

## RECLAIM THIS! GETTING CREDIT SELLER RIGHTS IN BANKRUPTCY RIGHT

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### INTRODUCTION

The oxymoronically titled Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA” or “2005 amendments”)<sup>1</sup> has received considerable attention since its passage, and considerably less than all of it is positive.<sup>2</sup> By even a neutral account, the bill is clumsily drafted,<sup>3</sup> unnecessarily prolix,<sup>4</sup> inter-

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1. Pub. L. No. 109-8, 119 Stat. 23 (2005) (codified as amended in scattered sections of 11 U.S.C.). BAPCPA became fully effective for cases filed on or after October 17, 2005. *Id.* § 1501, 119 Stat. at 216.

2. Professor Mechele Dickerson points out:

Although the bill garnered the support of a substantial number of Democrats and Republicans in Congress, virtually all bankruptcy and commercial law professors at all major U.S. law schools (including this author), all major non-partisan national bankruptcy organizations, and the national organization of bankruptcy judges argued that the bill was ill-conceived, poorly drafted, and appeared to benefit only the credit card lobby.

A. Mechele Dickerson, *Regulating Bankruptcy: Public Choice, Ideology, & Beyond*, 84 WASH. U. L. REV. 1861, 1866 n.29 (2006).

3. See Jean Braucher, *The Challenge to the Bench and Bar Presented by the 2005 Bankruptcy Act: Resistance Need Not Be Futile*, 2007 U. ILL. L. REV. 93, 97 (“The problems with the 2005 Act are breathtaking. There are typos, sloppy choices of words, hanging paragraphs and inconsistencies.”); Ralph Brubaker, *Supreme Court Adopts the Forward-Looking Approach to Projected Disposable Income in Chapter 13*, 30 BANKR. L. LETTER 2, Aug. 2010, available at Westlaw 30 No. 8 BLL 2 (“BAPCPA is a poorly drafted statute. What’s more, Congress knew that it was a poorly drafted statute and was warned repeatedly about all of the difficulties that it would pose for the courts . . . Congress just did not care, though, and enacted BAPCPA without attempting to fix even the most glaring drafting gaffes.”); John Rao, *Testing the Limits of Statutory Construction Doctrines: Deconstructing the 2005 Bankruptcy Act*, 55 AM. U. L. REV. 1427, 1427 (2006) (“Most bankruptcy practitioners, scholars, and courts readily agree on one thing: the 2005 Bankruptcy Act . . . is poorly drafted.”); 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, 191–92 (2005) (noting that bankruptcy experts drafted previous amendments to title 11 and that BAPCPA drafters refused to make technical corrections to the statute); see also *In re Donald*, 343 B.R. 524, 529 (Bankr. E.D.N.C. 2006)

nally inconsistent,<sup>5</sup> and annealed in a cauldron of special interest pressures.<sup>6</sup> The legislative history is scant<sup>7</sup> and what does exist is

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(stating the 2005 law's changes are "confusing, overlapping, and sometimes self-contradictory" and "introduce new and undefined terms that resemble, but are different from, established terms that are well understood").

4. Often pointed to as the prime example is the almost impenetrably dense means test, 11 U.S.C. § 707(b)(2)–(3) (2012), providing for no less than three layers of screening in Chapter 7 cases: presumed abuse, rebuttal, and totality of the circumstances. Professor David Gray Carlson, based on his study of the means test's impact, has concluded that the result of the huge investment of time and effort that goes into the test has, at best, had no effect, and, arguably, has actually encouraged bankruptcy abuse. David Gray Carlson, *Means Testing: The Failed Bankruptcy Revolution of 2005*, 15 AM. BANKR. INST. L. REV. 223, 227 (2007). However, other examples abound, such as the amendment to 11 U.S.C. § 365(b)(1), which prior to BAPCPA, read in relevant part: "[T]he trustee may not assume such contract or lease unless . . . the trustee cures, or provides adequate assurance that the trustee will promptly cure, such default." 11 U.S.C. § 365(b)(1)(A) (2000), amended by 11 U.S.C. § 365(b)(1)(A) (2000 & Supp. V 2005). To that sentence BAPCPA added the following incomprehensible language:

[O]ther than a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property, if it is impossible for the trustee to cure such default by performing nonmonetary acts at and after the time of assumption, except that if such default arises from a failure to operate in accordance with a nonresidential real property lease, then such default shall be cured by performance at and after the time of assumption in accordance with such lease, and pecuniary losses resulting from such default shall be compensated in accordance with the provisions of this paragraph.

Pub. L. No. 109-8, § 328, 119 Stat. 23, 100 (2005). References to the "Code" or the "Bankruptcy Code" herein are to the current law of Bankruptcy as found in Title 11 of the United States Code and amended through Pub. L. No. 112-106, approved April 5, 2012.

5. As one of several examples, consider section 521(i) of the Federal Bankruptcy Code, 11 U.S.C. §§ 101–1532 (2012). Pursuant to section 521(i)(1), if an individual debtor in a voluntary case under Chapter 7 or 13 fails to file all of the information required under section 521(a)(1) within forty-five days after the date of the filing of the petition, the case shall be "automatically dismissed" effective on the forty-sixth day after the date of the filing of the petition. 11 U.S.C. § 521(i)(1) (2012). Section 521(i)(2) then allows any party in interest to file a motion seeking an order of dismissal—presumably of the case that has already been automatically dismissed. *Id.* § 521(i)(2). This raises the prospect that a case that was automatically dismissed (or should have been) might actually proceed to discharge before the missing mandated information is discovered and acted upon. This anomaly has led Judge Jay Cristol to express his frustration with "automatic" dismissal in poetic fashion. See *In re Riddle*, 344 B.R. 702, 703 (Bankr. S.D. Fla. 2006) (one of the couplets in the poem reads: "How can any person know what the docket does not show?"). The constitutionality of automatic dismissal has also been questioned. See Gregory Germain, *Due Process in Bankruptcy: Are the New Automatic Dismissal Rules Constitutional?*, 13 U. PA. J. BUS. L. 547, 549 (2011).

The ambiguities and uncertainties created by BAPCPA, moreover, were not limited to the consumer side of the field. For example, there is a split of authority as to whether section 1115 of the Code, added by the 2005 amendments, exempts individual Chapter 11 debtors from the absolute priority rule. For example, see *Dill Oil Co. v. Stephens (In re Stephens)*, 704 F. 3d 1279, 1281, 1283–85 (10th Cir. 2013), and cases cited therein.

6. Many critics of BAPCPA argued that the credit card industry was the biggest beneficiary of the act. Both Senator Dick Durbin and Representative Jim McDermott suggest-

less than altogether clear or helpful.<sup>8</sup> Together, these factors have frequently rendered the traditional judicial function in application of the law; namely, ascertaining (or at least beginning by ascertaining) congressional intent, an exercise in futility.<sup>9</sup> To say

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ed during the floor debates that the bill was bought and paid for by the consumer credit industry; especially the credit card industry. *See, e.g.*, 151 CONG. REC. S2216 (daily ed. Mar. 8, 2005) (statement of Sen. Durbin); 151 CONG. REC. H2084 (daily ed. Apr. 14, 2005) (statement of Rep. McDermott).

A case can be made, however, that no lender group fared better under BAPCPA than the auto lenders, who among other things, were rewarded with a prohibition against modification in Chapter 13 if the vehicle in question was acquired for personal use and within two and a half years of filing (otherwise, within one year). *See* 11 U.S.C. § 1325(a)(9) (2012); *see also* William C. Whitford, *A History of the Automobile Lender Provisions of BAPCPA*, 2007 U. ILL. L. REV. 143, 144 (arguing that automobile lenders are likely to benefit more than any other group under BAPCPA). In any case, the late Senator Paul Wellstone, the lone senator to vote against the bill, summed up the view of many in the bankruptcy field when he offered this comment with respect to an earlier iteration of the bill that eventually was passed as BAPCPA:

You are hard pressed to find a bankruptcy judge that supports this legislation. You are hard pressed to find a bankruptcy law professor, a bankruptcy expert of any kind, anywhere, any place in the U.S.A. that backs this bill. This bill was written for the lender. It is that simple.

147 CONG. REC. 13,139, 13,140 (2001) (statement of Sen. Wellstone). On the other hand, Professor Dickerson has offered a thoughtful explanation and critique of BAPCPA that is much more nuanced and complex than the single industry capture exposition, although even she concedes the criticality of the role played by the consumer credit lobby. *See* Dickerson, *supra* note 2, at 1861–63.

7. *See* DaimlerChrysler Fin. Servs. Americas v. Miller (*In re* Miller), 570 F.3d 633, 639 (5th Cir. 2009) (“Even if we were to seek guidance on BAPCPA from somewhere outside its plain language, we would be stopped by a dearth of plain legislative history.”).

8. *See* Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. J.L. 485, 485–93 (2005) (detailing the legislation’s history going back to its original antecedents in the dissent to the National Bankruptcy Review Commission’s 1997 Report); NAT’L BANKR. REVIEW COMM’N, BANKRUPTCY: THE NEXT TWENTY YEARS FINAL REPORT (1997), *available at* <http://govinfo.library.unt.edu/nbrcreportcont.html>.

Generally speaking, there is no question that motivation behind the legislation was to curb the use of the bankruptcy laws as a form of debt management by people who in fact could afford to pay all or a substantial portion of their debts. There is, however, very little specific legislative guidance concerning the intended purpose for and operation of most of the provisions of BAPCPA themselves, and particularly those relating to business cases. *See* *Coop v. Frederickson* (*In re* Frederickson), 545 F.3d 652, 656 (8th Cir. 2008); *see also In re McNabb*, 326 B.R. 785, 789 (Bankr. D. Ariz. 2005) (“Legislative history is virtually useless as an aid to understanding the language and intent of BAPCPA.”).

9. Since the mid-1980s, a significant body of literature has developed exploring alternative approaches to statutory interpretation. Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 256 (1992). On the most traditional account, embraced in innumerable judicial opinions, the role of courts in applying statutory language is to determine the intent of the legislature. Under an intentionalist view, the court might consider a wide variety of legislative materials in order to determine the intent behind the statute as promulgated. *See* Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988–89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 301 (1990) (ar-

the least, it is difficult to discern that which, in all likelihood, does not and has never existed in a uniform or coherent fashion.<sup>10</sup>

Nonetheless, since enactment of BAPCPA, courts have labored gamely to make sense of its provisions, which, in any number of instances, are inscrutably obscure, and seem to lack any inher-

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guing that the court's primary consideration when presented with a statute is to "advance rather than impede or frustrate the will of Congress"). A narrow variation of intentionalism, sometimes referred to as textualism and almost always identified with Justice Scalia, restricts the search for legislative intent to the law as written. See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 3, 23–25 (Amy Gutmann ed., 1997). On the other end of the intentionalism spectrum is an approach, sometimes called purposivism, which goes behind inquiry into what the legislature "had in mind" to determine what the legislature was ultimately seeking to accomplish. Purposivism is frequently identified with the Legal Process Movement. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1374 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). In contrast to the standard models of statutory interpretation, which have been dubbed "archeological" in focus, T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 22–25 (1988), is a school of thought closely associated with Professors Eskridge and Frickey, known as dynamic statutory interpretation. See, e.g., William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990). Taking a pragmatic perspective, the adherents of this theory abandon the backward-looking archeological approach in favor of what has been described as a "nautical model," Aleinikoff, *supra*, at 33–36, in which the legislature launches the ship, but the courts chart the voyage taking into account contemporary needs and considerations. See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 73–74 (1990) (suggesting the most important object of statutory interpretation is to attain the best results for society through practical reasoning). And yet, even the most devout proponents of dynamic statutory interpretation acknowledge that when the statutory text is clear, it is by far the most important consideration and will ordinarily control absent significant changes in the social and legal order that call for a more evaluative perspective. See, e.g., Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO L.J. 281, 309 (1989) ("When the statutory command is unclear, [courts may bring] contemporary values to bear. But when the statutory language and legislative history make the statute's meaning unmistakable, such 'interpretation' is more in the nature of a partial repeal."); Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 189 (1986) (explaining that if the meaning of the statute is clear, judges must obey).

10. I make this assertion in relation to BAPCPA, and the process attending its enactment, and not as a more general commentary on the legislative process that might be taken as subscribing to the public choice theory that legislation is always an incoherent compromise and Congress has no mind of its own. See Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 68 (1994); see generally DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* 88–115 (1991) (providing a helpful summary of the public choice literature in relation to statutory interpretation). On the other hand, as Judge Learned Hand pointed out over fifty years ago, the point does remain true that if by legislative "intent" we mean what one person or any group of people "had in mind," this is inherently unknowable. *United States v. Klinger*, 199 F.2d 645, 648 (2d Cir. 1952).

ently clear reason.<sup>11</sup> Thoughtful commentators have undertaken to offer useful insight and analysis to help guide that effort.<sup>12</sup> Overall, however, these efforts have fallen, and will continue to fall, short in relation to any number of provisions of BAPCPA. This is because they entail a stoic and estimable, but ultimately vain, attempt to interpret statutory text that is, in some instances, impenetrably vague or simply incomplete, or, in other instances, confounds essential bankruptcy policy. A coherent and intelligible expression of legislative intent that might have shed some light in the process is nowhere to be found.<sup>13</sup> Although the competition is unquestionably stiff, in perhaps no substantive area of the field have these observations been truer than in the efforts to deconstruct and rationally apply the changes BAPCPA wrought on an area of commercial law and practice that was already embroiled in confusion and controversy; namely, sellers' right of reclamation.

The 2005 amendments to the right of reclamation are a puzzle. Through no fault of their own, courts have creatively, but unsuccessfully, attempted to untangle the Gordian Knot into which BAPCPA has tied the right of reclamation (and an ancillary new remedy for credit sellers of goods) in bankruptcy.<sup>14</sup> This is partly due to the fact that, at some level, courts simply cannot accept that the statute means what it says, or, in certain cases, accept the implications of applying the statute to mean what it says. Courts, of course, are constrained in their efforts to minimize the chaos given the fact that, by dint of their structural and institu-

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11. See *In re Perfetto*, 361 B.R. 27, 31 (Bankr. D.R.I. 2007), in which the court mused: Such incongruous 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.

12. See, e.g., Samuel L. Bufford & Erwin Chemerinsky, *Constitutional Problems in the 2005 Bankruptcy Amendments*, 82 AM. BANKR. L.J. 1 (2008); Richard Levin & 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); A. Thomas Small, *If You Fix It, They Will Come—A New Playing Field for Small Business Bankruptcies*, 79 AM. BANKR. L.J. 981 (2005); Eugene R. Wedoff, *Major Consumer Bankruptcy Effects of BAPCPA*, 2007 U. ILL. L. REV. 31.

13. See *supra* notes 7–8 and accompanying text.

14. That remedy is the new administrative expense priority in § 503(b)(9) for the value of goods sold to the debtor in the ordinary course of the debtor's business in the twenty-day period prior to the filing of the case. 11 U.S.C. § 503(b)(9) (2012).

tional responsibilities, they must be honest brokers and play the hand that the legislature deals them, regardless (continuing the metaphor) of how rotten the cards.<sup>15</sup> Those of us who comment on the law, however, are not constrained by the parameters associated with playing a formal role in the constitutional system of government, and we do not have to decide real cases between actual litigants. We have the prerogative and the privilege, therefore, to go beyond the positive law and openly (but hopefully constructively) critique legislative enactments that either defy rational interpretation or introduce systemic disharmony into the larger regime. We have license to ask the “right” questions; and, in this instance, the right questions about reclamation are: (1) how does preferential treatment for reclaiming and other sellers of goods fit within the broader panoply of bankruptcy policies, separate and apart from the role the doctrine serves under state law; (2) how well does BAPCPA balance these considerations; and (3) if poorly, then how can and should credit seller remedies be crafted in bankruptcy to ensure that the interests of those sellers, and the various other parties with a stake in the bankruptcy case, are optimally coordinated and aligned? Those are the questions this article seeks to raise and begins to answer.

In order to provide the context, Part I begins with an overview of the right of reclamation under both common law and the Uniform Commercial Code (“U.C.C.”), and then also in a bankruptcy proceeding up to circa 2005.<sup>16</sup> Next, Part II chronicles the changes to the rules governing reclamation and reclamation-type claims in bankruptcy brought about under BAPCPA, and reviews the palmary efforts of courts to grapple with some of the key interpretational curiosities that these revisions have spawned. In this

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15. The Supreme Court of the United States has been clear that where Congress has unambiguously drafted a particular provision, it is the court’s sole function to enforce it according to its terms, not to undermine its effect. *See Lamie v. United States Tr.*, 540 U.S. 526, 534–36 (2004). The words of a statute cannot be ignored or jettisoned by courts looking to impose their own meaning, however logical that meaning, on a statutory scheme. *See, e.g., IUE-CWA v. Visteon Corp. (In re Visteon Corp.)*, 612 F.3d 210, 219–20 (3d Cir. 2010) (construing the provision of section 1114 of the Bankruptcy Code in accordance with its plain language); *see also supra* note 9 (outlining different approaches to statutory interpretation and referencing a preference for remaining faithful to the plain language of the statute).

16. AMERICAN LAW INSTITUTE, AND NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM COMMERCIAL CODE: OFFICIAL TEXT AND COMMENTS (2013).

connection, this article emphasizes two points: (1) why the prevailing judicial approaches to these kinds of credit seller claims in bankruptcy are, with a few exceptions, unsupportable under the terms of the statute as written; and (2) what are the larger, negative ramifications of such forced and unnatural interpretation. Finally, Part III sets forth an alternative way of thinking about and approaching credit seller claims (and the reclamation remedy) in bankruptcy that coheres not simply with what historically have been the most compelling purposive objects of the right of reclamation, but also harmonizes the interaction of those objectives with the unique policy considerations that are implicated once a bankruptcy case is filed.

## I. HISTORICAL OVERVIEW

### A. *The Common Law*

Ordinarily, a credit seller of goods has no special claim to the goods it sells unless the seller reserves a security interest in those goods.<sup>17</sup> A limited exception to this axiom existed at common law (and perhaps even earlier) for a seller who had been defrauded into delivering goods to an insolvent buyer.<sup>18</sup> Generally speaking, this right to “reclaim” required a showing that the buyer had misrepresented its solvency to the selling creditor or, later in the development of the right, to a third party (such as a credit reporting agency) on whose records the selling creditor relied.<sup>19</sup> Even though title and possession of the goods had passed to the buyer, in such a case the defrauded seller was entitled effectively to re-

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17. The typical remedy in such a case would be an action for the price under U.C.C. section 2-709, which would, if successful, lead to a judgment and, only then, the ability to obtain a lien on the debtor’s assets by levy and execution. U.C.C. § 2-709 (2013).

18. For a much more complete historical account of the right of reclamation, as well as an analysis in support of a more or less expanded version of the remedy, see generally *Pester Refining Co. v. Ethyl Corp. (In re Pester Refining Co.)*, 964 F.2d 842, 844 (8th Cir. 1992) (stating that reclamation is a rescissory “remedy, based upon the theory that the seller has been defrauded”); Larry T. Garvin, *Credit, Information, and Trust in the Law of Sales: The Credit Seller’s Right of Reclamation*, 44 UCLA L. REV. 247 (1996) (detailing the statutory history of reclamation, the U.C.C.’s formulation of the remedy of reclamation, and the state of reclamation case law at the time).

19. See generally Robert Braucher, *Reclamation of Goods from a Fraudulent Buyer*, 65 MICH. L. REV. 1281, 1282–83 (1967) (noting that it was generally assumed that insolvency without fraud or misrepresentation was not a basis for rescission and replevin, although such fraud could exist if the debtor knew payment was extremely unlikely and failed to disclose that fact).

scind the contract and recover the specific goods. In time, the right might also be triggered in the absence of a misrepresentation if the acquisition of the goods was part of a premeditated scheme to defraud, or if it could be shown that the debtor was hopelessly insolvent at the time of the purchase.<sup>20</sup> The right to reclaim the goods subject to the sale, when it existed, generally extended to indefinable proceeds in the event of resale or, where the goods were fungible in nature, had become commingled with like goods.<sup>21</sup>

The only widely recognized exception to the seller's right of reclamation was in cases where title to the goods had passed to a bona fide purchaser for value before the right to reclaim had been exercised.<sup>22</sup> In general, however, this protected status was held not to extend either to a consensual inventory lender or to a levying creditor of the buyer.<sup>23</sup> In the latter situation, this was true regardless of whether the credit was extended before or after the sale giving rise to the reclamation claim, unless the defrauded seller by its words or conduct had misled the levying creditor into believing that the buyer was the true owner of the goods.<sup>24</sup>

Historically, the right to reclaim goods would be forfeited if not exercised diligently.<sup>25</sup> It was not, however, governed, as it later came to be, by a rigidly truncated period for demand,<sup>26</sup> and was also enforceable even in the event of the buyer's bankruptcy since

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20. *Id.* at 1283 (suggesting, "amid some dispute," substantial authority for this position).

21. Garvin, *supra* note 18, at 257.

22. This was consistent with the long-recognized exception to the common law principle of *nemo dat quod non habet* whereby a party with voidable title might nonetheless pass good title in the market. See Grant Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 YALE L.J. 1057, 1057-60 (1954); see also 2 WILLIAM BLACKSTONE, COMMENTARIES 449 (9th ed. 1783) ("But [title] may also in some cases be transferred by sale, though the vendor *hath none at all* in the goods: for it is expedient that the buyer, by taking proper precautions, may at all events be secure of his purchase; otherwise all commerce between man and man must soon be at an end.").

23. See *infra* note 28.

24. Braucher, *supra* note 19, at 1283. Professor Garvin also points out that the scope of this exception was narrower at common law than it came to be under the U.C.C. Garvin, *supra* note 18, at 259-60 (noting that the attaching creditor and recipient of new security for an old debt were not included among those who qualified as a bonafide purchase for value).

25. See, e.g., *Leatherbury v. Connor*, 23 A. 684, 685 (N.J. 1892) (stating that sellers seeking to take advantage of the remedy must proceed with diligence).

