

# COMMENT

## A Remedy Without A Right: The Cash Seller's Right To Reclaim Under U.C.C. § 2-507

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## INTRODUCTION

Last week, Ahmad made a cash sale.<sup>1</sup> Ahmad<sup>2</sup> sold Bill<sup>3</sup> a box of widgets.<sup>4</sup> As Ahmad's employees loaded the box of widgets onto Bill's loading dock,<sup>5</sup> Bill handed Ahmad a check<sup>6</sup> for the full

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<sup>1</sup> A cash sale is a transaction in which the seller delivers the goods and the buyer pays for the goods at substantially the same time. *See, e.g.*, BLACK'S LAW DICTIONARY 217 (6th ed. 1990) (defining "cash sale" as sale requiring simultaneous delivery and payment); SAMUEL WILLISTON, THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT § 341 (1909) (defining common-law "cash sale" as transaction in which seller conditioned delivery on payment); LAWRENCE VOLD, HANDBOOK OF THE LAW OF SALES § 29, at 160 (2d ed. 1959) (defining "cash sale" as transaction in which seller simultaneously exchanged ownership and possession for payment). Vold refers to common-law cash sales as "technical cash sales" to distinguish them from "ordinary cash sales" under the Uniform Sales Act of 1906. *Id.*; *see also infra* notes 74-79 and accompanying text (discussing difference between technical and ordinary cash sales under Uniform Sales Act of 1906).

<sup>2</sup> Ahmad is the seller. *See* U.C.C. § 2-103(1)(d) (1990) (defining "seller" as person who sells or contracts to sell goods).

<sup>3</sup> Bill is the buyer. *See* U.C.C. § 2-103(1)(a) (1990) (defining "buyer" as person who buys or contracts to buy goods).

<sup>4</sup> The widgets are the goods. *See* U.C.C. § 2-105 (1990) (defining "goods" as "all things . . . which are movable at the time of identification to the contract for sale").

<sup>5</sup> Ahmad "delivered" the goods to Bill. *See* U.C.C. § 2-401(2)(a) (1990) (describing when title passes upon physical delivery). The Uniform Commercial Code (Code) fixes the moment of delivery in several different ways, depending on the terms of the sales contract. *Id.* If the contract calls for the seller to physically deliver the goods to the buyer, the Code fixes the moment of delivery either at the time the seller ships the goods or at the time the buyer takes receipt (physical possession) of the goods. U.C.C. § 2-401(2)(a)-(b) (1990). If the contract does not call for the seller to move the goods, the Code fixes the moment of delivery either at the time that the parties form the contract or at the time the seller delivers the documents of title to the buyer. U.C.C. § 2-401(2)(c)-(d) (1990). For purposes of this Comment, delivery occurs at the moment that the buyer takes physical possession of the goods.

<sup>6</sup> A check is a written order to a bank to pay a specified amount from deposited funds. AMERICAN HERITAGE DICTIONARY 262 (2d college ed. 1985); *see also* BLACK'S LAW DICTIONARY 237 (6th ed. 1990) (defining "check" as draft drawn on bank and payable on presentment). Historically, courts have recognized check payments as cash sales. Henry Gross, Note, *The Rights of Reclaiming Cash Sellers When Contested by Secured Creditors of the Buyer*, 77 COLUM. L. REV. 934, 937 (1977); *see also* Richard A. Mann & Michael J. Phillips, *The Cash Seller Under the Uniform Commercial Code*, 20 B.C. L. REV. 370, 372 (1979) (stating that seller's acceptance of worthless check was most significant cash sale transaction). The common-law courts recognized that a check payment

purchase price.<sup>7</sup> Ahmad immediately deposited the check, but it

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did not satisfy the simultaneous payment and delivery requirement. VOLD, *supra* note 1, § 30, at 170; *see infra* note 7 (discussing simultaneous payment and delivery requirement). The seller had to exchange the check for cash before payment was complete. VOLD, *supra* note 1, § 30, at 170. However, common-law judges considered the time required for the seller to cash the check as part of the simultaneous payment. *Id.*; *see also* Gross, *supra*, at 937 n.21 (stating that courts did not consider period between seller's receipt and deposit of check as extension of credit).

Courts treated a check payment as a conditional sale. VOLD, *supra* note 1, § 30, at 169. Courts distinguished this from the conditional sale discussed *infra* note 46. *See* WILLISTON, *supra* note 1, § 341. Courts did not accept the view that a check was a conditional sale with an extension of credit. Calvin W. Corman, *Cash Sales, Worthless Checks and the Bona Fide Purchaser*, 10 VAND. L. REV. 55, 59-60 (1956). Some jurisdictions, however, viewed a check payment as a form of conditional sale. *Id.* at 66. Nonetheless, these jurisdictions still treated the transaction as a cash sale. *Id.*

Likewise, the Code acknowledges that cash sales may involve check payments. *See* U.C.C. § 2-511(2) (1990) ("Tender of payment is sufficient when made by any means or in any manner current in the ordinary course of business . . ."); U.C.C. § 2-511 cmt. 4 (1990) (stating that acceptance of check in cash sale is standard and proper). The number and size of modern commercial transactions also support the policy recognizing check payments as cash sales. *See* GEORGE I. WALLACH, *THE LAW OF SALES UNDER THE UNIFORM COMMERCIAL CODE* ¶ 7.03 (1981) (stating that it is unreasonable to require sellers to demand cash in large transactions due to risk of theft or loss); *see also In re Mort Co.*, 208 F. Supp. 309, 311 (E.D. Pa. 1962) (stating that not allowing businessperson to use check in cash sale would signal return to "primitive commercial methods"); Gross, *supra*, at 937 n.21 (citing above passage from *Mort* as strong policy rationale for allowing check payments in cash sales).

<sup>7</sup> Common-law courts recognized that a perfectly simultaneous exchange was often physically impossible. *Mann & Phillips*, *supra* note 6, at 371 n.5; *see, e.g., Commonwealth v. Devlin*, 6 N.E. 64 (Mass. 1886) (involving delivery of sheep); *Hirsch v. C. W. Leatherbee Lumber Co.*, 55 A. 645 (N.J. 1903) (involving delivery of 8,435 railroad ties). Therefore, courts required "substantially simultaneous" delivery and payment. *Mann & Phillips*, *supra* note 6, at 371; *see also* VOLD, *supra* note 1, § 30, at 170 (describing "substantially simultaneous"); Lawrence Vold, *Worthless Check Cash Sales, "Substantially Simultaneous" and Conflicting Analogies*, 1 HASTINGS L.J. 111, 111-12 (1950) (describing "substantially simultaneous"); *cf. In re Helms Veneer Corp.*, 287 F. Supp. 840, 843 (W.D. Va. 1968) (stating that delivery and payment need not be absolutely simultaneous, but delivery on promise of future payment was not cash sale); *In re Kee Lox Mfg.*, 22 U.C.C. Rep. Serv. (Callaghan) 938, 938 (E.D. Pa. 1977) (holding that exchange of check for goods was not cash sale if payment was made on account of past indebtedness).

“bounced.”<sup>8</sup> A few days later, Ahmad received notice from his bank that Bill’s check had bounced. Fortunately, Bill still had the box of widgets in his warehouse, so Ahmad reclaimed them.<sup>9</sup>

Ahmad is a cash seller.<sup>10</sup> Courts have uniformly recognized the cash seller’s right to reclaim goods when the buyer’s check bounces.<sup>11</sup> Courts, however, disagree whether the common law or the Uniform Commercial Code (Code) is the source of the cash

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<sup>8</sup> The phrase “bounced check” is an informal expression. When a seller presents a check to the bank for payment, but the bank returns the check unpaid because of insufficient funds in the buyer’s bank account, the check has “bounced.” See VOLD, *supra* note 1, § 30, at 170 (defining “bounced check” as check bank refused to pay). The formal term is “dishonored check.” See BLACK’S LAW DICTIONARY 468 (6th ed. 1990) (defining “dishonor” as bank refusing to pay draft when payee presents it). The banking term is “N.S.F. (not sufficient funds) check.” *Id.* at 1065.

<sup>9</sup> See VOLD, *supra* note 1, § 30, at 169 (stating that if check bounces, unpaid seller may reclaim goods); BLACK’S LAW DICTIONARY 1271 (6th ed. 1990) (defining “reclaim” as asserting one’s right to recover property transferred conditionally or mistakenly). This is the reclamation remedy. This introductory hypothetical assumes that no lien creditor or secured creditor has acquired an interest in the box of widgets. See ROBERT A. HILLMAN ET AL., COMMON LAW AND EQUITY UNDER THE UNIFORM COMMERCIAL CODE ¶ 9.03[7][a][ii] (1985) (stating that secured creditors or good-faith purchasers for value may cut off cash seller’s reclamation right); *infra* note 28 (defining “lien creditor,” “secured creditor,” and “good faith purchaser for value”).

<sup>10</sup> See *supra* note 1 (describing requirements for cash sale status).

<sup>11</sup> Many courts have recognized the cash seller’s reclamation right. See, e.g., Burk v. Emmick, 637 F.2d 1172 (8th Cir. 1980) (discussed *infra* notes 217-34 and accompanying text); Szabo v. Vinton Motors, 630 F.2d 1 (1st Cir. 1980) (discussed *infra* notes 193-216 and accompanying text); Sorrels v. Texas Bank & Trust Co., 597 F.2d 997 (5th Cir. 1979); *In re Samuels & Co. (Stowers v. Mahon)*, 526 F.2d 1238 (5th Cir.) (en banc) (discussed *infra* notes 170-92 and accompanying text), *cert. denied*, 429 U.S. 834 (1976); Florida E. Coast Props. v. Best Contract Furnishings, 593 So. 2d 560 (Fla. Dist. Ct. App. 1992); Holiday Rambler v. Morris, 32 U.C.C. Rep. Serv. (Callaghan) 1222 (D. Kan. 1981); Robert Weed Plywood Corp. v. Downs (*In re Richardson Homes Corp.*), 18 U.C.C. Rep. Serv. (Callaghan) 384 (N.D. Ind. 1975); *In re Helms Veneer Corp.*, 287 F. Supp. 840 (W.D. Va. 1968); *In re Mort Co.*, 208 F. Supp. 309 (E.D. Pa. 1962); Citizens Bank v. Taggart, 191 Cal. Rptr. 729 (Ct. App. 1983) (noted *infra* note 234); Chicago Limousine Serv. v. Hartigan Cadillac, 548 N.E.2d 386 (Ill. App. Ct. 1989), *rev’d on other grounds*, 564 N.E.2d 797 (Ill. 1990); Genesee Merchants Bank & Trust v. Tucker Motor Sales, 372 N.W.2d 546 (Mich. Ct. App. 1985); Ranchers & Farmers Livestock Auction v. First State Bank, 531 S.W.2d 167 (Tex. Ct. App. 1975).

seller's reclamation right.<sup>12</sup> Furthermore, courts disagree on the time limit that applies when the cash seller exercises this right.<sup>13</sup> The Code is the source of the courts' disagreements.<sup>14</sup> The Code does not explicitly state that the cash seller has a reclamation right.<sup>15</sup> Furthermore, the Code does not clearly set a time limit for

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<sup>12</sup> See *infra* notes 96-138 and accompanying text (examining two approaches for finding source of cash seller's reclamation right). Some courts enforce the cash seller's reclamation right under section 2-507(2), viewing it as a codification of the common-law cash sale doctrine. See *In re Samuels & Co.* (Stowers v. Mahon), 526 F.2d 1238, 1253 (5th Cir.) (en banc) (Ainsworth, J., dissenting) (restating previous three-judge panel ruling that Code adopts common-law distinctions between cash and credit sellers), *cert. denied*, 429 U.S. 834 (1976); Graeme S. Cooper, *The Reclamation Rights of Unpaid and Unsecured Sellers in International Trade*, 1987 COLUM. BUS. L. REV. 17, 99 (1987) (stating that courts base cash seller's reclamation right on belief that § 2-507(2) codifies common-law cash sale doctrine); *infra* notes 100-25 and accompanying text (discussing view that § 2-507(2) codifies common-law cash sale doctrine). Other courts conclude that the reclamation right is inherent in the Code and is found in the interplay of §§ 2-507(2) and 2-511(3). See, e.g., *Szabo v. Vinton Motors*, 630 F.2d 1, 3 (1st Cir. 1980) (stating that cash seller's reclamation right is inherent in §§ 2-507(2) and 2-511(3)); *In re Helms Veneer Corp.*, 287 F. Supp. 840, 846 (W.D. Va. 1968) (stating that court interpreted reclamation right from §§ 2-507 and 2-511); *infra* notes 126-38 and accompanying text (discussing reclamation right based on interplay of §§ 2-507(2) and 2-511(3)). At least one court, however, has rejected the idea that the Code provides a reclamation right to cash sellers. See *In re Samuels & Co.*, 526 F.2d at 1244 (stating that cash seller's reclamation right under § 2-507(2) is "judicially-confected").

<sup>13</sup> See *infra* notes 170-234 and accompanying text (discussing *Samuels, Szabo, and Burk*). The 1990 Code revisions settled the issue. WILLIAM H. HENNING & GEORGE I. WALLACH, *THE LAW OF SALES UNDER THE UNIFORM COMMERCIAL CODE* ¶ 7.05 (1992) (stating that prior to revision, courts were split on applicability of 10-day limit); see also *infra* notes 142-234 and accompanying text (discussing split in courts over 10-day limit). Today, courts grapple with the new issue of when it is reasonable to allow the cash seller to assert her reclamation right. See *infra* notes 235-49 and accompanying text (discussing 10-day limit and present reasonableness standard).

<sup>14</sup> See 1 THOMAS M. QUINN, *QUINN'S UNIFORM COMMERCIAL CODE COMMENTARY AND LAW DIGEST* ¶ 2-507[A][5] (2d ed. 1991) (stating that courts rendered U.C.C. § 2-507(2) virtually meaningless in effort to reconcile Code section and its Official Comment 3); PERMANENT EDITORIAL BOARD COMMENTARY ON THE UNIFORM COMMERCIAL CODE, FINAL DRAFT COMMENTARIES 1-7, P.E.B. COMMENTARY NO. 1, at 3-4 (Mar. 1, 1990) [hereafter P.E.B. COMMENTARY NO. 1] (stating that § 2-507(2) and its Official Comment 3 were inconsistent and caused courts to make incorrect rulings).

<sup>15</sup> See U.C.C. § 2-507(2) (1990) (omitting reference to reclamation right); U.C.C. § 2-511 (1990) (omitting reference to reclamation right).

the cash seller to exercise her reclamation right.<sup>16</sup> The Permanent Editorial Board for the Uniform Commercial Code (P.E.B.)<sup>17</sup> attempted to resolve the courts' disagreements when the P.E.B. revised the Comment to the relevant Code section.<sup>18</sup> The P.E.B., however, devised a questionable resolution to the disagreements.<sup>19</sup> In revising Comment 3 to Code section 2-507, the P.E.B. eliminated the bright-line ten-day time restriction on the cash seller's reclamation right and replaced it with a reasonableness standard.<sup>20</sup> The P.E.B.'s revision, however, does not incorporate the cash seller's reclamation right into Code section 2-507.<sup>21</sup> Additionally, the

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<sup>16</sup> See U.C.C. § 2-507 cmt. 3 (1990) (stating that there is no specific time limit on cash seller's exercise of reclamation right). Common-law rules regarding prejudice, waiver, estoppel, and ratification limit the cash seller's reclamation right. *Id.*; see also *infra* notes 60-69 and accompanying text (discussing common-law limits on cash seller's reclamation right).

