The Reclaiming Cash Seller and the Bankruptcy Code

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THE RECLAIMING CASH SELLER AND THE 
BANKRUPTCY CODE

by

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

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THROUGHOUT the 1960s and 1970s the collision between the reclaiming seller of goods and his buyer's trustee in bankruptcy constituted one of commercial law's major controversies. The divergent results that courts reached when faced with this clash, the numerous theories those courts employed to justify their results, and the legal confusion that thus prevailed spawned reams of scholarly commentary. This commentary primarily dealt with the position of the reclaiming credit seller utilizing Uniform Commercial Code section 2-702(2).\(^1\) Occasionally, however, the distinct but related problem of the UCC cash seller\(^2\) attracted scholarly attention.\(^3\) After passage of the Bankruptcy Reform Act of 1978,\(^4\) the flow


2. For a discussion of the UCC cash sale reclamation right and its operation under §§ 2-507(3) and 2-511(3), see infra notes 53-96 and accompanying text.

3. E.g., Dugan, Cash-Sale Sellers Under Articles 2 and 9 of the Uniform Commercial
of articles on reclaiming sellers dwindled. The Bankruptcy Code sought to end the confusion regarding the reclaiming seller's position and has partially succeeded in doing so. Although litigation concerning reclaiming credit sellers has hardly ceased, a stable, albeit unsatisfactory, definition of the credit seller's position has emerged.

The status of the reclaiming UCC cash seller under the Bankruptcy Code, however, still remains uncertain. This Article aims to demonstrate that the unpaid cash seller should be able to reclaim goods sold to a buyer who subsequently goes into bankruptcy. This conclusion requires discussion of considerable preliminary material. First, the Article considers the position of the reclaiming cash seller before the enactment of the UCC. Second, the Article discusses the reclamation rights of the UCC cash seller and the confused interaction between those rights and prior bankruptcy law. Third, employing these earlier discussions as aids in the primary task, the Article analyzes the reclaiming cash seller's position under the Bankruptcy Code. The conclusion summarizes the authors' views on the range of problems that the cash seller confronts and offers some policy considerations that underlie those views.

I. SELLER RECLAMATION PRIOR TO THE UNIFORM COMMERCIAL CODE

During the period preceding the states' enactment of the Uniform Commercial Code the distinction between cash and credit sales was widely recognized. In a credit sale the buyer received both title to the goods and possession of those goods before paying for them. Title ordinarily passed at
the time the credit sale contract was made. In a cash sale, on the other hand, title passed from seller to buyer only upon the buyer's payment of the price. The seller delivered possession of the goods to the buyer with the understanding that the buyer would pay the price at once and that title would not pass until such payment occurred.

The parties' intent determined whether a transaction was to be for cash or on credit. Absent evidence of a contrary intent, the law presumed that the transaction was not a cash sale. Two clear examples of such a contrary intent were the over-the-counter sale and the typical retail sale, in which the buyer brings goods to a cashier for payment. The most important instance of a cash sale, however, was the situation in which the seller parted with possession of the goods in exchange for the buyer's check. The check was regarded as a conditional payment, with title to the goods not passing until

9. Uniform Sales Act § 18(1), 1 U.L.A. 311 (1950), stated that the intent of the parties controls the passage of title in a contract to sell specific or ascertained goods. Id. Section 19, rule 1 declared that, absent evidence of an intent to the contrary, title passes to the buyer upon the making of an unconditional contract for the sale of specific, deliverable goods. Id. at 323. This section also stated that whether the time of payment, or the time of delivery, or both, be postponed was immaterial. This was the general rule, to which the cash sale was one exception. Gilmore, The Commercial Doctrine of Good Faith Purchase, 63 Yale L.J. 1057, 1060 n.10 (1954). For the rule's specific application to credit sales, see Note, The Rights of Reclaiming Cash Sellers When Contested by Secured Creditors of the Buyer, 77 Colum. L. Rev. 934, 935-36 & n.10 (1977).

10. Somewhat resembling the cash sale despite being basically a credit arrangement was the pre-UCC conditional sale, which was a security device in which the seller would transfer possession of the goods but would retain title to them until the buyer completed a series of installment payments. Under such an arrangement, the buyer's failure to complete payment would enable the seller to reclaim the goods. L. Vold, Handbook of the Law of Sales § 57, at 280-81 (2d ed. 1959). In both cash and conditional sales, title remained in the seller until payment was made, and the seller could reclaim the goods from a defaulting buyer. The cash sale, however, differed from the conditional sale in at least two respects: (1) the cash seller typically parted with possession in the expectation of immediate payment and thus did not extend credit; and (2) the reservation of title until the completion of payment was often inferred in a cash sale but express in a conditional sale. See J. Waite, The Law of Sales 78-79, 280 (2d ed. 1938).


12. J. Waite, supra note 10, at 78. This statement might suggest that, for a cash sale to exist, the goods and the price had to be exchanged simultaneously. Williston seemed to take this view, defining a cash sale as one involving the transfer of both title and possession upon payment of the price. 2 S. Williston, supra note 8, § 341, at 325. The dominant view, however, was that the transfer of the goods and the transfer of the price need only be substantially simultaneous. L. Vold, supra note 10, § 29, at 164-67. The allowable time between delivery and payment varied with the commercial setting and the particulars of the transaction, and could range from a few minutes to several weeks. Id. at 166.


14. See F. Burdick, The Law of Sales of Personal Property 58-59 (3d ed. 1913). This presumption was contrary to an earlier tendency to assume that the sale was for cash unless there was provision for credit. L. Vold, supra note 10, § 29, at 162.

15. L. Vold, supra note 10, § 29, at 163.

16. R. Nordstrom, supra note 1, at 501; L. Vold, supra note 10, § 30; Note, supra note 9, at 937.

17. Williston contested this assertion, arguing that the seller assents to the transfer of full title upon receiving the check. 2 S. Williston, supra note 8, § 346a. Williston, however, admitted that his analysis was not supported by the weight of authority. Id. § 346b, at 346.
the drawee bank paid the check. However, contract language such as "Cash Sale," "Sale for Cash," and "Terms Cash" did not by itself create a cash sale.

When the buyer defaulted the credit seller usually had an action for the price. Since title had already passed to the buyer at the time of the sale contract, the seller ordinarily could not reclaim the goods. If the buyer's fraud induced the sale, however, the buyer was deemed to have obtained only voidable title, and the unpaid credit seller could rescind the contract and recover the goods. Two widely recognized situations in which rescission was available to the credit seller existed. First, when the buyer received goods on credit while not intending to pay for them, the buyer's insolvency often assisted in proving the intent not to pay. Second, rescission was also available to a credit seller when the buyer induced the sale by making material misstatements about his financial condition. On the other hand, in a cash sale, the seller retained title to the goods until payment, and the buyer's failure to pay entitled the seller to reclaim the goods. Courts often held, however, that the seller's failure to reclaim the goods with reasonable promptness waived the seller's right to repossess.

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18. L. Vold, supra note 10, § 30, at 169-70. The seller's receipt of a promissory note or a post-dated check, however, rendered the transaction a credit sale. Id. at 170. Moreover, auction sales and C.O.D. sales generally were not regarded as cash sales. Id. § 29, at 163-64. (auction); F. Burdick, supra note 14, at 62-63 (C.O.D.); 2 S. Williston, supra note 8, § 345 (C.O.D.).


20. Id. § 36, at 215; 3 S. Williston, supra note 8, § 561.

21. Gilmore, supra note 9, at 1060; Note, supra note 9, at 936. The seller in a conditional sale, though, could reclaim upon the buyer's default. See supra note 10.

22. L. Vold, supra note 10, § 79, at 397-98; Gilmore, supra note 9, at 1059-60.

23. For a discussion of these two situations, the buyer's receipt of goods without intent to pay and the buyer's misstatement of his financial condition, see O'Rieley v. Endicott-Johnson Corp., 297 F.2d 1, 5 (8th Cir. 1971); Manly v. Ohio Shoe Co., 25 F.2d 384, 385 (4th Cir. 1928); 3 S. Williston, supra note 8, §§ 636, 637; Annot., 59 A.L.R. 418 (1929). The law regarding rescission for fraud, however, tended to vary from state to state. 4A W. Collier, Collier on Bankruptcy ¶ 70.41, at 484-85 (J. Moore 14th ed. 1976).

24. 3 S. Williston, supra note 8, § 637, at 457. The mere receipt of the goods while insolvent, however, without anything more, would not constitute fraud. Id.; Annot., supra note 23, at 424. For instance, a buyer who took the goods with a reasonable, good faith intent to pay was often regarded as not having committed fraud. In re Empire Grocery Co., 277 F. 73, 74 (D. Mass. 1921); 77 C.J.S. Sales § 51 (1952). Still, numerous cases exist regarding the buyer's receipt of the goods while insolvent as probative of the intent not to pay for them. See, e.g., California Conserving Co. v. D'Avanzo, 62 F.2d 528, 530 (2d Cir. 1933); In re Paper City Mill Supply Co., 28 F.2d 115, 115 (D. Mass. 1928); In re Henry Siegel Co., 223 F. 369, 370 (D. Mass. 1915); In re Spann, 183 F. 819, 822-23 (N.D. Ga. 1910). Moreover, the seller could sometimes rescind even when the insolvent buyer honestly intended to pay, but had no reasonable basis for assuming that he could do so. In re Gurvitz, 276 F. 931, 932 (D. Mass. 1921); Annot., supra note 23, at 428-30. Finally, rescission was possible in cases in which the buyer was not insolvent, but the requisite intent could be established by other means. 3 S. Williston, supra note 8, § 637, at 455-56.

25. In this situation there was no requirement that the buyer be insolvent. 4A W. Collier, supra note 23, ¶ 70.41, at 487 n.15.

26. R. Nordstrom, supra note 1, at 501 n.96; L. Vold, supra note 10, § 29, at 161, § 30, at 169; J. Waite, supra note 10, at 79; Gilmore, supra note 9, at 1060 n.10.

27. What constitutes reasonable promptness would vary with the circumstances. The case most often cited in this connection is Frech v. Lewis, 218 Pa. 141, 67 A. 45, 47 (1907) (2½-month delay too long). See also L. Vold, supra note 10, § 29, at 167-69 (seller must
One policy clearly reflected in these reclamation rules is protecting the security of property for the original owners. By enabling the cash seller to recover in a wider range of instances than the credit seller, law prior to the UCC emphasized this policy to a greater extent in the cash sale situation. This differentiation reflects the different risks undertaken by cash and credit sellers. By bargaining for a substantially simultaneous exchange of the goods and their price rather than transferring title and possession in the expectation of future payment, the cash seller sought a degree of protection greater than the credit seller sought. Since the unpaid cash seller could reclaim and, absent fraud, the unpaid credit seller could not, pre-UCC law generally recognized the greater security of property for which the cash seller had bargained. This recognition facilitated trade by giving the cash seller a means for dealing with financially troubled buyers in relative safety. The law's distinct treatment of cash and credit sellers probably also reflected the difference in buyer behavior thought to occur in each situation. Unlike a credit buyer's failure to pay, a reasonable man might perceive the cash buyer's failure to pay as behavior approaching theft.

Cutting against the policies of protecting seller property interests and penalizing egregious buyer behavior was the social interest in promoting the free transferability of goods. This interest assumed special importance when the reclaiming seller competed with third parties who had obtained an interest in goods sold to the buyer. The most important such third party was the purchaser of goods from the buyer, who might otherwise have been deterred from buying without legal protection against a reclaiming seller who had sold to his seller. Courts therefore held that a defrauded credit seller repossess promptly or lose his right to reclaim); J. Waite, supra note 10, at 79 (seller must repossess promptly or lose his right to reclaim). The effect of the seller's failure to reclaim with reasonable promptness was either to convert the transaction into a credit sale or change it into a conditional sale. L. Vold, supra note 10, § 29, at 168-69.

29. Stowers v. Mahon (In re Samuels & Co.), 510 F.2d 139, 144-45 (5th Cir. 1975), rev'd, 526 F.2d 1238 (5th Cir.) (en banc), cert. denied, 429 U.S. 834 (1976). Nothing in the Fifth Circuit's reversal denies this rather general proposition.
30. "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 primitive commercial methods, such a businessman should be able to use a check for payment." In re Mort Co., 208 F. Supp. 309, 311 (E.D. Pa. 1962).
31. Gilmore, supra note 9, at 1060:
A reasonable man might suppose that if taking goods on credit without the intention or ability to pay for them is fraud, then the same practice where the buyer is supposed to pay cash would be the same kind of fraud. The courts have held, however, in the cash sale situation that something more serious than "mere" fraud is involved, something approaching theft—"larceny by trick or device" as the time-honored phrase runs—and that consequently the defaulting cash sale buyer gets no title . . . .
32. See generally L. Vold, supra note 10, § 30, at 172-84 (referring to the policy of promoting the free transferability of goods while discussing the clash between the cash seller and the good faith purchaser for value).
33. On the other hand, promoting the free transferability of goods by preventing the original seller from recovering against the third-party purchaser might sometimes defeat the free movement of goods by reducing the original seller's incentive to accept a check. See Young v. Harris-Cortner Co., 152 Tenn. 15, 268 S.W. 125, 127 (1924).
could not recover the goods if the third-party buyer qualified as a good faith purchaser for value. Originally, the unpaid cash seller fared better than the credit seller, but eventually the cash seller also lost the ability to reclaim from good faith purchasers for value. Both the cash seller and the defrauded credit seller, however, typically could reclaim the goods when one of the buyer's other creditors acquired a lien on the goods. Both the cash and defrauded credit sellers were also able to recover the goods when the buyer subsequently went into bankruptcy.

II. THE RECLAIMING SELLER UNDER THE UNIFORM COMMERCIAL CODE AND PRIOR BANKRUPTCY LAW

While the body of pre-UCC rules just discussed was not without uncertainties, those rules presented few problems when a seller with a clear right to reclaim from the buyer confronted a bankruptcy trustee. Such a seller

34. L. Vold, supra note 10, § 79, at 400-02; 3 S. Williston, supra note 8, § 650, at 503-04; Gilmore, supra note 9, at 1060. Also, courts sometimes held that the defrauded credit seller could lose to such secured parties as the buyer's chattel mortgagee or pledgee if these parties were able to qualify as good-faith purchasers for value. 14 C.J.S. Chattel Mortgages § 23, at 618 (1939); 72 C.J.S. Pledges § 26 (1951). Obviously, the nondefrauded credit seller would also lose to the good faith purchaser. Since the credit seller transferred full title absent any deficiencies, those rules presented few problems when a seller with a clear right to reclaim from the buyer confronted a bankruptcy trustee. Such a seller

35. The unpaid cash seller was originally able to defeat purchasers from his buyer since title never moved to the buyer, and the buyer could transfer no greater title than he possessed. L. Vold, supra note 10, § 30, at 172. This view, however, eventually fell out of favor in the case of the third party who purchased in good faith and for value. On the pre-UCC confusion in this area and the gradual trend toward favoring the good faith purchaser, see Collins, Title to Goods Paid for with Worthless Check, 15 S. Cal. L. Rev. 340, 347 (1942); Corman, Cash Sales, Worthless Checks and the Bona Fide Purchaser, 10 Vand. L. Rev. 55, 56-70 (1956); Vold, Worthless Check Cash Sales, "Substantially Simultaneous" and Conflicting Analogies, 1 Hastings L.J. 111, 126 (1950). Some authority existed for the proposition that the unpaid cash seller could defeat pre-UCC secured parties such as the buyer's pledgee or chattel mortgagee because the failure of title to pass to the buyer precluded the existence of the pledgor or chattel mortgagor property rights needed to create either interest. See Ison v. Cofield, 261 Ala. 296, 74 So. 2d 484, 485 (1954); Franklin Bank v. Boeckeler Lumber Co., 83 Ind. App. 94, 147 N.E. 722, 723 (1925); 14 C.J.S. Chattel Mortgages § 305 (1939). Such secured parties, however, could sometimes defeat the cash seller if they qualified as good faith purchasers for value. See 72 C.J.S. Pledges § 26 (1951).


37. J. Benjamin, A TREATISE ON THE LAW OF SALES OF PERSONAL PROPERTY 477-78 (7th Am. ed. 1931); F. Burdick, supra note 14, at 205; 2 F. Mechem, A TREATISE ON THE LAW OF SALE OF PERSONAL PROPERTY § 924 (1901); F. Tiffany, HANDBOOK OF THE LAW OF SALES § 56, at 194 (2d ed. 1908); L. Vold, supra note 10, § 79, at 402-03. The reasons for this conclusion were that the buyer, who had only a voidable title, could transfer no greater rights than he possessed, and that the lien creditor could not qualify as a good faith purchaser for value. For a limited exception to this general rule, see infra note 120.

38. L. Vold, supra note 10, § 30, at 171. Presumably, the cash seller was unable to recover the goods because the trustee could obtain no title to goods when the bankrupt buyer also lacked title to them.

39. L. Vold, supra note 10, § 79, at 403; Gilmore, supra note 9, at 1060. A credit seller who had not been defrauded, however, would lose to the trustee, at least when his reclamation was attacked as preferential. See Marks v. Goodyear Rubber Sndrees, Inc., 238 F.2d 533, 534-35 (2d Cir. 1956); Plummer v. Myers, 137 F. 660, 662 (E.D. Pa. 1905). Presumably, the credit seller's defeat reflected the fact that in such cases the buyer received full title to the goods, a title that the trustee could assume.
was almost always successful in bankruptcy. The states’ enactment of the UCC changed this rather settled situation dramatically. The UCC’s reclaiming seller provisions provided opportunities for new attacks on the seller’s once secure position, opportunities that trustees and some bankruptcy judges were quick to exploit. The resulting challenges to the seller’s ability to reclaim generated an intricate and generally incoherent body of case law. This first section examines the seller’s reclamation rights under UCC sections 2-702(2), 2-507(2), and 2-511(3). Then it discusses the reclaiming cash seller’s position under prior bankruptcy law.

A. The Reclaiming Credit Seller

Under UCC section 2-702(2) the credit seller can reclaim goods sold to a nonpaying buyer who has received the goods while insolvent. Section 2-702(2) clearly constitutes a qualified re-enactment of the seller’s pre-UCC remedy of rescission for fraud. Basing the seller’s right to reclaim on the buyer’s receipt of the goods while insolvent, section 2-702(2) tracks the pre-UCC tendency to treat the receipt of goods while insolvent as evidence of the fraudulent intent not to pay for those goods. In addition, a comment to section 2-702(2) indicates that any receipt of goods on credit by an insolvent buyer amounts to a tacit misrepresentation of solvency and therefore constitutes fraud upon the seller. Both courts and commentators routinely

40. See supra notes 38-39 and accompanying text.
41. Mann & Phillips III, supra note 1, at 1.
42. U.C.C. § 2-702(2) (1978). That section provides:
Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery the ten day limitation does not apply. Except as provided in this subsection the seller may not base a right to reclaim goods on the buyer’s fraudulent or innocent misrepresentation of solvency or of intent to pay.

Id.

43. See supra note 24 and accompanying text.
44. U.C.C. § 2-702 comment 2 (1978). This comment, referring to a tacit misrepresentation of solvency, could also be referring to the second typical situation giving rise to a pre-UCC right of rescission. See supra note 25 and accompanying text.
45. Alfred M. Lewis, Inc. v. Holzman (In re Telemart Enterprises, Inc.), 524 F.2d 761, 765 (9th Cir. 1975) (§ 2-702(2) reclamation right “indistinguishable from a right to rescind a voidable transaction” and “the exact equivalent of the common law remedy of rescission”), cert. denied, 424 U.S. 969 (1976). See also Ray-O-Vac v. Daylin, Inc. (In re Daylin, Inc.), 596 F.2d 853, 856 (9th Cir. 1979) (quoting Telemart with approval); Bassett Furniture Indus. v. Wear (In re PfA Farmers Mkt. Ass’n), 583 F.2d 992, 1002-03 (8th Cir. 1978) (§ 2-702(2), while not exactly like common law right of rescission, is an updating of and a substitute for that right); In re Federal’s Inc., 553 F.2d 509, 516 (6th Cir. 1977) (§ 2-702(2) “more than a
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regard section 2-702(2) as based on prior fraud rules. Perhaps reinforcing section 2-702(2)'s genesis in pre-UCC law is that section's last sentence, which seems to make the section the seller's sole fraud-based reclamation remedy.\(^47\)

In order to reclaim the goods under section 2-702(2), the credit seller must meet that section's requirements. First, the seller must have discovered that the buyer received the goods while insolvent.\(^48\) Second, unless there was a written misrepresentation of solvency within three months of delivery, the seller must have made a demand for the goods within ten days of the buyer's receipt of those goods. The ten-day demand requirement has given rise to a fair measure of case law discussing both the seller conduct needed for a good demand\(^49\) and methods for computing the ten-day period during which that

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\(^46\) T. QUINN, UNIFORM COMMERCIAL CODE COMMENTARY AND LAW DIGEST ¶ 2-702[A][3], at 2-405, -406 (1978):

Section 2-702 is designed to face up to an ugly fact: People who are insolvent or on the edge of insolvency go right on buying goods on credit. The insolvent buyer cannot pay for the goods and will never pay for them; but what does that matter, as long as he can face his customers with a bulging inventory. What is still worse is that it is not at all unlikely that this same sort of buyer will doctor the records, for example, a financial statement, to lull even a questioning supplier into a false sense of security . . . .

