

UNITED STATES BANKRUPTCY COURT  
For the Southern District of Iowa

In the Matter of	:	
PESTER REFINING COMPANY,	:	Case No. 85-340-C H
	:	
Debtor.	:	Chapter 11
-----	:	
ETHYL CORPORATION,	:	
	:	Adversary No. 85-0192
Plaintiff,	:	
v.	:	
PESTER REFINING COMPANY,	:	
	:	
Defendant.	:	

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ORDER--TRIAL ON RECLAMATION COMPLAINT UNDER 11 U.S.C. §546(c)

On February 7, 1989, a trial was held on the Reclamation Complaint. The following attorneys appeared on behalf of their respective clients: James M. Holcomb and Robert A. Simms for Plaintiff Ethyl Corporation (hereinafter "Ethyl"); and John G. Fletcher and September Wethington-Smith for Defendant Pester Refining Company (hereinafter "PRC"). At the conclusion of said hearing, the Court took the matter under advisement upon a briefing deadline. The parties filed a stipulation of facts, briefs were timely filed, and the Court considers the matter fully submitted.

This is a core proceeding pursuant to 28 U.S.C. §157(b)(2). The Court, upon review of the pleadings, arguments of counsel, and briefs, now enters its findings of fact and conclusions pursuant to Fed.R.Bankr.P. 7052.

### FINDINGS OF FACT

The parties have stipulated to the following facts:

1. On February 25, 1985, PRC filed a Chapter 11 Petition.
2. On February 25, 1985, Pester Corporation, Pester Marketing, and Petroleum Special, Inc. of Iowa filed Chapter 11 petitions. At no time were any of the four bankruptcy cases substantively consolidated.
3. Ethyl is a corporation organized under the laws of the state of Virginia.
4. PRC is a corporation organized under the laws of the state of Kansas.
5. At all times material to the issues involved in this proceeding, PRC owned and operated a refinery located in El Dorado, Kansas.
6. The law of the state of Kansas governs the sale by Ethyl and the purchase by PRC of the products that are the subject of this proceeding.
7. By letter agreement between Ethyl and PRC dated May 21, 1982, which letter agreement was extended by letter agreement dated January 27, 1983, Ethyl agreed to sell to PRC and PRC agreed to purchase from Ethyl 100 percent of PRC's antiknock requirements, subject to the terms of such letters including the right of PRC to be released from the agreement.
8. During February of 1985 PRC issued to Ethyl its Purchase Order No. 36054 for the purchase on credit of 6,000 gals. of Ethyl

Tel Motor Premix 33 White 8.

9. In mid-February of 1985, and before shipment, Ethyl issued and forwarded to PRC a document entitled "Order Acknowledgement" that pertained to the 6,000 gal. of Ethyl Tel Motor Premix 33 White 8 to be shipped to PRC.

10. On February 19, 1985, Ethyl instructed the Atchison, Topeka & Santa Fe Railway Co. to release to PRC the railroad tank car (No. EBAX006412) that contained the 6,000 gal. of Ethyl Tel Motor Premix 33 White 8. On February 22, 1985, said railroad tank car was delivered to and received by PRC at its refinery at El Dorado, Kansas.

11. The purchase price for said 6,000 gal of Ethyl Tel Premix 33 White 8 was the sum of \$117,007.00.

12. On February 6, 1985, PRC issued to Ethyl its Purchase Order No. 35966 for the purchase of 12--55 gal. drums of ethyl antioxidant 733-PDA H-50.

13. In early February of 1985, and before shipment, Ethyl issued and forwarded to PRC and PRC received a document entitled "Order Acknowledgement" that pertained to said 12--55 gal. drums of ethyl antioxidant.

14. On February 11, 1985, Ethyl shipped to PRC via motor carrier said 12--55 gal. drums of ethyl antioxidant.

15. On February 19, 1985, the 12--55 gal. drums of ethyl antioxidant were delivered to and received by the PRC refinery in El Dorado, Kansas.

16. The purchase price for said 12--55 gal. drums of ethyl antioxidant was the sum of \$9,537.00 plus \$451.00 in shipping charges, for a total of \$9,988.00.

17. On February 26, 1985, Ethyl issued a letter to PRC that was received by PRC on February 27, 1985. This letter stated that the above-described products were shipped and delivered pursuant to a credit sale arrangement when PRC was insolvent and made demand upon PRC for the return of the product. The Ethyl Tel Motor Premix 33 White 8 and the 12--55 gal. drums of ethyl antioxidant were in the possession of PRC on February 26 and 27, 1985, and were identifiable.

18. At the time of the filing of the PRC Chapter 11 petition (February 25, 1985), the parties agreed PRC was indebted to Ethyl in the amount of \$366,136.78. Of this amount, \$126,995.00 represents the invoice price for sale of the product which is the subject of this reclamation proceeding. As to the balance of \$239,141.78, Ethyl remains a general unsecured creditor. Ethyl filed its Proof of Claim in the PRC bankruptcy on December 16, 1985, in the total amount of \$369,500.73.

