Recent Trends in Energy Restructurings

September Meeting of the Society of Petroleum Evaluation Engineers (Houston Chapter)

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Types of Bankruptcies

- Chapter 7
- **Chapter 11**
- Chapter 13
- Chapter 9
- Chapter 15
Chapter 11 Constituents

- Debtor-in-Possession
- Committees
- Ad Hoc Groups
- Mineral Interest Holders
- Plan Trustee/Chapter 11 Trustee
- U.S. Trustee
Debtor-in-Possession Protections

- Automatic Stay
- Financing
- Sale of Assets
- Executory Contracts
- Reorganization
Automatic Stay

- Injunction stays any act to collect on a claim or to perfect or enforce a lien
- Very broad scope
- Applies to any act to obtain possession of, or exercise control over property of the estate, or take property from the state
- Subject to very specific and limited exceptions
- Does not apply to non-debtor guarantors, except under exceptional circumstances
Recent Litigation Related to the Automatic Stay

- **Make-Whole Litigation**
  - Is a lender entitled to relief from the automatic stay to reverse the automatic acceleration of the maturity date of a loan?
  - Covered more extensively in a few slides!

- **Hedging Facilities**
Hedging Facilities

- Affected Constituents:
  - Debtor
  - Committees
  - Ad Hoc Groups (Lenders)
Hedging Facilities

- Hedging facilities are generally not subject to the automatic stay
  - Bankruptcy Code affords special treatment to financial markets (qualified financial contracts)
- Prepetition setoff of hedging facilities to pay down the RBL
- Debtors often request Hedging Orders to permit special treatment to hedge providers
Debtor-in-Possession Protections

- Automatic Stay
- Financing
- Sale of Assets
- Executory Contracts
- Reorganization
Cash Collateral

- Cash/Proceeds
- Use of cash collateral via:
  - Consent, or
  - Court order after notice and hearing
- Requirement to segregate and account
DIP Lending

- Priming DIP Liens – Standard to Carve Out Existing Priority Liens
- Subordinate Liens Must be Adequately Protected
- Court Order and/or Loan Documents
- Superpriority Claims
- Must be paid in full to confirm Plan
- Interest/Fees
Adequate Protection

- Collateral Value as of Petition Date
- Use/Diminution/Turnover of Equipment
- Replacement Liens
- Budget Requirements
- Superpriority and/or Administrative Claims
- Reporting Requirements
- Lien Stipulations
- Releases
- Lien Investigation Period
- Surcharge Waiver/Carve-Outs
- Payments
Lien Issues
(Midstates Petroleum Company, LLC)

- Affected Constituents:
  - Debtor
  - Committees
  - Ad Hoc Groups (Lenders & Midstream Pipelines)
Lien Issues
(Midstates Petroleum Company, LLC)

- Unsecured Creditors Committee took a very aggressive stance in case
- Unsecured creditors were predicted to receive no distribution other than a “tip”
Lien Issues
*(Midstates Petroleum Company, LLC)*

- Unsecured Creditors Committee requested standing to bring claims against lenders on debtors’ behalf
- Fraud claims were unsubstantiated but led to a tense in and out of court dynamic
- Lenders settled lien perfection claims with Unsecured Creditors Committee
Make-Wholes

- Affected Constituents:
  - Debtor
  - Committees
  - Ad Hoc Groups (Lenders)
Make-Wholes

- Make-Wholes are a creature of contract
  - May appear in a credit agreement or an indenture
- Essentially a compromise:
  - Borrower gains right to prepay; Lender preserves bargained-for yield
- Make-Wholes are generally permissible if formula-driven (not liquidated damages)
Make-Wholes

- Other provisions in a contract may frustrate the operation of a Make-Whole
  - Acceleration of debt as a result of bankruptcy petition

- Litigation generally turns on when contract language triggers Make-Whole:
  - Specific Date; or
  - Maturity Date (subject to acceleration)
Make-Wholes

- Often these disputes arise in the context of a refinancing
  - Refinancings in a bankruptcy can occur through postpetition financing or through exit financing
- Make-Whole litigation raises two questions:
  - Is a post-maturity date refinancing equivalent to a redemption? and
  - Is a lender entitled to relief from the automatic stay to reverse the automatic acceleration of the maturity date of a loan?
Make-Wholes

- Second and Third Circuit Courts recently produced decisions that currently serve as the state of the law:
  - *In re MPM Silicones, LLC (Momentive)* and *In re Energy Future Holdings Corp. (EFH)*
- Third Circuit shocked the bankruptcy bar with a decision reversing lower courts and allowing a make-whole claim in *EFH*
- Second Circuit heard oral arguments on *Momentive* appeal and opinion is pending
Debtor-in-Possession Protections

- Automatic Stay
- Financing
- Sale of Assets
- Executory Contracts
- Reorganization
363 Sales

- Bid Procedures/Stalking Horse Provisions
- Engagement of investment banker/broker
- Sale of Assets “Free and Clear”
- Liens attach to proceeds
- Credit Bid Rights
- Good Faith Protection
Bidding Process (Stone Energy Corp.)

- Affected Constituents:
  - Debtor
  - Committees
  - Ad Hoc Groups (Lenders)
Bidding Process  
(Stone Energy Corp.)

- Debtors marketed assets prepetition
- Filed a Sale Motion almost immediately
- Stalking Horse bidder requested a closed-bidding process
- New bidders appeared prior to auction
- Bankruptcy court allowed the new bidders to join the auction
Bidding Process (Stone Energy Corp.)

- Stalking Horse bidder did not increase its bid after the first topping bid.
- Two new bidders increased the bidding level to approximately 50% greater than the Stalking Horse bid.
- Leading example of potential risks of a closed-bidding process.
Debtor-in-Possession Protections

- Automatic Stay
- Financing
- Sale of Assets
- Executory Contracts
- Reorganization
Executory Contracts &
Unexpired Leases

- Debtor can (i) assume, (ii) assume and assign, or (iii) reject executory contracts and unexpired leases
- Assuming and assuming and assigning a contract are subject to certain restrictions
Gathering Agreements

- Affected Constituents:
  - Debtor
  - Ad Hoc Groups (Midstream Pipelines)
Gathering Agreements

- Generally, Gathering Agreements are viewed as covenants running with the land.
- Status of Gathering Agreements as covenants depends on state law and drafting of agreement.
Gathering Agreements

- One bankruptcy court, affirmed by the district court, held that a Gathering Agreement could be rejected
  - *In re Sabine Oil & Gas Corp.*

- Another court suggested, but did not hold, the same
  - *In re Quicksilver Resources Inc.*

- Both courts received extensive criticism
Debtor-in-Possession Protections

- Automatic Stay
- Financing
- Sale of Assets
- Executory Contracts
- Reorganization
Reorganization Plans

- Value is Key
- Treatment of Creditors
- Discharge
- Absolute Priority
- Feasibility
- Third Party Releases
- Good Faith
Cram Down Plans

- Approval of Plan over Creditor objection
- Acceptance by one “impaired” class of creditors
- Must be “Fair and Equitable”
  - Retain Liens
  - Receive cash payments equal to “value” of claim
- Interest Rate
Liquidation Plan

- Trustee to pursue/collect miscellaneous Assets, including litigation claims
- Liquidating Trustee:
  - administers claims
  - makes distributions
  - pursues settlements or litigation
Full Case Citations

Questions ?
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