

# Claims for Goods Delivered on the Eve of a Bankruptcy Filing: What Every Business Lawyer Needs to Know

By Scott H. Bernstein and Robert A. Rich

Blissfully unaware that its customer, a merchant, is on the brink of filing a bankruptcy petition, your client has delivered goods on credit. The likely unhappy result: when the customer files, your client is left holding a general unsecured claim, with little chance to be paid until the conclusion of the proceeding. That may be years down the road, and when it finally takes place may amount to no more than pennies on the dollar. But all may not be lost.

This article focuses on section 503(b)(9) of the Bankruptcy Code, a specific bankruptcy provision that was enacted with the intent of addressing this situation, and provides a primer for business lawyers that are called upon to counsel clients who have delivered goods to a bankrupt company during the twenty-day period prior to the date of the bankruptcy filing.

## The Enactment of Section 503(b)(9)

The enactment of the 2005 Bankruptcy Prevention and Consumer Protection Act amended Title 11 of the United States Code, §§ 101-1532 (as amended, the “Bankruptcy Code”) in many ways to enhance the rights of trade creditors in commercial bankruptcies, including section 503(b)(9) of the Bankruptcy Code. Section 503(b)(9) provides that a creditor has an administrative expense claim for the “value of any goods received by the debtor within 20 days before the date of commencement of a case under [the Bankruptcy Code] in which the goods have been sold to the debtor in the ordinary course of such debtor’s business.”<sup>1</sup> A creditor’s right to assert a section 503(b)(9) claim is not linked or conditioned upon the creditor’s separate, potential right to assert a reclamation claim against the debtor pursuant to section 546(c) of the Bankruptcy Code.<sup>2</sup>

Prior to section 503(b)(9), prepetition obligations of a debtor to a trade creditor were classified as general unsecured claims for all purpose—often resulting in distributions of pennies on the dollar, or nothing. Now such claims, if they satisfy section 503(b)(9), are transformed into administrative expense claims which are given priority of treatment over general unsecured claims, and which must be paid in full in order for a chapter 11 debtor to emerge from bankruptcy.<sup>3</sup> A second benefit of the statute to trade creditors is the possibility of more prompt payment of the section 503(b)(9) claim.<sup>4</sup> Since the liability is an administrative expense and not a prepetition claim, a chapter 11 debtor with adequate resources can pay the allowed administrative expense prior to confirmation of a plan. In sum, trade creditors that successfully assert a section 503(b)(9) claim for goods delivered within twenty

days of the petition date have an increased likelihood of a full and quicker recovery of this claim. A downside from the debtor’s perspective is that the cash needed to successfully reorganize and emerge from chapter 11 will be significantly increased by the amount necessary to pay the section 503(b)(9) claims in full, and the payment of the section 503(b)(9) claims may deprive the debtor of much needed liquidity.<sup>5</sup> However, debtors—even after allowance and payment of the section 503(b)(9) claims for the value of the goods—may continue to realize the mark-up profit on the re-sale of the goods or use of the goods incorporated into a finished product for sale.

In enacting this provision, it is believed that Congress intended to address the situation in which a supplier would withhold credit and goods during a customer’s liquidity crisis out of a concern that it would be paid little or nothing for goods delivered to a debtor on the eve of its bankruptcy.<sup>6</sup> (And as prior cases and experience have made clear to trade creditors, traditional reclamation rights under section 546(c) of the Bankruptcy Code could easily be defeated in a bankruptcy.) This would often turn liquidity problems into full-blown liquidity crises, as debtors would increasingly be unable to buy goods on credit that were vital for continued operations. Anecdotes also abounded of less ethical companies placing unusually large orders for goods to be delivered just days before a planned bankruptcy filing from vendors who were unaware of the severity of the debtor’s liquidity problems. By filing for bankruptcy right after receiving the goods, a retailer (for instance) would have products on its shelves to allay customer concerns and generate cash for post-filing expenses—coupled with a debt to be paid, if at all, under a confirmed chapter 11 plan months or years down the road.

With little legislative history behind section 503(b)(9), practitioners and courts recognize there are many questions about the interpretation and application of this statute. Just two years after its enactment, Judge Burton R. Lifland of the United States Bankruptcy Court for the Southern District of New York was already writing that “[t]his new provision presents other issues concerning, *inter alia*, the valuing of the subject goods; what constitutes the actual receipt of the goods; how is the claim asserted; when is it to be paid; is it subject to the claims processing and omnibus bar date orders, etc.”<sup>7</sup> Now that the statute has operated for more than five years and there has been an increased number of retail bankruptcies during the recent economic downturn, case law is beginning to address the issues raised by section 503(b)(9).

