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I. Introduction

There were relatively few significant New York cases involving oil and gas in the past year due to New York's moratorium on the high volume hydrofracturing operations necessary for development of unconventional oil and gas formations. The few notable cases include a case rejecting a lessee's attempt to extend leases relying on force majeure due to the moratorium, and a bankruptcy case permitting an exploration and production company to reject midstream gathering contracts in a Chapter 11 reorganization. The latter case is of special significance because of the potential effect on bankruptcies of other exploration and production companies, and the impact on future agreements between exploration and production companies and midstream companies, particularly when an exploration and production company would like a midstream company to incur significant capital expenditures to extend its pipelines service to a producer.

II. Cases

A. Beardslee v. Inflection Energy, LLC, 798 F.3d 90 (2d Cir. 2015).

The United States Court of Appeals for the Second Circuit affirmed the judgment of the District Court that force majeure clauses in oil and gas leases did not modify the leases' habendum clause.[1]

The United States District Court for the Northern District of New York granted a motion for summary judgment in favor of plaintiff lessors, holding that the oil and gas leases lessors entered into with defendant lessee expired at the end of their primary terms and that lessee could not invoke force majeure to extend the leases.[2]

Upon appeal the Second Circuit Court of Appeals certified two questions to the New York Court of Appeals: (1) under New York law, and in the context of an oil and gas lease, did the State's moratorium amount to a force majeure event; and (2) if so, does the force majeure clause modify the habendum clause and extend the primary terms of the leases?[3] The New York Court of Appeals only answered the second question, holding that the force majeure clause "does not modify the primary term of the habendum clause and therefore, does not extend the leases."[4]

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1. Beardslee v. Inflection Energy, LLC, 798 F.3d 90, 93 (2d Cir. 2015).
2. *Id.*
3. *Id.* (citing Beardslee v. Inflection Energy, LLC, 761 F.3d 221, 224 (2d Cir. 2014)).
4. *Id.* (citing Beardslee v. Inflection Energy, LLC, 25 N.Y.3d 150, 157 (2015)).

The Second Circuit Court of Appeals then held, based upon the New York Court of Appeals holding, that, "[w]hether or not the moratorium on HVHF and horizontal drilling qualifies as a force majeure event, then, it did not operate to extend the Leases' primary terms," thus affirming the judgment of the District Court.[5]

B. In re Sabine Oil & Gas Corp., 547 B.R. 66 (Bankr. S.D.N.Y. 2016).

The Southern District of New York Bankruptcy Court held that an exploration and production company debtor could reject midstream agreements. The case illustrates the risk to midstream companies that their agreement with exploration and production companies may be rejected in bankruptcy.

In the Chapter 11 bankruptcy proceeding for Sabine Oil & Gas Corporation, an exploration and production company, debtor-in-possession sought to reject midstream gas gathering agreements under Section 365 of the Bankruptcy Code, 11 U.S.C. § 365.[6] The Bankruptcy Court recognized that the "process of deciding a motion to assume [or reject] is one of the bankruptcy court placing itself in the position of ... the debtor in possession and determining whether assuming [or rejecting] the contract would be a good business decision or a bad one."[7] The midstream objectors argued that the dedications of production and transportations fees in the gathering agreements were "covenants that run with the land" which would survive rejection under Section 365.[8]

The Court concluded that it could not make a binding determination on the substantive legal issue of whether the covenants "ran with the land" in the context of a motion to reject.[9] However, the Court nonetheless reviewed the law of real covenants under Texas law in a nonbinding analysis. Under Texas law a covenant runs with the land when (1) it touches and concerns the land; (2) it relates to a thing in existence or specifically binds the parties and their assigns; (3) it is intended by the original parties to run with the

5. *Id.* at 94.

6. In re Sabine Oil & Gas Corp., 547 B.R. 66, 71 (Bankr. S.D.N.Y. 2016).

7. *Id.* (quoting In re Orion Pictures Corp., 4 F.3d 1095, 1099 (2d Cir. 1993)) (internal quotation marks omitted).

8. *Id.* at 72.

9. *Id.* at 79 (citing *In re Orion*, 4 F.3d at 1098-99 (2d Cir. 1993)).

land; and (4) the successor to the burden has notice.[10] The Court also found that horizontal privity was required between the parties to the covenant.[11]

The Court concluded that the agreements did not convey any interest in real property in the mineral estate to the midstream objectors, as required to establish horizontal privity between the parties.[12] The Court also found that the dedications of production did not "touch and concern" the land in that they did not impact the value of the underlying leases or affect the leases.[13] The agreements only concerned production after severance, that is, personal property.[14] Accordingly, the Bankruptcy Court ruled that rejection of the agreements was a reasonable exercise of debtor's business judgment.[15]

The nonbinding conclusion that the agreements did not touch and concern the land was subsequently affirmed in *In re Sabine Oil & Gas Corp.*, 550 B.R. 59 (Bankr. S.D.N.Y. 2016).

10. *Id.* at 75-76 (citing Inwood N. Homeowners' Ass'n, Inc. v. Harris, 736 S.W.2d 632, 634 (Tex. 1987)).
11. *Id.* at 76.
12. *Id.* at 77.
13. *Id.* at 75.
14. *Id.* at 78.
15. *Id.* at 79.