

Decoding the Code: Why the Revisions to Section 546(c) Do Not Create a Federal Right of Reclamation for Sellers

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The revisions made to the Bankruptcy Code through the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), effective October 17, 2005, brought with them an occasion for scholarly debate regarding the effect of those revisions on the various Code sections. With language that left room for differing interpretations and little legislative history for guidance, some revisions caused practitioners and scholars to question what was previously well-settled law.¹ This article addresses the uncertainty left in the wake of Congress's revision to section 546(c), a section previously understood to require a seller asserting a reclamation right² in a bankruptcy case to prove that right under state law. While the language of this section has changed, amended section 546(c) does not provide a new federal reclamation right, although it does expand certain relevant time periods.³ A seller asserting a right to reclaim in a bankruptcy case must still prove that right under state law.

The arguments against the creation of a new federal right of reclamation include: (1) the provision's location in a section dedicated to limitations on a trustee's avoiding powers; (2) the rules of statutory construction; (3) a fair reading of the new Code section; (4) the absence of any commentary from Congress surrounding what would be a substantial change; and (5) previously well-settled caselaw that follows state law in determining property rights in assets of a bankruptcy estate. Recent caselaw and commentary substantiate these arguments.⁴ Most notable to date for its in-depth analysis is the opinion of the Honorable Burton Lifland in *In re Dana Corporation*.⁵

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COMPARING PRE- AND POST-BAPCPA VERSIONS OF SECTION 546(c)

Section 546 of the Bankruptcy Code contains limitations on a trustee's avoiding powers. Avoiding powers give the trustee the ability to undo certain transactions that may have the effect of benefiting one creditor over another and disturbing the bankruptcy goal of equality of distribution among creditors.⁶ Under section 546(c), if a seller can prove a right to reclamation, then the trustee cannot use its avoiding powers to defeat that right. The recent revisions to section 546(c) caused some to question whether the Bankruptcy Code provided a seller an absolute federally created right to reclaim or whether that right still derived from, and had to be proven under, state law.⁷

Prior to the enactment of BAPCPA, section 546(c) read as follows:

- (c) Except as provided in subsection (d) of this section, the rights and powers of a trustee under sections 544(a), 545, 547, and 549 of this title are subject to any statutory or common-law right of a seller of goods that has sold goods to the debtor, in the ordinary course of such seller's business to reclaim such goods if the debtor has received such goods while insolvent, but—
 - (1) such a seller may not reclaim any such goods unless such seller demands in writing reclamation of such goods—
 - (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.⁸

Amended section 546(c) reads:

- (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 the trustee under sections 544(a), 545, 547, and 549 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 a 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 provide notice in the manner described in paragraph (1), the seller still may assert the rights contained in section 503(b)(9).⁹

Pre-amendment, section 546(c) was understood as “the sole remedy for a creditor who seeks reclamation from a bankrupt debtor.”¹⁰ Prior to the effective date of BAPCPA, former section 546(c) provided that a trustee's avoiding powers were subject to “any statutory or common-law right of a seller of goods... to reclaim.” Congress's express purpose in enacting section 546(c) was “to recognize, in part, the validity of section 2-702 of the Uniform Commercial Code.”¹¹ Congress first enacted section 546(c) to preserve a seller's state-law right to reclaim in order to temper a trustee's strong-arm powers upon the filing of a bankruptcy petition.

At common law, a seller had a right to reclaim only by proving that the buyer misrepresented its solvency in order to fraudulently induce the seller to deliver goods.¹² The Uniform Commercial Code (U.C.C.) provides a statutory right to reclamation in section 2-702, in some instances eliminating the requirement that the seller prove fraudulent inducement.¹³ In interpreting the Bankruptcy Code pre-amendment, courts recognized that “§ 546(c) does not create an independent right to reclamation... it merely recognizes that such a right exists to a limited degree in a bankruptcy case, provided that such a right exists either under common law or under state statute.”¹⁴

The new version of section 546(c) deletes the reference to “statutory or common-law” reclamation rights and instead states that the trustee's avoidance powers are subject to “the right of a seller of goods... to reclaim.” Additionally, the amended section references a 45-day time period in which a seller may reclaim, which appears to replace the 10-day period of the former section. These changes are the primary bases for the erroneous argument that Congress created a right to reclaim in-

dependent of state-law rights. Despite these changes, courts thus far have not interpreted the revisions to section 546(c) as giving a seller an absolute right to reclaim but rather that a seller must establish a right to reclaim pursuant to state law, and, provided such right is established, the trustee's strong-arm powers will be curtailed by that right.¹⁵

The suggestion that BAPCPA creates an absolute federal right to reclamation must fail. Any confusion caused by the change in language in certain sections of BAPCPA does not eviscerate the need to apply common sense:

[I]ncongruous results appear throughout BAPCPA, creating the potential for many anomalies that were either never considered or completely ignored by the architects of this law. Left to deal with such issues, but with no guidance provided by the seemingly myopic drafters, courts are and will be required to fashion common sense approaches to achieve order out of the confusion unwittingly created by Congress.¹⁶

Congress originally enacted section 546(c) to preserve a seller's state law right to reclaim under U.C.C. § 2-702 and should not now be read to ignore the U.C.C. in favor of a federal right to reclaim. Ultimately, section 546(c) is a limitation on a trustee's avoiding powers where a seller has a right to reclaim under state law; it is not a section dedicated to granting an independent federal right of reclamation to sellers.

