

SELECTED TOPICS IN BUSINESS BANKRUPTCY

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I. Worker Adjustment and Retraining Notification (“WARN”) Act

A. The WARN Act requires employers to provide written notice of at least 60 days in advance of plant closings and mass layoffs, 29 U.S.C. § 2102(a).

1. **Exceptions to the 60-day notice rule** (where only required to give as much notice as is practicable):

i. **Seeking Capital:** When, before a plant closing, a company is actively seeking capital or business and reasonably believes in good faith that advance notice would preclude its ability to obtain such capital or business, and this new capital or business would allow the employer to avoid or postpone a shutdown for a reasonable period, § 2102(b)(1).

ii. **Unforeseeable Business Circumstances:** When the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable at the time that 60-day notice would have been required, § 2102(b)(2)(A).

iii. **Natural Disaster:** When a plant closing or mass layoff is the direct result of a natural disaster such as a flood, earthquake, or drought, § 2102(b)(2)(B).

B. **Which employers are covered by the WARN Act?** See § 2101(a)(1)

1. Businesses with 100+ full-time employees; or

i. Part-time employees are those who work less than 20 hours per week or who have been there less than six months, § 2101(a)(8).

2. Businesses with 100+ employees who in the aggregate work at least 4,000 hours a week (not including overtime).

C. **What triggers the WARN Act?**

1. **Plant closing**, § 2101(a)(2):

i. Closing a single site of employment, facility, or operating unit, either permanently or temporarily (for more than 6 months) and which affects at least 50 employees (not including part-time employees) during a 30-day period.

ii. All of the employment losses do not have to occur within the same facility or operating unit that is shut down—a plant closing also occurs when an employer closes an operating unit that has fewer than 50 workers, but that closing also involves the layoff of enough other workers to make the total number of layoffs 50 or more.

2. **Mass layoff**, § 2101(a)(3):

i. Laying off 500+ employees (not including part-time employees) during a 30-day period for more than 6 months; or

ii. Laying off 50-499 employees (not including part-time employees) during a 30-day period for more than 6 months and these layoffs constitute 33% of the employer’s total active workforce (not including part-time employees) at the single site of employment.

a. **Laying off an employee not only includes terminating the employee, but also reducing the hours of work by 50% or more for each month of a 6-month period, § 2101(a)(6).**

D. **The following circumstances do not trigger the WARN Act, § 2103:**

1. Plant closings or mass layoffs where the employer closes a temporary facility or completes a temporary project, and the employees were hired with the clear understanding that their employment would end with the closing of the facility or the completion of the project; or

2. Closing a facility or operating unit due to a strike or lockout.

E. **Who gets notice under the WARN Act?**

1. “[E]ach **representative of the affected employee**” (e.g. union representative) or, if there is no such representative, to the “**affected employee**,” § 2102(a)(1);

i. Includes full-time and part-time workers, hourly and salaried workers, and managerial and supervisory workers.

ii. Does not include business partners or government employees.

2. “[E]ntity **designated by the State to carry out rapid response activities**,” § 2102(a)(2); and

i. In Wisconsin, this is the Wisconsin Department of Workforce Development.

ii. For other states’ rapid response entities, see http://www.doleta.gov/layoff/rapid_coord.cfm.

3. “[T]he **chief elected official of the unit of local government within which such closing or layoff is to occur**.” *Id.*

F. **What are the notice requirements?**

1. The notice must be written, § 2102(a).

2. Mailing of notice to an employee’s last known address or inclusion of the notice in the employee’s paycheck is acceptable, § 2107(b).

3. Notice to unrepresented, affected employees (for example) must provide the following (See 20 CFR Part 639):

i. A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect;

ii. The expected date when the plant closing or mass layoff will commence (at a maximum, a 14-day window) and the expected date that the individual employee will be separated;

iii. An indication of whether bumping rights exist (“bumping rights” are those rights of an employee to displace another employee due

to a layoff—usually provided for in collective bargaining agreements); and

iv. The name and telephone number of a company official to contact for additional information.

G. What are the penalties for failing to give the requisite notice? See § 2104

1. **Employee back pay and benefits** for the period of the violation, up to a maximum of 60 days;

2. **Up to an additional \$500/per day** for the period of the violation, if employer fails to notify the local government and if employer does not pay its employees their back pay and benefits, described in subsection (1) above, within 3 weeks of ordering the shutdown or layoff; and

3. **Attorneys' fees.**

i. However, if the act or omission was in good faith and the employer had reasonable grounds for believing that the act or omission was not a violation, the court may reduce the amount of the penalty.

