The 20-Day Goods Priority Claim Under Bankruptcy Code Section 503(b) (9): The Complexities of a Seemingly Simple Statute

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Abstract

Bankruptcy Code section 503(b)(9) was included as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") to provide additional protection to certain trade creditors by allowing suppliers of goods to assert an administrative expense claim for the value of goods sold and delivered to, and received by, a customer in the ordinary course of business within 20 days of the customer's bankruptcy filing (the "503(b)(9) Claim"). The 503(b)(9) Claim grants goods suppliers a step up in priority, thus increasing the likelihood of full payment on their claim. The 503(b)(9) Claim has also helped trade creditors avoid many problems associated with recovering on a bankruptcy reclamation claim.

Although section 503(b)(9) has certainly proven to be a shot in the arm for trade creditors supplying goods, it has not come without issues. The courts have grappled with many questions left unanswered by this relatively short and apparently simple statutory provision. For instance, debtors have challenged what exactly constitutes "goods"; when payment must be made on account of an allowed 503(b)(9) Claim; the impact of a debtor's setoff rights and preference and other avoidance claims on the allowance of 503(b)(9) Claims; when goods are deemed "received" in calculating the 20 day reachback; and the manner in which 503(b)(9) Claims must be asserted and what deadlines apply for asserting such claims, all driven by the debtor's goal of reducing the size of the 503(b)(9) Claims pool. This article summarizes how the courts have interpreted section 503(b)(9) and how their rulings directly impact the ability of trade creditors to recover on their 503(b)(9) Claims.

The 503(b)(9) Claim and Reclamation Rights

Bankruptcy Code section 503(b)(9) provides as follows:

> (b) After notice and a hearing, there shall be allowed, administrative expenses, other than claims allowed under section 502(f) of this title, including –
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>> (9) the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business.

Bankruptcy Code section 546(c) provides, in pertinent part, as follows:

(c)(1) [S]ubject to the prior rights of a holder of a security interest in such goods or the proceeds thereof, the rights and powers of the trustee under sections 544(a), 545, 547, and 549 are subject to the right of a seller of goods that has sold goods to the debtor, in the ordinary course of such seller's business, to reclaim such goods if the debtor has received such goods while insolvent, within 45 days before the date of the commencement of a case under this title, but such a seller may not reclaim such goods unless such seller demands in writing reclamation of such goods --

> (A) not later that 45 days after the date of receipt of such goods by the debtor; or
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> (B) not later than 20 days after the date of commencement of the case, if the 45-day period expires after the commencement of the case.

(2) If a seller of goods fails to provide notice in the manner described in paragraph (1), the seller may still assert the rights contained in section 503(b)(9).

A 503(b)(9) Claim is like a safety net for suppliers of goods that cannot recover on their reclamation claims. Section 546(c)(1) grants a trade creditor the right to reclaim goods sold to an insolvent debtor in the ordinary course of the creditor's business and received by the debtor within 45 days of the commencement of the debtor's bankruptcy case. A trade creditor seeking reclamation must send a written reclamation demand identifying the goods not more than 45 days after the debtor's receipt of the goods, or not later than 20 days after commencement of the bankruptcy case if the 45-day period expires after the bankruptcy filing. The creditor must prove the debtor's insolvency at the time of the reclamation demand based on a balance sheet test of liabilities exceeding assets.

Despite BAPCPA's changes to the reclamation requirements in the Bankruptcy Code, reclamation creditors continue to have difficulty obtaining relief for several reasons. First, under section 546(c)(1), reclamation rights are subject to the prior rights of the debtor's lender with a floating lien in all of the debtor's inventory, including the goods subject to reclamation. There is a significant risk that relief reclamation claims will be denied where the debtor has a prepetition lender with a large outstanding claim that is secured by the debtor's inventory. Second, reclamation rights are likely to be limited to the goods in the debtor's possession at the time of the reclamation demand (or sometimes on the bankruptcy filing date), which, as a practical matter, can be difficult to prove. Lastly, the only statutory remedy for a successful reclamation claimant -- return of goods -- could make recovery on reclamation claims very costly and time intensive.