The law has always viewed [this] situation as a species of fraud, which, of course, it is, and has reached for the traditional remedy for transactions that are permeated with fundamental unfairness. The deal would be called off by the law; rescinded. This had the effect of giving the seller his goods back.

Unfortunately, . . . alleging fraud is one thing; proving it is another . . . . And even if you have a solid case, the law of fraud is such a tangled maze, . . . that the ultimate outcome is usually unpredictable.

It was against this background that 2-702 was written, and it advanced a new and eminently sensible idea. Why not, it reasoned, drop all the talk of fraud and the need to prove fraud and simply permit the seller to get his goods if the insolvency came to light within ten days after the goods were delivered? . . . Where the buyer had furnished a phony financial statement to get the merchandise, the time period could be extended; but the basic idea was the ten-day reclamation right—with no need to prove anything but the insolvency.

\(^47\) United States v. Wyoming Nat'l Bank, 505 F.2d 1064, 1068 (10th Cir. 1974) (sentence eliminates common law claim by a defrauded seller); R.J. Reynolds Tobacco Co. v. Eli Witt Co. (In re Eli Witt Co.), 12 Bankr. 757, 761 (Bankr. M.D. Fla. 1981) (common law fraud rescission remedy no longer exists under UCC); Kennett-Murray & Co. v. Pawnee Nat'l Bank, 598 P.2d 274, 277 (Okla. Ct. App. 1979) (§ 2-702(2) precludes all seller's equitable fraud remedies except reclamation right granted by that section). Styler v. Scharf (In re Metal Tech Mfg., Inc.), 27 U.C.C. Rep. Serv. 701, 704-05 (D. Utah 1979), however, states that: (1) § 2-702(2) eliminates any common law claim by a defrauded seller for reclamation; (2) read along with UCC § 2-721, § 2-702(2) is the exclusive provision regarding the seller's right to reclamation, but does not affect the availability of other fraud remedies such as damages; and (3) the effect of §§ 2-702(2) and 2-721 on fraud claims not based on misrepresentations of solvency or intent to pay is unclear.

\(^48\) The UCC defines an insolvent party 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." U.C.C. § 1-201(23) (1978).

\(^49\) Actual physical repossession of the goods within the ten-day period is not necessary. J. WHITE & R. SUMMERS, supra note 1, § 7-15, at 242. One case has suggested that "an act of demanding or asking" may suffice. In re Childress, 6 U.C.C. Rep. Serv. 505, 507 (Bankr. E.D. Tenn. 1969). A § 2-702(2) demand's effectiveness clearly is not precluded by the fact that it
demand must occur.\textsuperscript{50} Most of the cases discussing the written misrepresentation exception to the ten-day demand requirement have concerned what sorts of writings qualify as written misrepresentations.\textsuperscript{51} Others have

was made orally. United Beef Packers v. Lee (\textit{In re A.G.S. Food Sys., Inc.}), 14 Bankr. 27, 28-29 (Bankr. D.S.C. 1980) (going to buyer's place of business and asking for meat a good § 2-702(2) demand); Metropolitan Distribs. v. E. Supply Co., 21 Pa. D. & C.2d 128, 134 (Ct. C.P. Allegheny County 1959) (dictum suggesting that telephone call sufficient). One court held that a timely demand will be effective despite the seller's knowledge of the buyer's insolvency at the time the goods were delivered. Monsanto Co. v. Walter E. Heller & Co., 114 Ill. App. 3d 1076, 449 N.E.2d 993, 998-99 (1983). At least two courts have gone beyond § 2-702(2)'s literal language by requiring some sort of follow-up in addition to the demand. Bar Control v. Gifford (\textit{In re Colacci's of America, Inc.}), 490 F.2d 1118, 1120-21 (10th Cir. 1974); \textit{In re Behring & Behring}, 5 U.C.C. Rep. Serv. 600, 606 (Bankr. N.D. Tex. 1968), aff'd, 445 F.2d 1096, 1100 (5th Cir. 1971).

Perhaps the most exhaustive discussion of the requisites for a valid § 2-702(2) demand is contained in Butts v. Bendix Forest Prods. Corp. (\textit{In re Summit Creek Plywood Co.}), 27 Bankr. 209 (Bankr. D. Or. 1982). That court discussed the demand requirement with reference to UCC § 1-201(26)'s discussion of notice, stating that notice will be sufficient if it reflects the seller's intention to rescind the sale. \textit{Id.} at 214. The court went on to say that even though the seller's telegraphed notice referred to the seller's right of stoppage in transit rather than the § 2-702(2) reclamation right, that did not make the notice ineffective for § 2-702(2) purposes because the telegram still informed the buyer of the seller's intention to rescind. \textit{Id.} The court also stated that the notice need not go to an authorized agent of the buyer, and that the seller was only required to make those efforts reasonably required to inform the buyer in the ordinary course of the buyer's business. \textit{Id.} For this reason, notification to an attorney known to be previously representing the buyer was sufficient. \textit{Id.}

50. The first day of the ten-day period is the day after delivery, and the period ends on the tenth day following delivery. See Action Indus., Inc. v. Dixie Enterprises, Inc. (\textit{In re Dixie Enterprises, Inc.}), 22 Bankr. 855, 857-58 (Bankr. S.D. Ohio 1982); United Beef Packers v. Lee (\textit{In re A.G.S. Food Sys., Inc.}), 14 Bankr. 27, 28 (Bankr. D.S.C. 1980); \textit{In re Behring & Behring}, 5 U.C.C. Rep. Serv. 600, 606 (Bankr. N.D. Tex. 1968). Also, two courts have held that if the last day falls on a Sunday, the period runs until the end of the following day. \textit{In re Dixie Enterprises, Inc.}, 22 Bankr. at 858; \textit{In re A.G.S. Food Sys.}, 14 Bankr. at 28. The date of delivery has been held to be the day the buyer takes actual physical possession of the goods, and not the day the seller gives the goods to a carrier. Aventura Sportswear, Ltd. v. Maloney Enter., Inc. (\textit{In re Maloney Enter., Inc.}), 37 Bankr. 290, 292 (Bankr. E.D. Ky. 1983).

51. U.C.C. § 2-702 comment 2 (1978) states that "the statement of solvency must be in writing addressed to the particular seller and dated within three months of delivery." The dating requirement, however, has been ignored by one case stating that the writing need only have been presented to the seller within three months of delivery. Potts v. Mand Carpet Mills (\textit{In re Bel Air Carpets, Inc.}), 452 F.2d 1210, 1212 (9th Cir. 1971). Several courts have stated that a check may be a written misrepresentation of solvency. \textit{In re Creative Bldgs., Inc.}, 498 F.2d 1, 4-5 (7th Cir. 1974) (but check not written misrepresentation on facts of case); Amoco Pipeline Co. v. Admiral Crude Oil Corp., 490 F.2d 114, 117 (10th Cir. 1974) (check written misrepresentation of solvency); Mullen v. Sweetheart Cup Corp. (\textit{In re Bar-Wood, Inc.}), 15 U.C.C. Rep. Serv. 828, 830-32 (Bankr. S.D. Fla. 1974) (but check not written misrepresentation on facts of case); \textit{In re Fairfield Elevator Co., 14 U.C.C. Rep. Serv. 96, 107-08 (Bankr. S.D. Iowa 1973) (but check not written misrepresentation on facts of case); Liles Bros. & Son v. Wright, 638 S.W.2d 383, 386-87 (Tenn. 1982) (post-dated check written misrepresentation of solvency); Theo Hamm Brewing Co. v. First Trust & Sav. Bank, 103 Ill. App. 2d 190, 242 N.E.2d 911, 915 (1968) (but check not written misrepresentation of solvency on facts of case). See also North Ga. Toyota v. Jahn (\textit{In re Tom Woods Used Cars, Inc.}), 24 Bankr. 529, 531 n.3 (Bankr. E.D. Tenn. 1982) (check given after delivery of goods not written misrepresentation of solvency).

Also, a signed purchase order indicating that payment would be made has been held not to be a written misrepresentation of solvency. \textit{In re Regency Furniture, Inc., 7 U.C.C. Rep. Serv. 1381, 1382 (Bankr. E.D. Tenn. 1970). The same is true for a letter admitting all sorts of business problems, but including a payment schedule covering the total debt. \textit{In re Units, Inc.}, 3 U.C.C. Rep. Serv. 46, 47-48 (Bankr. D. Conn. 1965). Obviously, writings alleged to be misrepresentations of solvency must make some assertion regarding the buyer's financial con-
grafted additional requirements onto section 2-702(2)'s language.\textsuperscript{52}

\section*{B. The Reclaiming Cash Seller}

\subsection*{1. UCC Sections 2-507(2) and 2-511(3).}

The UCC de-emphasizes the title rationale on which the cash seller's common law recovery right was based.\textsuperscript{53} Although no UCC section is specifically identified as a cash sale provision, sections 2-507(2) and 2-511(3) plainly state rules functionally equivalent to the pre-UCC doctrine that title passes only upon payment of the price when the parties intend a cash sale.\textsuperscript{54} Section 2-507(2) provides that when payment is due on delivery, the buyer's right to retain or dispose of the goods is conditional upon making that payment.\textsuperscript{55} Making the buyer's right to retain or dispose of the goods conditional upon payment corresponds to the pre-UCC rule that in such transactions title passed only upon payment.\textsuperscript{56} Section 2-511(3) states that payment by check is conditional and, as between the parties, is defeated by dishonor of the check when presented.\textsuperscript{57} Under pre-UCC law payment by check was conditional, and title would not pass until the drawee bank paid the check. Section 2-511(3) clearly follows the first portion of this rule, but the section does not explicitly describe the status of goods transferred in exchange for a check which is later dishonored. As between the seller and the buyer, however, it is hard to imagine how the buyer could retain the goods if payment is defeated by dishonor of the check. Accordingly, both courts\textsuperscript{58} and commentators\textsuperscript{59} routinely treat sections 2-507(2) and 2-511(3) in situations in which these sections do not address a particular subject. U.C.C. § 1-103 comment 1 (1978) states that the section "indicates the continued applicability to commercial contracts of all supplemental bodies of law except insofar as they are explicitly displaced by this Act . . . ." Moreover, the legislative and drafting history of these sections strongly suggests a general intent to adhere to pre-UCC cash sale rules. See Mann & Phillips, supra note 3, at 376-80.

55. U.C.C. § 2-507(2) (1978), which provides "[w]here 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."

56. See supra text accompanying note 11.

57. U.C.C. § 2-511(3) (1978), which provides that "payment by check is conditional and is defeated as between the parties by dishonor of the check on due presentment."

58. E.g., Holiday Rambler Corp. v. First Nat'l Bank & Trust Co., 723 F.2d 1449, 1451 (10th Cir. 1983); Burk v. Emmick, 637 F.2d 1172, 1174 (8th Cir. 1980); Szabo v. Vinton
which payment is by completely clear. At first blush, section 2-511(3) appears to address cases in which payment is by check, and section 2-507(2) seems to encompass the residual cash sale categories. A few courts have chosen to consider check cases under section 2-511(3) alone, but the majority have employed sec-

507(2) and 2-511(3) as cash sale provisions.61

The proper division of labor between sections 2-507(2) and 2-511(3) is not completely clear. At first blush, section 2-511(3) appears to address cases in which payment is by check, and section 2-507(2) seems to encompass the residual cash sale categories. A few courts have chosen to consider check cases under section 2-511(3) alone, but the majority have employed sec-


60. How courts now define the contours of a cash sale is noteworthy. The mere fact that goods are paid for by check does not make the transaction one for cash. North Ga. Toyota v. Jahn (In re Tom Woods Used Cars, Inc.), 24 Bankr. 529, 529-30 (Bankr. E.D. Tenn. 1982) (delivery of car without payment, seller’s retention of title certificate, and dispatch of check upon delivery of certificate do not create cash sale because title moved to buyer upon delivery of car). Also, a cash seller’s failure to repossess unpaid for goods will change the transaction to a credit sale. See Bar Control v. Gifford (In re Colacci’s of America, Inc.), 490 F.2d 1118, 1120 (10th Cir. 1974). An established course of conduct in which the buyer issues a check for the approximate value of goods ordered and the seller then releases the goods, with the check being covered by a financier of the buyer, qualifies as a cash sale. Monsanto Co. v. Walter E. Heller & Co., 114 Ill. App. 3d 1078, 449 N.E.2d 993, 994-98 (1983). Also qualifying as a cash sale is a transaction in which, upon delivery of cattle, the seller prepared a sight draft on the buyer and deposited the draft in his own bank, with the draft arriving at the defendant’s bank one week after delivery. See Peck v. Augustus Bros., 203 Neb. 574, 279 N.W.2d 397, 399-400 (1979). This transaction was a cash sale because the contract required the buyer to pay the balance of the purchase price upon completion of the contract, and no extension of credit was contemplated. In Burk v. Emmick, 637 F.2d 1172, 1173-74 (8th Cir. 1980), the sale was for cash even though a portion of the purchase price was paid by the buyer’s personal note. The court gave no reason for classifying the transaction as one for cash; however, the sale contract did state that the buyer was to put $15,000 down and tender the balance upon delivery. Id. at 1173.

61. The legislative and drafting history of §§ 2-507(2) and 2-511(3) also suggests their relation to the pre-UCC cash sale. See Mann & Phillips, supra note 3, at 376-80.

62. This includes situations in which “the buyer ‘pays’ by sight draft on a commercial firm which is financing him.” U.C.C. § 2-511 comment 4 (1978). Post-dated checks, however, are credit instruments to which § 2-511(3) does not apply. Id. comment 6.

63. We have urged this allocation of responsibility at various times. See Mann & Phillips III, supra note 1, at 15; Mann & Phillips, The “Bad Check” Seller under UCC Section 2-511(3), 16 AM. BUS. L.J. 329, 348-49 (1979).


2. The Cash Sale Reclamation Right. The cash seller proceeding under section 2-507(2), 2-511(3), or both, may reclaim the goods from the buyer after the buyer’s failure to pay or the dishonor of the buyer’s check. Disagreement about the origin of the right to reclaim exists, however, since neither section contains an explicit reclamation provision. Moreover, UCC section 2-703, the general seller’s remedy section, fails to include reclamation among the remedies afforded the seller after the buyer’s breach. Faced with this problem, some courts have created a power to reclaim by grafting the section 2-702(2) reclamation right onto sections 2-507(2) and 2-511(3). Most courts, however, have either explicitly or inferentially regarded the

Nevertheless, no language exists in either § 2-507(2) or § 2-511(3) requiring that these two sections be conjoined in bad check cases. Moreover, with one exception, these sections and their comments do not cross-reference each other. The exception, U.C.C. § 2-511(3) comment 6 (1978), seems to deal solely with credit instruments such as notes and post-dated checks, and not with checks that are used for immediate payment. See infra note 73.

66. Of course, the overwhelming preponderance of cash sale cases are check or draft cases.

67. R. Nordstrom, supra note 1, at 501-02, 510. Some disagreement exists regarding the cash seller’s ability to recover the proceeds of goods sold the buyer and then re-sold. Compare Stowers v. Mahon (In re Samuels & Co.), 526 F.2d 1238, 1245 (5th Cir.) (no § 2-507(2) right to proceeds), cert. denied, 429 U.S. 834 (1976) with Ranchers & Farmers Livestock Auction Co. v. Honey, 38 Colo. App. 69, 552 P.2d 313, 317 (1976) (recovery of proceeds possible when third party did not act in good faith).

68. U.C.C. § 2-703(d) (1978), however, allows the seller to resell the goods and recover damages. In Harris Trust & Sav. Bank v. Wathen’s Elevators, Inc. (In re Wathen’s Elevators, Inc.), 32 Bankr. 912, 918 (Bankr. W.D. Ky. 1983), the court stated that, once delivery occurs, the right to repossess will be meaningless without a right to resell. This right, the court continued, finds implied support in the conjunction of UCC §§ 2-507 and 2-511. Id.


reclamation right as inherent to sections 2-507(2), 2-511(3), or both.\footnote{72}

The majority view on the genesis of the UCC cash seller's reclamation right is almost certainly the correct one. Section 2-702(2) expressly applies only when the buyer has received goods on credit while insolvent. Sections 2-507(2) and 2-511(3), which generally do not apply to credit sales,\footnote{73} state rules that are quite similar to pre-UCC cash sale doctrines.\footnote{74} Section 2-702(2), on the other hand, is a qualified re-enactment of the common law remedy of rescission for fraud. These two bases for reclamation, and the requirements for triggering each, were quite distinct prior to enactment of the UCC. In particular, section 2-702(2)'s requirement that the buyer receive goods on credit while insolvent is rooted in pre-UCC rules for proof of the buyer's intent not to pay\footnote{75} and had no real counterpart in the cash sale context.\footnote{76} Moreover, virtually nothing exists in sections 2-507(2) and 2-511(3) or their comments linking these provisions to section 2-702(2).\footnote{77} Finally, section 1-103 allows common law rules to supplement the UCC.\footnote{78} The cash seller's common law reclamation right thus can apply in the section 2-507(2) and 2-511(3) context and thereby make unnecessary the basing of that right on section 2-702(2).

3. The Ten-Day Demand Problem. Most courts, regardless of their position on the origin of the cash sale reclamation right, apply section 2-702(2)'s

\footnote{72} Also relevant is Peck v. Augustin Bros., 203 Neb. 574, 279 N.W.2d 397, 400 (1979) (state replevin statute employed along with UCC cash sale provisions to afford seller reclamation right).

\footnote{73} Sections 2-507(2) and 2-511(3), however, might have some application between a buyer and seller when the buyer offers a credit instrument. U.C.C. § 2-511 comment 6 (1978) states:

Where the instrument offered by the buyer is not a payment but a credit instrument such as a note or a check postdated by even one day, the seller's acceptance of the instrument insofar as third parties are concerned, amounts to a delivery on credit and his remedies are set forth in the section on buyer's insolvency. As between the buyer and the seller, however, the matter turns on the present subsection and the section on conditional delivery and subsequent dishonor of the instrument gives the seller rights on it as well as for breach of the contract for sale.

\footnote{74} The drafting history of §§ 2-507(2) and 2-511(3) also suggests that the reclamation right is inherent to those sections. See Mann & Phillips, supra note 3, at 379, 381.

\footnote{75} See supra note 24 and accompanying text.

\footnote{76} See supra notes 10-12, 26-27 and accompanying text.

\footnote{77} Comment 3 to § 2-507, see infra note 80, which seems to make § 2-702(2)'s ten-day demand limitation applicable in § 2-507(2) cases, does not suggest that § 2-702(2) is the source of the cash sale reclamation right. See U.C.C. § 2-507 comment 3 (1978). To limit the seller's power to reclaim by imposing a ten-day demand requirement is not to create that power in the first place. Comment 3 also contains "follow-up" language, but this portion of the comment makes no reference to § 2-702. Both the ten-day demand limitation and the follow-up requirement, in fact, tend to presuppose a reclamation right that somehow inheres in § 2-507(2). Each limitation is meaningful mainly in the reclamation context, and the placement of each beneath § 2-507 suggests that § 2-507(2) is the source of the reclamation right each presupposes.

It should be noted, finally, that § 2-511(3) and its comment contain no express links to § 2-702. Comment 6 to § 2-511 does mention § 2-702, but does so in the context of credit instruments such as post-dated checks. See supra note 73.

\footnote{78} U.C.C. § 1-103 (1978).
ten-day demand limitation in cash sale cases. Courts base this application on one of section 2-507's comments, which states that the ten-day limit within which a credit seller must reclaim goods delivered to an insolvent buyer also applies under section 2-507. Nevertheless, courts proceeding solely under section 2-511(3) in bad check cases often ignore the ten-day demand limitation, and even courts that view the cash seller's rights as connected in some way to section 2-507(2) have occasionally rejected the ten-day demand requirement.

Imposing section 2-702(2)'s ten-day demand rule on cash sale reclamations produces most unfortunate results in bad check cases. Due to the time consumed in the check collection process, the seller often will not learn of dishonor until after the ten-day period has passed. In such cases, the cash sale reclamation right is rendered nugatory.

See Holiday Rambler Corp. v. First Nat'l Bank & Trust Co., 723 F.2d 1449, 1452 (10th Cir. 1983); Bar Control v. Gifford (In re Colacelli's of Am., Inc.), 400 F.2d 1118, 1121 (10th Cir. 1974).