H. Employees may have additional contractual remedies. See 29 U.S.C. § 2105.

II. Wisconsin's "Business (Plant) Closing and Mass Layoff" Law: Wis. Stat. § 109.07

A. This law has similar requirements to the WARN Act, but maintains a lower threshold in two key areas:

1. **Which employers are covered by § 109.07?**

i. Businesses with 50+ employees in Wisconsin.

2. **What triggers § 109.07?**

i. A mass layoff = 25% of the workforce or 25 employees, whichever is greater; or at least 500 employees.

ii. A plant closing = Permanent or temporary shutdown of an employment site or one or more facilities or operating units in a single municipality that affects 25+ employees.

III. Payment of pre-petition wages and contributions to employee benefit plans

A. In almost every circumstance, a bankruptcy filing will not occur at a time when all employee wages and benefits are paid in full. Thus, in the event that a debtor has not already ceased operations and seeks to continue operations after the filing for any amount of time, a motion seeking approval to pay pre-petition wages and employee benefit plan contributions should be filed as a "first day" motion.

B. Such a motion must first seek interim approval of such payment with final approval being sought thereafter. F.R.B.P. 6003. Under this Rule, the motion must make a showing that the failure to grant the motion will result in "immediate and irreparable harm" in order to receive interim approval.

C. Pre-petition wage and benefit plan contributions hold special priority, behind only domestic support obligations and trustee administrative expenses (§ 507(a)(1)), certain other

administrative expenses (§ 507(a)(2)) and allowed unsecured claims in an involuntary case arising in the ordinary course of business between the commencement of the case and before the earlier of the entry of an order for relief or the appointment of a trustee, “gap claims” (§ 507(a)(3)).

D. Fourth priority is provided to wages, salaries or commissions earned during the 180 days prior to the filing of the petition up to \$11,725 (per April 1, 2010 adjustments).

E. Fifth priority is provided to claims for contributions to employee benefit plans arising during the 180 days prior to the filing of the petition up to the number of employees covered by each plan multiplied by \$11,725, less the aggregate amount paid to employees under § 507(a)(4), plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.

F. Why file such a motion? Minimize disruption to employees. If employees are not paid and otherwise compensated in the manner to which they are accustomed, it may severely impact them (employees living paycheck to paycheck, for example) and cause them to seek other employment. This can cause disruption for the debtor by losing experienced workers and increased costs associated with hiring and training of employees.

G. What to include in a motion for approval to pay pre-petition wages and employee benefit plan contributions:

1. The basis for your motion. Many such motions are grounded in the “doctrine of necessity” (fiduciary duty to preserve the estate), § 105(a) and / or § 363(b) (transactions outside the ordinary course of business with a sound business reason);

2. Provide an overview of the employees and the wages and benefits you are seeking to pay. Ensure that the amounts for which approval is sought are within the limitations of § 507 to avoid objections. The motion need not be limited to the wages and benefit claims set forth in § 507, you can seek approval to continue all customarily provided wages and benefits. Include any incentive program payments, paycheck deductions (child support, health care contributions, garnishments, etc.), government withholdings, any reimbursable expenses, contributions to medical dental and other benefit plans, insurance and disability benefits, employee savings plans (401(k)), transportation assistance and other standard items the debtor includes as compensation. Include any payments or withholdings made to or for the benefit of employees that are normal and customary for the debtor in order to minimize the change or disruption to employees if possible;

3. Make sure to seek elimination of the notice and stay requirements of F.R.B.P. 6004 (a) and (h) and to approve a limited service list for the request for interim approval.

IV. Payment of employment taxes

A. The Internal Revenue Code requires an employer to deduct and withhold income, unemployment and social security taxes from wages. 26 U.S.C. § 3102(a) and 26 U.S.C. § 3402(a). Such withholdings are held as a special trust fund for the benefit of the United States. 26 U.S.C. § 7501(a).

B. If the required withholdings are not timely paid, a penalty is imposed on the corporate employees who are responsible for withholding paying such taxes. 26 U.S.C. § 6672. This section provides that: “Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable for a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over ...”

C. The United States Supreme Court has held that 26 U.S.C. § 6672 applies to persons responsible for collecting withholding taxes and is not limited to persons who perform all three of the duties set forth in the statute. *Slodov v. U.S.*, 436 U.S. 238, 250, 98 S.Ct.1778, 56 L.Ed.2d 251 (1978). Thus, a “responsible person” can be anyone who performs one of the three duties stated.

