261] Section 1-103 also should preserve the seller's pre-Code remedies, especially if the Code remedy is invalidated in

---

257. *See In re* Neisner Bros., Inc., 25 U.C.C. Rep. Serv. 157, 162-63 (S.D.N.Y. 1978); *In re* Wetson's Corp., 17 U.C.C. Rep. Serv. 423, 429 (S.D.N.Y. 1975); *In re* Giltex, Inc., 17 U.C.C. Rep. Serv. 887, 895-96 (S.D.N.Y. 1975). In addition, the bankruptcy judge's opinion in In re *Federal's, Inc.* expressly stated that since the effect of section 2-702's conflict with Bankruptcy Act sections 64(a) and 67(c)(1)(A) was to make that section totally inoperative in bankruptcy, the seller's right to reclaim the property had to be determined by reference to pre-Code law. 12 U.C.C. Rep. Serv. 1142, 1153 (E.D. Mich. 1973). On appeal to the District Court, the bankruptcy court decision favoring the receiver was affirmed and the statement that § 2-702 was totally inoperative in bankruptcy was tacitly supported. *In re* Federal's Inc., 402 F. Supp. 1357, 1363 (E.D. Mich. 1975). This decision was reversed by the Sixth Circuit Court of Appeals. *In re* Federal's Inc., 553 F.2d 509 (6th Cir. 1977).

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

259. *In re* Wetson's Corp., 17 U.C.C. Rep. Serv. 423, 429 (S.D.N.Y. 1975). In In re *Giltex, Inc.* the court followed the reasoning contained in this passage. 17 U.C.C. Rep. Serv. 887, 895-896 (S.D.N.Y. 1975). The other cases cited in note 257 *supra* are either unreported, or else failed to discuss this point.

260. To date there has been no judicial decision addressing this issue.

261. This would not be the case, however, under the view that all section 2-702 limitations are grafted onto § 2-507(2)'s reclamation right. *See* notes 76-78 *supra* and accompanying text.

bankruptcy.[262] Unfortunately, the availability of this "end run" around the potential bankruptcy problems faced by section 2-511(3) sellers awaits a more definitive judicial determination.

IV. The Reclaiming Seller and the Bankruptcy Reform Act

The discussion above forms the basis for the principal task of this Article: an examination of the reclaiming seller's rights against the trustee under the Bankruptcy Reform Act. This section will begin by sketching briefly the legislative history of the Reform Act. Then, it will discuss a new Reform Act provision (section 546(c)) that seems to have been intended to resolve the seller-trustee conflict. After concluding that this provision fails to solve some of the problems which existed under prior law, this section will examine the seller's position under the Reform Act successors to Bankruptcy Act sections 70(e), 70(c), 67(c), and 60, respectively. It will conclude with a proposed amendment to section 546(c) which should resolve some of the difficulties revealed by the discussion.

A. *Legislative History of the Bankruptcy Reform Act*[263]

On July 24, 1970, Congress created the Commission on the Bankruptcy Laws of the United States to study and recommend changes in federal bankruptcy legislation.[264] After two years of work, the Commission submitted its Report to Congress on July 30, 1973.[265] Shortly thereafter, bills embodying the Commission's recommendations were introduced in both the House[266] and the Senate.[267] There was little action on these bills until 1975, when they were reintroduced without significant amendment.[268] Parallel bills reflecting the recommendations of the National Conference of Bankruptcy Judges were also introduced at this time.[269] House subcommittee hearings on its bills began in 1975 and extended into

262. This may have been the view taken by the first In re *Federal's, Inc.* decision. *See* 12 U.C.C. Rep. Serv. 1142, 1153 (E.D. Mich. 1973).

263. Summaries of much of this history can be found at 124 Cong. Rec. S14,718-19 (daily ed. Sept. 7, 1978) (remarks of Sen. DeConcini); 123 Cong. Rec. H11,700-01 (daily ed. Oct. 27, 1977) (remarks of Rep. Butler).

264. Pub. L. No. 91-354, 84 Stat. 468 (1970).

265. Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 137, 93d Cong., 1st Sess. (Letter of Transmittal) (1973) [hereinafter cited as Commission Report].

266. H.R. 10,792, 93d Cong., 1st Sess. (1973).

267. S. 2565, 93d Cong., 1st Sess. (1973).

268. *See* H.R. 31, 94th Cong., 1st Sess. (1975); S. 235, 94th Cong., 1st Sess. (1975).

269. *See* H.R. 32, 94th Cong., 1st Sess. (1975); S. 236, 94th Cong., 1st Sess. (1975); H.R. 16643, 94th Cong., 1st Sess. (1975).

1976;[270] the corresponding Senate hearings were completed during 1975.[271] After further committee work—some of it in consultation with the National Conference of Bankruptcy Judges and the National Bankruptcy Conference—revised bills were eventually introduced in the House[272] and Senate[273] in January and October of 1977, respectively. The House passed its version of this legislation on February 1, 1978, while the Senate approved its version on September 7, 1978. After some work in conference committee and House and Senate action to reconcile differences between the two bills, the Bankruptcy Reform Act finally became law on November 6, 1978.[274] The portions of the Act relevant to this Article took effect October 1, 1979.[275]

B. *Section 546(c)*

For the purposes of this Article, the most significant provision of the Bankruptcy Reform Act is its new section 546(c), which had no antecedents in the Bankruptcy Act. Section 546(c) states that

> [t]he rights and powers of the trustee under sections 544(a), 545, 547, and 549 of this title are subject to any statutory right or common-law right of a seller, in the ordinary course of such seller's business, of goods to the debtor to reclaim such goods if the debtor has received such goods while insolvent, but—
>
> (1) such a seller may not reclaim any such goods unless such seller demands in writing reclamation of such goods before ten days after receipt of such goods by the debtor; and
> (2) the court may deny reclamation to a seller with such a right of reclamation that has made such a demand only if court—
>
> (A) grants the claim of such a seller priority as an administrative expense; or
> (B) secures such claim by a lien.[276]

270. *Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32 before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong., 1st & 2d Sess. (1975-76) [hereinafter cited as *1975 House Hearings*].

271. *Hearings on S. 235 and S. 236 Before the Subcomm. on the Improvement of Judicial Machinery of the Comm. on the Judiciary*, 94th Cong., 1st Sess. (1975) [hereinafter cited as *1975 Senate Hearings*].

272. *See* H.R. 6, 95th Cong., 1st Sess. (1977). This was followed by H.R. 7330, 95th Cong., 1st Sess. (1971) and H.R. 8200, 95th Cong., 1st Sess. (1977). H.R. 8200 was the bill eventually passed by the House.

273. *See* S. 2266, 95th Cong., 1st Sess. (1977).

274. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified at 11 U.S.C.A. § 101 to 151326 (West Supp. 1979)).

275. *Id.* § 402.

276. 11 U.S.C.A. § 541(c) (West Supp. 1979). Also of some interest here is 11 U.S.C.A. § 546(b) (West Supp. 1979), which states:

> The rights and powers of the trustee under section 544, 545, or 549 of this title are subject to any generally applicable law that permits perfection of an interest in property

This subsection negates the powers of a trustee proceeding under the successors to Bankruptcy Act sections 60, 67(c), and 70(c), but does not affect the trustee's powers under the revised version of section 70(e).[277] It also requires for its operation a *written* demand by the seller of goods within ten days of their receipt by the buyer-debtor.[278] It does not, however, answer a number of questions which inevitably will arise concerning the adequacy of the written demand.[279] Furthermore, section 546(c) applies only to sales in the

---

to be effective against an entity that acquires rights in such property before the date of such perfection. If such law requires seizure of such property or commencement of an action to accomplish such perfection, and such property has not been seized or such action has not been commenced before the date of the filing of the petition, such interest in such property shall be perfected by notice within the time fixed by such law for such seizure or commencement.

Section 546(c) works only to negate whatever powers the trustee might have had under the successors to Bankruptcy Act §§ 67(c), 70(c) and 70(e), and does not affect the trustee's power under the successor to § 60. *See* notes 322, 348, 358, 370-71 *infra* and accompanying text. This provision came upon the scene relatively late in the legislative history of the new Bankruptcy Act. Nothing like it was present in the COMMISSION REPORT, *supra* note 265, and the early bankruptcy reform legislation did not contain such a provision. *See, e.g.,* H.R. 31 & 32, 94th Cong., 1st Sess. (1975); S. 235 & 236, 94th Cong., 1st Sess. (1975). In the House, it made its first appearance in an Appendix to the 1975-76 hearings as part of an amended Bankruptcy Act of 1975 prepared by the National Bankruptcy Conference. *See 1975 House Hearings, supra* note 270, Appendix 2, at 355. *See also* Weintraub & Edelman, *supra* note 2, at 1165. Here, it took the form of a generalized credit seller's right to recover against the trustee on the basis of common-law fraud, a right which was supposed to negate § 2-702(2) in bankruptcy proceedings. In the Senate, it first appeared in a 1976 "Staff Report" by the relevant Senate subcommittee considering the two Senate bills of concern at that time. *See id.,* at 1165-66; *1975 Senate Hearings, supra* note 271, Part 3, at 120-27 (containing a letter from Professor John Minahan of the Vermont Law School to Senator Roman Hruska with a proposed provision almost identical to that of the Staff Report, a response by Edelman and Weintraub, and a response to this by Minahan). The first Senate version differed considerably from that of the House, substantially tracking § 2-702(2)'s language and providing for a ten day written demand. The new bills introduced in the House and the Senate in 1977 basically combined these original House and Senate versions by providing for seller recovery on either a § 2-702(2) or a common-law basis. *See, e.g.,* S. 2266, 95th Cong., 1st Sess. § 546(b) (1977). The language contained in such bills was much like that of the present section 546(c), and they proceeded through the rest of the legislative process with only relatively minor changes.