80. U.C.C. § 2-507 comment 3 states "[s]hould the seller after making such a conditional delivery fail to follow up his rights, the condition is waived. The provision of this Article for a ten-day limit within which the seller may reclaim goods delivered on credit to an insolvent buyer is also applicable here." Courts have wisely tended to ignore comment 3's ambiguous follow-up language in cash sale cases. Two cases that do discuss the follow-up requirement appear to blur it together with the ten-day demand limitation. See Holiday Rambler Corp. v. First Nat'l Bank & Trust Co., 723 F.2d 1449, 1452 (10th Cir. 1983); Bar Control v. Gifford (In re Colacelli's of Am., Inc.), 400 F.2d 1118, 1121 (10th Cir. 1974).


82. See Citizens Bank v. Taggart, 143 Cal. App. 3d 318, 321-23, 191 Cal. Rptr. 729, 731-33 (1983) (only limitation on cash seller's right to reclaim is that it be exercised within a reasonable period of time); see also Burk v. Emmick, 637 F.2d 1172, 1175-76 (8th Cir. 1980) (as between seller and buyer, only limitation on seller's right to reclaim is a reasonableness requirement); cf. In re Lindenbaum's, Inc., 2 U.C.C. Rep. Serv. 495, 497 (Bankr. E.D. Pa. 1964) (reclamation allowed despite two-week delay in depositing check).

83. R. NORDSTROM, supra note 1, at 503. Nordstrom has stated that:

A ten-day period for reclaiming under section 2-507(2) may be unduly short in situations in which a check has been returned for insufficient funds. Such a check may have passed through several indorsers and banks, not being returned to the seller until after the buyer has had the goods for more than ten days. A seller who has negotiated or transferred a check in the ordinary course of his
On February 18, 1977, Vinton Motors, a Vermont automobile dealer, delivered a 1977 Oldsmobile to Bell Oldsmobile, a Massachusetts dealer, in return for Bell’s check drawn on a Boston bank. Vinton deposited the check in a Vermont bank on February 22. On February 23, Bell executed an assignment for the benefit of creditors. The assignee withdrew all of the funds in Bell’s account and deposited them in his own name as assignee on February 24. Vinton was not notified that the check had been dishonored until March 1. Later, Bell went into bankruptcy. Admitting the hardship this created for the cash seller, the court of appeals nonetheless applied the ten-day requirement and denied Vinton’s claim.

One of the court’s justifications for applying the demand rule to the cash seller is the incentive it provides for prompt presentment, but prompt presentment provides little protection against the delays inherent in the collection process. The court also observed that the cash seller can defend himself by requiring payment by certified check or by taking and perfecting a purchase business ought not be held to have waived his demanded payment solely because the banking process requires more than ten days to inform the seller that the check was dishonored.

*Id.* (footnote omitted). Professor Robert Dugan has noted that: “[u]nder standard check-collection procedures, ten days will elapse before the seller realizes that his buyer will not or cannot cover the dishonored item.” Dugan, *supra* note 3, at 346 (footnote omitted). This problem is aggravated when the buyer and the seller are located in different communities. See *id.* n.48. Consequently, “application of the ten-day rule to check-payment sales would render reclamation relief largely illusory.” *Id.* at 346; see also T. QUINN, *supra* note 46, ¶ 2-507[A][5], at 52-200 (Cum. Supp. 1984); Siegal, *supra* note 1, at 35.

84. 630 F.2d 1, 1-2 (1st Cir. 1980).

85. Also noteworthy is the situation presented by Citizens Bank v. Taggart, 143 Cal. App. 3d 318, 191 Cal. Rptr. 729 (1983), in which Braxton Motor Company, an Oklahoma automobile dealer, sold a Cadillac to Richard Taggart on May 20, 1982, and received a check for $15,864.30 in return. The check was later returned for lack of sufficient funds. Shortly after the sale, however, Taggart moved the car to Placer County, California. The Citizens Bank of Roseville, which had made two unsecured loans to Taggart in 1980 and 1981, eventually secured a judgment against Taggart. A writ of execution was issued, and in September 1982 the Placer County Sheriff levied on the Cadillac. The California Court of Appeals concluded that Braxton sold the automobile to Taggart (who immediately moved it to a different state) and was thereafter unable to locate the vehicle until notified by the Placer County Sheriff that the vehicle had been seized. To argue Braxton lost the right to reclaim because such right was not asserted within ten days of delivery places sellers such as Braxton in a no-win situation. It is difficult to conceive of what exactly Braxton could have done to protect its rights. 191 Cal. Rptr. at 733.

86. 630 F.2d at 4. The Eighth Circuit declared that Szabo’s result “tend[s] to coerce the cash seller who reasonably expects the buyer to tender payment at delivery to go through the cautious motions of a credit seller dealing with an economically unstable buyer.” Burk v. Emmick, 637 F.2d 1172, 1175-76 n.6 (8th Cir. 1980).

87. Szabo, 630 F.2d at 4.

88. T. QUINN, *supra* note 46, ¶ 2-507[A][5], at S2-201 (Cum. Supp. 1984) has noted in discussing Szabo that:

> Presenting checks as rapidly as possible, also suggested by the court, is not only sensible, but imperative, thanks to this type of ruling.

> Will racing down to the bank, as the court also suggested, solve the problem? Hardly. Let the seller run as fast as he can. Once the check gets in the collection system, it is beyond his control. It will move at its own pace to the payor and, on dishonor, back to the depositary. Along the way—in both directions—there may be many stops. It all takes time . . . and the 2-507(2) clock is running . . . running . . . running.
money security interest in the goods sold, but both options are burdensome. 89

The Szabo court also commented that the hardship the ten-day demand limitation imposes on cash sellers was no greater than that imposed on credit sale reclamations. 90 This remark, ignores the special problems that the check collection process poses for the cash seller. It does, however, highlight the difficulties that the ten-day demand requirement creates for all reclaiming sellers. In the case of the credit seller, the ten-day demand limitation is imposed by the express language of section 2-702(2), but nothing in sections 2-507(2) and 2-511(3) requires that this limitation govern cash sale reclamations. Sections 2-507(2) and 2-511(3) largely re-enact the pre-UCC rules regarding cash sales, rules that required only that the seller proceed with reasonable promptness. 91 Grafting the ten-day demand requirement onto sections 2-507(2) and 2-511(3) tends to blur the distinction between cash and credit sales, a distinction the UCC's drafters presumably wished to preserve when they originally included these sections. Admittedly, the reference in the section 2-507 comments to the section 2-702(2) ten-day demand limitation is not inconsistent with the language of section 2-507(2) and can be read as merely supplementary. 92 But the UCC's comments, while quite persuasive and frequently followed, are not law. 93 Moreover, since the sec-

89. Szabo, 630 F.2d at 4 (suggesting both options). These options have been described as unrealistic. T. Quinn, supra note 46, ¶ 2-507[A][5], at S2-217 (Cum. Supp. 1984). In this context, a purchase money security interest is a security interest in which the goods sold serve as the collateral securing payment of the price. U.C.C. § 9-107(a) (1978). The security interest must attach in order to be enforceable between the parties. Id. §§ 9-203(1), (2). When, as here, the goods will not remain in the secured party's possession, attachment requires the completion of a security agreement. Id. § 9-203(1)(a). An unperfected security interest, however, is of little use if third parties acquire rights in the goods. The seller with an unperfected purchase money security interest in the goods sold will lose to a competing lien creditor with an interest in the goods. Id. § 9-301(1)(b). He will also lose to secured parties with a perfected security interest, and to secured parties whose unperfected security interest attached before his. See id. § 9-312(5). Generally speaking, the seller will also lose to subsequent purchasers of the goods. H. Bailey, SECURED TRANSACTIONS IN A NUTSHELL 232 (2d ed. 1981). The unperfected secured party will not prevail against a trustee in bankruptcy, J. White & R. Summers, supra note 5, § 24-3, and as a result will only have general creditor status in bankruptcy. In order to get some measure of protection against such third parties, the seller with a purchase money security interest will be required to perfect his security interest. Except for purchase money interests in consumer goods other than motor vehicles or fixtures, this requires filing. U.C.C. § 9-302(1)(d) (1978). Perfection, however, does not afford the purchase money secured seller complete protection against third parties. For example, the seller will often lose to purchasers of the goods. See id. § 9-307. In some cases the seller will also lose to prior perfected secured parties, see id. §§ 9-312(3)-(5). Finally, the seller may lose to the trustee in bankruptcy, see J. White & R. Summers, supra note 5, § 24-4.

Certification or acceptance of a check makes the drawee bank primarily liable on the check. See U.C.C. §§ 3-410(1), 3-413(1) (1978). The bank, however, has no obligation to certify, id. § 3-411(2), and may charge for this service. Given the previously discussed burden of employing a purchase money security interest, the wary seller may sometimes refuse to deal with financially troubled buyers at all. Thus, the option historically provided by the cash sale doctrine may be precluded, depriving financially troubled buyers of that particular means for making needed purchases. 90. 630 F.2d at 4 n.3.
91. See supra notes 27, 54-57 and accompanying text.
92. Szabo, 630 F.2d at 4.
93. Id. at 4 (conceding the point). See also J. White & R. Summers, supra note 5, § 4, at
tion 2-507 comment does not apply to section 2-511(3), the ten-day demand limitation should not apply to bad check cases if that section is viewed as the appropriate and sufficient provision for such cases. To summarize, nothing compels courts to apply the ten-day demand limitation to the cash seller, and significant policy considerations weigh against its application in all cash sale contexts, especially the bad check context. Instead, courts should employ pre-UCC reasonable promptness standards, or date the ten-day period from the time the seller receives notice of dishonor.

C. The UCC Reclaiming Seller Under Prior Bankruptcy Law

One aim of the Bankruptcy Reform Act was to end the confusion regarding the UCC section 2-702(2) credit seller's ability to recover in bankruptcy. Ironically, though, the confusion had already been substantially reduced by the time the Reform Act took effect in 1979. At that time the federal circuit courts considering the question were in substantial agreement that a credit seller complying with UCC section 2-702(2)'s requirements would defeat the trustee. Strangely, however, the UCC cash seller generally fared less well on the relatively infrequent occasions when he confronted a bankruptcy trustee. Trustee attacks on reclamation attempts by UCC section 2-702(2) credit sellers proceeded under sections 70(c), 70(c), 67c, 012-14. Moreover, if the comments are somehow binding, courts might do well to pay more heed to U.C.C. § 2-511 comment 4 (1978), which states: "This Article recognizes that the taking of a seemingly solvent party's check is commercially normal and proper and, if due diligence is exercised in collection, is not to be penalized in any way."

94. See supra notes 62, 64 and accompanying text.
96. See supra note 215.
97. See Ray-O-Vac v. Daylin, Inc. (In re Daylin, Inc.), 596 F.2d 853, 856 (9th Cir. 1979); Bassett Furniture Indus., Inc. v. Wear (In re PFA Farmers Mkt. Ass'n), 583 F.2d 992, 998 (8th Cir. 1978); In re Federal's, Inc., 553 F.2d 509, 514 (6th Cir. 1977); Alfred M. Lewis, Inc. v. Holzman (In re Telemart Enters., Inc.), 524 F.2d 761, 763 (9th Cir. 1975). The one apparent exception to this circuit-level consensus that the UCC § 2-702(2) seller should triumph, In re Kravitz, 278 F.2d 820, 822 (3d Cir. 1960), was in reality decided on a basis that favored the seller in most states. See infra notes 117-23 and accompanying text.
and 60 of the old Bankruptcy Act. Only Bankruptcy Act sections 70(c) and 60, however, were employed in cash sale litigation. This section of the Article focuses on the rights of the reclaiming cash seller under these two sections.

1. The Cash Seller Under Bankruptcy Act Section 70(c). Section 70(c) of the Bankruptcy Act provided the trustee with the rights and powers of a so-called "ideal lien creditor." By its terms, the section armed the trustee with every right and power state law gave to its most favored creditor who had acquired a lien by legal or equitable proceedings. The lien creditor, whose rights the trustee assumed, was purely hypothetical. Section 70(c) did not require the trustee to locate an existing creditor who had, or could have obtained, a lien. This hypothetical lien holder was regarded as having obtained the lien on the date of bankruptcy. The trustee's ability to prevail under section 70(c) depended on whether such a lien creditor could have defeated the reclaiming seller under state law.

a. The UCC Section 2-702 Backdrop. Consideration of the UCC cash seller's ability to defeat a trustee proceeding under Bankruptcy Act section 70(c) requires a brief discussion of the confused struggle between the UCC section 2-702(2) seller and the Bankruptcy Act section 70(c) trustee. Resolution of this conflict depended on whether the UCC section 2-702(2) seller could defeat a party possessing lien creditor status on the date of bankruptcy. At first glance, the 1962 version of UCC section 2-702(3) seemed to yield a ready answer to this question. This subsection provided that the seller's right to reclaim under UCC section 2-702(2) was subject to the rights

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102. Bankruptcy Act § 64.
103. Id. § 60.
   "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 on all property by legal or equitable proceedings upon which a creditor of the bankrupt upon a simple contract could have obtained such a lien, whether or not such a creditor exists.
This language tends to parallel the definition of a lien creditor contained in U.C.C. § 9-301(2) (1978), which in relevant part defines a lien creditor as "a creditor who has acquired a lien on the property involved by attachment, levy, or the like," and as "a trustee in bankruptcy from the date of the filing of the petition . . . ."
105. In re Waynesboro Motor Co., 60 F.2d 668, 669 (S.D. Miss. 1932).
107. Lewis v. Manufacturers Nat'l Bank, 364 U.S. 603, 609 (1961). One court, however, held that the obligation underlying the hypothetical lien need not have been created at any particular time. In re Federal's, Inc., 553 F.2d 509, 514 (6th Cir. 1977).
108. Bassett Furniture Indus. v. Wear (In re PFA Farmers Mkt. Ass'n), 583 F.2d 992, 994 (8th Cir. 1978) (rights of hypothetical lien creditor to be determined by state law).
109. For a more detailed treatment of this subject, see Mann & Phillips III, supra note 1, at 19-27, 28-30.
of a buyer in ordinary course of business, another good faith purchaser, or a lien creditor (with a cross-reference to UCC section 2-403). A few courts interpreted this version of section 2-702(3) as directly subordinating the UCC section 2-702(2) seller to a lien creditor and thus to the trustee. The weight of federal authority, however, held to the contrary.

The courts deciding that the UCC section 2-702(2) seller defeated a trustee proceeding under Bankruptcy Act section 70(c) utilized a variety of approaches. Crucial to the rationale many of these courts used was that, read literally, the 1962 version of UCC section 2-702(3) subordinates the seller to a lien creditor's rights under UCC section 2-403 and not to the lien creditor himself. Section 2-403's only statement about the lien creditor's rights, however, is that those rights are governed by the UCC Articles on Secured Transactions, Bulk Transfers, and Documents of Title. Ignoring the latter two articles as irrelevant to the seller/trustee situation, the courts focused on the Article on Secured Transactions (article 9). At this point, however, the courts parted company. The Third Circuit's well-known decision in In re Kravitz117 focused on UCC section 9-301(3)'s definition of the term lien creditor, noted that the definition included the trustee in bankruptcy, and read that section as consistent with section 70(c) of the Bankruptcy Act. After apparently coming to the conclusion that the UCC did

112. Ray-O-Vac v. Daylin, Inc. (In re Daylin, Inc.), 596 F.2d 853, 855-56 (9th Cir. 1979); Bassett Furniture Indus., Inc. v. Wear (In re PFA Farmers Mkt. Ass'n), 583 F.2d 992, 994-1000 (8th Cir. 1978); In re Federal's, Inc., 553 F.2d 509, 511-16 (6th Cir. 1977); see also Johnston & Murphy Shoes, Inc. v. Meinhard Commercial Corp. (In re Mel Golde Shoes, Inc.), 403 F.2d 658, 659-60 (6th Cir. 1968) (involving contest between seller and lien creditor, not trustee); In re Royalty Homes, Inc., 8 U.C.C. Rep. Serv. 61, 64-65 (Bankr. E.D. Tenn. 1970) (following Mel Golde); cf. United States v. Westside Bank, 38 U.C.C. Rep. Serv. 705 (5th Cir. 1984) (seller defeats general unsecured creditor of buyer). But see In re Kravitz, 278 F.2d 820, 821-22 (3d Cir. 1960) (holding for the trustee under Bankruptcy Act § 70(c)). The Kravitz reasoning, however, would have favored the seller in most states. See infra notes 117-23 and accompanying text. Following the Kravitz rationale is In re Kee Lox Mfg. Co., 22 U.C.C. Rep. Serv. 938, 943-44 (Bankr. E.D. Pa. 1977).
113. See, e.g., In re Federal's, Inc., 553 F.2d 509, 511-12 (6th Cir. 1977) (following Mel Golde); In re Mel Golde Shoes, Inc., 403 F.2d 658, 659 (6th Cir. 1968); In re Kravitz, 278 F.2d 820, 821-22 (3d Cir. 1960).
114. The lien creditor is almost certainly not a good faith purchaser entitled to defeat the credit seller under U.C.C. § 2-702(3) (1978). See infra note 183.
116. See, e.g., In re Federal's, Inc., 553 F.2d 509, 511-12 (6th Cir. 1977) (following Mel Golde); In re Mel Golde Shoes, Inc., 403 F.2d 658, 659-60 (6th Cir. 1968); In re Kravitz, 278 F.2d 820, 821-22 (3d Cir. 1960).
117. 278 F.2d 820 (3d Cir. 1960).
118. Id. at 822. The court stated:

We think the correct way to put the matter is that by federal law the trustee in
not resolve the credit seller/lien creditor controversy, the court turned to pre-UCC state law to resolve the issue.\textsuperscript{119} Since the state in question, Pennsylvania, had adopted a minority rule whereby a lien creditor whose lien on the goods resulted from credit extended subsequent to the sale would defeat a defrauded seller,\textsuperscript{120} the Bankruptcy Act section 70(c) trustee emerged victorious.\textsuperscript{121} In most states, however, the lien creditor lost to a defrauded seller,\textsuperscript{122} and as a result the \textit{Kravitz} rationale generally favored the UCC section 2-702(2) seller.\textsuperscript{123} The other courts, rejecting a literal application of UCC section 2-702(3) and looking to article 9, focused on UCC section 9-301(1)(b) rather than section 9-301(3).\textsuperscript{124} Section 9-301(1)(b) subordinates an unperfected secured party to a lien creditor.\textsuperscript{125} Holding that the UCC section 2-702(2) reclamation right is not a security interest,\textsuperscript{126} these courts also turned to pre-UCC law to resolve the seller/lien creditor clash. In each case the relevant state's pre-UCC law supported a seller recovery.\textsuperscript{127}

Other courts favoring the section 2-702(2) seller ignored article 9 and employed different arguments for the seller's recovery. The Ninth Circuit employed a straightforward pre-UCC rationale, reasoning that UCC section 2-702 authorized the equivalent of common law rescission for fraud, and that sales under that section resulted in a transfer of only voidable title.\textsuperscript{128} Consequently, the seller's right could only be cut off by a good faith purchaser for value, and since the bankruptcy trustee was not a good faith purchaser, but

\begin{itemize}
  \item\textsuperscript{119} See id.
  \item\textsuperscript{120} The cases on which the \textit{Kravitz} court relied were Schwartz v. McCloskey, 156 Pa. 258, 263-64, 27 A. 300, 301-02 (1893); Smith v. Smith, Murphy & Co., 21 Pa. 367, 373 (1853); Mann v. Salsberg, 17 Pa. Super. 280, 285 (1901). The reasoning behind these cases appears to have been that, because of the buyer's apparent absolute ownership of the goods and the creditor's right to rely on this, the creditor should be treated like a good faith purchaser, who could recover against a defrauded seller. See Schwartz v. McCloskey, 156 Pa. at 263-64, 27 A. at 301-02. The general rule, however, was that the lien creditor could not qualify as a good faith purchaser for value. See supra note 37.
  \item\textsuperscript{121} 278 F.2d at 822-23.
  \item\textsuperscript{122} See supra note 37 and accompanying text.
  \item\textsuperscript{123} "The rule is well settled in most states that the seller's right to rescind on grounds of fraudulent misrepresentation of solvency is not cut off by a levying creditor. Consequently, it is possible to explain—and correctly explain—the \textit{Kravitz} Case as an anomaly peculiar to Pennsylvania." Hawkland, supra note 1, at 88 (footnotes omitted); see also Permanent Editorial Board Note on 1966 amendment to U.C.C. Section 2-702 (law of most states differed from Pennsylvania rules applied in \textit{Kravitz}, and in such states reclamation right "fully effective"), \textit{reprinted in U.C.C. REP. SERV. CURRENT MATERIALS (CALLAGHAN)} \textsuperscript{\textcopyright} 2702, at 128 (1979).
  \item\textsuperscript{124} In \textit{re} Mel Golde Shoes, Inc., 403 F.2d 658, 659-60 (6th Cir. 1968); see also \textit{In re Federal's, Inc}, 553 F.2d 509, 511-12 (6th Cir. 1977) (following \textit{Mel Golde}); \textit{In re Royalty Homes, Inc.}, 8 U.C.C. Rep. Serv. 61, 64 (E.D. Tenn. 1970) (following \textit{Mel Golde}).
  \item\textsuperscript{125} U.C.C. § 9-301(1)(b) (1978).
  \item\textsuperscript{126} See infra notes 145-75 and accompanying text.
  \item\textsuperscript{127} See \textit{In re Federal's, Inc}, 553 F.2d 509, 514-15 (6th Cir. 1977); \textit{In re Mel Golde Shoes, Inc.}, 403 F.2d 658, 660 (6th Cir. 1968); \textit{In re Royalty Homes, Inc.}, 8 U.C.C. Rep. Serv. 61, 65 (E.D. Tenn. 1970).
  \item\textsuperscript{128} Ray-O-Vac v. Daylin, Inc. (\textit{In re Daylin, Inc.}), 596 F.2d 853, 856 (9th Cir. 1979).
\end{itemize}
only a lien creditor, the seller triumphed. An Eighth Circuit decision, favoring the reclaiming credit seller, did so virtually by fiat. After exhaustively discussing and attacking almost every conceivable argument concerning the seller/trustee clash, the court concluded that under Missouri law a lien creditor could not cut off the seller’s right to reclaim under UCC section 2-702(2) because the purpose of that section was to simplify and expand the seller’s right to reclaim.