26. See *infra* note 32 and accompanying text.



it was considered to be and treated as a valid pre-bankruptcy interest in the debtor's property to which the trustee took subject.<sup>27</sup> Thus, at common law, the right of reclamation represented a powerful remedy not only against the debtor, but also against a wide variety of other claimants in the goods, including most claims based on prior consensual liens.<sup>28</sup>

### B. Codification

The notion of affording special rights for sellers of goods who extended unsecured credit to insolvent buyers did not find its way into the Uniform Sales Act, though it was assumed to continue as a matter of suppletory common law.<sup>29</sup> The first codification of the reclamation remedy occurred in connection with approval and adoption of Article 2 of the U.C.C.<sup>30</sup> Specifically, U.C.C. section 2-702(2) allows a credit seller<sup>31</sup> to reclaim its goods from an insol-

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27. See *Donaldson v. Farwell*, 93 U.S. 631, 633 (1876); see also Frank R. Kennedy, *The Trustee in Bankruptcy Under the Uniform Commercial Code: Some Problems Suggested by Articles 2 and 9*, 14 RUTGERS L. REV. 518, 549–54 (1960) (discussing the right of reclamation with respect to the rights of lien creditors in bankruptcy).

28. Prior to Article 9's broad endorsement of a unitary security device and the "floating lien" over inventory and receivables, chattel security law's concerns over the issue of ostensible ownership resulted in a very limited ability of inventory lenders to establish priority over after-acquired property without the necessity for extensive, technical, and burdensome on-going monitoring and paperwork. The history of how debtors and creditors overcame the common law's hostility to nonpossessory security interests is well told in 1 GRANT GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* (1965). Even after widespread adoption of the U.C.C., some commentators argued it was a "commercial injustice" for a secured party to be preferred over the reclaiming seller when the secured party's claim to the goods was based solely on an after-acquired property clause. See, e.g., Lawrence R. Small, *The Remedy Provisions of Article 2 of the Uniform Commercial Code: A Practical Orientation*, 4 GONZ. L. REV. 176, 189–91 (1969). It is, however, now a well-accepted principle. See *infra* text accompanying notes 73 & 118.

29. Richard M. Cieri & Jeffrey B. Ellman, *Understanding Reclamation Claims in Bankruptcy: Hidden Complexity in a Simple Statute*, 5 J. BANKR. L. & PRAC. 531, 533 & n.5 (1996) (reviewing the most common elements of a reclamation claim cited by courts under U.C.C. section 2-702(2), some of which also required that the buyer still be in possession of the goods at the time demand is made).

30. For an extensive history of the drafting of the Article 2 reclamation right see Braucher, *supra* note 19, at 1285–91.

31. Courts have also created a right of reclamation for cash sellers (such as a case where payment for goods is made by a check that is later dishonored) out of U.C.C. section 2-507(2) cmt. 3 and U.C.C. section 2-511(3). See *In re Helms Veneer Corp.*, 287 F. Supp. 840, 844–46 (W.D. Va. 1968); *In re Mort Co.*, 208 F. Supp. 309, 310–11 (E.D. Pa. 1962). However, U.C.C. section 2-403(1) gives voidable title to the cash buyer, meaning that the buyer, who holds voidable title, has the power to transfer good title to a good faith purchaser for value. U.C.C. § 2-403(1) (2013). At common law, and under the Uniform Sales Act, unpaid cash sellers generally prevailed over the claims of bona fide purchasers, in-

vent buyer provided that demand is made within ten days after receipt of the goods.<sup>32</sup> As a practical matter, the statutory ten-day demand requirement limits the utility of the remedy to only the most vigilant vendors. However, upon a showing that the buyer misrepresented solvency in writing within the three months preceding delivery of the goods,<sup>33</sup> section 2-702(2) eliminates the ten-day demand condition, thus expanding considerably both the scope and the impact of the credit seller's potential reclamation claim in these limited circumstances.<sup>34</sup>

Although codification of credit sellers' reclamation rights has made the remedy a more self-activating one by eliminating the need for individual proof of fraud or intent to defraud in every case where the buyer receives goods on credit while insolvent, codification has also preempted case law development by limiting the scope of the right to circumstances where the conditions specified in the statute have been satisfied.<sup>35</sup> U.C.C. section 2-702(3) further narrows the remedy by providing that exercise of the reclamation right is in lieu of all other remedies against the goods.<sup>36</sup> This has meant the loss of the seller's ability to pursue additional

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cluding those who took by lien, because title was deemed not to pass to the buyer in a cash sale transaction until payment had been made. See Richard Arnold, Note, *The Cash Seller's Right of Reclamation Versus the Second Party's Floating Lien: Who is Entitled to Priority?*, 35 WASH. & LEE L. REV. 277, 277-78 (1978). For discussion of priority between purchasers and a credit seller's express right of reclamation see *infra* text accompanying notes 70-73.

32. U.C.C. § 2-702 (2002). Under Article 2, of course, the rights of sellers and buyers are not determined by the location of title. U.C.C. § 2-401(1) (2013).

33. For more detailed discussion of the form which such misrepresentation of solvency might take, see Garvin, *supra* note 18, at 274-75.

34. According to Official Comment 2 to former U.C.C. section 2-702(2), to fall within this exception to the "time limitation," the written statement of solvency must be addressed to the particular seller and "dated within three months of the delivery." U.C.C. § 2-702(2) cmt. 2 (2002).

35. The last sentence of U.C.C. section 2-702(2) expressly provides that a credit seller may not base a right to reclaim goods except in the manner provided in that subsection. U.C.C. § 2-702(2) (2013); see also *CAM/RPC Elecs. v. Robertson (In re MGS Marketing)*, 111 B.R. 264, 267 (B.A.P. 9th Cir. 1990) (noting that all equitable and common law remedies are supplanted).

36. U.C.C. § 2-702(3) ("Successful reclamation of goods excludes all other remedies with respect to them."). Comment 3 to U.C.C. section 2-702 recognizes that the right to reclaim goods constitutes a preference as against the buyer's other creditors and, therefore, exercise of the right bars all other remedies as to the goods involved. U.C.C. § 2-702 cmt. 3; see also *In re Ky. Flush Door Corp.*, 28 B.R. 808, 810 (Bankr. W.D. Ky. 1983) (recognizing that section 2-702 provides the "sole remedy for a reclaiming seller"); Garvin, *supra* note 18, at 275 (observing that this contrasts with the more liberal approach taken to election of remedies for both buyers and nonreclaiming sellers).

remedies, such as consequential damages or a deficiency judgment. In addition, in the view of several courts, it has also entailed loss of the right that existed at common law to retain a priority against identifiable proceeds of goods subject to reclamation, even as against unsecured creditors.<sup>37</sup> Finally, as discussed below,<sup>38</sup> while the right itself finds expression in subsection (2) of U.C.C. section 2-702 against the buyer as the exclusive source of reclamation, subsection (3) further limits the breadth of the reclamation right by delineating more broadly—than at common law—the scope of the seller’s right vis-à-vis other parties who might claim an interest in the goods.<sup>39</sup> This is also where the intersection with bankruptcy law begins.

Until 1966, the official text of U.C.C. section 2-702(3) made the seller’s right to reclaim subject to the claims of both lien creditors and good faith purchasers. Therefore, not surprisingly, most of the early litigation in bankruptcy involving assertion of reclamation rights pitted the aggrieved seller against the trustee acting in her hypothetical lien creditor capacity.<sup>40</sup> In 1966, the drafters of the U.C.C. recommended the elimination of “lien creditors” from the class of persons to whose rights a reclaiming seller would be subject under section 2-702(3).<sup>41</sup> Upon adoption by the states, this deletion seriously blunted the trustee’s ability to defeat reclaiming sellers by resorting to the strong-arm powers. However, in that same year, Congress promulgated amendments

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37. See *Stowers v. Mahon (In re Samuels & Co.)*, 526 F.2d 1238, 1245 (5th Cir. 1976); see also *infra* note 66. The basis of this argument is that U.C.C. section 2-702(2) speaks only of reclaiming *goods*, and says nothing of reclaiming proceeds. Of course, even if good as against unsecured creditors, such a priority would not in any case apply as against a purchaser or prior lienor because of the express subordination in section 2-702(3). See *infra* text accompanying notes 70–73. While not altogether clear, it appears that the seller’s right to reclaim fungible goods that have become commingled in a single bulk may continue under Article 2. See *Conoco, Inc. v. Braniff, Inc. (In re Braniff, Inc.)*, 113 B.R. 745, 754–55 (Bankr. M.D. Fla. 1990); *Eighty-Eight Oil Co. v. Charter Crude Oil Co. (In re Charter Co.)*, 54 B.R. 91, 93 (Bankr. M.D. Fla. 1985); *infra* text accompanying note 68.

38. See *infra* text accompanying notes 70–73.

39. See *supra* notes 22–24 and accompanying text.

40. Compare *Johnston & Murphy Shoes, Inc. v. Meinhard Commercial Corp. (In re Mel Golde Shoes, Inc.)*, 403 F.2d 658, 660–61 (6th Cir. 1968) (defrauding seller’s right to reclaim goods is superior to any right of attaching creditors under section 70(c) of the former Bankruptcy Act), with *In re Kravitz*, 278 F.2d 820, 822–23 (3d Cir. 1960) (determining the “strong arm” clause under section 70(c) of the former Bankruptcy Act was successfully used to defeat reclaiming seller under authority of U.C.C. section 2-702 (3)).

41. PERMANENT EDITORIAL BD. FOR THE UNIFORM COMMERCIAL CODE, REPORT NO. 3, at 3 (1967).

to the former Bankruptcy Act that included the new standards (now incorporated into Bankruptcy Code section 545) for invalidating state-created priorities masquerading as statutory liens.<sup>42</sup> This immediately created an issue as to whether or not the U.C.C. section 2-702(2) reclamation right could be avoided as an offending statutory lien.<sup>43</sup>

Relying on an expansive definition of the term “lien,” and the fact that effectiveness of the rights conferred by U.C.C. section 2-702(2) are rather obviously made contingent on the financial solvency of the buyer, some bankruptcy courts reasoned that the statutory reclamation right represented precisely the kind of state-created priority that it was the policy of Bankruptcy Act section 67(c)(1)(A)<sup>44</sup> (the precursor to Code section 545(1)) to prevent from interfering with the order of distribution in a bankruptcy case.<sup>45</sup> On the other hand, influenced by the longstanding equitable and common law antecedents of the Article 2 reclamation right, panels for each of the Sixth, Eighth, and Ninth Circuits analogized U.C.C. section 2-702(2) more to a state-created right of *ownership* than to a lien arising “solely by force of statute.”<sup>46</sup> Therefore, these courts ruled that the trustee was without

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42. See Alfred M. Lewis, Inc. v. Holzman (*In re Telemart Enters.*), 524 F.2d 761, 764 (9th Cir. 1975) (discussing abuses that led to abolition of state-created priorities in section 67(c) of the former Bankruptcy Act, originally adopted as part of the Chandler Act (Act of June 22, 1938, ch. 575 § 67(c), 52 Stat. 840, 877) amendments to the former Bankruptcy Act, and rewritten by Congress in 1966); Act of July 5, 1966, Pub. L. No. 89-495, 80 Stat. 268, 268–70 (amending sections 1, 17a, 64a(5), 67(b), 67(c), and 70c of the Bankruptcy Act, and for other purposes).

43. See, e.g., *In re Telemart Enters.*, 524 F.2d at 763.

44. That provision provided: “(c)(1) The following liens shall be invalid against the trustee: (A) every statutory lien which first becomes effective upon the insolvency of the debtor.” 11 U.S.C. § 107(c)(1)(A) (1964 & Supp. II 1967).

45. See, e.g., Queensboro Farm Prods., Inc. v. Wetson’s Corp. (*In re Wetson’s Corp.*), 17 U.C.C. Rep. Serv. (Callaghan) 423, 426 (Bankr. S.D.N.Y. 1975) (stating that, like other liens, because the reclamation right is extinguished upon payment of the debt, it falls within the definition of a “lien”).

46. *In re Federal’s, Inc.*, 553 F.2d 509, 516 (6th Cir. 1977) (emphasis omitted) (internal quotation marks omitted); see also Bassett Furniture Indus. v. Wear (*In re PFA Farmers Market Ass’n*), 583 F.2d 992, 1000 (8th Cir. 1978) (reasoning that the reclamation right involves the concept of “voidable title” rather than a state priority or a traditional lien); *In re Telemart Enters.*, 524 F.2d at 765. Note, however, that in *In re Wetson’s Corp.* the court rejected the argument that section 2-702(2) was the analogue of the common law right to reclaim since there was no right to reclaim at common law without specific proof of fraud. 17 U.C.C. Rep. Serv. at 426.

authority under section 67(c)(1)(A) to refuse an otherwise procedurally proper reclamation demand.<sup>47</sup>

### C. *The Bankruptcy Reform Act of 1978*

In an apparent effort to settle the controversy concerning the proper characterization of reclamation claims in bankruptcy,<sup>48</sup> the Bankruptcy Reform Act of 1978<sup>49</sup> contained a new provision that explicitly precluded the trustee from relying upon certain enumerated avoiding powers, including section 545, in order to defeat the claims of reclaiming sellers.<sup>50</sup> Bankruptcy Code section 546(c), as originally adopted,<sup>51</sup> affirmatively stated that the trustee's rights and powers were subject to a seller's statutory or common law right to reclaim goods sold to the debtor provided that: (1) the goods were sold in the ordinary course of the seller's business; (2) the debtor was insolvent at the time the goods were received; (3) reclamation was demanded in writing within ten days of such receipt (twenty days if the ten-day period expired after the commencement of the case); and (4) the goods were in the debtor's possession at the time the demand was received.<sup>52</sup> Placement of this provision within section 546, titled "Limitations on avoiding powers," is explicable, and should be understood, in light of the history described above regarding the uncertain validity of reclamation claims under the former Bankruptcy Act.<sup>53</sup>

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47. Presumably, if the reclamation right is not a "statutory lien," then neither would the trustee's status as a bona fide purchaser of property under section 67(c)(1)(B), the precursor to section 545(2), have been of any greater avail to the trustee than the section 67(1)(A) power to invalidate statutory liens arising upon the debtor's insolvency.

48. See S. REP. NO. 95-989, at 86-87 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5872-73; H.R. REP. NO. 95-595, at 372 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6328; see also *Pester Ref. Co. v. Ethyl Corp. (In re Pester Ref. Co.)*, 964 F.2d 842, 845 (8th Cir. 1992) (pointing out that section 546(c) was Congress' response to two decades of litigation between trustees and reclaiming sellers).

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

50. *Id.* § 546(c), 92 Stat. at 2597. Section 546(c) also, by its original terms, barred a trustee from using his rights and powers under sections 544(a), 547, or 549 to avoid a reclamation claim which satisfied the requirements of both state and common law, as modified by section 546(c). *Id.*

51. When the context requires differentiation, the pre-BAPCPA version of section 546(c) is referred to as "former section 546(c)" and the current version as "revised section 546(c)."

52. *In re Child World, Inc.*, 145 B.R. 5, 7 (Bankr. S.D.N.Y. 1992).

53. Pub. L. No. 95-598, § 546, 92 Stat. at 2597; see *supra* text accompanying notes 42-47.

The requirement of insolvency in section 546(c), unlike the limitations concerning an ordinary course transaction and debtor's possession at the time demand was received, was already contained, of course, in U.C.C. section 2-702(2). In *In re Storage Technology Corp.*, however, the court rejected the creditors' argument that the more expansive U.C.C. definition of insolvency should apply in construing section 546(c).<sup>54</sup> Instead, though conceding some practical merit in the creditors' contention, the court ruled that overriding policy considerations nevertheless dictated that the narrower bankruptcy definition of balance sheet insolvency should provide the governing standard.<sup>55</sup> The differences between the two statutory provisions did not end there. In contrast with U.C.C. section 2-702(2), former section 546(c) required that the demand be in writing and drew no distinction for cases in which there had been a specific misrepresentation of insolvency by the buyer.<sup>56</sup> Thus, from early on, reclamation in bankruptcy began to distance itself in key respects from both exercise of the right under state law and from the original objective of insulating reclamation claims from the trustee's avoiding powers.

As the discussion above illustrates, because section 546(c) was more restrictive than U.C.C. section 2-702(2), some creditors maintained that former section 546(c) should not be interpreted so as to bar a seller who failed to establish compliance with its provisions from *still* attempting to establish entitlement to recovery of the goods solely by virtue of U.C.C. section 2-702(2).<sup>57</sup> Os-

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54. *Pike Tool & Grinding v. Storage Tech. Corp.* (*In re Storage Tech. Corp.*), 48 B.R. 862, 864, 866–67 (Bankr. D. Colo. 1985); see U.C.C. § 1-201(b)(23) (2013) (defining insolvency in the equity sense of being unable to pay debts as they come due in addition to the traditional balance sheet sense of insolvency).

55. *In re Storage Tech. Corp.*, 48 B.R. at 866–67; accord *Eagle Indus. Truck Mfg., Inc. v. Continental Airlines, Inc.* (*In re Continental Airlines, Inc.*), 125 B.R. 415, 417 (Bankr. D. Del. 1991) (using balance sheet test of insolvency); *Lawrence Pharm., Inc. v. Best Buy Drugs, Inc.* (*In re Best Buy Drugs, Inc.*), 89 B.R. 997, 998 (Bankr. S.D. Fla. 1988). A contrary result, which has been reached in other cases, has been criticized by some commentators. See *Ambico, Inc. v. AIC Photo, Inc.* (*In re AIC Photo, Inc.*), 57 B.R. 56, 58–60 (Bankr. E.D.N.Y. 1985); Benjamin Weintraub & Alan N. Resnick, *From the Bankruptcy Courts: The Definition of "Insolvent" for Reclamation Purposes—The Bankruptcy Code vs. the UCC*, 19 UCC L.J. 170, 174–75 (1986) (“[I]t is difficult to justify the use of the UCC insolvency definition to construe ‘insolvent’ in Section 546(c) of the Bankruptcy Code when a different definition of insolvency is contained in the Bankruptcy Code itself.”).

56. Compare 11 U.S.C. § 546(c)(1) (2000), with U.C.C. § 2-702(2) (2013).

57. The other main differences between former section 546(c) and the U.C.C. were that section 546(c) did not waive the ten-day notice requirement if the buyer fraudulently misrepresents its solvency to the seller, and section 546(c) specified that notice must be in writing. See, e.g., *In re Leeds Bldg. Prods., Inc.*, 141 B.R. 265, 267 (Bankr. N.D. Ga. 1992)

tensibly, the argument went that, as a limitation on the trustee's avoiding powers, section 546(c) should be read only as creating a "safe harbor" for a reclamation seller who satisfied its requirements, and not as detailing a further limitation on the circumstances under which a right of reclamation might be recognized in bankruptcy.<sup>58</sup> Under this construction, while noncompliance with section 546(c) would concededly entail loss of its impervious shield against application of the trustee's avoiding powers, automatic disallowance of the reclamation claim would not necessarily follow. Instead, a seller would retain its pre-bankruptcy interest in the goods subject to whatever avoidance firepower the trustee could muster.<sup>59</sup> Given the existence of substantial authority for the proposition that U.C.C. section 2-702(2) is not a statutory lien within the meaning of the Bankruptcy Act predecessor to section 545(1), if this view of the scope of former section 546(c) had been widely accepted, there is ample reason to believe that numerous reclamation claims that satisfied state but not federal definitional standards would have been afforded recognition in a bankruptcy case.<sup>60</sup>

This contention, however—that the seller's failure to satisfy former section 546(c) should not alone serve to relieve the trustee of the burden of establishing the applicability of one of the specified avoiding powers, including invalidity under section 545—was met with little success in the courtroom.<sup>61</sup> Perhaps the primary explanation as to why this otherwise plausible argument was found wanting is that the legislative history of the Bankruptcy Reform Act rather strongly evinces a congressional recognition of,

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(explaining these differences and citing authorities supporting this proposition).

58. See, e.g., *Hitachi Denshi Am., Ltd. v. Rozel Indus. (In re Rozel Indus.)*, 74 B.R. 643, 644–46 (Bankr. N.D. Ill. 1987) (rejecting this argument).

59. In essence, this view would have rendered section 546(c) a nonexclusive, although self-executing, remedy for a seller seeking to reclaim goods from a debtor. See, e.g., *Farmers Rice Milling Co. v. Hawkins (In re Bearhouse, Inc.)*, 84 B.R. 552, 559–60 (Bankr. W.D. Ark. 1988) (regarding right to reclamation other than upon strict compliance with section 546(c)).

60. See *supra* notes 46–47 and accompanying text (explaining the existence of substantial authority for the proposition that U.C.C. section 2-702(2) is not a statutory lien within the meaning of the Bankruptcy Act predecessor to section 545(1)).

61. See *United Beef Packers v. Lee (In re A.G.S. Food Sys.)*, 14 B.R. 27, 28–29 (Bankr. D.S.C. 1980); see also John P. Finan, *Reclamation Sellers and the Bankruptcy Trustee: Rationality v. the Language of Section 546(c) of the Bankruptcy Act*, 92 COM. L.J. 329, 334 (1987) (supporting the argument that section 546(c) should not be construed as an exclusive remedy).

and desire to end the debate and litigation over, the issue of whether U.C.C. section 2-702(2) was an avoidable statutory lien.<sup>62</sup> Put in that context, former section 546(c) was reasonably interpreted initially as answering that inquiry in the affirmative, but then carving out a limited exception where the state or common law reclamation claimant could also show compliance with the additional substantive requirements enumerated in former section 546(c). Accordingly, the overwhelming majority of the courts that addressed the issue treated former section 546(c) as the sole and exclusive remedy for a seller seeking to reclaim goods from the estate of a bankrupt debtor.<sup>63</sup> In so doing, these courts established early on that section 546(c) conferred rights independent of, or certainly at least not wholly coincident with, state law.

Procedurally, an action to reclaim goods from the estate was treated as a contested matter and, therefore, initially brought before the bankruptcy court by motion.<sup>64</sup> The burden of proof as to the affirmative elements of the seller's right to the relief sought, including the key issues of the debtor's insolvency and timeliness of the demand, was on the moving party. Additionally, the petitioning seller had to identify the goods remaining in the debtor's possession as of the time of receipt of the reclamation demand,<sup>65</sup> and, if later disposed of, had to be able to trace the proceeds of resale in order to be able to maintain any hope of recovering specific property from the estate.<sup>66</sup> However, even in jurisdictions that

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62. See *supra* note 48. For a case analyzing that legislative history in the context of this particular argument see *B. Berger Co. v. Contract Interiors, Inc. (In re Contract Interiors, Inc.)*, 14 B.R. 670, 673-74 (Bankr. E.D. Mich. 1981).

