

**FIRST SUBMISSION OF THE
INTERNATIONAL WOMEN'S INSOLVENCY AND
RESTRUCTURING CONFEDERATION**

TO THE

ABI COMMISSION TO STUDY THE REFORM OF CHAPTER 11

FIELD HEARING NOVEMBER 7, 2013, AT CFRP/WHARTON IN PHILADELPHIA, PA

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IWIRC Preamble

The International Women's Insolvency & Restructuring Confederation (IWIRC) is a non-profit professional association with a global membership of more than 1,200 attorneys, bankers, corporate-turnaround professionals, financial advisors and other restructuring practitioners. IWIRC is committed to bringing value to the restructuring practice by contributing time and leveraging the wealth of experience of its members.

IWIRC is pleased to assist in the efforts of the American Bankruptcy Institute to study the existing bankruptcy laws and rules, with an eye towards suggesting reforms for the consideration of Congress. This paper is our first submission made in connection with the ABI Commission to Study the Reform of Chapter 11. We thank Samuel J. Gerdano, Executive Director of the American Bankruptcy Institute, and the Commission for the opportunity to collaborate. We look forward to continuing to work together in support of the Commission's goals.

In the context of the November 7, 2013, Commission Field Hearing on Plan and Distribution Issues, we are expanding on comments previously raised by the National Association of Credit Management (NACM) regarding Section 503(b)(9) claims. Noting that, (i) Section 1129(a)(9)(A) requires, in most instances, full payment of allowed administrative expenses on the effective date of a plan, (ii) debtors are challenged to determine the full extent of their liabilities in a timely manner, and (iii) creditors are not obtaining the full benefit of the legal protections afforded to them under Section 503(b)(9), our paper and testimony recommends changes to streamline the process for asserting Section 503(b)(9) claims, resulting in consistent and efficient claims

management, thereby saving time and costs for debtors, creditors and bankruptcy courts, as well as increasing the liquidity of these claims.

I. Introduction: 11 U.S.C. § 503(b)(9)

An important issue still facing debtors and creditors is the handling of administrative expenses under Section 503(b)(9) of title 11 of the United States Code (the “Bankruptcy Code”). Pursuant to Section 503(b)(9) of the Bankruptcy Code, which was added in 2005 as part of the Bankruptcy Abuse Prevention and Consumer Protection Act, administrative expense treatment is given to creditors for “the value of any goods received by the debtor within 20 days before the date of commencement of a case under [the Bankruptcy Code] in which the goods have been sold to the debtor in the ordinary course of such debtor’s business.”¹ This section of the Bankruptcy Code has been a victory for trade creditors because it elevated what were previously general unsecured pre-petition claims to administrative expense status.² Holders of an administrative expense enjoy high priority in a bankruptcy proceeding. They are typically paid in full, barring the unusual instances in which a debtor is administratively insolvent.

A debtor that challenges the assertion of an administrative expense under Section 503(b)(9) has relatively limited grounds to do so and the bases to challenge such a claim are fairly straight forward. Generally, the objections fall into four primary categories: (i) that the property received by the debtor was not a "good"; (ii) that the property was not received within 20 days of the petition date; (iii) a challenge of the value of the "goods"

¹ 11 U.S.C. § 503(b)(9) (2012).

² *In re Global Home Products, LLC*, No. 06-10340-KG, 2006 WL 3791955, at *3 (Bankr. D. Del. Dec. 21, 2006) (“new status provided at least two benefits to the holder . . . first, the allowed expense must be paid in full as a condition of confirmation of a chapter 11 plan . . . [and second] there is a potential for a more prompt payment of “the 20 day” liability.”).

actually received by the debtor; and (iv) whether the goods in question were sold in the ordinary course of the debtor's business.³

As discussed below, presently trade creditors wishing to assert a Section 503(b)(9) claim and debtors managing them are faced with challenges. For example, Section 503(a) requires that administrative expenses be asserted via a "request for payment"⁴ as opposed to submission of a proof of claim. The Official Form B-10 Proof of Claim Form explicitly states: "*Do not use this form to make a claim for an administrative expense that arises after the bankruptcy filing. You may file a request for payment of an administrative expense according to 11 U.S.C. § 503.*"⁵ The procedure for the management of administrative expenses is separate and distinct from established procedures for the management of other pre-petition claims.