<sup>17</sup> The Permanent Editorial Board for the Uniform Commercial Code (P.E.B.) is a joint committee of the American Law Institute and the National Conference of Commissioners on Uniform State Laws. David A. Kaplan, *Who in the Banking Bar*, NAT'L L.J., Dec. 26, 1983, at 1. The P.E.B. issues supplementary commentaries on the Code to clarify ambiguities, to resolve interpretive disputes, and to improve the general operation of the Code. PERMANENT EDITORIAL BOARD COMMENTARY ON THE UNIFORM COMMERCIAL CODE, FINAL DRAFT COMMENTARIES 1-7, P.E.B. RESOLUTION ON PURPOSES, STANDARDS AND PROCEDURES FOR P.E.B. COMMENTARY TO THE U.C.C., at vii (Mar. 1, 1990).

<sup>18</sup> See P.E.B. COMMENTARY NO. 1, *supra* note 14, at 4 (revising Comment 3). In 1990, the P.E.B. revised Official Comment 3 to U.C.C. § 2-507. *Id.* The former Comment 3 required the cash seller to assert her reclamation right within 10 days of delivering the goods. U.C.C. § 2-507 cmt. 3 (1987) (amended 1990); see *supra* note 5 (defining "delivery"). The revised Comment 3 requires the cash seller to assert her reclamation right within a reasonable time. U.C.C. § 2-507 cmt. 3 (1990). The P.E.B. did not modify the text of § 2-507(2). See P.E.B. COMMENTARY NO. 1, *supra* note 14, at 4 (revising only Official Comment 3, not text of § 2-507(2)).

<sup>19</sup> See *infra* note 21 and accompanying text (noting shortcomings of P.E.B. revision).

<sup>20</sup> U.C.C. § 2-507 cmt. 3 (1990).

<sup>21</sup> See U.C.C. § 2-507 cmt. 3 (1990) (stating that U.C.C. § 2-507(2) codifies cash seller's reclamation right). However, it is not clear that § 2-507(2) codifies the common-law cash sale doctrine. See *infra* notes 118-25 and accompanying text (arguing that § 2-507(2) does not codify cash sale doctrine); Cooper, *supra* note 12, at 100 (acknowledging that courts are uncertain about relationship of § 2-507(2) to pre-Code common law); Richard A. Mann & Michael J. Phillips, *The Reclaiming Cash Seller and the Bankruptcy Code*, 39 Sw. L.J. 603, 615 (1985) (stating that courts and commentators disagree about origin of cash seller's reclamation right).

P.E.B.'s Comment revision provides ambiguous time limits as to when cash sellers may exercise their reclamation right.<sup>22</sup>

Current proposals to revise section 2-507 respond to only one of these concerns, clarifying the source of the reclamation right. Since the P.E.B. revised Comment 3 to section 2-507, the Article 2 P.E.B. Study Group<sup>23</sup> (Study Group) has recommended that the P.E.B. further revise section 2-507.<sup>24</sup> The Study Group has recommended that the P.E.B. delete section 2-507(2) and integrate the cash seller's reclamation right with the credit seller's reclamation right under section 2-702(2).<sup>25</sup> The Study Group's recommended

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Determining the source of the cash seller's reclamation right is important for defining the scope of that right. See Zipporah B. Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 469 (1987) (stating that ignorance of Code's origins had led to confusion about scope and purpose of certain provisions); Gross, *supra* note 6, at 941-42 (acknowledging direct relationship between basis and scope of cash seller's reclamation right). For example, if a court bases the cash seller's reclamation right on the common law, the right may survive against the buyer's lien creditors, who would take possession of the goods under other provisions of the Code. See William L. Tabac, *The Unbearable Lightness of Title Under the Uniform Commercial Code*, 50 MD. L. REV. 408, 412-45 (1991) (arguing that Code does not displace common-law reclamation right and, thus, cash seller's reclamation right has priority over security interests); Gross, *supra* note 6, at 939-62 (arguing that Code codifies common-law reclamation right and, thus, cash seller has priority over third parties). On the other hand, if a court bases the cash seller's reclamation right in the Code, without reference to the common law, the buyer's lien creditors may have priority. See JOHN O. HONNOLD ET AL., CASES, PROBLEMS AND MATERIALS ON SECURITY INTERESTS IN PERSONAL PROPERTY 36-38 (2d ed. 1992) (discussing possible priority relationships between sellers and lien creditors); *In re Samuels & Co. (Stowers v. Mahon)*, 526 F.2d 1238, 1242-43 (5th Cir.) (en banc) (ruling that lien creditors are purchasers under Code, and, therefore, have priority over unpaid cash sellers), *cert. denied*, 429 U.S. 834 (1976); see also *infra* note 28 (describing lien creditors' interests and security interests).

<sup>22</sup> U.C.C. § 2-507 cmt. 3 (1990) (stating that there is no specific time limit on cash seller's exercise of reclamation right). Common-law rules regarding prejudice, waiver, estoppel, and ratification limit the cash seller's reclamation right. *Id.*; see also *infra* notes 60-69 and accompanying text (discussing common-law limits on cash seller's reclamation right).

<sup>23</sup> In 1988, the P.E.B. appointed the Article 2 P.E.B. Study Group to determine whether or not Article 2 should be revised. PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, P.E.B. STUDY GROUP UNIFORM COMMERCIAL CODE ARTICLE 2: PRELIMINARY REPORT, at vi (Mar. 1, 1990) [hereafter P.E.B. STUDY GROUP PRELIMINARY REPORT].

<sup>24</sup> See *id.* pt. 5, at 8-9, pt. 7, at 5-6 (describing Study Group's recommendation to revise § 2-507(2)).

<sup>25</sup> *Id.* pt. 5, at 9.

revision would presumably recognize the cash seller's reclamation right explicitly in the text of the Code.<sup>26</sup> The revised statute, however, would retain the reasonableness standard time limit.<sup>27</sup> The recommended revision provides an explicit source for the cash seller's reclamation right, but it does not provide an unambiguous limit on the seller's exercise of that right.

This Comment examines the confusion surrounding the unpaid cash seller's reclamation remedy under Code section 2-507(2).<sup>28</sup>

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<sup>26</sup> See *id.* pt. 7, at 5 (acknowledging that presently § 2-702(2) does not explicitly govern cash sellers' reclamation rights).

<sup>27</sup> See *id.* pt. 7, at 6 (recommending that seller have reasonable time to demand reclamation after seller discovers or should have discovered that check bounced).

<sup>28</sup> This Comment does not address the rights of unpaid sellers against third parties, namely lien creditors, secured parties, and good faith purchasers for value. See *supra* note 9 (noting that introductory hypothetical assumes that no lien creditor or secured creditor acquired interest in goods). Lien creditor is a general term for a creditor holding a lien on the debtor's property as security for a debt. BLACK'S LAW DICTIONARY 923 (6th ed. 1990) (defining "lien creditor"). A secured party is a type of lien creditor who holds a limited, contractual interest in the debtor's goods. BLACK'S LAW DICTIONARY 1354 (6th ed. 1990) (defining "secured party"); see also HONNOLD ET AL., *supra* note 21, at 37 (describing secured party). That limited interest is commonly referred to as a security interest. HONNOLD ET AL., *supra* note 21, at 37. The first two sentences of § 1-201(37) define a security interest as "an interest in personal property . . . which secures payment or performance of an obligation. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (Section 2-401) is limited in effect to a reservation of a 'security interest.'" U.C.C. § 1-201(37) (1990). The Code's definition of a security interest is long and detailed. See U.C.C. § 1-201(37) (1990) (requiring nearly two pages to define "security interest"); HONNOLD ET AL., *supra* note 21, at 223 (noting that length of definition suggests difficulty of defining term).

A good faith purchaser for value is a purchaser who buys without notice that the seller's title is questionable. BLACK'S LAW DICTIONARY 693 (6th ed. 1990) (defining "good faith purchaser"). The Code defines the terms "good faith," "purchaser," and "value." U.C.C. §§ 2-103(1)(b) (1990) (defining "good faith" as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade"), 1-201(33) (defining "purchaser" as "person who takes by purchase"), 1-201(32) (defining "purchase" to include "taking by sale, . . . lien, . . . gift or any other voluntary transaction creating an interest in property"), 1-201(44)(d) (defining "value" as rights "in return for any consideration sufficient to support a simple contract"). Common-law courts generally did not grant good faith purchaser status to third parties in cash transactions. Grant Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 YALE L.J. 1057, 1060 (1954); Gross, *supra* note 6, at 944. Under the common-law cash sale doctrine, defaulting buyers did not acquire title, so they could not pass it to good faith purchasers. Gross, *supra* note 6, at 944; see



This Comment consists of three parts. Part I discusses the common-law cash sale doctrine<sup>29</sup> and how that doctrine relates to the cash seller's modern reclamation right under the Code.<sup>30</sup> It seeks to distinguish the cash seller's common-law reclamation right from her reclamation right under section 2-507(2).<sup>31</sup> Part I also seeks to identify the source of the reclamation right<sup>32</sup> by examining two approaches to the origin of the cash seller's modern right.<sup>33</sup> Part II analyzes how courts have limited the modern reclamation right.<sup>34</sup> It also discusses the former ten-day limit for reclamation<sup>35</sup> and the present reasonableness standard that replaced it.<sup>36</sup> Finally, Part III proposes that the P.E.B. consolidate the cash seller's reclamation right with the express reclamation right of the credit seller under section 2-702(2).<sup>37</sup> The proposed amendment to section 2-702(2) would also reinstate the bright-line ten-day limit on the cash seller's

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*also infra* notes 40-44, 51-59 (describing common-law cash sale doctrine). Under the Code, defaulting buyers may pass good title to good faith purchasers. U.C.C. § 2-403(1) (1990); Gross, *supra* note 6, at 944-45. Thus, a good faith purchaser takes priority over an unpaid seller. Gilmore, *supra*, at 1057-60; HONNOLD ET AL., *supra* note 21, at 25-27; *see infra* note 58 (discussing voidable title and good faith purchaser for value under common law); *infra* note 123 (discussing voidable title and good faith purchaser for value under Code). *See generally* HONNOLD ET AL., *supra* note 21 (examining lien creditors, secured parties, good faith purchasers, and their rights under U.C.C. Articles 2 and 9). Therefore, third parties have an interest in the source and content of the cash seller's reclamation right. *See supra* note 21 (noting interest of third parties in source of reclamation right). This Comment, however, deals only with the unpaid seller's right to reclaim from the buyer who issued the worthless check.

<sup>29</sup> *See infra* notes 40-44, 51-69 and accompanying text (discussing cash seller's reclamation right under common-law cash sale doctrine).

<sup>30</sup> *See infra* notes 51-90 and accompanying text (examining how cash sale doctrine relates to cash seller's reclamation right under Code).

<sup>31</sup> *See infra* notes 118-25 and accompanying text (distinguishing cash seller's reclamation rights under common law and Code).

<sup>32</sup> *See infra* notes 92-138 and accompanying text (identifying source of cash seller's reclamation right).

<sup>33</sup> *See infra* notes 96-138 and accompanying text (discussing two views on source of reclamation right under Code).

<sup>34</sup> *See infra* notes 142-249 and accompanying text (discussing courts' application of time limits on cash seller's reclamation right).

<sup>35</sup> *See infra* notes 170-216 and accompanying text (describing 10-day limit on cash seller's reclamation right under Code).

<sup>36</sup> *See infra* notes 217-49 and accompanying text (discussing common-law reasonableness standard).

<sup>37</sup> *See infra* text accompanying notes 250-51 (discussing proposal to consolidate cash and credit sellers' reclamation rights under § 2-702(2)).

reclamation right.<sup>38</sup> The proposed amendment to section 2-702(2) would promote uniformity in the understanding and application of the Code.<sup>39</sup>

### I. THE CASH SALE DOCTRINE AND THE CODE

This Part discusses the relationship between the common-law cash sale doctrine<sup>40</sup> and the cash seller's modern reclamation right under the Code.<sup>41</sup> Common-law judges distinguished cash sales from credit transactions<sup>42</sup> based on when title<sup>43</sup> passed from seller to buyer.<sup>44</sup> Historically, courts defined a cash sale as a transaction in which the seller transferred title and possession to the buyer, who, in turn, simultaneously paid for the goods.<sup>45</sup> In contrast, in a

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<sup>38</sup> See *infra* notes 252-74 and accompanying text (discussing proposed amendment to § 2-702(2) that reinstates 10-day limit on reclamation right).

<sup>39</sup> See *infra* notes 250-320 and accompanying text (discussing benefits of proposed amendment to § 2-702(2)).

<sup>40</sup> The common-law cash sale doctrine provided that a cash seller retained title until she received payment. Tabac, *supra* note 21, at 420 n.71; Robert Dugan, *Cash-Sale Sellers Under Articles 2 and 9 of the Uniform Commercial Code*, 8 U.C.C. L.J. 330, 366 n.103 (1976). If the seller did not receive payment, she could reclaim the goods. Dugan, *supra*, at 366 n.103. The doctrine was similar to rescinding a contract for failure to fulfill a contract condition. Cooper, *supra* note 12, at 99. This Comment addresses the situation when the unfulfilled condition is payment on the check. See *supra* text accompanying notes 1-9 (setting out introductory hypothetical). The doctrine's rationale rested on the assumption that the seller did not intend to transfer title before she received payment. Richard L. Barnes, *Toward a Normative Framework for the Uniform Commercial Code*, 62 TEMP. L. REV. 117, 133 (1989).

<sup>41</sup> See U.C.C. § 2-507(2) (1990) ("Where payment is due and demanded on the delivery to the buyer of goods . . . his right as against the seller to retain or dispose of them is conditional upon his making the payment due."); *infra* notes 92-96 and accompanying text (discussing § 2-507(2)).

<sup>42</sup> Mann & Phillips, *supra* note 6, at 371; Gross, *supra* note 6, at 935; see HENNING & WALLACH, *supra* note 13, ¶ 7.04 (stating that common-law courts' first inquiry was whether transaction was cash or credit sale).

<sup>43</sup> See AMERICAN HERITAGE DICTIONARY 1273 (2d college ed. 1985) (defining "title" as uncontroverted legal right to control and to dispose of property). One court described title as an "intangible something, the passing of which no man can prove by evidence." Girard Trust Corn Exch. Bank v. Warren Lopley Ford, 12 Pa. D. & C.2d 351, 354 (C.P. 1957). The Code does not define title. See U.C.C. § 2-401 (1990) (omitting "title" from definitional cross-references).

<sup>44</sup> Mann & Phillips, *supra* note 6, at 371; Gross, *supra* note 6, at 935-36.

<sup>45</sup> See WILLISTON, *supra* note 1, § 341 (defining "cash sale" as sale where payment is condition of title transfer). Early commentators on the common law reflect two positions: (1) absent payment, title did not pass to the buyer unless the parties intended to conduct a credit transaction; and (2) title

credit sale, the seller transferred title and possession to the buyer before receiving payment.<sup>46</sup> Unlike the common law, the Code does not consider title in distinguishing between cash and credit sales.<sup>47</sup> Instead, under the Code, both cash and credit sellers transfer title when they deliver the goods to buyers.<sup>48</sup> The Code thus adopts a different approach than the common law regarding the

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*supra* note 6, at 371 (stating that common-law courts ruled that seller did not transfer title until payment, unless party could show contrary intent). In contrast, modern courts assume that a transaction is a credit sale. Mann & Phillips, *supra* note 6, at 371; *see also* WILLISTON, *supra* note 1, § 343 (stating that modern courts presume title passes at delivery). Generally, common-law courts defined a cash transaction as the transfer of possession with virtually simultaneous payment. Mann & Phillips, *supra* note 6, at 371; *see generally* VOLD, *supra* note 1, § 29 (describing cash sale); WILLISTON, *supra* note 1, §§ 341-342 (describing cash sales and early common-law doctrines).

