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BY BRUCE S. NATHAN AND SCOTT CARGILL

Is Electricity a “Good” Eligible for § 503(b)(9) Priority Status?



Bruce S. Nathan
Lowenstein Sandler
LLP; New York



Scott Cargill
Lowenstein Sandler
LLP; Roseland, N.J.

Bruce Nathan is a partner in Lowenstein Sandler LLP's Bankruptcy, Financial Reorganization and Creditors' Rights Group in New York and a past member of ABI's Board of Directors. Scott Cargill is Of Counsel in the firm's Roseland, N.J., office.

Section 503(b)(9) of the Bankruptcy Code grants sellers of goods an administrative-priority claim for the value of goods sold to a debtor received within 20 days of a bankruptcy filing. Since its enactment in 2005, there has been significant litigation concerning nearly every element of § 503(b)(9) that a creditor must prove to obtain priority status for its claim. There is perhaps no other issue concerning eligibility for § 503(b)(9) priority status that has so evenly divided the courts as whether the provision of electricity qualifies as a sale of “goods.” The divergent rulings are also notable because of the different approaches that courts have taken to arrive at their holdings. Most recently, courts in Oregon and New York have held that electricity was ineligible for § 503(b)(9) priority because it is not a “good,” but those courts took different paths to reach the same result.

In its February 2023 decision in *PacifiCorp v. North Pacific Cannery & Packers Inc.*,¹ the U.S. District Court for the District of Oregon affirmed the bankruptcy court's ruling that electricity is not a “good” after considering extensive expert testimony. Three months later, the U.S. Bankruptcy Court for the Southern District of New York reached the same result in *In re Sears Holdings Corp.*² without the benefit of any expert testimony. The *Sears* court instead relied on nonbinding precedent within the district that narrowly construed statutory priorities and noted the lack of consensus among the courts over whether electricity is a good eligible for priority status under § 503(b)(9). As a result of the differing approaches as exemplified by the *PacifiCorp* and *Sears* decisions, other courts considering whether electricity is a good eligible for § 503(b)(9)

priority status will have to decide whether to rely on complex scientific evidence concerning the nature of electricity.

Section 503(b)(9) Claims

The text of § 503(b)(9) appears relatively straightforward. It affords an administrative-priority claim 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.”³ This priority status frequently entitles the holder of an allowed § 503(b)(9) claim to full payment prior to any recovery by general unsecured creditors.

What Are “Goods”?

Key to determining whether a seller has an eligible § 503(b)(9) priority claim is proving that the debtor received “goods” within 20 days prior to the bankruptcy filing. Although the Bankruptcy Code does not define the term “goods,” courts have adopted the definition of “goods” from Article 2 of either the model or the state-adopted version of the Uniform Commercial Code (UCC). The model UCC defines “goods” as “all things (including specifically manufactured goods) [that] are movable at the time of identification to the contract for sale.”⁴ As such, “Identification of goods occurs when existing goods are designated, or agreed upon, as the goods to which the contract refers.”⁵

For the *PacifiCorp* court, the creditor's inability to present credible expert scientific evidence that the electricity supplied to the debtors was *movable* at

1 2023 WL 1765691 (D. Ore. Feb. 3, 2023).

2 2023 WL 3470475 (Bankr. S.D.N.Y. May 15, 2023).

3 11 U.S.C. § 503(b)(9).

4 Model U.C.C. § 2-105(1).

5 2 Anderson U.C.C. § 2-501:4 (3d ed.).

the time of identification to the contract was fatal to the creditor's § 503(b)(9) priority claim. By comparison, the *Sears* court denied allowance of the creditor's § 503(b)(9) claim because electricity is not a good, without the benefit of any expert testimony.

Courts nationwide have reached conflicting decisions on the question of whether electricity is a "good" in determining eligibility for § 503(b)(9) priority status. These courts have also not reached consensus over what factual evidence is required to prove that electricity is movable at the time of identification to the contract for sale and, as such, is a good.

