American Bankruptcy Institute

2022 Winter Leadership Conference

CONCURRENT SESSION

Who Has the Energy? Restructuring Trends in an Ever-Changing Industry

Hosted by the Commercial & Regulatory Law and Emerging Industries & Technology Committees

Omar J. Alaniz
Reed Smith LLP; Dallas

Hon. David R. Jones
U.S. Bankruptcy Court (S.D. Tex.); Houston

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TURNAROUND AND RESTRUCTURING

CURRENT OBSERVATIONS FOR ENERGY

October 2022

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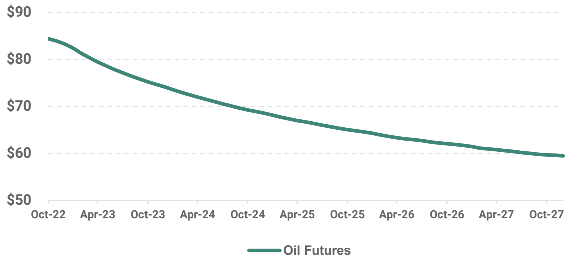
Ongoing Recovery in Oil & Gas

Source: Capital IQ

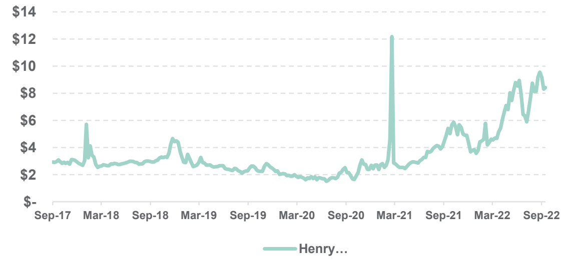
Commodity Prices, Historical and Futures

HISTORICAL OIL PRICING

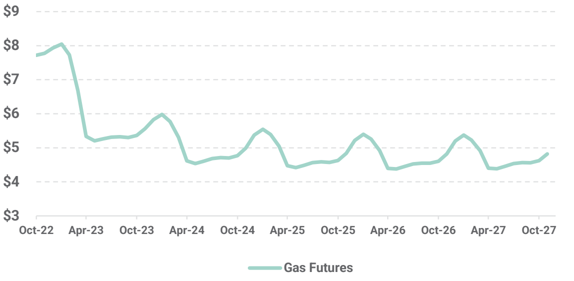
OIL FUTURES



HISTORICAL GAS PRICING



GAS FUTURES



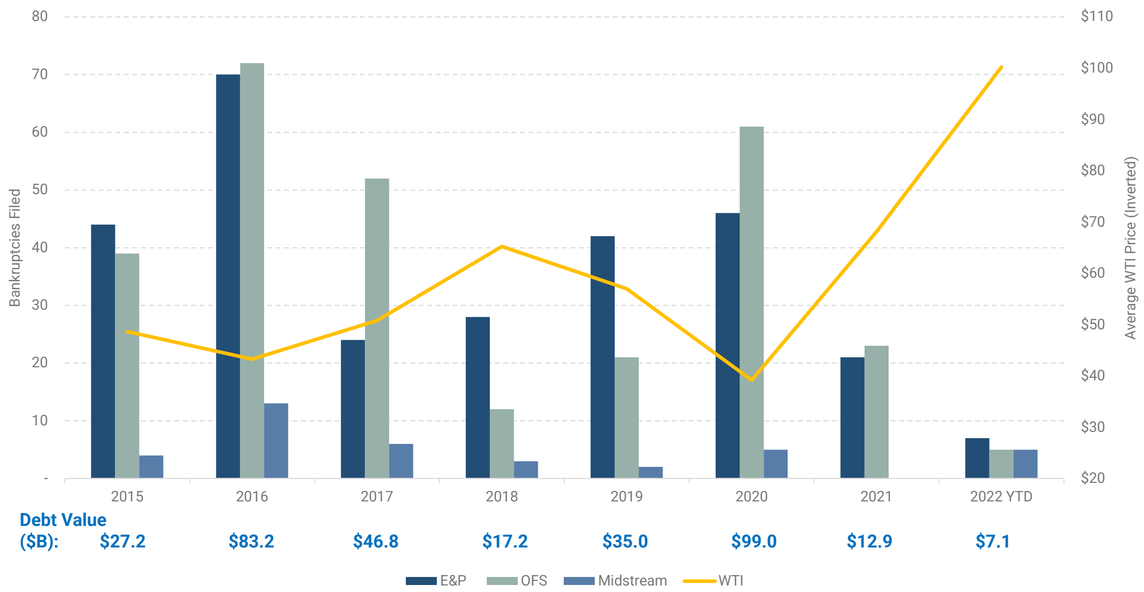
Source: EIA, CME Group

TURNAROUND & RESTRUCTURING

Oil & Gas Bankruptcies: Cycles Driven by Commodity Pricing

Since 2015, the U.S. has restructured over $300 billion of debt in the energy sector. The recovery in WTI pricing, high yield refinancing market and record FCF has resulted in reduced filings in 2021 and 2022.

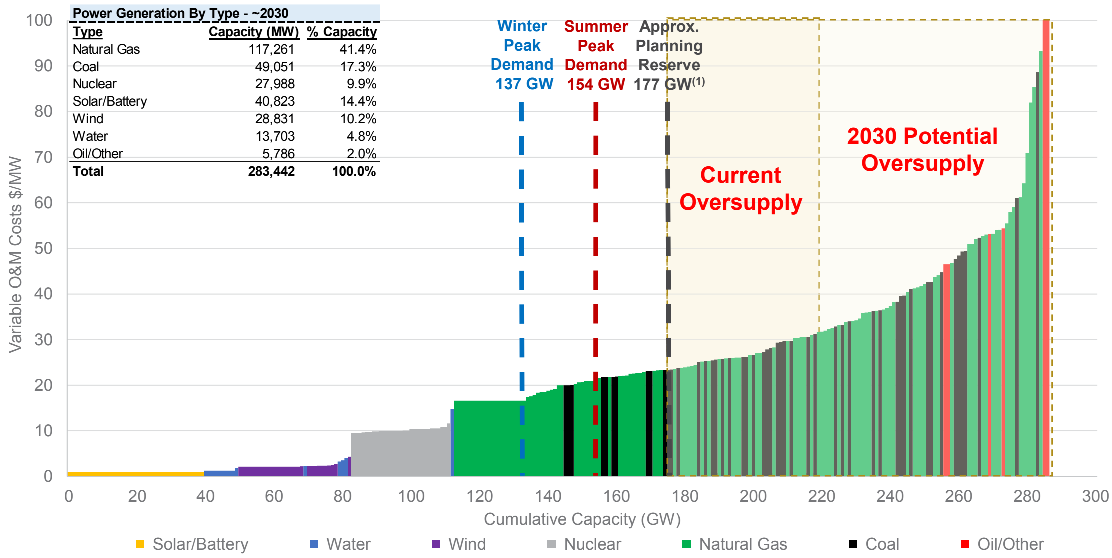
ENERGY BANKRUPTCY CASE COUNT and DEBT - 2015 – 2021: Inverse Correlation to WTI



Source: Haynes & Boone, Reorg.com, EIA, Ankura

PJM Oversupply Situation Getting Worse

By 2030, PJM projected to be oversupplied by 83%, with 70% of increase from renewable additions



Power Generation By Type - ~2030

Type	Capacity (MW)	% Capacity
Natural Gas	117,261	41.4%
Coal	49,051	17.3%
Nuclear	27,988	9.9%
Solar/Battery	40,823	14.4%
Wind	28,831	10.2%
Water	13,703	4.8%
Oil/Other	5,786	2.0%
Total	**283,442**	**100.0%**

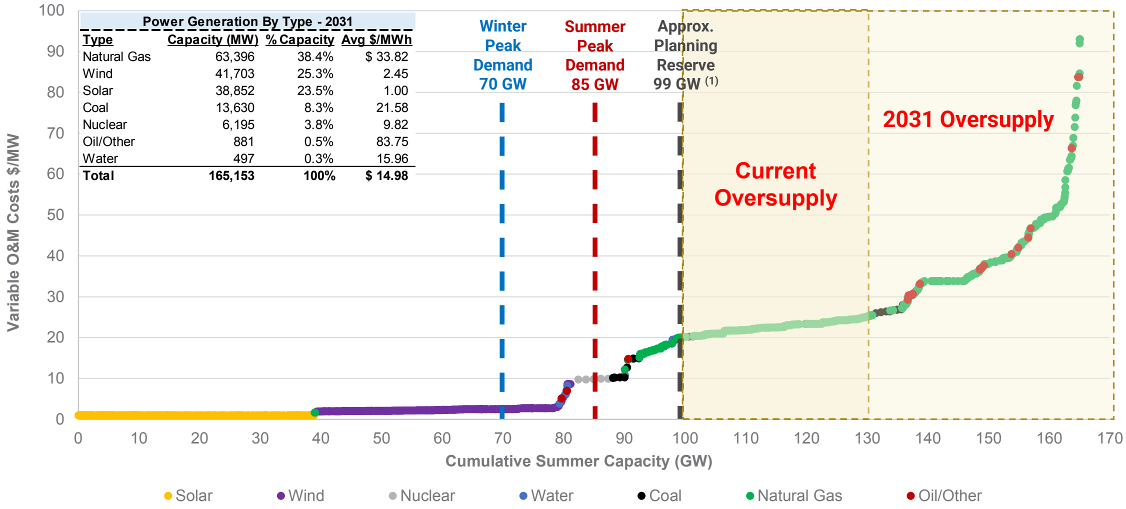
- Proposed new capacity additions of 28.1 GW of solar, 16.8 GW of wind and 19.6 GW natural gas would result in an oversupply of 106 GW or 83% above forecasted peak demand[2]
- Older, less efficient fossil fuel-fired generation with a higher cost structure will be forced out of the supply stack
  - Includes 3.2 GW of coal-fired generation scheduled to be retired in 2022
  - Implies significant restructuring needs for obsolete thermal generation
- Unreliable and low-return renewable additions could be a further source of restructuring needs

(1) Consistent with historical PJM reserve levels, ~15%
(2) Additions sourced from S&P CapIQ includes all proposed new generation

TURNAROUND & RESTRUCTURING

And in ERCOT – Overbuild of the "Unreliables"?

If intermittent capacity is adjusted for performance, ERCOT will retain a thin line of required reserves



Power Generation By Type - 2031			
Type	**Capacity (MW)**	**% Capacity**	**Avg $/MWh**
Natural Gas	63,396	38.4%	$ 33.82
Wind	41,703	25.3%	2.45
Solar	38,852	23.5%	1.00
Coal	13,630	8.3%	21.58
Nuclear	6,195	3.8%	9.82
Oil/Other	881	0.5%	83.75
Water	497	0.3%	15.96
Total	**165,153**	**100%**	**$ 14.98**

- New capacity under construction of 29 GW of solar, 8 GW of wind and 7 GW natural gas, results in an "oversupply" of 66 GW (67%) above forecasted planning needs (2)
  - Adjusted for average performance (wind at 20% and solar at 40% of capacity), the generation stack has an oversupply of 10 GW (10%)
- Wind and solar represent 49% of the expected supply stack, or 22% adjusted for average performance
- Additional proposed capacity of 107 GW includes 26 GW of wind, 35 GW of solar and 34 GW natural gas
- The 7 GW of natural gas capacity wouldn't keep up with expected demand growth and margin requirements
- Retirement of most coal plants would eliminate any "real" oversupply and increase reliance on non-dispatchable power sources
- Obsolete thermal generation and excessive renewable generation investment could lead to restructuring needs

(1) Consistent with historical ERCOT reserve levels, ~15%
(2) Source: S&P CapIQ, ERCOT. Additions adjusted to include only the solar and wind capacity currently in early development or construction

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TURNAROUND AND RESTRUCTURING

generic crime of money laundering. Subsection (b) prohibits "us[ing] proceeds" of illegal activity to promote illegal activity. But the generic crime of money laundering prohibits only using such proceeds in a "financial transaction." 18 U.S.C. § 1956(a)(1)(A). Fakhuri says that difference means Subsection (b) does not categorically match 8 U.S.C. § 1101(a)(43)(D).[17]

[9] We disagree. As the BIA observed, jurisdictional elements are "ignored" during a categorical analysis. *Torres v. Lynch*, 578 U.S. 452, 473, 136 S.Ct. 1619, 194 L.Ed.2d 737 (2016). And the generic crime requires a "financial transaction" to establish a connection with "interstate or foreign commerce." *See* 18 U.S.C. § 1956(c)(4). Thus, the "financial transaction" element is merely a roundabout way of requiring that the crime affect interstate commerce. That's the classic example of a jurisdictional element, *see Torres*, 578 U.S. at 473, 136 S.Ct. 1619, so the BIA didn't err in failing to hold that it made Subsection (b) overbroad.

What's more, Fakhuri's claim fails because he has not shown that there is a "realistic probability" Tennessee would apply Subsection (b) to conduct that doesn't involve a financial transaction. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193, 127 S.Ct. 815, 166 L.Ed.2d 683 (2007). To do that, he "must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues." *Id.*[18] As the BIA once observed and is still true, Fakhuri hasn't identified such an example from another case. Nor has he ever attempted to explain why his case falls outside the bounds of the generic crime.[19] Hence, the BIA did not err in concluding that Subsection (b) was a categorical match with the generic crime of money laundering.

The petition for review is DISMISSED to the extent it raises unexhausted claims. It is otherwise DENIED.

IN RE: ULTRA PETROLEUM CORPORATION, Debtor,

Federal Energy Regulatory Commission, Appellant,

v.

Ultra Resources, Incorporated, Appellee.

No. 20-20623 consolidated with No. 21-20126

United States Court of Appeals, Fifth Circuit.

FILED March 14, 2022

Background: Chapter 11 debtor, an energy company, moved to reject its executory filed-rate contract with pipeline company that transported its natural gas. Pipeline company objected and asked court to refrain from issuing decision until proceedings could occur before the Federal Ener-

17. If he sought to advance any other explanations for why Subsection (b) is overbroad, he forfeited them "by failing to adequately brief [them]." *Rollins v. Home Depot USA*, 8 F.4th 393, 397 (5th Cir. 2021).

18. *See also United States v. Castillo-Rivera*, 853 F.3d 218, 223 (5th Cir. 2017) (en banc) (noting that there is "no exception" to the "requirement" that an alien point to an "actual case" involving nongeneric conduct).

19. Even if it did, he has forfeited that claim. *See Rollins*, 8 F.4th at 397.

gy Regulatory Commission (FERC). After inviting FERC to participate as party-in-interest but denying pipeline company's request, as well as FERC's motion for reconsideration, the United States Bankruptcy Court for the Southern District of Texas, Marvin Isgur, Chief Judge, granted debtor's motion, 621 B.R. 188, and also confirmed debtor's reorganization plan over FERC's objection. Pipeline company appealed order granting rejection motion. FERC appealed confirmation order. The District Court, Kenneth M. Hoyt, Senior District Judge, 2020 WL 7323356, granted debtor's motion for certification of direct appeal of rejection order to the Court of Appeals. FERC's petition for direct appeal of its companion appeal from confirmation order also was granted.

Holdings: The Court of Appeals, King, Circuit Judge, held that:

(1) the Fifth Circuit's statements in *In re Mirant Corp.*, 378 F.3d 511, concerning the consequences of rejection of a filed-rate contract in bankruptcy were not dicta;

(2) debtor's rejection of the subject contract was valid and did not undermine FERC's exclusive authority to set rates;

(3) while a bankruptcy court faced with a motion to reject a filed-rate contract must invite FERC to participate in the bankruptcy proceedings as a party-in-interest, there is no requirement that FERC be allowed to conduct a hearing before the court can decide on rejection; and

(4) rejection of filed-rate contract does not amount to a "rate change" requiring regulatory approval under the section of the Bankruptcy Code governing process for confirming reorganization plans.

Affirmed.

1. Bankruptcy ⚷3782

Where question at heart of bankruptcy case is one of law, the Court of Appeals, acting as a second court of review, reviews the question de novo.

2. Bankruptcy ⚷2041.1

Congress intended to grant comprehensive jurisdiction to bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with bankruptcy estate.

3. Bankruptcy ⚷3501

Chapter 11 of the Bankruptcy Code sets out the framework for restructuring a bankrupt business.

4. Bankruptcy ⚷3102.1, 3106

Under the Bankruptcy Code, one of the options available to a bankrupt business is the rejection of an "executory contract," that is, a contract in which performance remains due on both sides. 11 U.S.C.A. § 365(a).