277. *See* notes 324, 340, 349 & 361 *infra* and accompanying text. The subsection also affects the trustee who proceeds under § 549 of the New Act, which involves postpetition transactions. Earlier versions of this provision included the successor to § 70(e). *See, e.g.,* S. 2266, 95th Cong., 1st Sess. § 546 (b) (1977); H.R. 8200, 95th Cong., 1st Sess. § 546(b) (1977).

278. This parallels U.C.C. § 2-702(2)'s ten day demand requirement, *see* notes 49-52 *supra* and accompanying text, although here the demand must be written. It does *not* incorporate § 2-702(2)'s "written misrepresentation" exception to this requirement. *See* notes 56-62 & 81-84 *supra* and accompanying text. Also, this provision does not mesh with the "follow-up" requirements imposed upon the cash and credit sellers. *See* notes 53-55 & 81-84 *supra* and accompanying text. In addition, it is worth noting that some of the earlier versions of this provision did not incorporate the requirement of a written demand. *See, e.g.,* S. 2266, 95th Cong., 1st Sess. § 546(b)(1) (1977); H.R. 8200, 95th Cong., 1st Sess., § 546(b)(1) (1977).

279. For instance, there may be problems as to what constitutes a sufficient "writing." In cases where the demand is dispatched before the end of the ten day period but received

ordinary course of the seller's business. This requirement should, at the very minimum, exclude from its coverage bulk sales,[280] sales by a non-merchant,[281] and sales by a merchant which are unrelated to his basic line of business or apparent expertise. Finally, the concluding subparagraph of section 546(c) provides the trustee with the option of protecting a seller who complies with the main body of the provision by allowing the seller's claim priority as an administrative expense or by securing his claim as a lien, rather than by allowing outright recovery of the goods.[282]

Although courts interpreting section 546(c) will face problems of a more or less "procedural" nature such as specification of the "written demand" requirement, the greater difficulty will be encountered in determining the exact reclamation rights in the seller that the section incorporates and protects against the trustee.[283] Section 546(c) clearly applies to the reclaiming credit seller proceeding under U.C.C. section 2-702(2), with the omissions mentioned above.[284] As both the House and Senate Reports to the Bankruptcy

---

after this time has run, courts will have to decide whether the demand should be regarded as effective upon dispatch or upon receipt. *See also* Weintraub & Edelman, *supra* note 2, at 1171-72.

280. *See* U.C.C. § 6-102(1).

281. Although U.C.C. § 2-104(1)'s definition of the term "merchant" does not use the term "ordinary course of business," its "deals in goods of the kind" language fairly clearly includes a seller with a more or less regular line of business in certain sorts of goods. Also, U.C.C. § 1-201(9)'s definition of "Buyer in ordinary course of business" envisions purchases from "a person in the business of selling goods of that kind." And a nonmerchant who fails to "deal in goods of the kind" presumably will lack an "ordinary course of business."

282. *See* S. REP. No. 989, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 5787, [hereinafter cited as 1978 SENATE REPORT]; H. REP. No. 595, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 5963, [hereinafter cited as 1978 HOUSE REPORT]; 124 CONG. REC. S17,413-14 (daily ed. Oct. 5, 1978) (remarks of Sen. DeConcini); 124 CONG. REC. H11,097 (daily ed. Sept. 28, 1978) (remarks of Rep. Edwards); 1979 COLLIER PAMPHLET EDITION, BANKRUPTCY CODE, Part 3, at 279 [hereinafter cited as 1979 COLLIER PAMPHLET]. *See also 1975 Senate Hearings, supra* note 271, Part 3, at 126 (letter from Edelman & Weintraub); note 174 *supra.*

283. Throughout this section, § 546(c) is interpreted to incorporate statutory or common-law rights which are *themselves* contingent on the receipt of goods while insolvent. The section could, however, be read as including *any* statutory right or common-law right of a seller, in the ordinary course of such seller's business, of goods to the debtor to reclaim such goods, such rights being effective against the trustee only if the debtor has received such goods while insolvent. In the first case, insolvency assists in defining the right incorporated; in the second, it acts as a bankruptcy-specific limitation on the reach of rights more generally defined. Practically speaking, this distinction is most likely to be significant with respect to the cash sale, which might be excluded totally from section 546(c)'s coverage under the first reading, *see* notes 292-304 *infra* and accompanying text, but would be incorporated and then limited by the actual existence or nonexistence of insolvency under the second interpretation. The first interpretation of section 546(c) is the more plausible given the obvious intent of its drafters to parallel the language of U.C.C. § 2-702(2), which is a reclamation right premised on the buyer's receipt of goods while insolvent. *See* text accompanying note 285 *infra.*

284. The principal modification is the "writing" requirement that attached to the ten

Reform Act put it: "[t]he purpose of the provision is to recognize, in part, the validity of section 2-702 of the Uniform Commercial Code, which has generated much litigation, confusion, and divergent decisions in different circuits."[285] Section 546(c) also allows the reclaiming seller a common-law right of recovery in bankruptcy despite the exclusivity of U.C.C. section 2-702(2).[286] The legislative history of this section[287] tends to suggest that recovery based on pre-Code fraud rules was intended.[288] Section 546(c) also speaks of a common-law right operative "if the debtor has received such goods while insolvent." As was noted above[289] fraud recovery was possible under pre-Code law even when the buyer was not insolvent. Therefore certain types of common-law fraud seem to be excluded from section 546(c). Moreover, state-by-state variations in fraud rules[290] and the uncertainty surrounding this whole area[291] may confront courts applying the new section with significant difficulties.

The difficulties presented by section 546(c)'s apparently incomplete adoption of pre-Code fraud law, however, pale in significance when compared with another "incorporative" problem: whether the section should be regarded as including the Code and common-law[292] *cash* sale recovery rights. Section 546(c) states that the rights and powers of the trustee are subject to *"any* statutory right or common law right of a *seller"*.[293] Moreover, some of the legislative history suggests that the cash seller should be included. Two prominent Congressional sponsors of the Bankruptcy Reform Act have stated that it "applies to receipt of goods on credit as well as by cash

day demand. Also, it is possible that some sales not in the ordinary course of the seller's business may be covered by § 2-702, but not by § 546(c). In addition, the Code definition of insolvency seems broader than that of the Bankruptcy Reform Act. *Compare* U.C.C. § 1-201(23) *with* 11 U.S.C.A. § 101(26) (West Supp. 1979). Thus, reclaimants meeting the 2-702(2) tests might not qualify under the section 546(c) test.

285. 1978 SENATE REPORT, *supra* note 282 at 88-89; 1978 HOUSE REPORT, *supra* note 282, at 544. *See also* 1979 COLLIER PAMPHLET, *supra* note 282, at 278-79.

286. *See* note 47 *supra* and accompanying text. Federal law would control here on supremacy grounds.

287. *See 1975 House Hearings, supra* note 270, app. 2, at 355; *1975 Senate Hearings, supra* note 271, Part 3, at 120-27; Weintraub & Edelman, *supra* note 2. *See also* note 284 *supra.*

288. *See generally* notes 6-19 *supra* and accompanying text.

289. *See* notes 12 & 19 *supra* and accompanying text.

290. *See* note 10 *supra* and accompanying text.

291. *See* Weintraub & Edelman, *supra* note 2, at 1166-70.

292. As in the case of common-law fraud, *see* note 286 *supra,* it might be difficult to conjure up situations in which the availability of the common-law cash sale reclamation right would be of much use to the cash seller.

293. Section 546(c)'s failure fully to track the language of § 2-702(2) by including the words "on credit" might suggest that it is intended to include the casb seller.

sales."[294] The relevant House and Senate Reports, however, do not mention the cash seller, and focus instead on section 2-702(2) and the bankruptcy problems it has presented.[295] In view of the cash seller's lower visibility throughout the enactment of the Bankruptcy Reform Act,[296] this omission might be taken as indicating an intent that section 546(c) focus on the most immediately pressing problem, the fate of the 2-702 seller in bankruptcy. Even more troubling is the fact that section 546(c) refers to recovery rights based on the buyer's receipt of goods while insolvent.[297] It will be recalled that neither sections 2-507(2) and 2-511(3)[298] nor the common-law cash sale recovery right[299] depend upon insolvency for their application. Despite this uncertainty, the better view is to read section 546(c) as including both the Code and the common-law cash sale reclamation rights. This conclusion is impelled both by the explicit references to the cash seller in some of the legislative history to section 546(c), and by one of the policy bases underlying the distinction between cash sales and credit sales at common law and under the Code. The somewhat greater protection vis-á-vis third parties afforded the cash seller in both instances[300] reflects the idea that the seller bargaining on "cash" terms is attempting to obtain, and thus deserves to receive, greater protection than is the seller extending credit.[301] If that is so, to include the credit seller under section 546(c) while rejecting the cash seller, who is entitled to somewhat greater protection, is anomalous absent a clear statement that the cash seller is *not* to be included. It should be noted, finally, that even if the cash

294. 124 CONG. REC. § 17,413-14 (daily ed. Oct. 5, 1978) (remarks of Sen. DeConcini); 124 CONG. REC. H11,097 (daily ed. Sept. 28, 1978) (remarks of Rep. Edwards). Also, Professor Minahan's 1976 letter to Senator Hruska proposing an early draft of what eventually became § 546(c), *see* note 276 *supra,* clearly envisioned its applicability to cash sales under the U.C.C. *See 1975 Senate Hearings, supra* note 271, Part 3, at 120-21.

