

THE CASH SELLER UNDER THE UNIFORM COMMERCIAL CODE

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Although there is abundant commentary on the rights of the credit seller under section 2-702(2) of the Uniform Commercial Code,¹ particularly the credit seller's rights in bankruptcy, there is a dearth of commentary on the rights of the cash seller under the Code.² Yet, cases involving the cash seller's rights under the Code raise as many issues as those involving the credit seller's rights. Consequently, a comprehensive examination of the cash seller's rights is long overdue.

In this article, we will address the cash seller's rights under the Code, contending that these rights should be greater than they are under some of the prevailing case law. We first will examine the cash seller's rights at common law. Then we will focus on the drafting and legislative history of sections 2-507(2), 2-511(3), and 2-403, which govern the cash seller's rights under the Code. Next, we will examine in detail the seller's rights against both buyer and third parties—good faith purchasers for value, lien creditors, and Article 9 secured parties. Finally, we will discuss the many unresolved questions presented by the interaction of the principal cash sale provisions, sections 2-507(2) and 2-511(3), with various provisions of the Bankruptcy Act.

I. THE CASH SELLER UNDER THE COMMON LAW

The common law defined the cash sale or, as it was often called, the "technical cash sale," as a sale in which title to the goods sold passed from

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¹ See Mann & Phillips, *The Reclaiming Seller and the Bankruptcy Act: A Roadmap of the Strategies*, 18 B.C. IND. & COM. L. REV. 609, 609 n.3 (1977), for a partial listing of commentary on this question. See also Weintraub & Edelman, *Seller's Right to Reclaim Property Under Section 2-702(2) of the Code Under the Bankruptcy Act: Fact or Fancy*, 32 BUS. LAW. 1165 (1977); Sebert, *The Seller's Right to Reclaim: Another Conflict Between the Uniform Commercial Code and the Bankruptcy Act?*, 52 NOTRE DAME LAW. 219 (1976).

² According to our research, only the following articles discuss the cash seller's rights: Dugan, *Cash Sale Sellers Under Articles 2 and 9 of the Uniform Commercial Code*, 8 U.C.C. L. J. 330 (1976); Mann & Phillips, *supra* note 1, at 642-47; McDonnell, *The Floating Lienor as Good Faith Purchaser*, 50 S. CAL. L. REV. 429 (1977); Wiseman, *Cash Sellers, Secured Financiers and the Meat Industry: An Analysis of Articles Two and Nine of the Uniform Commercial Code*, 19 B.C. L. REV. 101 (1977); 48 U. COLO. L. REV. 267 (1977); 77 COLUM. L. REV. 934 (1977); 25 DRAKE L. REV. 239 (1975); 9 CREIGHTON L. REV. 412 (1975); 7 ST. MARY'S L.J. 462 (1975). The student articles relate primarily to *In re Samuels & Co.*, 526 F.2d 1238 (5th Cir. 1976). There is a fair amount of commentary on the cash seller's right at common law. We have used much of this commentary in the first section of our article.

seller to buyer only upon the buyer's payment of the purchase price.³ Although some commentators defined the cash sale as involving the transfer of both title and possession upon payment of the price,⁴ most courts defined it as involving the transfer of possession in *expectation* of immediate payment; these courts contemplated substantially simultaneous delivery and payment.⁵ Thus, in a cash sale at common law, "the seller delivers possession to the buyer in the understanding that the price shall be paid at once and title shall not pass until payment."⁶ A conditional sale, on the other hand, was defined as a sale in which the seller transferred possession to the buyer while expressly retaining title until he received full payment.⁷ While this definition of a conditional sale obviously overlapped with the definition of a cash sale,⁸ there were differences between the two transactions. In most conditional sales, the seller did not transfer possession with an expectation of immediate payment, but, rather, extended possession of the goods and employed a security device to retain title (and the consequent right to reclaim the goods if the buyer defaulted) until the buyer completed a series of installment payments.⁹ Both the cash sale and the conditional sale were distinguishable from the credit sale in which the seller transferred possession and title to the buyer in expectation of future payment.¹⁰

Whether the transaction was a cash or credit sale depended upon when title to the goods passed which, in turn, depended upon the parties' intent.¹¹ However, since parties did not always manifest their intent,¹² courts had to resort to presumptions about the passage of title. In some early decisions, the courts assumed that unless there was a provision for credit, title did not pass until the purchase price was paid; these courts assumed "that sales in which no time is agreed upon for payment are *prima facie* cash sales."¹³ In twentieth century cases, however, the courts usually assumed that title passed upon formation of the sales contract unless a contrary intent appeared.¹⁴

³ L. VOLD, *HANDBOOK OF THE LAW OF SALES* 168 (1931).

⁴ See, e.g., 2 WILLISTON ON SALES § 341, at 325 (rev. ed. 1948); Note, *The "Cash Sale" Presumption in Bad Check Cases: Doctrinal and Policy Anomaly*, 62 YALE L.J. 101, 102 n.6 (1952).

⁵ Vold, *Worthless Check Cash Sales, "Substantially Simultaneous" and Conflicting Analogies*, 1 HASTINGS J. 111, 111-12 (1950). This is an obvious concession to the extreme difficulty, not to say physical impossibility, of an exactly simultaneous exchange of possession and payment in the typical sale for cash. See also VOLD, *supra* note 3, at 170-71.

⁶ J. WAITE, *THE LAW OF SALES* 78 (2d ed. 1938).

⁷ See WILLISTON, *supra* note 4, § 341, at 325; WAITE, *supra* note 6, at 279-80.

⁸ For the employment of a "conditional sale" rationale to what are arguably "cash sale" situations, see the cases discussed in Corman, *Cash Sales, Worthless Checks and the Bona Fide Purchaser*, 10 VAND. L. REV. 55, 66-67 (1956); 62 YALE L.J., *supra* note 4, at 108-09. For a further discussion of this overlap, see WAITE, *supra* note 6, at 279-80.

⁹ See VOLD, *supra* note 3, at 267-68; Corman, *supra* note 8, at 66; WILLISTON, *supra* note 4, § 341, at 325.

¹⁰ See WILLISTON, *supra* note 4, § 343, at 330, 335.

¹¹ See 62 YALE L.J., *supra* note 4, at 101. See also UNIFORM SALES ACT, § 18(1).

¹² See Corman, *supra* note 8, at 60, especially note 36.

¹³ VOLD, *supra* note 3, at 176.

¹⁴ WILLISTON, *supra* note 4, § 343, at 330. See also BURDICK ON SALES 58, 60 (3d ed. 1913); VOLD, *supra* note 3, at 167-68, 176. Section 19, Rule 1, of the Uniform Sales

After the development of this presumption in favor of credit sales, the classification of a sale as one for cash frequently turned upon whether the requisite "contrary intention" was present.¹⁵ Where the sales agreement expressly stipulated that title passed only when the price was paid, the transaction usually was considered a cash sale.¹⁶ Two other situations almost universally regarded as cash sales were "over-the-counter"¹⁷ and self-service store sales.¹⁸ By far the most important "cash sale" situation occurred where the agreement otherwise contemplated a cash sale and the seller parted with possession and accepted the buyer's worthless check as payment.¹⁹ On the other hand, auction sales involving any sort of a credit provision²⁰ and "cash on delivery" sales²¹ usually were not regarded as "cash" sales.

This characterization of a sale as either a cash, conditional, or credit sale was important because this characterization affected the seller's ability to recover the goods in the event the buyer failed to pay. If a sale was classified as a cash sale the seller retained title to the items transferred and could reclaim any goods for which the buyer did not pay.²² The seller could waive his right

Act exemplified the modern rule: "Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed." The Uniform Sales Act, however, did not contain an express "cash sale" provision. Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 YALE L.J. 1057, 1060 n.10 (1954).

When title passes upon formation of the sales contract, the seller retains a "seller's lien" for the price as long as he retains possession of the goods. VOLD, *supra* note 3, at 168. For more information on sellers' liens, see *id.* at 224-25.

¹⁵ It is interesting to note that although contract language such as "terms cash" or "cash sale" seems to express clearly a contrary intent, the courts did not always so find. See VOLD, *supra* note 3, at 171-72; WAITE, *supra* note 6, at 280; WILLISTON, *supra* note 4, § 343, at 335.

¹⁶ VOLD, *supra* note 3, at 169. In such a case, however, the "cash sale" began to take on some of the attributes of a conditional sale. See WAITE, *supra* note 6, at 280 (where "the intent to hold up title until payment is inferable, rather than expressed, the transaction is apt to be called a 'cash sale,' rather than a 'conditional sale.'"). This article, however, takes a broader view of the cash sale. See, e.g., 62 YALE L.J., *supra* note 4, at 107-08 (especially the text accompanying note 45).

¹⁷ VOLD, *supra* note 3, at 169; WILLISTON, *supra* note 4, § 343, at 333.

¹⁸ WILLISTON, *supra* note 4, § 343, at 333-34; 13 OKLA. L. REV. 350, 352-53 (1960).

¹⁹ VOLD, *supra* note 3, at 174; R. NORDSTROM, HANDBOOK OF THE LAW OF SALES 501 (1970). Williston severely criticized the characterization of "bad check" sales as cash sales; Vold staunchly defended this characterization. Compare WILLISTON, *supra* note 4, § 346a, with Vold, *supra* note 5. Williston eventually admitted that "so far as the cases on worthless checks are involved the author's [Williston's] analysis is not supported by the weight of authority." WILLISTON, *supra* note 4, § 346b, at 346. For an article supportive of Williston, see Note, *The Effect of Accepting a Worthless Check Where the Parties Contemplate a Cash Sale*, 28 KY. L.J. 322 (1940).

²⁰ VOLD, *supra* note 3, at 170.

²¹ BURDICK, *supra* note 14, at 62-63; WILLISTON, *supra* note 4, § 345; 16 MICH. L. REV. 557 (1918).

²² VOLD, *supra* note 3, at 172; WAITE, *supra* note 6, at 79; NORDSTROM, *supra* note 19, at 501 n.96. Where there was no cash sale and title had passed, the seller had an action for the price. WILLISTON, *supra* note 4, § 343, at 337. He might also have had

to reclaim, however. Waiver frequently occurred because the seller failed to object to nonpayment or failed to attempt reclamation within a reasonable time.²³ Waiver also occurred where the seller delayed presentment of a buyer's check or transferred an "indicia of ownership," such as a negotiable bill of lading or a warehouse receipt, with the goods.²⁴

In other situations at common law, a seller lost his right of reclamation because third parties were involved in the transaction.²⁵ Whether the seller lost his right depended on the identity of the third party. Where a good faith purchaser for value bought the seller's goods from the buyer, courts were divided over which party prevailed, although twentieth century courts generally held that the seller lost his right to reclaim.²⁶ In contrast, the cash seller retained his right to reclaim where a lien creditor of the buyer attached the

an action on the instrument in a "bad check" case. See NORDSTROM, *supra* note 19, at 502 (discussing the "bad check" situation under the UCC).

²³ The case most often cited in this regard was *Frech v. Lewis*, 218 Pa. 141, 67 A. 45 (1907) (2 1/2 month delay). See Note, *Right to Reclaim Delivered Goods in a Cash Sale*, 36 DICK. L. REV. 276 (1932).

²⁴ See Corman, *supra* note 8, at 65-66; 62 YALE L.J., *supra* note 4, at 109-10. Sometimes a finding of waiver was based on the doctrine of laches. *Id.*

²⁵ Some authorities suggested that different rules should apply to situations involving third parties if the buyer fraudulently induced the seller to agree to a cash sale. See WILLISTON, *supra* note 4, § 346a, at 344-45; Note, 28 KY. L.J., *supra* note 19, at 327; 17 TENN. L. REV. 272 (1942). These commentators presumed that the defrauding buyer took "voidable title." As a result, the cash seller lost to good faith purchasers in almost all cases, to lien creditors in a few states, and to secured parties in some cases. See text and notes 26-33 *infra*. The anomalous result of this position was that the defrauded cash seller had less chance of recovery against third parties than the cash seller who was not defrauded. The sources above do not explore these implications, nor do they discuss what constitutes fraud in the cash sale context.

The better approach to the cash seller-defrauding buyer situation is to disregard the presence of fraud. See Gilmore, *supra* note 14, at 1060:

Cash sale theory developed quite differently [from credit sale theory].

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

²⁶ Section 2-403(1)(b) and (c) of the UCC reach the same result. See text and notes 79-82 *infra*. For commentary on the pre-Code confusion, see Collins, *Title to Goods Paid for with Worthless Check*, 15 S. CAL. L. REV. 340 (1942); Corman, *supra* note 8; Gilmore, *supra* note 14, at 1060-62; Vold, *supra* note 5; 3 HASTINGS J. 162 (1951); Note, 28 KY. L.J., *supra* note 19; 42 MICH. L. REV. 328 (1943); 14 MINN. L. REV. 696 (1930); 17 TENN. L. REV. 272 (1942); 62 YALE L.J., *supra* note 4.

Credit sellers, like cash sellers, lost their rights when good faith purchasers were involved. In contrast, the conditional seller's position was good. He generally triumphed over a good faith purchaser for value if he complied with the jurisdiction's security interest recording requirements. However, if he failed to record in a jurisdiction requiring it, or if the good faith purchaser acquired that status before the seller's recordation, the conditional seller lost to the purchaser. See VOLD, *supra* note 3, at 295-302; WILLISTON, *supra* note 4, §§ 324, 327, 327a. But see *id.* § 325.

seller's goods,²⁷ or where a trustee in bankruptcy assumed control of the buyer's assets.²⁸ If, however, the third party was the holder of a subsequent security interest in the goods conveyed,²⁹ courts were divided over who prevailed. Some courts held that the seller prevailed.³⁰ They reasoned that a chattel mortgagor or pledgor (the buyer) could pledge only property in which he had an interest, although a limited or special interest sufficed.³¹ In a cash sale, the nonpaying buyer lacked any interest, even a limited interest, in the seller's goods since the seller retained title. Thus, the pledgor or chattel mortgagor could convey no interest, the pledgee or chattel mortgagee could receive no interest, and the seller's rights remained intact. Nevertheless, some courts reached the opposite result. They argued that the pledgee or chattel mortgagee qualified as a good faith purchaser for value³² and, as such, defeated the rights of the cash seller.³³

Thus, although the cash seller's right under the common law to reclaim goods for which the buyer did not pay was not inviolable, it was fairly durable. With the adoption of the Uniform Commercial Code, however, the cash seller's rights were changed somewhat.

²⁷ VOLD, *supra* note 3, at 170-71; Note, 36 DICK. L. REV., *supra* note 23, at 284-85; 16 MICH. L. REV. 557 (1918). Except in a few states, the defrauded credit seller also could recover against an attaching lien creditor. See J. BENJAMIN, LAW OF SALES OF PERSONAL PROPERTY 477-78 (7th Am. ed. 1899); BURDICK, *supra* note 14, at 205; F. MECHEM, LAW OF SALES § 924 (1901); F. TIFFANY, LAW OF SALES § 56, at 194 (2d ed. 1908); VOLD, *supra* note 3, at 381. A conditional seller could recover from a lien creditor of his buyer to the same extent that he could recover from a good faith purchaser. See note 26, *supra*. See VOLD, *supra* note 3, at 296, 300; WILLISTON, *supra* note 4, §§ 326, 227, 227a.

²⁸ See VOLD, *supra* note 3, at 301. The defrauded credit seller could recover against the trustee. See Gilmore, *supra* note 14, at 1060. As for conditional sellers, see WILLISTON, *supra* note 4, § 326a, at 273-76.

²⁹ For a brief itemization and description of typical common law security devices, see J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 754-57 (1970). Only the most common of these, the pledge and the chattel mortgage, are considered in this article.

³⁰ See, e.g., *Ison v. Cofield*, 261 Ala. 296, 74 So. 2d 484 (1954); *First Guaranty Bank v. Western Cross-Arm & Mfg. Co.*, 139 Wash. 614, 619-20, 247 P. 1027, 1029 (1926); 17 MINN. L. REV. 105 (1932); 14 C.J.S. *Chattel Mortgages* § 305, at 951 (1939). But see *id.* § 23, at 616-17 (1939) (which does not specifically refer to a cash sale). For a suggestion that the secured party could triumph if he had a properly recorded security interest, see 72 C.J.S. *Pledges* § 25, at 34 (1951). It is difficult to see, however, why recording changes the result since a prerequisite for a pledge or chattel mortgage—a property interest—is lacking.

Generally, a defrauded credit seller lost to a secured party if the secured party qualified as a good faith purchaser for value. See 14 C.J.S. *Chattel Mortgages* § 23, at 618, § 307, at 954 (1939); 72 C.J.S. *Pledges* § 26, at 35 (1951); 1 JONES, CHATTEL MORTGAGES AND CONDITIONAL SALES § 116, at 951 (1933). For the rules regarding conditional sales, see *id.* §§ 114, 116, 117; VOLD, *supra* note 3, §§ 97, 98, at 296-300; 14 C.J.S. *Chattel Mortgages* § 23, at 618, § 305, at 951-53.

³¹ JONES, *supra* note 30, § 114, at 193 (1933); 14 C.J.S. *Chattel Mortgages* § 23, at 614, 616 (1939); 72 C.J.S. *Pledges* § 8, at 9 (1951). Cf. RESTATEMENT OF SECURITY § 10(3) (1941); 68 AM. JUR. 2d *Secured Transactions* § 138, at 985-86 (1973).

³² See 14 C.J.S. *Chattel Mortgages* §§ 307-09 (1939); 72 C.J.S. *Pledges* § 26 (1951).