D. In determining whether a person is a “responsible person”, it must be determined whether or not that person “retains sufficient control of corporate finances that he can allocate corporate funds to pay the corporation's other debts in preference to the corporation's withholding tax obligations.” *Bowlen v. United States*, 956 F.2d 723, 728 (7th Cir. 1992) (citation omitted).

E. There are two elements for a person to be held liable under 26 U.S.C. § 6672: (i) the person against whom liability is sought must be a person who is required to collect, truthfully account for or pay any tax; and (ii) the person willfully fails to collect, truthfully account for or pay the tax. *Wood v. U.S.*, 808 F.2d 411, 414 (5th Cir. 1987).

F. The term “willful” in 26 U.S.C. § 6672 has been defined to mean “voluntary, conscious and intentional-as opposed to accidental-decisions not to remit funds properly withheld to the Government.” *Domanus v. U.S.*, 961 F.2d 1323, 1324 (7th Cir. 1992).

G. In a small business case, special care must be taken to ensure that all required taxes and withholdings have occurred. The failure to do so could result in liability to a principal of the entity and may not be dischargeable under § 523(a)(1) and (a)(7) in the event a debtor's principal will also be filing for bankruptcy protection.

V. Single asset real estate cases

A. BAPCPA substantially changes whether or not a case will be given the single asset real estate (“SARE”) designation. Prior to BAPCPA, in order to receive a SARE designation, the debtor could have no more than \$4 million of secured debt against the real property. BAPCPA removed this limitation.

B. What is single asset real estate under the Code?

... real property constituting a single property or project, other than residential real property with fewer than 4 residential units, which generates substantially all of the gross income of a debtor who is not a family farmer and on which no substantial business is being conducted by the debtor other than the business of operating the real property and activities incidental.

11 U.S.C. § 101(51B).

C. Determining whether or not a debtor is a SARE case can be difficult, particularly the third element, that there be no substantial business conducted by the debtor apart from the operation of the real property and related activities. See *In re Scotia Development, LLC*, 375 B.R. 764 (Bankr.S.D.Tex. 2007) (finding that a debtor was not a SARE debtor, because the management of the timberlands involved a number of distinct activities, the debtor employed approximately 60 persons involved in the management and harvesting of timber and the entity was involved in the supervision of third party harvesters, among other activities) *In re Kara Homes, Inc.* 363 B.R. 399 (Bankr.D.N.J. 2007) (finding that affiliated Chapter 11 debtors, who each developed individual parcels of real estate were SARE debtors, despite the debtors' assertion that all of their business operations relating to the finding, development, marketing and sales of the properties were more than incidental to the debtors' efforts to sell the real property.

D. Why does it matter if a case receives a SARE designation?

1. Section 362(d)(3) limits the benefit of the automatic stay to a SARE debtor. The section requires that the debtor, within 90 days of the filing of the bankruptcy, or 30 days after the court determines that the case is a SARE case (whichever is later), file a plan with a reasonable possibility of confirmation within a reasonable time or make regular payments to the creditor, at the non-default rate or the must grant the creditor relief. This rule does not preclude a creditor from seeking relief for cause or lack of adequate protection.

a. "Reasonable possibility of confirmation" is dependent on the facts of the case. In connection with § 362(d)(3), it is not necessary for the court to determine that the plan is actually confirmable. 68 *W. 127th St., LLC* 285 B.R. 838 (Bankr.S.D.N.Y. 2002).

b. Section 362(d)(3)(B)(i) permits the debtor to make regular payments to the creditor out of cash collateral "... be made from rents or other income generated before, on, or after the date of the commencement of the case by or from the property ..."

2. If the real estate is a project that is not complete and not generating rents, without a confirmable plan, the debtor will likely not be able to count on the protections of the automatic stay after the 90 or 30 day period.

3. In a SARE case, a plan must be filed within 90 days of the filing of the case (or such other date set by the court for cause, with such order being entered within the 90 day time period) or within 30 days of the court designating the case a SARE case. A SARE designation significantly reduces the time for filing a plan under § 1121.

D. How is a case designated a SARE case?

1. The debtor can designate it in their filing or a creditor can petition the Court for a finding that the case is a SARE case.

2. If you are representing a creditor and believe that the case is eligible for SARE designation, make a motion early in the case in order to commence the timer for the debtor to file a plan.