295. *See* text accompanying note 285 *supra.*

296. Under the Code, cash sale cases have been less numerous than credit sale cases. Also, commentary on the U.C.C. cash seller's rights against third parties, especially the trustee, has been less extensive than that regarding the § 2-702 situation. Cash sale commentary has also tended to be of more recent vintage than credit sale commentary.

297. *But see* note 283 *supra.*

298. The preferred view is that the Code cash sale reclamation right is inherent to §§ 2-507(2) and 2-511(3). *See* notes 89-93 *supra* and accompanying text. If it is assumed, however, that § 2-507(2) depends upon § 2-702(2) for a reclamation right, this problem might disappear. *See* notes 76-78 *supra* and accompanying text. This argument cannot be used in the case of § 2-511(3), which has no express links to § 2-702. *See* notes 89 & 98 *supra* and accompanying text.

299. This right of reclamation was based on the fact that title to goods never passed to the nonpaying buyer, and that he therefore could not transfer title to the trustee. *See* notes 21-23 & 28-29 *supra* and accompanying text.

300. *See generally* notes 31-39 *supra* and accompanying text.

301. *See* L. VOLD, *supra* note 4, § 30, at 172-78.

seller is regarded protected by section 546(c),[302] the provision's ten day written demand requirement will render the recovery right ineffective in many "bad check" cases.[303] Unfortunately, such cases comprise the vast majority of cash sale decisions.[304]

The most vexing question concerning section 546(c), however, is its effect on the seller who does not comply with its requirements or otherwise is not included within its coverage, but who still may be able to defeat a trustee proceeding under the range of Bankruptcy Act provisions available to him. For instance, will a seller who has made only an oral demand within the ten day period after the debtor-buyer's receipt of the goods (thus satisfying section 2-702(2) but not section 546(c)) consequently be precluded from any chance of recovery against the trustee, or will his 2-702(2) right be tested under the successors to sections 60, 67(c), and 70(c) much as under the prior Act? Or, to take an even more likely case, will the seller utilizing 2-702(2)'s "written misrepresentation" exception to the ten day demand requirement[305] be similarly precluded from reclaiming?[306] Section 546(c) can be read so as to give only the reclaiming seller who complies with its requirements the power to defeat the trustee outright. The seller who fails to do so could not

---

302. Also, the seller's U.C.C. right of stoppage in transit could come within the purview of § 546(c), although this is on balance fairly unlikely. This right applies where the seller discovers the buyer to be insolvent. *See* U.C.C. §§ 2-702(1), 2-705(1). However, it is arguably not so much a right to "reclaim" goods (or at least to reclaim them from the debtor) as the sort of right which is intended to make such a reclamation unnecessary. Also, so far as we can discern, the scanty legislative history to § 546(c) is devoid of references to the right of stoppage in transit. In addition, the § 2-705 remedy might be classified as a security interest. *See* U.C.C. § 9-113, Comment 1; Mann & Phillips, *The Reclaiming Seller, supra* note 2, at 648-49. If so, it presumably should not be included within § 546(c), which hardly seems to cover security devices or liens of any sort. Section 546(c)'s inapplicability, however, to the right of stoppage might not be especially damaging to the seller utilizing it, since his ability to resist the trustee seems good in any event. *See* Mann & Phillips, *The Reclaiming Seller, supra* note 2, at 647-49.

303. *See* text accompanying note 94 *supra*.

304. *See* note 71 *supra* and accompanying text.

305. *See* notes 56-62 *supra* and accompanying text.

306. This problem could also arise if the seller makes a written demand inadequate for § 546(c) purposes, but which satisfies § 2-702(2) or § 2-507(2). Moreover, it could be presented by cash or credit sales not in the ordinary course of business, *see* notes 280, 281, & 284 *supra* and accompanying text, or even by credit sales where the buyer is insolvent in the Code sense but not in the bankruptcy sense, *see* note 284 *supra*. Finally, § 546(c) might be inapplicable if the seller complies procedurally but proceeds under a theory of common-law fraud not covered by § 546(c). *See* text accompanying notes 289-96 *supra*. Such a seller, if not tacitly foreclosed by § 546(c), still might be able to defeat the trustee proceeding under the successors to §§ 60, 67(c), and 70(c). *See* note 36 *supra* and accompanying text. However, since the exclusivity provision of § 2-702(2) probably would apply to this case, the seller would be required to make the "reversion" argument set out above. *See* notes 257-62 *supra* and accompanying text; note 321 *infra*.

subordinate the trustee's rights to his own. That is, on this view, section 546(c) would state that the trustee's rights under the listed bankruptcy provisions are subject to the rights of a reclaiming seller who (for instance) makes a demand in writing within ten days, but, by implication, that the trustee's rights under these sections are *not* subordinate to the rights of a seller who does *not* do so. Underlying this view of section 546(c) is the idea that it is intended to resolve the dispute between the Code seller and the trustee in bankruptcy by explicitly stating the conditions under which such a seller can defeat the trustee, and by implicitly providing that only under those conditions can the seller prevail. This argument is bolstered by the statement that the purpose of section 546(c) "is to recognize, *in part,* the validity of section 2-702 of the Uniform Commercial Code, which has generated much litigation, confusion and divergent decisions in different circuits."[307] This reasoning is also supported by the fact that the successors to Bankruptcy Act sections 60, 67(c), and 70(c) have not been amended so as to resolve the problems discussed above.[308] This suggests that only section 546(c) is to govern the rights of the reclaiming seller when the trustee does not proceed under the successor to section 70(e).

Although this interpretation of section 546(c) cannot be dismissed out of hand, it fails to persuade for several reasons. First, the language of section 546(c) does not directly support such a restrictive reading of the seller's rights. The section does not expressly state the effect of a failure to comply with its requirements or state that consideration of sections 544(a), 545, 547, and 549 is precluded in cases where the seller fails to comply. Second, the one bit of legislative history precisely directed to this point suggests that section 546(c) should not prevent the noncomplying seller from contesting the trustee under other bankruptcy provisions.[309] Third, the no-

307. 1978 SENATE REPORT, *supra* note 282, at 88-89 (emphasis added). This quotation was previously used to suggest that § 546(c) did not include cash sale reclamation rights. If this is so, cash sellers would not seem to be confronted with the "exclusion" problem discussed here, unless § 546(c)'s failure to include the cash seller could somehow be taken as a tacit declaration that only defrauded credit sellers and § 2-702 sellers can recover against the trustee, a contention difficult to accept given the cash seller's longstanding ability to do so. In general it is difficult to employ this textual language simultaneously to support contentions that: (1) the cash seller is not to be included within § 546(c); and (2) the cash seller's rights cannot be tested under the successors to §§ 60, 67(c), and 70(c).

308. *See generally* notes 341-82 *infra* and accompanying text.

309. Professor Minahan's letter to Senator Hruska, *see* note 284 *supra,* was followed by another on November 8, 1976 to Harry D. Dixon, Jr., Minority Counsel, Subcommittee on Improvement in Judicial Machinery, U.S. Senate. In part, this letter referred to certain unreported comments on Minahan's earlier proposal by Professor Kennedy:

I read Professor Kennedy's remarks with interest. His construction of the section is

tion that seller recovery rights not covered by section 546(c) are ineffective in bankruptcy leads to absurd conclusions if pushed very far: recovery would be denied to cash sellers (if deemed not within 546(c)), sellers exercising a right of stoppage in transit, or possibly even sellers with a perfected Article 9 security interest in goods sold. Finally, reading section 546(c) as precluding further efforts by non-complying sellers leads to absurd conclusions if the section is read in conjunction with other sections of the Bankruptcy Reform Act—that is, if the Act is to be read as a coherent whole. If section 546(c) is "exclusive" in the sense indicated, the seller who fails to comply with its requirements will be subject to the rights of a trustee under the successors to sections 60, 67(c), and 70(c).[310] These "rights" are the ability to avoid certain "preferential" transfers, to invalidate certain statutory liens, and to assume the status of an "ideal lien creditor" as defined by state law.[311] Formerly, the seller's recovery against a trustee proceeding under these sections depended on whether the seller rights asserted could be characterized as voidable preferences, or statutory liens, or whether such rights would be subject to those of a lien creditor. If section 546(c) is read *in pari materia* with the successors to these sections, it must be taken to mean that the seller recovery rights it includes are *not* preferential transfers, statutory liens, or rights defeasible by a lien creditor if the seller complies with its procedural requirements, but *would* be so designated if the seller fails to comply.[312] To take a concrete exam-

entirely consistent with my intentions. You will recall that Professor Kennedy observed that, "It is not clear what the impact of your § 4-407 is on the right of recovery by a seller who relied on a materially false misrepresentation of the buyer's financial condition but who failed to make a written demand within ten days of the debtor's receipt of the property." I intentionally remained silent on that question as I was not prepared to state that such a right to reclaim is always invalid in bankruptcy. It seems to be that this decision should be left to the courts to decide in light of the particular circumstances of the cases. Here the courts have discretion, absent notification within the ten-day period, to declare that the particular reclamation is a statutory lien or that it conflicts with the federal priorities. Section 4-407 merely gives a minimum of ten days worth of protection. Beyond the ten-day period, the courts could go either way.