63. See, e.g., *Flav-O-Rich, Inc. v. Rawson Food Serv., Inc. (In re Rawson Food Serv., Inc.)*, 846 F.2d 1343, 1346 (11th Cir. 1988); *Plastic Distrib. Corp. v. Koro Corp. (In re Koro Corp.)*, 20 B.R. 241, 242-43 (B.A.P. 1st Cir. 1982); *In re Leeds Bldg. Prods., Inc.*, 141 B.R. 265, 267 (Bankr. N.D. Ga. 1992); *Fitzgerald Buick, Inc. v. Rea Keech Buick, Inc. (In re Rea Keech Buick, Inc.)*, 139 B.R. 625, 628 (Bankr. D. Md. 1992); *Chemical-Ways Corp. v. Page (In re Dynamic Techs. Corp.)*, 106 B.R. 994, 1004 (Bankr. D. Minn. 1989) (stating that section 546(c) is the exclusive remedy for vendors to reclaim goods); *In re Rozel Indus.*, 74 B.R. at 646; *Allstate Fabricators Corp. v. Flagstaff Foodservice Corp. (In re Flagstaff Foodservice Corp.)*, 56 B.R. 899, 908 (Bankr. S.D.N.Y. 1986); *In re Contract Interiors, Inc.*, 14 B.R. at 674-75.

64. See FED. R. BANKR. P. 7001 (excluding from the designation of an adversary proceeding any proceeding brought to recover or reclaim property in possession of the trustee under section 554(b) or section 725); see also FED. R. BANKR. P. 9013, 9014.

65. *Accord In re Rawson Food Serv., Inc.*, 846 F.2d at 1347; *Conoco, Inc. v. Braniff, Inc. (In re Braniff, Inc.)*, 113 B.R. 745, 752 (Bankr. M.D. Fla. 1990); see *United States v. Westside Bank*, 732 F.2d 1258, 1263 (5th Cir. 1984) (reclamation is only valid as to goods which are identifiable and in the buyer's possession at the time the demand is received).

66. *Archer Daniels Midland Co. v. Charter Int'l Oil Co.*, 60 B.R. 854, 856 (M.D. Fla.



recognized extension of the right of reclamation to proceeds, and these were few, the rule remained that proceeds from the sale of goods subject to demand for reclamation, like the goods themselves, were not recoverable by the seller if the goods were disposed of before demand was received.<sup>67</sup> Finally, under limited circumstances, a supplier might be able to reclaim fungible, bulk goods that had become commingled in a common pool,<sup>68</sup> but not where the goods had become transformed into some other product.<sup>69</sup>

Even when the seller was able to establish all of the elements of a proper reclamation claim under state law, U.C.C. section 2-702(3) explicitly made, as it continues to do so, the seller's ability to reclaim the goods subject to the rights of a buyer in the ordinary course and a good faith purchaser.<sup>70</sup> Under the U.C.C., the term "purchaser" is defined more broadly than at common law to include a secured creditor.<sup>71</sup> Therefore, in the case of inventory goods, for example, the right to reclaim goods under former section 546(c), which expressly incorporated "statutory or common-law,"<sup>72</sup> was generally regarded as subordinate to the claim of a

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1986) (proceeds directly traceable from sale of goods in buyer's possession when reclamation demand was made may be recoverable under section 546(c)). A large number of decisions, however, held that because U.C.C. section 2-702(2) speaks only of reclaiming *goods*, and not of reclaiming *proceeds*, U.C.C. § 2-702(2) (2013), by extension section 546(c) does not create a right to reclaim the proceeds from resale of goods otherwise subject to reclamation. See, e.g., *Collingwood Grain, Inc. v. Coast Trading Co. (In re Coast Trading Co.)*, 744 F.2d 686, 689–92 (9th Cir. 1984) (finding that a seller did not demonstrate a right to reclaim goods or proceeds, and citing additional authorities supporting this finding).

67. See *Jones Oil Co. v. Intercity Oil Co. (In re Intercity Oil Co.)*, 122 B.R. 358, 360 (Bankr. W.D. Wis. 1990); *Archer Daniels*, 60 B.R. at 856; *In re Lawrence Paperboard Corp.*, 52 B.R. 907, 910 (Bankr. D. Mass. 1985).

68. See *In re Braniff*, 113 B.R. at 754–55 (applying a "first in, first out" theory for allocating fungible, pooled goods among suppliers); see also Garvin, *supra* note 18, at 257; *supra* text accompanying note 21.

69. See *Bethlehem Steel Corp. v. Wheeling-Pittsburgh Steel Corp. (In re Wheeling-Pittsburgh Steel Corp.)*, 74 B.R. 656, 660–61 (Bankr. W.D. Pa. 1987).

70. U.C.C. § 2-702(3); see *Westside Bank*, 732 F.2d at 1260 (stating reclamation can never be asserted to defeat the interest of protected third parties who acquire from the defaulting buyer); *In re Coast Trading Co.*, 744 F.2d at 690 (stating sale to a good faith purchaser cuts off reclamation). The term "buyer in the ordinary course of business" is defined in U.C.C. section 1-201(b)(9) as essentially a retail buyer from a party in the business of selling goods of that type. U.C.C. § 1-201(b)(9) (2013). The ability of a party with voidable title to pass good title to a good faith purchaser is recognized in U.C.C. section 2-403(1). U.C.C. § 2-403(1) (2013).

71. See U.C.C. § 1-201(b)(29), (30) ("purchase" includes taking by lien as well as by sale); see also *supra* text accompanying notes 22–23.

72. 11 U.S.C. § 546(c) (2000).

prior security interest in the debtor's inventory (and proceeds) which, under the terms of an after-acquired property clause, attached and took priority as to the goods as soon as the debtor acquired rights in them.<sup>73</sup>

Because of this limitation, and the absence of any guidance in former section 546(c), most courts held that the existence of such a prior secured creditor operated to negate the reclamation right in a bankruptcy case *to the extent* of the amount of the prior secured lien.<sup>74</sup> These courts reasoned that section 546(c) was intended to preserve, not enhance, the rights of reclaiming sellers, such that the seller should be entitled to no greater rights in bankruptcy than it would enjoy under state law.<sup>75</sup> According to these courts, then, where the claim of the senior creditor under U.C.C. section 2-702(3) exceeded the value of the proceeds from the resale of the goods, the reclamation right would be worthless. Thus, it was only when either the creditor released its lien on the goods, or the proceeds from the goods subject to reclamation exceeded the sum needed to pay the secured creditor in full, that the subordinated reclaiming seller's claim would attach—but only to the extent of the remaining assets and that was all.<sup>76</sup> A handful of courts went even further and concluded that just the mere existence of a secured creditor with a lien on the goods (or proceeds) subject to reclamation extinguished the reclamation claim entire-

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73. See, e.g., *In re Diversified Food Serv. Distribs., Inc.* 130 B.R. 427, 429 (Bankr. S.D.N.Y. 1991) (finding holder of previously perfected floating lien on inventory has priority over reclaiming sellers); *Pillsbury Co. v. FCX, Inc. (In re FCX, Inc.)*, 62 B.R. 315, 323 (Bankr. E.D.N.C. 1986); *In re Lawrence Paperboard Corp.*, 52 B.R. 907, 911 (Bankr. D. Mass. 1985). As noted *supra* note 31, the secured creditor's bona fide purchaser status can also defeat a "cash seller" of inventory.

74. See, e.g., *In re Quality Stores, Inc.*, 289 B.R. 324, 340 (Bankr. W.D. Mich. 2003) ("Because the value of the Debtor's collateral is insufficient to satisfy the secured claim of the Prepetition Lenders, there exists no collateral value to support the Reclamation Claimants' subordinate rights in the specific inventory consisting of their goods delivered to the Debtor."); *In re Bridge Info. Sys., Inc.*, 288 B.R. 133, 138 (Bankr. E.D. Mo. 2001) (finding reclamation creditor produced no evidence to meet its burden of proof that sufficient proceeds remained from sale of inventory to preserve its state law reclamation rights against prior perfected secured claim).

75. *Pester Ref. Co. v. Ethyl Corp. (In re Pester Ref. Co.)*, 964 F.2d 842, 847 (8th Cir. 1992).

76. *Id.* at 848; see also *In re Houlihan's Rest., Inc.*, 286 B.R. 137, 140 (Bankr. W.D. Mo. 2002); *Mitsubishi Consumer Elecs. Am., Inc. v. Steinberg's, Inc. (In re Steinberg's Inc.)*, 226 B.R. 8, 12 (Bankr. S.D. Ohio 1998); *In re Leeds Bldg. Prods. Inc.*, 141 B.R. 265, 269–70 (Bankr. N.D. Ga. 1992) (holding that right to reclaim exists only to the extent that the right has value outside of bankruptcy); *Toshiba Am. Inc. v. Video King of Illinois, Inc. (In re Video King of Illinois, Inc.)*, 100 B.R. 1008, 1016–17 (Bankr. N.D. Ill. 1989).

ly, regardless of whether the secured creditor was ultimately paid in full and its lien released as to some or all of the collateral.<sup>77</sup>

On the other end of the spectrum, *In re Sunstate Dairy & Food Products Co.* is illustrative of a line of cases that took a very different approach in giving effect in bankruptcy to the restrictions contained in U.C.C. section 2-702(3).<sup>78</sup> These courts held that the operative wording “subject to” did not mean that the reclamation right itself was extinguished or scaled back by virtue of the existence of a superior lien.<sup>79</sup> Rather, it was only the ability to *exercise* the right to the extent of the value of the secured claim that was cut off and, therefore, the bankruptcy court could not deny the reclamation claim unless the alternative relief contemplated by former section 546(c)(2) were granted of either an administrative expense priority or a substitute lien on other property of the estate.<sup>80</sup> These decisions obviously accorded to the reclaiming seller a remedy that had no corollary under state law, once more implying, if not a separate federal remedy, at least a remedy with cer-

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77. See *In re Shattuc Cable Corp.*, 138 B.R. 557, 563–64 (Bankr. N.D. Ill. 1992) (a seller who is unable to reclaim goods due to the intervening rights of a good faith purchaser has no right of reclamation that can be asserted in a bankruptcy proceeding); *Lavonia Mfg. Co. v. Emery Corp.*, 52 B.R. 944, 947 (Bankr. E.D. Pa. 1985); *In re Lawrence Paperboard Corp.*, 52 B.R. at 911–12 (deciding existence of secured creditor extinguishes reclamation claim). In *In re Arlco, Inc.*, even though the secured creditor was oversecured, the court declined to invoke the marshaling in order to preserve some assets for the seller’s reclamation claim after the prior lien had been satisfied. *Galey & Lord, Inc. v. Arley Corp. (In re Arlco, Inc.)*, 239 B.R. 261, 272–74 (Bankr. S.D.N.Y. 1999).

78. *Isaly Klondike Co. v. Sunstate Dairy & Food Prods. Co.*, (*In re Sunstate Dairy & Food Prods. Co.*), 145 B.R. 341 (Bankr. M.D. Fla. 1992).

79. *Id.* at 346; see *Am. Saw & Mfg. Co. v. Bosler Supply Grp.*, (*In re Bosler Supply Grp.*), 74 B.R. 250, 254–55 (N.D. Ill. 1987); *In re Marko Elecs., Inc.*, 145 B.R. 25, 29 (Bankr. N.D. Ohio 1992); *In re Diversified Food Serv. Distribs., Inc.*, 130 B.R. 427, 430 (Bankr. S.D.N.Y. 1991); *In re Roberts Hardware Co.*, 103 B.R. 396, 399 (Bankr. N.D.N.Y. 1988); *Harris Trust & Sav. Bank v. Wathen’s Elevators, Inc. (In re Wathen’s Elevators, Inc.)*, 32 B.R. 912, 923 (Bankr. W.D. Ky. 1983); see also Lisa S. Gretchko, *Seller Beware! Is Your Reclamation Claim as Strong as You Think It Is?*, AM. BANKR. INST. J., Mar. 1, 2003, at \*20, available at Westlaw 22-MAR AM. BANKR. INST. J. 20 (describing this approach as consistent with the wording of former section 546(c)(2)).

80. *In re Bosler Supply Grp.*, 74 B.R. at 254–55; accord *In re Diversified Food Serv.*, 130 B.R. at 429–30 (explaining reclaiming sellers entitled to administrative expense priority, not actual sales proceeds, where goods subject to reclamation claim had been sold by perfected inventory lien creditor); *Pillsbury Co. v. FCX, Inc. (In re FCX, Inc.)*, 62 B.R. 315, 322 (Bankr. E.D.N.C. 1986); cf. *In re Lawrence Paperboard Corp.*, 52 B.R. at 909–10 (explaining an administrative expense priority in full amount of reclamation claims would not be approved as part of negotiated settlement of creditors’ reclamation demands where record was devoid of any evidence to support such claims).

tain unique federal characteristics.<sup>81</sup> This point portends the debacle that would later arise under BAPCPA.<sup>82</sup>

In any case, regardless of how the existence of a prior secured claim was conceived in terms of the impact on a reclaiming seller, the ability of a bankruptcy court generally under former section 546(c)(2) to respond to a proper reclamation claim with compensatory relief not involving return of the goods was obviously important in a Chapter 11 case where retention of goods by the debtor-in-possession would, in the court's judgment, facilitate the prospects for eventual rehabilitation.<sup>83</sup> In deciding whether to order physical reclamation of the goods or other compensatory relief, courts opined that the debtor's need for the goods had to be balanced against the seller's need for the immediate cash into which the goods presumably could be converted if returned.<sup>84</sup> And yet, due to uncertainty over market conditions or simply for the sake of convenience, in some cases the reclaiming seller might have preferred this alternative relief to return of the actual goods.<sup>85</sup> Ultimately, however, the decision whether to grant a lien or an administrative priority in lieu of a right to reclaim resided within the sole discretion of the bankruptcy court, but that was a state of affairs not long to endure.<sup>86</sup>

## II. ENTER BAPCPA

With virtually nothing by way of explanation, section 1227(a) of BAPCPA amended section 546(c)(1) of the Code to provide that the rights of a trustee under sections 544(a), 545, 547, and 549 are subject to the rights of a seller of goods to reclaim goods sold

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81. See *supra* text accompanying notes 55, 63.

82. See *infra* text accompanying notes 112, 115, 134–37.

83. See *Pester Ref. Co. v. Ethyl Corp. (In re Pester Ref. Co.)*, 964 F.2d 842, 847 (8th Cir. 1992) (noting that the remedial discretion in section 546(c)(2) facilitates reorganization and provides flexibility in enforcing superior rights of secured creditors).

84. See, e.g., *Eagle Indus. Truck Mfg., Inc. v. Continental Airlines, Inc. (In re Continental Airlines, Inc.)*, 125 B.R. 415, 417–18 (Bankr. D. Del. 1991).

85. The risk, on the other hand, in the case of an administrative expense claim would be if, prior to payment, the debtor converted the case to Chapter 7 and the estate turned out to be administratively insolvent. See *infra* note 181.

86. Whether an administrative claim or a substitute lien is granted is within the discretion of the court. See, e.g., *In re Leeds Bldg. Prods., Inc.*, 141 B.R. 265, 268–69 (Bankr. N.D. Ga. 1992); *Conoco, Inc. v. Braniff, Inc. (In re Braniff, Inc.)*, 113 B.R. 745, 757 (Bankr. M.D. Fla. 1990).

in the ordinary course of business to the debtor if: (1) the debtor, while insolvent, received these goods not later than forty-five days prior to the commencement of the case, and (2) written demand for reclamation of the goods is made not later than forty-five days after receipt of such goods by the debtor or, if the forty-five-day period expires after the commencement of the case, not later than twenty days after the commencement of the case.<sup>87</sup> Section 1227(b) then added an administrative expense priority, codified as section 503(b)(9), for the value of any goods received by the debtor not later than twenty days prior to the commencement of the bankruptcy case and which were sold to the debtor in the ordinary course of the debtor's business.<sup>88</sup> Section 1227(a), containing the amendments to section 546(c)(1), also eliminated the language of former section 546(c)(2) concerning the courts' discretionary ability to provide substitutional relief, and replaced it with language making clear that entitlement to the new administrative expense priority in section 503(b)(9) is not precluded by the failure of a seller to comply with the notice requirement in revised section 546(c)(1).<sup>89</sup>

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87. BAPCPA, Pub. L. No. 109-8, § 1227, 119 Stat. 23, 199–200 (2005). A red-lined version of the changes 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~~ receipt of such goods by the debtor; or

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

~~(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).~~

~~(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.~~

88. § 1227, 119 Stat. at 200.

89. Compare 11 U.S.C. § 546(c) (2000), with Pub. L. No. 109-8, § 1227, 119 Stat. at 200.

The totality of these changes is as extraordinary as it is perplexing, and the further distancing of section 546(c) from state law is notable. First, the reference in former section 546(c)(1) to any “statutory or common-law” right to the goods sold is gone, raising a legitimate question of whether revised section 546(c)(1) creates a federal right of reclamation independent from and wholly disassociated from U.C.C. section 2-702(2).<sup>90</sup> Next, the period within which written demand must be made after receipt of the goods is no longer coincident with state law. Rather, the period within which a timely demand may be made, and correspondingly the goods potentially subject to reclamation, is extended exponentially from ten to forty-five days after receipt of the goods.<sup>91</sup> Third, the fact that demand must be made no later than twenty days after commencement of the case if the forty-five-day period has not yet expired as of the time the bankruptcy case is filed creates the curious oddity that, under the right circumstances, there will be a shorter demand period when the filing occurs within forty-five days of the buyer’s receipt of the goods.<sup>92</sup> Fourth, the case law under former section 546(c) holding that the reclamation claim is subject to a prior security interest that attaches to the goods is expressly codified, but the revised version says nothing about the priority of a reclamation claim vis-à-vis other claimants protected under U.C.C. section 2-702(3), such as a buyer in the ordinary course and other bona fide purchasers.<sup>93</sup> Fifth, the reference in revised section 546(c) to section 507(c) should probably be to section 507(b), dealing with priority inter se among administrative

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90. In *In re Tucker*, Judge Haines mused:

[P]erhaps the amended § 546(c) creates its own reclamation right, rather than merely validating the right that exists under the U.C.C. This impression is supported by the fact that the amendment also strikes the reference to ‘any statutory or common law’ right to reclaim, and instead simply states that the trustee’s powers are subject to the ‘right of a seller’ to reclaim.

*Davis v. Par Wholesale Auto, Inc. (In re Tucker)*, 329 B.R. 291, 398 n.8 (Bankr. D. Ariz. 2005).

91. For an alternative explanation for the forty-five-day demand period, see *infra* text accompanying notes 150–52.

92. This would be true, for example, where the goods were delivered to the debtor on March 1, the debtor filed on March 14, but the seller did not learn of the bankruptcy case until April 5. Although the forty-five-day period has not expired, it is now more than twenty days since the bankruptcy filing, so a reclamation claim would be untimely. Inexplicably, former section 546(c)(1)(B) gave sellers *more* time, not less, when bankruptcy was filed during the notice period.

93. See Pub. L. No. 109-8, § 1227, 119 Stat. at 199–200; *supra* note 74 and accompanying text.

expense claims under section 507(a)(2). Sixth, the option of the court under former section 546(c)(2) to provide an administrative claim or substitute lien in lieu of reclamation of the goods is eliminated.

Finally, and perhaps most significant, is the new administrative expense priority in section 503(b)(9) for claims based on the value of goods received by the debtor within twenty days of the date of filing.<sup>94</sup> This priority exists: (1) without proof of the debtor's insolvency; (2) without establishing the seller's right to the goods under state law; and (3) without any direct connection to the right of reclamation in revised section 546(c), other than the clarification in new subsection (c)(2) that the claim is not affected by a failure to give notice under subsection (c)(1). In sum, with the exception of the issue of whether the reclamation right is superior to a prior secured claim, which was never in much doubt to begin with, the 2005 amendments to the credit sellers' remedies did nothing to clear up the unsettled questions under the pre-revised version of the statute and created several new, vexing issues of both interpretation and policy, as catalogued below.<sup>95</sup>

#### A. Section 546(c)

##### 1. Reclamation in the Case Law

In the first written opinion of significance interpreting revised section 546(c), *In re Advanced Marketing Services, Inc.*, the Delaware Bankruptcy Court disappointed open account sellers that envisioned BAPCPA as ushering in an era of greatly expanded reclamation rights.<sup>96</sup> The case entailed a request by Simon & Shuster for: (1) a temporary restraining order enjoining the debtor from selling approximately \$6 million in goods received from Simon & Shuster during the forty-five-day period prior to bank-

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94. See Michael G. Wilson & Henry P. "Toby" Long III, *Section 503(b)(9)'s Impact: A Proposal to Make Chapter 11 Viable Again for Retail Debtors*, 30 AM. BANKR. INST. J. 20, 57 (2011) ("The burden of satisfying those claims often destroys a debtor's ability to confirm a chapter 11 plan that otherwise could permit the company to survive and successfully reorganize.").

95. See *supra* note 74 and accompanying text (explaining that the issue of whether the reclamation right is superior to a prior secured claim was not a matter causing great controversy).