II. Critical vendors

A. Debtors will sometimes file a first day motion seeking authority to pay pre-petition claims of certain suppliers of goods in order to maintain the supply chain during reorganization. These so called “critical vendor” motions, are based on the premise that appeasing certain vendors is so critical to the debtor’s reorganization that it is necessary for their pre-petition claims to be paid in order to continue to receive goods on a credit basis.

B. Many courts justify granting a critical vendor motions under § 105 and the “doctrine of necessity”. The argument being that payments to critical vendors allow for reorganization and a greater recovery to the remaining creditors than they could expect without such payments. Without critical vendor payments, therefore, reorganization is more likely to fail and the debtor and its estate will suffer substantial harm.

C. Can a motion for payment to critical vendors be granted in light of *Kmart*?

1. The Seventh Circuit Court of Appeals in *In re Kmart Corp.* 359 F.3d 866 (7th Cir. 2004) strongly criticized the critical vendor practice.

2. In *Kmart*, the Court determined that § 105 does not grant the authority to allow for critical vendor payments.

3. The 7th Circuit agreed with other circuits who had determined that § 105 does not allow a bankruptcy judge to allow payment of unsecured debt unless all unsecured creditors in the class are paid in full. *Kmart* at 871 (citations omitted).

4. The 7th Circuit also characterized the “doctrine of necessity” as “a fancy name for a power to depart from the Code.” *Kmart* at 871.

5. The Court rejected arguments that § 364(b) or § 503 provide the basis for such payments. In connection with § 364, the Court pointed out that the section authorizes a debtor to obtain credit, it says nothing about how that credit is to be utilized by the debtor or paid to creditors. *Kmart* at 872. In determining that § 503 does not provide the basis for payment to critical vendors, the Court stated that pre-petition debts are not administrative expenses and to treat them as such would impair the ability of a bankruptcy court to shield the post-filing entity from old debt. *Id.*

6. While not determining whether or not critical vendor motions could be granted at all, the Court indicated that if § 363(b)(1) allows critical vendor payments, it would require a showing that the disfavored (non-critical) vendors will be as well off with reorganization as with liquidation **and** that the purportedly critical vendors would cease deliveries if they were not paid for the prepetition deliveries. *Kmart* at 873. The Court pointed out that some critical vendors will continue to do business with the debtor without special treatment because they must, for example if they have a supply contract. *Id.* Neither showing was made in the *Kmart* case and the Court affirmed the District Court’s reversal of the bankruptcy court’s order authorizing payment to critical vendors.

7. In *Kmart*, the Court found that even if § 363(b)(1) allows payment to critical vendors, there was an insufficient showing in the case to permit such payment and the bankruptcy court's order could not be upheld.

8. Since *Kmart*, several courts have formulated tests to determine whether or not to grant a critical vendor motion. *In re Tropical Sportswear Int'l Corp.*, 320 B.R. 15 (Bankr.M.D.Fla. 2005) (Finding that a critical vendor motion could be granted under §§ 105 and 363 if evidence provided shows: (i) that the payments are necessary to the reorganization process; (ii) a sound business justification exists in that the critical vendors refuse to do business with the debtor without such protection; and (iii) the non-critical vendors are at least as well off as they would have been without the critical vendor order); *In re United American, Inc.* 327 B.R. 776 (Bankr.E.D.Va. 2005) (substantially identical test to *Tropical Sportswear* used to determine that vendor was not a critical vendor); *In re Corner Home Care, Inc.*, 438 B.R. 122 (Bankr.W.D.Ky. 2010) (utilizing *United American* test to deny a motion for payment of certain pre-petition debt post-petition by an alleged critical vendor); *In re CoServ, L.L.C.* 273 B.R. 487 (Bankr.N.D.Tex. 2002) (Setting forth a 3 part test: i) it must be critical that the debtor deal with the claimant; ii), unless the debtor deals with the claimant, the debtor risks the probability of harm, or, alternatively, loss of economic advantage to the estate or the debtor's going concern value, which is disproportionate to the amount of the claimant's prepetition claim; and iii) there is no practical or legal alternative by which the debtor can deal with the claimant other than by payment of the claim)(In a subsequent case, the Bankruptcy Court for the Northern District of Texas recognized that flexibility is necessary given the circumstances of business bankruptcy filings and a prepayment hearing to determine if the *CoServ* test is satisfied may not always be necessary under the circumstances of every case).