## Developments in the Case Law and Practice

### 1. What Is the Meaning of “Goods”?

Based upon the distinction between “goods” and “services” throughout the Bankruptcy Code, there is universal agreement that section 503(b)(9) does not cover a claim for services provided.<sup>8</sup> However, the term goods is not defined by the Bankruptcy Code. Uniform Commercial Code (“UCC”) § 2-105(1) defines goods as “all things (including specially manufactured goods) which are moveable 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.”<sup>9</sup> Many bankruptcy courts have concluded that the term goods as used in section 503(b)(9) must conform to the meaning given in UCC § 2-105(1). *See, e.g., In re Circuit City Stores, Inc.*,<sup>10</sup> *In re Goody’s Family Clothing, Inc.*,<sup>11</sup> *In re Plastech Engineered Prods.*<sup>12</sup> Three reasons are often given for adopting the definition of goods from the UCC. First, using the UCC definition gives a consistent, uniform approach, since forty-nine states have already adopted some version of the UCC.<sup>13</sup> Second, the UCC definition is consistent with the definition in Black’s Law Dictionary and with the term’s ordinary and common usage.<sup>14</sup> In other words, the UCC definition is the “well-known meaning” of goods and fits the commercial expectations of the parties. Third, courts find support for using the UCC definition from the fact that section 503(b)(9) is itself part of a section titled “Reclamation” in the 2005 amendments to the Bankruptcy Code. Given that reclamation has its origins in the UCC, which defines “goods,” and that Congress did not choose to provide a different definition in the Bankruptcy Code, courts have reasoned that the UCC definition was likely intended to apply to the Bankruptcy Code as well.<sup>15</sup> Courts have similarly found that the terms “received,” “sold,” and “ordinary course of business” as used in section 503(b)(9) must conform to the meanings given in the UCC.<sup>16</sup>

### 2. What if a Contract Involves the Sale of Goods and Services?

Courts have considered whether the “predominant purpose test,” developed by courts to determine whether the UCC applies to hybrid contracts calling for the delivery of both goods and services, should be used for claims under section 503(b)(9).<sup>17</sup> Under this test, the court must determine whether “the sale of goods predominates.”<sup>18</sup> Despite the administrative ease of applying the predominant purpose test and the likelihood that its application will reduce the number of allowed section 503(b)(9) claims, many trade creditors have raised a fairness concern: that a court’s holding that the predominant purpose was not to provide goods results in an “all or nothing result,” denying a section 503(b)(9) claim even if a significant purpose was to provide goods to the debtor.

An alternative approach is to separate the goods aspect of the trade creditor’s claim from the services

components, and grant administrative claims for the value of the tangible items. In rejecting the predominant purposes test, one court reasoned that while a “winner takes all” approach might be logical and necessary in particular nonbankruptcy contexts, there is nothing in section 503(b)(9) that requires such an approach.<sup>19</sup> Rather, because the statute refers to the “value of any goods received,” where there was a mixed goods/services contract section 503(b)(9) would apply to the value of the goods sold but would not apply to the value of the services provided.<sup>20</sup> Another court, when rejecting the predominant purposes test, has held that “Congress, in section 503(b)(9), did not provide any basis for excluding from the section’s scope goods delivered pursuant to a contract the primary thrust of which is provision of services.”<sup>21</sup>

However, generally courts agree that to establish a section 503(b)(9) claim, the claimant must prove by a preponderance of the evidence that (1) the vendor sold goods to the debtor; (2) the goods were received by the debtor within twenty days prior to filing; and (3) the goods were sold to the debtor in the ordinary course of business.<sup>22</sup> Received means taking physical possession of the goods during the twenty days prior to the bankruptcy filing.<sup>23</sup> Additionally, the claimants must show that the debtor has not already paid for the goods.<sup>24</sup>