See publication Words and Phrases for other judicial constructions and definitions.

5. Bankruptcy ⚷3102.1

Rejection of executory contracts is vital to basic purpose of Chapter 11 reorganization, because rejection can release debtor's estate from burdensome obligations that can impede successful reorganization. 11 U.S.C.A. § 365(a).

6. Bankruptcy ⚷3104, 3111

Rejection of executory contract is subject to bankruptcy court's approval and is generally considered by court under deferential "business judgment" standard. 11 U.S.C.A. § 365(a).

7. Bankruptcy ⚷3115.1

Rejection of an executory contract is a breach of contract, with the same effect as a breach outside bankruptcy. 11 U.S.C.A. § 365(a).

8. Bankruptcy ⚷3115.1

Rejection of executory contract by debtor leaves the counterparty to the contract with a claim against the estate for damages resulting from debtor's nonperformance, though, due to the nature of bankruptcy and the insolvency of debtor, such claim is rarely paid in full and the counterparty may receive only cents on the dollar. 11 U.S.C.A. § 365(a).

9. Commerce ⚷62.2
Gas ⚷1

Because business of transporting and selling natural gas is affected with public interest, Natural Gas Act grants Federal Energy Regulatory Commission (FERC) exclusive jurisdiction over transportation and sale of natural gas in interstate commerce for resale. Natural Gas Act § 1, 15 U.S.C.A. § 717(a).

10. Public Utilities ⚷123

Part of the responsibility of the Federal Energy Regulatory Commission (FERC) is to ensure that all rates charged by natural-gas companies are "just and reasonable." Natural Gas Act § 4, 15 U.S.C.A. § 717c(a).

11. Gas ⚷14.3(1)

All rates charged by natural-gas companies, even those arising from private contract negotiations, are "filed" with the Federal Energy Regulatory Commission (FERC), and cannot be modified or abrogated absent FERC's approval. Natural Gas Act § 4, 15 U.S.C.A. § 717c(c).

12. Gas ⚷2

Natural Gas Act (NGA) is in all material respects substantially identical to the Federal Power Act (FPA). Natural Gas Act, § 1 et seq., 15 U.S.C.A. § 717 et seq; Federal Power Act, §§ 1 et seq., 321, 16 U.S.C.A. §§ 792 et seq., 791a.

13. Electricity ⚷1
Gas ⚷2

Because the Natural Gas Act (NGA) is in all material respects substantially identical to the Federal Power Act (FPA), courts follow the established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes. Natural Gas Act, § 1 et seq., 15 U.S.C.A. § 717 et seq; Federal Power Act, §§ 1 et seq., 321, 16 U.S.C.A. §§ 792 et seq., 791a.

14. Gas ⚷14.3(1), 14.5(1)

Natural Gas Act (NGA) requirement that the Federal Energy Regulatory Commission (FERC) approve any changes to a filed rate applies not only to the parties to the contract, but also to the courts; the "filed rate doctrine" prevents both parties and courts from modifying the filed rate contained in a tariff. Natural Gas Act § 4, 15 U.S.C.A. § 717c(c).

15. Public Utilities ⚷119.1

When the Federal Energy Regulatory Commission (FERC) is considering whether to change a filed rate, it follows the *Mobile-Sierra* doctrine, 76 S.Ct. 368, 76 S.Ct. 373, and will change a rate only if the existing contract adversely affects the public interest. Natural Gas Act § 4, 15 U.S.C.A. § 717c(c).

16. Public Utilities ⚷119.1

Federal Energy Regulatory Commission (FERC) may not modify filed rate simply because party finds continued performance unprofitable. Natural Gas Act § 4, 15 U.S.C.A. § 717c(c).

17. Bankruptcy ⚷3105.1
Public Utilities ⚷183

Bankruptcy court may authorize rejection of a filed-rate contract; the power of the court to do so does not conflict with authority given to Federal Energy Regulatory Commission (FERC) to regulate rates. 11 U.S.C.A. § 365(a); Natural Gas Act § 4, 15 U.S.C.A. §§ 717c(a), 717c(c).

18. Bankruptcy ⚷3115.1

Public Utilities ⚷170

Rejection of filed-rate contract in bankruptcy is not collateral attack upon contract's filed rate because that rate is given full effect when determining breach-of-contract damages resulting from rejection. 11 U.S.C.A. § 365(a); Natural Gas Act § 4, 15 U.S.C.A. §§ 717c(a), 717c(c).

19. Bankruptcy ⚷3110.1

In ruling on rejection motion concerning a power contract, bankruptcy courts must consider whether rejection harms public interest or disrupts supply of energy, and must weigh those effects against contract's burden on bankrupt estate. 11 U.S.C.A. § 365(a).

20. Bankruptcy ⚷3110.1

With respect to rejection of a filed-rate contract in bankruptcy, the Fifth Circuit's decision in *In re Mirant Corp.*, 378 F.3d 511, balances the interests of the bankruptcy courts, which are ultimately in charge of the rejection decision, and the Federal Energy Regulatory Commission (FERC) by requiring that rejection of a filed-rate contract be considered under a higher standard that considers the public interest and by allowing FERC to participate in the bankruptcy proceedings. 11 U.S.C.A. § 365(a).

21. Bankruptcy ⚷3115.1

Public Utilities ⚷171

Following rejection of a filed-rate contract in bankruptcy, Federal Energy Regulatory Commission (FERC) cannot require continued performance on the rejected contract. 11 U.S.C.A. § 365(a).

22. Courts ⚷90(2)

One panel of the Court of Appeals may not overrule another.

23. Courts ⚷92

Court of Appeals' statements in *In re Mirant Corp.*, 378 F.3d 511, concerning the consequences of rejection of a filed-rate contract in bankruptcy were not dicta, even though no filed-rate contract was ever rejected in *Mirant*; given procedural history of case, language in question was necessary to *Mirant* court's holding, as bankruptcy court had concluded that it had both authority to authorize debtor-energy company to reject the contract and power to enjoin Federal Energy Regulatory Commission (FERC) post-rejection, district court denied motion to reject and vacated bankruptcy court's injunctive relief, debtor appealed both of district court's orders, and Court of Appeals answered each question, thus addressing not only whether contract could be rejected, but also consequences of rejection and scope of injunctive relief that could be issued by bankruptcy court following rejection. 11 U.S.C.A. § 365(a).

24. Courts ⚷92

Court's statement is not "dictum" if it is necessary to the result or constitutes an explication of the governing rules of law.

See publication Words and Phrases for other judicial constructions and definitions.

25. Courts ⚷92

Court's statement is "dictum" if it could have been deleted without seriously impairing the analytical foundations of the holding and, being peripheral, may not have received the full and careful consideration of the court that uttered it.

See publication Words and Phrases for other judicial constructions and definitions.

26. Bankruptcy ⚷2014
Courts ⚷96(7)

Court of Appeals is always chary to create circuit split and doubly so in context of bankruptcy, where uniformity is sufficiently important that Constitution authorizes Congress to establish uniform laws on subject of bankruptcies throughout United States. U.S. Const. art. 1, § 8, cl. 4.

27. Bankruptcy ⚷3105.1
Public Utilities ⚷170, 183

District court and, by extension, bankruptcy court has power to authorize rejection of filed-rate contract, and such rejection does not conflict with authority given to Federal Energy Regulatory Commission (FERC) to regulate rates; because such rejection would only have indirect effect upon filed rate, it is not collateral attack upon that contract's filed rate that is prohibited outside of hearing before FERC, so long as rejection is based on other reasons beyond fact that debtor would like to pay lower rate, since either modification of rate or full abrogation of agreement requires FERC's approval. 11 U.S.C.A. § 365(a).

28. Bankruptcy ⚷3110.1
Gas ⚷9

Chapter 11 debtor-energy company's rejection of its executory filed-rate contract with the pipeline company that transported its natural gas was valid and did not undermine the exclusive authority of the Federal Energy Regulatory Commission (FERC) to set rates; the Bankruptcy Court considered and granted debtor's motion to reject not under the normal business judgment standard, but under a higher standard that explicitly considered the public interest, debtor's rejection of the contract did not collaterally attack the rate filed with FERC because the rate was still used to set the damage award that pipeline company was entitled to after rejection, and debtor did not seek to reject the contract because the rates were excessive and it was seeking to secure a lower rate but, instead, wanted out of the contract altogether given its suspension of its drilling program and its nonuse of the volume reservation on the pipeline. 11 U.S.C.A. § 365(a); Natural Gas Act § 4, 15 U.S.C.A. §§ 717c(a), 717c(c).

29. Bankruptcy ⚷3110.1

Use of a higher standard than the business judgment standard, namely, a standard that includes consideration of the public interest, is required before rejection of filed-rate contract can be approved by the bankruptcy court. 11 U.S.C.A. § 365(a).

30. Bankruptcy ⚷3110.1

In applying higher standard that takes into account the public interest in determining whether the equities favor rejecting a filed-rate contract, the bankruptcy court must ensure that rejection of such contract does not cause any disruption in supply of electricity, natural gas, or whatever regulated commodity is subject of contract under consideration. 11 U.S.C.A. § 365(a).

31. Bankruptcy ⚷3110.1, 3117

Although consideration of the public interest is required before a filed-rate contract can be rejected in bankruptcy, it is courts, not the Federal Energy Regulatory Commission (FERC), that should carefully scrutinize the impact of rejection upon the public interest; accordingly, while a bankruptcy court must invite FERC to participate in the bankruptcy proceedings as a party-in-interest, there is no requirement that FERC be allowed to conduct a hearing before the court can decide on rejection. 11 U.S.C.A. § 365(a).

32. Bankruptcy ⚷3115.1, 3549

Rejection of filed-rate contract in bankruptcy does not amount to a "rate change" under the section of the Bankruptcy Code governing the process for confirming reorganization plans, which provides that a reorganization plan can be confirmed only if any governmental regulatory commission with jurisdiction, after plan confirmation, over rates of debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval; an impermissible rate change occurs only if the actual filed rate found in the contract is changed, not when, in the case of a rejected contract, the damages calculation from the rejection of the contract is based upon the filed rate. 11 U.S.C.A. §§ 365(a), 1129(a)(6).

See publication Words and Phrases for other judicial constructions and definitions.

Appeal from the United States Bankruptcy Court for the Southern District of Texas, USBC No. 20-32631, Marvin P. Isgur, U.S. Bankruptcy Judge, Kenneth M. Hoyt, U.S. District Judge

Jeffrey A. Lamken, Lucas M. Walker, Lauren Marguerite Weinstein, MoloLamken, L.L.P., Washington, DC, Lauren F. Dayton, Mark W. Kelley, Molo Lamken, L.L.P., New York, NY, Scott Ediger, Federal Energy Regulatory Commission, Washington, DC, for Appellant.

George W. Hicks, Jr., C. Harker Rhodes, IV, Kirkland & Ellis, L.L.P., Washington, DC, for Appellee.

Kenneth W. Irvin, Sidley Austin, L.L.P., Washington, DC, for Amicus Curiae Rockies Express Pipeline, L.L.C.

Scott A. Brister, Esq., Hunton Andrews Kurth, L.L.P., Austin, TX, for Amicus Curiae Rover Pipeline, L.L.C.

Before KING, GRAVES, and HO, Circuit Judges.

KING, Circuit Judge:

We are asked to determine whether Ultra Resources, Inc.'s rejection of a filed-rate contract in bankruptcy relieves it of its obligation to continue performance absent the approval of FERC (the Federal Energy Regulatory Commission). We are also asked to consider whether, under 11 U.S.C. § 1129(a)(6), the bankruptcy court was required to obtain the approval of FERC before confirming Ultra Resources's reorganization plan. We hold that under the particular circumstances presented here, Ultra Resources is not subject to a separate public-law obligation to continue performance of its rejected contract, and that 11 U.S.C. § 1129(a)(6) did not require the bankruptcy court to seek FERC's approval before it confirmed Ultra Resource's reorganization plan. We therefore AFFIRM.

I.

Ultra Resources, Inc. ("Ultra") is an energy company whose primary business is the production of natural gas. It contracted with Rockies Express Pipeline LLC ("REX") to reserve space on REX's pipeline for Ultra's natural gas. Under the contract, Ultra would pay a monthly reservation charge to reserve a certain amount of space in the pipeline, regardless of how much gas it actually shipped (or even if it ultimately shipped no gas). The contract was made in the shadow of REX's application to FERC to construct a new pipeline, and Ultra was one of the "anchor shippers" whose commitments partially induced REX to construct its pipeline.

The original agreement between Ultra and REX was made in 2008. In 2016, after Ultra failed a creditworthiness check, REX sued for damages in Texas state court and asserted that the contract had been terminated based on Ultra's failure to meet creditworthiness requirements. Ultra then filed for Chapter 11 bankruptcy, and Ultra and REX settled REX's contract claim. Ultra and REX also agreed to a new contract which is the subject of the instant case. The new agreement was slated to run from 2019 until 2026, and reserved space on the REX pipeline for Ultra's natural gas at a rate of $169 million over the life of the agreement—a price Ultra was required to pay whether or not it used the pipeline. Shortly before this new agreement went into effect, Ultra suspended its drilling program; it later filed again for Chapter 11 bankruptcy. Anticipating the bankruptcy filing, REX had previously petitioned FERC for a declaration that Ultra could not reject the contract between Ultra and REX without FERC's approval; Ultra filed for bankruptcy before FERC issued a decision.

As part of the bankruptcy proceedings, Ultra sought permission from the bankruptcy court to reject its natural gas shipping contract with REX. REX objected and requested that the bankruptcy court refrain from issuing a decision until proceedings could occur before FERC, which would decide whether rejecting the contract was in the public interest, arguing that FERC had exclusive authority to decide whether Ultra should be relieved of its obligations under the filed-rate contract with REX. The bankruptcy court denied that request, but asked FERC to "participate as a party-in-interest in" the bankruptcy proceedings and "comment on whether the rejection of [the contract] would harm the public interest."

FERC responded by filing a motion for reconsideration with the bankruptcy court, arguing that proceedings before FERC were required because FERC could only speak through its orders, occurring after said proceedings, and could not comment on the public interest through counsel in the bankruptcy proceedings. The bankruptcy court denied FERC's motion. Following an evidentiary hearing (which FERC ultimately participated in through counsel), the bankruptcy court authorized Ultra to reject its contract with REX. In its opinion, the bankruptcy court stated that: (1) it had the authority to approve rejection of the contract under our precedent in *In re Mirant Corp.*, 378 F.3d 511 (5th Cir. 2004); (2) even giving the rejection question heightened scrutiny and considering the effect on the public interest, as required under *Mirant*, rejection was still appropriate as it would not harm the supply of natural gas and would significantly benefit Ultra's estate; (3) any concerns that rejection would allow Ultra to "free ride" on the pipeline and "still be able to ship natural gas along the REX pipeline, only for substantially less than the cost imposed under [the contract]" were a result of FERC's regulations, not rejection itself, and did not counsel against allowing Ultra to reject the contract; and (4) rejection "neither modif[ied] nor abrogate[d] the [contract]" and therefore did not amount to a rate change requiring approval under 11 U.S.C. § 1129(a). The bankruptcy court also confirmed Ultra's reorganization plan over FERC's objection.

II.

[1] The question at the heart of this case is one of law and therefore is reviewed de novo. *In re Glenn*, 900 F.3d 187, 189 (5th Cir. 2018). That question concerns a clash of two congressionally constructed titans, FERC and the bankruptcy courts. Congress has imbued each entity with a significant wellspring of authority.

