

## **New Bankruptcy Code Grants Sellers Additional Time to Reclaim Their Goods**

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Scenario: On Monday, ABC Goods ships to Acme Customer \$500,000 worth of goods. ABC receives confirmation of receipt of the shipment on Wednesday and title has passed to Acme Customer. On Friday, Acme files a voluntary petition for bankruptcy. After hearing about the filing from another supplier, ABC calls Acme and demands return of the goods. Acme, feeling very secure behind the shield of the Bankruptcy Code, tells ABC that a) it will not return the goods and b) ABC's only remedy is file a proof of claim and hope for something better than a few cents on the dollar recovery. Is Acme correct? No!

Similar to Florida law, the Bankruptcy Code provides a seller with certain rights to reclaim its goods. This right was recently amended with the signing of the Bankruptcy Abuse Prevention, Consumer Protection Act (hereinafter "Act"). Prior to the Act, a seller had a very limited ten (10) days after the buyer's receipt of the goods to reclaim the goods. However, § 546(c), as amended, provides:

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

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

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

The extended period of time not only provides the seller with additional time to make a claim, it also expands the scope of the goods that will fall under the reclamation rights umbrella due to the longer look back period.

The amendments to § 546(c) also deleted the limitation that the reclamation rights were subject to "any statutory or common law" rights of a seller, meaning the U.C.C. Under the U.C.C. the seller had to be concerned with whether that the goods were identifiable as being those sold to the debtor and that the goods were in possession or in control of the debtor at the time of the demand. However, the seller still must prove by a preponderance of the evidence that debtor was insolvent at the time of the sale, that the sale was in the ordinary course of the seller's business, that the goods were not paid for and that a written demand was made on the debtor within forty-five (45) days of receipt of the goods by the debtor (or twenty (20) days if the forty-five (45) days of receipt expires prior to the twentieth (20th) day after the commencement of the case).

Caveat 1! It has been argued that the drafters of the amendments made a drafting error in that when read closely (1)(B) suggests that if the forty-five (45) day period of receipt ends prior to forty-five (45) days after the commencement of the case, then the seller has twenty (20) days after commencement to make the written demand and the longer period under (1)(A) does not apply. Until binding case law is available in the district where the bankruptcy case is pending, sellers should, if possible, make a written demand within twenty (20) days of the filing.

Caveat 2! Reclamation looks on paper to be a wonderful tool to recover goods sold to an insolvent buyer. However, practically speaking, the seller must be prepared for the fact that the buyer may simply use/sell the goods while the parties dispute the reclamation claim in court. In this event (or if the seller fails to provide the notice described above), the Code provides that the seller has an administrative claim under § 503(b) for “the value of any goods received by the debtor within 20 days before the date of commencement...”. An administrative claim is senior in priority to general, unsecured claims and, generally speaking, must be paid in full in order for the debtor to confirm a plan of reorganization.

**Iurillo & Associates, P.A.**, located in downtown St. Petersburg, is comprised of **Camille J. Iurillo**, Shareholder and **Sabrina C. Beavens**, Associate. **Ms. Iurillo** has been active in the St. Petersburg Bar Association for several years, including her current tenure as Secretary. In addition, she is a member of the Board of Directors of the St. Petersburg Bar Foundation and the Chair Elect of The Florida Bar’s Practice Management and Development Section. **Ms. Beavens** is also very active in the St. Petersburg Bar Association and is currently serving as its Membership Committee Chair.

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