By comparison, a creditor asserting a 503(b)(9) Claim is more likely to obtain a recovery than by only relying upon bankruptcy reclamation rights. A creditor with a 503(b)(9) Claim is not restrained by many of the defenses and limitations that have frustrated reclamation creditors. For instance, a creditor asserting a 503(b)(9) Claim is not subject to the defenses of a prior lien on inventory, or that the goods were sold or consumed, or were not otherwise in the debtor's possession when the reclamation demand was made.

Meaning of "Goods" Under Section 503(b)(9)

Since the adoption of section 503(b)(9), the courts have grappled with the meaning of "goods". In *In re Plastech Engineered Products, Inc.*,[1] the Bankruptcy Court for the Eastern District of Michigan considered whether goods supplied in the context of mixed transactions (i.e., a vendor that provides both goods and services together) are covered by section 503(b)(9). The debtor, Plastech Engineered Products, Inc., was in the business of designing and manufacturing plastic components for automobiles. Numerous creditors asserted 503(b)(9) Claims and Plastech challenged four such claims on the grounds that they did not involve a sale of "goods" as required by section 503(b)(9).

The first creditor, American Turf Care ("ATC"), was in the business of snow plowing, salting, de-icing, mowing, and landscaping. During the twenty days before the bankruptcy filing, at the request of Plastech, ATC plowed snow and applied de-icer to the areas that it cleared. ATC billed Plastech separately for the snow clearing services and for the chemicals used on the road surfaces. ATC asserted a 503(b)(9) Claim in the aggregate amount of $12,688, of which $2,400 was allocated for snow clearing services and $10,288 for application of the de-icing chemicals.

The second creditor, Geo-Tech Ploymers, LLC ("GT"), sold thermoplastic polyolefin pellets to Plastech. As part of their relationship, Plastech delivered post-industrial scrap to GT that GT used to produce the pellets. GT did not pay for the scrap it converted into raw materials for the pellets. Instead, GT invoiced Plastech for the pellets at a lower per pound price than if GT had supplied its own raw materials. GT filed a 503(b)(9) Claim in the amount of $153,639 against Plastech on account of the pellets delivered.

The third creditor, Spina Electric Company ("Spina"), provided materials and labor to repair damaged motors provided by Plastech. Spina billed Plastech separately for the materials and labor that Spina provided to Plastech. Spina asserted a 503(b)(9) Claim in the amount of $9,331. for the combined value of labor and materials.

The fourth creditor whose 503(b)(9) Claim was objected to was Lakeshore Energy Service, LLC ("Lakeshore"). Lakeshore was a utility provider that sold natural gas to Plastech within the 20 days prior to Plastech's bankruptcy filing.

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[1] 397 B.R. 828 (Bankr. E.D. Mich. 2008)

Plastech argued in its global objection to the 503(b)(9) Claims that none of the creditors had provided “goods” within the meaning of section 503(b)(9). Recognizing that three of these transactions were hybrid in nature (involving both goods and services), Plastech urged the bankruptcy court to follow the “predominant purpose test” used by courts in the context of Uniform Commercial Code (“UCC”) disputes concerning whether mixed goods and services transactions were sales of “goods” or the provision of “services.[2]

The Plastech court applied the definition of goods contained in UCC Section 2-105[3] and rejected the predominant purpose test used in UCC cases as an unnecessary “winner take all” test in a mixed goods/service transaction where, as in Plastech, the respective value of the goods and services were distinguishable.

The court allowed the respective 503(b)(9) Claims of each of the claimants to the extent that the creditors provided goods rather than services. ATC and Spina had provided Plastech with “goods” whose value was readily ascertainable from their itemized invoices. The Plastech court held that the fact services were also provided did not justify denial of the full amount of the 503(b)(9) Claims. Moreover, the pellets GT had made for Plastech were still goods, notwithstanding the services GT provided as part of its manufacturing process and the scrap that Plastech provided to GT for the production of the pellets.