[2–8] The bankruptcy court's power derives from the Bankruptcy Code. "Congress intended to grant comprehensive jurisdiction to bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate." *Celotex Corp. v. Edwards*, 514 U.S. 300, 308, 115 S.Ct. 1493, 131 L.Ed.2d 403 (1995). Specifically, Chapter 11 sets out the framework for restructuring a bankrupt business. *In re Mirant Corp.*, 378 F.3d 511, 517 (5th Cir. 2004). One of the options available to a bankrupt business is the rejection of an executory contract—that is, a contract in which performance remains due on both sides. 11 U.S.C. § 365(a); *Mirant*, 378 F.3d at 518 n.3. Rejection of contracts "is vital to the basic purpose of a Chapter 11 reorganization, because rejection can release the debtor's estate from burdensome obligations that can impede a successful reorganization." *Mirant*, 378 F.3d at 517 (quoting *In re Nat'l Gypsum Co.*, 208 F.3d 498, 504 (5th Cir. 2000)). Rejection is subject to the bankruptcy court's approval and is generally considered by the court under the deferential "business judgment" standard. *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, ––– U.S. ––––, 139 S. Ct. 1652, 1658, 203 L.Ed.2d 876 (2019). The rejection of an executory contract is a breach of contract, with "the same effect as a breach outside bankruptcy." *Id.* at 1666. Rejection leaves the counterparty to the contract with "a claim against the estate for damages resulting from the debtor's nonperformance." *Id.* at 1658. Due to the nature of bankruptcy and the insolvency of the debtor, however, this claim is rarely paid in full and the counterparty "may receive only cents on the dollar." *Id.* Additionally relevant to the Chapter 11 reorganization process described herein is 11 U.S.C. § 1129(a)(6), which states that a reorganization plan can be confirmed only if "[a]ny governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval."

[9–16] Next, because "the business of transporting and selling natural gas . . . is affected with a public interest," 15 U.S.C. § 717(a), the Natural Gas Act grants FERC "exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale," *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300–01, 108 S.Ct. 1145, 99 L.Ed.2d 316 (1988). Part of FERC's responsibility is to ensure that all rates charged by natural-gas companies are "just and reasonable." 15 U.S.C. § 717c(a). All rates, even those arising from private contract negotiations, are "filed" with FERC, 15 U.S.C. § 717c(c), and cannot be modified or abrogated absent FERC's approval, *see Mirant*, 378 F.3d at 518.[1] The requirement that FERC approve any changes to a filed rate applies not only to the parties to the contract, but also to the courts—the "filed rate doctrine" prevents both parties *and* courts from modifying the filed rate contained in a tariff. *Id.* When FERC is considering whether to change a filed rate, it follows the *Mobile-Sierra* doctrine, and will change a rate only if the existing contract "adversely affect[s] the public interest." *Fed. Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348, 355, 76 S.Ct. 368,

1. Although *Mirant* considered a power contract regulated by FERC under the Federal Power Act (FPA), the Natural Gas Act is "in all material respects substantially identical." *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7, 101 S.Ct. 2925, 69 L.Ed.2d 856 (1981) (quoting *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 353, 76 S.Ct. 368, 100 L.Ed. 388 (1956)). Courts "therefore follow [the] established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes." *Id.*

100 L.Ed. 388 (1956); *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 344–45, 76 S.Ct. 373, 100 L.Ed. 373 (1956). FERC may not modify a filed rate simply because a party finds continued performance unprofitable. *See Mirant*, 378 F.3d at 518.

III.

It is also important to note that this is not the first time these two titans have clashed. Instead, today's battlefield lies in the shadow of our precedent in *In re Mirant Corp.*, 378 F.3d 511 (5th Cir. 2004). In that case, our court considered "whether a district court may authorize the rejection of an executory contract for the purchase of electricity as part of a bankruptcy reorganization, or whether Congress granted [FERC] exclusive jurisdiction over those contracts." *Mirant*, 378 F.3d at 514. The *Mirant* court answered yes to the question regarding rejection of an executory contract, *id.*, and FERC does not dispute that holding. The question faced by the *Mirant* court arose in a similar context to the instant case. After Mirant filed for Chapter 11 bankruptcy, it sought to reject an electricity-purchase agreement. *Id.* at 515–16. The contract included filed rates that could only be modified by FERC. *Id.* at 515. The bankruptcy court found that it could reject the contract not withstanding FERC's regulatory authority, and additionally enjoined FERC from not only enforcing the specific contract at issue, but also acting in any way to enforce "all of Mirant's wholesale electric contracts" without ten days' notice. *Id.* at 516. The district court then withdrew the reference to the bankruptcy court and found that "the Bankruptcy Code does not provide an exception to FERC's authority . . . and that Mirant must seek relief from the filed rate . . . in a FERC proceeding." *Id.* The district court therefore denied the motion to reject the contract and "vacated the bankruptcy court's injunctive relief because it would interfere with the performance of FERC's regulatory oversight functions." *Id.* at 516–17.

Our court first acknowledged that "FERC has the exclusive authority to determine wholesale rates" and that any attempt to "modify the rates" or "abrogate [the contract]" would have to go through FERC. *Id.* at 519. However, we distinguished the action in the bankruptcy court because "Mirant's *rejection* of the [contract] is a *breach* of that contract" and FERC does not have exclusive authority over a breach of contract claim; "[w]hile the FPA does preempt breach of contract claims that challenge a filed rate, the district courts are permitted to grant relief in situations where the breach of contract claim is based upon another rationale." *Id.* Thus, rejection was allowed since rejection "would only have an indirect effect upon the filed rate" and the "unsecured claim against the bankruptcy estate would be based upon . . . the *filed rate*." *Id.* at 519–20. Rejection therefore was not a challenge to the filed rate that was under the exclusive jurisdiction of FERC. This was so even though part of the reason Mirant sought rejection was that the rate was too high, as Mirant additionally stated "it [did] not need the electricity purchased under the [contract] to fulfill its obligations to supply electricity." *Id.* at 520.

Our court additionally based its holding that rejection of a power contract was allowed on the fact that "[t]he Bankruptcy Code does not . . . include an exception prohibiting rejection of, or providing other special treatment for, wholesale electric contracts subject to FERC jurisdiction." *Id.* at 521. This lack of an exception signaled a congressional intent to permit rejection since other areas featured "specific limitations on and exceptions to the

§ 365(a) general rejection authority." *Id.* at 521; *see also NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 522–23, 104 S.Ct. 1188, 79 L.Ed.2d 482 (1984) ("Obviously, Congress knew how to draft an exclusion for collective-bargaining agreements when it wanted to; its failure to do so in this instance indicates that Congress intended that § 365(a) apply to all collective-bargaining agreements covered by the NLRA.").

We also rejected FERC's argument that the bankruptcy court needed to ensure that Mirant paid "the full amount of any damages resulting from the breach" because any other result would represent a challenge to the filed rate. *Mirant*, 378 F.3d at 520. We stated that payment of less than the full damages amount would be "entirely dependent upon Mirant's bankrupt status" and the fact that the amount ultimately paid would "depend solely upon the terms applicable to the unsecured creditors as a class under the reorganization plan" and not from the act of "rejection itself." *Id.* at 520–21.

Our court then considered the scope of the district court and bankruptcy court's injunctive power over FERC since "the district court also vacated all of the injunctive relief that the bankruptcy court entered." *Id.* at 522. We stated: "We recognize that some injunctive relief is necessary to bring finality to Mirant's rejection decisions and allow the reorganization process to proceed, but the injunctive relief as previously entered [by the bankruptcy court] was overly broad." *Id.* at 522–23. Our court accepted that a limited injunction was appropriate under 11 U.S.C. § 105(a) because "[t]he concern that the bankruptcy court expressed—that FERC could negate Mirant's rejection of an executory power contract by ordering Mirant to continue performing under the terms of the rejected contract—is certainly a legitimate basis for injunctive relief." *Id.* at 523. However, we also noted that a bankruptcy court's power under § 105(a) is limited and should be used sparingly; therefore, the bankruptcy court exceeded its authority because it "attempted to accomplish the narrow goal of protecting Mirant's right to reject executory contracts by prohibiting FERC from taking *any* action" against Mirant. *Id.* at 524. Instead, any injunction had to be limited to protecting Mirant from FERC's attempts to compel Mirant to perform under the particular contract that the court enabled Mirant to reject.

We last considered the standard a court should use when deciding whether to approve rejection of a power contract. We stated that "Supreme Court precedent supports applying a more rigorous standard" than the normal business judgment standard. *Id.* In addition, "[u]se of the business judgment standard would be inappropriate in this case because it would not account for the public interest inherent in the transmission and sale of electricity." *Id.* at 525. We thus recommended that the district court or bankruptcy court, on remand, should "carefully scrutinize the impact of rejection upon the public interest and should . . . ensure that rejection does not cause any disruption in the supply of electricity to other public utilities or to consumers." *Id.* We further counseled that the courts should "welcome FERC's participation," which the bankruptcy court had already signaled it would, by "includ[ing] FERC as a party in interest for all purposes." *Id.* at 525–26.

[17–19] In summary, *Mirant* teaches the following. First, "the power of the [bankruptcy] court to authorize rejection of [a filed-rate contract] does not conflict with the authority given to FERC to regulate rates." *Id.* at 518. Second, and related, rejection "is not a collateral attack upon [the] contract's filed rate because that rate is given full effect when determining the breach of contract damages resulting from the rejection." *Id.* at 522. Third, in ruling on a rejection motion, bankruptcy courts must consider whether rejection harms the public interest or disrupts the supply of energy, and must weigh those effects against the contract's burden on the bankrupt estate. *Id.* at 525.

IV.

[20–22] In light of *Mirant*, then, what FERC casts as a pitched battle is actually a settled truce. *Mirant* balances the interests of the bankruptcy courts (which are ultimately in charge of the rejection decision) and FERC (by requiring that rejection of a filed-rate contract is considered under a higher standard that considers the public interest and by allowing FERC to participate in the bankruptcy proceedings). As a panel of this court, we are bound by our precedent in *Mirant*, which holds that a bankruptcy court can authorize rejection of a filed-rate contract, and that, post-rejection, FERC cannot require continued performance on the rejected contract. "It is well-established in this circuit that one panel of this Court may not overrule another." *United States v. Segura*, 747 F.3d 323, 328 (5th Cir. 2014) (quoting *Cent. Pines Land Co. v. United States*, 274 F.3d 881, 893 (5th Cir. 2001)). We are not permitted to stray from *Mirant*'s holding even if we were so inclined (which we are not).

[23–25] As stated earlier, FERC has no quarrel with the proposition that *Mirant* allows a bankruptcy court to approve rejection of a filed-rate contract. FERC, however, argues that any statements in *Mirant* about the consequences of such a rejection (including the statement that FERC could not enforce full performance and payment under a rejected contract) were dicta. However, that portion of the *Mirant* decision was not dicta, and it controls here. We have previously stated that "[a] statement is not dictum if it is necessary to the result or constitutes an explication of the governing rules of law." *Segura*, 747 F.3d at 328 (quoting *Int'l Truck & Engine Corp. v. Bray*, 372 F.3d 717, 721 (5th Cir. 2004)). By contrast, "[a] statement is dictum if it could have been deleted without seriously impairing the analytical foundations of the holding and being peripheral, may not have received the full and careful consideration of the court that uttered it." *Id.*

The language in *Mirant* regarding the effects of rejection, and a bankruptcy court's powers if it approves rejection of a filed-rate contract, is the former; that is, it was necessary to our holding in *Mirant.* We can glean so first from the procedural history of *Mirant.* FERC puts great weight on the fact that no filed-rate contract was ever rejected in *Mirant*, and that therefore any commentary on FERC's regulatory authority post-rejection was not essential to *Mirant*'s holding. However, FERC's argument arises from an incomplete recounting of the facts facing us in *Mirant.* When considered in context, the single fact that no contract was ever actually rejected buckles under the weight that this argument asks it to bear.

Mirant came to our court after consideration by two separate courts—the bankruptcy court and the district court. The bankruptcy court concluded that "it had the power to enjoin FERC" as well as "the authority to authorize Mirant to reject" the contract. *Mirant*, 378 F.3d at 516. In addition, the bankruptcy court had issued an injunction that prevented FERC from taking any action to compel Mirant to honor not only the contract for which it was seeking rejection, but any of Mirant's wholesale electric contracts. *Id.*

The district court then found that neither it nor the bankruptcy court had the authority to reject a filed-rate contract. The court therefore denied the motion to reject *and* "vacated the bankruptcy court's injunctive relief because it would interfere with the performance of FERC's regulatory oversight functions." *Id.* at 516–17.

Mirant "appeal[ed] *each* of the district court's orders." *Id.* at 517 (emphasis added). And in the decretal language of our opinion, we made clear that we had answered each question: the "portion of the district court's order dismissing [the] case for lack of jurisdiction to authorize the rejection . . . [was] REVERSED" while "the portion of that order vacating the bankruptcy court's injunctive relief [was] AFFIRMED," and the case was "REMANDED to the district court for proceedings not inconsistent with [the] opinion"—the entirety of the opinion. *Mirant*, 378 F.3d at 526. Therefore, the questions before us in *Mirant* were not only whether the contract could be rejected, but also the consequences of that rejection and the scope of the injunctive relief that could be issued by the bankruptcy court following that rejection. *Mirant*'s answer to that question—that the bankruptcy court had the power to enjoin FERC from enforcing the rejected contract, but did not have the authority to issue an injunction preventing FERC from taking *any* action pursuant to its broad regulatory power—was not dicta.

Instead, that language was essential to our holding in *Mirant.* First and foremost, the language regarding the division of authority between the bankruptcy courts and FERC was "an explication of the governing rules of law." *Segura*, 747 F.3d at 328 (quoting *Int'l Truck*, 372 F.3d at 721). In *Mirant*, we were deciding: (1) whether a filed-rate utility contract could be rejected; (2) if so, what rules of law governed that rejection; and (3) the bankruptcy court's authority to enforce that rejection. Analysis of the effects that rejection would have cannot be "deleted without seriously impairing the analytical foundations of the holding." *Id.* (quoting *Int'l Truck*, 372 F.3d at 721). The consequences of rejection of a filed-rate contract are central to the decision to allow rejection of said contracts, and the governing rules of law related to those consequences required explication; that discussion was not dicta.

Otherwise, should the bankruptcy court or district courts have rejected the contract, they would have been left adrift when considering how to enforce that rejection thereafter. Could either court issue the same widespread, near-all-encompassing injunction that the bankruptcy court had previously enacted? Were they blocked from issuing any injunction at all? Or was the answer somewhere in between? Knowing that the case would be remanded, it was of paramount importance that we establish the proper bounds of authority. We did so, notably picking the middle road—that some injunctive relief was proper to "bring finality to Mirant's rejection decisions and allow the reorganization process to proceed," but that an injunction implicating any regulatory action taken by FERC (as had been "previously entered") was "overly broad." *Mirant*, 378 F.3d at 522–23. Having "provid[ed] guidance on remand," we then "l[eft] the task of crafting the language of [the] injunctive relief . . . to the bankruptcy court." *Id.* at 522. Those words of guidance were not merely suggestions, but instructions the bankruptcy court was required to follow. *See Harris v. Sentry Title Co.*, 806 F.2d 1278, 1280 n.1 (5th Cir. 1987) (concluding that guidance directed to the parties and district court on remand "may not be summarily dismissed as dictum"); *Cole Energy Dev. Co. v. Ingersoll-Rand Co.*, 8 F.3d 607, 609 (7th Cir. 1993) ("[E]xplicit rulings on issues that were before the higher court and explicit directives by that court to the lower court concerning proceedings on remand are not dicta.").

Moreover, our determination in *Mirant* that rejection has only an "indirect effect upon the filed rate" and "is not a collateral attack upon [the filed rate]" was a necessary prerequisite to our holding that a debtor can reject a filed-rate contract in bankruptcy. *Id.* at 519–20, 522. FERC would only have authority to enforce continued performance if rejection challenged the filed rate and represented an attempt to change the filed rate itself, since the filed-rate doctrine provides that "courts lack authority to impose a different rate than the one approved by [FERC]." *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 578, 101 S.Ct. 2925, 69 L.Ed.2d 856 (1981). Since *Mirant* clearly holds that rejection of a contract is not a collateral attack on the filed rate, FERC does not have the authority to compel continued performance and continued payment of the filed rate after a valid rejection.

We finally note that the above approach is not just the *Mirant* approach—it is also the *FirstEnergy* approach. The Sixth Circuit independently reached the same result as we did in *In re FirstEnergy Solutions Corp.*, 945 F.3d 431 (6th Cir. 2019). In doing so, the Sixth Circuit also viewed *Mirant*'s language regarding FERC's authority post-rejection as binding. It stated that "[f]ully and properly applied, *Mirant* teaches that once the bankruptcy court determined that the anticipated FERC action would directly interfere with [the debtor's] request to reject the contracts, 11 U.S.C. § 105(a) gave it the power to enjoin FERC from issuing any such contradictory order." *Id.* at 451. The Sixth Circuit also specifically rejected the argument that payment of a filed-rate is a public-law obligation that survives rejection. *Id.*

[26] "We are always chary to create a circuit split" and doubly so "in the context of bankruptcy, where uniformity is sufficiently important that our Constitution authorizes Congress to establish 'uniform laws on the subject of bankruptcies throughout the United States.' " *In re Ultra Petroleum Corp.*, 943 F.3d 758, 763–64 (5th Cir. 2019) (first quoting *United States v. Graves*, 908 F.3d 137, 142 (5th Cir. 2018), then quoting *In re Marciano*, 708 F.3d 1123, 1135 (9th Cir. 2013) (Ikuta, J., dissenting)). To view *Mirant* in the manner that FERC asks us and then hold that payment of a filed rate is still required even if a contract is rejected would create just such a circuit split. We decline to do so.

