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Necessity or Overreach? Weighing the Costs and Benefits of State Law Interpretation in Oil and Gas Bankruptcy Cases

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NECESSITY OR OVERREACH? WEIGHING THE COSTS AND BENEFITS OF STATE LAW INTERPRETATION IN OIL AND GAS BANKRUPTCY CASES

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Introduction

"Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding."[1] With these words, the United States Supreme Court established guidelines for the interaction of state and federal law in the bankruptcy context. The *Butner* principle, as this guidance has come to be known, was devised to promote the uniform treatment of property interests under both state and federal law.[2] But in striving to establish uniformity in this manner, the *Butner* principle necessarily acknowledges divergent treatment of property interests in different bankruptcy courts across the country, to the extent that there is

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1. *Butner v. U.S.*, 440 U.S. 48, 55 (1979).

2. Rich Mullen, *Bankruptcy 101 – Back to Basics with Butner*, WEIL BANKR. BLOG (Oct. 27, 2011), https://business-finance-restructuring.weil.com/throwback-thursday/bankruptcy-101-back-to-basics-with-butner/ ("The Court reasoned that a uniform treatment of property interests by state and federal courts would reduce uncertainty, discourage forum shopping and prevent a party from receiving a windfall merely because of a debtor's bankruptcy.").

variation among state property laws.[3] Such divisions are readily observable in oil and gas bankruptcies.

When an oil and gas company files for bankruptcy, federal bankruptcy judges are often confronted with the need to interpret complex, technical, and even "arcane" state property laws, due primarily to the interplay between property and contract law in these cases.[4] Courts' interpretations can sometimes produce non-uniform results: a bankruptcy court in one instance may conclude that an interpretation of state property law is implicated in its interpretation of a debtor's contract, while another court may reach a different conclusion when faced with a very similar contract.[5] This lack of uniformity, combined with state law complexity, has led some to question whether bankruptcy is the appropriate forum within which to resolve these issues.[6]

Specifically, much ink has been spilled over the proper characterization of oil and gas agreements in bankruptcy.[7] A court's characterization of an oil and gas agreement as a real property conveyance, a lease, or an executory contract directly impacts the way the debtor can treat the agreement in bankruptcy.[8] If the court determines that the debtor has conveyed a real property interest to another party via the agreement, the property conveyed is not part of the bankruptcy estate, and the debtor may not assume or reject the agreement in bankruptcy.[9] In contrast, if the court characterizes the agreement as either a lease or an executory contract, the agreement may be assumed or rejected by the debtor.[10]

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3. *See id.* ("In the absence of some specific bankruptcy interest or provision, bankruptcy courts will take nonbankruptcy rights as they are found.").

4. Michael P. Pearson, *Covenants Running With the Land*, 48 ST MARYS L.J. 727, 785 (2017).

5. *See generally* Wayne C. Byers & Timothy N. Tuggey, *Oil and Gas Leases and Section 365 of the Bankruptcy Code: A Uniform Approach*, 63 AM. BANKR. L.J. 337 (1989).

6. Shereen Jennifer Panahi, *"Dedication of Production" Clauses: Challenges in Ascertaining Interests in Natural Gas Gathering and Processing Agreements in Bankruptcy*, 9 GEO. WASH. J. ENERGY & ENVTL. L. 189, 193 (2019) (discussing jurisdictional issues).

7. Byers & Tuggey, *supra* note 5 at 337 ("The wave of bankruptcies among oil and gas concerns…has made the application of section 365 to the various instruments commonly employed in the industry a very significant issue.").

8. Charles Persons, *Drilling Down: A Deeper Look into the Distressed Oil & Gas Industry Part 3 - The Ability to Assume or Reject Oil and Gas Leases*, WEIL BANKR. BLOG (2015), https://business-finance-restructuring.weil.com/energy-sector/drilling-down-a-deeper-look-into-the-distressed-oil-gas-industry-part-3-the-ability-to-assume-or-reject-oil-and-gas-leases/ (last visited Feb 24, 2020).

9. 11 U.S.C. §541 (defining property of the bankruptcy estate).

10. 11 U.S.C. §365.

Although the proper characterization of oil and gas agreements is indeed unclear, this Article contends that many of the problems commonly associated with this characterization are perhaps not as severe as they might first appear. In particular, it examines three issues that scholars and observers have identified arising from the interplay of federal and state law in oil and gas bankruptcies.

The first, and likely most prominent, issue is the lack of uniform treatment of these agreements in bankruptcy. As illustrated by the *Butner* principle, bankruptcy law presumes that federal courts will generally respect state-created property interests. This principle creates a sort of "vertical uniformity": a party to a bankruptcy case can expect that their property interests will, by and large, receive the same treatment under both state law and federal bankruptcy law. Deference to state law, however, also means that there is no "horizontal uniformity" in bankruptcy cases. In other words, a party's outcome in bankruptcy will vary depending on the state law the bankruptcy court is applying.

In the oil and gas context, there are concerns about lack of both types of uniformity.[11] Bankruptcy courts may vary in their determination as to whether state law applies. In addition, a bankruptcy court applying the law of one state may well reach a different conclusion than if it had applied another state's law. From a bankruptcy perspective, only the first of these uniformity problems can be resolved. The second uniformity problem will only be resolved if all 50 states adopt uniform property laws.

After exploring lack of uniformity, the Article proceeds to talk about a bankruptcy court's jurisdiction to address the state-law issues raised in an oil and gas bankruptcy case. Although some have questioned whether bankruptcy courts properly have jurisdiction to address these issues,[12] this Article contends that often, there is no practical choice but for bankruptcy courts to address these issues as and when they arise. Indeed, although jurisdictional questions are often difficult to resolve in the bankruptcy context, the *Butner* principle does contemplate that bankruptcy courts will hear and decide issues relating to state law when those issues are implicated in decisions relating to the bankruptcy case.

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11. *See, e.g.*, Byers & Tuggey, *supra* note 5 at 338 (observing that "the current treatment of oil and gas leases in bankruptcy offers little certainty"); Panahi, *supra* note 6 at 193 ("[M]any bankruptcy judges have not hesitated to opine on the state law (i.e., non-core) matters, potentially creating more confusion and inhibiting uniformity in the application and interpretation of state laws").

