HOW BAPCPA AFFECTS THE RIGHTS OF UNPAID PREPETITION SELLERS OF GOODS

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Table of Contents

The Bankruptcy Prevention and Consumer Protection Act of 2005[1] enhanced the rights of creditors that have sold goods to a debtor prepetition by, among other things, (a) providing administrative expense status to certain claims for goods sold to the debtor within 20 days of the petition date, and (b) expanding a seller's right to reclaim goods. These changes can have a significant impact on debtors that purchase significant amounts of inventory. In this paper, we consider the scope and extent of these two amendments.

I. RECLAMATION

Generally speaking, a seller that sells goods on unsecured credit has no greater claim to the goods sold – or any other goods of the buyer – than do other unsecured creditors. This is true both inside and outside of bankruptcy. Reclamation is a limited exception to that rule. Outside of bankruptcy, in virtually every U.S. jurisdiction, a seller's right to reclaim is governed by UCC § 2-702. In bankruptcy, it is governed by Bankruptcy Code § 546(c),[2] which is the exclusive method for reclamation in bankruptcy. See, e.g., Oakland Gin Co. v. Marlow (In re Julien Co.), 44 F.3d 426, 432 (6th Cir. 1995) (collecting cases); Flav-O-Rich, Inc. v. Rawson Food Serv., Inc. (In re Rawson Food Serv., Inc.), 846 F.2d 1343, 1346 (11th Cir. 1988).

Section 546(c) was amended by BAPCPA, applicable to bankruptcy cases filed or after October 17, 2005. In order to appreciate how reclamation has been affected by the amendment of section 546(c) by BAPCPA ("new § 546(c)"), one must understand generally how reclamation works – and what the principal open issues are – under section 546(c) prior to amendment ("old § 546(c)").[3]

A. Reclamation under Old § 546(c)

Old § 546(c) provides as follows:

> Except as provided in subsection (d) of this section,[4] the rights and powers of a trustee under sections 544(a), 545, 547, and

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1 The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. 109-8, was enacted on April 20, 2005. In general, the provisions of BAPCPA apply to bankruptcy cases filed on or after October 17, 2005.

2 Unless otherwise noted, sections referred to in this paper are to sections of the Bankruptcy Code, 11 U.S.C. § 101 et seq. (the "Code").

3 Old § 546(c) continues to apply to bankruptcy cases filed prior to October 17, 2005.

4 Subsection (d) deals with reclamation rights of farmers that sold grain to a debtor grain storage facility and fishermen that sold fish to a debtor fish processing facility. This subsection was not affected by BAPCPA, and is beyond the scope of this paper.

549 of this title are subject to any statutory or common-law right of a seller of goods that has sold goods to the debtor, in the ordinary course of such seller's business, to reclaim such goods if the debtor has received such goods while insolvent, but –

(1) such a seller may not reclaim any such goods unless such seller demands in writing reclamation of such goods –

(A) before 10 days after receipt of such goods by the debtor; or

(B) if such 10-day period expires after the commencement of the case, before 20 days after receipt of such goods by the debtor; and

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

(A) grants the claim of such a seller priority as a claim of a kind specified in section 503(b) of this title; or

(B) secures such claim by a lien.

Most importantly, old § 546(c) specifically applies only when a seller of goods has a "statutory or common-law" right to reclaim, i.e., get back the goods that were sold and delivered to the buyer. In virtually every U.S. jurisdiction, this right is supplied by UCC § 2-702(2) and limited by UCC § 2-702(3) (as promulgated in 1966).[5] Subsection (2) allows a seller

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[5] UCC § 2-702(2) and (3) provides:

(2) 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 have a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.

(3) 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 under this Article (Section 2-403). Successful reclamation of goods excludes all other remedies with respect to them.

As originally drafted, subsection (3) also made the seller's right to reclaim subject to the claims of "lien creditors." The 1966 amendments to the UCC removed that language, but some state's versions retain it.

of goods, upon discovering that the buyer has received goods on credit while insolvent,[6] to reclaim the goods upon a demand made within 10 days of the buyer's receipt of the goods. In addition, under the UCC, the 10-day limit does not apply if a written representation of the buyer's solvency has been made to the seller within three months before delivery of the goods. Since the seller's right to reclaim is a rescissional remedy that relates only to particular goods,[7] the very goods that were sold must be in the debtor's possession (or at least control) and identifiable when the demand is received. See, e.g., In re Rawson Food Serv., Inc., supra at 1347 (collecting cases); Galey & Lord Inc. v. Arley Corp. (In re ARLCO, Inc.), 239 B.R. 261, 266-67 (Bankr. S.D.N.Y. 1999).

Thus, application of old § 546(c) involves an initial two-step process: first, a determination whether the seller has satisfied the requirements of UCC § 2-702(2) and (3); and second, application of the additional requirements of old § 546(c)(1). Among other things, old § 546(c)(1) requires that: (a) the sale be in the ordinary course of the seller's business; (b) the reclamation demand be in writing;[8] and (c) the demand be made (i) within 10 days of the debtor's receipt of the goods or, (ii) if that period expires after the commencement of the bankruptcy case, within 20 days after such receipt.[9] In addition, virtually all courts reaching the

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[6] UCC § 2-702(2) requires that "the seller discover[] that the buyer has received goods on credit while insolvent." Based on this language and on the underlying purpose of reclamation as a remedy for tacit fraud, most courts require the seller to "establish that it discovered a debtor's insolvency within the ten days following delivery of the goods." See, e.g., In re Suwanee Swifty Stores, Inc., 2000 WL 33740259, at *1 (Bankr. M.D. Ga. 2000); accord 2 Hawkland UCC Series § 2-702:5 (Art. 2) (2002) ("Hawkland").

[7] The right to reclaim derives from the theory that the buyer has defrauded the seller, thus permitting rescission. "Indeed, at common law and under the Uniform Sales Act, the seller could only reclaim goods by proving that the buyer fraudulently induced delivery by misrepresenting its solvency." Pester Refining Co. v. Ethyl Corp. (In re Pester Refining Co.), 964 F.2d 842, 844 (8th Cir. 1992). The reclamation remedy under UCC § 2-702(2) remains grounded in fraud as it is based on "the proposition that any receipt of goods on credit by an insolvent buyer amounts to a tacit business misrepresentation of solvency and therefore is fraudulent." Official Comment to UCC § 2-702, ¶ 2. This conclusion is reinforced by the exception in UCC § 2-702(2) to the 10-day demand limitation if there has been a written misrepresentation of solvency within three months before delivery of the goods.

[8] UCC § 2-702(2) does not require that the seller's demand be in writing.

[9] Under old § 546(c)(1), the limited demand period applies even though the seller has received a written representation of the debtor's solvency within three months before delivery of the goods and, therefore, need not make demand within 10 days under UCC § 2-702(2).

(footnote continued…)

issue have decided that old § 546(c) requires that the buyer be "insolvent" under the bankruptcy definition set forth in section 101(32), even though the UCC definition is broader.[10] See, e.g., Weyerhaeuser Co. v. Diamond Lumber, Inc. (In re Diamond Lumber, Inc.), 102 B.R. 77, 78-79 (Bankr. N.D. Tex. 1988) (collecting cases). Contra Ambico, Inc. v. AIC Photo, Inc. (In re AIC Photo, Inc.), 57 B.R. 56, 58-59 (Bankr. E.D.N.Y. 1985) (since seller is exercising in bankruptcy a right created by the UCC, the relevant definition of "insolvent" is the UCC definition).

It may also be incumbent on the reclaiming seller to "diligently pursue" its reclamation rights, e.g., by promptly filing an action to reclaim and seeking to restrain the debtor from using, consuming, commingling, selling, etc. the goods. See McLouth Steel Prods. Corp. v. Quaker Chem. Co. (In re McLouth Steel Prods. Corp.), 213 B.R. 978, 986-87 (E.D. Mich. 1997) ("[W]here a written notice of reclamation has been properly made on an insolvent buyer and where the buyer objects to the claim, the reclamation claimant must seek judicial intervention in order to further perfect and preserve its reclamation claim."); Tate Cheese Co. v. Crofton & Sons (In re Crofton & Sons), 139 B.R. 567, 569 (Bankr. M.D. Fla. 1992) (court denied reclaiming seller any remedy under old § 564(c) where it did nothing after making written demand for over 4½ months prepetition and over three months postpetition, saying: "Reclamation is not a self-

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(footnote continued…)

The Third Circuit, in Montello Oil Corp. v. Marin Motor Oil, Inc. (In re Marin Motor Oil Co.), 740 F.2d 220 (3d Cir. 1984), tackled a number of basic issues under old § 546(c). The court determined that, to satisfy the "written demand" requirement of old § 546(c)(1), the writing must specify that the relief requested is reclamation. Thus, the seller's complaint for attachment in aid of injunctive relief that did not mention reclamation was not sufficient. See id. at 224. The court also determined that "receipt" for purposes of triggering the 10-day demand period and testing the debtor's insolvency means "taking physical possession" (thus adopting the definition of "receipt" in UCC § 2-103(1)(c) or constructive receipt as specified in UCC § 2-705(2) (which deals with the circumstances that terminate the seller's right to stop delivery of goods to an insolvent buyer)). Thus, in Marin, delivery of gasoline to a common carrier did not constitute "receipt," even though title and risk of loss transferred to the buyer at that time. Rather, "receipt" occurred when the gasoline was delivered to the debtor's bailee. See id. at 224-26. Lastly, the court determined that "demand" occurs when the appropriate writing is dispatched by the reclaiming seller, as long as the method chosen is commercially reasonable – not when the demand is received by the debtor. The court chose this test to reduce controversy. See id. at 226-29.