### 3. What Is the Meaning of “Value”?

In an October 2009 decision from the *SemCrude* bankruptcy proceeding in the United States Bankruptcy Court for the District of Delaware, Judge Brendan Linehan Shannon addressed the meaning of “value” under section 503(b)(9).<sup>25</sup> In *SemCrude*, a secured creditor opposed certain section 503(b)(9) claims, asserting that the term “value” for purposes of a section 503(b)(9) claim should be “the resale price of goods, or if the goods were not resold, the current market value of the goods on the effective date of the Plan.”<sup>26</sup> Not surprisingly, many of the vendors argued that the “value” of the goods was established by the invoice or contract price. Judge Shannon, while recognizing that the term “value” is not defined in the Bankruptcy Code, found that “there is ample and convincing authority to support the proposition that the invoice or purchase price is presumptively the best determinant of value.”<sup>27</sup> The court noted, however, that such price could be rebutted under the particular facts and circumstances of a given transaction.<sup>28</sup>

### 4. When Are Section 503(b)(9) Claims Paid?

In *In re Global Home Products, LLC*, the court addressed the issue of the timing of payment on section 503(b)(9) claims. There, the court noted that section 503(b)(9) does not specify a time for payment, yet section 1129(a)(9) requires that all administrative expense claims be paid in full on the effective date of the plan.<sup>29</sup> The court also considered three factors in determining how to exercise its discretion on the timing of payment of an administrative expense claim: (1) the prejudice to the debtor, (2) hardship

to the claimant, and (3) potential detriment to other creditors. The debtor argued against immediate payment for a variety of reasons, including the lack of sufficient funds, the fact that the debtor-in-possession financing agreement prohibited the debtor from paying any debts not included in the post-petition budget, and the concern that immediate payment of one section 503(b)(9) claim would trigger an avalanche of similar demands. The creditor, on the other hand, presented no evidence of hardship.<sup>30</sup> The court, finding that the prejudice to the debtor clearly outweighed the hardship to the claimant, denied the creditor's motion for immediate payment and ordered that section 503(b)(9) claims were payable only on the effective date of a plan.<sup>31</sup>

Soon after *Global Home Products*, the court in *In re Bookbinders' Restaurant, Inc.* considered a similar motion for immediate payment of a section 503(b)(9) claim. The creditor argued that section 503(b)(9) requires a chapter 11 debtor to treat section 503(b)(9) administrative expenses in the same manner as administrative expenses arising from the post-petition delivery of goods and services; since the debtor in that case had been paying its post-petition trade debt in the ordinary course, it was likewise required to pay the section 503(b)(9) administrative expenses in the ordinary course. The court squarely rejected this argument and found that the pre-confirmation allowance of a section 503(b)(9) claim does not create an "unqualified right to immediate payment."<sup>32</sup> Instead, the court adopted the same three-factor test used in *In re Global Home Products*, and found that an evidentiary hearing would be required to determine whether to compel immediate payment of the allowed section 503(b)(9) claim or defer payment to a later stage in the case.<sup>33</sup>

Both decisions suggest that a section 503(b)(9) claimant may be able to obtain immediate payment of its administrative expense claim if the claimant demonstrates, at an evidentiary hearing, that it will suffer unusual hardship in the absence of immediate payment. However, practitioners should note that it is almost unheard of for a section 503(b)(9) claimant to have satisfied this burden.

## 5. May Secured Creditors Enjoy the Benefit of Section 503(b)(9)?

In *In re Brown & Cole Stores, LLC*,<sup>34</sup> a creditor, Associated Grocers, Incorporated ("AGI"), sought allowance of a section 503(b)(9) claim while asserting that it held a security interest in property of the debtor to secure its claim. The debtor, Brown & Cole Stores, LLC ("B&C"), opposed the allowance of the administrative expense claim, contending that section 503(b)(9) applied only to unsecured claims for goods received within the twenty-day statutory period.<sup>35</sup> B&C argued that, unlike the language of section 503(b)(1)(B)(i) which provides administrative priority for any tax "incurred by the estate, whether secured or unsecured...", section 503(b)(9) was silent as to the secured status of the claim. B&C also asserted that since all other section 503(b) claims were unsecured claims, the silence implied that only unsecured claims were included.<sup>36</sup> AGI wanted both

an administrative claim and a secured claim in order to increase its ability to oppose confirmation of B&C's chapter 11 plan. In a chapter 11 reorganization, a secured creditor has its own ability to oppose confirmation of a chapter 11 plan, while creditors holding administrative expense claims must be paid in full in order for a chapter 11 plan to be confirmed and become effective. Accordingly, a secured creditor with an administrative claim may more effectively oppose confirmation of a chapter 11 plan by arguing that the chapter 11 plan will not result in full payment of administrative expense claims on the effective date of the chapter 11 plan.