1975 Senate Hearings, supra note 271, Part 3, at 122 (Letter of Prof. Minahan to Subcomm. Minority Counsel, Nov. 8, 1976).

310. Since § 546(c) does not apply when the trustee proceeds under the successor to § 70(e), *see* note 277 *supra* and accompanying text, the seller failing to comply with § 546(c) but meeting the requirements of § 2-702(2) would have a better chance of recovery in a case under the successor to § 70(e) than in a case in which the trustee proceeds under the successors to §§ 60, 70(c) and 67(c). This seems contrary to § 546(c)'s apparent attempt to give the trustee acting under § 70(e)'s successor a favored position over trustees proceeding under other bankruptcy sections and is one more anomaly in the new statute.

311. *See generally* notes 340-82 *infra* and accompanying text.

312. In the case of the successor to § 70(c), this would involve Bankruptcy Act determination of what was formerly a state law question. *See* notes 177-78 *supra* and accompanying

ple, this reasoning would compel the strange (not to say absurd) conclusion that definition of the 2-702(2) recovery right as a statutory lien depends upon the presence or absence of a written demand.[313]

In light of the above,[314] it is probably best to treat section 546(c) as having nothing to say regarding the definition of seller recovery rights under other bankruptcy sections, and to apply it in accordance with its literal terms. Thus applied, the section should provide the seller with a "nonexclusive safe harbor" against a trustee proceeding under the listed bankruptcy provisions. If section 546(c) is not an implicit attempt to define the operative terms of the bankruptcy sections to which it refers, there seems to be little reason to prevent the fate of the noncomplying seller from being determined in the usual fashion under these provisions.[315] This approach has the additional benefit of greater consistency with the emerging consensus in the federal courts of appeals favoring the 2-702 seller in bankruptcy.[316] Thus viewed, section 546(c)'s limitation on the trustee's previous powers in certain situations should not be seen as a means of aggrandizing those powers in other situations.[317] Section 546(c)

---

text. It also conflicts with the result intended under the new Act. *See* notes 346-49 *infra* and accompanying text.

313. *See, e.g.*, 11 U.S.C.A. §§ 102(2), (38) (West Supp. 1979) (defining the terms "lien" and "statutory lien"). *See also id.* § 547(b) (defining a preferential transfer). In addition, *see* notes 365-76 *infra* and accompanying text. This result would seem especially strange in the case of the common-law fraud recovery right incorporated within § 546(c), which was never confused with a statutory lien, was usually not a voidable preference, and which enabled the seller to defeat the lien creditor in most states. *See* notes 34-36 & 194-95 *supra* and accompanying text.

314. It should be noted that difficulties similar to (though less severe than) those discussed in the preceding paragraph will occur even if § 546(c) is read in a nonrestrictive fashion. Here, § 546(c) would be read as tacitly stating that certain seller recovery rights are *not* voidable preferences, statutory liens, or subject to the rights of an ideal lien creditor where (for example) a written demand has been made, but that these seller rights *may or may not* be so regarded if a written demand is absent, this question being resolved under the appropriate sections of the new Act.

315. Of course, to say that § 546(c) does not attempt to define the key terms of the provisions to which it refers is not necessarily to say that it allows the seller failing to meet its requirements to test his rights under those provisions. The section could possibly be read as utterly agnostic with respect to such definitions, but as still preventing the noncomplying seller from determining his position under them. The distinction between defining the content of another bankruptcy provision and allowing or not allowing the seller to utilize that provision seems fairly tenuous, however.

316. *See* notes 182 & 192 *supra* and accompanying text.

317. It could be asserted, however, that § 546(c) does not necessarily embody this growing consensus toward favoring the § 2-702 seller. In fact, its drafters and sponsors may have misread somewhat the state of the present law. *Compare* note 285 *supra* and accompanying text *with* notes 182 & 192 *supra* and accompanying text. The section is evidently intended to improve the seller's position in some respects, so a diminution of the seller's rights in other

can plausibly be regarded as one manifestation of a growing recognition (or rediscovery)[318] of the seller's right to recover goods in bankruptcy.

Section 546(c) of the Bankruptcy Reform Act is plainly intended to reduce the longstanding uncertainty regarding the relative rights of the seller of goods and the bankruptcy trustee that was brought about by the introduction of the Uniform Commercial Code. While it does clearly give the U.C.C. section 2-702 seller who makes a written demand the ability to defeat the trustee,[319] section 546(c) is not a comprehensive resolution of all possible seller-trustee conflicts and indeed introduces several uncertainties of its own. In fact, given the tendency toward a federal circuit-level consensus favoring the 2-702 seller in bankruptcy, one is almost tempted to suggest that secton 546(c) has left the state of the law in this area less clear than it found it.[320] First, section 546(c) does not apply to section 544(b) of the new Act (the successor to section 70(e)), and, as a result, the trustee may theoretically be able to use this provision to defeat a reclaiming seller despite section 546(c). Second, judicial definition and elaboration of the important "written demand" requirement will be a necessity. Third, section 546(c) does not always clearly specify the seller rights which it is to incorporate and favor. In particular, its applicability to the cash seller and to certain pre-Code fraud situations is confusing, although the ten-day "written demand" requirement will probably prevent recovery in most "bad check" cases. Finally, and most importantly, section 546(c) provides no guidance for the treatment of sellers who fail to meet its requirements, but who nonetheless may be able to defeat the trustee without its assistance. In fact, the section could plausibly be read as precluding such sellers from recovery. In view of all these uncertainties, it is necessary to consider the position of the

---

contexts probably was not intended, except (as in the case of the written demand) where this is clearly stated. *See* note 315 *supra*.

318. *See* notes 36-37 *supra* and accompanying text.

319. This assertion must be qualified by noting that § 546(c) will not protect § 2-702 sellers dealing outside the ordinary course of business or selling to buyers not insolvent in the bankruptcy sense. Such situations, however, probably will be rare.

320. In fairness, § 546(c) does deal more or less clearly with the most commonly litigated situation relevant here—the collision of the § 2-702 seller and the trustee. Moreover, some of the uncertainties noted in this Article are less probable than is the prototype § 2-702 situation. Also, some of § 546(c)'s ambiguities—the written demand requirement is an example—involve matters not easily capable of statutory specification and best left to the courts. But the situation where the seller fails to satisfy § 546(c) written demand requirements while meeting § 2-702(2)'s tests is less improbable, and immediately gives rise to the § 546(c) "exclusivity" problem we have discussed at length.

reclaiming U.C.C. cash and credit sellers[321] under the various provisions which the trustee may be able to bring to bear against them under the Bankruptcy Reform Act. Section 544(b) of the new Act will be considered first, since its successful utilization by the trustee could render section 546(c) irrelevant.[322]

C. *Section 544(b)*

As noted in the preceding subsection,[323] section 546(c)'s limitation on the trustee's powers does not extend to Bankruptcy Reform Act section 544(b),[324] the successor to section 70(e). Thus, it is possible for a trustee acting under section 544(b) to defeat the reclaiming seller even if the seller qualifies for protection under section 546(c). Section 544(b) and its legislative history present a clear resolution of some of the issues concerning section 70(e)'s possible application to the reclaiming seller. The Reform Act's resolution of these questions, however, is such that it is very unlikely that the trustee will be able to employ section 544(b) against the seller.

Section 544(b) provides:

> The trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.[325]

As with section 70(e), this section applies to any transfer or obligation incurred. This language would seem to apply to either a reclamation effected prior to bankruptcy ("any transfer of an interest of the debtor") or a reclamation demand made after bankruptcy proceedings have commenced ("any obligation incurred by the debtor").[326]

---

321. Since § 546(c) is by hypothesis not operative in this situation, common-law remedies should not be relevant due to the Code's usual exclusion of them. *See* U.C.C. §§ 1-103, 2-702(2). But it is possible that the "reversion" argument discussed at notes 258-63 *supra* and accompanying text may still be available to the seller. *See* notes 286, 306 *supra*. It is assumed here that a seller successfully utilizing the reversion argument would be able to recover against the trustee under each section discussed below if he could prove the fraud or misrepresentation. *Cf.* note 36 *supra* and accompanying text.