[10] UCC § 1-201(23) provides: "A person is 'insolvent' who either has ceased to pay his or her debts in the ordinary course of business, cannot pay his or her debts as they become due, or is insolvent within the meaning of the federal bankruptcy law."

executing remedy. Since Debtor failed to pay for or return the cheese in response to Tate's written reclamation demand, it was incumbent on Tate to pursue the reclamation demand through appropriate judicial channels."); accord In re Waccamaw's Homeplace, 298 B.R. 233, 238-39 (Bankr. D. Del. 2003) (following Crofton, court held that reclaiming seller must "exercise self-help or seek judicial intervention" to preserve its rights and, having failed to do so after making demand for reclamation a month before the debtor's bankruptcy petition was filed, was entitled to no remedy under old § 546(c) because there was no evidence that any goods sold by the reclaiming seller were in the debtor's possession on the petition date). However, there is contrary authority, which the court in Crofton refused to follow. See 139 B.R. at 569, n.5. For example, in Griffin Retreading Co. v. Oliver Rubber Co. (In re Griffin Retreading Co.), 795 F.2d 676 (8th Cir. 1986), the court disagreed with the bankruptcy court's determination that the reclaiming seller was not entitled to relief under old § 546(c) because it had failed to seek judicial relief immediately after making its postpetition reclamation demand. The Eighth Circuit indicated that 102 days was not an unreasonable delay in any event, but also imposed on the debtor the obligation to seek resolution of the reclamation issue.[11]

In summary, if a seller satisfies all of the requirements of UCC § 702(2) and (3) and all of the requirements of old § 524(c)(1), then its right to reclaim is not avoidable under sections 544(a) (as inferior to the rights of a hypothetical a judgment lien creditor), 545 (as a statutory lien that becomes effective on insolvency), 547 (as a preference) or 549 (as an unapproved postpetition transfer).[12]

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[11] The court in Griffin stated:

> Once Griffin received notice of Oliver's intent to reclaim it became obligated to hold the goods for re-delivery to the seller. If Griffin desired to utilize the goods for the purpose of effecting a reorganization then it had the burden of requesting such use from the court. . . . To require the reclaiming creditor to follow its demand with an adversarial proceeding would only foster a race to the courthouse.

Id. at 679-80.

[12] At the time old § 546(c) was enacted as part of the Bankruptcy Reform Act of 1978, case law under the Bankruptcy Act (the "Act") indicated that, in some circumstances, the rights of a reclaiming seller under UCC § 2-702 could be cut off by a trustee in his capacity as a hypothetical judgment lien creditor under § 70(c) of the Act or avoided as a preference or statutory lien under § 67 of the Act. See Hawkland ¶ 2-702:10.

(footnote continued…)

In addition, while the remedy under UCC § 2-702(2) and (3) is limited to return of the goods that were delivered to the buyer, old § 546(c)(2) provides an alternative. The bankruptcy court can deny reclamation by granting the reclaiming seller an administrative claim or a secured claim, thereby permitting the debtor/buyer to continue to possess and use the goods otherwise subject to reclamation. See, e.g., In re Pester Refining Co., supra at 845 (discretion provides needed flexibility to facilitate reorganization while recognizing reclaiming seller's rights); Eagle Indus. Truck Mfg., Inc v. Continental Airlines, Inc. (In re Continental Airlines, Inc.), 125 B.R. 415, 418 (Bankr. D. Del. 1991) (court determined that Continental's need for the tow trucks at issue – which were "absolutely essential for transporting air cargo" and not available from other sources – outweighed the seller's "need to sell the used equipment for cash").

1. At Issue Under Old § 546(c): Rights of Reclaiming Seller Versus Rights of Preexisting Secured Creditor with Floating Security Interest in Inventory

Among the issues that remain a matter of dispute under old § 546(c) is the effect of a security interest on the rights of a reclaiming seller that has satisfied all of the requirements of UCC § 2-702(2) and old § 546(c)(1). UCC § 2-702(3) provides that "[t]he seller's right to reclaim . . . is subject to the rights of a buyer in ordinary course or other good faith purchaser under this Article (Section 2-403)." The question arises whether a secured creditor with a preexisting floating security interest in inventory satisfies this test. The vast majority of courts considering the issue have held that such a secured creditor that has acted in "good faith" is protected by UCC § 2-702(3). The court in ARLCO, supra, 239 B.R. at 267-72, considered this issue at length and concluded that the secured creditor was a "good faith purchaser under this Article," as required by UCC § 2-702(3). As the court explained:

> To derive the definition of "good faith purchaser," reference must be made to several subsections of U.C.C. § 1-201, which provides general definitions applicable to the entire U.C.C. First, "good faith" is defined as "honesty in fact in the conduct or transaction concerned." U.C.C. § 1-201(19). This is further refined when dealing with a merchant because U.C.C. § 2-103(1)(b) requires the "observance of reasonable commercial

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Note that, under old § 546(c), the seller's reclamation rights may be set aside as a fraudulent transfer under section 544(b) or 548. New § 546(c) does not change this.

> standards of fair dealing in the trade." A "purchaser" is defined as one "who takes by purchase," U.C.C. § 1-201(33), and "purchase" is defined to include "taking by sale, discount, negotiation, mortgage, pledge, lien, issue or re-issue, gift or any other voluntary transaction creating an interest in property." U.C.C. § 1-201(32). Thus, the definition of purchaser is broad enough to include an Article 9 secured party, which then qualifies as a purchaser under U.C.C. § 2-403. . . . The reference in U.C.C. § 2-702(3) to "the rights of a buyer in ordinary course or other good faith purchaser under this Article (Section 2-403)" does not mean to imply that reclaiming sellers are only subject to interests acquired under Article 2. Rather, the focus is on the rights of the listed parties under Article 2. Under this reading, the purpose for the reference to U.C.C. § 2-403 is clear. U.C.C. § 2-403 provides, in part, that "[a] person with voidable title has power to transfer a good title to a good faith purchaser for value." As included in the U.C.C. § 1-201(44) definition, "value" is considered to be given for rights if they are acquired "as security for or in total or partial satisfaction of a pre-existing claim." Thus, under Article 2 – specifically U.C.C. § 2-403 – the party who qualifies as a "good faith purchaser" as defined under U.C.C. § 1-201 and gives "value," as defined in U.C.C. § 1-201(44), acquires greater rights than the party transferring the goods to it had. Therefore, U.C.C. § 2-403 gives a transferor, even one who has acquired goods wrongfully, the power to transfer the goods "to a Code-defined 'Good faith purchaser.'" . . . . Thus, in the instant case, if CIT qualifies as a good faith purchaser pursuant to U.C.C. § 1-201 and gave fair value pursuant to U.C.C. § 1-201(44), then pursuant to U.C.C. § 2-403, even if [the debtor] had voidable title to the goods, it could transfer good title under Article 2 to CIT. Further, if CIT obtained the goods in this manner, the demand of a reclaiming seller is subject to CIT's interest. U.C.C. § 2-702(3).

Id. at 268-69 (some citations omitted).[13]

However, there are contrary arguments. In dicta (because the vendor conceded the seniority of the preexisting secured creditor's claim), the Seventh Circuit in In re Reliable Drug Stores, Inc., 70 F.3d 948, 949 (7th Cir. 1995) (opinion by Judge Easterbrook), indicated that Article 9 security interests may not have priority under UCC § 2-702(3) because secured creditors are not good faith purchasers "under this Article" (meaning Article 2). The court also

[13] In addition, the court in ARLCO determined by summary judgment that CIT had acted in "good faith," even though it was aware of the debtor's financial problems and stopped advancing funds without notifying creditors it knew would be impacted by the decision. 239 B.R. at 271-72.

noted that certain eminent legal scholars argue that "§ 2-702(2) gives a vendor the rights of a purchase-money security holder for 10 days, and the purchase-money lender beats a creditor with a security interest in after-acquired inventory." Id. at 949-50 (citations omitted).[14]

2. At Issue Under Old § 546(c): Effect of Prior Rights of Preexisting Secured Creditor with Floating Security Interest in Inventory

Assuming that a good faith creditor with a floating security interest in inventory is a "good faith purchaser under this Article," as the vast majority of courts hold,[15] another issue arises: what is the effect of such a prior security interest on the rights of the reclaiming seller? UCC § 2-702(3) provides that the seller's right is "subject to" the rights of the secured creditor, while old § 546(c) is silent on this issue. There is a split of authority.

A few courts have held that the reclaiming seller's reclamation right is "extinguished" if there is a secured creditor with a prior security interest in the goods. See, e.g., In re Shattuc Cable Corp., 138 B.R. 557, 563-64 (Bankr. N.D. Ill. 1992) ("Reclamation is in the nature of an in rem property right and if it cannot be exercised due to the superior title vested in a good faith purchaser, then it must necessarily be extinguished.")[16] (disapproved in In re Reliable Drug Stores, Inc., supra at 950).

Some courts have determined that, since the seller still has a right to reclaim – albeit it subordinate to the security interest of the secured creditor – old § 546(c)(3) entitles the seller to either an administrative claim or a junior lien in the full amount of the reclamation claim. See, e.g., Isaly Klondike Co. v. Sunstate Dairy & Food Prods. Co. (In re Sunstate Dairy

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[14] The court in ARLCO, supra at 269-71, deals with and disposes of these arguments.