The Ninth Circuit Bankruptcy Appellate Panel rejected B&C's position on the grounds that the statute was unambiguous. The Bankruptcy Appellate Panel explained:

By the plain terms of the statute, a vendor's right to assert an administrative claim is limited in only three ways: (1) the vendor must have provided goods (not services); (2) the debtor must have received the goods within twenty-days of the commencement of the case; and (3) the goods must have been sold "in the ordinary course" of the debtor's business. This right to an administrative claim does not depend on whether the seller has a right to reclaim under state law... It applies even if the goods are no longer in the possession of the debtor or are not identifiable. It applies even if the goods are encumbered by a senior security interest.<sup>37</sup>

The Ninth Circuit Bankruptcy Appellate Panel also found no merit to B&C's argument that the strict application of section 503(b)(9) to a secured claim would be inequitable to other creditors since funds paid to an administrative claimant would be available to other creditors if not paid to the secured creditor.<sup>38</sup> While the Bankruptcy Appellate Panel deferred to Congress as to the equities and related statutory priorities, it also noted that payment of an administrative claim would free up collateral that could be available for unsecured creditors. The Bankruptcy Appellate Panel further explained that if such a creditor turns out to be unsecured or under-secured, denying it priority as an administrative expense would effectively ignore the statute.<sup>39</sup>

Additionally, while the bankruptcy court below held the debtor could not set off its prepetition unsecured debts against the trade creditor's administrative expense, the Bankruptcy Appellate Panel reversed.<sup>40</sup> Section 503(b)(9) claims are the only section 503(b) claims based on debts incurred by the debtor prepetition. For that reason, the Bankruptcy Appellate Panel held that section 553(a) of the Bankruptcy Code (which authorizes the setoff of mutual prepetition debts), applies to section 503(b)(9) claims.<sup>41</sup> Accordingly, a debtor may be able to avoid paying a sec-

tion 503(b)(9) claim to the extent it can establish a right of prepetition setoff against its obligation to the creditor holding the section 503(b)(9) claim.

## 6. Is Section 502(d) a Bar to Section 503(b)(9) Claims?

There is a split in authority over whether section 502(d) of the Bankruptcy Code may be used to temporarily disallow a claim under section 503(b)(9) of the Bankruptcy Code up to the amount potentially recoverable on account of preferential transfers allegedly avoidable under section 547 of the Bankruptcy Code. Section 502(d) requires disallowance of a claim of a transferee of a voidable transfer under chapter 5 of the Bankruptcy Code *in toto* if the transferee has not paid the amount or turned over the property received as required under the sections of the Bankruptcy Code under which the transferee's liability arises.<sup>42</sup> The bankruptcy court in *Circuit City* recently held that section 502(d) may be used to disallow a section 503(b)(9) claim, which it considered nothing more than a claim as defined in section 101(5)(A)<sup>43</sup> of the Bankruptcy Code and therefore subject to sections 501(a) and 502(d) of the Bankruptcy Code.<sup>44</sup> The *Circuit City* court agreed with the debtors' argument that section 503(b)(9) claims are different from other administrative claims in two important respects: first, they are governed by section 501(a), meaning that the claimant must file a proof of claim, and second, they arise pre-petition, unlike all other administrative claims.<sup>45</sup>

Moreover, the *Circuit City* court emphasized that sections 501, 502 and 503 are not mutually exclusive provisions of the Bankruptcy Code because a creditor "may be required to seek allowance of its claim under both §§ 502 and 503."<sup>46</sup> The court was concerned that declining to temporarily disallow the claims might prejudice the debtors' bankruptcy estates and defeat the goal of equitable distribution to similarly situated creditors in bankruptcy by allowing section 503(b)(9) claimants both to receive payment on their asserted administrative claims for the delivery of goods and to use the provision of the same goods as the basis of the new value defense under section 547(c)(4) of the Bankruptcy Code in the preference defense litigation. Accordingly, the *Circuit City* court concluded that section 503(b)(9) claims, which if not temporarily disallowed would have to be paid in full at confirmation of the debtors' chapter 11 plan, should be temporarily disallowed pending a decision during the related preference litigation under section 547 of the Bankruptcy Code as to whether creditors are able to use the delivery of the goods during the twenty-day period as a "new value" credit to offset their preference exposure while being paid in full on the section 503(b)(9) claims.<sup>47</sup>