<sup>46</sup> Gross, *supra* note 6, at 935-36; *see also* Cooper, *supra* note 12, at 25 (stating basic concept of American common-law sales: when seller transfers possession without receiving payment, seller is creditor for price); BLACK'S LAW DICTIONARY 369-70 (6th ed. 1990) (defining credit sale as transaction where seller allows buyer to pay for goods at later time). However, a simultaneous delivery and check payment is a credit sale if the check is post-dated. U.C.C. § 2-511 cmt. 6 (1990); Gross, *supra* note 6, at 937 n.22. Likewise, a check payment made at delivery on account of past indebtedness is not a cash sale. *In re Kee Lox Mfg.*, 22 U.C.C. Rep. Serv. (Callaghan) 938, 939 (E.D. Pa. 1977). A comprehensive discussion of the credit seller's common-law and Code remedies is beyond the scope of this Comment. *See supra* note 28 (describing scope of this Comment). This Comment includes brief descriptions of the credit seller's remedies. *See infra* note 56 (describing credit seller's remedies under common law); *infra* note 150 and accompanying text (describing credit seller's remedy under Code § 2-702(2)). A third type of transaction is the conditional sale. WILLISTON, *supra* note 1, § 341. Unlike common-law cash and credit sales, conditional sales sever title and possession. *Id.* The seller gives possession of the goods to the buyer, but the seller retains title until the buyer pays for the goods. *Id.*; Mann & Phillips, *supra* note 6, at 371.

<sup>47</sup> *See* 3 ALPHONSE M. SQUILLANTE & JOHN R. FONSECA, WILLISTON ON SALES § 23-2, at 324 (4th ed. 1974) (stating that location of title is not deciding factor in resolving conflicts); Tabac, *supra* note 21, at 408 (stating that Code's drafters expressly rejected title theory of transactions in goods); Gross, *supra* note 6, at 940 (stating that Code expressly rejects title-based approach); *infra* notes 110-17 and accompanying text (discussing Code's rejection of title as legally significant concept).

<sup>48</sup> *See* U.C.C. § 2-401(2) (1990) (stating that title passes to buyer when seller delivers goods); U.C.C. § 2-403(1)(b) (1990) (stating that buyer who obtains delivery in exchange for subsequently dishonored check acquires voidable title); *see also infra* note 58 (discussing voidable title).

role of title in cash transactions.<sup>49</sup> By diminishing the role of title, the Code implicitly rejects the common-law rationale for the cash seller's reclamation right.<sup>50</sup>

#### A. *The Common-Law Cash Sale Doctrine*

The common-law cash sale doctrine provided a reclamation remedy to cash sellers who did not receive payment<sup>51</sup> or who received subsequently dishonored checks.<sup>52</sup> According to the doctrine, the goods continued to belong to the seller until she transferred<sup>53</sup> or relinquished title to the buyer.<sup>54</sup> Because the seller retained title to the goods until she received payment,<sup>55</sup> the cash sale doctrine permitted her to reclaim the goods.<sup>56</sup> Common-law courts equated a

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<sup>49</sup> See U.C.C. § 2-401(2) (1990) (stating that when seller retains title in delivered goods, she only reserves security interest); *In re Samuels & Co.* (Stowers v. Mahon), 526 F.2d 1238, 1246 (5th Cir.) (en banc) (stating that Code abolished title reservation for both cash and credit sellers), *cert. denied*, 429 U.S. 834 (1976); 3 SQUILLANTE & FONSECA, *supra* note 47, § 23-2, at 324 (stating that seller cannot retain title after delivery of goods); Gross, *supra* note 6, at 940 (stating that if Code codified common-law cash sale doctrine, seller would retain title to goods).

<sup>50</sup> See *supra* notes 40-49 (noting that Code rejects title, common-law rationale for cash seller's reclamation right); *infra* notes 118-25 (discussing Code's rejection of title).

<sup>51</sup> Tabac, *supra* note 21, at 420 n.71; Gross, *supra* note 6, at 937.

<sup>52</sup> Gross, *supra* note 6, at 937; see *supra* note 40 (defining cash sale doctrine); *supra* note 6 (discussing check payment).

<sup>53</sup> See Barnes, *supra* note 40, at 133 (stating that for seller to use cash sale doctrine, she must have intended to transfer title only after buyer made payment); Gross, *supra* note 6, at 936 (discussing theory that seller retained full ownership rights).

<sup>54</sup> See *infra* notes 60-69 and accompanying text (describing ways cash seller might relinquish title to buyer).

<sup>55</sup> See Barnes, *supra* note 40, at 133 (stating that for seller to use cash sale doctrine, she must have intended to transfer title after buyer made payment); Gross, *supra* note 6, at 936 (discussing theory that seller retained full ownership rights); *supra* note 43 (defining title).

<sup>56</sup> Mann & Phillips, *supra* note 6, at 372; see also Gross, *supra* note 6, at 936-37 (stating that cash sale doctrine formed basis for cash seller's reclamation right). In contrast to the cash seller's reclamation right, the common law greatly limited the credit seller's reclamation right. See HENNING & WALLACH, *supra* note 13, ¶ 7.04 (stating that common-law reclamation remedies are less generous for credit seller than cash seller). The common law did not base the credit seller's reclamation right on the buyer's failure to pay. Gross, *supra* note 6, at 936. Instead, courts applied the credit seller's common-law reclamation right if the buyer had fraudulently misrepresented her ability or intent to pay. *Id.* In such cases, the seller could rescind the transfer of title.

cash seller holding a worthless check with a victim of theft.<sup>57</sup> Victims of theft did not transfer title and could recover their goods from anyone found possessing them.<sup>58</sup> Likewise, the cash seller who received a worthless check did not transfer title to the buyer.<sup>59</sup>

The cash seller would lose her common-law reclamation right, however, if the court recharacterized the transaction as a credit sale.<sup>60</sup> If the court recharacterized the transaction, the seller could

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*Id.* In contrast, courts did not require cash sellers to establish fraud as a condition for exercising their common-law reclamation right. *Id.* at 937; *infra* notes 60-69 and accompanying text (describing cash sale doctrine's limits on common-law reclamation).

<sup>57</sup> See Gilmore, *supra* note 28, at 1060 (stating that common-law courts viewed cash sale default as similar to "larceny by trick"); Gross, *supra* note 6, at 936-37 (stating that common-law courts treated defaulting cash buyers and thieves similarly). Early common-law courts regarded the buyer who paid by check as a wrongful possessor until the bank paid the check. Gross, *supra* note 6, at 937 n.18. When the bank credited the check payment to the seller, the court related the payment back to the time of delivery. *Id.* The payment's relation back absolved the buyer of tort liability for her wrongful possession. *Id.*

<sup>58</sup> HONNOLD ET AL., *supra* note 21, at 25 (stating that thief acquires void title). The common law distinguished between void title and voidable title. *Id.* The thief who possessed void title did not have the power to transfer good title to any subsequent buyer. *Id.* At common law, the doctrine of voidable title permitted a credit seller to void a contract for sale and reclaim the goods from the buyer. Gross, *supra* note 6, at 943. Voidable title arose when the buyer fraudulently induced the seller to part with possession of her goods in a credit transaction. *Id.* The credit seller's option to void the sale remained open until the buyer resold the goods to a good faith purchaser for value. *Id.*; see *supra* note 28 (describing good faith purchaser for value under Code).

The voidable title doctrine generally did not apply to common-law cash transactions because the buyer acquired void title from the seller under the cash sale doctrine. Gross, *supra* note 6, at 944. Under limited circumstances, however, common-law courts did recognize good faith purchasers. See *id.* (stating that common-law courts did allow seller to reclaim in extreme circumstances where third-party purchaser was justified in relying on buyer's alleged title); see, e.g., *J.L. McClure Motor Co. v. McClain*, 42 So. 2d 266 (Ala. Civ. App. 1949) (involving seller who signed bill of sale); *Keegan v. Kaufman Bros.*, 156 P.2d 261 (Cal. Ct. App. 1945) (involving seller who assisted buyer in sorting sheep with third party looking on); *Zendman v. Harry Winston, Inc.*, 111 N.E.2d 871 (N.Y. 1953) (involving seller who allowed buyer to display diamond ring in window among store merchandise).

<sup>59</sup> Tabac, *supra* note 21, at 424; Gross, *supra* note 6, at 943; *supra* note 58 (discussing voidable title under common law).

<sup>60</sup> Mann & Phillips, *supra* note 6, at 372-73; Gross, *supra* note 6, at 937-38 n.22.

not reclaim the goods.<sup>61</sup> Thus, the seller's sole remedy would be to sue the buyer for breach of contract to recover the purchase price.<sup>62</sup> Several of the cash seller's acts or omissions influenced whether the court would recharacterize the sale, causing the seller to lose her reclamation right.<sup>63</sup> First, the cash seller could lose her reclamation right if she did not enforce the simultaneous payment and delivery requirement.<sup>64</sup> The longer the period between delivery and payment, the more likely common-law courts were to rule that the transaction was a credit sale.<sup>65</sup> Second, the cash seller who accepted a check payment could lose her reclamation right if she unreasonably delayed cashing the buyer's check.<sup>66</sup> This delay was evidence that the seller considered the transaction a credit sale.<sup>67</sup> Third, the cash seller could lose her reclamation right by estoppel if she failed to protest upon learning that the buyer's check had bounced.<sup>68</sup> Finally, the cash seller could impliedly waive her reclamation right if she did not exercise it within a reasonable time and, thereby, harmed the buyer or third parties.<sup>69</sup> Thus, the common-law cash sale doctrine restricted the exercise of the cash seller's reclamation right in certain situations.

While recognizing the cash seller's reclamation right,<sup>70</sup> subsequent uniform laws also adopted the common-law restrictions.<sup>71</sup> The first of these uniform laws was the Uniform Sales Act of 1906

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<sup>61</sup> Gross, *supra* note 6, at 937-38 n.22.

<sup>62</sup> HONNOLD ET AL., *supra* note 21, at 16.

<sup>63</sup> Mann & Phillips, *supra* note 6, at 372-73; Gross, *supra* note 6, at 937-38 n.22.

<sup>64</sup> See sources cited *supra* note 63.

<sup>65</sup> Gross, *supra* note 6, at 937-38 n.22.

<sup>66</sup> Mann & Phillips, *supra* note 6, at 373; Gross, *supra* note 6, at 937-38 n.22.

<sup>67</sup> Gross, *supra* note 6, at 937-38 n.22.

<sup>68</sup> *Id.*; see Mann & Phillips, *supra* note 6, at 373 (explaining that seller lost reclamation right when third parties were involved).

<sup>69</sup> Mann & Phillips, *supra* note 6, at 373; Gross, *supra* note 6, at 937-38 n.22.

<sup>70</sup> See Gilmore, *supra* note 28, at 1060 n.10 (stating that common-law cash sale doctrine survived under Uniform Sales Act of 1906); U.C.C. § 2-507(2) (1990) (stating conditional rights of buyer); Cooper, *supra* note 12, at 99 (stating that § 2-507(2) is essence of cash sale doctrine).

<sup>71</sup> See VOLD, *supra* note 1, § 29, at 160 (describing how cash seller waived right to cash payment, thus losing "technical cash sale" status under Uniform Sales Act of 1906); U.C.C. § 2-507 cmt. 3 (1990) ("[T]he right will be defeated by delay causing prejudice to the buyer, waiver, estoppel, or ratification of the buyer's right to retain possession. Common-law rules and precedents governing such principles are applicable . . .").

(Sales Act).<sup>72</sup> The Sales Act was the predecessor of the modern Uniform Commercial Code.<sup>73</sup> The Sales Act created two classes of cash sales:<sup>74</sup> ordinary and technical. In an ordinary cash sale, the seller transferred title to the buyer when the parties identified the goods to be sold.<sup>75</sup> Section 19 of the Sales Act governed ordinary cash sales.<sup>76</sup> The common law, however, continued to govern technical cash sales.<sup>77</sup> In a technical cash sale, the seller did not transfer title until she received payment from the buyer.<sup>78</sup> Courts treated technical cash sales identically to common-law cash sales under the cash sale doctrine.<sup>79</sup> Thus, the Sales Act coexisted with

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<sup>72</sup> See KARL LLEWELLYN, *CASES AND MATERIALS ON THE LAW OF SALES* xvi (1930) (stating that Uniform Sales Act of 1906 "cleared away much rubbish and produced about as workable a rebuilt machine on the old model as was humanly possible"). The National Conference of Commissioners on Uniform State Laws appointed Samuel Williston to draft the Uniform Sales Act of 1906 (Sales Act). Wiseman, *supra* note 21, at 473. The "old model" to which Professor Llewellyn referred was the English Sales of Goods Act of 1893. *Id.* at 475. Williston based the Sales Act on the Sales of Goods Act of 1893. *Id.* After 15 years, only 23 jurisdictions (of a possible 53) had adopted the Sales Act. *Id.* at 474.

<sup>73</sup> See Wiseman, *supra* note 21, at 472-92 (describing Llewellyn's dissatisfaction with Uniform Sales Act of 1906 and events leading up to Uniform Sales Act of 1940, first version of modern Code).

<sup>74</sup> WILLISTON, *supra* note 1, § 343; VOLD, *supra* note 1, § 29, at 160-62. The Sales Act states that "[w]here there is an *unconditional* contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed." SALES ACT § 19, rule 1 (1906) (emphasis added). The common-law cash sale, however, is conditional. VOLD, *supra* note 1, § 29, at 162 n.75. In cash sales, common-law courts conditioned the transfer of title on payment. *Id.*; see *supra* note 40 (describing transfer of title under common-law cash sale doctrine). Thus, the Sales Act did not expressly govern conditional cash sales. VOLD, *supra* note 1, § 29, at 162 n.75; Gilmore, *supra* note 28, at 1060 n.10. The cash sale doctrine presumably endured under § 73 of the Sales Act. Gilmore, *supra* note 28, at 1060 n.10; see also SALES ACT § 73 (1906) ("In any case not provided for in this act, the rules of law and equity . . . shall continue to apply to contracts to sell and to sales of goods.").

<sup>75</sup> VOLD, *supra* note 1, § 29, at 163. The Sales Act presumed that the seller transferred title when the parties identified the goods to be sold. WILLISTON, *supra* note 1, § 343.

<sup>76</sup> VOLD, *supra* note 1, § 29, at 160 n.63; see *supra* note 74 (providing text of Sales Act § 19, rule 1).

<sup>77</sup> VOLD, *supra* note 1, § 29, at 162 n.75 (citing Gilmore, *supra* note 28, at 1060 n.10).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

the common-law cash sale doctrine from 1906 until the National Conference of Commissioners on Uniform State Laws<sup>80</sup> adopted the first Uniform Commercial Code in 1957.<sup>81</sup>

By the late 1930s, many commentators in the business, legal, and academic communities widely criticized the Sales Act.<sup>82</sup> The major criticism was that the Sales Act did not effectively respond to the commercial markets' need for flexibility in increasingly sophisticated commercial transactions.<sup>83</sup> Various drafts and official texts of the Code followed the Sales Act.<sup>84</sup> Finally, the drafters adopted the

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<sup>80</sup> In 1890, the American Bar Association (A.B.A.) created the National Conference of Commissioners on Uniform State Laws (National Conference). Wiseman, *supra* note 21, at 473 n.28. The A.B.A. created the National Conference to promote uniformity in state laws by voluntary state action. *Id.*

<sup>81</sup> See *supra* note 74 (discussing cash sale doctrine's survival under Sales Act). Although the Sales Act presumed that the seller transferred title upon delivery, title remained an important concept. See Wiseman, *supra* note 21, at 476 (stating that Sales Act did not address reality in modern sales transactions). The Sales Act instructed courts to use title to resolve numerous issues. *Id.* The location of title determined who would bear the risk of damage or loss while goods were in the seller's possession, being loaded onto a ship, or in port. *Id.* at 477. The location of title also determined the measure of damages for a seller's breach of contract. *Id.* The location of title also decided choice of law questions in interstate commerce cases. *Id.* Moreover, it governed the seller's right to replace goods and the buyer's rights to reject them. *Id.* Finally, the location of title determined the rights of third parties. *Id.*

<sup>82</sup> Wiseman, *supra* note 21, at 472. See generally *id.* at 472-92 (describing Llewellyn's dissatisfaction with Sales Act and detailing events leading up to Uniform Sales Act of 1940).

