

11 U.S.C. § 1107

11 U.S.C. § 1108

O.R.S. 72.5010

Estoppel

Replevin

Specific Performance

Grassmueck v. Caddock, Sr.
Grassmueck v. Caddock, Jr.

Adv. No. 91-4009-aer

Adv. No. 91-4010-aer

In re Joel and Paula Shepherd

Bankr. Case No. 690-62091-aer7

10-13-94

AER

Unpublished

Defendants originally successfully defended a suit by the Trustee alleging that transfers of two specialized boats made by the debtors to the defendants constituted an unauthorized post-petition transfer which could be avoided pursuant to section 549. This court granted judgments in favor of the defendants based upon the following conclusions: (1) the transfers of the boats by debtors to the defendants was in the ordinary course of the debtors' business as allowed pursuant to sections 1107 and 1108; and/or (2) the defendants, as buyers, acquired a special property interest in the boats, pursuant to the provisions of O.R.S. 72.5010, when pre-petition deposits were made and the manufacturing commenced due to the unique character of the boats in question.

The trustee appealed this court's decision to the U.S. District court for the District of Oregon which remanded to this court for further consideration.

On remand, this court found: (1) that if a supplier furnishes goods on an unsecured basis to a debtor, seller, and those goods were "identified" to a contract, an unsecured buyer should have rights superior to the rights of debtor-in-possession or the unsecured supplier based upon the buyers's rights to exercise the UCC right of replevin in this case; (2) that the defendants have remedies under both the UCC and outside the UCC that are not available to general unsecured creditors; (3) that the remedy of replevin provided by O.R.S. 72.7160(3) based upon the facts of this case is available to a party with a "special property" interest against a seller and ahead of other sellers; and (4) that the remedy of estoppel, based upon accepting the benefits of an executory contract under the facts in this case, is available to defendants outside the UCC.

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9 UNITED STATES BANKRUPTCY COURT
10 FOR THE DISTRICT OF OREGON

11 IN RE)
12)
13 JOEL SHEPHERD and) Case No. 690-62091-aer7
14 PAULA SHEPHERD,)
15)
16 _____ Debtors.)
17)
18 MICHAEL A. GRASSMUECK, INC.,) Adversary Proceeding
19 Trustee,) No. 91-6409-aer
20)
21 Plaintiff,)
22)
23 v.)
24)
25 RICHARD E. CADDOCK, SR.,)
26 _____ Defendant.)
27)
28 MICHAEL A. GRASSMUECK, INC.,) Adversary Proceeding
29 Trustee,) No. 91-6410-aer
30)
31 Plaintiff,)
32)
33 v.)
34)
35 RICHARD E. CADDOCK, JR.,) MEMORANDUM OPINION
36 _____ Defendant.)

1 This matter comes before the court upon remand pursuant to an
2 Order of the United States District Court for the District of
3 Oregon, The Honorable Michael R. Hogan, Judge, entered, herein on
4 or about November 3, 1993. The parties originally submitted this
5 matter to the court for a trial upon stipulated facts.

6 **STIPULATED FACTS**

7 The plaintiff in both adversary proceedings is the trustee in
8 the Joel and Paula Shepherd bankruptcy proceeding filed June 11,
9 1990 as a Chapter 11 proceeding. It was converted to a proceeding
10 under Chapter 7 on August 6, 1990.

11 The debtors, doing business as Challenger Marine, were in the
12 business of manufacturing and selling custom boats. All boats
13 manufactured by the debtors were specially ordered. Customers were
14 offered a choice of standard hulls which could be modified for an
15 additional charge. All customers ordered some modifications,
16 either to the hull or to the interior. No two boats sold at retail
17 were alike.

18 On February 11, 1990 the debtors entered into a contract with
19 defendant, Richard E. Caddock, Jr., to build for him a Kenai Guide
20 Boat with specially ordered features including a motor well the
21 debtors had not previously provided in a Challenger Marine 20'
22 Kenai Guide 72 (V-sled). They required him to make a deposit of
23 \$11,400 before they would begin to manufacture the boat. He
24 deposited \$1,000 on February 11, 1990 and \$10,400 on February 25,
25 1990.

1 On or about March 26, 1990, the debtors entered into a
2 contract with defendant, Richard Caddock, Sr. to build a Kenai
3 Guide Boat with custom features similar to those ordered by Richard
4 Caddock, Jr. Richard Caddock, Sr. made a deposit of \$11,040 on
5 March 26, 1990.

