

AMERICAN BANKRUPTCY INSTITUTE JOURNAL

Issues and Information for Today's Busy Insolvency Professional

Section 503(b)(9) Claims and Bar Dates: Creditors Must Be Vigilant

Written by:

Carl N. Kunz, III
Morris James LLP, Wilmington, Del.
ckunz@morrisjames.com

Nearly three years ago, BAPCPA handed trade creditors a victory in the form of §503(b)(9) of the Bankruptcy Code, which grants administrative expense priority to claims for “the value of any goods received by the debtor within 20 days before the date of commencement of a case under [title 11] in which the goods have been sold to the debtor in the ordinary course of such debtor’s business.” Thus, rather than being left to hold the bag on large accounts receivable as debtors increase their supply of inventory in their run up to bankruptcy, trade creditors now have an administrative priority claim for those goods. While §503(b)(9) undoubtedly has increased the cost of a bankruptcy case from the debtor’s perspective, it recognizes the crucial role ordinary trade creditors play in propping up the debtor in the early days of a bankruptcy case.

Surprisingly, in the three years since §503(b)(9) became effective, there have been few opinions written about it, and most merely involve whether such claims are required to be paid immediately. Almost uniformly the answer has been “no.”¹

More surprising than the lack of decisional law may be the lack of any uniform process for gathering and dealing with such claims. Notwithstanding the recent uptick in the number of bankruptcy



Carl N. Kunz, III

About the Author

Carl Kunz is a partner in the Bankruptcy and Creditors' Rights Group at Morris James LLP in Wilmington, Del.

filings, no singular method of dealing with §503(b)(9) claims has materialized. Because §503(b)(9) has merely taken what would normally have been an unsecured pre-petition claim and converted it into an administrative priority claim, no longer do debtors appear content merely to set separate general bar dates and administrative bar dates. Instead, this new *pre-petition* administrative claim has generated many different types of bar date motions and exacerbated the confusion among creditors as to how and when to assert §503(b)(9) claims. This discussion

Claims Chat

examines some of the procedural ways in which debtors in cases in Delaware have tried to address §503(b)(9) claims and briefly discusses some of the concerns and advantages posed by each.

Advanced Marketing Services Inc., Case No. 06-11480 (CSS). In this case, Advanced Marketing, whose business primarily consisted of receiving books, CDs and other forms of media and distributing such media to various retailers and discounters, sought chapter 11 protection. As one might expect, in this type of inventory-focused business, the debtor faced an enormous potential liability for both reclamation claims and §503(b)(9) claims. Perhaps recognizing the logistical issues that would come from administering countless motions for

allowance and payment of §503(b)(9) claims, the debtor filed a motion seeking to establish a single deadline for filing both general proofs of claim and §503(b)(9) administrative claims. As part of the motion, the debtor devised a procedure that required §503(b)(9) claimants to file a special proof of claim form to assert §503(b)(9) claims, thereby dispensing with the requirement that §503(b)(9) administrative creditors file “requests” as required under §503(a). Rather, claimants were permitted merely to file a form and support it with relevant documentation.²

This procedure was certainly beneficial to creditors because it simplified the method of presenting §503(b)(9) claims. It also had a two-fold benefit to the debtor. First, the debtor avoided having to promptly address motions or requests for allowance and payment of administrative claims.

Second, the procedure may have induced creditors to be less diligent in seeking to compel immediate payment of these administrative claims—which they almost certainly would have done had they been compelled to file motions.

² It is worth noting that the U.S. Trustee for Region 3 has recently attacked the use of a proof of claim procedure for administrative claims. Though raised in the context of §503(b) claims generally, the U.S. Trustee in *In re Maxjet Airways Inc.*, No. 07-11912 (PJM) (Bankr. D. Del) (Dkt. 306), objected to the debtor’s proposal to have administrative expense claimants file special administrative proofs of claim. The U.S. Trustee asserted that 11 U.S.C. §501 only permits a creditor or indenture trustee to file a proof of claim. The U.S. Trustee argued that administrative claimants are not “creditors” who, by definition, hold claims that arose pre-petition against the debtor. See 11 U.S.C. §101(5), (10). While not vigorously opposed by the debtor, the U.S. Trustee’s objection found some favor with the court, who, while noting that abandoning the proposed proof of claim procedure was “detrimental to the administrative expense claimants,” directed the debtor to “do it the hard way.” (*i.e.*, require administrative claimants to file their requests by motion, on notice). See Transcript (Dkt. 348). It is doubtful that the U.S. Trustee’s argument would hold against bar date motions seeking to set only §503(b)(9) deadlines, as such claims are clearly pre-petition claims, and therefore are asserted by “creditors” under 11 U.S.C. §§101(5), (10), and 501.