RULES OF STATUTORY CONSTRUCTION

Rules of statutory construction guide the interpretation of provisions of the Bankruptcy Code.¹⁷ The first rule of statutory construction is to "begin with the text of [the] provision and, if its meaning is clear, end there."¹⁸ The District Court of Delaware recently discussed the rules of statutory construction in analyzing section 546(a) of the Code:

Whether or not statutory language is plain or ambiguous "is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." A provision can be considered ambiguous only "when, despite a studied examination of the statutory context, the natural reading of a provision remains elusive." That is not to say that a provision of the Bankruptcy Code should be read in isolation. On the contrary, "in interpreting the Bankruptcy Code, the Supreme Court has... prefer[red] instead to take a broader, contextual view." Nevertheless, the focus must be on the language of the statutory scheme. The court may only look to "policy... pre-

[Bankruptcy] Code practice, and legislative history” for guidance when “the meaning of a provision is not plain.”¹⁹

The meaning of amended section 546(c)(1) is not plain on its face. The new reference to “the right of a seller of goods” does not make clear whether the statute is creating a new, independent federal right to reclaim or acknowledging the well-settled, pre-amendment reference to a state-defined statutory or common-law reclamation right. Furthermore, it is not clear if the addition of the language “subject to the prior rights of a holder of a security interest in such goods or proceeds thereof” is a substitute for the deleted language, “any statutory or common law” right. At the very least, the addition of this language affirms well-settled case law that prior security interests in reclaimed goods trumps the right that reclaiming sellers might have to those goods.²⁰

A second rule of statutory construction used in analyzing an amendment to a Code section is that “no changes in law or policy are to be presumed from changes in language in a [statutory] revision unless an intent to make such changes is clearly expressed.”²¹ “This rule—one which bars a court from construing a statute to have abrogated the common law, or to have established a new rule of law, without clear evidence in favor of such a construction—is firmly and sensibly entrenched in federal jurisprudence.”²² This proposition was thoroughly discussed by one bankruptcy court to guide its determination that former section 546(c)(2),²³ enacted under the Bankruptcy Act, could not provide a reclaiming seller with greater rights than U.C.C. § 2-702(2) without clear guidance from Congress.²⁴ That court gave great weight to the silence on the part of Congress: “[t]he conclusion emerging plainly is that the legislative history falls far short of what would be needed for the definitive answer that Section 546(c)(2) intended to give more to a reclaiming seller than he ever had either at common law or under U.C.C. Section 2-702(2).”²⁵ Congress’s silence also speaks volumes as to how to interpret the changes to amended section 546(c)(1) with the enactment of BAPCPA.

In enacting BAPCPA, there is no evidence that Congress expressed an intention to create a new rule that would give reclaiming sellers an absolute federal right to reclaim that would not exist outside the bankruptcy context. Congress did not evidence an intention to overrule the Supreme Court’s analysis in *Butner*, that “Congress has generally left the determination of property rights in assets of a bankrupt’s estate to state law.”²⁶ This principle was recently highlighted by the U.S. Supreme Court in *Travelers Casualty and Surety Company of America v. Pacific Gas and Electric Company*.²⁷ In considering section 502(b)(1)

of the revised Code, the Supreme Court discussed the role of state law in bankruptcy:

Creditors' entitlements in bankruptcy arise in the first instance from the underlying substantive law creating the debtor's obligation, subject to any qualifying or contrary provisions of the Bankruptcy Code.... That principle requires bankruptcy courts to consult state law in determining the validity of most claims.... Indeed, we have long recognized that the "basic federal rule" in bankruptcy is that state law governs the substance of claims, Congress having generally left the determination of property rights in the assets of a bankrupt's estate to state law.... As we stated in *Butner*, "[p]roperty interests are created and defined by state law," and "[u]nless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding."²⁸

Further, there is no evidence that Congress intended to abrogate the longstanding resort to the U.C.C. to determine a seller's reclamation rights. To argue that the provisions of the U.C.C. no longer apply to reclamation demands in a bankruptcy case would ignore the influence of the U.C.C. in our jurisprudence. The legislative history that accompanied the enactment of the 1978 reforms to the Bankruptcy Code states that: "one purpose of the 1978 reforms was to make bankruptcy law generally more congruent with modern commercial practices, in particular the Uniform Commercial Code."²⁹ Over 30 years ago, in analyzing U.C.C. § 2-702 against the backdrop of the Bankruptcy Act, the Sixth Circuit stated:

While we should not flinch from upholding the primacy of the Bankruptcy Act if it is otherwise demanded, a construction of the Act which would invalidate the application of the U.C.C. must at least give pause. The [U.C.C.] is far more than a spurious state law created by special interests for their own special protection. As pointed out by Judge Friendly in *United States v. Wegematic Corp.*, 360 F.2d 674, 676 (2d Cir. 1966), the Code was, even in 1966, "well on its way to becoming a truly national law of commerce."³⁰

Similarly, if the legislative history that accompanies BAPCPA expressed a clear intention to invalidate the application of U.C.C. § 2-702 and instead provide for a federal right to reclaim, the courts would be bound to apply that interpretation of amended section 546(c).³¹ However, where the plain meaning of the revised Code section is not clear and the legislative history is silent, it "would indeed be myopic if we failed to rec-

ognize the revolution in commercial law that the Uniform Commercial Code has occasioned in the states.”³²

The clear legislative history that accompanied the original enactment of section 546(c) should not be overlooked in the absence of contradictory legislative history to the amendments in BAPCPA. In originally enacting section 546(c), Congress explicitly stated: “[t]he purpose of the provision is to recognize, in part, the validity of section 2-702 of the Uniform Commercial Code.”³³ In enacting BAPCPA, Congress did not state a clear intention to overrule the application of U.C.C. § 2-702.

