actually had no reclamation rights, and therefore was not entitled to administrative expense treatment. The Bankruptcy Court overruled the objection and the debtor appealed.

The Sixth Circuit began its analysis by noting that the question was whether McKesson had a right to reclaim those goods. If so, then the bankruptcy court, having denied reclamation, was obligated to grant McKesson an administrative-expense priority in the amount of the goods (as it did). If not, then the court was not so obliged and McKesson's claim for the value of those goods could be properly regarded as merely a general unsecured claim.

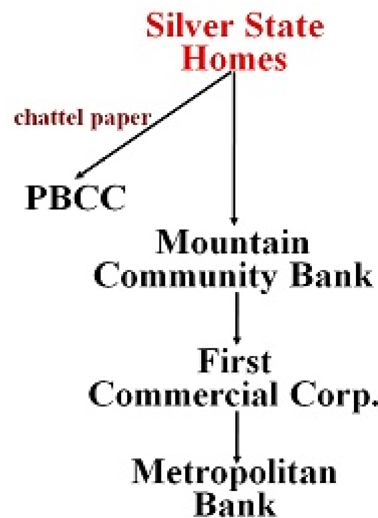
The court then proceeded to analyze McKesson's reclamation rights under § 2-702 of the UCC. It quoted the applicable state's version of § 2-702(3), which provides that "[t]he seller's right to reclaim . . . is subject to the rights of a buyer in ordinary course or other good faith purchaser." The court then properly noted that secured creditors qualify as purchasers. *See* § 1-201(b)(29), (30). Nevertheless, the court concluded that this provision – despite its seemingly clear language – did not restrict McKesson's *right* to reclaim, merely its *ability* to reclaim. It then cited a previous Sixth Circuit decision from 1968 that was troubled by a perceived inequity in allowing the rights of a secured creditor to defeat the rights of a reclaiming seller and which refused to enforce the limitation on reclamation in § 2-702(3). Based on this, the court concluded that McKessen was entitled to priority.

The court may have reached the correct result. After all, it was the debtor who had requested administrative expense priority. Thus, perhaps the matter could have perhaps been resolved on grounds of waiver or res judicata. Alternatively, the court might have concluded that once the secured creditors were fully paid, as they had been, the limitation in § 2-702(3) was no longer relevant. Unfortunately, the court instead simply refused to read § 2-702(3) to do what it clearly purports to do: restrict the seller's reclamation rights. In the process, it has created doubt and confusion as to whether a secured party really does take priority over an unpaid seller.

Metropolitan Bank & Trust Co. v. Pacific Business Capital Corp., 2008 WL 2277510 (D. Nev. 2008)

In this case, the court had to resolve a priority dispute between a creditor secured in chattel paper and a purchaser of that chattel paper. The facts can be summarized as follows. The debtor, Silver State Homes, originated chattel paper by selling mobile homes. Its principal lender was PBCC, which had a security interest in the debtor's chattel paper. That security interest was perfected by filing and the security agreement prohibited the debtor from selling the paper without PBCC's consent.

The debtor later sold 160 mobile home notes (chattel paper) to Mountain Community Bank. A representative of PBCC attended the closing and authorized the sale of 32 of the notes free and clear of PBCC's interest. The representative was unaware that the debtor was simultaneously selling an additional 128 notes to Mountain Community Bank. Mountain Community later sold these 128 notes to First Commercial Corp., which in turn resold them to Metropolitan Bank.



The issue came down to whether Metropolitan Bank took free of PBCC's security interest under former § 9-308(a), the predecessor to § 9-330(b). That requires that the purchaser give new value and take possession of the chattel paper in the ordinary course of the purchaser's business and without knowledge that the specific paper is subject to the security interest.[1] The court first commented that the security agreement did not define "ordinary course of business." It then concluded that the sales were not in the ordinary course of the debtor's business because selling the same paper to multiple parties is not in the ordinary course of business.

