Cooley

Bankruptcy Court Finds that 503(B)(9) Claims Count as New Value for Preference Defense Purposes

March 19, 2010

This is an important update for trade vendors and suppliers of goods who may be the targets of preference litigation.

On January 6, 2010 the United States Bankruptcy Court for the Middle District of Tennessee issued a decision in the *Commissary Operations* case (Case No. 308-06279) which should assist creditors who are defending against preference actions. As many trade creditors are aware, Section 503(b)(9) of the Bankruptcy Code accords first priority administrative status to claims for goods received by the debtor within 20 days of the bankruptcy filing ("20-day claims"). Bankruptcy Judge Marian F. Harrison held that the goods that comprise 20-day claims may also be included in the subsequent new value defense under Section 547(c)(4) of the Bankruptcy Code, which allows preference defendants to reduce their preference liability if they supplied the debtor with new merchandise or services after the payments sought to be recovered were received.

While the debtor sought to disqualify 20-day claims from being counted as new value, the court in *Commissary Operations* determined that result would deprive trade creditors of the priority accorded them under the Bankruptcy Code. Moreover, Judge Harrison stated that requiring creditors to choose between asserting a 20-day claim and preserving their right to assert a new value defense that includes deliveries made to the debtor within the 20 days prior to the bankruptcy filing "would chill their willingness to do business with troubled entities". However, please note that in another recent decision in the *Circuit City* bankruptcy, the court held that 20-day claims should be temporarily disallowed under Section 502(d) of the Bankruptcy Code pending the outcome of preference actions being pursued in that case.

For more information on this Alert, please contact one of the attorneys listed below.

This content is provided for general informational purposes only, and your access or use of the content does not create an attorney-client relationship between you or your organization and Cooley LLP, Cooley (UK) LLP, or any other affiliated practice or entity (collectively referred to as "Cooley"). By accessing this content, you agree that the information provided does not constitute legal or other professional advice. This content is not a substitute for obtaining legal advice from a qualified attorney licensed in your jurisdiction, and you should not act or refrain from acting based on this content. This content may be changed without notice. It is not guaranteed to be complete, correct or up to date, and it may not reflect the most current legal developments. Prior results do not guarantee a similar outcome. Do not send any confidential information to Cooley, as we do not have any duty to keep any information you provide to us confidential. When advising companies, our attorney-client relationship is with the company, not with any individual. This content may have been generated with the assistance of artificial intelligence (AI) in accordance with our AI Principles, may be considered Attorney Advertising and is subject to our legal notices.

Key Contacts

Robert Eisenbach San Francisco	reisenbach@cooley.com +1 415 693 2094
Cathy Hershcopf New York	chershcopf@cooley.com +1 212 479 6138

This information is a general description of the law; it is not intended to provide specific legal advice nor is it intended to create an attorney-client relationship with Cooley LLP. Before taking any action on this information you should seek professional counsel.

Copyright © 2023 Cooley LLP, 3175 Hanover Street, Palo Alto, CA 94304; Cooley (UK) LLP, 22 Bishopsgate, London, UK EC2N 4BQ. Permission is granted to make and redistribute, without charge, copies of this entire document provided that such copies are complete and unaltered and identify Cooley LLP as the author. All other rights reserved.