12. Panahi, *supra* note 6 at 193 (summarizing the debate in this area).

Finally, the Article seeks to illuminate the impact of bankruptcy court oil-and-gas decisions. The Article suggests that the overall impact of bankruptcy court decisions about oil and gas contracts may well be minimal on a practical level. Among other things, oil and gas bankruptcies are highly fact-specific and, consequently, readily distinguishable from each other. In addition, as explained below, all parties may be motivated not to bring issues surrounding oil and gas contracts to the bankruptcy court.

This Article's exploration of concerns about uniformity, jurisdiction, and impact helps put these concerns into context and illustrates that, despite these concerns, bankruptcy law may still be a desirable and at times necessary forum for oil and gas industry players. The Article proceeds as follows. Part I provides general background on oil and gas bankruptcies and on the particular subject that is this Article's focus: a debtor's ability to assume or reject oil and gas-related agreements in bankruptcy. Part II explores each of the three issues surrounding this subject in depth, while Part III concludes by summarizing the place of these three issues within the broader framework for oil and gas bankruptcy analysis.

I. Background

This Part first explores the current state of the oil and gas industry. As Subpart A describes, for various reasons, the oil and gas industry is in a slump. This suggests that bankruptcy may well be on the horizon for many companies. Subpart B then introduces a key question a bankruptcy court may face when a company in the oil and gas industry files for bankruptcy: can the company assume or reject certain agreements it entered into prior to the bankruptcy filing?

A. Rising Industry Distress

Oil and gas bankruptcies are on the rise, and industry news suggests that the number of oil and gas bankruptcies is likely to continue to grow in the near future. In 2019, the number of oil and gas bankruptcies in the U.S. and Canada rose 50% over the previous year, and experts predict a continued increase in the number of bankruptcies as energy prices decline due to a global oil surplus.[13] From 2015 to 2019, 208 oil and gas production companies filed for bankruptcy.[14]

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13. *U.S., Canadian Oil Company Bankruptcies Surge 50% in 2019: Report,* REUTERS (Jan. 22, 2020), https://finance.yahoo.com/news/north-american-oil-company-bankruptcies-184043339.html.

14. *Id.*

Although producers have certainly been hit hard, the effects of the industry slump have not been limited to production companies. For example, oilfield service company bankruptcies almost doubled from 2018 to 2019, rising from 12 to 21 in just a year.[15] A notable oilfield service company bankruptcy was Weatherford International, which filed for bankruptcy in July of 2019, listing $8.3 billion in total debts.[16]

Although midstream companies have fared better, even they are not completely spared: two midstream companies filed for bankruptcy in 2019, and 28 have filed since the beginning of 2015.[17] Overall, experts predict that as many as 40 oil and natural gas companies could file for bankruptcy in 2020 in the United States alone.[18]

The oil and gas bankruptcy boom is reflective of the energy industry as a whole. According to analysts, 50 energy companies filed for bankruptcy during the first nine months of 2019, "including 33 oil and gas producers, 15 oilfield services companies and two midstream companies."[19] By comparison, just 43 oil and gas companies filed for bankruptcy during all of 2018.[20] Indeed, the energy sector leads all other sectors with the highest number of distressed companies.[21]

The collapse of oil prices and the bankruptcies of major industry players have also impacted suppliers and employees. Since 2019, the oilfield services sector has lost nearly 13% of its workforce.[22]

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15. *Id.*

16. Olivia Pulsinelli, *Weatherford Files $8.3B Bankruptcy in Houston*, HOUSTON BUS. J. (Jul. 1, 2019), https://www.bizjournals.com/houston/news/2019/07/01/weatherford-files-8-3b-bankruptcy-in-houston.html.

17. *U.S., Canadian Oil Company Bankruptcies Surge 50% in 2019: Report,* REUTERS (Jan. 22, 2020), https://finance.yahoo.com/news/north-american-oil-company-bankruptcies-184043339.html.

18. Sayer Devlin & Christine Buurma, *Oil Patch May See 40 U.S. Bankruptcies This Year, Law Firm Says*, BLOOMBERG BANKR. L. NEWS (Jan. 24, 2020).

19. Alex Kimani, *2020: The Year of the Oil Bankruptcies*, OILPRICE.COM (Dec. 27, 2019), https://oilprice.com/Energy/Energy-General/2020-The-Year-Of-The-Oil-Bankruptcies.html.

20. *Id.*

21. *Id.*

22. David Wethe & Reg Gale, *Oil's Collapse is Taking an Entire Service Industry Down With It*, BLOOMBERG LAW (Apr. 16, 2020), https://www.bloomberglaw.com/exp/eyJjdHh0IjoiQktOVyIsImlkIjoiMDAwMDAxNzEtODJkOS1kMmFiLWE1ZjEtODdkZDIxYjUwMDAwIiwic2lnIjoia3BHeG5tcUxQSXJ2anJqeGlacktsaHgzUCt3PSIsInRpbWUiOiIxNTg3MDQwMTE3IiwidXVpZCI6ImFSNXJwdkhmKy9CZnpVOWVLeWthVVE9PS9ieFdJS0lCUHprK0VSVXVnc3Q3bnc9PSIsInYiOiIxIn0=?usertype=External&bwid=00000171-82d9-d2ab-a5f1-87dd21b50000&qid=6892596&cti=LSCH&uc=1320015811&et=CURAT

The COVID-19 global pandemic has hit the oil industry particularly hard. In response to expanding supply and lower crude prices, explorers across the United States have begun shutting down drilling rigs.[23] A survey by the Kansas City Federal Reserve found that almost 40% of oil and natural gas producers will become insolvent sometime in 2020 if crude prices remain at current levels.[24] During the first quarter of 2020, eight oilfield service companies, representing a total of $10.9 billion of debt, filed for chapter 11 bankruptcy.[25]

Even large companies are not immune from the current crisis. In April of 2020, Marathon Petroleum Corporation became the first U.S. facility to shut down due to the coronavirus pandemic when it idled its Gallup, New Mexico refinery.[26] Across the country, banks are gearing up to operate oil and gas fields in order to avoid losses on loans they extended.[27] Although the federal government and the Organization of the Petroleum Exporting Countries (OPEC) have taken some measures to help ease the crisis for the energy sector, many fear that those measures will not be enough.[28] In a recent survey by the Dallas Federal Reserve, several large producers appeared to call for more government intervention.[29] Oil prices crashed

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23. Joe Carroll, Sayer Devlin & David Wethe, *Oil-Industry Collapse Accelerates as Scores of Rigs Go Dark (1)*, BLOOMBERG LAW (2020), https://www.bloomberglaw.com/document/X49CPJD0000000?udv_expired=true (last visited Apr 14, 2020).