[27] Given that it is clear that the challenged language in *Mirant* is binding, the result of this case is straight forward. A district court (and, by extension, a bankruptcy court) has the "power . . . to authorize rejection of" a filed-rate contract and such rejection "does not conflict with the authority given to FERC to regulate rates." *Mirant*, 378 F.3d at 518. Because such a rejection "would only have an indirect effect upon the filed rate," *id.* at 519–20, it is "not a collateral attack upon that contract's filed rate" that is prohibited outside of a hearing before FERC. *Id.* at 522. That is true so long as the rejection is based on other reasons beyond the fact that the debtor would like to pay a lower rate (as is the case here), since either modification of the rate or full abrogation of the agreement requires FERC's approval. *Id.* at 519.

[28] Each element is satisfied here. The bankruptcy court considered and granted rejection of the contract. That rejection did not collaterally attack the rate filed with FERC because the rate was still used to set the damage award that REX (the creditor) was entitled to after rejection. Ultra (the debtor) did not seek to reject the contract because the rates were excessive (which would represent a prohibited collateral attack on the rate itself). Instead, Ultra has "suspended its drilling program[,] . . . has never shipped natural gas on the REX pipeline" under the current contract, and has been "releas[ing] its REX pipeline capacity to other natural gas shippers." Ultra is not just seeking to secure a lower rate, but instead wants out of the contract altogether, given the suspension of its drilling program and its nonuse of the volume reservation. That rejection is valid, and, under *Mirant*, does not undermine FERC's exclusive authority to set rates.

[29, 30] In addition, the bankruptcy court did not consider rejection under the normal business judgment standard, but instead explicitly considered the public interest in reaching its decision. In applying this higher standard, the bankruptcy court stated it was employing "*Mirant* Scrutiny." We agree with the bankruptcy court that *Mirant* requires consideration of the public interest before rejection of a filed-rate contract can be approved but, to dispel any confusion, we again reiterate that the use of a higher standard is required. A court must determine whether "the equities balance in favor of rejecting" the filed-rate contract. *Mirant*, 378 F.3d at 525 (quoting *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 526, 104 S.Ct. 1188, 79 L.Ed.2d 482 (1984)). Specifically, a court must "ensure that rejection does not cause any disruption in the supply of electricity," natural gas, or whatever regulated commodity is the subject of the contract under consideration. *Id.* Because the bankruptcy court did so here, its rejection decision was proper.

V.

[31] FERC advances two additional arguments for why the bankruptcy court's rejection decision was improper. It first argues that *Mirant* requires a bankruptcy court to allow FERC to comment on the public-interest ramifications of rejecting a filed-rate contract, and that because FERC "is a deliberative body that speaks through its orders," *ANR Pipeline Co. Columbia Gas Transmission, LLC*, 173 FERC ¶ 61,131 (2020), the only way to satisfy that requirement is for FERC to conduct full proceedings before the Commission. However, *Mirant* does not include such a requirement. As stated above, *Mirant* does indeed require consideration of the public interest before a filed-rate contract can be rejected. But *Mirant* makes clear that "*courts* should carefully scrutinize the impact of rejection upon the public interest," not FERC. *Mirant*, 378 F.3d at 525 (emphasis added). We further noted that "the bankruptcy court ha[d] already indicated that it would include FERC as a party in interest for all purposes in this case" and "presume[d] that the district court would also welcome FERC's participation, if this case is not referred back to the bankruptcy court." *Id.* at 525–26. That way, "FERC [would] be able to assist *the court* in balancing these equities." *Id.* at 526 (emphasis added).

Nothing in that language can be read as requiring a bankruptcy court to allow FERC to conduct a hearing before the court can decide on rejection. To be sure, FERC's insight is highly beneficial when a court is weighing the complex and interwoven questions at the heart of the decision of whether to reject a filed-rate contract. Therefore, to again avoid the risk that our statements in *Mirant* are read as mere recommendations, rather than commands, we make clear here that a bankruptcy court must invite FERC to participate in the bankruptcy proceedings as a party-in-interest. Whether FERC ultimately decides to participate is up to it, but the court must at least extend the invitation. The bankruptcy court did so here, welcoming FERC to participate as a party-in-interest, which FERC ultimately did. The requirements of *Mirant* were satisfied.

In addition, under the circumstances presented by this case, we decline to expand beyond our dictates in *Mirant* by requiring a bankruptcy court to halt its progress and allow FERC to hold a hearing on the public-interest ramifications of the rejection of a filed-rate contract. We fully recognize the expertise FERC has to offer and the importance of ensuring that expertise is considered when rejection of a filed-rate contract is being contemplated. However, in a Chapter 11 bankruptcy, time is of the essence and delay drains the coffers of all involved (except, of course, for those of the lawyers who would be paid to hurry up and wait). *See* Volume G Collier on Bankruptcy App. Pt. 44–590 (Richard Levin & Henry J. Sommer eds., 16th ed. 2021) ("An oft-cited goal of Chapter 11 is to encourage swift and successful reorganizations with lower transaction costs."); James J. White, *The Virtue of Speed in Bankruptcy Proceedings*, 40 L. Quad. Notes, no. 3, 1997, at 76, 79 ("Speed is an antidote to many of the substantive ills in Chapter 11. That speed will benefit not only secured creditors, but unsecured creditors as well."). The current approach balances the benefits of providing the bankruptcy court with FERC's insight with the necessity for swift and efficient bankruptcy proceedings.

[32] FERC last argues that the bankruptcy court erred because the rejection of the REX contract amounted to a rate change, and its inclusion in Ultra's confirmed reorganization plan violated 11 U.S.C. § 1129(a)(6). 11 U.S.C. § 1129(a)(6) states that a reorganization plan cannot be confirmed unless "[a]ny governmental regulatory commission with jurisdiction ... over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval." FERC asserts that a rate change has occurred because Ultra will not actually pay the full amount owed on the contract after it is rejected.

However, we made clear in *Mirant* that an impermissible rate change occurs only if the actual filed rate found in the contract is changed. Such a change does not occur here because "the damages calculation from the rejection of [the] contract ... is based upon the filed rate." *Mirant*, 378 F.3d at 520. FERC in fact made a variation of its § 1129(a)(6) argument to us when we were deciding *Mirant*, asserting that "anything less than full payment would constitute a challenge to the filed rate." That argument did not carry the day then, and does not carry the day now. We previously held that "any effect on the filed rates from a motion to reject would result not from the rejection itself, but from the application of the terms of a confirmed reorganization plan to the unsecured breach of contract claims." *Id.* at 521. We therefore made clear that the filed rate itself is separate from full payment of that rate. Since the bankruptcy court did not change the actual rate and used it to calculate the damages claim that would result from rejection of the contract, the confirmation of the reorganization plan did not violate 11 U.S.C. § 1129(a)(6).

For the foregoing reasons, we AFFIRM.

Covenants Running with the Land: Overview

Midstream Contracts

- Midstream companies provide the infrastructure that connects extracted oil and gas to an end user or a major downstream transportation facility. The midstream process generally begins with gathering production at or near the well where oil or gas is extracted and involves the transportation of the production to a downstream facility. Midstream facilities may also treat or process gas before it enters a downstream facility
- The term "midstream contracts" can encompass various types of contracts between producers and midstream companies, including:
  - gas purchase agreements,
  - agreements for midstream services on FERC-regulated pipelines (generally referred to as "transportation agreements"), and
  - gathering and processing agreements (*"GPAs*"), which are agreements governing: (i) the gathering of natural gas at the well head; (ii) the movement of natural gas through pipelines not regulated by FERC; and/or (iii) gas processing, including the separation of a gas production stream into natural gas liquids ("*NGLs*") and a residue gas stream, the further fractionation and compression of the gas to increase pressure and enable transportation to downstream facilities
- GPAs have received significant attention as a result of issues that have arisen in certain E&P restructurings and are the focus of the following discussion

Covenants Running with the Land: Overview (cont.)

GPAs

- Gathering and processing services are necessary to get natural gas production to market, and became even more important as producers expanded into new (sometimes isolated) geographic regions and increased production from certain shale plays over the last decade
- Gathering and processing companies generally agree to bear the initial investment of building local pipelines and processing facilities and connecting these systems to the producers' wells with a custom infrastructure
  - In order to recoup this up-front investment over time, GPAs generally are longer-term contracts and often contain requirements for the producer to deliver minimum amounts of gas for processing and/or transportation
- Because GPAs govern systems that are not regulated, the rates, terms and conditions of service must be negotiated
  - By contrast, the rates, terms and conditions of pipelines regulated by FERC or a state utility or public service commission are contained in tariffs that must be filed with and approved by the regulatory body, and the ability to negotiate these terms may be more limited
- Notwithstanding the importance of a producer's access to midstream facilities, an upstream debtor may be incentivized to reject certain long-term contracts with its midstream service providers if alternative providers are available or if the debtor wishes to abandon operations at certain geographic locations altogether
- The threat of rejection may also be used by producers to renegotiate long-term contract economics, even where the producer has limited alternatives for gathering and processing services

Contract or Property Interest?

In a bankruptcy case, classifying the obligations contained in a GPA as contractual interests versus property interests (e.g., a covenant running with the land) becomes important primarily in two contexts:

- Whether the GPA can be assumed/assigned/rejected by the debtor pursuant to section 365
  - To the extent that obligations pursuant to a GPA are determined to be "covenants running with the land," the producers may not be able to "reject" those obligations under section 365, although the case law is evolving
  - This distinction can have a meaningful impact on the producer's ability to restructure operations and achieve a fresh start in bankruptcy
    - For example, in some cases, the economic burden of the producer's obligation to deliver gas or make deficiency payments can be the very reason why the company must file
  - This determination can also have a meaningful impact on the Gatherer's recovery and negotiating position
    - If the producer can reject the GPA, the Gatherer is generally left with an unsecured claim for rejection damages
    - Also note that, even if the Gatherer is determined to have a covenant running with the land, its property interest in the land/minerals may still be inferior to the perfected mortgages of secured creditors who are first in time

- Whether the debtor can sell assets free and clear of the midstream provider's interests pursuant to section 363
  - Generally, a sale pursuant to section 363 may not be free and clear of a covenant that runs with the land and the purchased assets will remain subject to the covenant
  - However, a recent decision has highlighted the possibility that a debtor may sell oil and gas properties free and clear of a covenant running with the land under section 363 if (a) the properties are subject to the superior perfected mortgages of secured creditors (see below) or (b) the covenant can be satisfied by means of a cash payment under the agreement's terms

Contract or Property Interest? (cont.)

Bankruptcy courts look to state law to determine whether a GPA contains a "covenant running with the land"

- Ultimately, this is a fact-specific inquiry, and state laws (and courts' interpretations of them) vary as to what factors they find relevant to determining whether the particular elements required to establish a covenant running with the land have been satisfied

State	Requirements to Constitute a "Covenant Running with the Land"
AL	• intent of parties • touches and concerns the land
CO	• intent of parties • touches and concerns the land • privity of estate between the original covenanting parties at the time of the covenant's creation
LA	• a real covenant is a creature of common law, but at least one court applying Louisiana law concluded that a real covenant runs with the land if it is established in the title to the land and clearly apparent from the title documents
ND	• covenant must directly benefit the land (regardless of intent of parties) • relates to, touches or concerns the land granted or demised and the occupation or enjoyment thereof
NM	• touches and concerns the land • original covenanting parties must intend the covenant to run • successor to the burden must have notice of the covenant
OH	• privity of estate between the party claiming the benefit and the party with the burden • the covenant must either affect or touch and concern the land • the original covenanting parties intend for the covenant to run with the land
OK	• privity of estate between the party claiming the benefit and the party on whom the burden rests • the benefit or burden must "touch and concern" the land • the original covenanting parties must have intended for the burden or benefit to pass to successors

Contract or Property Interest? (cont.)

State	Requirements to Constitute a "Covenant Running with the Land"
PA	• intent of parties alone is dispositive (though some decisions have suggested that a requirement of privity of estate can be read into the intent requirement)
TX	• touches and concerns the land • relates to a thing in existence or specifically binds the parties and their assigns • the original parties to the covenant intend it to run with the land • the successor in interest to the burdened land has notice of the covenant • the parties must be in privity of estate when covenant is made (debate over whether horizontal or vertical privity,* or both is required)
UT	• touches and concerns the land • covenanting parties must intend the covenant to run with the land • privity of estate (vertical privity required; uncertain whether mutual or horizontal privity, or both are additionally required) • must be in writing
WV	• privity of estate between covenantor and covenantee • the benefit and burden had to "touch and concern" the respective estates of the covenantor and covenantee • where the covenant related to a thing not in esse, the word "assigns" is necessary
WY	• the original covenant must be enforceable • the parties must intend that the covenant run with the land • the covenant must touch and concern the land • there must be privity of estate between the parties

* "Horizontal privity of estate" is the relationship between two parties where one party conveys rights in a real property estate to the other party. "Vertical privity of estate" is where one party conveys its interests (which may be subject to covenants running with the land) to the other party. "Mutual privity of estate" exists when two parties have a continuing and simultaneous interest in the same property. The conveying party and the recipient are said to be "in privity of estate."

Recent Cases

- The issue of "real covenant running with the land" has been litigated in a number of recent cases, in which bankruptcy courts applied the laws of different states and reached diverging conclusions:

Case	Southland Royalty Co. (2020)	Chesapeake Energy (2020)	Extraction Oil & Gas (2020)*	Alta Mesa Resources (2019)	Badlands Energy (2019)	Sabine Oil & Gas (2016)
Venue	D. Del.	S.D. Tex.	D. Del.	S.D. Tex.	D. Colo.	S.D.N.Y.
Governing Law	Wyoming	Texas	Colorado	Oklahoma	Utah	Texas
Creation of Real Covenant	No	No	No	Yes	Yes	No

- *Sabine* was affirmed by the District Court and the Second Circuit
- The *Chesapeake Energy and Extraction Oil & Gas* decisions are the subject of pending appeals in federal district court
- The *Extraction Oil & Gas* opinion on "covenant running with the land" was followed by an important bench ruling on rejection, discussed below

* **Note**: In *Extraction Oil & Gas*, the court issued memorandum opinions in each of three separate adversary proceedings commenced by the debtors, each against a separate counterparty to an agreement purporting to contain a covenant running with the land. The analysis in the three opinions is substantially overlapping and we analyze them as a unit, focusing primarily on the decision regarding the Elevation Midstream gathering agreement.