## 7. How Are Section 503(b)(9) Claims Asserted?

The Bankruptcy Code and the Federal Rules of Bankruptcy Procedure do not provide clear instruction on how a party should assert a section 503(b)(9) claim. Ordinarily,

a creditor holding a prepetition claim against a debtor files a proof of claim against the debtor's bankruptcy estate.<sup>48</sup> A properly filed proof of claim is deemed allowed unless a party in interest objects.<sup>49</sup> Unlike proofs of claim that are deemed allowed by being properly filed, administrative expense claims, arguably including section 503(b)(9) claims, are only allowed "after notice and a hearing."<sup>50</sup> A request for the allowance of such an expense requires the filing of a motion<sup>51</sup> and, unless the court orders otherwise, all parties in interest are entitled to notice of the request and the opportunity to object thereto.<sup>52</sup> As of the date hereof, there is no consensus on whether section 503(b)(9) claims, which despite their administrative expense status are prepetition claims, are filed as proofs of claim or motions requesting allowance of the claims, or whether both a proof of claim and a motion have to be filed by claimants.<sup>53</sup>

Accordingly, debtors often ask courts to approve certain procedures for asserting section 503(b)(9) claims in a case. For example, in *In re SemCrude, L.P.*, the Delaware bankruptcy court entered an *Order Establishing Procedures for the Resolution of Administrative Claims Asserted Pursuant to Section 503(b)(9) of the Bankruptcy Code and Regarding Payments for Post-Petition Purchases* (the "Procedures Order").<sup>54</sup> The Procedures Order was entered after substantial negotiation and input by the debtors and interested parties. Its primary purpose was to provide a streamlined mechanism for determination and allowance of section 503(b)(9) claims, as the debtors expected thousands of creditors to assert hundreds of millions of dollars of such claims.<sup>55</sup> Under the Procedures Order, the debtors were required to include in Schedule E to their *Schedules of Assets and Liabilities* a listing of the estimated amounts, based on their records, owed to vendors who delivered goods within the twenty days prior to the petition date.<sup>56</sup> The debtors filed that listing and thereafter the Court set a bar date establishing March 3, 2009 as the deadline to file proofs of claim that applied to section 503(b)(9) claims as well as other prepetition claims.<sup>57</sup> Thus, in *SemCrude L.P.*, section 503(b)(9) claimants, despite their elevated treatment since 2005 in terms of priority and potential for getting paid during the bankruptcy proceeding, followed the same procedure for filing proofs of claim as the other types of creditors holding prepetition claims.

## Conclusion

While section 503(b)(9) appears simple on its face, the number of issues that already have been litigated prove the complexity of its application. There can be substantial cost to exercising the rights provided under section 503(b)(9). Since the Federal Rules of Bankruptcy Procedure and the Bankruptcy Code do not specify how a section 503(b)(9) claim is to be asserted, a creditor may end up retaining a lawyer to file a motion requesting the allowance and payment of a section 503(b)(9) claim as well as to file a proof of claim before the applicable bar date asserting the section 503(b)(9) claim. If challenged, discov-

ery may be needed to determine the value of the goods received by the debtor within the twenty-day period prior to the bankruptcy filing and an evidentiary hearing may be conducted to fix the value of the claim.

Once the claimant succeeds in having its section 503(b)(9) claim fixed in amount and allowed by court order, there is always the potential that the chapter 11 estate might be administratively insolvent, in which case the claim may not be paid in full or at all. Debtors may also manipulate the timing of payment of the section 503(b)(9) claim to meet their own liquidity needs. Debtors may attempt to discount the payment of section 503(b)(9) claims by obtaining orders that grant them the discretion to pay such claims on terms favorable to their bankruptcy estates. Debtors then use the promise of quick, consensual payment as an inducement for the claimant to agree to reduce the amount of its allowed claim or to provide favorable credit terms going forward. Of course, a section 503(b)(9) claimant can refuse a debtor's offer to accept a lesser amount in exchange for a quicker payment and instead sit on its claim and demand cash on delivery. Thus, while the section enhances the protection of trade creditors, in the short term section 503(b)(9) remains a source of dispute and other issues are likely to arise as parties (and courts) become more experienced with section 503(b)(9).

