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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	WW-16-1424-KuFB
)		
PETTIT OIL COMPANY,)	Bk. No.	3:13-bk-47285-PBS
)		
Debtor.)	Adv. No.	3:14-ap-04222-PBS
)		
_____)		
IPC (USA), INC.,)		
)		
Appellant,)		
)		
v.)	O P I N I O N	
)		
KATHRYN A. ELLIS, Chapter 7)		
Trustee,)		
)		
Appellee.)		
_____)		

Argued and Submitted on September 28, 2017
at Seattle, Washington

Filed - October 23, 2017

Appeal from the United States Bankruptcy Court
for the Western District of Washington

Honorable Paul B. Snyder, Bankruptcy Judge, Presiding

Appearances: Edwin K. Sato of Bucknell Stehlik Sato & Orth,
LLP, argued for appellant, IPC (USA), Inc.;

Andrew H. Morton of Foster Pepper PLLC argued for
appellee, Kathryn A. Ellis, Chapter 7 Trustee.

Before: KURTZ, FARIS, and BRAND, Bankruptcy Judges.

1 KURTZ, Bankruptcy Judge:
2

3 Kathryn A. Ellis, chapter 7¹ trustee (Trustee), filed an
4 adversary complaint against appellant, IPC (USA), Inc. (IPC),
5 seeking to avoid under § 544(a)(1), IPC's unperfected security
6 interest in consigned fuel inventory, accounts receivable (A/R),
7 and cash (Cash) all of which were in the possession of the
8 debtor, Pettit Oil Company (Debtor), on the petition date.

9 The bankruptcy court granted partial summary judgment in
10 favor of Trustee, ruling that the agreement between IPC and
11 Debtor was a "true" consignment under Revised Article 9
12 (Article 9) of the Uniform Commercial Code (U.C.C.)
13 § 9-102(a)(20). Under U.C.C. § 9-319(a), for purposes of
14 determining the rights of Debtor's creditors while the fuel
15 inventory was in its possession, Debtor is deemed to hold rights
16 and title to the goods identical to those the consignor, IPC,
17 had or had power to transfer. In contrast, under U.C.C.
18 § 9-103(d), IPC is deemed to hold only a purchase-money security
19 interest in the consigned goods as against creditors of Debtor-
20 consignee. It is undisputed that IPC did not perfect its
21 interest in the consigned fuel. Applying these statutes, the
22 bankruptcy court found that IPC's interest in the fuel inventory
23 was subordinate to the rights of Trustee as a judicial lien
24 creditor.

25 Subsequently, the court granted partial summary judgment in
26

27
28 ¹ Unless otherwise indicated, all chapter and section
references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

1 favor of Trustee, ruling that IPC's interests in the A/R and
2 Cash generated from the sale of the consigned fuel and held by
3 Debtor on the petition date was also subordinate to the rights
4 of Trustee because IPC had not complied with the U.C.C.'s
5 perfection rules for priority in accounts receivable or cash.

6 In a final ruling, the bankruptcy court granted summary
7 judgment in favor of Trustee awarding damages in the amount of
8 \$5,493,498.69 on her claims against IPC, consisting of:
9 \$1,161,754.00 for the fuel inventory, \$3,895,961.69 for the A/R,
10 and \$435,783.00 Cash that was in Debtor's bank account on the
11 petition date.

12 IPC argues on appeal that the bankruptcy court erred by
13 including the value of the A/R and Cash in the judgment. IPC
14 contends that under U.C.C. § 9-319, Trustee could reach only the
15 "goods" - the fuel inventory - in the possession of Debtor on
16 the petition date because the U.C.C. definition of "goods" does
17 not include A/R and Cash. In short, U.C.C. § 9-319 should not
18 be applied beyond its scope. Relying on the underlying
19 consignment agreement between the parties, IPC contends that it
20 is the only party with an interest in the A/R and Cash.

21 For the reasons explained below, we find no support for
22 IPC's proposition in Article 9 or elsewhere. Accordingly, we
23 AFFIRM.