96. *Simon & Schuster, Inc. v. Advanced Mktg. Servs., Inc. (In re Advanced Mktg. Servs., Inc.)*, 360 B.R. 421, 426 (Bankr. D. Del. 2007).

ruptcy; and (2) segregation of such goods until the reclamation claim was resolved.<sup>97</sup> Earlier, Simon & Shuster had served the debtor with a written demand for return of the goods. Simon & Shuster argued irreparable injury and likelihood of success on the merits based, *inter alia*, on the fact that revised section 546(c) no longer allowed the court to substitute a replacement lien or administrative claim for a seller's reclamation right, so that Simon & Shuster's reclamation claim would be eliminated if the goods were permitted to be sold.<sup>98</sup> Further, Simon & Shuster maintained that there were no *prior rights* in the goods that took precedence over its reclamation claim since the debtor's pre-filing inventory lender was to be paid off with the proceeds of the debtor's postpetition financing.<sup>99</sup>

The court denied the motion for a temporary restraining order, concluding that Simon & Shuster's alleged losses could be compensated in the form of money damages, although the court did not specifically address how it would be able to offer such substitute relief should it later turn out that the goods were improperly liquidated by the debtor.<sup>100</sup> As for the prior lien rights argument, however, the court held that because the postpetition debtor-in-possession financing order provided that the lenders' prepetition liens would also secure the postpetition financing, and the terms of the postpetition credit were virtually identical to the prepetition financing, Simon & Shuster's reclamation claim was subordinate to the senior lenders' interest in the goods.<sup>101</sup> While leaving many questions unanswered,<sup>102</sup> the effect of the holding in *Ad-*

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97. *Id.* at 424.

98. *Id.* at 426–28.

99. *Id.* at 426–27.

100. *Id.* at 428.

101. *Id.* at 427. The court specifically distinguished the bankruptcy court holding in *In re Phar-Mor, Inc.*, 301 B.R. 482, 497–98 (Bankr. N.D. Ohio 2003), on the basis that in *Phar-Mor*, the prior secured lender had already been paid in full from collateral other than the collateral that was also subject to the seller's reclamation demand. *Advanced Mktg.*, 360 B.R. at 427.

102. For instance, it was suggested that because the issue in *Advanced Marketing* came before the court on motion for a temporary restraining order the court did not, for example, consider the seller's possible right to adequate protection or administrative priority for goods delivered between the twenty-first and forty-fifth day prior to filing that were subject to reclamation but became, or might become, unavailable because of disposition by the debtor-in-possession. Eric R. Wilson & Robert L. LeHane, *Secured Lenders' Pre- and Post-Petition Liens Trump Reclamation Rights Under Amended §546(c)*, 26 AM. BANKR. INST. J. 26, 27 (2007). The authors note that the court's referral to Simon & Shuster's claim as "worthless" is probably some "indication" of how the court would likely have ruled on the



*vanced Marketing* was to disappoint sellers who believed revised section 546(c) might: (1) entitle them to what amounted to specific performance of their claim against goods received within forty-five days of filing, and (2) alter the pre-BAPCPA rules barring reclaiming creditors from invoking the doctrine of marshaling of assets against a senior lender with a valid lien on both the goods in question and other collateral.<sup>103</sup>

Probably the most important post-BAPCPA case to date was rendered later the same year—*In re Dana Corp.*<sup>104</sup> Authored by longtime and highly respected Bankruptcy Judge Burton Lifland, *Dana Corp.* involved more than 450 reclamation demands on goods with an aggregate value in excess of \$297 million against the Chapter 11 debtors, operating as debtors-in-possession.<sup>105</sup> The debtors, manufacturers of auto parts, asserted a “prior lien” defense based on a postpetition credit facility secured by all pre- and postpetition assets of the debtors, and from which the lenders under the prepetition credit facility, secured by the prepetition assets, were to be paid.<sup>106</sup> If upheld, this defense would render the reclamation claims valueless since the prepetition debt to be retired with the postpetition credit facility exceeded the value of the reclamation claims. Relying on *In re Phar-Mor, Inc.*,<sup>107</sup> the sellers argued, as did Simon & Shuster in *Advanced Marketing*, that because the prepetition debt had been discharged by a source *other*

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issue. *Id.* However, even in the case where the goods have value in excess of the lien—something that was not the case in *Advanced Marketing*—the elimination by BAPCPA of the option of the court to grant a substitute lien or administrative expense priority in lieu of reclamation moots the issue in all likelihood.

103. The *Advanced Marketing* court noted that Simon & Shuster was essentially calling on the court to apply the doctrine of marshaling, but that the doctrine cannot be invoked by unsecured creditors. 360 B.R. at 427 (citing *Yenkin-Majestic Paint Corp. v. Wheeling-Pittsburgh Steel Corp. (In re Pittsburgh-Canfield Corp.)*, 309 B.R. 277, 291 (B.A.P. 6th Cir. 2004)); *see also* *Galey & Lord, Inc. v. Arley Corp. (In re Arclo, Inc.)*, 239 B.R. 261, 274–76 (Bankr. S.D.N.Y. 1999) (refusing to order marshaling, as too costly and time-consuming, to preserve a portion of the reclaiming seller’s goods and observing that, in any case, marshaling requires *two* secured creditors). *But see In re Suwannee Swifty Stores, Inc.*, No. 96-60807, 2000 WL 33740259, at \*3 (Bankr. M.D. Ga. Mar. 20, 2000) (suggesting, in dicta, that marshaling may be invoked by a nonsecured creditor).

104. 367 B.R. 409 (Bankr. S.D.N.Y. 2007).

105. *Id.* at 410–11. As in *Advanced Marketing*, the creditors’ claims were based on sales extending back forty-five days from the date of the commencement of the case. *Id.* at 414–15.

106. *Id.* at 410–11.

107. 301 B.R. 482 (Bankr. N.D. Ohio 2003).

than the goods, namely the postpetition financing, the prior lien against the goods had been extinguished.<sup>108</sup> Alternatively, the sellers argued that BAPCPA created a new federal right of reclamation that, presumably, is not subject to authority decided under former section 546(c).<sup>109</sup>

As to the first argument, the court acknowledged a split in the pre-BAPCPA case law on the scope of the prior lien defense, but found as better-reasoned the authorities holding that if goods serving as collateral for prepetition debts are used *either* to satisfy that debt or as collateral for the debtor-in-possession financing, the functional effect is the same; namely, that the goods have been used to satisfy the prepetition debt.<sup>110</sup> Because, as noted, in this case the value of the goods subject to reclamation was less than the amount secured by the prior lien, that meant that the reclamation claims were effectively extinguished.<sup>111</sup>

The court also rejected the alternative argument that Congress, by eliminating the language in former section 546(c) relating to any “statutory or common law right,” was intending to create a new federal bankruptcy law right.<sup>112</sup> In explaining this position, Judge Lifland made his case in terms of the structure of the Code as originally enacted in 1978, pointing to the continued placement of the reclamation right in the Code section titled “Limitations on avoiding powers,” a section not dedicated to the creation of new rights.<sup>113</sup> Beyond that, his rationales supporting the conclusion that revised section 546(c) creates no federal rights separate from state law were predicated largely on the inadequacies of the revised statute (and thus the difficulties that would be associated in parsing the scope of such a new remedy). For example, he pointed to the failure of Congress to make a provision for

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108. *In re Dana Corp.*, 367 B.R. at 413; *see also*, Colin T. Darke, *Secured Lenders Versus Reclaiming Vendors: An Analysis of Sixth Circuit's Phar-Mor Decision*, 18 NORTON J. BANKR. L. & PRAC. 377, 387 (2009).

109. *In re Dana Corp.*, 367 B.R. at 413.

110. *Id.* at 418–21 (concluding that the decision of the court in *In re Dairy Mart Convenience Stores, Inc.*, 302 B.R. 128 (Bankr. S.D.N.Y. 2003), was better-reasoned than *Phar-Mor*).

111. *Id.* at 419. The total secured prepetition debt was approximately \$381 million, whereas the largest single reclamation claim was only about \$9.6 million. *Id.* at 413.

112. *Id.* at 416 (internal quotation marks omitted); *see also supra* note 90.

113. *In re Dana Corp.*, at 416–17. The court also relied on the maxim that amendments to the Bankruptcy Code should not be construed to effect major changes without at least some discussion in the legislative history. *Id.* at 417 (citing *Dewsnup v. Timm*, 502 U.S. 410, 419 (1992)).

the protection of buyers in the ordinary course and good faith purchasers.<sup>114</sup> Additionally, he noted that revised section 546(c) refers to the prior rights of a holder of a security interest in the goods but does not indicate what those rights are, and makes no provision for the exclusion of goods that are not identifiable or in the possession of the debtor on the day of demand.<sup>115</sup> In both instances, Judge Lifland observed that recourse to state law is necessary to clarify these key aspects governing the scope of the right of reclamation and, thus, the revised statute should not be read as doing more than incorporating the right of reclamation as it exists under state law.<sup>116</sup>

In a subsequent post-BAPCPA reclamation decision, *In re Circuit City Stores, Inc.*, the Circuit City debtors, in a jointly-administered case, sought summary judgment on their omnibus objections to the reclamation claims of several suppliers of goods to the various Circuit City debtors made in the ordinary course of business in the forty-five days preceding the Circuit City Chapter 11 filing.<sup>117</sup> As in *Dana Corp.* and *Advanced Marketing*, the debtor-in-possession financing arrangement provided for repayment of the senior prepetition lender's indebtedness and a continuation of that prepetition lender's security interest in all existing and after-acquired assets, including inventory and the proceeds therefrom, in favor of the new lender.<sup>118</sup> Several months after filing, the debtors concluded that it would not be possible to rehabilitate the business, and the court authorized a "going out of business" sale of all of the debtors' still-operating stores.<sup>119</sup> Thereafter, the debtors proceeded with the filing of a joint plan of liquidation.<sup>120</sup>

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114. *Id.* at 417 ("Clearly, Congress could not have intended to permit reclamation of goods that have been sold to consumers or other good faith purchasers.").

115. *Id.* at 416. In short, the court concluded that revised section 546(c) could not be construed to grant an independent federal right of reclamation because it simply fails to set forth a "coherent comprehensive federal scheme" detailing the contours of such a right. *Id.*

116. *Id.* at 417–18.

117. 441 B.R. 496, 498–99 (Bankr. E.D. Va. 2010). As to one of the defendants, the decision was affirmed, sub nom., in *Paramount Home Entm't, Inc. v. Circuit City Stores, Inc.*, 445 B.R. 521 (Bankr. E.D. Va. 2010).

118. *In re Circuit City Stores, Inc.*, 441 B.R. at 499. The DIP Financing Facility provided that it was to be secured by substantially all of the debtors' existing and after-acquired assets and that it was to be used to pay the prepetition secured lenders as well as finance postpetition operations. *Id.*

119. *Id.* at 500.

120. *Id.*

The reclamation claims at issue, which in the aggregate exceeded \$10 million, were made pursuant to a “Reclamation Procedures Order” entered by the court shortly after the filing.<sup>121</sup> The reclamation claimants took no action after their reclamation demands were sent to the debtors under the “Reclamation Procedures Order,” other than to file a subsequent claim, on or about the time the “going out of business” sale order was entered.<sup>122</sup> These subsequent claims asserted entitlement either to secured or priority claim status based on multiple section of the Code, including sections 546(c) and 507(a)(2).<sup>123</sup> The debtor filed an omnibus objection seeking to have all of the claims classified as general unsecured, nonpriority claims.<sup>124</sup> The court, in granting the debtors’ summary judgment motion, noted the complete absence under revised section 546(c) of any authority for granting administrative expense or secured creditor status on account of reclamation claims.<sup>125</sup> Specifically, the court observed that section 546 is not a remedial statute; rather, “[i]t simply subordinates the avoiding powers of a trustee [or debtor-in-possession] . . . to the right of a seller to reclaim its goods under certain conditions.”<sup>126</sup> The court further adopted the *Dana Corp.* view that revised section 546(c) did not create a federal right of reclamation independent of state law.<sup>127</sup> Turning to state law, the court then pointed out that, under U.C.C. section 2-702(2), a seller’s right is limited to a claim for return of the specified goods, and does not give rise to any of the rights associated with a security interest, including any claim against the proceeds of the reclamation goods.<sup>128</sup>

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121. *Id.* The “Reclamation Procedures Order” called for claimants to file reclamation demands within twenty days following the date of filing, but did not in any fashion alter the claimant’s substantive rights or their ability to prosecute a claim seeking reclamation. *Id.*

122. *Id.*

123. *Id.* at 501.

124. *Id.* at 502.

125. *Id.* at 504.

126. *Id.* at 504 & n.14 (footnote omitted). Additionally, the court stated that it “finds the *In re Dana Corporation* analysis persuasive and concludes that there still exists no federal right to reclamation post-BAPCPA.” *Id.* at 505.

127. *Id.* at 505 (“In order to prevail, Respondents must be able to prove that they have a valid right of reclamation under state law.”).

128. *Id.* at 510–11 (distinguishing state law on the ground that section 546(c) grants the reclaiming seller the right only to reclaim the goods, and not the goods “or the proceeds thereof”); *see also supra* note 66 (explaining whether goods or proceeds may be reclaimed under section 546(c)).

As far as entitlement to administrative expense status, the reclamation claimants urged the court to follow the Sixth Circuit's *Phar-Mor* decision, requiring administrative expense priority when goods subject to the reclamation claim had been sold and the proceeds used to satisfy the superpriority of the postpetition lender's lien.<sup>129</sup> As in *Dana Corp.*, the court declined, noting, initially, that BAPCPA appeared to moot *Phar-Mor* and similar pre-2005 cases by restricting any such claims to the terms of the new section 503(b)(9) administrative priority.<sup>130</sup> The court continued, however, that even to the extent such authorities remained relevant, the reclamation claimants' failure in this case to take any action with respect to their claims, other than initially to assert them in the response to the "Reclamation Procedures Order," negated any further argument for relief.<sup>131</sup>

## 2. Analysis of the Post-BAPCPA Reclamation Cases

Until 2005, it was defensible to conceptualize bankruptcy as not creating any independent reclamation rights, but simply recognizing such rights as existed outside of bankruptcy, subject to certain additional conditions and limitations, in much the same way that section 553(a) enforces setoff rights that arise outside of bankruptcy, with certain exceptions.<sup>132</sup> After BAPCPA, it is simply no longer reasonable to draw that conclusion, even though several bankruptcy courts have expressed concern that the practical

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129. *In re Circuit City Stores, Inc.*, at 507; *Phar-Mor, Inc. v. McKesson Corp.* (*In re Phar-Mor, Inc.*), 534 F.3d 502, 508 (6th Cir. 2008). See generally Darke, *supra* note 108 (providing an overview of: (1) bankruptcy financing, (2) reclamation rights, and (3) the *Phar-Mor* decision).

130. *In re Circuit City Stores, Inc.*, 441 B.R. at 507 (concluding that under the *current* version of the statute, administrative expense priority can only be obtained by establishing the criteria that would qualify for an administrative expense under section 503(b)(1) or section 503(b)(9)).

131. *Id.* at 507–08. The court surmised that the claimants failure to do so was likely a product of the fact that they realized it would be pointless in the face of prior blanket liens on the debtors' assets, including inventory, the existence of which rendered the reclamation claims valueless. *Id.* at 509 (citing *In re Dana Corp.*, 367 B.R. 409, 421 (Bankr. S.D.N.Y. 2007)).

132. That provision preserves, but does not create, the right to offset mutual prepetition debts that exists outside of bankruptcy, but excludes certain claims—such as those acquired within ninety days of filing for purposes of creating a right to a setoff—and subjects the nonbankruptcy right of setoff to the automatic stay and to the provisions of section 363 regarding a debtor-in possession's right to use property that may be subject to a setoff. See 11 U.S.C. § 553(a) (2012).

difficulties associated with that determination would be disruptive to the fair and efficient administration of bankruptcy cases.<sup>133</sup>

Respectfully, the wheels began to come off the tracks with the *Dana Corp.* court's analysis of why revised section 546(c) did not create an independent federal right of reclamation. Posing the question in that fashion preordained the outcome based simply on the orthodoxy that there is no federal commercial law.<sup>134</sup> But whether there is or is not a federal commercial law is largely immaterial in that it is simply no longer possible after BAPCPA to understand reclamation in bankruptcy as not creating rights other than (or in addition to) those that exist under state law, if indeed it was ever possible to do so.<sup>135</sup> Furthermore, the conclusion that BAPCPA did not create a separate federal right of reclamation was *not* necessary to the principal holding in *Dana Corp.* (and, for that matter, *Advanced Marketing*) that the postpetition credit facility, calling, respectively, for a "roll-up" and a "creeping roll-up,"<sup>136</sup> trumped the sellers' reclamation claims.<sup>137</sup>

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133. See *supra* notes 114–15 and accompanying text.

134. After the rejection of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), it has been understood that there is no general federal commercial law. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they *commercial law* or a part of the law of torts.") (emphasis added); see also *United States v. Stump Home Specialties Mfg., Inc.*, 905 F.2d 1117, 1119 (7th Cir. 1990) ("[F]ederal courts have neither the time nor the specialized knowledge to forge a new body of commercial law; by doing so they would simply be adding to the already excessive complexity of American law."). There has, however, developed special federal common law in a number of areas of activity, such as banking, labor relations, environmental protection, pension plans, and of course bankruptcy, where there is a strong federal interest. See generally Official Comm. of Unsecured Creditors of the Columbia Gas Transmission Corp. v. Columbia Gas Sys. Inc. (*In re Columbia Gas Sys.*), 997 F.2d 1039, 1054–64 (3d Cir. 1993) (discussing when federal common law will control the adjudication of an issue). Thus, notwithstanding the scruples of federal courts about fashioning a federal commercial law out of common law cloth, the fact remains that Congress has clearly granted the federal courts jurisdiction over many a subject matter otherwise unregulated by federal law, but as to which strong federal interests are implicated. In discussing what he described as the "interstitial character" of federal legislation in general, Professor Gilmore cited the former Bankruptcy Act as the "most familiar example" of how state law operates in the background of federal legislation to fill the inevitable gaps in the fabric of federal statutory law. GILMORE, *supra* note 28, at 403; see Lawrence Ponoroff, *Exemption Limitations: A Tale of Two Solutions*, 71 AM. BANKR. L.J. 221, 222 & nn.6–12 (1997) (citing examples).

135. See *supra* text accompanying notes 55, 63, 81.

136. As explained by the court in *In re Capmark Fin. Grp., Inc.* 438 B.R. 471, 511 n.15 (Bankr. D. Del. 2010), a roll-up most simply is the payment of a pre-petition debt with the proceeds of a post-petition loan, whereas a "creeping roll-up" is identical to a roll-up except that the payment of the pre-petition debt occurs over time. In both instances, the postpeti-

To underscore the point, the specific reference to “statutory or common law” in former section 546(c) made it tenable to conceptualize the statute as simply protecting state law reclamation claims from avoidance and (as in the past) preserving the state law right in bankruptcy, subject to certain restrictions.<sup>138</sup> Under the revised version of section 546(c), those rights continue to be limited in some ways, but for the first time are also expanded in other respects.<sup>139</sup> That is simply a fact—and if it means, advisedly or not, that there is now a right to reclaim goods under circumstances that would not pertain under state law—well, then that is simply what it means. Although the congressional intent was not made explicit, what purpose was to be served by deleting the phrase “any statutory or common law right of a seller of goods,” and replacing it with reference to “the right of a seller of goods” other than to separate, if not divorce, reclamation claims in bankruptcy from reclamation claims under the U.C.C.?<sup>140</sup>

The *Dana Corp.* opinion pointed out that the title of section 546 remains “Limitations on avoiding powers” as an indication that it is not intended to confer any new rights.<sup>141</sup> This fact, however, is largely explicable in historic terms,<sup>142</sup> so it would be a mistake to make too much of it. Moreover, the heading of a section cannot trump the clear language of the statute,<sup>143</sup> which now no longer

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tion credit is provided by the prepetition lender, so rarely does money actually change hands. Rather, as a matter of bookkeeping entries, “[t]he pre-petition loan is deemed satisfied and the post-petition loan includes the amount of the pre-petition debt.” *Id.* at 511 n. 14.

137. *In re Simon & Schuster, Inc. v. Advanced Mktg. Servs., Inc.* (*In re Advanced Mktg. Servs., Inc.*), 360 B.R. 421, 426–28 (Bankr. D. Del. 2007). Both the pre- and post-amended versions of section 546(c)(1) were understood, implicitly and explicitly, respectively, as incorporating the U.C.C. section 2-702(3) rule subjecting the reclamation claim to the holder of a prior floating lien on lien. Indeed, the court in *Dana Corp.* predicated its holding based on agreement with a pre-BAPCPA case. *See In re Dana Corp.*, 367 B.R. 409, 419–21 (Bankr. S.D.N.Y. 2007); *supra* text accompanying note 74.

138. Stacey L. Meisel & Lauren Hannon, *Decoding the Code: Why the Revisions to Section 546(c) Do Not Create a Federal Right of Reclamation for Sellers*, 17 NORTON J. BANKR. L. & PRAC. 217, 219 (2008) (quoting *In re Zeta Consumer Prods. Corp.*, 291 B.R. 336, 350 (Bankr. D. N.J. 2003)).

139. *In re Dana Corp.*, 367 B.R. at 414–15 (indicating that, under BAPCPA, the right of reclamation has been expanded in two respects: (1) the pre-filing look-back during which goods may be subject to reclamation expanded from ten to forty-five days, and (2) the grace period within which a seller must file notice of reclamation if not filed prior to the commencement of the bankruptcy case expanded from ten to twenty days).

140. *See supra* note 87.

141. *In re Dana Corp.*, 367 B.R. at 416; *see supra* text accompanying note 113.

142. *See supra* text accompanying note 42–47, 53.

143. *See infra* note 213 and accompanying text.

coincides with the state law notice period and specifically addresses to what class of other claimants—holders of prior security interests—the reclaiming seller's right are subject. If we indulge the pre-BAPCPA conceptualization of reclamation, and assume that a seller must comply with both state and federal requirements in order to reclaim goods, then Congress' expansion of the period within which demand must occur from ten to forty-five days was a wholly meaningless and superfluous exercise (except possibly in certain rare misrepresentation situations).<sup>144</sup>

By categorical language, the goods potentially subject to reclamation under, respectively, U.C.C. section 2-702(2) and revised section 546(c)(1) are no longer entirely coextensive.<sup>145</sup> Most pertinent to the analysis, there is undeniably now a longer look-back period under the Code. Commentators have undertaken to explain this seeming anomaly, although they start from the premise that enhancing the state law rights of reclamation claimants would be intolerable.<sup>146</sup> Granted it would not be pretty, but of the many recognized theories of statutory interpretation, the “end justifies the means” is unknown.<sup>147</sup> Moreover, as a practical matter, since the effective date of BAPCPA, credit sellers have regularly asserted, and courts have entertained without blushing, reclamation claims for goods received by the debtor within forty-five days prior to the commencement of the case.<sup>148</sup>

Nonetheless, the argument proceeds that, to avoid the harmful results of an expanded reclamation period, revised section 546(c)(1) can (and should) ostensibly be read as *retaining* the ten-day U.C.C. look-back period.<sup>149</sup> This assertion is made despite the fact that the “10,” which previously appeared in the statute, has been replaced with the “45.” The results-oriented explanation

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144. *Infra* text accompanying notes 151–52.