9. Even if a court may consider granting critical vendor motions, the debtor still must show that the vendor(s) sought to be paid are, in fact, "critical". *In re Zenus is Jewelry, Inc.*, 378 B.R. 432 (Bankr.D.N.H. 2007) (Court denied debtor's request to pay five (5) prepetition vendors in various amounts in order to receive credit terms, finding that other vendors would sell to debtor on a C.O.D. basis and that there are other diamond wholesalers other than the five (5) vendors at issue. The Court found that the vendors were not critical, in that they do not provide unique product that cannot be secured elsewhere); *Compare, In re Just for Feet, Inc.*, 242 B.R. 821 (D.Del. 1999) (Finding that certain suppliers were critical vendors and approved payment of certain prepetition and post petition debt under the "necessity of payment" doctrine and § 105. The Court found that the debtor's survival required name brand sneakers and athletic apparel and granted payment to certain prepetition vendors and invited to the debtor to renew their motion as to other trade vendors, as there was no proof that other vendors were critical to the survival of the debtor).

D. Given *Kmart*, in the 7th Circuit, how should one plan prior to filing in the event that a critical vendor motion is necessary?

1. Be prepared. If possible, try to minimize any past due debt to critical vendors, being mindful of the potential for preference liability for the vendor.

2. Prior to filing, determine whether or not a critical vendor motion will even be necessary. Does the debtor require shipments of goods that may be unique to certain suppliers in order to continue business operations? If these parties will not ship to the debtor post-petition, are there alternatives to secure these items or, if not, alternate methods to ensure post-petition payment for shipments made by these vendors (ex. line of credit for vendors to draw on if not paid within established terms).

3. If a critical vendor motion is needed, plan your motion accordingly – secure affidavits showing how and why payment to these vendors will be necessary to reorganization, affidavits from the vendors that they will not deal with the debtor without such treatment including valid reasons for not doing so and analysis establishing that the other creditors will be as well or better off with such payments taking place.

4. Be prepared for substantial scrutiny and be ready to propose alternatives to the critical vendors if the motion is denied – ex. establish a letter of credit with the DIP financier to be drawn on by the critical vendors if post-petition payments not made within terms; help vendor with § 503(b)(9) administrative expense for goods delivered in the 20 days before filing.

VI. Other first day motions

A. Apart from motions to pay employee wages and benefits and any potential critical vendor motions, there are a number of matters to consider prior to filing that may require a motion to be filed contemporaneously with the petition.

B. Among the other matters that may require a first day motion are:

1. Consolidation and/or joint administration of cases if you are filing multiple bankruptcies for related entities;

2. Extensions of time to file schedules and statements (14 days under F.R.B.P. 1007). Such a motion will require your pleadings to show “cause” in accordance with F.R.B.P. 1007(a)(5) and (c) and 9006(b);

3. To authorize the debtor to obtain post-petition financing and authorizing the debtor to use cash collateral;

4. For the retention and compensation of professionals used in the ordinary course of business and establishing procedures for their interim compensation (for example, if your debtor has recurring regulatory issues and utilizes specific regulatory counsel to handle these items);

5. To employ and retain counsel, *nunc pro tunc*, to the petition date;

C. Keep in mind F.R.B.P. 6003 when drafting first day motions. The rule prohibits the court, except to the extent necessary to avoid “immediate and irreparable harm”, from entering certain relief within 21 days after the filing of the petition. The types of relief barred under this rule include applications to employ professionals under F.R.B.P. 2014, motions to use, sell or lease estate property, except for motions under F.R.B.P. 4001 (obtaining credit, use of cash collateral, relief from stay, prohibiting or conditioning the use, sale or lease of property, approval of certain agreements) and motions to assume or assign executory contracts.

D. Some courts have pushed back against aggressive first day motion practice and have denied, modified or limited relief requested by debtors in their first day motions. Some first day motion practices attempted to give a creditor control of the bankruptcy proceeding from the outset via harsh terms in proposed financing sought to be approved via first day motions (ex. “Roll up” – utilizing postpetition financing to pay off a lender’s prepetition secured debt, securing pre-petition claims with post-petition liens). The United States Bankruptcy Court for the Western District of New York stated four (4) principals that should be utilized in considering first day motions: 1) the relief sought by the motions should be tailored to avoid disruption to the debtor business and maintain the existence of the debtor, until appropriate notice can be given to creditors and interested parties; 2) the relief requested should be simple and comprehensible to avoid “unanticipated and untoward consequences”; 3) the relief requested should not modify the procedural or substantive rights established by the Bankruptcy Code and Rules; and 4) unless expressly authorized by the Bankruptcy Code, the substantive rights of parties should not be violated or altered. *In re The Colad Group, Inc.*, 324 B.R. 208, 213-14 (Bankr.W.D.N.Y. 2005).