322. The successor to § 64 of the Bankruptcy Act, 11 U.S.C.A. § 507 (West Supp. 1979), will not be discussed within, since the argument that the seller reclamation right is a state-created priority now seems to have been rejected by the vast weight of authoritative precedent. *See* note 204 *supra*. Also, § 67(a) of the Bankruptcy Act, *see* note 248 *supra*, apparently has been deleted from the new Act and has been partially incorporated within the new § 547. *See* 1979 COLLIER PAMPHLET, *supra* note 282, Part 3, at 292. Section 547, the successor to § 60, will be treated at length below.

323. *See* note 277 *supra* and accompanying text.

324. 11 U.S.C.A. § 544(b) (West Supp. 1979).

325. *Id.*

326. *See* note 245 *supra* and accompanying text.

Section 70(e) was susceptible to the interpretation that the trustee could step into the shoes of *any* actual creditor with a provable claim and exercise that creditor's avoidance rights. One significant unresolved issue under section 70(e) was whether the trustee could claim the rights of a secured creditor.[327] This question is now answered by section 544(b), which confers upon the trustee only the avoidance powers of "a creditor holding an *unsecured* claim." This obviously prevents the trustee from assuming the position of an actual secured party. As the House and Senate Reports to the Bankruptcy Reform Act noted, "Subsection (b) . . . gives the trustee the right of actual unsecured creditors under applicable law to void transfers, . . . and overrules those cases that hold section 70(e) gives the trustee the rights of secured creditors."[328] This of course prevents the trustee from occupying the position of a party who, if existing, would almost certainly defeat the reclaiming seller.[329]

It is still possible that the trustee might be able to assume the rights of an actual lien creditor of the buyer, but it is not clear whether such a creditor could qualify as "unsecured." The Reform Act's definitions of the terms "security agreement" and "security interest"[330] clearly contemplate a consensual interest unlike that attained by the lien creditor, whose right to the goods does not depend upon the buyer's consent.[331] However, section 506 of the new Act, entitled "Determination of Secured Status,"[332] seems to be the provision from which definition of the term "unsecured" should proceed, and this section apparently takes a broader view of what constitutes a secured claim. Section 506 states in relevant part that "[a]n allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property."[333] This language seems clearly to include within the definition of "secured claim" a "claim of a creditor secured by a lien

327. *See* note 249 *supra* and accompanying text.

328. S. REP. No. 989, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. CODE CONG. & ADMIN. NEWS [hereinafter cited as 1978 SENATE REPORT]; H.R. REP. No. 595, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. CODE CONG. & ADMIN. NEWS [hereinafter cited as 1978 HOUSE REPORT]. Early versions of this section did not include the word "unsecured." *See, e.g.*, H.R. 31, 32, § 4-604(b)(1), 94th Cong., 1st Sess. (1975). This was changed to the present form by 1977. *See, e.g.*, H.R. 8200 § 544(b), 95th Cong., 1st Sess. (1977).

329. *See* notes 116-23 *supra* and accompanying text.

330. *See* 11 U.S.C.A. §§ 101(36), (37) (West Supp. 1979).

331. U.C.C. § 9-301(3) in part defines a lien creditor as a creditor "who has acquired a lien on the property involved by attachment, levy or the like." *See also* notes 33 & 124 *supra* and accompanying text.

332. 11 U.S.C.A. § 506 (West Supp. 1979).

333. *Id.* at § 506(a).

on property." Moreover, the Reform Act's very broad definition of the term "lien"[334] would easily include the lien possessed by a lien creditor. Thus, at least for section 544(b) purposes,[335] it appears that the Reform Act intends that the lien creditor be regarded as a creditor with a secured claim and that the trustee will not be allowed to assume the position of an actual lien creditor under that section.

Even if the trustee can succeed to the rights of an actual lien creditor, this ability should harbor no significant difficulties. Existing lien creditors are likely to be less common than existing secured parties. Also, in the case of a seller who fails to comply with section 546(c) the "ideal lien creditor" status granted the trustee under section 544(a)[336] would preclude the need to resort to the actual creditor status granted by section 544(b).[337] The lien creditor should not defeat the cash or credit seller in any event.[338] If the trustee does manage to occupy the position of an existing lien creditor, whose rights under state law are superior to those of the reclaiming seller, he can avoid the seller's entire claim even if the amount covered by the lien is less than the value of the goods sold the buyer.[339]

D. Section 544(a)

The first of the significant Bankruptcy Reform Act provisions likely to confront the seller who fails to comply with section 546(c), but is not otherwise precluded by it or by section 544(b), is section 544(a), the successor to section 70(c). In relevant part, section 544(a) provides that:

> The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by—

334. "'[L]ien' means charge against or interest in property to secure payment of a debt or performance of an obligation." 11 U.S.C.A. § 101(28) (West Supp. 1979). This generic term should include (not distinguish) the term "judicial lien," which the Act defines as a "lien obtained hy judgment, levy, sequestration, or other legal or equitable process or proceeding." *Id.* § 101(27).

335. This argument should *not* be taken as forcing the conclusion that lien creditors should for all bankruptcy purposes be treated as secured parties. Rather, the § 506 language should apply only where definition of a term such as "unsecured" is involved. In particular, there is no reason to think that this argument upsets § 544(a)'s recourse to state law for definition of the "ideal lien creditor's" rights, *see* notes 362-63 *infra* and accompanying text, or that it changes the previous discussion of this subject.

336. *See* note 363 *infra* and accompanying text.

337. If § 544(a) is precluded by the seller's successful invocation of § 546(c), § 544(b) obviously becomes very important. *But see* note 310 *supra*.

338. *See generally* notes 124-66 *supra* and accompanying text.

339. The legislative history of § 554(b) explicitly states that the section is to follow Moore v. Bay, 284 U.S. 4 (1931). *See* 1978 SENATE REPORT, *supra* note 328, at 542; notes 254-55 *supra* and accompanying text.

> (1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained a judicial lien, whether or not such a creditor exists;
> (2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists . . . .[340]

All things considered, section 544(a) does not represent a substantial change from section 70(c).[341] The trustee rights it establishes are effective at the "commencement of the case," but this is basically the same as section 70(c)'s "date of bankruptcy."[342] The "avoid any transfer of property of the debtor" language could be read as permitting the trustee to attack prebankruptcy reclamations,[343] but this is an unlikely interpretation.[344]

Section 544(a) also eliminates one of the hypothetical statuses granted the 70(c) trustee—that of the judgment creditor[345] —but this is not significant here, since the trustee clearly assumes a status

340. 11 U.S.C.A. § 544(a) (West Supp. 1979). For the corresponding language of § 70(c), see the text accompanying note 176 *supra*.

341. As the House and Senate Reports to the Bankruptcy Reform Act put it: "Subsection (a) is the 'strong arm clause' of current law, now found in Bankruptcy Act section 70(c)." 1978 SENATE REPORT, *supra* note 328, at 542. The Commission on the Bankruptcy Laws of the United States saw few problems with § 70(c). *See* COMMISSION REPORT, *supra* note 265, Part I, at 18, 200, Part II, at 160-61. Its original revision of § 70(c), however, differed substantially in form (though rather less so in suhstance) from both § 70(c) and § 544(a).

342. *See* 11 U.S.C.A. §§ 301, 303(b) (West Supp. 1979) (defining commencement of the case as the filing of a petition). Also, §§ 544(a)(1) and (2) substantially resolve the question regarding the timing of the obligation underlying the hypothetical lien, *see* note 180 *supra*, by putting the trustee in the shoes of "a creditor that extends credit to the debtor at the time of the commencement of the case." Congressional sponsors of the Bankruptcy Reform Act have stated that "section 544(a)(1) overrules Pacific Fin. Corp. v. Edwards, 309 F.2d 224 (9th Cir. 1962), and *In re* Federal's, Inc., 553 F.2d 509 (6th Cir. 1977), insofar as those cases held that the trustee did not have the status of a creditor who extended credit immediately prior to the commencement of the case." 124 CONG. REC. H11,097 (daily ed. Sept. 28, 1978) (remarks of Rep. Edwards); 124 CONG. REC. S17,413 (daily ed. Oct. 6, 1978) (remarks of Sen. DeConcini). Presumably, the distinction between a creditor extending credit immediately prior to the commencement of the case and one doing so at the commencement of the case will not be significant.

343. *But see* Mann & Phillips, *The Reclaiming Seller*, *supra* note 2, at 633-34.

344. Sections 544(a)(1) and (2) give the trustee the ability to avoid transfers of the debtor voidable by creditors who extended credit and took certain other steps to collect at the commencement of the bankruptcy case. Assuming that the seller had earlier completed a valid repossession under U.C.C. §§ 2-702(2), 2-507(2) or 2-511(3), it is difficult to see how the trustee could avoid this transfer, since the debtor-buyer would have lacked title and possession of the goods at the time in question. In such a case, the trustee would be required to utilize §§ 544(b) or 547 of the Bankruptcy Reform Act, the successors to §§ 70(e) and 60, respectively.