<sup>83</sup> *Id.* at 472-92; see also LLEWELLYN, *supra* note 72, at xvi (stating that Sales Act did not address commercial changes since 1906).

<sup>84</sup> In 1940, Llewellyn drafted and presented the Uniform Sales Act of 1940 to the National Conference. Wiseman, *supra* note 21, at 490-91. The Uniform Sales Act of 1940 was a "radical revision" of the 1906 Sales Act. *Id.* at 491, 501. In 1944, the National Conference and the American Law Institute agreed to co-sponsor the project. Bruce W. Frier, *Interpreting Codes*, 89 MICH. L. REV. 2201, 2201 (1991). Expansions and revisions of the Uniform Sales Act of 1940 resulted in the first Uniform Commercial Code in 1957. See MICHAEL J. EZER, UNIFORM COMMERCIAL CODE BIBLIOGRAPHY 1-6 (1972) (chronologically listing drafts and editions of Code). Elizabeth S. Kelly has compiled the nonconfidential drafts of the Code through 1962 in a 23 volume set. See AMERICAN LAW INSTITUTE & NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM COMMERCIAL CODE DRAFTS (1984).



first modern Code in 1957.<sup>85</sup> The Code set forth the requirements governing cash sales in section 2-507(2).<sup>86</sup>

The Code differs from the Sales Act and the common law in several respects. The Code eliminates the Sales Act's distinction between ordinary and technical cash sales.<sup>87</sup> The Code also abandons the title-based rationale of the cash seller's common-law reclamation right,<sup>88</sup> yet it fails to articulate an alternative rationale.<sup>89</sup> Moreover, the Code does not give the cash seller an express right to reclaim goods if the buyer's check bounces.<sup>90</sup> Because the cash seller's reclamation right is not express and its rationale is ambiguous, courts have struggled to identify the source of the Code's reclamation right.<sup>91</sup>

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<sup>85</sup> EZER, *supra* note 84, at 5.

<sup>86</sup> See U.C.C. § 2-507(2) (1990) ("Where payment is due and demanded on the delivery to the buyer of goods . . . his right as against the seller to retain or dispose of them is conditional upon his making the payment due.").

<sup>87</sup> Mann & Phillips, *supra* note 6, at 379-80.

<sup>88</sup> Mann & Phillips, *supra* note 21, at 613; see also K. N. Llewellyn, *Through Title to Contract and a Bit Beyond*, in 3 LAW: A CENTURY OF PROGRESS 1835-1935, at 80, 87 (1937) (stating that Code rejecting title-based approach was Code's greatest departure from prior sales law); *supra* notes 47-50 and accompanying text (noting Code's rejection of title-based analysis); *infra* notes 118-25 and accompanying text (discussing title's diminished role in Code).

<sup>89</sup> See U.C.C. § 2-507(2) cmt. 3 (1990) (stating that subsection (2) codifies cash seller's reclamation right and omitting reference to title). Code § 2-511(3) provides that "payment by check is conditional and is defeated as between the parties by dishonor of the check on due presentment." U.C.C. § 2-511(3) (1990). However, the check's dishonor does not return title to the seller. See U.C.C. § 2-511 cmt. 6 (1990) (stating that dishonor of check gives seller action on check and for breach of contract); U.C.C. § 2-507 cmt. 3 (1990) (stating that cash seller's reclamation right is in nature of lien). The buyer possesses voidable title after the bank dishonors her check. See *supra* note 58 (discussing voidable title). In amending Official Comment 3 to § 2-507, the P.E.B. implied that "inherent justice" was the principal rationale for the cash seller's reclamation right. See P.E.B. COMMENTARY NO. 1, *supra* note 14, at 2 (citing WILLISTON, SALES 99 (1948) (basing unpaid seller's remedy on inherent injustice of depriving her of goods when she has not been paid for them)).

<sup>90</sup> Cooper, *supra* note 12, at 99; Gross, *supra* note 6, at 938-39; see also U.C.C. § 2-507(2) (1990) (omitting express reclamation right).

<sup>91</sup> See Cooper, *supra* note 12, at 100 (acknowledging that courts are uncertain about relationship of § 2-507(2) to pre-Code common law); Gross, *supra* note 6, at 939-43 (stating that source of cash seller's common-law reclamation right has eluded courts).

*B. Identifying the Source of the Code's Reclamation Right*

Section 2-507(2) provides the closest statutory analogy to the common-law cash sale doctrine.<sup>92</sup> This section provides that payment is a condition of the buyer's right to "retain or dispose" of the goods.<sup>93</sup> Section 2-507(2), however, does not expressly provide the unpaid cash seller with a right to reclaim.<sup>94</sup> The absence of an express reclamation right seems to imply that the Code has eliminated it.<sup>95</sup> To avoid this conclusion, courts and commentators have developed different approaches to find a cash seller's reclamation right under the Code.<sup>96</sup> Some argue that the Code impliedly codifies the common-law cash sale doctrine.<sup>97</sup> Others contend that the Code disregards the common-law cash sale doctrine and replaces it

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<sup>92</sup> U.C.C. § 2-507(2) (1990) ("Where payment is due and demanded on the delivery to the buyer of goods . . . his right as against the seller to retain or dispose of them is conditional upon his making the payment due.").

Section 2-703(f) seems to provide a reclamation right for cash sellers, but courts have not interpreted the section in that way. Gross, *supra* note 6, at 938-39 n.29. Section 2-703(f) states that "[w]here the buyer . . . fails to make a payment due on or before delivery . . . the aggrieved seller may . . . cancel." U.C.C. § 2-703(f) (1990). Official Comment 3 to § 2-703 hints that the section is intended to provide an express reclamation right. Gross, *supra* note 6, at 938-39 n.29. Official Comment 3 to § 2-703 states that the phrase "fails to make payment due" covers the situation when a buyer bounces a check. U.C.C. § 2-703 cmt. 3 (1990). Generally, however, courts have rejected this view. Gross, *supra* note 6, at 938-39 n.29. Most courts have interpreted § 2-703(f) to apply only to sales agreements that are executory on both sides. *Id.*; see, e.g., *In re Samuels & Co. (Stowers v. Mahon)*, 526 F.2d 1238, 1244 (5th Cir.) (en banc) (stating that § 2-703 does not include or suggest cash seller's reclamation right), *cert. denied*, 429 U.S. 834 (1976); see also Robert Braucher, *Reclamation of Goods from a Fraudulent Buyer*, 65 MICH. L. REV. 1281, 1290 (1967) (inferring that right to "cancel" is limited to executory agreements).

<sup>93</sup> U.C.C. § 2-507(2) (1990).

<sup>94</sup> Cooper, *supra* note 12, at 99; see also *In re Samuels & Co.*, 526 F.2d at 1244 (stating that cash seller's right to reclaim under § 2-507(2) is "judicially-confected").

<sup>95</sup> See Gross, *supra* note 6, at 938-39 (observing that Code seems to eliminate cash seller's reclamation remedy while enlarging credit seller's reclamation rights).

<sup>96</sup> *Id.* at 939-40; see Cooper, *supra* note 12, at 99 (describing three methods of identifying cash seller's reclamation right).

<sup>97</sup> See *In re Samuels & Co.*, 526 F.2d at 1253 (Ainsworth, J., dissenting) (stating that Code adopts common-law distinctions between cash and credit sellers); *infra* notes 100-25 and accompanying text (discussing argument that Code codifies cash sale doctrine).

with a statutory reclamation right.<sup>98</sup> This section examines each approach and concludes that the Code replaces the common-law cash sale doctrine with a statutory reclamation right.<sup>99</sup>

### 1. Approach One: The Cash Seller's Reclamation Right from the Common-Law Cash Sale Doctrine

In an influential decision,<sup>100</sup> dissenting judges on the Fifth Circuit Court of Appeals<sup>101</sup> argued that the Code codifies the common-law cash sale doctrine.<sup>102</sup> Several commentators have written articles in support of the dissenters' view.<sup>103</sup> They contend that the Code's drafting history supports the view that the Code codifies the common-law cash sale doctrine.<sup>104</sup> According to these commentators, the drafters did not intend section 2-507(2) to replace the common-law cash sale doctrine.<sup>105</sup> They also contend that section 2-507(2) governs both ordinary and technical cash sales, which

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<sup>98</sup> See HENNING & WALLACH, *supra* note 13, ¶ 7.05 (stating that cash seller's reclamation right arises from interplay of §§ 2-507(2) and 2-511(3)); *infra* notes 126-34 and accompanying text (discussing contention that Code completely replaces common-law cash sale doctrine).

<sup>99</sup> See *infra* notes 100-38 and accompanying text (discussing alternative views of relationship between common-law cash sale doctrine and cash seller's reclamation right under Code).

<sup>100</sup> Tabac, *supra* note 21, at 430-31; Dugan, *supra* note 40, at 335-36.

<sup>101</sup> *In re Samuels & Co.*, 526 F.2d at 1249 (Ainsworth, J., dissenting).

<sup>102</sup> See *id.* (stating that Code adopts common-law distinctions between cash and credit sellers).

<sup>103</sup> See, e.g., Mann & Phillips, *supra* note 6, at 379-80 (arguing that Code codifies cash seller's common-law reclamation right); Gross, *supra* note 6, at 940-41 (arguing that Code codifies cash seller's common-law reclamation right).

<sup>104</sup> Mann & Phillips, *supra* note 6, at 379-80 (stating that drafting and legislative history indicate that § 2-507(2) preserves cash seller's common-law reclamation right). The use of prior drafts of the Code as legislative history is controversial. *Id.* at 379 n.43. An early draft of the Code barred the use of prior drafts to determine legislative intent. UNIFORM COMMERCIAL CODE: OFFICIAL DRAFT-TEXT AND COMMENTS EDITION § 1-102(3)(g) (A.L.I. & N.C.C.U.S.L. 1952). Powerful state commissions lobbied against the provision. Mann & Phillips, *supra* note 6, at 379 n.43. Later drafts omitted the prohibition. *Id.* For arguments for and against using the Code's legislative history, see NEW YORK LAW REVISION COMMISSION, A STUDY OF THE UNIFORM COMMERCIAL CODE (1955) (arguing that prohibition against using Code's legislative history has no legal precedent) and J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 10 (1970) (arguing against using Code's legislative history).

<sup>105</sup> Mann & Phillips, *supra* note 6, at 376-77.

courts treated separately under the Sales Act.<sup>106</sup> Thus, they assert, the Code implicitly codifies the common-law cash sale doctrine.<sup>107</sup>

Supporters of this approach also note several similarities between the common-law cash sale doctrine and the cash seller's reclamation right that courts enforce under the Code.<sup>108</sup> For example, like the common-law doctrine, the Code's reclamation remedy requires substantially simultaneous payment and delivery of goods.<sup>109</sup> Moreover, like the common law, the Code provides separate remedies for cash and credit sellers.<sup>110</sup> At common law, the reclamation rights of cash and credit sellers were unrelated.<sup>111</sup> Supporters of this approach note that the Code continues to distinguish between reclaiming cash and credit sellers.<sup>112</sup> Code section 2-507(2) governs the cash seller,<sup>113</sup> while section 2-702(2) governs the reclaiming credit seller.<sup>114</sup> The Code sections are not only separate

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<sup>106</sup> *Id.* at 379 (arguing that § 2-507(2) expands Sales Act provision encompassing common-law reclamation). *But see* Gross, *supra* note 6, at 942 (arguing that Code does not displace traditional common-law theory for cash seller's reclamation right).

<sup>107</sup> Mann & Phillips, *supra* note 6, at 379.

<sup>108</sup> *See In re Samuels & Co. (Stowers v. Mahon)*, 526 F.2d 1238, 1253 (5th Cir.) (en banc) (Ainsworth, J., dissenting) (listing similarities between common-law and Code reclamation rights), *cert. denied*, 429 U.S. 834 (1976); *infra* notes 109-17 and accompanying text (discussing similarities between reclamation rights under common law and Code).

<sup>109</sup> *See supra* note 7 (discussing Code's "substantially simultaneous" delivery and payment requirement).

<sup>110</sup> *See* Cooper, *supra* note 12, at 79 (stating that §§ 2-507(2) and 2-702(2) are discrete, exhaustive, and mutually exclusive); *In re Samuels & Co.*, 526 F.2d at 1253 (Ainsworth, J., dissenting) (stating that Code addresses cash and credit sales in separate provisions).

<sup>111</sup> Mann & Phillips, *supra* note 6, at 384; *see also* Gilmore, *supra* note 28, at 1060 (discussing separate development of cash and credit sales theories).

<sup>112</sup> Cooper, *supra* note 12, at 70; Mann & Phillips, *supra* note 6, at 384.

<sup>113</sup> Cooper, *supra* note 12, at 98; Mann & Phillips, *supra* note 6, at 375; Gross, *supra* note 6, at 939; *see also* U.C.C. § 2-507(2) (1990) ("Where payment is due and demanded on the delivery to the buyer of goods . . . his right as against the seller to retain or dispose of them is conditional upon his making the payment due.").

<sup>114</sup> Cooper, *supra* note 12, at 80; Gross, *supra* note 6, at 938; *see* U.C.C. § 2-702(2) (1990). That section provides:

Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery the ten-day limitation does not apply.

and worded differently,<sup>115</sup> but sections 2-507(2) and 2-702(2) impose different requirements on the reclaiming seller.<sup>116</sup> The similarities between the Code and common law bolster the view that the Code codifies the common-law doctrine.<sup>117</sup>

The view that the Code codifies the cash seller's common-law reclamation right, however, does not account for the differing approaches to the concept of title.<sup>118</sup> Under the common-law cash sale doctrine, the seller's title retention formed the basis for the unpaid cash seller's reclamation right.<sup>119</sup> The Code, however, does

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U.C.C. § 2-702(2) (1990). Section 2-702(2) addresses two related situations, but in each case, the buyer must be insolvent for the seller to reclaim. *Id.*; Cooper, *supra* note 12, at 81; Gross, *supra* note 6, at 938. First, if the buyer has not misrepresented her solvency, the seller has 10 days to reclaim the goods after the buyer receives them. U.C.C. § 2-702(2) (1990); Cooper, *supra* note 12, at 81. The unpaid seller need not physically repossess the goods within the 10-day limit, but she must make a written demand for their return. Cooper, *supra* note 12, at 82-83; Gross, *supra* note 6, at 938 n.25. Second, if the buyer has misrepresented her solvency in writing within three months preceding delivery, the seller may reclaim the goods at any time. U.C.C. § 2-702(2) (1990); Cooper, *supra* note 12, at 81. Official Comment 2 to § 2-702 states that the written misrepresentation must be addressed to the particular seller and dated within three months of delivery. U.C.C. § 2-702 cmt. 2 (1990). *But see In re Bel Air Carpets*, 452 F.2d 1210 (9th Cir. 1971) (rejecting Comment 2 and holding that date of writing is irrelevant; writing need only be presented to seller within three months of delivery).

