



# Unsecured Trade Creditors Committee

## ABI Committee News

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### May 20-Day Goods Qualify as an Administrative Expense under §503(b)(9) and New Value?

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There currently exists a split as to whether goods delivered within 20 days of a filing that qualify as §503(b)(9) administrative expenses ("20-day claims" or "20-day goods") may also serve as new value to defend a preference under § 547(c)(4). On Jan. 6, 2010, Hon. Marian Harrison held that a preference defendant was not precluded from asserting new value based on 20-day goods. [\[2\]](#) By contrast, on Dec. 1, 2010, Hon. Kevin R. Huennekens prohibited such dual use reasoning that the assertion of both claims constituted "double payment." [\[3\]](#) This article sets forth the pertinent statutory provisions and summarizes the decisions in *Commissary* and *Circuit City* illustrating the conflict in law.

#### Pertinent Statutory Provisions

##### ***Administrative-Expense Claims***

Section 503(b)(9) provides that a creditor is entitled to an allowed administrative expense for the value of any goods received by the debtor 20 days prior to the petition date. The statute reads in pertinent part:

After notice and a hearing, there shall be allowed administrative expenses... including...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. [\[4\]](#)

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### ***New-Value-Preference Defense***

Pursuant to § 547(c)(4), a creditor is protected from avoidance of preferential transfer to the extent that after the transfer the creditor gave new value for the benefit of the debtor. The provision reads in pertinent part:

The trustee may not avoid under this section a transfer—

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor—

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor. [5]

### ***Commissary***

In *Commissary*, multiple creditors asserted claims for the allowance of administrative expenses arising under § 503(b)(9). The debtor initiated adversary proceedings against several of the creditors seeking recovery of alleged preferential transfers made within 90 days before the petition date. The creditors asserted new-value defenses, which included the value of those goods that were also subject to § 503(b)(9) claims. The court held that deliveries entitled to § 503(b)(9) status are not disqualified from serving as new value in a preference defense. The court based its argument around four major lines of reasoning.

First, the court distinguished § 503(b)(9) claims from reclamation claims, noting that a debtor is obligated to segregate and return reclamation goods. In the case of 20-day goods, they may be used freely and are “exactly the same as money or money’s worth as goods shipped free of the seller’s strings.” [6] Second, the court held that it does not matter that a claimant might receive post-petition payment for the 20-day goods. By receiving such 20-day goods, the debtor was able to fulfill its customers’ expectations, thereby promoting goodwill. Because the creditor helped the debtor cultivate that goodwill, new value was provided and the creditor should not be prohibited from asserting the defense even if it was later paid. [7]

Third, the Bankruptcy Code seeks to encourage creditors to continue to do business with debtors, including the continued extension of credit. If creditors were required to choose between the § 503(b)(9) claim and the new-value defense, this would “chill their willingness to do business with troubled entities.” [8] Last, the court found that there is nothing in the plain language of either § 503(b)(9) or 547 indicating that Congress intended the benefits of these provisions to offset each other. [9]

### ***Circuit City***

In *Circuit City*, Judge Huennekens came to a different conclusion, holding that 20-day

goods cannot be double-counted as both an administrative claim and new value. The court based its decision on a close reading of § 547(c)(4), focusing specifically on subsection (B) which sets forth the concept of an “unavoidable transfer.” The subsection reads, in pertinent part:

The trustee may not avoid under this section a transfer to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor...

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor. [10]

The court parsed subsection (B) into two parts: whether (1) the debtor made a transfer for the creditor’s benefit, and (2) this transfer was “otherwise unavoidable” as required by the Code. With respect to the first prong, the court reasoned that the debtors made a transfer for the creditor’s benefit when it established a court-ordered reserve fund for the creditor’s § 503(b)(9) claim. The establishment of the reserve was absolute and the debtors effectively parted with their interest in such monies. [11]

With respect to the second prong, the court considered seven Code provisions to determine if the transfer of the reserve fund was unavoidable. After rejecting §§ 544, 547, 548 and 553(b) as inapplicable as they pertain only to transfers made prior to the petition date and rejecting §§ 545 and 724(a) because they pertain only to the fixing of a lien, the court focused on § 549, which permits a trustee to avoid certain post-petition transfers. [12] Because the reserve fund was authorized by both the court and the Code, § 549 did not render the reserve avoidable. [13] The court held that the reserve was an “otherwise unavoidable transfer” under § 547(c)(4)(B) and the creditor could not assert the 20-day goods as new value.

## Conclusion

The intersection of the new-value defense and administrative claims under § 503(b)(9) of the Code is unsettled. Currently, the Bankruptcy Court of the Middle District of Tennessee permits the simultaneous assertion of both claims while the Bankruptcy Court of the Eastern District of Virginia and Northern District of Georgia permit only one or the other to go forward.

*1. The views expressed in this article are those of the authors and may not reflect the views of the firm.*

*2. Commissary Op. Inc. v. Dot Foods Inc. (In re Commissary Op. Inc.), 421 B.R. 873*

(Bankr. M.D. Tenn. 2010).

[3.](#) *Circuit City Stores Inc. v. Mitsubishi Digital Elec. Am. Inc. (In re Circuit City Stores Inc.)*, No. 10-03068, 2010 Bankr. LEXIS 4398, at \*34 (Bankr. E.D. Va. Dec. 1, 2010); see also *TI Acquisition LLC v. Southern Polymer Inc. (In re TI Acquisition LLC)*, 429 B.R. 377 (Bankr. N.D. Ga. 2010) (Diehl, J.) (creditor was not entitled to use new value defense because its claim under § 503(b)(9) had been allowed and was fully funded).

[4.](#) 11 U.S.C. § 503(b)(9) (2010).

[5.](#) 11 U.S.C. § 547(c)(4) (2010).

[6.](#) *Id.* at 878.

[7.](#) *Id.* at 879-80.

[8.](#) *Id.* at 879.

[9.](#) *Id.* at 879.

[10.](#) 11 U.S.C. § 547(c)(4) (2010).

[11.](#) *Id.* at \*22.

[12.](#) *Id.* at \*28.

[13.](#) *Id.*