24. Rachel Adams-Heard & Catarina Saraiva, *Oil Companies Warn Kansas City Fed of Widespread Insolvencies*, BLOOMBERG LAW (2020) (last visited Apr 14, 2020).

25. Sergio Chapa, *Service companies lead energy bankruptcy filings so far this year*, HOUSTONCHRONICLE.COM (2020), https://www.houstonchronicle.com/business/energy/article/Service-companies-lead-energy-bankruptcy-filings-15184036.php (last visited Apr 14, 2020) (noting that this was an increase over six companies during the fourth quarter of 2019).

26. Barbara J. Powell & David Marino, *Some of America's Oil Refineries May Be on Brink of Shutting (1)*, BLOOMBERG LAW (2020), https://www.bloomberglaw.com/document/X88EQT2G000000? (last visited Apr 14, 2020).

27. David French & Imani Moise, *Exclusive: U.S. banks prepare to seize energy assets as shale boom goes bust*, REUTERS, April 10, 2020, https://www.reuters.com/article/us-usa-banks-energy-assets-exclusive-idUSKCN21R3JI (last visited Apr 14, 2020) (citing JPMorgan Chase, Wells Fargo, Bank of America, and Citigroup as examples of lenders setting up companies to own and manage oil and gas assets).

28. Kalyeena Makortoff, *Oil Prices Fall Again Despite Opec+ Deal to Cut Production*, THE GUARDIAN, Apr. 10, 2020, https://www.theguardian.com/business/2020/apr/10/opec-russia-reduce-oil-production-prop-up-prices.

29. David Gaffen, *'Survival Mode' – Oil Patch Workers Let It All Hang Out in Post-Crash Fallas Fed Survey*, REUTERS, Mar. 25, 2020, https://www.reuters.com/article/global-

below $0 in April of 2020 for the first time ever,[30] and the Department of Energy has begun work on a plan that would compensate U.S. oil producers for *not* producing in the near future.[31] In short, "[a] tidal wave of bankruptcies is about to hit" the oil and gas industry.[32]

B. Classification of Oil and Gas Contracts

If and when oil and gas companies begin to file, "[t]he real issue behind bankruptcy is going to be breach of contract. Everybody is going to be in breach."[33] Indeed, a major issue in many oil and gas bankruptcies involves the classification of various contracts in the bankruptcy case. Specifically, the U.S. oil and gas industry is "highly dependent upon an intricate set of agreements that allow oil and gas to be gathered from privately owned land."[34] The classification issue became increasingly important after energy commodity prices collapsed in 2014, leaving producers to reduce or suspend oil and gas drilling operations.[35] As production declined, many producers were forced to make large deficiency payments under their agreements with midstream companies.[36] Producers that could not restructure these agreements to reduce or eliminate deficiency payments

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oil-texas/survival-mode-oil-patch-workers-let-it-all-hang-out-in-post-crash-dallas-fed-survey-idUSL1N2BI2OQ.

30. Stephanie Kelly, *Oil Price Crashes into Negative Territory for the First Time in History Amid Pandemic*, REUTERS (Apr. 19, 2020), https://www.reuters.com/article/us-global-oil/oil-falls-on-concern-over-storage-and-earnings-idUSKBN2210V9.

31. Jennifer A. Dlouhy & Sheela Tobben, *U.S. Weighs Paying Drillers to Leave Oil in Ground Amid Glut*, BLOOMBERG NEWS (Apr. 15, 2020), https://www.bloomberg.com/news/articles/2020-04-15/u-s-weighs-paying-drillers-to-leave-oil-in-the-ground-amid-glut.

32. Jordan Fabian & Jennifer A. Dlouhy, *Trump Vows Oil Rescue That He's Been Powerless to Deliver*, BLOOMBERG LAW (Apr. 21, 2020) (quoting the chief executive of Canary Drilling Services, an oilfield services company).

33. Jeremy Hill & Nicole Bullock, *DISTRESSED DAILY: Bankruptcy in the Time of Negative Oil*, BLOOMBERG LAW (Apr. 21, 2020) (quoting Professor Jonathan Lipson, who was speaking about the expected wave of bankruptcy filings by companies hurt by the coronavirus).

34. Fredric Sosnick et al., *Midstream Companies Have Renewed Hope: Running-With-The-Land Oil and Gas Dedication Survives a Bankruptcy Challenge, Offering Precedent in Contra to* Sabine, SHEARMAN & STERLING PERSPECTIVES (Oct. 18, 2019), https://i.emlfiles4.com/cmpdoc/8/7/4/8/2/2/files/9697_doc-6-nov.pdf?dm_i=4WAM,8O87,19L67L,WNLW,1.

35. Pearson, *supra* note 4 at 731.

36. *Id.*

often ended up in bankruptcy, trying to reject[37] their most burdensome contracts.[38] Midstream companies, the contractual counterparties, strongly objected to the debtor-producer's rejection of the contracts, arguing that these contracts contained covenants running with the land, thus creating property interests that bankruptcy law could not terminate.[39]

To understand these arguments, it is important to consider how bankruptcy law differentiates between contract rights and property rights. Bankruptcy law allows the debtor to assume (that is, remain a party to) or reject executory contracts or unexpired leases.[40] Like many other areas of law, bankruptcy law elevates substance over form, meaning that merely labeling an agreement a "lease" does not necessarily mean that it will be classified as a lease in bankruptcy court.[41] In the oil and gas context, although oil and gas contracts may be labeled as "leases," in substance, these agreements are often more akin to conveyances of real property interests in fee simple.[42] If an oil and gas "lease" is, in reality, a conveyance of real property interests, those interests cannot be terminated in bankruptcy, as they will have been conveyed by the debtor prior to the bankruptcy case.[43]

Thus, the classification of an oil and gas lease in a bankruptcy case involves an examination of the substance of the agreement, which in turn frequently invokes difficult questions of both state and federal law. Although bankruptcy law generally defers to property interests created under state law, some courts have held that the question of whether an agreement is an "executory contract" is firmly within the province of bankruptcy law. Thus, the extent to which courts refer to state property law

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37. "Rejection" of a contract in bankruptcy means that the debtor breaches the contract. The claim is treated as a pre-petition claim, meaning that it may be paid only cents on the dollar. *See* 11 U.S.C. §365(g).

38. Pearson, *supra* note 4 at 731-32.

39. *Id.* at 732.

