

[By-Lined Article]

UCC 'Goods' Definition Applies to Section 503(b)(9) of Bankruptcy Code

By Rudolph J. Di Massa Jr. And Matthew E. Hoffman

August 7, 2009

The Legal Intelligencer

In *In re Plastech Engineered Products Inc.*, the U.S. Bankruptcy Court for the Eastern District of Michigan held that the Uniform Commercial Code's definition of "goods" applies in determining whether a claim is entitled to administrative expense priority under Section 503(b)(9) of the Bankruptcy Code, which grants such priority to claims for the value of goods received by the debtor within 20 days before the petition date. The court ultimately allowed administrative expense priority claims to four creditors for the value of goods received by the debtors within 20 days before the petition date but denied priority status for any labor or services rendered in connection with the creditors' deliveries of those goods.

In reaching its conclusion, the court also held that the "predominant purpose test" (used outside the bankruptcy context to determine whether a contract is primarily for the sale of goods or for the sale of services) does not apply to the analysis under Section 503(b)(9) because the only relevant determination under Section 503(b)(9) is the value of the goods received, regardless of whether the underlying agreement also provides for the sale of services.

In connection with the 503(b)(9) claim of a utility company, which supplied natural gas to the debtor, the court also held that the natural gas constituted "goods" and that goods need not necessarily be held in "reclaimable" form in order for the utility company to be entitled to a Section 503(b)(9) claim. Additionally, the court held that the utility company was not precluded from administrative expense priority status simply because of the existence of Section 366 of the Bankruptcy Code, which addresses the post-petition sale of utility services.

Facts and Background

On Feb. 1, 2008, Plastech Engineered Products Inc. and a number of related entities (collectively, the debtors) filed petitions for relief under Chapter 11 of the Bankruptcy Code. Before their bankruptcy filing, the debtors were engaged in business as a "tier one" automotive supplier, designer, and maker of blow-molded and injection-molded plastic products. The debtors sought, and the court established, procedures and a deadline for creditors' requests for payment of claims under Section 503(b)(9) of the Bankruptcy Code. A number of creditors sought payment of such claims, including claims brought by a snow removal contractor; a supplier of certain materials that the debtors used in their production process; a company that performed engine work for the debtors; and a natural gas utility company (collectively, the claimants). The debtors sought to reclassify the claimants' claims as general unsecured claims, arguing that such claims arose from the delivery of services, rather than goods, to the debtors. The claimants provided a variety of documentary evidence and testimony in support of their claims.

Parties' Positions

The debtors argued that none of the claimants delivered "goods" to the debtors and, consequently, that the claimants were not entitled to administrative expense priority claims under Section 503(b)(9) of the Bankruptcy Code. The debtors correctly observed that the Bankruptcy Code does not define the term "goods," and they urged the court to construe the term "goods" narrowly, to

adopt the definition of "goods" contained in the Uniform Commercial Code, or UCC, and then to apply that definition to the claimants' claims.

The debtors next argued that if any of the claimants entered into transactions with the debtors involving a mix of goods and services, the court should apply the "predominant purpose" test, which has been developed by courts outside the bankruptcy context to determine whether an agreement is one for the sale of goods under the UCC. The debtors argued that applying this test to the claimants' claims would lead the court to conclude that each transaction in question had as its predominant purpose the delivery of services and not goods, and therefore those claimants would not be entitled to Section 503(b)(9) claims. The debtors requested that the court adopt an "all or nothing" approach to the extent the claimants had provided both goods and services, such that if the predominant purpose of the transaction was determined to be the delivery of goods, then the entire claim could be allowed under section 503(b)(9), and vice versa. The debtors also argued that although natural gas may constitute "goods" as defined in the UCC, the utility company that had provided the natural gas was not entitled to a Section 503(b)(9) claim because, as a provider of utility services, the utility company was limited to the rights and remedies afforded it under Section 366 of the Bankruptcy Code.