³³ See text and note 25 *supra*.

II. THE CASH SELLER UNDER THE UNIFORM COMMERCIAL CODE

In situations involving the sale of goods,³⁴ the common law of "cash sales" discussed above is, of course, inapplicable if it conflicts with the UCC.³⁵ Although there are no Code sections specifically identified as "cash sale" provisions,³⁶ sections 2-507(2), 2-511(3), and 2-403 are the Code's counterparts to the common law rules governing cash sales.³⁷

At the core of the legislative scheme are sections 2-507(2) and 2-511(3). Section 2-507(2) provides: "Where payment is due and demanded on the delivery to the buyer of goods or documents of title, his right as against the seller to retain or dispose of them is conditional upon his making the payment due." Like the common law cash sale, this section envisions a nearly simultaneous exchange of goods and payment. Section 2-507(2) also states a rule functionally equivalent to the common law rule that title to goods moves from seller to buyer upon payment.³⁸ While section 2-507(2) deals with cash sales generally, section 2-511(3) concerns "bad check" sales. This section states that "payment by check is conditional and is defeated as between the parties by dishonor of the check on due presentment."³⁹ Although this section does not describe explicitly the status of goods conveyed to the buyer in a "bad check" transaction, it implies that the buyer cannot retain the goods if his check is dishonored. Thus, the Code has two principal "cash sale" provisions: 2-511(3) for "bad check" sales, and 2-507(2) for other "cash sale" situations.⁴⁰

The third member of the cash sale trilogy is section 2-403. It sets out the unpaid seller's right to the goods relative to the right of the good faith pur-

³⁴ See U.C.C. § 2-102.

³⁵ See U.C.C. § 1-103.

³⁶ But see note 79 *infra* (referring to U.C.C. § 2-403(1)(c)).

³⁷ The Code deemphasizes the concept of "title" which was so crucial to the common law governing cash sales. However, § 2-401(1)'s statement that "[a]ny 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" might be seen as the Code recognition of the common law conditional sale. See Dugan, *supra* note 2, at 343. See also text and notes 7-9 *supra*.

³⁸ See NORDSTROM, *supra* note 19, at 501. See also text and notes 3-6 *supra*.

³⁹ Note also that Comment 4 to § 2-511(3) 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."

⁴⁰ Section 2-403(1) of the Code further supports the notion that the Code (especially §§ 2-507(2) and 2-511(3)) distinguishes between "bad check" sales and other cash sales. Section 2-403(1)(b) refers only to "bad check" situations, whereas § 2-403(1)(c) deals exclusively with other cash sales.

Nevertheless, it is possible to utilize §§ 2-507(2) and 2-511(3) together in a "bad check" case. Most courts have adopted this approach. See, e.g., *In re Mort Co.*, 208 F. Supp. 309, 310 (E.D. Pa. 1962) (bankruptcy decision); *In re Lindenbaum's*, 2 U.C.C. Rep. Serv. 495 (E.D. Pa. 1964) (decision of bankruptcy referee). A few courts, however, have proceeded solely under § 2-511(3) in "bad check" cases. See, e.g., *Gicinto v. Credithrift of America*, 219 Kan. 766, 549 P.2d 870 (1976). Also a few courts have decided "bad check" cases solely under § 2-507(2). See, e.g., *United States v. Wyoming Nat'l Bank of Casper*, 505 F.2d 1064, 1068 (10th Cir. 1974). Some commentators agree with these courts that § 2-507(2) is the appropriate "bad check" provision. See, e.g., NORDSTROM, *supra* note 19, at 501-02.

chaser for value who has purchased the goods from the buyer and the right of a lien creditor of the buyer, as follows:

(1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though

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 (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 . . . lien creditors are governed by the Articles on Secured Transactions (Article 9), Bulk Transfers (Article 6) and Documents of Title (Article 7).

Section 2-403(1) obviously resolves the uncertainty that existed in the common law in favor of the good faith purchaser. Section 2-403(4), although it mentions lien creditors, does not relate the rights of the unpaid seller to those of the lien creditor; rather, it ostensibly leaves this problem to be resolved by other sections of the Code.⁴¹ As for the Article 9 secured party, section 2-403 does not deal explicitly with his rights relative to those of the unpaid cash seller.

The striking similarity between the common law regarding cash sales and the three UCC provisions outlined above is reinforced by the legislative and drafting history of these provisions. Although the three cash sale provisions outlined above replace, to some extent, the common law regarding cash sales, an examination of the UCC's legislative⁴² and drafting⁴³ history clearly indi-

⁴¹ See text and notes 121-23 *infra*, for a further discussion of this matter.

⁴² In preparing this article, we examined the following legislative history (including state legislative hearings, studies, reports, and comments): ARKANSAS UNIFORM COMMERCIAL CODE (with references to prior Arkansas law) (Bobbs-Merrill Co. 1961); SIXTH PROGRESS REPORT TO THE CALIFORNIA LEGISLATURE BY THE SENATE FACT FINDING COMMITTEE ON THE JUDICIARY—PART 1, THE UNIFORM COMMERCIAL CODE (1959-61); COMMISSION ON UNIFORM STATE LAWS, CALIFORNIA ANNOTATIONS TO THE PROPOSED CODE (1960) [hereinafter cited as CALIFORNIA COMMISSION]; CALIFORNIA COMMERCIAL CODE (special comments by John A. Bohn & Charles L. Williams and California case annotations) (West Pub. Co. 1964); LEGISLATIVE COUNCIL COMMITTEE ON THE UNIFORM COMMERCIAL CODE, REPORT ON THE UNIFORM COMMERCIAL CODE TO THE COLORADO GENERAL ASSEMBLY (1964); W. STARR, REPORT OF THE TEMPORARY COMMISSION TO STUDY AND REPORT UPON THE UNIFORM COMMERCIAL CODE TO THE GENERAL ASSEMBLY OF CONNECTICUT (1959); CONNECTICUT UNIFORM COMMERCIAL CODE (special comments by William F. Starr and Connecticut case annotations) (West Pub. Co. 1960); DELAWARE UNIFORM COMMERCIAL CODE (special comments by the Committee to Study and Report on the Uniform Commercial Code for Delaware and Delaware case annotations) (Edw. Thompson Co. and West Pub. Co. 1967) [hereinafter cited as DELAWARE COMMENTS]; DISTRICT OF COLUMBIA UNIFORM COMMERCIAL CODE (with case annotations and encyclopedic commentary) (West Pub. Co. and Equity Pub. Co. 1967); FLORIDA UNIFORM COMMERCIAL CODE (special comments by Sam G. Harri-

cates that neither the Code drafters nor the states enacting the UCC intended that the Code completely replace the common law. In the cash sale area, this

son, Jr. and Florida case annotations) (Harrison Co. and West Pub. Co. 1966) [hereinafter cited as FLORIDA COMMENTS]; GEORGIA UNIFORM COMMERCIAL CODE (encyclopedic commentary on construction, comparison and contrast with former Georgia laws by William H. Agnor, E. Bryon Hilley, G. Stanley Joslin, Arthur G. Murphey, L. Ray Patterson, James C. Quarles, James C. Rehberg & Robert H. Walling) (Harrison Co. 1962); The UCC and the Hawaii Law, Stefan A. Riesenfeld, *et. al.*; COMMISSION ON UNIFORMITY OF LEGISLATION IN THE UNITED STATES, ILLINOIS ANNOTATIONS TO THE UNIFORM COMMERCIAL CODE (Burdette Smith Co. 1960) [hereinafter cited as ILLINOIS COMMISSION]; ILLINOIS UNIFORM COMMERCIAL CODE (special comments by William B. Davenport, Robert L. Bombaugh & Lawrence A. Coles, Jr. and Illinois case annotations) [hereinafter cited as ILLINOIS COMMENTS]; INDIANA UNIFORM COMMERCIAL CODE (special comments by Harry Pratter & R. Bruce Townsend and Indiana case annotations) (Bobbs-Merrill Co. 1963) [hereinafter cited as INDIANA COMMENTS]; LEGISLATIVE COUNCIL JUDICIARY COMMITTEE, UNIFORM COMMERCIAL CODE: KANSAS ANNOTATIONS (1964) [hereinafter cited as KANSAS JUDICIARY COMMITTEE]; KANSAS UNIFORM COMMERCIAL CODE (special comments by John E. Howe & Walter D. Navin and Kansas case annotations) (West Pub. Co. 1968) [hereinafter cited as KANSAS COMMENTS]; LEGISLATIVE RESEARCH COMMISSION, UNIFORM COMMERCIAL CODE: ANALYSIS OF ITS EFFECT ON EXISTING KENTUCKY LAW (1957) [hereinafter cited as KENTUCKY COMMISSION]; MAINE UNIFORM COMMERCIAL CODE (Special comments by Maine Uniform Commercial Code Committee and Maine case annotations) (West Pub. Co. and Equity Pub. Corp. 1964) [hereinafter cited as MAINE COMMENTS]; MASSACHUSETTS ANNOTATIONS TO THE PROPOSED UNIFORM COMMERCIAL CODE (Michie Co. and Lawyer's Co-Operative Pub. Co. 1953); MICHIGAN COMPILED LAWS ANNOTATED, UNIFORM COMMERCIAL CODE (special practice comments by Roy L. Steinheimer, Jr. and Michigan case annotations) (West Pub. Co. 1967) [hereinafter cited as MICHIGAN COMMENTS]; MINNESOTA UNIFORM COMMERCIAL CODE (special comments by Stanley V. Kinyon and Minnesota case annotations) (West Pub. Co. 1966) [hereinafter cited as MINNESOTA COMMENTS]; MISSISSIPPI UNIFORM COMMERCIAL CODE (with summary for Mississippi lawyers prepared by the Uniform Commercial Code Committee) (Harrison Co. and Lawyer's Co-Operative Pub. Co. 1967); MISSOURI UNIFORM COMMERCIAL CODE (with special comments and Missouri case annotations) (Vernon Law Book Co. 1965); NEVADA LEGISLATIVE COUNSEL BUREAU, REPORT ON THE UNIFORM COMMERCIAL CODE (1964); NEVADA ANNOTATIONS TO REVISED STATUTES CH. 104 (Nevada Legis. Counsel Bur.) (1964); NEW HAMPSHIRE UNIFORM COMMERCIAL CODE (special comments adapted from the New Hampshire State Bar Association Special Committee on the Uniform Commercial Code's Annotations to the Proposed Commercial Code) (Equity Pub. Corp. 1961); COMMISSION TO STUDY AND REPORT UPON THE UNIFORM COMMERCIAL CODE FOR NEW JERSEY, REPORT TO THE GOVERNOR, THE SENATE AND THE ASSEMBLY (Soney & Sage 1960) [hereinafter cited as NEW JERSEY COMMISSION]; NEW JERSEY UNIFORM COMMERCIAL CODE (exhaustive special study comments by William D. Hawkland, Clarence Ferguson & Egon Guttman and New Jersey case annotations) (West Pub. Co. 1962) [hereinafter cited as NEW JERSEY COMMENTS]; NEW YORK LAW REVISION COMMISSION, REPORT FOR 1954 AND RECORD OF HEARINGS ON THE UNIFORM COMMERCIAL CODE (1954); NEW YORK LAW REVISION COMMISSION, A STUDY OF THE UNIFORM COMMERCIAL CODE (1955) [hereinafter cited as NEW YORK COMMISSION]; NEW YORK LAW REVISION COMMISSION, REPORT FOR 1956 RELATING TO THE UNIFORM COMMERCIAL CODE (1956); COMMISSION ON UNIFORM STATE LAWS, REPORT OF THE COMMISSION ON THE UNIFORM COMMERCIAL CODE IN NEW YORK TO THE LEGISLATURE OF THE STATE OF NEW YORK (1961); HOGAN & PENNEY, ANNOTATIONS OF THE UNIFORM COMMERCIAL CODE TO THE STATUTORY AND DECISIONAL LAW OF NEW YORK (New York Commission on Uniform State Laws 1961), in MCKINNEY'S CONS. LAWS OF N.Y. 421-656 (UCC Pamphlet ed., Edw. Thompson Co. 1963); NEW YORK STATE COMMISSION ON UNIFORM STATE LAWS, REPORT ON 1963 PROPOSED AMENDMENTS TO THE UNIFORM COMMERCIAL CODE TO THE GOVERNOR AND THE LEGIS-

history strongly suggests a general intent to adhere to pre-Code common law, except in the case of section 2-403's resolution of the good faith purchaser priority problem.⁴⁴

LATURE OF THE STATE OF NEW YORK (1963); NEW YORK STATE COMMISSION ON UNIFORM STATE LAWS, SUPPLEMENTARY REPORT ON THE UNIFORM COMMERCIAL CODE TO THE LEGISLATURE OF THE STATE OF NEW YORK (1964); NEW YORK UNIFORM COMMERCIAL CODE (with New York case annotations, special comments by New York Commission on Uniform State Laws and practice comments by Lester E. Denonn, Alfred A. Buerger, William J. O'Connor, Jr., William C. Pierce, John C. Clarke, Robert M. Young, Jr., Henry Harfield, Donald J. Rapson, Charles C. Blaine, Robert M. Spaulding, Carlos L. Israel & Homer Kripke) (McKinney's Cons. Laws of N.Y. ed., Edw. Thompson Co. 1964) [hereinafter cited as NEW YORK COMMENTS]; NORTH CAROLINA UNIFORM COMMERCIAL CODE (special comments by Legislative Council Committee for Study of the Uniform Commercial Code and North Carolina case annotations) (Michie Co. 1965) [hereinafter cited as NORTH CAROLINA COMMENTS]; OKLAHOMA UNIFORM COMMERCIAL CODE (special comments by William R. Bandy & Robert L. Cox and Oklahoma case annotations) (West Pub. Co. 1963) [hereinafter cited as OKLAHOMA COMMENTS]; OREGON UNIFORM COMMERCIAL CODE (with case annotations in separate volume) (Oregon Jt. Comm. on Rules and Resolutions 1963); PENNSYLVANIA JOINT STATE GOVERNMENT COMMISSION REPORT, PENNSYLVANIA ANNOTATIONS TO UNIFORM COMMERCIAL CODE (1st ed. 1952; rev. ed. 1953) [hereinafter cited as PENNSYLVANIA COMMISSION]; PENNSYLVANIA UNIFORM COMMERCIAL CODE (with Pennsylvania Bar Association notes and Pennsylvania case annotations) (1st ed. West Pub. Co. and G. T. Bisel Co. 1954; rev. ed. 1970) [hereinafter cited as PENNSYLVANIA COMMENTS]; SOUTH CAROLINA UNIFORM COMMERCIAL CODE (special comments and case annotations by Robert N. Foster) (Michie Co. 1966); SOUTH DAKOTA UNIFORM COMMERCIAL CODE COMMISSION, A STUDY OF THE UNIFORM COMMERCIAL CODE AND A COMPARISON TO EXISTENT SOUTH DAKOTA LAWS (Vermilion Press 1964); REPORT ON THE UNIFORM COMMERCIAL CODE (Va. Code Commission 1963); VIRGINIA UNIFORM COMMERCIAL CODE (special comments and case annotations by Wilfred J. Ritz) (Michie Co. 1965); WASHINGTON UNIFORM COMMERCIAL CODE (special comments by Washington Uniform Laws Commission and Washington case annotations) (West Pub. Co. & Bancroft-Whitney Co. 1966) [hereinafter cited as WASHINGTON COMMENTS]; WYOMING LEGISLATIVE RESEARCH COMMITTEE, THE UNIFORM COMMERCIAL CODE (1960). This list omits some sources that were unavailable. For a complete listing of legislative reports, see M. EZER, UNIFORM COMMERCIAL CODE BIBLIOGRAPHY 6-16 (1972).