VII. Reclamation and administrative priority for the value of goods received by a debtor.

A. Reclamation is the right of a seller of goods to “take back” goods that have been delivered to an insolvent customer, for which payment has not been received.

B. Reclamation is a state law right that is found at § 2-702 of the Uniform Commercial Code. Wisconsin’s codification of reclamation rights are found at § 402.702 Wis. Stats., which provides:

(2) Where the seller discovers that the buyer has received goods on credit while insolvent the seller may reclaim the goods upon demand made within 10 days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within 3 months before delivery the 10-day limitation does not apply. Except as provided in this subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.

(3) The seller's right to reclaim under sub. (2) is subject to the rights of a buyer in ordinary course or other good faith purchaser under s. 402.403. Successful reclamation of goods excludes all other remedies with respect to them.

C. Goods must be in the buyer’s possession at the time reclamation is sought. The goods must also be identifiable.

D. Reclamation is generally a weak remedy, as the right of reclamation is subject to the rights of “good faith purchasers” and includes a typical secured lender who holds a lien on inventory. *See* § 402.702(3) Wis. Stats.

D. The Bankruptcy Code (arguably) recognizes reclamation rights in § 546(c). *See In re Dana Corp.*, 367 B.R. 409 (Bankr. S.D.N.Y. 2007) (finding that § 546 does not create a reclamation right in bankruptcy, despite the BAPCPA deletion of reference to the “statutory or common law” rights of a seller in the pre-BAPCPA statute). Prior to BAPCPA, a creditor was required to exercise their state law reclamation rights in bankruptcy court, as the statute did not reference anything other than a sellers common law or statutory right of redemption.

E. Section 546(c) provides that a seller of goods to a debtor in the ordinary course of business may reclaim goods delivered while the debtor was insolvent within the 45 days prior to the commencement of a bankruptcy case. Section 546(c)(1) requires a seller demand reclamation not later than 45 days after receipt of the goods by the debtor or not later than 20 days after the commencement of the bankruptcy case, if the 45 day period expires after the commencement of the bankruptcy case. A reclamation demand must be made in writing.

F. The reclamation remedy provided for in the bankruptcy code is limited to return of the goods and is subject to pre-existing liens, rendering the remedy very weak.

G. Prior to BAPCPA, the bankruptcy court could also grant a reclamation claimant administrative priority or a replacement lien in lieu of the return of the goods. However, BAPCPA removed this alternative.

H. BAPCPA did provide a benefit to parties who provide goods to debtors who either fail to provide timely written notice seeking reclamation or whose reclamation rights are worthless due to a pre-existing lien. Section 503(b)(9) permits a claimant to seek administrative claim priority for “the value of any goods received by the debtor within 20 days before” the filing of the bankruptcy petition, **provided** that such goods were sold to the debtor in the ordinary course of the debtor’s business. A claimant seeking such administrative priority need not be a “critical vendor” and .

I. Unlike reclamation, the goods delivered need not be in the debtor’s possession at the time the claimant seeks administrative priority under § 503(b)(9).

J. The 9th Circuit BAP has determined that even a secured creditor can be granted administrative priority under § 503(b)(9). *In re Brown & Cole Stores, LLC*, 375 B.R. 873 (9th Cir. BAP 2007).

K. Administrative claim priority under § 503(b)(9) is only available for goods, not services. *In re Goody’s Family Clothing, Inc.*, 401 B.R. 131 (Bankr.D.Del. 2009); *In re Plastech Engineered Products, Inc.*, 397 B.R. 828 (Bankr.E.D.Mich. 2008); *GFI Wisconsin, Inc. v. Reedsburg Utility Comm’n*, 2010 WL 4595508 (determining that electricity is a “good” for purposes of the statute, utilizing the UCC definition of goods).

L. The administrative expense priority provided by § 503(b)(9) is not automatic. It requires “notice and hearing”. Thus, creditors counsel should ensure that they receive information from their clients regarding deliveries during the 20 days prior to a bankruptcy filing in order to ensure that any necessary motion seeking administrative priority is filed.