Finally, with regard to the Lakeshore claim, the court noted that both Plastech and Lakeshore agreed that natural gas was a “good” within the meaning of the UCC. The court rejected Plastech’s argument that Lakeshore is not entitled to the protections of section 503(b)(9) because Lakeshore is a utility that should only have the special protections only afforded to utilities under Bankruptcy Code section 366. The court held that section 503(b)(9) and section 366 “are not mutually exclusive” and are both available to utility creditors.

The Bankruptcy Court for the District of Delaware in In re Goody’s Family Clothing, Inc.,[4] also recently considered the scope of “goods” within the meaning of section 503(b)(9). Goody’s operated approximately 350 retail stores across the United States. Added Value Services, Inc. (“AVS”), a vendor of Goody’s, received inventory Goody’s purchased from other vendors, and inspected, ticketed, and repackaged the inventory prior to shipping it to Goody’s for final resale to customers. During the 20 days prior to the Goody’s bankruptcy filing, AVS issued invoices totaling $63,118 to Goody’s and filed a 503(b)(9) Claim in that amount. Goody’s objected, arguing that the claim was not properly classified as a 503(b)(9) Claim because AVS had provided services, not “goods”, to Goody’s within the meaning of the statute.

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[2] The predominant purpose test seeks to classify a particular transaction as either a transaction for goods (to which the UCC applies) or a transaction for services (to which the UCC does not apply). Under the test, courts will determine whether the predominant purpose of the contract is to supply goods (with the rendition of services being incidentally involved), in which event the transaction is considered a sale of goods; or alternatively, if the predominant purpose of the contract is to provide services (with the provision of goods incidentally involved), in which event the transaction is for services.

[3] U.C.C. § 2-105(1) provides that “Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action…."

[4] 401 B.R. 131 (Bankr. D. Del. 2009)

The court held that AVS provided services to Goody's and, therefore, was not entitled to a priority 503(b)(9) Claim. The court noted that "goods" are not defined in the Bankruptcy Code and it was, therefore, appropriate to refer to the UCC to supplement the Bankruptcy Code. Under the UCC's definition of goods, the court held that the activities AVS performed were properly classified as intangible services and not goods.

The Goody's court also addressed an alternative argument by AVS that because AVS had rendered services to make the inventory saleable, its claim included the "value of the goods" received, and should be an allowed 503(b)(9) Claim. AVS argued that section 503(b)(9) uses the phrase "value of the goods" to include any costs required to make the goods saleable. Rejecting the argument, the court relied on Plastech and noted that "[i]t is the goods and not the value that must be received by the debtor." While the Goody's court conceded that AVS provided value to Goody's, AVS did not provide any goods, and therefore the court disallowed AVS' 503(b)(9) Claim in full.

In *In re Samaritan Alliance, LLC*,[5] the Bankruptcy Court for the Eastern District of Kentucky considered whether electricity constitutes goods under section 503(b)(9). Kentucky Utilities Company ("KU") asserted a 503(b)(9) Claim in the amount of $35,067 for electricity provided to Samaritan during the 20 days prior to Samaritan's bankruptcy filing. Samaritan objected to KU's 503(b)(9) Claim, arguing that electricity does not constitute "goods" within the meaning of section 503(b)(9).

As an alternative position, Samaritan argued that section 503(b)(9) should apply only to goods that are subject to reclamation under Bankruptcy Code section 546(c). Samaritan asserted that section 546(c) was intended to work in tandem with section 503(b)(9), providing alternative means of recovery for goods -- so long as the goods are reclaimable. Samaritan argued that section 503(b)(9) was enacted to discourage a debtor from stockpiling goods before a bankruptcy and that because electricity cannot be "stockpiled", electricity should not be considered "goods" under section 503(b)(9).

The court agreed with Samaritan, holding that "[w]hile courts are divided on the general questions of whether or not electricity is 'goods,' . . . section 503(b)(9) is not applicable here and . . . the electricity provided is more properly characterized as a 'service'."