Some courts have held that a check qualifies as a written misrepresentation of solvency. *See, e.g., Amoco Pipeline v. Admiral Crude Oil*, 490 F.2d 114, 117 (10th Cir. 1974); *Theo. Hamm Brewing v. First Trust & Sav. Bank*, 242 N.E.2d 911, 915 (Ill. App. Ct. 1968). *Hamm Brewing* required that the seller have actually considered the check a representation of solvency at the time she accepted it. *Hamm Brewing*, 242 N.E.2d at 914; *see also In re Fairfield Elevator Co.*, 14 U.C.C. Rep. Serv. (Callaghan) 96, 107-08 (S.D. Iowa 1973) (implying that check is not written misrepresentation of solvency within meaning of § 2-702(2) without proof that parties relied on check as representation of solvency).

<sup>115</sup> Gross, *supra* note 6, at 940.

<sup>116</sup> Compare U.C.C. § 2-507(2) (1990) (imposing delivery and payment requirements on cash seller) with U.C.C. § 2-702(2) (1990) (imposing insolvency and time limit requirements on credit seller's reclamation). *See supra* note 109 and accompanying text (describing § 2-702(2)'s requirements for reclamation).

<sup>117</sup> *See supra* notes 108-16 and accompanying text (noting that Code continues common-law distinctions between cash and credit seller reclamation).

<sup>118</sup> Gross, *supra* note 6, at 940-41.

<sup>119</sup> *See supra* notes 40-49 and accompanying text (discussing seller's title retention as rationale for reclamation under cash sale doctrine).

not base the cash seller's reclamation right on the seller retaining title.<sup>120</sup> In fact, the Code expressly rejects title as legally significant.<sup>121</sup> Under the Code, both cash and credit sellers automatically relinquish title once the parties identify the goods to be sold.<sup>122</sup> Thus, the cash buyer under the Code acquires title before the seller receives payment.<sup>123</sup>

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<sup>120</sup> Cooper, *supra* note 12, at 70-71; 3 SQUILLANTE & FONSECA, *supra* note 47, § 23-2, at 325.

<sup>121</sup> Tabac, *supra* note 21, at 408; *see also* U.C.C. § 2-401(1) (1990) ("Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest."); Gross, *supra* note 6, at 940 (stating that § 2-401 expressly rejects "title-based approach"). The Code abandoned the "lump-title" concept. 3 SQUILLANTE & FONSECA, *supra* note 47, § 23-2, at 324. "Lump-title" is a pejorative term coined by Karl Llewellyn. *See id.* at 323-24 (stating derivation of term "lump-title"). The term derides the Sales Act's use of title to "govern every point which it can be made to govern." Llewellyn, *supra* note 88, at 87; *see also* Wiseman, *supra* note 21, at 477 (listing various uses of title under Sales Act of 1906).

Llewellyn, the principle drafter of Article 2, and others put forward three main criticisms of the concept of title. HILLMAN ET AL., *supra* note 9, ¶ 5.01. First, the location of title depends on the parties' intentions, which are often unclear. *Id.* Second, courts can easily manipulate title to reach the results that they prefer. *Id.* Finally, the concept of title becomes unworkable as transactions become more complex. *Id.* For these reasons, the Code drafters restricted the use of title to a few, limited instances. 3 SQUILLANTE & FONSECA, *supra* note 47, § 23-2 n.18, at 326-27; *see also* Cooper, *supra* note 12, at 70-71 (stating that no Code section involving reclamation rights of unpaid sellers directly mentions title). Those provisions are the following: § 2-106 (defining "sale"); § 2-312 (warranty of title); § 2-326 (sale or return); § 2-327 (sale or approval); § 2-401 (passing of title); § 2-403 (insurable interests); and § 2-722 (liability of third person for injury to goods). HILLMAN ET AL., *supra* note 9, ¶¶ 5.01, 5.03; 3 SQUILLANTE & FONSECA, *supra* note 47, § 23-2 n.18, at 327.

<sup>122</sup> *See* U.C.C. § 2-401 cmt. 4 (1990) (stating that title passes when seller commits to sell specific goods); *In re Samuels & Co. (Stowers v. Mahon)*, 526 F.2d 1238, 1246 (5th Cir.) (en banc) (stating that Code's prohibition applies equally to credit and cash transactions), *cert. denied*, 429 U.S. 834 (1976).

<sup>123</sup> *See* U.C.C. § 2-403(1)(b) (1990) (providing that buyer acquires voidable title if delivery was in exchange for subsequently dishonored check). Under the Code, the doctrine of voidable title permits the cash seller to void the contract for sale and to reclaim the goods. HONNOLD ET AL., *supra* note 21, at 25; Tabac, *supra* note 21, at 423; Gross, *supra* note 6, at 943. Voidable title arises when the buyer fraudulently induces the seller to part with possession of the goods. HONNOLD ET AL., *supra* note 21, at 25; Tabac, *supra* note 21, at 423; Gross, *supra* note 6, at 943. The seller's option to void the sale remains open until the buyer resells the goods to a good faith purchaser for value. HONNOLD ET AL., *supra* note 21, at 25-26; Tabac, *supra* note 21, at 422; Gross, *supra* note 6, at 943; *see supra* note 58 (discussing voidable title and good faith

By repudiating the role of title, the Code directly conflicts with the common-law cash sale doctrine.<sup>124</sup> If the cash seller does not retain title, the foundation of the doctrine collapses.<sup>125</sup> This fundamental conflict over the role of title undermines the contention that the Code codifies the common-law cash sale doctrine.

## 2. Approach Two: The Cash Seller's Reclamation Right from the Code Itself

Alternatively, some courts<sup>126</sup> and commentators<sup>127</sup> contend that the cash seller's reclamation right stems from the Code itself. Many courts have found the reclamation right inherent in section 2-507(2) when considering that section in conjunction with section 2-511(3).<sup>128</sup> Under section 2-511(3), a check is only conditional payment until the bank cashes the check.<sup>129</sup> If the bank refuses to cash

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purchaser for value under common law); *supra* note 28 (describing good faith purchaser for value). For an examination of the doctrine of voidable title, see generally HONNOLD ET AL., *supra* note 21, at 25-27 and Gross, *supra* note 6, at 943-44.

<sup>124</sup> See *supra* notes 40-50 and accompanying text (discussing role of title under cash sale doctrine). *But see* Dugan, *supra* note 40, at 342 (arguing that Code limited its rejection of cash sale doctrine to case law giving seller priority over subsequent good-faith purchasers).

<sup>125</sup> See *supra* notes 40-45 and accompanying text (discussing rationale of cash sale doctrine).

<sup>126</sup> Many courts have found the cash seller's reclamation right inherent or implicit in §§ 2-507(2) and 2-511(3). See, e.g., Szabo v. Vinton Motors, 630 F.2d 1, 3 (1st Cir. 1980) (inherent); Citizens Bank v. Taggart, 191 Cal. Rptr. 729, 732 (Ct. App. 1983) (inherent); Genesee Merchants Bank & Trust v. Tucker Motor Sales, 372 N.W.2d 546, 548 n.1 (Mich. Ct. App. 1985) (implicit); Ranchers & Farmers Livestock Auction v. First State Bank, 531 S.W.2d 167, 169 (Tex. Ct. App. 1975) (inherent).

<sup>127</sup> Commentators have also found the cash seller's reclamation right inherent in §§ 2-507(2) and 2-511(3). See, e.g., HENNING & WALLACH, *supra* note 13, ¶ 7.05; Cooper, *supra* note 12, at 100; Mann & Phillips, *supra* note 6, at 375.

<sup>128</sup> See, e.g., Szabo v. Vinton Motors, 630 F.2d at 3 (stating that reclamation right is inherent in §§ 2-507(2) and 2-511(3) taken together); Citizens Bank v. Taggart, 191 Cal. Rptr. at 731 (stating that §§ 2-507 and 2-511 taken together give rise to cash seller's reclamation right); Genesee Merchants Bank & Trust v. Tucker Motor Sales, 372 N.W.2d at 548 n.1 (stating that cash seller's right to reclaim is implicit in § 2-507(2)); Ranchers & Farmers Livestock Auction v. First State Bank, 531 S.W.2d at 169 (stating that seller's right to reclaim interpreted Virginia's version of U.C.C. §§ 2-507 and 2-511); see also U.C.C. § 2-511(3) (providing that "payment by check is conditional and is defeated as between the parties by dishonor of the check on due presentment").

<sup>129</sup> U.C.C. § 2-511(3) (1990); HENNING & WALLACH, *supra* note 13, ¶ 7.05.

the check, the buyer fails to meet the condition.<sup>130</sup> Under section 2-507(2), the buyer's right to keep and to dispose of the goods is predicated on her making payment.<sup>131</sup> Therefore, if the check bounces, the buyer forfeits her right to retain and to dispose of the goods.<sup>132</sup> Accordingly, these courts and commentators argue that in light of section 2-511(3), the unpaid cash seller must have the right to reclaim the goods.<sup>133</sup> In essence, any reclamation right that cash sellers possess stems from the Code, not from the common law.<sup>134</sup>

In summary, approach one fails to satisfactorily identify the source of the cash seller's reclamation right under the Code. By rejecting the legal significance of title, the Code's drafters rejected the common-law cash sale doctrine's rationale.<sup>135</sup> This rejection of title weakens the argument that section 2-507(2) codifies the common-law cash sale doctrine.<sup>136</sup> Consequently, most courts use the second approach to identify the cash seller's reclamation right.<sup>137</sup> Most courts infer the reclamation right by considering sections 2-507(2) and 2-511(3) concurrently.<sup>138</sup> For reasons that remain unknown, the cash seller's reclamation right does not appear in the text of either provision.<sup>139</sup> Because courts continue their struggle to identify the source of the cash seller's reclamation right,<sup>140</sup> the P.E.B. should revise the Code to explicitly recognize the reclamation right.<sup>141</sup>

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<sup>130</sup> See sources cited *supra* note 129.

<sup>131</sup> U.C.C. § 2-507(2) (1990); HENNING & WALLACH, *supra* note 13, ¶ 7.05.

<sup>132</sup> HENNING & WALLACH, *supra* note 13, ¶ 7.05.

<sup>133</sup> *Id.*

<sup>134</sup> See *supra* notes 40-55 and accompanying text (describing rationale of cash seller's reclamation right under cash sale doctrine).

<sup>135</sup> See *supra* notes 118-25 and accompanying text (discussing Code's rejection of title-based rationale).

<sup>136</sup> See *supra* notes 40-45 and accompanying text (describing role of title in cash sale doctrine); *supra* notes 118-25 and accompanying text (describing role of title in Code).

<sup>137</sup> Mann & Phillips, *supra* note 6, at 375; see cases cited *supra* note 126 (providing representative list of cases in which courts inferred cash seller's reclamation right from §§ 2-507(2) and 2-511(3)).

<sup>138</sup> Mann & Phillips, *supra* note 6, at 375.

<sup>139</sup> See U.C.C. § 2-507(2) (1990) (omitting reference to reclamation right); U.C.C. § 2-511(3) (1990) (omitting reference to reclamation right).

<sup>140</sup> See *supra* notes 96-138 and accompanying text (describing alternative sources for cash seller's reclamation right).

<sup>141</sup> See *infra* text accompanying note 251 (setting out text of proposed Code amendment).



## II. THE CASH SELLER'S TEN-DAY LIMIT

The text of section 2-507(2) is silent on whether the cash seller has a reclamation right<sup>142</sup> and what time limits might apply to the cash seller's exercise of this right.<sup>143</sup> Prior to 1990, most courts that applied section 2-507(2) improperly enforced Official Comment 3's ten-day limit.<sup>144</sup> However, at least two courts rejected the ten-day limit because the text of section 2-507(2) did not support the restriction.<sup>145</sup> The split in authority brought the issue of the ten-day limit to the attention of the P.E.B.

In 1990, the P.E.B. resolved the conflict when it removed the ten-day limit from Official Comment 3 and substituted a common-law reasonableness standard.<sup>146</sup> The P.E.B. articulated two reasons for removing the time limit.<sup>147</sup> First, the P.E.B. noted that the text of section 2-507(2) did not support the restriction.<sup>148</sup> Official Comment 3 incorporated the ten-day limit by explicitly referring to section 2-702(2),<sup>149</sup> which expressly grants a reclamation right to the

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<sup>142</sup> See U.C.C. § 2-507(2) (1990) (omitting reference to reclamation right).

<sup>143</sup> See U.C.C. § 2-511(3) (1990) (omitting reference to reclamation right).

<sup>144</sup> See P.E.B. COMMENTARY NO. 1, *supra* note 14, at 3-4 (stating that § 2-507(2) and its Official Comment 3 were inconsistent and caused courts to make incorrect rulings); *Szabo v. Vinton Motors*, 630 F.2d 1, 3 (1st Cir. 1980) (stating that prior courts had uniformly imposed 10-day limit). Many courts enforced the 10-day limit. See, e.g., *Szabo*, 630 F.2d at 3-4 (discussed *infra* notes 193-216 and accompanying text); *Sorrels v. Texas Bank & Trust Co.*, 597 F.2d 997, 1000 (5th Cir. 1979); *In re Samuels & Co. (Stowers v. Mahon)*, 526 F.2d 1238, 1245 (5th Cir.) (en banc) (discussed *infra* notes 170-92 and accompanying text), *cert. denied*, 429 U.S. 834 (1976); *Holiday Rambler v. Morris*, 32 U.C.C. Rep. Serv. (Callaghan) 1222, 1225 (D. Kan. 1981), *aff'd sub nom.*, *Holiday Rambler v. First National Bank and Trust Co.*, 723 F.2d 1449 (10th Cir. 1983).

<sup>145</sup> See *Burk v. Emmick*, 637 F.2d 1172, 1175-76 (8th Cir. 1980) (refusing to enforce 10-day limit because text of § 2-507(2) did not support restriction); *Citizens Bank v. Taggart*, 191 Cal. Rptr. 729, 732 (Ct. App. 1983) (refusing to enforce 10-day limit because text of § 2-507(2) did not support restriction); *infra* notes 217-34 and accompanying text (discussing *Burk* and noting *Taggart*).

<sup>146</sup> See *infra* notes 235-41 and accompanying text (discussing P.E.B.'s revision of Official Comment 3 to § 2-507).

<sup>147</sup> See P.E.B. COMMENTARY NO. 1, *supra* note 14, at 3-4 (stating two reasons for eliminating 10-day limit); *infra* notes 242-47 (discussing P.E.B.'s reasons for removing 10-day limit).

<sup>148</sup> P.E.B. COMMENTARY NO. 1, *supra* note 14, at 3.

<sup>149</sup> *Id.*; U.C.C. § 2-507 cmt. 3 (1990); Gross, *supra* note 6, at 940.

credit seller.<sup>150</sup> By eliminating the cross-reference to section 2-702(2) and the ten-day limit, the P.E.B. restricted Official Comment 3 to its proper role of supporting the text of section 2-507(2).<sup>151</sup>

The Official Comments to the Code do not have the force of law,<sup>152</sup> they supplement the Code's text.<sup>153</sup> Courts should not give Official Comments the same persuasive authority as legislative history because they do not necessarily reflect the intent of the state legislatures that enacted the Code.<sup>154</sup> However, the Official Comments do serve two important functions.<sup>155</sup> First, the Official Comments fill gaps within the sketchy framework of the Code.<sup>156</sup> Second, the Official Comments guide courts in applying the Code by explaining the policies and rationales behind the various provisions.<sup>157</sup>

The former Comment 3 went beyond its proper gap-filling and explicative functions<sup>158</sup> by imposing restrictions that section 2-507(2)'s text did not support.<sup>159</sup> Former Official Comment 3 established a ten-day period during which the cash seller could exercise her reclamation remedy.<sup>160</sup> Former Official Comment 3 borrowed the ten-day limit by cross-reference to section 2-702(2), which gov-

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<sup>150</sup> *In re* Fairfield Elevator Co., 14 U.C.C. Rep. Serv. (Callaghan) 96, 107 (S.D. Iowa 1973); see U.C.C. § 2-702(2) (1990) (discussed *supra* note 116).