6 After receiving the defendants' deposits and before June 11,
7 1990, the debtors commenced manufacturing the boats for the
8 defendants. The debtors manufactured the aluminum hulls according
9 to the specification of the defendants' orders. In order to
10 provide for the specially ordered motor wells, it was necessary to
11 drill into the boat hulls to allow for fastening the motor wells.
12 Both boats were among the most highly customized boats ever built
13 by the debtors. The boats were not held as inventory for sale to
14 the general public; but the boats could have been sold, at a
15 discount, to other buyers.
16

17 After the filing of the Chapter 11 petition, the debtors
18 completed the manufacture of the boats. Both defendants took
19 delivery of the boats. Richard Caddock, Sr. paid debtors \$7,662.38
20 post-petition, an overpayment of \$259.88. Richard Caddock, Jr.
21 paid debtors \$7,912.38 post petition, an overpayment of \$121.35.
22 Both boats had a fair market value of \$18,400. Both defendants
23 received a credit towards the purchase price in the amounts of the
24 pre-petition deposits. There was no court order authorizing the
25 transfers of the two boats during the Chapter 11 proceeding.
26

PROCEDURAL BACKGROUND

1 Plaintiff filed its complaint against each of the defendants
2 alleging that the transfers of the boats by the debtors to the
3 defendants constituted an unauthorized post-petition transfer which
4 could be avoided pursuant to 11 U.S.C. § 549. In substance,
5 plaintiff maintains that it was improper for debtors to credit the
6 amount of the defendants' deposits against the purchase price of
7 the boats. Plaintiff seeks a judgment against each defendant for
8 the amount of the defendant's pre-petition deposit. The matter was
9 submitted to the court for trial upon stipulated facts.
10

11 After the submission, by the parties, of their respective
12 briefs and oral argument, this court ruled in favor of the
13 defendants, granting judgments in favor of the defendants
14 dismissing the plaintiff's claims. The ruling of this court was
15 based upon the following conclusions:

16 1. The transfers of the boats by debtors to the defendants
17 was in the ordinary course of the debtors' business as allowed
18 pursuant to 11 U.S.C. §§ 1107 and 1108; and/or

19 2. The defendants, as buyers, acquired a special property
20 interest in the boats pursuant to the provisions of O.R.S.
21 72.5010(1)(b) which provides, inter alia, that a buyer obtains a
22 special property interest in goods when there is a contract for the
23 purchase of the goods and the goods are designated or identified by
24 the seller as goods to which the contract refers. This court
25 concluded that the defendants acquired a special property interest
26 in the boats when the pre-petition deposits were made and the

1 manufacturing commenced due to the unique character of the boats in
2 question.

3 Plaintiff appealed this court's decision to the United States
4 District Court for the District of Oregon. The district court,
5 pursuant to an order entered by the Honorable Michael R. Hogan,
6 District Judge, has remanded this matter to this court for further
7 consideration of certain questions posed by the district court.

8 After remand, the parties submitted further briefs and
9 presented oral argument. The parties have declined to present any
10 evidence in addition to the stipulated facts.

11 **ISSUES ON REMAND**

12 The district court has instructed this court to give further
13 consideration to the following questions:

- 14
- 15 A. If a supplier furnishes goods on an unsecured basis
16 to a debtor, seller, and those goods were
17 "identified" to a contract, should the unsecured
18 buyer have rights in the goods superior to the
19 rights of a debtor-in-possession or the unsecured
20 supplier?
 - 21 B. If the only remedies available to the defendants
22 under the UCC at the time of filing the Chapter 11
23 proceeding are those also available to unsecured
24 creditors, then hasn't any "special property"
25 interest that may have existed lapsed?
 - 26 C. Is there any other evidence of insolvency
within ten days of the initial deposits?
 - D. Are any other UCC remedies available to a party
with a "special property" interest against a
seller and ahead of other unsecured creditors?
 - E. Is there any evidence of the value of the
prepetition manufacturing as opposed to the
value of the postpetition manufacturing?

1 F. Are there any other remedies available to
2 defendants outside the UCC, i.e., constructive
3 trust, estoppel based on accepting benefits of
4 an executory contract?