[15] In Davis v. Par Wholesale Auto, Inc. (In re Tucker), 329 B.R. 291, 301 (Bankr. D. Ariz. 2005), the court held that an inventory financier was not a "good faith purchaser" for purposes of UCC § 2-702 because it lacked "good faith." The lender failed "to observe reasonable commercial standards of fair dealing" because it had not filed a financing statement "so that credit sellers [could] become aware of the risk to their reclamation rights and protect themselves by perfecting an inventory purchase money security interest, which requires notification to the conflicting inventory financier." The court found only one potentially contrary case, Guy Martin Buick, Inc. v. Colorado Springs National Bank, 184 Colo. 166, 519 P.2d 354 (1974), which it discredited and distinguished. See id. at 300-01.

[16] Collingwood Grain, Inc. v. Coast Trading Co. (In re Coast Trading Co.), 744 F.2d 686, 690-92 (9th Cir. 1984), is often cited for this proposition, although it is doubtful that the case – which involves the prior rights of a third party buyer with possession of the goods – actually supports it.

& Food Prods. Co.), 145 B.R. 341, 345-46 (Bankr. M.D. Fla. 1992) (administrative claim for full value awarded to reclaiming seller despite existence of senior security interest in goods that would render any junior interest therein valueless). They point to the language of old § 546(c)(3): "the court may deny reclamation to a seller with such a right of reclamation . . . only if the court . . . grants the claim of such a seller [administrative] priority . . . or secures such claim by a lien" (emphasis added). From this language, they reason that, since a seller that satisfies the requirements of UCC § 2-702(2) and old § 546(c)(1) has a right to reclaim, even though that right is subordinate to a prior security interest, the seller's claim is entitled to an administrative claim or a secured claim, whichever will enable it to obtain value – period.

By contrast, the majority of courts have held that the seller's subordinate right to reclaim is entitled to alternative treatment under old § 546(c)(2) only to the extent that the right would have value outside of bankruptcy in light of the secured creditor's prior security interest. See, e.g., In re Pester Refining Co., supra, 964 F.2d at 846-47; In re ARLCO, Inc., supra, 239 B.R. at 272-73. "These courts emphasize that the reclaiming seller is entitled to a lien or administrative expense claim only to the extent that the value of the specific inventory in which the reclaiming seller asserts an interest exceeds the amount of the floating lien in the debtor's inventory." Yenkin-Majestic Paint Corp. v. Wheeling-Pittsburgh Steel Corp. (In re Pittsburgh-Canfield Corp.), 309 B.R. 277, 287 (6th Cir BAP 2004).[17] The rationale for this determination is that Congress did not intend to make the reclaiming seller better off in bankruptcy than outside of bankruptcy, where it could only get the goods back subject to the senior lien. Thus, the court in Pester held that the reclaiming seller's rights depend on "the secured creditor's decision with respect to its security interest in the goods," and are, thus, "subject to being rendered valueless by the actions of" the secured creditor. 964 F.2d at 847. If the proceeds of the goods to be reclaimed are ultimately used to pay the secured creditor, the reclaiming seller would be entitled

[17] The court in Pittsburgh-Canfield, supra at 291, also noted that, since a right of reclamation is not a lien or security interest, marshaling does not apply. Therefore, the senior secured creditor cannot be required to collect its debt first from collateral that is not subject to reclamation. Accord In re ARLCO, Inc., supra at 274-275 (marshaling is not available to a reclaiming seller because it is not a secured creditor and because marshaling cannot be raised against a good faith purchaser). However, other courts have indicated that reclamation rights are akin to a security interest. See, e.g., U.S. v. Westside Bank, 732 F.2d 1258, 1262-65 (5th Cir. 1984).

to no administrative claim or junior lien because its rights would be eliminated under state law.[18] To provide an administrative claim in that instance would give the reclaiming seller something state law does not: a priority interest in assets other than the goods subject to reclamation. On the other hand, "if the secured creditor releases its security interest in the goods to be reclaimed, the seller may enforce its right to reclaim." Id. In Pester, the court held that, because the confirmed plan provided for the secured creditor to release its lien on all of the debtor's assets in return for payment from other sources, the reclaiming seller was entitled to be paid the value of the goods under old § 546(c).[19] Id. at 848.

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[18] The court in In re Dairy Mart Convenience Stores, Inc., 302 B.R. 128 (Bankr. S.D.N.Y. 2003), explained a reclaiming seller's rights as follows:

> [I]t is only when the reclaiming seller's goods or traceable proceeds from those goods are in excess of the value of the superior claimant's claim that the reclaiming seller will be allowed either to reclaim the goods or receive an administrative claim or lien in an amount equal to the goods that remain after the superior claim has been paid . . . . The payment on the reclamation claim must derive from the goods sold by the reclaiming creditor. When goods subject to a reclamation demand are liquidated and the proceeds used to pay the secured creditor's claim, the reclaiming seller's subordinated right is rendered valueless. . . . Once the secured creditor is paid in full, the reclaiming seller is only entitled to reclamation when the surplus collateral remaining consists of the very goods sold by the reclaiming seller or the traceable proceeds from those goods.

Id. at 134 (citations omitted).

[19] While the vast majority of courts have adopted the holding of Pester, they apply it differently. For example, in Dairy Mart, the court adopted the Pester approach, but determined that even though the prepetition secured creditor released its prepetition liens when it was paid by the DIP lender, the reclaiming seller had no right to an administrative claim. The court reasoned that, by the time the prepetition secured creditor was paid and released its lien, the goods subject to reclamation had been sold and the proceeds either delivered to the prepetition secured creditor or the DIP lender. Further, the release of the prepetition liens and the granting of liens to the DIP lender "must be viewed as an integrated transaction" which, in effect, transferred the senior prepetition liens to the DIP lender. 302 B.R. at 135. The court distinguished the facts of Pester as involving a release followed by payment from a source that "did not have a direct connection to the previous lien." Id. at 136.

By contrast, in In re Phar-Mor, Inc., 301 B.R. 482 (Bankr. N.D. Ohio 2003), – which was decided within days of Daisy Mart – the court adopted the Pester approach, but held that the seller's reclamation claim was not rendered valueless, even though the prepetition secured

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B. Reclamation under New § 546(c)

The foregoing sums up key aspects of the law regarding reclamation in bankruptcy prior to the enactment of BAPCPA, which amended old § 546(c). New § 546(c) applies in cases commenced on and after October 17, 2005.

New § 546(c) provides as follows:

> (c)(1) Except as provided in subsection (d) of this section and in section 507(c),[20] and subject to the prior rights of a holder of a security interest in such goods or the proceeds thereof, the rights and powers of a trustee under sections 544(a), 545, 547, and 549

(footnote continued...)
creditor released its lien when it was paid off by the DIP lender and the reclaimed goods were subsequently sold with the proceeds applied to the pay the DIP loan. The court reasoned that the prepetition secured creditor was paid from the proceeds of the DIP loan and not from the sale of the reclaimed goods, and found that the prepetition liens that were released provided no protection for the DIP lenders. Further, since the DIP lenders had notice of the reclamation claim, they was not good faith purchasers given priority under UCC § 2-702(3). The court said: "DIP Lenders were granted new liens and super-priority status. They did not assume the liens that secured the obligations arising under the pre-petition loans. Even if the goods that were subject to the [reclamation demands] were sold and the proceeds thereof were applied to the DIP Facility, a debtor's decision to grant a security interest in inventory to a subsequent secured lender cannot defeat a seller's reclamation rights." Id. at 498.

Possibly as a result of this split in authority, the court order approving the DIP loan in the Pittsburgh-Canfield case specifically provided that "the Prepetition Lenders were [to be] paid in full" and that "the liens or security interests of the Prepetition Lenders were assigned and transferred, to the extent permitted by applicable law, to the lenders under the DIP Facility." 309 B.R. at 282. After adopting the Pester approach, and without discussing any distinction between the rights of the prepetition lenders and those of the DIP lenders, the court denied the reclaiming sellers any lien or administrative expense. It noted that "if any of the [reclaiming sellers] chose (or were permitted) to obtain possession of their goods and were required to pay the DIP Lenders (or Prepetition Lenders for that matter) an amount sufficient to satisfy the outstanding lien at the time, . . . none of [them] would have come away with any proceeds." Id. at 288. The court also pointed out that the DIP loan order – which was not appealed – granted the DIP lenders "a superpriority position." Id.

[20] Section 507(c) provides that, for purposes of determining priorities, "a claim of a governmental unit arising from an erroneous refund or credit of a tax has the same priority as a claim for the tax to which such refund or credit relates." The reference to that subsection in new § 546(c) appears to be in error. It has been suggested that the reference should to section 507(b), which provides for a superpriority administrative claim if adequate protection proves inadequate. See, Kenneth N. Klee, The Bankruptcy Abuse Prevention and Consumer Protection Act of 2003 – Business Bankruptcy Amendments, at 14 n.2 (available on Westlaw at SL068 ALI-ABA 189 (July 2005)).

are subject to the right of a seller of goods that has sold goods to the debtor, in the ordinary course of such seller's business, to reclaim such goods if the debtor has received such goods while insolvent, within 45 days before the date of the commencement of a case under this title, but such seller may not reclaim such goods unless such seller demands in writing reclamation of such goods –

(A) not later than 45 days after the date of receipt of such goods by the debtor; or

(B) not later than 20 days after the date of commencement of the case, if the 45-day period expires after the commencement of the case.

(2) If a seller of goods fails to provides notice in the manner described in paragraph (1), the seller still may assert the rights contained in section 503(b)(9).

