Boston College Law Review

Volume 18
Issue 4 *Number 4*

Article 1

4-1-1977

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BOSTON COLLEGE
INDUSTRIAL AND COMMERCIAL
LAW REVIEW

VOLUME XVIII APRIL 1977 NUMBER 4

THE RECLAIMING SELLER AND THE BANKRUPTCY ACT: A ROADMAP OF THE STRATEGIES

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Since the early 1960's, the scholarly commentary concerning the relative rights of a trustee in bankruptcy[1] and the rights of a reclaiming seller under Article 2 of the Uniform Commercial Code[2] has been characterized by intense debate.[3] This conflict has arisen primarily

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[1] This article deals with the provisions of the present Bankruptcy Act, 11 U.S.C. §§ 1 *et seq.* (1970) (amended in 1972 and 1975). The reader should note that Congress is presently considering several proposed revisions of the Act which, if passed, could substantially alter much of the discussion in this article. For a general description of these proposals, see Lee, *A Critical Comparison of the Commission Bill and the Judge's Bill for the Amendment of the Bankruptcy Act*, 49 AM. BANKR. L.J. 1 (1975).

[2] All citations to the Uniform Commercial Code are based upon the 1972 Official Text unless otherwise noted.

[3] *See, e.g.*, 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) [hereinafter cited as Bjornstad]; Braucher, *Reclamation of Goods from a Fraudulent Buyer*, 65 MICH. L. REV. 1281 (1967) [hereinafter cited as Braucher]; Countryman, *Buyers and Sellers of Goods in Bankruptcy*, 1 N.M. L. REV. 435 (1971) [hereinafter cited as Countryman]; Hawkland, *The 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) [hereinafter cited as Hawkland]; Henson, *Reclamation Rights of Sellers Under Section 2-702*, 21 N.Y.L.F. 41 (1975) [hereinafter cited as Henson]; Kennedy, *The Interest of a Reclaiming Seller under Article 2 of the Code*, 30 BUS. LAW. 833 (1975) [hereinafter cited as Kennedy]; 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]; Shanker, *Bankruptcy and Article 2 of the Uniform Commercial Code*, 40 REF. J. 37 (1966) [hereinafter cited as Shanker]; 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*]; Note, *Bankruptcy and Article Two of the*

from the problems presented when a buyer receives goods on credit and then enters into bankruptcy. The seller clearly wishes to reclaim the goods or to obtain their value from the buyer. However, the trustee in bankruptcy typically will oppose the seller's claim in accordance with his duty under the Bankruptcy Act to collect and reduce to money the property of the bankrupt buyer.[4] The failure of the courts and the commentators to reach a consensus on whether the seller or trustee should receive priority is to some extent a consequence of the Uniform Commercial Code's intrusion into this area, particularly by the language of U.C.C. section 2-702 which permits a credit seller to reclaim goods from an insolvent buyer.[5] Even more significantly, this lack of consensus reflects an intractable underlying policy conflict between the seller's interests and those of the bankruptcy trustee,[6] a conflict which is exacerbated by the tangible financial consequences of policies favoring either party.[7]

This article does not seek to provide a resolution of the difficulties facing a seller who attempts to reclaim property from a bankrupt buyer. Rather, it will attempt to elucidate both the strategies available to the reclaiming seller and the potential legal obstacles he may confront in utilizing each strategy. Because the Bankruptcy Act's treatment of the reclaiming seller is largely determined by the characterization of the seller's rights under the common law and the Code, this article will first consider the pre-Code remedies traditionally available to the credit seller when reclaiming from an insolvent buyer. It will then examine the prerequisites necessary to assert reclamation rights under the Uniform Commercial Code. The article will next explore the applicable Bankruptcy Act sections within the context of the options or strategies available to the reclaiming seller. These options are organized in reverse chronological sequence beginning with the basic

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Uniform Commercial Code: The Right to Recover the Goods Upon Insolvency, 79 HARV. L. REV. 598 (1966) [hereinafter cited as Note, 79 HARV. L. REV.] *See also* R. DUESENBERG & L. KING, SALES & BULK TRANSFERS UNDER THE UNIFORM COMMERCIAL CODE § 13.03[4] (1966) [hereinafter cited as DUESENBERG & KING]; R. NORDSTROM, HANDBOOK OF THE LAW OF SALES, §§ 167-69 (1970); J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 7-15 (1972) [hereinafter cited as WHITE & SUMMERS]. Further, volumes 3, 3A, 4, and 4A of COLLIER ON BANKRUPTCY (rev'd 14th ed. 1976) [hereinafter cited as COLLIER] contain considerable material bearing upon this problem.

[4] *See* 11 U.S.C. §§ 75, 110 (1970).

[5] See notes 30-47 *infra* and accompanying text.

[6] Typically, a seller who has sold goods on credit would prefer to protect his business interests by reclaiming the goods if the buyer defaults. Absent such protection a seller would be reluctant to transfer property to a buyer before the purchase price is paid. This would discourage the extension of credit or acceptance of checks as a means of payment and consequently would interfere with the flow of commerce. Conversely, the bankruptcy trustee is under a duty to protect the property of the bankrupt and to insure the fair distribution of assets to creditors. See note 4 *supra* and accompanying text. If the property in question has become part of the bankrupt's estate then the reclaiming seller should receive no better treatment than that given general creditors.

[7] *See, e.g.*, Henson, *supra* note 3, at 51 n.37, who concludes from official 1969 statistics that the unsecured creditor (e.g., a § 2-702 reclaimant who could not prevail

situation which has generated almost all the litigation regarding section 2-702 of the Uniform Commercial Code and the Bankruptcy Act: the case where the seller delivers goods on credit to a buyer who is unable to pay, discovers the buyer's insolvency only upon his bankruptcy, and attempts to reclaim the goods from the trustee after the date of the petition. The article will next examine the credit seller's chances for success if he manages to discover the buyer's insolvency and effect a reclamation *before* the date of bankruptcy. The article will close with a discussion of the efficacy of a host of other Code options relevant to the pre-bankruptcy period: refusal of delivery except for cash under section 2-702(1); stoppage in transit under section 2-705; reservation of title to the goods; and, finally, perfection of an Article 9 security interest.

I. SECTION 2-702, ITS ANTECEDENTS, AND ITS POSSIBLE CHARACTERIZATIONS

The Bankruptcy Act does not specifically refer to the rights of a reclaiming seller in those provisions which deal with the distribution of the bankrupt's estate. Therefore, the choice of the appropriate Act provision depends upon the characterization of the 2-702(2) right to reclaim. For example, section 67c(1)(A) of the Act provides that "every statutory lien which first becomes effective upon the insolvency of the debtor" will be "invalid against the trustee."[8] The language of this section is relevant when compared to U.C.C. section 2-702(2) which permits a credit seller to reclaim goods from an insolvent buyer.[9] If the seller's right to reclaim under section 2-702(2) of the Uniform Commercial Code is characterized as a statutory lien, then the trustee can obviously invalidate any such reclamation under section 67c(1)(A).[10] However, section 2-702 may also be viewed as a codification of a common law right of reclamation and, as such, would not constitute a statutory lien.[11] Such a characterization would thus deny a trustee the right to invalidate a reclamation under section 67c(1)(A).

As will be seen later in this article, similar problems of characterization exist in interpreting several other Bankruptcy Act provisions.[12] For this reason it is important first to examine the rights of a seller to reclaim under the common law and the requisites for reclamation under section 2-702 of the Uniform Commercial Code. This examination will show that while the characterization of section 2-702 will often be crucial to a determination of priorities under the

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against the trustee) "in an average asset case would receive less than eight cents per dollar claimed, and about 90 percent of all bankruptcies are no-asset cases."

[8] 11 U.S.C. § 107(c)(1)(A) (1970). Section 67c(1)(A) is discussed at notes 100-26 *infra*.

[9] Section 2-702(2) is quoted in the text at note 32 *infra*.

[10] See notes 100-26 *infra* and accompanying text.

[11] See notes 105-09 *infra* and accompanying text.

[12] See notes 68-264 *infra* and accompanying text.

Bankruptcy Act, there is little consensus as to what the proper characterization should be.

A. *Pre-Code Remedies*

At common law, the unpaid credit seller had recourse to a number of options against the buyer, including an action for the price.[13] However, an action for price in an insolvency proceeding was of little use to the seller, since by implication the buyer was unable to pay his debts. A more important remedy was found in the use of a theory of rescission based upon fraud[14] where the seller could sometimes effect a return of the goods sold. Under this remedy, the buyer was deemed to have taken only a voidable title, and the parties were to be restored to their original pre-contractual position by an equitable operation in which full title to the goods was viewed as never having passed from the seller.[15] Still, the buyer's taking of voidable title was sufficient to enable him to pass full title to a good faith purchaser for value, against whom the seller could not triumph.[16] As a general rule, the rescinding seller did have rights superior to those of an attaching lien creditor.[17] Furthermore, the seller's right to rescind and reclaim was not disturbed by an intervening bankruptcy of the debtor, because the trustee was deemed to have taken title to the bankrupt's property subject to the retroactive divestment effected by such a rescission.[18]

Subject to many state-to-state differences, there seem to have been two basic situations giving rise to the seller's common law right of rescission for fraud.[19] The first of these was where the buyer received the goods not intending to pay for them.[20] This intent could be proved by several methods,[21] including proof of the buyer's insolvency upon receipt of the goods.[22] However, the buyer's insolvency was usually considered only presumptive as to the existence of intent

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[13] *See* 3 WILLISTON ON SALES § 561 (rev'd ed. 1948).

[14] *See* L. VOLD, HANDBOOK OF THE LAW OF SALES 397 (2d ed. 1959) [hereinafter cited as VOLD]; 77 C.J.S. *Sales* §§ 45-51 (1952).

[15] *See, e.g.*, Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 YALE L.J. 1057, 1059-60 (1954) [hereinafter cited as Gilmore]; VOLD, *supra* note 14, at 397-98.

[16] *See, e.g.*, Gilmore, *supra* note 15, at 1060; VOLD, *supra* note 14, at 400.

[17] *See, e.g.*, Jones v. H.M. Hobbie Grocery Co., 246 F. 431, 433 (1917).

[18] *See, e.g.*, Fisher v. Shreve, Crump & Low Co., 7 F.2d 159 (D. Mass. 1925); Mulroney Mfg. Co. v. Weeks, 185 Iowa 714, 171 N.W. 36 (1919). *See generally* Annot., 59 A.L.R. 418 (1929).

[19] For cases explicitly making this distinction between the two approaches, see O'Rieley v. Endicott-Johnson Corp., 297 F.2d 1, 5 (8th Cir. 1961); Manly v. Ohio Shoe Co., 25 F.2d 384, 385 (4th Cir. 1928). *See also* 3 WILLISTON ON SALES §§ 623 *et seq.* (rev'd ed. 1948); Annot., 59 A.L.R. 418 (1929).

[20] *See, e.g.*, O'Rieley v. Endicott-Johnson Corp., 297 F.2d 1, 5 (8th Cir. 1961); 77 C.J.S. *Sales* § 50 (1952).

[21] *See* Annot., 59 A.L.R. 418, 426-28 (1929).

[22] *See, e.g.*, California Conserving Co. v. D'Avanzo, 62 F.2d 528, 530 (2d Cir. 1933); *In re* Henry Siegel Co., 223 F. 369 (D. Mass. 1915).

to defraud,[23] and this presumption could be overcome by proof that the buyer had in good faith intended to pay for the goods and had a reasonable basis for believing in his ability to do so.[24] The second situation establishing the right of rescission arose where the buyer made material, false representations as to his financial situation, thereby inducing the seller to part with the goods.[25] In this instance, the misrepresentation need not have been intentional.[26] However, the fraudulent statement had to be a representation of present fact, and not an expression of opinion, promise, or belief.[27] The courts in some instances also required that the seller show reliance on the misrepresentation[28] and that such reliance was reasonable under the circumstances.[29]

B. *A Credit Seller's Remedies Under the Uniform Commercial Code*

The Uniform Commercial Code provides an unpaid credit seller with a variety of remedies which are catalogued in section 2-703.[30] However, after the goods have been delivered the seller has far fewer remedies available. These include an action for the price under section 2-709 and possibly for incidental damages under section 2-710.[31]

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[23] *In re* Paper City Mill Supply Co., 28 F.2d 115 (D. Mass. 1928).

[24] *E.g., In re* Empire Grocery Co., 277 F. 73 (D. Mass. 1921); 77 C.J.S. *Sales* § 51 (1952). Where the buyer honestly intended to pay but had no reasonable basis for expecting to be able to do so, the seller typically was able to rescind. *See In re* Gurvitz, 276 F. 931, 932 (D. Mass. 1921).

[25] *See In re* Indiana Concrete Pipe Co., 33 F.2d 594, 595-96 (N.D. Ind. 1929); 3 WILLISTON ON SALES § 636 (rev'd ed. 1948); Annot., 59 A.L.R. 418, 418-24 (1929).

[26] *E.g.,* Manly v. Ohio Shoe Co., 25 F.2d 384, 385 (4th Cir. 1928).

[27] *See, e.g.,* VOLD, *supra* note 14, at 399-400; 77 C.J.S. *Sales* §§ 46, 48 (1952).

[28] *See, e.g.,* 77 C.J.S. *Sales* § 48 (1952). However, there was often some disagreement as to the degree of reliance required. *Compare,* O'Rieley v. Endicott-Johnson Corp., 297 F.2d 1, 5, 8-9 (8th Cir. 1961) *with* National Shawmut Bank v. Johnson, 317 Mass. 485, 490, 58 N.E.2d 849, 852 (1945).

[29] The reliance was sometimes expressed in terms of the duty to inquire as to the buyer's financial status. *See, e.g.,* Wead v. Ganzhorn, 249 N.W. 271, 272-73 (Iowa 1933); 77 C.J.S. *Sales* § 48, at 684 (1952).

[30] U.C.C. § 2-703 provides:

> Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract (Section 2-612), then also with respect to the whole undelivered balance, the aggrieved seller may
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> (a) withhold delivery of such goods;
>
> (b) stop delivery by any bailee as hereafter provided (Section 2-705);
>
> (c) proceed under the next section respecting goods still unidentified to the contract;
>
> (d) resell and recover damages as hereafter provided (Section 2-706);
>
> (e) recover damages for non-acceptance (Section 2-708) or in a proper case the price (Section 2-709);
>
> (f) cancel.

[31] U.C.C. § 2-709 states that "[w]hen a buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages under [§ 2-710], the price . . . of goods accepted. . . ."

However, in order to recover the specific goods sold, the seller must proceed under section 2-702(2), which provides that:

> 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 intent to pay.[32]

This reclamation right, as at common law,[33] is expressly subordinated to the rights of a buyer in ordinary course or other good faith purchaser by section 2-702(3) of the current Code.[34]

Section 2-702(2) presents a number of technical requirements necessary for the obtaining of the reclamation right. First, the seller must discover that the buyer received the goods while insolvent, an insolvent party being defined by section 1-201(23) 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." Second, unless there is a written misrepresentation of solvency within three months of delivery, the seller must demand the goods within ten days of their receipt by the buyer. 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.[35] While it is not specifically mentioned in section 2-702, it can be reasonably assumed that actual physical repossession of the goods within the ten day period is not required.[36] However, the cases diverge as to what minimum action must be taken by the seller. One case has suggested in dictum that "an act of demanding or asking" may be enough.[37] Another, again in dictum, seems to have regarded a telephone call as sufficient.[38] However, some cases have treated a bare oral demand as inadequate, and have stated that some sort of "follow-up" to regain possession is required.[39] Since the courts have

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[32] U.C.C. § 2-702(2).

[33] See note 16 *supra* and accompanying text.

[34] The 1962 version of section 2-702(3) also subordinated the seller to the rights of a lien creditor. See note 73 *infra* and accompanying text.

It should be noted that the present version of § 2-702(3) also provides that "[s]uccessful reclamation of goods excludes all other remedies with respect to them."

