

BUSINESS LAW SUMMARY

NEWS AND IMPORTANT INFORMATION FOR YOUR BUSINESS

BANKRUPTCY UPDATE – THE CREDITOR’S RIGHT OF RECLAMATION



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The number of individuals and businesses that filed for bankruptcy in the United States Bankruptcy Court, Northern District of Indiana, declined slightly last year. In 2009, there were 18,700 new bankruptcy filings with 14,782 Chapter 7 cases. In 2010, there were 18,286 new bankruptcy filings with 14,367 Chapter 7 cases. There was approximately a 2.2 percent decrease in new filings and a 2.8 percent decrease in Chapter 7 cases.

With the number of new bankruptcies still high, it is important for creditors to be aware of the right of reclamation. The right of reclamation gives sellers an opportunity to retrieve their goods or otherwise stop delivery. The right of reclamation, however, is fairly limited. But, it is one more tool for sellers to be keep in their tool box. The reclaiming seller may be able to improve its position, when compared to a general

unsecured creditor, if it successfully navigates the maze of rules under both the Uniform Commercial Code (“UCC”) and the Bankruptcy Code.

The right of reclamation comes from Section 2-702 of the UCC. The UCC requires the seller to do the following: (1) the buyer must receive the goods

on credit; (2) the buyer must receive the goods while insolvent; (3) the seller must make demand for the goods “within ten days after receipt” by the buyer; (4) the goods must be identifiable; and (5) the buyer must remain in possession

of the goods. A reclamation demand should include a detailed description of the goods sold. While the UCC permits an oral demand for reclamation, the Bankruptcy Code requires that the demand be in writing and that the goods were sold in the ordinary course of the seller’s



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business. If the demand is in writing, the date the demand is sent controls so long as the demand was made in a commercially reasonable manner.

A seller who makes a valid reclamation demand often fares better than one who does not, even if the buyer files bankruptcy. A reclaiming seller is not stayed by the filing of a bankruptcy petition from making a reclamation demand. Section 546(c) of the Bankruptcy Code preserves the UCC right of reclaiming sellers in bankruptcy cases. It provides a seller with the right to reclaim goods if the debtor received the goods while insolvent and within 45 days before the filing of the bankruptcy petition. An important exception to the right of reclamation under both the UCC and

the Bankruptcy Code is the good faith purchaser exception. The right of reclamation is subject to the rights of a buyer in the ordinary course or other good faith purchaser. So, if the goods sold to the debtor were sold to another purchaser, prior to the demand for reclamation, the seller's right of reclamation may be cut-off.

Since the demand for reclamation must be made within ten days, the creditor must be aware of the right and be prepared to act quickly.



Joshua A. Burkhardt

SEC CONSIDERS ADOPTING INTERNATIONAL GENERALLY ACCEPTED ACCOUNTING PRINCIPLES STANDARDS



The events of recent months have only underscored the importance of an international language of financial disclosure and transparency. Achieving this would significantly improve investor confidence in global capital markets. Investors could more easily compare issuers' disclosures, regardless of what country or jurisdiction they came from.

-Christopher Cox
Former Chairman, Securities and Exchange Commission

Accounting standards among countries often vary. In North America alone, the United States Generally Accepted Accounting Principles (U.S. GAAP) differ from the Canadian GAAP standards. In an effort to make international financial comparison as easy as possible, the International Accounting Standards Board (IASB), an independent standard-setting body has developed a set of international accounting standards for uniform use across boundaries. Known as the International Financial Reporting Standards (IFRS), the IASB seeks to develop a single set of high quality, understandable, enforceable and globally accepted international financial reporting standards. In the years ahead, the U.S. too may look to IFRS as its new financial reporting standards.

The Securities and Exchange Commission (SEC) continues to review whether "convergence" of the IFRS with U.S. GAAP would be preferable to adoption of IFRS outright. Convergence is designed to bring U.S. GAAP and IFRS closer together. The focus is on having similar general



principles. Regardless, if adopted, the SEC has made clear that it envisions 2015 as the earliest possible date for the required use of IFRS by U.S. public companies. Commissioners have called for more study of IFRS and a 2011 vote on whether to move ahead with a mandate to use IFRS.

Accordingly, while the SEC has not set a mandatory date for U.S. adoption of IFRS for public or private companies, it's important for business owners to be aware of the principles, and to understand some of the basic differences with U.S. GAAP.

Ernst & Young has issued a publication called IFRS vs GAAP, The Basics, that states:

While the US and international standards do contain differences, the general principles, conceptual framework, and accounting results between them are often the same or similar, even though the areas of divergence seem to have disproportionately overshadowed these similarities.

Still, the significant differences between the two, as identified in Ernst & Young's publication, touch on a number of areas, including:

- Financial statement presentation
- Interim financial reporting
- Consolidations, joint venture accounting and equity method investees

- Business combinations
- Inventory
- Long-lived assets
- Intangible assets
- Impairment of long-lived assets, goodwill and intangible assets
- Financial instruments
- Foreign currency matters
- Leases
- Income taxes
- Provisions and contingencies
- Revenue recognition
- Share-based payments
- Employee benefits other than share-based payments
- Earnings per share
- Segment reporting
- Subsequent events
- Related parties

The SEC appears poised to continue the possible convergence or adoption of IFRS in the years ahead. Business owners would be wise to keep abreast of coming promulgations by the SEC, and should seek additional advice from their accountant as to what IFRS means for their company, whether it's available to them, and how they should prepare.



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LAWYER PROFILE FOR SPRING 2011

Estate planning is an important step for any adult, regardless of the size of his or her estate. Difficult questions, such as who will make decisions for me should I become ill and who will care for my children should I pass away, need to be answered. For a business owner there are even more issues to cover: Is there someone in my family or working for my business who could handle the day-to-day affairs of the business if I can't be at work every day; is there sufficient cash in the business to carry it through if I weren't there to generate work; should I consider an exit strategy.

We stand ready to help you through this important process. **Heidi Adair** is one of the attorneys in the office who assists business owners with their estate planning. She is a graduate of Indiana University School of Law – Bloomington and is certified as an Estate Planning and Administration Specialist by the Indiana State Bar Estate Planning and Administration Specialty Certification Board.

Heidi has counseled numerous business owners, entrepreneurs, executives, families and heirs on matters involving succession planning, estate planning and incapacity planning. If you would like to begin assessing or to review your estate planning, feel free to speak with your business attorney or contact Ms. Adair directly.

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