Summary of Recent Cases: *Sabine, Extraction* and *Southland*

Sabine Oil & Gas v. HPIP (Bankr. S.D.N.Y. 2016); *Extraction Oil & Gas v. Elevation Midstream* (Bankr. D. Del. 2020); and *Southland Royalty v. Wamsutter* (Bankr. D. Del. 2020), which respectively analyzed requirements under the laws of Texas, Colorado and Wyoming, respectively conducted a searching inquiry that significantly restricts which midstream agreements will run with the land

Touch and concern

- *Sabine, Extraction* and *Southland* held that (under applicable state law) the practical and economic impact of an exclusive gathering agreement on a producer's oil and gas reserves was not sufficient to satisfy the "touch and concern" requirement, so long as such impact was indirect
- In reaching the conclusion that the agreements' dedications and delivery obligations did not touch and concern the producers' real property, they highlighted the agreements' "reservations," i.e., provisions typical of midstream agreements that reserve all decisions concerning the timing and manner of production to the producer
  - *Extraction* did hold that one covenant in the gathering agreements, namely Extraction's "drilling commitment" would touch and concern the producer's real property

Privity

- Moreover, *Extraction* and *Southland* held expressly (and *Sabine* could be read to suggest) that conveying a surface easement contemporaneously with the midstream agreement is not sufficient to create horizontal privity (under state law)
- *Extraction* could even be read to hold that it is never possible to establish privity in a midstream agreement under Colorado law, stating as follows:
  - "Extraction lacked the ability to convey an easement appurtenant to the mineral estates separate and apart from the land the easement appurtenant is annexed to;" and
  - "Extraction also lacked the ability to convey its rights of ingress and egress upon the surface estates, which are incidental (and appurtenant) to ownership of Extraction's mineral estates"

Summary of Recent Cases: *Badlands* and *Alta Mesa*

By contrast, *Alta Mesa Resources v. Kingfisher Midstream* (Bankr. S.D. Tex. 2019) and *Badlands Energy v. Wapiti Utah* (Bankr. D. Colo. 2019) are much more favorable to the creation of covenants running with the land, with the *Alta Mesa* decision expressly disagreeing with and criticizing *Sabine*

Animating Logic

- The animating logic of the *Alta Mesa* decision is that an oil and gas lessee holds a "leasehold estate," not just an amalgam of a "surface estate" and a "mineral estate"
- "The Alta Mesa gathering agreements dedicate to Kingfisher the products of oil and gas leases, not the products of fee mineral estates. Entering into the agreements, Alta Mesa possessed a bundle of rights that included the right to search for and reduce hydrocarbons to possession, surface easements for exploration and production, and other rights and privileges necessary for profitable production. Those leasehold rights exist to facilitate the capture of hydrocarbons. Unlike in *Sabine*, where that court focused its inquiry on a fee mineral estate, the relevant starting point here is Alta Mesa's leasehold interest"

Touch and concern

- According to the *Alta Mesa* court, the gathering agreement touched and concerned the oil and gas leases for two reasons: (1) the gathering system had a practical impact on the value of the producer's oil and gas leases; and (2) the gathering agreement entailed the granting of a surface easement that limits Alta Mesa's possessory interest in its leases

Privity

- As to privity, the *Alta Mesa* court held that the grant of a surface easement was sufficient to create horizontal privity, rejecting the *Sabine* court's implication (later adopted expressly by *Extraction*) that a grant of property in the surface estate was not sufficient to establish privity with respect to the mineral estate

Summary of Recent Cases: *Chesapeake v. ETC*

The recent decision issued in *Chesapeake v. ETC* (Bankr. S.D. Tex. 2020) does not fully embrace either approach

Touch and Concern

- With respect to touch and concern, the court held that the agreement did not touch and concern real property because of the language of the dedication clause, which dedicated only "produced" oil and gas, and not the underlying leases, suggesting that:
  - "Had the agreement between the parties included a dedication of 'all of the Debtors' right, title and interest in and to the leases,' the Court's analysis might have been profoundly different"
- Under the prevailing law of most states, once oil and gas is produced from a well, it is severed from the real property and becomes personal property; personal property cannot be subject to a covenant running with the land

Intent

- In addition, the court adopted the novel analysis (not advanced by either party) that the parties did not intend for the covenant to run with the land because the remedy for breach was limited to monetary damages only, not specific performance

Alternative Path 1: Rejection as a Means to Escape Covenants Running with the Land

Recent decisions have opened up another possibility for E&Ps to address burdensome midstream contracts, even if they contain covenants running with the land: ordinary rejection of the agreement under section 365 of the Bankruptcy Code

***Extraction* (D. Del., applying Colorado law to the covenant running with the land issue)**

- After the "covenant running with the land" adversary proceedings were decided against them, certain of the debtors' counterparties (Grand Mesa, Platte River and DJ South) continued to press their objection to rejection of the agreements on the following grounds:
  - rejection did not satisfy the business judgment standard;
  - rejection did not satisfy a higher "public interest" standard that they argued was required because the agreements were subject to regulation by the Federal Energy Regulatory Commission (FERC);
  - in the event these parties prevailed in their appeal of the adversary proceeding decisions, the agreements contained covenants running with the land that would continue to bind the debtors post-rejection
- The court rejected each of these theories. Of critical relevance to this presentation, the court held that even if the covenants ran with the land, they would not bind the debtors post-rejection. The court reasoned as follows:

> *"Even if the TSAs contain covenants running with the land . . . the question then becomes what effect the covenants have on the Debtors' property post rejection. The answer is simple: any covenant running with the land still exists (as the contract still exists), but it is unenforceable against the Debtors and their assigns after the Rejection Counterparties' claims are satisfied as part of the reorganization process. **Upon rejection, the Rejection Counterparties' claims under the TSAs will be compensated, rendering the claims fully satisfied and incapable of subsequent enforcement against the Debtors and its assigns** through either privity of contract or privity of estate. Importantly, the Rejection Counterparties cannot seek duplicative recovery for the breached covenants by using privity of estate as justification for suing successors to the Debtors' real property interests for a breach of the fully satisfied covenants."*

Alternative Path 1: Rejection as a Means to Escape Covenants Running with the Land (cont.)

Chesapeake Energy **(S.D. Tex., applying Texas law to the covenant running with the land issue)**

- In *Chesapeake*, which was briefed and argued before *Extraction* (although decided afterward), the debtors pressed the same line of reasoning, arguing that regardless of whether it contained a covenant running with the land, the ETC Texas gas processing agreement could be rejected and would no longer bind the debtors post-rejection, except that the counterparty could assert a claim in the bankruptcy case
- The court agreed in part, concluding that "executory contracts and covenants that run with the land are **not mutually exclusive**"
  - However, the court did not reach the conclusion urged by the debtors regarding the consequences of rejection, instead stating that "[d]epending on the particular language of the subject agreement, a plethora of outcomes [is] possible"
  - The court stated that the ongoing effect of a covenant that runs with the land post-rejection would have to be evaluated in light of the Supreme Court's recent decision in *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, which held that rejection relieves a debtor of its obligation to perform but does not deprive a counterparty of its other contractual entitlements

Southland Royalty **(D. Del., applying Wyoming law to the covenant running with the land issue)**

- Most recently, in *Southland Royalty*, the bankruptcy court concurred with *Extraction* and concluded that a dedication covenant could be rejected even were it to constitute a covenant running with the land
- In line with the *Extraction* court, the *Southland* court held that the dedication covenant, even if it were a covenant running with the land, would not bind the debtors post-rejection
  - "[I]t appears to the Court that the purpose of the [dedication covenant] will be satisfied by [the midstream's] bankruptcy claims for fees. . . . A claim against the estate for [the fee] amounts due to [the debtor's] rejection and resulting breach of the [dedication agreement] would fully compensate [the midstream] and be consistent with the terms of the [dedication agreement] and state law"

Alternative Path 1: Rejection as a Means to Escape Covenants Running with the Land (cont.)

Analysis

- The argument that rejection would relieve a debtor and its assigns of covenants running with the land appears to be new, and has not been considered by any appellate court. Prior to *Southland, Chesapeake* and *Extraction,* both litigants and courts appear to have presumed that covenants running with the land would bind post-rejection
- Unique facts in *Chesapeake* and *Extraction* strengthened the debtors' arguments, and other contracts could be distinguished:
  - In *Chesapeake*, the agreement contained a provision limiting remedies to monetary damages only
  - In *Extraction*, the debtors' obligations under the agreements could be satisfied either by shipping the quantities required by the minimum volume commitments ("MVCs") or by prepaying the "Total Financial Commitment"

Alternative Path 2: 363 Sale as a Means to Escape Covenants Running with the Land

The recent *Southland* case has opened up one more possibility for E&Ps to address burdensome midstream contracts: sale of burdened property free and clear of GPAs under section 363 of the Bankruptcy Code

Southland

- The debtor sought declarations that (a) the GPA at issue did not create a covenant running with the land and (b) even if it did, the debtor could still sell the burdened assets free and clear of such covenant
- The court held that the assets could be sold free and clear of any such covenant, for two reasons:
  - The assets were subject to the prior perfected mortgages of the RBL lenders, who could remove the covenant by foreclosing on the assets. *See* 11 U.S.C. § 363(f)(1) (allowing a sale free and clear if "applicable nonbankruptcy law permits sale of such property free and clear of such interest")
  - Under the terms of the gathering agreement, the debtors' obligations could be satisfied in full by prepayment of the MVC. *See* 11 U.S.C. § 363(f)(5) (allowing a sale free and clear if "such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest")

<u>Analysis</u>

- The *Southland* decision builds on the Fifth Circuit's decision in *Energytec*, which stated in dicta that a covenant running with the land would not foreclose a sale of assets free and clear of that covenant
  - In spite of *Energytec,* it has often been assumed that a covenant running with the land is not an interest subject to elimination under section 363 (see *Badlands*)
- The *Southland* decision was dependent on the existence of prior perfected RBL mortgages and/or the debtor's ability to prepay the MVC
- The *Southland* decision was decided under Wyoming law and may not translate to other jurisdictions

Predicting Outcomes: Key Factors

<u>Venue</u>

- As can be seen from the express disagreement between the *Alta Mesa* and *Sabine* decisions, some courts are inclined to enforce covenants running with the land and others to maximally enforce a debtor's right to reject executory contracts

<u>State Law</u>

- None of the recent decisions expressly identified the relevant state law as the reason it parted ways with other courts. However, as noted above, different states do have somewhat different tests for covenants running with the land. For instance, states differ in their articulation of the "touch and concern" element, which may have been a factor in certain of the decisions
  - *Badlands*: the Utah law adopts a broad test for the touch and concern element that focuses on a covenant's effect on the land's value rather than a physical effect upon the land (*accord Alta Mesa* under Oklahoma law)
  - *Sabine/Chesapeake*: under Texas law, the oil and gas, once severed from the land, are personal properties. Hence, a covenant that pertains to extracted oil and gas does not "touch and concern" a real property *(accord Extraction* under Colorado law)

<u>Contract Terms</u>

- In addition, the terms of the contract being analyzed are very important. The subsequent pages explore the following key factors in greater detail:
  - <u>Intent</u>: Although express intent to run with the land is usually sufficient, certain contracts may contain language that undermines the articulated intent
  - <u>Touch and Concern</u>: Breadth of the interests dedicated by the producer to the midstream company, and the rights reserved by the producer
  - <u>Privity</u>: Was there a contemporaneous transfer of a property interest that can satisfy privity?

Analysis of Contract Terms in Recent Cases: Intent

Case	Chesapeake	Extraction
Contract Term	"**Seller's dedication hereunder is a covenant running with the land**, and Buyer and Seller shall sign, and Buyer shall file in the property records of the applicable county or counties, a Memorandum of this Transaction Confirmation." "The **sole and exclusive remedy** of the parties in the event of a breach of a Firm obligation to deliver or receive Gas shall be recovery of the following: (i) in the event of a breach by Seller on any Day(s), **payment by Seller to Buyer** in an amount equal to . . . ."	"The Dedication and the Delivery Obligation, the grant of servitude hereinafter provided and other Property Rights and Producer's covenants under Section 2.3, together with all other related commitments in this Agreement and [certain other matters] are not merely contract rights but are covenants running with (and touching and concerning) all of the Dedicated Interests."
Court's Analysis	Such a remedy is inherently personal in nature and unrelated to any real property interest held by Chesapeake. This economic provision better expresses the parties' true intent under, and the personal nature of, their agreement. The damages limitation, along with the acknowledgement that the ETC Purchase Agreement is a two-party forward contract as discussed below, suggests that the added language that "the parties intended for the obligation to run with the land" was an ill-conceived attempt to portray the ETC Purchase Agreement as a horse of a different color.	"The only covenants that the parties intended to run with the land were clearly and expressly identified in the Gas Agreement."
Holding	No intent for covenant to run with the land.	Intent found for enumerated covenants only.
Commentary	*Chesapeake*: Of the six recent decisions, *Chesapeake* is the only one that looks beyond the parties' articulation of their intent. The damages limitation in the Chesapeake agreement appears to be relatively unique, and likely due to the agreement being a gas processing agreement (the contract was termed a "Contract for Sale and Purchase of Natural Gas," and provided that it constituted a forward contract) rather than a gathering agreement. *Extraction*: Midstream agreements vary in formulation, with some providing that specified covenants run with the land and others providing more broadly that the "agreement" is a covenant that runs with the land.	

Analysis of Contract Terms in Recent Cases: Touch and Concern

Case	Chesapeake	Alta Mesa
Contract Term	Dedication: "Seller dedicates for sale and delivery hereunder **all of the Gas** owned or controlled by Seller or an Affiliate of Seller **that is produced** from the oil and gas leases described in Exhibit "C" to this Transaction Confirmation (such gas, "**Seller's Gas**")." Delivery obligation: "Seller shall tender all of Seller's Gas to Buyer [up to certain quantities]"	Dedication: Section 3.3 dedicates to Kingfisher "all Interests within the Dedicated Area" and required Alta Mesa to "deliver to [Kingfisher] all Committed [oil and gas] produced."
Court's Analysis	The thing or object of the parties' agreement is gas to be delivered to ETC's entry point if any such gas is produced . . . . Only after gas is produced and becomes personal property does an obligation regarding the disposition of that gas arise." "Had the agreement between the parties included a dedication of 'all of the Debtors' right, title and interest in and to the leases,' the Court's analysis might have been profoundly different."	The gathering agreements touch and concern the Alta Mesa's oil and gas leases because both the benefits and the burdens of the covenants affect the value of Alta Mesa's real property interests. Kingfisher used its surface easement to build a modern gathering system for the dedicated wells, which enhances the value of Alta Mesa's leases. On the other hand, the gathering agreements impose costs and delivery restrictions on produced hydrocarbons, which diminish the value of Alta Mesa's unproduced reserves. Thus, there is a logical connection between both the burden and benefit of the covenants and Alta Mesa's real property. **This simple fact persists even though Kingfisher is not entitled to possession until after the hydrocarbons become personal property**.
Holding	Touch and concern requirement not satisfied.	Touch and concern requirement satisfied.
Commentary	It is possible to reconcile the touch and concern analysis in *Chesapeake* and *Alta Mesa*, which issued from the same jurisdiction. One possible distinction lies in the contractual language of the Chesapeake agreement, which applies only to gas "that is produced." However, the *Alta Mesa* court's reasoning does not appear tethered to particular contract language. Another possible distinction is that *Alta Mesa* was decided under Oklahoma law, which requires only that "there must be a logical connection between the benefit to be derived from enforcement of the covenant and the property."	

Analysis of Contract Terms in Recent Cases: Privity

Case	Sabine	Alta Mesa
Contract Term	"One of the Nordheim Agreements, the Gas Gathering Agreement, contemplates a separate and subsequent conveyance from Sabine to Nordheim of a mutually agreed tract of land in connection with Nordheim's construction and operation of a gathering system." Subsequently, on March 11, 2014, "Sabine conveyed to Nordheim [the mutually agreed tract]. Also on March 11, 2014, Sabine conveyed to Nordheim a Pipeline and Electrical Easement, which granted Nordheim a 90-foot pipeline and electrical easement over the remaining 21 acres of the Nordheim Parcel, so that Nordheim could install and operate two pipelines and one electrical utility line over that tract of land."	"In Section 3.2, Alta Mesa pledged to convey or assign to Kingfisher "any easement or rights-of-way for purposes of constructing, owning, operating, repairing, replacing and maintaining any portion of the [ ] Gathering System." "On December 1, 2016, OEA and Kingfisher amended both the gas and crude oil gathering agreements to include additional interests in furtherance of the construction and operation of the gathering system. The 2016 amended agreements modified the originals in two important ways. First, the amendments adjusted the gathering fees . . . . Second, the amendments added a "Conveyance of Transportation Right," which the parties intended to "be a conveyance of a portion of [Alta Mesa's] real property interests."
Court's Analysis	"Nordheim suggests that horizontal privity of estate can be satisfied by a contractual provision that contemplates but does not effectuate a future assignment by Sabine of real property interests to Nordheim. This argument defies common sense — the possibility of horizontal privity of estate does not constitute actual horizontal privity of estate."	"Although less than a fee simple estate, the easements conveyed to Kingfisher a possessory interest in the leasehold estate. The surface easement is integrally tied to the purpose of an oil and gas lease. The conveyance of the easements to Kingfisher is enough to show horizontal privity with respect to the gathering agreements."
Holding	Horizontal privity requirement not satisfied.	Horizontal privity requirement satisfied.
Commentary	The *Alta Mesa* directly criticizes and disagrees with *Sabine*'s privity analysis, as discussed further below. However, the cases are factually distinguishable. In *Sabine,* there was no contemporaneous conveyance of a surface easement—the transfer was subsequent. By contrast, in *Alta Mesa*, there was a conveyance of an easement contemporaneous with 2016 amendments. In fact, the Alta Mesa 2016 amendments are generally understood to have been a response to the *Sabine* decision, and similar transportation easements have been granted in many gathering agreements that postdate *Sabine*. However, *Alta Mesa* cannot be reconciled with *Extraction*, which held that a contemporaneous grant of surface easement did not establish privity with respect to the oil and gas leases.	