[35] *In re* Behring & Behring, 5 U.C.C. Rep. Serv. 600, 606 (N.D. Tex. 1968) (decision of bankruptcy referee).

[36] *See, e.g.*, WHITE & SUMMERS, *supra* note 3, at 242.

[37] *In re* Childress, 6 U.C.C. Rep. Serv. 505, 507 (E.D. Tenn. 1969) (decision of bankruptcy judge).

[38] Metropolitan Distribs. v. Eastern Supply Co., 21 Pa. D. & C.2d 128, 134, 1 U.C.C. Rep. Serv. 154, 158 (C.P. Allegheny Co. 1959).

[39] *In re* Collacci's of America, Inc., 490 F.2d 1118, 1121 (10th Cir. 1974) (the court inferred that a demand under § 2-702(2) meant "a regaining of possession or a

failed to provide any clear guidance as to what constitutes a sufficient act of reclamation under section 2-702, it would be advisable for the reclaiming seller to make an immediate oral demand followed by the delivery of a written demand to the buyer. The seller should then attempt to make a peaceful physical repossession[40] as soon as possible, in order to protect his rights.

Section 2-702(2) further provides that the ten day limitation does not apply "if misrepresentation of solvency has been made to a particular seller in writing within three months before delivery."[41] Comment 2 to U.C.C. section 2-702 states that, for the exception to operate, "the statement of solvency must be in writing, addressed to the particular seller and dated within three months of the delivery."[42] In attempting to define the scope of a "writing" the courts have generally held that a check may act as a misrepresentation of solvency,[43] but have found insufficient such statements as a signed purchase order[44]

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bona fide attempt to do so."); *In re* Behring & Behring, 5 U.C.C. Rep. Serv. 600, 606 (N.D. Tex. 1968) (decision of bankruptcy referee). The referee in *Behring* 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.

5 U.C.C. Rep. Serv. at 606. The court went on to suggest that a petition for reclamation in a bankruptcy proceeding might be considered a suitable "follow up" of the oral demand. *Id.* See note 160 *infra*.

The court in *Behring* did not mention where it had derived the "follow up" requirement. In addition § 2-702 does not contain any language that would support the requirement. However, it is conceivable that the language was derived from § 2-507 Comment 3. Section 2-507, which deals with cash sales, provides that "[w]here payment is due and demanded on 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." U.C.C. § 2-507(2). Official Comment 3 to this section goes on to state that "[s]hould the seller after making such a conditional delivery fail to *follow up* his rights, the condition is waived. The provision [in § 2-702(2)] for a ten day limit within which the seller may reclaim goods delivered on credit to an insolvent buyer is also applicable here." U.C.C. § 2-507 Official Comment 3 (emphasis added). The implication of the comment is that the power to reclaim goods is a right which must be "followed up" to preserve the seller's interest in the return of the property. Regretfully the Code is unclear as to what actions by the seller would satisfy this requirement.

[40] *Cf.* U.C.C. § 9-503 (secured party's procedure for repossession upon default).

[41] U.C.C. § 2-702(2).

[42] U.C.C. § 2-702 Comment 2. In *In re* Bel Air Carpets, Inc., 452 F.2d 1210, 1212 (9th Cir. 1971), the court found that the "written misrepresentation be presented, not dated, within the three months period." The court reasoned that the requirement that the writing be dated within three months of delivery would severely limit the seller's rights, since a businessman might reasonably rely on a statement received within three months of delivery, but dated prior to that period. Hence, the date of the statement should not be given a strict application. *Id.*

[43] *See, e.g., In re* Creative Bldgs., Inc., 498 F.2d 1, 4 (7th Cir. 1974); Amoco Pipeline Co. v. Admiral Crude Oil Corp., 490 F.2d 114, 117 (10th Cir. 1974); Theo. Hamm Brewing Co. v. First Trust & Savings Bank, 103 Ill. App. 2d 190, 195, 242 N.E.2d 911, 914-15 (App. Ct. 1968).

[44] *In re* Regency Furniture, Inc., 7 U.C.C. Rep. Serv. 1381 (E.D. Tenn. 1970) (decision of bankruptcy referee).

and a letter virtually admitting insolvency but setting out a schedule of payments.[45] Some courts have also found that the seller, acting with the prudence of an ordinary businessman, must have relied upon the writing, despite the absence of any such requirement in section 2-702(2).[46] Finally, several courts have expressly stated that the Code's requirement of good faith is relevant to the seller's conduct in this situation.[47]

C. *Possible Characterizations of Section 2-702(2)*

The characterization of section 2-702(2) will often be decisive in determining the reclaiming credit seller's success when he attempts to reclaim goods from the bankruptcy trustee. Basically, three such characterizations are important to such a determination:[48] section 2-702(2) might be regarded either as a codification of the common law remedy of rescission for fraud, as an Article 2 security interest,[49] or as a statutory lien. The first such characterization is probably the more significant, given the defrauded seller's ability to recover against the trustee under pre-Code law.[50] The section 2-702(2) reclamation right clearly was not created *ex nihilo;* its historical relationship to the common law rescission right is obvious. In particular, its requirements of receiving goods "while insolvent" and the need for a "written misrepresentation" seem to derive from the first and second branches of the pre-Code remedy.[51] Yet there still are some fairly important differences between the common law and U.C.C. right of reclamation. First, section 2-702(2)'s ten day and three month time limitations are obvious innovations.[52] Secondly, section 2-702(2) marks a considerable easing of the seller's evidentiary burden. Under prior law, the buyer's receipt of the goods while insolvent usually established only a rebuttable presumption of fraud,[53] while according to Comment 2 to section 2-702 "Subsection (2) takes as its base line the proposition that any re-

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[45] *In re* Units, Inc., 3 U.C.C. Rep. Serv. 46, 48 (D. Conn. 1965) (decision of bankruptcy referee) (the court found no representation of solvency in the letter).

[46] *In re* Creative Bldgs., Inc., 498 F.2d 1, 4 (7th Cir. 1974); Theo. Hamm Brewing Co. v. First Trust & Savings Bank, 103 Ill. App. 2d 190, 195-96, 242 N.E.2d 911, 915 (1968); *In re* Fairfield Elevator Co., 14 U.C.C. Rep. Serv. 96, 107-08 (S.D. Iowa 1973) (decision of bankruptcy judge). This requirement resembles the prior approach under the common law. See notes 28 and 29 *supra* and accompanying text.

[47] See cases cited at note 46 *supra. See also* U.C.C. § 2-103(1)(b).

[48] Here we are concerned with characterizations of § 2-702 arising independently of Bankruptcy Act definitions. Thus, its possible characterization as a "priority" will not be discussed here. On this, see notes 127-35 *infra* and accompanying text.

[49] See U.C.C. § 9-113 and its comments.

[50] See note 18 *supra* and accompanying text.

[51] See notes 19-29 *supra* and accompanying text.

[52] Under the common law the seller was under an obligation "to proceed promptly" or act "within a reasonable time" in reclaiming the goods. Frech v. Lewis, 218 Pa. 141, 144, 67 A. 45, 46 (1907) (the court phrased these requirements in the cash sale context).

[53] See notes 23-24 *supra* and accompanying text.

ceipt of the goods on credit by an insolvent buyer amounts to a tacit business misrepresentation of solvency and therefore is fraudulent against the particular seller." Third, it seems that at common law an oral misrepresentation could give rise to a right of recovery, while under section 2-702(2) only a *written* misrepresentation is given explicit treatment. Finally, under pre-Code law a seller trying to base his recovery for fraud on the buyer's misrepresentation could be defeated by a failure to show reasonable reliance or an adequate investigation of dubious representations.[54] Section 2-702(2) does not explicitly include such requirements, although a number of courts have grafted these requirements onto the section.[55] These differences, however, do not so outweigh section 2-702's origin in the common law that they foreclose any contention that the section is a codification of the common law remedy for rescission for fraud. Hence, as witnessed by the divergence among the courts, the question of the section's characterization as a codification of a common law remedy is not easily resolved.[56]

Section 2-702 is also susceptible to characterizations as either a security interest or a statutory lien. The U.C.C.'s basic definition of the term "security interest" in section 1-201(37)[57] is arguably broad enough to include the section 2-702(2) reclamation right. Section 1-201(37) states that "[t]he retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer . . . is limited in effect to a reservation of a 'security interest.' " If a reclaiming seller may reserve the right to reclaim goods when the buyer is insolvent under 2-702(2), it could be argued that this reservation is a security interest under the section 1-201(37) definition. However, there is authority to the effect that this section does not create a security interest under the Code,[58] presumably since section 9-113 does not include section 2-702 in its list of sections which create Article 2 security interests.[59]

The other possibility is that section 2-702 may be regarded as sufficiently similar to the host of legislatively-created liens benefiting certain classes of parties supplying goods or services to be classed as a "statutory lien." The resolution of this characterization rests partly in the issue as to whether section 2-702 is merely a codification of the common law remedy of rescission for fraud or whether the section is so different from its common law origins that it should be charac-

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[54] See notes 28-29 *supra* and accompanying text.

[55] See notes 46-47 *supra* and accompanying text.

[56] See cases cited at notes 107 and 109 *infra*.

[57] U.C.C. § 1-201(37) provides: " 'Security interest' means an interest in personal property or fixtures which secures payment or performance of an obligation."

[58] *See In re* Mel Golde Shoes, Inc., 403 F.2d 658, 660 (6th Cir. 1968); Ranchers & Farmers Livestock Auction Co. v. First State Bank, 531 S.W.2d 167, 169 (Tex. Ct. App. 1975). *See also* the authorities cited in Note, 53 N.C. L. REV. 169, 174 n.24 (1974). But see note 227 *infra* and accompanying text.

[59] U.C.C. § 9-113, Comment 1.

terized as primarily a stuatutory remedy.[60] If the latter interpretation is accepted, the additional problem arises as to whether section 2-702 is a lien. This problem is compounded by the fact that neither the Bankruptcy Act nor the Code specifically defines a lien.[61] Due to the lack of any clear guidance from the Act or the Code, a resolution of which characterization to apply to various sections of the Bankruptcy Act has eluded the courts and the commentators. This dilemma will present itself at several subsequent points in the article in terms of the various strategies available to the seller when he attempts to protect himself from a buyer's bankruptcy.

II. DEMAND AFTER BANKRUPTCY

The most common context in which conflicts between section 2-702(2) and the Bankruptcy Act arise is when the credit seller makes his demand for the goods *after* the date of the buyer's bankruptcy petition.[62] The reason for the frequency of this sequence of events is that the seller's discovery of the buyer's insolvency is often tied to a decisive, public event such as the filing of a petition in bankruptcy which is intended to put creditors on notice. As a result of the frequency of this fact pattern, most of the reported litigation on the conflict between section 2-702 and the Bankruptcy Act involves precisely this situation.

If the seller has attempted to reclaim after the bankruptcy of the buyer, the trustee typically will oppose the reclamation on one or more of three grounds. First, the trustee may utilize section 70(c) of the Bankruptcy Act which grants the trustee the rights of a hypothetical lien creditor.[63] Under this section the trustee may assert that he has a superior interest in the goods as compared to the seller's right to reclaim. Second, since section 67c(1)(A) of the Act invalidates certain statutory liens, the trustee may argue that section 2-702(2) is invalid as a lien created by statute.[64] Finally, section 64(a) invalidates various state created priorities which interfere with the purposes of the Bankruptcy Act.[65] The trustee may utilize this section to invalidate section 2-702(2) by attempting to demonstrate that the section is a state created priority in defiance of section 64(a).[66]

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[60] See notes 100-26 *infra* and accompanying text.

[61] See notes 110-14 *infra* and accompanying text.

[62] *See In re* Perskey & Wolf, Inc., 19 U.C.C. Rep. Serv. 812, 814 (N.D. Ohio 1976).

[63] 11 U.S.C. § 110(c) (1970).

[64] *Id.* § 107(c)(1).

[65] *Id.* § 104(a).

[66] It has been suggested that a reclaiming seller who makes a demand after bankruptcy may be estopped, since the reclamation may be considered a voidable preference under § 60 of the Bankruptcy Act, 11 U.S.C. § 96 (1970). *See* King-*Voidable Preferences, supra* note 3, at 938. This argument essentially asserts that if a trustee can avoid a transfer made by the bankrupt before bankruptcy, the trustee can use the same power to resist making that transfer during bankruptcy. Although no one seems to have suggested

A. *Section 70(c)*

In order to protect the assets of the bankrupt for distribution to general creditors, the Bankruptcy Act gives the trustee extensive powers to invalidate certain transfers of the bankrupt to creditors and to claim a priority to the bankrupt's property so as to invalidate secret or invalid liens.[67] Much of this power is derived from section 70(c) of the Bankruptcy Act which provides in relevant part that:

> The trustee shall have as of the date of bankruptcy the rights and powers of . . . 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.[68]

Section 70(c) has been termed the "strong-arm" clause of the Bankruptcy Act, a provision by which 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."[69] The power so granted, however, operates "as of" the date of bankruptcy: that is, the trustee is effectively deemed to have completed the steps necessary for perfection of his lien on the date of bankruptcy. As a result, the trustee is precluded from overcoming the claims of preceding lienholders or other interested parties by picking the optimal time or times for the perfection of hypothetical liens.[70] It should also be noted that section 70(c) does not require the trustee to locate an actual, existing party who could have asserted the right assumed by the trustee.[71]

In this context, if the trustee is a lien creditor "with every right and power which is conferred by the law of the state," determination of "ideal lien creditor" status under section 70(c) should first suggest

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it, it is conceivable that this "estoppel" argument might be used by the trustee in connection with § 70(e) of the Bankruptcy Act, 11 U.S.C. § 110(e) (1970), which also renders transfers made by the bankrupt voidable by the trustee. In any event, the effect of these two sections of the Bankruptcy Act upon a 2-702 reclaiming seller will be discussed fully under the next division, which addresses the problems of a seller who has exercised his reclamation right prior to bankruptcy. See notes 166-202 *infra* and accompanying text.

[67] *See* 4A COLLIER, *supra* note 3, ¶ 70.45 at 557-60.

[68] 11 U.S.C. § 110(c) (1970).

[69] *In re* Kravitz, 278 F.2d 820, 822 (3d Cir. 1960), *quoting In re* Waynesboro Motor Co., 60 F.2d 668, 669 (S.D. Miss. 1932).

[70] *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.

Id.

[71] *See* 4A COLLIER, *supra* note 3, ¶ 70.50, at 609-14. *But See* Pacific Fin. Corp. v. Edwards, 304 F.2d 224, 228-29 (9th Cir. 1962).

reference to the Uniform Commercial Code's statements on the rights of lien creditors as against the rights of the reclaiming seller. The 1962 version of section 2-702(3) provided a superficially clear statement on this point: "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)."[72] This language, when combined with section 70(c) of the Bankruptcy Act, seemingly provided a definite answer to the question posed: the trustee as lien creditor should always triumph over the reclaiming 2-702 seller.[73] However, the Third Circuit's famous and controversial decision of *In re Kravitz*[74] took a somewhat different reading of the relevant language, and in the process touched off a major dispute among commercial and bankruptcy law commentators which has exposed serious code ambiguities and omissions in this area.[75]

Kravitz involved the competing rights of the seller and the trustee to goods delivered on credit to the buyer three days before his involuntary petiton in bankruptcy.[76] One day after the petition was filed the seller attempted to reclaim the goods under section 2-702(2). Both the bankruptcy referee and district court rejected the seller's claim.[77] In affirming this decision, the Third Circuit did not interpret section 2-702(3)[78] as directly subordinating a credit seller to a lien creditor or a trustee. Instead, the court noted that section 2-702(3) refers to section 2-403 in defining the relative rights of a seller and a lien creditor.[79] The only reference in section 2-403 to lien creditors is that "[t]he rights of . . . lien creditors are governed by the [Article] on Se-

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[72] U.C.C. § 2-702(3) (1962 version).

[73] *See* Shanker—*Reply*, *supra* note 3, at 97-98.

[74] 278 F.2d 820 (3d Cir. 1960).