II. Perils Resulting from the Lack of any Stated Procedure for Asserting or Paying 503(b)(9) Claims

Liabilities asserted via a proof of claim filed in accordance with the rules, are presumptively valid.⁶ Administrative expenses, however, are not. Rather, notice, an opportunity for a hearing and court approval is required for allowance and payment of an administrative expense.⁷ Perhaps part of the justification for shifting the initial burden of

³ See J. Kate Stickles & G. David Dean, *A Roadmap for Managing § 503(b)(9) Claims and Objections: The Debtor's Perspective*, 26 AM. BANKR. INST. J. 75-76 (October 2008); but see Brendan M. Gage, *Should Congress Repeal Bankruptcy Code Section 503(b)(9)?*, 19 AM. BANKR. INST. L REV. 215 (2011) ("section 503(b)(9) litigation involving setoff and preference liability centers on the debtor's ability to procedurally mitigate the impact of twenty-day claims").

⁴ 11 U.S.C. § 503(a) (2012) ("An entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause.").

⁵ Proof of Claim, Form B 10 (Official Form 10), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK_Forms_Current/B_010.pdf.

⁶ See FED. R. BANKR. P. 3001(f) ("Evidentiary Effect. A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim.").

⁷ See 11 U.S.C. § 503(b) (2012) ("After notice and a hearing, there shall be allowed administrative expenses. . . ."); see also 11 U.S.C. § 102(1) (2012) ("'after notice and a hearing', or a similar phrase— (A) means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances; but (B) authorizes an act without an actual hearing if such

proof to administrative creditors is that their claims receive more favorable treatment as they are paid at a higher priority. Creditors who fail to timely assert their Section 503(b)(9) claims may be deemed to have waived administrative priority.⁸

Due to the lack of statutory guidance, creditors assert Section 503(b)(9) claims in an inconsistent manner. Some of the methods used include: (i) writing letters and making calls to the debtor, the claims agent and the Court; (ii) including Section 503(b)(9) claims as part of a standard proof of claim form, which results in a combination claim that has two different priorities of payment; and (iii) filing “requests” or motions with the court. Just as creditors have been proceeding inconsistently, so have debtors.

One method popular among debtors is to file a motion at the beginning of the case requesting an order establishing a bar date for filing requests for payment under Section 503(b)(9).⁹ For example, the *Plastech* court, after a hearing, granted the debtor’s motion¹⁰ for an order establishing the manner and procedures for asserting and responding to Section 503(b)(9) claims¹¹. Streamlining the process for asserting Section 503(b)(9) claims by filing a motion early on in the case, as in *Plastech*, is beneficial but is being employed on a case-by-case basis, at the election of a given debtor.

Debtors have also filed a motion seeking to establish a single deadline for filing both Section 503(b)(9) claims and other pre-petition claims, and set a procedure for asserting Section 503(b)(9) claims on a special proof of claim form, with supporting

notice is given properly and if — (i) such a hearing is not requested timely by a party in interest; or (ii) there is insufficient time for a hearing to be commenced before such act must be done, and the court authorizes such act.”).

⁸ See, e.g., *In re Dana Corp.*, No. 06-10354-BRL, 2007 WL 1577763, at *5 (Bankr. S.D.N.Y. May 30, 2007) (“[o]nce the Bar Date Order was entered, a simple review of the docket would have revealed the date and the type of claims that were covered.”).

⁹ See, e.g., *In re Plastech Engineered Products, Inc.*, No. 08-42417 (Bankr. E.D. Mich. 2008).

¹⁰ *Id.* at D.I. 671.