New § 546(c), marked to show changes from old § 546(c), is as follows:

(c) (1) Except as provided in subsection (d) of this section and in section 507(c), and subject to the prior rights of a holder of a security interest in such goods or the proceeds thereof, the rights and powers of ~~a~~the trustee under sections 544(a), 545, 547, and 549 ~~of this title~~ are subject to ~~any statutory or common-law~~the right of a seller of goods that has sold goods to the debtor, in the ordinary course of such seller's business, to reclaim such goods if the debtor has received such goods while insolvent, within 45 days before the date of the commencement of a case under this title, but ~~– (1)~~ such a seller may not reclaim ~~any~~ such goods unless such seller demands in writing reclamation of such goods –

(A) ~~before 10~~not later than 45 days after the date of the receipt of such goods by the debtor; or

(B) ~~if such 10~~ not later than 20 days after the date of commencement of the case, if the 45-day period expires after the commencement of the case~~, before 20 days after receipt of such goods by the debtor; and~~.

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

~~(A) grants the claim of such a seller priority as a claim of a kind specified in section 503(b) of this title; or~~

~~(B) secures such claim by a lien.~~ (2) If a seller of goods fails to provide notice in the manner described in paragraph (1), the seller still may assert the rights contained in section 503(b)(9).

1. Resolved by New § 546(c): Rights of Reclaiming Seller Subject to Rights of Preexisting Secured Creditor

Where old § 546(c) was silent, new § 546(c) specifically provides that a seller's reclamation right is "subject to the prior rights of a holder of a security interest in such goods or the proceeds thereof." Thus, Congress dispatched the minority argument, discussed supra, that an Article 9 security interest cannot be senior to a seller's right to reclaim goods.[21] However, new § 546(c) does not resolve other disputes under old § 546(c). For example, it does not tell us what "subject to" means or whether the reclaiming seller must do more than simply make a proper and timely demand to avoid losing its rights.

2. At Issue Under New § 546(c): Relationship Between UCC § 2-702 and New § 546(c)

The amendment of old § 546(c) by BAPCPA raises a number of new issues, too – probably the most important of which is how new § 546(c) interfaces with existing state law regarding reclamation, i.e., UCC § 2-702(2) and (3). This issue arises because of the reference in old § 546(c)(1) to "any statutory or common law right of a seller . . . to reclaim" was replaced in new § 546(c)(1) by "the right of a seller . . . to reclaim" (emphasis added). Adding fuel is extension of the period before bankruptcy during which the debtor receives the goods from 10 days (which mirrors the 10-day period in UCC § 2-702) to 45 days, with a corresponding prepetition extension of the period within which demand can be made.[22]

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[21] The effect of this amendment on the "good faith" requirement imposed by UCC § 2-702(3), but absent in new § 546(c), depends on the relationship between new § 546(c) and UCC § 2-702, discussed infra.

[22] Under UCC § 2-702(2), demand must be made within 10 days after receipt of the goods, unless a misrepresentation of solvency has been made to the seller within three months before delivery. Under old § 546(c), in all circumstances, demand must be made in writing within 10 days after receipt of the goods or, if that period expires after commencement of the buyer's bankruptcy case, within 20 days after receipt of the goods. By contrast, under new § 546(c), the goods must be received within 45 days of bankruptcy and the seller must make written demand for reclamation within 45 days after receipt or, if that period expires after commencement of the buyer's bankruptcy case, within 20 days after the petition date. As pointed out in Collier on Bankruptcy, "[since] a seller's right to reclamation only covers goods received by the debtor within 45-days of the commencement of the debtor's case, the phrases 'not later than 45 days after the date of receipt of such goods by the debtor' in [new] section 546(c)(1)A) and 'if the 45-day period expires after the commencement of the case' in [new] section 546(c)(1)(B) appear to be meaningless." 5 Collier on Bankruptcy ¶ 546.04[2](a)[iv] (15th ed. rev. 2005). Collier also discusses other drafting glitches with respect to the time periods specified in new § 546(c).

There are at least three possible answers to that question. First, new § 546(c) establishes a new federal reclamation right that preempts state law and is the sole basis for reclamation in bankruptcy. Second, new § 546(c) only expands in bankruptcy the time periods within which goods subject to reclamation can be delivered and demand made, but otherwise requires satisfaction of UCC § 2-702 as well as the other limiting requirements of new § 546(c), e.g., written demand. Third, new § 546(c) still requires full satisfaction of every aspect of UCC § 2-702. See generally In re Tucker, supra, 329 B.R. at 298 n.8 (court speculates about interrelationship between new § 546(c) and UCC § 2-702).

To determine which of these approaches is appropriate, one should consider the Supreme Court's approach to a similar issue: whether a federal statute impliedly establishes a private right of action. In Cort v. Ash, 422 U.S. 66, 78, 95 S. Ct. 2080, 2088 (1975), the Supreme Court articulated a four-factor test to govern that inquiry:

> First, is the plaintiff "one of the class for whose especial benefit the statute was enacted". . . – that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

As one commentator explains, the Supreme Court's decisions since Cort v. Ash have become increasingly restrictive, making it more difficult to find an implied private right of action in a federal statute. Bradford C. Mank, Legal Context: Reading Statutes in Light of Prevailing Legal Precedent, 34 Ariz. St. L.J. 815, 843-45 (2002). Subsequent Supreme Court cases emphasized legislative intent over all other factors and "increasingly required textual evidence that Congress intended to establish a private remedy." Id. at 846.[23]

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[23] Among the cases cited in the Mank article are Touche Ross & Co. v. Redington, 442 U.S. 560, 99 S. Ct. 2479 (1979), and Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 100 S. Ct. 242 (1979). In Touche Ross, the Supreme Court stated:

> It is true that in Cort v. Ash, the Court set forth four factors that it considered "relevant" in determining whether a private remedy is implicit in a statute not expressly providing one. But the Court did not decide that each of these factors is entitled to equal weight.

(footnote continued…)

Arguably, under the modified Cort v. Ash test, new § 546(c) does not create a reclamation right that is not dependent on satisfaction of state law requirements. For, even though reclaiming sellers are intended to benefit from the amendment, reclamation is traditionally a matter of state law, the enforcement of which has been more limited in bankruptcy. More importantly, there are cogent arguments that Congress did not intend to create an expanded federal reclamation right and that such a result would not advance the purposes of bankruptcy law.

First, new § 546(c) does not create a comprehensive federal scheme for reclamation, thus indicating that Congress did not intend to create an independent federal reclamation right that preempts state law. This is evident from a comparison of UCC § 2-702 to new § 546(c). Most telling is the inclusion in new § 546(c)(1) of the limitation that the reclaiming seller's right is "subject to the prior rights of a holder of a security interest in such goods or the proceeds thereof"[24] without also dealing with the rights of other "purchasers" or "buyers" of goods. By contrast, UCC § 2-702(3) specifically makes the seller's reclamation right "subject to the rights of a buyer in ordinary course or other good faith purchaser." If new § 546(c) creates an independent federal reclamation right that preempts state law, then in bankruptcy a reclaiming seller would have rights superior to those of "a buyer in the ordinary course or other good faith purchaser" (other than a holder of a prior security interest). It is difficult to imagine, however, that Congress intended to permit reclamation even if the goods in

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(footnote continued...)

> The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action. Indeed, the first three factors discussed in Cort – the language and focus of the statute, its legislative history, and its purpose . . . – are ones traditionally relied upon in determining legislative intent.

444 U.S. at 23-24, 100 S. Ct. at 249. Further, in Transamerica, the Supreme Court explained that, in Touche Ross, it rejected the contention that its inquiry under the Cort v. Ash factors could not "stop with the intent of Congress, but must consider the utility of a private remedy, and the fact that it may be one not traditionally relegated to state law." 444 U.S. at 23, 100 S. Ct. at 249. Rather, even if a statute were designed to protect a specific class of persons, "[t]he dispositive question remains whether Congress intended to create any such remedy." Id. at 24, 100 S. Ct. at 249.

[24] As noted above, the insertion of this language was probably intended to repudiate the argument that preexisting floating security interest in goods under Article 9 are not senior to a seller's right to reclaim.

question have been sold by a merchant to a consumer – i.e., a buyer whose interest would be protected under UCC § 2-702(3) but not new § 546(c) standing alone.[25] Further, new § 546(c) does not provide any limitation on when the seller discovers the buyer's insolvency. Did Congress intend to protect a seller that delivered goods to the buyer even though it knew at the time that the buyer was insolvent?

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[25] In the following situation, the consumer (Harriet) would prevail over a reclaiming seller (Bruce) under UCC § 2-702 and old § 546(c), but not under new § 546(c) if it creates a preemptive, federal reclamation right:

On Monday, Bruce sold and delivered his car to Diane, a used car dealer, who promised to pay for it in a week. The next day, Harriet enters into a contract with Diane to purchase that car on the lot, and makes a down payment, but does not immediately take possession because she wants the car washed. Harriet and Diane agree that she will pick up the car at the end of the week. Unbeknownst to Bruce, Diane was insolvent when he bought the car from Bruce. Diane goes into bankruptcy on Wednesday. Bruce finds out and, on Thursday, delivers a written reclamation demand to Diane. The car is still on the lot.

Under UCC § 2-702 and old § 546(c), Bruce will not be entitled to reclaim the car because Harriett has a superior right to the car, even though it was in Diane's possession when she received Bruce's reclamation demand. This is because Harriet is a "buyer in ordinary course," whose rights are senior to those of a reclaiming seller under UCC § 2-702(3). "Buyer in ordinary course of business" is defined in UCC § 1-201(9) as

> a person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind. A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller's own usual or customary practices. . . . Only a buyer that takes possession of the goods or has a right to recover the goods from the seller under Article 2 may be a buyer in ordinary course of business.