<sup>151</sup> P.E.B. COMMENTARY NO. 1, *supra* note 14, at 3-4.

<sup>152</sup> Mann & Phillips, *supra* note 6, at 383; see *Burk v. Emmick*, 637 F.2d 1172, 1175 n.5 (8th Cir. 1980) (stating that Official Comments cannot impose constraints not found in text).

<sup>153</sup> Mann & Phillips, *supra* note 6, at 383; see Sean M. Hannaway, Note, *The Jurisprudence and Judicial Treatment of the Comments to the Uniform Commercial Code*, 75 CORNELL L. REV. 962, 967 (1990) (discussing functions of Official Comments).

<sup>154</sup> J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 13 (3d ed. 1988).

<sup>155</sup> See Hannaway, *supra* note 153, at 967 (discussing functions of Official Comments).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 975.

<sup>159</sup> P.E.B. COMMENTARY NO. 1, *supra* note 14, at 3. Courts should not have followed this Official Comment because it overstepped its proper interpretive role. Hannaway, *supra* note 153, at 975-76. In the absence of an applicable Code provision, courts should have applied the common-law standard of reasonableness. *Id.* at 976; P.E.B. COMMENTARY NO. 1, *supra* note 14, at 4.

<sup>160</sup> U.C.C. § 2-507 cmt. 3 (1987) (amended 1990). The former Comment 3 provided: "The provision of this Article [in § 2-702(2)] for a 10-day limit within which the seller may reclaim goods delivered on credit to an insolvent buyer is also applicable here." *Id.*

erns credit sellers.<sup>161</sup> Accordingly, most courts that applied section 2-507(2) adopted the ten-day limit.<sup>162</sup> Courts required cash sellers, like credit sellers,<sup>163</sup> to exercise their reclamation remedy within ten days of the goods' delivery.<sup>164</sup>

In articulating its second justification for removing the time limit, the P.E.B. reasoned that there was no need for a specific time limit.<sup>165</sup> The P.E.B.'s reasoning, however, does not adequately address the policy arguments in favor of the ten-day limit.<sup>166</sup> This Part describes the history of the ten-day limit<sup>167</sup> and discusses the potential dangers of replacing the limit with a common-law reasonableness standard.<sup>168</sup> This Part also suggests that the P.E.B. should expressly reinstate the ten-day limit.<sup>169</sup>

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<sup>161</sup> See U.C.C. § 2-507 cmt. 3 (1987) (amended 1990) (providing cross-reference to § 2-702(2)).

<sup>162</sup> See *Szabo v. Vinton Motors*, 630 F.2d 1, 3 (1st Cir. 1980) (stating that courts have consistently held that cash seller's reclamation right was subject to 10-day limit referred to in Comment 3). *But see* *Burk v. Emmick*, 637 F.2d 1172, 1175 n.6 (8th Cir. 1980) (refusing to impose 10-day limit); *infra* notes 217-34 and accompanying text (discussing *Burk*).

<sup>163</sup> See U.C.C. § 2-702(2) (1990) ("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 . . .").

<sup>164</sup> See, e.g., *Szabo*, 630 F.2d at 4 (discussed *infra* notes 193-216 and accompanying text); *In re Samuels & Co. (Stowers v. Mahon)*, 526 F.2d 1238, 1245 (5th Cir.) (en banc) (discussed *infra* notes 170-92 and accompanying text), *cert. denied*, 429 U.S. 834 (1976).

<sup>165</sup> P.E.B. COMMENTARY NO. 1, *supra* note 14, at 4.

<sup>166</sup> See *infra* notes 242-49, 278-320 (discussing arguments in favor of 10-day limit).

<sup>167</sup> See *infra* notes 170-216 and accompanying text (discussing former Comment 3's 10-day limit).

<sup>168</sup> See *infra* notes 217-41 and accompanying text (discussing common-law reasonableness standard of post-1990 Comment 3).

<sup>169</sup> See *infra* notes 242-49 and accompanying text (arguing that P.E.B. should reinstate 10-day limit).

### A. *Samuels and Szabo: Enforcing the Ten-Day Limit*

In the prominent case<sup>170</sup> of *In re Samuels*,<sup>171</sup> the Fifth Circuit Court of Appeals applied the ten-day limit,<sup>172</sup> holding that the limit was an absolute requirement.<sup>173</sup> *Samuels* involved cattle sellers that were seeking to reclaim the proceeds from cattle they had sold to Samuels & Co.<sup>174</sup> The company had paid fifteen cattle sellers with checks, expecting the checks to be paid from the firm's credit line.<sup>175</sup> Due to Samuels' financial difficulties, the firm's financier terminated Samuels' line of credit before paying the checks.<sup>176</sup>

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<sup>170</sup> See Tabac, *supra* note 21, at 425 (describing *Samuels* as "notorious case"). The procedural history of *Samuels* is daunting. The unpaid cattle sellers prevailed in bankruptcy, but lost in the United States District Court of Appeals for the Northern District of Texas. *Id.* at 425 n.108. The Fifth Circuit Court of Appeals reversed the district court decision and, like the bankruptcy court, held for the cattle sellers. *In re Samuels & Co. (Stowers v. Mahon)*, 483 F.2d 557, 559 (5th Cir. 1973). The Supreme Court reversed on other grounds and remanded the case to the court of appeals. *Mahon v. Stowers*, 416 U.S. 100, 114 (1974) (per curiam).

On remand, the Fifth Circuit again held for the cattle sellers. *In re Samuels & Co. (Stowers v. Mahon)*, 510 F.2d 139, 153 (5th Cir. 1975). Judge Godbold wrote a stinging dissent. *Id.* at 154-60; see *infra* notes 187-92 and accompanying text (discussing Judge Godbold's dissent). A deeply divided Fifth Circuit, sitting en banc, reversed per curiam. *In re Samuels & Co. (Stowers v. Mahon)*, 526 F.2d 1238, 1241 (5th Cir. 1976) (en banc); Tabac, *supra* note 21, at 430. The Fifth District affirmed the district court's judgment and adopted Judge Godbold's dissent in its entirety. *In re Samuels & Co.*, 526 F.2d at 1241. Five judges dissented. *Id.* at 1249-57; see *infra* note 192 (discussing dissent). The Supreme Court denied certiorari. *Stowers v. Mahon*, 429 U.S. 834 (1976).

Ultimately, Congress amended the Packers and Stockyards Act of 1921 to grant sellers priority. Tabac, *supra* note 21, at 425-26 n.108. See generally *id.* (describing procedural history of *Samuels*).

<sup>171</sup> *In re Samuels & Co. (Stowers v. Mahon)*, 526 F.2d 1238 (5th Cir. 1976) (en banc), *rev'g sub nom.*, *Stowers v. Mahon*, 483 F.2d 577 (5th Cir. 1973), *cert. denied*, 429 U.S. 834 (1976).

<sup>172</sup> *In re Samuels & Co.*, 526 F.2d at 1245.

<sup>173</sup> *Id.*

<sup>174</sup> *In re Samuels & Co. (Stowers v. Mahon)*, 483 F.2d 557, 559 (5th Cir. 1973), *rev'd*, 416 U.S. 100 (1974), *on remand*, 510 F.2d 139 (5th Cir. 1975), *rev'd per curiam*, 526 F.2d 1238 (5th Cir. 1975) (en banc), *and cert. denied*, 429 U.S. 834 (1976).

Samuels & Co. was a meat-packing firm. Dugan, *supra* note 40, at 337.

<sup>175</sup> Dugan, *supra* note 40, at 338.

<sup>176</sup> *In re Samuels & Co. (Stowers v. Mahon)*, 526 F.2d 1238, 1244 (5th Cir.) (en banc), *cert. denied*, 429 U.S. 834 (1976). The C.I.T. Corporation (C.I.T.) financed Samuels' operations by advancing funds to cover the firm's checks. Dugan, *supra* note 40, at 338. When the firm's business deteriorated, C.I.T. stopped advancing funds, and Samuels' checks to 15 cattle sellers bounced.

Samuels immediately filed for bankruptcy,<sup>177</sup> and all of the checks bounced.<sup>178</sup> A year after Samuels filed for bankruptcy, the cattle sellers sought to exercise their reclamation rights against Samuels' trustee in bankruptcy.<sup>179</sup>

On *Samuels'* third hearing before the Fifth Circuit, the court of appeals ruled against the cattle sellers.<sup>180</sup> Judge Godbold's<sup>181</sup> original dissent,<sup>182</sup> now representing the majority, first determined

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*Id.* C.I.T.'s advances to Samuels totaled one million dollars. *In re Samuels & Co.*, 526 F.2d at 1244.

<sup>177</sup> Dugan, *supra* note 40, at 338.

<sup>178</sup> Tabac, *supra* note 21, at 426; Gross, *supra* note 6, at 945.

<sup>179</sup> See sources cited *supra* note 178.

<sup>180</sup> *In re Samuels & Co.*, 526 F.2d at 1238.

<sup>181</sup> Judge John C. Godbold is now a senior circuit judge on the Eleventh Circuit Court of Appeals. Dale R. Crider, *Resume Fraud Complicates Firing Claims*, NAT'L L.J., Dec. 7, 1992, at 17. He was appointed to the federal bench in 1966, and is the only judge to serve as chief judge on two different circuit courts of appeals. Robert B. McNeil, STATES NEWS SERVICE, Sept. 2, 1988, available in LEXIS, News Library, States News Service File. He served as chief judge of the Fifth Circuit Court of Appeals from February 2, 1981 until the circuit was divided on September 30, 1981. *Id.* When the Eleventh Circuit Court of Appeals was created, Judge Godbold became its chief judge. *Id.* In 1987, Judge Godbold became the director of the Federal Judicial Center, a research, development, and educational agency of the federal courts. Warren Burger, *Public Needs Whole Story on Salaries*, U.S.A. TODAY, Mar. 31, 1989, at 9A; *G.O.P. Picks Candidate for Appeals Court*, U.P.I., May 14, 1987, available in LEXIS, News Library, U.P.I. State and Regional Wires Archive File. Shortly after assuming that post, Judge Godbold acquired senior status. *U.S. Appeals Judge Retires*, N.Y. TIMES, Oct. 24, 1987, § 1, at 8. He retired as director of the Federal Judicial Center in 1990, having reached the mandatory retirement age of 70. Steven Labaton, *Where Rookies Are Turned Into Federal Judges*, N.Y. TIMES, Mar. 2, 1990, § B, at 8.

Outside of the legal community, Judge Godbold is probably most well known for chairing the panel that recommended that Congress impeach former U.S. District Judge Alcee Hastings. See *Hastings Says No New Evidence Against Him*, U.P.I., Jan. 16, 1987, available in LEXIS, News Library, U.P.I. State and Regional Wires Archive File (discussing panel's recommendation that Congress impeach Judge Hastings). For a more detailed discussion of Judge Godbold's controversial role in that process, see Fred Strasser, *The Battle of Hastings*, NAT'L L.J., June 13, 1988, at 7-8.

<sup>182</sup> In the introduction to his dissent, Judge Godbold sternly rebuked the majority for being led by its sympathies for the "little fellows," the cattle sellers. *In re Samuels & Co.*, 526 F.2d at 1242. He pondered what the majority would do if the next seller were not sympathetic, but rather a large corporation. *Id.* His warning was sharp: "Doing what seems fair is heady stuff . . . Today's heady draught may give the majority a euphoric feeling, but it can produce tomorrow's hangover." *Id.*

whether the cattle sellers had a reclamation right under the Code.<sup>183</sup> He reluctantly<sup>184</sup> acknowledged that they did.<sup>185</sup> Judge Godbold based the cattle seller's reclamation right on a long-standing<sup>186</sup> and improper<sup>187</sup> judicial interpretation of Official Comment 3 to Code section 2-507(2), not on the Code itself.<sup>188</sup> Judge Godbold then examined what limitations applied to the cattle sellers in exercising their reclamation rights.<sup>189</sup> He concluded that Official Comment 3 must limit the reclamation right.<sup>190</sup> He found that neither the Code nor the Official Comments provided an exception to the ten-day limit.<sup>191</sup> Therefore, the cattle sellers had lost their claim to the carcasses and any proceeds from their sale.<sup>192</sup>

Like the Fifth Circuit in *Samuels*, the First Circuit Court of Appeals also chose to impose the ten-day limit in *Szabo v. Vinton Motors*.<sup>193</sup> In *Szabo*, Vinton Motors sold and delivered a car to Bell Oldsmobile.<sup>194</sup> At delivery, Bell gave Vinton Motors a check for the full purchase price.<sup>195</sup> Five days later, Bell filed for bankruptcy.<sup>196</sup>

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<sup>183</sup> See *In re Samuels & Co.*, 526 F.2d at 1244 (stating that cash seller's reclamation right is "judicially-confected").

<sup>184</sup> *Id.* at 1245. Judge Godbold was reluctant to acknowledge the cash seller's reclamation right because the Code did not expressly grant it. *Id.* at 1244-45.

<sup>185</sup> *Id.* at 1244 (stating that cash seller's reclamation right is "judicially-confected"). Judge Godbold stated that the reclamation right was not a product of the Code, but rather a result of judicial interpretation of Official Comment 3. *Id.* at 1245.

<sup>186</sup> *Id.* at 1244.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 1245.

<sup>190</sup> *Id.* at 1244.

<sup>191</sup> *Id.* at 1245.

<sup>192</sup> *Id.* at 1248. In a sharp dissent, the minority accused the majority of applying the Code's credit sale provisions to a cash transaction. *Id.* at 1253 (Ainsworth, J., dissenting). Although the seller delayed a year before seeking reclamation, the dissent maintained that absolute ownership could not pass to the buyer until payment was completed. *Id.* at 1253. The dissent charged that the majority opinion could not survive logic or the provisions of the Code. *Id.* at 1257.

<sup>193</sup> 630 F.2d 1 (1st Cir. 1980).

<sup>194</sup> *Id.* at 1. Vinton Motors delivered a 1977 Regency Oldsmobile to Bell on February 18, 1977. *Id.*

<sup>195</sup> *Id.* Simultaneous with delivery, Vinton Motors received Bell's check for \$7,590.30. *Id.*

<sup>196</sup> *Id.* On February 23, Bell assigned all of its assets to an assignee for the benefit of its creditors. *Id.* The next day, Bell's assignee withdrew all of Bell's funds from its account. *Id.* at 2.

Bell's check bounced.<sup>197</sup> Within ten days of receiving notice of the bounced check from the bank, Vinton Motors sought to exercise its reclamation right against Bell's trustee in bankruptcy.<sup>198</sup>

The bankruptcy court ruled that Vinton Motors had a right to reclaim under section 2-507(2), but chose to disregard Official Comment 3.<sup>199</sup> The bankruptcy court refused to enforce the ten-day limit because the text of section 2-507(2) did not unambiguously impose it.<sup>200</sup> The bankruptcy court held that the Code allowed Vinton Motors a reasonable time to reclaim the goods once it received notice from the bank that the check had bounced.<sup>201</sup> The court further ruled that ten days was a reasonable time.<sup>202</sup> Accordingly, the bankruptcy court awarded Vinton Motors the proceeds from the sale of the car.<sup>203</sup>

On appeal, the United States District Court for the District of Massachusetts affirmed the bankruptcy court's decision.<sup>204</sup> Although Vinton did not attempt to reclaim the car within ten days of delivery,<sup>205</sup> the court still awarded Vinton Motors the proceeds from the sale.<sup>206</sup> The district court ruled that the ten-day period ran from the date Vinton Motors had learned about the bounced check, not from the date Vinton Motors delivered the car to Bell.<sup>207</sup> The court reasoned that Vinton Motors could not lose its right to

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<sup>197</sup> *Id.* Vinton Motors deposited Bell's check on February 22. *Id.* at 1. At that time, Bell had sufficient funds in its account to cover the check. *Id.* at 2. On March 1, Vinton Motors received a written notice from its bank that Bell's check had bounced. *Id.* Within 10 days of receiving the notice from its bank, Vinton Motors demanded that Bell return the car. *Id.*

<sup>198</sup> *Id.* at 1. Vinton was reclaiming the proceeds from the sale of the car. *Id.* Szabo was Bell's trustee in bankruptcy. *Id.*

<sup>199</sup> *Id.* at 2. The court chose to disregard Comment 3 for two reasons. *Id.* First, the 10-day limitation would conflict with the common-law cash sale doctrine. *Id.* Second, the notification of a check's dishonor normally took more than 10 days. *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* The bankruptcy court held that a cash seller could reclaim within a reasonable time of actual notice. *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 3.