⁴³ In preparing this article, we examined all major prior drafts and prior official texts including: UNIFORM COMMERCIAL CODE: MAY 1949 DRAFT WITH COMMENTS (ALI & NCCUSL 1949) [hereinafter cited as "1949 Draft"]; UNIFORM COMMERCIAL CODE: PROPOSED FINAL DRAFT—TEXT AND COMMENTS EDITION (ALI & NCCUSL May 1950) [hereinafter cited as "1950 Draft"]; SEPTEMBER 1950 REVISIONS OF ARTICLE 2, ARTICLE 4 AND ARTICLE 9 (ALI & NCCUSL 1950); UNIFORM COMMERCIAL CODE: 1951 FINAL TEXT WITH COMMENTS (ALI & NCCUSL 1952) [hereinafter cited as "1952 Draft"]; UNIFORM COMMERCIAL CODE: OFFICIAL DRAFT—TEXT AND COMMENTS EDITION (ALI & NCCUSL 1952) [hereinafter cited as "1952 Official Draft"]; RECOMMENDATIONS OF THE EDITORIAL BOARD FOR CHANGES IN THE TEXT AND COMMENTS OF THE UNIFORM COMMERCIAL CODE OFFICIAL DRAFT, TEXT AND COMMENTS EDITION (UCC Enlarged Editorial Bd. April 30, 1953); RECOMMENDATIONS OF THE EDITORIAL BOARD FOR CHANGES IN THE TEXT AND COMMENTS OF THE UNIFORM COMMERCIAL CODE OFFICIAL DRAFT, TEXT AND COMMENTS EDITION UCC Enlarged Editorial Bd. June 1, 1953); 1956 RECOMMENDATIONS OF THE EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE (ALI & NCCUSL 1956); UNIFORM COMMERCIAL CODE: 1957 OFFICIAL TEXT WITH COMMENTS (ALI & NCCUSL 1957); 1958 SUPPLEMENT TO THE 1957 OFFICIAL TEXT WITH COMMENTS OF THE UNIFORM COMMERCIAL CODE (ALI & NCCUSL Dec. 1958);

For example, section 2-507(2) adds generality to the Uniform Sales Act,⁴⁵ but, nevertheless, is very similar in effect to the common law.⁴⁶ The comments to Michigan's Code explicitly link section 2-507(2) with this pre-Code law of cash sales:

[Section 2-507(2)'s] concept of conditional delivery has no counterpart in the USA [Uniform Sales Act]. It appears to give the seller the right to repossess the goods if payment is not promptly made. This goes beyond the protection afforded by the seller's lien in Section 54 of the USA which is dependent upon the seller's possession of the goods for its effectiveness. Indeed, this provision reminds one of the seller's rights under the "cash sale" concept.⁴⁷

UNIFORM COMMERCIAL CODE: 1958 OFFICIAL TEXT WITH COMMENTS (ALI & NCCUSL 1959); UNIFORM COMMERCIAL CODE: 1962 OFFICIAL TEXT WITH COMMENTS (ALI & NCCUSL 1962); REPORT NO. 1 OF THE PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE (UCC Perm. Editorial Bd. Oct. 31, 1962); REPORT NO. 2 OF THE PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE: REPORT ON VARIATIONS TO CODE IN ADOPTING STATES (UCC Perm. Editorial Bd. Oct. 3, 1964); NON-UNIFORM AMENDMENTS TO THE UNIFORM COMMERCIAL CODE IN ENACTING JURISDICTIONS: Vol. 1—Articles 1, 2, 3, and 4; Vol. 2—Articles 5, 6, 7 and 8; Vols. 3 and 4—Article 9 (UCC Perm. Editorial Bd. Oct. 18, 1965); SUPPLEMENT TO NON-UNIFORM AMENDMENTS TO THE UNIFORM COMMERCIAL CODE IN ENACTING JURISDICTIONS (UCC Perm. Editorial Bd. October 3, 1966).

Some commentators have questioned the use of prior drafts of texts and comments as legislative history. An earlier draft Code section warned: "Prior drafts of text and comments may not be used to ascertain legislative intent." 1952 Official Draft § 1-102(3)(g). Although later drafts did not include this provision, some commentators believe it should have been retained. WHITE & SUMMERS, *supra* note 29, at 10. The New York Law Revision Commission, however, recommended deletion of the warning:

Section 1-102(3)(g), together with paragraph (f) referring to the comments constitutes an attempt to establish a proper boundary between what shall be considered as relevant "legislative history" and what shall not be so considered. The most diligent search has revealed no precedent for such a provision.

The validity of such a provision is doubtful. Traditionally, the courts have determined what materials should be considered as relevant "legislative history"; in other words, the questions of admissibility of extrinsic aids has been a matter for the court's decision and courts have generally been liberal in examining "the events leading up to the introduction of the bill out of which the statute under consideration developed."

NEW YORK COMMISSION, *supra* note 42, at 38.

⁴⁴ Section 2-507(2) is one of the least controversial provisions in the Code. The survival of the original version of § 2-507(2), despite a dozen or so revisions of the Code, demonstrates its noncontroversial and noninnovative nature.

⁴⁵ See INDIANA COMMENTS, *supra* note 42; MICHIGAN COMMENTS, *supra* note 42; NEW JERSEY COMMISSION, *supra* note 42; NEW JERSEY COMMENTS, *supra* note 42. The Uniform Sales Act did not have an explicit "cash sale" provision. See note 14 *supra*.

⁴⁶ See CALIFORNIA COMMISSION, *supra* note 42; NEW JERSEY COMMISSION, *supra* note 42; NEW JERSEY COMMENTS, *supra* note 42; OKLAHOMA COMMENTS, *supra* note 42.

⁴⁷ See MICHIGAN COMMENTS, *supra* note 42. But see INDIANA COMMENTS, *supra* note 42, Comment 2, which states: "Broadly interpreted, all unpaid sellers would have this right of replevin. But this interpretation would make a nullity of section 2-702 which specifically provides for the seller's right to 'reclaim' the goods." Actually, the existence of a reclamation right in § 2-507(2) would not "make a nullity" of § 2-702 since the latter section applies only to credit sales, not to cash sales.

Consequently, as far as the buyer and seller are concerned, the drafting and legislative history of section 2-507(2) seem to indicate that section 2-507(2) preserves the seller's common law rights in the "cash sale" situation.

The legislative history of section 2-511(3) also indicates that the drafters did not intend to change the common law regarding "bad check" sales. Although section 2-511(3) is new⁴⁸ and has no counterpart in the Uniform Sales Act,⁴⁹ it nonetheless accords with the common law in most jurisdictions.⁵⁰

A. *The Cash Seller's Rights Against the Nonpaying Buyer*

As noted above, despite an occasional judicial statement to the contrary,⁵¹ sections 2-507(2) and 2-511(3) and the cases decided under them strikingly resemble the common law as it related to the seller's rights against the nonpaying buyer. Perhaps the most important similarity between the common law and the Code is that both recognize the unpaid seller's right to reclaim his

⁴⁸ See CALIFORNIA COMMISSION, *supra* note 42; KENTUCKY COMMISSION, *supra* note 42; NEW YORK COMMENTS, *supra* note 42.

⁴⁹ See DELAWARE COMMENTS, *supra* note 42; MAINE COMMENTS, *supra* note 42; PENNSYLVANIA COMMENTS, *supra* note 42.

⁵⁰ See DELAWARE COMMENTS, *supra* note 42; FLORIDA COMMENTS, *supra* note 42; ILLINOIS COMMENTS, *supra* note 42; KANSAS JUDICIARY COMMITTEE, *supra* note 42; KANSAS COMMENTS, *supra* note 42; KENTUCKY COMMISSION, *supra* note 42; MAINE COMMENTS, *supra* note 42; MINNESOTA COMMENTS, *supra* note 42; NORTH CAROLINA COMMENTS, *supra* note 42; OKLAHOMA COMMENTS, *supra* note 42; PENNSYLVANIA COMMENTS, *supra* note 42.

In addition, the history strongly suggests that this section would allow a seller to recover the goods from the buyer upon dishonor of a check given in payment. See DELAWARE COMMENTS, *supra* note 42; FLORIDA COMMENTS, *supra* note 42; PENNSYLVANIA COMMENTS, *supra* note 42. The Kansas legislative history contains the following statement: "As to the seller's recourse against the goods under the Code, see Section 2-702." See KANSAS JUDICIARY COMMITTEE, *supra* note 42.

There is agreement that the section has no effect upon the rights of third parties. See KENTUCKY COMMISSION, *supra* note 42, these rights being governed by § 2-403. See DELAWARE COMMENTS, *supra* note 42; FLORIDA COMMENTS, *supra* note 42; ILLINOIS COMMENTS, *supra* note 42; NEW YORK COMMENTS, *supra* note 42; OKLAHOMA COMMENTS, *supra* note 42.

Although the drafting history of §§ 2-403(1) and (4) was rather convoluted, their basic purpose was always quite clear—to resolve the cash seller-good faith purchaser priority question which was disputed and uncertain under the prior law. In contrast to the precision with which § 2-403(1) answers the question of priority between these two parties, § 2-403(4) leaves the rights of other purchasers and lien creditors to Articles 6, 7, and 9. However, these Articles fail to provide any definitive resolution to the relative rights of cash sellers and lien creditors, a failure which was recognized by the Permanent Editorial Board when it stated that: "There is no suggestion in the official text that the rights of lien creditors are exclusively governed by the Articles referred to." REPORT NO. 2 OF THE PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE: REPORT ON VARIATIONS TO CODE IN ADOPTING STATES (UCC Perm. Editorial Bd. Oct. 31, 1964).

⁵¹ See, e.g., *Gross v. Powell*, 288 Minn. 386, 392-94, 181 N.W.2d 113, 117-18 (1970); *Evans Prods. Co. v. Jorgenson*, 245 Or. 362, 365-66, 421 P.2d 978, 980 (1966). See also U.C.C. § 2-401 and Comment 1. But see *Stumbo v. Paul B. Hult Lumber Co.*, 86 Or. 1321, 444 P.2d 564, 571 (1970) (§ 2-507(2) "represents whatever remains of the 'cash sale' doctrine under the Code").

goods.⁵² There is a disagreement about the source of the right in Code cases, however, since neither section 2-507(2) nor section 2-511(3) contain an explicit reclamation provision.⁵³ Some courts view the right as more or less inherent in the general cash sale provision, section 2-507(2).⁵⁴ Other courts create the right by grafting the ten-day right to reclaim in section 2-702(2)⁵⁵ onto section 2-507(2).⁵⁶ Still other courts view the seller's right to reclaim goods as inherent in section 2-511(3), the "bad check" provision.⁵⁷

A great many, perhaps most, courts that view the cash seller's right of reclamation as connected in some way to section 2-507(2) also believe that section 2-702(2) restricts this right to a certain extent. They disagree, however, on how section 2-702(2) limits this right. Comment 3 to section 2-507(2) suggests that there are two separate, though almost indistinguishable, limita-

⁵² On the pre-Code reclamation right granted the unpaid cash seller, see text and note 22 *supra*. For an argument that § 2-507(2) substantially embodies the pre-Code "cash sale" doctrine, see 77 COLUM. L. REV., *supra* note 2, at 940-43.

⁵³ The legislative history of §§ 2-507(2) and 2-511(3) suggests that the reclamation right is inherent to those sections. See text and note 47 *supra*. But see the Indiana Code Comment in note 47 *supra*.

Also possibly relevant here is U.C.C. § 2-703(f), which states, in relevant part, that "where the buyer fails to make a payment due on or before delivery . . . the aggrieved seller may . . . cancel." See Wiseman, *supra* note 2, at 119, 151; 77 COLUM. L. REV., *supra* note 2, at 938-39 n.29.

⁵⁴ See *In re Helms Veneer Corp.*, 287 F. Supp. 840, 845-46 (W.D. Va. 1968) (bankruptcy decision); *In re Mort Co.*, 208 F. Supp. 309, 310 (E.D. Pa. 1962) (bankruptcy decision); *Ranchers & Farmers Livestock Auction Co. v. Honey*, 552 P.2d 313, 317 (Colo. Ct. App. 1976); *In re Lindenbaum's Inc.*, 2 U.C.C. Rep. Serv. 495, 496 (E.D. Pa. 1964) (decision of bankruptcy referee).

⁵⁵ Section 2-702(2) 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.

⁵⁶ See *In re Kee Lox Mfg. Co.*, 22 U.C.C. Rep. Serv. 938, 941 (E.D. Pa. 1977) (decision of bankruptcy judge) (dictum); *In re Richardson Homes Corp.*, 18 U.C.C. Rep. Serv. 384, 386 (N.D. Ind. 1975) (decision of bankruptcy judge); *In re Kirk Cabinets, Inc.*, 15 U.C.C. Rep. Serv. 746, 748-49 (M.D. Ga. 1974) (decision of bankruptcy judge); *In re Fairfield Elevator Co.*, 14 U.C.C. Rep. Serv. 96, 106-07 (S.D. Iowa 1973) (decision of bankruptcy judge); *Greater Louisville Auto Auction, Inc. v. Ogle Buick, Inc.*, 387 S.W.2d 17, 20 (Ky. 1965). See also *United States v. Wyoming Nat'l Bank of Casper*, 505 F.2d 1064, 1068 (10th Cir. 1974) (stating that § 2-507(2) should not apply where the rights of third parties are involved, and seeming to regard § 2-702(2) as the appropriate provision in such cases).

⁵⁷ See *Gicinto v. Creditthrift of America, Inc.*, 219 Kan. 766, 769, 549 P.2d 870, 873 (1976); *Conyngham & Co. v. Frank*, 72 Pa. D. & C.2d 762, 767, 20 U.C.C. Rep. Serv. 83, 86 (C. P. Luzerne County 1975). But see *In re Bar-Wood, Inc.*, 15 U.C.C. Rep. Serv. 828, 829 (S.D. Fla. 1974) (decision of bankruptcy judge) (recognizing an inherent right of reclamation in § 2-511(3), but stating that this section only operates as "between the parties," and suggesting that § 2-702(2) must be utilized in third-party cases).

tions on a cash seller's right to reclaim goods: a requirement that the seller "follow up" his reclamation rights or waive the conditional nature of his delivery of the goods to the buyer;⁵⁸ and a requirement that the seller reclaim the goods within ten days.⁵⁹ Most courts apply only the ten-day limitation on the seller's right under section 2-507(2).⁶⁰ The one court that discussed both of the limitations effectively blurred them.⁶¹ In addition, at least one court found section 2-702(2)'s exception to the ten-day limitation for situations where the buyer has made a written misrepresentation of solvency⁶² also applicable to cash sellers.⁶³ In contrast to these cases decided under section 2-507(2), courts proceeding under the "bad check" provision of 2-511(3) simply do not apply any of the limitations of section 2-702(2).⁶⁴

⁵⁸ The one case discussing this requirement has regarded it as necessitating "a regaining of possession or a bona fide attempt to do so." *In re Colacci's of America, Inc.*, 490 F.2d 1118, 1121 (10th Cir. 1974) (bankruptcy decision).

⁵⁹ Cases holding this ten-day demand requirement applicable to § 2-507(2) reclamations include: *In re Samuels & Co., Inc.*, 526 F.2d 1238, 1245 (5th Cir. 1976) (bankruptcy decision) (Appendix adopting dissenting opinion of Judge Godbold, 510 F.2d at 154); *In re Helms Veneer Corp.*, 287 F. Supp. 840, 846 (W.D. Va. 1968) (bankruptcy decision); *In re Richardson Homes Corp.*, 18 U.C.C. Rep. Serv. 384, 387 (N.D. Ind. 1975) (decision of bankruptcy judge); *In re Kirk Cabinets, Inc.*, 15 U.C.C. Rep. Serv. 746, 748-49 (M.D. Ga. 1974) (decision of bankruptcy judge); *In re Fairfield Elevator Co.*, 14 U.C.C. Rep. Serv. 96, 106-07 (S.D. Iowa 1973) (decision of bankruptcy judge). On the details of this requirement in the context of § 2-702(2), see Mann & Phillips, *supra* note 1, at 614-15.

⁶⁰ See note 59 *supra*.

⁶¹ See *In re Colacci's of America, Inc.*, 490 F.2d 1118, 1120-21 (10th Cir. 1974) (bankruptcy decision).

⁶² For the statutory language, see note 55 *supra*. On the details of this requirement in the credit sale context, see Mann & Phillips, *supra* note 1, at 615-16. Note that some cases have held that a check may constitute a misrepresentation of solvency. See *id.* at 615 n.43 and accompanying text. Cf. *In re Kee Lox Mfg. Co.*, 22 U.C.C. Rep. Serv. 938, 941-42 (E.D. Pa. 1977) (decision of bankruptcy judge) (discussing cases).

⁶³ See *In re Fairfield Elevator Co.*, 14 U.C.C. Rep. Serv. 96, 106-08 (S.D. Iowa 1973) (decision of bankruptcy judge). Although the close linkage of the "ten-day demand" and "written misrepresentation" aspects of § 2-702(2), see note 55 *supra*, creates some justification for this application of § 2-702(2)'s requirements to § 2-507(2), it clearly goes beyond the express command of Comment 3, and, moreover, tends to mix "fraud" and "cash sale" rationales to an undesirable degree. On the relationship between the "written misrepresentation" limitation and common law fraud, see Mann & Phillips, *supra* note 1, at 616-17.

⁶⁴ But see *In re Bar-Wood, Inc.*, 15 U.C.C. Rep. Serv. 828 (S.D. Fla. 1974) (decision of bankruptcy judge). In this case, the judge stated that § 2-511(3) would apply as between the parties in a bad check case, but he seemed to feel that § 2-511(3) could provide no reclamation right in a "third party" situation. Thus, he turned to § 2-702(2) and held that the seller lost his right of reclamation under this section. The judge concluded that the seller had not demanded return of the goods within the ten day period, and that the buyer's check did not, on these facts, constitute a written misrepresentation of solvency.

In cases proceeding solely under § 2-511(3), the ten-day limitation on the right to reclaim is inapplicable because the comments to § 2-511(3), unlike those to § 2-507(2), do not refer to the limitation. If a seller delays too long before exercising his

Although many courts impose some of section 2-702(2)'s limitations on the cash seller's right to reclaim his goods, any application of section 2-702(2) to cash sales, beyond that which Comment 3 to section 2-507 permits, is improper.⁶⁵ In fact, the Comment's suggestion that section 2-702(2)'s ten-day limit on reclamation applies to the cash seller is undesirable. In the "bad check" situation, the application of section 2-702(2)'s ten-day limitation works an unnecessary hardship on the seller since in most instances he will not discover that the check is bad within the ten days. As one commentator has put it:

[A] ten-day period for reclaiming under section 2-507(2) may be unduly short in situations in which a check has been returned for insufficient funds. Such a check may have passed through several indorsers and banks, not being returned to the seller until after the buyer has had the goods for more than ten days. A seller who has negotiated or transferred a check in the ordinary course of his business ought not to 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.⁶⁶

Even in cash sale situations not involving "bad checks," there are several arguments against grafting section 2-702(2)'s limitations onto section 2-507(2)'s reclamation right. First, section 2-702(2) by its terms applies only to sales "on credit"; cash sales are not "on credit."⁶⁷ Second, while Comment 3 to section 2-507 suggests some connection between that section and section 2-702(2), the Comment nevertheless presupposes a right of reclamation inherent in section 2-507(2).⁶⁸ Moreover, while the comments to Code sections may be helpful in explaining the Code, they are not positive law and cannot impose restrictions that the Code itself does not impose.⁶⁹ Finally, the

right to reclaim, he nevertheless is subject to the defense of common law waiver. On common law waiver, see notes 23-24 *supra*.