NO FEDERAL RECLAMATION RIGHT

Based on the rules of statutory construction and on a fair reading of the revised Code, amended section 546(c) remains primarily an exception to the trustee’s strong-arm powers, assuming that the seller has a right of reclamation under state law.³⁴ This section does not create an independent right of reclamation.³⁵ Pre-amendment cases, to the extent that they interpret the general intent of section 546(c), remain applicable. Judge Lifland recently bolstered this position with his opinion in *Dana*.

In *Dana*, the debtor, along with its subsidiary corporations, filed bankruptcy, resulting in numerous demand letters to the debtor corporations from unpaid sellers for the return of previously shipped goods and the assertion of reclamation claims against the debtor estates.³⁶ The debtor corporations argued the reclamation claims should be valued at zero since superior prior liens on the goods rendered the reclamation claims valueless.³⁷ The reclaiming sellers countered that BAPCPA created a new federal right to reclamation, independent of the prior rights of the lenders.³⁸

While recognizing that the amendments to section 546(c) sparked debate over Congress’s intent of how to treat reclaiming sellers in a bankruptcy case, Judge Lifland explicitly disagreed with the contention that Congress created a federal right of reclamation stating that: “[t]he Reclamation Claimants contend that the deletion of the reference to state law in the amended section 546(c) no longer incorporates the state law right of reclamation, and instead creates a brand new federal bankruptcy law right. I disagree.”³⁹

Where amended section 546(c) deletes the reference to the trustee’s avoidance powers being subject to “statutory or common law” reclamation rights, it instead states that the trustee’s avoidance powers are subject to “the right of a seller of goods... to reclaim.” This change does not give a seller an absolute federal right to reclaim, nor does it expand a seller’s state law rights.⁴⁰ The change uses “the right” to reference the well-settled, pre-amendment, state-defined statutory right to reclaim.⁴¹

As a pragmatic consideration, Judge Lifland pointed out one of the absurdities that would arise if amended section 546(c) did create an independent federal reclamation right. The new Code section inserts the language “subject to the prior rights of a holder of a security interest in such goods or the proceeds thereof,” thereby codifying the rights of prior lien holders. However, it makes no mention of other “purchasers” or “buyers” of goods. Consequently, if amended section 546(c) created a federal right of reclamation independent of state law, “then in a bankruptcy a reclaiming seller would conceivably have broad rights superior to those of buyers in the ordinary course of business, lien creditors or good faith purchasers other than a holder of a prior security interest.”⁴² According to Judge Lifland, and public policy considerations in general, “Congress could not have intended to permit reclamation of goods that have been sold to consumers or other good faith purchasers.”⁴³ Additionally, the “prior rights” of the holder of a security are not defined by the Bankruptcy Code, therefore, “the only available referent for such ‘prior rights’ is nonbankruptcy law.”⁴⁴

Accordingly, under the well-settled principles of state-law reclamation rights, if a reclaiming seller meets the statutory requirements of notice provided in Bankruptcy Code section 546(c), it must then be determined if there are prior security interests that would prevent returning the goods to the seller. As provided by statute: “[t]he seller’s right to reclaim... is subject to the rights of a buyer in the ordinary course or other good faith purchaser.”⁴⁵ The term “purchaser” means a person who takes by “purchase,” which is given a broad definition and includes taking by “mortgage, pledge, lien, security interest, issue or reissue, gift or any other voluntary transaction creating an interest in property.”⁴⁶ A creditor with a prior perfected security interest in inventory that contains an after-acquired property clause, for example a “floating lien,” is also a good faith purchaser.⁴⁷ Like its predecessor, amended section 546(c) does not bestow any further rights upon a reclaiming seller other than what exists under state law.⁴⁸

In view of that, secured creditors with a security interest in the goods sought to be reclaimed would come ahead of the interest of the reclaiming seller, and the reclaiming seller’s interest would come ahead of general unsecured creditors. Therefore, if an interest of a secured creditor is released or satisfied by less than all of the goods sought by reclamation, “the reclaiming seller retains a priority interest in any remaining goods, and in surplus proceeds from the secured creditors’ foreclosure sale.”⁴⁹ However, where the goods to be reclaimed are exhausted by the rights of the secured creditors, the reclaiming seller does not get a priority interest in any other asset of the debtor at the expense of general unsecured

creditors of the debtor.⁵⁰ This rule has not changed with the revisions to section 546(c). There is no independent federal right to reclamation that would trump this well-settled caselaw, nor should one be created simply because of a poorly written statute.