Background: The Filed Rate Doctrine

- Under the Federal Power Act, Natural Gas Act and Interstate Commerce Act, certain contracts involving the sale of power and the transportation of oil and gas must be filed with FERC, which then determines whether the rates specified in those contracts are "just and reasonable"
- In a non-bankruptcy context, once a contract is filed with and approved by FERC, it has plenary and exclusive jurisdiction over the rates, terms and conditions of service under such a contract (the so-called "**filed rate doctrine**")

"[T]he right to a reasonable rate is the right to the rate which [FERC] files or fixes, and . . . , ***except for review of [FERC]'s orders, the courts can assume no right to a different one*** on the ground that, in its opinion, it is the only or the more reasonable one."

Montana-Dakota Utilities Co. v. Nw. Pub. Serv. Co., 341 U.S. 246, 251-52 (1951)

Background: Rejection and the Filed Rate Doctrine

- Historically, FERC has opposed motions to reject FERC-filed contracts pursuant to section 365 of the Bankruptcy Code, claiming that the "filed rate doctrine" equally applies to the rejection context and divests the bankruptcy court *entirely* of subject matter jurisdiction over such a motion
- More recently, FERC has pressed the argument that it has "concurrent jurisdiction" with the bankruptcy court over power purchase agreements and pipeline agreements. In essence, FERC maintains that where a party to a filed rate contract seeks to reject the agreement in bankruptcy, it requires approval from **both the Commission and the bankruptcy court**
- FERC's position is articulated clearly in its recent decisions, as follows:

"Where a party to a Commission-jurisdictional agreement under the NGA seeks to reject the agreement in bankruptcy, that party must obtain approval from both the Commission and the bankruptcy court to modify the filed rate and reject the contract, respectively . . . .

[T]he Bankruptcy Code does not displace the Commission's jurisdiction over filed rate contracts under the NGA. As filed rates, such contracts are not typical commercial contracts but rather establish public obligations that carry the force of law. As the Supreme Court explained with specific regard to Commission-jurisdictional contracts, filed rate obligations exist independently of private contractual duties and continue to bind the counterparties, regardless of one party's breach of contract, or even a determination that a contract may not be enforced at all."

ETC Tiger Pipeline, LLC, 171 FERC ¶ 61,248 (2020)

Background: Rejection and the Filed Rate Doctrine (cont.)

- FERC's position regarding exclusive jurisdiction prevailed in the 2006 *Calpine* decision, in which the SDNY district court held that authorizing rejection would constitute an impermissible "collateral attack" on the filed rate
  - The court held that "it lacks jurisdiction to authorize the rejection of the Power Agreements because doing so would directly interfere with FERC's jurisdiction over the rates, terms, conditions, and duration of wholesale energy contracts"
  - It reasoned that "just as regulatory action was required to transform the terms and conditions of the Power Agreements from mere contracts into regulated duties, so also is regulatory action from FERC required to eliminate those duties"
- However, similar arguments were rejected by the Fifth Circuit's 2004 *Mirant* decision and the Sixth Circuit's 2019 *FirstEnergy* decision
  - *Mirant* and *FirstEnergy* did not accept FERC's contention that filed rate contracts have the status of a federal regulation for all purposes
  - Instead, they reasoned that, while the Bankruptcy Code has certain exceptions to and limitations on the rejection power (e.g., for collective bargaining agreements), no such limitations exist for filed rate agreements. Rather, upon rejection, the filed rate would be honored in the calculation of rejection damages
- It is possible to distinguish *Calpine*, on the one hand, from *Mirant and FirstEnergy*. In *Calpine*, the debtors were transparently rejecting agreements due to their pricing and other terms, which lent credence to the view that rejection was a collateral attack on the rate. By contrast, in *Mirant* and *FirstEnergy*, the debtors were careful to make clear that they had no need for the purchased power, regardless of rate. This distinction is specifically addressed in the *Calpine* and *FirstEnergy* opinions

Rejection of FERC-Filed Contracts: A Heightened Standard?

- As a general matter, a deferential standard of "business judgment" applies to a debtor's motion to reject an executory contract under section 365 of the Bankruptcy Code
- However, in an effort to "harmonize" the Federal Power Act and the Bankruptcy Code, *Mirant* and *FirstEnergy* held that a heightened standard applies to the rejection of FERC-filed contracts
  - A bankruptcy court should permit a rejection of a FERC-filed contract "only if the debtor can show that **[the contract] burdens the estate**, [and] that **after careful scrutiny, the equities balance in favor of rejecting**" (*Mirant*)
  - In conducting this inquiry, a bankruptcy court should consider the rejection's impact on the ***public interest***, "including the consequential impact on consumers and any tangential contract provisions concerning such things as decommissioning, environmental management, and future pension obligations" (*FirstEnergy*)
- However, the heightened standards are still vastly more favorable to the debtors than having to seek a modification from FERC
- *FirstEnergy* and *Mirant* were decided in the context of the Federal Power Act, which governs power supply contracts, and there is no circuit level authority on the standard for rejecting in the context of the Natural Gas Act or Interstate Commerce Act
  - In *Ultra Petroleum* (S.D. Tex. 2020), the court extended the *Mirant* decision to a natural gas transportation agreement
  - However, in *Extraction* (D. Del. 2020), the court suggested that the heightened standard **does not** apply to the rejection of an oil transportation service agreement, the rates of which were approved by FERC. The *Extraction* court stated that *Ultra Petroleum* was distinguishable on two grounds: (1) FERC has a more limited jurisdiction over oil pipelines than over gas and power contracts, and (2) the Interstate Commerce Act, which governs the oil pipelines, contemplates different "public interest" considerations than the Natural Gas Act, which governs the gas pipelines

Defensive Strategies: A Race to the Courthouse

- Recently, pipeline companies have anticipated their E&P counterparties' chapter 11 proceedings by commencing administrative proceedings before FERC seeking a declaratory judgment from the agency that rejection requires FERC approval
  - ***Gulfport***: Rockies Express Pipeline, Midship Pipeline, TC Energy Pipelines and Rover Pipeline obtained (a) a ruling from FERC that it has concurrent jurisdiction over rejection; and (b) as to Rockies Express Pipeline, Midship Pipeline and Rover Pipeline, a determination that public interest does not require abrogation or modification of the Gulfport TSAs
  - ***Chesapeake***: In advance of Chesapeake's chapter 11 filing, FERC issued an opinion in favor of ETC Tiger, holding that FERC had concurrent jurisdiction over the rejection of TSA. FERC's ruling with respect to ETC Tiger is on appeal to the Fifth Circuit
  - ***Ultra Petroleum***: Rockies Express filed a FERC petition seeking a declaratory judgment, but the proceeding was stayed by the bankruptcy filing before FERC issued a ruling
  - ***PG&E***: California law mandated that PG&E provide a 15-day notice period before filing for bankruptcy. When the notice was filed, certain power purchase agreement counterparties sought and obtained a declaratory judgment from FERC that it has concurrent jurisdiction over the rejection of FERC-filed wholesale power contracts

Defensive Strategies: A Race to the Courthouse (cont.)

- Certain E&P debtors have responded to the midstream entities' preemptive moves by seeking relief from the Bankruptcy Court:
  - ***Ultra Petroleum***: Shortly after the filing of a chapter 11 petition, the debtor commenced an adversary proceeding against FERC, seeking, among other things, an injunction enjoining FERC from issuing any order that would interfere with the rejection
    - Shortly thereafter, the debtors filed a motion for a temporary restraining order. During the oral argument on that motion, Rockies Express agreed to withdraw or revise its FERC petition to reflect that the bankruptcy court has primary jurisdiction over the rejection issue, and on that basis, the bankruptcy court denied the motion for TRO as unnecessary
    - Eventually, the debtors voluntarily dismissed the adversary proceeding against FERC
  - ***Gulfport***: FERC issued orders prepetition, proclaiming that it has concurrent jurisdiction with the bankruptcy court over the rejection of FERC-filed TSAs. The debtor commenced an adversary proceeding seeking, among other things, an injunction enjoining FERC from issuing or enforcing any order that would interfere with the rejection
    - Like in *Ultra Petroleum*, the debtors filed a motion for a temporary restraining order. However, the bankruptcy court denied the motion as "premature and unnecessary"
    - In the end, the debtors voluntarily dismissed the adversary proceeding against FERC

Defensive Strategies: A Race to the Courthouse (cont.)

- ***PG&E***: The debtors commenced an adversary proceeding against FERC on the first day of bankruptcy seeking, among other things, a declaration of the bankruptcy court's exclusive jurisdiction over the rejection
  - The bankruptcy court granted the requested declaration, but the jurisdiction issue was eventually mooted by the confirmation of a reorganization plan, under which the debtors would assume the power purchase agreements at issue

- ***Chesapeake***: FERC issued an order prepetition, finding that, where a party to a contract filed with FERC under the Natural Gas Act seeks to reject it in bankruptcy, that party must obtain approval from both FERC and the bankruptcy court. The debtors commenced on the first day of bankruptcy an adversary proceeding against FERC, seeking, among other things, an injunction enjoining FERC from issuing or enforcing any order that would interfere with the rejection
  - To resolve the adversary proceeding, FERC stipulated that it would not issue any order requiring the debtors to obtain FERC's approval in rejecting the FERC-filed midstream TSAs and would not rule on any FERC petitions filed by the midstream entities prepetition without obtaining from the bankruptcy court a relief from the automatic stay
  - Subsequent to the stipulation, the debtors filed with FERC a request for rehearing of FERC's order finding concurrent jurisdiction, but FERC denied the request
  - The debtors then filed with the bankruptcy court an emergency motion for, among other things, an order that would direct FERC to withdraw its order denying the rehearing request, arguing that FERC's issuance of that order constituted a violation of the stipulation
  - After a hearing, the bankruptcy court denied the debtors' emergency motion without prejudice
  - The debtors subsequently filed with the Fifth Circuit a petition for review of FERC's concurrent jurisdiction order

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Defensive Strategies: A Race to the Courthouse (cont.)

- The automatic stay is a significant factor in how rejection of filed rate agreements is adjudicated because it may preclude FERC from issuing orders or pipeline companies from commencing or continuing litigation before FERC
- In addition, bankruptcy courts are often willing to enjoin FERC proceedings, relying on their section 105(a) authority
- As a result, counterparties that do not seek relief from FERC prepetition will be hard-pressed to seek such relief afterward
  - *In Extraction*, Grand Mesa (a midstream entity) moved the bankruptcy court to declare that filing a FERC petition for a public interest determination on the rejection of TSAs at issue would not violate the automatic stay or, in the alternative, relieve it from the automatic stay to file such a petition
  - The court denied this motion. Grand Mesa appealed but eventually settled with the debtors
- However, the applicability of the automatic stay to an anticipated action by FERC is less straightforward, given that the exercise of police and regulatory power is excepted from the automatic stay
  - In *FirstEnergy*, the Sixth Circuit rejected the bankruptcy court's sweeping determination that any action FERC might take would be subject to the stay because FERC was merely adjudicating private rights rather than pursuing public policy. However, the court did state that, in the particular case at hand, FERC might be subject to the automatic stay because the FERC-filed contract at issue only involved a small portion of electricity supply within the applicable region
- Both *Mirant* and *FirstEnergy* made clear that any injunction to be issued under section 105(a) has to be appropriately tailored

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Procedural Considerations: Withdrawal of Reference

- Title 28, section 157(d) of the United States Code provides:

  "The district court may withdraw, in whole or in part, any case or proceeding referred [to the bankruptcy court], on its motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce"

- Counterparties to power purchase agreements and gas transportation agreements have sought withdrawal of the reference in rejection disputes, perceiving the bankruptcy court to be an unfavorable forum

- The courts have interpreted section 157(d) as providing two bases for withdrawal: (1) <u>permissive</u> withdrawal "for cause shown," and (2) <u>mandatory</u> withdrawal when a consideration of federal law other than title 11 is required
  - Whether to grant a motion for permissive withdrawal of reference is within a district court's discretion
  - Application of mandatory withdrawal requires the *interpretation, as opposed to mere application*, of a non-bankruptcy federal law

- Recent decisions suggest that the FERC-filed status of a contract is **insufficient** as a basis to withdraw the reference of a motion to reject it from the bankruptcy court
  - The bankruptcy courts have reasoned that only section 365 of the Bankruptcy Code and no other federal law is relevant to the resolution of a motion to reject a FERC-filed contract (*see, e.g.*, *PG&E*, *Chesapeake*)
  - In *PG&E*, the district court agreed with the bankruptcy court that the resolution of whether the bankruptcy court may unilaterally allow a debtor to reject a FERC-filed contract does **not** require any substantial consideration of non-bankruptcy federal law, implicitly suggesting that the Federal Power Act is irrelevant to the rejection

Procedural Considerations: Withdrawal of Reference (cont.)

- However, older decisions in the Southern District of New York have concluded the opposite, holding that the FERC-filed status of a contract does warrant a mandatory withdrawal of the rejection motion to the district court

- In *In re Calpine* (S.D.N.Y. 2006), the district court concluded that the district court (as well as the bankruptcy court) lacked jurisdiction to authorize the rejection of a FERC-filed contract because it would "directly interfere with FERC's jurisdiction over the rates, terms, conditions, and duration of wholesale energy contracts" and thus the rejection would amount to a "collateral attack on the filed rate itself"
  - The court distinguished *Mirant* on the grounds that (1) *Mirant* heavily relied on Fifth Circuit cases that have no Second Circuit corollaries and (2) the debtor in *Mirant* provided a rationale that is unrelated to the rate for rejecting a FERC-filed contract

- In *In re Boston Generating, LLC* (S.D.N.Y. 2010), the district court concluded that the debtor utility company's motion to reject a FERC-filed gas TSA had to be withdrawn mandatorily, concluding that, "[i]n order to decide the Rejection Motion, a court will have to decide whether Congress has, through the Bankruptcy Code, given the district court power to authorize the Debtors to reject the [TSA], or if instead, doing so would run afoul of FERC's exclusive jurisdiction over filed rate contracts under the [Natural Gas Act]"

Procedural Considerations: Direct Appeal to Court of Appeals

- Generally, a final order of the bankruptcy court may be appealed to the district court or, in certain circuits, to the bankruptcy appellate panel. A decision on that appeal may be further appealed to a court of appeals
- However, 28 U.S.C. § 158(d) provides a mechanism for a party to appeal a bankruptcy court's decision directly to a court of appeals
  - Section 158(d)(2)(A) provides that the appropriate court of appeals shall have jurisdiction of appeals to a final decision by the bankruptcy court if the bankruptcy court, the district court, or the bankruptcy appellate panel involved, acting on its own motion or at the request of a party to the decision, or all the appellants and appellees (if any) acting jointly, certify that:
    i. the decision "involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance,"
    ii. the decision "involves a question of law requiring resolution of conflicting decisions," or
    iii. "an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken"

    <u>and if the court of appeals **authorizes** the direct appeal</u> of the decision

Procedural Considerations: Direct Appeal to Court of Appeals (cont.)

- In *Extraction*, Grand Mesa (a midstream entity) and FERC filed a joint motion asking the district court to certify for direct appeal to the Third Circuit the bankruptcy court's (1) order approving the debtors' rejection of Grand Mesa TSAs and (2) order denying the stay of rejection pending appeal
  - Grand Mesa and FERC argued that their appeals satisfy each of section 158(d)(2)(A)'s three subsections
- Most recently, in *Ultra Petroleum*, the district court granted the debtors' motion for certification of the bankruptcy court's approval of rejection for direct appeal to the Fifth Circuit
  - The district court concluded that the rejection dispute at issue is a matter of public importance, as required under 28 U.S.C. § 158(d)(2)(A)(i), because the issue presented "may indeed transcend the dispute between Ultra and [the midstream entity] currently before [it]"
  - In reaching this conclusion, the district court noted that the Fifth Circuit granted the joint petition for direct appeal with respect to FERC's appeal to the bankruptcy court's confirmation of reorganization plan

FERC-Filed Contracts Post-Rejection

- FERC has viewed plan confirmation as yet another opportunity to assert its jurisdiction over filed rate contracts. In its chapter 11 confirmation objections, it has argued that the plan runs afoul of section 1129(a)(6) of the Bankruptcy Code, which requires that "[a]ny governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval"
- FERC has also objected to the broad scope of injunctions in the plan, and to provisions that provide for the bankruptcy court's retention of exclusive jurisdiction over a broad range of issues related to the chapter 11 plan
- In these objections, FERC appears to be laying the groundwork to seek to continue to enforce the filed rate, potentially on the basis of the Supreme Court's decision in *Mission Product Holdings, Inc. v. Tempnology,* which provides that rejection does not excuse a debtor from "all the burdens that generally applicable law . . . imposes"
- According to FERC, "*Mission Product* supports the principle that a debtor does not extinguish its filed rate obligations . . . by rejecting a contract in bankruptcy." ETC Tiger Pipeline, LLC, 171 FERC ¶ 61,248 (2020)

FERC-Filed Contracts Post-Rejection (cont.)