The PacifiCorp Court Relies on Expert Scientific Evidence

In August 2019, the debtor in *PacifiCorp* commenced its chapter 11 case.⁶ *PacifiCorp*, a public utility that supplied electricity to the debtor prior to the petition date, asserted a § 503(b)(9) claim for approximately \$206,000.⁷ The debtor objected to priority status for *PacifiCorp*'s claim, arguing that electricity does not qualify as "goods" within the meaning of § 503(b)(9).⁸

Noting that the Bankruptcy Code does not define "goods," the bankruptcy court adopted the model UCC definition.⁹ Accordingly, *PacifiCorp* carried the burden of proving that the supplied electricity was movable at the time of identification to the contract for sale.

Both the debtor and *PacifiCorp* submitted expert scientific testimony to support their positions. The bankruptcy court observed that the experts agreed on how electricity is generated and "that meters measure and record the amount of electricity passing through the meter, and the amount a customer will be required to pay for that electricity."¹⁰ The court framed the dispute as "whether the electricity provided to [the] Debtor was movable at the time it was identified to the contract of sale."¹¹

PacifiCorp's expert testified that the electricity the debtor received is identified to the contract the instant it passed through the meter, so the electricity was movable at that time.¹² By contrast, the debtor argued that the electricity "is not identified to the contract until the meter can register and display the usage."¹³

Critical to the bankruptcy court's analysis was the debtor's expert's undisputed testimony that all widely used electric meters cannot register and display the amount of electricity that a customer uses before the electricity is consumed because electricity moves at such immense speed.¹⁴ The court held that *PacifiCorp*'s claim was not eligible for § 503(b)(9) priority status because electricity is not a good. The bankruptcy court relied, in part, on the U.S. District Court for the Southern District of New York's holding in *In re Great*

Atl. & Pac. Tea Co. (A&P),¹⁵ which similarly considered expert scientific evidence. The bankruptcy court concluded that electricity is not movable at the time of identification to a contract of sale when it cannot be identified — or even perceived — because meters are incapable of recording and displaying the amount of electricity before the electricity has been consumed.¹⁶

The bankruptcy court rejected *PacifiCorp*'s argument that the electricity is identified at the time it passes through the meter.¹⁷ While acknowledging that other courts have held that electricity is identified when it passes through the meter,¹⁸ the court was unpersuaded by those cases for two reasons: (1) electricity cannot be movable at the time it is identified, because meters cannot register and display electricity before it is consumed;¹⁹ and (2) those courts did not have the benefit of scientific evidence concerning the nature of electricity and how electric meters work.²⁰

Thus, the bankruptcy court concluded that electricity "merely passing through a meter" was insufficient to identify the electricity to a contract pursuant to the UCC's definition of "goods."²¹ The court also relied on U.S. Supreme Court precedent holding that bankruptcy priorities should be narrowly construed and any doubts resolved consistent with the Bankruptcy Code's goal of equal distribution.²² Accordingly, affording *PacifiCorp* priority treatment of its § 503(b)(9) claim was unwarranted because it "is far from clear" whether electricity qualifies as goods within the meaning of § 503(b)(9).²³

On appeal, the district court framed "two essential questions": (1) whether to apply the UCC definition of "goods" to § 503(b)(9) claims; and (2) whether electricity satisfies the UCC's definition of "goods."²⁴ The court relied on the UCC's definition of "goods"²⁵ and concluded that electricity is not identified until it is recorded by the meter. Accordingly, since electricity is already consumed by the time it has been identified, it is not movable at the time of identification, as required by the UCC definition of "goods."²⁶ Finally, the district court agreed that § 503(b)(9)'s priority treatment of claims should be narrowly interpreted.²⁷

15 *Hudson Energy Services, LLC v. Great Atl. & Pac. Tea Co. (In re Great Atl. & Pac. Tea Co.)*, 538 B.R. 666 (S.D.N.Y. 2015).

16 *See N. Pac. Cannery*, 628 B.R. at 342-43.

17 *Id.* at 342.