[75] *See generally* Hillman, *Interpreting the Uniform Commerical Code: UCC Section 1-103 and "Code Methodology,"* 18 B.C. IND. & COM. L. REV. —— (1977).

[76] 278 F.2d at 821.

[77] *Id.* Neither the referee's decision nor the district court decision has been published. However, Professor Morris Shanker, who personally examined the full *Kravitz* file, has concluded that: 1) *Kravitz* was decided under an earlier version of section 2-702(2), *see* U.C.C. § 2-702 (1952 version), which lacked the current exclusion of the common law fraud remedy (on the latter, see also notes 142-54 *infra* and accompanying text); 2) the district court opinion seemed to hold that the § 2-702 reclamation right would be unavailable to the seller because of its subordination to a lien creditor via section 2-702(3); 3) counsel for the seller definitely advanced a common law fraud theory before the referee; and 4) the case therefore proceeded largely under a common law fraud theory before the lower courts. *See* Shanker, *supra* note 3, at 42. However, the court of appeals, while not completely clear as to the theory under which it was proceeding, did give considerable attention to section 2-702 and other sections of the Code, as the following discussion should indicate.

[78] The applicable version of § 2-702 in *Kravitz* differed somewhat from the 1962 version quoted in the text. See text at note 72 *supra*. This earlier version in relevant part provided that "where a seller discovers the buyer to be insolvent he may . . . (b) subject to the rights of a buyer in ordinary course . . . or lien creditor under this Article (Section 2-403), and within ten days after receipt, reclaim any goods received by the buyer on credit . . . ." *Kravitz*, 278 F.2d at 821; U.C.C. § 2-702(1) (1952 version).

[79] 278 F.2d at 821. Section 2-403 is quoted at note 220 *infra*.

cured Transactions (Article 9) . . . ."[80] The court then referred to section 9-301(3), which defines a lien creditor as "a trustee in bankruptcy from the date of the filing of the petition."[81] The court interpreted this section as recognizing that the rights of a trustee as lien creditor are governed by the Bankruptcy Act.[82] 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 . . . ."[83] 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[84] finding that the reclaiming seller, even if defrauded, could not triumph over certain lien creditors.[85] Then, after holding that nothing in the U.C.C. changed this rule, it found for the trustee, affirming the district court decision.[86] In effect, the court reasoned that since the U.C.C. does not provide any guidance as to the rights of the parties, pre-Code law should apply.[87]

The legislative reaction to *Kravitz* did not take long to develop. By 1962, at least two states had amended or enacted section 2-702(3) to eliminate the "lien creditor" language.[88] In commenting on this reaction in an article of the same year, Professor Hawkland noted that *Kravitz* did *not* hold that the trustee would inevitably triumph through the operation of Code Sections 2-702(3), 2-403(4), and 9-301(3).[89] He contended that the result in *Kravitz* was "an anomaly peculiar to Pennsylvania" because of that state's unusual pre-Code rule regarding the relative rights of the reclaiming seller and a lien creditor.[90] While arguing that the legislative history of section 2-702 really made such a

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[80] 278 F.2d at 821-22. *See* U.C.C. § 2-403(4) (1952 version).

[81] U.C.C. § 9-301(3) (1952 version).

[82] 278 F.2d at 822. The court stated:

> We think the correct way to put the matter is that by federal law the trustee in bankruptcy is made a lien creditor and that this right thus given him is recognized by the Uniform Commercial Code which simply states the power of the trustee as created by the prevailing law, that is, the federal law of bankruptcy.

Id.

[83] *Id.*

[84] The cases cited by the court for authority were Schwartz v. McClosekey, 156 Pa. 258, 27 A. 300 (1893) and Mann v. Salsberg, 17 Pa. Super. 280 (1901).

[85] 278 F.2d at 822.

[86] *Id.*

[87] *See* Shanker, *supra* note 3, at 40-43 where the author presents an intriguing argument that *Kravitz* rested on an analysis of common law fraud, since the prior version of § 2-702 did not limit the use of other fraud defenses. See note 77 *supra*. He concludes that § 2-702 under the 1962 version explicitly cuts off the rights of the seller in favor of the lien creditor. *Id.* See note 97 *infra*.

[88] *See* 1961 Ill. Laws, at 2101, § 2-702 (codified at ILL. ANN. STAT. tit. 26, § 2-702 (1974) (Smith-Hurd)); 1961 N.M. Laws, ch. 96, § 2-702 (codified at N.M. STAT. ANN. § 50A-2-702 (1962)).

[89] *See* Hawkland, *supra* note 3, at 88.

[90] *Id.*

change unnecessary, Professor Hawkland nevertheless advocated an amendment to section 2-702(3) deleting its "or lien creditor" language.[91] In 1966, the Permanent Editorial Board for the Uniform Commercial Code adopted this change,[92] although a sizeable majority of the states still retain the pre-1966 version.[93]

The effect of *Kravitz* and the 1966 amendment has been to further complicate the problem of interpreting section 2-702. In states which have not adopted the 1966 amendment, two general approaches seem to have emerged. The first of these basically supports the *Kravitz* result: recourse to pre-Code law to determine the relative rights of seller and lien creditor.[94] In most states,[95] the recourse to

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[91] *See id.:*

> [T]here is no indication whatsoever from the legislative history of the Uniform Commercial Code that 2-702 was intended to give the trustee more rights vis-a-vis the defrauded seller than he was accorded under previous law. Because 2-702(3), however, can be read as doing precisely what its draftsmen manifestly did not want done, an amendment to the section seems in order. . . . The amendment to 2-702(3), of course, should not be considered as legislative history for the conclusion that the defrauded seller necessarily prevails over the trustee in bankruptcy. Its intention is merely to adopt the rule of the *Kravitz Case*, as correctly read and applied.

Id.

[92] 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).

[93] For a more or less current listing, see UNIFORM LAWS ANNOTATED, UNIFORM COMMERCIAL CODE, § 2-702, at 350 (1976). According to that listing, sixteen states have adopted the new language.

[94] Actually, there seems to be a variety of approaches here, all 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 section 70(c) of the Bankruptcy Act. See notes 74-87 *supra* and accompanying text.

The second approach is basically similar, but differs in the details of its application. Crucial to it is the assertion that § 2-702(3) does not of itself define the lien creditor rights to which it refers, and that reference to section 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 (effectively § 9-301), that section must be consulted to determine their content. However, unlike *Kravitz*, 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 interests 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. *See, e.g.*, DUESENBERG & KING, *supra* note 3, § 13.03[4] at 13-26.2 to 13-33. *Cf.* Bjornstad, *supra* note 3, at 358. At least two cases have followed this approach. *See In re* Mel Golde Shoes, Inc., 403 F.2d 658, 659-60 (6th Cir. 1968) (involving contest between reclaiming seller and lien creditor; seller held to triumph under pre-Code Kentucky law); *In re* Royalty Homes, Inc., 8 U.C.C. Rep. Serv. 61, 64 (E.D. Tenn. 1970) (decision of bankruptcy referee) (seller triumphs over trustee under pre-Code Tennessee law).

The third approach is simply to view § 2-702(2) as a codification of the common law remedy of recission for fraud, and thus to avoid its confusing relations with §§ 2-702(3), 2-403, and 9-301. *See* King, *supra* note 3, at 82:

> In the abstract, therefore, there are definite problems of classification and real problems of effectuating the protection intended [by the U.C.C. for the seller]. But is it at all necessary, even proper, to view the interaction [between § 2-702 and the Bankruptcy Act] solely in the abstract?

pre-Code law should produce a triumph for the seller over the trustee because at common law the defrauded seller typically would defeat an attaching lien creditor.[96]

The second approach is to view the Code as a self-contained body of law in which the seller is expressly subordinated to a lien creditor by section 2-702(3), without any need to consult the cross references to section 2-403 and to Article 9.[97] This approach, obviously, will result in victory for the trustee in all states where the original 2-702(3) language is still in force, since under that version the seller's right to reclaim "is subject to the rights of a . . . lien creditor." Con-

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> Historically, the seller's right to reclaim was recognized in bankruptcy proceedings, assuming he could prove whatever ingredients of fraud were necessary. At least this was true in most jurisdictions which did not grant superior rights to an intervening attaching or levying creditor. For this very basic reason the trustee was not permitted the use of § 70(c)
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> . . . [T]here is no reason to believe that the situation *should be* any different under the Uniform Commercial Code. The intention of its draftsmen clearly was to eliminate the necessity of proving fraud or misrepresentation in the case of the ten-day demand. If you will, the Uniform Commercial Code made no change; it carried over the fraud element but accepted its existence as an irrebutable presumption. Accordingly, there is absolutely no reason for a bankruptcy court to view § 2-702(2) as any startling change. There is absolutely no reason to regard it as having opened the door to a different construction injurious to the seller. There is not a new right; it is the same old one. It should be remembered that, in substance, neither the Uniform Commercial Code nor the Bankruptcy Act has been changed in any respect to require departure from prior precedent or even to permit reappraisal of the principles.

Id. See also In re Royalty Homes, Inc., 8 U.C.C. Rep. Serv. 61, 63-64 (E.D. Tenn. 1970) (decision of bankruptcy referee), approvingly citing the above article and holding that the seller could triumph over the trustee under Tennessee law. As discussed in the previous paragraph, this case also took an attitude toward the Code language basically similar to that of the second approach described above, thus suggesting a basic compatibility between that view and the one developed here.

[95] *See, e.g.*, Hawkland, *supra* note 3, at 88; Note, 79 HARV. L. REV., *supra* note 3, at 610.

[96] See notes 17 & 18 *supra* and accompanying text.

[97] *See* Countryman, *supra* note 3, at 457; Shanker-*Reply*, *supra* note 3, at 96-98; Shanker, *supra* note 3, 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) (decision of bankruptcy referee); *In re* Behring & Behring, 5 U.C.C. Rep. Serv. 600, 606-07 (N.D. Tex. 1968) (decision of bankruptcy referee); *In re* Units, Inc., 3 U.C.C. Rep. Serv. 46, 48-49 (D. Conn. 1965) (decision of bankruptcy referee); *In re* Eastern Supply Co., 1 U.C.C. Rep. Serv. 151, 153-54 (W.D. Pa. 1963) (decision of bankruptcy judge), *aff'd*, 331 F.2d 852 (3d Cir. 1964). *See also In re* Federal's, Inc., 12 U.C.C. Rep. Serv. 1142, 1144-50 (E.D. Mich. 1973) (decision of bankruptcy judge), *aff'd*, 402 F. Supp. 1357 (E.D. Mich. 1975) (expressing approval for this view but feeling constrained by precedent to make recourse to pre-Code law). *Cf.* DUESENBERG & KING, *supra* note 3, § 13.03[4] at 13-33 to 13-36.

Also, Professor Shanker has 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, and because the 2-702 reclamation right is an unperfected security interest subject to a lien creditor by U.C.C. § 9-301(1)(b). Shanker-*Reply*, *supra* note 3, at 98-102. *But see* notes 58-59 *supra* and accompanying text.

versely in those states where the 1966 amendment has been adopted, the seller is likely to triumph in almost all cases. If, as is most likely, the amendment is viewed as removing from the Code any pretense to establishing the relative rights of seller and lien creditor, a reference to pre-Code law will be necessary. As has been suggested, this should enable the creditor seller to recover from the trustee in most states, since the pre-Code law of a majority of the states favors the reclaiming seller over the lien creditor.[98] However, the amendment might also be seen in its historical context as a positive state declaration that the seller should triumph over the lien creditor in all situations, including instances in which the state's pre-Code rule would favor the lien creditor. The basis for this argument would rest on the premise that if under the 1962 version of 2-702(3), the reclaiming seller's rights were subject to those of a lien creditor, the removal of the words "lien creditor" from that section would indicate that the legislature no longer wished to subordinate the seller to the trustee in bankruptcy.[99]

B. *Section 67c(1)*

Even if the seller attempting to reclaim after bankruptcy is not frustrated by section 70(c) of the Bankruptcy Act, section 67c(1)(A)[100] may still prove to be an obstacle. Section 67c(1)(A) states in relevant part that "every statutory lien which first becomes effective upon the insolvency of the debtor" is "invalid against the trustee."[101] Since the section 2-702(2) reclamation right depends upon the seller's discovery of the buyer's insolvency, this language seems to satisfy that requirement of section 67c(1)(A).[102] The pivotal issue, then, is whether sec-

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[98] See note 95 *supra.*

[99] But see note 91 *supra.*

[100] Commentary on the relationship between § 2-702(2) and § 67c of the Bankruptcy Act includes: Henson, *Reclamation Rights of Sellers Under Section 2-702,* 21 N.Y.L.F. 41 (1975); Note, 32 WASH. & LEE L. REV. 1001 (1975); Note, 53 N.C. L. REV. 169 (1974); Note, 35 U. PITT. L. REV. 922 (1974).

[101] 11 U.S.C. § 107(c)(1)(A) (1970). Section 67c(1)(B) of the Bankruptcy Act might also work to block the reclaiming seller. This section provides in part that, subject to certain provisos, "every statutory lien which is not perfected or enforceable at the date of bankruptcy against one acquiring the rights of a bona fide purchaser from the debtor on that date, whether or not such a purchaser exists," will be invalid against the trustee. *Id.* § 107(c)(1)(B). *See* 4 COLLIER, *supra* note 3, at ¶ 67.28[2.2]. Section 2-702(3) of the Code of course makes the seller's § 2-702 reclamation right "subject to the rights of a buyer in ordinary course or other good faith purchaser . . . ." Still, the basic issue—whether § 2-702 is a "statutory lien"—is obviously the same under either bankruptcy provision. See notes 104-14 *infra* and accompanying text.

[102] The Bankruptcy Act states that:

> A person shall be deemed insolvent within the provisions of this title whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts

tion 2-702 is a "statutory lien."[103] The cases addressing this question typically raise three basic issues: (1) whether the section 2-702 remedy is actually "statutory"; (2) whether the 2-702 reclamation right is a "lien"; and (3) what was the legislative intent and purpose of section 67c.

1. Section 2-702 as a Statutory Remedy

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, but shall not include any lien provided by or dependent upon an agreement to give security, whether or not such lien is also provided by or is also dependent upon statute and whether or not the agreement or lien is made fully effective by statute.[104]

The 2-702(2) reclamation right clearly arises "by force of statute upon specified circumstances or conditions," but one court has argued that section 2-702(2) is not a statutory lien because the lien does not arise "solely by force of statute."[105] The court reasoned that section 2-702's relationship with the common law remedy of rescission for fraud[106] implies that the Code did not create a new remedy but merely

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11 U.S.C. § 1(19) (1970). The Uniform Commercial Code, on the other hand, states that "[a] person is 'insolvent' who has either 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." U.C.C. § 1-201(23). Obviously, the Code definition of insolvency is broader than that of the Bankruptcy Act, and for this reason there may be instances in which a valid demand under § 2-702 may not become "effective upon the insolvency of the debtor" in the bankruptcy sense. *But see* 4 COLLIER, *supra* note 3, ¶ 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.

Also, it might be argued that the § 2-702(2) reclamation right is conditioned on a host of factors other than the debtor's insolvency. *See* Note, 32 WASH. & LEE L. REV. 1001, 1014 (1975).

[103] For cases holding that § 2-702(2) is a statutory lien, see *In re* Perskey & Wolf, Inc., 19 U.C.C. Rep. Serv. 812 (N.D. Ohio 1976) (decision of bankruptcy referee); *In re* Federal's, Inc., 402 F. Supp. 1357, 1367-68 (E.D. Mich. 1975), *affirming* 12 U.C.C. Rep. Serv. 1142 (E.D. Mich. 1973) (decision of bankruptcy judge); *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) (decision of bankruptcy judge); *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) (*Trahan* and *Nieves* deal with interpretations of civil codes). *But see In re* Telemart Enterprises, Inc., 524 F.2d 761 (9th Cir. 1975); *In re* National Bellas Hess, Inc., 17 U.C.C. Rep. Serv. 430 (S.D.N.Y. 1975) (decision of bankruptcy judge).