- By contrast, debtors take the position that once the bankruptcy court approves rejection of a FERC-filed contract, they are relieved from continuously performing under the contract, and the counterparty would be left with a damages claim against a debtor
- This position finds substantial support in *Mirant*, where the Fifth Circuit announced that "a bankruptcy court can clearly grant injunctive relief to prohibit FERC from negating [a debtor's] rejection by requiring continued performance at the pre-rejection filed rate"
  - As the court held in *Mirant*, paying rejection damages in "bankruptcy dollars" would not violate the filed rate doctrine because the damages are *calculated* based on the filed rate
  - In *FirstEnergy*, the Sixth Circuit relied on *Mirant* without expressing any disagreement as to the bankruptcy court's authority to issue such an injunction
- FERC's confirmation objections were overruled in *Ultra Petroleum, FirstEnergy* and *Extraction,* and a similar objection is currently pending in *Chesapeake*
  - In *Extraction,* the bankruptcy court overruled FERC's objection on 1129(a)(6) (which concerns rate changes) on the grounds that (1) as it previously held, neither the rejection nor the plan effected any change in rate going forward and (2) 1129(a)(6) applies only to rates charged by a debtor, not rates paid by a debtor
  - The bankruptcy court also overruled FERC's objection based on the potential conflict of the discharge injunction in the plan with future FERC proceedings as being "vague and conjectural in nature"
- FERC's appeals of the *Ultra Petroleum* and *Extraction* confirmation orders are currently pending

Current Legal Landscape: Pending Disputes

The following FERC rejection disputes are currently pending in front of the bankruptcy court and on appeal:

- *Chesapeake*
  - Chesapeake's appeal of the FERC ruling on concurrent jurisdiction is currently pending before the Fifth Circuit
  - Debtors' motion for rejection is currently pending and is the subject of a motion to withdraw the reference
  - FERC's confirmation objection is currently pending
- *Ultra Petroleum*
  - Rockies Pipeline and FERC have appealed the bankruptcy court's rejection decision
    - Pending appeal, Rockies Pipeline has settled with the debtors as to the amount of Rockies Pipeline's allowed claim without any prejudice to any party in the appeal
    - Both of the appeals by Rockies Pipeline and FERC are currently pending before the Fifth Circuit
    - In addition, FERC's appeal of the confirmation order is pending before the Fifth Circuit
- *Extraction*
  - FERC appealed the bankruptcy court's confirmation order to the district court, although such appeal may become moot due to settlements between Extraction and the midstream counterparties

Do Midstream Agreements Create Real Property Interests?

By **Omar Alaniz, Gary Johnson and Ramy Morad** (December 4, 2020, 6:42 PM EST)

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As the COVID-19 pandemic continues, so too, does the distress inflicted upon upstream exploration and production companies.

To be sure, as of this writing, the price per barrel of West Texas Intermediate crude oil stands at approximately $45. In light of this low-price commodity environment, many exploration and production companies have commenced Chapter 11 bankruptcy proceedings, hoping to reorganize and restructure their balance sheets.

Section 365 of the Bankruptcy Code provides debtors a special opportunity to evaluate their executory contracts (i.e., contracts with respect to which the contracting parties have material obligations remaining) and determine which contracts are the most burdensome to the debtor's estate, which the debtor may thereafter seek to reject, and which contracts are beneficial, which the debtor may thereafter assume.

For decades, midstream companies that expended significant capital to construct gathering systems to service producers were comfortable that structuring the gas-gathering agreements with a covenant that runs with the land made the agreements impervious to a bankruptcy rejection.

But the increasing trend in exploration and production Chapter 11 cases is to seek rejection of the agreements that often contain out-of-market minimum volume commitments that were intended to cover the midstream companies' capital outlay.

The midstream companies' central legal defense is that the agreements containing covenants that run with the land create real property rights that are not susceptible to bankruptcy rejection. The covenant-running-with-the-land analysis is a state-specific inquiry, albeit one that is very similar across the various states.

The similarities in state law notwithstanding, bankruptcy courts across the country have yielded different interpretations when faced with the question whether a gas-gathering agreement that purports to run with the land may be rejected. A string of recent bankruptcy rulings has swung the pendulum the other way, evening the score set by the bankruptcy courts in In re: Alta Mesa Resources Inc. and In re: Badlands Energy Inc.[1]

In re: Extraction Oil & Gas Inc.

On Oct. 14, the U.S. Bankruptcy Court for the District of Delaware in three adversary proceedings[2] stemming from Extraction Oil & Gas Inc.'s Chapter 11 proceedings, held that Extraction's midstream agreements with Elevation Midstream LLC did not create covenants that run with land under Colorado law, and thus could be rejected by Extraction as executory contracts under Section 365 of the Bankruptcy Code.

In conducting its analysis, the Delaware bankruptcy court joined the U.S. Bankruptcy Court for the Southern District of New York's line of reasoning in Sabine Oil & Gas Corp. v. HPIP Gonzales Holdings

LLC[3] and focused on the relationship of the various covenants contained in the gathering agreements and the debtor-producer's mineral estate.

In order for a covenant to run with the land under Colorado law, (1) the parties must intend to create a covenant that runs with the land; (2) the covenant must touch and concern the land; and (3) there must be privity of estate between the original covenanting parties at the time the covenant is created.[4] As to intent, the court found that certain of covenants were expressly intended to run with the land.[5]

To satisfy the touch-and-concern element, the court found that "the particular covenant intended to run with the land must closely relate to the estate in the real property with which it is intended to run (here, Extraction's mineral estate), its use, or enjoyment."[6] The court concluded that the only covenant that touched and concerned Extraction's mineral estate was a drilling commitment, which required Extraction to drill a certain number of wells into its mineral estate within a particular area within certain timeframes.[7]

According to the court:

> The Drilling Commitment touches and concerns Extraction's mineral estates because it closely relates to the land by altering the parties' legal relationship thereto. … The Drilling Commitment directly affects the parties' physical use and enjoyment of the land because the obligation to drill a certain number of wells on a certain schedules affects Extraction's drilling and development of its mineral estates.[8]

In contrast to the drilling commitment, the other covenants at issue did not touch and concern the land because they bore no relationship to Extraction's mineral estate, and instead only concerned severed and produced minerals, which constitute personal property.

For example, with respect to Extraction's dedication covenant,[9] the court found that "the dedications and commitments do not touch and concern Extraction's mineral estates because the obligations and services for which they were made concern only personal property and do not closely relate to real property, specifically Extraction's mineral estates."[10]

Citing Sabine, the court noted that "[d]edications generally identify only particular produced minerals or produced water subject to, set apart for, pledged or committed to the parties' contractual obligations under midstream agreements."[11]

Similarly, Extraction's delivery covenant did not touch and concern Extraction's mineral estates because they only concerned produced minerals, and therefore only touched and concerned personal property.[12]

This focus on produced minerals, once again, echoes the sentiments of Sabine, in which the court held that "the triggers for the covenants at issue relate to the Products, not the land itself,"[13] before ultimately concluding that the covenants in the agreements under review did not run with the land.

As to the privity element, which requires that any covenant that allegedly runs with the land be accompanied by a contemporaneous conveyance of some interest in the land with which the covenant runs,[14] the Delaware court found privity of estate was not satisfied because the midstream agreements did not convey to Elevation any interest in Extraction's mineral estates.

Although Elevation contended that Extraction's conveyance of easements, rights-of-way and other surface rights satisfied the privity of estate requirement, the court found that, because the "surface estate and mineral estate, once severed, are separate and distinct estates in real property … [c]onveyances of easements or rights-of-way across the surface estate are interests in the surface estate that cannot satisfy the privity of estate respecting a mineral estate."[15]

The Extraction court's focus on the relationship of the covenants with the debtor-producer's mineral estate stands in contrast to the focus of the Alta Mesa and Badlands courts, which considered the relationship of the covenants with the debtor-producer's leasehold interests, and which ultimately held that the gathering agreements in question did contain covenants running with the land.

In Alta Mesa Holdings LP v. Kingfisher Midstream LLC, the U.S. Bankruptcy Court for the Southern District of Texas found that "[t]he Alta Mesa gathering agreements dedicate to Kingfisher the products of oil and gas leases, not the products of fee mineral estate. ... Unlike in Sabine, where the court focused its inquiry on a fee mineral estate, the relevant starting point here is Alta Mesa's leasehold interest."[16]

Similarly, the Badlands court found that:

> The "Dedicated Reserves" under the GPA are interests in real property, not personal. ... "Dedicated Reserves" is defined broadly as "the interests of Producer in all Gas reserves in and under, and all Gas owned by Producer and produced or delivered from (i) the Leases and (ii) other lands within the AMI." ... Unlike the Sabine decision, the present dedication encompasses real property.[17]

Moreover, unlike the Extraction court, the Alta Mesa court recognized the significance of facilities obligations in its touch-and-concern analysis.

According to the Alta Mesa court:

> The gathering system, which Kingfisher constructed in furtherance of the agreements, enhances the value of Alta Mesa's unproduced reserves. Because the gathering system enhances the value of the reserves themselves, not simply Alta Mesa's personal interest in the reserves, there is a logical connection between the covenant calling for the construction of the gathering system and the value of the reserves.[18]

In contrast, the Extraction court refused to afford any significance to Elevation's facilities obligation (i.e., its obligation to construct and operate the midstream facilities to service producer gas, oil and water) in its touch-and-concern analysis, instead noting that "the midstream facilities enable Elevation to provide the services it is obligated to provide to Extraction's personal property."[19]

Furthermore, whereas the Extraction court was unwilling to attach significance to the easements and rights-of-way granted by Extraction to Elevation, the Alta Mesa court found that:

> In the context of an oil and gas lease the surface easement is integral to the lessee's ability to realize the value of its mineral reserves. ... The covenants granting Kingfisher surface easements directly burden Alta Mesa's interest in the reserves because they restrict Alta Mesa's use of the surface land for drilling or exploration.[20]

The difference in analysis between Extraction and Alta Mesa on this point is extreme and without a significant difference in the underlying state law at issue.

In re: Chesapeake Energy Corp.

Adding an additional wrinkle into the fold, in In re: Chesapeake Energy Corp., the U.S. Bankruptcy Court for the Southern District of Texas recently considered whether a gas purchase agreement between Chesapeake and ETC Texas Pipeline Ltd. could be rejected as an executory contact under Section 365 of the Bankruptcy Code.[21]

In determining that the covenants contained in the gas purchase agreements did not run with the land, the court concluded that the intent element in the covenant running with the land analysis was not satisfied, notwithstanding a clear written expression by the parties that they intended for the obligation to sell specified quantities of gas to run with the land.

While the court acknowledged that an express statement of that intent, generally speaking, would establish the requisite intent for a covenant to run with the land, the court looked to other provisions of the gas purchase agreement and concluded that the requisite intent was lacking.

Specifically, the court noted that the formulaic monetary damages provision — and absence of equitable remedies such as specific performance and injunctive relief — underscored the personal, rather than real property, nature of ETC's rights under the contract.

The Chesapeake ruling also sheds some important light on whether a dedication covenant adequately touches and concern the land to which it relates. ETC contended that the dedication of all oil and gas produced from Chesapeake's leases touched and concerned the land.

The court disagreed, however, and noted that "[o]nly after gas is produced and becomes personal property does an obligation regarding the disposition of that gas arise."[22] Significantly, the court noted in a footnote that "[h]ad the agreement between the parties included a dedication of 'all of the Debtors' right, title and interest in and to the leases,' the court's analysis might have been profoundly different."[23]

Once again, by focusing on the mineral estate, rather than the debtor's leasehold interests, the court concluded that the agreement concerned only personal property, and not real property, and therefore did not create a covenant running with the land.

In re: Southland Royalty Co. LLC

More recently, on Nov. 13, the U.S. Bankruptcy Court for the District of Delaware issued a decision in an adversary proceeding in the In re: Southland Royalty Co. LLC case, where the court determined that Southland Royalty Co., an exploration and production operator with assets primarily in Wyoming, could reject a gas gathering agreement it had with Wamsutter LLC, a midstream service provider.[24]

Southland and Wamsutter were parties to two midstream agreements, the L60 and L63 agreements. After the parties entered into the L60 agreement, Southland enhanced its drilling program to include horizontal wells that required an expansion and update to the Wamsutter gathering system.

To accommodate this expansion and update, the parties entered into the L63 agreement. The area covered by the L63 agreement was located within the area covered by the L60 agreement, but it served different receipt points. Both agreements included minimum volume commitments, but the L63 agreement contained the more onerous of the two, with an estimated $863 million commitment.

Southland filed Chapter 11 on Jan. 27 after Wamsutter made a $6.9 million adequate assurance request on the cash-strained operator. Citibank is the debtor's sole secured lender with $540 million outstanding as of the bankruptcy. The bank agreed to a sale process that the debtor kicked off shortly after the filing.

However, the sale process came to a grinding halt when it became clear that Wamsutter would not renegotiate the gathering agreements' pricing to a level sufficient to attract binding bids from potential bidders, thereby dashing away the Chapter 11 parties' hope of a speedy sale.

Southland subsequently initiated an adversary proceeding against Wamsutter with a fairly straightforward strategy: Seek a declaration from the bankruptcy court that it could (1) reject the L63 agreement, (2) sell its assets free and clear of Wamsutter's interest under Section 363(f) of the Bankruptcy Code, and (3) novate all gathering and processing services to the L60 agreement.

The elements to create a real covenant under Wyoming law are similar to the elements in the state laws analyzed in Sabine, Badlands, Alta Mesa and Extraction: The parties must intend to create a real covenant, the covenant must touch and concern the land, and there must be privity of estate between the parties.[25]

The court found that the parties unquestionably intended for the dedication provision in the L63 agreement to run with the land. But, the court was unwilling to bootstrap the clear intent in the dedication provision to the remainder of the L63 agreement. The court also found that Southland's commitment to Wamsutter did not touch and concern the land.

Southland had dominion over its unproduced gas reserves and unfettered control over its exploration, drilling and production activity. Southland's produced gas was the only property directly benefited and burdened by the L63, which once severed, is personal property. The court reasoned that "[a]t bottom, the L63 is a contract for Wamsutter's services in the [dedication area] so that Southland can monetize its production."[26]

The court also disposed of Wamsutter's argument concerning the privity of the estate requirement, determining that Southland's easement conveyances were of surface rights, not of an interest in the mineral estate.

The court also held that Southland could sell its assets free and clear of Wamsutter's interest. Wyoming law permits a mortgagee like Southland's lender to foreclose and extinguish later-created real property covenants. Thus, Wamsutter's interest could be sold free and clear under Section 363(f)(1) of the Bankruptcy Code, which permits free and clear sales when nonbankruptcy law permits the property to be sold free and clear.

The court also held that Section 363(f)(5) — permitting free and clear sales when the entity could be compelled to accept a money satisfaction — applied because Wyoming law gives broad discretion to a court to select appropriate remedies to enforce covenants. Importantly, the court noted that the L63 agreement does not exclude monetary damages as a remedy to address breaches.

Southland won the rejection battle, but not the war. U.S. Bankruptcy Judge Karen Owens denied Southland's request to sever the minimum volume commitment from the gathering agreement.

The agreement's structure and language convinced Judge Owens that the minimum volume commitments was intertwined with the gathering and processing services. Wamsutter's witnesses testified that the minimum volume commitments was part-and-parcel with Wamsutter's agreement to expend significant capital to construct the gathering system.

Judge Owens also held that Southland could not flow gas serviced by the L63 agreement under the overlapping L60 agreement. Wamsutter persuaded the court that the agreements dealt with different receipt points, which is supported by the interplay between the two gathering agreements as well as their structure.