⁶⁵ This argument has several implications for the rest of the article. It coincides with the argument that § 2-403 alone should govern "cash sale" priorities, see text and notes 78-126 *infra*, since it militates against employing § 2-702(3) for that purpose. It also has definite implications for the cash seller-versus-lien creditor priority question. See text and notes 121-25 *infra*. This, in turn, affects resolution of the cash seller-versus-trustee question under § 70(c). See text and notes 128-36 *infra*.

⁶⁶ NORDSTROM, *supra* note 19, at 503. See also Dugan, *supra* note 2, at 346-49; Wiseman, *supra* note 2, at 142-43.

⁶⁷ See Dugan, *supra* note 2, at 341-42.

⁶⁸ Moreover, even if there is some connection between § 2-507(2) and § 2-702(2), as Comment 3 to § 2-507(2) suggests, § 2-702(2) is not the source of the unpaid cash seller's right of reclamation. Rather, this right of reclamation is inherent in § 2-507(2). Our view is supported by the "follow up" limitation also expressed in Comment 3 to § 2-507(2). This "follow up" limitation clearly implies the preexistence of a reclamation right in § 2-507(2) because, without referring to § 2-702(2), it limits an unpaid cash seller's reclamation right.

The tendency among courts to graft § 2-702(2) onto other sections of the Code is a particularly egregious error in the case of § 2-511(3), whose only conceivable link to § 2-702(2) is the statement in Comment 6 to the effect that post-dated check sales are to be governed by § 2-702(2).

⁶⁹ See Dugan, *supra* note 2, at 346.

historical antecedents of sections 2-507(2), 2-511(3), and 2-702(2) militate against linking section 2-702(2) with either of the other two sections. Sections 2-507(2) and 2-511(3), as legislative history indicates, reflect the common law surrounding cash sales, including the common law right to reclaim.⁷⁰ Section 2-702(2) also reflects the common law. Its common law basis, however, is not the right to reclaim goods for which the buyer has not paid but, rather, the right to rescind for fraud.⁷¹ Thus, the common law ancestor of sections 2-507(2) and 2-511(3), and that of section 2-702(2), are unrelated.⁷² There is no basis, therefore, for now linking these provisions.

For courts that balk at finding an inherent right to reclaim in section 2-507(2) and 2-511(3), and, therefore, utilize section 2-702(2), an alternative solution is section 1-103.⁷³ This section incorporates the common law, including the cash seller's common law right of reclamation, into the Code in the absence of a contradictory Code provision, thereby making it unnecessary for courts to resort to section 2-702(2) to find a basis for the reclamation right.

B. The Cash Seller's Rights Against Third Parties

As was the case at common law,⁷⁴ the cash seller's reclamation right under the UCC⁷⁵ may be affected by the rights of third parties to the goods. In this regard, there are three types of third parties:⁷⁶ good faith purchasers of the goods, parties who have obtained from the buyer an Article 9 security interest in the goods, and lien creditors of the buyer who have attached the goods.⁷⁷ Neither section 2-507(2), the general cash sale provision, nor section 2-511(3), the "bad check" provision, describe the rights of the Code cash seller relative to the rights of these third parties. In fact, both sections state that they apply only to the relationship between seller and buyer.⁷⁸ In our opin-

⁷⁰ See text and notes 46-50 *supra*.

⁷¹ See Mann & Phillips, *supra* note 1, at 616-17.

⁷² See text and notes 25-26, 29, 32-33 *supra*. For a fuller comparison, compare text and notes 3-33 *supra* with Mann & Phillips, *supra* note 1, at 612-13.

⁷³ Section 1-103 provides: "Unless displaced by the particular provisions of this Act, the principles of law and equity . . . shall supplement its provisions."

⁷⁴ See text and notes 25-33 *supra*.

⁷⁵ From this point on, the terms "seller under §§ 2-507(2) and 2-511(3)," "Code cash seller," and "cash seller," will be used more or less interchangeably.

⁷⁶ These three types of third parties are not necessarily mutually exclusive. For example, holders of Article 9 security interests may be deemed good faith purchasers for value. See text and notes 83-87 *infra*.

⁷⁷ Section 9-301(3)'s definition of the term "lien creditor" includes a trustee in bankruptcy whose rights we discuss later in this article.

⁷⁸ U.C.C. § 2-507(2) states: "Where payment is due and demanded on the delivery to the buyer of goods or documents of title, *his right as against the seller* to retain or dispose of them is conditional upon his making the payment due." (emphasis added). U.C.C. § 2-511(3) provides in relevant part: "payment by check is conditional and is defeated *as between the parties* by dishonor of the check on due presentment." (emphasis added). See, e.g., *In re* Samuels & Co., 526 F.2d 1238, 1244 (5th Cir. 1976) (bankruptcy decision); *United States v. Wyoming Nat'l Bank of Casper*, 505 F.2d 1064, 1068 (10th Cir. 1974); *In re* Richardson Homes Corp., 18 U.C.C. Rep. Serv. 384, 386-87 (N.D. Ind. 1975) (decision of bankruptcy judge); *In re* Bar-Wood, Inc., 15 U.C.C. Rep. Serv. 828, 829 (S.D. Fla. 1974) (decision of bankruptcy judge).

ion, section 2-403 of the Code should govern all cash sale priority questions. We believe that section 2-403 provides the most complete solution to these priority questions, is the simplest priority provision to apply, produces the most uniform results, has the most direct statutory links to sections 2-507(2) and 2-511(3), and was intended by the Code drafters and the enacting states to serve as the key priority provision.

To support our conclusion that section 2-403 should govern UCC cash sale priority questions, we shall first discuss the rights of the cash seller in relation to those of good faith purchasers. We shall then examine the relative rights of cash sellers and parties who have obtained from the buyer an Article 9 security interest in the goods. Finally, we shall look at the conflicting claims of cash sellers and attaching lien creditors of the buyer.

1. The Cash Seller and the Good Faith Purchaser for Value

We turn first to the seller's rights relative to those of the good faith purchaser for value. Section 2-403(1) provides that the cash seller's right to reclaim his goods lapses if the buyer transfers the goods to a good faith purchaser for value.⁷⁹ Section 2-403 produces this result by enabling a buyer of goods with voidable title to transfer good title to a good faith purchaser for value. This section then lists the two cash sale situations in which the buyer acquires voidable title: where delivery was in exchange for a check which is later dishonored,⁸⁰ and where the parties agreed that the transaction was to be a "cash sale."⁸¹ Since these two situations embrace all cash sale cases, section 2-403(1) precludes an unpaid cash seller from recovering the goods from a good faith purchaser for value.⁸²

⁷⁹ Section 2-403(1) provides in relevant part:

A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though

.... (b) the delivery was in exchange for a check which is later dishonored, or

(c) it was agreed that the transaction was to be a "cash sale". . . .

⁸⁰ U.C.C. § 2-403(1)(b).

⁸¹ U.C.C. § 2-403(1)(c).

⁸² There are few reported cases involving actual "buyers"—buyers other than lien creditors or secured parties who may also qualify as good faith purchasers. All these cases permitted the unpaid cash seller to recover the goods because the buyer failed to establish his good faith for value status. *See* *Ranchers & Farmers Livestock Co. v. Honey*, 552 P.2d 313 (Colo. App. 1976) (subsequent purchaser had notice of unpaid cash seller's § 2-507 claim); *Conyngham & Co. v. Frank*, 72 Pa. D. & C.2d 762, 764-65, 20 U.C.C. Rep. Serv. 83, 84-85 (1975) (good faith purchaser for value cannot contract or pay for goods *before* delivery of the goods to the buyer despite § 1-201(44)(c) of the Code which defines "value" to include preexisting contracts for purchase). However, once a third party proves that he is a good faith purchaser for value, he will inevitably prevail over the cash seller. For the definitions of "good faith," "purchaser," and "value," see U.C.C. §§ 1-201(19), (32), (33), (44).

2. The Cash Seller and the Article 9 Secured Party

Section 2-403(1) also precludes the unpaid cash seller from recovering the goods from the holder of a perfected Article 9 security interest in the goods.⁸³ Although section 2-403(1) ostensibly applies only to good faith purchasers for value, secured parties usually qualify as good faith purchasers because of the Code's broad definitions of "purchase" and "purchaser." Section 1-201(32) of the UCC states: "Purchase includes taking by sale, discount, negotiation, mortgage, pledge, lien, issue or reissue, gift, or any other voluntary transaction creating an interest in property." Section 1-201(33) of the UCC defines "purchaser" as "a person who takes by purchase." Since the Code's definition of "value" includes security for a preexisting claim,⁸⁴ even a secured party with an after-acquired property clause is a purchaser for value.⁸⁵ Thus, so long as the secured party acts in good faith he will be

⁸³ For a discussion of the cash seller's rights as against some of the common law counterparts of the Article 9 secured party, see text and notes 27-31 *supra*.

A recent case decided under the Code took an approach similar to the common law. *Gicinto v. Credithrift of America, Inc.*, 219 Kan. 766, 549 P.2d 870 (1976). Although this case also involved non-Code statutory title provisions dealing with motor vehicle certificates of title, the court held that on the basis of § 2-155(3) the cash seller prevailed over a secured party because title did not pass to the buyer and, therefore, the buyer had nothing to which the secured party's security interest could attach. The court stated:

[W]hen a check is dishonored when presented there is no payment, title does not pass, and the seller can maintain replevin against the buyer or a third party who is not an innocent purchaser. The Uniform Commercial Code is in accord, [section 2-511(3)] providing that "payment by check is conditional and is defeated as between the parties by dishonor of the check of due presentment."

.... Credithrift, [the secured party], recognized the force of the foregoing authorities and now concedes that title never passed to Norman [the buyer]. The result is that Credithrift couldn't acquire a security interest in any of the [goods], since [section 9-203] required the debtor to acquire an interest in the collateral before a security interest could attach. The security agreement was thus unenforceable even as between the signatories.

219 Kan. at 769, 549 P.2d at 873 (citations omitted).

The court's conclusion concerning attachment seems erroneous. Section 9-203(1)(c) requires the debtor-buyer to have rights in the collateral. "Rights" does not necessarily mean "title." However, even if it does, title passes under § 2-401(2) (unless the parties explicitly agree otherwise) when the seller delivers the goods to the buyer. Moreover, under § 2-403(1), the buyer receives "voidable title" in cash sale and bad check cases. Voidable title should be sufficient "rights in the collateral" for a security interest to attach. Finally, under § 2-501(1), "rights" may be acquired as early as identification of the goods to the contract, for the buyer obtains a special property and an insurable interest in the goods. This, too, may be sufficient "rights" in the collateral to permit attachment. See 1 P. COOGAN, W. HOGAN, & D. VOGTS, *SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE* § 4.06, at 311-14 (1976). For an argument to the contrary, see 77 COLUM. L. REV., *supra* note 2, at 951-55.

⁸⁴ U.C.C. § 1-201(44)(b).

⁸⁵ See, e.g., *In re Daley, Inc.*, 17 U.C.C. Rep. Serv. 433, 435 (D. Mass. 1975) (bankruptcy decision); *In re Haywood Woolen Co.*, 3 U.C.C. Rep. Serv. 1107, 1111-12

deemed a good faith purchaser for value,⁸⁶ and therefore will enjoy priority over the reclamation claims of an unpaid cash seller.⁸⁷

Although no courts have gone this far, section 2-403(1) also precludes the unpaid cash seller from recovering goods from the holder of an *unperfected* security interest in the goods.⁸⁸ Since an unperfected security interest is indistinguishable from a perfected one with respect to satisfying the requirements of purchase, value, and good faith, the holder of an unperfected security interest should be a good faith purchaser for value who therefore takes free of the claims of an unpaid cash seller.⁸⁹

(D. Mass. 1967) (decision of bankruptcy referee); *Stumbo v. Paul B. Hult Lumber Co.*, 251 Or. 20, 41-43, 444 P.2d 564, 574-75 (1968). Some commentators, however, argue that an Article 9 secured party with a security interest in after-acquired property has not given value unless the secured party has made additional advances in reliance upon the buyer's possession of the goods. See Wiseman, *supra* note 2, at 144-46; McDonnell, *supra* note 2, at 454-56; 77 COLUM. L. REV., *supra* note 2, at 955-56.

⁸⁶ For a case in which the secured party did not show good faith, see *In re American Food Purveyors, Inc.*, 17 U.C.C. Rep. Serv. 436, 441-44 (N.D. Ga. 1974) (decision of bankruptcy judge). The various opinions in *In re Samuels & Co.*, 483 F.2d 557 (5th Cir. 1973), *rev'd sub nom.* Mahon v. Stowers, 416 U.S. 100 (1974) (*per curiam*), *modified*, 510 F.2d 139 (5th Cir. 1975), *rev'd en banc*, 526 F.2d 1238 (5th Cir. 1976), provide contrasting views of what constitutes "good faith" in the cash seller-versus-secured party situation.

⁸⁷ *In re Samuels & Co.*, 526 F.2d 1238, 1242-44 (5th Cir.), *cert. denied sub nom.* Stowers v. Mahon, 429 U.S. 834 (1976) (bankruptcy decision); *United States v. Wyoming Nat'l Bank of Casper*, 505 F.2d 1064, 1067-68 (10th Cir. 1974); *First Nat'l Bank & Trust Co. v. Jim Payne Pontiac, Inc.*, 20 U.C.C. Rep. Serv. 768, 774-76 (Okla. Ct. App. 1976); *Guy Martin Buick, Inc. v. Colorado Springs Nat'l Bank*, 184 Colo. 166, 174, 519 P.2d 354, 358-59; *Peerless Equipment Co. v. Azle State Bank*, 559 S.W.2d 114, 115-16 (Tex. Civ. App. 1977).

⁸⁸ See *Guy Martin Buick, Inc. v. Colorado Springs Nat'l Bank*, 184 Colo. 166, 519 P.2d 354 (1974). The Colorado Supreme Court reached this result by basing the superiority of the unperfected security interest on § 9-301 of the Code. As the court stated:

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

Id. at 175-76, 519 P.2d at 359-60. See also *United States v. Wyoming Nat'l Bank of Casper*, 505 F.2d 1064, 1067-68 (10th Cir. 1974) (unclear whether security interest was perfected or unperfected). This reasoning applies with equal force to reclamation rights arising under § 2-511(3), since they too are omitted from § 9-301.

⁸⁹ This result is not inconsistent with the policy behind requiring the perfection of security interests because perfection is required to protect parties who might rely on the debtor-buyer's possession of the goods, and a cash seller does not need this protection.

3. The Cash Seller and the Attaching Lien Creditor

The rights of the unpaid cash seller relative to those of the attaching lien creditor⁹⁰ under the UCC are not as clear as the cash seller's rights in relation to either the good faith purchaser for value or the holder of a security interest in the goods. Although the relative priorities of the reclaiming cash seller and a lien creditor were well established at common law—the cash seller prevailed⁹¹—their relative priorities under the UCC is unclear. Present case law is split over how to resolve the priority problem. Some courts take the view that the attaching lien creditor qualifies as a good faith purchaser for value and, thus, under section 2-403(1), has a right to the goods superior to the unpaid cash seller. Other courts classify the unpaid cash seller's right to reclaim goods under section 2-507(2),⁹² the general cash sale provision, as an unperfected security interest which is subordinate to the rights of a lien creditor under section 9-301(1)(b). Still other courts conclude from section 2-702(3)⁹³ that the seller's right to reclaim goods, as it is set out in section 2-702(2), is subordinate to the lien creditor's right to the goods. Although all three of these approaches reach the same result, we believe that this result is wrong; an attaching lien creditor should not prevail over a reclaiming cash seller. A brief discussion of these three approaches illustrates the legal and practical problems with them.

We turn first to the view that the attaching lien creditor qualifies as a good faith purchaser for value and, thus, enjoys priority over the reclaiming cash seller under section 2-403(1).⁹⁴ Only two cases have discussed this approach; each case reached a different result.⁹⁵ One case cryptically stated:

The fact that the holder of a voluntary lien—including an Article Nine interest—is a "purchaser" under the Code is of great significance to a proper understanding and resolution of this case under Article Two and Article Nine. The Code establishes that purchasers can take from a defaulting cash buyer, [section 2-403]. Lien creditors are included in the definition of purchasers, [sections 1-201(32) and 1-201(33)]. A lien is an Article Nine interest, [Comments to section 9-101 and 9-102]. The existence of an Article Nine interest presup-

⁹⁰ The Code's definition of a lien creditor is contained in § 9-301(3): "A 'lien creditor' means a creditor who has acquired a lien on the property involved by attachment, levy or the like and includes . . . a trustee in bankruptcy from the date of the filing of the petition"

⁹¹ See text and note 32 *supra*.

⁹² There are no cases discussing the relative rights of a reclaiming § 2-511(3) seller and a lien creditor. *But see In re Bar-Wood, Inc.*, 15 U.C.C. Rep. Serv. 828, 829 (S.D. Fla. 1974) (decision of bankruptcy judge). *Bar-Wood* suggests that, in third party cases, the "bad check" seller must rely on § 2-702(2). If § 2-702 is the applicable provision, § 2-702(3)'s possible subordination of the seller to a lien creditor becomes relevant. See text and notes 110-20 *infra*.