145. Compare U.C.C. § 2-207(2) (2013), with 11 U.S.C. § 546(c)(1) (2012).

146. Meisel & Hannon, *supra* note 138, at 217, 220.

147. See *supra* note 9.

148. For example, in both *In re Dana Corp.* and *In re Advanced Marketing Services*, discussed *supra* Part II.A.1, the reclamation demands for goods received by the debtors during the forty-five days prior to bankruptcy were denied because of a prior lien, not because of the absence of a misrepresentation concerning solvency. The *Dana* court even acknowledged the expansion of the notice period for all reclamation claims as one of the changes wrought by BAPCPA. *In re Dana Corp.*, 367 B.R. 409, 414–15 (Bankr. S.D.N.Y. 2007); see *supra* text accompanying note 143.

149. Meisel & Hannon, *supra* note 138, at 226.



is simply that reference to the ten-day period was superfluous given that Congress intended the right to be defined by state law—even though under this view it would have been equally superfluous in 1978 to include the reference to “10,” and despite the fact that BAPCPA also eliminated the prior reference to any right arising under “statutory or common law.”<sup>150</sup> And what about the forty-five day period for giving notice? The explanation continues that this language was included in order to *cure* the oversight in former section 546(c) of not providing an analog to U.C.C. section 2-702(2)’s elimination of the ten-day notice requirement in the event of written misrepresentation of insolvency within three months before delivery of the goods.<sup>151</sup> Thus, the forty-five day language, it is suggested, identifies an extended look-back period when the debtor has misrepresented solvency to the seller, and it is inapplicable in every other situation, where the former ten-day rule still pertains. That is, Congress decided to expand reclamation rights in the event of a misrepresentation of solvency, just like under U.C.C. section 2-702(2), but only by forty-five rather than ninety days.<sup>152</sup> This, it is maintained, is consistent with a reclamation statute in bankruptcy that adds requirements to state law, but does not enhance rights.<sup>153</sup>

There are a few problems with this creative but uneasy interpretation of statutory text and congressional intent. First, there is no reference whatsoever in revised section 546(c)(1) to a separate, extended notice period in the event of misrepresentation, a distinction that also did not exist under the prior version of the statute. Thus, the language of both the former and revised versions of section 546(c)(1) refer to a *signal* period of time within which demand must be made. The only logical inference from that fact is that the written demand requirement is unchanged in

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150. *Id.*

151. *Id.* at 225–27. The authors suggest that support for this position can be found in the following two articles: Sally S. Neely, *How BAPCPA Affects the Rights of Unpaid Prepetition Sellers of Goods*, ALI-ABA Advanced Program on Chapter 11 Reorganizations 17–19 (2008) and the Hon. Bruce A. Markell, *Changes to Avoiding Powers Brought About by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, Westlaw SL068 ALI-ABA 247 (2005). Meisel & Hannon, *supra* note 138, at 233 n.53. However, a fairer description would be to say that Ms. Neely and Judge Markell raise this interpretation as a possible reading, but do not necessarily endorse it.

152. Meisel & Hannon, *supra* note 138, at 226–27.

153. *Id.* at 227.

purpose and application, other than by the temporal extension of thirty-five days. Second, and perhaps most obvious, if the intent was to correct an oversight by providing additional rights in the event of misrepresentation consistent with state law, why not indicate that intent and then adopt a look-back period coinciding with state law, as opposed to abstrusely adopting a notice period that is half as long as the state law period and that replaces the ten-day demand period that had unquestionably applied in all cases under the former version of the statute? Finally, the U.C.C. does not deal with situations involving written misrepresentation of insolvency by *extending* the notice period. Rather it *waives* the demand requirement in such a case.<sup>154</sup> If Congress was intent on bringing section 546(c) more into line with U.C.C. section 2-702(2), it is peculiar that Congress would do so using an approach—extension of the notice period (although not to the full three months)—different than the technique used under the state law being emulated—elimination of the notice period for goods delivered up to three months prior to the misrepresentation.<sup>155</sup>

In short, this proposed construction of section 546(c)(1) defies all reason. Lack of legislative history should not be regarded as license to invent a legislative intent irrespective of its consonance with the plain language of the statute itself. As noted, this is not a matter of subscribing to one theory of statutory interpretation over another in situations where the meaning of a legislative expression is unclear, or where underlying circumstances have changed in a far-reaching and unanticipated fashion.<sup>156</sup> Rather, it is a fact that the only sensible reading of the language of revised section 546(c)(1) is that a credit seller that otherwise qualifies under the statute, subject to its limitation for prior liens, may reclaim goods sold in the ordinary course, received by the debtor in the forty-five days preceding filing, and still in the debtor's possession.<sup>157</sup> The fact that the *effect* of this interpretation is to ele-

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154. U.C.C. § 2-702(2) (2013).

155. See *supra* note 34 and accompanying text.

156. See Eskridge, *supra* note 9, at 1554 (analogizing judges to diplomats, who in applying ambiguous or outdated communiques to unforeseen circumstances, must exercise some creativity and discretion, but who, at bottom, are agents in a common enterprise who must also obey mandates that are clear); see also *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (“[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.”).

157. This is certainly how the statute is being interpreted in practice. See, e.g., *In re Circuit City Stores, Inc.*, 441 B.R. 496, 499 (Bankr. E.D. Va. 2010) (seven claimants all

vate the rights of one class of creditors at the expense of other more or less similarly positioned creditors does not alter the well-established principle that “when the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.”<sup>158</sup> In this instance, a construction that vests rights in certain creditors that do not appertain under state law is troublesome and messy,<sup>159</sup> but it is not “absurd” nor is it unheard of as a matter of bankruptcy law.<sup>160</sup> Likewise, the loss of stability and

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filed demands with respect to goods sold to Circuit City in the ordinary course of business during the forty-five day period preceding the filing); *see also supra* note 148.

158. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quoting *United States v. Ron Pairs Enters., Inc.*, 489 U.S. 235, 241 (1989)) (internal quotation marks omitted). It is rather fundamental that when the express language of a statute is clear, the court should not adopt a different construction, absent clear legislative intent to the contrary. *United States v. Turkette*, 452 U.S. 576, 580 (1981) (quoting *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

159. For an interesting treatment of why the courts’ proclivity for avoiding “messy” constructions is misguided, see Anita S. Krishnakumar, *The Anti-Messiness Principle in Statutory Interpretation*, 87 NOTRE DAME L. REV. 1465 (2012). The principle articulated by the Supreme Court of the United States in *Butner v. United States*—that a creditor’s rights, entitlements, and priority in assets of the bankruptcy estate are determined under state law—casts a long shadow over federal bankruptcy law. 440 U.S. 48, 54–55 (1979). But the shadow is a dappled one, because, as Professor Moringiello has pointed out, it is often overlooked that the Court qualified its statement with the perambulatory language “[u]nless some federal interest requires a different result.” Juliet A. Moringiello, *(Mis)use of State Law in Bankruptcy: The Hanging Paragraph Story*, 2012 WIS. L. REV. 963, 987 (quoting *Butner*, 440 U.S. at 55); *see also* *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (federal common law can exist when necessary to protect a uniquely federal interest). Further, the *Butner* argument ignores the fact that, at most, the decision constrains judges from ignoring (or altering) state property law rights even if the judge believes that federal bankruptcy policy augurs for a different result. It does not prevent Congress, in the exercise of its constitutional authority to enact uniform laws on the subject of bankruptcies, from limiting state law rights and remedies (as section 502(b)(6) does with respect to long-term claims of lessors), or expanding on those rights and remedies (as revised section 546(c) seems clearly to do). *See In re White Plains Dev. Corp.*, 137 B.R. 139, 141–42 (Bankr. S.D.N.Y. 1992). That Congress should have paid closer attention to the rationales offered by the Court in *Butner* of reducing uncertainty, discouraging forum shopping, and preventing a windfall in favor of one party over the other based purely on the fortuity of bankruptcy, is fair criticism, but it does not negate the primacy of the Code, when demanded, over state law. *Butner*, 440 U.S. at 55 (quoting *Lewis v. Mfrs. Nat’l Bank*, 364 U.S. 603, 609 (1961)); *see also* *United States v. Wegematic Corp.*, 360 F.2d 674, 676 (2d Cir. 1966) (finding the defendant’s suggestion to look to the Uniform Commercial Code as a source for the “federal” law of sales persuasive); *see also infra* note 265.

160. For example, section 1322(b)(2) of the Code has always afforded favored treatment to claims secured by the debtor’s residence in order to “encourage the flow of capital into the home lending market.” *Nobelman v. Am. Sav. Bank*, 508 U.S. 324, 332 (1993) (Stevens, J., concurring). Likewise, with the exception of section 507(b)(2), all of the categories of priority claims in section 507 reflect policy considerations that Congress deemed to trump the all-important equality principle in bankruptcy. *See Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215, 219 (1941) (“The power of the bankruptcy court to subordinate claims or to adjudicate equities arising out of the relationship between the several

predictability in commercial transactions that would exist until such time as the bankruptcy courts developed a coherent and consistent jurisprudence under the admittedly less than fully comprehensive and comprehensible scheme in revised section 546(c) is not grounds to ignore what the statute commands.<sup>161</sup>

In *Dana Corp.*, the court stressed that revised section 546(c) expressly subordinates the seller's reclamation remedy to the rights of a holder of a prior security interest in such goods.<sup>162</sup> As noted earlier, that represents a codification of the practice generally followed under former section 546(c).<sup>163</sup> The court went on to observe that the 2005 amendments do not similarly address the other two classes of claimants who, under state law, take the goods free of the rights of a reclaiming seller, and which it equally had been the practice under former section 546(c) to recognize as having rights superior to those of a reclaiming sellers.<sup>164</sup> The court then mused that "[i]f amended 546(c) created an independent federal reclamation right that replaced state law, then in 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."<sup>165</sup> Although that may be so, it is not entirely clear this must be true. Just because revised section 546(c) creates new rights, does not necessarily mean that it must be construed as *replacing* state law.

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creditors is complete."). The requirements under section 365(b)(1)(A) and section 1124(b)(2) for, respectively, curing a prepetition default in order to assume an executor contract or unexpired lease, and avoid impairment of a class of claims, also result in an elevation in priority for what would otherwise be general unsecured claims. See Moringiello, *supra* note 159, at 988 (urging that federal concerns overcome the presumption that state law defines property rights where remedies are concerned); *infra* note 190.

161. Adam J. Levitin, *Toward a Federal Common Law of Bankruptcy: Judicial Lawmaking in a Statutory Regime*, 80 AM. BANKR. L.J. 1, 81 (2006) ("Bankruptcy is about how to divide efficiently and fairly a fund that is too small to satisfy all claimants. Satisfying multiple claimants from a limited fund always involves balancing the interests of the claimants, as well as the debtor in Chapter 11 and Chapter 13 cases. Such balancing cannot always be done robotically according to the Code's formulas.") (internal footnotes omitted); see also *infra* note 265.

162. *In re Dana Corp.*, 367 B.R. 409, 417 (Bankr. S.D.N.Y. 2007).

163. See *supra* note 74.

164. *In re Dana Corp.*, 367 B.R. at 416. Under former section 546(c), the limitations on the right of reclamation contained in U.C.C. section 2-702(3) were routinely applied. See *supra* note 39 and accompanying text.

165. *In re Dana Corp.*, 367 B.R. at 417.

In light of the fact that former section 546(c) was more restrictive than U.C.C. section 2-702(2),<sup>166</sup> it was certainly possible that a seller might have a valid state law reclamation right that was not protected or preserved in bankruptcy.<sup>167</sup> It now may be the case that the expanded reclamation rights under revised section 546(c) complement rather than abrogate or replace state law. This could mean that the two classes of claimants identified in U.C.C. section 2-702(3), but excluded from revised section 546(c), remain protected by virtue of the continued incorporation of the U.C.C. reclamation rules in bankruptcy. Under this view, revised section 546(c) continues to limit state law reclamation rights in certain respects as it always has, but now expands them in other particulars, such as through the adoption of a demand period that extends well beyond the state law time period for making demand.

Alternatively, and perhaps more realistically, given that the practice under former section 546(c) had been to treat reclamation claims as subject to the several classes of purchasers identified in U.C.C. section 2-702(3), it would not be by any stretch illogical to assume that Congress, by expressly recognizing only one class of such claimants, *did* (knowingly or not) elevate the rights of reclaiming sellers above those of buyers in the ordinary course and other good faith purchasers.<sup>168</sup> Whether it was good public policy to do so is another question entirely, as the application of this construction would present some disquieting results to say the least.<sup>169</sup> This would not, however, be the only case of bor-

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166. See *supra* text accompanying notes 53–57.

167. See, e.g., *Barry v. Shrader Holding Co., Inc. (In re M.P.G., Inc.)*, 222 B.R. 862, 864–65 (Bankr. W.D. Ark. 1998) (holding that a seller's oral demand for return of goods, while adequate under state law, did not satisfy section 546(c), and thus deprived the seller of its protection).

168. In fact, that is probably the most plausible construction under a slight variation of the interpretive maxim of *expressio unius est exclusio alterius*; that is, the presumption that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another section of the same statute. See, e.g., *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994). Here, the disparate inclusion and exclusion are not in different sections of the same act, but in the same section of the Code in its pre- and post-amended versions.

169. Among these results would be the ability of an inventory supplier to a debtor-hardware store to recover a hammer sold to a consumer in a garden variety retail transaction a couple of weeks prior to filing, although, as a practical matter, that would likely never occur. More realistic might be the sale of substantially all of the goods to a bona fide purchaser for value.

der-line nonsensical results accomplished by BAPCPA.<sup>170</sup> More to the point, and as discussed more fully below,<sup>171</sup> softening the impact of the non-sequiturs through stretched and tortured interpretation not only distorts the legislative and judicial roles, it also has the unintended effect of serving as a kind of anodyne to the worst injuries inflicted by BAPCPA.<sup>172</sup> This bandaging over and numbing of the wound, while of some short-term comfort, is inimical in its potential for forestalling administration of the only real cure: corrective legislation.

Generally, we know BAPCPA was motivated by intent to curb what was perceived as widespread debtor abuses, particularly in consumer cases,<sup>173</sup> and to corral judicial discretion.<sup>174</sup> It is also beyond cavil that certain groups were intended to gain advantage in bankruptcy cases, and it seems credit sellers of goods on the eve of bankruptcy, along with auto lenders and credit card issuers, were among them.<sup>175</sup> In each case, the consequences have implica-

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170. In addressing whether the “ride-through” method for dealing with a secured claim was still an option after BAPCPA, one court lamented:

Unfortunately, the BAPCPA amendments do not provide a clear answer. The amendments are confusing, overlapping, and sometimes self-contradictory. They introduce new and undefined terms that resemble, but are different from, established terms that are well understood. Furthermore, the new provisions address some situations that are unlikely to arise. Deciphering this puzzle is like trying to solve a Rubik’s Cube that arrived with a manufacturer’s defect.

*In re Donald*, 343 B.R. 524, 529 (Bankr. E.D.N.C. 2006); *see also supra* notes 3, 5.

171. *See infra* Part III.

172. In *In re Nance*, the court acknowledged that “adoption of the strict, mechanical approach” for calculating a debtor’s “disposable income” as required by amendments to Chapter 13 may lead to “impractical results,” but observed that such impractical results do not render the statute “absurd.” 371 B.R. 358, 367 (Bankr. S.D. Ill. 2007). More to the point, the court stated that it would “not override the definition and process for calculating disposable income as being absurd simply because it leads to results that are not aligned with the old law.” *Id.* (quoting *In re Alexander*, 344 B.R. 742, 747 (Bankr. E.D.N.C. 2006)) (internal quotation marks omitted). “Unintended, impractical results are for Congress to address by amending the statute.” *Id.*

173. H.R. REP. NO. 109-31, at 2–5 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 88–92.

174. *See generally In re Nance*, 371 B.R. at 366 (noting that one of the major goals of BAPCPA was to replace judicial discretion with specific statutory standards and formulae); Kara J. Bruce, *Rehabilitating Bankruptcy Reform*, 13 NEV. L.J. 174, 191–93 (2012) (analyzing BAPCPA’s shift from “standards to rules”); Lauren E. Tribble, *Judicial Discretion and the Bankruptcy Abuse Prevention Act*, 57 DUKE L.J. 789, 791–92 (2007).

175. *See supra* note 6 and accompanying text. It bears reiterating that while the industry capture account of BAPCPA tells an important part of the story, the legislation also advanced the interests of a number of other groups, including the holders of domestic support obligations, retirees, veterans, and, in a few instances, even consumers. *See, e.g.*, 11 U.S.C. § 527 (2012) (evidencing actual consumer oriented protection through enhanced disclosure requirements). *See generally Dickerson, supra* note 2, at 1902–05 (identifying

tions for inter-creditor, as well as debtor-creditor, relationships, and inevitably entail a recalibration of the balance that must always occur among competing policies and interests in a bankruptcy case. The replacement of former section 546(c)(2) with its current language is certainly consistent with a desire to restrict judicial discretion. Likewise, the expansion of former section 546(c)(1), as well as the adoption of the new administrative expense priority in section 503(b)(9), are consonant with the intent to advance and favor certain creditor interests. Thus, in many respects, the new treatment of credit seller claims aligns neatly with the broad themes that animated BAPCPA from the start. It is conceded that these objectives may have been accomplished at too high a cost in terms of erosion of other long-standing, fundamental bankruptcy policies. They may also have been achieved in a clumsy manner and one that will require considerable time to sort out through the traditional case-by-case development. But that does not mean that the statute cannot mean what it says and, for the most part, what it says quite clearly.<sup>176</sup>

Since promulgation of the U.C.C., reclamation has not represented a terribly powerful or significant remedy for vendors.<sup>177</sup> The combination of a short window within which to make demand, coupled with subordination to other claimants even when the vendor is sufficiently aware and diligent so as to make a timely and proper reclamation demand, operates to make successful state law reclamation claims more the exception than the rule. Prior to BAPCPA, the same sentiment could be expressed regarding the reclamation remedy in bankruptcy.<sup>178</sup> Indeed, the more-or-less routine granting (at least until recently) of critical vendor orders represented a much more practical remedy for sellers of

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the interests of several groups, beyond the consumer credit industry, whose interests were taken into account in the crafting of the legislation).

176. This is reinforced by the fact that a bill sponsored by Representative Nadler to repeal section 503(b)(9) and restore section 546(c) to its pre-BAPCPA form died in committee. Business Reorganization and Job Protection Act of 2009, H.R. 1942, 111th Cong. (1st Sess. 2009).

177. See, e.g., *Chemical-Ways Corp. v. Page* (*In re Dynamic Techs. Corp.*), 106 B.R. 994, 1004 (Bankr. D. Minn. 1989) ("Section 546(c) is the *exclusive remedy* available to vendors who are attempting to reclaim their goods.").

178. *Crown Quilt Corp. v. HRT Indus., Inc.* (*In re HRT Indus., Inc.*), 29 B.R. 861, 862 (Bankr. S.D.N.Y. 1983) (commenting that seldom is property actually reclaimed in a reorganization case in lieu of other available relief); cf. *supra* notes 78–81 and accompanying text (regarding the pre-BAPCPA alternative relief provided in some cases to reclaiming sellers who were unable to reach the goods subject to the claim).

goods than reclamation, unburdened as it was (and still is) by the intricacies of section 546(c) in both its current and original form.<sup>179</sup> In any event, with BAPCPA, Congress seems to have swung the pendulum in the other direction by adopting a nearly unqualified administrative expense priority for sellers whose claims arise within twenty days of filing,<sup>180</sup> and amending section 546(c) to permit, subject to certain conditions and limitations, what appears to be a right to reclaim goods received by the debtor between twenty-one and forty-five days prior to the commencement of the case.<sup>181</sup> This may represent bad policy judgment in terms of larger system goals, but that does not mean that the legislative commands represent an indecipherable enigma that consequentially frees us to search for alternative meaning wherever it can be most conveniently and expediently found. Rather, the

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179. In *In re KMart Corp.*, Judge Easterbrook decided that bankruptcy courts' more-or-less routine granting of critical vendor orders under the doctrine of "necessity" was not justified under their section 105 or section 364 powers. 359 F.3d 866, 871–72 (7th Cir. 2004). The court left open the possibility of granting a request to pay prepetition debt of critical vendors under section 363(b)(1), but only when the debtor is able to "prove, and not just allege, two things: that, but for immediate full payment, vendors *would* cease dealing; and that the business will gain enough from continued transactions with the favored vendors to provide some residual benefit to the remaining, disfavored creditors, or at least leave them no worse off." *Id.* at 868, 872–73; see also Alan N. Resnick, *The Future of the Doctrine of Necessity and Critical-Vendor Payments in Chapter 11 Cases*, 47 B.C. L. REV. 183, 203 (2005).