Whatever one might think of the reasoning employed in these various cases, they did establish a substantial circuit-level consensus in favor of the UCC section 2-702(2) seller who was confronted by a bankruptcy trustee utilizing Bankruptcy Act section 70(c). Further solidifying the seller’s position was the UCC Permanent Editorial Board’s 1966 decision to eliminate section 2-702(3)’s “or lien creditor” language. Although taken literally the amendment does not definitively resolve the seller/lien creditor controversy, the amendment has generally been construed to require that the seller triumph. Thus the trustee apparently was completely precluded from mounting a successful Bankruptcy Act section 70(c) attack in those states adopting the amendment.

b. Bankruptcy Act Section 70(c) and the Cash Seller. The decisions presenting a clash between the Bankruptcy Act section 70(c) trustee and the reclaiming UCC cash seller were a mixed lot, some holding for the seller and others for the trustee. The cases supporting the trustee did so on one of two grounds: (1) that the cash seller was subordinate to a lien creditor

129. Id. The court relied on its earlier decision in Alfred M. Lewis, Inc. v. Holzman (In re Telemart Enters., Inc.), 524 F.2d 761, 765 (9th Cir. 1975).
130. Bassett Furniture Indus., Inc. v. Wear (In re PFA Farmers Mkt. Ass’n), 583 F.2d 992, 992 (8th Cir. 1978).
131. See id. at 994-1000.
133. E.g., Braucher, supra note 1, at 1298 (hopefully the amendment will “validate the right to reclaim stated in section 2-702 according to the terms of that section, in bankruptcy as well as out”); Jackson & Peters, supra note 1, at 939 (if legislative history means anything, it means that drafters intended that lien creditors should usually lose); King, supra note 1, at 81 (amendment means that trustee “will lose all hope of defeating a reclaiming seller with any power granted the trustee by § 70(c) of the Bankruptcy Act”); see also Hawkland, supra note 1, at 88 (intention of amendment to adopt Kravitz rule, “as correctly read and applied”). Professor Hawkland had earlier rejected a possible reading of Kravitz that saw the case as inevitably subordinating the seller to the trustee-as-lien creditor. Id.
under UCC section 2-702(3), or (2) that the cash sale reclamation right was a security interest, which, if not perfected, was subordinate to a lien creditor under UCC section 9-301(1)(b).

The cases holding that the UCC cash seller lost to the trustee because the cash seller was subordinate to a lien creditor under UCC section 2-702(3) did not invoke Bankruptcy Act section 70(c). Rather, the cases held that because UCC section 9-301(3)'s definition of the term lien creditor includes a trustee in bankruptcy, the cash seller lost to the trustee under the UCC itself. Since the trustee proceeding under Bankruptcy Act section 70(c) was entitled to sit in the shoes of the lien creditor, and since UCC section 9-301(3) has been read as recognizing the trustee's status under Bankruptcy Act section 70(c), treating these decisions as if they had invoked Bankruptcy Act section 70(c) is appropriate. In any event, the reasoning employed in these cases was almost certainly fallacious. Unless UCC section 2-702(2) is recognized as the source of the cash sale reclamation right, nothing links UCC section 2-702(3) to UCC sections 2-507(2) and 2-511(3). The cash sale reclamation right should be regarded as inherent to UCC sections 2-507(2) and 2-511(3), and as in no way based on UCC section 2-702(2). Thus, UCC section 2-702(3) has no application to cash sale reclaims.

Even assuming arguendo that UCC section 2-702(3) somehow does apply to the UCC cash seller, that section should not subordinate such a seller to a lien creditor. The only intelligible way to make UCC section 2-702(3) applicable to cash sale reclaims is to base the cash reclamation right on UCC section 2-702(2). In this event the body of UCC section 2-702(2) cases dealing with the credit seller/lien creditor controversy must apply to cash sale reclaims as well. The bulk of authoritative precedent dealing with this question let the seller win outright or concluded that a reversion to pre-UCC law was necessary. Under pre-UCC law, the cash seller defeated both the lien creditor and the trustee. Finally, the argument that the Bankruptcy Act section 70(c) trustee defeated the cash seller under UCC section 2-702(3) plainly was of no avail in states deleting the original "or lien creditor" language from UCC section 2-702(3). In these states a cash seller whose reclamation right was assumed to arise under UCC section 2-702(2) should

interest in goods, but only because that party is neither a good faith purchaser nor a lien creditor).


137. See supra note 104.

138. See supra notes 67-77 and accompanying text. Of course, UCC § 2-702(2)'s ten-day demand requirement may apply to the reclaiming cash seller, but this requirement is due to the language of U.C.C. § 2-507(2) comment 3 (1978). See supra notes 79-82 and accompanying text.

139. See supra notes 109-31 and accompanying text. For some courts, necessary to this argument was the assertion that UCC § 2-702(2) did not create a security interest. See supra note 126 and accompanying text. We conclude, however, that UCC §§ 2-507(2) and 2-511(3) do not create security interests. See infra notes 145-71 and accompanying text.

140. See supra notes 36, 38 and accompanying text.

141. See supra notes 132-33 and accompanying text.
have been victorious either because of the pro-seller reading typically given the amendment,\textsuperscript{142} or through recourse to pre-UCC law.\textsuperscript{143}

The other possible attack on the cash seller's ability to recover in bankruptcy centered on UCC section 9-301(1)(b), which subordinates an unperfected security interest to the rights of a lien creditor whose lien attaches before the security interest is perfected.\textsuperscript{144} Thus, if the cash sale or its associated reclamation right involves an unperfected security interest, the cash seller loses to the trustee, the ideal lien creditor.\textsuperscript{145} They could be so treated only if they qualify as so-called article 2 security interests. The controlling provision for these security interests is UCC section 9-113.\textsuperscript{146} Under that section, once the buyer lawfully obtains possession of the goods, a security agreement is needed to make the security interest enforceable,\textsuperscript{147} and the holder of the security interest must ordinarily file a financing statement\textsuperscript{148} to

\begin{footnotesize}
\textsuperscript{142}. See supra note 133.
\textsuperscript{143}. See infra notes 183-87 and accompanying text.
\textsuperscript{144}. U.C.C. § 9-301(1)(b) (1978).
\textsuperscript{145}. See Stowers v.Mahon (In re Samuels & Co.), 526 F.2d 1238, 1246-48 (5th Cir.) (dictum on Bankruptcy Act § 70(c) point), cert. denied, 429 U.S. 834 (1976). But see Swayne v. Idaho Auto Auction (In re Shoemaker), 4 Bankr. 505, 506 (Bankr. D. Idaho 1980) (cash seller defeats trustee under Bankruptcy Act, § 70(c) despite argument that seller has unperfected security interest).
\textsuperscript{146}. U.C.C. § 9-113 (1978) provides that:
A security interest arising solely under the Article on Sales (Article 2) is subject to the provisions of this Article except that to the extent that and so long as the debtor does not have or does not lawfully obtain possession of the goods
(a) No security agreement is necessary to make the security interest enforceable; and
(b) no filing is required to perfect the security interest; and
(c) the rights of the secured party on default by the debtor are governed by the Article on Sales (Article 2).
Even when UCC § 9-113 dispenses with the need for a security agreement and a properly filed financing statement, however, article 9 third-party priority rules still apply. J. WHITE & R. SUMMERS, supra note 5, § 22-10, at 898.
Moreover, U.C.C. § 9-113 comment 1 (1978) provides:
Under the provisions of Article 2 on Sales, a seller of goods may reserve a security interest (see, e.g., Sections 2-401 and 2-505), and in certain circumstances, whether or not a security interest is reserved, the seller has rights of resale and stoppage under Sections 2-703, 2-705 and 2-706 which are similar to the rights of a secured party. Similarly, under such sections as Sections 2-506, 2-707 and 2-711, a financing agency, an agent, a buyer or another person may have a security interest or other right in goods similar to that of a seller. The use of the term "security interest" in the Sales Article is meant to bring the interests so designated within this Article.
As this language indicates, § 9-113 generally covers nonconsensual interests that arise by operation of law in the course of a sales transaction. Id. comment 2. A conspicuous exception to this generalization, however, is id. § 2-401(1), the relevant portion of which declares: "Any retention 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."
\textsuperscript{147}. U.C.C. § 9-203(1)(a) (1978). The security agreement must be signed by the debtor and must contain a description of the collateral. Id. It must also contain language creating or providing for a security interest. Id. § 9-105(1)(k). Section 9-203(1)(a) also provides for attachment without a security agreement when the secured party is in possession of the collateral, but this possibility is excluded by hypothesis when the buyer has lawfully obtained possession of the goods.
\textsuperscript{148}. See id. § 9-302. Id. § 9-302(1)(d) provides that a purchase money security interest in consumer goods does not require filing in order to be perfected. Also, certain situations exist
\end{footnotesize}
perfect the interest.\textsuperscript{149}

The courts considering the matter have generally concluded that UCC section 2-702(2) does not create a security interest,\textsuperscript{150} and sound reasons exist for this conclusion. First, UCC section 2-702 is not contained in the UCC section 9-113 comment listing security interests to which UCC section 9-113 applies.\textsuperscript{151} Second, the UCC section 2-702(2) reclamation right cannot be exercised in such a way as to allow the seller to benefit from UCC section 9-113. According to UCC section 9-113, the rights or interests that section protects are exempted from article 9 requirements so long as the buyer does not have or obtain possession of the goods.\textsuperscript{152} The reclamation right established by UCC section 2-702(2), however, cannot arise until after the seller yields possession to the buyer because this right is premised on the buyer's receipt of the goods while insolvent. Thus, the UCC section 2-702(2) reclamation right cannot be exercised in a manner entitling it to the UCC section 9-113 exemption from article 9's requirements.\textsuperscript{153} To include UCC in which a security interest may be perfected by the secured party's possession of the collateral. \textit{Id.} §§ 9-302(1)(a), 9-305. These situations are excluded by hypothesis, however, when the debtor has lawfully obtained possession of the goods.

\textsuperscript{149} \textit{Id.} § 9-113 comment 3; see also Putterbaugh v. Fournier (\textit{In re Happy Jack's Restaurant, Inc.}), 29 U.C.C. Rep. Serv. 655, 657-60 (Bankr. D. Me. 1980) (seller must perfect by filing to defeat trustee proceeding under UCC § 9-301(1)(b); because filing improper, trustee wins).


\textsuperscript{151} U.C.C. § 9-113 (1978); see supra note 146.

\textsuperscript{152} U.C.C. § 9-113 (1978). Thus a security interest contemplated by UCC § 9-113 is effectively enforceable and perfected, and its holder has enhanced rights against third parties, until the debtor obtains lawful possession. What are those enhanced rights? For example, although the UCC does not expressly deal with the point, a secured party who perfects before the creation of the lien creditor's lien will defeat such a lien creditor. H. BAILEY, supra note 89, at 278. A secured party with an unperfected security interest or a secured party who perfects after the creation of the lien creditor's lien, however, will lose to a lien creditor. U.C.C. § 9-301(1)(b) (1978). If a secured party files with respect to a purchase money security interest within ten days after the debtor receives possession of the collateral, however, the secured party takes priority over rights of a lien creditor that arise between the time the security interest attaches and the time of filing. \textit{Id.} § 9-301(2). Moreover, a secured party who files or perfects before another secured party files or perfects has priority over the second secured party. \textit{Id.} §§ 9-312(3), (4). An unperfected secured party, however, generally loses to a perfected secured party. H. BAILEY, supra note 89, at 230.

\textsuperscript{153} U.C.C. § 9-113 (1978) states that "so long as the debtor does not have or does not lawfully obtain possession of the goods... (c) the rights of the secured party on default by the debtor are governed by the Article on Sales (Article 2)." This language clearly envisions that certain situations exist in which the rights of article 2 secured parties covered by UCC § 9-113 will be governed by the provisions of article 2. Since the UCC § 2-702(2) reclamation right cannot arise until after the goods have moved to the buyer and UCC § 9-113 imposes article 9 attachment and filing requirements once this has happened, it is difficult to see how the § 2-702(2) seller could ever avail himself of the opportunity to utilize his article 2 reclamation right if § 2-702(2) is included within § 9-113. Thus, to assume that § 2-702(2) was intended to be within § 9-113's coverage is implausible. This conclusion might be avoided,
section 2-702(2) within UCC section 9-113's coverage is to deny the re-
claiming seller section 9-113's benefits, enhanced protection against various
third parties, while exposing the seller to section 9-113's disadvantages, for
example, the perfection needed to defeat the lien creditor and the Bank-
ruptcy Act section 70(c) trustee. 154

Third, including the UCC section 2-702(2) seller within UCC section 9-
113 would emasculate section 2-702(2). Holding that section 2-702(2)'s ef-
fective right to rescind for fraud is a security interest subject to article 9
leads to the absurd conclusion that the seller could not reclaim from the
buyer unless the buyer signed a written agreement providing such a right as
required by UCC section 9-203. 155 Finally, UCC section 2-702(2)'s rescis-
ion remedy does not comport with the UCC's definition of a security inter-
est 156 because section 2-702(2) does not secure payment but rather serves as
a substitute for payment. 157

If the UCC cash sale reclamation right is based on UCC section 2-702(2),
the cases and arguments just discussed should also have disposed of the con-
tention that UCC sections 2-507(2) and 2-511(3) were unperfected security
interests defeated by a bankruptcy trustee who assumed a lien creditor's po-
sition under UCC section 9-301(1)(b). If the UCC cash sale reclamation
right is regarded as inherent to UCC sections 2-507(2) and 2-511(3), 158 the
above arguments should have been highly persuasive in the cash sale con-
text. The cases holding that the cash seller is an unperfected secured party,
however, focus less on the nonconsensual cash sale reclamation right than on
the rationale supposedly underlying that right. 159 Specifically, these cases

however, if it is assumed that the buyer subject to § 2-702(2) has not lawfully obtained posses-
sion of the goods. See infra notes 172-74 and accompanying text.
154. See supra note 152.
155. Braucher, supra note 1, at 1290. U.C.C. § 9-203 (1978) is article 9's attachment provi-
sion. See supra note 147.
156. See U.C.C. § 1-201(37) (1978).
157. '[A] right to rescind is a right to undo the transaction—to reclaim the goods as a
substitute for the price—not a right to 'secure' payment of the price as required by the defini-
tion of 'security interest'; under section 2-702(3), successful reclamation 'excludes all other
remedies'. ' Braucher, supra note 1, at 1290 (footnote omitted). For an attack on this argu-
ment, see Jackson & Peters, supra note 1, at 928-29.
158. See supra notes 70-77 and accompanying text. This view of the cash sale reclamation
right is, of course, our own.
159. Stowers v. Mahon (In re Samuels & Co.), 526 F.2d 1238, 1246-48 (5th Cir.), cert. de-
nied, 429 U.S. 834 (1976), held that the UCC cash sale reclamation right was a security
interest, and went on to note in dictum that, since the seller had not perfected, he would lose to
the trustee under UCC § 9-301(1)(b) and Bankruptcy Act § 70(c). Other cases have held,
ated, or implied that the cash sale reclamation right is a security interest in situations in
which the seller confronted a secured party. See United States v. Wyoming Nat'l Bank, 505
F.2d 1064, 1068 (10th Cir. 1974); First Nat'l Bank v. Carbasjal, 132 Ariz. 263, 645 P.2d 778,
782 (1982) (express reservation of title as well); Hardick v. Hill, 403 So. 2d 1125, 1126 (Fla.
768, 182 S.E.2d 687, 689 (express reservation of title as well), rev'd on other grounds, 228 Ga.
325, 185 S.E.2d 393, vacated, 125 Ga. App. 126, 186 S.E.2d 542 (1971); Peerless Equip. Co. v.
Azle State Bank, 559 S.W.2d 114, 115 (Tex. Civ. App.—Fort Worth 1977, no writ). But see
seller defeated trustee proceeding under Bankruptcy Act § 70(c) despite argument that cash
seller was unperfected secured party); Guy Martin Buick, Inc. v. Colorado Springs Nat'l Bank,
revert to the pre-UCC conception of a cash sale\textsuperscript{160} by treating a cash sale as a retention or reservation of title to the goods under UCC section 2-401(1).\textsuperscript{161} Once the buyer has or lawfully obtains possession of the goods sold, it was argued, the cash seller had to perfect his security interest in order to defeat a lien creditor and the Bankruptcy Act section 70(c) trustee.\textsuperscript{162} This argument misrepresented the nature of the UCC cash sale. Section 2-401 proclaims that the seller's rights and remedies apply irrespective of title to the goods.\textsuperscript{163} To be sure, UCC sections 2-507(2) and 2-511(3) state rules functionally equivalent to the pre-UCC doctrine that title passed only upon payment in a cash sale, but nowhere do they specifically refer to title. No retention or reservation of title on the seller's part is needed for these sections to operate.\textsuperscript{164}

The argument for the seller's subordination to the lien creditor and the trustee under UCC section 2-401 also suffered from the other problems noted in the UCC section 2-702(2) context.\textsuperscript{165} Sections 2-507(2) and 2-511(3) are not contained in the commentary listing the article 2 security interests covered by section 9-113 and cannot be employed to afford the seller section 9-113's benefits.\textsuperscript{166} Further, to treat sections 2-507(2) and 2-511(3) as security interests is to weaken substantially the cash sale reclamation right, the existence of which no one denies.\textsuperscript{167} Finally, characterizing the cash sale reclamation right\textsuperscript{168} as a security interest is at odds with the nature of the underlying transaction.\textsuperscript{169} If UCC section 2-401(1) has any application to cash sales, that application should be limited to situations in

\textsuperscript{160} Colo. 166, 519 P.2d 354, 359-60 (1974) (rejecting argument that cash seller was unperfected secured party).
\textsuperscript{161} See supra notes 10-12, 26 and accompanying text.
\textsuperscript{162} See supra note 146. This argument could not be employed in the case of UCC § 2-702(2), because that section's common law antecedents were not premised on a reservation of full title by the seller. See supra notes 8, 20-25 and accompanying text.
\textsuperscript{163} See supra note 146. U.C.C. § 2-401 (1978). Id. comment 1 states in part that the UCC Article on Sales "deals with the issues between seller and buyer in terms of step by step performance or non-performance under the contract for sale and not in terms of whether or not 'title' to the goods has passed."
\textsuperscript{164} See supra notes 54-61 and accompanying text; see also Myers v. Columbus Sales Pavilion, Inc., 575 F. Supp. 805, 808 (D. Neb.) (§§ 2-507(2) and 2-511(3) do not depend on title and do not implicate § 2-401(1)), aff'd, 723 F.2d 37 (8th Cir. 1983).
\textsuperscript{165} See supra notes 150-57 and accompanying text.
\textsuperscript{166} The cash seller who tenders the goods can no doubt refuse to transfer possession to a buyer who refuses to make payment. U.C.C. § 2-507(1) (1978). Sections 2-507(2) and 2-511(3), on the other hand, are usually employed to provide a reclamation right for the unpaid seller who has already delivered the goods to the buyer. Dugan, supra note 3, at 344-45.
\textsuperscript{167} See Dugan, supra note 3, at 344-45.
\textsuperscript{168} The cash sale reclamation right, like the § 2-702(2) reclamation right, is basically a power to undo the transaction.
\textsuperscript{169} The most common situation in which a seller retains a security interest in goods he sells is a credit transaction in which the interest is taken to secure payment of the price. The cash sale by definition does not contemplate an extension of credit. The cash seller transfers the goods thinking that he is receiving substantially simultaneous payment, and has no apparent need to secure the price. See Dugan, supra note 3, at 344 (arguing that the cash seller is excluded from UCC § 1-201(37)'s definition of the term "security interest" because this definition refers to situations involving an extension of credit).
which the seller and the buyer expressly agree that the seller reserves title.\textsuperscript{170} This is consistent with section 2-401(1)'s aim of ensuring that true security devices are subject to article 9 requirements.\textsuperscript{171}

Finally, the UCC cash and credit sellers should have defeated the trustee under Bankruptcy Act section 70(c) even if their rights were treated as security interests. According to UCC section 9-113, such interests are not subject to article 9 attachment and filing requirements so long as the debtor lacks possession of the goods or does not lawfully obtain their possession. Taking possession of goods on credit while insolvent or taking goods in exchange for a bad check is not a lawful obtaining of possession.\textsuperscript{172} In such cases the rights of the putative security interest holder, the seller, are governed by article 2, not article 9,\textsuperscript{173} and the seller therefore would defeat the lien creditor and the Bankruptcy Act section 70(c) trustee.\textsuperscript{174} Alternatively, an unpaid seller may have been able to avoid the claims of a Bankruptcy Act section 70(c) trustee by repossessing the goods after the buyer obtained possession.\textsuperscript{175} If valid, this argument presumably would have held even if the

\textsuperscript{170} U.S. Billiards Co. v. Greenberger (In re Bensar Co.), 36 Bankr. 699, 702 (Bankr. S.D. Ohio 1984) (signed writing evidencing intention to create security interest required); cf. First Nat'l Bank v. Smoker, 153 Ind. App. 71, 286 N.E.2d 203, 211 (1972) (explicit agreement under § 2-401(1) needed to alter § 2-401(2)'s rule that title passes to buyer at time and place seller completes delivery). The clearest type of agreement intended to be covered by UCC § 2-401(1)'s "retention or reservation" language is a transaction corresponding to the pre-UCC conditional sale. See Dugan, supra note 3, at 343 (conditional sale archetypal instance of title retention); Jackson & Peters, supra note 1, at 918-20 (clearly identifying § 2-401(1) with the conditional sale transaction).