Harriett, who does not have possession, nonetheless has the "right to recover the goods from the [dealer] under UCC § 2-502, if she pays the rest of the purchase price because (a) she "had paid part or all of the price of the goods," and (b) the car has been "identified" because the purchase contract has been made with respect to it (thus giving her a "special property interest" under UCC § 2-501(a)). Therefore, the Harriet is a "buyer in ordinary course," whose right to possession and ownership is protected by UCC § 2-702(3) and old § 546(c).

However, Harriet is not a "holder of a security interest in such goods or the proceeds thereof." Therefore, if new § 546(c) creates a preemptive federal right to reclamation, Harriet's rights as a "buyer in ordinary course" would not trump Bruce's right to reclaim.

One can also argue that the language of new § 546(c) does not evidence an intent to create a preemptive federal right. It retains the context of old § 546(c), which merely provided an exception for state law reclamation rights from certain avoiding powers under certain circumstances. If Congress had intended to create a federal right, wouldn't it have used language such as "a seller may reclaim goods when . . ."? Further, if this federal reclamation right arises under the Code, how could it be subject to the avoiding powers? Particularly in that context, the use of the definite article "the" to replace "any statutory or common law" could indicate that "the right" already exists – particularly when there is no discussion in the legislative history that Congress intended to create a new preemptive federal right. Lastly, it is contrary to general bankruptcy policy – and would not advance the purposes of bankruptcy – to enhance the rights of one set of creditors (at the expense of other creditors) just because a bankruptcy petition has been filed. See Patterson v. Shumate, 504 U.S. 753, 766, 112 S. Ct. 2242, 2249-50 (1992).[26] If a seller of goods has a more generous right to reclaim in bankruptcy under new § 546(c) than it has outside of bankruptcy under UCC § 2-702, that is just what has happened.

If Congress did not intend to create a preemptive federal reclamation right in bankruptcy, is there evidence that it intended to expand the time periods provided in UCC § 2-702(2) within which goods subject to reclamation are delivered and demand is made? This interpretation would create a more limited federal reclamation right in bankruptcy. However, it would still permit reclamation in bankruptcy when it would not be available outside of bankruptcy. Therefore, this interpretation of § 546(c) is subject to some of the same arguments as the preemptive federal reclamation right discussed above. Congress did not use language of creation or indicate in the legislative history that it intended to create a federal right. And, to provide a right of reclamation in bankruptcy that is more expansive than that available outside of bankruptcy is inconsistent with the general policy and purposes of bankruptcy law.

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[26] In Patterson v. Shumate, supra at 764, 112 S. Ct. at 2249-50 (1992), the Supreme Court excluded from his bankruptcy estate a debtor's interest in a pension plan that was not alienable under the Internal Revenue Code and ERISA because, among other things, the occurrence of bankruptcy should not entitle creditors to rights they do not have outside of bankruptcy. "Declining to recognize any exceptions . . . within the bankruptcy context minimizes the possibility that creditors will engage in strategic manipulation of the bankruptcy laws in order to gain access to otherwise inaccessible funds." Id. at 764, 112 S. Ct. at 2250.

In addition, while the new 45-day time period provided in new § 546(c) can be read as inconsistent with and more generous than UCC § 2-702, it need not be. Rather, new § 546(c) can be interpreted as merely imposing more liberal time limitations on the reclaiming seller's extant state law rights – the third possible interpretation noted above.

The time limitations imposed by new § 546(c)(1) permit a seller to reclaim goods received within 45 days before the commencement of the case if the seller makes a written demand for reclamation not later than 20 days after the commencement of the case. To be consistent with UCC § 2-702, this time limitation can be interpreted (a) to impose a new outside limit on the date of receipt of the goods (i.e., 45 days before bankruptcy)[27] and (b) to provide a longer period for written demand by a seller that (i) has received a misrepresentation of solvency within three months before delivery of the goods or (ii) has made a timely oral demand under UCC § 2-702 within 10 days of receipt of the goods. Thus, under this interpretation of new § 546(c), if an insolvent buyer/debtor receives goods 25 days prior to the commencement of its bankruptcy case and the seller received a written misrepresentation of solvency within three months before delivery, the seller would have 45 days after delivery to demand reclamation in writing (25 days before and 20 days after bankruptcy). Also, if a seller that had not received a written misrepresentation of solvency makes oral demand for reclamation within 10 days of receipt of the goods by the buyer/debtor (thus satisfying UCC § 2-702(2)) and written demand within 45 days of receipt (thus satisfying new § 546(c)(1)), then the seller could enforce its state law reclamation rights in bankruptcy. However, if that seller failed to make any demand within 10 days of delivery, it would have no reclamation right in bankruptcy because no such right would exist as a matter of state law.

This approach – that new § 546(c) (like old § 546(c)) imposes bankruptcy limitations on the exercise of rights that a reclaiming seller has under state law – takes into account all of the concerns expressed above regarding the application of the modified Cort v. Ash test. It recognizes that the language of new § 546(c) contains no words of "creation" – much less a coherent, comprehensive reclamation scheme – but continues to provide only that a seller's reclamation rights are not subject to certain avoiding powers. It reflects the lack of legislative history indicating an intention to create a new federal reclamation right. It gives a

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[27] Neither UCC § 2-702 nor old § 546(c) imposes such a requirement.

reclaiming seller no greater rights in bankruptcy than outside of bankruptcy, thus furthering fundamental bankruptcy policy. And, it leaves to the states a matter traditionally governed by state, not federal, law.

3. At Issue Under New § 546(c): Availability of Alternative Remedies

Regardless whether new § 546(c) creates a federal reclamation right, another aspect of new § 546(c) raises significant issues, i.e., the deletion of the alternative remedies paragraph of old § 546(c)(2), which provides:

> [T]he court may deny reclamation to a seller with such a right of reclamation that has made such a demand only if the court (A) grants the claim of such a seller a priority as a claim of the kind specified in section 503(b) of this title; or (B) secures such a claim by a lien.

Old § 546(c)(2) enables the bankruptcy court to authorize a debtor to retain and use in their business goods subject to a valid reclamation claims, thus avoiding what could be significant and costly disruption of the debtor's reorganization.[28] In return, the reclaiming seller has to be given either an administrative claim or a lien. In reality, what generally occurs is that debtors file a "first day motion" to establish reclamation procedures and obtain orders that (a) permit the debtors to use or return (under specified circumstances)[29] goods subject to demands

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[28] The disruption could result from loss of goods necessary to the debtor's business operations, diversion of management focus to deal with reclamation claimants, or piecemeal litigation. As noted by the court in In re Quality Stores, Inc., 289 B.R. 324, 329 n.8 (Bankr. W.D. Mich. 2003):

> Absent such [reclamation] procedures, a 'free for all' might result. . . . Having no reclamation procedure is disadvantageous to a chapter 11 debtor, its creditors, and the court. Early in the case, the focus of the parties should be upon the content and propriety of first-day orders, approval of cash collateral agreements or postpetition financing, appointment of necessary insolvency professionals, and other matters of time-sensitive importance. The determination of the validity and priority of reclamation claims are issues that can normally be deferred until a later time during a chapter 11 case.

[29] When reclamation is not available (or, presumably, even if it is), a buyer/debtor and seller can agree to the return of goods in accordance with section 546(h) (as amended by BAPCPA) or section 546(g) (one of two subsections "(g)" prior to amendment by BAPCPA). Renumbered § 546(h) provides as follows:

(footnote continued…)

for reclamation, (b) provide administrative expense treatment for holders of valid reclamation claims whose goods are retained, and (c) establish mandatory procedures for resolution of the validity and amount of, and ultimate payment of, such claims.[30] This approach also facilitates determination of the validity and amount of reclamation claims after relevant developments occur.[31]

The question arises whether, under new § 546(c), sellers that have complied with the requirements of new § 546(c) – which, as discussed above, may or may not include compliance with UCC § 2-702 – have an absolute right to return of the goods.[32] Or, could it be argued that, since old § 546(c)(2) set limits on the circumstances in which a bankruptcy court could deny reclamation, its repeal removes the previous limitation and gives the bankruptcy court wider discretion in the matter? See Richard Levin and Alesia Ranney-Marinelli, The Creeping Repeal of Chapter 11: The Significant Business Provisions of the Bankruptcy Abuse

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(footnote continued…)

> Notwithstanding the rights and powers of a trustee under sections 544(a), 545, 547, 549, and 553, if the court determines on a motion by the trustee made not later than 120 days after the date of the order for relief in a case under chapter 11 of this title and after notice and a hearing, that a return is in the best interests of the estate, the debtor, with the consent of a creditor and subject to the prior rights of holders of security interests in such goods or the proceeds of such goods, may return goods shipped to the debtor by the creditor before the commencement of the case, and the creditor may offset the purchase price of such goods against any claim of the creditor against the debtor that arose before the commencement of the case.

[30] Attached in an Appendix are samples of such a motion and attendant order, which were filed and entered in May 2005 in In re Meridian Automotive Systems – Composites Operations, Inc., et al., Case No. 05-11168 (Bankr. D. Del.).

[31] As noted above, if there is a prior floating security interest in the goods, under the Pester (majority) approach, the amount of a reclamation claim depends on what actually happens to the goods and their proceeds.

[32] If goods must be returned to the reclaiming seller that has satisfied the requirements of new § 546(c), presumably they would be subject to the prior floating security interest. In that circumstance, the secured party could exercise its remedies with respect to the goods without violating the automatic stay. Such a result would result in no benefit to the reclaiming seller while needlessly disrupting the debtor's business.