19. From and after December of 1981, and at all times material to this proceeding, Continental Illinois National Bank and Trust Company of Chicago, First Interstate Bank of Denver, N.A., and Bankers Trust Company (hereinafter collectively the "Bank Group") held a perfected security interest in all present and future

inventory, equipment, general intangibles, accounts, contract rights, goods and fixtures of PRC including the proceeds of the collateral and the products of the collateral, pursuant to the terms of a loan agreement generally referred to as the Bank Group Revolving Credit Agreement. In addition, from and after December of 1981, and at all times material to this proceeding, Bank Group held a properly recorded mortgage or deed of trust in all of the real estate of PRC pursuant to the loan agreement generally referred to as the Bank Group Term Loan Agreement. PRC's property which collateralized Bank Group Revolving Credit Agreement also collateralized the Bank Group Term Loan Agreement, and PRC's property which collateralized the Bank Group Term Loan Agreement also collateralized the Bank Group Revolving Credit Agreement.

20. From and after May-June of 1984, and at all times material to this proceeding, Southern Union Refining Company and Inland Crude Purchasing Corporation (hereinafter collectively the "Junior Lienors") held a perfected security interest in all present and future inventory, equipment, general intangibles, accounts, contract rights, goods and fixtures of PRC, including the proceeds and products thereof, as collateral security for the indebtedness owing by PRC to the Junior Lienors. In addition, from and after May-June of 1984, and at all times material to this proceeding, the Junior Lienors held a properly recorded mortgage or deed of trust in all of the real estate of PRC as security for the debt. Said security interest and mortgages or deeds of trust held by the Junior Lienors were junior only to the security interest in mortgage or deed of

trust held by Bank Group. PRC's property which collateralized the security agreements granted to Junior Lienors also collateralized the mortgages or deeds of trust given the Junior Lienors, and PRC's property which collateralized the mortgages or deeds of trust given the Junior Lienors also collateralized the security agreements granted to Junior Lienors.

21. Both Bank Group and Junior Lienors were "good faith" purchasers within the meaning of Uniform Commercial Code §2-702 (Kans. Stat. Ann. 84-2-702 [1983]).

22. Ethyl's reclamation claim to the product is subject to the lien of both Bank Group and Junior Lienors upon the product.

23. In October of 1985, upon application of the Unsecured Creditors Committee of PRC, the Bankruptcy Court entered an order directing that Wright, Killiam & Feldman, Inc., of Houston, Texas, be retained to prepare an appraisal of the PRC Refinery in El Dorado, Kansas. In December of 1985, Wright, Killiam & Feldman, Inc. issued its appraisal, entitled Pester Refining Company Asset Valuation Report, (hereinafter "WK&F Report") and the same was filed with the Bankruptcy court. The parties have consented to the Court taking judicial notice of the WK&F Report.

24. The WK&F Report concluded that, if PRC had been liquidated (on either the date of filing its bankruptcy petition or on the date of the WK&F Report), the net realization value of the PRC Refinery would range from a negative \$5,000,000.00 to a negative \$21,000,000.

25. On March 21, 1986, (the date of confirmation of PRC's Plan of Reorganization) the amount of the deficiency of the allowed secured claim of Bank Group against PRC, after giving credit for the inventory, receivables and other properties of PRC that were sold, or were collected, and applied on the Bank Group debt, was the sum of \$25,912,823.00. On March 21, 1986, the amount of the deficiency of the allowed secured claim of the Junior Lienors against PRC was the sum of \$17,061,436.00.

26. Under the terms of the Plan of Reorganization, the Bank Group wrote off in excess of \$500,000.00 of the debt owing to it by PRC, which indebtedness exceeded \$60,000,000.00.

27. Shortly after the filing of PRC's petition, the Court entered an Order, on application and notice, granting Bank Group a "super-priority" lien, pursuant to Bankruptcy Code §364(c)(1) and (3), on all of PRC's property as security for credit extended to PRC by Bank Group during the administration of the estate.

28. The parties have agreed that the Court may take judicial notice of the First Amended Joint Disclosure Statement filed by PRC that was approved by the Court together with the First Amended Joint Plans of Reorganization (hereinafter the "Plan") filed by PRC that was approved and confirmed by the Court on March 21, 1986. Under the Plan, Ethyl is the holder of a Class 9 Claim. The parties have also agreed that the Court may also take judicial notice of all filings in the bankruptcy proceedings of the Pester Corporation, Pester Refining Company and Petroleum Special, Inc. of Iowa.