Interpreting amended section 546(c) as creating a federal reclamation right unhinged from the state law rights of the creditor would require the case-by-case development of federal common law to sort out the relative rights of prepetition creditors. While a compelling case can be made that it is appropriate to create federal common law to resolve some issues,⁵¹ invoking federal common law to enhance the prebankruptcy rights of one set of creditors to reclaim specific assets of the debtor offends a fundamental principle of bankruptcy law, which is to give effect to the prebankruptcy rights, remedies, and expectations of creditors regarding property rights.⁵²

Such an interpretation would also be particularly harmful to predictability in business transactions prebankruptcy. Unsecured creditors deciding whether to supply the debtor on credit would have no way of assessing their rights relative to other unsecured creditors since their rights could be drastically different if the debtor filed for bankruptcy. Some creditors could, in effect, be acquiring what amounts to secret liens, without the knowledge of other creditors. Why? Because a 45-day period permitting reclamation to suppliers is too long for any supplier to make a meaningful evaluation of the risks involved. It is much more feasible to assume that a supplier could assess the risks that arise in a 10-day period as opposed to a 45-day period when determining whether to supply credit to a financially troubled company—if a supplier evaluated risk at all—especially since this coincides with the same risk that exists under state law. In addition, the supposed federal right of reclamation could be so destructive to the debtor's ability to reorganize that bankruptcy courts, if required to enforce an automatic federal right to reclaim, would resort to section 105 to exercise "equitable powers" or perhaps countenance procedural delays to prevent reclamation, thereby further undermining predictability.

MODIFIED TIMEFRAMES

The modification to the timeframes in section 546(c) also does not support the argument that the revisions to this section create rights more generous than state law.⁵³ A comparison of state law to both versions of section 546(c) does not result in any inconsistency. There are three relevant time periods that should be considered when comparing rights under U.C.C. § 2-702, former section 546(c), and amended section 546(c):

(1) the general look-back period; (2) the look-back period when there is a written misrepresentation of solvency; and (3) the notice period.

Section 2-702 of the U.C.C., the basis for state law reclamation rights, allows an unpaid seller to reclaim if the demand is made within 10 days after the insolvent buyer receives the goods. If, however, the buyer misrepresented his solvency in writing to the seller, the unpaid seller is not limited to 10 days to reclaim but rather can look-back three months, or 90 days, to assert reclamation rights. Outside of bankruptcy, under section 2-702, the notice period goes hand-in-hand with the look-back period, and, therefore, the reclaiming seller has 10 days to give notice by making the demand and up to 90 days in the event of a written misrepresentation of solvency.

Former section 546(c) mirrors the 10-day look-back period of the U.C.C. for unpaid sellers to reclaim goods from the debtor. However, former section 546(c) contains no provision for a look-back period if the buyer misrepresented his solvency to the seller. The notice period in former section 546(c) is 10 days, similar to the U.C.C. but, in the event that the 10-day period expired on a date that fell after the commencement of the bankruptcy case, the notice period was then extended to 20 days.

Amended section 546(c) can only be interpreted in the following manner to reach a logical conclusion: it must be read as retaining the general look-back period of 10 days, in recognition of the well-settled principle that the look-back period is a right provided by state law and therefore mirrors the look-back period in section 2-702, despite the fact that the number “10” no longer appears in the section. It would have been superfluous for Congress to write “10 days” since Congress already referenced the applicability of state law with the use of the definite article “the” in the phrase “the right of a seller of goods...to reclaim” that replaces the phrase “any statutory or common law” right.⁵⁴ Congress—recognizing the deficiency in former section 546(c) regarding the misrepresentation of solvency—adds a look-back period for instances in which the buyer misrepresents its solvency to the seller by adding in the 45-day language. With amended section 546(c), Congress clarified that a seller in a bankruptcy proceeding reclaiming goods from a debtor that misrepresented its solvency is afforded an extended look-back period, similar to state law. The look-back period under amended section 546(c) when a buyer misrepresents its solvency is now 45 days. Whereas former section 546(c) did not include a provision for an extended look-back period in the event that a buyer misrepresented its solvency, Congress corrected this exclusion by allowing for 45 days, bringing amended section 546(c) in line with U.C.C. section 2-702. Although the time period in this provision is not as generous as the 90-day

period provided for in section 2-702 of the U.C.C., it is the same right that exists under state law, not an additional or enhanced right.⁵⁵ Finally, the notice period under BAPCPA remains the same as pre-BAPCPA. The general notice period of 10 days applies in accordance with “the right of a seller of goods... to reclaim,” as that right is defined under state law but, in the event that the 10-day period expires on a date that falls after the bankruptcy case is filed, the notice period is then extended to 20 days.

To read the revisions to amended section 546(c) as granting sellers rights superior to those of reclaiming sellers under state law by interpreting the time periods to be more generous would mean that Congress acted contrary to the well-settled principle that creditors cannot be afforded greater rights in bankruptcy than would be available to them under state law. As stated earlier, this principle was highlighted by the recent U.S. Supreme Court opinion in *Travelers*.⁵⁶

It simply defies logic to permit a reclaiming seller greater rights after a bankruptcy petition is filed than if a seller attempted to reclaim under state law. For instance, if amended section 546(c) was interpreted to increase the look-back period from 10 to 45 days (without regard to a misrepresentation of solvency), then a seller who finds that the time to reclaim under state law has already expired could then file an involuntary petition against the buyer and regain the ability to reclaim in the bankruptcy case. Surely Congress did not intend such a result.