5 **DISCUSSION**

6 All statutory references are to the Bankruptcy Code, Title 11
7 United States Code, unless otherwise indicated.

8 Two of the questions are easily resolved. This matter was
9 submitted to the court upon stipulated facts. There was not any
10 evidence presented on either the issue of the debtors' insolvency
11 within ten days of the defendants' initial deposits or the value of
12 pre- or post-petition manufacturing. Both sides agree on this.
13 They have declined to present further evidence.

14 The remaining questions appear to ask whether or not the
15 defendants have some property interest or right in the boats which
16 would have been enforceable under applicable non-bankruptcy law
17 which would have placed the defendants, as buyers, ahead of any
18 claims of the sellers or general unsecured creditors. If the
19 defendants merely have the same remedies available to them that any
20 general unsecured creditor would have, then the plaintiff should
21 prevail because there was a post-petition transfer (the boats) in
22 satisfaction of a pre-petition debt (the deposits) not otherwise
23 authorized. If, however, the defendants have some property
24 interest or right which is enforceable under applicable non-
25 bankruptcy law which would place the claims of the defendants ahead
26 of general unsecured creditors and the debtors, then the transfers

1 may have occurred within the ordinary course of the business of the
2 debtors and the defendants may prevail.

3 In substance, on the date of the Chapter 11 filing, there
4 existed between the debtors and the defendants, executory
5 contracts. The contracts were executory because some performance
6 remained due on both sides. The debtors had partially completed
7 the manufacture of the boats and the defendants had partially paid
8 the purchase price for the boats. This court has previously held
9 that there was no express assumption of these executory contracts
10 by the debtors since that would have required a general notice to
11 creditors and an opportunity for creditors to object and request a
12 hearing. This was not done in this case. The debtors, however, by
13 implication, assumed the contracts by completing their performance
14 (completing the manufacture of the boats and delivery to the
15 defendants). The defendants completed their performance of the
16 contracts, post-petition, by payment of the balance of the purchase
17 price for the boats.
18

19 This court has previously held that the boats were identified
20 to the contract between the debtors and the defendants when the
21 deposits were received and manufacturing commenced. The district
22 court has affirmed that "The boats provided were so specialized and
23 were identified and designated to the sales contracts prior to the
24 filing under either a 'first step in production' or 'work in
25 progress' test." Order, p.7.
26

Constructive Trust:

1 The defendants maintain that they were entitled to these
2 specific boats, therefore, the debtors held the boats in
3 constructive trust for the defendants at the time the Chapter 11
4 petition was filed.

5 Plaintiff maintains that defendants have failed to carry their
6 burden of proof to establish that a constructive trust should be
7 imposed upon the boats.

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10 Section 541 provides in pertinent part as follows:

11 (a) . . . Such estate is comprised of all of the following
12 property, where-ever located and by whomever held:

13 (1) . . . [A]ll legal or equitable interests of the
14 debtor in property as of the commencement of the
15 case.

16 Property owned by a debtor, subject to a constructive trust for the
17 benefit of another does not, however, become part of the bankruptcy
18 estate. Begier v. I.R.S., 496 U.S. 53, 110 L.Ed.2d 46 (1990). The
19 question of whether or not a constructive trust should be imposed
20 is determined by state law. Mitsui Manufacturers Bank v. Unicom
21 Computer Corporation, (In re Unicom Computer Corporation), 13 F.3d
22 321 (9th Cir. 1994).

23 Under Oregon, law a constructive trust is one created by
24 operation of law when one, through abuse of a fiduciary or
25 confidential relation, or by bad faith, fraud, duress, concealment,
26 undue influence or other unconscionable conduct, has obtained the
legal right to hold property, is unjustly enriched thereby, and

1 ought not, inequity and good conscience, be permitted to hold and
2 enjoy that property. Marsten v. Myers, 217 Or. 498, 342 P.2d 1111
3 (1959); Albino v. Albino, 279 Or. 537, 568 P.2d 1344 (1977). The
4 defendants have the burden of proving each element of the
5 constructive trust with evidence that is "[S]trong, clear and
6 convincing . . . evidence that is of 'extraordinary
7 persuasiveness.'" Pantano v. Obbiso, 283 Or. 83, 580 P.2d 1026,
8 1027 (1978). Here, the defendants have failed to prove several of
9 the essential elements.

10
11 First, there have been no allegations or admission of any
12 evidence in this case of fraud, bad faith, duress, concealment,
13 undue influence or other unconscionable conduct at the time the
14 debtors and the defendants entered into the contracts to produce
15 the boats. There were merely executory contracts to produce boats
16 with certain features.