Timing of Payment for Allowed Section 503(b)(9) Claims

Since section 503(b)(9)'s enactment, several courts have addressed when holders of allowed 503(b)(9) Claims must be paid. In *In re Arts Dairy, LLC*,[6] Joseph and Jason Bockey (the "Bockeys") filed a 503(b)(9) Claim for $3,895. The court summarily agreed, without objection from any party, that the requirements of section 503(b)(9) were satisfied and the claim was allowed in that amount. The Bockeys demanded immediate payment of the claim and both the debtor and AgStar Financial Services ("AgStar"), the debtor's secured creditor, objected.

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[5] 2008 WL 2520107 (Bankr. E.D. Ky. June 20, 2008)

[6] 2009 WL 1758760 (Bankr. N.D. Ohio June 19, 2009)

The court considered three factors in deciding whether the Bockeys were entitled to immediate payment: (i) prejudice to the debtor; (ii) hardship to the claimant; and (iii) potential detriment to other creditors. Due to the small size of the claim, the court concluded that the debtor would not suffer any hardship if the debtor were directed to immediately pay the claim. Indeed, the debtor had scheduled nearly $3 million in assets and reported gross income of approximately $4.64 million for the previous year. However, also because the claim was relatively small, the court found that the Bockeys would not suffer any hardship if they were not paid immediately. Thus, the first two factors canceled each other out and the court considered the detriment to other creditors factor.

The court denied the immediate payment of the 503(b)(9) Claim on the basis that the court found no compelling reason to treat the Bockeys differently than similarly situated creditors. The debtor had not identified the Bockeys as a "critical vendor" necessary for the debtor's reorganization, potentially requiring the immediate payment of the Bockeys' claim. Moreover, the funds necessary to pay the 503(b)(9) Claim had to come from the cash collateral of AgStar, which had objected to the immediate payment of the Bockeys' 503(b)(9) Claim. Because AgStar would not receive adequate protection for the debtor's use of AgStar's cash collateral to make such a payment, the court was compelled to deny the request for immediate payment.

Similarly, the Bankruptcy Court for the District of Delaware, in *In re Global Home Prods., LLC*,[7] considered the same factors applied by the Arts Dairy court in denying immediate payment of a creditor's 503(b)(9) Claim. Additionally, the Bankruptcy Court for the Eastern District of Pennsylvania also held, in In re Bookbinders' Restaurant, Inc.,[8] that section 503(b)(9) does not require the immediate payment of an allowed 503(b)(9) Claim and a court has the discretion to determine when such claims should be paid.

Setoff and Section 503(b)(9)

In *In re Brown & Cole Stores, LLC*,[9] the Bankruptcy Appellate Panel (the "BAP") for the Ninth Circuit considered whether a debtor could setoff claims the debtor held against a creditor against the same creditor's 503(b)(9) Claim. The debtor, Brown & Cole Stores, LLC ("Brown & Cole"), was a grocery store chain consisting of 27 stores in Washington State. Associated Grocers, Inc. ("Associated") was Brown & Cole's principal supplier. Associated was a cooperative and Brown & Cole was its largest shareholder, holding approximately 25% of Associated's stock. Associated's claim against Brown & Cole included a 503(b)(9) Claim of $6.4 million for goods Associated sold to Brown & Cole in the 20 days prior to Brown & Cole's bankruptcy filing. Associated's 503(b)(9) Claim was secured by a first priority security interest in Brown & Cole's stock.

Brown & Cole and Associated were also parties to a master supply agreement ("Supply Agreement"). Brown & Cole claimed that prior to its bankruptcy filing, Associated had breached

[7] 2006 WL 3791955 (Bankr. D. Del. Dec. 21, 2006)

[8] 2006 WL 3858020 (Bankr. E.D. Pa. Dec. 28, 2006)

[9] 375 B.R. 873 (B.A.P. 9th Cir. 2007)

the Supply Agreement resulting in a claim for over $1 million based upon Associated's improper pre-bankruptcy termination of a rebate program.