Prevention and Consumer Protection Act of 2005, 79 Am. Bankr. L.J. 603, 606 (2005) ("Levin").

4. At Issue Under New § 546(c): Applicability of Automatic Stay to Reclaiming Seller's Efforts to Take Possession of Goods

Another issue with respect to reclamation under BAPCPA arises from the addition of new section 362(b)(24) to the Code; it provides that the automatic stay does not apply to "any transfer that is not avoidable under section 544 and that is not avoidable under section 549." This new exception to the automatic stay, together with amendments to section 549(c) and the definition of transfer in section 101(54), were intended to overrule Thompson v. Margen (In re McConville), 110 F.3d 47 (9th Cir. 1997). In that case, lenders made a postpetition loan secured by a mortgage to a debtor, without knowledge of the debtor's bankruptcy case and without obtaining a court order. The Ninth Circuit held that the lenders were not protected by section 549(c)[33] because the granting of a mortgage lien is not a "transfer of real property."

Despite that limited purpose, however, new § 362(b)(24), read literally, might except from the automatic stay any postpetition transfer that is not avoidable under either section 544 or section 549. Does this mean that, under BAPCPA, a reclaiming seller is no longer precluded, absent relief from the stay, from taking physical possession of reclaimed goods? See Levin at 606-07.

Given the definition of "transfer" in section 101(54) to include any "mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property," it is arguable that a reclaiming seller's retaking of possession is a "transfer." Further, if a seller satisfies all of the requirements of new § 546(c), its

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[33] Prior to amendment by BAPCPA, section 549(c) provided, in relevant part:

> The trustee may not avoid under subsection (a) of this section a transfer of real property to a good faith purchaser without knowledge of the commencement of the case and for present fair equivalent value unless a copy or notice of the petition was filed, where a transfer of such real property may be recorded to perfect such transfer, before such transfer is so perfected that a bona fide purchaser of such property, against whom applicable law permits such transfer to be perfected, could not acquire an interest that is superior to the interest of such good faith purchaser.

The BAPCPA amendments to section 549(c) and the definition of "transfer" make clear that the protective protections of section 549(c) apply to the creation of a mortgage lien.

reclamation right is not subject to avoidance under section 544 (unless it is a fraudulent transfer avoidable under section 544(b)) or section 549. Therefore, it is arguable that the reclaiming seller's acts to obtain possession of the reclaimed goods in the possession of the debtor are not stayed. However, it is also arguable that a reclaiming seller does not have the right to take possession of the reclaimed goods involuntarily because, under state law,[34] the right to reclaim is not the same as a secured creditor's right to repossess. See 4A Anderson, Uniform Commercial Code § 2-702:42 & 2-702:45 (3rd ed. 1997) ("Anderson"). Rather, judicial intervention may be necessary. Arguably, any action to obtain possession of the goods would have to be filed in the bankruptcy court because of its exclusive jurisdiction over "all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate." See 28 U.S.C. § 1334(e).

II. ADMINISTRATIVE EXPENSE UNDER NEW § 503(b)(9)

Regardless whether courts adopt an expansive or restrictive view of the changes wrought by new § 546(c), BAPCPA provides unpaid sellers of goods with an additional remedy in section 503(b)(9), as follows:

> (b) After notice and a hearing, there shall be allowed administrative expenses . . . including –
>
> * * *
>
> (9) the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business.

This is an independent right to an administrative claim, which does not depend on whether the seller has a right to reclaim under state law. New § 546(c)(2) reinforces this interpretation as it specifically provides that "a seller that fails to provide notice in the manner described in [new § 546(c)(1)] . . . still may assert the rights contained in section 503(b)(9)." In fact, the right to an administrative claim under section 503(b) does not precisely overlap with the right to reclaim under new § 546(c) (regardless of which interpretation discussed above

[34] Even if new § 546(c) creates a preemptive federal right of reclamation in bankruptcy, it is likely that federal courts would still look to preexisting law to determine what "reclamation" means (as opposed to the criteria qualifying a seller to reclaim).

ultimately prevails). It is limited to goods delivered with 20 days before the petition date and to goods sold to the debtor in the ordinary course of the debtor's business.[35]

Nevertheless, in practice, new § 503(b)(9) may result in the assertion of fewer demands for reclamation. Presumably, a seller that qualifies under section 503(b)(9) will be satisfied with an administrative claim unless the goods at issue are not encumbered by a prior security interest and the seller would prefer to get the goods themselves back. However, sellers with colorable reclamation claims could make demand and use their position as additional leverage to obtain prompt payment of their administrative claim or prompt return of the goods under section 546(h) (discussed supra).

There is no reason to believe that this new administrative expense includes a right to payment different from other section 503(b) administrative expenses, i.e., on the effective date of a confirmed chapter 11 plan (section 1129(a)(9)(A)). See CIT Commc'ns Fin. Corp. v. Midway Airlines Corp. (In re Midway Airlines Corp.), 406 F.3d 229, 242 (4th Cir. 2005).[36] However, it is not clear how or as of what date "value" is to be determined because new § 503(b)(9) appears to be independent of the limitations of section 503(b)(1), i.e., "actual, necessary costs and expenses of preserving the estate." Some have complained that it is not even

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[35] Both new and old § 546(c) require that the goods were sold to the debtor in the ordinary course of the seller's (not the debtor's) business.

[36] Midway dealt with the remedies available to a personal property lessor when the trustee fails to perform the obligations under a lease as required by section 365(d)(10). The Fourth Circuit held that the lessor has an administrative expense claim under section 503(b), but that immediate payment of that claim is not required. The court stated:

> While an administrative expense under § 503(b) must be paid in cash on the effective date of the plan in a chapter 11 proceeding, see 11 U.S.C. § 1129(a)(9)(A), and must be paid first upon distribution of the assets in a chapter 7 proceeding, see 11 U.S.C. § 726(a)(1), bankruptcy courts have wide latitude in deciding whether to order payment prior to these deadlines. "In most situations the courts prefer to postpone payment of the administrative claim until confirmation of a plan or the distribution in a liquidation. However, once a claimant has requested payment, the court may exercise its discretion whether circumstances warrant immediate response." [2 William L. Norton, Jr., Norton Bankruptcy Law & Practice 2d] § 42:14 (2004).

406 F.3d at 242.

clear whether new § 503(b)(9) applies if the debtor paid for the goods prepetition. See Levin at 607. Nevertheless. it is hard to believe that a court would interpret new § 502(b) to provide administrative expense status when there is no underlying debt or claim.

In their article, Levin and Ranney-Marinelli also raise the issue whether a seller that has successfully reclaimed goods under new § 546(c) could also have an administrative claim under new § 503(b)(9) for the value of same goods if they were delivered to the debtor within 20 days of the filing. Id. If one accepts the proposition that an underlying claim is an essential prerequisite for an administrative expense under section 503(b), then the answer to that question would depend, in the first instance, on whether a seller that successfully exercises its right to reclaim goods still has a claim with respect to such goods. Since new § 546(c) deals only with when reclamation will be allowed, it should not be considered the source of a claim if reclamation fails. Looking to state law, one finds that, according to UCC § 2-702(3), "[s]uccessful reclamation of goods excludes all other remedies with respect to them." As explained in 4A Anderson § 2-702:53, "[o]nce the seller has reclaimed goods because of the buyer's insolvency, the seller is barred from asserting any other remedy against the buyer with respect to such goods." Hawkland points out that this bar to further recovery should apply even if there has been "a sharp drop in the market price so that the value of the reclaimed goods will be lower than the contract price, or a diminution of their value due to use or deterioration of the reclaimed goods." 2 Hawkland § 2-702:11. This limitation should apply – thus eliminating any underlying claim that would be eligible for administrative expense status – if new § 546(c) is interpreted as dependent on UCC § 2-702 (i.e., the second and third options discussed above). However, if new § 546(c) creates a preemptive federal right of reclamation, then arguably the limitation of UCC § 2-702(3) does not apply – which is yet another reason not to interpret new § 546(c) to create such a right.

III. CONCLUSION

BAPCPA has certainly enhanced the rights of unpaid creditors that have sold goods to a debtor prepetition. However, as demonstrated above, it is not a foregone conclusion that reclamation has undergone a radical transformation under BAPCPA. Rather, courts – and the lawyers that appear before them – will be developing the meaning of these sections case by case. As interesting will be the interplay, on a practical level, among the alternatives available to unpaid sellers of goods under BAPCPA, i.e., an administrative expense claim under section 503(b)(9), reclamation under new § 546(c) and return of goods under renumbered section 546(h).

In any event, it is clear than unpaid sellers of goods have more arrows in their quiver under BAPCPA than in cases filed before October 17, 2005.

APPENDIX

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
MERIDIAN AUTOMOTIVE SYSTEMS - COMPOSITES OPERATIONS, INC., et al.,[1]	Case No. 05-11168 (MFW)
	Jointly Administered
Debtors.	**Objection Deadline: May 19, 2005 at 4:00 p.m. (ET)** **Hearing Date: May 26, 2005 at 3:00 p.m. (ET)**

MOTION OF THE DEBTORS FOR AN ORDER ESTABLISHING PROCEDURES FOR THE TREATMENT AND RECONCILIATION OF RECLAMATION CLAIMS

The above-captioned debtors and debtors-in-possession (each a "Debtor" and collectively, the "Debtors") hereby move this court (the "Motion") for entry of an order pursuant to sections 105(a) and 546(c) of title 11 of the United States Code (the "Bankruptcy Code") establishing procedures for the treatment and reconciliation of all reclamation claims asserted against the Debtors. In support of this Motion, the Debtors respectfully state as follows:

STATUS OF THE CASE AND JURISDICTION

1. On April 26, 2005 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. On April 27, 2005, the Court entered an Order granting joint administration of these chapter 11 cases.