## Endnotes

1. 11 U.S.C. § 503(b)(9).
2. See *ASM Capital, LP v. Ames Dep't Stores, Inc.* (In re *Ames Dep't Stores, Inc.*), 582 F.3d 422, 424 n.2 (2d Cir. 2009) (Congress "amended section 546(c)(2) to provide that '[i]f a seller of goods fails to provide notice in the manner described in paragraph (1), the seller still may assert the rights contained in section 503(b)(9)'" (citation omitted); see also *In re Plastech Engineered Prods.*, 397 B.R. 828, 838 (Bankr. E.D. Mich. 2008) ("However, there is nothing in § 503(b)(9) that requires a claimant to also be entitled to a reclamation right under § 546. Section 546 does not limit or control in any way the rights that a claimant has under § 503(b)(9)"). The 2005 Bankruptcy Prevention and Consumer Protection Act also expanded Section 546(c) to provide a longer look-back period, allowing sellers of goods the right to seek reclamation of goods sold to a debtor in the ordinary course of the seller's business and received by the insolvent debtor within the forty-five day period prior to the bankruptcy filing.
3. Section 1129(a)(9)(A) of the Bankruptcy Code requires full payment of allowed administrative expenses on the effective date of the plan as a condition of confirmation, unless the holder has agreed to different treatment. So, under section 503(b)(9), a debtor may no longer confirm a plan that provides for payment over time or partial payment for the value of goods received within 20 days before the petition date, unless the particular claimant agrees. Section 503(b)(9) is one of the few instances where a claim arising prepetition is treated as an administrative, or post-petition, claim. Other instances include the actual and necessary expenses incurred by a petitioning creditor that files an involuntary bankruptcy petition against a debtor, and the reasonable compensation for professional services rendered by the petitioning creditor's attorney or accountant. See 11 U.S.C. §§ 503(b)(3)(A), (b)(4).
4. Section 503(b)(9) may provide the statutory basis for a bankruptcy court approving a critical vendor program that allows for immediate payment of all or a portion of a vendor's section 503(b)(9) claims in exchange for a commitment from the vendor to ship

goods on a postpetition basis. See *In re Mark IV Industries, Inc.*, No. 09-12795 (SMB) (Bankr. S.D.N.Y. May 27, 2009) (Docket No. 164) (*Order Authorizing (I) the Debtors to Pay Certain Prepetition Claims of Critical Vendors and Certain Administrative Claimholders, and (II) Financial Institutions to Honor and Process Related Checks and Transfers*).

5. Michael L. Atkinson, a Managing Director of Protiviti, Inc., through an unpublished article in the co-authors' possession, presents a strong case that the enactment of section 503(b)(9) has created a nearly impossible hurdle to clear in chapter 11 reorganizations of retailers because the retailers would not only need sufficient financing to fund working capital and future expected losses, but would also need additional financing to pay section 503(b)(9) claims in full. Mr. Atkinson believes that this hurdle has proved impossible to clear either through direct lending or a combination of lending and capital infusions from buyers looking to obtain an equity interest in the reorganized company.
6. See *In re Arts Dairy, LLC*, 414 B.R. 219, 220 (Bankr. N.D. Ohio 2009) (describing policy goals of section 503(b)(9)).
7. *In re Dana*, 367 B.R. 409, 411 (Bankr. S.D.N.Y. 2007).
8. See *In re Goody's Family Clothing, Inc.*, 401 B.R. 131, 136 (Bankr. D. Del. 2009) (denying administrative expense status under section 503(b)(9) for services provided to the debtor within 20 days preceding the bankruptcy filing); see also *Brown & Cole Stores, LLC v. Associated Grocers, Inc.* (In re *Brown & Cole Stores, LLC*), 375 B.R. 873, 878 (B.A.P. 9th Cir. 2007) ("By the plain terms of the statute, a vendor's right to assert an administrative claim is limited [in that] the vendor must have provided goods (not services)").
9. U.C.C. § 2-105(1).
10. *In re Circuit City Stores, Inc.*, 416 B.R. 531, 536 (Bankr. E.D. Va. 2009).
11. *Goody's*, 401 B.R. at 134.
12. *In re Plastech Engineered Prods.*, 397 B.R. 828, 836 (Bankr. E.D. Mich. 2008).
13. See *Circuit City*, 416 B.R. at 535; see also *Goody's*, 401 B.R. at 134.
14. See *Circuit City*, 416 B.R. at 535.
15. See *id.* at 536.
16. See *In re SemCrude, L.P.*, 416 B.R. 399, 405 (Bankr. D. Del. 2009); see also *In re Pridgen*, No. 07-04531-8 (RDD), 2008 Bankr. LEXIS 1274, at \*11 (Bankr. E.D.N.C. Apr. 22, 2008).
17. See *Circuit City*, 416 B.R. at 537.
18. *Id.* In so ruling, the court looked with favor upon the formulation of the predominant purpose test set forth in *Princess Cruises, Inc. v. Gen. Elec. Co.*, 143 F.3d 828, 833 (4th Cir. 1998) (quoting *Bonebreak v. Cox*, 499 F.2d 951 (8th Cir. 1974)), which held that "[t]he test for inclusion or exclusion is not whether they are mixed but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved (e.g., contract with artist for painting) or is a transaction of sale, with labor incidentally involved."
19. See *In re Plastech Engineered Prods.*, 397 B.R. 828, 838 (Bankr. E.D. Mich. 2008) (holding that claimants with mixed goods and services claims would only hold allowed priority claims for the goods portion of the claims).
20. See *id.* at 837-38.
21. *In re Pilgrim's Pride Corp.*, 421 B.R. 231, 237 (Bankr. N.D. Tex. 2009).
22. See *In re Goody's Family Clothing, Inc.*, 401 B.R. 131, 133 (Bankr. D. Del. 2009).
23. See *Circuit City*, 432 B.R. at 228-230. In *In re Circuit City Stores, Inc.*, the court applied the UCC's definition of goods to determine when goods were received for the purpose of section 503(b)(9). Under the UCC, "receipt" of goods means "taking physical possession of them." UCC § 2-103(c). The court held that the debtors did not take receipt of the goods during the twenty-day period when the goods were physically received by the debtors prior to the