<sup>207</sup> *See id.* at 2 (stating that 10-day limitation runs from date seller receives written notice of check's dishonor).

reclaim before it knew that the check had bounced.<sup>208</sup> Accordingly, the district court upheld the award of proceeds to Vinton Motors.<sup>209</sup>

The First Circuit reversed, holding that the ten-day limit ran from the date of delivery.<sup>210</sup> Because Vinton Motors did not demand the car back within ten days of delivery, the court ruled that Vinton Motors had waived its reclamation right.<sup>211</sup> In dicta, the court also addressed the bankruptcy court's reasonableness standard.<sup>212</sup> The First Circuit noted that the ten-day limit provided greater certainty than the common-law reasonableness standard.<sup>213</sup> The court also observed that imposing the ten-day limit on cash sellers was no harsher than the ten-day limit that section 2-702(2) imposed on credit sellers.<sup>214</sup> The court stated that the ten-day limit was an incentive for sellers to cash checks quickly<sup>215</sup> and take other precautions.<sup>216</sup>

#### B. *Burk v. Emmick: The Common-Law Reasonableness Standard*

Other courts confronted with the issue of whether to enforce the ten-day limit have reached a different result. In *Burk v. Emmick*,<sup>217</sup> the Eighth Circuit Court of Appeals adopted the common-law reasonableness standard<sup>218</sup> that the First Circuit rejected in *Szabo*.<sup>219</sup> Burk sold 950 head of cattle to Emmick in return for a sight draft<sup>220</sup> drawn on a specified bank.<sup>221</sup> The bank orally confirmed to Burk that Emmick had sufficient funds in his account to cover the sight

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<sup>208</sup> *Id.* at 2-3. The court reasoned that a seller should not lose her reclamation right before she knew that reclamation was called for. *Id.*

<sup>209</sup> *Id.* at 3.

<sup>210</sup> *Id.* at 4.

<sup>211</sup> *Id.* at 1-2.

<sup>212</sup> *Id.* at 4.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 4 n.3.

<sup>215</sup> *Id.* at 4.

<sup>216</sup> *Id.* The court suggested that Vinton Motors could have required a certified check. *Id.* The court cautioned that a cash seller who fails to take precautions does so at her own risk. *Id.*; see *infra* note 273 (defining certified check).

<sup>217</sup> 637 F.2d 1172 (8th Cir. 1980).

<sup>218</sup> *Id.* at 1176.

<sup>219</sup> See *Szabo v. Vinton Motors*, 630 F.2d 1, 4 (1st Cir. 1980) (rejecting reasonableness standard).

<sup>220</sup> A sight draft is a financial instrument payable on demand. BLACK'S LAW DICTIONARY 1381 (6th ed. 1990).

<sup>221</sup> *Burk*, 637 F.2d at 1173. The sight draft covered most of the purchase price. *Id.* Emmick covered the balance of the purchase price with a personal



draft.<sup>222</sup> When Burk presented the sight draft to the bank, however, the bank refused to honor it.<sup>223</sup> More than ten days later, Burk reclaimed the cattle and resold them for less than Emmick's purchase price.<sup>224</sup> Burk then sued Emmick to recover the difference.<sup>225</sup> Burk also sued the bank on the theory of promissory estoppel.<sup>226</sup> Burk won judgments against Emmick and the bank in the United States District Court for the Northern District of Iowa.<sup>227</sup>

On appeal, the bank argued that Burk had not properly reclaimed the cattle.<sup>228</sup> Specifically, the bank pointed out that Burk did not demand return of the cattle within ten days of delivery to Emmick.<sup>229</sup> The Eighth Circuit declined to disturb the jury verdict,<sup>230</sup> holding that the ten-day limit was unnecessary.<sup>231</sup> Instead, the court adopted the reasonableness standard.<sup>232</sup> The court tested the reasonableness of Burk's reclamation by determining whether Burk's delay in reclaiming the cattle had prejudiced either Emmick or the bank.<sup>233</sup> The court concluded that the delay had not harmed Emmick or the bank and ruled that Burk's reclamation was not unreasonable.<sup>234</sup>

In 1990, the P.E.B. amended Comment 3 and eliminated the ten-day limit.<sup>235</sup> The P.E.B., concluding that the restriction was unne-

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note. *Id.* The bank, Northwestern National Bank of Sioux City, was a codefendant. *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* Emmick also did not honor his personal note. *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* In a jury trial, Burk recovered \$19,300 from Emmick on the theory of breach of contract. *Id.* Burk recovered \$24,700 from the bank on the theory of promissory estoppel. *Id.*

<sup>228</sup> *Id.* at 1174.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 1177.

<sup>231</sup> *Id.* at 1175 n.5. The court reasoned that Official Comment 3 merely suggested the 10-day limit. *Id.* It noted that the Official Comments cannot impose restrictions that the text does not support. *Id.*

<sup>232</sup> *Id.* at 1176.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* The Third District Court of Appeal of California also rejected Szabo's 10-day limit. *Citizens Bank v. Taggart*, 191 Cal. Rptr. 729, 732 (Ct. App. 1983). Instead, the court adopted the reasonableness standard, quoting heavily from the *Burk* decision. *Id.* at 732.

<sup>235</sup> P.E.B. COMMENTARY NO. 1, *supra* note 14, at 4.

essary,<sup>236</sup> expressly repudiated court rulings that had imposed the ten-day limit.<sup>237</sup> It replaced the ten-day limit with the common-law standard of reasonableness.<sup>238</sup> The P.E.B.'s reasoning<sup>239</sup> was similar to the district court's reasoning in *Szabo*.<sup>240</sup> The P.E.B. determined that it could not justify cutting off the cash seller's right to reclaim before she actually received notice that the check had bounced.<sup>241</sup>

The P.E.B.'s decision to adopt the common-law standard of reasonableness poses a potential problem.<sup>242</sup> Reasonableness is a fact-driven<sup>243</sup> and subjective<sup>244</sup> standard requiring case-by-case court assessments.<sup>245</sup> Such case-by-case analysis may produce more just decisions,<sup>246</sup> but the risks of judicial inefficiency and unpredictability may offset this benefit.<sup>247</sup> To avoid the risks that ad hoc determi-

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> See *id.* (describing P.E.B.'s reasoning for eliminating 10-day limit); *infra* note 241 and accompanying text (discussing P.E.B.'s reasons for eliminating 10-day limit).

<sup>240</sup> See *supra* notes 204-09 and accompanying text (discussing district court opinion in *Szabo*).

<sup>241</sup> P.E.B. COMMENTARY NO. 1, *supra* note 14, at 4.

<sup>242</sup> See *infra* notes 243-49 (discussing potential problems of reasonableness standard).

<sup>243</sup> See U.C.C. § 1-204(2) (1990) ("What is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action."); Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621, 630 (1975) (citing common-law reasonableness standard as example of Code's renunciation of legislative responsibility in favor of "technical assessments").

<sup>244</sup> See Michael E. Rose, *Spike the Trees to Save the Forests?*, 18 ENVTL. L. 365, 368 (1987-88) (noting that "[r]easonableness . . . is in the eye of the beholder"); *In re Samuels & Co.*, 526 F.2d 1238, 1243 (5th Cir.) (en banc) (questioning dissent's contention that cattle sellers' yearlong delay was reasonable), *cert. denied sub nom.*, *Stowers v. Mahon*, 429 U.S. 834 (1976). Judge Godbold, representing a majority of the 5th Circuit sitting en banc, refused to accept this application of Code policy. *Id.*; see *supra* notes 170-92 (discussing *Samuels*). But see Wiseman, *supra* note 21, at 468 n.13 (arguing that prevalent commercial standards determine what is reasonable; therefore, reasonableness standard is not subjective).

<sup>245</sup> Danzig, *supra* note 243, at 630.

<sup>246</sup> Robert N. Webner, Note, *The Fact-Opinion Distinction in First Amendment Libel Law: The Need for a Bright-Line Rule*, 72 GEO. L.J. 1817, 1850 (1984).

<sup>247</sup> *Id.* at 1850 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343-44 (1974)); Danzig, *supra* note 243, at 630. The Supreme Court described the risks of case-by-case decision making in the context of the First Amendment as:

nations of reasonableness create, the Code should substitute the reasonableness test with a bright-line rule.<sup>248</sup> In the particular case of the cash seller's reclamation right, a bright-line time limit is necessary to promote uniformity in the understanding and application of the law.<sup>249</sup> This Comment seeks to address this need for a bright-line restriction by reinstating the ten-day limit.

### III. CONSOLIDATING THE RECLAMATION RIGHTS OF CASH AND CREDIT SELLERS: A PROPOSAL

This Comment proposes an amendment to Code section 2-702 that would consolidate the cash and credit sellers' reclamation rights under section 2-702(2).<sup>250</sup> Section 2-702(2) would expressly recognize the cash seller's reclamation right and reinstate the ten-day limit on that right. The text of amended section 2-702(2) would read as follows:

(2) *Where the cash seller discovers that the buyer has received goods on payment of a subsequently dishonored check, the cash seller may reclaim the goods upon demand if such demand is made within ten days after the buyer's receipt of the goods. Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten-day after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery the ten-day limit does not apply. Except as provided in this subsection the seller may not base a right to reclaim goods on the buyer's fraudu-*

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(1) inefficiency, (2) unpredictable results, and (3) unmanageable increase in lower court supervision. Webner, *supra* note 246, at 1850. Case-by-case analysis was not practical, so the Court adopted a bright-line rule. *Id.*

<sup>248</sup> See Harry Ballan, Note, *The Courts' Assault on the Robinson-Patman Act*, 92 COLUM. L. REV. 634, 649 (1992) (stating that legislatures should draw bright lines when feasible). Professor LaFave, addressing the use of bright lines in the context of the Fourth Amendment, outlined four questions to ask before adopting a bright-line rule: (1) Does the rule increase judicial efficiency? (2) Does it produce substantially just results? (3) Does the rule address a genuine need for greater efficiency? (4) Is it relatively secure from abuse? Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. PITT. L. REV. 307, 325-26 (1981-82).

<sup>249</sup> See *supra* notes 246-48 and accompanying text (discussing usefulness of bright-line limit on cash seller's reclamation right).

<sup>250</sup> See *infra* notes 251-74 and accompanying text (discussing proposed amendment). The Permanent Editorial Board Article 2 Study Group (Study Group) recommended deleting § 2-507(2) and integrating the "cash payment exception" with the "insolvency exception" in § 2-702(2). P.E.B. STUDY GROUP PRELIMINARY REPORT, *supra* note 23, pt. 5, at 9. The proposed amendment would render section 2-507(2) obsolete and in need of repeal.

lent or innocent misrepresentation of solvency or of intent to pay.<sup>251</sup>

A. *Restoring the Ten-Day Limit on the Cash Seller's Reclamation Right*

The proposed amendment solves both the source and content problems of the cash seller's reclamation right under Code section 2-507(2). Courts would no longer have to deduce the reclamation right by inference<sup>252</sup> or reference to the common law.<sup>253</sup> Instead, the reclamation right would be explicit.<sup>254</sup> The proposed express reclamation right would also benefit buyers and sellers in cash transactions. First, an express Code-based reclamation right would increase the predictability of courts' decisions identifying the right's source.<sup>255</sup> Parties to cash transactions would know at the outset that the court would base the cash seller's reclamation right on the Code and apply the Code's limitations on that right.<sup>256</sup>

Second, by placing the cash seller's reclamation remedy in section 2-702(2), the P.E.B. would expressly reject the historical distinction between cash and credit sellers. In consolidating the reclamation rights, the Code would acknowledge that cash and credit sellers should be treated similarly in modern commercial transactions.<sup>257</sup> Determining whether the transaction was a cash or credit sale need not govern the analysis of what rules should apply to the seller's reclamation right.<sup>258</sup> Under the Code, both cash and credit sellers must transfer title to the buyer in expectation of payment for the goods.<sup>259</sup> In both cases, the buyer takes title knowing that she will not pay for the goods.<sup>260</sup> The only practical difference

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<sup>251</sup> Emphasized text identifies proposed additions to U.C.C. § 2-702 (1990).

<sup>252</sup> See *supra* notes 128-38 and accompanying text (discussing inferring reclamation right from Code §§ 2-507(2) and 2-702(2)).

<sup>253</sup> See *supra* notes 92-117 and accompanying text (discussing argument that Code codifies common-law reclamation right).

<sup>254</sup> See *supra* text accompanying note 251 (setting forth proposed amendment).

<sup>255</sup> QUINN, *supra* note 14, ¶ 2-507[A][5]; Mann & Phillips, *supra* note 21, at 615.

<sup>256</sup> QUINN, *supra* note 14, ¶ 2-507[A][5].

<sup>257</sup> See Barnes, *supra* note 40, at 133 (stating that distinction between cash and credit sellers is perceptible, but meaningless).

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*; U.C.C. §§ 2-507(2), 2-702(2) (1990); see *supra* notes 47-50, 120-23 (discussing role of title under Code).

<sup>260</sup> Barnes, *supra* note 40, at 133; see *supra* note 116 (noting § 2-702(2)'s insolvency requirement).

between the two transactions is that the cash seller will probably learn of the buyer's default more quickly than the credit seller.<sup>261</sup> This is because the cash seller expects payment in full immediately.<sup>262</sup> Such timing differences are not a sound basis for distinguishing between cash and credit sellers.<sup>263</sup> Common-law courts made reclamation easier for cash sellers because cash sales involved less risk of nonpayment.<sup>264</sup> Now, credit transactions dominate all types of commercial sales.<sup>265</sup> There is no longer any justification for penalizing credit sellers with more restrictive reclamation rights.<sup>266</sup> Moreover, the proposed amendment would expand credit sellers' reclamation rights beyond those of cash sellers when the credit seller receives a written misrepresentation of the buyer's solvency.<sup>267</sup>

By consolidating the cash and credit sellers' reclamation rights under section 2-702(2), the P.E.B. would also simplify the restrictions on the cash seller's reclamation right. The proposed amendment would reinstate the ten-day limit on reclaiming goods.<sup>268</sup> This bright-line limit would increase judicial efficiency<sup>269</sup> and promote clarity in the law.<sup>270</sup> The ten-day limit would force cash sellers to cash checks promptly.<sup>271</sup> The ten-day limit would also encourage cash sellers to take precautions against accepting worthless checks.<sup>272</sup> These precautions include requiring the buyer to pay by

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<sup>261</sup> Barnes, *supra* note 40, at 133.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> See *supra* note 150 (discussing credit seller's reclamation right under § 2-702(2)).

<sup>268</sup> See *supra* text accompanying note 251 (setting out proposed amendment to § 2-702(2)).

<sup>269</sup> See *supra* notes 242-49 and accompanying text (discussing benefits of bright-line rules).

<sup>270</sup> See *supra* notes 242-49 and accompanying text (discussing benefits of bright-line rules).

<sup>271</sup> Szabo v. Vinton Motors, 630 F.2d 1, 4 (1st Cir. 1980).