18 *See, e.g., In re Escalera Res. Co.*, 563 B.R. 336, 360 (Bankr. D. Colo. 2017) (electricity "is measured as it passes through a meter. A meter records movement of electrical energy but is not read every nanosecond. Instead, the public utility reads the meter periodically.... Nothing else is required to satisfy the UCC Section 2-105 definition of 'goods.'").

19 *See N. Pac. Cannery*, 628 B.R. at 342-43.

20 *See id.* at 342-43. *See also GFI Wisconsin Inc. v. Reedsburg Util. Comm'n*, 440 B.R. 791, 799-800 (W.D. Wis. 2010) (holding electricity is "goods" and noting that "the UCC should not depend on quantum physics, how fast electrons are moving at a particular time or even where a debtor's meter is located on an electrical circuit"); *In re Irving Indus. Inc.*, 432 B.R. 354, 370 (Bankr. D. Mass. 2010) ("The notion that electricity is consumed at the time it is identified by the meter (and is therefore no longer movable) is inconsistent with the fact that electricity does not simply reach a customer's meter and simultaneously cease to exist. Instead, it passes through the meter. At the time the electricity is identified to the contract, it is literally moving, and it remains movable for some period of time thereafter."); *S. Montana Elec. Generation and Trans. Coop.*, 2013 WL 85162, *5 (Bankr. D. Mont. Jan. 8, 2013) ("[E]lectricity begins flowing through power lines when a circuit is formed and continues moving at least until it is metered. The metering satisfies the identification requirement of the UCC and the movement is sufficient to satisfy the movability requirement."); *In re Wometco de Puerto Rico Inc.*, 2016 WL 155393, *2 (D. P.R. Jan. 12, 2016) (under UCC definition, "a thing is a 'good' as long as it is movable at the time of identification to a contract for sale, regardless of whether it remains moveable for eternity or for an infinitesimal amount of time thereafter").

21 *Id.* at 343.

22 *See id.* at 344.

23 *See id.*

24 *PacifiCorp*, 2023 WL 1765691 at *4.

25 *Id.*

26 *See id.*

27 *Id.* at *5.

6 *In re N. Pac. Cannery & Packers Inc.*, 628 B.R. 337, 339 (Bankr. D. Ore. 2021).

7 *Id.*

8 *Id.*

9 *Id.* at 341 (citing *In re PMC Mktg. Corp.*, 517 B.R. 391-92 (B.A.P. 1st Cir. 2014); *In re Pilgrim's Pride Corp.*, 421 B.R. 231, 236-37 (Bankr. N.D. Tex. 2009) (explaining that use of model UCC, as opposed to UCC version enacted by state, is appropriate to ensure uniformity in interpretation of UCC, as applied to § 503(b)(9)).

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 *See id.* at 342-43.

The Sears Court's Approach

The facts in *Sears* were substantially similar to *PacifiCorp*. In October 2018, debtors Sears Holdings Corp. and Kmart Corp. filed chapter 11 cases in the U.S. Bankruptcy Court for the Southern District of New York.²⁸ The Puerto Rico Electric Power Authority (PREPA) asserted § 503(b)(9) claims for approximately \$530,000 for electricity supplied to the debtors in the 20 days prior to the filing.²⁹ The debtors filed objections to PREPA's priority claims, arguing that electricity does not qualify as "goods" under § 503(b)(9).³⁰

The bankruptcy court considering PREPA's § 503(b)(9) priority claims did not conduct an evidentiary hearing or hear arguments on the merits.³¹ The court relied on the UCC's definition of "goods" in determining PREPA'S eligibility for § 503(b)(9) priority status,³² then cited the *A&P* case for the proposition that electricity is not a "good" under the UCC in determining eligibility for § 503(b)(9) priority status.³³ It did not consider any of the analysis from, or the scientific evidence reviewed in, the *A&P* case. Rather, the court described the holding in *A&P* as "the clear answer on this issue from our Court," even though *A&P* is not binding precedent.³⁴ In addition, the court recognized the nearly equal split among the courts over whether electricity qualifies as "goods" under § 503(b)(9).³⁵