180. It has actually been suggested that section 503(b)(9) was intended by Congress to be a response to the ad hoc nature of critical vendor orders, and perhaps as well to the Seventh Circuit's decision in *KMart*, but the argument is far-fetched. See Mark A. McDermott, *Critical Vendor and Related Orders: Kmart and the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 14 AM. BANKR. INST. L. REV. 409, 426–27 (2006) (arguing for continuation of critical vendor payments even after BAPCPA); Brendan M. Gage, Note, *Should Congress Repeal Bankruptcy Code Section 503(b)(9)?*, 19 AM. BANKR. INST. L. REV. 215, 229–32 (2011) (observing that if Congress' goal was to eliminate the need for critical vendor orders with section 503(b)(9), it failed to achieve that goal). On the other hand, it was predicted, and has apparently been the case, that the 2005 changes to the Code have, along with other factors, dramatically reduced the need for critical vendor orders. See Douglas G. Baird, *Essay: Bankruptcy from Olympus*, 77 U. CHI. L. REV. 959, 965 & n.25 (2010) (stating priority afforded by section 503(b)(9) "is usually enough to keep [vendors] sufficiently happy that a critical-vendor order is not necessary"); Lauren C. Cohen, *The Application of Section 502(d) to Section 503(b)(9) Claims—"You Can Put Lipstick on a Pig,"* 18 NORTON J. BANKR. L & PRAC. 259, 262 (2009) ("One of the effects of the implementation of section 503(b)(9) has seemingly been a decrease in 'critical vendor' first-day motions, which have apparently been replaced with '503(b)(9) motions.'"); see also *In re News Publ'g Co.*, 488 B.R. 241, 244–46 (Bankr. N.D. Ga. 2013) (denying the debtor's motion for authorization to pay prepetition claims of alleged "critical vendors" on the basis of failure to satisfy *KMart's* "stringent" test).

181. Of course, the right to reclaim extends to goods that might also make up a section 503(b)(9) administrative claim, but it is the rare case where that alternative would be attractive to a vendor given the relative simplicity of a claim under section 503(b)(9).



revised treatment for twenty- and forty-five-day credit seller claims is easily explicable as a by-product of the legislative process, which, on each occasion when it occurs, involves moving the normative fulcrum in one direction or the other in the ultimate accommodation of various constituents with a cognizable interest in the process. Sometimes we applaud the change and in other instances not, but we cannot responsibly ignore it.<sup>182</sup>

## B. Section 503(b)(9)

### 1. The Twenty-Day Claims in the Case Law

BAPCPA's incorporation into the Code of an administrative expense priority for twenty-day claims is a game changer for credit sellers eligible to assert rights thereunder. It effectively elevates what previously would have been a run-of-the-mill general unsecured claim into a priority payment that must be paid in full unless the estate is administratively insolvent.<sup>183</sup> This invests section 503(b)(9) claimants, individually and as a class, with enormous leverage over the viability of reorganization.<sup>184</sup> More-

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182. In *In re Miller*, the court held that, “[a]lthough we have no reason to pass judgment on the process by which BAPCPA became law, we note that perceived poor drafting should not be regarded as a license to invalidate plain-text readings in the name of fixing a statute that some believe is broken.” *DaimlerChrysler Fin. Servs. v. Miller (In re Miller)*, 570 F.3d. 633, 639 (5th Cir. 2009). The court in *Miller* also rejected the “[e]quity of the statute” theory as “essentially [being] a ‘dead letter’ from the beginning of the twentieth century.” *Id.* The “equity of the statute” approach, grounded in ancient common law doctrine, reflects a challenge to the new textualism in statutory interpretation and reflects a strong purposivist view. See John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 22–27 (2001); *supra* note 9.

183. See *In re Plastech Engineered Prods., Inc.*, 394 B.R. 147, 151 (Bankr. E.D. Mich. 2008) (noting that, unless otherwise agreed, the holder of an allowed administrative expense claim must receive cash equal to the amount of the claim as of the plan effective date); see also *In re Bashas’ Inc.*, 437 B.R. 874, 895 (Bankr. D. Ariz. 2010) (approving payment of roughly \$30 million of section 503(b)(9) claims on the plan effective date). It is also quite possible under section 503(b)(9) that, on motion of the creditor, payment might occur at any point in time prior to the effective date of the plan. See *In re Bookbinders’ Rest., Inc.*, No. 06-12302ELF, 2006 WL 3858020, at \*1 (Bankr. E.D. Pa. Dec. 28, 2006) (holding that the timing on payment of an administrative expense allowed under section 503(b)(9) resides within the discretion of the court).

184. Particularly in situations where the debtor is a large retailer, section 503(b)(9) provides credit sellers with enormous leverage in Chapter 11 cases. Gage, *supra* note 180, at 217–18 (stating that, for restaurants and retailers with high inventory turnover, twenty-day claims have presented an “insurmountable hurdle to a successful non-liquidation reorganization”); see also Bruce, *supra* note 174, at 199 (noting that the prospects of an immediate cash recovery through “quick liquidation may overshadow the creditor’s interest in supporting the reorganization” of the debtor). For an example of a case where sec-

over, because administrative expenses have always been understood as relating to postpetition expenditures critical to the preservation of the estate, the new priority for prepetition debts arising out of the ordinary course of sale, and delivery to the debtor, of goods on the eve of bankruptcy has also required bankruptcy professionals to change the way in which they tend to think about what constitutes an administrative expense.<sup>185</sup>

Once more, the absence of any legislative guidance has led (and permitted) courts and commentators to speculate on the purpose for this special priority.<sup>186</sup> It also left courts that desire to make sense out of the most disturbing consequences of the new provisions without much to work with in seeking feasible answers to a number of questions concerning the scope and availability of the priority, as well as the relationship between section 503(b)(9) and section 546(c).<sup>187</sup> The leading treatise in the field pronounces that the rationale for affording administrative priority to twenty-day claimants was intended to prevent a debtor, knowing it would not be able to pay for them, from loading up on goods that the debtor anticipates will be useful in the imminent bankruptcy case.<sup>188</sup> Others are less sure of this explanation, and a variety of alternative theories have been offered,<sup>189</sup> most prominent and compelling among them being the hope that, in some cases, bankruptcy

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tion 503(b)(9) claims contributed to the conclusion that reorganization was not feasible, see *In re Souza*, No. 12-13341, 2012 WL 8441318, at \*6 & n.1, \*9 (Bankr. E.D. Cal. Nov. 26, 2012).

185. Section 503(b) accords a second priority under section 507(a)(2) for claims entitled to administrative expense priority under section 503(b). 11 U.S.C. § 507(a)(2) (2012). Section 503(b)(1)(A) refers to the actual, necessary costs and expenses of preserving the *estate*. *Id.* § 503(b) (2012). The non-exhaustive list of administrative expense claims in the remainder of the subsections of 503(b) all pertain to obligations arising either in connection with the filing of a petition or postpetition, except for section 503(b)(9). *Id.*

186. See Gage, *supra* note 180, at 229 (identifying as the four most popular theories: “(1) the critical vendor order replacement theory; (2) the continued dealings theory; (3) the stockpiling theory; and (4) the reclamation fortification theory.”).

187. See *id.* at 228, 234–36 (noting that “[t]he legislative history on section 503(b)(9) is virtually nonexistent” and discussing the scope and practical realities of section 546(c) in conjunction with section 503(b)(9)).

188. See 4 COLLIER ON BANKRUPTCY ¶ 503.16[2], p.503–79 (15th ed., rev. 2009). It is, however, curious if this was truly the rationale for section 503(b)(9), why the focus is on goods delivered in the ordinary course of the *debtor’s* business, as opposed to the ordinary course of the *seller’s* business. By definition, a last minute stockpiling of goods prior to filing is not in the ordinary course of the debtor’s business. This is part of the reason why the continued dealings explanation of section 503(b)(9) seems the more compelling one. See *infra* note 269 and accompanying text.

189. See *supra* note 186.

might be avoided entirely by encouraging vendors to continue to do business with the financially beleaguered debtor.<sup>190</sup> This lack of clarity and agreement over underlying purposive design for BAPCPA's revisions relating to credit seller claims has only made things that much more challenging for courts searching for principled ways to mitigate what they regard as the most damaging results emanating from application of the statutory text.

Among the elucidative questions that have emerged in relation to section 503(b)(9),<sup>191</sup> the most germane for present purposes are those that deal with the interaction *vel non* between the new administrative expense claim and section 546(c) reclamation claims.<sup>192</sup> Some courts have perceived the two provisions as operating in tandem, which is pragmatically sensible, but without any textual support in, and arguably even contrary to, the legislation itself.<sup>193</sup> For example, in *In re Momenta, Inc.*, the seller-creditor filed a motion seeking allowance of a \$163,527.95 administrative expense claim for shipments of goods made within twenty days of the petition under six different invoices.<sup>194</sup> The debtor did not dis-

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190. This policy is reflected in other areas of the Code as well, including several of the preference exceptions in section 547(c), the section 502(f) priority for gap claims in involuntary cases, and the administrative expense priorities in section 503(b)(1)(A). 11 U.S.C. §§ 502, 503, 547 (2012). In each case, bankruptcy equality policy is sacrificed to a certain extent in order to advance this goal. *Id.*; see also *supra* note 160. With the decline in effectiveness of the reclamation remedy to recover inventory shipped just prior to bankruptcy, the section 503(b)(9) priority has served as a counterweight against the imposition of restrictive credit terms (or the withdrawal altogether of credit) for distressed debtors. See, e.g., AMERICAN BANKR. INST. COMM'N TO STUDY THE REFORM OF CHAPTER 11 (May 21, 2013) (testimony of Paul Calahan), available at [http://commission.abi.org/sites/default/files/statements/21may2013/PaulCalahan\\_Testimony.pdf](http://commission.abi.org/sites/default/files/statements/21may2013/PaulCalahan_Testimony.pdf).

191. Several of these issues were identified by Judge Lifland in *In re Dana Corp.*, 367 B.R. 409, 411–12 (Bankr. S.D.N.Y. 2007). An even more comprehensive catalogue of issues arising under section 503(b)(9) can be found in Paul R. Hage & Patrick R. Mohan, *Recent Developments in Section 503—Administrative Expenses*, 2012 NORTON ANN. SURV. BANKR. L. 785, 823 (2012), where the authors state that “[i]n the seven years since section 503(b)(9) became effective . . . courts continue to deal with litigation with respect to nearly every part of the statutory language.”

192. As discussed in much greater detail *infra* text accompanying notes 239–51, the issue is whether the limitations that pertain to section 546(c) apply in connection with section 503(b)(9). See also *In re Dana Corp.*, 367 B.R. at 415 (“There is no shortage of commentary on the interplay of sections 503(b)(9) and 546(c).”).

193. One commentator has urged that not only should the terms in the two sections be interpreted with the identical meaning, but that the defenses available in section 546(c), such as the prior lien defense, should also apply to section 503(b)(9) claims. Frederick J. Glasgow III, Comment, *Reclaiming the Defenses to Reclamation*, 26 EMORY BANKR. DEV. J. 301, 303 (2010). The effect of doing so would be, for all practical purposes, to negate section 503(b)(9) from having any impact except in a very narrow sliver of cases. See *infra* note 197.

194. 455 B.R. 353, 355–56 (Bankr. D.N.H. 2011).

pute that all of the shipments were made during this period and conceded that the shipments under two of the invoices, for goods received by the debtor in the twenty days preceding filing, were entitled to administrative priority.<sup>195</sup> The debtor contested, however, the seller's entitlement to priority with respect to the other four shipments—so-called “Drop Shipments”—made directly to the debtor's customers, on the grounds that these goods were not “received by the debtor” within the meaning of section 503(b)(9).<sup>196</sup>

The court began its analysis by citing the axioms that the words in any one statutory provision must be understood in relation to their context within the overall statutory scheme, and that when Congress amends the bankruptcy laws it is assumed not to effect major change without signaling such in the legislative history.<sup>197</sup> The court then observed that section 503(b)(9) was introduced into the Code under a subsection of the same section of BAPCPA that amended section 546, and noted the pre-BAPCPA use of administrative priority to a reclamation claimant as an alternative to recovery of the goods under former section 546(c)(2).<sup>198</sup> Based on this, the court concluded that sections 503(b)(9) and 546(c) “are related provisions that should be read together.”<sup>199</sup> Proceeding from the proposition that section 546(c) creates no independent federal rights, but simply allows a credit seller to exercise her state law remedies subject to the additional limitations imposed by the Code on the exercise of those remedies,<sup>200</sup> the court turned to the U.C.C.'s understanding of the term “received” to conclude that the supplier could only assert an administrative claim for those goods as to which the debtor had physical possession or could be deemed in constructive possession within the meaning of U.C.C. section 2-705(2).<sup>201</sup> Inasmuch as the

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195. *Id.* at 356.

196. *Id.* (internal quotation marks omitted).

197. *Id.* at 357. On this basis, the court accorded section 503(b)(9) a very narrow field of operation, as essentially providing an alternative remedy for a seller entitled to reclamation but for its failure to comply with the notice requirements of section 546(c)(1). *Id.*

198. *Id.* at 357–58.

199. *Id.*; accord *In re Circuit City Stores, Inc.*, 432 B.R. 225, 229 (Bankr. E.D. Va. 2010); *S. Polymer, Inc. v. TI Acquisition, LLC (In re TI Acquisition, LLC)*, 410 B.R. 742, 745 (Bankr. N.D. Ga. 2009).

200. *In re Momenta, Inc.*, 455 B.R. at 358 (citing *In re Dana Corp.*, 367 B.R. 409, 416 (Bankr. S.D.N.Y. 2007)).

201. *Id.* at 359–60. U.C.C. section 2-705(2) terminates a seller's right to stop goods in transit upon the happening of any one of four events. The first entails the buyer taking possession of the goods. The remaining three involve possession through third parties that are constructively deemed to be tantamount to possession by the buyer. See *In re Wezbra Dairy, LLC*, 493 B.R. 768, 770–71 (Bankr. N.D. Ind. 2013) (holding that property was

facts did not support constructive possession of any of the goods subject to the drop shipments, the seller's administrative expense was limited to the goods physically delivered directly to the debtor.<sup>202</sup>

In contrast with *Momenta, Inc.* and similar authorities that seem to read section 503(b)(9) as narrowly offering an alternative remedy for reclaiming sellers,<sup>203</sup> the bankruptcy court in *In re Erving Industries, Inc.* took a very different view of the relationship between sections 503(b)(9) and 546(c).<sup>204</sup> In the main, the case involved the appropriateness of a claim under section 503(b)(9) for the value of electricity supplied to the debtor during the twenty days preceding filing.<sup>205</sup> Consistent with the generally accepted approach to the question,<sup>206</sup> the court in *Erving* applied the Article 2 definition of goods for purposes of interpreting the scope of section 503(b)(9).<sup>207</sup> However, unlike the conclusion reached in some earlier cases,<sup>208</sup> the court determined under that

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deemed received upon acquisition of possession, irrespective of the location of title).

202. *In re Momenta, Inc.*, 455 B.R. at 361. The court in *Momenta, Inc.* went on to conclude, in accord with most other decisions addressing the issue, that section 502(d) was inapplicable to allowed administrative expense claims generally and to a supplier's administrative expense claim in particular. *Id.* at 364; accord *ASM Capital, LP v. Ames Dep't Stores, Inc. (In re Ames Dep't Stores, Inc.)*, 582 F.3d 422, 427 (2d Cir. 2009); *In re Halabu*, No. 11-59449, 2013 WL 780757, at \*2 (Bankr. E.D. Mich. Mar. 1, 2013); *In re Energy Conversion Devices, Inc.*, 486 B.R. 872, 874, 878 (Bankr. E.D. Mich. 2013); see also Michael Ryan Diaz, Note, *Disallowing Administrative Expenses Under Section 502(d): When Claims Are Not "Claims" Under the Bankruptcy Code*, 20 AM. BANKR. INST. L. REV. 397, 413 (2012) (agreeing with the majority of courts that administrative expenses are not subject to section 502(d)'s disallowance provision). *But see In re Circuit City Stores, Inc.*, 426 B.R. 560, 571 (Bankr. E.D. Va. 2010) (holding that the goals of equitable distribution and efficiency support the conclusion that section 502(d) may be used to temporarily disallow section 503(b)(9) claims pending resolution of preference litigation); Cohen, *supra* note 180, at 267–68, 271 (arguing on policy grounds that section 502(d) should apply to all administrative expenses, but, at a minimum, to section 503(b)(9) claims).

203. See 455 B.R. at 357–58; see also *In re Circuit City Stores, Inc.*, 416 B.R. 531, 536–37 (Bankr. E.D. Va. 2009) (concluding that section 503(b)(9) was adopted by Congress as an attempt to enhance certain types of reclamation claims); Glasgow, *supra* note 193, at 304, 315, 339 (urging that section 503(b)(9) be read in light of section 546(c)).

204. 432 B.R. 354, 373 (Bankr. D. Mass. 2010).

205. *Id.* at 356.

206. See, e.g., *In re Grede Foundries, Inc.*, 435 B.R. 593, 594–95 (Bankr. W.D. Wis. 2010) (noting that, almost without exception, courts have looked to the U.C.C.'s definition of "goods"); *GFI Wis., Inc. v. Reedsburg Util. Comm'n*, 440 B.R. 791, 797–98 (Bankr. W.D. Wis. 2010) (holding that it is reasonable to apply the definition of goods provided by the U.C.C. because courts often apply U.C.C. definitions when interpreting Bankruptcy Code provisions).

207. *In re Erving*, 432 B.R. at 365–66.

208. *In re Pilgrim's Pride Corp.*, 421 B.R. 231, 239 (Bankr. N.D. Tex. 2009); *In re Samaritan Alliance, LLC*, No. 07-50735, 2008 WL 2520107, at \*4 (Bankr. E.D. Ky. June 20,

definition that the sale of electricity *did* constitute the sale of goods for purposes of section 503(b)(9).<sup>209</sup>

Of greater moment for current purposes, however, is the court's discussion of an alternative argument raised by the debtor; specifically, "that the meaning of *goods* under § 503(b)(9) should be interpreted in relation to the reclamation provisions under § 546(c) and properly includes only goods that are capable of being 'stockpiled' by debtors and reclaimed by creditors."<sup>210</sup> This argument, the court mused, "goes too far and disregards the plain language of § 503(b)(9)."<sup>211</sup> The court refused, in other words, to read the language of section 546(c)(2) as limiting in any way the right to assert priority under section 503(b)(9) to those creditors who might have qualified as reclamation sellers but for the failure to make timely demand.<sup>212</sup> Finally, the court dismissed the argument that placement of the reclamation amendments and the

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2008) (stating that electricity is more properly characterized as a service). A number of subsequent decisions have also adopted that view. *E.g.*, *In re NE Opco, Inc.*, \_\_\_ B.R. \_\_\_, No. 13-11483, 2013 WL 5880660, at \*12 (Bankr. D. Del. Nov. 1, 2013) (holding that because electricity is consumed almost at the same moment that it is identified to the contract, it is not moveable and, thus, cannot qualify as a "good"); *In re PMC Mktg. Corp.*, \_\_\_ B.R. \_\_\_, No. 09-02048, 2013 WL 4735736, at \*6 (Bankr. D.P.R. Oct. 1, 2013).

209. *In re Erving*, 432 B.R. at 368; accord *In re Eastman Kodak Co.*, No. 12-10202 (ALG), 2012 WL 3879995 (Bankr. S.D.N.Y. July 30, 2012); cf. *In re Great Atl. & Pac. Tea Co.*, 498 B.R. 19, 28-29 (Bankr. S.D.N.Y. 2013) (remanding bankruptcy court's determination that electricity is not a good for an evidentiary hearing as to whether electricity is metered and consumed at the same time or, as logic dictates, there is a delay between identification and consumption); *In re Plastech Engineered Prods., Inc.*, 397 B.R. 828, 839 (Bankr. E.D. Mich. 2008) (distinguishing natural gas from electricity).

210. *In re Erving*, 432 B.R. at 372 (footnote omitted).

211. *Id.* at 372-73.

212. *Id.* at 373; see also *GFI Wis., Inc. v. Reedsburg Util. Comm'n*, 440 B.R. 791, 802 (Bankr. W.D. Wis. 2010), wherein the court stated:

Finally, the bankruptcy court was correct to reject appellant's argument that although the definition of "goods" is governed by the UCC, the term should be limited to goods that are reclaimable. Congress added § 503(b)(9) to the Bankruptcy Code as part of § 1227 of the Bankruptcy Abuse Prevention and Consumer Protection Act, entitled "Reclamation." Most of § 1227 is devoted to amending § 546 of the Code to provide relief to sellers of goods who failed to give an effective notice for reclamation. Appellant reads this as an indication that § 503(b)(9) is a reclamation concept and suggests that goods must be reclaimable in order for a seller to have a § 503(b)(9) claim. Appellant contends that once electricity has been metered, it is consumed by the customer and is no longer capable of being reclaimed.

The bankruptcy court rejected this argument, noting that § 546 does not require that goods *must* be reclaimable to fall under § 503(b)(9) and at any rate, electricity might well be reclaimable, as when it is stored in a battery. . . . I agree. Nothing in the language of § 503(b)(9) requires a claimant to be entitled to a reclamation right under § 546.

new priority in the same section of BAPCPA created any necessary linkage between the two provisions, commenting that “the sheer placement of sections of the public law cannot trump the plain language of the Bankruptcy Code.”<sup>213</sup>

In *In re Brown & Cole Stores, LLC*, the Ninth Circuit Bankruptcy Appellate Panel affirmed the bankruptcy court’s holdings that the section 503(b)(9) priority (in this case for in excess of \$6 million for the twenty-day sales) extends to secured as well as unsecured claims, and reversed the bankruptcy court’s determination that the right of setoff did not apply to such claims.<sup>214</sup> As to the former point, the debtor argued that the amendment of section 503(b)(1)(B)(i) in 2005 to clarify that the priority for any tax incurred by the estate pertained whether the claim was “secured or unsecured” implied that the absence of comparable language in section 503(b)(9) should be understood as indicating Congress’ intent to limit the new administrative expense priority to *unsecured* twenty-day claims.<sup>215</sup> The majority opinion rejected the argument, noting that section 503(b)(9) is unambiguous on its face and there was no reason for the court to inquire “beyond its plain language.”<sup>216</sup> Insofar as the right of setoff was concerned, the court disagreed with the bankruptcy court that the element of mutuality was lacking simply because the claim against the estate was an administrative expense claim.<sup>217</sup> To the contrary, the court noted that what is critical in determining the applicability of section 553(a) is not whether the claim against which setoff is sought is an administrative expense, but rather whether the claim is a pre or postpetition claim.<sup>218</sup> Because section 503(b)(9), unlike other administrative expenses, applies to prepetition obligations, setoff should generally be permitted.<sup>219</sup> Moreover, the majority

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213. *In re Erving*, 432 B.R. at 373 (adopting the reasoning of *In re Plastech*, 397 B.R. at 838, that there is no basis to import a requirement that goods be reclaimable into entitlement to priority under section 503(b)(9)).