40. 11 U.S.C. § 365(a) (allowing the trustee or debtor-in-possession to assume, assign, or reject executory contracts and unexpired leases with the bankruptcy court's approval); Daniel Tavera, *A Purchase or a Loan? Rethinking the Transactions Private Equity-Backed Oil and Gas Companies Encounter in Uncharted Waters*, 5 OIL & GAS, NAT. RESOURCES & ENERGY J. 41, 42 (2019).

41. Tavera, *supra* note 40 at 54 ("In adopting the [Bankruptcy] Code, Congress intended for courts to examine the true substance of the transaction on a case-by-case basis to discover if a lease is a true lease or a financing instrument.").

42. Byers & Tuggey, *supra* note 5 at 337-38 (summarizing different approaches to classifying oil and gas leases).

43. Pearson, *supra* note 4 at 732.

to characterize the substance of an agreement varies and may depend on how each court interprets an "executory contract."[44]

Making matters worse, there is no "coherent approach" in bankruptcy as to what it means for a contract to be "executory."[45] Although many courts use the Countryman test to determine whether a contract is executory,[46] others have recognized the limitations of this test and sought alternate definitions.[47]

Oil and gas leases can sometimes fall within a gray area, making them difficult to classify. Under the terms of many oil and gas leases, some oil and gas interests revert back to the mineral interest owner upon failure to meet specific terms and conditions.[48] This is a conditional conveyance, classified either as "a freehold conveyance with a reversionary interest in favor of the original owner or as a leasehold conveyance."[49] If a bankruptcy is filed after the conveyance of the working interest but before oil and gas has been produced, a court may hold that the agreement is an executory contract.[50] However, some jurisdictions, such as Texas, provide that an oil and gas interest vests in the lessee upon conveyance.[51] In these instances, the agreement would not be executory, as the interest has already vested.[52]

Courts in Oklahoma and New Mexico are among those that have held that § 365 of the Bankruptcy Code—the provision used by the debtor to assume or reject executory contracts and unexpired leases—does not apply to oil and gas leases.[53] For example, in *In re Heston Oil Co.*, the District Court for the Northern District of Oklahoma held that § 365 did not apply

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44. Byers & Tuggey, *supra* note 5 at 337-338; Jay Lawrence Westbrook, *A Functional Analysis of Executory Contracts*, 74 MINN. L. REV. 227, 316 n. 372 (1989) (noting divisions among courts as to the status of an oil and gas lease).

45. ELIZABETH WARREN ET AL., THE LAW OF DEBTORS AND CREDITORS: TEXT, CASES, AND PROBLEMS 578 (Wolters Kluwer Law & Business, 7th ed., 2014).

46. The Countryman test provides that a contract is executory if "the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other." Vern Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 MINN. L. REV. 439, 460 (1973).

47. *See, e.g.*, In re Riodizio, Inc., 204 B.R. 417 (Bankr. S.D.N.Y. 1997) (finding that the Countryman definition does not resolve classification questions for certain contracts, such as options agreements).

48. Persons, *supra* note 8.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. Byers & Tuggey, *supra* note 5 at 350 (citing cases).

to an Oklahoma oil and gas lease because it was neither an "executory contract" nor an "unexpired lease."[54] The court first analyzed the property rights created under Oklahoma law by an oil and gas lease to determine that the so-called "lease" could not qualify as an "unexpired lease" under § 365 because "[t]he interests arising from an oil and gas lease are more akin to a *profit a prendre* and are generally considered as estates in real property having the nature of a fee."[55] It then determined that the parties did not have significant material outstanding obligations under the agreement so as to render it "executory."[56]

Not all courts have followed this reasoning, however. Notably, a New York bankruptcy judge in 2016 allowed a Texas oil and gas producer to reject its future volume obligations under gas gathering contracts with two gathering companies.[57] Although the court in *In re Sabine Oil & Gas Corp.* noted that it lacked authority to determine whether the agreements were subject to rejection in the context in which the issue arose, it did issue a preliminary ruling that concluded that the gathering agreements did not create real property interests under Texas law and that the debtors could therefore reject those agreements.[58]

Other cases seem to point to a different outcome than the one reached by the *Sabine* court.[59] And much seems to depend on the language of the agreement itself: for example, in *Newco v. Energytec, Inc.*, the Fifth Circuit carefully examined the language of a gas gathering agreement in order to determine that a covenant ran with the land, which in turn indicated the creation of a real property interest.[60] More recently, the U.S. Bankruptcy Court for the District of Colorado applied Utah law to determine that

54. In re Heston Oil Co., 69 Bankr. 34 (N.D. Okla. 1986).

55. *Id.* at 36.

56. *Id.*

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

58. *Id.*

59. *See, e.g.*, *American Refining Co. v. Tidal Western Oil Corp.*, 264 S.W. 335, 340 (Tex. Cit. App. 1924) ("The fact that gas in transit from its place under ground must pass through artificial conduits before it can be utilized does not, as a general rule, change its character from real to personal property."); *Montfort v. Trek Resources, Inc.*, 198 S.W.3d 344 (Tex. Civ. App. 2006) (holding that a covenant requiring oil and gas leasehold estate owner to furnish water to surface owner was a covenant that touched and concerned the land).

60. Newco Energy v. Energytec, Inc. (In re Energyte, Inc.), 739 F.3d 215, 221-25 (5th Cir. 2013).

midstream gas and gathering processing and saltwater disposal contracts constituted covenants running with the land.[61]

In short, courts are all over the map in their approaches to whether an oil and gas agreement may be treated as an executory contract or unexpired lease in bankruptcy, and there may be variation even when they are applying the same state's law. The case law's lack of consistency has not escaped scholarly notice.[62] To examine the classification debate from a different angle, this Article focuses on three particular "side effects" arising from the classification problem.

The first of these "side effects" is the lack of uniformity. Because bankruptcy courts take different approaches to analyzing oil and gas agreements, cases that involve similar documents can have divergent outcomes. It is safe to say that there is no uniform approach to classifying an oil and gas agreement and little consensus on the extent to which bankruptcy law concerns outweigh those of state property law.[63]

The second "side effect" relates to the jurisdiction of federal bankruptcy courts to hear and decide what may be effectively considered state law issues. Because oil and gas agreements often require resort to state property law, some have contended that their interpretation is properly left to the states.[64]

The final "side effect" concerns the impact bankruptcy cases have on the oil and gas industry more generally. Notably, when the *Sabine* case was

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61. Fredric Sosnick et al., *Midstream Companies Have Renewed Hope: Running-with-the-land Oil and Gas Dedication Survives a Bankruptcy Challenge, Offering Precedent in Contra to* Sabine, SHEARMAN & STERLING PERSPECTIVES (Oct. 18, 2019).