This analysis of course misses the point entirely. Unlike Article 9's protection for buyers of goods in the ordinary course of business, which inquires whether the sale is in the ordinary course of the *seller's* business, *see* §§ 1-201(b)(9), 9-320(a), the protection for purchasers of chattel paper applies when the transfer is in the ordinary course of the *purchaser's* business. Thus, the court was not focused on the proper inquiry. Beyond that, the provisions of the security agreement – which would be of dubious relevance to the meaning of the statutory phrase "ordinary course of business" even if that phrase did apply to the debtor's business, can have no possible relevance to whether the purchaser – who is a stranger to that agreement – is acting in the ordinary conduct of its own affairs. Frankly, it should not be difficult to ascertain whether a transaction is in the ordinary course of business, *cf.* James J. White & Robert S. Summers, Uniform Commercial Code, Sec. 33-8 (5th. ed., 2002) ("[o]nly rarely will it be difficult to tell whether the seller was 'in the business of selling goods of that kind.' "), and the court in this case seems to be have been trying to solve a problem where none existed.

Nevertheless, the court may have reached the correct result because it noted that there was no evidence that Mountain Community Bank was unaware of PBCC's security interest.

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[1] Current law is a bit more lenient. Section 9-330(b) allows the purchaser to take free even if the purchaser is aware that the paper is encumbered as long as the purchaser does not know that the purchase violates the rights of the secured party.

In re Western Iowa Limestone, Inc.,
538 F.3d 858 (8th Cir. 2008)

This case involved the conduct of three fertilizer and chemical dealers who purchased agricultural lime from Western Iowa Limestone, Inc., but left the lime with Western per the terms of the parties' bill of sale, pending the dealers' resale of the lime to their own customers. Western maintained all of its lime, including that which had been sold to the dealers, in a single undifferentiated pile on its premises.

When Western filed for bankruptcy, some lime that had been sold to the dealers remained on its premises. United Bank of Iowa, having a security interest in all of Western's assets, sold the lime as part of Western's inventory. At that time, the dealers filed a joint objection to the planned distribution of the sale proceeds, claiming priority over the bank as buyers in the ordinary course of business as to the purchased, undelivered lime.

Even though the dealers lacked physical possession of the lime, the bankruptcy court held that they had constructive possession, which the bankruptcy court held was sufficient to satisfy the "possession" requirement of § 1-201(b)(9) and give the dealers priority under § 9-320(a). The Bankruptcy Appellate Panel reversed, ruling that the dealers did not have constructive possession. The Panel declined to address whether constructive possession would have sufficed had it been proven. The Eighth Circuit reversed the BAP and affirmed the bankruptcy court on both points, reasoning that, because Iowa courts had construed "possession" to include "constructive possession" in other UCC contexts, there was no reason to do otherwise here.

In so holding, the Eighth Circuit expanded the definition of § 1-201(b)(9) in a way that is not supported by the text of the UCC, the commentary, or the literature in this area. In fact, looking at the Code's treatment of possession elsewhere, there is reason to believe that only actual possession should suffice here. In the 1999 revisions to § 2-716(3), for example, consumers (but not other purchasers) are given a special property in goods upon identification to the contract. As White & Summers note, the new language would allow a consumer buyer to claim that he or she is a buyer in ordinary course of business even without possession. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE, § 33-8 (5th. ed., 2002). The dealers in this case were not consumer purchasers, of course, and it is reasonable to assume that this special provision for consumers would not have been necessary if the word "possession" was automatically intended to include "constructive possession" of the kind that is claimed in this case.

Furthermore, even if constructive possession were acceptable, the facts of this case do not support constructive possession. Instead, constructive possession normally contemplates delivery of the goods to a third party or other exercise of dominion and control on the part of the purchaser. In this case, where the goods remained with the seller in a single, undifferentiated mass, finding constructive possession seems clearly wrong.

may escape liability for refusing to pay a cashier's check or other check it has already accepted. *See* §§ 3-411, 4-403.

The court also attempted to distinguish checks drawn on an attorney trust account from certified and cashier's checks by noting that the latter "are immediately negotiable." This language incorrectly implies that the former are somehow non-negotiable. The distinguishing feature of certified and cashier's checks is that they are "accepted at issuance," not that they are "immediately negotiable." Whether an instrument is "negotiable" depends entirely on whether the instrument satisfies the requirements described in § 3-104. Whether the funds on which the instrument is drawn are subject to garnishment, or whether a bank has already committed to pay the check via acceptance, are entirely separate matters.

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