2. The Debtors are continuing in possession of their respective properties and have continued to operate and maintain their businesses as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

[1] The Debtors are: Meridian Automotive Systems - Composites Operations, Inc., Meridian Automotive Systems, Inc., Meridian Automotive Systems - Angola Operations, Inc., Meridian Automotive Systems - Construction, Inc., Meridian Automotive Systems - Detroit Operations, Inc., Meridian Automotive Systems - Grand Rapids Operations, Inc., Meridian Automotive Systems - Heavy Truck Operations, Inc., Meridian Automotive Systems - Shreveport Operations, Inc., and Meridian Automotive Systems - Mexico Operations, LLC.

3. No request has been made for the appointment of a trustee or examiner, and no official committee has yet been appointed in these chapter 11 cases.

4. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). The statutory predicates for the relief requested herein are sections 105(a) and 546(c) of the Bankruptcy Code.

BACKGROUND OF THE DEBTORS

5. The Debtors and their non-debtor affiliates are leading producers and suppliers to the North American automotive industry of front- and rear-end modules, bumper systems, exterior composite plastic modules, exterior structural components, interior components and modules, and exterior lighting components. The Debtors currently supply parts for 19 of the 20 best selling vehicles in North America and a significant number of other popular light trucks, sport utility vehicles ("SUVs"), passenger cars, and class 8 heavy trucks produced by the major automotive original equipment manufacturers ("OEMs"), including General Motors, Ford, DaimlerChrysler, Toyota, Honda, Subaru, Mazda, Mitsubishi, Freightliner and Volvo. The Debtors have historically been the largest suppliers of stamped steel bumper systems and roll-formed reinforcement beams to Ford for its light truck and SUV lines and of interior consoles to General Motors for its luxury SUV line.

6. The Debtors and their non-debtor affiliates operate 20 principal manufacturing facilities located in Indiana, Kansas, Louisiana, Michigan, New York, North Carolina and Ohio, as well as in Brazil, Canada and Mexico. In fiscal year 2004, the Debtors and their non-debtor affiliates recorded $1,005.7 million in net sales, resulting in adjusted EBITDA of approximately $92.8 million. At March 31, 2005, the Debtors and their non-debtor

affiliates reported approximately $530 million in total assets and approximately $815 million in total liabilities on a consolidated basis. The Debtors and their non-debtor affiliates employ approximately 5,400 employees worldwide.

7. The Debtors commenced these chapter 11 cases as a result of challenging industry conditions, including exponential increases in costs of essential commodities such as resin, nickel and steel, ongoing pricing pressure from OEMs, elimination of accelerated payment programs from certain OEMs, increased labor costs, and cyclical demand. Such conditions have resulted in a steady deterioration of the Debtors' liquidity position and have forced the Debtors to seek chapter 11 protection while they restructure their balance sheet.

RELIEF REQUESTED

8. By this motion, the Debtors seek entry of an order pursuant to sections 105(a) and 546(c) of the Bankruptcy Code establishing procedures for the treatment and reconciliation of all Reclamation Claims (as defined herein) asserted against the Debtors, in order to determine the amount of each Reclamation Claim in the event that such claim is ultimately allowed in these chapter 11 cases. The Debtors believe that such procedures, as described in greater detail below, will simplify the process of addressing reclamation claims against the Debtors while adequately safeguarding the rights of creditors asserting such claims.

9. The Debtors purchase substantial amounts of goods on a daily basis, and prior to the Petition Date ordered a variety of goods from both domestic and international suppliers for use in the ordinary course of their business operations. Normally, such goods are delivered to the Debtors' various facilities for use in the Debtors' manufacturing operations, with invoices for the goods delivered to the Debtors for payment. As of the Petition Date, the Debtors had not paid for certain goods in their possession that had been delivered by their suppliers.

10. Vendors who ship goods on credit, like those who shipped goods to the Debtors prior to the Petition Date, have the right under both state law and the Bankruptcy Code to reclaim those goods under certain circumstances. A claim with respect to these rights of reclamation (a "Reclamation Claim") will, if properly asserted, request that the Debtors either return certain identified goods or pay for such goods in full.

11. Section 546(c)(I) of the Bankruptcy Code provides that vendors who have sold goods to a debtor in the ordinary course of business may reclaim such goods (subject to certain limitations) if: (i) the debtor was insolvent when the goods were delivered; (ii) the vendor submits a written reclamation demand to the debtor; (iii) such demand is made within ten (10) days after the debtor's receipt of the goods (or within twenty (20) days if the 10 day period would expire after the petition date); and (iv) the vendor is otherwise entitled to reclamation under applicable state law. See 11 U.S.C. § 546(c); Eagle Indus. Truck Mfg. v. Continental Airlines, Inc. (In re Continental Airlines, Inc.), 125 B.R. 415, 417-18 (Bankr. D. Del. 1991). Notwithstanding the foregoing, section 546(c) allows a debtor to continue using goods subject to a valid Reclamation Claim in the ordinary course of business if the reclaiming vendor is either granted an administrative claim for the value of such goods or a lien securing its Reclamation Claim.

12. Given the volume of inventory received by the Debtors on a daily basis, the Debtors anticipate that a number of vendors may assert Reclamation Claims against them after receiving notice of the commencement of these chapter 11 cases. Indeed, during the first week of these chapter 11 cases the Debtors received dozens of reclamation demands related to goods that were delivered to the Debtors prior to the Petition Date.

13. The goods at issue are essential to the Debtors' operations, which would be disrupted if vendors were allowed to reclaim them from the Debtors. For this reason, and to avoid piecemeal litigation that would interfere with the Debtors' reorganization efforts, the Debtors seek to establish uniform procedures for the treatment and reconciliation of all Reclamation Claims. The Debtors submit that the proposed procedures will simplify the process of resolving Reclamation Claims while properly safeguarding the rights of the parties asserting such claims.

PROPOSED RECLAMATION PROCEDURES

14. By this Motion, the Debtors seek entry of an order (the "Reclamation Order") authorizing the Debtors' establishment and implementation of the following procedures (the "Reclamation Procedures") for treating and reconciling Reclamation Claims:

(a) Any vendor asserting a Reclamation Claim (a "Reclamation Claimant") must satisfy all requirements entitling it to a right of reclamation under applicable state law and section 546(c)(1) of the Bankruptcy Code.

(b) The Debtors will file a notice (the "Reclamation Notice") with the Court, and serve such Reclamation Notice on counsel to any official committee appointed in these chapter 11 cases (the "Committee") and on each Reclamation Claimant, listing those Reclamation Claims the Debtors deem to be valid and the amount thereof.

(c) The Reclamation Notice shall be filed by the Debtors no later than sixty (60) days after the Court's entry of the Reclamation Order (the "Notice Deadline").

(d) If the Debtors fail to file the Reclamation Notice prior to expiration of the Notice Deadline, any Reclamation Claimant may bring a motion to determine the validity of its Reclamation Claim, provided that such motion shall not be filed prior to expiration of the Notice Deadline.

(e) All parties in interest shall have twenty (20) days from the date the Reclamation Notice is filed with the Court to object to the inclusion or exclusion in the Reclamation Notice of any Reclamation Claim or the amount thereof All Reclamation Claims in the Reclamation Notice that do not draw an objection shall, subject to the reservations in clause (g) below), be fixed in the amount provided in the Reclamation Notice without further order of the Court.

(f) With respect to any Reclamation Claim on account of which a timely objection to the Reclamation Notice is filed, the amount of such Reclamation Claim shall, subject to the reservations in clause (g) below, be fixed pursuant to an agreement of the relevant parties, or by order of the Court.

(g) The Debtors reserve the right to further object to any Reclamation Claim fixed pursuant to these Reclamation Procedures or order of the Court on any other grounds, including that all Reclamation Claims are subject to a creditor's security interest in or lien upon the goods subject to such Reclamation Claim. The fixing of a Reclamation Claim as provided in subparagraphs (e) and (f) above shall not be deemed a final allowance of any such Reclamation Claim.

15. Unless the goods at issue are returned to the applicable Reclamation Claimant as described below, any Reclamation Claim fixed pursuant to the procedures outlined in paragraph 14 above shall (subject to the reservations set forth in such paragraph and at the election of the Debtors') (i) pursuant to section 546(c)(2)(A) of the Bankruptcy Code be treated as an administrative priority claim under section 503(b)(1) of the Bankruptcy Code or (ii) pursuant to section 546(c)(2)(B) of the Bankruptcy Code be granted a lien to secure such claim.

16. Because it may be beneficial in some circumstances for the Debtors to honor a reclamation demand, the Debtors request that the Court authorize the Debtors to make the any goods available for pickup by the any Reclamation Claimant, (a) before the time that the Reclamation Claim of any Reclamation Claimant is fixed pursuant to the procedures set forth in paragraph 14 above, with the consent of (i) the administrative agent for the post-petition lenders, (ii) the administrative agent for the prepetition lenders under the second lien credit agreement, and (iii) the collateral agent for the subordinated noteholders, and (b) after the time the Reclamation Claim of any Reclamation Claimant is fixed pursuant to the procedures set forth in paragraph 14 above; provided that, with respect to each of clauses (a) and (b) above in this paragraph 16, (x) any such Reclamation Claimant timely demands in writing the reclamation of its goods pursuant to section 546(c)(1) of the Bankruptcy Code and section 2-702 of the Uniform

Commercial Code, (y) the Debtors have accepted the goods at issue for delivery, and (z) such Reclamation Claimant properly identifies the goods to be reclaimed.