345. *See* text accompanying note 176 *supra*.

very similar to that of the Code lien creditor under subsection (1).[346] Both subsections of section 544(a) maintain section 70(c)'s grant of "ideal lien creditor" status to the trustee by using identical "whether or not such a creditor exists" language.[347]

Thus, for present purposes at least, section 544(a) of the Bankruptcy Reform Act does not substantially differ from section 70(c) of the former act. As a result, the cases involving the competing rights of the reclaiming seller and the trustee under section 70(c) are likely to be of continued importance. As demonstrated above[348] these cases establish a substantial consensus in favor of the credit seller who proceeds under U.C.C. section 2-702(2), with more mixed results in the case of the cash seller proceeding under sections 2-507(2) and/or 2-511(3). Thus, assuming that the seller who fails to comply with Reform Act section 546(c) is not precluded from recovery, his situation vis-à-vis a trustee proceeding under section 544(a) should be very similar to that of a seller confronted by section 70(c) of the Bankruptcy Act.

E. Section 545

Section 545 of the Bankruptcy Reform Act, the successor to section 67(c) of the Bankruptcy Act, provides in relevant part as follows:

> The trustee may avoid the fixing of a statutory lien on property of the debtor to the extent that such lien—
>
> (1) first becomes effective against the debtor—
>
> . . .
>
> (D) when the debtor becomes insolvent;
>
> (E) when the debtor's financial condition fails to meet a specified standard; or
>
> . . .
>
> (2) is not perfected or enforceable on the date of the filing of the petition against a bona fide purchaser that purchases such property on the date of the filing of the petition, whether or not such a purchaser exists;[349]

---

346. Sections 101(27), (28) of the Bankruptcy Reform Act, 11 U.S.C.A. §§ 101 (27), (28) (West Supp. 1979), define a "lien" as a "charge against or interest in property to secure payment of a debt or performance of an obligation" and "judicial lien" as a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." U.C.C. § 9-301(3) in part defines a lien creditor as "a creditor who has acquired a lien on the property involved by attachment, levy or the like." Also, § 9-301(3) includes within its definition "a trustee in bankruptcy from the date of the filing of the petition," thus suggesting that the trustee would defeat the reclaiming seller in any case where a lien creditor would do so.

347. This is also suggested by the "without regard to any knowledge of the trustee or of any creditor" language in § 544(a). This language was present in modified form in the original Bankruptcy Commission redraft of § 70(c). COMMISSION REPORT, *supra* note 265, Part II, at 160. The Commission stated that this langnage was "designed to make clear that the trustee's status . . . is purely hypothetical." *Id.* at 161.

348. *See* notes 182-83 *supra* and accompanying text.

349. 11 U.S.C.A. § 545 (West Supp. 1979).

Parts (D) and (E) of subsection (1) would ordinarily be satisfied by section 2-702(2), since the operation of that section is expressly premised on the buyer-debtor's insolvency. Even if the buyer is insolvent in the Code sense but solvent for bankruptcy purposes,[350] part (E) should be sufficiently broad to cover the 2-702 situation. But it is far from clear that either section 2-507(2) or section 2-511(3) could satisfy either criterion, for neither is expressly conditioned upon the buyer's insolvency or general financial condition.[351] Subsection (2) of section 545 does, however, permit the trustee to avoid statutory liens not perfected or enforceable against an ideal bona fide purchaser on the date of the petition. It is arguable that a reclaiming seller who effected the reclamation *before* the filing of the petition could be considered to have "perfected" his "lien" against a bona fide purchaser.[352] Of course, even if this is true, the reclaiming seller is usually attempting to reclaim the goods *after* the petition is filed. In that case, the seller reclaiming under sections 2-702(2), 2-507(2) or 2-511(3) is subordinated by section 2-403(1) to the rights of a good faith purchaser for value,[353] and therefore would satisfy this test.

Consequently, as under the previous Act, it must be determined whether the right of a reclaiming seller is to be considered as a statutory lien and thus as avoidable by the trustee. Section 545 does little if anything to resolve the confusion on this question which existed under prior law.[354] The Bankruptcy Reform Act defines a statutory lien as a

> lien arising solely by force of a statute on specified circumstances or conditions, or lien of distress for rent, whether or not statutory, but does not include security interest or judicial lien, whether or not such interest or lien is provided by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute.[355]

---

350. *See* note 283 *supra*.

351. If these cash sale provisions were to be regarded as dependent upon § 2-702(2) for a right of reclamation, they could perhaps be treated as contingent upon the debtor's insolvency. *See* notes 76-78 *supra* and accompanying text. As argued above, however, the better view of §§ 2-507(2) and 2-511(3) is otherwise. *See* notes 89-93 *supra* and accompanying text.

352. This assumes that an Article 2 reclamation right may be perfected by repossession. If so, then, since § 2-403 applies only to goods "delivered under a transaction of purchase," the fact that the goods have been physically reclaimed and are no longer in the possession of the buyer would give a subsequent good faith purchaser for value no rights in them. *See* U.C.C. § 2-403(1) & Comments.

353. *See* notes 107-15 *supra* and accompanying text. The "good faith purchaser for value" mentioned by § 2-403(1) is assumed to be the same as the "bona fide purchaser" of § 545.

354. *See generally* notes 193-214 *supra* and accompanying text.

355. 11 U.S.C.A. § 101(38) (West Supp. 1979).

This definition follows the language of the Bankruptcy Act[356] almost exactly. It therefore retains all of the previous interpretative problems. Unlike the Bankruptcy Act, the Reform Act does provide a definition of the term "lien,"[357] but since this is substantially the same as the generally accepted definition,[358] the new definition is also of no help in the present context.[359] It should be reiterated, however, that the three circuit-level cases considering this problem under section 67(c) concluded that section 2-702(2) was not a statutory lien,[360] and these rulings should be of continued significance under the new Act.

F. Section 547

Section 547 of the Bankruptcy Reform Act, the successor to Bankruptcy Act section 60,[361] substantially modifies its predecessor's treatment of voidable preferences. Many of the changes contained in section 547, however, relate to problems created by section 60's interaction with Article Nine of the Uniform Commercial Code.[362] Taken as a whole, then, the new section does not appear to alter radically the situation confronting the Article 2 seller of goods who repossesses them before the date of bankruptcy. The operative provision of section 547 is its subsection (b):

> Except as provided in subsection (c) of this section, the trustee may avoid any transfer of property of the debtor—
>
> (1) · to or for the benefit of a creditor;
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
> (3) made while the debtor was insolvent;
> (4) made—
>
> (a) on or within 90 days before the date of the filing of the petition; or
> (b) between 90 days and one year before the date of the filing of the petition, if such creditor, at the time of such transfer—

356. *See* note 193 *supra* and accompanying text.

357. *See* 11 U.S.C.A. § 101(28) (West Supp. 1979), *quoted at* note 331 *supra.* This definition would include both judicial liens ("lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding," *id.* § 101(27)), and security interests ("lien created by an agreement," *id.* § 101(37)). It should be noted that both of these types of liens are explicitly excluded from the definition of a statutory lien. However, Article 2 reclamation rights are certainly not judicial liens, and, as discussed at notes 136-42 *supra* and accompanying text, they should not be considered security interests. If they were so characterized they would consequently not be subject to § 545 at all.

358. *See* note 197 *supra* and accompanying text.

359. The legislative history on this section is also silent concerning the applicability of § 545 to the seller's reclamation rights.

360. *See, e.g.,* National Bellas Hess, Inc., 17 U.C.C. Rep. Serv. 430 (S.D.N.Y. 1975).

361. *See* notes 215-43 *supra* and accompanying text.

362. *See, e.g.,* J. White & R. Summers, *supra* note 2, §§ 24-4 to -7.

(i) was an insider; and
(ii) had reasonable cause to believe the debtor was insolvent at the time of such transfer; and

(5) that enables such creditor to receive more than such creditor would receive if—

(a) the case were a case under chapter 7 of this title;
(b) the transfer had not been made; and
(c) such creditor received payment of such debt to the extent provided by the provisions of this title.[363]

The principal changes from prior law are section 547(b)(4)'s modification of the time periods within which a preference can occur and its related shift in the use of the requirement that the creditor have "reasonable cause to believe" in the debtor's insolvency.[364] The latter requirement has been eliminated when the transfer takes place on or within ninety days of the petition, a change from section 60's four month time span. Also, the "reasonable cause" test has been retained and the four month period has been lengthened in cases where certain "insiders"[365] are benefitted by the transfer.[366] However, since it is unlikely that the reclaiming seller will often qualify for "insider" status, this extension of time will rarely apply. Thus, the seller will be able to repossess at a somewhat later time under section 547 than was the case previously, at the slight cost of no longer being able to escape the trustee by arguing that he lacked reasonable cause to believe in the debtor's insolvency. Another possibly significant change involving a section 547(b) term concerns its conditions regarding effectuation of a "transfer." The term itself is defined much as it was in the previous Act.[367] However, section 547(e)(3) adds new language stating that "[f]or the purposes of this section, a transfer is not made until the debtor has acquired rights in the property transferred."[368] Although the meaning of "rights in the property" is none too clear,[369] it could be argued that the default-

363. 11 U.S.C.A. § 547(b) (West Supp. 1979).

364. *See* notes 223-27 *supra* and accompanying text.

365. For the definition of the term "insider," see 11 U.S.C.A. § 101(25) (West Supp. 1979). Rarely, if ever, will the Code seller of goods qualify as an "insider" under this definition.