¹¹ *Id.* at D.I. 1083, 2368.

relevant documentation.¹² This practice was later challenged in at least one case.¹³ In *Maxjet Airway*, the United States Trustee objected to the use of a proof of claim form for administrative claims, arguing that administrative claimants, who are not “creditors” by definition, must file “requests”.¹⁴ The objection expressed concern over using a form (which would be filed with a claims agent or the clerk) because these administrative expenses then would not come to the attention of the Court in the same manner as other administrative expenses, which, in its view, was required by the Bankruptcy Code.¹⁵ The debtor gave little resistance to the objection.¹⁶ The *Maxjet Airways* Court acknowledged that, although burdensome to administrative claimants, they were required to file their requests by motion, on notice.¹⁷

Adding to the confusion is the lack of direction within the Bankruptcy Code or the Federal Rules of Bankruptcy Procedure as to the manner or timing in which a Section 503(b)(9) claimant may “file a request for payment” or when the claim, once allowed, is to be paid. In 2006, a Delaware bankruptcy court held that the timing of the payment of Section 503(b)(9) claims was left to the discretion of the court.¹⁸ Shortly after the Delaware bankruptcy court’s decision, a Pennsylvania bankruptcy court was also

¹² See e.g., *In re Advanced Marketing Services Inc.*, 06-11480-CSS (Bankr. D. Del. 2007), at D.I. 684 (motion) and D.I. 760 (order).

¹³ *In re Maxjet Airways Inc.*, No. 07-11912-PJW (Bankr. D. Del.).

¹⁴ *Id.* at D.I. 306; 11 U.S.C. §§101(5), 101(10) (2012).

¹⁵ *In re Maxjet Airways Inc.*, at D.I. 348 at 28-29.

¹⁶ See *id.* at D.I. 348 at 26 (“But again, we’re willing to use the claim form or use a request for payment....”).

¹⁷ *Id.* at D.I. 348 (“But the US Trustee doesn’t want you to streamline the process. Do it the hard way. *** I think that is detrimental to the administrative expense claimants, but we’ll do it the hard way.”); see also *In re Rio Valley Motors Co., LLC*, No. 06-11866-SS, 2009 WL 2922835, *3 (Bankr. D. N.M. June 8, 2009) (noting that creditor’s claim was premature due to failure to provide sufficient notice on all parties, and that although creditors may “eventually prevail on their administrative expense claim, all creditors must first be given the opportunity to file their objections to this treatment.”).

¹⁸ *In re Global Home Products, LLC*, No. 06-10340-KG, 2006 WL 3791955 (Bankr. D. Del. Dec. 21, 2006),

confronted with the question of when a Section 503(b)(9) claim must be paid.¹⁹ The court agreed with the decision in *Global Home Products* and found that the pre-confirmation allowance of a Section 503(b)(9) claim does not create an “unqualified right to immediate payment.”²⁰ Instead, the court held that the timing of payment of a Section 503(b)(9) claim is governed by the same principles that govern the timing of payment of other Section 503(b) administrative claims.²¹

Certain jurisdictions have adopted local rules concerning Section 503(b)(9) claims. For example, the Local Bankruptcy Rules for the U.S. Bankruptcy Court for the District of Massachusetts contain a deadline for asserting Section 503(b)(9) claims²², and the Local Bankruptcy Rules for the U.S. Bankruptcy Court for the Northern District of Indiana contains rules governing the filing and allowance of these claims.²³ Without a standardized procedure applicable across all jurisdictions, creditors will continue to be confused as to what to file and when to file it. They will need to either get informal guidance or engage counsel. Retaining counsel, at times, is cost-prohibitive and therefore creditors will forego asserting their Section 503(b)(9) claims altogether, which defeats the very purpose of the statute.

III. Existence of a Market for 503(b)(9) Claims

One solution for frustrated creditors is to transfer their Section 503(b)(9) claims to third parties. By transferring Section 503(b)(9) claims, creditors can monetize them at a discount and avoid incurring additional expenses. Neither the Bankruptcy Code nor the

¹⁹ *In re Bookbinders' Restaurant, Inc.*, No. 06–12302-ELF, 2006 WL 3858020 (Bankr. E.D. Pa. Dec. 28, 2006).