⁹³ For the text of § 2-702(3), see note 112 *infra*.

⁹⁴ For the text of § 2-403(1), see note 79 *supra*.

⁹⁵ *In re Samuels & Co.*, 526 F.2d 1238 (5th Cir. 1976) (bankruptcy decision); *In re Kirk Cabinets, Inc.*, 15 U.C.C. Rep. Serv. 746 (M.D. Ga. 1974) (decision of bankruptcy judge) ("The trustee in bankruptcy is not a good faith purchaser, but he is a lien creditor as defined in [§ 9-301(3)].").

poses the debtor's having rights in the collateral sufficient to permit attachment, [section 9-204]. Therefore, since a defaulting cash buyer has the power to transfer a security interest to a lien creditor, including an Article Nine secured party, the buyer's rights in the property, however marginal, must be sufficient to allow attachment of a lien. And this is true even if, *arguendo*, I were to agree that the cash seller is granted reclamation rights under Article Two.⁹⁶

It is unclear from this discussion whether the court considers a lien creditor to be a good faith purchaser for value. In any event, the quoted passage is dictum since the "lien holder" in this case actually was an Article 9 secured party.⁹⁷

Whether dictum or holding, however, the court's reasoning is faulty and its conclusion is ludicrous. Even if a lien creditor qualifies as a good faith purchaser for value,⁹⁸ section 2-403(4) states: "The rights of . . . lien creditors are governed by the Articles on Secured Transactions (Article 9), Bulk Transfers (Article 6) and Documents of Title (Article 7)." Since this language indicates that section 2-403 governs the rights of good faith purchasers for value, and since it states that section 2-403 does *not* govern the rights of lien creditors, it is clear that lien creditors are not good faith purchasers for value. Thus, section 2-403 specifically excludes lien creditors from its purview. The view that lien creditors are good faith purchasers with priority over unpaid cash sellers, therefore, is unconvincing.⁹⁹

⁹⁶ *In re Samuels & Co.*, 526 F.2d 1238, 1242-43 (5th Cir. 1976) (bankruptcy decision) (emphasis in original).

⁹⁷ *Id.* at 1241.

⁹⁸ In the passage quoted above from *In re Samuels & Co.*, *id.*, the court used § 1-201(32) to reach its dubious conclusion that a lien creditor qualifies as a good faith purchaser for value under the Code. Although § 1-201(32) defines "purchase" to include taking by "lien" or any other "voluntary transaction creating an interest in property," lien creditors are not holders of voluntary liens and, therefore, fall outside the Code's definition of "purchasers."

In addition, the court's characterization of the lien as an Article 9 security interest is incorrect. The Code sections that the court cites in the passage quoted above do not support its conclusion. Moreover, § 9-104 of the Code, a provision which the court ignored, repudiates the court's conclusion. Section 9-104 provides: "This Article does not apply . . . (c) to a lien given by statute or other rule of law for services or materials; or . . . (h) to a right represented by a judgment . . ." Consequently, Article 9 does not apply to judicial liens such as "the lien of an unsecured creditor who arms himself with a judgment and levies," *WHITE & SUMMERS, supra* note 29, at 757 n.14, or liens such as mechanics liens. Since a lien creditor is not an Article 9 secured party, he cannot argue that he is a good faith purchaser for value because Article 9 secured parties enjoy such status.

Finally, there are sound policy reasons for not regarding lien creditors as good faith purchasers for value. The lien creditor, unlike the typical good faith purchaser for value, does not rely on the ostensible ownership or voidable title of the buyer-debtor. Therefore, there is no policy reason for granting good faith purchaser status to the lien creditor, and thereby giving the lien creditor priority over the cash seller.

⁹⁹ A similar argument can be made from the 1962 version of § 2-702(3) which states that the seller's right to reclaim under § 2-702(2) "is subject to the rights of a buyer in ordinary course or other good faith purchaser or lien creditor under this

The argument that the unpaid cash seller's right to reclaim goods under sections 2-507(2) and 2-511(3)¹⁰⁰ is an unperfected security interest subordinate to the rights of a lien creditor¹⁰¹ is equally unconvincing. The few cases that have discussed this contention are divided over its validity.¹⁰²

One reason we believe this argument fails is that classifying the cash seller's reclamation right as a security interest is at odds with the nature of the cash sale. A security interest typically stems from a *credit* transaction where the seller retains an interest in the goods as security for the purchase price. The cash sale, however, is not a credit transaction¹⁰³ and the cash seller does not retain an interest in the goods.¹⁰⁴ The cash seller's reclamation right is more like a power to undo the transaction than a power to recover based on a retention of title. Although section 2-401(1) of the Code provides that "[a]ny 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," this provision seems to apply only when the seller expressly retains title.¹⁰⁵ Moreover, section 2-401(1) should not govern cash sales since it appears to be the descendant of the conditional sale¹⁰⁶ which was more or less distinct from the cash sale at common law. Consequently, it is incongruous to view the cash seller's reclamation right as a security interest.

Another reason for rejecting the argument that the cash seller's reclamation right is a security interest is that the list of Article 2 security interests,

Article (Section 2-403)." This version of § 2-702(3) clearly shows that, under the Code, good faith purchasers and lien creditors are distinctly different parties.

¹⁰⁰ Most of what follows probably pertains more to § 2-507 than to § 2-511(3), although the text will include both.

¹⁰¹ Section 9-301(1)(b) of the Code states in relevant part:

Except as otherwise provided in subsection (2), an unperfected security interest is subordinate to the rights of . . . (b) a person who becomes a lien creditor before the security interest is perfected.

¹⁰² Cases holding that the cash seller's reclamation right is a security interest include *In re Samuels & Co.*, 526 F.2d 1238, 1245-48 (5th Cir. 1976) (bankruptcy decision). A case holding that it is not a security interest is *Guy Martin Buick, Inc. v. Colorado Springs Nat'l Bank*, 184 Colo. 166, 175, 519 P.2d 354, 359 (1974).

¹⁰³ 77 COLUM. L. REV., *supra* note 2, at 958-59. This is true even when the seller accepts a check as payment, since acceptance of a check (unless post-dated) does not change a cash sale into a credit transaction. See NORDSTROM, *supra* note 19, at 502-03; U.C.C. § 2-511, Comment 6.

¹⁰⁴ See 77 COLUM. L. REV., *supra* note 2, at 957-59.

¹⁰⁵ Cf. *Bank of Madison v. Tri-County Livestock Auction Co.*, 9 U.C.C. Rep. Serv. 53, 55-56 (Ga. Ct. App. 1971). In this case, the seller expressly reserved title by reciting in its invoices: "Customers paying for livestock by check or draft agree that the title does not pass until funds have actually been received." The court held that this constituted a security interest under § 2-401(1) and was subordinate to a perfected security interest. See also *General Electric Credit Corp. v. Tidwell Industries, Inc.*, 21 U.C.C. Rep. Serv. 1188, 1193 (Ariz. 1977). But see *In re Samuels & Co.*, 526 F.2d 1238, 1246-47 (5th Cir. 1976) (bankruptcy decision). In *United States v. Wyoming Nat'l Bank of Casper*, 505 F.2d 1064, 1068 (10th Cir. 1974), the court held that a cash seller who took a "bad check" could not assert a security interest under § 2-507(2), but could assert a security interest under § 2-401(1).

¹⁰⁶ See Dugan, *supra* note 2, at 343.

found in Comment 1 to section 9-113,¹⁰⁷ does not include the seller's right to reclaim goods under sections 2-507(2) or 2-511(3). The Article 2 security interests—the seller's right to stop delivery of goods under sections 2-703 and 2-705, or resell the goods under sections 2-703 and 2-706; the buyer's security interest in goods justifiably rejected under section 2-711; and the financing agent's security interest in goods under section 2-506—differ fundamentally from the cash seller's right to reclaim goods. The existence of the Article 2 security interests listed in this Comment depends on the seller's possession of the goods; the existence of the seller's right to reclaim goods, however, stems from the seller's nonpossession of the goods. The cash seller's right of reclamation under sections 2-507(2) or 2-511(3) undoubtedly is not the sort of right which section 9-113 regards as a security interest.¹⁰⁸

Finally, analogous support for the proposition that a cash seller's reclamation right under sections 2-507(2) and 2-511(3) of the Code is not a security interest exists in several courts' assertions that the credit seller's right of reclamation under section 2-702(2) of the Code is not an Article 2 security interest.¹⁰⁹ Since section 2-702(2), unlike sections 2-507(2) and 2-511(3), contemplates an extension of credit to the buyer, it presents a stronger case for a court's characterizing it as a security interest. The refusal of several courts to characterize the section 2-702(2) right as a security interest thus suggests that they also would refuse to characterize the cash seller's right in section 2-507(2) or 2-511(3) as a security interest.

For the reasons outlined above, we contend that the unpaid cash seller's right to reclaim goods is not a security interest. Consequently, section 9-301(1)(b), which determines the priority between secured parties and lien

¹⁰⁷ In relevant part, this Comment states:

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

¹⁰⁸ If, however, the seller's reclamation right under either § 2-507(2) or § 2-511(3) is deemed a security interest, the defaulting buyer arguably "does not lawfully obtain possession of the goods" under § 9-113, particularly if the buyer has given the seller a "bad check." If so, the seller's rights under its "security interest" are governed solely by Article 2. See Braucher, *Reclamation of Goods from a Fraudulent Buyer*, 65 MICH. L. REV. 1281, 1290 (1967); Wiseman, *supra* note 2, at 148-49; 77 COLUM. L. REV., *supra* note 2, at 956-57.

¹⁰⁹ See, e.g., *In re Mel Golde Shoes, Inc.*, 403 F.2d 658, 660 (6th Cir. 1968); *Ranchers & Farmers Livestock Auction Co. v. First State Bank*, 531 S.W.2d 167, 169 (Tex. Ct. App. 1975); *In re American Food Purveyors, Inc.*, 16 U.C.C. Rep. Serv. 436, 440 (N.D. Ga. 1974) (decision of bankruptcy judge); *English v. Ralph Williams Ford*, 9 U.C.C. Rep. Serv. 437, 444 (Cal. Ct. App. 1971); Braucher, *supra* note 108, at 1290, 1294.

creditors, is irrelevant to determination of priority between unpaid cash sellers and lien creditors.

Likewise, the argument that section 2-702(3) subordinates the seller's right to reclaim under section 2-702(2) to the lien creditor's right to the goods is irrelevant to resolution of the conflicting rights of the unpaid cash seller and the attaching lien creditor. Nevertheless, some courts have cited section 2-702(3) as support for the proposition that a lien creditor's rights are superior to those of an unpaid cash seller under section 2-507(2),¹¹⁰ the general cash sale provision.¹¹¹ These courts generally argue that the unpaid cash seller derives his right of reclamation from section 2-702(2), the ten-day reclamation provision. Therefore, they argue, section 2-702's limitations on the right to reclaim, including subsection (3),¹¹² which subordinates the reclaiming seller to the lien creditor, apply to the cash seller.¹¹³

This argument, however, is unpersuasive for a number of reasons. First, it assumes that the cash seller's right to reclaim his goods stems from section 2-702(2). As we noted earlier,¹¹⁴ this assumption is incorrect; the cash seller's right to reclaim is inherent in the two key cash sale provisions, sections 2-507(2) and 2-511(3). Thus, there is no reason for a court to look to section 2-702. Second, if the cash seller's right to reclaim goods stems from section 2-511(3), the "bad check" provision, section 2-702(3)'s priority provision is inapplicable because there is nothing to link the two sections. Case law bears out this assertion; no decision has applied section 2-702(3)'s priority rules to a "bad check" case proceeding under section 2-511(3). Third, the view that section 2-702(3) subordinates the cash seller to the lien creditor does not enjoy unanimous support. Several courts have held or suggested that the cash seller's rights are superior to those of a lien creditor.¹¹⁵ Finally, even if the seller's right to reclaim goods originates in section 2-702(2), section 2-702(3) does not always subordinate the rights of the cash seller to those of the lien creditor. Approximately one-third of the states have adopted the Permanent Editorial Board's amendment to section 2-702(3)¹¹⁶ which deletes the refer-

¹¹⁰ No decisions discuss the applicability of § 2-702(3) to cash sale cases that stem from § 2-511(3)'s "bad check" provision. *But see* note 92 *supra*.

¹¹¹ *See In re Richardson Homes Corp.*, 18 U.C.C. Rep. Serv. 384, 387 (N.D. Ind. 1975) (decision of bankruptcy judge); *In re Kirk Cabinets, Inc.*, 15 U.C.C. Rep. Serv. 746, 749 (M.D. Ga. 1974) (decision of bankruptcy judge). *Cf. Greater Louisville Auto Auction, Inc. v. Ogle Buick, Inc.*, 387 S.W.2d 17, 20 (Ky. 1965) (court would have applied § 2-702(3) if third party had qualified as a lien creditor).

¹¹² Section 2-702(3) provides:

The seller's right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course or other good faith purchaser or lien creditor under this Article (Section 2-403). Successful reclamation of goods excludes all other remedies with respect to them.

The 1972 amendments to the UCC deleted the words "or lien creditor" from the language above. *See* text and notes 116-17 *infra*.

¹¹³ *See* cases cited at note 111 *supra*.

¹¹⁴ *See* text and notes 65-72 *supra*.

¹¹⁵ *See In re Mort Co.*, 208 F. Supp. 309, 310 (E.D. Pa. 1962); *In re Lindbaum's Inc.*, 2 U.C.C. Rep. Serv. 495, 496 (E.D. Pa. 1964) (decision of bankruptcy referee).

¹¹⁶ REPORT NO. 3 OF THE PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE (U.C.C. Perm. Editorial Bd. 1967).

ence in this section to lien creditors.¹¹⁷ In states that have amended this section, courts must resort to other Code provisions or the common law to resolve the priority issue.¹¹⁸ At common law, as we have noted,¹¹⁹ the cash seller defeated the lien creditor. Even in jurisdictions that retain the reference in section 2-702(3) to lien creditors, there is a possibility that a cash seller would defeat a lien creditor. In these jurisdictions, there is a dispute as to whether section 2-702(3) subordinates the seller to a lien creditor. The dominant view apparently is that section 2-702(3) does not compel subordination of the seller, and that recourse to common law rules is necessary.¹²⁰ Thus, even if section 2-702 is linked to section 2-507(2) (or even section 2-511(3)) and section 2-702(3) is viewed as the proper priority provision, many courts probably would resort to common law rules. Thus, the cash seller would defeat the lien creditor.

For all the reasons which we have outlined above, it is clear that section 2-702(3) does not properly resolve the conflict between the reclaiming cash seller's and the attaching lien creditor's right to the goods. We contend that section 2-403, rather than section 2-702(3), provides the best approach to the

¹¹⁷ See U.C.C. § 2-702(3) (1972 version).

¹¹⁸ Most likely, courts will recognize that the 1972 amendment removes any pretense of a resolution of seller-versus-lien creditor priority issue and implicitly advocates resort to common law for the solution.

¹¹⁹ See text and note 27 *supra*.

¹²⁰ Generally, these courts first note that § 2-702(3) states that the "seller's right to reclaim under subsection (2) is subject to the rights of a . . . lien creditor under this Article (Section 2-403)." They argue that § 2-702(3) does not subordinate the seller to a lien creditor, but, rather, to the lien creditor's *rights* as defined in § 2-403. Section 2-403(4) merely states that the lien creditor's rights are governed by Articles 6, 7, and 9 of the Code. Articles 6 and 7 are equally unenlightening; the only Article 9 provision dealing with this matter, § 9-301(1)(b), states that an unperfected security interest is subordinate to a lien creditor. Since the cash seller's right of reclamation is not a security interest, and since § 9-301 is otherwise unenlightening, these courts conclude that the question is unresolved by the Code. Thus, they resort to common law priority rules under which the defrauded credit seller prevails over the lien creditor. For cases espousing views similar to that which we just described, see *In re PSA Farmers Market Ass'n*, 24 U.C.C. Rep. Serv. 1176, 1180-87 (8th Cir. 1978); *In re Federal's Inc.*, 553 F.2d 509, 511-12 (6th Cir. 1977) (bankruptcy decision); *In re Mel Golde Shoes, Inc.*, 403 F.2d 658, 659-60 (6th Cir. 1968) (bankruptcy decision); *In re Kravitz*, 278 F.2d 820, 822 (3d Cir. 1960) (bankruptcy decision); *In re Kee Lox Mfg. Co.*, 22 U.C.C. Rep. Serv. 938, 943-44 (E.D. Pa. 1977) (decision of bankruptcy judge); *In re Royalty Homes, Inc.*, 8 U.C.C. Rep. Serv. 61, 64 (E.D. Tenn. 1970) (decision of bankruptcy referee). For cases taking the view that § 2-702(3) subordinates the reclaiming credit seller to the lien creditor, see *In re Goodson Steel Corp.*, 10 U.C.C. Rep. Serv. 387, 391-93 (S.D. Tex. 1968) (decision of bankruptcy referee); *In re Behring & Behring*, 5 U.C.C. Rep. Serv. 600, 606-07 (N.D. Tex. 1968) (decision of bankruptcy referee); *In re Units, Inc.*, 3 U.C.C. Rep. Serv. 46, 48-49 (D. Conn. 1965) (decision of bankruptcy referee); *In re Eastern Supply Co.*, 1 U.C.C. Rep. Serv. 151, 153-54 (W.D. Pa. 1963) (decision of bankruptcy judge), *aff'd*, 331 F.2d 852 (3d Cir. 1964). Note that the view that we advocate—recourse to common law priority rules—is supported by all of the courts of appeals considering the issue. For a more detailed discussion of these questions, see Mann & Phillips, *In re Federal's, Inc., Another Round in the Battle between the Reclaiming Credit Seller and the Bankruptcy Trustee*, 46 FORDHAM L. REV. 641 (1978); Mann & Phillips, *supra* note 1, at 620-24.

problem of priorities between the cash seller and the lien creditor. Although section 2-403 primarily establishes priority between cash sellers and good faith purchasers for value, subsection (4) states: "The rights of . . . lien creditors are governed by the Articles on Secured Transactions (Article 9), Bulk Transfers (Article 6) and Documents of Title (Article 7)." Articles 6 and 7, however, say nothing about the rights of lien creditors. Article 9 is equally unenlightening; the only possible reference to lien creditors in Article 9 is section 9-301(1)(b)'s statement that a lien creditor has priority over an unperfected security interest. But, as we demonstrated earlier, the cash seller's reclamation right is not a security interest,¹²¹ so section 9-301(1)(b) is inapplicable. The Code alone, therefore, does not solve the priority problem. However, section 1-103¹²² permits courts to look to the common law where, as here, the Code has not displaced prior law. There is no doubt that under the common law, the unpaid cash seller prevails over the lien creditor.¹²³ Thus, section 2-403 indirectly resolves the conflict between the rights of the reclaiming cash seller and the attaching lien creditor.¹²⁴

Section 2-403's solution has several distinct advantages over the other solutions provided by current case law. First, it 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.¹²⁵ Second, if sections 2-507(2) and 2-511(3) embody the common law cash sale doctrine, as we believe they do, 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.