29. Under the First Amended Joint Disclosure Statement and the

Plan, reclamation claimants, such as Ethyl, could elect to either (a) pursuant to paragraph 1 of Exhibit 3 to the Plan, pursue their reclamation claims, or (b) pursuant to paragraphs 2 and 3 of Exhibit 3 of the Plan, elect to compromise and settle their claims by sharing pro rata in certain proceeds from the MAPCO-Burke Natural Gas Liquids litigation then pending in the court. All of the reclamation creditors, except Ethyl, elected alternative (b). Ethyl elected alternative (a) and is pursuing its reclamation claim as permitted under paragraph 1 of Exhibit 3 to the Plan.

30. Following confirmation of the Plan, PRC, for administrative purposes, treated Ethyl as having elected alternative (b) and, by reason thereof, Pester Marketing Company paid to Ethyl its pro rata portion of the interest in the promissory note referred to in Exhibit 4 to the Plan. Said payments to Ethyl were \$764.41 in June of 1987 and \$1,146.61 on March 31, 1988.

31. Ethyl voted to approve the Plan that was filed by PRC.

32. Because PRC did not have funds available to pay its administrative expense claimants, PRC's allowed administrative claims (meaning expenses of administration under Bankruptcy Code §503(b) and §507(a)(1)) were paid by Pester Marketing Company.

33. During the month of February 1985, PRC was insolvent as such term is defined in Bankruptcy Code §101(29). During the month of February 1985, Pester was insolvent for purposes of Bankruptcy Code §546(c) and for purposes of §2-702 of the Uniform Commercial Code of Kansas.

34. Neither the 6,000 gals. of Ethyl Tel Motor Premix 33 White



8, nor the 12--55 gal. drums of ethyl antioxidant, are in possession of PRC. PRC has been unable to give any information as to the disposition of the product and it was never returned to Ethyl.

35. The railroad tank car (No. EBAX006412) has been returned to Ethyl.

## DISCUSSION

### I. Bifurcation of Trial.

The parties previously agreed the issues presented in this adversary proceeding would be bifurcated into separate trials. In this first trial, the Court must determine whether Ethyl has a valid and enforceable right of reclamation regarding the 6,000 gal. of Ethyl Tel Motor Premix 33 White 8 and the 12-55 gal. drums of ethyl antioxidant under §546(c) of the Bankruptcy Code and §2-702 of the Uniform Commercial Code. If Ethyl does have a valid reclamation right, a second trial will be necessary to determine the amount due Ethyl and the source of the funds to pay said amount.

### II. Right of Reclamation.

Bankruptcy Code §546(c) allows a seller of goods, with certain restrictions, to exercise any statutory or common law right he may have to reclaim the goods from a bankrupt buyer. In determining whether a seller has a statutory or common law right to reclaim goods, the Court must look to state law. Matter of Griffin Retreading Co., 795 F.2d 676, 678 (8th Cir. 1986) (citation omitted).

The parties have stipulated that Kansas law applies in this case and the Court agrees. In seeking reclamation rights, Ethyl relies upon §2-702 of the Uniform Commercial Code as adopted by Kansas

K.S.A. §84-2-702. That section provides, in relevant part:

- (2) Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten (10) days after the receipt....
- (3) the seller's right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course or other good faith purchaser under this article....

The Bankruptcy Code, as previously noted, recognizes the validity and enforceability of state created reclamation rights and has imposed upon reclamation creditors an additional requirement that the reclamation demand made upon the buyer be in writing within ten days after receipt of the goods by the debtor. 11 U.S.C. §546(c)(1) (emphasis added). In addition to these requirements the goods must be in the debtor's possession at the time of the demand. Matter of Bosler Supply Group, 74 B.R. 250, 253 (N.D. Ill. 1987) (citations omitted).

In the case *sub judice*, the parties stipulated Ethyl has complied with each of these requirements and the Court agrees. Ethyl sold the antioxidant and the Ethyl Tel Motor Premix 33 White 8 to PRC on credit and delivered said product to PRC on February 19, 1985 and February 27, 1985. PRC filed its Chapter 11 petition on February 25, 1985. On February 26, 1985, Ethyl issued its written reclamation demand to PRC, which was received by PRC on February 27, 1985. PRC was in possession of the product on the date the demand was made by Ethyl and received by PRC. Finally, at all times pertinent to this

adversary proceeding, PRC was insolvent as defined in §101(21) for purposes of §546(c) and K.S.A. §85-2-702. Accordingly, Ethyl timely and properly exercised its reclamation rights under §546(c) and K.S.A. §84-2-702.