17. The Reclamation Procedures are necessary to facilitate the uninterrupted operation of the Debtors' businesses and to minimize potential costs to the Debtors' estates. The Debtors' operations may suffer and management's attention will be diverted from important operational issues if the Debtors are required to respond to each Reclamation Claim on an ad hoc basis, as adversary proceedings and motions may be filed or as other enforcement action is taken by a Reclamation Claimant. The Debtors believe that the Reclamation Procedures described herein are the most efficient and cost-effective method of resolving Reclamation Claims, and that such procedures are in the best interests of the Debtors, their estates and creditors.

18. Relief similar to that requested herein has been granted in other recent, large chapter 11 cases in this District. See, e.g., In re Fleming Companies, Inc., et al., Case No. 03-10945 (MFW) (Bankr. D. Del. April 22, 2003); In re W.R. Grace & Co., Case No. 01-1139 (JJF) (Bankr. D. Del. May 3, 2001); In re U.S. Office Products Company, Case No. 01-0646 (Bankr. D. Del. Mar. 28, 2001); In re Trans World Airlines, Inc., Case No. 01-0056 (PJW) (Bankr. D. Del. Jan. 10, 2001). The Debtors respectfully submit that similar relief is warranted in these chapter 11 cases.

NOTICE

19. Notice of this Motion has been provided to: (i) the Office of the United States Trustee; (ii) the Debtors' thirty (30) largest unsecured creditors on a consolidated basis; (iii) counsel to the administrative agent for the prepetition lenders under the first lien credit agreement; (iv) counsel to the administrative agent for the prepetition lenders under the second lien credit agreement; (v) counsel to the administrative agent for the post-petition lenders; (vi)

U.S. Bank National Association as collateral agent for the subordinated noteholders; (vii) all parties who have asserted a Reclamation Claim against the Debtors to date; and (viii) those parties requesting notice pursuant to Bankruptcy Rule 2002, in accordance with Del. Bankr. LR 2002-1(b). In light of the nature of the relief requested herein, the Debtors submit that no other or further notice is necessary.

NO PRIOR REQUEST

20. No prior request for the relief sought herein has been made to this or any other court in these bankruptcy cases.

WHEREFORE, the Debtors respectfully request that the Court enter an order, in substantially the form attached hereto as Exhibit A, (i) approving the Reclamation Procedures and (ii) granting such other and further relief as the Court deems just and proper.

Dated: Wilmington, Delaware
May 9, 2005

Respectfully submitted,

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Proposed Counsel to the Debtors and Debtors-in-Possession

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
MERIDIAN AUTOMOTIVE SYSTEMS - COMPOSITES OPERATIONS, INC., et al.,[1]	Case No. 05-11168 (MFW)
	Jointly Administered
Debtors.	**Ref. Docket No. 87**

ORDER ESTABLISHING PROCEDURES FOR THE TREATMENT AND RECONCILIATION OF RECLAMATION CLAIMS

Upon the Motion[2] of the above-captioned Debtors for entry of an order pursuant to sections 105(a) and 546(c) of the Bankruptcy Code establishing procedures for the treatment and reconciliation of all Reclamation Claims asserted against the Debtors; and upon consideration of the Motion and all pleadings related thereto; and the Court finding that (a) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, (b) this matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2), and (c) notice of the Motion was due and proper under the circumstances; and it appearing that the relief requested in the Motion is in the best interests of the Debtors, their estates and creditors; and after due deliberation, and good and sufficient cause appearing therefor, it is hereby:

ORDERED, that the Motion is granted; and it is further

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1 The Debtors are: Meridian Automotive Systems Composites - Operations, Inc., Meridian Automotive Systems, Inc., Meridian Automotive Systems - Angola Operations, Inc., Meridian Automotive Systems - Construction, Inc., Meridian Automotive Systems - Detroit Operations, Inc., Meridian Automotive Systems - Grand Rapids Operations, Inc., Meridian Automotive Systems - Heavy Truck Operations, Inc., Meridian Automotive Systems - Shreveport Operations, Inc., and Meridian Automotive Systems - Mexico Operations, LLC.

2 Capitalized terms used but not defined herein shall have the meaning ascribed to such terms in the Motion.

ORDERED, that the following Reclamation Procedures are hereby approved for the treatment and reconciliation of all Reclamation Claims asserted against the Debtors:

(a) Any vendor asserting a Reclamation Claim (a "Reclamation Claimant") must satisfy all requirements entitling it to a right of reclamation under applicable state law and section 546(c)(1) of the Bankruptcy Code.

(b) The Debtors will file a notice (the "Reclamation Notice") with the Court, and serve such Reclamation Notice on counsel to any official committee appointed in these chapter 11 cases (the "Committee") and on each Reclamation Claimant, listing those Reclamation Claims the Debtors deem to be valid and the amount thereof.

(c) The Reclamation Notice shall be filed by the Debtors no later than sixty (60) days after the Court's entry of the Reclamation Order (the "Notice Deadline").

(d) If the Debtors fail to file the Reclamation Notice prior to expiration of the Notice Deadline, any Reclamation Claimant may bring a motion to determine the validity of its Reclamation Claim, provided that such motion shall not be filed prior to expiration of the Notice Deadline.

(e) All parties in interest shall have twenty (20) days from the date the Reclamation Notice is filed with the Court to object to the inclusion or exclusion in the Reclamation Notice of any Reclamation Claim or the amount thereof. All Reclamation Claims in the Reclamation Notice that do not draw an objection shall, subject to the reservations in clause (g) below), be fixed in the amount provided in the Reclamation Notice without further order of the Court.

(f) With respect to any Reclamation Claim on account of which a timely objection to the Reclamation Notice is filed, the amount of such Reclamation Claim shall, subject to the reservations in clause (g) below, be fixed pursuant to an agreement of the relevant parties, or by order of the Court.

(g) The Debtors, the official committee of unsecured creditors appointed in these chapter 11 cases (the "Committee"), the administrative agent under the first lien credit agreement, and the administrative agent under the second lien credit agreement reserve the right to further object to any Reclamation Claim, the amount of which is fixed pursuant to these Reclamation Procedures or order of the Court, on any other grounds including that all Reclamation Claims are subject to a creditor's prior security interest in or lien upon the goods subject to such Reclamation Claims. The fixing of the amount of a Reclamation Claim as provided in subparagraphs (e) and (f) above shall not be deemed a final allowance of any such Reclamation Claim; and it is further

ORDERED, unless the goods at issue are returned to the applicable Reclamation Claimant, at the election of the Debtors' (after consultation with the Committee and subject to the reservations set forth in clause (g) in the second decretal paragraph of this Order) the amount of any Reclamation Claim fixed pursuant to the procedures outlined in this Order shall, to the extent of any surplus proceeds in reclamation goods after satisfaction of any prior secured claims against such goods: (i) pursuant to section 546(c)(2)(A) of the Bankruptcy Code be treated as an administrative priority claim under section 503(b)(1) of the Bankruptcy Code or (ii) pursuant to section 546(c)(2)(B) of the Bankruptcy Code be granted a lien to secure such claim; and it is further

ORDERED, that the Debtors (in consultation with the Committee) are authorized to make any applicable goods available for pickup by any Reclamation Claimant, (a) before the time that the amount of any Reclamation Claim of any Reclamation Claimant is fixed pursuant to the procedures set forth in the second decretal paragraph of this Order, with the consent of (i) the administrative agent for the post-petition lenders, (ii) the administrative agent for the prepetition lenders under the first lien credit agreement, (iii) the administrative agent for the prepetition lenders under the second lien credit agreement, and (iv) the collateral agent for the subordinated noteholders, and (b) after the time the amount of any Reclamation Claim of any Reclamation Claimant is fixed pursuant to the procedures set forth in the second decretal paragraph of this Order, upon five (5) business days prior notice to counsel for the administrative agent for the post-petition lenders, counsel for the administrative agent for the prepetition lenders under the first lien credit agreement, and counsel for the administrative agent for the prepetition lenders under the second lien credit agreement; provided that if the Debtors or their counsel are informed that either such agent objects to the proposed pickup of goods, the Debtors shall not make such goods available for pickup by the applicable Reclamation Claimant unless and until any such

objection has been resolved; provided further, with respect to each of clauses (a) and (b) above, (x) any such Reclamation Claimant timely demands in writing the reclamation of its goods pursuant to section 546(c)(1) of the Bankruptcy Code and section 2-702 of the Uniform Commercial Code, (y) the Debtors have accepted the goods at issue for delivery, and (z) such Reclamation Claimant properly identifies the goods to be reclaimed; and it is further

ORDERED, that all Reclamation Claimants and other parties in interest are prohibited from interfering in any way with the post-petition delivery of goods to or by the Debtors in violation of section 362 of the Bankruptcy Code; and it is further

ORDERED, that nothing contained herein or in the Motion shall constitute a finding, or be deemed or interpreted as an admission of any kind against the Debtors, or used against the Debtors in any other proceeding before this Court or otherwise, and it is further

ORDERED, that except as provided herein, this order shall be without prejudice to the substantive rights of any party asserting a Reclamation Claim; and it is further

ORDERED, that this Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation of this Order.

Dated: Wilmington, Delaware
May 24, 2005

MARY F. WALRATH
CHIEF UNITED STATES BANKRUPTCY JUDGE