62. *See* Part II.A, *infra*.

63. *See generally* Byers & Tuggey, *supra* note 5 (proposing a uniform approach to addressing the applicability of §365 to oil and gas leases); *see also* Richard L. Epling, *Oil and Gas Rights in Bankruptcy: Beware the Many Pitfalls for Interest Holders and Creators*, 74 BUS. LAWYER 127, 139 (2018) ("The tangle of state lien laws relating to oil and gas production is a thicket of non-uniform provisions that vary from state to state and provides a potential trap for the unwary whether they be secured lenders, suppliers, gathering companies, or the producers themselves."); Tavera, *supra* note 40 at 42-43 ("In the oil and gas industry, a bankruptcy court's inability to uniformly define the interests under state law for oil and gas leases or conveyances causes significant confusion."); Panahi, *supra* note 6 at 199-200 (noting that "the need for uniform resolution on the real property implications of 'dedications of production' is more pertinent than ever").

64. Panahi, *supra* note 6 at 193 ("Despite…jurisdictional questions, many bankruptcy judges have not hesitated to opine on the state law (i.e., non-core) matters, potentially creating more confusion and inhibiting uniformity in the application and interpretation of state laws.").

decided in 2016, it shocked the industry.[65] Should a New York bankruptcy judge issuing a non-binding interpretation of Texas law be able to significantly influence the way oil and gas agreements are structured?[66] Or were these shock waves merely temporary? The next Part turns to these and other questions.

II. Analysis

Although oil and gas bankruptcies can raise many issues, the characterization of oil and gas contracts and leases in bankruptcy has often been a primary focus. As bankruptcies rise in the oil and gas sector, this issue may well become more salient. This Part analyzes three issues related to a bankruptcy court's characterization of an oil and gas agreement: (1) the lack of uniformity in this area of the law; (2) whether bankruptcy courts have jurisdiction to decide these issues; and (3) the impact a bankruptcy judge's decision may have in the future. All three of these issues are implicated in the larger question of how to characterize an oil and gas "lease."

A. Uniformity

The characterization of an oil and gas agreement in bankruptcy raises questions about the interplay between state and federal law. Because state property laws vary, transactions that are identical in substance may be treated differently depending on the jurisdiction in which they occur.[67] In contrast, bankruptcy law is designed to be applied uniformly across the United States.[68] Yet, the *Butner* principle suggests that in general, bankruptcy law should defer to state property law. Thus, in practice, bankruptcy cases involving substantially similar oil and gas agreements can also vary depending on the jurisdiction.

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65. Ken W. Irvin & David E. Kronenberg, *Sabine Oil & Gas and its Effect on Oil and Gas Gatherers: Existential Threat or Flash in the Pan?*, 26 NO. 1 J. BANKR. L. & PRAC. NL ART. 2 (2017) ("Many commentators initially viewed the ruling as a potential threat to oil and gas gatherers, a critical link in the nationwide oil and gas transportation network.").

66. Pearson, *supra* note 4 at 777-78 ("When viewed logically, the *Sabine* Cases have had a more wide-ranging impact than they should have as decisions by a bankruptcy court sitting in New York interpreting Texas law….[T]he cases have generated an enormous amount of interest and commentary.").

67. Byers & Tuggey, *supra* note 5 at 351 ("[I]t makes very little sense for substantially identical transactions to produce *vastly* divergent consequences under the Bankruptcy Code.") (emphasis in original).

68. *See* U.S. Const. Art. I, s.8, cl. 4 (authorizing Congress to enact "uniform Laws on the subject of Bankruptcies throughout the United States").

As referenced in the Introduction, bankruptcy's deference to state property law stems from the principle articulated by the U.S. Supreme Court in *Butner v. United States*. *Butner* provides that bankruptcy law respects state property entitlements unless an overwhelming federal interest demands a different result.[69] Although a contract may be considered property, bankruptcy law treats contractual rights differently than property rights. Indeed, Congress created specific provisions in the Bankruptcy Code to allow contract rights to be modified in bankruptcy,[70] with the result that a key benefit of bankruptcy is the ability to reject contracts and pay counterparties only a fraction of the damage claims.[71] Practically speaking, bankruptcy draws a line between contract rights and property rights: debtors can break contracts in bankruptcy with fewer consequences than they would face under non-bankruptcy (state) law, but debtors, in general, must respect state-created property rights, even in bankruptcy court.

This means that although bankruptcy law applies uniformly across the 50 states, when state laws characterize property interests differently, as many do in the oil and gas context, bankruptcy can impact similar oil and gas conveyances differently depending on the state.

As discussed, some observers have criticized the lack of uniform results in oil and gas bankruptcies. Lack of uniformity results from two primary causes. As just discussed, lack of uniformity can arise from variances in state law. This particular lack of uniformity is due to nonuniform state laws, not to nonuniform application of bankruptcy principles to those laws.[72] This lack of uniformity is not a bankruptcy-specific problem and would only be resolved if states amended their property laws to be uniform.

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69. *Butner v. United States*, 440 U.S. 48, 55 (1979) ("Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding.").

70. 11 U.S.C. § 365 (2005).

71. Tom Califano et al., *COVID-19: The Benefits of US Chapter 11 Relief in a Time of Economic Crisis*, DLA PIPER (Mar. 19, 2020), https://www.dlapiper.com/en/us/insights/publications/2020/03/benefits-of-chapter-11-to-companies-in-crisis/ ("[T]he Bankruptcy Code allows debtors to receive the benefits of their existing executory contracts while determining which contracts will survive the bankruptcy and, upon rejecting burdensome contracts, become free from continued performance obligations which may no longer be commercially attractive.").

72. *See* Hanover Nat. Bank v. Moyses, 186 U.S. 181, 188 (1902) ("The laws passed on the subject [of bankruptcy] must, however, be uniform throughout the United States, but that uniformity is geographical, and not personal.").

However, lack of uniformity also results due to the varying approaches bankruptcy courts take to addressing questions about the proper characterization of oil and gas conveyances. In other words, bankruptcy courts themselves disagree over whether agreements concerning oil and gas interests primarily concern contract rights or property rights. This particular lack of uniformity arises at the bankruptcy level and, although it may have some relation to the bankruptcy court's interpretation of state law, it may also have little to do with variances in state laws themselves.

