

When Are Goods "Received" for Purposes of Section 503(b)(9) of the Bankruptcy Code?

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") created section 503(b)(9) of the Bankruptcy Code (the "Code") to provide additional protection to trade creditors. Pre-BAPCPA, unpaid trade creditors relied on reclamation actions under 11 U.S.C. § 546(c) to recover goods supplied to debtors prior to a bankruptcy filing. Now, section 503(b)(9) of the Code allows a supplier of goods to assert an administrative expense claim for the value of goods received by a debtor in the ordinary course of business within 20 days of the debtor's bankruptcy filing. Granting administrative expense priority treatment to trade creditors increases their likelihood of receiving full payment of their claims.

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Section 503(b)(9) provides that a creditor is entitled to an administrative claim for "the value of any goods *received by the debtor within 20 days before the date of commencement of a case [under the Code]* in which the goods have been sold to the debtor in the ordinary course of such debtor's business." Despite the apparently simplicity of section 503(b)(9), issues may arise in determining the meaning of "received" when goods are delivered to a carrier pursuant to a Free on Board ("FOB") Shipping Point agreement. In this situation, a trade creditor ships goods to a debtor with a FOB date and location indicating that title to the goods transfers when they are loaded onto the common carrier. Then, the debtor files for bankruptcy after the goods are shipped but before they arrive at the debtor's facility. Can the trade creditor assert a 503(b)(9) claim for the value of the shipped goods? The answer turns upon whether the goods are considered to be "received" at the point in time when title transfers or when the goods physically arrive at the debtor's facility.

The U.C.C.

"Received" is never defined by the Code. Since Congress borrowed from the Uniform Commercial Code ("U.C.C.") when enacting section 546(c), the Code section dealing with reclamation and a predecessor to section 503(b)(9), bankruptcy courts are directed to look to the U.C.C. for guidance on construing or defining the terms of section 503(b)(9). *In re SemCrude, L.P.*, 416 B.R. 399, 405 (Bankr. D. Del. 2009). "Receipt" is defined in section 2-103 of the U.C.C. to mean "taking physical possession."

Domestic Shipments

The U.C.C. definition of "received" is controlling for domestic shipments of goods. Like "received," the term "goods" is similarly not defined by the Code. In *In re Circuit City Stores, Inc.*, 416 B.R. 531 (Bankr. E.D. Va. 2009), the court held that "goods" should be interpreted using the U.C.C. definition since section 503(b)(9) was an "attempt by Congress to enhance certain types of reclamation claims" and the right of reclamation "arises from the U.C.C." *Id.* at 536.

Since section 503(b)(9) is closely related to the reclamation section of the Code, reclamation cases that turn on the meaning of "received" are instructive. In *In re Marin Motor Oil, Inc.*, 740 F.2d 220, 224-25 (3d Cir. 1984), Montello Oil Corp. ("Montello") contracted to sell gasoline to Marin Motor Oil, Inc. ("Marin"), FOB: New York Harbor. Marin arranged for a commercial barge to pick up the gasoline in New York Harbor. After the gasoline was delivered, Montello demanded payment of the invoice or return of the goods, and then filed suit seeking a writ of attachment against Marin. Marin then filed for bankruptcy, and Montello brought an adversary proceeding seeking reclamation of the gasoline under Code section 546(c), arguing that Marin did not "receive" the goods until the carrier pumped the gasoline into Marin's storage terminal. Marin argued that it received the goods when they were loaded onto the common carrier because title and risk of loss transferred at that time.

The *Marin* court relied on the U.C.C. and determined that the gas was "received" when Marin took physical possession; in other words, when the gas was pumped into Marin's storage terminal. The court observed that the U.C.C. does not rely on the concept of title for purposes of determining when a shipment is received. The court also focused on the seller's right to stop delivery. U.C.C. section 2-705 views goods given to a common carrier for delivery as being in possession of the common carrier, and gives the seller the right to stop delivery upon discovery of the buyer's insolvency. This right to stop delivery applies regardless of which party is deemed to have title or bear the risk of loss. Under the U.C.C., the seller's right to stop delivery terminates when the buyer physically receives the goods, and the seller then has a separate right to reclamation. Under *Circuit City*, "received" for the purposes of section 503(b)(9) means receipt of physical possession of the goods.



International Shipments

In certain international contexts, however, courts have reached the opposite conclusion. In *In re World Imports Ltd.*, 511 B.R. 738 (Bankr. E.D. Pa. 2014), a shipment of goods was loaded onto a ship in Shanghai, FOB: China, more than 20 days prior to the debtor's bankruptcy filing. The debtor took physical possession of the goods less than 20 days prior to the petition date. In other words, the shipper would only be entitled to a 503(b)(9) claim if the goods were considered "received" when the debtor took physical possession. The debtor argued that a relevant treaty that incorporates terms used in international trade applied to the dispute and preempted the usual U.C.C. interpretation. Both the U.S. and China are signatories to the United Nations Convention on Contracts for the International Sale of Goods ("CISG").

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