- statutory period, the goods were sold on consignment, and the creditor retained title to the consigned goods until the time of sale when title to the particular consigned goods passed to the debtors and then to the customer as part of a simultaneous transaction. Accordingly, the court disallowed the claims as administrative expense claims and allowed them as non-priority, general unsecured claims. *See id.* at 227-231.
24. *See In re Renew Energy, LLC*, No. 09-10491 (RDM), 2009 Bankr. LEXIS 3352, at \*\*8, 12 (Bankr. W.D. Wis. Sept. 30, 2009) (holding that the delivery of prepaid goods within twenty days prior to filing did not give rise to a claim under section 503(b)(9)); *see also In re Wetco Rest. Group, LLC*, No. 07-51169 (RS), 2008 Bankr. LEXIS 1272, at \*8 (Bankr. W.D. La. Apr. 23, 2008) (same).
  25. *See In re SemCrude, L.P.*, 416 B.R. 399, 405 (Bankr. D. Del. 2009).
  26. *Id.*
  27. *Id.*
  28. *See id.*; *see also In re Pilgrim's Pride Corp.*, 421 B.R. 231, 243 n.13 (Bankr. N.D. Tex. 2009) ("If the contract provided a breakdown between goods delivered and services rendered,...the contract price for the goods delivered would provide a good starting place, as is the case with determination of value of post-petition performance of a rejected contract").
  29. *In re Global Home Prods., LLC*, No. 06-10340 (KG), 2006 Bankr. LEXIS 3608, at \*\*9-10 (Bankr. D. Del. Dec. 21, 2006).
  30. *Id.* at \*15.
  31. *Id.* at \*\*15-16.
  32. *In re Bookbinders' Rest., Inc.*, No. 06-12302 (ELF), 2006 Bankr. LEXIS 3749, at \*16 (Bankr. E.D. Pa. Dec. 28, 2006).
  33. *See id.* at \*\* 2, 14.
  34. *Brown & Cole Stores, LLC v. Associated Grocers, Inc. (In re Brown & Cole Stores, LLC)*, 375 B.R. 873, 876 (B.A.P. 9th Cir. 2007).
  35. *See id.*
  36. *See id.* at 877-78.
  37. *Id.* at 878 n.7.
  38. *See id.* at 876.
  39. *See id.* at 878.
  40. *See id.* at 879.
  41. *See id.*; *see also In re Circuit City Stores, Inc.*, No. 08-35653 (KRH), 2009 Bankr. LEXIS 4011, at \*\*22-23 (Bankr. E.D. Va. Dec. 3, 2009) (holding that the debtors were allowed to set off section 503(b)(9) administrative claims against any receivables or other items owed to the debtors by such claimants and these rights may be exercised by the debtors under section 558 of the Bankruptcy Code against section 503(b)(9) claims without first having to offset against non-priority claims).
  42. *See* 11 U.S.C. § 502(d) ("[T]he court shall disallow any claim of any entity from which property is recoverable under section 542, 543, 550 or 553 of this title...unless such entity...has paid the amount, or turned over any such property, for which such entity...is liable under section 522(i), 542, 543, 550, or 553 of this title").
  43. 11 U.S.C. § 101(5)(A) ("The term 'claim' means—(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured").
  44. *In re Circuit City Stores, Inc.*, 426 B.R. 560, 571 (Bankr. E.D. Va. Jan. 6, 2010), *reh'g denied*, No. 08-35653 (KRH), 2010 Bankr. LEXIS 571 (Bankr. E.D. Va. Feb. 23, 2010); *but see ASM Capital LP v. Ames Dep't Stores, Inc. (In re Ames Dep't Stores, Inc.)*, 582 F.3d 422, 430 (2d Cir. 2009) (holding that section 503(b)(9) claims are not subject to disallowance under section 502(d) of the Bankruptcy Code because administrative expense claims are not claims within the meaning of section 101(5)(A) of the Bankruptcy Code); *In re Plastech Engineered Products, Inc.*, 394 B.R. at 163-64 (same).