²⁰ *Id.* at *4.

²¹ *Id.*

²² Local Bankr. R. 3002-1 (Bankr. D. Ma. June 1, 2012).

²³ Local Bankr. R. B-3002-1 (Bankr. N.D. Ind. Aug. 20, 2013).

Federal Rules of Bankruptcy Procedure²⁴ impose restrictions on the transfer of administrative expense claims. It is difficult for parties in the market to acquire Section 503(b)(9) claims because they cannot find prospective transferors by studying publicly available information. This is because Section 503(b)(9) claims are not reflected in the schedules filed by debtors. Nor are they apparent from review of claim registers because requests for payment, unlike proofs of claim, are not kept on a register. Typically, it is up to claims traders to research the likely parties holding Section 503(b)(9) claims, such as by reviewing the Top 30 Unsecured Creditors List, or it is up to the Section 503(b)(9) claimant to search out a party willing to purchase its claim.

We note that conflicting opinions exist about whether claims trading, including 503(b)(9) claims trading is beneficial or detrimental to the bankruptcy process. The current market is unregulated and lacks transparency, but claims are being traded. The future of the market is unknown. There is a debate as to whether the market should continue in its unregulated form or if a regulated market should be created.

With this said, a uniform system to govern the filing and transferring of Section 503(b)(9) claims would allow for the assertion and transfer of such claims more readily, and on a more open and visible market.

IV. IWIRC Recommendation to Change Existing Procedures & Implementation of Proposal

A pre-petition claim filed on Official Form B-10 is usually filed directly by creditors and permits creditors to file the claim without delay or the assistance of counsel. IWIRC recommends that a separate standardized form, which is substantially similar in

²⁴ See FED. R. BANKR. P. 3001(e) (concerning disclosure requirements for transfers of certain kinds of claims, and imposing no substantive restrictions).

appearance to Official Form B-10, be used for asserting Section 503(b)(9) claims. In utilizing such a form, the creditor would be asked to identify the goods delivered, the delivery date, the delivery location and the method of delivery. The creditor would also be required to supply supporting documentation to substantiate the satisfaction of the requirements of Section 503(b)(9), *i.e.*, by attaching invoices, bills of lading, delivery tickets, etc. Such an approach would allow a creditor to readily assert its payment rights on the one hand, and on the other hand, would allow for the debtor to check its books and records and determine whether to specifically object to the creditor's assertion of its Section 503(b)(9) claim.

The manner of filing a Section 503(b)(9) claim by employing the standardized form would be the same as filing a proof of claim. The Section 503(b)(9) standard form would be filed with the Clerk of Court, unless the claimant is otherwise instructed to send the form to a claims agent for filing. The claims register, maintained by the Clerk or the claims agent, would reflect that the claim includes an assertion of Section 503(b)(9) rights, and thus, potential purchasers would have the necessary information to solicit the purchase of the claim.

Regardless of the form chosen to be used by Section 503(b)(9) claimants, IWIRC supports amendments that would officially extend the existing practices and procedures for effecting transfers of regular, pre-petition unsecured claims to Section 503(b)(9) claims. Specifically, IWIRC recommends that Official Forms 210A (filed by a claim transferee to evidence transfer of the claim) and 210B (the form of notice completed by the Clerk and sent to the alleged transferor) be used for effecting the transfer of 503(b)(9) claims, and that Bankruptcy Rule 3001(e) govern the transfer of such claims. IWIRC

suggests that relatively simple modifications to the existing Official Forms 210A and 210B, and the accompanying instructions to those forms, could be made to readily tailor them to the needs of transferees seeking to effect a transfer of Section 503(b)(9) claims. IWIRC sees little benefit to creating a wholly separate system for transferring Section 503(b)(9) claims because creditors, claims traders and debtors are already familiar with the established filing and notice procedures, and the official forms and accompanying instructions may be easily modified to recognize the transfer of 503(b)(9) claims.