In their 1989 article, *Oil and Gas Leases and Section 365 of the Bankruptcy Code: A Uniform Approach*, Wayne Byers and Timothy Tuggey described three primary approaches courts have taken to address whether oil and gas leases can be treated as executory contracts or unexpired leases in bankruptcy.[73] Some courts take the view that the treatment of an oil and gas lease in bankruptcy depends entirely on state oil and gas law.[74] These courts might defer heavily to state law, applying bankruptcy principles only after they have carefully ascertained how the agreement would be characterized by the state in question.

A second group of courts has taken the position that §365 of the Bankruptcy Code applies to all oil and gas leases.[75] These courts start with a broader definition of executory contract that would seem to encompass all state law characterizations of these conveyances.[76] Finally, a third group of courts has reached the opposite conclusion, holding that oil and gas conveyances generally do *not* fall within §365's scope.[77] These courts may spend less time examining state law and more time looking at other bankruptcy courts' characterizations of §365's scope.[78]

Thus, the uniformity problem in bankruptcy is not limited to state law differences. Instead, differences in how courts interpret both state and federal bankruptcy law can generate entirely different results as well. Courts that take a monoline position on oil and gas conveyances arguably provide more "uniform" treatment of these transactions across different cases falling within the same court. However, as discussed, not all courts take the same approach, and some courts take polar opposite approaches.

And of course, the courts that do rely heavily on state laws attain vastly different results depending on the state. As an example, take Texas and

73. Byers & Tuggey, *supra* note 5 at 337.
74. *Id.* at 337-38.
75. *Id.* at 338.
76. *Id.*
77. *Id.*
78. *Id.*

Oklahoma, two neighboring states with different approaches to oil and gas-related property interests. Texas law embraces "ownership-in-place," a theory under which the surface owner also owns the oil and gas beneath the land.[79] If oil and gas migrate from beneath the tract, the ownership interest is subject to divestment.[80] In ownership-in-place states, a "lease" of oil and gas is, in substance, "the sale of a fee interest in the oil and gas in place."[81]

By contrast, Oklahoma follows a "nonownership" theory, under which the surface owner has only the right to explore for and develop gas on the tract.[82] Thus, in Oklahoma, oil and gas is not "owned" until is it is produced.[83] In Oklahoma and other nonownership states, an oil and gas lease transfers only the right to search for and produce oil and gas from the tract.[84]

In both ownership-in-place and nonownership states, the lessee will own any oil and gas produced (subject to an obligation to pay royalties to the lessor); however, if a company files for bankruptcy before any oil and gas is produced, the laws in Texas and Oklahoma point to different results.[85] As one commentator has observed,"[t]he tangle of state lien laws relating to oil and gas production is a thicket of non-uniform provisions that vary from state to state and provide a potential trap for the unwary."[86]

When an oil and gas company files for bankruptcy, "[a] bankruptcy court's inability to uniformly define the interests under state law for oil and gas leases or conveyances causes significant confusion."[87] Some commentators have observed that the bankruptcy courts' practice of relying on state law to classify the rights in an oil and gas conveyance produces "disparate results."[88] But, this reliance is exactly what the Supreme Court has called for bankruptcy courts to do in *Butner*. And the alternative, bankruptcy courts disregarding state law property interests, is not a guarantee of uniform results, either.

Broadly speaking, a bankruptcy court faced with characterizing an oil and gas agreement for purposes of determining the debtor's ability to

79. *Id.* at 339.
80. *Id*. at 338.
81. *Id.* at 339.
82. *Id.* at 340.
83. *Id.* at 338.
84. *Id.* at 340.
85. *Id.* at 341.
86. Epling, *supra*, note 63 at 139.
87. Tavera, *supra* note 40 at 42-43.
88. *Id.* at 55.

assume or reject it may choose from two competing approaches. The court can either use state law to help it characterize the agreement or disregard state law nuances by simply determining that bankruptcy law does (or does not) apply to all agreements of the type it is facing. To achieve greater uniformity in this area, Congress could amend §365 of the Bankruptcy Code to give more explicit direction to bankruptcy courts by, for example, explicitly stating that oil and gas conveyances are all executory (or not).

However, such a blanket approach would sacrifice attention to the particular details of each agreement. Typically, bankruptcy elevates substance over form, and a blanket approach arguably would disregard substance in order to promote uniformity. Furthermore, *Butner* clearly indicates that unless a federal interest requires a different result, property issues should be resolved by reference to state law. It is not clear in this context that federal law does require a different result; at the very least, courts can disagree over whether this is the case, making an argument that there is a strong federal interest in uniformity tenuous here. Arguably, state law should matter in the characterization of oil and gas-related property agreements, since bankruptcy generally takes state property law as it finds it.[89]

In conclusion, both *Butner* and the principle of elevating substance over form seem to indicate that it is generally desirable for bankruptcy courts to use state law characterizations of oil and gas agreements in their own interpretations. However, requiring bankruptcy courts to take a close look at state law raises questions about jurisdiction. Namely, can or should bankruptcy courts interpret and apply intricate state-created property laws? This question is taken up in the next section.

B. Jurisdiction

Because, as just discussed, a determination of whether an oil and gas agreement is a lease or an executory contract in bankruptcy may invoke questions of state law, oil and gas bankruptcies also give rise to questions that can broadly be classified as "jurisdictional" in nature. For example, is it proper for federal bankruptcy judges to opine on intricate and extremely technical state law matters, such as the property issues oil and gas interests

89. Charles Persons, *Drilling Down: A Deeper Look into the Distressed Oil & Gas Industry Part 3 – The Ability to Assume or Reject Oil and Gas Leases*, WEIL BANKRUPTCY BLOG, Feb. 5, 2015; *see also* Zachary D. Bombatch, *Pennsylvania Oil and Gas Leases in Bankruptcy: Rejection Should Occur Only Before Production*, 16 DUQ. BUS. L.J. 267, 272 (2014) (noting that state law determines how to characterize an oil and gas lease as a true lease versus a conveyance of real property).

necessarily implicate? Are these matters "core" proceedings, which a bankruptcy court can decide, or are they "non-core," meaning that a bankruptcy judge can only issue proposed findings of fact and conclusions of law to the district court?[90]

Responses to these concerns raise two primary points. First, the dividing line between core and non-core proceedings is often blurry.[91] In some cases, issues may raise questions that present a mix of considerations. Notably, "whether midstream agreements qualify as executory contracts under the Bankruptcy Code remains 'a question of federal law,' and yet whether they create 'a real property interest…is a question of state law.'"[92] Put differently, the determination of whether an agreement is an executory contract appears to be a core issue—an issue arising squarely in a bankruptcy case. But resolving the questions necessary to decide this core issue can involve asking how state law would characterize these agreements, and that question seems more like a non-core matter.