4. Summary

To summarize our views about the proper resolution of the conflict between the unpaid cash seller's right to reclaim his goods and third parties' rights, we reiterate that section 2-403 of the Code should govern all priority problems. As numerous courts have recognized, section 2-403(1) expressly resolves the conflict between the good faith purchaser's and the unpaid cash seller's right to the goods by subordinating the cash seller to the good faith purchaser. Section 2-403(1) also resolves the conflict between the holder of an Article 9 security interest and the unpaid cash seller because most Article 9 secured parties¹²⁶ qualify as good faith purchasers for value and, as such, fit

¹²¹ See text and notes 100-02 *supra*.

¹²² Section 1-103 provides in pertinent part: "Unless displaced by the particular provisions of this Act, the principles of law and equity . . . shall supplement its provisions."

¹²³ See text and note 27 *supra*.

¹²⁴ See cases cited in note 120 *supra*.

¹²⁵ *But see* Dugan, note 2 *supra*, at 367-68. Professor Dugan suggests that it is "not unlikely" that the lien creditor would defeat the cash seller at common law. However, he cites no authority for either proposition.

¹²⁶ Secured parties who assert a security interest in the goods by virtue of an after-acquired property clause may or may not qualify as good faith purchasers for value. See text and note 85 *supra*.

squarely within the rules of section 2-403(1). Thus, under this section, the Article 9 secured party's right to the goods is superior to that of the unpaid cash seller. Moreover, section 2-403(4) circuitously establishes priority between the lien creditor and the cash seller by referring one first to Articles 6, 7, and 9 of the Code and then, because of those Articles' failure to resolve the problem, to section 1-103 and the common law priority rules. As a result, the unpaid cash seller assumes priority over the lien creditor.

III. THE CASH SELLER AND THE TRUSTEE IN BANKRUPTCY¹²⁷

Good faith purchasers, secured parties, and lien creditors are not the only third parties that the unpaid cash seller must face in his struggle to reclaim his goods. A seller attempting to reclaim goods may find that the buyer is insolvent and that a trustee in bankruptcy has taken charge of the buyer's assets. The trustee can employ several sections of the Bankruptcy Act (Act)¹²⁸ to oppose the seller's attempt to reclaim the goods. These sections include section 70(c), which gives the trustee the rights of a hypothetical lien creditor; section 67(c), which invalidates certain statutory liens; section 60, which voids certain preferential transfers made by the debtor; and section 70(e), which annuls fraudulent or voidable transfers. This section of our article discusses the effect of these sections of the Bankruptcy Act upon the reclaiming cash seller.

A. Section 70(c)

One of the most commonly used weapons in the trustee's arsenal is section 70(c) of the Bankruptcy Act.¹²⁹ Section 70(c), the so-called "strong arm" provision, states in relevant part:

The trustee shall have as of the date of bankruptcy the rights and powers of . . . a creditor who upon the date of bankruptcy obtained a lien by legal or equitable proceedings upon all property . . . upon which a creditor of the bankrupt upon a simple contract could have obtained such a lien, whether or not such a creditor exists.¹³⁰

Section 70(c), as one court has noted, transforms the trustee into an "ideal creditor . . . armed cap-a-pie with every right and power which is conferred by the law of the state upon its most favored creditor who has acquired a lien

¹²⁷ *Editor's Note:* On November 6, 1978, after the completion of this article, Congress thoroughly revised the existing bankruptcy law in the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 [hereinafter cited as Reform Act]. This Reform Act will take effect on October 1, 1979. *Id.* § 402, 92 Stat. 2682 (1978). Because the Reform Act affects only a portion of this article, we will briefly explain a few of the Reform Act's more important implications for this article at the article's conclusion. At this point, we wish only to say that, based on a preliminary examination of the Reform Act and its legislative history, we believe that most of this article's discussion of the cash seller's right to reclaim when the buyer enters bankruptcy is still relevant.

¹²⁸ 11 U.S.C. §§ 1 *et seq.* (1976).

¹²⁹ *Id.* § 110(c).

¹³⁰ *Id.*

by legal or equitable proceedings."¹³¹ For the transformation to occur, this creditor need not exist;¹³² the trustee must merely hypothesize a creditor entitled to priority over existing bankruptcy claimants under the law of the forum state. However, the trustee is deemed to be an "ideal creditor" only "upon the date of bankruptcy"; in other words, the trustee cannot pick a more advantageous, earlier time on which to acquire the hypothetical lien.¹³³

Having been characterized as the holder of a lien, the trustee can defeat the unpaid cash seller and recover the goods for the bankrupt's estate only if the hypothetical lien creditor could do so under state law. Some courts in such cases have held for the cash seller;¹³⁴ others, for the lien creditor.¹³⁵ We contend, as we did earlier, that the cash seller should prevail over the lien creditor and, thus, over the trustee in bankruptcy proceeding under section 70(c) of the Bankruptcy Act.¹³⁶

B. Section 67(c)

Another of the trustee's weapons is section 67(c) of the Bankruptcy Act.¹³⁷ A closely related section of the Act, section 67(b),¹³⁸ validates a broad range of statutory liens against the trustee. However, section 67(c) carves out many exceptions to section 67(b) by stating "every statutory lien which is not perfected or enforceable at the date of bankruptcy against one acquiring the rights of a bona fide purchaser from the debtor on that date, whether or not

¹³¹ *In re Waynesboro Motor Co.*, 60 F.2d 668, 669 (S.D. Miss. 1932) (discussing predecessor of § 70(c)).

¹³² See 4A COLLIER ON BANKRUPTCY ¶ 70.50, at 609-14 (14th ed. 1976). But see *Pacific Fin. Corp. v. Edwards*, 304 F.2d 224, 228-29 (9th Cir. 1962).

¹³³ See *Lewis v. Manufacturers Nat'l Bank*, 364 U.S. 603, 609 (1961), where the Court stated:

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

See also *In re Federal's, Inc.*, 533 F.2d 509, 512-14 (6th Cir. 1977).

¹³⁴ *In re Mort Co.*, 208 F. Supp. 309, 310-11 (E.D. Pa. 1962); *In re Lindenbaum's Inc.*, 2 U.C.C. Rep. Serv. 495, 497 (E.D. Pa. 1964) (decision of bankruptcy referee). See also *In re Helms Vencer Corp.*, 287 F. Supp. 840, 845-46 (W.D. Va. 1968) (the actual Bankruptcy Act section at issue is uncertain, but the court seems willing to find for the seller in an appropriate case).

¹³⁵ See *In re Richardson Homes Corp.*, 18 U.C.C. Rep. Serv. 384, 387 (N.D. Ind. 1975) (decision of bankruptcy judge); *In re Kirk Cabinets, Inc.*, 15 U.C.C. Rep. Serv. 746, 749 (M.D. Ga. 1974) (decision of bankruptcy judge).

At least one court has held that an unpaid cash seller's right to reclaim goods was an "unperfected security interest" which was subordinate to the rights of a lien creditor under § 9-301(1)(b). This court concluded, therefore, that the trustee in bankruptcy, *qua* hypothetical lien creditor, prevailed over the cash seller. *In re Samuels & Co.*, 526 F.2d 1238, 1248 (5th Cir. 1976).

¹³⁶ See Dugan, *supra* note 2, at 367-68, for a brief suggestion contrary to this conclusion.

¹³⁷ 11 U.S.C. § 107(c) (1976).

¹³⁸ *Id.* § 107(b).

such a purchaser exists," is invalid against the trustee.¹³⁹ In other words, the trustee in bankruptcy steps into the shoes of a hypothetical bona fide purchaser of the goods from the buyer. If the hypothetical purchaser has priority over the holder of a statutory lien on the goods, the trustee also has priority over the lienor.

Section 67(c) has serious implications for the cash seller. If the unpaid cash seller's right to reclaim his goods is characterized as a statutory lien, the cash seller loses his right to reclaim the goods when the trustee enters the picture. Since, under section 2-403(1) of the Code, the unpaid cash seller's right to the goods is inferior to that of the good faith purchaser,¹⁴⁰ the cash seller's right to the goods is also inferior to that of the trustee. There has been no litigation over whether the cash seller's right of reclamation inherent in sections 2-507(2) and 2-511(3) of the Code is a statutory lien. However, several courts have held that section 2-702(2) of the Code, which allows the credit seller to reclaim goods within ten days, creates a statutory lien which is invalidated by section 67(c) of the Act.¹⁴¹

Since the cash seller's reclamation right inherent in sections 2-507(2) and 2-511(3) of the Code is similar to the credit seller's right in section 2-702(2), it is instructive to examine the courts' rationale for characterizing, or for refusing to characterize, the right in section 2-702(2) as a statutory lien. The starting point for the courts' consideration of this problem is section 1(29a) of the Bankruptcy Act,¹⁴² which defines a statutory lien as "a lien arising solely by force of statute upon specified circumstances or conditions."¹⁴³ Sections 2-507(2), 2-511(3), and 2-702(2) plainly qualify as "statutes." However, the definition speaks of a lien "arising *solely* by force of statute."¹⁴⁴ Some courts, noting section 2-702(2)'s close relationship with the common law remedy of rescission for fraud, argue that section 2-702(2) is not "solely statutory" be-

¹³⁹ *Id.* § 107(c)(1)(B).

¹⁴⁰ See text and notes 79-82 *supra*.

¹⁴¹ *In re Neisner Bros., Inc.*, 25 U.C.C. Rep. Serv. 157, 159-60 (S.D.N.Y. 1978) (decision of bankruptcy judge); *In re Kee Lox Mfg. Co.*, 22 U.C.C. Rep. Serv. 938, 942-43 (E.D. Pa. 1977) (decision of bankruptcy judge); *In re Perskey & Wolf, Inc.*, 19 U.C.C. Rep. Serv. 812, 814-17 (N.D. Ohio 1976) (decision of bankruptcy referee); *In re Giltex, Inc.*, 17 U.C.C. Rep. Serv. 887, 888 (S.D.N.Y. 1975); *In re Wetson's Corp.*, 17 U.C.C. Rep. Serv. 423, 427-28 (S.D.N.Y. 1975) (decision of bankruptcy judge); *In re Good Deal Supermarkets, Inc.*, 384 F. Supp. 887, 889 (D.N.J. 1974). See also *In re J. R. Nieves & Co.*, 446 F.2d 188, 190 (1st Cir. 1971); *In re Trahan*, 283 F. Supp. 620, 623 (W.D. La.), *aff'd*, 402 F.2d 796 (5th Cir. 1968) (*Trahan* and *Nieves* deal with interpretations of civil codes).

It is interesting to note, however, that all the United States Courts of Appeals that have considered this question have held that § 2-702(2) of the Code does *not* create a statutory lien. *In re PFA Farmers Market Ass'n*, 24 U.C.C. Rep. Serv. 1176, 1187-92 (8th Cir. 1978); *In re Federal's Inc.*, 553 F.2d 509, 516-17 (6th Cir. 1977); *In re Telemart Enterprises, Inc.*, 524 F.2d 761, 763-64 (9th Cir. 1975). See also *In re National Bellas Hess, Inc.*, 17 U.C.C. Rep. Serv. 430 (S.D.N.Y. 1975) (decision of bankruptcy judge).

¹⁴² 11 U.S.C. § 1(29a) (1976).

¹⁴³ *Id.*

¹⁴⁴ *Id.* (emphasis added).

cause it is simply a codification of the common law.¹⁴⁵ Other courts contend that the differences between section 2-702(2) and its common law counterparts justify characterizing section 2-702(2) as "solely statutory" within the definition of section 1(29a).¹⁴⁶

Without discussing the tedious and unanswerable question whether the cash sale provisions of sections 2-507(2) and 2-511(3) are closer to their common law counterparts than section 2-702(2) is to its forebears, we can say confidently that sections 2-507(2) and 2-511(3), as the courts interpret them, are closely related to the common law of cash sales.¹⁴⁷ As with section 2-702(2), however, this relationship does not provide a clear answer to the question whether the cash seller's right to reclaim his goods constitutes a statutory lien for purposes of section 67(c). While some courts will find that the seller's right of reclamation inherent in sections 2-507(2) and 2-511(3) is not "solely statutory," other courts may characterize the right as "solely statutory."

In deciding whether to characterize the cash seller's right in sections 2-507(2) and 2-511(3) as a statutory lien within the purview of section 67(c) of the Act, courts also must determine whether the right is a "lien." The Bankruptcy Act does not define the term "lien." Many courts, however, define it as a hold or claim on property for the payment of some debt, obligation, or duty.¹⁴⁸ Again, it is helpful to look at cases in which courts discuss whether the right in section 2-702(2) constitutes a "lien." Some courts have held that section 2-702(2) is not a "lien" because lien holders typically can repossess and sell the encumbered property and also recover any remaining debt from the debtor, whereas the reclaiming seller under section 2-702(2) can only recover and sell the goods.¹⁴⁹ These courts base their conclusion on section 2-702(3)'s statement that "[s]uccessful reclamation of goods excludes all other remedies with respect to them." Other courts have held that section 2-702(2) does

¹⁴⁵ See *In re Federal's, Inc.*, 553 F.2d 509 (6th Cir. 1977):

We must agree with the district court's observation that § 2-702 is more than a mere codification of the common law. Nevertheless, we are persuaded that the right asserted by the seller under § 2-702(2) is a valid state-created right of ownership. Because that right conceptually has its antecedents in the historical and equitable right of a defrauded seller to reclaim the goods he has sold to an insolvent buyer, we hold it cannot be said to arise "solely by force of statute" under § 1(29).

Id. at 516 (emphasis added). See also *In re National Bellas Hess, Inc.*, 17 U.C.C. Rep. Serv. 431-32 (S.D.N.Y. 1975) (decision of bankruptcy judge).

¹⁴⁶ See *In re Giltex, Inc.*, 17 U.C.C. Rep. Serv. 887, 889-90 (S.D.N.Y. 1975); *In re Wetson's Corp.*, 17 U.C.C. Rep. Serv. 423, 426 (S.D.N.Y. 1975) (decision of bankruptcy judge).

¹⁴⁷ See text and notes 34-50 *supra*.

¹⁴⁸ See, e.g., 51 AM. JUR. 2d *Liens* § 1, at 142-43 (1970); BLACK'S LAW DICTIONARY 1072-73 (rev'd 4th ed. 1968). For a compendium of definitions of this term, see 53 N.C. L. REV. 169, 172-73 (1974).

¹⁴⁹ See *In re National Bellas Hess, Inc.*, 17 U.C.C. Rep. Serv. 430, 432-33 (S.D.N.Y. 1975) (decision of bankruptcy judge).

create a "lien" because the reclamation right, like a lien, terminates upon payment of the debt.¹⁵⁰

This case law, like that involving the definition of "solely statutory," does not answer clearly the question whether the reclamation right inherent in sections 2-507(2) and 2-511(3) constitutes a "lien." Obviously, this reclamation right fits within the general definition of a "lien." However, the seller's common law right of reclamation, from which the right in sections 2-507(2) and 2-511(3) stem, was not considered a "lien."¹⁵¹ Moreover, the argument that the reclamation right in section 2-702(2) is not a lien because it is limited to recovery of the goods is equally applicable to the right in sections 2-507(2) and 2-511(3). Finally, some courts might characterize this reclamation right as a "lien" because it terminates upon payment. We believe this characterization would be improper, though, since the same argument would apply equally to most of the unpaid cash seller's remedies, few of which are "liens."¹⁵² Thus, we believe courts should not deem the seller's right of reclamation under sections 2-507(2) and 2-511(3) a "lien."