\textsuperscript{171} R. Nordstrom, supra note 1, at 380-81. The main point, presumably, is that express reservations of title should be subjected to article 9 requirements in order to afford third parties the notice that article 9 perfection procedures provide.

\textsuperscript{172} See Braucher, supra note 1, at 1290; Jackson & Peters, supra note 1, at 929-30; Wise- man, supra note 3, at 148-49. "The seller reclaiming under sections 2-507 or 2-702 appears to be a prime candidate to assert a claim that the buyer-debtor did not 'lawfully obtain possession'; indeed, no other claim founded in Article 2 seems to come close." Jackson & Peters, supra note 1, at 929.

\textsuperscript{173} U.C.C. § 9-113(c) (1978). When the rights of parties other than the debtor-buyer are involved, however, article 9 should control priorities between the seller and these third parties. See J. White & R. Summers, supra note 5, § 22-10, at 898. In such a case the seller would be in possession of a perfected security interest. See Jackson & Peters, supra note 1, at 939. Under UCC § 9-113(b) the requirement that the secured party file to perfect is waived if the buyer/debtor does not lawfully obtain possession. Id. at 939 n.110.

\textsuperscript{174} If the seller's recovery is governed by article 2 standards, he should defeat the Bankruptcy Act § 70(c) trustee. If the seller is deemed to be in possession of a perfected security interest controlled by the priority rules of article 9, he should defeat the trustee if the interest was perfected before the lien creditor acquired his lien. See supra note 152.

\textsuperscript{175} See Jackson & Peters, supra note 1, at 933-34, 938, 940-41. Jackson and Peters state that:

The language of section 9-113 arguably accommodates the vicissitudes of the reacquiring seller. It provides that Article 9 rules on validation, perfection, and default do not apply "so long as the debtor does not have... possession." If "so long as" implies that the debtor's possession is reversible, then, upon reacquisition, the seller's Article 2 rights are not seriously compromised. Although such a seller may have to take into account the interests of other parties that arose while the buyer was in possession, his reacquisition is still to be distinguished from the retaking associated with ordinary Article 9 security interests. Id. at 933-34 (emphasis in original; footnotes omitted). Thus, upon repossession, no security agreement is required to make the security interest enforceable, no filing is needed to perfect it,
buyer's possession without payment was deemed lawful.

c. The Preferred Resolution of UCC Cash Sale Priority Problems. Thus far, the arguments for the UCC cash seller's priority over the lien creditor and the Bankruptcy Act section 70(c) trustee have been mainly negative. The primary concern of the preceding discussion has been to demonstrate that the UCC cash seller cannot be subordinated to a lien creditor under UCC sections 2-702(3) and 9-301(1)(b). What remains to be considered is the proper means for determining priority between the cash seller and the lien creditor. The authors contend that UCC section 2-403 provides the best resolution of this question. The fact that section 2-403 is capable of handling all important cash sale priority questions provides support for this position.176

UCC sections 2-507(2) and 2-511(3) only apply as between buyer and seller and do not control the cash seller's relations with third parties.177 However, UCC section 2-403(1)178 subordinates the cash seller to a good

and the rights of the secured party upon the buyer's default are governed by article 2. The seller would defeat the Bankruptcy Act § 70(c) trustee either under article 2, or as a perfected secured party under article 9. Jackson and Peters, however, suggest that the seller should lose to a lien creditor who obtains his lien while the buyer is in lawful possession of the goods, for at this time the seller's interest would be neither perfected nor governed by article 2. Jackson & Peters, supra note 1, at 938. Since the Bankruptcy Act § 70(c) trustee assumes the position of a hypothetical lien creditor who obtained his lien on the date of bankruptcy, see supra notes 106-07 and accompanying text, the seller could lose to a trustee when the buyer was lawfully in possession of the goods on the day of bankruptcy. Jackson and Peters also suggest that the seller may lose his preferred position if he fails to reclaim promptly. See Jackson & Peters, supra note 1, at 940-41. But see U.C.C. § 9-113 comment 3 (1978) (a secured party who wishes to retain a security interest after the debtor lawfully obtains possession must comply fully with article 9 and must ordinarily perfect by filing to protect himself against third parties); cf. First Nat'l Bank v. Carbajal, 132 Ariz. 263, 267-68, 645 P.2d 778, 782 (1982) (seller could not recover against a secured party because he failed to complete a security agreement or to be in possession of the collateral under UCC § 9-203(1)(a) at a time when the buyer had rights in the collateral).

176. Cf. Jackson & Peters, supra note 1, at 948: "While it is true that Article 2 has no section denominated 'priorities,' section 2-403 contains a form of ordering for the cases within its bounds that is indistinguishable from the ordering scheme we customarily consider a priorities framework." (Footnote omitted).

177. U.C.C. § 2-507(2) (1978) states: "Where payment is due and demanded on the delivery 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. § 2-511(3) (1978) provides in relevant part that: "payment by check is conditional and is defeated as between the parties by dishonor of the check on due presentment." Id. § 2-511 comment 4 declares: "Subsection (3) is concerned with the rights and obligations as between the parties to a sales transaction when payment is made by check. . . . The conditional character of the payment under this section refers only to the effect of the transaction 'as between the parties thereto . . . ." Cases routinely state that UCC §§ 2-507(2) and 2-511(3) only apply as between the parties. Stowers v. Mahon (In re Samuels & Co.), 526 F.2d 1238, 1244 (5th Cir.), cert. denied, 429 U.S. 834 (1976); United States v. Wyoming Nat'l Bank, 505 F.2d 1064, 1068 (10th Cir. 1974).

178. U.C.C. § 2-403(1) (1978) provides in part that:

(1) A purchaser of goods acquires all title which his transferer 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
faith purchaser for value\textsuperscript{179} and refers to bad check sales and cash sales in general while doing so.\textsuperscript{180} Since article 9 secured parties\textsuperscript{181} are routinely held to be good faith purchasers for value,\textsuperscript{182} UCC section 2-403(1) provides a basis for their triumph over the cash seller.

UCC section 2-403 does not directly resolve the cash seller/lien creditor priority question.\textsuperscript{183} Section 2-403(4) directs us to article 9 for a solution to the problem, but neither of the two relevant article 9 provisions mentioning the lien creditor is very helpful. UCC section 9-301(3) fails to decide the issue because that section is essentially definitional and merely recognizes the trustee’s lien creditor status under Bankruptcy Act section 70(c).\textsuperscript{184} UCC section 9-301(1)(b), which subordinates an unperfected secured party to a lien creditor, is inadequate because the UCC cash sale provisions do not have been delivered under a transaction of purchase the purchaser has such power even though . . . .

(b) the delivery was in exchange for a check which is later dishonored, or
(c) it was agreed that the transaction was to be a “cash sale”. . . .

(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).

\textit{Id.} § 2-507(2) comment 3 implicitly refers to UCC § 2-403 when that comment provides:

Subsection (2) deals with the effect of a conditional delivery by the seller and in such a situation makes the buyer’s “right as against the seller” conditional upon payment. These words are used as words of limitation to conform with the policy set forth in the bona fide purchase sections of this Article.

Section 2-403 is the only article 2 provision plausibly identified as a bona fide purchase section.


\textsuperscript{180} The reclaiming credit seller under UCC § 2-702(2) is likewise subordinated to a good faith purchaser for value under either UCC § 2-403(1) or UCC § 2-702(3).

\textsuperscript{181} The recharging credit seller under UCC § 2-702(2) has not been delivered under a transaction of purchase by the purchaser has such power even though . . . .

(b) the delivery was in exchange for a check which is later dishonored, or
(c) it was agreed that the transaction was to be a “cash sale”. . . .

(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).

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\textsuperscript{181} The reasoning contained in \textit{infra} note 182 and accompanying text should apply to unperfected as well as perfected security interests. The cases in which a cash seller competes with a holder of an unperfected security interest, however, generally consider whether the cash sale reclamation right is a security interest. See, e.g., First Nat’l Bank v. Carbajal, 132 Ariz. 263, 645 P.2d 775, 782-83 (1982) (seller’s right, while still a security interest, did not attach, and seller thus defeated by unperfected secured party); Guy Martin Buick, Inc. v. Colorado Springs Nat’l Bank, 184 Colo. 166, 519 P.2d 354, 358-60 (1974) (secured party declared good faith purchaser for value, seller’s attempt to characterize right as security interest rejected, and unperfected secured party wins because cash sale reclamation right not one of the interests defeating an unperfected security interest in \textit{UCC} § 9-301); Hardick v. Hill, 403 So. 2d 1125, 1126 (Fla. Dist. Ct. App. 1981) (cash seller defeats unperfected security interest and cash seller first to attach).

\textsuperscript{182} \textit{E.g.}, Sorrels v. Texas Bank & Trust Co., 597 F.2d 997, 1001 (5th Cir. 1979); Stowers v. Mahon (\textit{In re Samuels & Co.}), 526 F.2d 1238, 1242-44 (5th Cir.), \textit{cert. denied}, 429 U.S. 834 (1976); United States v. Wyoming Nat’l Bank, 505 F.2d 1064, 1067-68 (10th Cir. 1974); see Mann & Phillips III, \textit{supra} note 1, at 18-19; Mann & Phillips, \textit{supra} note 3, at 386-87 (reasoning supporting secured party’s good faith purchaser for value status).

\textsuperscript{183} Despite some confusing language in Stowers v. Mahon (\textit{In re Samuels & Co.}), 526 F.2d 1238, 1242-43 (5th Cir.), \textit{cert. denied}, 429 U.S. 834 (1976), which might be read as asserting a contrary proposition, the lien creditor is not a good faith purchaser for value. See Mann & Phillips III, \textit{supra} note 1, at 20-21; see \textit{also} Bassett Furniture Indus., Inc. v. Wear (\textit{In re PFA Farmers Mkt. Ass’n}), 583 F.2d 992, 997-98 (8th Cir. 1978) (lien creditor is not good faith purchaser for value under UCC § 2-403).

\textsuperscript{184} \textit{See supra} notes 104, 118 and accompanying text.
create a security interest. UCC section 1-103, however, allows recourse to pre-UCC law. Before enactment of the UCC the cash seller defeated an attaching lien creditor. As a result, the cash seller defeats a lien creditor under the UCC and also defeats a trustee proceeding under Bankruptcy Act section 70(c).

UCC section 2-403's solution has two distinct advantages over the other solutions provided by current case law. First, this solution produces certain and uniform results. Our research has uncovered no common law cases in which the lien creditor defeated an unpaid cash seller who had not waived his rights. Second, if UCC sections 2-507(2) and 2-511(3) embody the common law cash sale doctrine, as we believe they do, UCC section 2-403 resolves the priority problem in a way that is consistent with the common law doctrines, and thus provides historical continuity as well.

2. The Cash Seller Under Bankruptcy Act Section 60. When the cash seller reclaimed the goods within the four months preceding bankruptcy, he ran the risk of having the repossession declared preferential under section 60 of the Bankruptcy Act. A preferential transfer was: (1) a transfer; (2) made or suffered by the debtor; (3) of the debtor's property; (4) within four months of bankruptcy; (5) to a creditor; (6) on account of an antecedent debt; (7) while the debtor was insolvent; and (8) enabling the creditor to obtain a greater percentage of his debt than some other creditor of the same class. The trustee could avoid a preference if the creditor receiving it had, at the time the transfer was made, reason to believe the debtor was insolvent.

Arguing that the UCC cash seller's repossession following the buyer's failure to pay constituted a voidable preference if the repossession occurred within four months of bankruptcy is not difficult. A repossession taking place within that time was obviously a transfer within the Bankruptcy Act's broad definition of that term, and while this transfer may not always have been made by the debtor, the transfer certainly was at least suffered by that party. Although in cash sales prior to the UCC doubt existed as to whether

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185. U.C.C. § 1-103 (1978) provides: "Unless displaced by the particular provisions of this Act, the principles of law and equity . . . shall supplement its provisions."
186. See supra note 36 and accompanying text.
188. Bankruptcy Act § 60(a)(1) defined a preferential transfer as:
   a transfer . . . 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.
190. Bankruptcy Act § 60(b).
191. See id. § 1(30). The seller, however, might be regarded as having reclaimed the goods when he merely made a demand for them. See Potts v. Mand Carpet Mills (In re Bel Air Carpets, Inc.), 452 F.2d 1210, 1211 (9th Cir. 1971).
goods delivered but not paid for were the debtor's property,\textsuperscript{192} the situation was probably different under the UCC.\textsuperscript{193} Since the cash seller was repossessing to satisfy a debt created at the time the seller delivered the goods to the buyer, the transfer was made to a creditor on account of an antecedent debt. Ordinarily, the buyer was insolvent in such cases.\textsuperscript{194} Since the cash seller without a perfected security interest would typically have been a gen-

\begin{footnote}
192. Our research has not disclosed any cases clearly dealing with the question of whether a repossession following a cash buyer's failure to pay for the goods was a preference prior to enactment of the UCC. The pre-UCC cash seller, however, was generally able to recover in bankruptcy, see supra note 38 and accompanying text, and a reclamation before bankruptcy was almost certainly not preferential before passage of the UCC. The basic reason for this conclusion is that, since title to the goods only moved upon payment in a cash sale, see supra notes 11-12 and accompanying text, the nonpaying buyer lacked title to them. Thus, the seller's repossession could not have been a transfer of the debtor's property because the nonpaying buyer received no title in a cash sale. See \textit{In re Perpall}, 256 F. 758, 761 (2d Cir. 1919) (decided outside the preference context). Also, courts commonly held that no title passed to the trustee in a cash sale in which payment was not made and that Bankruptcy Act § 60's "property of the debtor" standard was tested with reference to whether the trustee would have obtained title under Bankruptcy Act § 70(a). See 3 W. \textsc{Collier}, \textit{supra} note 23, \textit{\S} 60.07[2], at 791; 4A id. \textit{\S} 70.19[5], at 242-44. When the defrauded credit seller repossessed the goods, the reclamation was not preferential because the buyer acquired only a voidable title and the transfer thus did not involve the property of the debtor. Fisher v. Shreve, Crump & Low Co., 7 F.2d 159, 161 (D. Mass. 1925). Furthermore, the repossessing party also triumphed over the Bankruptcy Act § 60 trustee in consignment and bailment cases. See Kemp-Booth Co. v. Calvin, 84 F.2d 377, 380-81 (9th Cir. 1936); \textit{In re Wright-Dana Hardware Co.}, 205 F. 335, 336 (N.D.N.Y. 1913), \textit{aff'd}, 211 F. 908 (2d Cir. 1914). Finally, the seller's repossession under a conditional sales contract was not preferential. Finance & Guar. Co. v. Oppenheim, 276 U.S. 10, 12 (1928).

193. The UCC de-emphasizes the title concept. See supra note 163 and accompanying text. U.C.C. § 2-401 comment 1 (1978) states that:

\begin{quote}
This section . . . in no way intends to indicate which line of interpretation should be followed in cases where the applicability of "public" regulation depends upon . . . location of "title" without further definition . . . . It is therefore necessary to state . . . when title passes under this Article in case the courts deem any public regulation to incorporate the defined term of the "private" law.
\end{quote}

Assuming that the Bankruptcy Act qualified as a public regulation, this language might be read as instructing the courts to consult UCC § 2-401's title passage rules in Bankruptcy Act § 60 cases. U.C.C. § 2-401(2) (1978) states: "Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest . . . ." The last sentence of UCC § 2-401(1) declares: "Subject to these provisions . . . title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties." Among the provisions to which this rule is subject, however, is UCC § 2-401(1)'s statement that "[a]ny retention or reservation by the seller . . . is limited in effect to a reservation of a security interest." Thus, if the cash sale is regarded as not involving any agreement regarding the passage of title, title moves to the buyer when the seller delivers, and any subsequent repossession would be a transfer of the debtor's property. If the cash sale is characterized as involving an explicit agreement that title will not pass until payment of the price, such an agreement would most likely be characterized as involving only the reservation of a security interest. This characterization will not prevent title from passing in the normal fashion. See U.C.C. § 2-401(2) (1978). Of course, we do not view the UCC cash sale as coming within the terms of UCC § 2-401(1). See supra notes 159-71 and accompanying text.

194. Bankruptcy Act § 1(15) defined insolvency as a situation in which the aggregate of the debtor's property was insufficient to pay his debts. The UCC definition of insolvency, however, is broader. See U.C.C. § 1-201(23) (1978). This difference between definitions should be of no concern unless the cash sale reclamation right is based on UCC § 2-702(2), which premises the right on the seller's discovery of the buyer's insolvency. This reading of the cash sale reclamation right, however, is untenable. See supra notes 70-77 and accompanying text.
eral creditor in bankruptcy,\textsuperscript{195} and since such creditors usually do not re-
cover anything resembling the full amount of their debts, the transfer would
enable the reclaiming cash seller to fare better than general creditors. Fi-
nally, the reclamation ordinarily occurred in circumstances strongly sug-
gest ing that the buyer was in financial difficulty, thus satisfying the
requirement that the creditor have reason to believe that the buyer is
insolvent.

