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[When Are Goods Received For The Purpose Of Asserting Administrative Priority Status Under Section 503\(b\)\(9\) Of The Bankruptcy Code?](#)

A bankruptcy court recently held that in order for a supplier of goods on credit to establish an administrative claim under Bankruptcy Code section 503(b)(9) in the bankruptcy case of its buyer, the supplier will need to show that its buyer "physically" received the goods within 20 days prior to the buyer's bankruptcy filing, regardless of when title to the goods passed. *In Re Circuit City Stores, Inc., et al.*, Case No. 08-35653, No. 7149 (Bankr. E.D. VA April 8, 2010).

Section 503(b)(9) was added to the Bankruptcy Code in 2005, which, along with the expanded reclamation rights in section 546(c), was intended to provide suppliers of goods on credit with additional protections upon the bankruptcy filing of their customers. Pursuant to section 503(b)(9), vendors can claim administrative priority status for the value of the goods supplied within 20 days prior to a customer's bankruptcy filing. As a result, the claims of vendors who supply product to the debtor within this time period (and who have not received payment) are placed above, and paid before, those of the general unsecured creditors.

The relevant part of Section 503(b)(9) reads:

"After notice and a hearing, there shall be allowed administrative expenses, . . . including—

....

(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."

11 U.S.C. § 503(b)(9). At first blush, the section appears simple enough, in that it requires: (a) a vendor to sell goods to a debtor in the ordinary course of business (and not receive payment for the goods); and (b) such goods to be "received" by the debtor within 20 days prior to filing bankruptcy.

However, since the adoption of section 503(b)(9), courts have had to grapple with the meaning of the

various requirements of 503(b)(9) in order to define its limits, such as defining the term "goods." See *In re Circuit City Stores, Inc.*, 416 B.R. 531, 537 (Bankr. D. Va. 2009) (adopting the UCC definition of "goods"); accord *In re Goody's Family Clothing, Inc.*, 401 B.R. 131, 134 (Bankr. D. Del. 2009); *In re Plastech Engineered Prods., Inc. (Plastech II)*, 397 B.R. 828, 836 (Bankr. E.D. Mich. 2008). Most recently in the *Circuit City* case, the word "received" became the center of a dispute between the debtor and one of its vendors asserting administrative status under section 503(b)(9).

Circuit City was a national retailer that had a somewhat distinct business arrangement with one of its vendors. That vendor supplied goods to Circuit City pursuant to a consignment agreement. The agreement provided that, although the goods were physically delivered to Circuit City's warehouses and stores and remained in the physical possession of Circuit City after delivery up to the time of their sale to Circuit City's customers, the vendor retained title to the goods until the time that Circuit City sold these goods to its customers. Under this "consignee/consignor and buyer/seller relationship," title to the particular goods passed first to Circuit City and then to the customer at the time of the sale to the customers as part of a simultaneous transaction.

As of the time of Circuit City's bankruptcy filing, Circuit City owed the vendor more than \$9 million for goods that were sold by Circuit City during the 20 day prior to the bankruptcy filing, but were physically delivered to it before this 20-day period. The vendor sought administrative status for these amounts and asserted that section 503(b)(9) requirements were all satisfied, including the requirement of having the "goods received by the debtor within 20 days before the date of [the bankruptcy filing]." The vendor took the position that the relevant date for determining when the goods were "received" for the purposes of section 503(b)(9) is the date when Circuit City sold the goods to its customers, since title to the goods could not pass to Circuit City before then. Circuit City argued that the critical date is instead when the goods were "physically delivered," which was prior to the 20-day window, regardless of when title to the goods passed.

The bankruptcy court agreed with Circuit City and rejected the vendor's interpretation of the word "received." Reaching this conclusion, the court partly relied on judicial interpretations of the word "receipt" as used in section 546(c). The word "receipt" in section 546(c) is likewise not defined in the Bankruptcy Code. However, courts interpreting 546(c) have generally adopted the definition set forth in Article 2 of the UCC, which provides that "receipt" means "taking physical possession." The court in *Circuit City* concluded that the words "received" in section 503(b)(9) and "receipt" in section 546(c) are "similar words and concern related issues," and therefore adopted that same definition from the UCC.

While the court's decision in *Circuit City* is not binding on other courts, it may be followed if it is found to be well reasoned. If nothing else, it serves as a caution to vendors who may be relying on similar consignment/sale arrangements to increase their 503(b)(9) claims and therefore lessen their risk exposure in the event their customers file bankruptcy. Such vendors concerned about the creditworthiness of their

customers may wish to consult counsel and explore alternative mechanisms to improve their positions.

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