366. The elimination of the "reasonable cause" requirement for transfers occurring within three months of the petition and the extension of time for "insider" transfers date from the Report of the Commission on the Bankruptcy Laws of the U.S. *See* COMMISSION REPORT, *supra* note 265, Part I, at 201-02; Part II, at 166, 170.

367. *Compare* 11 U.S.C.A. § 101(40) (West Supp. 1979) *with* 11 U.S.C. § 1(30) (1976). *See also* note 220 *supra*.

368. 11 U.S.C.A. § 547(e)(3) (West Supp. 1979).

369. This language seems directed toward the Article 9 problems presented by cases such as *In re* King-Porter Co., 446 F.2d 722 (5th Cir. 1971); Grain Merchants of Ind., Inc. v. Union Bank & Sav. Co., 408 F.2d 209 (7th Cir. 1969); and Dubay v. Williams, 417 F.2d 1277

ing buyer does not have rights in the goods he takes.[370] Under the U.C.C., however, it would appear that the buyer acquires rights in the goods at the latest at the time of delivery.[371]

The other requirements contained in section 547(b) are less likely to present the reclaiming Code seller with difficulties not confronted under section 60. The important "property of the debtor"[372] and "antecedent debt"[373] elements seem to be unchanged, and the problems they pose are likely to continue. The formal definition of the term "creditor" is different from that of the Bankruptcy Act,[374] but this change is unlikely to be significant in the present context, and the old doctrines interpreting this term[375] may well possess continued vitality. Further, the Bankruptcy Reform Act essentially retains the prior Act's definition of insolvency,[376] but it now lightens the trustee's evidentiary burden[377] by creating a presumption that the debtor is insolvent during the ninety days preceding the petition.[378] Finally, while the section 60 "percentage of the debt"[379] test has been substantially reworded by section 547(b)(5),

(9th Cir. 1966). *See* 1978 HOUSE REPORT, *supra* note 328, at 546; 1978 SENATE REPORT, *supra* note 328, at 91. This seems intended to stop recoveries by secured parties with "floating liens" in the debtor's after-acquired property, accounts receivable, proceeds, etc., these recoveries being partially based on the theory that the "transfer" occurred when the security interest was perfected, and not at some later time following the debtor's obtaining of the after-acquired assets. *Cf.* J. WHITE & R. SUMMERS, *supra* note 2, § 24-5, at 878-80. *But see* 11 U.S.C.A. § 547(c)(5) (West Supp. 1979).

370. This involves the application of pre-Code doctrines regarding passage of title to the bankruptcy setting. *See* notes 6, 20-23, & 29 *supra* and accompanying text.

371. *See* text accompanying note 236 *supra*. The nonpaying buyer has the ability to transfer good title to a good faith purchaser for value under § 2-403(1). Moreover, he acquires a special property and an insurable interest in goods upon the making of the contract under § 2-501(1).

372. *See* notes 233-36 *supra* and accompanying text.

373. *See* notes 237-43 *supra* and accompanying text. The "owed by the debtor before such transfer was made" language seems to have been added to cope with Article 9 problems. *See* 1978 HOUSE REPORT, *supra* note 328, at 546; 1978 SENATE REPORT, *supra* note 328, at 91 (the reference to subsection (b)(2)). Also, the rule that any extension of credit, no matter how brief, will change a cash transaction into a credit transaction involving an antecedent debt, *see* note 238 *supra*, has probably been preserved. The original version of the revised Bankruptcy legislation contained a provision defining an antecedent debt as one incurred more than five days before a transfer paying or securing the debt. *See, e.g.*, H.R. 10792, 93d Cong., 1st Sess., § 4-607(g)(1) (1973). This change was intended to mitigate the stringency of the "extension of credit" rule. *See* COMMISSION REPORT, *supra* note 265, Part I, at 205. However, this language obviously has not survived, and § 547 thus might be taken as having implicitly adopted the rule.

374. *Compare* 11 U.S.C.A. § 101(9) (West Supp. 1979) *with* 11 U.S.C. § 1(11) (1976).

375. *See* notes 228-32 *supra* and accompanying text.

376. *Compare* 11 U.S.C.A. § 101(26) (West Supp. 1979) *with* 11 U.S.C. § 1(19) (1976).

377. *See, e.g.*, COMMISSION REPORT, *supra* note 265, Part I, at 19.

378. 11 U.S.C.A. § 547(f) (West Supp. 1979).

379. *See* note 222 *supra* and accompanying text.

few practical differences should result, since it is difficult to see how the successfully repossessing seller could fail to place himself in a better position than the seller who fails to do so under the new Act.

In addition to the concerns stated or suggested by section 547(b), one other provision of section 547 is of interest here. Section 547(c)(2) provides a possible avenue of escape for the seller by stating that the trustee may not avoid a transfer:

> to the extent that such transfer was—
>
> (A) in payment of debt incurred in the ordinary course of business or financial affairs of the debtor and the transferee;
> (B) made not later than 45 days after such debt was incurred;
> (C) made in the ordinary course of business or financial affairs of the debtor and the transferee; and
> (D) made according to ordinary business terms;[380]

Although many sales of goods to insolvent buyers should be in the ordinary course[381] of both the seller's and the buyer's business or financial affairs and the forty-five day limit appears to be ample time for repossession, it is doubtful whether this provision will be of much use to the seller. First, it is not obvious that repossesson of goods can be treated as "payment" under section 547(c)(2)(A). Second, it is not at all clear that a repossession following the buyer's failure to pay—a situation where subsequent bankruptcy is often anticipated by the seller—can be regarded as made "in the ordinary course of business" or "according to ordinary business terms" under sections 547(c)(2)(C), (D). Finally, a successful repossession under such circumstances does not comport with the section's "purpose . . . to leave undisturbed normal financial relations, because it does not detract from the general policy of the preference section to discourage unusual action by either the debtor or his creditors during the debtor's slide into bankruptcy."[382]

G. Summary and Recommendations

On the whole, the Bankruptcy Reform Act achieves at best a partial resolution of the numerous problems faced by the seller of goods who attempts to reclaim them before or after his buyer goes into bankruptcy. Section 546(c) does deal squarely with the most common sort of seller-trustee conflict—that when a credit seller in the ordinary course of business delivers goods to an insolvent buyer

380. 11 U.S.C.A. § 547(c)(2) (West Supp. 1979).
381. *Cf.* note 289 *supra* and accompanying text.
382. 1978 HOUSE REPORT, *supra* note 328, at 545; 1978 SENATE REPORT, *supra* note 328, at 90.

and then goes bankrupt—and permits the seller to prevail[383] if he makes a written demand for the goods within ten days of their receipt by the buyer. In allowing such a recovery, section 546(c) recognizes, with qualifications, both section 2-702(2) of the Uniform Commercial Code and (where needed) common-law fraud rights of recovery premised on the buyer's receipt of the goods while insolvent.[384] Some procedural or definitional problems[385] aside, however, section 546(c) presents two major interpretative difficulties. First, the recovery rights it incorporates are not clearly specified. In particular, its applicability to the cash seller is less than obvious, and it also seems not fully to incorporate all relevant types of common-law fraud. Second, its effect on the seller who fails to comply with its requirements (for example, the ten day written demand) is quite uncertain. If unable to satisfy such requirements, the seller arguably could be cut off from all chance of recovery. On the other hand, such a seller might be permitted to confront a trustee utilizing Reform Act sections 544(a), 545, 547 and 549 without the "safe harbor" provided by section 546(c).

Assuming, as this Article has argued, that the latter interpretation of section 546(c) is preferable, the seller who fails to comply with its various requirements will face problems similar to those presented by Bankruptcy Act sections 60, 67(c) and 70(c). For the noncomplying seller almost all the old dilemmas should persist with full vigor. Finally, it should be noted that Reform Act section 544(b), whose use by the trustee is *not* precluded by section 546(c), provides him with an opportunity to defeat the seller outright. But, as has been demonstrated, this section—which in matters relevant here marks a substantial change from section 70(e)—will almost certainly be of little avail against the reclaiming seller.

Thus, section 546(c), while evidencing an obvious purpose to give significant protection to the seller who meets certain tests, suffers from important ambiguities when applied to the more or less "penumbral" situations outside the much-discussed 2-702 context with which its drafters seemed principally to be concerned. In an attempt to resolve these ambiguities, we offer the following modified version of section 546(c). This suggested amendment is intended to embody the proseller orientation which is plainly apparent in the section's language and history and to resolve almost all uncertainties in favor of preserving in bankruptcy reclamation rights granted

383. One curious aspect of the new Act, however, is that § 546(c) does not limit the trustee who proceeds under Reform Act § 544(b).

384. *See* note 286 *supra* and accompanying text.

385. *See* notes 378-81 *supra* and accompanying text.

by the U.C.C. or by common law. Also, it generally follows the overall plan of section 546(c) and does not address the seller-trustee controversy on some new basis.[386] Finally, the scope of the amendment is limited to section 546(c)—thus avoiding any attempt at revision of other relevant Reform Act provisions—because, unlike these provisions, it is intended to deal with the specific problem at hand and does not apply in a variety of other contexts for which changes in statutory language might produce unforeseen consequences.