### III. Priority of Right of Reclamation.

Although Ethyl clearly has reclamation rights under §546(c) and K.S.A. §84-2-702, the Court must next determine whether said rights are subject to the rights of a good-faith purchaser, pursuant to K.S.A. §84-2-702(3). The parties stipulated that both Bank Group and Junior Lienors were good-faith purchasers and that both held perfected security interests in all inventory and other assets of PRC that pre-dated the purchase of the products from Ethyl. The parties also stipulated that Ethyl's reclamation claim, if any, to the product is subject to, or junior to, the liens of both Bank Group and Junior Lienors to the product. The Court agrees with the parties because K.S.A. §§84-1-201(19), (32) and (33) define good faith purchaser to include a party holding a "voluntary lien" upon the property, which Bank Group and Junior Lienors do hold, and the Court previously held Bank Group was a good-faith purchaser because of its financing agreement with PRC. See Matter of Pester Refining Co., 66 B.R. 801, 815 (Bankr. S.D. Iowa 1986)

rev'd on other grounds, 845 F.2d 1976 (8th Cir. 1988). As a result,

the Court concludes Ethyl's reclamation rights are subject and subordinate to the perfected blanket security interests of Bank Group and Junior Lienors and, thus, Ethyl is not entitled to possession of the product.

Given that Ethyl is not entitled to the possession of the property, the next issue concerns what reclamation rights, if any, does Ethyl still possess. Bankruptcy Code §546(c)(2) provides:

- (2) the court may deny reclamation to a seller with such a right of reclamation that has made such a demand only if the court--
  - (A) grants the claim of such a seller priority as a claim of a kind specified in section 503(b) of this title [administrative expense]; or
  - (B) secure such claim by a lien.

11 U.S.C. §546(c)(2) (emphasis added). PRC contends the existence of Bank Group's and Junior Lienors' security interest extinguish Ethyl's reclamation rights. Ethyl, on the other hand, contends its reclamation right is subject to, not extinguished by, the security interests of Bank Group and Junior Lienors, and that it is entitled to administrative expense under §546(c)(2)(A).

Upon review, the Court finds Ethyl's arguments to be persuasive. PRC's mistake is that it treats the terms "subject to" and "extinguished by" as synonyms, even though the terms clearly are not synonymous. A substantial majority of courts addressing the issue have ruled that the rights of a good-faith purchaser do not extinguish a reclamation claim. See Bosler Supply Group, 74 B.R. at

253; Matter of Melvin Liquid Fertilizer Co., Inc., 37 B.R. 587, 590 (Bankr. W.D. Ohio 1984); In re Wathen's Elevators, Inc., 32 B.R. 912, 923 (Bankr. W.D. Ky. 1983); In re Davidson Lumber Co., 22 B.R. 775, 776 (Bankr. S.D. Fla. 1982); In re Western Farmers Assoc., 6 B.R. 432, 436 (Bankr. W.D. Wash. 1980); contra In re FCX, Inc., 62 B.R. 315, 322-23 (Bankr. E.D.N.C. 1986).

Moreover, the leading case cited by PRC, In re Coast Trading Co., Inc., 744 F.2d 686 (9th Cir. 1984) actually supports Ethyl's position. In that case, goods allegedly subject to reclamation had been resold by the debtor and were no longer in the debtor's possession when the reclamation demand was made. Id. at 688-89. The court correctly concluded the creditor had no reclamation rights because one of the elements of reclamation--goods in possession of the debtor at the time of reclamation demand--had not been satisfied. Id. at 690. The court, apparently applying Kansas law, further noted that had the creditor been able to demonstrate that the goods were in the possession of the debtor at the time of the demand, it would have had reclamation rights and would have been entitled to administrative priority under §546(c) notwithstanding the existence of the secured creditor. Id. at 692 (distinguishing case before it from In re Western Farmers Assoc., 6 B.R. 432 (Bankr. W.D. Wash. 1980)).

PRC's allegation that "Kansas concurs with the rule that a good-faith purchaser defeats any reclamation claim by a seller" is similarly unpersuasive. In support of its position, PRC cites two non-Kansas cases referred to in the Kansas Comments to K.S.A. §84-2-

702 which, PRC claims, "both hold that secured creditors with a prior perfected security interest are good-faith purchasers under 2-403 and defeat a seller's reclamation claim." The Court, however, disagrees with PRC's interpretation of the holdings.

In one of those cases, Kennett-Murray & Co. v. Pawnee Nat'l Bank, 598 P.2d 274 (Okla. App. 1979), the plaintiff was an alleged reclamation creditor who had attempted to regain reclamation product (or the proceeds thereof) and was involved in a priority dispute with the defendant, two banks which held prior perfected security interests in, among other things, the reclamation product. The court correctly held the right of the holder of the prior perfected security interest to the product was superior to the claim of the alleged reclamation creditor because said creditor did not timely exercise its right of reclamation. Id. at 277. The court, however, did not rule that the prior perfected security interest extinguished plaintiff's reclamation rights:

We further note that even if Kennett-Murray had pursued its rights under §2-702 within ten days, it would nevertheless be subordinate to the two banks with perfected security interests...

Id. (emphasis added).