The claimants did not contest the debtors' argument that the UCC's definition of "goods" should apply to the Section 503(b)(9) analysis, but they disagreed with the debtors' "all or nothing" approach. They asserted that they were entitled to Section 503(b)(9) claims for the value of any "goods" they delivered, even if their respective agreements with the debtors may also have provided for the delivery of some services. The claimants next argued that, to the extent the court did apply a "predominant purpose" test, the evidence demonstrated that the predominant purpose of their contracts with the debtors was in fact the delivery of product rather than the provision of a service. Finally, the natural gas utility company asserted simply that there is nothing in the rights conferred by Section 366 that makes those rights mutually exclusive of the rights that Section 503(b)(9) affords a creditor that has sold "goods" to a debtor.

Court's Analysis

Section 503(b)(9), which was added to the Bankruptcy Code through the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, or BAPCPA, provides administrative expense priority to claims for "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." While noting that the Bankruptcy Code does not define the term "goods," the court cited two decisions where courts considered the issue and applied the UCC definition of "goods." The court also cited one treatise that suggested this approach. Accordingly, the court held that the UCC's definition of "goods" applies for purposes of analysis under Section 503(b)(9).

The court next turned to the debtors' argument for an "all or nothing" application of the "predominant purpose" test. After considering controlling precedent, the court found that the predominant purpose test applies where there is a mix of goods and services and where there is also a need to categorize the transaction as either a sale of goods or a delivery of services. The court found nothing in Section 503(b)(9) that requires such an approach, reasoning that if a particular transaction provides for a sale of both goods and services, and the value of each can be determined, then the delivery of the goods should give rise to an administrative expense priority claim pursuant to Section 503(b)(9), while the provision of services should be relegated to general unsecured claim status. The court found that the only relevant determination under Section 503(b)(9) is the value of the "goods" that were delivered, regardless of whether the contract also calls for the delivery and sale of services. Thus, because the "predominant purpose" test does not inform the court as to whether a particular thing that has been sold constitutes "goods," the

court found application of the test to be unnecessary. The court was able to determine the portions of the claimants' claims attributable to goods and those attributable to services and, accordingly, granted administrative expense priority to the portions attributable to goods and general unsecured status to those attributable to services.

In response to another of the debtors' arguments, the court held that goods need not be in "reclaimable form" in order for creditors to have an administrative expense priority claim. As a result, the delivery of natural gas by one of the claimants was deemed to give rise to a 503(b)(9) claim. Finally, as to the natural gas utility company, the court found that Section 366 of the Bankruptcy Code, which provides certain protections to a post-petition seller of utility services to a debtor, does not preclude the seller from successfully seeking an administrative expense priority claim on account of goods pursuant to Section 503(b)(9): The court reasoned that one can be a seller of "goods" entitled to a Section 503(b)(9) claim for certain prepetition deliveries, and simultaneously be entitled to the protections of Section 366 with respect to utility services provided to a debtor post-petition.

Conclusion

The *Plastech* opinion answers one of many questions still remaining since BAPCPA became law more than three-and-a-half years ago, and it sends a cautionary message to suppliers of goods and services. Assuming that other courts will subscribe to the reasoning of the Bankruptcy Court for the Eastern District of Michigan, these suppliers are well-advised to draft their contracts to distinguish between the goods they provide and the services they deliver. When practical, they should also consider setting out one price for the goods provided, and another price for the services rendered.

Rudolph J. Di Massa, Jr., a partner at Duane Morris, is a member of the [business reorganization and financial restructuring practice group](#). He concentrates his practice in the areas of [commercial litigation](#) and [creditors' rights](#). He is a member of the American Bankruptcy Institute, the American Bar Association and its business law section, the Commercial Law League of America, the Pennsylvania Bar Association and the business law section of the Philadelphia Bar Association.

Matthew E. Hoffman practices in the area of business reorganization and financial restructuring. Hoffman is admitted to practice in Pennsylvania and New Jersey.

This article originally appeared in *The Legal Intelligencer* and is republished here with permission from [law.com](#).