The suggested revision[387] of section 546(c) is as follows:

> (c) The rights and powers of the trustee under sections 544(a), 544(b), 545, 547 and 549 of this title are subject to the following rights of a seller of goods to the debtor, in the ordinary course of such seller's business, to reclaim goods from the debtor:
>
> (1) any statutory right of a seller of goods to reclaim such goods if the debtor has received such goods on credit while insolvent;
> (2) any statutory or common-law right of a seller of goods to reclaim such goods where payment (including payment by check) is due and demanded upon delivery, or where delivery and payment are intended to be substantially simultaneous, and such payment is not made upon delivery, or such check is dishonored upon due presentment; and
> (3) any common-law right of a seller of goods to reclaim such goods because of the debtor's intentional or innocent misrepresentation of a fact material to the sale;
>
> provided that—
> (A) except where payment is made by a check which is given as payment upon delivery and then dishonored upon due presentment, such a seller may not reclaim any such goods unless such seller demands in writing reclamation of such goods before ten days after receipt of such goods by the debtor;
> (B) where payment is made by a check which is given as payment upon delivery and then dishonored upon due presentment, such a seller may not reclaim any such goods unless such seller demands in writing reclamation of such goods before ten days after notice of such dishonor; and
> (C) the court may deny reclamation to a seller with such a right of reclamation that has made such a demand only if the court—
> (i) grants the claim of such a seller priority as an administrative expense; or
> (ii) secures such claim by a lien.
>
> Nothing in this section shall determine the status or rights under any other provision of this title of a seller of goods to the debtor who fails to comply with any of this section's requirements.

386. The most obvious alternative way to address the seller-trustee clashes discussed in this article would be to attempt amendment of all the provisions likely to be utilized by the trustee to defeat the seller. As the textual sentence following this note indicates, however, this approach could pose problems of its own. It should also be noted that the drafters' failure to do so may suggest, contrary to our positions, that § 546(c) is intended totally to govern the seller's ability to recover. *See* note 308 *supra* and accompanying text.

387. For the text of § 546(c), see text accompanying note 276 *supra*.

This revision of section 546(c) adds to its list of excluded Reform Act provisions section 544(b), the successor to section 70(e). Although, as has been noted, this section is not likely to be much of an obstacle to the seller, there is no obvious distinction between it and sections 544(a), 545, 547 and 549 capable of justifying their inclusion and its exclusion from 546(c). In fact, earlier versions of section 546(c) did include section 544(b).[388] Subsection (1), of course, is designed to incorporate U.C.C. section 2-702(2), and follows that section's language more closely than the current version of 546(c) by adding the words "on credit."[389] Subsection (2) is intended to resolve section 546(c)'s uncertainty regarding the status of the cash seller by using the relevant language of U.C.C. sections 2-507(2) and 2-511(3), as well as the basic test for the existence of the common-law cash sale, to ensure that sellers employing all of these reclamation rights will be able to defeat the trustee.[390] The purpose of subsection (3) is to bring within 546(c) a wide range[391] of common-law fraud recovery rights, including recovery rights based on unintentional misrepresentation, as defined by state law. These portions of our section 546(c) would also preserve existing requirements as to insolvency and ordinary course of business, along with the possible problems these may occasionally pose.[392]

Proviso (A) to this amendment of 546(c) preserves the written demand requirement as stated by the current section 546(c) and does not attempt to resolve the interpretative problems[393] this requirement will present, since such matters are best left to the courts. However, proviso (A) does not apply to cash sales involving a bad check where the check is presented for payment within a reasonable time ("due presentment").[394] This situation is dealt with

388. *See* note 277 *supra*. There is no recorded explanation for the subsequent deletion of § 544(b).

389. This subsection, however, should not include the seller's right of stoppage in transit. Of course, stoppage in transit is less a reclamation right than a device to make reclamation unnecessary.

390. For the relevant Code language and common-law tests, see notes 20-21 *supra* and accompanying text.

391. In particular, common-law fraud recovery rights not premised on the buyer's insolvency will be included. *See* notes 12, 19, 289-91 *supra* and accompanying text. Also, this subsection is not limited to credit sales, and thus will include cash sale situations involving fraud. *See* notes 38-39 *supra* and accompanying text. This approach, of course, will subject the courts to all the uncertainties inhering in pre-Code fraud rules, *see* note 10 *supra* and accompanying text, but these hardly seem fewer than those posed by § 546(c)'s arbitrary distinction between fraud based on the buyer's insolvency and other types of fraud.

392. *See* notes 280-81, 284 *supra* and accompanying text.

393. *See* note 279 *supra* and accompanying text.

394. *See* note 103 *supra* and accompanying text. Under the Code, this should be governed by § 3-503. Of course, the seller failing to make due presentment would not have a Code recovery right at all.

by proviso (B), which preserves the ten day written demand requirement, but causes it to run from the time the seller receives notice that the check has been dishonored, rather than from the buyer's receipt of the goods as in proviso (A). This distinction is made because dating the ten day period from the time the goods are received would prevent seller recoveries in many, if not most, bad check cases due to the time lapse involved with the return of a check for insufficient funds.[395] In the "bad check" cash sale case, then, the seller will be required to undertake presentment within a "due" time, and then to make a written demand within ten days of learning that the check has not been paid.[396] Proviso (C) to this revision of section 546(c) is the same as under the current version of that section. Finally, and most importantly, section 546(c) as revised is intended to make it clear that sellers not complying with the various 546(c) tests are *not* thereby totally precluded from recovery in bankruptcy. Instead, they may confront the trustees without section 546(c)'s possible preclusion of Reform Act sections 544(a), 544(b), 545, 547 and 549, thus setting up seller-trustee conflicts similar to those presented by the Bankruptcy Act. Such an approach admittedly will introduce some of the difficulties section 546(c) was presumably designed to eliminate, but, as this Article has argued,[397] it seems preferable to the alternatives.

V. Conclusion

Grant Gilmore has suggested that "[i]n the growth of the law there are periods of relative stability and periods of rapid change. The introduction of some radically new element into a stable situation leads to a pendulum-like swing from simplicity to complexity and then, as the new element becomes assimilated, back towards simplicity."[398] This is an apt depiction of the history of the conflict between the reclaiming seller and the trustee in bankruptcy. At common law the relative rights of these two parties were well established: the reclaiming seller who could repossess from his buyer almost always prevailed over the trustee as well. Upon the introduc-

395. *See* the text accompanying note 94 *supra.* It should be noted that the "given as payment upon delivery" language of proviso (B) excludes bad check *credit* sales.

396. This should eliminate, for bankruptcy purposes, the ten day demand and "follow-up" requirements attached to the cash sale reclamation right by the Code and (where relevant) common-law waiver doctrines. *See* notes 30 & 81-84 *supra* and accompanying text. Of course, a seller who complies with these requirements but fails to comply with the written demand test will not be totally precluded from recovery, because of the last sentence of revised § 546(c). *See* text accompanying note 397 *infra.*

397. *See* notes 303-18 *supra* and accompanying text.

398. G. Gilmore, Security Interests in Personal Property § 9.1, at 288 (1965).

tion of the Uniform Commercial Code, however, a "radically new element" disturbed this stable situation. In the early years following adoption of the U.C.C. there developed a number of complex and confounding interpretative issues regarding the relative rights of reclaiming seller and trustee, all evidently unforeseen by the Code drafters.[399] After some twenty years these issues were approaching a state of resolution as the Code became more completely assimilated. By the late 1970's the law governing the reclaiming seller-trustee conflict had begun to swing back to its pre-Code simplicity and outcome with the seller generally prevailing. The passage of the Bankruptcy Reform Act is likely to affect this situation in one of three highly divergent ways. The first possibility—simple, but inadequate—is that courts will interpret section 546(c) to permit recovery for those sellers it expressly benefits but to preclude recovery for those it does not clearly cover. For reasons discussed at length, this result is neither desirable nor certain. Consequently, a second possible outcome is that the advent of the Bankruptcy Reform Act—with its ambiguities and limited coverage—will generate a wave of complex litigation reminiscent of the unsettled early years following the enactment of the U.C.C.[400] The third, and most desirable, possibility is that the courts will assimilate the Reform Act and existing law by viewing the former as primarily an attempt to resolve the old controversy on a basis favorable to the seller rather than to renew that dispute on a different level. One way to effectuate this view of the Reform Act is to interpret section 546(c) as this Article has suggested it be amended. While such an approach would not eliminate all of the problems created by the enactment of the Code, it would resolve section 546(c)'s ambiguities in a fashion consistent with the section's apparent intent to protect the seller and should provide a basis upon which courts could continue their recent clarification of the seller's position. If this does not occur, or if Congress does not amend section 546(c), it is quite conceivable that the pendulum will swing abruptly back towards a complexity and uncertainty the Bankruptcy Reform Act was presumably intended to eliminate.

---

399. The legislative and drafting history of §§ 2-702, 2-507, 2-511, and 2-403 is devoid of any reference to the Bankruptcy Act. *See* Mann & Phillips, *Cash Sale, supra* note 2, at 376-80.

400. This viewpoint is contrary to that expressed by one commentator who stated that § 546 "should draw the curtain over the long and lively debate concerning the efficacy of § 2-702(2) in bankruptcy proceedings." Squillante, *supra* note 168, at 1507.