¹ See, e.g., *In re Global Home Prods. LLC*, No. 06-10340 (KG), 2006 WL 3791955 (Bankr. D. Del. Dec. 21, 2006); *In re Bookbinders Restaurant Inc.*, No. 06-12302, 2006 WL 3858020 (Bankr. E.D. Pa. Dec. 28, 2006).

Leiner Health Products Inc., Case No. 08-10446 (KJC). In the *Leiner* case, the debtors filed a bar date motion relatively early in the case. The motion was innocently captioned “Debtor’s Motion for Entry of An Order (A) Setting Bar Dates for Filing Proofs of Claim, (B) Approving the Form and Manner for Filing Proofs of Claim and (C) Approving Notice Thereof.” Nowhere in the title of the motion was there any indication that the debtor was also setting a deadline for filing §503(b)(9) administrative claims—but that is exactly what the debtor was doing.

Buried within the *Leiner* motion, the establishment of a general bar date expressly included §503(b)(9) claims. Yet the motion expressly excluded all other §503(b) administrative claims from the effect of the bar date.

What was not clear, however—and not explained—was the form that §503(b)(9) claims had to take. Notwithstanding that the motion could be read to require §503(b)(9) claimants to file proofs of claim, *Leiner* did not include a separate §503(b)(9) form. Moreover, there were no explicit instructions for filing §503(b)(9) claims, and the proof-of-claim form attached to the motion and approved by the court did not mention §503(b)(9) claims at all. Thus, by default, the motion for a general bar date to file *proofs of claim* appears to have required creditors holding both general unsecured claims and §503(b)(9) claims to file two different documents simultaneously: a proof of claim form for their pre-petition claim up to 20 days prior to the petition date, and a “request” (*i.e.*, a motion) for the portion of the claim that related to goods delivered to and received by the debtor in the 20 days prior to bankruptcy.

Of more concern is the fact that in *Leiner*, the notice of the bar date received by creditors buried the requirement that §503(b)(9) claims had to be filed by the bar date within a list of types of claims that did not need to be filed by the bar date—effectively an exclusion within the exclusion. Further, there was no explanation in the notice of what a §503(b)(9) claim is. A case of “gotcha?” Perhaps. As the *Leiner* bar date has only recently passed, it remains to be seen whether litigation over late filed §503(b)(9) claims, or over such claims being filed on a form as opposed to by motion, may ultimately arise from this procedure.

Aegis Mortgage Corporation, No. 07-11119 (BLS). A slightly better variation on the *Leiner* method appeared in the *Aegis* case. In that case, the debtor’s bar date motion clearly specified in the title of the motion and in separate paragraphs within the motion that it sought to establish a §503(b)(9) bar date. While, like *Leiner*, the motion did not define §503(b)(9) claims in the motion or in the proposed notice to creditors, it nonetheless made very clear that creditors had to file “requests” for payment of these administrative expense claims.

While perhaps not ideal, the *Aegis* method appears to give appropriate notice that the debtor is doing something other than fixing a general bar date. It also clearly establishes the method by which such claims are to be asserted. Yet, there are more creative and fairer ways to provide creditors with notice of §503(b)(9) claim deadlines and better ways to provide instructions on filing them. One such case is that of *Dura Automotive Systems Inc.*, No. 06-11202 (KJC).

In *Dura*, the debtor filed a motion to set bar dates. The motion sought to establish a general bar date for pre-petition claims, but expressly included claims entitled to priority under §503(b)(9). In addition, the debtor expressly sought authority for §503(b)(9) claimants, as pre-petition creditors, to file proofs of claim and not requests. In contrast, the motion was clear that other §503(b) claimants were required to make appropriate requests under §503(a), and that submitting proofs of claim for other §503(b) claims was not permitted. Rather than preparing a separate §503(b)(9) proof of claim form, however, *Dura* merely added a small block to the official claim form where a creditor could simply insert the amount of its pre-petition claim that was entitled to §503(b)(9) priority.

This straightforward procedure is appealing because it dispenses with the requirement that a creditor file a motion. Further, it also streamlines the process by requiring the filing of only a single proof of claim. A creditor need only note how much of its entire pre-petition claim is entitled to priority—a practice that has been prevalent when asserting other types of pre-petition, priority claims, like §507(a) claims. It also avoids the process of reserving rights—filing a proof of claim for one’s entire pre-petition claim, while separately filing a motion that then tries to establish the priority of a portion

of that claim.