PRC's reliance on Iola State Bank v. Bolan, 699 P.2d 720 (Ks. 1984) and Matter of Pester Refining Co., supra, is also misplaced. In both cases the court was required to determine only the right of a seller to physical possession of the goods when the seller's interest was challenged by a good-faith purchaser. In both cases, the court

held that the creditor's right to possession of property was defeated by the existence of a good-faith purchaser. In neither case did the court hold that a good-faith purchaser extinguished a creditor's non-repossessory reclamation rights. In the case *sub judice* Ethyl concedes its right to possession is defeated and the issue is whether the existence of a good-faith purchaser has any impact on Ethyl's rights vis a vis PRC, i.e., its rights to administrative expense under §546(c)(2)(A).

The cases involving rights of reclamation which are unavoidable because of intervening rights of a good-faith purchaser in the goods or product are distinguishable from those cases involving the unavailable rights of reclamation because the goods or product are no longer in the possession of the debtor. Where the rights of a good-faith purchaser (e.g., the superior rights of a secured creditor in inventory) intervene, the seller has a right of reclamation but is prevented from doing so because of the intervening rights of the secured creditor. Where the goods are no longer in Debtor's possession, the seller has no right of reclamation. Coast Trading, supra.

In conclusion, the Court has not found any case involving the application of Kansas law, except Coast Trading Co., which addresses the issue of a reclamation creditor's rights as against the debtor. As Coast Trading Co. states, Ethyl retains reclamation rights subject to the claims of Bank Group and Junior Lienors. Since Ethyl has met all of the reclamation requirements but reclamation of the product is precluded because of Bank Group's and Junior Lienors' prior perfected

security

interests, the grant of an administrative expense or lien under §546(c)(2) is mandatory. Bosler Supply, 74 B.R. at 253; see Griffin Retreading Co., 795 F.2d at 676; Coast Trading Co., 744 F.2d at 692; Melvin Liquid Fertilizer, 37 B.R. at 590; Wathen's Elevators, 32 B.R. at 923; Davidson Lumber, 22 B.R. at 776. Thus, Ethyl does have a valid reclamation right subject to the security interest of Bank Group and Junior Lienors.

#### IV. Plan Treatment.

PRC next argues that even if Ethyl does have valid reclamation rights under §546(c), it is not entitled to be paid as a priority administrative claimant because of the terms of the Plan which was confirmed and not appealed, set aside or revoked. In order to address this argument, the Court must set out all relevant portions of the Plan and Disclosure Statement which include the following:

##### PLAN - Article II - Definitions

2.1 "Administrative Claim" shall mean an expense of administration of these Chapter 11 cases, under Sections 503(b) and 507(a)(1) to and including the Date of the Order of Confirmation, and all allowances approved by the Court in accordance with the Code, and does not mean or include Allowed Special Claims. [emphasis added]

2.36 "Special Claim" shall mean that part of an Allowed Claim encompassed by a notice of reclamation properly filed with a Debtor, but an alleged reclamation claim will only be an allowed Special Claim to the extent that Debtor had actual or constructive right, title and interest in the property subject only to the rights of a secured creditor which had properly perfected its rights as of the Petition Date under Article 9 of the Uniform Commercial Code as enacted in the applicable states and product was in existence at the



time notice of reclamation was received by that Debtor . . . .  
[emphasis added]

3.22 "Class 9C": (PRC other Special Claims) Class 9C consists of PRC reclamation creditors, meaning all holders of claims against PRC who filed notices of reclamation of non-crude oil inventory, and requested certain other relief, whether or not such rights have been asserted by adversary proceeding and who claimed priority over general unsecured creditors. The Class does not include Class 9A and Class 9B holders of claims. [emphasis added]

EXHIBIT 3 of the Plan - Treatment of Class 9A, 9B, and 9C Claims

1. Alleged reclamation claimants will receive payment in full of the amount finally determined to be due by Court order.  
PRC believes that amount to be \$0. The Debtors believe the litigation of the issues underlying the alleged reclamation claims would be costly and time consuming. Identification of products shipped by a particular reclamation creditor and the determination of whether or not that product was on hand as of the Petition Date would be difficult. Further, Debtors believe that, in any event, the alleged reclamation claims would be determined to be inferior to the lien claims and administrative claims of the Bank Group and the Junior Lienors as well as invalid because of the Bank Group's prior liens and status as a good faith purchaser under the Uniform Commercial Code. [emphasis added]
2. As an alternative to Paragraph 1 above, holders of Special Claims in Classes 9A, 9B, and 9C may settle and compromise their claims by sharing pro rata up to \$300,000 of the proceeds from the Mapco/Burke of Natural Gas Liquids litigation currently pending in the Bankruptcy Court, based on the determination of the Allowed Special Claims of this Class. [emphasis added]

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Class 1 (Administrative claims) (Nonvoting) consists of all allowed administrative claims which means expenses of administration and does not include tax claims, claims of employee for wages or benefits or alleged reclamation claims. These claims will be paid in full for cash as soon as possible or in the ordinary course of business after the Confirmation Date of the Joint Plan. [emphasis added]

PRC offers two arguments as to why Ethyl is not entitled to an administrative claim under the terms of the confirmed Plan. PRC first argues that under §2.36 of the Plan, reclamation claims are

"allowed special claims" and said claims are excluded from the definition of "Administrative Claim" under §2.1. In addition, PRC argues that at page

20 of the Disclosure Statement, Class 1 (Administrative claims) are specifically defined to not include alleged reclamation claims.

