

The "Right To Reclaim" Revisited

In a prior issue of *The Arrow*, we discussed the right of a seller under UCC 2-702 to reclaim goods shipped on credit within ten days of delivery upon discovery of its buyer's insolvency. We now return to the subject to explain how to invoke this remedy after the buyer files bankruptcy.

First of all, the notice should be in writing. A buyer's reclamation demand does not violate the automatic stay imposed by the Bankruptcy Code because it has been construed as merely notice to the debtor of one's intent to reclaim goods.

If a bankruptcy petition has been filed, the proper procedure once notice is delivered is to follow up by filing an adversary proceeding for the reclamation of the goods. This lawsuit is filed in the Bankruptcy Court. An adversary proceeding is only necessary, however, if the debtor and trustee are unwilling to give a reclaiming seller's goods back without litigation. If everyone agrees, reclamation can be achieved by entry of an agreed order.

What happens, however, if, as is almost always the case, another creditor is claiming a lien on the inventory of the debtor under the UCC? Do you as the reclaiming seller lose your right of reclamation to the lien creditor who has previously filed a financing statement on inventory?

If the seller's goods had been resold in the ordinary course of busi-

ness to a third party prior to the demand for reclamation, the good-faith purchaser would take free of the seller's reclamation claim. Courts in most jurisdictions have included a lien creditor whose lien attaches to your goods upon their entry into the debtor's inventory as such a "good-faith purchaser."

Although your reclaiming rights as an unpaid seller are subject to this good-faith purchaser, that does not necessarily mean that you therefore lose those rights altogether.

In such a situation, if there is adequate security for the inventory lien holder without your goods, then your right to reclaim should be upheld by the Bankruptcy Court.

Even if there is not adequate collateral for the inventory lien financer, the court may allow you a secondary lien or an administrative priority as a substitute for your right of reclamation.

Sometimes the inventory lienholder, who also usually holds the debtor's cash and accounts receivable as collateral, will simply authorize payment of the claim in the ordinary course to keep the Chapter 11 debtor in business.

The lesson to be learned here is quite clear. You should always be sure to make the demand for reclamation and employ knowledgeable counsel to enforce it.



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