The inevitable, though unsatisfying, conclusion is that it is unclear whether the seller's right of reclamation under sections 2-507(2) and 2-511(3) is a voidable statutory lien. We contend, however, that the cash seller's right of reclamation inherent in these sections is not a "lien" and does not arise "solely by force of statute," and, therefore, does not fit the Act's definition of a statutory lien. The legislative history of section 67(c) of the Bankruptcy Act supports this conclusion.¹⁵³ Our contention is critical since it is clear that if

¹⁵⁰ See *In re Giltex, Inc.*, 17 U.C.C. Rep. Serv. 887, 890-91 (S.D.N.Y. 1975); *In re Wetson's Corp.*, 17 U.C.C. Rep. Serv. 423, 426-27 (S.D.N.Y. 1975) (decision of bankruptcy judge).

¹⁵¹ The common law clearly distinguished between the seller's right to reclaim goods for which the buyer had not paid, and interests such as that of the conditional seller. Common law designated the latter as a lien, but it did not characterize the former in this fashion. See text and notes 7-9 *supra*.

¹⁵² See U.C.C. § 2-703. This section makes the listed seller's remedies dependent upon (among other things) the buyer's failure "to make a payment due on or before delivery." Presumably, the seller's action for the price, at least, would terminate upon payment of the price. And it is not obvious how this remedy could be regarded as a "lien," since it does not seem to involve any sort of hold or claim on the goods sold. See U.C.C. § 2-709.

¹⁵³ At one time, the Bankruptcy Act preserved state-created priorities, thus giving the states substantial power to determine which creditors' claims had priority over which other creditors' claims. Act of July 1, 1898, ch. 541, § 64, 30 Stat. 563. In 1938, Congress amended the Act, taking this power away from the states. Act of June 22, 1938, ch. 575, § 64, 52 Stat. 874. Some states subsequently recast what once were state-created priorities in the form of liens in an attempt to salvage some of their lost power. See *In re Giltex, Inc.*, 17 U.C.C. Rep. Serv. 887, 892 (S.D.N.Y. 1975). Congress, in turn, reacted by amending § 67 of the Act to invalidate many of these statutory liens. Act of July 5, 1966, Pub. L. No. 89-495, §§ 3-4, 80 Stat. 268-69 (as codified in 11 U.S.C. §§ 107(c)(1)(A),(B),(C) (1970)). The general recognition of statutory liens in bankruptcy was retained in the new § 67(b). See 11 U.S.C. § 107(b) (1976).

Some courts have concluded on the basis of this legislative history that section 2-702(2) is one of the statutory liens at which § 67(c)(1)(A) is aimed. *In re Giltex, Inc.*, 17 U.C.C. Rep. Serv. 887, 892-95 (S.D.N.Y. 1975); *In re Wetson's Corp.*, 17 U.C.C. Rep. Serv. 423, 427-29 (S.D.N.Y. 1975); *In re Good Deal Supermarkets Inc.*, 384 F.

the cash seller's right of reclamation is denominated a statutory lien, the seller loses his right to reclaim the goods to the trustee in bankruptcy armed with section 67(c) of the Act.¹⁵⁴

Supp. 887, 889 (D.N.J. 1974). Those courts presumably would conclude, for the same reasons, that §§ 2-507(2) and 2-511(3) are statutory liens at which § 67(c)(1)(B) of the Act is aimed. Not all courts have adopted this reasoning, however. In fact, the three United States Courts of Appeals that have considered this question rejected this reasoning. See *In re PFA Farmers Market Ass'n*, 24 U.C.C. Rep. Serv. 1176, 1192 (8th Cir. 1978); *In re Federal's Inc.*, 553 F.2d 509, 516-17 (6th Cir. 1977); *In re Telemart Enterprises, Inc.*, 524 F.2d 761, 763-64 (9th Cir. 1975).

In addition, the cash seller's reclamation right is not one of the evils at which the 1966 amendment of § 67(c) of the Bankruptcy Act is directed. The common law analogues of § 2-507(2), § 2-511(3), and § 2-702(2) pre-date the developments which this amendment addressed. Cf. *In re Telemart Enterprises, Inc.*, 524 F.2d 761, 764 (9th Cir. 1975). Furthermore, the legislative history of this amendment, at least the Senate Report accompanying the legislation, does not refer to § 2-507(2), § 2-511(3), or § 2-702(2). See S. REP. NO. 1159, 89th Cong., 2d Sess. (1966) and S. REP. NO. 999, 89th Cong., 2d Sess., reprinted in [1966] U.S. CODE CONG. & AD. NEWS 2442-68. In the context of § 2-702(2), see *In re Federal's Inc.*, 553 F.2d 509, 516-17 (6th Cir. 1977), where the court stated:

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

Finally, the Senate Report of the Amendment states that it aims in part at "liens creating a noncontingent property interest in a specific asset." S. REP. NO. 999, 89th Cong., 2d Sess., reprinted in [1966] U.S. CODE CONG. & AD. NEWS 2457. Although a cash seller's reclamation right under § 2-507(2) and § 2-511(3) is clearly an interest "in a specific asset," it is "contingent" upon factors such as the buyer's failure to pay, the seller's compliance with the ten-day limitation (if it exists), and so forth.

¹⁵⁴ In three recent cases, courts invalidated the seller's right of reclamation as a statutory lien under § 67(c)(1)(A) of the Bankruptcy Act, but nevertheless permitted the seller to employ whatever pre-Code remedies he had. *In re Neisner Bros., Inc.*, 25 U.C.C. Rep. Serv. 157, 162-63 (S.D.N.Y. 1978) (decision of bankruptcy judge); *In re Weston's Corp.*, 17 U.C.C. Rep. Serv. 423, 429 (S.D.N.Y. 1975); *In re Giltex, Inc.*, 17 U.C.C. Rep. Serv. 887, 895-96 (S.D.N.Y. 1975) (decision of bankruptcy judge). The courts permitted the seller to resort to common law relief despite language in § 2-702(2) which provided: "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." One court avoided this exclusionary language by arguing:

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

In re Weston's Corp., 17 U.C.C. Rep. Serv. 423, 429 (S.D.N.Y. 1975) (decision of bankruptcy judge). In *In re Giltex, Inc.*, the court followed the reasoning in *In re Weston's Corp.* *In re Giltex, Inc.*, 17 U.C.C. Rep. Serv. 887, 895-96 (S.D.N.Y. 1975).

C. Section 60

The trustee in bankruptcy's ability to recover goods for the benefit of the bankrupt's estate is not dependent on his securing the goods before the creditor can do so. Under section 60(b) of the Bankruptcy Act,¹⁵⁵ the trustee can claim an unpaid cash seller's goods even though the seller has repossessed them before the date of bankruptcy.¹⁵⁶ Section 60(a)(1)¹⁵⁷ defines voidable pre-bankruptcy transfers, which are called "preferences," 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.¹⁵⁸

Under section 60(b) of the Act, the trustee can avoid a preference "if the creditor receiving it or to be benefitted thereby . . . has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent."¹⁵⁹

Although there are no cases in which a trustee has proceeded under section 60 against a cash seller who has reclaimed his goods,¹⁶⁰ such a case is

The effect of these cases on other Bankruptcy Act provisions is unclear since they deal only with § 67(c) of the Act. The effect of these cases on sections of the UCC other than § 2-702(2) is also unclear. However, there is no apparent reason not to extend the reasoning in these cases to §§ 2-507(2) and 2-511(3), and not to allow cash sellers to utilize pre-Code remedies if their Code reclamation rights are invalidated. There is no exclusivity provision in § 2-507(2) or § 2-511(3). Moreover, § 1-103 should preserve the seller's pre-Code remedies.

¹⁵⁵ 11 U.S.C. § 96(b) (1976).

¹⁵⁶ In fact, the seller might be deemed to have retaken the goods by merely demanding them. *Cf. In re Bel Air Carpets, Inc.*, 452 F.2d 1210, 1211 (9th Cir. 1971) (determining whether a transfer was in violation of § 70(d)).

¹⁵⁷ 11 U.S.C. § 96(a)(1) (1976).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* § 96(b). If the unpaid cash seller's right of reclamation is regarded as a preference under § 60(a) of the Bankruptcy Act, the cash seller might argue that the trustee cannot void the preference under § 60(b) because the seller did not have "reasonable cause to believe" that the buyer was insolvent. For cases concerning whether the seller's reclamation of the goods evidences belief in the buyer's insolvency, see, e.g., *Brown v. Tru-Lite, Inc.*, 398 F. Supp. 800, 804-05 (W.D. La. 1975) (seizure of goods by itself does not necessarily create finding of reasonable cause or a duty to investigate; each case must be considered on own facts); *Bossak & Co. v. Cox*, 285 F. 147, 148-49 (5th Cir. 1922) (recovery of goods then worth 50% of their sale price sufficient to establish reasonable cause). For views on whether a bad check creates a reasonable belief in the buyer's insolvency, see, e.g., *C.A. Swanson & Sons Poultry Co. v. Wylie*, 237 F.2d 16, 18 & n.4 (9th Cir. 1956) (NSF check one factor among many to be considered); *Dinkelspiel v. Weaver*, 116 F. Supp. 455, 462 (W.D. Ark. 1953) (NSF check not conclusive; must consider other circumstances); *Robie v. Myers Equipment Co.*, 114 F. Supp. 177, 182 (D. Minn. 1953) (dishonored check plus subsequent offer of postdated check enough to create finding of reasonable cause); *Connors v. Bucksport Nat'l Bank*, 214 F. 847, 849-50 (D. Maine), *aff'd*, 216 F. 990 (1st Cir. 1914) (bad check plus other information enough for finding of reasonable cause).

¹⁶⁰ Two cases mentioning cash sellers reclaiming their goods under § 2-507(2) or § 2-511(3) are *In re Colacci's of America, Inc.*, 490 F.2d 1118, 1120 (10th Cir. 1974)

possible.¹⁶¹ We submit, however, that if such a case arises, the cash seller should prevail over the trustee for a number of reasons. First, the seller is not

(decided under § 60(a) of the Bankruptcy Act) and *In re Helms Veneer Corp.*, 287 F. Supp. 840, 844-46 (W.D. Va. 1968) (which is not clearly a § 60 case). However, neither addressed the clash between § 60 and U.C.C. § 2-507(2) and § 2-155(3). Cf. Dugan, *supra* note 2, at 369-70.

¹⁶¹ Our research also has not disclosed any common law cash sale cases in which the trustee challenged the cash seller under § 60 of the Bankruptcy Act. This lack of cases probably stems from the common law view of title in cash sales. In a cash sale at common law, the buyer obtained title to the goods only upon payment; if the buyer did not pay for the goods, he did not take title. Therefore, the goods that an unpaid cash seller reclaimed were not the "property of the debtor." Thus, under § 60(a)'s definition, the reclamation was not a voidable preference and § 60(b) was inapplicable. See 4A COLLIER, *supra* note 211, ¶ 60.07, at 791, ¶ 70.19 [5], at 242-44. Similarly, in consignment and bailment cases, the repossessing party triumphed over the trustee, usually on the grounds that the bankrupt never had title to the goods. See *Kemp-Booth Co. v. Calvin*, 84 F.2d 377, 380-81 (9th Cir. 1936); *In re Wright-Dana Hardware Co.*, 205 F. 335, 336 (N.D.N.Y. 1913), *aff'd*, 211 F. 908 (2d Cir. 1914). The repossessing seller also defeated the trustee in cases where the bankrupt fraudulently obtained the goods. See, e.g., *Fisher v. Shreve, Crump & Lowe Co.*, 7 F.2d 159, 161 (D. Mass. 1925). However, in cases involving credit where the buyer did not defraud the seller, the trustee won under § 60. See *Marks v. Goodyear Rubber Sundries, Inc.*, 238 F.2d 533, 534 (2d Cir. 1956); *Plummer v. Myers*, 137 F. 660, 662 (E.D. Pa. 1905).

Despite the inapplicability of § 60(b) to common law cases involving reclaiming cash sellers, it is possible that § 60(b) is relevant to Code cases involving cash sellers. The Code deemphasizes the concept of title, U.C.C. § 2-401, thus muddying the issue of whether the buyer or the unpaid seller has title to the goods. However, the Code may reverse the common law result. Comment 1 to § 2-401 states:

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. The basic policy of this Article that known purpose and reason should govern interpretation cannot extend beyond the scope of its own provisions. It is therefore necessary to state what a "sale" is and when title passes under this Article in case the courts deem any public regulation to incorporate the defined term of the "private" law.

Thus, if the Bankruptcy Act is regarded as such a "public regulation," the "title" provisions of §§ 2-401(1)-(3) may apply. The relevant title provision seems to be § 2-401(2) which states that "[u]nless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with respect to the physical delivery of the goods." Thus, in a typical cash sale, the buyer obtains title to the goods as soon as the seller delivers them. Therefore, the goods would be the "property of the debtor" under § 60(a) of the Bankruptcy Act.

The issue of whether the buyer or the seller has title to goods for which the buyer has not paid is also important in the context of § 64(a) of the Bankruptcy Act. 11 U.S.C. § 104(a) (1976). Section 64(a), another possible tool of the trustee, establishes priorities among classes of creditors. In 1938, Congress amended § 64(a) to eliminate the advantage accorded to state-created priorities. See Act of July 1, 1898, ch. 541, § 64, 30 Stat. 653, *as amended by* Act of June 22, 1938, ch. 575, § 64, 52 Stat. 874. Sections 2-507(2) and 2-511(3) may be classified as invalid, state-created priorities because they allow a cash seller to recover goods after the buyer goes into bankruptcy. Indeed, some courts have reasoned similarly in cases involving the reclamation of goods under § 2-702. They hold that § 2-702(2) is an invalid, state-created priority. See *In re Neisners Bros., Inc.*, 25 U.C.C. Rep. Serv. 157, 161-62 (S.D.N.Y. 1978) (decision of bankruptcy judge); *In re Federal's, Inc.*, 12 U.C.C. Rep. Serv. 1142 (E.D. Mich.

a "creditor" within the meaning of section 1(11) of the Act.¹⁶² The Act defines "creditors" as "anyone who owns a debt, demand or claim provable in bankruptcy."¹⁶³ The unpaid cash seller superficially appears to qualify as a creditor, but there is considerable authority to the effect that an individual whose property has been stolen, misappropriated, converted, or fraudulently obtained is not a "creditor" if he stands on his rights as owner, demands return of the goods, and does not treat the possessor of the goods as a debtor (for example, by demanding payment rather than possession).¹⁶⁴ Although most of these cases involved fraudulent conduct by the bankrupt, there is no reason to treat the unpaid cash seller differently, especially since the defrauded seller's and the unpaid cash seller's interests in the goods are very similar at common law and under the Code. Moreover, many "bad check" transactions involve fraud.¹⁶⁵ Thus, the unpaid cash seller should not be considered a "creditor" within the meaning of the Bankruptcy Act.

Second, the unpaid cash seller's repossession of the goods is not a transfer "for or on account of the antecedent debt" for purposes of section 60(a). Courts regard the buyer's payment of the purchase price and the cash seller's delivery of the goods as substantially simultaneous,¹⁶⁶ and, thus, as not "for or on account of the antecedent debt."¹⁶⁷ However, it is often said that any extension of credit, no matter how brief, can change a cash sale into a credit sale and render any transfer by the buyer to the seller preferential.¹⁶⁸ Thus, if a buyer exchanges a "bad check" for the goods and a cash seller later retakes the goods, the question arises whether this retaking is a transfer "on account of an antecedent debt." We submit that the debt and cash seller's corresponding right to reclaim arises when the check is not paid, and that the seller's subsequent repossession of the goods relates back to the time the right of reclamation arose. Therefore, the right to reclaim is not "on account of an

1973) (decision of bankruptcy referee), *aff'd*, 402 F. Supp. 1357 (E.D. Mich. 1975); *In re Perskey & Wolf, Inc.*, 19 U.C.C. Rep. Serv. 812 (N.D. Ohio 1976) (decision of bankruptcy referee). However, *In re Federal's, Inc.* has been expressly overruled, 553 F.2d 509 (6th Cir. 1977). *In re Perskey & Wolf, Inc.* also has been impliedly overruled by the Sixth Circuit's decision in *In re Federal's Inc.* The validity of this argument is therefore questionable. See *In re PFA Farmers Market Ass'n*, 24 U.C.C. Rep. Serv. 1176, 1187-92 (8th Cir. 1978); *In re Federal's Inc.*, 553 F.2d 509, 517-18 (6th Cir. 1977); *In re Telemart Enterprises, Inc.*, 524 F.2d 761, 764-66 (9th Cir. 1975). Since there is no reason to treat differently the right of reclamation in § 2-507(2) or § 2-511(3) and that in § 2-702(2), it is unlikely that a court would consider the cash seller's right of reclamation to be invalid, state-created priority.

¹⁶² 11 U.S.C. § 1(11) (1976).

¹⁶³ *Id.*

¹⁶⁴ 3 COLLIER, *supra* note 132, ¶ 60.18.

¹⁶⁵ This is not, however, to suggest that the pre-Code cash sale reclamation right and the defrauded seller's rescission right were exactly the same, or, similarly, that the cash seller's right under § 2-507(2) and § 2-511(3), and the credit seller's rights under § 2-702(2) are equivalent. We simply believe that there is no compelling reason to treat the situations differently for purposes of § 60 of the Act.

¹⁶⁶ See text at note 38 *supra*.

¹⁶⁷ See 3 COLLIER, *supra* note 132, ¶ 60.19, at 847-49; ¶ 60.23, at 872-73.

