

## DELAWARE BANKRUPTCY BULLETIN

### Delaware Bankruptcy Court Denies Reclamation Claimant's Request for Temporary Restraining Order Due to Lender's Lien on Reclaimed Goods

On January 22, 2007, in Simon & Schuster, Inc. v. Advanced Marketing Services, Inc., the Delaware Bankruptcy Court issued a written opinion denying a reclamation creditor's request for a temporary restraining order against the debtor continuing to sell the reclaiming creditor's goods. The opinion appears to be the first under the newly-amended section 546(c)(1) of the Bankruptcy Code.

Section 546(c)(1) (as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA")) provides in relevant part that a creditor may reclaim goods provided to a debtor within 45 days before commencement of the debtor's bankruptcy case, "subject to the prior rights of a holder of a security interest in such goods or the proceeds thereof." Prior to BAPCPA, section 546(c)(2) had provided that a valid reclamation claim could only be denied if a replacement lien or an administrative expense claim was granted to the creditor. In support of its request for a TRO, Simon & Schuster, Inc. ("S&S") argued that with the elimination of that statutory provision by BAPCPA, S&S now had a "statutory right" to the goods it had shipped to the debtor ("Goods") and no other option existed. It further argued that emergency injunctive relief was necessary because its statutory right would be eviscerated if the debtor continued to sell the Goods pending resolution on the merits of S&S's reclamation claim.

The Court held that S&S had not demonstrated a "strong probability" of success on the merits of its reclamation claim because the debtor's senior lenders' ("Senior Lenders") pre-petition *and* post-petition liens were superior to S&S's reclamation claim. Thus, reclamation is not a proper remedy. The Court also rejected S&S's argument that the Court should ignore the Senior Lenders' pre-petition liens because, pursuant to the "creeping roll" provided in the DIP

agreement, eventually the claims underlying the pre-petition liens would be paid and replaced by post-petition advances secured by post-petition liens. The Court found that S&S's argument "ignore[d] the fact that the [pre-petition] Senior Facility is still in place" and, in any event, S&S had "failed to establish when [repayment of the pre-petition Senior Facility] will occur and, more importantly, whether any of the Goods subject to its reclamation claim will still be in the Debtors' possession at that time."

The Court also found that "the satisfaction of the [pre-petition] Senior Facility is of no moment" as the debtor's Interim DIP Order provided that the Senior Lenders' pre-petition liens also secured the post-petition DIP facility. Accordingly, the Court found that "[e]ven if the [pre-petition] Senior Facility is satisfied, the Senior Lenders' pre-petition and post-petition liens on the Debtors' inventory are superior to S&S's reclamation claim." In summary, the Court held that "[a]t the end of the day, S&S is doing little more than urging the Court to apply the doctrine of marshalling." The Court stated that as an unsecured creditor, S&S could not invoke the doctrine of marshalling to force the secured Senior Lenders to satisfy their claim out of collateral other than the Goods.

The Court's ruling is the first to consider the BAPCPA amendments to section 546(c)(1). It confirms that prior caselaw of the effect of pre-petition liens on the reclaimed inventory is still good law, even after the deletion of the alternative remedies in the prior version of section 546(c)(2).

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