Ethyl, on the other hand, completely disagrees with PRC's arguments. Ethyl first argues that "allowed special claims" under §2.36 cannot be determined without considering Exhibit 3. Under Exhibit 3, alleged reclamation creditors were given two options. Under ¶1 of Exhibit 3, they could pursue their reclamation claim and if successful would be paid in full the amount determined by the Court. As an alternative, ¶2 provided reclamation creditors could settle and compromise their claims by sharing in a pro rata distribution of the recovery from the Mapco/Burke litigation. All reclamation creditors except Ethyl chose the alternative treatment under ¶2. Ethyl argues that only those other reclamation creditors which chose the alternative treatment are "allowed special claims" under §2.36 and thus excluded from the definition of "Administrative Claim" under §2.1.

In addition, Ethyl also contends PRC's disclosure statement argument must fail for two reasons. First, if the Court determined Ethyl does not have an administrative claim and that page 20 of the disclosure statement overrules the language of Exhibit 3 regarding treatment of reclamation claimants, then Ethyl would be denied the

relief to which it is entitled under Bankruptcy Code §546(c). In addition, Ethyl argues PRC's interpretation of administrative claim treatment together with Class 9C treatment is irreconcilably in conflict because it attempts to say the Plan on the one hand creates rights for

reclamation creditors in Exhibit 3 (payment in full) while on the other hand taking those rights away by saying that a reclamation creditor can never recover anything.

Upon review of these positions, the Court finds Ethyl's arguments persuasive. The only part of Exhibit 3 which mentions "allowed special claims" is ¶2 dealing with the alternative relief that Ethyl declined to accept. Ethyl instead chose to pursue its reclamation claim under ¶1. In ¶1 PRC stated it believed the reclamation payment amount due would be \$0 and that any reclamation rights would be both inferior and invalid. These statements are incorrect because, as noted above, Ethyl's reclamation rights are inferior but not invalid, and said rights will have a value. Moreover, nowhere is it stated in ¶1 that a reclamation creditor who pursues its claim will be pursuing an "allowed special claim." That language only appears under the alternative relief in ¶2 which Ethyl declined to accept. Thus, the Court finds that under ¶1 of Exhibit 3, Ethyl's reclamation claim is not an "allowed special claim" under §2.1 of the Plan.

Ethyl's second argument is also persuasive. The terms of the confirmed plan, not the disclosure statement, bind the parties.

Under the Plan, Ethyl's reclamation rights are not excluded from the definition of "Administrative Claim."

V. Other Issues.

1. Amendment or Modification of Plan.

PRC offers a number of additional defenses which the Court will briefly discuss and reject. First, PRC argues that under §1127, only the proponent of the plan or reorganized debtor can amend or modify a confirmed plan. The Court agrees but the argument is irrelevant because Ethyl's complaint only requires the Court to interpret, not amend or modify, the Plan.

2. Absence of Funds.

Second, PRC argues granting Ethyl an administrative priority claim would be a meaningless act because there are no funds to pay administrative expense claims. The Court finds such objection premature because the source of funds to pay the administrative claim is one of the issues to be addressed during the second half of this bifurcated trial.

3. Res Judicata.

PRC argues Ethyl is barred and estopped from asserting its administrative expense claim because the confirmation order is *res judicata*. As authority PRC cites to In re Morningstar Farms, No. 86-00988-W unpub. op. (Bankr. N.D. Iowa May 12, 1988) wherein Chief Judge Melloy held that an order confirming a Chapter 11 plan is *res judicata*. This Court issued a similar ruling in Matter of Central Steel Tube Company, No. 83-856-D H, Adv. No. 87-0213, unpub. op. (Bankr. S.D. Iowa May 1, 1988). In Central Steel, the Court ruled

that the terms of a confirmed plan bind all parties even if the plan provided a creditor with less than it was otherwise entitled. Id. at 16. The Court went on to note it was "constrained to merely interpret and enforce the terms" of the confirmed plan. Id. In the case *sub judice* PRC's argument would be valid if there was an express prohibition in §2.1 of the Plan against Ethyl's reclamation claim. However, as noted above, there is no such prohibition under the Plan.

The Court is merely interpreting and enforcing the terms of PRC's Plan, not changing the terms of the Plan in violation of the doctrine of *res judicata*.