  45. *In re Circuit City Stores, Inc.*, No. 08-35653 (KRH), 2010 Bankr. LEXIS 571 at \*9.
  46. *See id.* at \*\*16-17.
  47. *See id.* at \*\*6, 20-25. Courts have yet to reach a consensus on whether fully funded section 503(b)(9) claims count as additional new value to reduce preference liability. *See TI Acquisition, LLC v. Southern Polymer, Inc. (In re TI Acquisition, LLC)*, 429 B.R. 377, 385 (Bankr. N.D. Ga. 2010) (holding that a creditor that delivered goods to the debtor prepetition is not entitled to the new value defense under section 547(c)(4) when that creditor has been paid in full on a section 503(b)(9) claim); *but see Commissary Operations, Inc. v. Dot Foods, Inc. (In re Commissary Operations, Inc.)*, 421 B.R. 873, 879 (Bankr. M.D. Tenn. 2010) (holding that held claims entitled to section 503(b)(9) status may constitute new value for purposes of section 547(c)(4)).
  48. *See* 11 U.S.C. § 501(a) ("A creditor or an indenture trustee may file a proof of claim. An equity security holder may file a proof of interest").
  49. *See* 11 U.S.C. § 502(a) ("A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects").
  50. *See* 11 U.S.C. § 503(b) ("After notice and a hearing, there shall be allowed, administrative expenses....").
  51. *See* FED. R. BANKR. P. 9013 ("a request for an order, except when an application is authorized by these rules, shall be by written motion...").
  52. *See* FED. R. BANKR. P. 2002(a)(6), (i).
  53. *See In re Circuit City Stores, Inc.*, No. 08-35653 (KRH), 2010 Bankr. LEXIS 571 at \*\*16-17 (Bankr. E.D. Va. Jan. 6 2010) (reaffirming an earlier decision that section 503(b)(9) claimants must file proofs of claim under section 501(a) and request administrative expense status by filing a motion under section 503(a) in order to be allowed their section 503(b)(9) claims).
  54. *In re SemCrude, L.P.*, No. 08-11525 (BLS) (Bankr. D. Del. Sept. 16, 2008) (Docket No. 1376).
  55. *See In re SemCrude, L.P.*, No. 08-11525 (BLS) (Bankr. D. Del. Aug. 11, 2008) (Docket No. 600) (*Motion of Debtors for Authorization to Establish Procedures for the Resolution of Reclamation Claims, Administrative Claims Asserted Pursuant to Section 503(b)(9) of the Bankruptcy Code, and Liens Asserted Pursuant to First Purchaser Lien or Similar Statutes*).
  56. *See* Procedures Order at page 2, paragraph (a).
  57. *See In re SemCrude, L.P.*, Case No. 08-11525 (BLS) (Bankr. D. Del. Jan. 8, 2009) (Docket No. 2746 at page 3, paragraph (c)) (*Order Pursuant to Bankruptcy Rule 3003(c)(3) and Section 503(b)(9) of the Bankruptcy Code Establishing Deadlines for Filing Proofs of Claim and Approving the Form and Manner of Notice Thereof*).

**Scott H. Bernstein is a senior associate in the New York office of Hunton & Williams LLP, where he counsels clients in the areas of complex bankruptcy reorganizations, creditors' rights, and bankruptcy litigation. He also has experience in the area of commercial litigation. Mr. Bernstein is a member of the Business Law Section of the New York State Bar Association.**

**Robert A. Rich is an associate in the New York office of Hunton & Williams LLP, where he counsels clients in the areas of complex bankruptcy reorganizations, creditors' rights, and bankruptcy litigation.**