



LOWENSTEIN BANKRUPTCY LOWDOWN



Lowenstein Bankruptcy Lowdown Video 19 – Court Reject Claims by Utilities that Electricity is a “Good” Entitled to Priority Treatment in Bankruptcy

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This Lowenstein Bankruptcy Lowdown video discusses two recent decisions that found that electricity provided to a debtor in the weeks prior to the bankruptcy filing did not qualify as a “good” and was not entitled to priority treatment under Section 503(b)(9) of the Bankruptcy Code, adding to a split among the courts across the country.

Section 503(b)(9) of the Bankruptcy Code allows for enhanced treatment of claims that are based on the sale of goods to a debtor, in the ordinary course of business, in the 20 days immediately prior to bankruptcy. Section 503(b)(9) claims must be paid in full before any distributor signs are made to unsecured creditors.

The Bankruptcy Code does not define “goods”, and courts have generally looked to the UCC—or Uniform Commercial Code—for guidance. The UCC broadly defines goods as all things that are movable at the time of identification to a contract of sale. The District Court for the District of Oregon used this definition in its February 2023 opinion in *PacifiCorp. V. North Pacific Cannery & Packers*.

The court accepted the scientific testimony of the debtor’s expert witness, who testified that because electricity moves at nearly the speed of light, electric meters could not detect the amount of the electricity passing through the meter before the electricity was consumed. Because the meters could not identify the amount of electricity before it was consumed, it failed to meet the definition of “goods” under the Uniform Commercial Code, and therefore was not entitled to priority under Section 503(b)(9).

The Bankruptcy Court for the Southern District of New York reached a similar result in its May 2023 opinion in the *Sears Holdings* Chapter 11 case. The *Sears* Court found that the definition of goods—even under the UCC—was ambiguous, and this ambiguity should not be resolved in favor of giving electric providers a priority claim.

Courts across the country are nearly evenly split over whether or not electricity qualifies as a good under Section 503(b)(9), and there is sure to be continued litigation on the issue. The matter is important not just to

electricity provider, but it also impacts the amount of assets the debtor has to distribute to general unsecured creditors.

Thank you for watching and we look forward to seeing you on future videos.