Associated filed a motion with the bankruptcy court for allowance and payment of Associated's 503(b)(9) Claim. Brown & Cole opposed the motion, arguing that Associated's 503(b)(9) Claim was not entitled to administrative priority status because it was a secured claim. In addition, Brown & Cole argued that Associated's 503(b)(9) Claim was subject to a reduction in the amount of Brown & Cole's setoff rights attributable to Brown & Cole's claims against Associated.

The bankruptcy court allowed Associated's 503(b)(9) Claim, notwithstanding Associated's status as a secured creditor. The bankruptcy court also rejected Brown & Cole's setoff defense on the basis that Brown & Cole improperly sought to setoff a prepetition unsecured claim against Associated's administrative priority claim. The bankruptcy court held that the proposed setoff lacked the necessary mutuality between the opposing claims. Brown & Cole appealed to the Ninth Circuit Bankruptcy Appellate Panel (the "9th Circuit BAP").

The 9th Circuit BAP affirmed the bankruptcy court's ruling that Associated could assert a 503(b)(9) Claim, notwithstanding Associated's status as a secured creditor. The 9th Circuit BAP found that section 503(b)(9) grants administrative priority status to all claims, secured or unsecured, that otherwise satisfy the requirements of the statute. A creditor's right to assert a 503(b)(9) Claim is limited in only three ways: (i) the creditor must have provided goods, not services; (ii) the debtor must have received the goods within 20 days of its bankruptcy filing; and (iii) the goods must have been sold in the ordinary course of the debtor's business. Accordingly, there is nothing precluding a secured creditor from asserting a 503(b)(9) Claim.

However, the 9th Circuit BAP reversed the bankruptcy court's allowance of the full amount of Associated's 503(b)(9) Claim, on the basis that Brown & Cole could setoff its prepetition claim against Associated's 503(b)(9) Claim. The 9th Circuit BAP held that Associated's 503(b)(9) Claim was a prepetition claim with the requisite mutuality, for setoff purposes, with Brown & Cole's prepetition breach of contract claim. Accordingly, Brown & Cole could use its prepetition claim to setoff and reduce Associated's recovery on its 503(b)(9) Claim.

Preferences and Section 503(b)(9)

In one of the most comprehensive opinions to date regarding section 503(b)(9), the Bankruptcy Court for the Eastern District of Michigan in *In re Plastech Engineered Products, Inc.*[10] considered whether a debtor could rely upon section 502(d) of the Bankruptcy Code to argue that a preference, or other avoidance claim, against a creditor is grounds for disallowing an otherwise allowable 503(b)(9) Claim. Plastech objected to several 503(b)(9) Claims, invoking section 502(d) to disallow these claims, based on Plastech's preference claims against the creditors asserting the 503(b)(9) Claims.

The Plastech court held that section 502(d) does not apply to administrative claims, such as 503(b)(9) Claims, and refused to deny the allowance of the creditors' 503(b)(9) Claims based on

[10] 394 B.R. 147 (Bankr. E.D. Mich. 2008)

Plastech's preference claims against them. The court noted that section 501 of the Bankruptcy Code governs the filing of prepetition claims and certain postpetition claims, and section 502 governs the allowance of claims filed under section 501. Section 502(d) also governs the disallowance of claims of creditors subject to preference or other avoidance claims that the debtor may assert. Section 502(d) assures equality of distribution of the assets of the bankruptcy estate "by restoring assets to the estate and delaying or even prohibiting any payment to a creditor that has not repaid an avoidable transfer or turned over property of the estate."

The court analyzed the relationship between section 502(d) and section 503(b)(9). Plastech argued that a prepetition administrative expense should be considered a "claim" for purposes of section 502(d) because that section states that it covers "any claim". Alternatively, Plastech argued that even if section 502(d) did not apply to section 503(b) administrative expense claims in general, there should be an exception allowing its application to 503(b)(9) Claims. According to Plastech, such an exception would be appropriate, because 503(b)(9) Claims, unlike other ordinary section 503(b) administrative expenses, arise from prepetition obligations. In response, the section 503(b)(9) claimants argued that section 502(d) only applies to claims that are filed under section 501 and allowed under section 502, thus having no bearing on administrative expenses asserted under section 503, including 503(b)(9) Claims.