¹⁶⁸ See, e.g., *In re Helms Veneer Corp.*, 287 F. Supp. 840, 843 (W.D. Va. 1968). The seller arguably retakes the goods to satisfy the buyer's preexisting obligation to pay for the goods.

antecedent debt."¹⁶⁹ Unless the seller's repossession of the goods is regarded as relating back to the time the debt arose, the repossession always will constitute a transfer "for or on account of an antecedent debt" because a seller obviously cannot reclaim his goods at the exact moment the check is dishonored.¹⁷⁰ Moreover, unless the repossession is regarded as *not* "for or on account of an antecedent debt," the cash seller is put in the same position in bankruptcy as the credit seller. Therefore, assuming that the cash seller repossesses his goods within a reasonable time, the brief lapse between the non-payment of the check, or creation of the debt, and the reclamation is insignificant.

Although, in our opinion, the unpaid cash seller's reclamation of his goods clearly is not a voidable preference within the meaning of section 60(b), the courts have not yet resolved the issue. Consequently, the unpaid cash seller's best strategy is not to reclaim his goods before bankruptcy but, rather, to file a bankruptcy reclamation petition and force the trustee to counter the petition with the less advantageous sections of the Act.¹⁷¹

D. Section 70(e)

Finally, the trustee in bankruptcy may resort to section 70(e) of the Bankruptcy Act¹⁷² which provides:

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

¹⁶⁹ Cf. *In re Telemart Enterprises, Inc.*, 524 F.2d 761, 764 (9th Cir. 1975) (involving § 2-702(2) of the Code):

[U]nder section 2-702(2) receipt of goods on credit while insolvent is deemed a fraud on the creditor rendering the sale voidable. The sale thus is defective from its inception. Clearly no new security has been given for an antecedent debt; the "lien," if it is conceived as such, attached at the instant the debt was created. Because no transfer is made on account of an antecedent debt, section 60 could never be applicable.

The above reasoning is equally applicable to a situation involving § 2-507(2) or § 2-511(3), where the event creating the "debt" (the buyer's failure to pay) also spawns the buyer's right of reclamation.

¹⁷⁰ If this argument seems extreme, consider the over-the-counter cash sale where the seller conveys the goods to the buyer on "cash" terms in expectation of immediate payment, the buyer does not pay, and the seller immediately retakes the goods. It is absurd to view the lapse of time between the creation of the "debt" (assuming that this time can be exactly specified) and the repossession as evidence that the repossession was "for or on account of an antecedent debt" and, thus, preferential. It is equally absurd to differentiate between over-the-counter cash sales and cash sales in which the seller transfers possession in exchange for a bad check and acts to repossess immediately upon notification that the check has not been paid.

¹⁷¹ This advice seems rather anomalous since the seller who acts less promptly would be more successful than the seller who acts quickly. But, the seller perhaps can turn this anomaly to his advantage by arguing that his rights should be no less when he acts promptly than when he acts belatedly.

¹⁷² 11 U.S.C. § 110(3) (1976).

under this title, shall be null and void as against the trustee of such debtor.¹⁷³

Section 70(e) permits the trustee to step into the shoes of any existing creditor of the bankrupt.¹⁷⁴ If this creditor has a claim to certain assets which is superior to the claim of any other creditor—including a reclaiming cash seller—the trustee can claim those goods. The trustee's power under section 70(e) is uncharacteristically restricted in one sense: unlike his power under sections 70(c) and 67(c), it exists only if an actual creditor with a superior claim to the goods exists.¹⁷⁵ In one respect, however, the trustee's power also is uncharacteristically broad. Under the much criticized¹⁷⁶ doctrine of *Moore v. Bay*,¹⁷⁷ the trustee *qua* creditor can displace the entire claim of another claimant even if the creditor into whose shoes he stepped could displace only a portion of it.¹⁷⁸

Thus, section 70(e) may present a dire threat to the reclaiming cash seller. Since the cash seller's right of reclamation is inferior to the rights of an Article 9 secured party¹⁷⁹ and, in some jurisdictions, a lien creditor,¹⁸⁰ the

¹⁷³ *Id.* § 110(e)(1).

¹⁷⁴ Like § 60 of the Bankruptcy Act, § 70(e) enables the trustee to invalidate transfers made by the debtor prior to the filing of the petition in bankruptcy. In fact, § 70(e) seems to apply only if the seller reclaims his goods before bankruptcy.

¹⁷⁵ See 4A COLLIER, *supra* note 132 ¶ 70.90[1], at 1029-30. Since in all likelihood a lien creditor's rights are not superior to those of a reclaiming Code cash seller, only the presence of a creditor with an Article 9 security interest would help the trustee to defeat the cash seller under § 70(e) of the Act.

¹⁷⁶ See MCLACHLAN, *BANKRUPTCY* 330-33 (1965); Kennedy, *The Trustee in Bankruptcy as a Secured Creditor Under the Uniform Commercial Code*, 65 MICH. L. REV. 1419, 1421 (1967). Professor Kennedy notes that the result in *Moore* "contravenes a fundamental attribute of subrogation—that the person subrogated acquires no greater rights than those of the person to whose position he is subrogated." *Id.*

¹⁷⁷ 284 U.S. 4 (1931).

¹⁷⁸ Thus, if the secured creditor had a claim of only \$100, the trustee could totally avoid a seller's right of reclamation even though the goods were worth \$10,000.

¹⁷⁹ See 4A COLLIER, *supra* note 132, ¶ 70.90, at 1034-35. Professor Kennedy argues strenuously that the trustee in bankruptcy should not be allowed to step into the shoes of a holder of a perfected security interest unless the trustee himself could avoid the secured party's claim. Kennedy, *The Trustee in Bankruptcy as a Secured Creditor Under the Uniform Commercial Code*, 65 MICH. L. REV. 1419, 1428-34 (1967). The courts have not yet resolved this issue, however. WHITE & SUMMERS, *supra* note 29 at 891.

Professor Kennedy's argument, if accepted by a court, would assist the reclaiming seller since the trustee usually cannot avoid the security interest and, therefore, could not use the security interest to displace the cash seller's right. If, however, the Article 9 security interest is unperfected, the trustee can displace it and use it against the cash seller, thereby defeating the reclaiming cash seller.

¹⁸⁰ In these jurisdictions, § 67(a)(1) of the Bankruptcy Act, 11 U.S.C. § 107(a)(1) (1976), could prove useful. See Braucher, *Reclamation of Goods from a Fraudulent Buyer*, 65 MICH. L. REV. 1281, 1292 (1967). Section 67(a)(1) grants the trustee the right to avoid liens obtained by attachment, judgment, levy, or other legal or equitable process or proceeding within four months before the filing of petition in bankruptcy, if at the time the lienor obtained the lien the person against whom it was obtained was insolvent. If subsequent to a cash seller's delivery of the goods, a creditor of an insolvent buyer obtains a judicial lien against the buyer within four months of bankruptcy, the

reclaiming seller may be vulnerable to the trustee's attack when either of these parties has a claim to the same goods.¹⁸¹

E. Summary

Although the rights of the unpaid cash seller when the buyer goes into bankruptcy are far from settled, we can draw some conclusions. Section 70(c) of the Bankruptcy Act, the hypothetical lien creditor provision, poses no threat to the cash seller if, as we contend, the cash seller's reclamation right is superior to the rights of a lien creditor. Section 67(c) of the Act is similarly harmless since the cash seller's right of reclamation is not a "statutory lien" invalidated by that section. Furthermore, section 60(b) of the Act, which avoids "preferential transfers" made within four months of bankruptcy, is inapplicable to the cash seller since the seller is not a "creditor" and does not reclaim the goods "for or on account of an antecedent debt" and, therefore, has not made a preferential transfer. One real threat to the cash seller does exist, however. Under section 70(c) of the Act, the trustee can defeat the cash seller's right to reclaim goods if any other creditor of the buyer could defeat all or part of the cash seller's claim. Thus, although the unpaid seller's right to reclaim his goods is fairly secure even in bankruptcy, it is not invincible.

Postscript: As stated in note 127, the wholesale changes in federal bankruptcy law effected by the Bankruptcy Reform Act of 1978¹⁸² necessitate some discussion of its impact on this article. Most of the article, however, remains relevant under the Reform Act. Moreover, the Reform Act strengthens our basic contention that the cash seller should defeat the trustee in bankruptcy.

For purposes of this article, the most important provision in the Reform Act is section 546(c).¹⁸³ Under this section, the trustee's right (via sections 60, 67(c), and 70(c) of the Bankruptcy Act) to goods sold to the bankrupt are "subject to any statutory right or common law right of a seller, in the ordinary course of such seller's business, to reclaim such goods if the debtor has received such goods while insolvent," and if the seller makes a written demand for the goods within ten days of their receipt by the

trustee may avoid that lien. In addition, under § 67(a)(3), 11 U.S.C. § 107(a)(3) (1976), the trustee can "preserve" the lien for the benefit of the estate, and use against other creditors in the bankruptcy proceeding whatever rights the judicial lien creditor had. Thus, the trustee would prevail over a reclaiming cash seller to the extent that a judicial lien would prevail over the seller.

It has been suggested, however, that § 67(a) may apply only to liens on property to which the trustee succeeds under § 70(a), 11 U.S.C. § 110(a) (1976). Section 70(a) grants the trustee the title of the bankrupt as of the date of bankruptcy. See 4A COLLIER, *supra* note 132, ¶ 67.03, at 66.2 If so, and if the seller reclaims the goods before bankruptcy, thus regaining full title, § 67(a) would not help a trustee.

¹⁸¹ A creditor with an Article 9 security interest in after-acquired property would suffice, of course. As to the prevalence of such parties, see Dugan, *supra* note 2, at 330-34. As for the lien creditor, given the typically short time period between delivery and reclamation, the likelihood of an actual creditor levying or attaching is fairly slight (assuming, of course, that such a lien creditor would have rights superior to those of the reclaiming seller).

¹⁸² Pub. L. No. 95-598, 92 Stat. 2549 (1978).

¹⁸³ Pub. L. No. 95-598, § 546(c), 92 Stat. 2597 (1978).

debtor.¹⁸⁴ The House¹⁸⁵ and Senate¹⁸⁶ subcommittee chairmen have stated that this section "applies to receipt of goods on credit as well as by cash sales." The House¹⁸⁷ and Senate¹⁸⁸ Reports, however, state that this provision resolves the longstanding conflict between the trustee and the reclaiming credit seller proceeding under UCC section 2-702(2);¹⁸⁹ neither report mentions the cash seller. Nevertheless, to the extent that the cash seller's reclamation right is tied to section 2-702,¹⁹⁰ section 546(c) is applicable to the cash sale seller. However, if section 546(c) of the Reform Act applies to the cash seller, this section sharply limits the seller's rights due to its ten-day written demand requirement.¹⁹¹ Because of section 546(c)'s uncertain applicability to cash sales and because failure to make the necessary written demand will probably force consideration of the seller's rights under the provisions negated by section 546(c) (not to mention those it does not affect), the Bankruptcy Reform Act analogs of section 70(c), 67(c), 60, and 70(e) will still be of concern to the cash seller.

The Reform Act's revisions of sections 70(c)¹⁹² and 67(c)¹⁹³ also do not seem to affect our discussion of these sections in this article. Moreover, although the Reform Act revised substantially section 60 of the existing Bankruptcy Act,¹⁹⁴ the revision basically embodies the current section's definition of the key term "preference"¹⁹⁵ and, therefore, does not affect our discussion of section 60.¹⁹⁶ The only change in the Reform Act that

¹⁸⁴ For the current "demand" requirements and the difficulties they pose, see text and notes 58-73 *supra*.

¹⁸⁵ 124 CONG. REC. H11089 (daily ed. Sept. 28, 1978) (remarks of Rep. Edwards), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 672 (Supp. 11c; Dec., 1978).

¹⁸⁶ 124 CONG. REC. S17406 *et seq.* (daily ed. Oct. 6, 1978) (remarks of Sen. DeConcini), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 742 (Supp. 11c; Dec., 1978).

¹⁸⁷ H.R. REP. NO. 595, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 544 (Supp. 11c; Dec., 1978).

¹⁸⁸ S. REP. NO. 989, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 88-89 (Supp. 11c; Dec., 1978).

¹⁸⁹ See notes 142-52 *supra* and accompanying text.

¹⁹⁰ See notes 51-73 *supra* and accompanying text.

¹⁹¹ For the problems posed for the cash seller by the current ten-day oral demand requirement, see text and notes 65-66 *supra*.

¹⁹² See Pub. L. No. 95-598, §§ 544(a)(1)(2), 92 Stat. 2596 (1978). See also H.R. REP. NO. 595, 95th Cong., 2d Sess., and S. REP. NO. 989, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 87, 542-43 (Supp. 11c; Dec., 1978). For this article's discussion of § 70(c), see text and notes 129-36 *supra*.

¹⁹³ See Pub. L. No. 95-598, § 545(2), 92 Stat. 2597 (1978). See also H.R. REP. NO. 595, 95th Cong., 2d Sess., and S. REP. NO. 989, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 87-88, 543 (Supp. 11c; Dec., 1978). For this article's discussion of section 67(c), see text and notes 137-54 *supra*. Here, as before, the basic question is whether § 2-507(2) or § 2-511(3) is a "statutory lien." For the new Act's definition of this term, see Pub. L. No. 95-598, § 101(38), 92 Stat. 2554 (1978). However, since § 546(c) clearly implies that the § 2-702(2) reclamation right is not to be so regarded, it is doubtful the § 2-507(2) or § 2-511(3) rights are "statutory lines."

¹⁹⁴ See Pub. L. No. 95-598, § 547, 92 Stat. 2597-600 (1978).

¹⁹⁵ Compare *id.* § 547(b), 92 Stat. 2598 (1978) with the text at note 158 *supra*.

¹⁹⁶ Section 60 is discussed at text and notes 155-71 *supra*. The "reasonable cause" discussion at text and notes 264 *supra* is substantially changed by the Reform Act. See Pub. L. No. 95-598, § 547(b)(4), 92 Stat. 2598 (1978). Cf. Pub. L. No. 95-598, §§ 101(9), 541(a)(1), 92 Stat. 2550-51, 2594 (1978) (slightly changed definitions of "property of the debtor" and "creditor").

is likely to affect our discussion in this article is the Act's revision of section 70(e).¹⁹⁷ The legislative history accompanying that section suggests that the trustee's ability to deploy it against pre-bankruptcy transfers to reclaiming cash sellers now may be somewhat limited.¹⁹⁸

CONCLUSION

As we have demonstrated in this article, the rights of a cash seller under the Uniform Commercial Code should not differ radically from those of the cash seller under the common law. Section 2-507(2), the general cash sale provision, and section 2-511(3), the "bad check" provision, obviously stem from pre-Code law and afford the cash seller the same right to reclaim goods for which the buyer has not paid that the cash seller enjoyed at common law.

As between the cash seller and third parties, however, the Code has made some changes in the common law. Like the common law, section 2-403(1) subordinates the unpaid cash seller's right to reclaim his goods to the rights of the good faith purchaser for value who has purchased the goods from the buyer. Like the common law, section 2-403(4) allows the unpaid cash seller to prevail over the attaching lien creditor of the buyer—although a few courts currently disagree with our conclusion. Unlike some common law cases, however, section 2-403(1) usually subordinates the cash seller to the holder of an Article 9 security interest in the goods because a secured party qualifies as a good faith purchaser for value in most instances.

When the post-UCC cash seller confronts the buyer's trustee in bankruptcy, the durability of the cash seller's right to reclaim is as yet unknown. Whether the cash seller can resist a trustee's attack under section 70(c) of the Bankruptcy Act (the "hypothetical lien creditor" provision) depends upon whether courts adopt the correct view of the cash seller's priority over lien creditors. Furthermore, whether the cash seller can repel an attack under sections 67(c) (the statutory lien provision) depends on the unresolved question whether the cash seller's right to reclaim goods constitutes a statutory lien. Finally, it remains unclear whether the cash seller's right to reclaim can be defeated by section 60(b) (the "voidable preference" provision) or section 70(e) (the existing, superior creditor provision).

¹⁹⁷ See Pub. L. No. 95-598, § 544(b), 92 Stat. 2596 (1978).

¹⁹⁸ See H.R. REP. NO. 595, 95th Cong., 2d Sess. and S. REP. NO. 989, 95th Cong., 2d Sess., reprinted in [1978] U.S. CODE CONG. & AD. NEWS 87, 542 (Supp. 11c; Dec., 1978). The sources just cited state that: "Subsection (b) is derived from current section 70e. It gives the trustee the rights of actual unsecured creditors under applicable law to void transfers. It follows *Moore v. Bay* . . . and overrules those cases that hold section 70e gives the trustee the rights of secured creditors." The refusal to allow the trustee proceeding under section 70(c) to "sit in the shoes" of secured creditors significantly limits his use of that section in the cash sale context, since the secured creditor is the party most likely to be "actually existing" and capable of defeating the cash seller. However, where the trustee can find a suitable existing party capable of defeating the cash seller, the continued vitality of *Moore v. Bay*, 284 U.S. 4 (1931), means that he is certain to displace *all* of the cash seller's claim. See text and notes 173-80 *supra*. See generally Mann & Phillips, *supra* note 1, at 639-40.

It is our view that the Uniform Commercial Code generally preserves the common law's protections. The UCC cash seller's rights, both in and out of bankruptcy, are thus very similar to those of the common law cash seller. Although courts in some recent decisions seem to have forgotten the protections which the cash seller deservedly enjoyed at common law, we are hopeful that courts in future cases will restore the cash seller to his enviable pre-Code position.

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