Despite the surface plausibility of this argument, it is unlikely that a pre-
bankruptcy repossession by the UCC cash seller was preferential under
Bankruptcy Act section 60. The trustee's power to avoid the reclamation
depended on his ability to establish all the elements of a preference plus the
seller's reasonable cause to believe in the debtor's insolvency. The trustee's
position was only as strong as the weakest link in his argumentative chain,
and several weak links exist in the above argument. First, it was not obvious
that all reclamations by unpaid cash sellers would have been undertaken
with the requisite reasonable cause to believe in the debtor's insolvency.\textsuperscript{196} Second, the contention that a repossession following the cash buyer's failure
to pay or the dishonor of the buyer's check was inevitably on account of an
antecedent debt is not completely convincing.\textsuperscript{197} When a seller of goods had
extended credit, the buyer's subsequent payment obviously was for an ante-
cedent debt.\textsuperscript{198} The buyer's contemporaneous payment for goods received in
a cash sale, on the other hand, was not for an antecedent debt.\textsuperscript{199} When the
cash seller repossessed following the buyer's failure to pay or the dishonor of
the buyer's check, no way existed for him to repossess quickly enough to
avoid the reclamation's characterization as a transfer for a preexisting obli-
gation. Even in the stereotypical over-the-counter sale in which the seller
handed over the goods, the buyer refused payment, and the seller promptly

\textsuperscript{195} See Bankruptcy Act § 64 (establishing Bankruptcy Act debt priorities).
\textsuperscript{196} The seller's reclamation of the goods, without anything more, did not always provide
sufficient evidence for a finding of reasonable cause to believe in the debtor's insolvency. Compare Brown v. Tru-Lite, Inc., 398 F. Supp. 800, 804-05 (W.D. La. 1975) (seizure of goods by itself not necessarily enough to create finding of reasonable cause; each case must be consid-
ered on its own facts), with Bossak & Co. v. Coxe, 285 F. 147, 148-49 (5th Cir. 1922) (recovery of
goods then worth only fifty percent of their sale price sufficient to establish reasonable cause).
Also, the courts seemed in general agreement that the mere receipt of a bad check was not
itself sufficient to create a reasonable belief finding. See, e.g., C.A. Swanson & Sons Poultry
Co. v. Wylie, 237 F.2d 16, 18 & n.4 (9th Cir. 1956) (not-sufficient-funds check one factor
among many to consider); Dinkelspiel v. Weaver, 116 F. Supp. 455, 462 (W.D. Ark. 1953)
(not-sufficient-funds check not conclusive; courts must consider other circumstances); Robie v.
Myers Equip. Co., 114 F. Supp. 177, 182 (D. Minn. 1953) (dishonored check plus subsequent
offer of post-dated check sufficient to create finding of reasonable cause); Conners v. Bucksport
Nat'l Bank, 214 F. 847, 849-50 (D. Me.) (bad check plus other information enough for finding
of reasonable cause), aff'd mem., 216 F. 990 (1st Cir. 1914).
\textsuperscript{197} Peck v. Augustin Bros., 203 Neb. 574, 279 N.W.2d 397, 401 (1979) ("[r]eclamation is
not a voidable preference because the title is voidable; thus, there is no transfer on account of
an antecedent debt").
\textsuperscript{198} Stock Clearing Corp. v. Weis Sec. Inc. (In re Weis Sec. Inc.), 542 F.2d 840, 843 (2d
Cir. 1976).
\textsuperscript{199} See id. A transaction originating as a cash sale could be converted into a transaction
for credit, however, if the seller in fact extended credit. In such cases, a subsequent transfer in
payment of the debt was for antecedent debt and could be preferential. Nat'l City Bank v.
Hotchkiss, 231 U.S. 50, 58 (1913).
reclaimed the transferred property, the reclamation presumably occurred after creation of the debt. With reference to Bankruptcy Act section 60's aim of protecting creditors against depletion of the estate by preferential transfers to other creditors, this situation was indistinguishable from the situation in which the buyer simply paid cash for the goods. Thus, in cases in which the seller reclaimed with reasonable promptness, the better course was to regard repossession as relating back to the time the debt arose and to treat such a reclamation as nonpreferential.

Another possible argument was that the UCC cash seller's repossession of the goods did not diminish the bankrupt's estate. In a normal cash sale in which the transfer of the goods and the transfer of the price are substantially simultaneous, the buyer's payment of the price was nonpreferential. This result was based at least in part on the argument that such an exchange did not diminish the estate because the goods and their price were of approximately equal value. The cash seller's repossession of delivered goods following the buyer's failure to pay was therefore also not preferential, since the underlying transaction was identical and the net effect on the estate was quite similar to the normal cash sale. Courts generally held that when the owner of property that had been stolen, misappropriated, converted, or fraudulently obtained stood on his right of ownership and re-took the property, no diminution of the estate and no preference occurred.

Whether the UCC cash seller was even a creditor under Bankruptcy Act section 60 was also doubtful. When the bankrupt debtor had stolen, misappropriated, converted, or fraudulently obtained property belonging to another, that party was not a creditor if he stood on his rights as owner and demanded return of the property or, in fraud cases, moved to rescind the transaction. This doctrine clearly applied when the buyer defrauded the

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200. One court considering the credit seller's fate under Bankruptcy Act §§ 64 and 67(c) seems to have taken this view.

201. See 3 W. COLLIER, supra note 23, ¶ 60.20, at 856-58 (requirement of depletion of bankrupt's estate implicit in nature of preference).

202. See id. ¶ 60.19, at 847-49, ¶ 60.23, at 872-73. Also, the result is no different if the seller waits a reasonable length of time before cashing the check. J. MACLACHLAN, supra note 106, § 255, at 292.

203. See 3 W. COLLIER, supra note 23, ¶ 60.20, at 861-62; ¶ 60.23, at 872-73.

204. Id. ¶ 60.24, at 878. No obvious reason existed not to extend this doctrine to cover the cash sale. In fact, the failure to pay for the goods in a cash sale has been said to involve a type of fraud. See supra note 31. When the owner accepted different property as a substitute for the property wrongly taken or when the property originally taken had so far lost its identity as not to be traceable, however, the courts ruled that diminution of the estate and a preference occurred, 3 W. COLLIER, supra note 23, ¶ 60.24, at 878.

205. 3 W. COLLIER, supra note 23, ¶ 60.18, at 841, 843-44. This presumption that the seller was an owner and not a creditor was not true, however, when the owner elected to treat the bankrupt party as a debtor. Id. at 841-43. Moreover, the bankrupt's payment or giving of
seller,206 and should have protected the reclaiming cash seller207 since bad check situations can be characterized as involving fraudulent conduct.208 Finally, and perhaps most importantly, the UCC cash seller's ability to defeat the trustee in a reclamation proceeding occurring after the bankruptcy petition209 should have worked to the seller's advantage when the trustee challenged a pre-bankruptcy repossession as preferential. Were the situation otherwise, the seller who acted promptly to assert his rights would have been penalized by having his reclamation declared a voidable preference, while the more dilatory seller would have emerged victorious.210

III. THE CASH SELLER UNDER THE BANKRUPTCY CODE

Congress's passage of the Bankruptcy Reform Act211 in 1978 changed the position of the reclaiming seller dramatically. The provision effecting this change is Bankruptcy Code section 546(c),212 which purports to end the prior confusion regarding the reclaiming seller's rights in bankruptcy by allowing certain sellers to defeat the trustee once they have met the section's procedural requirements. Although Bankruptcy Code section 546(c) clearly was intended to embrace the UCC section 2-702(2) credit seller, its application to the cash seller is dubious. After briefly considering Bankruptcy Code section 546(c)'s provisions, this section of the Article argues that section 546(c) does not cover the cash seller. The Article urges instead that a trustee seeking to defeat the cash seller must proceed under the successors to Bank-
ruptcy Act sections 70(c) and 60\textsuperscript{213} and that even then the cash seller should ordinarily defeat the trustee.

\textbf{A. Bankruptcy Code Section 546(c)}

In relevant part, section 546(c) of the Bankruptcy Code provides: [T]he rights and powers of a trustee under sections 544(a), 545, 547, and 549 of this title are subject to any statutory or common-law right of a seller of goods that has sold goods to the debtor, in the ordinary course of such seller's business, to reclaim such goods if the debtor has received such goods while insolvent, but—

(1) such a seller may not reclaim any such goods unless such seller demands in writing reclamation of such goods before ten days after receipt of such goods by the debtor; and

(2) the court may deny reclamation to a seller with such a right of reclamation that has made such a demand only if the court—

(A) grants the claim of such a seller priority . . . or

(B) secures such claim by a lien.\textsuperscript{214}

The section clearly recognizes certain state law reclamation rights, including the right provided in UCC section 2-702(2),\textsuperscript{215} and protects the rights against trustees utilizing the successors to Bankruptcy Act sections 70(c), 67c, and 60. Bankruptcy Code section 546(c) also seems to incorporate common law fraud reclamation rights.\textsuperscript{216} In all situations governed by Bankruptcy Code section 546(c) the goods to be reclaimed must have been sold in the ordinary course of the seller's business, which should exclude

\footnote{213. See generally infra notes 269-91 and accompanying text.}

\footnote{214. Bankruptcy Code § 546(c). The 1984 amendments, see supra note 4, do not appear to change the substance of the section. Bankruptcy Code §§ 544(a), 545, and 547 are the successors to Bankruptcy Act §§ 70(c), 67c, and 60, respectively. Bankruptcy Code § 549 involves post-petition transactions.}

\footnote{215. "The purpose of the provision is to recognize, in part, the validity of Section 2-702 of the Uniform Commercial Code . . . ." S. REP. NO. 989, 95th Cong., 2d Sess. 86-87 (1978) [hereinafter cited as 1978 \textit{SENATE REPORT}]; H. REP. NO. 595, 95th Cong., 2d Sess. 371-72 (1977) [hereinafter cited as 1977 \textit{HOUSE REPORT}]. The UCC § 2-702(2) seller, however, may not always be within Bankruptcy Code § 546(c)'s terms. The UCC definition of insolvency is broader than that contained in the Bankruptcy Code. Compare U.C.C. § 1-201(23) (1978) with Bankruptcy Code § 101(26). Presumably, the Bankruptcy Code definition controls and, in cases in which the buyer is insolvent in the UCC sense alone, Bankruptcy Code § 546(c) should not apply. See 4 \textit{COLLIER}, supra note 5, § 546.04[2], at 546-12 to -13.}

bulk sales, sales by a nonmerchant, and sales by a merchant that do not involve his basic line of business.

The protection Bankruptcy Code section 546(c) affords covered sellers, however, is limited by the requirement that the seller make a written demand for the return of the goods before ten days after the buyer's receipt of the goods. One court held that the written demand must explicitly state that the seller is asserting the right to reclaim and that a state court suit seeking damages and injunctive relief, but not reclamation, is inadequate to satisfy the demand requirement. 217 Another court held that a letter and the initiation of civil litigation seeking return of the goods will satisfy the demand requirement. 218 Concerning the ten-day period itself, one court concluded that the first day is the day after delivery, and that the period includes the tenth day after delivery. 219 The same court declared that if the last day of the period is a Sunday, the period expands to embrace the end of the following day. 220 The date of delivery, according to two courts, is the day the buyer receives actual physical possession of the goods. 221 One of these courts also held that the demand must only be dispatched, not received, within the ten-day period. 222

Bankruptcy Code section 546(c)'s ten-day written demand requirement presents a fairly obvious problem concerning the fate of sellers who are within that section's coverage and who possess valid state law reclamation rights, but who fail to satisfy the written demand requirement. This problem arises when, for instance, the reclaiming credit seller makes an oral demand sufficient to satisfy UCC section 2-702(2) but not Bankruptcy Code section 546(c), 223 or when such a seller attempts to rely on the written misrepresentation exception to UCC section 2-702(2)'s ten-day demand limitation. 224 In such cases, Bankruptcy Code section 546(c) is the seller's exclusive route for reclaiming the goods in bankruptcy, and is not a nonexclusive safe harbor allowing the seller who fails to satisfy the written demand requirement to

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220. Id. at 858.
proceed against the trustee as under prior bankruptcy law.\textsuperscript{225} Sellers who are covered by Bankruptcy Code section 546(c) and who fail to make the ten-day written demand have no further recourse against the trustee and cannot reclaim the goods in bankruptcy.

Even the seller who satisfies Bankruptcy Code section 546(c)'s requirements will not inevitably recover the goods or their value. Such sellers remain subordinate to parties capable of defeating the reclaiming seller under state law.\textsuperscript{226} Also, the court may instead grant priority to the seller's claim as an administrative expense\textsuperscript{227} or secure his claim by a lien\textsuperscript{228} in lieu of allowing reclamation. It has been held that the Bankruptcy Code section

\begin{itemize}

\item \textsuperscript{226} “As under nonbankruptcy law, the right is subject to any superior rights of other creditors,” 1978 Senate Report, supra note 215, at 86-87; 1977 House Report, supra note 215, at 371-72; see also Action Indus., Inc. v. Dixie Enters., Inc. (In re Dixie Enters., Inc.), 22 Bankr. 855, 859 (Bankr. S.D. Ohio 1982) (seller subordinate to good faith purchasers and secured parties in bankruptcy); 4 W. Collier, supra note 5, ¶ 546.04[2], at 546-13 to -14 (seller subordinate).

\item \textsuperscript{227} See Bankruptcy Code §§ 503(b), 507(a)(1). For a case awarding such a priority, see McCain Foods, Inc. v. Flagstaff Foodservice Co. (In re Flagstaff Foodservice Corp.), 14 Bankr. 462, 463, 469 (Bankr. S.D.N.Y. 1981) (seller gets administrative claim priority but only to extent of portion of goods in debtor's possession on day of demand and day of petition, which were the same day).

\item \textsuperscript{228} See Western Farmers Ass'n v. Ciba Geigy (In re Western Farmers Ass'n), 6 Bankr. 432, 436 (Bankr. W.D. Wash. 1980) (seller obtains lien subordinate to secured party's rights but having priority over administrative claims).
\end{itemize}
546(c) seller has no right to the proceeds of the goods he seeks to reclaim, but this obviously does not preclude the seller who has been awarded an administrative priority or a lien from participating in the division of the estate as dictated by the terms of such an award.

B. Bankruptcy Code Section 546(c) and the Cash Seller

Section 546(c) of the Bankruptcy Code should not be read as including the cash seller. The section’s literal terms compel this conclusion, and legislative history and judicial interpretations that might suggest a contrary reading of the section do not seriously undermine this position.

I. The Literal Meaning of Bankruptcy Code Section 546(c). Bankruptcy Code section 546(c) only recognizes and protects reclamation rights premised on the debtor’s receipt of the goods while insolvent. UCC sections 2-507(2) and 2-511(3) clearly do not create such rights. Neither section depends for its operation upon the buyer’s receipt of the goods while insolvent. UCC section 2-702, by contrast, is premised on the buyer’s receipt of the goods while insolvent. The weight of authority, however, has concluded that the UCC cash sale reclamation right is inherent to UCC sections 229.


This conclusion is admittedly contrary to the position we have taken in two previous articles. See Mann & Phillips III, supra note 1, at 49-51; Mann & Phillips, supra note 5, at 263-64. The reason for our shift is the considerable number of decisions holding that Bankruptcy Code § 546(c) is the reclaiming seller’s exclusive remedy in bankruptcy. Our previous inclusion of the cash seller within Bankruptcy Code § 546(c) was premised on the opposite assumption. See Mann & Phillips III, supra note 1, at 50; Mann & Phillips, supra note 5, at 264.

This conclusion is also supported by certain general policy considerations. See infra notes 304-10 and accompanying text.

See supra text accompanying note 214. Bankruptcy Code § 546(c) might, however, be given another literal reading, one that would include the cash seller. Rather than recognizing and incorporating statutory or common law reclamation rights themselves contingent on the buyer’s receipt of goods while insolvent, the section might be read as recognizing and incorporating any statutory or common law reclamation right, with the proviso that, for the right to be effective against the trustee, the debtor/buyer must in fact have received the goods while insolvent. For instance, a cash sale reclamation right based on UCC §§ 2-507(2) and 2-511(3) should qualify as a statutory reclamation right arising in the ordinary course of the seller’s business. Under this view of Bankruptcy Code § 546(c), the cash seller would defeat a trustee if the buyer received the goods while insolvent and the seller made a timely written demand.

This alternative reading of Bankruptcy Code § 546(c) has little or nothing to recommend it. First, Bankruptcy Code § 546(c) largely tracks UCC § 2-702(2)’s language, and was obviously drafted with that section in mind. Second, the “if the debtor has received such goods while insolvent” language is not set off or distinguished from the remainder of Bankruptcy Code § 546(c)’s main paragraph in any way. The ten-day written demand requirement, on the other hand, is clearly separated from the body of that paragraph. Most importantly, this alternative reading of Bankruptcy Code § 546(c) sweeps too broadly. A seller with a purchase money security interest in goods sold to the buyer has a right to repossess the goods upon the buyer’s default. U.C.C. § 9-503 (1978). This right should qualify as a statutory reclamation right, but no one argues that Bankruptcy Code § 546(c) includes article 9 secured parties. To suggest that a perfected secured party must meet Bankruptcy Code § 546(c)’s ten-day written demand requirement, or else lose all rights to the goods, is ludicrous.

See supra notes 55-57 and accompanying text.
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2-507(2) and 2-511(3), and is not based on UCC section 2-702(2). Even assuming arguendo that the UCC cash sale reclamation right does derive from UCC section 2-702(2), the right still should not depend on the buyer's receipt of the goods while insolvent. Even on this assumption section 2-702(2) merely provides the cash seller with a right to reclaim, but does not state the conditions under which that right arises. Whatever the source of the cash sale reclamation right, that right still depends on the buyer's failure to make the payment due or the dishonor of the buyer's check, and not on the buyer's receipt of the goods while insolvent.

To reason otherwise is to make UCC section 2-702(2)'s requirements applicable in the cash sale context, to blur the distinction between cash and credit sales, and to render UCC sections 2-507(2) and 2-511(3) superfluous.

2. The Extrinsic Evidence of Bankruptcy Code Section 546(c)'s Meaning. The legislative history accompanying Bankruptcy Code section 546(c) is scanty, ambiguous, and conflicting. The history provides little insight into whether Congress intended to include the cash seller within the scope of that section, or even whether including the cash seller within the section's scope furthers Congress's purpose in enacting that section.

Section 546 of the House and Senate bills that formed the basis for the Bankruptcy Reform Act spoke of recovery rights arising "if the debtor has received goods on credit..." 234. See supra notes 67-77 and accompanying text.

235. Perhaps, however, UCC § 2-702(2) can be conjoined with UCC § 2-507(2) and § 2-511(3) in such a way as to premise the cash sale reclamation right on all the requirements stated by each relevant provision. For example, the seller's recovery in a bad check case might depend upon the dishonor of the buyer's check (UCC § 2-511(3)), plus the buyer's receipt of the goods while insolvent (UCC § 2-702(2)). Admittedly, a few decisions exist that can be read as doing this. See Robert Weed Plywood Corp. v. Downs (In re Richardson Homes Corp.), 18 U.C.C. Rep. Serv. 384, 386 (Bankr. N.D. Ind. 1975); In re Kirk Kabinets, Inc., 15 U.C.C. Rep. Serv. 746, 748-49 (Bankr. M.D. Ga. 1974). If the UCC sections should be conjoined, the cash sale reclamation right seems to be partly based on the buyer's receipt of the goods while insolvent, and Bankruptcy Code § 546(c) would apply.

Even if the relevance of UCC § 2-702(2) to UCC § 2-507(2) and § 2-511(3) is conceded, however, this particular way of conjoining the sections is ludicrous. First, this reading ignores the fact that UCC § 2-702(2)’s “receipt of the goods while insolvent” language is rooted in pre-UCC fraud doctrines to which the antecedents of UCC §§ 2-507(2) and 2-511(3) have little or no relation. See supra notes 11-12, 20-27, 43-47 and accompanying text. As a result, the practical effect of such a reading is to blur the distinction between the cash sale reclamation right and the qualified reenactment of the credit seller's right of rescission for fraud contained in UCC § 2-702(2). Second, and more importantly, combining UCC §§ 2-507(2) and 2-511(3) with UCC § 2-702(2) to produce a hybrid cash sale reclamation right dependent in part on the buyer’s receipt of the goods while insolvent ignores the fact that the UCC § 2-702(2) right is based on the buyer's receipt of the goods “on credit while insolvent.” U.C.C. § 2-702(2) (1978). If the UCC § 2-702(2) reclamation right is to apply to cash sales, the conditions giving rise to that right should also apply to cash sales, but one of these conditions is the existence of a credit sale, and this condition clearly cannot control the cash seller.

236. The line between legislative intent and purpose is often indistinct. R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 87-88 (1975). When using legislative intent we refer to the meaning that a representative assembly attached to words used in a statute. On the other hand, when using legislative purpose we mean the overall aim, end, or object of the legislation. See Landis, A Note on Statutory Interpretation, 43 HARV. L. REV. 886, 888 (1930).
while insolvent." The final version of section 546(c), of course, did not contain the words "on credit." This permits the inference that Congress meant to include cash sales within Bankruptcy Code section 546(c)'s purview. Reinforcing this inference are the statements of two legislators prominent in the formulation and enactment of the Bankruptcy Code, each of whom declared that section 546(c) applied to both credit and cash sales. On the other hand, the only clear statement of the legislative purpose underlying Bankruptcy Code section 546(c) states that the purpose of that section was to recognize the validity of UCC section 2-702, which is consistent with an aim not to include the cash seller within Bankruptcy Code section 546(c).