17 Second, there has been no evidence introduced regarding a
18 fiduciary relationship:

19 A constructive trust arises when a person in a fiduciary
20 or confidential relationship acquires or retains property
21 in violation of his duty to the grantor. The
22 confidential relationship must be one in which the
23 grantor justifiably can and does rely. 580 P.2d at 1027.

24 Finally, the defendants have failed to prove, by clear and
25 convincing evidence, that the trustee would be unjustly enriched to
26 the extent that a constructive trust should be imposed upon the
bankruptcy estate. See Travelers Insurance Company v. Angus, (In
re Angus), 9 B.R. 769 (Bankr. D. Or. 1981).

1 Accordingly, the remedy of the imposition of a constructive
2 trust was not an available remedy for the defendants.

3 **Other UCC Remedies - Specific Performance and Replevin:**

4 This court has previously held in favor of the defendants
5 based, in part, upon the "special property" right that a buyer
6 acquires in goods to a contract for sale when the goods have been
7 identified to the contract under Oregon's version of the Uniform
8 Commercial Code (UCC). O.R.S. 72.5010(1)(b). On appeal, the
9 district court agreed that "The boats provided were so specialized
10 and were identified and designated to the sales contracts prior to
11 the filing under either a 'first step in production' or 'work in
12 progress' test." Order, p.7. Judge Hogan noted, however, that
13 O.R.S. 72.5020 provides that the buyer's rights to reclaim the
14 goods based upon the sellers' insolvency is only applicable "[I]f
15 the seller becomes insolvent within ten days after receipt of the
16 first installment on their price." O.R.S. 72.5020(1), in part.
17 Since there is no evidence that the debtors became insolvent within
18 ten days after receipt of the first deposit from the defendants, it
19 appears that any rights granted to the defendants pursuant to
20 O.R.S. 72.5010 have lapsed. On remand, however, Judge Hogan has
21 instructed this court to consider whether there are any other UCC
22 remedies available to the defendants which would give them an
23 interest against the seller (debtor) and ahead of other unsecured
24 creditors.
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1 Specific performance and replevin are distinct remedies under
2 the UCC. The defendants urge that either of these remedies would
3 give them a status ahead of other unsecured creditors. O.R.S.
4 72.7160(1) (specific performance) provides that:

5 Specific performance may be decreed where the goods are
6 unique or in other proper circumstances.

7 O.R.S. 72.7160(3) (replevin) provides as follows:

8 The buyer has a right of replevin for goods identified to
9 the contract if after reasonable effort the buyer is
10 unable to effect cover for such goods or the
11 circumstances reasonably indicate that such effort will
12 be unavailing or if the goods have been shipped under
13 reservation and satisfaction of the security interest in
14 them has been made or tendered.

15 The comments to the Uniform Commercial Code suggests that
16 Section 2-716 of the UCC "[C]ontinues in general prior policy as to
17 specific performance" but "seeks to further a more liberal attitude
18 than some courts have shown in connection with the specific
19 performance of contracts of sale." With regard to specific
20 performance, the comment continues:

21 In view of this Article's emphasis on the commercial
22 feasibility of replacement, a new concept to what are
23 "unique" goods is introduced under this section.
24 Specific performance is no longer limited to goods which
25 are already specific or ascertained at the time of
26 contracting. The test of uniqueness under this section
must be made in terms of the total situation which
characterizes the contract. . . . However, uniqueness is
not the sole basis of the remedy under this section for
the relief may also be granted in other proper
circumstances" and inability to cover is strong evidence
of "other proper circumstances".

With regard to replevin the Comment says:

1 The legal remedy of replevin is given the buyer in cases
2 in which cover is reasonably unavailable and goods have
3 been identified to the contract. This is in addition to
4 the buyer's right to recover identified goods on the
5 sellers' insolvency (Section 2-502). (emphasis added)

6 The plaintiff asserts that there are no cases in which a
7 bankruptcy trustee or Chapter 11 debtor-in-possession has been
8 required to specifically perform an agreement. While this court
9 has not found any Oregon cases on this subject, in Proyectos
10 Electronicos, S.A. v. Alper, 37 B.R. 931 (D.C. E.D. Penn. 1983),
11 the court held that a buyer was entitled to specific performance
12 under § 2-716(1) of the UCC with regard to non-unique electronic
13 equipment. The equipment had been contracted and paid for in full,
14 crated and set aside with the buyer's order numbers, pre-petition.
15 After the debtor-seller filed its Chapter 11 petition, the buyer
16 filed a request for relief from the automatic stay so that it could
17 obtain possession of the equipment. The court ordered the debtor
18 to turn the equipment over to Proyectos (the buyer) finding, in
19 part, that there had been constructive delivery.