[104] 11 U.C.C. § 1(29a) (1970).

[105] *In re* National Bellas Hess, Inc., 17 U.C.C. Rep. Serv. 430 (S.D.N.Y. 1975) (decision of bankruptcy judge).

[106] See notes 53-55 *supra* and accompanying text.

codified the common law.[107] The cases holding otherwise, however, stress the differences between section 2-702(2) and the traditional fraud remedy[108] in contending that 2-702 is primarily a new statutory remedy which falls within the ambit of Bankruptcy Act sections 1(29a) and 67c(1)(A).[109] This conflict as to the derivation of section 2-702(2) is difficult to resolve, since the section contains elements of both the common law and new statutory rights and remedies. For this reason, either argument is defensible and available as a strategy for the trustee or seller.

2. Section 2-702 as a lien

In Section 1(29a)'s definition of the term "statutory lien" seems to assume a recognized meaning for the term "lien," notwithstanding the fact that this term is not defined either by the Code or by the Bankruptcy Act. Most generally, a "lien" seems to be regarded as a hold or claim on property for the payment of some debt, obligation or duty.[110] This definition suggests that the lien should terminate upon payment of the debt, and some courts have contended that the 2-702(2) reclamation right similarly terminates upon the buyer's payment in arguing that it is in effect a "lien."[111] In contrast, another court has regarded the exclusivity of the 2-702 remedy[112] as differentiating it from the typical lien, since a lien holder can sell the property and recover any deficiency from the debtor as an unsecured creditor whereas the 2-702 seller cannot.[113] If section 2-702(2) is characterized as a codification of the common law fraud remedy, the section could be regarded as a lien, since the rescission right may be viewed as an interest in property for the payment of a debt. However, the common

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[107] *In re* National Bellas Hess, Inc., 17 U.C.C. Rep. Serv. 430, 431-32 (S.D.N.Y. 1975) (decision of bankruptcy judge). One commentator, however, has suggested that this argument should not be utilized, principally because it would involve a burdensome comparison of the alleged lien with various possible common law antecedents in order to determine its status as "solely statutory." *See* Note, 32 WASH. & LEE L. REV. 1001, 1009-10 (1975).

[108] On the characterization of § 2-702(2), see notes 48-55 *supra* and accompanying text.

[109] *See In re* Giltex, Inc., 17 U.C.C. Rep. Serv. 887, 889-90 (S.D.N.Y. 1975); *In re* Federal's, Inc., 402 F. Supp. 1357, 1364-65, 1367 (E.D. Mich. 1975); *In re* Wetson's Corp., 17 U.C.C. Rep. Serv. 423, 426 (S.D.N.Y. 1975) (decision of bankruptcy judge).

[110] *See, e.g.*, 51 AM. JUR.2d *Liens* § 1 at 142-43 (1970); BLACK'S LAW DICTIONARY 1072-73 (rev'd 4th ed. 1968). For a compendium of definitions of this term, see Note, 53 N.C. L. REV. 169, 172-73 (1974).

[111] *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) (decision of bankruptcy judge).

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

[113] *See In re* National Bellas Hess, Inc., 17 U.C.C. Rep. Serv. 430, 432-33 (S.D.N.Y. 1975) (decision of bankruptcy judge). *But see In re* Federal's, Inc., 402 F. Supp. 1357, 1367 (E.D. Mich. 1975), *affirming* 12 U.C.C. Rep. Serv. 1142 (E.D. Mich. 1973) (decision of bankruptcy judge).

law right of rescission is based upon the concept that the buyer has not given up full title to the goods.[114] Hence, it could also be argued that the right of rescission was not a lien since it represented more than an interest in property for the payment of a debt.

3. Legislative History of Section 67c

To determine whether a reclaiming seller under 2-702(2) meets the statutory requirement of section 67(c) of the Bankruptcy Act, several courts have resorted to the legislative history of section 67c for clarification of the phrase "statutory lien."[115] These courts have generally concluded that Congress' enactment of sections 1(29a) and 67c(1)(A) was part of an ongoing process which favors the trustee's power to invalidate state-created priorities which are designed to circumvent the policies of the Bankruptcy Act for the distribution of the bankrupt's estate. In the view of these decisions, this process effectively began in 1938 when the Act was amended to eliminate the general recognition in bankruptcy of state-created priorities.[116] Previous to 1938 the states were permitted to decide which group of creditors should receive priority after the satisfaction of all valid liens.[117] After the 1938 amendments several states attempted to circumvent the elimination of such priorities by casting what arguably were actual priorities in the guise of liens, thereby insuring such otherwise invalid priorities an enhanced status.[118] In 1966 Congress responded to this situation by amending section 67 to expand the list of statutory liens specifically declared invalid in bankruptcy.[119] Several courts in tracing this development have reasoned that the 2-702(2) reclamation right is a statutory lien which was intended by Congress to be invalidated by section 67c(1)(A).[120]

While the legislative history of the Act may demonstrate a general trend to invalidate disguised priorities,[121] the legislative interpretation of the pertinent sections leads to some confusion as to their specific application. The House and Senate Reports accompanying the

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[114] See note 15 *supra* and accompanying text.

[115] *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* Federal's, Inc., 402 F. Supp. 1357, 1367-68 (E.D. Mich. 1975); *In re* Good Deal Supermarkets Inc., 384 F. Supp. 887, 889 (D.N.J. 1974).

[116] Act of June 22, 1938, ch. 575, § 64, 52 Stat. 874.

[117] See discussion in *In re* Wetson's Corp., 17 U.C.C. Rep. Serv. 423, 425 (S.D.N.Y. 1975) (decision of bankruptcy judge).

[118] *See In re* Giltex, Inc., 17 U.C.C. Rep. Serv. 887, 892 (S.D.N.Y. 1975). On the distinction between priorities and liens, *see* 3A COLLIER, *supra* note 3, ¶ 64.02[2] at 2065-69.

[119] Act of July 5, 1966, Pub. L. No. 89-495, §§ 3, 4, 80 Stat. 268-69 (as codified in 11 U.S.C. §§ 107(c)(1)(A), (B), (C) (1970)). The general recognition of state created statutory liens was retained in the new § 67(b). 11 U.S.C. § 107(b) (1970).

[120] *See, e.g., In re* Giltex, Inc., 17 U.C.C. Rep. Serv. 887, 893 (S.D.N.Y. 1975); *In re* Federal's, Inc., 402 F. Supp. 1357, 1367-68 (E.D. Mich. 1975).

[121] *See In re* Federal's, Inc., 402 F. Supp. 1357, 1367-68 & n.6 (E.D. Mich. 1975).

1966 amendments make no reference to section 2-702 of the U.C.C. or to the problems presented in *Kravitz*.[122] This notwithstanding, the history does reveal a congressional concern to invalidate "liens which become effective only in the event of insolvency."[123] However, the history appears to except from the reach of section 67c(1)(A) "a specific property right which may be asserted independently of a general distribution and regardless of the transfer of the property."[124] Section 2-702(2) does of course apply only in the event of insolvency, but it could also operate "independently of a general distribution," if there were no bankruptcy proceeding. However, the section cannot operate "regardless of the transfer of the property," since section 2-702(3) expressly subordinates the seller to a "buyer in ordinary course or other good faith purchaser."[125] All of this notwithstanding, it has also been held that due to section 2-702's alleged basis in the common law of fraud the section does not conflict with the legislative purpose of section 67c.[126]

The foregoing analysis would seem to indicate that the intent of Congress in enacting section 67c(1)(A) is far from clear when applied to the 2-702(2) reclamation right. This indicates once more the wide-ranging impact of the basic problem of characterizing section 2-702(2)'s genesis and nature. If the court views 2-702 as merely a codification of the common law, the section is not primarily a statu-

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[122] *See* H.R. REP. NO. 686, 89th Cong., 1st Sess. (1965); S. REP. NO. 1159, 89th Cong., 2d Sess. (1966); S. REP. NO. 999, 89th Cong., 2d Sess. (1966). The Senate reports are found in [1966] U.S. CODE CONG. & AD. NEWS 2442-68.

[123] S. REP. NO. 1159, 89th Cong., 2d Sess. (1966), *reprinted in* [1966] U.S. CODE CONG. & AD. NEWS 2457.

[124] *Id.* at 2461.

[125] The foregoing discussion of § 67c's legislative history should be compared to the discussion in *In re* Giltex, Inc., 17 U.C.C. Rep. Serv. 887, 892-95 (S.D.N.Y. 1975).

[126] *In re* Telemart Enterprises, Inc., 524 F.2d 761 (9th Cir. 1975). The Ninth Circuit stated in *Telemart* that:

> Section 67c, as amended in 1966, is an attempt to minimize state conflicts with federal priorities by invalidating as against the trustee some of the more obviously spurious liens, those which function more as priorities in bankruptcy than as property interests. . . .
>
> 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 benefits of section 67b. As discussed below, under 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. 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. . . . Section 2-702(2) clearly, therefore, was not an attempt to escape the effect of section 60 by creating a spurious statutory lien, and enactment of section 2-702(2) did not present the abuse which section 67c was designed to combat. . . .

Id. at 764. The *Telemart* court's references to § 60 of the Bankruptcy Act seem principally intended to illuminate the intent and purpose of Congress in amending § 67. The case did not involve anything like a preferential transfer, and none of the other 67c cases cited in note 115 *supra* pursued this line of argument.

tory remedy or the type of state priority Congress intended to invalidate. Under this interpretation, the state's enactment of section 2-702 could not be viewed as an attempt to circumvent the ban on state-created priorites, since the right to reclaim already existed at common law. However, if the section is characterized as primarily a new statutory remedy it should be invalidated by section 67c(1)(A) as a statutory lien.

C. *Section 64(a)*

The question of whether section 2-702 of the Code should be considered as a statutory enactment of the common-law fraud remedy is also crucial to yet another attack on the section's efficacy in bankruptcy—its alleged status as a disguised state-created priority under section 64 of the Bankruptcy Act.[127] As noted earlier,[128] before 1938 the Act gave priority to debts of the bankrupt owing to any persons who by the laws of the State or of the United States were entitled thereto.[129] The 1938 amendment to section 64 eliminated this general recogntion, usually consigning the party owed such a debt to general creditor status.[130] In *In re Federal's Inc.*,[131] both the bankruptcy referee and the reviewing District Judge held that section 2-702, whose employment by the seller was felt to be practically (if not legally) tied to the buyer's petition in bankruptcy, was in effect a state-created priority in clear defiance of the federal standards set out by section 64.[132] A contrary result was reached in *In re Telemart Enterprises, Inc.*[133] where the Ninth Circuit held that section 2-702 is *not* in conflict with section 64. The court reasoned that a state would be in violation of section 64 only if it conferred a priority after the bankrupt received a nondefeasible title in the property.[134] If section 2-702 and its common law basis only creates a voidable title in the seller, then section 2-702 cannot be an interference with a nondefeasible title and, hence, is not a state-created priority.[135]

D. *Summary*

Generally speaking, the seller's position if he attempts to reclaim

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[127] 11 U.S.C. § 104(a) (1970).

[128] See notes 116-18 *supra* and accompanying text.

[129] Act of July 1, 1898, ch. 541, § 64, 30 Stat. 563.

[130] Act of June 22, 1938, ch. 575, § 64, 52 Stat. 874.

[131] 12 U.C.C. Rep. Serv. 1142 (E.D. Mich. 1973) (decision of bankruptcy referee), *aff'd*, 402 F. Supp. 1357 (E.D. Mich 1975). *See also In re* Perskey & Wolf, Inc., 19 U.C.C. Rep. Serv. 812 (N.D. Ohio 1976) (decision of bankruptcy referee).

[132] 402 F. Supp. at 1365-67; 12 U.C.C. Rep. Serv. at 1150-52. It is worth noting that both *Federal's* decisions declared section 2-702 totally inoperative in bankruptcy. 402 F. Supp. at 1368; 12 U.C.C. Rep. Serv. at 1153. For a contrary view, see *In re* Giltex, Inc., 17 U.C.C. Rep. Serv. 887, 895 (S.D.N.Y. 1975).

[133] 524 F.2d 761 (9th Cir. 1975).

[134] *Id.* at 765-66.

[135] *Id.*

after bankruptcy is problematical at best. If the trustee as an "ideal lien creditor" utilizes section 70(c), the seller should usually triumph in the minority of states which have adopted the 1966 amendment to U.C.C. section 2-702(3). For states which retain the "lien creditor" language in that section, the result will basically depend upon whether the court opts for a self-contained Code resolution of the seller-lien creditor priority problem (in which case the seller will lose), or instead employs pre-Code law to resolve this question (in which case the seller typically will win). Under section 67c, the courts are divided, but the weight of authority now favors the trustee. The trustee's success in utilizing section 64 is uncertain, because of the dearth of cases dealing with this point.[136]

As was suggested in the first section of this article,[137] the characterization of section 2-702(2) has distinct implications for the reclaiming seller's success in bankruptcy. If the section is deemed to be a statutory lien, the seller obviously will fail under section 67c.[138] Similarly, if the 2-702 right to reclaim is characterized as a security interest, the seller's claim will be defeated under section 70(c).[139] If the 2-702(2) reclamation right is characterized as basically a codification of the common law remedy of rescission for fraud, however, it should survive attack under sections 67c and 64.[140] Still, while this characterization should be helpful on the section 70(c) question, it probably would not be dispositive there, since the argument under that section has centered on the use of "lien creditor" in section 2-702(3) and not on 2-702's basis in common law.[141]

E. *Invalidation of the Section 2-702 Right to Reclaim*

This section has considered three statutory provisions by which a trustee may overcome a seller's attempt to reclaim after bankruptcy; sections 64(a), 67c(1)(A), and 70(c) of the Bankruptcy Act. The discussion as to these provisions has centered on the various issues involved in deciding whether the trustee or the seller should prevail. Additional consideration should be given to the question of what practical result will occur once a court has decided which party should prevail

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[136] It would seem likely that if section 2-702(2) is deemed a priority, it should not be regarded as a statutory lien. However, the cases dealing with both sections are unclear on this point.

[137] See notes 8-12 *supra* and accompanying text.

[138] However, if § 2-702(2) is regarded as a statutory lien, the trustee's § 70(c) claim might fail, depending on the language and interpretation of the relevant version of § 2-702 as regards priorities. *See* 53 C.J.S. *Liens* § 10, at 856-57 (1948).

[139] This is because U.C.C. § 9-301(1)(b) subordinates an unperfected security interest to a lien creditor. Also, if section 2-702(2) is characterized as a security interest, it may also be regarded as a statutory lien, (or at least as a lien), and vice-versa. *Cf.* Kennedy, *supra* note 3, at 834-36; Note, 53 N.C.L. REV. 169, 173-76 (1974). See also notes 57-59 *supra* and accompanying text.

[140] See notes 104-09, 133-35 *supra* and accompanying text.

[141] But see note 94 *supra*.

under these sections. If the seller prevails against the trustee, he may reclaim the goods, since the trustee would be unable to claim a priority or invalidate the effect of section 2-702. Of course, if the trustee prevails as the ideal lien creditor under section 70(c) an opposite result occurs, since the seller would be subordinated to the trustee. However, if the trustee prevails by invalidating section 2-702 as either a statutory lien under section 67c(1)(A) or as a state-created priority under section 64(a), the seller may still be able to reclaim the goods under the common law right of rescission. The question of whether the seller may thus overcome the invalidation of section 2-702 centers first on whether the section is an exclusive remedy which precludes the seller from resorting to his rights of rescission under the common law. Section 2-702(2) does provide that "[e]xcept as provided in this subsection the seller may not base a right to reclaim goods on the buyers' fraudulent or innocent misrepresentation of solvency or of intent to pay." The effect of this section is to deny the seller any use of the common law right of rescission since this relief is based on a theory of fraud or innocent misrepresentation.[142] However, if section 2-702(2) is invalidated by the Bankruptcy Act, the second question arises as to whether the section's limitation upon the common law remedy is also nullified.

