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McAfee & Taft

The Oil & Gas Creditor's Bankruptcy Toolbox

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Identifying Claims

- Categories of claims
 - Vendor equipment
 - Vendor services
 - Indemnities
 - Operator JIBs
 - JIB overbillings owed to WIO
 - Product sales
 - Revenues to WIOs, ROs
 - Pre-pay refunds owed to WIOs
 - Odd contractual obligations – e.g., distribution for third party
 - Tort claims
- When in doubt, file a proof of claim
 - Claim amounts can usually be amended; more difficult to add a new category of claims

Proactive and Reactive Tools

- Proactive examples:
 - trust funds
 - master agreements
- Reactive examples:
 - automatic stay of 11 U.S.C. 362 does not prohibit some protective steps
 - lien perfection
 - recoupment

Creditor's Tools

- Trust Fund Claims
- Lien Claims
- 503(b)(9) Claims
- Reclamation Claims
- Executory Contracts
- Proofs of Claims
- Administrative Claims
- Recoupment
- Setoff

Trust Fund Claims

- Bankruptcy Stay Affects Only Property of the Debtor's Estate
 - Whether property belongs to bankruptcy estate is a matter of federal common law
 - Federal common law generally defers to state law, except in cases of federal interest in uniform federal law (*e.g.*, the NGPA)
 - Property held in trust for another not property of the estate
- State Trust Law
 - Express trusts
 - Agreement (treated as contract; no writing or special words required by OK trust law)
 - Settlor, Trust Res, Beneficiary (may be as simple as an agreement to pay funds to another)
 - Constructive trusts – agreement implied from acts of parties
 - Resulting Trusts – imposed as a matter of law to effect a remedy based on circumstances

Lien Claims and Perfection

- Oklahoma
 - M&M lien (42 O.S. 144) – operator/vendor
 - Post-petition perfection permitted
 - Ongoing operations may permit perfection until bankruptcy deadline for M&M claims
 - Trustee may void perfected M&M lien and provide substitute lien on proceeds of collateral
 - Potential issue on pooled wells – implied contract?
 - Operator's lien on pooled units (52 O.S. 87.1(e))
 - Operator's lien on field-wide units (52 O.S. 287.8 - automatic perfection)
 - Operator's consensual lien (recordation required) – post-petition perfection prohibited; pro-active only
 - Lien on severed oil or gas or proceeds (52 O.S. 548.2; filing required; priority relates back to date of severance)
 - OIPA lien proposal (unrecorded producer's lien would gain priority over secured lender with filed security interest pre-dating severance)

11 U.S.C. Sec. 503(b)(9) Claims

- Administrative claim priority for value of goods received by debtor within 20 days before commencement of the case
- Applies only to goods sold to debtor in ordinary course of business

Reclamation Claims

- Possible right of reclamation under UCC Sec. 2-702
- Based on identification of goods delivered
- Requires prompt action to retake delivered goods
- Notification to the debtor may result in negotiated grant of priority

Executory Contracts

- Elements
 - Not fully performed on either side
 - Unperformed obligations must be such that breach of would allow the other party to suspend performance
- Statutes/Cases
 - 11 U.S.C. 365
 - Trustee may assume and assign executory contracts but must cure defaults and provide assurance of performance
- Issues
 - Cure Notices –object or be bound by proposed cure amount
 - Indemnities
 - Assumption of service agreement
 - Stay relief to pursue insurance proceeds that may fund indemnity

Administrative Claims

- **Examples:**
 - Post-petition jibs
 - Post-petition vendor services
- Have priority over general claims
- Must be paid in full to confirm a plan of reorganization in a Chapter 11 case

Recoupment

- Elements
 - Obligations arise under same contract
 - Obligations between exact same entities
- Theory
 - One net obligation to creditor
- Cases
 - *In re B&L Oil Co.*, 782 F.2d 155 (10th Cir. 1986)
- Potential tools to avoid unsecured status
 - Master JOAs
 - AMI agreements
 - JVAs

Setoff

- Theory – netting of general claims
- Elements
 - Obligations must be between same entities
 - Bankruptcy court must approve setoff
 - In bankruptcy, setoff may not cross time of bankruptcy filing
 - pre-petition debts of claimant may be offset only against pre-petition debts of debtor
 - post-petition debts offset only against post-petition debts
- *Nelson v. Linn Mid-Continent Exp.*, 2009 OK CIV APP 99
 - PRSA does not prohibit setoff of royalty overpayment claim against royalty obligation on different well.

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