#### 4. Election of Remedies.

PRC argues that Ethyl, by pursuing its reclamation claim, had elected its remedy and, therefore, the value of its reclamation claim is not entitled to treatment even as a general unsecured creditor under the Plan. The Plan provided that reclamation claims could elect to either (a) pursue the reclamation claim, pursuant to paragraph 1 of Exhibit 3 or (b) compromise and settle the reclamation claim by sharing in contingent proceeds from the MAPCO/ Burke litigation, with the remainder of the claim being treated as a general unsecured creditor, pursuant to paragraphs 2 and 3 of Exhibit 3. If Ethyl is denied all or part of its reclamation claim, the claim, or balance thereof, is an unsecured claim which Ethyl may pursue. Coupon Carriers Co. v. J. C. Marsh Manufacturing Co. (In re Coupon Carriers Co.), 77 B.R. 650, 653 (Bankr. N.D. Ill. 1987); Harris Trust and Savings Bank v. Wathen's Elevators, Inc. (In re Wathen's Elevators, Inc.), 32 B.R. 912, 923 (Bankr. W.D. Ky. 1983).

The Plan does not provide otherwise. Accordingly, Ethyl has elected its remedy under the Plan, but is not precluded from being treated as a general unsecured creditor under the Plan.

5. Laches.

PRC argues that Ethyl is barred by the doctrine of laches from collecting on the reclamation claim.

The basic elements of the equitable defense of laches are that the plaintiff must be guilty of unreasonable and inexcusable delay that has resulted in prejudice to the defendant. Goodman v. McDonnell Douglas Corp., 606 F.2d 800, 804 (8th Cir. 1979). The analogous statute of limitations is an important consideration as the same principles underlie both legal concepts: the desire to avoid unfairness that can result from the prosecution of stale claims. Id., 606 F.2d at 804, 805. Laches is an affirmative defense, see F.R.Civ.P. 8(c), and generally the burden of persuasion on an affirmative defense rests with the defendant. Goodman, supra, 606 F.2d at 806. A court should focus upon the length of the delay, the reasons therefor, how the delay affected the defendant, and overall fairness of permitting the assertion of the claim. Id.

Ethyl sold products to PRC on February 19 and 22, 1985; PRC filed its Chapter 11 petition on February 25, 1985; Ethyl demanded return of its product by letter dated February 26, 1985, and received by PRC on February 27, 1985; upon motion of PRC, Ethyl was prohibited by court order from reclaiming its product; PRC has not been able to account to anyone as to how it disposed of said product; Ethyl filed the instant complaint on May 29, 1985; PRC did not file an answer until June 7, 1988; the Plan was confirmed on March 21, 1986; and Ethyl timely elected under the Plan to pursue its reclamation rights.

There is no analogous statute of limitations. Section 2-702(2), U.C.C. [K.S.A. 84-2-702 (1983)] requires that a seller who wishes to reclaim goods and product must make demand therefor within ten days after the receipt of said goods and product, but there is no specific statute of limitations for the filing of the complaint. Ethyl filed its complaint within approximately four months of the time Ethyl became aware of PRC's bankruptcy petition. This is a reasonable time.

PRC has failed to show that it has been prejudiced by any delay. There has been a delay in the prosecution of this adversary proceeding, but PRC did not put this adversary proceeding at issue until over three years after the filing of the complaint. Ethyl was at no time entitled to the return of the product, and Ethyl's right to recovery is limited to its treatment under the Plan. Pester has neither changed its position nor incurred any additional obligations as a result of any delay herein. The respective rights under the Plan have not been altered because of the delay. Accordingly, PRC must fail in its affirmative defense of laches.

VI. Date For Valuation of Ethyl's Reclamation and Claim.

Pursuant to stipulation of the parties, the Court must determine the date of valuation of Ethyl's reclamation claim during this portion of the bifurcated trial.

PRC has alleged that the value of the reclamation product



declined in value after the filing of the petition and Ethyl's demand for reclamation.

Ethyl contends that the reclamation claim should be valued as of the date of the reclamation demand. The greater weight of authority supports this position. American Saw & Mfg. Co. v. Bosler Supply Group (Matter of Bosler Supply Group), 74 B.R. 250, 255 (N.D. Ill. 1987); Bethlehem Steel Corp. v. Wheeling-Pittsburgh Steel Corp. (In re Wheeling-Pittsburgh Steel Corp.), 74 B.R. 656, 661 (Bankr. W.D. Pa. 1987); Ohio Farmers Grain and Supply Assn. v. Melvin Liquid Fertilizer Co., Inc. (Matter of Melvin Liquid Fertilizer Co., Inc.) 37 B.R. 587, 590 (Bankr. W.D. Ohio 1984); Harris Trust & Savings Bank v. Wathen's Elevators, Inc. (In re Wathen's Elevators, Inc.), 32 B.R. 912, 923 (Bankr. W.D. Ky. 1983); Champion International Corp. v. Davidson Lumber Co. (In re Davidson Lumber Co.), 22 B.R. 775, 776 (Bankr. S.D. Fla. 1982).

Accordingly, the date for valuation of Ethyl's reclamation claim must be determined as of the date of Ethyl's demand for reclamation, to-wit: February 26, 1985.