The court followed prior decisions holding that section 502(d) is inapplicable to administrative expenses. The court then examined whether section 502(d) is applicable to 503(b)(9) Claims because 503(b)(9) Claims, by definition, arose prepetition.

First, the court agreed with caselaw holding that the allowance of claims is entirely distinct from the allowance of administrative expenses. Indeed, section 502 governs the allowance of claims that are filed under section 501, rather than all prepetition claims in general. Accordingly, section 502(d) has no bearing on section 503(b)(9).

Second, the court found that administrative expense payment requests under section 503(a) cannot be asserted by filing a proof of claim under section 501. Administrative expenses must be allowed by a court after a hearing, rather than being "deemed allowed" as a claim under section 502(a). While "claim" and "expense" may be related in certain regards, they are distinct concepts as used in the statutory scheme.

Third, the court held that in order to prevent a conflict between section 502(d) and section 503(b), the court sought to reconcile the two statutory provisions so that they could co-exist. The court read the mandatory disallowance of claims provision in section 502(d) to apply only to those types of claims filed in accordance with section 501 and not to apply to 503(b)(9) Claims, which are for the allowance of administrative expenses pursuant to section 503(b).

Lastly, Plastech argued that 503(b)(9) Claims should be treated as a "special class" because they arose prepetition and 503(b)(9) Claims should be subject to section 502(d); and subject to disallowance based on preference and other avoidance claims against the creditors. Thus, Plastech urged an exception to the normal rule that section 503(b) is outside of the reach of that disallowance provision. The court rejected this argument because no such exception is found in the Bankruptcy Code.

A Debtor's Receipt of Goods

The Bankruptcy Court for the Eastern District of North Carolina in *In re Pridgen,*[11] considered the issue of when a debtor "receives" goods within the meaning of section 503(b)(9) in the context of a consignment transaction. In that case, the debtors operated a business that sold gasoline to retail customers. The debtors bought the gasoline from Cary Oil Co., Inc. ("Cary"). According to the governing contract, the debtors were not obligated to pay for the gasoline at the time it was delivered to the debtors' holding tank. Rather, the debtors held the gasoline on consignment for Carey. The debtors would only be responsible to pay for the gasoline when it was actually sold to the debtors' customers.

The debtors filed for bankruptcy on December 1, 2007. Cary filed a 503(b)(9) Claim for gasoline that Cary claimed was sold during the 20 days prior to the bankruptcy filing. The bankruptcy court held that Cary's 503(b)(9) Claim could only include goods received on or after November 11, 2007, twenty days prior to the bankruptcy filing. However, the court found that Cary's 503(b)(9) Claim was based upon gasoline delivered to the debtors' holding tank on November 9, 2007; two days prior to November 11th. The court disallowed Cary's 503(b)(9) Claim on the basis that it sought to recover for gasoline received by the debtors prior to the 20 day period under section 503(b)(9).

In an attempt to argue that the debtors received gasoline within the 20 day window under section 503(b)(9), Cary also asserted that, as a result of the consignment arrangement, Cary retained title to the gasoline until the debtors actually sold the gasoline to its customers and therefore the gasoline was not "received" by the debtors until it was sold to the debtors' customers. Because certain amounts of gasoline were not sold to the debtors' customers until 20 days prior to the bankruptcy filing, Cary argued that it should be allowed as a 503(b)(9) Claim.

The court held that the plain language of section 503(b)(9) does not require title to goods to pass to a debtor for a 503(b)(9) Claim to arise. Rather, a debtor must simply "receive" the goods within the 20 days prior to the bankruptcy filing. Because the UCC defines "receipt" of goods only as "taking physical possession of them", based on the factual record, the debtors were in receipt of the goods when the gasoline was in the debtors' holding tanks, not when the gasoline was sold to the debtors' customers.