Ultimately, the court declined Southland's request to force Wamsutter to accept gas through the L60 notwithstanding the L63 rejection.

Concluding Thoughts

The dissimilarities in state substantive touch-and-concern law and in the factual circumstances attendant to the cases do not seem to be driving the disparate outcomes of these midstream agreement decisions.

The courts seem not to have landed on a common analytical threshold for determining what constitutes a real property interest; some applying very rigorous standards and scrutiny and placing very little value on the contemporaneous intent of the contracting parties and others using less rigorous standards and scrutiny and placing a much higher value on contemporaneous intent.

Because the factual circumstances of these cases arise out of a common set of industry dynamics, they are all very similar and their relatively minor factual differences do not appear to be outcome-determinative. Indeed, one is left with the impression that these bankruptcy courts might reach different outcomes applying the same state's touch-and-concern law to an identical set of facts.

Until some of these midstream agreement cases advance to federal circuit or the U.S. Supreme Court, there is going to be continuing uncertainty about whether midstream agreements create real property interests and how parties may structure them to assure themselves of a more certain outcome under Section 365 analysis.

One additional practical consideration comes into focus from Southland.

Although a single decision certainly does not create a trend, Judge Owens' refusal to allow the producer to remove the economically desirable aspects of a rejected midstream agreement and then to push them into another midstream agreement with the same counterparty that the debtor had determined not to reject means that in making rejection determinations, the producer needs to do an all-or-nothing analysis because the courts simply may not go for a "have your cake and eat it too" approach.

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[1] Alta Mesa Holdings, LP v. Kingfisher Midstream, LLC (In re Alta Mesa Res., Inc.), 613 B.R. 90 (Bankr. S.D. Tex. 2019); Monarch Midstream, LLC v. Badlands Prod. Co. (In re Badlands Energy, Inc.), 608 B.R. 854 (Bankr. D. Colo. 2019).

[2] See, Extraction Oil & Gas, Inc. v. Elevation Midstream, LLC (In re Extraction Oil & Gas, Inc.), 2020 Bankr. LEXIS 2855, Adv. Proc. No. 20-50839 (Bankr. D. Del. Oct. 14, 2020);Extraction Oil & Gas, Inc. v. Platte River Midstream, LLC (In re Extraction Oil & Gas, Inc.), 2020 Bankr. LEXIS 2853, Adv. Pro. No. 20-50833 (Bankr. D. Del. Oct. 14, 2020); Extraction Oil & Gas, Inc. v. Grand Mesa Pipeline, LLC (In re Extraction Oil & Gas, Inc.), 2020 Bankr. LEXIS 2854, Adv. Pro. No. 20-50816 (Bankr. D. Del. Oct. 14, 2020).

While Chief Judge Sontchi issued three separate Findings of Fact and Conclusions of Law, the facts and conclusions across all three rulings are substantially similar. However, because the ruling in Extraction Oil & Gas, Inc. v. Elevation Midstream, LLC contains the Court's most in-depth discussion of the issues presented in these proceedings, the discussion contained herein is in reference to that specific ruling.

[3] Sabine Oil & Gas Corp. v. HPIP Gonzales Holdings, LLC (In re Sabine Oil & Gas Corp.), 550 B.R. 59 (Bankr. S.D.N.Y. 2016).

[4] Extraction Oil & Gas, Inc. v. Elevation Midstream, LLC, 2020 Bankr. LEXIS 2855 *43 (Bankr. D. Del. Oct. 14, 2020).

[5] Only the covenants pertaining to dedication and delivery were expressly stated to run with the land. Id. at *46.

[6] Id. at *63 (internal citations omitted).

[7] Id. at *70.

[8] Id. at *69-70.

[9] The "dedication covenant" refers to Extraction's dedication and commitment of its mineral interests to the performance of gathering services provided by Elevation.

[10] Id. at *73.

[11] Id. at *75 (comparing In re Sabine Oil & Gas Corp., 550 B.R. 59, 81 (S.D.N.Y. 2016), aff'd, 567 B.R. 869 (S.D.N.Y. 2017), aff'd, 734 Fed. Appx. 64 (2d Cir. 2018).

[12] Id. at *81. The "delivery covenant" required Extraction to deliver 100% of the minerals produced

from its "Dedicated Interests" to the midstream service provider at specific "Delivery Points."

[13] In re Sabine Oil & Gas Corp., 550 B.R. at 81 (S.D.N.Y. 2016).

[14] Extraction Oil & Gas, Inc., 2020 Bankr. LEXIS 2855 at *53-54.

[15] Id.at *56.

[16] See, Alta Mesa Holdings, LP, 613 B.R. at 103 (internal citations omitted).

[17] See, Monarch Midstream, LLC, 608 B.R. at 869.

[18] See, Alta Mesa Holdings, LP, 613 B.R. 90 at 104 (internal citations omitted).

[19] See, Extraction Oil & Gas, Inc., 2020 Bankr. LEXIS 2855 at *86.

[20] See, Alta Mesa Holdings, LP, 613 B.R. 90 at 104.

[21] In re Chesapeake Energy Corporation, No. 20-33233, 2020 Bankr. LEXIS 3022 (Bankr. S.D. Tex. 2020).

[22] Id. at *24.

[23] Id. at n. 5.

[24] Southland Royalty Co. LLC v. Wamsutter LLC (In re Southland Royalty Co. LLC), No. 20-50551, 2020 Bankr. LEXIS 3185 (Bankr. D. Del. 2020).

[25] Id. at *25.

[26] Id., at *33.

Executive summary

- The "Texas Two-Step" strategy is where a company first implements a "divisive merger" transaction and then files for bankruptcy. Divisive mergers originate under Texas law and permit the division of an existing entity into two or more new entities, with certain benefits not achievable with traditional spinoffs or asset sales
- The Texas Two-Step has been utilized in a handful of chapter 11 cases to date, mostly by debtors seeking to isolate mass-tort liabilities and address them through the bankruptcy process
  - *See In re LTL Management, LLC* ("*LTL*") and *Aearo Technologies LLC* ("Aearo"), case studies in **Appendix B**
- As discussed more fully below, the Texas Two-Step may enable companies facing mass-tort liabilities to consolidate litigations across the country into a single bankruptcy court, while keeping substantial operations outside of bankruptcy. The debtor may then take advantage of the Bankruptcy Code to estimate the total amount of contingent claims for purposes of confirming a chapter 11 plan and attempting to negotiate a global settlement that resolves its liability and avoids the expense and unpredictability of scores of jury trials

Executive summary (cont.)

- Prior to *LTL*, three bankruptcy cases made use of the Texas divisive merger law, each filed by a company facing mass tort liabilities, and each seeking to follow a nearly identical playbook in front of one of two United States Bankruptcy Judges in the Western District of North Carolina: *In re Bestwall LLC*, *In re DBMP*, and *In re Aldrich Pump LLC*
- For other debtors, divisive mergers offer another tool to structure an exit from bankruptcy that preserves the value of go-forward reorganized entities while separately ring-fencing the assets allocated to pay for certain nondischargeable liabilities
  - *See In re Fieldwood Energy* ("*FWE*") case study in **Appendix B**

Goals and benefits of the Texas Two-Step

- In each of the four mass tort Texas Two-Step cases, the debtor has pursued the following playbook:
  - halt all tort litigation against the debtor and its non-debtor affiliates for the duration of the chapter 11 case;
  - avail itself of the bankruptcy court's claims estimation authority to help facilitate a global settlement; and
  - confirm a consensual chapter 11 plan that establishes a litigation trust and includes a channeling injunction to protect the ongoing enterprise from further litigation risk and expense
- None of the mass tort debtors (including *Bestwall*, which filed in 2017) has yet reached the plan solicitation stage as they each continue to work through the estimation and settlement process and respond to new challenges raised by various constituencies

Goals and benefits of the Texas Two-Step (cont.)

Litigation injunction

- Upon the filing of a chapter 11 case, the automatic stay enjoins commencement or continuation of any litigation against a debtor
- In each of the four mass tort Texas Two-Step cases, the debtor also requested a preliminary injunction to enjoin litigation against its non-debtor affiliates during the chapter 11 case:
  - In the first three cases, the court granted the injunction on the grounds that such suits would interfere with the debtor's ability to confirm a chapter 11 plan because of the various indemnification and funding obligations among each debtor and its non-debtor affiliates
  - As discussed below, *LTL* did not follow the same playbook and has faced pushback and several obstacles to date

Goals and benefits of the Texas Two-Step (cont.)

Claims estimation

- Section 502(c) of the Bankruptcy Code allows a bankruptcy court to estimate the amount of "any contingent or unliquidated claim" if leaving the liquidation of such claim to a separate process or timeline (such as pursuant to a proceeding in a separate court) "would unduly delay the administration of the [bankruptcy] case"
- This may be true even for litigation not yet commenced as of the petition date
- In each of the first three cases, the court granted the respective debtor's claims estimation motion, approving and establishing an evidentiary procedure relying on expert testimony and fact discovery to fix the amount of the total asbestos liability for current and future claimants

Goals and benefits of the Texas Two-Step (cont.)

Claims estimation (cont.)

- Importantly, claims estimation alone does not create a cap on the ultimate liability, absent being incorporated into a chapter 11 plan that provides such a cap. If the debtor fails to confirm a plan and the chapter 11 case is dismissed, the claims estimation will not limit the magnitude of contingent liabilities that might later be determined in separate litigations
- However, claims estimation and the subsequent plan negotiation process can facilitate a consensual global settlement and, if a plan is confirmed that includes a channeling injunction, the ongoing operations are protected from future litigation and the amount of resources allocated to pay distributions for future claims is capped as set forth in the plan

Goals and benefits of the Texas Two-Step (cont.)

Litigation trust and channeling injunction

- All four cases were filed with the stated intent of confirming a "524(g) plan" to channel future litigation to a trust established by the plan to satisfy all asbestos claims and liabilities up to a consensually agreed aggregate amount, thereby protecting each respective enterprise from any further liability and litigation
- Section 524(g) of the Bankruptcy Code codified the approach first taken in the *Johns-Manville* bankruptcy in the 1980s, itself a leading producer of asbestos and subject to tens of thousands of lawsuits and tort claims
- Section 524(g) provides that, in connection with the confirmation of a chapter 11 plan that compromises asbestos mass tort liability, a court may issue a channeling injunction that enjoins creditors from taking any "legal action for the purpose of directly or indirectly collecting, recovering, or receiving payment or recovery with respect to any claim . . . that, under a plan of reorganization, is to be paid in whole or in part by a trust." 11 U.S.C. § 524(g)

Goals and benefits of the Texas Two-Step (cont.)

Protecting the ongoing enterprise

- A Texas Two-Step also seeks to preserve and protect business operations in the normal course during the chapter 11 proceeding
- In contrast, if the entire enterprise filed for chapter 11 relief,
  - actions by any debtor taken outside of the "ordinary course" of business would require a public motion, court approval, and would allow for stakeholder objections, and
  - professional expenses and statutory fees would be materially higher for the substantially more complex bankruptcy proceedings, and the debtor would likely be obligated to pay the fees and expenses for multiple parties, including adversaries

Limitations of the Texas Two-Step

Creditors retain affirmative rights and protections

– Prepetition transfers of liabilities and assets pursuant to a Texas Two-Step do not appear to protect the corporate entities from causes of action claiming fraudulent conveyance or other affirmative creditor rights and protections
  - Statutory purpose: According to legislative history and public commentary, the purpose of divisive merger laws is to encourage freedom of contract by permitting corporate restructurings that might otherwise be blocked by contractual transfer restrictions, and ***not*** to alter or impact creditor rights
  - Creditor action to date: Challenges have been raised in each of the mass tort Texas Two-Step cases, claiming fraudulent conveyance, pleading theories of corporate alter ego to pierce the legal boundaries between the debtor and its non-debtor affiliates, and seeking to substantively consolidate a debtor and its affiliate entities for a similar result. None of these actions has yet been litigated to conclusion

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Limitations of the Texas Two-Step (cont.)

Fraudulent conveyance risk

– The two WDNC judges overseeing all four cases (prior to the recent transfer of the *LTL* case) have already clearly expressed their view that the Texas Two-Step may be subject to challenge as a fraudulent conveyance:
  - ". . . Texas has adopted the Uniform Fraudulent Transfer Act . . . and fraudulent transfer law is also a part of the Bankruptcy Code . . . . If a debtor used the Texas [divisive merger] statute to commit a fraudulent transfer — creating the harm that the Committee complains of — such law would be available to address such acts." *In re BestWall LLC*, 606 B.R. 243, 252 (Bankr. WDNC 2019)
  - "[I]f a corporation uses a divisional merger to dump its liabilities into a newly created 'bad' company that lacks the ability to pay creditors while its 'good' twin walks away with the enterprise's assets, a fraudulent transfer avoidance action lies." *In re Aldrich Pump LLC*, No. 20-30608, 2021 WL 3729335, at *29 (Bankr. WDNC Aug. 23, 2021)
  - A "primary author of the Texas divisional merger statute[] has confirmed that the rights of creditors under federal and state fraudulent transfer laws are not abrogated or abridged by such a merger." *In re DBMP Inc.*, No. 20-30080, 2020 WL 3552350, at *25 (Bankr. WDNC Aug. 11, 2021) (citation omitted)

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Faculty

Omar J. Alaniz is the hiring partner in the Dallas office of Reed Smith LLP and represents distressed companies, including in out-of-court workouts and chapter 11 restructurings. He regularly advises boards of directors in considering liability management alternatives. Mr. Alaniz's diverse practice also includes representation of creditor committees, equityholders, joint-venture partners, preference and fraudulent-transfer plaintiffs and defendants, and other key stakeholders. He also has experience in energy restructurings, including onshore and offshore matters, and has had significant representations in real estate, financial services, aviation and health care matters. He has appeared in bankruptcy and appellate courts throughout the country, including the Texas and U.S. Supreme Court. Mr. Alaniz has been recognized in the 2015-22 editions of *Chambers USA* and in 2021 was invited to membership in the American College of Bankruptcy. In 2019, he was invited to join the prestigious 60-member National Bankruptcy Conference, and he was honored as a member of the inaugural class of ABI's "40 Under 40" in 2017. In addition, he received the Sandra Day O'Connor Award for Professional Excellence at a ceremony held in the U.S. Supreme Court hosted by Chief Justice John G. Roberts, Jr. Mr. Alaniz is a former chair of the Bankruptcy Section of the Texas State Bar and was an adjunct faculty member at SMU Dedman School of Law for several years, where he taught bankruptcy law courses. He also teaches a 12-week chapter 11 course to lawyers in the DFW area entering the restructuring practice. Mr. Alaniz coached the SMU Duberstein moot court team to five national championships — the most in the competition's history. He received his B.A. in economics at Austin College in 2000 and his J.D. from the University of Texas School of Law in 2003, where he was a Susman Godfrey Moot Court Champion.

Hon. David R. Jones is Chief U.S. Bankruptcy Judge for the Southern District of Texas in Houston, initially sworn in on Sept, 30, 2011, and named Chief Judge in 2015. Prior to becoming a judge, he was a partner in the bankruptcy group at Porter Hedges, LLP in Houston, specializing in bankruptcy and bankruptcy-related litigation. Judge Jones received his B.S. in electrical engineering from Duke University in 1983, his M.B.A. from Southern Methodist University in 1986, and his J.D. from the University of Houston in 1992, where he served as editor-in-chief of the *Houston Law Review*.

Angela M. Libby is a restructuring partner with Davis Polk & Wardwell LLP in New York, where she advises debtors, creditors, banks, hedge funds, lenders, asset-purchasers and other strategic parties in a wide range of corporate restructuring matters, including prepackaged and traditional bankruptcies, out-of-court workouts, debtor-in-possession and exit financing transactions, asset sales, bankruptcy litigation, cross-border insolvencies and liability-management transactions. A 2019 ABI "40 Under 40" honoree, Ms. Libby was named a 2021 "Rising Star" in energy by *Law360*, and *Turnarounds & Workouts* listed her among 2020's "Outstanding Young Restructuring Lawyers." In addition, she was one of only three recipients nationwide of the 2019 *IFLR* "US Rising Star Award," and she was named in *Global Restructuring Review*'s "40 Under 40" list in 2022. Ms. Libby received her A.B. in history and religion from Dartmouth College and her J.D. from New York University School of Law, where she was an AnBryce Scholar.

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