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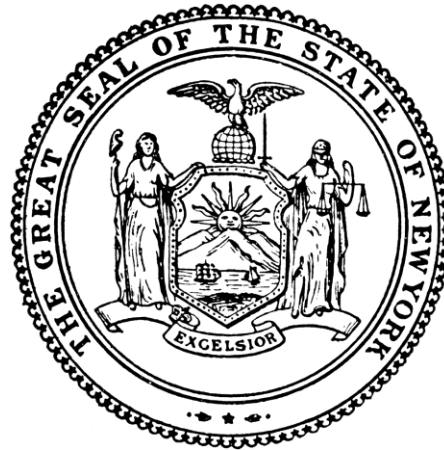
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Table of Contents

I. Introduction	372
II. Judicial Developments	372
<i>In re Sabine Oil & Gas Corp.</i>	372

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I. Introduction

There were few significant New York cases involving oil and gas in the past year due to New York's continuing moratorium on high-volume hydraulic fracturing operations, which are necessary for the development of unconventional oil and gas formations. The most notable decision was the United States Court of Appeal's, Second Circuit, affirmation that an exploration and production company could reject midstream gathering contracts in a Chapter 11 reorganization. The Sabine case is significant due to its impact on 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. Judicial Developments

In re Sabine Oil & Gas Corp.

Nordheim Eagle Ford Gathering, LLC ("Nordheim") appealed the District Court's decision that Sabine Oil & Gas Corporation could reject gas marketing agreements under Section 365 of the Bankruptcy Code, 11 U.S.C. § 365(a).¹ Nordheim argued that the agreements were "real covenants that run with the land" under Texas law.² If the agreements were real covenants the contracts were not executory and could not be rejected under Section 365 of the Code.³

On appeal, the United States Court of Appeals, Second Circuit, affirmed the District Court for the Southern District of New York, holding that bankruptcy trustee for exploration and production could reject gas marketing agreements in bankruptcy.⁴

Under Texas law, a real covenant running with the land must: "1) touch and concern the land, 2) relate to a thing in existence or specifically bind the parties and their assigns, 3) be intended by the original parties to run with the land; and 4) the successor to the burden must have notice."⁵ The parties conceded that the agreements met prongs two through four, but disputed whether the agreements "touch and concern" the land.⁶ The

1. *In re Sabine Oil & Gas Corp.*, 734 F. App'x 64, 65 (2d Cir. 2018).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* at 66 (citing *Inwood N. Homeowners' Ass'n, Inc. v. Harris*, 736 S.W.2d 632, 635 (Tex. 1987)).

6. *Id.* at 66.

Bankruptcy Court held that under Texas law horizontal privity was also required.⁷ The Court of Appeals agreed.⁸

Nordheim argued that horizontal privity was established by separate easement agreements.⁹ This argument was rejected by the Court of Appeals because neither gas marketing agreement conveyed an interest in the land.¹⁰ In the alternative, Nordheim argued that the agreements created equitable servitudes.¹¹ The Court of Appeals rejected this contention as well because the agreements did not benefit any real property interest of Nordheim.¹² The Court of Appeals affirmed the order of the District Court.¹³

7. *Id.*

8. *Id.* (citing *Westland Oil Dev. Corp. v. Gulf Oil Corp.*, 637 S.W.2d 903, 910-11 (Tex. 1982); *Davis v. Vidal*, 151 S.W. 290, 291 (Tex. 1912); *Flanniken v. Neal* 4 S.W. 212, 214-15 (Tex. 1887)).

9. *Id.* at 67.

10. *See id.*

11. *Id.* at 67-68.

12. *Id.* at 68 (citing *In re Sabine Oil & Gas Corp.*, 567 B.R. 869, 877 (S.D.N.Y. 2017)).

13. *Id.*