Secondly, as a practical matter, many bankruptcy judges must hear and decide non-core state law matters with some regularity.[93] And practically speaking, bankruptcy courts may finally adjudicate non-core issues with the parties' consent.[94] Although commentators have lamented that bankruptcy court opinions about state property law issues "creat[e] more confusion and inhibit[] uniformity in the application and interpretation of state laws,"[95] addressing questions of state law may be a necessary side effect of resolving core issues that come before the bankruptcy court.

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90. These questions might more accurately be divided into questions of jurisdiction (state vs. federal courts) and allocation among the federal bench (bankruptcy vs. district court judges). For more on this topic, *see* WARREN ET AL., *supra* note 45 at pp. 853-54, 860-63.

91. Executive Benefits Ins. Agency v. Arkison, 573 U.S. 25, 33 (2014) ("It is the bankruptcy court's responsibility to determine whether each claim before it is core or non-core."); Panahi, *supra* note 6 at 193 ("The substantial case law addressing the issue of which non-core matters bankruptcy judges may properly hear indicates that this question continues to present challenges to bankruptcy participants.").

92. Panahi, *supra* note 6 at 193 (quoting In re Sabine Oil & Gas Corp., 547 B.R. 66, 74 (Bankr. S.D.N.Y. 2016)).

93. Panahi, *supra* note 6 at 193 (noting that "many bankruptcy judges have not hesitated to opine on…state law (i.e., non-core) matters").

94. Arkison, 573 at 34 ("If all parties 'consent,' the statute permits the bankruptcy judge 'to hear and determine and to enter appropriate orders and judgments' as if the proceeding were core."), quoting 11 U.S.C. § 157(c)(2).

95. Panahi, *supra* note 6 at 193.

A bankruptcy judge asked to classify an agreement conveying oil and gas interests must determine whether it is proper for the court to finally adjudicate these issues, even though there is little clear guidance in this area.[96] Bankruptcy courts are Article I courts, meaning they have only the jurisdiction Congress vests in them via statute.[97] For this reason, some scholars have argued that bankruptcy courts cannot exercise authority beyond what Congress has specifically granted.[98] In contrast, others believe bankruptcy courts have substantially more flexibility.[99]

A bankruptcy judge faced with classifying an oil and gas conveyance thus may find that they are between a rock and a hard place. Giving even a non-binding opinion may be considered by some too great an intrusion into state law concerns.[100] Yet, providing an opinion on how the debtor may treat an oil and gas conveyance can also provide clarity and certainty to the parties, allowing them to move forward with the bankruptcy case. Such clarity and certainty may be particularly valuable in a bankruptcy where the debtor is pressed for time.[101] Returning to bankruptcy only after the question has been litigated in state court is not a viable option for many companies in bankruptcy.

Once again, it is important to return to the *Butner* principle, which contemplates that state law matters will arise in the natural course of

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96. *See* Panahi, *supra* note 6 at 193 (observing that "the bankruptcy judge in *Sabine* had to determine whether bankruptcy, federal, or state court is the proper forum").

97. *Id.*; Leandra Lederman, *Equity and the Article I Court: Is the Tax Court's Exercise of Equitable Powers Constitutional?*, 5 FLA. TAX REV. 357, 375 (2001) (characterizing Article I courts as "creatures of statute").

98. Panahi, *supra* note 6 at 193. For an example of this argument, *see, e.g.,* Alan M. Ahart, *The Limited Scope of Implied Powers of a Bankruptcy Judge: A Statutory Court of Bankruptcy, Not a Court of Equity*, 79 AM. BANKR. L.J. 1, 2 (2005) ("[A] bankruptcy judge's powers stem virtually exclusively from statutes.").

99. *See, e.g.*, Manuel D. Leal, *The Power of the Bankruptcy Court: Section 105*, 29 S. TEX. L. REV. 487, 490 (1988) ("There is general agreement that Congress has expressly granted very broad powers in section 105 [of the Bankruptcy Code] to judges exercising federal bankruptcy jurisdiction.").

100. *See* Mark Wege, Oscar N. Pinkas, & Lauren Macksoud, *Does the Second Circuit in Sabine Have the Final Word on Texas Law?*, DENTONS, Aug. 1, 2018, https://www.dentons.com/en/insights/articles/2018/august/1/does-the-second-circuit-in-sabine-have-the-final-word-on-texas-law (noting that "many industry participants disagree with the New York courts' application of Texas law").

101. *See* Melissa B. Jacoby & Edward J. Janger, *Ice Cube Bonds: Allocating the Price of Process in Chapter 11 Bankruptcy*, 123 YALE L.J. 862 (2014) (discussing the frequent use of "melting ice cube" arguments in bankruptcy—the assertion that the company will not be viable for long because its assets are rapidly wasting away).

bankruptcy proceedings.[102] Recall that under *Butner*, bankruptcy courts must defer to state law unless federal law dictates a different result. A corollary to this principle is the idea that by deferring to state law, bankruptcy courts must necessarily interpret and apply state law in order to give it proper deference. Put differently, knowing when to defer to state law necessitates knowing enough about state law to know when a federal interest dictates a different result.

Thus, the question of whether bankruptcy courts should decide these issues may be important primarily as a theoretical matter. In practice, companies in bankruptcy often need a quick answer as to whether they can assume or reject agreements they entered into prepetition.[103] Practically speaking then, the only viable option is for bankruptcy courts to address these issues when they are presented. In addition, *Butner* provides some support for the notion that bankruptcy judges will have to address state law issues during the course of bankruptcy proceedings.

If we accept that bankruptcy courts must or should wade into state law issues in order to resolve the question of when an oil and gas conveyance may be assumed or rejected in bankruptcy, a further concern surfaces. Namely, will these bankruptcy court decisions have an outsize impact?[104]

C. Impact

Concern over the proper role of bankruptcy in the interpretation of oil and gas conveyances may be greater if the bankruptcy decisions in this area have a significant practical or negative impact on either the oil and gas field or related state law. Recently, this appeared to happen with *In re Sabine Oil & Gas Corp.*[105] In *Sabine*, a bankruptcy judge sitting in New York interpreted Texas law to preliminarily conclude that two midstream

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102. Butner, 440 U.S. at 57 ("[T]he basic federal rule is that state law governs.").