<sup>272</sup> *Id.*; *In re Samuels & Co.*, 526 F.2d 1238, 1247-48 (5th Cir.) (en banc), cert. denied, Stowers v. Mahon, 429 U.S. 834 (1976).

certified check<sup>273</sup> and verifying that the buyer has sufficient funds by calling her bank.<sup>274</sup>

### B. *In Defense of a Bright-Line Rule*

Critics of the proposed amendment might reject it for several reasons. Some critics might charge that the ten-day limit would be unfair because it is too short and inflexible.<sup>275</sup> Other critics may argue that the ten-day limit would be unduly burdensome because it would force cash sellers to take unnecessary precautions.<sup>276</sup> Finally, some critics might contend that the reasonableness standard is adequate and argue that it makes the bright-line limit unnecessary.<sup>277</sup>

#### 1. Is a Ten-Day Limit Unfair to Cash Sellers?

Past courts<sup>278</sup> and commentators<sup>279</sup> have criticized the ten-day limit as unfair because the cash seller may unknowingly waive her reclamation right before she discovers that the buyer's check has bounced.<sup>280</sup> In light of this potentially unfair result, one commentator has argued that the ten-day limit renders the cash seller's rec-

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<sup>273</sup> *Szabo*, 630 F.2d at 4; see BLACK'S LAW DICTIONARY 227 (6th ed. 1990) (defining "certified check" as obligation of bank that it is estopped from refusing to pay).

<sup>274</sup> See *Burk v. Emmick*, 637 F.2d 1172, 1173 (8th Cir. 1980) (imposing liability on bank for orally confirming to seller that funds were available to pay sight draft and subsequently refusing to honor it).

<sup>275</sup> See *infra* notes 278-92 (presenting argument that 10-day limit is unfair).

<sup>276</sup> See *infra* notes 293-301 and accompanying text (presenting argument that 10-day limit is overly burdensome).

<sup>277</sup> See *supra* notes 302-11 and accompanying text (presenting argument that 10-day limit is unnecessary).

<sup>278</sup> See *Burk v. Emmick*, 637 F.2d 1172, 1175-76 n.6 (8th Cir. 1980) (stating that 10-day limit places unfair burden on cash seller); *Citizens Bank v. Taggart*, 191 Cal. Rptr. 729, 732 (Ct. App. 1983) (stating that 10-day limit is unnecessary hardship on seller because it is usually too late to reclaim goods when seller discovers that check has bounced); *supra* notes 217-34 and accompanying text (discussing *Burk* and *Taggart*); *supra* notes 199-203 and accompanying text (discussing ruling of bankruptcy court in *Szabo*).

<sup>279</sup> Many commentators have criticized the 10-day limit for its harshness. See, e.g., JOHN NORDSTROM, HANDBOOK OF THE LAW OF SALES 503 (1970) (10-day limit unduly short); Mann & Phillips, *supra* note 6, at 383 (10-day limit unnecessarily harsh); Dugan, *supra* note 40, at 346 (10-day limit unreasonable).

<sup>280</sup> See *supra* notes 278-79 (noting courts and commentators who reject 10-day limit as unfair).

lamation remedy "illusory."<sup>281</sup> The commentator contends that the remedy is illusory because a ten-day period is too short under standard check-collection procedures.<sup>282</sup> Accordingly, this commentator has suggested that the ten-day limit should not apply to sales involving dishonored checks.<sup>283</sup> Although this charge may have been valid at one time, changes in federal law regulating customer notification about dishonored checks adequately address this concern.<sup>284</sup> Federal Reserve Board Regulation CC (Regulation CC)<sup>285</sup> mandates a new system for handling dishonored checks.<sup>286</sup> Regulation CC creates a duty for banks to expeditiously<sup>287</sup> return dishonored checks to the depository bank.<sup>288</sup> Regulation CC also imposes strict time guidelines on paying banks to notify depository banks about dishonored checks.<sup>289</sup> These time guidelines ensure that a bank would notify a seller about a bounced check within ten days in all except the most unusual circumstances.<sup>290</sup> Moreover, electronic

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<sup>281</sup> Dugan, *supra* note 40, at 346.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* at 343-44. Another approach would have courts assume that the 10-day limit is subject to modification by agreement of the parties implied by trade usage, course of dealing, or course of performance. *Id.*

<sup>284</sup> See P.E.B. COMMENTARY NO. 1, *supra* note 14, at 1 n.1 (stating that Regulation CC makes 10-day limit problem less significant); *infra* note 290 and accompanying text (describing requirements of Regulation CC).

<sup>285</sup> 12 C.F.R. § 229. Federal Reserve Board Regulation CC, 12 C.F.R. § 229, took effect on September 1, 1988. Yvette D. Kantrow, *Banks Feel Little Impact from Reg CC; Faster Crediting of Checks Said to Raise Costs Slightly*, AM. BANKER, Jan. 3, 1990, at 5. The Federal Reserve Board issued Regulation CC pursuant to the Expedited Funds Availability Act which addressed many banks' excessive check-crediting delays. *Id.*

<sup>286</sup> Kantrow, *supra* note 285, at 5. Initially, bankers and their trade associations protested against the anticipated expense and administrative burden of Regulation CC. *Id.* It turned out to be neither costly nor very disruptive of existing bank operations. *Id.*

<sup>287</sup> See Federal Reserve Board Regulation CC, 12 C.F.R. § 229.30 (1992) (defining "expeditious manner"). Regulation CC defines "expeditiously" according to the amount of the check and distance between the depository and paying banks. *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> See *infra* note 290 (detailing Regulation CC's notice requirements for dishonored checks).

<sup>290</sup> See Federal Reserve Board Regulation CC, 12 C.F.R. §§ 229.30, 229.33 (1992) (setting out strict time guidelines for handling of dishonored checks). The notice guidelines for dishonored checks provide that:

If a paying bank determines not to pay a check in the amount of \$2,500 or more, it shall provide notice of nonpayment such that the notice is received by the depository bank by 4:00 p.m. (local

check verification and guarantee systems are now common.<sup>291</sup> Thus, the ten-day limit is no longer unreasonable.<sup>292</sup>

## 2. Is a Ten-Day Limit Unduly Burdensome on Cash Sellers?

Some critics<sup>293</sup> may claim that the ten-day limit places an undue burden on cash sellers to protect themselves from dishonest buyers. They may assert that when the cash seller receives a check, she may reasonably conclude that she has received payment for the goods.<sup>294</sup> Forcing the cash seller to take extra precautions, they might argue, would make the cash seller behave like a nervous

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time) on the second business day following the banking day on which the check was presented to the paying bank. If the day the paying bank is required to provide notice is not a banking day for the depository bank, receipt of notice on the depository bank's next banking day constitutes timely notice. Notice may be provided by any reasonable means, including the returned check, a writing (including a copy of the check), telephone, Fedwire, telex, or other form of telegraph.

Federal Reserve Board Regulation CC, 12 C.F.R. § 229.33(a) (1992). Regulation CC's two-day notice requirement allows the depository bank up to eight days to notify the payee of nonpayment. *See id.*

<sup>291</sup> *See If You Can't Beat Debit, Promote It*, P.O.S. NEWS, Apr. 1992, available in LEXIS, News Library, Ziff Banking Newsletter 1 File (noting that eight of top check authorization companies service nearly 200,000 merchants); Melissa O'Neil, *ETC Checks on Bad Checks*, SEATTLE TIMES, July 2, 1991, at C4 (noting that industry leader processed 338 million checks in 1990). Technological advances in check verification and guarantee make checks safer to accept. P.R. NEWSWIRE (Los Angeles), Dec. 7, 1984, available in LEXIS, News Library, PR Newswire File. Check verification involves the comparison of the customer's name, account, or driver's license number with an extensive data base of "check bouncers" to determine the likelihood that the bank will honor the check. Jeanne Iida, *First Financial Lands Chaney on the Bounce*, AM. BANKER, Aug. 25, 1992, at 2. In some cases, for an additional fee, the check authorization firm will guarantee payment of the check based on its knowledge of the customer's dependability. *Id.*

<sup>292</sup> *See* P.E.B. COMMENTARY NO. 1, *supra* note 14, at 1 n.1 (stating that Regulation CC makes 10-day limit problem less significant).

<sup>293</sup> *See, e.g.,* Burk v. Emmick, 637 F.2d 1172, 1175-76 n.6 (8th Cir. 1980) (stating that court was not prepared to force cash seller to behave like credit seller dealing with unstable buyer); *In re* Samuels & Co., 526 F.2d 1238, 1254 (5th Cir. 1976) (en banc) (Ainsworth, J., dissenting) (stating that it is unreasonable to require cash seller to behave like secured creditor), *cert. denied*, Stowers v. Mahon, 429 U.S. 834 (1976); Citizens Bank v. Taggart, 191 Cal. Rptr. 729, 733 (Ct. App. 1983) (quoting Burk v. Emmick, 637 F.2d at 1175-76 n.6); *cf.* Mann & Phillips, *supra* note 6, at 383 (stating that 10-day limit is undesirable because it requires cash sellers to behave like credit sellers).

<sup>294</sup> *In re* Samuels & Co., 526 F.2d at 1253-54 (Ainsworth, J., dissenting).



might argue, would make the cash seller behave like a nervous credit seller.<sup>295</sup> The cash seller, however, can take precautions short of taking a security interest<sup>296</sup> in the goods.<sup>297</sup> The cash seller has both conventional<sup>298</sup> and modern technological tools<sup>299</sup> at her disposal to guard against accepting worthless checks. Moreover, because there is no longer any justification for treating cash and credit sellers differently,<sup>300</sup> both cash and credit sellers will be subject to equally burdensome time constraints.<sup>301</sup>

### 3. Is a Ten-Day Limit Necessary?

Critics may also argue that the ten-day limit is unnecessary. They might contend that the reasonableness standard is adequate to protect buyers from sellers who do not promptly cash check payments.<sup>302</sup> However, the reasonableness standard is ambiguous<sup>303</sup> and requires case-by-case analysis.<sup>304</sup> In contrast, the ten-day limit is a fair bright-line rule.<sup>305</sup> The time limit would create an unambiguous qualification for reclamation,<sup>306</sup> thus eliminating the need for

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<sup>295</sup> *Id.*

<sup>296</sup> See *supra* note 28 (defining "security interest").

<sup>297</sup> See *supra* notes 273-74, 291 (describing precautions cash seller can take against accepting worthless checks).

<sup>298</sup> See *supra* notes 273-74 and accompanying text (noting conventional ways to avoid worthless checks).

<sup>299</sup> See *supra* note 291 and accompanying text (noting technological advances in check verification and guarantee industries).

<sup>300</sup> See *supra* notes 257-67 and accompanying text (arguing that there is no longer any justification for treating cash and credit sellers differently).

<sup>301</sup> See *Szabo v. Vinton Motors*, 630 F.2d 1, 4 n.3 (1st Cir. 1980) (stating that hardship on cash seller is no greater than hardship on credit seller). The hardship on the credit seller may be greater because the credit seller must discover the buyer's insolvency within 10 days, while the cash seller need only discover that the check has bounced. See *supra* text accompanying note 251 (setting out text of proposed amendment to § 2-702(2)).

<sup>302</sup> See P.E.B. COMMENTARY NO. 1, *supra* note 14, at 4 (stating that specific time limit is unnecessary).

<sup>303</sup> Danzig, *supra* note 243, at 630.

<sup>304</sup> See *supra* notes 242-49 and accompanying text (discussing drawbacks of common-law reasonableness standard).

<sup>305</sup> See *supra* notes 170-216 and accompanying text (discussing 10-day limit as bright-line rule); *supra* notes 278-92 (discussing reasonableness of 10-day limit).

<sup>306</sup> See text accompanying *supra* note 251 (setting forth proposed amendment to § 2-702(2)).

case-by-case analysis.<sup>307</sup> The availability of a bright-line rule, however, would not ensure that courts would apply it.<sup>308</sup> Courts and attorneys have some latitude in presenting the issues of a case.<sup>309</sup> Courts can recast issues to avoid applying rules, but this danger exists with both flexible and bright-line rules.<sup>310</sup> The risk that courts will frame issues in such a way as to avoid applying the law is not peculiar to bright-line rules.<sup>311</sup>

In summary, the proposed amendment would both clarify and simplify the law for courts and parties to transactions.<sup>312</sup> It would address the source and content problems that the P.E.B.'s 1990 Comment revision did not resolve.<sup>313</sup> The proposed amendment would provide the cash seller with an express reclamation right<sup>314</sup> and reinstate the ten-day limit.<sup>315</sup> The ten-day limit is not unduly burdensome,<sup>316</sup> particularly since changes in federal law have expedited the check return process.<sup>317</sup> Moreover, cash sellers have several simple and inexpensive precautions that they may take to avoid accepting worthless checks.<sup>318</sup> Thus, the proposed amendment to section 2-702(2) would recognize changes in the modern commer-

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<sup>307</sup> See *supra* note 248 (noting conditions necessary for courts to forego case-by-case analysis).

<sup>308</sup> Jeremy Paul, *The Politics of Legal Semiotics*, 69 TEX. L. REV. 1779, 1802 (1991). The following illustration is based on Professor Paul's example: A bright line rule allowing a farmer to irrigate her fields from subterranean water reservoirs is useful if the court determines that the issue is the farmer's right to irrigate her fields from the reservoirs. *Id.* However, if the court determines that the issue is the farmer's liability for the subsidence of her neighbor's land due to the irrigation, the bright-line rule is ineffective. *Id.*

<sup>309</sup> *Id.* at 1802 n.62. Bright-line rules cannot determine the context in which courts will apply them. *Id.*

<sup>310</sup> *Id.* at 1802-03.

<sup>311</sup> *Id.* at 1803.

<sup>312</sup> See *supra* notes 250-311 and accompanying text (discussing proposed amendment to § 2-702(2)).

<sup>313</sup> See *supra* notes 252-74 and accompanying text (discussing proposed amendment's express reclamation right and 10-day limit).

<sup>314</sup> See *supra* notes 251-56 and accompanying text (discussing proposed amendment's express reclamation right).

<sup>315</sup> See *supra* notes 268-74 and accompanying text (discussing proposed amendment's 10-day limit).

<sup>316</sup> See *supra* notes 278-301 and accompanying text (discussing fairness of proposed amendment's 10-day limit).

<sup>317</sup> See *supra* notes 285-90 and accompanying text (discussing Regulation CC).

<sup>318</sup> See *supra* notes 273-74, 291 and accompanying text (discussing cash seller's precautions against accepting worthless checks).

cial setting<sup>319</sup> and add fair and reasonable restrictions to an ambiguous law.<sup>320</sup>

#### CONCLUSION

Under section 2-507(2), courts have based the cash seller's reclamation right on inference and reference to the common law. The confusion surrounding the source of the reclamation right has added to the debate about its limitations. The desire to maintain common-law distinctions between cash and credit sellers drives the debate. However, in this era of modern commercial transactions, common-law distinctions are no longer appropriate. The consolidation of the cash and credit sellers' reclamation rights eliminates the distinctions. The explicit grant of a reclamation right to the cash seller provides a wholly statutory source for the right. Furthermore, the ten-day limit on the cash seller's reclamation right eliminates the archaic distinction between cash and credit sellers. Should the P.E.B. decide to merge the cash and credit sellers' reclamation rights under section 2-702(2), the proposed amendment would promote uniformity in the understanding and application of the cash seller's reclamation right.

*Camil A. Skipper*

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<sup>319</sup> Barnes, *supra* note 40, at 133; *see also supra* notes 257-66 and accompanying text (discussing archaic common-law distinction between cash and credit sellers).

<sup>320</sup> *See supra* notes 278-92 and accompanying text (discussing reasonableness of reinstating 10-day limit).

