Electricity as 'Good' or a 'Service' Under Section 503(b)(9)

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Bankruptcy courts have long pondered the issue of whether electricity is a "good" or a "service" for purposes of priority claims status under Section 503(b)(9) of the Bankruptcy Code. Section 503(b)(9) creates an administrative priority status for claims for the value of "goods" which were delivered to the debtor within the 20-day window preceding the filing of the bankruptcy petition.

Administrative claims typically get paid in full and ahead of other claims. As a result, Section 503(b)(9) claim status is highly prized. The section does not apply to "services," however. This has created a deep divide of opinion where electricity is concerned.

The US District Court in Oregon recently chimed in on this growing debate, making it the highest court to date to consider the issue. The issue now seems poised to progress to a US Circuit Court of Appeals. Nevertheless, the future treatment of electricity under Section 503(b)(9) seems uncertain due to both the varying definitions of the term "goods" and their application to electricity, as well as to the current state of technology.

Overview

Section 503(b)(9) was added to the Bankruptcy Code in 2005. Ever since, there has been an ongoing debate as to whether electricity is a good or a service for purposes of Section 503(b)(9). If electricity is determined to be a "good," a creditor can receive priority claim treatment for its value. But, if it is a "service," it will not.

To date, six Bankruptcy Court decisions from the District of Colorado, the District of Massachusetts, the District of Montana, the Western District of Wisconsin, and the District of Puerto Rico have found electricity to be a good, qualifying for priority claims treatment. Meanwhile, four Bankruptcy Court decisions, from the Eastern District of Kentucky, the District of Delaware, the Northern

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District of Texas, and the Southern District of New York, have found that it is a service and does not qualify.

On Feb. 3, 2023, the US District Court for the District of Oregon weighed in on the issue, holding that electricity is not a good, but rather a service, for purposes of Section 503(b)(9). This is the highest court to date to render an opinion on the subject. It is anticipated that the utility company involved, Pacific Power & Light, will appeal the matter next to the Ninth Circuit. At the time of this article, however, the appeal period has not yet expired.

Application of Section 503(b)(9) to Goods Only

Section 503(b)(9) grants a heightened, priority status to a claim for:

> [T]he value of any goods received by the debtor within 20 days before the date of the 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.

Unfortunately, the Bankruptcy Code does not define the term "goods." As a result, many courts when faced with the issue of whether electricity is a "good" have turned to the Uniform Commercial Code (UCC) for guidance. The UCC defines the term "goods" as all things "which are movable 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 …" In reaching the holding that electricity is not a "good," the US District Court for the District of Oregon focused its attention on this specific language of the UCC in its recent *North Pacific Canners* decision. See In re Pacificorp d/b/a *Pacific Power & Light v. North Pacific Canners & Packers, Inc.*, No. Civ. No. 6:21-cv-00863-AA, 2023 BL 35703, (D. Or. Feb. 03, 2023).

The Case

In the *North Pacific Canners* case, the utility company, Pacific Power & Light, supplied electricity to the debtor at multiple locations and was owed $502,230 at the time of the bankruptcy filing. Of that amount owed, $206,009 was for electricity received by the debtor within the 20-day window immediately preceding the filing of the

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bankruptcy petition.

Accordingly, Pacific Power & Light asserted a priority claim under Section 503(b)(9) in that amount. The debtor objected, arguing that priority claim status under Section 503(b)(9) was not available to the utility company on the basis that electricity is not a good, but rather a service. The Bankruptcy Court held an evidentiary hearing and the parties each offered expert witness testimony on the subject. Thereafter, the Bankruptcy Court sided with the Debtor, concluding that electricity is not a good, and consequently, that Pacific Power & Light's claim was not entitled to priority claim status. Pacific Power & Light appealed to the District Court.

The District Court began its analysis by turning to the UCC's definition of "goods" and concluding that it was faced with a mixed question of law and fact. The question of whether electricity is a good for purposes of Section 503(b)(9) is a question of law. However, applying the UCC definition requires a determination of whether electricity is movable at the time it is identified, and that is a question of fact. The District Court placed great weight on the expert testimony presented by the debtor's expert, Dr. Howard Scott:

Of note, Dr. Scott reported that "[e]lectricity travels near the speed of light, and electricity meters operate at a much slower speed than that," and "though all widely used forms of electric meters do measure the amount of electricity that passed through them, they only do so after the electricity was consumed."

Thus, the court found that all widely used forms of electric meters are incapable of identifying the amount of electricity consumed before it is consumed, as required by the UCC's definition of "goods." Again, the UCC's definition requires that the goods be movable at the time of identification to the contract for sale. The District Court found that the identification of electricity "is impossible until, at the earliest, the quantity of electricity delivered is registered and displayed on the meter," and by that time, the electricity has already been consumed and is, thus, no longer "movable."

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Accordingly, based on this finding, the District Court determined that electricity could not qualify as a "good" for purposes of Section 503(b)(9) claim status.

Other Courts

Notably, in reaching this holding, the *North Pacific Canners* case parts ways with other courts which have also applied the UCC definition of "goods" to electricity and reached the opposite conclusion. The Bankruptcy Court for the District of Massachusetts determined that "electricity easily falls with the definition" of the UCC's definition of "goods" for purposes of Section 503(b)(9). *In re Erving Industries, Inc.*, 432 B.R. 354 (Bankr. D. Mass. 2010). The Bankruptcy Court for the District of Puerto Rico also reached the same conclusion that electricity is a "good" when applying the UCC's definition of "goods." In re *Wometco de Puerto Rico Inc.*, No. 15-02264, 2016 BL 8198, (Bankr. D.P.R. Jan. 12, 2016).

Other courts have rejected the UCC's definition entirely in this context. In *In re Escalera Resources Co.*, the Bankruptcy Court for the District of Colorado has stated that the definition of "goods" in the context of bankruptcy is a question of federal law and it is not appropriate to apply a state law (UCC) definition. Judge Joseph McNamara searched for a federal definition of the term "goods" by starting with the dictionary. Pursuant to the standard dictionary definition, "goods" means things with value, whether tangible or not, that are produced for sale, including commodities. Judge McNamara noted that by employing the term "goods," Congress made the decision to use "an extremely broad word" in drafting Section 503(b)(9).

Consequently, he found no linguistic basis for a restrictive definition of the term. He noted that electricity has tangible, physical attributes. It can be seen, heard, touched, felt, and quantified. Moreover, electricity has been treated as a "good" under other areas of the law such as antitrust, labor law, energy regulation, torts, and international treaties. See *In re Escalera Resources Co.*, 563 B.R. 336 (Bankr. D. Colo. 2017).

Final Considerations

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It is conceivable, if not predictable, that the decisions finding that electricity is not a good on the basis that, because of its speed, it is consumed before the meters can register it may become obsolete as the technology upon which these decisions are based becomes obsolete. With technological advances and future capabilities, we can anticipate that electricity may someday soon be identified in faster ways or by different methods.
It is an interesting thought that the term "goods" is tied by these decisions to our current state of technology. Thus, these decisions may ultimately be as short-lived as the technology upon which they are based, and like electricity may be subject to change with the speed of light.

For more information, contact any attorney with Frost Brown Todd's Bankruptcy & Restructuring practice group.

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