Thus, we are left with a clash between Bankruptcy Code section 546(c)'s language, which clearly excludes the cash seller, and an ambiguous legislative history. The traditional way to resolve conflicts of this sort is to employ the strict version of the plain meaning rule, which counsels courts to follow the literal language of the statute and to ignore such extrinsic interpretative aids as legislative history when the statutory language is clear unless such an interpretation would produce absurd or impracticable results. Bankruptcy Code section 546(c) clearly recognizes and protects only those seller reclamation rights premised on the debtor's receipt of the goods while insolvent, and the UCC cash sale reclamation right is just as clearly not so premised. Moreover, reading Bankruptcy Code section 546(c) as excluding the cash seller does not produce absurd or impracticable results, but merely means that the reclaiming cash seller will confront the trustee in much the

239. 1978 SENATE REPORT, supra note 215, at 86-87; 1977 HOUSE REPORT, supra note 215, at 371-72. An early draft provision, which eventually became Bankruptcy Code § 546(c), provided for a right to reclaim when the "[d]ebtor received the property on credit or payment by draft which was subsequently dishonored." Hearings on S.235 and S.236 Before the Subcomm. on the Improvement of Judicial Machinery of the Comm. on the Judiciary, 94th Cong., 1st Sess., Part I, at 121 (1975) (emphasis added); see also Weintraub & Edelman, supra note 1, at 1165-66 (describing this provision and its context). The italicized language was subsequently dropped, suggesting that the reclamation provision was no longer to cover the bad check seller. Accordingly, the later deletion of the words "on credit" may simply have been intended to remove surplusage in the statutory language, which by then clearly referred only to UCC § 2-702(2) and common law fraud.
240. On the continued recognition of the plain meaning rule, see 2A D. SANDS, SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 46.01, at 48 (1972). One classic formulation of the plain meaning rule states that "[w]here the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion." Caminetti v. United States, 242 U.S. 470, 485 (1917). "[W]hen words are free from doubt," the same source continues, "they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from . . . any extraneous source"; such plain language, it concludes, "is the sole evidence of the ultimate legislative intent" unless it leads to "absurd or wholly impracticable consequences." Id. at 490-91. Much the same viewpoint is expressed by the common statement that the role of the various interpretative aids is "only to resolve ambiguity and never to create it." D. SANDS, supra, § 46.04, at 54 (footnote omitted) (noting the prevalence of this view).
same fashion as under prior bankruptcy law. Thus, adherence to a strict version of the plain meaning rule makes the indicated legislative history irrelevant and compels the cash seller's exclusion from Bankruptcy Code section 546(c).

Today, however, the strict version of the plain meaning rule may no longer enjoy wide acceptance. If so, then balancing the claims of clear statutory language against those of extrinsic evidence when the two conflict becomes necessary. Bankruptcy Code section 546(c)'s literal language clearly excludes the cash seller, but the legislative history suggesting an intent to the contrary is less compelling. Congress's deletion of the "on credit" language from the original bill may suggest an intent to include the cash seller, but our review of the legislative history to Bankruptcy Code section 546(c) does not reveal any explanation for the elimination of the reference to credit sales. The deletion could be read as merely removing surplusage in statutory language that clearly referred only to UCC section 2-702(2) and common law fraud. If Congress did intend to include the cash seller by deleting the words "on credit," it did a rather incomplete job of effectuating that intent. Bankruptcy Code section 546(c)'s reference to reclamation rights premised on the debtor's insolvency, which clearly excluded the UCC cash seller, was left untouched.

Statements by the committeeman in charge of a particular bill are considered highly persuasive evidence of the legislative intent, but such statements are not conclusive and cannot override clear statutory language to the contrary. Thus, the two statements that the cash seller is covered by

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241. See 2A D. Sands, supra note 240, § 46.07; R. Dickerson, supra note 236, at 230 (noting lack of an agreed upon content to plain meaning rule, especially as regards what plain meaning rule excludes from the court's consideration).

242. See R. Dickerson, supra note 236, at 232-33 (plain meaning rule only creates presumption that legislature meant what it said, and this presumption can be overcome by strong enough evidence of absurdity, inequity, or unreasonableness). 2A D. Sands, supra note 240, § 46.07, at 65, however, seems to take the view that, when text and history conflict, the text should give way. "[I]t is clear that if the literal import of the text of an act is not consistent with the legislative meaning or intent, or such interpretation leads to absurd results, the words of the statute will be modified by the intention of the legislature." Id. (footnote omitted).

"The intention prevails over the letter, and the letter must if possible be read so as to conform to the spirit of the act." Id. However, this can only occur when "the words are sufficiently flexible" to accommodate the legislature's apparent intention. Id. But even assuming overwhelming extrinsic evidence of a congressional intention to include the cash seller in Bankruptcy Code § 546(c), that section's language is not flexible enough to include the cash seller and cannot be read in such a way as to accommodate Bankruptcy Code § 546(c)'s presumed spirit. Moreover, the legislative history indicating an intent to include the cash seller is less than overwhelming, and we do not read the quoted language as stating that any extrinsic indication of an intent contrary to the plain meaning of the text, no matter how weak, should invariably triumph over clear statutory language.

243. See 2A D. Sands, supra note 240, § 48.18, at 224-25 (stressing the need for caution in using legislature's action on amendments). Some authority also exists for the proposition that amendments should not be resorted to when the language of the statute is clear and unambiguous. See E. Crawford, The Construction of Statutes 383-84 (1940).

244. See 2A D. Sands, supra note 240, § 48.14, at 220.

245. "Statements by the committeeman in charge of a bill are not, however, given effect to override a clear and unambiguous meaning conveyed by the language of the statute." Id. § 48.14, at 220 (footnote omitted). A similar statement is made with respect to the committee reports to which such statements are analogized. Id. § 48.06, at 203.
Bankruptcy Code section 546(c) seem unable to prevail over the statute's plain meaning. And, as has been noted, if Congress's intent was to include the cash seller within Bankruptcy Code section 546(c), Congress used language incredibly unsuited to the attainment of that end.

3. Judicial Interpretations of Bankruptcy Code Section 546(c). For all the reasons discussed above, we believe that Bankruptcy Code section 546(c)'s plain language excludes the cash seller and that the legislative history suggesting a contrary interpretation should be ignored or accorded less weight than the statutory language. Subsequent judicial interpretations of statutory language, however, can be an important tool for ascertaining a statute's meaning.246 and two courts have held that Bankruptcy Code section 546(c) includes cash sellers.247 In one of these decisions a bankruptcy panel for the First Circuit Court of Appeals concluded that Bankruptcy Code section 546(c) included cash transactions.248 The panel failed to find any express or implied intent to limit the section's applicability to credit sales.249 It noted that the section's legislative history supports its view.250 The panel also read Bankruptcy Code section 546(c) as the seller's exclusive remedy, and since the seller had failed to make a written demand within ten days, the seller was not entitled to reclaim the goods.251 The panel did not focus on the fact that a literal reading of Bankruptcy Code section 546(c) excludes the cash seller.252 Instead, it described the scope and requirements of Bankruptcy Code section 546(c) as "clear and unambiguous."253

The second court holding that the cash seller is subject to Bankruptcy Code section 546(c) proceeded somewhat differently. Confronted with a mass of reclaiming cash and credit sellers, the court concluded, without any explanation, that all sellers should be treated similarly.254 Ignoring the numerous decisions holding that the cash sale reclamation right is inherent to UCC sections 2-507(2) and 2-511(3) and the many reasons why UCC sections

246. See E. CRAWFORD, supra note 243, §§ 218, 224.
249. Id. at 243 n.3. The panel noted the lack of reference to the cash seller in the 1978 SENATE REPORT and 1977 HOUSE REPORT, supra note 259, but concluded that these sources said nothing to indicate that the cash seller was excluded from Bankruptcy Code § 546(c).
250. 20 Bankr. at 243 n.3.
251. Id. at 243.
252. The panel also made no reference to Szabo v. Vinton Motors, Inc., 630 F.2d 1, 3 (1st Cir. 1980), which held that the cash sale reclamation right is inherent to UCC §§ 2-507(2) and 2-511(3).
253. 20 Bankr. at 242. The panel paraphrased Bankruptcy Code § 546(c) as follows: "[a]ny common law or statutory right to reclaim goods sold in the ordinary course of business is contingent upon (the seller) making a written demand within ten days of the debtor's receipt of the goods." Id. at 243.
2-702(2) cannot govern the cash seller,255 the court proceeded to use UCC section 2-702(2) to assess the rights of both the cash and the credit sellers. Specifically, it made UCC section 2-702(2)'s ten-day demand, insolvent buyer, and written misrepresentation requirements applicable to all these different sellers.256 The court then imposed Bankruptcy Code section 546(c)'s ten-day written demand limitation on all the sellers.257 The few sellers surviving these various hurdles were then held subordinate to a good faith purchaser258 under UCC section 2-702(3).259

There is little reason to give these two decisions much weight in the interpretation of Bankruptcy Code section 546(c),260 although their claim to consideration is bolstered by the fact that they occurred fairly close to the time of Bankruptcy Code section 546(c)'s enactment.261 Interpretative stability, it has been argued, requires that once a court has made a decisive interpretation of legislative intent, other courts should follow that direction and construe the statute as the prior court did.262 In addition, legislative silence in the face of a particular interpretation is said to be evidence that the legislature intended to enact that interpretation.263 In reality, however, the courts have not followed prior judicial interpretations in a mechanical fashion. To become truly authoritative, an interpretation must be both widely accepted264 and of long duration.265 Here, only two decisions holding that Bankruptcy Code section 546(c) includes the cash seller exist, and both decisions are relatively recent. The authoritativeness of the court from which the decision emanates is another factor to consider in assessing the weight to give to a prior interpretation.266 In the present situation, the two pertinent cases were decided by a bankruptcy court and an appellate bankruptcy panel, each of whose decisions can be appealed.267 Moreover, the argument that legislative silence in the face of an interpretation implies tacit enactment of that interpretation has frequently been criticized, and is especially unreliable when no evidence that the legislature was aware of the interpretation exists.268 Here, there is no reason to think that Congress has paid any atten-

255. See supra notes 67-77 and accompanying text.
256. 32 Bankr. at 921.
257. Id. at 921-22. Presumably, the court did so because UCC § 2-702(2) clearly is within Bankruptcy Code § 546(c)'s purview.
258. See supra notes 179-82 and accompanying text.
259. 32 Bankr. at 918-23. For our objections to the practice of using UCC § 2-702(3) to govern cash sale priorities, see supra notes 138-43 and accompanying text.
260. Unreasonable and clearly erroneous constructions of statutes are not to be followed. 2A D. SANDS, supra note 240, § 49.14, at 235.
261. See id., § 49.08, at 255.
262. E. LEVI, AN INTRODUCTION TO LEGAL REASONING 32 (paperback ed. 1949).
263. See 2A D. SANDS, supra note 240, § 49.10.
264. See E. CRAWFORD, supra note 243, at 390; 2A D. SANDS, supra note 295, § 49.04, at 236.
265. E. CRAWFORD, supra note 243, at 390; 2A D. SANDS, supra note 240, § 49.07, at 251-52. "Contemporaneous interpretations ranging in duration from as long as seventy to as short as five years have been found to have established the legislative meaning." Id. at 252 (footnote omitted).
266. D. SANDS, supra note 240, § 49.05, at 238.
268. 2A D. SANDS, supra note 240, § 49.10, at 261-62.
tion to the two cases in question.

4. Summary. Our position regarding Bankruptcy Code section 546(c) and the cash seller is that Bankruptcy Code section 546(c) has no application to a seller who is seeking to reclaim goods under UCC sections 2-507(2) and 2-511(3). This conclusion is based primarily on Bankruptcy Code section 546(c)'s literal language, which not only makes no reference to the cash seller, but also specifically limits that section's application to reclamation rights premised upon the buyer/debtor's receipt of the goods while insolvent. This restriction on Bankruptcy Code section 546(c) clearly excludes sellers proceeding under UCC sections 2-507(2) and 2-511(3). Our conclusion is bolstered by the longstanding rule favoring cash sellers over defrauded credit sellers, and by the fact that reading Bankruptcy Code section 546(c) to cover the bad check seller would render his rights completely nugatory. In reaching this conclusion, we have carefully considered both the legislative history of Bankruptcy Code section 546(c) and the judicial interpretations of that section. In both instances the evidence is scanty and un-compelling, especially when considered in light of the clear and unambiguous language of Bankruptcy Code section 546(c). The legislative history is far from overwhelming because of its paucity, inconsistency, and ambiguity. The judicial authority is also scanty, not authoritative, and otherwise unpersuasive. As a result, we find the legislative history and the judicial interpretations unilluminating and conclude that the literal language of Bankruptcy Code section 546(c) should control. That language clearly and unambiguously does not include sellers who proceed under UCC sections 2-507(2) and 2-511(3).

C. The Cash Seller Outside Bankruptcy Code Section 546(c)

Clearly, reclaiming sellers who are outside Bankruptcy Code section 546(c)'s coverage are not thereby precluded from recovering against the trustee. Although Bankruptcy Code section 546(c) has been held to be the exclusive provision governing the reclamation rights of the sellers that section covers, reclaimants not within the section's purview should proceed against the trustee much as under prior bankruptcy law. Having concluded that the cash seller is not covered by Bankruptcy Code section 546(c), we now examine the cash seller's prospects when he proceeds against a trustee employing the successors to Bankruptcy Act sections 70(c) and 60. These successor provisions change little of the prior law. Thus, the cash seller who could reclaim from his buyer should also defeat the trustee under these provisions, and thus should generally be successful in bankruptcy.

1. Bankruptcy Code Section 544(a). Section 544(a)(1) of the Bankruptcy

269. See Westinghouse Credit Corp. v. Walters (In re Walters), 17 Bankr. 644, 648 (Bankr. S.D. Ohio 1982) (right to reclaim can be exercised in circumstances other than those covered by Bankruptcy Code § 546(c)).

270. Bankruptcy Code § 544(a)(1) provides:
Code, the successor to Bankruptcy Act section 70(c), gives the trustee the rights of a hypothetical, ideal judicial lien creditor as of the commencement of the bankruptcy case.\textsuperscript{271} Thus, Bankruptcy Code section 544(a)(1) is virtually identical to Bankruptcy Act section 70(c).\textsuperscript{272} As before, the trustee's ability to prevail depends upon whether such an ideal creditor can defeat the claimant under state law.\textsuperscript{273} Since the cash seller should defeat a lien creditor under the UCC, the cash seller also should overcome a trustee utilizing section 544(a) of the Bankruptcy Code.

2. Bankruptcy Code Section 547. For our purposes, at least, section 547 of the Bankruptcy Code,\textsuperscript{274} the successor to Bankruptcy Act section 60, does
not significantly modify the treatment of preferential transfers. For most
transfers, Bankruptcy Code section 547 reduces the time period within
which a preference can occur from four months before the filing of the peti-
tion to 90 days before that time. Transfer to insiders occurring between
90 days and one year of the petition, however, can be preferential. Bank-
ruptcy Code section 547 also eliminates Bankruptcy Act section 60's re-
quirement that there be reasonable cause to believe in the debtor's insolvency. The Bankruptcy Code essentially retains the Bankruptcy Act's
definition of insolvency, but creates a new presumption that the debtor is insolvent during the 90 days preceding the petition. The net effect of
these changes on the reclaiming seller is not substantial, since the seller will
typically not be an insider, he will be able to safely repossess roughly one
month later than under the Bankruptcy Act. The argument that the seller
lacked reasonable cause to believe in the debtor's insolvency, however, will
no longer be available to the seller. Also, the seller will be somewhat disad-
vantaged by the way the new presumption of insolvency lessens the trustee's
evidentiary burden.

In other relevant respects though, Bankruptcy Code section 547 largely
tracks prior law on the subject of preferential transfers. The first argument
was that since the debtor's contemporaneous payment for value received in a cash sale was not for or on account of an antecedent debt,
neither was the cash seller's prompt repossession following the buyer's fail-
ure to pay. Instead, the reclamation should have been viewed as relating
back to the time the debt arose. The Bankruptcy Code now codifies the rule
that a transfer by the debtor is not preferential if the transfer is a contempo-
raneous exchange for new value flowing from the creditor. Thus, the first
argument would seem to be at least as valid under Bankruptcy Code section
547 as it was under Bankruptcy Act section 60.

The second argument, that a cash seller's repossession did not diminish
the debtor's estate, also relied to some degree on the rule that in a cash

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275. Id.
276. Id. § 547(b)(4)(B). For the Bankruptcy Code's elaborate definition of the term ins-
ider, see Bankruptcy Code § 101(25). Hardly ever will the reclaiming cash seller fit within
this definition.
278. Bankruptcy Code § 547(f).
279. Also, the Bankruptcy Code defines the term "transfer" much as did the Bankruptcy
280. To date, no decisions have involved the cash seller's position under Bankruptcy Code
§ 547. The exercise of the UCC § 2-705 right of stoppage in transit, however, was held not
281. See supra notes 197-200 and accompanying text.
282. See Bankruptcy Code § 547(c)(1); see also 4 COLLIER, supra note 5, ¶ 547.37(2) (ex-
plaining the provision). Under Bankruptcy Code § 547(c)(1) payment by check is equivalent
to a cash payment. 4 W. COLLIER, supra note 5, ¶ 547.37(2), at 547-119.
283. See supra notes 201-04 and accompanying text.
sale the debtor's contemporaneous payment in exchange for new value was not preferential. In this case, the rationale for the rule was that such transfers did not diminish the debtor's estate. Applying this rationale, we contended that the cash seller's prompt repossession after the debtor's failure to pay deserved to be treated like the contemporaneous payment in exchange for new value because the underlying transaction was the same and the net dollar effect quite similar. This conclusion was bolstered by the rule that neither a diminution of the estate nor a preference occurred when the owner of property that had been stolen, misappropriated, converted, or fraudulently obtained stood on his rights of ownership and reclaimed the property. We believed that this rule was sufficiently broad to cover the unpaid cash seller. As noted in the preceding paragraph, the rule regarding contemporaneous cash transfers for new value has been codified in the Bankruptcy Code. Consequently, despite the lack of an express statutory reference in Bankruptcy Code section 547, the requirement that the transfer must diminish the estate continues. The rule that prompt repossession of stolen, misappropriated, converted, or fraudulently obtained property does not reduce the estate likewise continues. Thus, the second argument seems equally persuasive under the Bankruptcy Code as under prior law.

The third argument was also based on the rule regarding stolen, misappropriated, converted, or fraudulently obtained property, a rule we regarded as applicable to the unpaid cash seller. The repossessing owner of such property was not a creditor under Bankruptcy Act section 60. Although the Bankruptcy Code definition of the term creditor differs from that contained in the Bankruptcy Act, the rule upon which the third argument was based persists. The reclaiming cash seller is therefore unlikely to be deemed a creditor under Bankruptcy Code section 547.

The final argument, that repossession by an unpaid cash seller was non-preferential, rested on the cash seller's ability to defeat the trustee in a reclamation proceeding occurring after the bankruptcy petition. If a seller who waited until after the date of bankruptcy to assert his rights could defeat the trustee, we contended, the seller who acted with more dispatch should also prevail. This argument seems equally persuasive under the Bankruptcy Code. Since the cash seller who mounts a bankruptcy recla-

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284. See Bankruptcy Code § 547(c)(1).
285. See 4 W. COLLIER, supra note 5, ¶ 547.21.
286. See id. ¶ 547.23.
287. See supra notes 205-08 and accompanying text.
288. Compare Bankruptcy Code § 101(9) with Bankruptcy Act § 1(11).
289. See 4 W. COLLIER, supra note 5, ¶ 547.19.
290. See supra notes 209-10 and accompanying text.
291. Cf. National Sugar Ref. Co. v. C. Czarnikow, Inc. (In re National Sugar Ref. Co.), 27 Bankr. 565, 571 (S.D.N.Y. 1983) (stoppage by seller in transit); In re Fabric Buys, 34 Bankr. 471, 476 (Bankr. S.D.N.Y. 1983) (recovery of goods). Both decisions used Bankruptcy Code § 546(c)'s protection of the repossessing UCC credit seller to argue that the trustee should not be able to defeat an exercise of the right of stoppage in transit. As one of these courts stated: [I]f by section 546(c), Congress has ruled that a seller's recovery of goods received by an insolvent buyer is not, when proper written notice is given, a preferential transfer, then recovery of the goods before they reach the buyer must be
mation petition should emerge victorious under Bankruptcy Code section 544(a), the trustee should be precluded from successfully attacking as prefer-
tential a pre-bankruptcy reclamation by an otherwise similarly situated seller.

IV. POLICY CONSIDERATIONS FAVORING THE CASH SELLER

Thus far, this Article has been both descriptive and prescriptive, combin-
ing an account of the current state of the law with recommendations regarding the course the law should take. This section is almost completely prescriptive. It begins by restating and summarizing the authors' position regarding the rights of the cash seller who reclaims under the Uniform Com-
mercial Code. The section then more fully explicates the policy considera-
tions supporting this position.

A. Summary of Our Position

Although the textual discussion of the matter was equivocal, we believe that UCC section 2-507(2) should apply solely to those cash sales not involv-
ing payment by check or draft, and UCC section 2-511(3) should be the lone provision governing check or draft cases. Regardless of which section is ap-
plicable, the right to reclaim when payment is not made or the check or draft is dishonored should be regarded as inherent to the section in question and as in no way dependent on UCC section 2-702(2). Moreover, UCC sec-
tion 2-702(2)'s ten-day demand requirement should have no application to cash sale cases in general, and to bad check cases in particular. Due present-
ment of the check and a demand for reclamation, however, must be made within a reasonable time after notice of dishonor.