24 I. FACTS

25 A. The Consignment Agreement Between IPC and Debtor

26 Debtor was a distributor of bulk oil, gas, diesel and
27 lubricant products and sold fuel products at self-fueling sites
28

1 known as "cardlock sites."²

2 On September 1, 2013, IPC entered into a Consignment and
3 Service Agreement (CSA) with Debtor. Under the CSA, IPC
4 provided fuel to various cardlock sites owned or leased by
5 Debtor. IPC retained title to the fuel until the fuel was sold
6 to end user customers. Debtor was obligated to maintain the
7 financial records for the consignment transactions, including
8 booking and accounting for receivables and administering,
9 invoicing, collecting, and remitting payments to IPC for the
10 full cost of all consigned fuel sold by Debtor. In
11 consideration, IPC agreed to pay Debtor a monthly commission.

12 Debtor was also required to instruct its customers to make
13 payments directly to IPC's lockbox account at Union Bank in San
14 Francisco. However, upon implementation of the CSA, many
15 cardlock customers continued to send payments for IPC fuel
16 purchased at Debtor's cardlock sites to Debtor's account, a
17 lockbox with Debtor's lender, KeyBank National Association
18 (KeyBank). The CSA provided that if Debtor's customers sent
19 payments to Debtor instead of IPC, Debtor was to promptly
20 forward those payments to IPC. California law governed the
21 interpretation of the CSA.

22 It is undisputed that IPC never filed a financing statement
23 or otherwise perfected its interests in the consigned fuel, the
24 A/R, or Cash.

25 ///

26 _____
27 ² Many of the facts are set forth in the bankruptcy court's
28 memorandum decision, Ellis v. IPC (USA), Inc. (In re Pettit Oil
Co.), 2016 WL 3049607 (Bankr. W.D. Wash. May 19, 2015).

1 **B. Bankruptcy Events**

2 Debtor filed a chapter 11 petition in November 2013
3 (Petition Date). At the time of filing, there was an
4 unquantified amount of IPC fuel remaining in the tanks at
5 Debtor's cardlock sites. In addition, there were unpaid
6 accounts receivable for IPC fuel that had been sold and invoiced
7 to Debtor's customers, accounts receivable outstanding for sales
8 of IPC fuel that had been sold but not yet invoiced to Debtor's
9 customers, and cash in Debtor's KeyBank lockbox for sold and
10 invoiced IPC fuel that customers had mistakenly sent to Debtor
11 instead of to IPC's lockbox. Debtor ceased operations, and its
12 case converted to chapter 7 in January 2014. Ellis was
13 appointed the chapter 7 trustee.

14 Trustee filed an adversary proceeding against IPC,³
15 alleging five causes of action, two of which are relevant here.
16 In her first cause of action, Trustee sought a declaration that
17 the CSA was a "true" consignment as defined in U.C.C.
18 § 9-102(a)(20) and that, as of the Petition Date, IPC held no
19 more than an unperfected security interest in the consigned fuel
20 inventory, A/R, and Cash which was in Debtor's possession on the
21 Petition Date. In her second cause of action, Trustee alleged
22 that as a hypothetical judgment lien creditor under § 544(a)(1),
23 she could avoid IPC's unperfected security interest and recover

25 ³ Trustee also named KeyBank and Pettit Properties, Inc.
26 (PPI) as defendants. KeyBank answered the complaint and filed a
27 cross-claim against IPC and PPI. IPC answered the complaint and
28 filed a counterclaim against Trustee and cross-claims against
KeyBank and PPI. These cross-claims were resolved in separate
proceedings.

1 from IPC the value of the consigned fuel inventory, A/R, and
2 Cash under § 550 for the benefit of the estate. Trustee later
3 amended her second cause of action to allege that she had
4 avoidance powers under § 549 with respect to postpetition
5 payments made by Debtor to IPC relating to fuel sales.

6 Trustee moved for partial summary judgment on her first and
7 second causes of action. After a hearing, the bankruptcy court
8 issued a memorandum decision and entered an order granting
9 partial summary judgment to Trustee. The court noted that IPC
10 had conceded that all the elements under U.C.C. § 9-102(a)(20)
11 for showing a "true" consignment were met, and found that the
12 elements were indeed met. The bankruptcy court thus concluded
13 that Article 9 governed Trustee's rights as a judicial lien
14 creditor. U.C.C. § 9-109(a)(4).