The questions of exclusivity and invalidation have been considered in three recent cases which have held that the common law remedy of rescission *does* survive the invalidation of section 2-702(2).[143] These cases involved the specific question of whether section 2-702 should be invalidated as a statutory lien under section 67c(1)(A) of the Bankruptcy Act. In the referee's decision for *In re Federal's*, Judge Brody gave the seller whose 2-702(2) reclamation was invalidated by section 67c(1)(A) the option of reverting to a cause of action based upon pre-Code fraud.[144] However, his decision in this regard was premised on the controversial view that section 67c, if applicable, totally negates the effect of section 2-702 in bankruptcy proceedings.[145] However, in *In re Wetson's*,[146] Judge Herzog took a different tack, finding the exclusivity provision of section 2-702(2) inapplicable for the following reasons:

> Equitable considerations require that I reject the argument

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[142] See notes 13-29 *supra* and accompanying text.

[143] *In re* Wetson's Corp., 17 U.C.C. Rep. Serv. 423, 429 (S.D.N.Y. 1975) (decision of bankruptcy judge); *In re* Giltex, Inc., 17 U.C.C. Rep. Serv. 887, 896 (S.D.N.Y. 1975); *In re* Federal's, Inc., 12 U.C.C. Rep. Serv. 1142, 1153 (E.D. Mich. 1973) (decision of bankruptcy judge).

[144] Judge Brody stated: "Since the provision of the Uniform Commercial Code in issue here is in conflict with the Bankruptcy Act it has no application in this proceeding. Panasonic's right to reclaim its property therefore must be determined by reference to Michigan law other than the Code." 12 U.C.C. Rep. Serv. 1142, 1153 (E.D. Mich. 1973) (decision of bankruptcy judge).

[145] See note 132 *supra*.

[146] 17 U.C.C. Rep. Serv. 423 (S.D.N.Y. 1975) (decision of bankruptcy judge).

> 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.[147]

In *In re Giltex*, the third recent case, the court followed Judge Herzog's reasoning.[148]

Thus, three courts have permitted sellers to circumvent the many 2-702/Bankruptcy Act conflicts discussed above by permitting a recourse to pre-Code fraud law where section 2-702 is invalidated in bankruptcy. Since it allows a reversion to non-uniform pre-Code remedies, this reasoning stands in ironic contrast to the fundamental proposition that Article 2 of the Uniform Commercial Code was intended to augment and make cumulative and uniform the various remedies available to aggrieved parties under a sales contract.[149] Also, the view of section 2-702(2)'s exclusivity provision in the *Wetson's* case is, to say the least, uncertain.[150] Moreover, the reclaiming seller's problems in proving common law fraud are likely to exceed his evidentiary difficulties under section 2-702,[151] although, if he can prove fraud under the common law, he should almost always triumph over the trustee.[152] All things considered, it would behoove future reclaiming credit sellers to include a common law fraud count in their reclamation petitions. An argument based upon the common law right of rescission may prove crucial if the seller is unable to overcome a trustee's contention that section 2-702(2) is invalid under section 67c(1)(A) as a statutory lien.

The effect of these three cases upon other Bankruptcy Act provisions is presently unclear since the cases only deal with the invalidation of section 2-702(2) under section 67c(1)(A). However, the language in these cases is general enough to be applied to other Bankruptcy Act provisions. For example, the invalidation of 2-702(2) as a state created priority under section 64(a) could have the same effect as invalidation under 67c(1)(A).[153] Hence, a seller may be permitted

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[147] *Id.* at 429.

[148] 17 U.C.C. Rep. Serv. 887, 895-96 (S.D.N.Y. 1975).

[149] *See, e.g.*, U.C.C. §§ 1-102(2); 2-703, Comment 1.

[150] *See In re* Goodson Steel Corp., 10 U.C.C. Rep. Serv. 387, 392 (S.D. Tex. 1968) (decision of bankruptcy referee).

[151] See notes 53-55 *supra* and accompanying text.

[152] See note 18 *supra* and accompanying text.

[153] It should be noted that the language of § 64(a) and § 67c(1)(A) differ to the extent that one could argue that § 64(a) does not specifically invalidate the exclusivity provision of § 2-702(2). Section 67c(1)(A) states that certain statutory liens are "invalid against the trustee." 11 U.S.C. § 107(c)(1) (1970). However, § 64(a) does not mention the invalidation of state-created priorities. As noted earlier, see text at notes 116-18 &

to resort to common law remedies if 2-702(2) is invalidated as a state created priority. The possible effect of these cases upon other Bankruptcy Act sections will be considered later in this article.[154]

III. RECLAMATION BEFORE BANKRUPTCY

As demonstrated in the previous discussion, the position of the reclaiming credit seller vis-a-vis the trustee is problematical at best where he attempts reclamation under section 2-702(2) after the date of the bankruptcy petition. However, assuming that the seller becomes aware of the buyer's insolvency early enough, he might enhance his chances of success if he can effect a reclamation of the goods before bankruptcy. In this context, actual physical repossession of the goods may not be necessary, since, if the technical requisites of a valid 2-702(2) "demand"[155] have been met, this demand may by itself be sufficient to give the seller a full 2-702 right to the goods.[156] This section will first discuss the effect of such a reclamation if the trustee proceeds under any of the three Bankruptcy Act provisions (sections 70(c), 67c, and 64(a)) discussed in the preceding section. Then it will examine the seller's prospects if the trustee utilizes two other Bankruptcy Act sections specifically directed toward the pre-bankruptcy time period, sections 60 and 70(e). In all cases, the discussion will assume that the seller has taken whatever steps are necessary to obtain a full 2-702(2) right to the goods.

A. *Sections 70(c), 67c and 64(a)*

Critical to the success of the seller's reclamation under these bankruptcy provisions is the contention that the trustee's rights to the goods under each section are ascertained as of the date of the bankruptcy. Under section 70(c) the trustee is to have the rights and powers of an "ideal lien creditor"[157] "as of the date of bankruptcy."[158] Thus, if the 2-702(2) reclamation (or demand) is deemed to re-vest

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129-30 *supra*, the 1938 Bankruptcy Act excluded state priorities from § 64a, so that a creditor now claiming under a state-created priority is relegated to the position of a general creditor. *See* 3A COLLIER *supra* note 3, ¶ 64.01 at 2053-54. These changes did remove the *validity* of state created priorities under the Bankruptcy Act, so that it is arguable that such priorities were *invalidated*, despite the presence of specific language in the statute to that effect.

[154] See text at notes 201-02, 232 *infra*.

[155] See notes 36-40 *supra* and accompanying text.

[156] *See In re* Bel Air Carpets, Inc., 452 F.2d 1210 (9th Cir. 1971), which held that a 2-702(2) demand made before the date of bankruptcy was sufficient to enable the seller to triumph over the trustee, where the actual physical transfer of the goods from the buyer to the seller occurred *after* bankruptcy. In so holding, the court stated that "[t]he statutory demand and the legal right to possession, not actual physical possession of the goods in question, govern the seller's rights" and that "[t]he 'transfer' here occurred . . . prior to the date of bankruptcy and we must determine [the seller's] legal rights as of that date." *Id.* at 1211.

[157] See notes 69-70 *supra* and accompanying text.

[158] 11 U.S.C. § 110(c) (1970).

title in the seller prior to the institution of bankruptcy proceedings, the buyer would lack title "as of the date of bankruptcy," and the trustee as the "ideal lien creditor" of section 70(c) would effectively have nothing to attach.[159] One case, in dictum, seems to support this view of the matter.[160]

The impact of a pre-bankruptcy reclamation on the trustee's rights under section 67c is less certain, since the section does not specifically refer to the time at which the trustee's power takes effect.[161] Several general statements by courts and commentators have been made to the effect that section 67c operates only as of the time

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[159] However, the trustee may be able to utilize the rights of an *actual* lien creditor under § 67a(1). *See* Braucher, *supra* note 3, at 1292. Section 67a(1), 11 U.S.C. § 107(a)(1) (1970), 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 the filing of a petition in bankruptcy if at the time such lien was obtained such person was insolvent. Thus, if subsequent to delivery of the goods an actual creditor of the buyer obtains a judicial lien (for example, by levy) within four months of bankruptcy, then the trustee may avoid that lien. In addition, under § 67a(3), 11 U.S.C. § 107(a)(3) (1970), the trustee could then preserve the lien for the benefit of the estate, and thereby gain whatever rights the judicial lien creditor had. In the case of a reclaiming seller, the trustee would prevail over the seller to the extent of the judicial lien.

Thus, the availability of §§ 67a(1) and (3) to displace the reclaiming seller depends not only upon a creditor obtaining a levy upon the goods in what may be a very short time period but also upon whether the law of the particular state provides for the superiority of the judicial lien. To the extent that a § 67a lien holder can be equated with a lien creditor, this should depend upon which version of § 2-702 is in force, the effect given the 1966 amendment, and which view of the cross-references in section 2-702 is adopted by the courts. See generally notes 68-99 *supra* and accompanying text. But in those states where a judicial lien creditor is superior to the reclaiming seller, § 67a could be useful to a trustee who cannot rely upon §70(c) because the reclamation had been effected prior to the filing of the bankruptcy petition.

However, it has been suggested that section 67a may only apply to liens attaching to property to which the trustee succeeds under section 70(a), 110 U.S.C. § 110(a) (1970), which grants the trustee the title of the bankrupt as of the date of bankruptcy. *See* 4 COLLIER, *supra* note 3, ¶ 67.03 at 66.2. If so, and if (as discussed in the text), the seller regains full title to the goods by reclaiming before bankruptcy, then § 67a would not be of help to a trustee either.

[160] In *In re* Behring & Behring, 5 U.C.C. Rep. Serv. 600 (N.D. Tex. 1968) (decision of bankrupty referee), where a bare oral demand was made within ten days of the receipt of the goods and before the date of bankruptcy, the court held that some sort of "follow-up" was necessary to activate the right of reclamation. *Id.* at 606. In considering whether the reclamation petition made by the seller (after the date of bankruptcy) might constitute such a "follow-up," the referee stated: "If the filing of the petition for reclamation in this proceeding be considered to be the follow up of the previous effort at reclamation, then bankruptcy having intervened the question arises whether the right of reclamation was cut off by the trustee under section 70(c) of the Bankruptcy Act." *Id.* The court then went on to decide that the right was cut off through the operation of section 2-702(3). *Id.* at 606-07. See note 97 *supra* and accompanying text. The clear implication of the quoted language, however, is that had there been an adequate follow-up (or, more generally, a sufficient demand) *before* bankruptcy, the seller would have triumphed. This is reinforced by the court's statement that "[i]t could be argued that the petition for reclamation would relate back to the time of the oral demand and hence would antedate the cut off right of the trustee." *Id.* at 607.

[161] *See* 11 U.S.C. § 107(c)(1)(A) (1970).

of the filing of the petition.[162] However, in *In re Federal's, Inc.* the court declared that under section 67c(1)(A) the right to reclaim under section 2-702(2) was "unenforceable in bankruptcy."[163] Although the case concerned a reclamation after bankruptcy, the basic principle that section 2-702(2) has no effect in bankruptcy could be extended to the area of pre-bankruptcy reclamation. In effect the trustee would have to argue that section 2-702(2) was so contrary to the intent of section 67c(1)(A), that this policy consideration should overcome any implied requirement that the property be part of the bankrupt's estate when the petition is filed.

The trustee's utilization of section 64(a) to invalidate the 2-702(2) reclamation as a state-created priority would seem to depend upon his possession of title to the goods at the time of the reclamation, since it is difficult to see how he could establish priorities as regards goods to which he lacks title. However, section 70(a) of the Bankruptcy Act gives the trustee only "the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title,"[164] and here, of course, the seller has obtained a complete right to the goods before this petition. Thus, unless the trustee can invalidate the 2-702(2) reclamation by utilizing one of the other bankruptcy sections discussed here, he should be precluded from employing section 64(a) in the context of a pre-bankruptcy reclamation.

B. *Sections 60 and 70(e)*

This article has so far dealt with those provisions of the Bankruptcy Act—sections 64(a), 67c and 70c—which are primarily concerned with the trustee's title to the estate of the bankrupt. Generally, these interests of the trustee take effect as of the date of bankruptcy. However, the trustee needs to have additional powers to invalidate transfers of property that occur prior to the filing of the petition in which the purpose is to create a "preference" for the creditor. Without such a power, the debtor could transfer his property to selected creditors before the petition and thereby deny any recovery to other less favored creditors. Accordingly, the Bankruptcy Act has empowered the trustee to invalidate certain pre-bankruptcy transfers in order to facilitate an equitable distribution of assets.[165] These transfer provisions are relevant to a pre-bankruptcy reclamation, since the trustee may claim that such an action by the seller is an invalid transfer.

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[162] *See* 4 COLLIER, *supra* note 3, ¶ 67.27 at 373. *See also* Goggin v. Division of Labor Law Enforcement, 336 U.S. 118, 124-27 (1949). The *Goggin* case, however, involved the transfer to the trustee after bankruptcy of property previously subject to a perfected government tax lien and previously in the possession of the government.

[163] 402 F. Supp. at 1368. See note 132 *supra*.

[164] 11 U.S.C. § 110(a) (1970). *Cf.* 3A COLLIER, *supra* note 3, ¶ 64.02[7] at 2075-76.

[165] *See* 3 COLLIER, *supra* note 3, ¶ 60.01 at 743-44.

1. Section 60

Section 60(a)(1) of the Bankruptcy Act defines a preference as:

> 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.[166]

Under subsection (b) "such preferences may 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."[167] Such an avoidance empowers the trustee to recover the property from the seller.

Some of the elements of a preference—e.g., the fact of a "transter . . . to or for the benefit of the creditor,"[168] the insolvency of the debtor at the time of the transfer;[169] the four month time period; and the effect of giving the creditor a greater percentage of his debt than some other creditor of the same class[170]—have not constituted major points of disagreement in litigation between the seller and the trustee.

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[166] 11 U.S.C. § 96(a)(1) (1970). For a schematic statement of the basic elements of a preference, see 3 COLLIER, *supra* note 3, ¶ 60.02 at 758-61.

[167] 11 U.S.C. § 96(b) (1970). It is interesting to note that the "discovery of the buyer's insolvency" requirement of § 2-702(2) may result in satisfaction of the "reasonable cause to believe" requirement of § 60(b). Although the latter standard is of course objective and the former is not, proof of the former may often effectively amount to proof of the latter.

[168] In terms of defining a transfer § 1(30) of the Bankruptcy Act states:

> 'Transfer' shall include the sale and every other and different mode, direct or indirect, of disposing of or of parting with property or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment, payment, pledge, mortgage, lien, encumbrance, gift, security, or otherwise; the retention of a security title to property delivered to a debtor shall be deemed a transfer suffered by such debtor . . . .

11 U.S.C. § 1(30) (1970). Even a simple 2-702(2) demand, if sufficient to give the seller a full right to goods, should meet this requirement.

The Bankruptcy Act defines a "creditor" as including "anyone who owns a debt, demand, or claim provable in bankruptcy . . . ." 11 U.S.C. § 1(11) (1970). An unpaid credit seller would seem easily to qualify under this definition, and a return of the property to him would obviously be for his benefit.

[169] Either the Uniform Commercial Code or the Bankruptcy Act definition of insolvency would apply to this situation. See note 102 *supra*.

[170] Creditors who in the absence of a preference would be entitled to the same percentage of their claims are considered members of the same class for purposes of § 60. *See* 3 COLLIER, *supra* note 3, ¶ 60.34 at 905. Here, absent a right to reclaim, the credit seller would clearly be in the general creditor category, and would obtain a greater percentage of his debt than other general creditors if he did physically repossess the goods.