UCC section 2-403 should govern all priority questions involving the com-
peting rights of the UCC cash seller and third parties. UCC section 2-
403(1) resolves the previous uncertainty surrounding the conflict between the cash seller and the good faith purchaser by subordinating the former to the latter. Since most article 9 secured parties qualify as good faith purchas-
ers for value, UCC section 2-403(1) also enables these parties to defeat the reclaiming cash seller. Section 2-403, however, enables the cash seller to defeat the lien creditor circuitously by compelling reference to UCC section 1-103, which authorizes the use of pre-UCC state law. Under pre-UCC priority rules the cash seller triumphed over the lien creditor.

When the buyer goes into bankruptcy, the reclaiming cash seller should usually be able to prevail in a clash with the trustee. Section 546(c) of the

equally exempt. To hold otherwise would mean that a seller who can stop deliv-
ery should instead engage “in the rather absurd behavior of proceeding to de-
deliver the goods . . . and immediately thereafter issuing a written demand for reclamation . . . .”

In re Fabric Buys, 34 Bankr. at 476 (quoting In re National Sugar Ref. Co., 27 Bankr. at 571).

Just as the seller who exercises his right of stoppage in transit should recover when the re-
claiming seller would do likewise, so should the seller who repossesses before bankruptcy pre-
vail where he could defeat the trustee in a later reclamation petition.

292. See supra notes 62-77 and accompanying text.

293. See supra notes 176-87 and accompanying text.
Bankruptcy Code should have no application in such situations. Although judicial interpretations of the section and the section’s legislative history provide some support for a contrary position, they are decidedly outweighed by the section’s express language, which clearly and unambiguously excludes the cash seller. As a result, a trustee wishing to defeat the cash seller’s reclamation petition must utilize other bankruptcy provisions. The two weapons in the trustee’s arsenal best suited for this task, sections 544(a) and 547 of the Bankruptcy Code, are unlikely to prove sufficient. The trustee’s success under Bankruptcy Code section 544(a) depends upon whether a hypothetical ideal lien creditor assuming that status on the date of bankruptcy can defeat a reclaiming cash seller. Since the reclaiming cash seller will defeat a lien creditor, the cash seller will also defeat a trustee utilizing Bankruptcy Code section 544(a). For a number of reasons articulated above, the reclaiming cash seller should also overcome a trustee asserting that the reclamation is preferential under Bankruptcy Code section 547. To summarize, a seller who complies with either UCC section 2-507(2) or section 2-511(3) should be able to reclaim from the buyer, lien creditors of the buyer, and the buyer’s trustee. Good faith purchasers from the buyer and article 9 secured parties, however, generally have rights in the goods superior to those of the reclaiming cash seller.

This interpretation of the cash seller’s reclamation rights is in marked contrast to the results that should obtain when a credit seller attempts to reclaim goods sold to the buyer. Unlike the unpaid cash seller, an unsecured credit seller is ordinarily unable to reclaim the goods upon the buyer’s failure to pay. Instead, such a seller is limited to such damages as the UCC makes available.

Only when the specific conditions of UCC section 2-702(2) are met can the credit seller reclaim. These conditions impose procedural limitations on the exercise of the credit sale reclamation right that are more restrictive than those we believe should apply to the cash seller. The credit seller may reclaim only if the buyer is insolvent and, in most cases, only if demand has been made within ten days after the receipt of the goods. The cash sale reclamation right, on the other hand, is clearly not premised on the buyer’s insolvency, and the ten-day demand limitation should not apply in the cash sale context. In addition, the UCC seems to give the reclaiming cash seller more remedial options than the reclaiming credit seller. UCC section 2-702(3) provides that the seller’s reclamation of the goods excludes all other remedies. In contrast, neither UCC section 2-507(2) nor section 2-511(3) contains such a limitation. In a proper case, accordingly, the cash

295. See supra notes 48-52 and accompanying text. The exception to the ten-day demand requirement is the situation in which a misrepresentation of solvency has been made to the seller within three months before delivery.
296. Moreover, U.C.C. § 2-721 (1978) states: “Remedies for material misrepresentation or fraud include all remedies available under this Article for non-fraudulent breach. Neither rescission or a claim for rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy.” This section would apply if a UCC § 2-507(2) or § 2-511(3) situation were considered fraud. We view such situations as at least fraudulent and as often criminal. See infra note 299. Moreover, UCC
seller may be able to reclaim and still recover various types of damages from the buyer.\footnote{297} Recovery of such damages is foreclosed to the credit seller who successfully reclaims the goods under UCC section 2-702.

The reclaiming cash seller should also fare better against third parties than his credit sale counterpart. Here the main difference between the two sellers occurs in the bankruptcy context. Under UCC sections 2-403(1) and 2-702(3) both the cash and credit sellers will be subordinate to a good faith purchaser for value.\footnote{298} For that reason, both sellers should also lose to a party with a security interest in the goods. Despite the tremendous confusion on this question, however, both the cash and credit sellers should defeat a lien creditor's competing interest in the goods. In bankruptcy the UCC section 2-702 seller's fate is exclusively controlled by Bankruptcy Code section 546(c), while the cash seller's prospects are determined under other Bankruptcy Code provisions. Because Bankruptcy Code section 546(c)'s ten-day written demand limitation will often pose a major obstacle to reclamation and because no ten-day limitation should apply in most cash sale cases, the credit seller should fare less well in bankruptcy than his cash sale counterpart.

B. Policy Considerations

1. In General. While the conclusions summarized above are justified by technical legal arguments of all sorts, those conclusions also comport with important and well-established policies of a more general nature. First, the different recovery rights possessed by cash and credit sellers reflect the different expectations sellers entertain when they enter into these distinct types of bargains. A seller who contracts on cash terms has not agreed to extend credit and, as a result, has not agreed to assume the risks attendant upon an extension of credit. Instead, the cash seller has bargained for a substantially simultaneous exchange of the goods and their price, with the expectation that in doing so he is achieving a greater measure of security than would be the case in a credit sale. Second, giving the cash seller greater recovery rights than the credit seller is justified by the idea that the more egregious forms of buyer behavior should trigger correspondingly greater powers of reclamation in the seller. The buyer conduct enabling the cash seller to reclaim the goods involves something more serious than mere fraud. In fact, such behavior may sometimes be criminal.\footnote{299} In the ordinary credit sale

\footnote{\footnote{297} See U.C.C. §§ 2-706, -708 to -710 (1978).
\footnote{298} See supra notes 178-80 and accompanying text; see also U.C.C. § 2-702(3) (1978), which states that the seller's reclamation right under UCC § 2-702(2) is "subject to the rights of a buyer in ordinary course or other good faith purchaser under this Article (Section 2-403)."
\footnote{299} One who obtains property through the knowing use of a bad check can be guilty of obtaining property by false pretenses, and may also be criminally liable under the bad check statutes enacted by some states. A. LOEWY, CRIMINAL LAW IN A NUTSHELL 98 (1975). In addition, the buyer behavior involved in noncheck cash sale cases may well be larceny.}
case, by contrast, UCC section 2-709's action for the price is triggered by nothing more significant than the buyer's failure to make a payment when due. Even in a credit sale case involving section 2-702(2), there is only "a tacit business misrepresentation of solvency" which is "fraudulent as against the particular seller." 300

Third, extending greater reclamation rights to cash sellers may sometimes benefit financially troubled buyers. Unless sellers take the time and trouble to obtain and perfect a purchase money security interest in the goods sold, they may be disinclined to deal with buyers whose future ability to pay is questionable. In such cases, the option of dealing on cash terms provides suppliers with an incentive to sell that otherwise might be lacking. This is implicitly recognized by UCC section 2-702(1), which provides that when a seller discovers that a buyer is insolvent the seller may refuse to deliver the goods except for cash. 301 This section suggests that the UCC's drafters regarded a cash sale as a relatively secure transaction, so secure, in fact, that it could safely be entered into with an insolvent party. In such situations the availability of the cash sale option serves both the buyer's and the seller's interests. The option enables the seller to avoid throwing good goods after bad. Moreover, the option may provide a last hope for the financially distressed buyer, who in order to have any chance of survival must continue to purchase the raw materials, equipment, and inventory needed to keep the business in operation.

2. In Cases Involving Nonbankruptcy Third Parties. The policy considerations just stated clearly justify the cash seller's preferred position in cases in which the seller seeks simply to recover goods from the buyer. When the rights of third parties are involved, however, the situation becomes more complicated. Here, the policies discussed above must be balanced against the important societal interest in promoting the free transferability of goods. In the case of the good faith purchaser for value, the UCC has effectively struck the balance in favor of free transferability by unambiguously declaring that the good faith purchaser will defeat the cash seller.

The social interest in the free transferability of goods, however, is not so clearly implicated when the third party is an unsecured creditor 302 who has attached goods sold the buyer in order to satisfy the debt. Good faith purchasers are entitled to defeat the seller's competing claim to the goods because a contrary rule would create disincentives to buy and would thus frustrate the free movement of goods. Thus, the good faith purchaser is allowed to assume that the buyer's possession of the goods evidences the absence of competing claims to them. The lien creditor, however, is not a purchaser but a creditor, and, because the lien creditor does not rely upon the buyer's possession of the goods, the societal interest in free transferability

301. Id. § 2-702(1).
302. A secured creditor is generally considered to be a good faith purchaser for value who will defeat the cash seller. This result is based on the secured party's reliance upon the buyer's possession of the goods.
of goods is not involved. In the case of the lien creditor the relevant policy issue is fairness and equity among creditors. This issue is resolved in favor of a credit seller proceeding under UCC section 2-702(2). Such a creditor will generally defeat a lien creditor with a competing interest in the goods. Due to the various policy considerations favoring the cash seller over the UCC section 2-702(2) seller, this result may dispose of the cash sale question as well, but additional reasons for favoring the cash seller over the lien creditor also exist. A cash seller is better characterized as the owner of the goods than as a creditor. Unlike the credit seller, he has not extended credit to the buyer. The practical effect of the buyer's failure to pay or the dishonor of the buyer's check is to defeat the buyer's right to retain the goods. Consequently, the principle of equality among creditors has little or no application when a cash seller and a lien creditor assert competing rights to goods sold the buyer. Here, the protection of the seller's property interests and the expectations with which he contracted is of considerably greater weight than the free transferability of goods or the goal of achieving fairness among creditors. Moreover, the relatively secure position accorded the cash seller may sometimes work to the advantage of the buyer's unsecured creditors if the cash seller's greater security induces sales to financially troubled buyers and thus enables those buyers to stay afloat.

3. In Bankruptcy. In the bankruptcy context the general policy of achieving fairness and equity among creditors is of prime importance. Section 546(c) of the Bankruptcy Code, by establishing a virtually unqualified right to reclaim once certain procedural requirements have been met, balances the equities in a fashion generally favoring the reclaiming credit seller. Thus, due to the many policy reasons for favoring the cash seller over the credit seller, the cash seller's ability to reclaim goods from the trustee should be at least as great as that afforded the credit seller by Bankruptcy Code section 546(c). Including the cash seller within Bankruptcy Code section 546(c), however, is not the way to achieve this result. General considerations of policy combine with the provision's clear language to exclude the cash seller from Bankruptcy Code section 546(c) so that the cash seller's fate is determined under such other provisions as the trustee can bring to bear in attempting to defeat the cash seller's reclamation. The trustee's efforts to defeat the cash seller under such provisions, however, will almost certainly fail.

Bankruptcy Code section 546(c)'s ten-day written demand requirement is a fairly significant check on the credit seller's ability to reclaim. In the

303. Cf. U.C.C. § 2-702 comment 3 (1978) (because UCC § 2-702(2) reclamation right constitutes preferential treatment as against buyer's other creditors, UCC § 2-702(3) provides that reclamation bars seller's other remedies as to the goods).
304. Here we assume arguendo that the unpaid cash seller is a creditor.
305. See supra notes 269-91 and accompanying text.
306. As one court has put the matter:

The court recognizes that to give exclusive effect to section 546(c) permits a debtor, who either actively or passively defrauds a seller of goods in the ordinary course of business, to insulate such fraudulent transactions unless the seller
cash sale context, however, the demand requirement’s effect on the seller’s chances of recovery is even more pronounced. If Bankruptcy Code section 546(c) is read to include the cash seller and to constitute the reclaiming seller’s sole recourse in bankruptcy, the cash sale reclamation right will be rendered virtually useless once the buyer becomes bankrupt. Most cash sales involve checks, and due to delays in the check collection process, few cash sellers will be informed of the buyer’s dishonor in time to act. Moreover, even when the cash seller does receive prompt notification of dishonor, Bankruptcy Code section 546(c)’s requirement that the ten-day demand be in writing creates somewhat greater compliance problems than the UCC’s less rigorous demand rule. Thus, the likely result of including the cash seller within Bankruptcy Code section 546(c) is that relatively few cash sellers will qualify for the protection that the section theoretically affords. Credit sellers, on the other hand, will fare better under the section because they will not confront the check collection delays impeding the cash seller’s ability to recover. Such an outcome frustrates the many policy reasons for favoring the cash seller over the credit seller.

If Bankruptcy Code section 546(c) is held applicable to cash sellers, thus precluding almost all cash sale reclamations, the cash seller will be required to adopt various means of protection when dealing with buyers of marginal solvency. Each of these means has adverse effects that outweigh the small benefit the bankrupt buyer’s other creditors derive from the cash seller’s inability to reclaim. The first alternative is for the seller to refuse to accept a check and to demand legal tender. Unfortunately, legal tender presents significant risks of theft and loss, especially when the parties are distant or the sum involved is large. Demanding legal tender also can cause delays in consummating sales, particularly since banks may not always have sufficient amounts on hand. In sum, this alternative is a large step backward in the conduct of commercial relations.

The second alternative for the seller is to negotiate an agreement permitting him to withhold delivery of the goods until the buyer’s check clears. The court also recognizes that to limit the right of a defrauded seller to recover property only if he complies with the conditions set forth in section 546(c), for all practical purposes, makes the right meaningless. The event that generally triggers demand for reclamation is the filing of a petition in bankruptcy. Unless the filing of the petition is preceded by extensive publicity, a seller will ordinarily not be able to comply with the conditions set forth in section 546(c). A court, however, does not have the power to legislate; it must merely accept what the legislature has written.


307. U.C.C. § 2-511(2) (1978) confers this right by stating: “Tender of payment is sufficient when made by any means or in any manner current in the ordinary course of business unless the seller demands payment in legal tender and gives any extension of time reasonably necessary to procure it.”

308. U.C.C. § 2-507(1) (1978) states: “Tender of delivery is a condition to the buyer's duty
This alternative would cause delay in delivery and, because withholding delivery is an unusual business practice, may diminish the seller's prospects of making sales. Also, determining when the check is actually paid may be inconvenient or difficult. These drawbacks may not assume much significance in an isolated deal with an agreeable or desperate buyer, but their aggregate impact is likely to be substantial if the seller regularly tries to deal on this basis.

The seller's third alternative is to take and perfect a security interest. This approach will frequently ensure the seller's ability to recover the goods in bankruptcy, but it is also inconvenient and costly, especially if practiced on a regular basis. More importantly, while this strategy is regularly employed in credit sales, perfecting a security interest is almost completely at odds with the nature of a cash transaction. For a seller to have his buyer sign a security agreement while accepting that buyer's check seems rather ludicrous. A check, after all, is ordinarily regarded as a payment, not a credit instrument.

The last of the cash seller's alternatives, requiring a certified check from the buyer, is perhaps the most feasible of his options. Like a demand for legal tender, however, demanding a certified check causes delay and inconvenience. On the other hand, this alternative does not involve the safety risks presented by true cash transactions. Since banks customarily charge their customers for certified checks, demanding a certified check does create additional expense for the buyer. This may cause the seller to lose sales he otherwise would have made, or may cause the seller to lose profits as he reduces his selling price to reflect the cost of certification.

Finally, all of these alternatives share an additional important disadvantage. Unlike the cash seller's exercise of the right to reclaim, these alternatives will be employed many more times than actually needed. If a seller could determine in advance which of his buyers is likely to pay with a bad check, he could employ one of the methods just discussed in those cases and only in those cases. Such knowledge, of course, is often not readily available to sellers, and obtaining that knowledge usually involves considerable time, effort, and expense. As a result, a seller who employs these means of protection ordinarily must engage in overkill, utilizing the protective measures whenever the buyer's solvency is even remotely in doubt. The likely consequences are economic waste, unnecessary delays, and unjustified inconveniences. Allowing the cash seller to reclaim in the small percentage of cases

to accept the goods and, unless otherwise agreed, to his duty to pay for them." *Id. § 2-507 comment 2 explains that the "unless otherwise agreed" language is directed primarily to cases in which payment in advance has been promised.

309. A secured party who perfects before the date of bankruptcy, for instance, will defeat a trustee proceeding under Bankruptcy Code § 544(a). H. BAILEY, supra note 89, at 311. Some perfected security interests, however, may be preferential under Bankruptcy Code § 547. H. BAILEY, supra note 89, at 312-22.

310. Admittedly, the secured party is not required to file to perfect when his interest is a purchase money security interest in consumer goods. U.C.C. § 9-302(1)(d) (1981). Most litigated cash sale cases, however, are not consumer goods transactions.
in which reclamation is necessary for his protection largely eliminates these results.

V. CONCLUSION

Article 2 of the UCC is commonly regarded as bearing the imprint of American legal realism, fostering a regime of broad standards with the flexibility needed to accommodate the variegated patterns and inevitable changes of commercial life. Viewed through different eyes, though, the legal realist influence has been less a facilitator of necessary adaptation and change than a stimulant toward incoherence and confusion. Taken in isolation, UCC sections 2-507(2), 2-511(3), and 2-702(2) seem to elude either characterization. Instead, those sections state relatively clear rules capable of more or less easy application to the buyer/seller relations that they govern. Nevertheless, the interaction of these sections with federal bankruptcy law and the UCC priority problems triggered thereby are another story entirely. Section 546(c) of the Bankruptcy Code is an obvious reaction to the incoherence that preceded it. Whether this section's rigid, mechanical ten-day written demand requirement provides a superior basis for balancing the competing claims of reclaiming sellers and the bankrupt's other creditors, however, is open to question.

Our reservations about Bankruptcy Code section 546(c) have particular force in the case of the cash seller. For a considerable period, the cash sale has provided sellers with the option of not extending credit while following the customary business practice of accepting a check in payment. Sellers pursuing this option generally had greater recovery rights against the buyer and various third parties than did their credit sale counterparts. In particular, the cash seller has traditionally been able to recover from his buyer's trustee in bankruptcy. Under the UCC the seller continues to enjoy the op-

311. Speidel, Restatement Second: Omitted Terms and Contract Method, 67 CORNELL L. REV. 785, 790 (1982). This is mainly due to Karl Llewellyn's role as principal draftsman of article 2.
312. Id. at 786-92 (discussing the movement from rules to standards in commercial and contract law generally).
313. "[T]he inevitability of change will render functionless a commercial statute too inflexible to adapt. The structural simplicity of Article 2 enhances its capacity to respond to the complexities of the real world, to the large and evolving variety of 'commercial' transactions." Jackson & Peters, supra note 1, at 984 (footnote omitted).
314. For a suggestion that American legal realism has had tendencies toward nihilism, see G. GILMORE, THE AGES OF AMERICAN LAW 80-81 (paperback ed. 1977).
315. The absence of an explicit cash sale reclamation provision and the question whether UCC § 2-702(2)'s ten-day demand requirement applies to the UCC cash seller are partial exceptions to this generalization.
317. One case applying Bankruptcy Code § 546(c) to the cash seller has stated that the section "does not contain any explanation of why a ten-day demand must be made; neither does the legislative history provide its justification . . . . The ten-day limit seems, at best, arbitrary." Harris Trust & Sav. Bank v. Wathen's Elevators, Inc. (In re Wathen's Elevators, Inc.), 32 Bankr. 912, 922 n.31 (Bankr. W.D. Ky. 1983).
tion of refusing to extend credit and accepting the buyer's check instead.\textsuperscript{318}
The scattered recent decisions denying cash seller reclamations in bankruptcy do not provide any reason for regarding the cash sale's traditional role as obsolete. Little in the UCC or the Bankruptcy Code dictates the cash seller's subservience to the trustee. On the contrary, technical legal reasoning and compelling considerations of policy combine to favor the seller.

\textsuperscript{318} "This Article recognizes that the taking of a seemingly solvent party's check is commercially normal and proper and, if due diligence is exercised in collection, is not to be penalized in any way." U.C.C. § 2-511 comment 4 (1978).