The deadline to file Section 503(b)(9) claims varies substantially across chapter 11 cases. To help resolve such inconsistency, IWIRC supports the establishment of a default deadline to assert Section 503(b)(9) claims, which deadline could be modified by the bankruptcy court depending upon the circumstances of the case. Establishing such a deadline is advantageous to creditors, debtors and the bankruptcy courts. For creditors, there is less risk of missing the deadline for filing such claims. For debtors, it obviates the need for filing a motion to set a bar date for the filing of Section 503(b)(9) claims and provides a date certain by which the debtor may accurately assess the estate's liability for such claims. For bankruptcy courts, setting a default deadline, combined with the use of a standardized form as described above, will aid in avoiding a flood of "requests for payment" of Section 503(b)(9) claims in the critical, early stages of a chapter 11 case. If such a default deadline is established for asserting Section 503(b)(9) claims, consideration needs to be given to the manner in which notice of such Section 503(b)(9) filing deadline is given to creditors. IWIRC suggests that the deadline be published in the standard Notice of Commencement of the Case, Official Form 9, which informs creditors, equity security holders and other interested parties of the bankruptcy filing, the

date of the 341 meeting of creditors and depending on the case, the bar date for filing pre-petition proofs of claim. A simple tweak to the software that pre-populates this form could automatically provide for the calculation of the Section 503(b)(9) claim bar date.

IWIRC additionally supports changes to the manner in which Section 503(b)(9) claims are objected to and allowed. Under the current system, unless a debtor files a procedures motion, a creditor must file a motion or “request” for payment of its Section 503(b)(9) claim with the bankruptcy court. The debtor would then have the opportunity to object to such motion or request. Assuming the debtor’s objection, if any, is overruled, upon entry of the bankruptcy court’s order, the creditor would hold an allowed Section 503(b)(9) administrative claim (though the timing of payment of which would be left to the discretion of the court). Under the IWIRC proposal, because a creditor would not file a motion or “request” to assert its Section 503(b)(9) claim, procedures need to be established to object to and/or otherwise allow these claims. To avoid having the debtor respond to Section 503(b)(9) claims on an individual basis, IWIRC proposes that a debtor be required to review all of its Section 503(b)(9) claims and file a report within a period of time following the deadline to file Section 503(b)(9) claims (i.e. sixty days from the Section 503(b)(9) bar date, subject to further extension by the bankruptcy court). This uniform procedure would require the debtor to identify in its report the claims filed, the amount, if any, of the claim that the debtor deemed valid and the basis for any objection to the claims. Any claim on the Section 503(b)(9) report not objected to, would be deemed allowed by a proposed order submitted by the debtor to the bankruptcy court. For any claim to which the debtor asserted an objection, the claimant, who would still bear the burden of proof, would then be afforded the opportunity to respond to the

objection. If not resolved, the determination of allowance would be made by the bankruptcy court after a hearing. Such a procedure is consistent with the procedures already utilized and approved by several bankruptcy courts.²⁵

There are several benefits to adopting the changes recommended by IWIRC in this paper. For creditors, by establishing a national, uniform procedure for asserting 503(b)(9) claims, they would be able assert Section 503(b)(9) claims immediately after the filing of the case and thereby avoid the cost of having to continuously monitor the case for the later established procedure and deadline. In addition, their Section 503(b)(9) payment rights could be asserted without the need to retain counsel, which is typically required if a motion is filed. Moreover, creditors would have the opportunity to quickly liquidate their positions (by selling them to claims traders), rather than waiting months, if not years, to receive payment. For some creditors, the ability to receive this payment early can determine the future of their business.