In In re Plastech Engineered Products, Inc.,[12] the Bankruptcy Court for the Eastern District of Michigan addressed the issue of actual receipt of goods under section 503(b)(9). Vivitar, Inc., a vendor of Plastech, sold products to Plastech during the 20 days prior to Plastech's bankruptcy filing. Pursuant to their agreement, Plastech placed orders for certain goods from Vivitar and Plastech was billed for the goods shipped. However, Plastech did not actually receive the goods, Vivitar was instructed to drop ship the goods to Plastech's customer, Johnson Controls, Inc. ("Johnson Controls").

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[11] 2008 WL 1836950 (Bankr. E.D.N.C. April 22, 2008)

[12] 2008 WL 5233014 (Bankr. E.D. Mich. Oct. 7, 2008)

Vivitar filed a 503(b)(9) Claim in the amount of $95,635[13] for goods that Vivitar sold to Plastech during the 20 day period before the filing. Plastech objected to Vivitar's 503(b)(9) Claim, arguing that Vivitar failed to satisfy section 503(b)(9) because Plastech did not "receive" the goods that were delivered to Johnson Controls.

Vivitar argued that it held an allowable 503(b)(9) Claim because Plastech received the "value of the goods" delivered and physical delivery of the goods by Plastech was not required under section 503(b)(9). Alternatively, Vivitar argued that even if section 503(b)(9) required that Plastech actually received the goods, Johnson Controls' receipt of the goods was equivalent to Plastech's receipt.

In the absence of any binding case law deciding the issue, the bankruptcy court held that the plain language of section 503(b)(9) controlled. The court held that the meaning of the phrase "value of any goods received" within section 503(b)(9) is clear: the debtor must actually receive goods in order for section 503(b)(9) to apply. The receipt of their "value" alone is insufficient. In support of this proposition, the court cited to other sections of the Bankruptcy Code that permit claims based upon the benefits received by a party from a transfer of property, even where the party did not actually receive the property itself. By comparison to certain other provisions of the Bankruptcy Code, which allow for recovery based on the value of the goods, the court concluded that section 503(b)(9) should be read to limit its protections to goods actually received by the debtor.

The court next turned to Vivitar's argument that receipt by Johnson Controls constituted "constructive possession" of the goods by Plastech. The court declined to decide this issue, finding the record lacking as to the nature of the relationship between Plastech, Vivitar, and Johnson Controls and required further development of the record through a trial. Subsequent to the Plastech court's ruling, Vivitar and Plastech entered into a settlement stipulation where the parties agreed that Vivitar's 503(b)(9) Claim would be allowed in the amount of $75,000. Accordingly, it appears that Plastech was willing to settle the dispute on terms relatively favorable to Vivitar rather than risk further litigation on the constructive receipt argument under section 503(b)(9).

503(b)(9) Claims Filing Procedures and Bar Dates

Generally, a claimant is required to file a motion with the court seeking allowance of its administrative expense claim, unless the court approves special procedures allowing for asserting the claim through alternative means. Since the enactment of Section 503(b)(9), questions have arisen about whether section 503(b)(9) claimants must file a motion with the court to have their claims allowed. The Bankruptcy Rules do not contain any specific provisions for the assertion of 503(b)(9) Claims.

A few courts have adopted local rules setting deadlines for asserting 503(b)(9) Claims. For instance, the Bankruptcy Court for the District of Massachusetts adopted Local Rule 3002-1, requiring parties to file 503(b)(9) Claims with the court within 60 days of the first date set for the

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[13] Although the opinion references the amount of the 503(b)(9) Claim as being $104,676, *see Plastech*, 2008 WL 5233014 at *1, a subsequent stipulation between Plastech and Vivitar provides that the 503(b)(9) Claim is $95,635.

Bankruptcy Code section 341 meeting of creditors. Similarly, the Bankruptcy Court for the Eastern District of Michigan adopted a local rule setting a 503(b)(9) Claims deadline of 90 days following the first day set for a section 341 meeting of creditors.