ADMINISTRATIVE EXPENSE PRIORITY

Although reclaiming sellers may not prevail on the argument that the revised Code creates a federal right of reclamation, one consolation is the allowance of the new administrative expense claim for sellers that delivered goods 20 days before the bankruptcy filing. BAPCPA added subsection (9) to section 503(b), which reads:

(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 the 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.⁵⁷

Pursuant to section 546(c)(2), even if an unpaid seller fails to provide the requisite notice, the seller can still receive an administrative expense claim under the new section 503(b)(9) for goods delivered 20 days prior

to commencement of the bankruptcy case. As stated by Judge Lifland, “reclamation claims under amended section 546(c) have decreased importance because goods delivered to a debtor in the 20 days prior to bankruptcy will have automatic priority. Thus, reclamation rights are now mainly beneficial for sellers reclaiming goods delivered in the 21 to 45 days prior to the bankruptcy filing,” so long as there is a misrepresentation of insolvency.⁵⁸

However, the administrative expense status may be less beneficial to reclaiming sellers who are subject to section 547 preference actions where they have received payment from the debtor in the 90 days preceding the bankruptcy filing. The preference payments may be avoided by the debtor, and, pursuant to section 550 of the Code, the debtor may recover the transferred funds for the benefit of the estate.⁵⁹ If a preference action exists against a reclaiming seller pursuant to section 547(b), then the administrative claim that the reclaiming seller holds pursuant to section 503(b)(9) may be set off, under section 502(d), by the preference claim, albeit that said amounts may be reduced by preference defenses such as contemporaneous exchange for new value, in the ordinary course of business, etc. Pursuant to section 502(d), where money or property is owed to the estate, “the court shall disallow any claim of any entity from which property is recoverable under section . . . 550.”⁶⁰ In such instances, setoff will be appropriate: “§ 502(d) was intended to be used as an affirmative defense by the debtor in possession who asserts an objection to a creditor’s claim.”⁶¹ Therefore, adjustments to the administrative claim by way of setoff must first be made before the reclaiming seller is eligible to receive payment for the section 503(b)(9) claim.

In addition, the administrative expense status can be tempered if the case converts to one under Chapter 7. Pursuant to section 726, when a case converts to a Chapter 7, distribution of property of the estate begins with payment of section 507 priority claims, which includes administrative expenses, such as section 503(b)(9) claims. However, section 726(b)⁶² provides that section 503(b) claims incurred in the Chapter 7 will be given priority over 503(b) claims previously incurred in the Chapter 11. Therefore, conversion could potentially diminish recovery prospects for reclaiming sellers. The problem would arise if the Chapter 7 case was administratively insolvent or if there was not enough money to fully satisfy Chapter 11 administrative claims after payment of Chapter 7 administrative claims. In many cases, the creation of the section 503(b)(9) administrative expense claim will place such a strain on Chapter 11 debtors that conversion to a Chapter 7 may be the only realistic option. In fact, the onerous section 503(b)(9) claims could prevent a debtor from confirming a plan of reorganization because a pre-

requisite to confirmation is the ability to pay all administrative expense claims in full, in cash, on the effective date of the plan.⁶³

CONCLUSION

Despite the changes made to amended section 546(c) under BAPCPA, the rules of statutory construction and a fair reading of the Code along with well-settled principles of bankruptcy law and recent case law all support the conclusion that no independent federal right to reclamation exists. A contrary result would lead to the incongruous effect of affording sellers greater rights in bankruptcy than are available under state law and of creating an incentive for unpaid sellers to force insolvent buyers into bankruptcy with the filing of involuntary petitions. BAPCPA does not miraculously create a right to reclaim goods that could not be reclaimed under state law.

Instead, BAPCPA enhances the claims of reclamation sellers by affording them administrative expense status for goods delivered in the 20 days before bankruptcy, subject to setoff for preference claims that the debtor may have against the reclaiming seller.

NOTES

1. Henry J. Sommer, *Trying to Make Sense out of Nonsense: Representing Consumers Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 *Am. Bankr. L.J.* 191, 193 (2005) (“the bill’s poor drafting will require judges to exercise their judgment simply in trying to determine what it means”); Hon. Keith M. Lundin, *Ten Principles of BAPCPA: Not What was Advertised*, 24 *Am Bankr. Inst. J.* 1, 70 (2005) (“Whether by design or default, bankruptcy practitioners and judges will spend decades unraveling cross-references that lead nowhere and interpreting new terms of art that fail to communicate.”) (citations omitted).

2. Reclamation is defined as “the right of a seller to recover possession of goods delivered to an insolvent buyer.” *In re Pester Refining Co.*, 964 F.2d 842, 844, 23 *Bankr. Ct. Dec. (CRR)* 12, 26 *Collier Bankr. Cas.* 2d (MB) 1663, *Bankr. L. Rep. (CCH)* P 74639, 17 *U.C.C. Rep. Serv.* 2d 1138 (8th Cir. 1992).

3. This article will refer to the pre-BAPCPA section 546(c) as “former section 546(c)” and the post-BAPCPA section 546(c) as “amended section 546(c).”