214. *Brown & Cole Stores, LLC v. Assoc. Grocers, Inc. (In re Brown & Cole Stores, LLC)*, 375 B.R. 873, 875, 881 (B.A.P. 9th Cir. 2007).

215. *Id.* at 877–78.

216. *Id.* at 878.

217. *Id.* at 878–79.

218. *Id.* at 879.

219. *Id.* (noting that the provisions of section 553(a), which do not apply to most administrative expense claims, *do* apply to twenty-day sales claims).

opinion concluded that the debtor was not estopped, as the bankruptcy court had held, from asserting the right of setoff “as a matter of equity.”<sup>220</sup>

## 2. Analysis of the Section 503(b)(9) Case Law

Efforts to restrict the scope of section 503(b)(9) to a supplemental remedy available to the limited class of sellers who would have been entitled to reclamation but for a minor noncompliance with the notice requirement of section 546(c)(1) are as flawed as the efforts to continue to define reclamation after BAPCPA by reference to state law alone. Although the parade of evils both efforts would avoid, if successful, is clear and present, in the long run the harm resulting from the contrived and unnatural interpretation of statutory language in order to accomplish those aims is far more damaging to system values and integrity.<sup>221</sup>

With some exceptions, *Erving* and the majority opinion in *Brown & Cole Stores* being among them, the courts largely have done a creditable job since BAPCPA in preventing the adoption of the new priority in section 503(b)(9) from undermining or unduly interfering with core bankruptcy equality policies.<sup>222</sup> There is, however, a rub, and that is that the statute does not say, expressly or impliedly, what several of these reported decisions want it to say (and which it perhaps even *should* say, but doesn't).<sup>223</sup> The urge to see in section 503(b)(9) a critical linkage with the right of reclamation is understandable in light of the counterproductive results associated with the elevation of potentially enormous

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220. *Id.* at 879–80. The basis for the holding below was the debtor's failure to advise the vendor that it was contemplating bankruptcy. The majority opinion of the Bankruptcy Appellate Panel, however, correctly noted that there is no “duty to warn” creditors about the possibility of an impending bankruptcy. *Id.*

221. If there is no deference to even a weak conception of legislative supremacy, and a court is not restricted by statutory language, then a court can essentially make whatever rule it wishes. This flouts the core principles of separation of powers and respect for the rule of law. See Farber, *supra* note 9, at 284–88; see also *supra* notes 156, 158 and accompanying text.

222. This has been accomplished principally by artificially linking section 503(b)(9) to the right of reclamation under section 546(c). See *supra* notes 199–200 and accompanying text.

223. See *In re Shat*, 424 B.R. 854, 864 (Bankr. D. Nev. 2010) (“[T]he starting point [in statutory interpretation] is the presumption that Congress intended the accepted and plain meaning of the words it used.”).



prepetition unsecured claims to administrative priority status, but it is misguided.<sup>224</sup>

Consider Judge Jaroslovsky's separate opinion in *Brown & Cole Stores*.<sup>225</sup> He has no problem with the majority's setoff analysis,<sup>226</sup> but argues for limitation of the section 503(b)(9) priority to unsecured claims, noting a lack of clarity within the section itself and a presumption that Congress acts intentionally when it includes specific language in one section of a statute but does not do so in another.<sup>227</sup> More fundamentally, however, the opinion focuses on the policy consequences implicated by the majority's decision; namely, the chilling impact on the prospects for reorganization if a secured claim can also be granted priority status.<sup>228</sup> To avoid such a blow to reorganization prospects, Judge Jaroslovsky urges that section 503(b)(9) be woven "into the tapestry of American bankruptcy law, preserving the *clear intent* of Congress to protect recent suppliers of goods to debtors without unraveling other provisions of the Code meant to facilitate reorganization."<sup>229</sup>

Unfortunately, while section 503(b)(9) may be a missed stitch in the larger fabric of American bankruptcy law, Congress' intent was anything but clear, and, on its face, section 503(b)(9) is not limited to unsecured claims.<sup>230</sup> In discussing policy considerations

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224. See *infra* note 228 and text accompanying note 229.

225. *In re Brown & Cole Stores, LLC*, 375 B.R. at 881 (Jaroslovsky, J., concurring in part and dissenting in part).

226. *Id.*

227. *Id.*

228. *Id.* at 881–82. Following the failure of the Circuit City Chapter 11, the House Judiciary Committee conducted a hearing to determine why Chapter 11 could not save Circuit City. Several of the witnesses who testified at that hearing, including Professor Jack Williams (appearing on behalf of the American Bankruptcy Institute) and Richard M. Pachulski (Counsel to the Circuit City Creditors' Committee) identified section 503(b)(9) as a primary culprit in the failure of Circuit City and other large retailer Chapter 11 cases. *Circuit City Unplugged: Why Did Chapter 11 Fail to Save 34,000 Jobs?: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. 25–26, 92–93 (2009) (statements of Richard M. Pachulski & Jack F. Williams).

229. *In re Brown & Cole Stores, LLC*, 375 B.R. at 882 (Jaroslovsky, J., concurring in part and dissenting in part) (emphasis added); see also Glasgow, *supra* note 193, at 326 (agreeing with the dissent in *Brown & Cole Stores* that a creditor should only receive an administrative claim to the extent that its secured claim is not fully secured).

230. See *supra* note 211 and accompanying text. Judge Jaroslovsky cites the canon that Congress is presumed to act intentionally when it includes language in one section—in this instance section 503(b)(1)(B)(i)—but not another section, in this case section 503(b)(9). *In re Brown & Cole Stores, LLC*, 375 B.R. at 881 (Jaroslovsky, J., concurring in part and dissenting in part). By the same token, however, one must assume that Congress acts intentionally when it amends the language of a single provision—in this case section

and his concern for reorganization, Judge Jaroslovsky acknowledged that allowing priority to a secured creditor may not have a big impact in Chapter 7.<sup>231</sup> This is almost certainly true. Not to be lost sight of, however, is the fact that, as applied to unsecured creditors, the impact of section 503(b)(9) in a liquidation context can be just as disruptive as it is in Chapter 11, since its effect is to elevate one type of unsecured claim over all others in direct contravention of one of the primary goals and central policies of the Bankruptcy Code; namely, “equitable distribution” or “[e]quality of distribution among creditors.”<sup>232</sup> Whether and why recent unsecured suppliers of goods are more worthy than other unsecured vendors, or ought to be treated as such, are questions fairly open to debate. If, however, the basis for special solicitude is concern over debtors “loading up” in anticipation of filing,<sup>233</sup> the way in which the Code typically deals with other creditors who are the victims of opprobrious debtor conduct, such as fraud or defalcation, is by exclusion of that claim from discharge, not making other unsecured creditors pay the price for the debtor’s perfidy.<sup>234</sup> Nonetheless, there are, as discussed earlier,<sup>235</sup> other justifications for the favored treatment,<sup>236</sup> as well as other situations where the Code balances the equality principle against competing

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546(c)(2)—from providing a particular kind of relief as an alternative remedy, to saying that the remedy is not affected by entitlement to the other form of relief. *See infra* note 241.

231. *In re Brown & Cole Stores, LLC*, 375 B.R. at 881 (Jaroslovsky, J., concurring in part and dissenting in part).

232. *See, e.g., McCafferty v. McCafferty (In re McCafferty)*, 96 F.3d 192, 196 (6th Cir. 1996) (discussing the foundational nature of the equality principal); *In re Plastech Engineered Prods., Inc.*, 394 B.R. 147, 151 (Bankr. E.D. Mich. 2008) (suggesting that, without explanation or rationale, Congress violated “the bedrock policies of the Bankruptcy Code” to provide uniform and equal treatment to similarly situated creditors).

233. *See supra* note 188 and accompanying text.

234. Many of the exceptions to discharge, such as those in sections 523(a)(2) & (4), are animated by types of misconduct that, like most of the grounds for general denial of discharge in Chapter 7, would deprive the debtor of membership in the “honest-but-unfortunate” debtor family. *See* Lawrence Ponoroff, *Vicarious Thrills: The Case for Application of Agency Rules in Bankruptcy Dischargeability Litigation*, 70 TUL. L. REV. 2515, 2540 (1996).

235. *See supra* note 186 and accompanying text.

236. Most notable among them being to avoid financial distress from triggering an inevitable slide into bankruptcy. *See* AMERICAN BANKR. INST. COMM’N TO STUDY THE REFORM OF CHAPTER 11 (May 21, 2013) (testimony of Sandra Schirmang, Sr.), *available at* [http://commission.abi.org/sites/default/files/statements/21may2013/SandraSchirmang\\_Testimony.pdf](http://commission.abi.org/sites/default/files/statements/21may2013/SandraSchirmang_Testimony.pdf); *infra* note 269 and accompanying text.

policy objectives.<sup>237</sup> While the particular federal interest that dictates priority for credit sellers may not be readily apparent, it is the incontrovertible effect of section 503(b)(9) to grant such priority regardless of its interference, if not conflict, with both bankruptcy rehabilitation and equality policy.<sup>238</sup>

It is also true that the effort to temper the impact of the new administrative priority by linking it to section 546(c), as the *Momenta, Inc.* court and others have done,<sup>239</sup> helps limit the damage to important policy interests that would otherwise result. But is there really any principled basis on the language of the statute to support the effort? In *Momenta, Inc.*, citing to revised section 546(c)(2), the court observed that section 503(b)(9) provides a seller who did not comply with the notice requirements of section 546(c)(1) “an alternative remedy to reclamation.”<sup>240</sup> In fact, however, it does no such thing. Subsection (c)(2) simply says the failure to comply with the notice requirements of section 546(c)(1) does not affect a claimant’s rights under section 503(b)(9). It does not say only creditors who, but for their failure to give timely notice under subsection (c)(1) would have a valid reclamation claim, are eligible to assert a claim under section 503(b)(9).<sup>241</sup> Indeed, fairly read, the language of subsection (c)(2) is a testament to the fact that the two sections of the Code are *independent* of one an-

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237. See *supra* note 190.

238. See Bruce, *supra* note 174, at 197–200.

239. See *In re Momenta, Inc.*, 455 B.R. 353, 357–60 (Bankr. D.N.H. 2011); see also *supra* text accompanying notes 197–200.

240. *In re Momenta, Inc.*, 455 B.R. at 357.

241. Once more, section 546(c)(2) begins with the word *if*, not *when*, a seller fails to provide the notice contemplated by section 546(c)(1). On appeal of the bankruptcy court’s decision in *Momenta*, the seller pressed the argument that Congress could not have intended section 503(b)(9) to protect only reclamation sellers since (1) section 546(c) by its terms contemplates sellers, who are not entitled to reclamation, but who may still pursue relief under section 503(b)(9), and (2) a section 503(b)(9) claimant need not show that the debtor still possesses the goods—an “essential” requirement of a reclamation claim. *Ningbo Chenglu Paper Prods. Mfg. Co. v. Momenta, Inc.*, No. 11-cv-479-SM, 2012 WL 3765171, at \*5–6 (Bankr. D.N.H. Aug. 29, 2012). The court credited the argument as “plausible” which it surely is, but then concluded that the same factors equally suggest Congress’s more “focused” intent to provide a supplemental remedy for sellers that, but for a minor deficiency, would have qualified for reclamation under section 546(c). *Id.* In all truth, however, the second of the two points relied upon by the seller does no such thing, and, of course, if that were Congress’s intent, why did the focus shift from sales made in the ordinary course of the seller’s business to those made in the ordinary course of the buyer’s business?

other, and should be so construed.<sup>242</sup> In addition, the ordinary course of business limitation appears in both sections, but *not* in a consistent fashion. Section 546(c)(1) relates to transactions made in the ordinary course of the “*seller’s* business,” whereas section 503(b)(9) refers to “goods . . . sold to the debtor in the ordinary course of such *debtor’s* business.”<sup>243</sup> The distinction is not without potentially significant consequence in terms of a non-professional seller’s rights under, respectively, the two Code sections. All of this points up that, under any sort of plain meaning approach, sections 546(c) and 503(b)(9) cannot be understood as related, other than in the sense they deal with similar (but *not* identical) kinds of claims.

This conclusion draws additional support when one considers the applicability of the prior lien defense to an administrative expense claim under section 503(b)(9). It has been argued with great force in a thoughtful student comment that “[w]here the prior lien defense would prevent a reclaiming seller from exercising his § 546(c) reclamation rights, this restriction should also prevent a seller from being granted an administrative expense under § 503(b)(9).”<sup>244</sup> This is, it may be recalled, a version of a similar issue that arose under former section 546(c)(2) regarding the impact of a prior lien on a reclaiming seller’s entitlement to an administrative priority or a secured claim.<sup>245</sup> In any event, the author urges that an “absurd result” is reached if a reclaiming seller that is foreclosed from recovering the goods by the explicit subordination in revised section 546(c)(1) to a prior lien is nonetheless allowed to receive an administrative expense claim equal to the value of the exact same goods.<sup>246</sup> In support of this construction, the author points to Judge Lifland’s decision in *In re*

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242. In other words, section 546(c)(2) used to say, in essence, you can be given an administrative claim in lieu of the goods. After BAPCPA, it effectively says that even though you do *not* qualify as a reclamation seller, you may still recover under section 503(b)(9).

243. Compare 11 U.S.C. § 546(c)(1) (2012) (emphasis added), with 11 U.S.C. § 503(b)(9) (2012) (emphasis added).

244. Glasgow, *supra* note 193, at 321.

245. See *supra* notes 74–82 and accompanying text.

246. Glasgow, *supra* note 193, at 321. The author supports his argument with a clever analogy to the analysis employed by the Ninth Circuit in *Bonner Mall P’ship v. U.S. Bancorp Mortg. Co. (In re Bonner Mall Partnership)*, 2 F.3d 899 (9th Cir. 1993), a case exploring whether the new value exception to the absolute priority rule under the former Bankruptcy Act survived enactment of the Code in 1978. Glasgow, *supra* note 193 at 326–38.

*Dana Corp.*,<sup>247</sup> agreeing with the debtors' contentions that the "prior liens . . . rendered all of the reclamation claims valueless."<sup>248</sup>

It is important, however, to point out two things about the opinion in *Dana Corp.* First, while the court does note that BAPCPA has resolved the conflict among the courts concerning whether a reclaiming seller must be granted an administrative claim or a lien on property of the debtor's estate pursuant to former section 546(c)(2) when the goods in question are subject to the claim of a prior lienholder with a superior interest,<sup>249</sup> the decision does not indicate in exactly *whose favor* that resolution has been decided.<sup>250</sup> Second, the court had this to say in relation to section 503(b)(9):

The issues before the Court today relate solely to the Prior Lien Defense to reclamation rights under section 546(c) of the Bankruptcy Code and not to the rights to an administrative expense under the newly enacted section 503(b)(9) of the Bankruptcy Code. This new provision presents other issues concerning, *inter alia*, the valuing of the subject goods; what constitutes the actual receipt of the goods; how is the claim asserted; when is it to be paid; is it subject to the claims processing and omnibus bar date orders, etc.? These issues will not, and need not, be parsed here. Suffice it to say that in light of the section 503(b)(9) amendment, section 546(c) is *no longer an exclusive remedy for a prepetition seller*.<sup>251</sup>

While it may be peculiar that a seller who cannot reclaim goods under revised section 546(c), because of the existence of a prior security in those goods, may be able to obtain an administrative claim for the value of those goods (or at least some of those goods), it is submitted that precisely that result is the better and most faithful reading of the Code after BAPCPA.<sup>252</sup> If that result is untenable, the solution is legislative correction, not judicial invention. Moreover, by calling attention to the fact that section

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247. Glasgow, *supra* note 193, at 307–08; *In re Dana Corp.*, 367 B.R. 409 (Bankr. S.D.N.Y. 2007).

248. *In re Dana Corp.*, 367 B.R. at 411.

249. *Id.* at 415 n.5.

250. In other words, the "resolution" could be that a seller whose reclamation claim is barred by the prior lien defense now is provided with an administrative expense claim under section 503(b)(9), at least with respect to goods delivered to the debtor in the twenty days prior to commencement of the case.

251. *In re Dana Corp.*, 367 B.R. at 411–12 (emphasis added) (footnote omitted).

252. Recall that the look-back periods in the two statutes are not coincident. *See supra* note 139 and accompanying text.

546(c) is “no longer an exclusive remedy for a prepetition seller,” *Dana Corp.* seems to support that very reading, as opposed to one that restricts section 503(b)(9) to circumstances where reclamation would be available but for the failure to make timely demand. When the discretion to grant an administrative expense was part of the reclamation statute, as was true prior to BAPCPA, it made perfect sense to understand entitlement to the alternative relief as hinging on the existence of an otherwise valid reclamation claim. Now, however, since the right to an administrative expense claim is disjoined from the reclamation statute (other than to make clear in revised section 546(c)(2) that compliance with the requirements of section 546(c)(1) does not defeat a claim under section 503(b)(9)), it is far more dubious to maintain that position. That is to say, it is simply implausible to assert that a defense to one remedy somehow impliedly serves as a defense to what the court in *Dana Corp.* properly described as a separate, independent remedy for eligible prepetition sellers.<sup>253</sup> Finally, this analysis draws added support from the fact that eligibility for relief under the two remedies is different: reclamation of goods sold in the ordinary course of the seller’s business with a forty-five-day look-back from the date of demand under section 546(c)(1), versus priority for the value of goods acquired by the debtor in the ordinary course of the debtor’s business and delivered within twenty days prior to the commencement of the case. In sum, there is simply no basis in the Code after BAPCPA to construe section 546(c) as limiting or controlling in any way the rights of a claimant under section 503(b)(9), and ample reason to regard them as independent of one another.

### III. TOWARD A PROPOSAL FOR REFORM

It is without question that revised section 546(c) and section 503(b)(9), when applied in accordance with their evident and sensible meanings, seriously encroach upon established bankruptcy rehabilitative and equality policies, at least as those policies were understood up to 2005. This fact has undoubtedly had a significant and understandable impact on the case law, as has been seen. And yet, it is equally true that many of the consumer provisions in BAPCPA have gone well beyond “abuse prevention” and

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253. *In re Dana Corp.*, 367 B.R. at 411–12.

impinged, perhaps just as unwisely, on an equally core bankruptcy value; namely, the fresh start principle.<sup>254</sup> That alone, however, is not justification for courts to refuse or confound application of clear rules in order to minimize the deleterious impact. The fact is that public policy, as expressed in legislation, is not static and does change over time. Likewise, a complex legal regime like bankruptcy simultaneously advances multiple policy goals that must be and are constantly balanced and adjusted against one another. Necessarily, the relative strength of any one such value, like “fresh start,” will change over time. The “established” policies of today are not necessarily those of tomorrow. One may not agree with particular changes,<sup>255</sup> but, unless they are constitutionally infirm, democratic process demands that they not be ignored. All public policy is imperiled when that occurs in any single instance, no matter how defensible the decision to do so in that particular case because of what is perceived as a danger to paramount system values. This is a fundamental tenet of perhaps the most salient value of all; namely, respect for a legal regime premised on the rule of law and correlative appreciation of the truth that respect for that value demands the strictest adherence when it is least convenient and comfortable to do so.<sup>256</sup>

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254. This is reflected in a variety of places throughout the Code, including means testing in section 707(b); the elimination of “ride through” under sections 521(d) and 362(h); the limitations on strip-down in section 1325(a) (the so-called “hanging paragraph”); exemption restrictions in section 522(p); and many, many more. *See generally* Nuvel Credit Corp. v. Westfall (*In re Westfall*), 599 F.3d 498, 501–02 (6th Cir. 2010) (citing AmeriCredit Fin. Servs., Inc. v. Long (*In re Long*), 519 F.3d 288, 294 (6th Cir. 2008)) (stating that there is little doubt that the architects of the hanging paragraph in section 1325(a) intended only good things for auto lenders); Harvey R. Miller, *Chapter 11 in Transition—From Boom to Bust and into the Future*, 81 AM. BANKR. L.J. 375, 388 (2007) (calling BAPCPA an ill-conceived special interest victory that has “effectively repealed the fresh start principle for individuals”). The point being that “fresh start” is neither a formal legal status nor a cognizable legal right, but rather an aspiration of the system that will over time wax and wane in importance when weighed against other goals of the system, such as wealth maximization, abuse prevention, etc. *See* Ponoroff, *Vicarious Thrills*, *supra* note 234, at 2519–20.

255. In the interests of full disclosure, I am certainly willing to go on record with my antipathy toward many of the changes to bankruptcy law wrought by BAPCPA.

256. Justice Douglas expressed it well in his dissenting opinion in the *Regional Rail Reorganization Act Cases*:

If the rule of law under a moral order is the measure of our responsibility, as I have always assumed, we can only hold that the Rail Act of January 2, 1974 . . . undertakes to sanction a fraudulent conveyance, as those words were used . . . in our Bankruptcy Act. I have been reluctant so to conclude, implicating as it does our legislative branch in a lawless maneuver of gigantic proportions. But, baldly put, the present law is a *tour de force* to that end.

It is certainly possible, as has been seen, to read limitations into section 503(b)(9) that do not exist, and to construe the enhanced reclamation remedy so as to be applicable in only very limited circumstances.<sup>257</sup> Such efforts, however, arguably exceed the permissible boundaries of judicial authority under almost any recognized understanding of our constitutional structure of government.<sup>258</sup> Much more troubling is the fact that, even if one could concoct a theory of statutory interpretation to support them, these efforts also have a nasty unintended fall-out.<sup>259</sup> That is, they blunt or mask the worst consequences of BAPCPA, but they do not by any stretch of the imagination eliminate them. That may be beneficial in the short-run, but like an analgesic that temporarily dulls the pain from an injury, it also allows us to muddle along without addressing the root of the problem, and perhaps even exacerbates that problem. This cannot be a positive thing for the long-term health of the bankruptcy system or our system of justice. The stronger, but far more distasteful, medicine would be to bow to the unambiguous command of the legislature, however quixotic. The howl and outlandish results that would follow if the new rules are as unsound as they seem to be might even cause the affected interest groups to pressure Congress to deal with the issue in a far more guileless and effective manner than occurred in 2005; that is, amendment of the statute to unscramble an egg that probably never should have been broken in the first place.