20 The court held that these facts constituted such "other proper
21 circumstances." The court held further that the buyer was entitled
22 to replevy the equipment because the debtor had no interest in the
23 equipment and the property's continued possession in the estate was
24 not necessary to an effective reorganization.

1 Further, the court also expressly held, that under these
2 circumstances, the buyer was not required to seek cover. The court
3 noted:

4 In a non-bankruptcy context, failure of a seller to
5 deliver goods under similar circumstances would enable a
6 buyer to buy replacement goods, i.e., cover and recover
7 the difference between cost of cover and the price of the
8 original contract as well as any money paid to the
9 defaulting seller. . . . To require Proyectos to cover
10 would require it to pay for identical goods a second time
11 and then stand in line with other unsecured creditors of
12 the debtor, now bankrupt, with the illusory hope that it
13 would get reimbursed for the difference between the cost
14 of cover and the original contract price plus the money
15 already paid to debtor. Such a result would not be in
16 keeping with the purpose of the Commercial Code to make a
17 non-breaching party whole.

18 Id. at 933.

19 In Sedmak v. Charlie's Chevrolet, Inc., 622 S.W. 2d 694, 26
20 A.L.R. 4th 284, 31 UCC Rep.Serv. 851 (Mo., 1981), the court held
21 that the buyers' contract to purchase a limited production Indy 500
22 pace car, while not unique, was sufficient for finding of "other
23 proper circumstances" to warrant specific performance. Since the
24 court found that the buyers could not effect cover except with
25 considerable expense, trouble, loss, great delay and inconvenience.

26 In Tatum v. Richter, 373 A.2d 923, 21 UCC Rep.Serv. 967 (Md.
1977), the buyer desired to purchase a used Ferrari automobile from
Tatum, an automobile dealer. Richter placed a substantial deposit
with Tatum. Tatum located an automobile for Richter and identified
it by model and serial number. This was held sufficient, by the
court, to allow Richter to exercise the right of replevin

1 "[B]ecause he was unable to effect cover and there was no other way
2 to protect himself against loss of his deposit." 373 A.2d at 926.

3 Here, it is clear that the boats are sufficiently unique or
4 that, "other proper circumstances" exist such that, outside of
5 bankruptcy, the defendants would have been entitled to the UCC
6 remedy of specific performance. It is unlikely, however, that such
7 a remedy could have been exercised against the debtors in this case
8 since, as the defendants concede, the debtors could have chosen to
9 reject the executory contracts in existence as of the date of the
10 Chapter 11 filing.

11 It would appear, however, that the UCC remedy of replevin
12 would have been available to the defendants since the boats were
13 clearly identified to the contract between the debtors and the
14 defendants and, following the rationale of Proyectos and the other
15 cases cited above, it is clear that the defendants would not be
16 able to effect cover, at least not without considerable expenses,
17 trouble, loss, great delay and inconvenience.

18 In short, had the debtors elected to reject the executory
19 contracts in existence with the defendants, the defendants could
20 have exercised their right of replevin to take possession of the
21 partially completed boats. This is a UCC remedy available to the
22 defendants which gives them a "special property interest" against
23 the seller and ahead of other unsecured creditors.

24 **Estoppel:**
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1 This court has been instructed to consider whether or not
2 there are other remedies available to defendants outside the UCC
3 including the defense of estoppel based on accepting benefits of an
4 executory contract. This is one of the defenses urged by the
5 defendants to the plaintiff's adversary proceedings.

6 In general, estoppel is an equitable principle which precludes
7 one party from exercising a right to the other's detriment if the
8 right holder, by words or conduct has led the other to believe that
9 the right would not be exercised. Daly v. Fitch, 70 Or.App. 18,
10 687 P.2d 1124 (1984). It requires reasonable reliance on the part
11 of the party claiming its protection, Willis v. Stager, 481 P.2d 78
12 (Or., 1971), but does not require proof of intent to mislead,
13 Employment Div., Dept. of Human Resources v. Western Graphics
14 Corp., 76 Or.App. 608, 710 P.2d 788 (1985).

