

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
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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
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Executory Contracts & Unexpired Leases

- Debtor can (i) assume, (ii) assume and assign, or (iii) reject executory contracts and unexpired leases
- Assuming and assigning 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

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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

- *In re Midstates Petroleum Company, Inc.*, Case 16-32237 (Bankr. S.D. Tex. Apr. 30, 2016)
- *In re MPM Silicones, LLC*, Case 14-22503 (Bankr. S.D.N.Y. Apr. 13, 2014)
- *In re Energy Future Holdings Corp.*, Case 14-10979 (Bankr. D. Del. Apr. 29, 2016)
- *In re Stone Energy Corp.*, Case 16-36390 (Bankr. S.D. Tex Dec. 14, 2016)
- *In re Sabine Oil & Gas Corp.*, Case 15-11835 (Bankr. S.D.N.Y. July 15, 2015)
- *In re Quicksilver Resources Inc.*, Case 15-10585 (Bankr. D. Del. Mar. 17, 2015)

Questions ?

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