The bankruptcy court rejected PREPA's reliance on Puerto Rico court decisions that electricity is a good instead of Southern District of New York precedent. The court considered the "overriding federal bankruptcy policies of uniformity and equitable distribution among administrative creditors" instead of state law, to avoid the risk of debtors facing different claim priorities for the same claim and from the same provider solely because the electricity was delivered to the debtor in different jurisdictions.³⁶ Similar to *PacifiCorp*, the court also observed that a "statute granting priority status is narrowly construed because priority claims reduce the total funds available for claimants."³⁷

Finally, the bankruptcy court rejected PREPA's argument that electricity is a good based on nonbankruptcy court decisions. The court concluded that there is no uniform treatment of electricity under the UCC definition of "goods," with most state courts holding that "electricity is a service while in transmission but constitutes a good once metered and identifiable."³⁸ As a result, the cases failed to provide any useful guidance for determining whether electricity is a good eligible for priority under § 503(b)(9).³⁹

No Uniform Methodology Among the Courts

The *PacifiCorp* and *A&P* decisions are among the most rigorous analyses of the scientific principles behind electricity transmission, and the interplay between such science and the UCC's requirement that goods be movable at the time of identification to a contract. The *Sears* decision is an example of a court reaching the same result by just relying on precedent within the bankruptcy court's jurisdiction.

While bankruptcy courts apply the UCC's definition of goods,⁴⁰ there is no uniform approach concerning what evidence must be considered to determine whether the UCC's definition has been satisfied. The *PacifiCorp*, *A&P* and *Escalera* courts heard extensive expert testimony concerning the science behind electricity transmission and metering, but still reached contradictory holdings. By contrast, the *GFI Wisconsin* court held that resolving the question of whether electricity qualifies as goods is not dependent on the underlying science, speed of electrons or where the debtor's meter is located on the electrical circuit.

Courts considering whether electricity is a good for § 503(b)(9) priority status and relying on case law that focuses on the current state of technology (*e.g.*, how quickly an electric meter can record and display the flow of electricity passing through the meter) may reach a different conclusion as a result of future technological advancements. With such a primary disagreement among the courts concerning not just the ultimate legal question of what constitutes "goods" — but also what factual evidence is required to answer this legal question — guidance from circuit-level appellate courts is likely necessary before developing a uniform approach to harmonizing these conflicting decisions.⁴¹ **abi**

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28 *Sears*, 2023 WL 3470475, at *1.

29 *Id.*

30 *Id.* at *1-2.

31 *Id.* at *1, n.2.

32 *Id.* at *3. The *Sears* opinion did not explain whether the bankruptcy court was considering the model UCC or New York's version of the UCC. However, for purposes of the definition of "goods," the definitions are identical.

33 *Id.* at *4.

34 *Id.* Notably, because the bankruptcy court sits in a multi-judge district, the *A&P* decision was not binding on the *Sears* court. See *In re Jamesway Corp.*, 235 B.R. 329, 336, n.1 (Bankr. S.D.N.Y. 1999).

35 Other courts holding that electricity does not qualify as "goods": *In re NE Opco Inc.*, 501 B.R. 233 (Bankr. D. Del. 2013); *Pilgrim's Pride*, 421 B.R. 231; *In re Samaritan Alliance LLC*, 2008 WL 2520107 (Bankr. E.D. Ky. June 20, 2008).

36 See *Sears*, 2023 WL 3470475, at *4.

37 *Id.* at *2.

38 *Id.* at *5.

39 *Id.*

40 The *Esclera* court considered the definition of "goods" under federal antitrust law, federal labor law, federal energy regulatory law, state tort law, state tax law and international treaties, but ultimately adopted the UCC definition of goods for purposes of § 503(b)(9). See *Escalera*, 563 B.R. at 369.

41 The claimants did not appeal the *Sears* or *PacifiCorp* decisions.