15 The defendants argue that at the time the petition was filed
16 the contract they had with the debtors was executory; the debtor
17 could assume or reject it. While the debtors did not expressly
18 assume the agreements, they impliedly did so by finishing the boats
19 and accepting the benefit of the defendants' performance (payment
20 of the balance of the purchase price). As a result of the debtors'
21 conduct, the defendants argue that the trustee should be estopped
22 from now challenging the transfers.
23

24 There appears to be at least one bankruptcy court which has
25 found that the trustee's avoidance powers under § 549 may be
26 subject to equitable defenses including estoppel. Ledford v.

1 Second National Bank, (In re Becker), 76 B.R. 108 (Bankr. S.D. Ohio
2 1987). There, the trustee sought to avoid an asserted secured
3 interest on the part of the creditor alleging that perfection of
4 the security interest occurred post-petition. The defendant,
5 creditor, answered the plaintiff's complaint alleging that the
6 plaintiff, Chapter 13 trustee, had previously admitted and
7 acknowledged the defendant's claim as secured. In reliance upon
8 the trustee's representation, the defendant had elected not to
9 object to the debtors' Chapter 13 plan. The trustee moved for
10 judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c). The
11 court denied the motion and held that "Plaintiff's complaint sets
12 forth the elements necessary for recovery under 11 U.S.C. § 549,
13 but the defenses of estoppel, reliance and waiver asserted by the
14 defendant may be sufficient to defeat the plaintiff's claim." 76
15 B.R. at 109.

17 The plaintiff's principal argument is that there was no
18 detrimental reliance by the defendants, a principal element of
19 estoppel. See Employment Div. v. Wester Graphics Corp., supra.
20 The thrust of the plaintiff's argument is that the boats which the
21 defendants received were worth far more than the amounts paid,
22 post-petition, hence the defendants received a windfall.

23 This court disagrees. Since the defendants could have
24 exercised the UCC remedy of replevin, they relied to their
25 detriment in foregoing such remedy and completing their performance
26 of the contract, payment of the balance of the purchase price.

1 Since the debtors elected to transfer the boats to the defendants
2 and to accept the payment of the balance of the purchase price from
3 each defendant, the defense of estoppel should bar the trustee-
4 plaintiff from exercising its powers under § 549 under the facts of
5 this case. Thus, the defendants have a non-UCC remedy, estoppel
6 based on accepting the benefits of an executory contract, as a
7 defense to the § 549 action brought by the plaintiff-trustee.
8

9 **Summary and Conclusion:**

10 Based upon the foregoing, this court answers the questions
11 posed by the district court on remand as follows:

12 A. If a supplier furnishes goods on an unsecured basis
13 to a debtor, seller, and those goods were
14 "identified" to a contract, should the unsecured
15 buyer have rights in the goods superior to the
16 rights of a debtor-in-possession or the unsecured
17 supplier?

18 Answer: Yes, based upon the buyer's right to
19 exercise the UCC right of replevin in this case.

20 B. If the only remedies available to the defendants
21 under the UCC at the time of filing the Chapter 11
22 proceeding are those also available to unsecured
23 creditors, then hasn't any "special property"
24 interest that may have existed lapsed?

25 Answer: Yes, however, the defendants have remedies
26 under both the Uniform Commercial Code and outside
the Uniform Commercial Code that are not available
to general unsecured creditors.

27 C. Is there any other evidence of insolvency
28 within ten days of the initial deposits?

29 Answer: No.

30 D. Are any other UCC remedies available to a party
31 with a "special property" interest against a
32 seller and ahead of other unsecured creditors?

33 Answer: Yes, the remedy of replevin provided by
34 O.R.S. 72.7160(3) based upon the facts in this
35 case.

1 E. Is there any evidence of the value of the
2 prepetition manufacturing as opposed to the
3 value of the postpetition manufacturing?

Answer: No.

4 F. Are there any other remedies available to
5 defendants outside the UCC, i.e., constructive
6 trust, estoppel based on accepting benefits of
7 an executory contract?

Answer: Yes, the remedy of estoppel based upon
accepting the benefits of an executory contract
under the facts in this case.

8
9 This court continues to conclude that the transactions between
10 the debtors and defendants fall within the ordinary course of
11 business as allowed by §§ 1107 and 1108. Accordingly, the
12 judgments entered herein in favor of the defendants, against the
13 plaintiff, should be permitted to remain in effect.

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16 ALBERT E. RADCLIFFE
17 Bankruptcy Judge
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