15 Article 9 treats a consignor such as IPC the same as a
16 secured party holding a purchase-money security interest (PMSI)
17 in the consigned goods. U.C.C. § 9-103(d). Since IPC did not
18 perfect its security interest in the consigned fuel, the
19 bankruptcy court granted Trustee summary judgment on her first
20 cause of action, declaring that the CSA was a "true" consignment
21 subject to the provisions of U.C.C. § 9-319(a).

22 As to Trustee's second cause of action, IPC contested that
23 Trustee could acquire a judicial lien on the A/R and Cash which
24 were generated from the prepetition sales of the consigned fuel
25 and in Debtor's possession on the Petition Date. IPC argued
26 that it was entitled to the Cash because the CSA required
27 payments to be sent directly to IPC. IPC further asserted that
28 Debtor held the A/R and Cash in a constructive trust for IPC and

1 thus they were not subject to attachment by Trustee under
2 § 544(a)(1).

3 The bankruptcy court ruled that a constructive trust would
4 not be imposed, and IPC does not contest that ruling in this
5 appeal. The court granted Trustee's motion, in part, finding
6 that, under § 544(a)(1), Trustee had a senior security interest
7 in the fuel inventory in existence on the Petition Date and also
8 in any proceeds arising from further sales of those goods.
9 U.C.C. §§ 9-315(a)(2); 9-319(a). The court denied Trustee's
10 summary judgment motion without prejudice on the issue whether
11 Trustee held a superior interest in the A/R and Cash held by
12 Debtor on the Petition Date because the parties had not briefed
13 choice-of-law issues which were relevant to the outcome.

14 At a subsequent hearing, the bankruptcy court noted that
15 California law governed the interpretation of the CSA and
16 Washington (location of Debtor) and Ohio law (location of
17 KeyBank) governed the perfection and priority rights at issue.
18 The court observed that California, Washington, and Ohio had
19 adopted essentially identical versions of the relevant U.C.C.
20 provisions. Therefore, to simplify matters, the court made
21 reference to the U.C.C. rather than citing to the applicable
22 state statutes.⁴ The bankruptcy court read its oral ruling into
23 the record and entered an order finding that Trustee as a
24 hypothetical judgment lien creditor had a senior interest to IPC
25 in the A/R and Cash which were in the possession of Debtor on
26 the Petition Date.

27
28 ⁴ We do so as well.

1 trustee or of any creditor, the rights and powers of,
2 or may avoid any transfer of property of the debtor or
any obligation incurred by the debtor that is voidable
by-

3
4 (1) a creditor that extends credit to the
debtor at the time of the commencement of
5 the case, and that obtains, at such time and
with respect to such credit, a judicial lien
6 on all property on which a creditor on a
simple contract could have obtained such a
7 judicial lien, whether or not such a
creditor exists[.]

8 "Under [§] 544(a), unperfected security interests are
9 avoidable and can be relegated to the status of general
10 unsecured claims." Neilson v. Chang (In re First T.D. & Inv.,
11 Inc.), 253 F.3d 520, 525 (9th Cir. 2001); U.C.C. § 9-322(a)(2)
12 ("A perfected security interest . . . has priority over a
13 conflicting unperfected security interest . . ."). The
14 bankruptcy court ruled that the CSA was a "true" consignment
15 under U.C.C. § 9-102(a)(20) and therefore properly analyzed
16 Trustee's rights as a judicial lien creditor under Article 9.

17 U.C.C § 9-319(a) applies when a creditor of the consignee
18 seeks to recover against the consigned goods. In re Valley
19 Media, Inc., 279 B.R. 105, 123 n.30 (Bankr. D. Del. 2002). The
20 statute provides that, "for purposes of determining the rights
21 of creditors of . . . a consignee, while the goods are in the
22 possession of the consignee, the consignee is deemed to have
23 rights and title to the goods identical to those the consignor
24 had." A consignor such as IPC is treated as a secured party
25 holding a PMSI in the consigned goods. U.C.C. § 9-103(d).

26 U.C.C. §§ 9-319(a) and 9-103(d) work in tandem to determine
27 the rights of a debtor's creditors while consigned goods are in
28 a debtor's possession. That is, a debtor is deemed to hold

1 rights and title to the goods such that its creditors can attach
2 the consigned goods as if the debtor actually had title and
3 obtain priority over a consignor who fails to perfect its PMSI
4 in the goods. The purpose behind U.C.C. § 9-319(a) is to
5 protect general creditors of the consignee from claims of
6 consignors that have undisclosed consignment arrangements with
7 the consignee that create secret liens on the inventory.

8 In re Valley Media, Inc., 279 B.R. at 125.

9 By its plain language, U.C.C. § 9-319(a) applies to the
10 consigned "goods." The statute does not determine priority in
11 cash or accounts receivable generated by the sale of the
12 consigned fuel. Once the fuel inventory was sold, title
13 transferred to the buyer and the secret lien in the inventory is
14 no longer a concern to third party creditors. After the fuel
15 was sold to third parties, Debtor was obligated to pay IPC.
16 Indeed, the CSA provides that Debtor was to promptly forward
17 payments which were mistakenly made to it. Moreover, Debtor was
18 responsible for invoicing and collecting the amounts due for
19 fuel that it sold. Under this arrangement, IPC was a general
20 unsecured creditor for amounts due.

21 IPC cannot simply rely on the CSA to obtain priority over a
22 judicial lien holder in the A/R and Cash. Again, this presents
23 the problem of a secret lien vis-a-vis a debtor's creditors. As
24 mentioned by the bankruptcy court, when a creditor makes a
25 decision to lend funds to a consignee, its decision is
26 necessarily based on all the property in the consignee's
27 possession. If IPC intended to claim priority over a judicial
28 lien creditor or another secured creditor in the A/R and Cash,

1 it was required to perfect its security interests therein
2 according to the rules set forth in Article 9.

3 For all purposes that matter to this case, the U.C.C.
4 treats a "true" consignment (such as IPC's) as a secured
5 transaction. The definitions of Article 9's key terms make this
6 clear: "security interest" includes "any interest of a
7 consignor," U.C.C. § 1-201(b)(35); "collateral" means "the
8 property subject to a security interest" and includes "goods
9 that are the subject of a consignment," U.C.C.
10 § 9-102(a)(12)(C); "secured party" means (among others) a
11 "consignor," U.C.C. § 9-102(a)(73)(C); and "debtor" means (among
12 others) a "consignee," U.C.C. § 9-102(a)(28)(C). Section
13 9-103(d) eliminates any possible doubt: "The security interest
14 of a consignor in goods that are the subject of a consignment is
15 a purchase-money security interest in inventory."

16 IPC's basic argument is that consignments are treated like
17 purchase-money security interests only for certain limited
18 purposes. This is exactly backwards. The rights of a "true"
19 consignor are the same as the rights of a secured party, unless
20 a U.C.C. section provides otherwise.

21 If IPC and Debtor had signed a security agreement rather
22 than a consignment agreement, this would be an easy case. If
23 IPC had filed a financing statement, its security interest in
24 the fuel would be perfected under U.C.C. § 9-310(a), and its
25 security interest in the A/R and Cash that are proceeds of the
26 fuel would also have been perfected. U.C.C. § 9-315(c). But
27 because IPC did not file a financing statement, its interest in
28 the collateral is unperfected. Therefore, IPC's rights in the

1 fuel, the A/R, and the Cash would be subordinate to the rights
2 of the Trustee, as a hypothetical lien creditor on the date of
3 Debtor's bankruptcy filing. U.C.C. § 9-317(a)(2),
4 § 9-102(a)(52)(C).

5 IPC contends, however, that the result is dramatically
6 different because IPC and Debtor signed a consignment agreement
7 rather than a security agreement. In support of this
8 contention, IPC relies on U.C.C. § 9-319(a), placing overriding
9 importance on the fact that the statute mentions consigned
10 "goods," but is silent concerning the proceeds of those goods.
11 IPC concedes (as it must) that its interest in the "goods"-the
12 fuel-is subordinate to the Trustee's rights. But it claims that
13 its rights in the fuel's proceeds-the A/R and Cash-is superior
14 to Trustee's rights, because U.C.C. § 9-319 mentions only
15 "goods." To accept IPC's argument, we would have to believe
16 that, by omitting the word "proceeds" from U.C.C. § 9-319, the
17 U.C.C. drafters silently negated all of the provisions cited
18 above that treat a consignment as a security interest and treat
19 a security interest in proceeds the same as the security
20 interest in the original collateral. We cannot adopt such a
21 strained interpretation of U.C.C. § 9-319. Instead, we read
22 U.C.C. § 9-319 as simply providing that a consignee can sell and
23 encumber consigned goods just the same as it could if it had
24 title to the consigned goods.

25 U.C.C. § 9-202 reinforces this conclusion and also explains
26 the difference between a true consignment and other types of
27 security transactions. Recall that the formal difference
28 between a typical secured transaction and a consignment is that

1 a consignor retains title to the collateral. Section 9-202
2 states that, with a limited and irrelevant exception, this
3 difference does not matter. "Except as otherwise provided with
4 respect to consignments . . . , the provisions of this article
5 with regard to rights and obligations apply whether title to
6 collateral is in the secured party or the debtor." Official
7 Comment 3.a explains:

8 **This section explicitly acknowledges two circumstances**
9 **in which the effect of certain Article 9 provisions**
10 **turns on ownership (title).** First, in some respects
11 sales of accounts, chattel paper, payment intangibles,
12 and promissory notes receive special treatment. See,
13 e.g., Sections 9-207(a), 9-210(b), 9-615(e). Buyers
14 of receivables under former Article 9 were treated
15 specially, as well. See, e.g., former Section
16 9-502(2). **Second, the remedies of a consignor under a**
17 **true consignment** and, for the most part, the remedies
18 of a buyer of accounts, chattel paper, payment
19 intangibles, or promissory notes **are determined by**
20 **other law and not by Part 6.** See Section 9-601(g).

21 (Emphasis added.) In other words, the consignor's retention of
22 title to the collateral may affect the remedies it can employ to
23 recover the collateral in the event of default. But retention
24 of title does not change the rules concerning priority among
25 competing claimants to the collateral.

26 Our conclusion is bolstered by reference to the U.C.C.
27 sections which governed true consignments prior to the revision
28 of the U.C.C. in 2001. Before then, certain true consignments
were dealt with in former U.C.C. §§ 2-326(3) and 9-114. Those
provisions were deleted and replaced by U.C.C. §§ 9-109(a)(4),
9-103(d) and 9-319. See U.C.C. § 2-326 cmt. 4.

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1 U.C.C. § 9-114⁶ addressed priority in certain consigned
2 goods and limited cases of identifiable cash proceeds received
3 on or before delivery of the goods to a buyer. The Official
4 Comments to U.C.C. § 9-114 give some insight into how consignors
5 were subjected to Article 9's filing requirements for perfection
6 and priority with respect to proceeds generated from the sale of
7 their consigned goods.

8 The Official Comment to U.C.C. § 9-114 stated that if a
9 consignor wished to have priority in accounts receivable or
10 other proceeds (cash) generated from the sale of the consigned
11 goods, it had to comply with the rules for the creation and
12 perfection of a security interest contained in Article 9.

13 Except in the limited cases of identifiable cash
14 proceeds received on or before delivery of the goods
15 to a buyer, **no attempt has been made to provide rules
16 as to perfection of a claim to proceeds of
17 consignments . . . or the priority thereof** It
18 is believed that under many true consignments the
19 consignor acquires a claim for an agreed amount
20 against the consignee at the moment of sale, and does
21 not look to the proceeds of sale. In contrast to the
22 assumption of this Article that rights to proceeds of
23 security interests under Section 9-306 represent the
24 presumed intent of the parties (compare Section
25 9-203(3)), **the Article goes on the assumption that if
26 consignors intend to claim the proceeds of sale, they**

21 ⁶ The statute provided:

22 A person who delivers goods under a consignment which
23 is not a security interest and who would be required
24 to file under [Article 9] by paragraph (3)(c) of
25 Section 2-326 has priority over a secured party who is
26 or becomes a creditor of the consignee and who would
27 have a perfected security interest in the goods if
28 they were the property of the consignee, and also has
priority with respect to identifiable cash proceeds
received on or before delivery of the goods to a
buyer, if . . . the consignor complies with [specified
notice requirements].