More frequently, debtors have sought and obtained court approval of procedures governing the assertion of 503(b)(9) Claims. For instance, in *In re Lyondell Chemical Company*, pending in the Bankruptcy Court for the Southern District of New York, the court's claims bar date order required parties to assert 503(b)(9) Claims by the general bar date, by submitting a proof of claim form to Lyondell's claims agent. Similarly, in *In re Pilgrim's Pride Corporation*, pending in the Bankruptcy Court for the Northern District of Texas, the court approved procedures requiring holders of 503(b)(9) Claims to submit a written request to the debtor, its counsel and claims agent by a fixed deadline, which request must include specific information and documents supporting the 503(b)(9) Claim.

It is incumbent on holders of 503(b)(9) Claims to follow the local court rules and/or orders approving a claims bar date and/or procedures governing 503(b)(9) Claims to ensure their claims are properly preserved. The consequences of a failure to follow such procedures were demonstrated by the In re Dana Corp.[14] decision issued by the Bankruptcy Court for the Southern District of New York. Dana Corporation filed for Chapter 11 protection on March 3, 2006. Dana manufactured and supplied modules, systems and components for original equipment manufacturers and service customers. Goodyear, one of Dana's major vendors, asserted a prepetition claim in excess of $3.2 million. Goodyear's claim included a 503(b)(9) Claim in the amount of over $1.4 million.

On June 30, 2006, Goodyear filed a general unsecured proof of claim, which included a request that service of all papers filed in the Chapter 11 case be addressed to Goodyear's Law Department at its corporate headquarters.

On July 19, 2006, the bankruptcy court approved an order setting September 21, 2006, as the last date to file proofs of claim for all pre-petition claims, including 503(b)(9) Claims. The claims bar date notice stated that 503(b)(9) Claims must be filed by the bar date.

Dana asserted that its claims agent timely mailed 21 prepetition claims bar date notices to Goodyear, including mailings to Goodyear's Law Department at the address designated in Goodyear's proof of claim as the address for service of papers, as well as Goodyear's corporate headquarters. However, Goodyear asserted that it had never received the notices. Goodyear did not file a 503(b)(9) Claim until March 29, 2007, more than six months after the bar date. Goodyear sought relief from the bankruptcy court to excluse its late filed 503(b)(9) Claim.

The bankruptcy court denied Goodyear's motion to allow its late filed 503(b)(9) Claim. The court noted that a claims bar date must be strictly enforced, except for creditors that never received notice of the bar date. A creditor could only seek relief from a late filed claim by showing that the lateness was attributable to "excusable neglect."

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[14] 2007 WL 1577763 (Bankr. S.D.N.Y. May 30, 2007)

The court determined that Goodyear had acted inexcusably in the late filing of its 503(b)(9) Claim. The court rejected Goodyear's argument that it did not receive the claims bar date notice, finding that 21 separate claims bar date notices were mailed to Goodyear.

The court also rejected Goodyear's argument that Goodyear's 503(b)(9) Claim was a "new breed of claims" that justified Goodyear's late filed claim. The court found that 503(b)(9) Claims were clearly identified in Dana's claims bar date notice as being subject to the claims bar date. In fact, the proof of claim forms that were sent to all of Dana's creditors contained a separate box and instructions specifically for asserting a 503(b)(9) Claim.

Finally, the court concluded that Dana would be prejudiced by the allowance of Goodyear's late filed 503(b)(9) Claim because allowance of the Goodyear claim would open the "floodgates" for other creditors to seek allowance of their late filed 503(b)(9) Claims.

Conclusion

There is no doubt that the addition of section 503(b)(9) to the Bankruptcy Code has materially enhanced the rights of goods suppliers against customers that file for bankruptcy. However, creditors must be diligent in understanding how section 503(b)(9) is being interpreted by the courts and what creditors must do to ensure that this new valuable right is properly asserted and preserved.

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