WHEREFORE, based on the foregoing analysis, the Court concludes as follows:

(1) Ethyl has a valid and enforceable right of reclamation regarding the 6,000 gallons of Ethyl Tel Motor Premix White 8 and the 12-55 gal. drums of Ethyl antioxidant.

(2) Ethyl's rights of reclamation are subordinate to, but not extinguished by, the perfected security interests of the Bank Group and Junior Lienors.

(3) Ethyl, as a holder of a Class 9C claim under the First Amended Joint Plan of Reorganization is entitled to be paid in full in an amount to be determined by the Court in the second proceeding herein.

(4) Ethyl is not barred or estopped from asserting its claim by the doctrines of *res judicata*, election of remedies, laches, or equitable estoppel.

(5) The date of Ethyl's reclamation demand, February 26, 1985, is the date for valuation of Ethyl's reclamation claim.

(6) The date for the second trial of this bifurcated proceeding shall be set upon further order of the Court.

IT IS SO ORDERED.

Dated this 28th day of September, 1989.

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RUSSELL J. HILL  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
For the Southern District of Iowa

In the Matter of	:	
PESTER REFINING COMPANY,	:	Case No. 85-340-C H
Debtor.	:	Chapter 11
-----	:	
ETHYL CORPORATION,	:	
Plaintiff,	:	Adversary No. 85-0192
v.	:	
PESTER REFINING COMPANY,	:	
Defendant.	:	
-----	:	

**JUDGMENT**

The issues of this proceeding having been duly considered by the Honorable Russell J. Hill, United States Bankruptcy Judge, and a decision having been reached,

IT IS ORDERED AND ADJUDGED as follows:

(1) Ethyl has a valid and enforceable right of reclamation regarding the 6,000 gallons of Ethyl Tel Motor Premix White 8 and the 12-55 gal. drums of Ethyl antioxidant.

(2) Ethyl's rights of reclamation are subordinate to, but not extinguished by, the perfected security interests of the Bank Group and Junior Lienors.

(3) Ethyl, as a holder of a Class 9C claim under the First Amended Joint Plan of Reorganization is entitled to be paid in full

in an amount to be determined by the Court in the second proceeding herein.

(4) Ethyl is not barred or estopped from asserting its claim by the doctrines of *res judicata*, election of remedies, laches, or equitable estoppel.

(5) The date of Ethyl's reclamation demand, February 26, 1985, is the date for valuation of Ethyl's reclamation claim.

Dated this 28th day of September, 1989.

Mary M. Weibel  
Clerk of U.S. Bankruptcy Court

BY: \_\_\_\_\_  
Deputy Clerk

SEAL OF THE U.S. BANKRUPTCY COURT

ENTRY OF JUDGMENT

Dated: September 28, 1989

# United States District Court

SOUTHERN DISTRICT OF IOWA - CENTRAL DIVISION

IN RE :

PESTER REFINING COMPANY,

**JUDGMENT IN A CIVIL CASE**

Debtor.

PESTER REFINING COMPANY,

Appellant,

CASE NUMBER: 89-774-B

v.

ETHYL CORPORATION,

Appellee.

- Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- Decision by Court.** This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the conclusions of law reached by the bankruptcy court and therefore the order appealed from is affirmed.

February 16, 1990  
Date

JAMES R. ROSENBAUM  
Clerk

L. Coughenauer  
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF IOWA  
CENTRAL DIVISION

IN RE:

PESTER REFINING COMPANY,  
Debtor.

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CIVIL NO.. 89-774-B

**AFFIRMANCE**

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PESTER REFINING COMPANY,

Appellant,

v.

ETHYL CORPORATION,

Appellee.

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Debtor-defendant Pester Refining Company appeals from an order in a core proceeding entered by the bankruptcy court on September 28, 1989, after trial on reclamation complaint of plaintiff Ethyl Corporation. The facts are undisputed. Pester complains of the conclusions of law reached by the bankruptcy judge.

I agree with, and adopt, the conclusions of law reached by the bankruptcy court and therefore the order appealed from is affirmed.

Counsel for Pester requested that I order that judgment on my decision not be entered until after the second trial of the bifurcated proceeding (presented scheduled in bankruptcy court for April of this year) and the decision by this court of any appeal from the result in the second trial, in order that a consolidated appeal might then be had. I think that better procedure is for judgment to be entered on my affirmance decision at this time and then, if Pester appeals, Pester may request the court of appeals to stay the appeal proceedings until any appeal to that court is taken in the matter scheduled for trial in April. In short, I believe it is best for the court of appeals rather than this court to decide whether to delay the appeal of

this decision in order to have a consolidated appeal later. Accordingly, the clerk is directed to enter judgment on this affirmance.

DATED this 16th day of February, 1990.

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HAROLD D. VIETOR, Chief Judge  
Southern District of Iowa