Although a debtor would have the ability to file a motion to modify the established uniform procedure to fit the particular needs of its case, under the IWIRC proposed procedure, debtors could avoid the expense of filing a Section 503(b)(9)

²⁵ See *In re Eastman Kodak Company, et. al*, Case No. 12-10202 (ALG), Bankr. S.D.N.Y. Feb. 12, 2012 (D.I. 374) (Debtors were required to file a report 75 days after 503(b)(9) bar date to assert objections. If no objection was asserted, claims was deemed allowed. If an objection was asserted, the creditor was given 30 days to respond.); *In re Bashas' Inc., et.al*, Case. No. 09-16050 (JMM), Bankr. D. Ariz. Aug. 28, 2009 (D.I. 458) (Debtors were required to file a report 60 days after 503(b)(9) bar date. A status hearing was to be scheduled at least 30 days after filing report, at which the court would consider the undisputed (or consensually resolved) and to set a response date for claims to which an objection was asserted); *In re Newpage Corp., et.al*, Case No. 11-12804 (KG), Bankr. D. Del. Dec. 16, 2011 (D.I. 746) (Debtors were required to file a report 120 days after 503(b)(9) bar date. Any claim not objected to was deemed allowed. Further proceedings on claims to which an objection was asserted would be scheduled); *In re Otero County Hospital Assoc., Inc. et. al*, Case No. 11-13686 (JA); Bankr. D. N.M. Sept. 12, 2011 (D.I. 119) (Debtor was required to “promptly” review the submitted requests and “from time to time” file a notice of the claims the amount, if any, of the claim the debtor deemed valid. If the debtor failed to file a notice within 30 days of submission of the 503(b)(9) claim, the creditor was permitted to file a motion. Any objection to the notice was to be filed within 10 days and further proceedings would be scheduled if the objection was not resolved.).

procedures motion. In addition, debtors will have more information earlier on in the case about the Section 503(b)(9) claims. This will assist management with case strategy decisions and planning for confirmation. In a 363 sale situation, a debtor would be better positioned to negotiate with a buyer and even possibly have these liabilities assumed by the buyer.

Finally, by utilizing a separate claim form for Section 503(b)(9) claims and requiring creditors to bifurcate their “hybrid” claims, there is a higher likelihood of accuracy of the claims because the forms encourage creditors to focus on the nature and calculation of each of the different claim types.²⁶ Additionally, less time will be spent by all parties (debtors, creditors and bankruptcy courts) earlier on, and in the critical moments of, a chapter 11 case to evaluate and if necessary, object to such hybrid claims. By splitting the claims into a Section 503(b)(9) claim on the one hand, and a regular unsecured proof of claim on the other, a debtor can handle objecting (or not objecting) to Section 503(b)(9) claims in the manner we propose above, earlier on in the case and benefit from the luxury of being able to wait until later in the case to object to the regular, unsecured proofs of claim, which is typically done post-confirmation and often by a plan trustee or administrator. This similarly benefits bankruptcy courts and other creditors because it keeps attention focused on issues more critical to the restructuring of the debtor and permits a reconciliation of the regular, unsecured proofs of claim to occur at a less precarious time in the case, after the plan is confirmed.

²⁶ For the purposes of this paper, a “hybrid” claim is one claim that asserts both a creditor’s regular prepetition, unsecured amount due and its 503(b)(9) claim for “goods” sold within the twenty days preceding the petition date.

V. Conclusion

IWIRC submits that, by establishing a uniform procedure for filing, transferring and reconciling Section 503(b)(9) claims, a more efficient, less costly system that benefits creditors, debtors, and bankruptcy courts would result. Creditor confusion over how and when to assert Section 503(b)(9) claims would be eliminated, and creditors would have the ability to readily file and liquidate their claims. Further, debtors would avoid much of the expense of motion practice and would have a better understanding of the claims asserted against the estate at an early stage of the case. Moreover, because the streamlined process would require less court involvement, judicial resources would be conserved. IWIRC submits that the revisions proposed herein will substantially improve the present procedures for asserting Section 503(b)(9) claims.

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Khshboo Patel is currently a law student at Emory University School of Law, class of 2014, where she is the President of the Emory Bankruptcy and Insolvency Practice Society and an assistant managing editor of the Emory Bankruptcy Developments Journal. She is also a Legal Extern at the Office of the United States Trustee in Atlanta and a member of IWIRC.

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