While *Dura*’s procedures were progressive, two of the more innovative practices appeared in the *Radnor* and *Tweeter* cases. *Radnor Holdings Corporation*, Case No. 06-10894 (PJW) and *TWTR Inc.* (formerly *Tweeter Home Entertainment Group Inc.*), Case No. 07-10787 (PJW).

In both the *Radnor* and *TWTR* cases, each debtor filed a motion, *on the first day of each case*, seeking to set a bar date exclusively for §503(b)(9) claims. Unlike other bar date orders implicating §503(b)(9) claims, the motions and notices sent to creditors actually explained what a §503(b)(9) claim is. Further, the orders approved a simple form for making the requests,³ and the notices listed specific information that was required to be submitted with the claims. Finally, the claimants had to certify that the goods were sold to the debtors in the ordinary course of business.

The advantages of these procedures to the debtor are obvious. They permit a debtor to immediately cap and evaluate its exposure to §503(b)(9) administrative claims. They may also temper the number of motions filed by creditors holding such claims, thereby reducing the fees and expenses attendant in immediately responding to them. Further, these procedures allow a debtor, without discovery, to specify the type and extent of the information it wants to see with respect to the claim. There are advantages to creditors as well. The procedures clearly indicate what is required of the creditor and propose a checklist of documentation and other evidence required to support the claim. They reduce motion practice and allow creditors merely to file a form, thereby reducing the overall cost of pursuing such claims.

In *Radnor* and *TWTR*, the advantages the procedures provided to the debtors and creditors were tempered somewhat by the initial uncertainty of when the bar date actually would be. One of the proposed notices set the bar date as “thirty...days from the date of service of this notice.” In that circumstance, a creditor would have to determine when the notice was served in order to determine the bar date. Also, the order setting the bar date required sending the notice “in no event later than the day that is five...business days following the filing

³ There is no indication in either of these cases that the U.S. Trustee objected to the use of a proof of claim form procedure for filing §503(b)(9) claims, as opposed to all §503(b) claims as was attempted in *Maxjet*.

of the Notice of Bankruptcy and Meeting of Creditors under Bankruptcy Code §341.” Accordingly, even if the final notice sent to a creditor established a specific bar date, a creditor in *Radnor* or *TWTR* probably received its first notice of the bankruptcy case and the notice of the deadline to file §503(b)(9) claims within days of each other. This could lead to confusion, with a creditor almost simultaneously receiving the notice of bankruptcy and meeting of creditors (which likely indicated that the creditor would receive later notice of the deadline for filing claims) and a §503(b)(9) notice required the filing of §503(b)(9) claims before the meeting of creditors.

Despite these minor inconveniences – though reserving judgment on the practice of setting a §503(b)(9) claim right out of the gate—the *Radnor* and *TWTR* procedures seem thus far to be the cleanest and most comprehensive procedures for addressing §503(b)(9) claims. They advise creditors what a §503(b)(9) claim is, they dispense with costly motion practice, and they provide clear indications of the supporting documentation required to prosecute such claims.

So far, however, a majority of cases continues to group §503(b)(9) claims with other administrative claims when it comes to setting bar dates. That could be a function of such cases having the potential for few §503(b)(9) claims. It could also be that the particular debtor is not in a rush to either determine or cap its liability for such claims. In those cases, the general bar date notices do not include §503(b)(9) claims and simply provide that persons having claims generally under 503(b) need not file proofs of claim by the bar date. *See, e.g., In re Sharper Image Corp.*, No. 08-10322 (KG), (Bankr. D. Del.); *In re American LaFrance LLC*, No. 08-10178 (BLS) (Bank. D. Del.); *American Home Mortgage Holdings Inc.*, No. 07-11047 (CSS) (Bankr. D. Del.). Cases like this will typically establish an administrative bar date to deal with all administrative claims at once.

In sum, there is no clear trend in the procedures that will be used in particular cases to address §503(b)(9) claims. While §503(b)(9) grants significant benefits to trade creditors in terms of ultimately recovery, one must still be vigilant. Attorneys and creditors alike must be on the lookout for early motions setting specific §503(b)(9) bar dates and carefully scrutinize bar date motions, orders and notices to determine whether §503(b)(9) claims are included and what procedures must

be followed. One thing is certain: Do not count on §503(b)(9) claims being treated procedurally like other §503(b) administrative claims. ■

Reprinted with permission from the ABI Journal, Vol. XXVII, No. 6, July/August 2008.

The American Bankruptcy Institute is a multi-disciplinary, nonpartisan organization devoted to bankruptcy issues. ABI has more than 11,500 members, representing all facets of the insolvency field. For more information, visit ABI World at www.abiworld.org.