However, the "property of the debtor" and the "antecedent debt" elements of a preference are not as easily resolved in a reclamation. Before the adoption of the Uniform Commercial Code these two elements did not present major problems of interpretation. Under the common law a reclaiming credit seller who could prove fraud was able to retain the goods as against the trustee by rescinding the contract.[171] The re-vesting of the buyer's voidable title in the seller was said to preclude the buyer from obtaining an interest in the goods sufficient to render them his "property"[172] or to preclude a diminution of the bankrupt's estate.[173] But, in non-fraud cases, reclamation by a credit seller seems to have been regarded as preferential.[174] Also, several courts have stated that any extension of credit, no matter how brief, makes a transfer "for or on account of an antecedent debt" under section 60(a)(1).[175] In effect, under the common law a reclamation for fraud would be a transfer for an antecedent debt, but would not be a transfer of the debtor's property. Hence, the seller could avoid the invalidation of the transfer under section 60.

The enactment of the Uniform Commercial Code, with its deemphasis of the title concept,[176] and the uncertain relationship of section 2-702(2) to common law fraud have changed certain aspects of this picture considerably. Although there seems to have been no litigation on this point, some Code commentators have expressed the view that, while a 2-702 reclamation might technically fulfill the elements of a preference under section 60(a), nonetheless it should not be so treated.[177] The principal reason for this seems to be the characterization of section 2-702 as basically a re-enactment of the common law remedy of rescission for fraud. This argument is often pressed with special vigor as regards the relationship of the common law to the "written misrepresentation" language of section 2-702(2).[178] However,

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[171] See note 18 *supra* and accompanying text.

[172] *See, e.g.*, Fisher v. Shreve, Crump & Low Co., 7 F.2d 159, 161 (D. Mass. 1925); Mulroney Mfg. Co. v. Weeks, 185 Iowa 714, 718, 171 N.W. 36, 38 (1919). *See also* Lowell v. Brown, 280 F. 193, 198 (D. Mass. 1922).

[173] *See, e.g.*, Kamberg v. Springfield Nat'l Bank, 293 Mass. 24, 26-27, 199 N.E. 339, 341 (1935). *See also* 3 COLLIER, *supra* note 3, ¶ 60.18, 60.24.

[174] *See* Marks v. Goodyear Rubber Sundries, Inc., 238 F.2d 533, 534 (2d Cir. 1956). This would presumably be based on the complete shift of title to the buyer in a non-fraud credit sale, and the consequent transfer of the buyer's "property" by repossession.

[175] *See, e.g.*, Engelkes v. Farmers Co-Operative Co., 194 F. Supp. 319, 324 (N.D. Iowa 1961). Here, the "antecedent debt" for which the transfer would be made would derive from the seller's extension of credit to the buyer.

[176] *See* U.C.C. § 2-101 comment.

[177] *See* King-*Voidable Preferences*, *supra* note 3, at 939-40; Note, 79 HARV. L. REV., *supra* note 3, at 612.

[178] *See* King-*Voidable Preferences*, *supra* note 3, at 939-40. Professor King argues:

> If reclamation under section 2-702(2) is treated as preferential simply because there is no need to show fraud where the claim is made within ten days of delivery, an artificial distinction will be created between the two rights specified in the section. Where the seller demands reclamation within ten days, it will be treated as preferential; if a written misrepresentation has been made to the seller, the reclamation will not be treated as

as previously noted,[179] this characterization of section 2-702(2) as a codification of the common law right of rescission is anything but certain. This uncertainty is increased if one refers to the title provisions of the Code which stand in direct contrast to the voidable title theory of the common law.

Section 2-401 of the U.C.C. provides that "[e]ach provision of this Article with regard to the rights, obligations and remedies of the seller . . . applies irrespective of title to the goods except where the provision refers to such title." Comment 1 to this section, however, states an additional instance in which considerations of "title" may be relevant: where the "applicability of 'public' regulation depends upon a 'sale' or upon location of 'title' without further definition . . . [i]t is . . . necessary to state what a 'sale' is and when title passes under this Article in case the courts deem any public regulation to incorporate the defined term of the 'private' law."[180] Section 2-401 does specify the times at which "title" will be deemed to "pass" when such considerations become relevant.[181] If the Bankruptcy Act is viewed as a "public regulation," the definition of the term "property of the debtor" in section 60(a) might well be regulated by the rule stated in Comment 1 to section 2-401. Under this approach section 2-702, which does not expressly mention "title," might be regarded as irrelevant to such definition. If so, by the terms of section 2-401(2), title generally passes upon the completion of the seller's performance with respect to the goods. Thus, the goods upon delivery would be the buyer's "property," and the subsequent reclamation by the seller would involve a "transfer of the property of a debtor." Assuming all of the other elements of a voidable preference are met, this self-contained Code approach could render a 2-702(2) reclamation a voidable preference under section 60 of the Bankruptcy Act, irrespective of its purported status as a reenactment of the common law fraud remedy. However, the outcome is unclear at present, since the result depends upon the court's characterization of section 2-702(2). If the court views the section as primarily a codification of the common law, the voidable title concept applies and the goods transferred would not be part of the debtor's property. If the court confines itself to the title provisions of the Code the opposite result would be achieved.

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preferential. The solution to the problem is to extend the pre-Code cases to cover both the non-fraud and written misrepresentation cases of section 2-702(2) by refusing to characterize reclamations as voidable preferences.

Id. Of course, this general argument could work against his basic position, since it could also be argued that section 2-702's de-emphasis of fraud could be extended to the "written misrepresentation" provisions so as to characterize the entire section as a voidable preference.

[179] See notes 48-56 *supra* and accompanying text.

[180] U.C.C. § 2-401, Comment 1.

[181] *See* U.C.C. §§ 2-401(1)-(3).

2. Section 70(e)

A trustee unable to utilize the Bankruptcy Act sections previously discussed might turn to section 70(e)[182] to defeat a credit seller reclaiming under section 2-702(2). Although to date no trustee seems to have utilized this section, its availability has been suggested.[183] Section 70(e)(1) 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.[184]

The applicability of section 70(e) in the context of 2-702 raises at least three issues. The first relates to what type of creditor would be able to avoid the section 2-702 reclamation. Second, can the trustee utilize the avoidance rights of these types of creditors? Finally, if the trustee can use 70(e), to what extent can he avoid the reclamation right of the seller?

It would seem that a general creditor, who by definition does not have an interest in specific property, would not have any power to avoid a section 2-702 reclamation, so the trustee would need to locate an actual[185] secured creditor or actual lien creditor. Since a creditor with a perfected Article 9 security interest in after-acquired property is deemed a good faith purchaser for value under the Code[186] and the seller's reclamation right is made expressly subject to a good faith purchaser by section 2-702(3), the secured party could avoid the reclamation. This result has been reached by a number of courts in denying the seller's reclamation petition as against secured creditors.[187]

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[182] 11 U.S.C. § 110(e) (1970).

[183] *See* Braucher, *supra* note 3, at 1292; Countryman, *supra* note 3, at 458.

[184] 11 U.S.C. § 110(e)(1) (1970).

[185] *See* 4A COLLIER, *supra* note 3, ¶ 70.90[1] at 1029-30.

[186] *See* U.C.C. §§ 1-201(19), 1-201(32), 1-201(33), 1-201(44); *In re* Daley, Inc., 17 U.C.C. Rep. Serv. 433, 435 (D. Mass. 1975). An alternative approach is that since: (1) section 2-403(1) empowers a purchaser (the debtor) with voidable title to transfer good title to a good faith purchaser for value, (i.e., the secured creditor); (2) title passes to the secured creditor at the latest, in the absence of a contrary agreement, upon delivery to the buyer/debtor under section 2-401; and (3) if the section 2-702(2) reclamation right is deemed to render the debtor's title voidable, then the creditor's security interest would be superior to the seller's reclamation right. *See In re* Hayward Woolen Co., 3 U.C.C. Rep. Serv. 1107, 1110-12 (D. Mass. 1967) (decision of bankruptcy referee); Countryman, *supra* note 3, at 447, 458.

[187] *See In re* Hayward Woolen Co., 3 U.C.C. Rep. Serv. 1107, 1110-12 (D. Mass. 1967) (decision of bankruptcy referee); *In re* Daley, Inc., 17 U.C.C. Rep. Serv. 433, 435 (D. Mass. 1975) (decision of bankruptcy judge) and the cases cited therein. One court refused to reach this result because of the failure of the secured party to show good faith. *In re* American Food Purveyors, Inc., 17 U.C.C. Rep. Serv. 436, 441-44 (N.D. Ga. 1974) (decision of bankruptcy judge).

The second type of creditor who could possibly avoid the seller's reclamation right is a creditor who obtained a lien on the goods after their delivery in a state giving such lien creditors priority over the seller.[188]

The resolution of whether the trustee can use the claim of a secured creditor or a lien creditor would seem to depend upon whether the claim of such a creditor is provable. Despite the fact that the claims of such creditors meet the literal requirements enunciated under the Bankruptcy Act to establish a provable claim,[189] Professor Kennedy has argued strenuously that the trustee should not be allowed to use the claim of a secured or lien creditor unless the trustee could himself avoid that creditor's claim.[190] If given an expansive interpretation, section 70(e) can be used by the trustee to invalidate a security interest which "runs counter to the uniform construction" of the Bankruptcy Act.[191] This issue has not yet been definitively resolved by the courts.[192]

The final issue is also clouded by some uncertainty. Once the trustee locates an actual creditor with a right to avoid the seller's reclamation, the doctrine of *Moore v. Bay*[193] comes into play. This case has come to mean that the trustee's rights derived from an actual creditor's power of avoidance are not limited to the amount of that creditor's claim.[194] Consequently, for example, if the creditor had a claim to the extent of only $100, the trustee could avoid a seller's right of reclamation even though the goods were worth $10,000. This doctrine has been sharply criticized[195] but may still have current vitality. Thus, it would seem that an avoidance under section 70(e) is possible unless the courts are persuaded that the trustee can only succeed to the rights of a lien creditor or secured creditor if the trustee can avoid that lien or security interest.

3. Summary

Due to the absence of applicable case law, any conclusions regarding reclamation before bankruptcy are necessarily tentative. If the seller is able to effect a reclamation of the goods prior to the filing,

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[188] See notes 84-85 *supra* and accompanying text.

[189] 11 U.S.C. § 103(a) (1970). *See* 4A COLLIER, *supra* note 3, ¶ 70.90 at 1034-35.

[190] *See* Kennedy, *The Trustee in Bankruptcy as a Secured Creditor under the Uniform Commercial Code*, 65 MICH. L. REV. 1419 (1967) [hereinafter cited as Kennedy, *The Trustee in Bankruptcy*]. In the case of a lien creditor, this would require that the trustee be able to use § 67a to avoid the lien. See note 159 *supra*.

[191] Kennedy, *The Trustee in Bankruptcy*, *supra* note 190, at 1430.

[192] *See* WHITE & SUMMERS, *supra* note 3, at 891.

[193] 284 U.S. 4 (1931).

[194] *See* Kennedy, *The Trustee in Bankruptcy*, *supra* note 190, 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.*

[195] *Id.* at 1420-24.

section 70(c) would seem to be inoperative since the reclamation would probably be viewed as revesting title in the seller before the date of bankruptcy. In like fashion, section 64 should not apply. The outcome under 67c(1) is less certain and depends upon whether the section serves as a general invalidation of section 2-702 or only operates upon liens not enforced as of the date of bankruptcy. The pre-bankruptcy reclamation of the goods also brings into play two additional sections of the Bankruptcy Act, which are directed at pre-bankruptcy transfers. It is conceivable that the reclamation could be avoided by the trustee as a voidable preference under section 60 unless section 2-702 is viewed as a re-enactment of the common law remedy for fraud and internal Code solutions regarding passage of title are eschewed. Finally, avoidance under section 70(e) is a distinct possibility, but depends upon the existence of certain types of actual creditors.

Once again the characterization of section 2-702 is highly determinative of the seller's success vis-a-vis the trustee.[196] If the section is considered to be a statutory lien, it may be avoided by the trustee under section 67(a) or 70(e).[197] If section 2-702 is deemed a security interest, then the reclamation could serve as a repossession perfecting that interest.[198] This delayed perfection may well be a voidable preference under section 60 as well as subject to avoidance under section 70(e).[199] If the section 2-702(2) reclamation right is considered as basically a codification of the common law remedy of rescission for fraud, the seller would win under section 60 unless the internal Code argument utilizing section 2-401 is accepted. Under section 70(e) this characterization should not be too significant, for reasons given above with respect to section 70(c).[200]

As noted previously,[201] when the trustee prevails a problem arises as to whether the exclusivity provision of section 2-702(2) is invalidated. If the trustee prevails under section 67c or 64(a), the court will have invalidated section 2-702(2) as a statutory lien or state-created priority. If the court further finds that the exclusivity provi-

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[196] For sections 70(c), 67(a), it is the time of the reclamation, and not the characterization, which is crucial here. The differential effect of the characterization should not produce a result different from the discussion in the text at notes 136-41 *supra*.

[197] This could occur only if an actual Article 9 secured party or lien creditor perfects or attaches during the interim between sale and repossession. As for § 60, this would depend on whether a statutory lien enforced before bankruptcy is a preference. However, § 67b of the Bankruptcy Act validates in bankruptcy all statutory liens not invalidated by other provisions of § 67c, irrespective of the operation of § 60. 11 U.S.C. § 107(b) (1970). In effect, the status of statutory liens in bankruptcy is determined by § 67, and not by § 60.

[198] U.C.C. § 9-305.

[199] See notes 260-63 *infra* and accompanying text. The avoidance under § 70(e) could occur only if an actual Article 9 secured party or lien creditor perfects or attaches during the interim between sale and repossession.

[200] See text at note 141 *supra*.

[201] See notes 142-54 *supra*.

sion of section 2-702(2) is invalidated, the seller will then be able to utilize the common law remedy of rescission for fraud. However, if the trustee prevails under the transfer provisions of section 60 or 70(e), there is possibly no invalidation of section 2-702(2). Unlike sections 64(a) and 67c, sections 60 and 70(e) do not address themselves to the invalidation of the statute involved. Instead they deal with the *transfer* of goods. Hence the application of section 60 or 70(e) would invalidate the transfer under section 2-702(2), but might not reach the other terms in that provision. In that event the exclusivity provision would be left intact and would prevent the seller from utilizing the common law remedies.[202]

IV. CASH SALE

Assuming an inability to recover under U.C.C. section 2-702(2) by demanding the goods either before or after bankruptcy, the credit seller might be forced back yet another hypothetical step in time in order to protect his interest in the property. Under section 2-702(1), the seller "may refuse delivery except for cash" where he "discovers the buyer to be insolvent." Following such a refusal, the rights of the seller upon the buyer's failure to pay apparently are governed by section 2-507(2) of the Code, which provides: "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." Despite the absence of express language to this effect, this section has been read as providing the cash seller with a right of reclamation if payment is not made,[203] this right arising either implicitly,[204] or by the apparent conjunction of section 2-507(2) with section 2-702(2).[205] Whatever its genesis, this

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[202] This would be based upon the approach taken in *In re* Federal's, 12 U.C.C. Rep. Serv. at 1153, that the exclusivity was invalidated as part of a general invalidation of the section in bankruptcy. See note 144 *supra*. Under the reasoning of *In re* Wetson the remedy provided by 2-702 remains exclusive only so long as it survives attack by the trustee. 17 U.C.C. Rep. Serv. at 429. In the event that the section does not survive, the seller is permitted recourse to pre-Code remedies. This language seems broad enough to include an attack by the trustee under § 60 or § 70(e). See text at note 147 *supra*.

[203] In an actual sale for "cash" as such, of course, the seller usually would not part with the goods until he received payment. Thus, the typical instance in which a failure to pay gives rise to the need for reclamation is where a check is given in payment and is subsequently dishonored. U.C.C. § 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." Comment 4 to this section states that "[t]his 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."

[204] *See In re* Helms Veneer Corp., 287 F. Supp. 840, 845-46 (W.D. Va. 1968); *In re* Mort Co., 208 F. Supp. 309, 310 (E.D. Pa. 1962). *See also* Ranchers & Farmers Livestock Auction Co. v. Honey, 552 P.2d 313, 316 (Colo. Ct. App. 1976).