4. The issue of reclamation post-BAPCPA and varying opinions on this topic have been addressed in several articles, including: Sally S. Neely, *How BAPCPA Affects the Rights of Unpaid Prepetition Sellers of Goods*, ALI-ABA Advanced Program on Chapter 11 Reorganizations p.17-19 (Mar. 22-24, 2007) (hereinafter the “Neely Article”); Hon. Bruce A. Markell, *Changes to Avoiding Powers Brought About by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, SL068 ALI-ABA 247, 251-52 (2005) (hereinafter the “Markell Article”); Richard Levin and Alesia Ranney-Marinelli, *The Creeping Repeal of Chapter 11: The Significant Business Provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 *Am. Bankr. L. J.* 603 (2005); Lisa S. Gretchko, *The Bankruptcy Reform Act One Year Later: A Disappointment for Trade Creditors*, 26-Feb *Am. Bankr. Inst. J.* 18 (2007); Eric R. Wilson and Robert L. LeHane, *Secured Lenders’ Pre- and Post-Petition Liens Trump Reclamation Rights Under Amended § 546(c)*, 26-Mar *Am. Bankr. Inst. J.* 26 (2007); Stacey L. Meisel and Lauren Hannon, *With Bated Breath: Do the Revision to § 546(c) Create a Federal Right of Reclamation for Sellers?* 26-Apr *Am. Bankr. Inst. J.* 20 (2007); Russell C. Silberglied and Marcos A. Ramos, *Section 546(c) and Reclamation Rights*

After BAPCPA: A Response to Wilson and LeHane, 26-Apr Am. Bankr. Inst. J. 32 (2007); Deborah L. Thorne, The Courts Begin To Speak: Deciphering § 546(c), 26-Apr Am. Bankr. Inst. J. 38 (2007); Deborah L. Thorne, Reclamation Under the New § 546(c)(1): Illusory as Ever, In re Dana Corp. and Incredible Auto Sales LLC, 26-Jun Am. Bankr. Inst. J. 46 (2007); and David L. Woods, Reclamation Under BAPCPA: Model for Uniformity?, 26-Aug Am. Bankr. Inst. J. 40 (2007).

5. In re Dana Corp., 367 B.R. 409, 48 Bankr. Ct. Dec. (CRR) 36, 57 Collier Bankr. Cas. 2d (MB) 1559, Bankr. L. Rep. (CCH) P 80942 (Bankr. S.D. N.Y. 2007); In re Advanced Marketing Services, Inc., 360 B.R. 421, 47 Bankr. Ct. Dec. (CRR) 192, 57 Collier Bankr. Cas. 2d (MB) 607 (Bankr. D. Del. 2007), subsequent determination, 360 B.R. 429 (Bankr. D. Del. 2007); In re Incredible Auto Sales LLC, 48 Bankr. Ct. Dec. (CRR) 42, 62 U.C.C. Rep. Serv. 2d 357 (Bankr. D. Mont. 2007).

6. This is often referred to as a trustee's "strong-arm powers."

7. In re Tucker, 329 B.R. 291, 298 n.8, 59 U.C.C. Rep. Serv. 2d 1131 (Bankr. D. Ariz. 2005) (in a case decided under pre-BAPCPA law, the court questions the impact that revisions to section 546(c) might have on cases decided under the new law).

8. 11 U.S.C.A. § 546(c) (2000).

9. 11 U.S.C.A. § 546(c) (2005). For the benefit of comparison, the following annotated version of section 546(c) uses ~~strikethrough~~ to show deletions from the old version and *italics* to show the additions:

(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, 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 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~~ *If 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 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) of this title; or (b) secures such claim by a lien*

10. In re Primary Health Systems, Inc., 258 B.R. 111, 114, 37 Bankr. Ct. Dec. (CRR) 72, 45 Collier Bankr. Cas. 2d (MB) 1363, 44 U.C.C. Rep. Serv. 2d 160 (Bankr. D. Del. 2001).

11. In re Affiliated of Florida, Inc., 237 B.R. 495, 497, 42 Collier Bankr. Cas. 2d (MB) 955, 39 U.C.C. Rep. Serv. 2d 997 (Bankr. M.D. Fla. 1998) (citation omitted); Matter of Flagstaff Foodservice Corp., 14 B.R. 462, 8 Bankr. Ct. Dec. (CRR) 120, 9 Collier Bankr. Cas. 2d (MB) 9, Bankr. L. Rep. (CCH) P 68438, 32 U.C.C. Rep. Serv. 1479 (Bankr. S.D. N.Y. 1981) quoting S. Rep. No. 95-989, 95th Cong., 2d Sess. 86-7 (1978); H. Rep. No. 95-595, 95th Cong., 1st Sess. 371-2 (1977), U.S. Code Cong. & Admin. News 1978, pp. 5872-5873, 6328 ("The purpose of the provision is to recognize, in part, the validity of section 2-702 of the Uniform Commercial Code, which has generated much litigation, confusion and divergent decisions in different circuits").

12. In re Pester Refining Co., 964 F.2d 842, 844, 23 Bankr. Ct. Dec. (CRR) 12, 26 Collier Bankr. Cas. 2d (MB) 1663, Bankr. L. Rep. (CCH) P 74639, 17 U.C.C. Rep. Serv. 2d 1138 (8th Cir. 1992).

13. U.C.C. § 2-702 (2004), entitled “Seller’s Remedies on Discovery of Buyer’s Insolvency,” states, in relevant part:

(2) Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within 10 days after the receipt....

(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.

14. *In re Zeta Consumer Products Corp.*, 291 B.R. 336, 350, 50 U.C.C. Rep. Serv. 2d 459 (Bankr. D. N.J. 2003).