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419 U.S. 102, 162 (1974) (Douglas, J., dissenting) (footnote omitted) (citations omitted).

257. See *supra* note 199 and accompanying text.

258. See *IUE-CW v. Visteon Corp.* (*In re Visteon Corp.*), 612 F.3d 210, 220 (3d Cir. 2010) (“It is for Congress, not the courts, to enact legislation. When courts disregard the language Congress has used in an unambiguous statute, they amend or repeal that which Congress enacted into law. Such a failure to defer to the clearly expressed statutory language of Congress runs contrary to the bedrock principles of our democratic society.”); see also *Lamie v. United States Tr.*, 540 U.S. 526, 538 (2004) (quoting *United States v. Locke*, 471 U.S. 84, 95 (1985)) (“Our unwillingness to soften the import of Congress’ chosen words . . . results from ‘deference to the supremacy of the Legislature . . .’”); *United States v. Granderson*, 511 U.S. 39, 68 (1994) (Kennedy, J., concurring) (“It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think, along with some Members of Congress, is the preferred result.”). Even Justice Breyer, who probably takes the broadest view of the judicial role in statutory interpretation, has acknowledged that the freedom judges have to consider statutory language in light of the statute’s basic purpose is circumscribed in the first instance by the answers supplied through the existence of clear text or the canons of interpretation. See *Fla. Dep’t of Revenue v. Picadilly Cafeterias, Inc.*, 554 U.S. 33, 55, 59 (2008) (Breyer, J., dissenting).

259. See *supra* note 156 (concerning the difficulties of doing so).



The groups that surely would spearhead such an effort are not among the disempowered or those without influence. They are the groups with the greatest access to, and loudest voices in, the system. While nothing short of utter frustration by the interest groups that clamored for the means test over its ineffectiveness in actually increasing bankruptcy payouts is likely to result in the repeal or revision of section 707(b), the same is not true with respect to vendor claims under sections 503(b)(9) and 546(c).<sup>260</sup> The proponents and opponents simply do not line up along the same lines as the proponents and opponents of the consumer “abuse” provisions of BAPCPA.<sup>261</sup> The issues surrounding credit seller claims are almost purely inter-creditor issues.

At least in the current political environment, it seems clear that a return to the *ancien régime* is not in the offing.<sup>262</sup> This, in and of itself, is not necessarily disturbing, as the differing considerations implicated in and outside of bankruptcy may make it equally imprudent to reflexively conclude that the Code should do (as it earlier did) no more than afford a seller the opportunity to take advantage of any reclamation right that might exist under state law, if indeed that is how former section 546(c) operated.<sup>263</sup> After all, we all bow to *Butner*, but, in truth, the principle articulated in *Butner* represents no more than a bias.<sup>264</sup> By definition, then, it applies more often than not, but it is not an absolute that substitutes for reasoned analysis in each instance where federal and state law intersect.<sup>265</sup> The efficient operation of a system of

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260. See Carslon, *supra* note 4, at 227 (suggesting that not only has the means test not produced bigger payouts, but in fact may have actually contributed to abuse of the system).

261. See *supra* note 6 (compiling citations that take the view that the well-funded and organized consumer credit lobby won the battle over BAPCPA at the expense of the overwhelmed individual consumer).

262. See *supra* note 176 and accompanying text.

263. See *supra* notes 55, 63 and accompanying text for discussion of the fact that a disconnect existed between section 546(c) and the state law right of reclamation existed from the very start.

264. *Butner v. United States*, 440 U.S. 48, 54–55 (1979) (articulating that a creditor’s rights, entitlements, and priority in assets of the bankruptcy estate are determined under state law).

265. In addition to the obvious circumstances where a federal interest predominates, such as in connection with the trustee’s avoiding powers, there are any number of areas where the bankruptcy courts must balance a creditor’s state law rights with the debtor’s federal law equitable right to a “fresh start” or to have the opportunity to reorganize. See, for example, *Coleman Oil Co. v. Circle K Corp. (In re Circle K Corp.)*, where, in the context of permitting the debtors to exercise an option to renew without first assuming a lease and curing prepetition defaults, the court noted:

bankruptcy laws is in and of itself an overriding federal interest, such that the exception to the *Butner* principle is one that can overcome the rule in virtually any situation.<sup>266</sup> It is with that in mind, and recognizing that section 503(b)(9) provides at least as much, if not more, protection than U.C.C. section 2-702(2),<sup>267</sup> that it is submitted a more principled and efficacious approach would be to: (1) eliminate any reference whatsoever to reclamation claims under section 546(c), thus permitting the trustee the opportunity to challenge any prepetition reclamation of goods under section 545 or otherwise, and negating any postpetition claims to physically recover goods; and (2) retain a modified version of the current administrative expense priority for twenty-day claims.<sup>268</sup>

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But all kinds of interferences with contractual rights occur in bankruptcy proceedings. Section 365(a) permits a debtor to reject an executory contract or unexpired lease altogether, which wholly contravenes the contract or lease as written. The automatic stay in bankruptcy frequently prevents the enforcement of contracts according to their terms. We have held that a bankruptcy debtor may cure a default and avoid the termination of a contract even if the contract does not allow for cure. . . . Thus no principle of bankruptcy or contract law precludes us from permitting the Debtors here to extend their leases in a manner contrary to the leases' terms, when to do so will effectuate the purposes of section 365.

127 F.3d 904, 910–11 (9th Cir. 1997). Similarly, in *In re NM Holdings Co.*, the court, relying on Sixth Circuit precedent regarding the scope of section 105(a), rejected the creditors' argument that the *Butner* principle deprived the court of authority to order substantive consolidation. 407 B.R. 232, 271, 273, 276–77 (Bankr. E.D. Mich. 2009). The court noted there is an overriding federal interest in the equitable and efficient distribution of a debtor's property among its creditors, and, in the case of conflict with state property law, bankruptcy policy must prevail. *Id.* at 277; *see also* Brady-Morris v. Schilling (*In re* Kenneth Allen Knight Trust), 303 F.3d 671, 678–79 (6th Cir. 2002) (quoting *In re Arehart*, 52 B.R. 308, 310 (Bankr. M.D. Fla. 1985)) (stating that whether an entity is eligible for relief under Title 11 is purely a question of federal law, such that the definition of a "business trust" is properly made as a matter of federal, not state, law); *Wolters Vill., Ltd. v. Vill. Props., Ltd.* (*In re* Vill. Props., Ltd.), 723 F.2d 441, 444 (5th Cir. 1984) (observing, in dicta, that the equities of a case may permit a bankruptcy judge to deviate from state law); Levitin, *supra* note 161, at 68 (arguing that there can be a federal common law in bankruptcy based on the language of the Bankruptcy Clause in the Constitution, the legislative history of the Code, pre-Code practices, and the nature of bankruptcy practice); *cf.* R. Benjamin Hanna, Note, *Federalism in Bankruptcy: Relocating the Doctrine of Substantive Consolidation*, 96 MINN. L. REV. 711, 713 (2011) (arguing that principles of federalism should be invoked to limit the application of substantive consolidation).

266. *See supra* note 159 for discussion of the *Butner* principle.

267. Compare 11 U.S.C. § 503(b)(9) (2012) (allowing administrative expenses for "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"), with U.C.C. § 2-702(2) (2013) ("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 . . .").

268. There seems to be a growing consensus among vendors that, particularly since BAPCPA, the combination of the growth in secured debt and the manner in which the case

Presumably, the possibility that bankruptcy might be avoided entirely is worth “something” in terms of a preferred position for trade creditors that take the risk of continuing to do business with the financially wobbly debtor.<sup>269</sup> If this is so, then that policy of encouraging vendors to continue to deal on open-credit terms with buyers in the shadow of bankruptcy is best served by something more reliable, certain, and less cumbersome than a reclamation claim.<sup>270</sup> For example, if it is to serve its purpose, this remedy should not fail based on the serendipity of whether the goods are still in the debtor’s possession or on the existence vel non of claimants with a superior interest—factors not easily known or inexpensively discovered by unsecured sellers. In short, the reclamation remedy does represent a very powerful incentive to encourage extension of open account credit to distressed debtor companies.

By the same token, a rule that sensitively implements this objective should not be one that provides absolute hegemony to the credit seller of goods over either the necessity for retention of the goods at issue for a successful reorganization or the interests of other creditors. In failing to balance dexterously these competing considerations, revised section 546(c) has introduced enormous cost, ambiguity, and uncertainty into the process with very meager corresponding return benefit. This is not to say former section 546(c) was much better. It is to say that reclamation in its orthodox state law sense has little to offer in bankruptcy, and particularly not in the reorganization context, where it might not only undermine the reorganization effort, but also work an inequity on

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law has developed has served to negate reclamation as a meaningful remedy for unsecured trade creditors. *See, e.g.*, AM. BANKR. INST. COMM’N TO STUDY REFORM OF CHAPTER 11 (May 21, 2013) (testimony of Sandra Schirmang, Sr.), *available at* [http://commission.abi.org/sites/default/files/statements/21may2013/SandraSchirmang\\_Testimony.pdf](http://commission.abi.org/sites/default/files/statements/21may2013/SandraSchirmang_Testimony.pdf).

269. As noted *supra* in the text accompanying notes 186–90, there is currently some uncertainty regarding the purpose behind section 503(b)(9). Although, in my view, this is the most compelling justification for special treatment of eve of bankruptcy credit seller claims, the first step in fashioning a revised version of the statute is, of course, to identify which justification is most salient. The difficulty (or irony) with the rationale of encouraging vendors not to shut off credit is that one can only identify the cases where the aim failed and, in a systematic way, can never know how many debtors, if any, were actually able to avoid bankruptcy as a result of this incentive.

270. Even though section 503(b)(9) does not preempt the possibility for payment to critical vendors, this point is particularly important given the narrowing of the bankruptcy courts’ authority to permit payment of prepetition claims under the doctrine of necessity. *See supra* notes 179–80 and accompanying text.

other prepetition sellers and creditors who would have no reason to be aware of what amounts to a secret lien against assets of the estate.

Nonetheless, if the legislative judgment is that there are sound bankruptcy policy reasons to treat open account sellers that deal with the debtor on the eve of bankruptcy (however defined) with special solicitude should a proceeding ensue, then the preference ought to be crafted in a fashion that most effectively and yet fairly accomplishes that goal. That requires, initially, clear identification of the justification(s) for favored treatment in the first place, which might include not only the desire to encourage vendors to do business with a struggling debtor, but also to police and rectify opprobrious conduct by debtors in loading up on open account claims in anticipation of bankruptcy.<sup>271</sup> Next, it calls for a rule carefully constructed and designed to serve these objectives with minimal limitations, conditions, and exceptions. Unlike section 546(c), the administrative expense priority in section 503(b)(9) is unequivocal on its face and, for the most part, free from what might be described as nettlesome qualifications. That may, then, represent a start. However, the statutory priority in its current form is also fairly open to criticism in circumstances where the allowance of such claim may have a disproportionately negative impact on other equally important goals of the system. Furthermore, to avoid a “doubling up” by a seller of goods, the priority would also need to make provision for a successful pre-filing reclamation of some or all of the twenty-day goods that, for whatever reason, is not avoidable.<sup>272</sup>

This leads to the suggestion that we decide first who is in the class of prepetition open account vendors who are to receive the favored treatment. Perhaps it is ten- rather than twenty-day claimants, or perhaps its twenty-day claimants but with a dollar cap.<sup>273</sup> There is no absolute right and wrong here, it is merely a political (and, if possible, empirical) judgment where to draw the

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271. If the latter is the primary rationale, there is some question whether a priority claim is the best (or fairest) solution. *See infra* note 284 and accompanying text.

272. *See* Bruce, *supra* note 174, at 200 (pointing out that a seller whose claim qualifies under section 503(b)(9) might also enjoy double recovery by asserting a reclamation claim).

273. An example of this approach is contained in section 502(b)(6), which governs the allowability of lessor claims arising from termination of a long-term lease. 11 U.S.C. § 502(b)(6) (2012).

line so as to get it “about right” more often than not. Simply for discussion purposes, let us assume that the best accommodation is to apply the rule to goods received by the debtor in the ordinary course of the debtor’s business within ten days prior to the commencement of the case.<sup>274</sup> Next, to assure to the degree possible that the assertion of this claim does not work more mischief than good, it is necessary to build some play into the joints of the system by investing bankruptcy judges with the kind of discretion that existed under former section 546(c)(2). That is, to permit courts to order that a lien be granted on property of the estate, so as to allow for deferred payment of the present value of the administrative claim in a plan of reorganization, in lieu of full payment of the claim in cash at or prior to the time of confirmation.<sup>275</sup> For this to make sense would also require that the statute be crafted to overrule the holding in *Brown & Cole Stores* such that rights under the administrative expense priority would be limited either to wholly or partially unsecured ten-day claims.<sup>276</sup> This would prevent, in an appropriate case, realization of the concerns forcefully articulated by Judge Jaroslovsky in his separate *Brown & Cole Stores* opinion.<sup>277</sup> The amended version of section 503(b)(9) might thus read as follows:

(b) After notice and a hearing, there shall be allowed administrative expenses . . . , including—

(9) a claim for the value of any goods received by the debtor within 10 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 the debtor’s business, but only to the extent such claim—

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274. If the principal rationale for an administrative expense priority is to encourage open account sellers to continue to do business with the debtor, then the issue of whether these sales are in the ordinary course should be assessed from the debtor’s perspective, as in current section 503(b)(9), but unlike section 546(c)(1). Alternatively, if the principal concern is loading up by the debtor before filing, then the focus might appropriately shift to ordinary course as determined from the seller’s perspective. See *supra* note 188.

275. See 11 U.S.C. § 1129(b)(2)(A) (2012).

276. *Brown & Cole Stores, LLC v. Associated Grocers, Inc.* (*In re Brown & Cole Stores, LLC*), 375 B.R. 873, 875 (B.A.P. 9th Cir. 2007).

277. See *supra* notes 225–29 and accompanying text for a discussion of Judge Jaroslovsky’s opinion, concurring in part and dissenting in part.

(A) is not secured by an otherwise unavoidable security interest, and  
(B) the debtor did not on account of such claim make an otherwise unavoidable transfer to or for the benefit of the claimant.<sup>278</sup>

This amendment does not resolve all of the questions that have arisen under current section 503(b)(9),<sup>279</sup> nor is it intended to do so. Rather, the aim is to assure a meaningful remedy that will serve the objective of encouraging suppliers and vendors to deal with a debtor teetering on the precipice of bankruptcy without giving away the store to that creditor (and, in the process, seriously impairing the interests of other creditors) should that effort to avoid a bankruptcy filing prove unavailing.<sup>280</sup> That in place, subsidiary issues concerning the scope of the remedy, all of which can never be anticipated in advance anyway, must and can be resolved in the typical common law fashion and are best left to that process.<sup>281</sup>

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278. I am not unmindful that, to a certain degree, this would produce a result in most cases not dissimilar from the result reached in the cases that held an otherwise valid reclamation could not be denied because of the existence of a prior lien, unless the relief contemplated in former section 546(c)(2) of either administrative expense priority or security was awarded. *See supra* text accompanying notes 78–82.

279. Several issues, including the meaning of “received,” whether utility services can constitute a “good” and application of section 502(d) to section 503(b)(9) claims, have previously been discussed. *See supra* text accompanying notes 90–93, 176, 204–08. Judge Lifland identified a number of other such questions in *In re Dana Corp.*, 367 B.R. 409, 411–12 (Bankr. S.D.N.Y. 2007). Since *Dana Corp.*, additional questions have arisen, such as: (1) the relationship between section 503(b)(9) and the courts’ ability to order payment of “critical vendor” claims under the doctrine of necessity; and (2) whether the value of goods subject to a section 503(b)(9) claim can be excluded from the subsequent new value defense of section 547(c)(4). *See e.g., In re O & S Trucking, Inc.*, No. 12-61003, 2012 WL 2803738, at \*2 (Bankr. W.D. Mo. June 29, 2012); *In re Commissary Operations, Inc.*, 421 B.R. 873, 878 (Bankr. M.D. Tenn. 2010); Nick Sears, Comment, *Defeating the Preference System: Using the Subsequent New Value Defense and Administrative Expense Claims to “Double Dip,”* 28 EMORY BANKR. DEV. J. 593, 607 (2012). A number of other issues are addressed in Gage, *supra* note 180, at 245–80.

280. This would be true regardless of whether the case was filed under Chapter 7 or 11, since the administrative expense priority conflicts with key policy aims in both situations. *See supra* text accompanying notes 229, 231–32.

281. By and large, except insofar as there is a genuinely identifiable federal interest, which might support a federal common law, many of these derivative issues will be resolved by reference to state law. *See* Ponoroff, *Exemption Limitations*, *supra* note 134, at 240–41 n.93 (discussing the growing “federalization” of commercial law). *See generally* Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585 (2006) (discussing areas where federal law continues to operate after *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)). When the administrative expense claim must be paid may well fall in the realm of federal common law. As for other issues, once more, clear identification of the purpose for the priority payment might well control. For instance, if the prof-

Just as this proposal does not resolve every issue relating to what are now being called ten-day claims, neither is there anything sacrosanct about this particular approach to the problem. It is merely intended to be illustrative of one, of what are surely many, avenues for addressing the most troubling issues created by BAPCPA's treatment of credit seller reclamation and related claims.<sup>282</sup> For example, instead of providing flexibility by giving the courts discretion to provide security in lieu of the administrative claim, the statute could be crafted to invest the courts with authority to delay payment of prepetition administrative claims until sometime after the plan effective date.<sup>283</sup> Alternatively, if the principal policy justification for priority is predicated on policing bad faith stockpiling by debtors, rather than creating incentive to keep the debtor afloat, perhaps proof of intent, aided or not by a presumption, should be an element of entitlement to the priority in one form or another.<sup>284</sup> Whatever the final product, it needs to represent a far more sensitive and discriminating approach than what has been accomplished by the relevant provisions of BAPCPA. Specifically, it needs to tailor more providently the contours of a special credit seller priority in certain situations, on the one hand, without compromising unduly foundational bankruptcy rehabilitation and equality policies, on the other.

## CONCLUSION

The judicial role of common law courts in statutory cases has been the subject of endless debate.<sup>285</sup> However, even the propo-

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ferred rationale of avoiding the interruption of open account credit is accepted, then it may well be that state law ought not provide the rule of decision over when goods are "received," as has currently been the rule. *See supra* notes 201–02 and accompanying text.

282. *See supra* note 278 (addressing some of the other unresolved issues).

283. Currently, the effective date of the plan represents the outside date for payment. *See supra* note 183; *cf. In re Vertis Holdings, Inc.*, No. 12-12821, 2012 WL 6560343, at ¶¶ 7–16 (Bankr. D. Del. Oct. 30, 2012) (noting that payment of section 503(b)(9) claimants does not have to be assured as a condition to approving either postpetition financing or use of cash collateral). Other alternatives might include a lower level of priority, rather than administrative expense status, that might allow for payments to the accepting class to be deferred with interest. *See* 11 U.S.C. § 1129(a)(9)(B) (2012).

284. Alternatively, if the anti-stockpiling rationale is the main concern, perhaps administrative expense priority is not the right solution at all. *See supra* note 188 and accompanying text. However, if the priority is maintained, then the focus probably ought to shift back from sales in the ordinary course of the seller's business to transactions in the ordinary course of the debtor's business. *See supra* note 188.

285. *See* Jeffrey A. Pojanowski, *Statutes in Common Law Courts*, 91 TEX. L. REV. 479 (2013) (reviewing some of this debate); *see also* Lawrence Ponoroff, *The Dubious Role of*

nents of the most permissive and discretionary vision of statutory interpretation recognize that when statutory text provides clear answers it ought to be given effect.<sup>286</sup> Concessions might be made for legislation that is dated, or where contemporaneous expression of legislative intent renders the otherwise clear text ambiguous, or where there has been a quantum alteration in the social, legal, or economic environment in which the statute operates. None of those exceptions can fairly be said to appertain to BAPCPA generally, or to the changes wrought by BAPCPA in the case of credit seller claims in particular. Surely, there are aspects of revised section 546(c), and even section 503(b)(9), that are less than clear and require interpretation.<sup>287</sup> Likewise, there are aspects of the interaction of those provisions with other provisions of the Code that need explication, and here courts play a vital role.<sup>288</sup>

That said, there are other key components of both of these statutory edicts that, while logically disturbing, leave little if any room for interpretation. It is also beyond serious quarrel that sections 546(c) and 503(b)(9) represent separate remedies, each with its own panoply of non-congruent requirements, limitations, and conditions.<sup>289</sup> The efforts that have been made to temper the most disquieting of these consequences in relation to bankruptcy rehabilitative and equality policies are commendable in motive, but ultimately difficult to defend on a principled basis. In the long-run, they do not reflect well on the viability and virtue of a healthy bankruptcy regime. Thus, and with reluctance, it is proposed, initially, that the courts accept the changes that BAPCPA has brought about with respect to eve-of-bankruptcy credit seller claims; the damaging result to perceived larger system values notwithstanding. It is then submitted that if the emperor truly has no clothes, this can and should lead to a more-or-less nonpartisan effort by affected interests to push Congress to craft an approach to such claims that calibrates, adjusts, and accommodates the multiple constituencies with a stake in the issue in a far more

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*Precedent in the Quest for First Principles in the Reform of the Bankruptcy Code: Some Lessons from the Civil Law and Realist Traditions*, 74 AM. BANKR. L.J. 173, 180–81 (2000) (critiquing the role of courts as part of the cause in bringing about need for reform of the Code).

286. *Supra* note 9.

287. *Supra* notes 251, 278 and accompanying text.

288. *See supra* note 134.

289. *Supra* Part II.B.2.



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discerning and adroit fashion than that which it preceded. This approach is messy and time-consuming, but it is also how our tradition of law and justice operates best. For illustrative purposes, one, of what undoubtedly are of several, alternatives for accomplishing this goal of corrective legislation has been proposed. Ultimately, however, the best solution is the one that will have been forged and honed in the furnace of honest and dispassionate debate.