[205] *See In re* Richardson Homes Corp., 18 U.C.C. Rep. Serv. 384 (N.D. Ind. 1975) (decision of bankruptcy judge); *In re* Kirk Kabinets, Inc., 15 U.C.C. Rep. Serv. 746, 748-49 (M.D. Ga. 1974) (decision of bankruptcy judge); *In re* Fairfield Elevator Co., 14 U.C.C. Rep. Serv. 96, 106-07 (S.D. Iowa 1973) (decision of bankruptcy judge); Greater

2-507(2) reclamation right clearly does involve at least one section 2-702(2) restriction. Comment 3 to section 2-507(2) states that "[t]he provision of this Article [section 2-702(2)] for a ten day limit within which the seller may reclaim goods delivered on credit to an insolvent buyer is also applicable here," and several cases have held that such a ten day limit clearly does apply.[206] Comment 3 also provides a "follow up" requirement analogous to that suggested for section 2-702(2)[207] by stating that the failure of the seller "to follow up his rights" waives the conditional nature of the buyer's right to retain or dispose of the property.[208] Finally, some cases have implied that the "written misrepresentation" exception to the ten day demand limitation under section 2-702(2)[209] also applies in the cash sale context.[210]

Assuming that the reclaiming 2-507(2) seller survives these procedural hurdles, however, his right to the goods as against the trustee in bankruptcy is still quite unclear. Generally, his ability to recover is likely to depend upon the characterization of the origin of the section 2-507(2) reclamation right. At common law, title was not deemed to pass until payment was made for the goods in a cash sale.[211] Thus, the cash seller had a right of replevin or trover[212] as to unpaid-for goods, and could recover them from both lien creditors of the buyer and the trustee in bankruptcy.[213] The cases suggesting that section 2-507(2) creates an inherent or implicit reclamation right seemingly independent of section 2-702(2) also hold that the cash seller's rights are superior to those of the trustee, and seem to do so on something akin to the "common law" basis.[214]

Louisville Auto Auction, Inc. v. Ogle Buick, Inc., 387 S.W.2d 17, 20 (Ky. 1965). This conjunction arises in part from Comment 3 to § 2-507. See note 39 *supra*.

[206] See cases cited in note 205 *supra*.

[207] See note 39 *supra* and accompanying text.

[208] *In re* Colacci's of America, Inc., 490 F.2d 1118, 1120-21 (10th Cir. 1974) seems to be the only case discussing this requirement under §§ 2-507 and 2-702(2), and it speaks only of "a regaining of possession or a bona fide attempt to do so." *Id.* at 1121.

[209] See notes 41-47 *supra* and accompanying text.

[210] *See, e.g., In re* Bar-Wood, Inc., 15 U.C.C. Rep. Serv. 828 (S.D. Fla. 1974) (decision of bankruptcy judge); *In re* Fairfield Elevator Co., 14 U.C.C. Rep. Serv. 96, 106-08 (S.D. Iowa 1973) (decision of bankruptcy judge).

[211] *See, e.g.*, Gilmore, *supra* note 15, at 1060; 77 C.J.S. *Sales* § 262, at 1060-62 (1952).

[212] *See, e.g.*, Frech v. Lewis, 218 Pa. 141, 142, 67 A. 45, 46 (1907); Gilmore, *supra* note 15, at 1059; 77 C.J.S. *Replevin* §§42-47 (1952); 78 C.J.S. *Sales* § 417 (1952). *See also* Sparkman v. Brown, 42 Ga. App. 335, 156 S.E. 240 (1930).

[213] *See, e.g.*, VOLD, *supra* note 14, § 30, at 170-72. *See also* Engelkes v. Farmers Co-Operative Co., 194 F. Supp. 319, 324 (N.D. Iowa 1961).

[214] *See In re* Mort, 208 F. Supp. 309 (E.D. Pa. 1962); *In re* Lindenbaum's, Inc., 2 U.C.C. Rep. Serv. 495 (E.D. Pa. 1964) (decision of bankruptcy referee). The court in *In re* Mort relied on the language of U.C.C. § 2-511, Comment 4 which states that "[t]his 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." The court went on to state that "[a] businessman in financial difficulty must be able to carry on cash transactions or go out of business altogether. Unless we are to return to primative commercial methods, such a businessman should be able to use a

However, this common law "cash sale doctrine" has come under attack in various 2-507(2) cases. The Code's general disavowal of the title concept has caused some courts to declare the old doctrine regarding the passage of title in a cash sale to be inapplicable to section 2-507(2).[215] It has also been stated that section 2-507(2) determines only the rights of parties to the sale, and not those of the seller and third parties.[216] More importantly, however, some cases have expressly subordinated a cash seller to a trustee through the operation of sections 2-702(3) and 9-301(3).[217] These courts have reasoned that since sections 2-507(2) and 2-702(2) are related, a cash seller should also be subject to the limitations of section 2-702(3) which subordinates a credit seller's rights to those of a lien creditor. Since a bankruptcy trustee is a lien creditor under section 9-301(3), the trustee should prevail over a reclaiming cash seller. This line of reasoning of course depends on the presence of the "lien creditor" language in section 2-702(3), and also on a somewhat controversial view as to its impact.[218] It should be further noted that if this line of reasoning were accepted, it would seem to guarantee victory for the trustee in all bankruptcy contexts, since the seller's subordination to the trustee (who is a lien creditor by section 9-301(3)) would be effected totally within the confines of the Uniform Commercial Code.[219]

Alternatively, however, it might be argued that section 2-403 of the Code, which subordinates the cash seller to a good faith purchaser for value, and *not* section 2-702(3), should govern the relative rights

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check for payment." 208 F. Supp. at 310-11. The court held that the seller could reclaim under § 2-507, that "[n]othing in the Bankruptcy Act changes this," and that "if the seller has a right to reclaim the goods he stands in a position superior to any creditor." *Id.* at 310. *See also In re* Helms Veneer Corp., 287 F. Supp. 840, 845-46 (W.D. Va. 1968), distinguishing *Mort* but seemingly willing to find for the cash seller in an appropriate case.

[215] *See, e.g.*, Evans Prods. Co. v. Jorgensen, 245 Or. 362, 365-66, 421 P.2d 978, 980 (1966).

[216] *See, e.g., id.* at 369-70, 421 P.2d at 982.

[217] *See In re* Richardson Homes Corp., 18 U.C.C. Rep. Serv. 384, 387 (N.D. Ind. 1975) (decision of bankruptcy judge); *In re* Kirk Kabinets, Inc., 15 U.C.C. Rep. Serv. 746, 749 (M.D. Ga. 1974) (decision of bankruptcy judge). *See also* Greater Louisville Auto Auction, Inc. v. Ogle Buick, Inc., 387 S.W.2d 17, 20 (Ky. 1965), where the applicability of section 2-702(3) to the reclamation rights of a cash seller was discussed, but where it was concluded that the third party was neither a good faith purchaser nor a lien creditor. In both *Richardson Homes* and *Kirk Kabinets* the courts stated that the seller would have to perfect a security interest in the goods to triumph against the trustee. *Richardson Homes*, 18 U.C.C. Rep. Serv. at 387; *Kirk Kabinets*, 15 U.C.C. Rep. Serv. at 749.

[218] See notes 88-99 *supra* and accompanying text. In the event, however, that the *Kravitz* view (i.e., a look to common law to discover the relative rights of seller and lien creditor) on this matter were accepted, the seller would typically triumph, since a cash seller typically could recover over a lien creditor before the advent of the Code. See note 213 *supra* and accompanying text.

[219] However, *Kravitz*, which also discussed section 9-301(3), seemed to reject this conclusion, probably because of the court's view that section 2-702(3) spoke only of the *rights* of a lien creditor, these rights not being adequately defined by the Code. 278 F.2d at 821-22. See notes 76-87 *supra* and accompanying text.

of the cash seller and third parties.[220] The basis for this argument would be that 2-702 only applies to credit sales while cash sales are governed by sections 2-507 and 2-403.[221] But even this approach presents difficulties for the cash seller. One "cash sale" case, *In re Samuels*,[222] has suggested that a lien creditor could be regarded as a good faith purchaser under section 2-403(1)(c).[223] The court noted that under U.C.C. section 1-201(32) a purchaser may be one who takes by lien and under section 2-403(1) a good faith purchaser may acquire title to goods which were obtained from a purchaser in a prior transaction who had issued a check which is later dishonored.[224] However, it is doubtful that a trustee in bankruptcy could be termed a good faith purchaser for value. The definition of the term "purchase" in U.C.C. section 1-201(32), while including a taking by lien, also speaks of "any other *voluntary* transaction creating an interest in property."[225] It is difficult to see how the trustee's lien, which under section 9-301(3) is acquired by "attachment, levy or the like," could be considered "voluntary." Finally, the whole controversy regarding the relative rights of a reclaiming credit seller and a trustee claiming as an ideal lien creditor under section 70(c) of the Bankruptcy Act becomes meaningless if a lien creditor is assumed to be a good faith purchaser for value. In fact, the inclusion of the terms "good faith purchaser" and "lien creditor" in the pre-1966 versions of U.C.C. section 2-702(3)

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[220] U.C.C. § 2-403 provides in relevant part:

> (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
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> (a) the transferor was deceived as to the identity of the purchaser, or
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> (b) the delivery was in exchange for a check which is later dishonored, or
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> (c) it was agreed that the transaction was to be a "cash sale," or
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> (d) the delivery was procured through fraud punishable as larcenous under the criminal law.
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> . . . .
>
> (4) The rights of other purchasers of goods and of lien creditors are governed by the Articles on Secured Transactions (Article 9), Bulk Transfers (Article 6) and Documents of Title (Article 7).

The reader should note that under § 2-403(4) the rights of a lien creditor are governed by Article Nine.

[221] *See* U.C.C. § 2-507, Comment 3.

[222] 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 sub nom.* Stowers v. Mahon, 97 S. Ct. 98 (1976). It is the final *Samuels* opinion at the circuit court level which is of concern here, and all subsequent citations will be to this opinion.

[223] *In re* Samuels & Co., 526 F.2d 1238, 1242-43 (5th Cir. 1976).

[224] *Id.*

[225] U.C.C. § 1-201(32) (emphasis added).

strongly suggest that the drafters of the Code saw a basic difference between them.[226]

The *In re Samuels* court also found that the 2-507(2) reclamation right is a security interest.[227] This right, if unperfected, would clearly be subordinate to that of a lien creditor by section 9-301(1)(b) of the Code. Once again, then, the trustee's 70(c) status should enable him to triumph. This argument, to say the least, is controversial since there is no specific reference in the Code to the status of 2-507 under Article 9. However, the alternative contention that the cash seller's priorities should be governed solely by section 2-403 is perhaps equally controversial. Since the courts have not resolved whether section 2-403 or Article 9 should apply, either argument would appear to be plausible.

Most of the preceding discussion has involved the relative rights of seller and trustee with respect to the trustee's rights as lien creditor under section 70(c) of the Bankruptcy Act. However, the argument that the cash seller should be subordinated to the trustee solely by means of U.C.C. sections 2-702(3) and 9-301(3) seems to operate without reference to any particular Bankruptcy Act provision, and, if accepted, would result in the automatic subordination of the seller to the trustee in all of the bankruptcy contexts discussed. But, as previously noted,[228] this argument is itself quite uncertain since the rights of a lien creditor are not adequately defined by the Code. Thus, it is quite possible that the rights of the reclaiming cash seller might vary with the particular Bankruptcy Act provision utilized by the trustee. If he utilizes section 60 claiming a preference or 64 claiming a state created priority, resolution of the problem would seem to depend on

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[226] It could be argued that this distinction is outweighed by the policy of the Bankruptcy Act to give the trustee the powers of an *ideal* lien creditor. See note 69 *supra*. However, the actual rights of the trustee as lien creditor are determined by state law. Hence, the approach of the Code should predominate to frustrate any claim that the trustee is a good faith purchaser for value.

[227] 526 F.2d at 1247-48. There, the court found that U.C.C. sections 2-401(1) and 1-201(37), which provide that any retention or reservation by the seller of property or title to the goods sold is limited in effect to reservation of a security interest, lead to the conclusion that the 2-507(2) right must be a security interest. *Id.* at 1246-47. However, Comment 1 to section 9-113 of the Code, which governs so-called Article 2 security interests, does not mention section 2-507 in its listing of sections creating such interests. (However, it has been suggested that while not mentioned in Comment 1 to section 9-113) the 2-702(1) right to refuse delivery except for cash is a security interest. WHITE & SUMMERS, *supra* note 3, at 780-81.) Moreover, as has been seen, the section 2-702(2) reclamation right has often been held not to be a security interest. See note 59 *supra* and accompanying text. Further, another case has squarely held that section 2-507(2) does not create a security interest. *See* Guy Martin Buick, Inc. v. Colorado Springs Nat'l. Bank, 184 Colo. 166, 175, 519 P.2d 354, 359 (1974). *See generally* Kennedy, *supra* note 3, at 836-39. Finally, even if the 2-507(2) right is regarded as a security interest, it is possible that in the context of a dishonored check, the buyer may be deemed to have "not lawfully obtained possession of the goods" under section 9-113 of the Code. If so, the "security interest" would be enforceable without Article 9 perfection and the rights of the secured party would be governed by Article 2. U.C.C. § 9-113(a), (c). *See* Henson, *supra* note 3, at 49-50.

[228] See note 219 *supra*.

whether a "title" analysis is deemed applicable to section 2-507(2), since both depend for their operation on the bankrupt buyer's having had title to the goods at some time.[229] As for section 67c and its restrictions on statutory liens, it is not obvious that the 2-507(2) reclamation right, whatever its relationship with section 2-702(2), could be regarded as "solely statutory," since it could easily be seen as a codification of the common law right of replevin in a cash sale.[230] If the trustee claims under section 70(e) that he can assume the right of a creditor who could avoid a section 2-702(2) reclamation, the question is likely to depend on whether there exists an actual party with a perfected Article 9 security interest in the goods. If so, the trustee should triumph because of the secured party's status as a good faith purchaser for value and the subordination of a cash seller to such a party under section 2-403(1)(c) of the Code.[231] Finally, it should be noted that if the seller is able to effect demand before bankruptcy his chances of success, as was the case in the credit sale context, should sharply improve. This is, however, subject to the possiblity of an avoidance under section 70(e), if the trustee can locate a prior creditor.

If a court were to rule that section 2-507 is invalid under a trustee's section 64(a) or 67c claims, the seller may attempt to resort to common law remedies. In response the trustee could argue that since Comment 3 to section 2-507 states that the ten day reclamation provision of section 2-702(2) is applicable to 2-507 reclamations, then the exclusivity provision of 2-702(2) should also apply. This argument may prove faulty since there is no specific language in 2-507 which dictates this result. In addition the common law cash sale doctrine is distinguishable from a credit sale situation in that fraud or misrepresentation was not a necessary element.[232] If the buyer merely failed to make payment when due, then the seller could reclaim the goods, since the buyer never received any title. Hence, the cash seller may be able to utilize the common law, if the trustee is successful in denying the seller's claim under section 2-507.

V. STOPPAGE IN TRANSIT AND WITHHOLDING OF DELIVERY

The seller may find that the reclamation provisions of sections 2-507 and 2-702 do not provide adequate protection of his interests when he is dealing with a marginally solvent buyer. Therefore, the seller may wish to take certain precautions prior to delivery, such as stoppage in transit and withholding of delivery. Section 2-702(1) pro-

[229] See notes 164, 172-81 *supra* and surrounding text. For a suggestion that "title" and the 2-507(2) right to retain or dispose of goods are distinct concepts, *see* Ranchers & Farmers Livestock Auction Co. v. Honey, 552 P.2d 313, 317 (Colo. Ct. App. 1976).

[230] See notes 211-14 *supra* and accompanying text. However, for a suggestion that the cash sale reclamation right might be invalidated by section 67c, *see* Henson, *supra* note 3, at 53-54.

[231] *See* notes 182-92 *supra* and accompanying text.