15. See *Dana Corp.*, 367 B.R. at 409; *Advanced Marketing Services*, 360 B.R. at 421; *Incredible Auto Sales*, 48 Bankr. Ct. Dec. (CRR) at 42.

16. *In re Perfetto*, 361 B.R. 27, 31 (Bankr. D. R.I. 2007).

17. *In re Allied Digital Technologies Corp.*, 341 B.R. 171, 173, 46 Bankr. Ct. Dec. (CRR) 79 (D. Del. 2006) (citing *In re Price*, 370 F.3d 362, 368-70 (3d Cir. 2004) (setting forth the statutory construction approach to the Bankruptcy Code)).

18. *Allied Digital*, 341 B.R. at 173 (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 120 S. Ct. 1942, 147 L. Ed. 2d 1 (2000) (internal quotations omitted)).

19. *Allied Digital*, 341 B.R. at 173 (internal citations omitted).

20. See *In re Pester Refining Co.*, 964 F.2d 842, 846, 23 Bankr. Ct. Dec. (CRR) 12, 26 *Collier Bankr. Cas. 2d (MB) 1663*, Bankr. L. Rep. (CCH) P 74639, 17 U.C.C. Rep. Serv. 2d 1138 (8th Cir. 1992).

21. *Matter of Peter DelGrande Corp.*, 138 B.R. 458, 460-61, 22 Bankr. Ct. Dec. (CRR) 1174, 26 *Collier Bankr. Cas. 2d (MB) 1374*, Bankr. L. Rep. (CCH) P 74672 (Bankr. D. N.J. 1992) (quoting *Finley v. U.S.*, 490 U.S. 545, 553, 109 S. Ct. 2003, 2009, 104 L. Ed. 2d 593 (1989)).

22. *In re Mark Anthony Const., Inc.*, 886 F.2d 1101, 1107, 19 Bankr. Ct. Dec. (CRR) 1391, Bankr. L. Rep. (CCH) P 73073, 89-2 U.S. Tax Cas. (CCH) P 9550, 64 A.F.T.R.2d 89-5412 (9th Cir. 1989).

23. Former section 546(c)(2) read:

(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 a claim by a lien.

24. *Matter of Flagstaff Foodservice Corp.*, 14 B.R. 462, 466-67, 8 Bankr. Ct. Dec. (CRR) 120, 9 *Collier Bankr. Cas. 2d (MB) 9*, Bankr. L. Rep. (CCH) P 68438, 32 U.C.C. Rep. Serv. 1479 (Bankr. S.D. N.Y. 1981) (oft-cited case for analysis of interplay between Section 546(c)(2) and U.C.C. § 2-702(2)).

25. *Matter of Flagstaff Foodservice Corp.*, 14 B.R. at 467.

26. *Butner v. U.S.*, 440 U.S. 4, 54-558, 99 S. Ct. 914, 59 L. Ed. 2d 136, 19 C.B.C. 481, Bankr. L. Rep. (CCH) P 67046 (1979) (“Property interest are defined by state law. Unless some federal interest requires a different result, there is no reason why such interest should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding”).

27. *Travelers Cas. and Sur. Co. of America v. Pacific Gas and Elec. Co.*, 127 S. Ct. 1199, 167 L. Ed. 2d 178, 47 Bankr. Ct. Dec. (CRR) 265, 57 *Collier Bankr. Cas. 2d (MB) 314*, Bankr. L. Rep. (CCH) P 80880 (U.S. 2007).

28. *Travelers*, 127 S. Ct. at 1204-05 (internal citations omitted).

29. *In re Antweil*, 931 F.2d 689, 693, 21 Bankr. Ct. Dec. (CRR) 1069, 24 *Collier Bankr. Cas. 2d (MB) 1772*, Bankr. L. Rep. (CCH) P 73928, 16 U.C.C. Rep. Serv. 2d 400 (10th Cir. 1991), judgment aff’d, 503 U.S. 393, 112 S. Ct. 1386, 118 L. Ed. 2d 39, 22 Bankr. Ct. Dec. (CRR) 1218,

26 Collier Bankr. Cas. 2d (MB) 323, Bankr. L. Rep. (CCH) P 74501, 17 U.C.C. Rep. Serv. 2d 1 (1992) (citing H.R. No. 595, 9th Cong., 2d Sess. 5, reprinted in 1978 U.S. Code Cong. & Admin. News 5963, 5966), aff'd, 503 U.S. 393, 112 S. Ct. 1386, 118 L. Ed. 2d 39 (1992).

30. Matter of Federal's Inc., 553 F.2d 509, 21 U.C.C. Rep. Serv. 689 (6th Cir. 1977).

31. Although federal law preempts state law where the two cannot be interpreted to eliminate conflict, bankruptcy generally avoids the need for preemption. See Robin E. Phelan, et al., *If Their Business Judgment Was So Good, How Come They're in Bankruptcy and Other Perplexing Mysteries of the Business Judgment Rule: Corporate Governance Issues for the Financially Troubled Company*, 10 J. Bankr. L. & Prac. 471, 471 (2001) (recognizing that "[a]lthough federal laws preempt conflicting state laws, in most cases federal and state laws are interpreted and applied to eliminate conflicts so that no preemption occurs. Bankruptcy is an excellent example of federal and state coordination").

