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Bankruptcy Court Finds that 503(B)(9) Claims Count as New Value for Preference Defense Purposes

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This is an important update for trade vendors and suppliers of goods who may be the targets of preference litigation.

On January 6, 2010 the United States Bankruptcy Court for the Middle District of Tennessee issued a decision in the *Commissary Operations* case (Case No. 308-06279) which should assist creditors who are defending against preference actions. As many trade creditors are aware, Section 503(b)(9) of the Bankruptcy Code accords first priority administrative status to claims for goods received by the debtor within 20 days of the bankruptcy filing ("20-day claims"). Bankruptcy Judge Marian F. Harrison held that the goods that comprise 20-day claims may also be included in the subsequent new value defense under Section 547(c)(4) of the Bankruptcy Code, which allows preference defendants to reduce their preference liability if they supplied the debtor with new merchandise or services after the payments sought to be recovered were received.

While the debtor sought to disqualify 20-day claims from being counted as new value, the court in *Commissary Operations* determined that result would deprive trade creditors of the priority accorded them under the Bankruptcy Code. Moreover, Judge Harrison stated that requiring creditors to choose between asserting a 20-day claim and preserving their right to assert a new value defense that includes deliveries made to the debtor within the 20 days prior to the bankruptcy filing "would chill their willingness to do business with troubled entities". However, please note that in another recent decision in the *Circuit City* bankruptcy, the court held that 20-day claims should be temporarily disallowed under Section 502(d) of the Bankruptcy Code pending the outcome of preference actions being pursued in that case.

For more information on this Alert, please contact one of the attorneys listed below.

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Key Contacts

Robert Eisenbach San Francisco	reisenbach@cooley.com +1 415 693 2094
Cathy Hershcopf New York	chershcopf@cooley.com +1 212 479 6138

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