[232] *See* Gilmore, *supra* note 15, at 1060.

vides the seller with several alternatives upon discovering the insolvency of the buyer, one of which is to stop delivery. Section 2-705 governs the seller's right to stop the goods in transit and provides in relevant part:

> (1) The seller may stop delivery of goods in the possession of a carrier or other bailee when he discovers the buyer to be insolvent (section 2-702) . . .
>
> (2) As against such buyer the seller may stop delivery until
>
> (a) receipt of the goods by the buyer; or
>
> (b) acknowledgement to the buyer by any bailee of the goods except a carrier that the bailee holds the goods for the buyer . . . .

One commentator has suggested that the second limitation in section 2-705(2)(b) represents an expansion of the right of stoppage as it existed under the Uniform Sales Act, wherein it was limited to the period during which the goods were in transit and ended upon their coming into the possession of another bailee.[233] In any event, it is a very limited right since it depends upon the seller not only discovering the insolvency but also notifying the carrier within what typically will be a brief time period.[234]

The right of a seller to retain the goods after a successful stoppage in transit under pre-Code law has been recognized by bankruptcy courts even when the buyer went into bankruptcy before or during transit.[235] Moreover, a case decided by the Tenth Circuit under the Code has arrived at a decision consistent with the pre-Code cases: that a timely exercise of stoppage in transit under sections 2-702 and 2-705 precludes the debtor from having possession or constructive possession of the goods and therefore renders them not the property of the debtor.[236] To date, stoppage in transit properly accomplished has remained immune from the attack of trustees. This result is appropriate, for the right in effect should be classified as a security interest.[237] As Comment 1 to section 9-113 points out the

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[233] *See* 3A DUESENBERG & KING, *supra* note 3, § 13.04[1] at 13-50. This observation is based upon a comparison of § 2-705 with Uniform Sales Act §§ 57-59 (1950). *See* VOLD, *supra* note 14, at 264-65.

[234] *See* 3A DUESENBERG & KING, *supra* note 3, § 13.04[3] at 13-56-57.

[235] *See In re* Charles T. Stork & Co., 265 F. 864, 866 (S.D.N.Y. 1920); 4A COLLIER, *supra* note 3, ¶ 70.40 at 481.

[236] *See* Amoco Pipeline Co. v. Admiral Crude Oil Corp., 490 F.2d 114, 116-17 (10th Cir. 1974).

[237] U.C.C. § 9-113, Comment 1. One commentator has suggested that the right of stoppage in transit might be considered a statutory lien. Henson, *supra* note 3, at 53. The suggestion seems to have been made by way of demonstrating the absurdity of considering § 2-702 as a statutory lien. In the unlikely event that § 2-705 were deemed a statutory lien, the above discussion of section 67c(1)(A) where reclamation had been effected before bankruptcy could be applicable. See notes 161-62 *supra* and accompanying text.

"rights of resale and stoppage under sections 2-703, 2-705 and 2-706 . . . are similar to the rights of a secured party." Because this is a security interest arising solely under Article 2, and so long as the buyer does not have or does not lawfully obtain possession of the goods, the seller does not need a security agreement to make his interest enforceable nor does he need to file in order to perfect it.[238] Thus, the seller who successfully stops the goods in transit has a perfected purchase money security interest (or the equivalent thereof) in the goods.[239] Arguably, then, he should have at least the same protection from the trustee in bankruptcy enjoyed by secured creditors whose interests arise under Article 9.[240]

Therefore, the use of stoppage in transit would seem to be a safe, though very narrow, recourse for a seller who discovers that the buyer is insolvent. Through the use of this device, the seller retains all of the rights of a seller who has never given up possession.[241] If the seller is fortunate enough to discover the insolvency of the buyer while still in possession of the goods, he can spare himself the hectic pursuit of the goods in transit by exercising another 2-702(1) right: refusal of delivery except for cash.[242] As long as the seller maintains possession awaiting cash payment[243] his possession of the goods should be immune from a turnover order.[244] Thus stoppage in transit or refusal of delivery except for cash should prevent the trustee from successfully claiming the rights of a lien creditor to the goods or invalidating the transaction as a preferential transfer.

VI. RESERVATION OF TITLE

Reliance by a seller upon stoppage in transit or withholding of delivery is precarious at best and hinges upon an expeditious response to the discovery of the buyer's insolvency. Consequently, a seller might be tempted to plan ahead by incorporating into the sales agreement a retention or reservation of title as a means of providing added protection against a default in payment by the buyer. This approach, however, will not help the seller if the buyer comes into possession of the goods, because section 2-401(1) states that "[a]ny reten-

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[238] U.C.C. §§ 9-113, 9-302, 9-305.

[239] U.C.C. § 9-107; P. COOGAN, W. HOGAN & D. VAGTS, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE, § 18.02[3][c] at 1888 (1976) [hereinafter cited as COOGAN, HOGAN & VAGTS].

[240] For example, a perfected purchase money security interest is superior to a lien creditor by virtue of § 9-301(2). Thus, the trustee could not defeat the seller who successfully stops delivery of the goods in transit by use of the lien creditor provisions in § 70(c) of the Bankruptcy Act. See notes 256-64 *infra* and accompanying text.

[241] *See* 3A DUESENBERG & KING, *supra* note 3, § 13.03[3] at 13-14.

[242] *Id.* § 13.03[2] at 13-10.

[243] The cash sale discussion in the previous section dealt with the situation where the seller failed to maintain possession awaiting cash payment. See note 203 *supra* and accompanying text.

[244] *See* 3A DUESENBERG & KING, *supra* note 3, § 13.03[2] at 13-12 to 13-13.

tion or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest." This triggers section 9-113 which provides certain exceptions to the perfection and default provisions of Article 9 so long as the debtor (buyer) does not have or does not lawfully obtain possession of the goods.[245] Thus, as soon as the seller delivers the goods to the buyer his rights will be governed entirely by Article 9 and under section 9-301(1)(b) his unperfected security interest will be subordinate to the rights of a lien creditor. In other words, the seller must acquire a purchase money security interest by obtaining a security agreement and perfecting it pursuant to the provisions of Article 9 in order to defeat the trustee.

VII. ARTICLE 9 SECURITY INTEREST

The most certain course of action for the seller to protect his interests from the claims of the trustee is to obtain a perfected Article 9 security interest. In fact, in several of the cases where the 2-702 reclaiming seller emerged vanquished, the judge added insult to injury by admonishing the seller to follow the simple expedient of perfecting a security interest.[246] The chief drawback to such an approach is that a security interest cannot be accomplished by the unilateral action of the seller—the debtor's signature is required.[247] Still, given the obstacle-strewn path of a seller attempting to reclaim under sections 2-702(2) or 2-507 or the requisite diligence of stoppage in transit, the effort involved in obtaining a signed security agreement would seem well rewarded.

If the seller does obtain a security interest it would be classified as a purchase money security interest because it would be "taken or retained by the seller of the collateral to secure all or part of its price."[248] In order for the seller's security interest to attach; *i.e.*, to be enforceable against the debtor: 1) there must be a security agreement signed by the debtor; 2) value must be given by the creditor; and 3) the debtor must have rights in the collateral.[249]

In addition to having a security interest enforceable against the debtor, the seller is particularly interested in protection against third

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[245] If the buyer uses fraudulent means to obtain the goods, such as a bad check, he would not lawfully obtain possession of the goods. See note 227 *supra*.

[246] *E.g.*, *In re* Samuels, 526 F.2d at 1248; *id.* at 1248-49 (Gee, J., concurring); *In re* Richardson Homes Corp., 18 U.C.C. Rep Serv. 384, 387 (N.D. Ind. 1975) (decision of bankruptcy judge).

[247] U.C.C. § 9-203(1).

[248] U.C.C. § 9-107.

[249] U.C.C. §§ 9-203(1), (2). These requirements present few interpretative problems in the purchase money security interest context with the possible exception of when the debtor has rights in the collateral. Article 9 does not explicitly state when a debtor-buyer acquires rights in the collateral, but this may occur upon identification of the goods to the contract. 1 COOGAN, HOGAN & VAGTS, *supra* note 239, § 4.06 at 311-14. In any event the buyer should have rights at the latest when he gains possession.

party claimants (including a trustee in bankruptcy).[250] This can be accomplished by perfecting the security interest, which in the context of a purchase money security interest entails filing[251] a financing statement in the appropriate place.[252] The security interest is deemed to be perfected once it has attached to the property and all the applicable steps for perfection have taken place.[253] If the seller perfects his purchase money security interest within 10 days after *non-inventory* collateral comes into possession of the debtor, his interests will have priority over conflicting security interests in the same collateral and lien creditors.[254]

The seller should be assured secured status in a bankruptcy proceeding if he perfects his interest within the allowed time period, even if this occurs after bankruptcy.[255] However, there are some problems[256] that can arise from a seller's deviating from the prescribed ritual, one of which deserves mention here because of the likelihood of its occurring in our present context. If the credit seller becomes apprehensive about the ability of the debtor to pay for goods already delivered and then obtains a signed security agreement from the debtor, he will encounter problems if the debtor goes into bankruptcy. If the perfection of this interest occurs after the filing of the petition in bankruptcy (and after any grace period),[257] then the trustee should defeat the security interest by virtue of his status as a hypothetical lien creditor who has priority under section 9-301(1).[258]

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[250] *See* WHITE & SUMMERS, *supra* note 3, at 796 ("[A]n unperfected secured party will invariably have to eat from the general creditors' trough in bankruptcy.")

[251] Filing is necessary to perfect, except for purchase money security interests in consumer goods. U.C.C. § 9-302(1). U.C.C. § 9-302(1)(c) (1966 version) also contained an exemption for farm equipment not having a purchase price in excess of $2,500. *See* §§ 9-109(1), (2) for a definition of farm equipment and consumer goods.

[252] The appropriate place depends upon the type of collateral and which alternative of § 9-401(1) (i.e. local or central filing) has been adopted in a jurisdiction.

[253] U.C.C. § 9-303(1). However, care should be taken when the property delivered by the seller is to become part of the buyer's inventory as defined under § 9-109(4). Often times a debtor will have signed an after-acquired security agreement which attaches to certain property which the debtor acquires at a later date. U.C.C. § 9-204. Section 9-312(3) provides rules of priority when the seller's purchase money security interest in inventory may conflict with an after-acquired property interest. To maintain priority the seller must perfect his purchase money security interest by the time the buyer receives possession and notify any prior secured party with a perfected security interest in the same type of inventory. Consequently, the seller must diligently seek out prior secured parties, notify them of his security interest and perfect before turning over possession to the buyer. If he does not, his interest will be subordinate to the conflicting security interest and perhaps lose out completely to a trustee under § 70(e) of the Bankruptcy Act. See notes 182-95 *supra* and accompanying text.

[254] U.C.C. §§ 9-312(4), 9-301(2).

[255] *See* King-*Voidable Preferences*, *supra* note 3 at 932; WHITE & SUMMERS, *supra* note 3, at 874.

[256] For a detailed discussion of the problem of voidable preferences and Article 9 security interest, see King-*Voidable Preferences*, *supra* note 3.

[257] *See id.* at 931-33.

[258] This is because the trustee has the status of an ideal lien creditor as of the date of bankruptcy. See note 70 *supra* and accompanying text.

In this case, the seller would actually have a greater chance of success by effectively exercising his 2-702(2) reclamation right.[259]

On the other hand, if the seller perfects any time prior to the filing of the petition, the trustee will not succeed under section 70(c) but will proceed to attack the security interest as a voidable preference under section 60 of the Bankruptcy Act. The requirements of this section are legion, as has been discussed above.[260] The first of these is to determine whether there has been a transfer for the benefit of a creditor. Since the Bankruptcy Act does define a transfer to include the granting of a security interest this first requirement is satisfied.[261] A second requirement is that the seller had reasonable cause to believe that the debtor was insolvent at the time of transfer. This should present few problems for the trustee, since under the hypothetical situation discussed herein in the credit seller perfected the security interest due to fears that the buyer was insolvent. Similarly, the four month requirement poses a simple question of fact. Finally, the requirement of showing an antecedent debt will be met if the seller has already delivered the goods to the buyer and then creates and perfects the security interest.[262] In addition, such a seller may be defeated by the trustee's stepping into the shoes of an actual lien creditor or secured creditor with priority over the seller's security interest by means of section 70(e).[263] This provision would probably be used by a trustee only if section 60 were unavailable.

Consequently, the most certain and best advised course is for the seller to obtain a security agreement signed by the debtor and to file a financing statement within the prescribed time after the debtor comes into possession of the goods. However, a seller who delivers the goods to the buyer and then seeks added protection beyond section 2-702 by compliance with the requirements of Article 9 will probably be disappointed by the operation of section 70(c) or 60.[264]

VIII. CONCLUSION

From the above, it is apparent that the seller's safest course is to obtain a security interest in the goods *and* diligently to perfect. The strategies of withholding delivery and stoppage in transit, while likely to be effective where utilizable, do not lend themselves to planning. Further, a mere reservation of title is of no assistance once the seller

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[259] Comment 5 to § 9-113 states that "a seller who reserves a security interest by agreement does not lose his rights under the Sales Article, but rights other than those conferred by the Sales Article depend on full compliance with this Article."

[260] See notes 165-81 *supra* and accompanying text.

[261] 11 U.S.C. § 1(30) (1970). This section is quoted at note 168 *supra*.

[262] *See* WHITE & SUMMERS, *supra* note 3, at 874. *See also* U.C.C. § 9-108.

[263] See notes 182-95 *supra* and accompanying text.

[264] The availability of section 70(e) to defeat Article 9 security interests has been questioned persuasively by Professor Kennedy. *See* Kennedy, *The Trustee in Bankruptcy*, *supra* note 190.

relinquishes possession. The cash sale may offer some protection (although the legal situation here is extremely unclear), but is also less than satisfactory because it is not a planning device. Similarly, a seller's reliance upon section 2-702 seems misplaced in many jurisdictions, because of the array of much-litigated Bankruptcy Act provisions which the trustee can bring to bear. Even with the added probability of success that a demand before bankruptcy might provide in this context, it is difficult for a seller to monitor the solvency of his buyer, and often the seller only discovers the insolvency via the bankruptcy proceedings. If other courts adopt the view that sellers, whose reclamation right under section 2-702 is invalid or unenforceable in bankruptcy, may pursue pre-Code remedies for fraud, then conceivably obtaining a written (mis)-representation of solvency in accordance with the requirements of 2-702 and/or the common law fraud requirements of his state could increase the liklihood that the 2-702 reclamation will withstand the trustee's assault.

Given this situation, perhaps the ideal solution is to vie for the best of both worlds by obtaining a perfected Article 9 security interest and the remedies of that Article, while at the same time pursuing the section 2-702 reclamation right upon discovery of the buyer's insolvency, thereby gaining the opportunity to enjoy the remedies of Article 2.[265] The basic advantage of a successful 2-702 reclamation over a claim based on the Article 9 interest is that the expense, risk, and judicial scrutiny of a foreclosure sale is avoided.[266] Furthermore, reclamation would be especially advantageous where the goods have appreciated in value, since the reclaiming seller is under no obligation to account to the buyer for any surplus over the contract price realized in a resale.[267] On the other hand, if the resale of the goods would realize less than the contract price, and there are some assets in the bankrupt's estate remaining for distribution to the general creditors, then the seller could proceed as a secured creditor, recovering some of the deficit from the resale. The full success of this two-pronged strategy depends on a degree of foresight, time, care and (sometimes) luck often inconsistent with the conditions under which credit sellers must operate. As a result, the flow of litigation—and attendant legal confusion—in this area is likely to continue for the foreseeable future.

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[265] *See* Benfield, *Rights of a Seller's Assignee to Reclaim Goods Under the U.C.C.*, 53 TEX. L. REV. 1, 9 (1974) for a discussion of this possibility. Comment 5 to § 9-113 permits this outcome. See note 259 *supra*.

[266] U.C.C. § 9-504 requires a commercially reasonable resale and an accounting of the proceeds.

[267] U.C.C. § 2-706(6).