32. In re Greene, 248 B.R. 583, 593, 41 U.C.C. Rep. Serv. 2d 1004 (Bankr. N.D. Ala. 2000).

33. See In re Primary Health Systems, Inc., 258 B.R. 111, 114, 37 Bankr. Ct. Dec. (CRR) 72, 45 Collier Bankr. Cas. 2d (MB) 1363, 44 U.C.C. Rep. Serv. 2d 160 (Bankr. D. Del. 2001).

34. Primary Health Systems, 258 B.R. at 114.

35. Primary Health Systems, 258 B.R. at 114.

36. Dana Corp., 367 B.R. at 410-11.

37. Dana Corp., 367 B.R. at 413.

38. Dana Corp., 367 B.R. at 416. The reclaiming sellers also argued that the debtor satisfied the prior prepetition lien of the lenders and therefore there was no Prior Lien Defense standing in the way of the reclaiming sellers. Dana Corp., 367 B.R. at 418. The court disagreed stating, in part, that the prepetition liens were released in exchange for payment from postpetition financing, which gave the postpetition financiers first-priority liens as part of one integrated transaction. Dana Corp., 367 B.R. at 421.

39. Dana Corp., 367 B.R. at 416.

40. Dana Corp., 367 B.R. at 416.

41. Dana Corp., 367 B.R. at 416.

42. Dana Corp., 367 B.R. at 416.

43. Dana Corp., 367 B.R. at 416, citing Incredible Auto Sales, 2007 WL 927615 at *6 ("it may be a mistake to assume that the amended § 546(c) was intended to provide an entirely new and self-contained body of reclamation law, because it fails to recognize the rights of buyers in the ordinary course, other good faith purchasers and lien creditors, who were always protected under the U.C.C.").

44. Dana Corp., 367 B.R. at 409. Similarly, in In re Advanced Marketing Services, Inc., an unpaid seller sought a temporary restraining order in connection with its complaint seeking reclamation of certain goods, immediate payment of administrative expense claims, and an accounting of goods. Advanced Marketing Services, 360 B.R. at 424. The Honorable Christopher S. Sontchi, unconvinced that the reclaiming seller established a strong probability of success on the merits, denied the TRO motion. Advanced Marketing Services, 360 B.R. at 427. The court found that the goods at issue were subject to the first priority prepetition and postpetition loans of the senior lenders. Advanced Marketing Services, 360 B.R. at 426. Therefore, the court held that, since amended section 546(c) "explicitly provides that 'the rights of a seller of goods are subject to the prior rights of a holder of a security interest in such goods of the proceeds thereof,' ... under the express language of § 546(c)(1) of the Bankruptcy Code, as amended, the Senior Lenders' pre-petition and post-petition liens on the Debtors' inventory are superior to [the sellers'] reclamation claim." Advanced Marketing Services, 360 B.R. at 421.

45. U.C.C. § 2-702(3).

46. U.C.C. § 1-201(32), (33).

47. Primary Health Systems, 258 B.R. at 114.

48. Dana Corp., 367 B.R. at 409.

49. Pester Refining, 964 F.2d at 846.

50. Pester Refining, 964 F.2d at 847.
51. See Adam J. Levitin, *Toward a Federal Common Law of Bankruptcy: Judicial Lawmaking in a Statutory Regime*, 80 Am. Bankr. L.J. 1 (2006).
52. See *Butner v. U.S.*, 440 U.S. at 54-55.
53. Support for this proposition can be found in the well-reasoned articles of Sally S. Neely and the Honorable Bruce A. Markell. See Neely Article, ALI-ABA Advanced Program on Chapter 11 Reorganizations at 17-19; and Markell Article, SL068 ALI-ABA at 251-52.
54. *Dana Corp.*, 367 B.R. at 409, citing Neely Article, ALI-ABA Advanced Program on Chapter 11 Reorganizations at 17.
55. See Neely Article, ALI-ABA Advanced Program on Chapter 11 Reorganizations at 17-19; and Markell Article, SL068 ALI-ABA at 251-52.
56. See *Travelers Cas. and Sur. Co. of America v. Pacific Gas and Elec. Co.*, 127 S. Ct. 1199, 167 L. Ed. 2d 178, 47 Bankr. Ct. Dec. (CRR) 265, 57 Collier Bankr. Cas. 2d (MB) 314, Bankr. L. Rep. (CCH) P 80880 (U.S. 2007).
57. 11 U.S.C.A. § 503(b)(9).
58. See *Dana Corp.*, 367 B.R. at 409.
59. 11 U.S.C.A. § 550(a)(1).
60. 11 U.S.C.A. § 502(d).
61. *In re TWA Inc. Post Confirmation Estate*, 305 B.R. 221, 226, 42 Bankr. Ct. Dec. (CRR) 116 (Bankr. D. Del. 2004).
62. In pertinent part, 11 U.S.C.A. § 726(b) reads:

In a case that has been converted to [a Chapter 7]... a claim allowed under section 503(b) of this title incurred under [a Chapter 7] after such conversion has priority over a claim allowed under section 503(b) of this title incurred under any other chapter of this title or under this chapter before such conversion.
63. In pertinent part, 11 U.S.C.A. § 1129(a)(9)(A) reads as follows:
 - (a) The court shall confirm a plan only if all of the following requirements are met:

...
 - (9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that—
 - (A) with respect to a claim of a kind specified in section 507(a)(2) or 507(a)(3) of this title, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim.