

Refining Deepwater Horizon Oil Spill Claims

Law360, New York (February 16, 2011) -- As many businesses that have been significantly affected by the Deepwater Horizon oil spill are parties to secured financing arrangements, many lenders are wondering whether their borrowers' claims are subject to the lenders' existing security interests.

Since most of the affected businesses' claims for damages resulting from the Deepwater Horizon oil spill will fall under the Oil Pollution Act of 1990 (OPA 1990), and other similar state statutes, this article will focus on the ability to take a security interest in such statutory claims and whether those statutory claims are sufficiently covered by a lender's existing security interest.

Prior to the revisions to Article 9 of the Uniform Commercial Code (the UCC) in 2000, tort claims were excluded from Article 9. As a result of the revisions in 2000 to Article 9, Section 9-109(d) (12) now provides an exception to the previous exclusion of tort claims so that Article 9 now applies to "commercial tort claims" and to security interests in tort claims that constitute the proceeds of other collateral. (See Official Comments to Section 9-109.) A "commercial tort claim" is defined in Section 9-102(a)(13) as:

"[A] claim arising in tort with respect to which: 1) The claimant is an organization; or 2) The claimant is an individual and the claim: a) Arose in the course of the claimant's business or profession; and b) Does not include damages arising out of personal injury to or the death of an individual."

While an OPA 90 claim or a claim brought under a similar state statute does not arise out of common law (as most tort claims do), the type of relief provided bears more resemblance to a tort claim than a contract claim. As a result, it may be deemed to effectively be a commercial tort claim.

If an OPA 90 claim is deemed to be in the nature of a "commercial tort," then the next question is whether a lender's existing security interest covers such claim. Unlike most other types of personal property collateral, a description by category (i.e. "accounts") is insufficient to identify a commercial tort as collateral under revised Article 9.

Instead, the type of commercial tort must be described. For example, "all tort claims arising out of the explosion of the debtor's factory." For this reason, a lender could never effectively take a security interest in a commercial tort that might arise in the future.

However, now that the commercial tort claims relating to the Deepwater Horizon oil spill have occurred, or could be anticipated, a lender is now able to identify those commercial tort claims with sufficient particularity. Thus, a lender considering extending new credit to or entering into any workout or forbearance with a borrower who may have such a claim should consider taking a specifically defined security interest in its borrower's Deepwater Horizon oil spill claim in conjunction with extending such new credit to or entering into any workout or forbearance arrangement.

In addition to carving out commercial torts from the general prohibition against allowing security interests in tort claims under Article 9, Revised Article 9 created a new subcategory of "general intangible" referred to as a "payment intangible." A "payment intangible" is defined in Section 9-

102(a)(61) as “a general intangible under which the account debtor’s principal obligation is a monetary obligation.”

Assuming a claim arising in tort is settled and reduced to a contractual obligation to pay, the right to payment becomes a payment intangible and ceases to be a claim arising in tort. (See Official Comments to Section 9-109.) Although it appears that this new subcategory of general intangible was designed to facilitate security interests in structured settlements, if a lender has a properly perfected security interest in “general intangibles” and its borrower settles an OPA 90 claim, the lender may have an argument that its existing security interest now extends to the borrower’s contractual right to now receive payment under that settlement.

However, if the borrower has granted another lender a specific intervening security interest in the borrower’s Deepwater Horizon oil spill tort claim, the lender holding the intervening specific security interest may arguably be successful in asserting the priority of its security interest in the settlement proceeds over a pre-existing lender’s security interest in “general intangibles.”

Accordingly, lenders who are already monitoring the impact (regardless of whether the lenders have a valid security interest in the underlying tort claims) of the Deepwater Horizon oil spill in the affected geographic region should also evaluate whether or not the scope of their existing security interests are sufficient to cover their borrowers’ OPA 90 or similar state law claims.

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