103. Kevin P. Lombardo, *The Rise of the Quickie Bankruptcy*, ABFJOURNAL (Mar. 1, 2010), https://www.abfjournal.com/articles/the-rise-of-the-quickie-bankruptcy/ ("As the clock ticks away, companies run a risk for further deflation of assets and in some cases, plummeting assets, by the very nature of the bankruptcy process.").

104. *See, e.g.*, Wege, *supra* note 100 ("There can be no doubt that the Second Circuit's decision will change—and already has changed—the way in which the midstream industry operates, interacts with producers and obtains financing.").

105. Gibson Dunn | In the Pipeline: Understanding Post-Sabine Midstream Contract Rejection Risk, , GIBSON DUNN (2019), https://www.gibsondunn.com/in-the-pipeline-understanding-post-sabine-midstream-contract-rejection-risk/ (last visited May 6, 2020) ("The landmark decisions in the chapter 11 case of Sabine Oil & Gas Corporation established both a substantive precedent and a procedural template regarding bankrupt E&P debtors' attempts to reject burdensome contracts with midstream service providers.").

contracts did not include covenants running with the land and could be rejected under §365 of the Bankruptcy Code.[106] Both the district court and the Second Circuit affirmed, basing their decisions on interpretations of Texas law as well.[107] Notably, Texas law is unsettled with respect to these issues, so the New York courts' interpretation of these issues was not guided by direct Texas Supreme Court precedent.[108] Although the outcome of the *Sabine* case "sent shockwaves through the midstream natural gas industry,"[109] in fact, "the issue of whether a particular midstream agreement can be rejected is a fact-specific question of state law,"[110] meaning that many cases involving similar questions about the proper characterization of oil and gas agreements may be distinguishable on their facts.

At the same time, observers have concluded that "[t]he *Sabine* cases have had a more wide-ranging impact than they should have as decisions by a bankruptcy court sitting in New York interpreting Texas law."[111] Indeed, many midstream companies have tried to proactively address the issues raised in *Sabine* by making changes to their contracts.[112]

If a bankruptcy court decision can have a significant impact on the industry in question, as the *Sabine* case seemed to, concerns about bankruptcy jurisdiction and uniformity may be amplified. As one commentator has remarked, "It is almost always better not to leave arcane state law interpretations in the hands of bankruptcy judges."[113] At the same time, it appears that many companies have been able to avoid raising the issue of contract rejection in bankruptcy court, either through restructuring their contracts pre-bankruptcy, or through settlement in bankruptcy.[114] And of course, *Sabine*, like many cases that depend on interpretation of state law, can be limited to its facts.[115]

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106. In re Sabine Oil and Gas Corp., 547 B.R. 66, 79-80 (Bankr. S.D.N.Y. 2016).

107. In re Sabine Oil & Gas Corp., 567 B.R. 869 (S.D.N.Y. 2017); Sabine Oil & Gas Corp. v. Nordheim Eagle Ford Gathering, LLC (In re Sabine Oil & Gas Corp.), 734 Fed. Appx. 64 (2d Cir. 2018).

108. Gibson Dunn, *supra* note 105.

109. Wege, *supra* note 100.

110. Gibson Dunn, *supra* note 105.

111. Pearson, *supra*, note 4 at 777.

112. *Id.* at 778.

113. *Id.* at 785.

114. *See id.* at 778 et seq. (discussing ways for companies to make changes to their contracts); Gibson Dunn, *supra* note 105 (citing instances of negotiated settlements).

115. Epling, *supra* note 63 (observing that "it is quite possible to limit *Sabine* to its facts"); Irvin & Kronenberg, *supra* note 65 ("The *Sabine* ruling may have less influence than once feared.").

Finally, at least one observer has noted that the ability to reject midstream agreements may be more of a negotiating tactic than a desired result for most producers.[116] That is because "the viability of the wells depends on transporting the hydrocarbons to market, and the most efficient way to do that is to use the existing midstream facilities."[117] Thus, while the threat of being able to reject a midstream agreement may be wielded in negotiations, it is likely that most producers and midstream companies will ultimately not want the agreement to be rejected.[118]

At bottom, then, the impact of a bankruptcy court decision permitting the rejection of an oil and gas agreement may not be as significant as many commentators fear. In addition, to the extent that state law is unclear, as it was in Texas, state courts will have the opportunity to clear up property law issues as and when they arise. Finally, to the extent that there is concern about bankruptcy law having an outsize impact on state law or oil and gas practices, parties can be (and, indeed, have been) proactive in taking steps to achieve their desired results by, for example, modifying contract language or committing to a settlement in a bankruptcy case rather than litigating the issue.

In short, although *Sabine* certainly alerted the oil and gas community that federal courts sitting in New York could affect the interpretation of midstream agreements governing Texas property, there seems to be little reason to be overly concerned about many cases duplicating the outcome in *Sabine* or, in general, the impact of any one bankruptcy case or court on these issues. As discussed, most parties are motivated not to bring these issues before the bankruptcy court, and the available evidence indicates that many have not.[119] This may be due as much to the uncertainty due to lack of uniformity, discussed above, than to concerns about courts replicating the *Sabine* decision.[120] That is because most of these cases are fact-specific, meaning that concerns about any one case having an outsize impact can be mitigated by finding ways to distinguish that case on its facts.

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116. Mark Pfeiffer, *Will the Pipeline Continue to Flow After Sabine? Oil and Gas Bankruptcies Expose Limitations in §365*, 35- JUL. AM. BANKR. INST. J. 38, 68 (July 2016).

117. *Id.*

118. *Id.*; *see also* Westbrook, *supra* note 44 at 316 n. 372 (observing that a debtor-lessor should not be able to reject, and a debtor-lessee should never want to reject an oil and gas lease).

119. Gibson Dunn, *supra* note 105.

120. *See* Gibson Dunn, *supra* note 105.

Conclusion

Oil and gas bankruptcy cases raise many complex issues, and this Article has touched on a few of them. Although lack of uniformity, jurisdictional questions, and the impact of oil and gas bankruptcy cases are all seemingly worrisome concerns, upon closer inspection, there is perhaps less to fear and more to gain from bankruptcy courts' involvement in the oil and gas arena. Though far from a perfect process, bankruptcy provides the opportunity for a debtor to address all of its creditors in one forum and to reassess its organizational model so that it can maximize the value of its assets.[121] Such opportunity for value maximization may well be needed by many oil and gas companies in the near future given the extent of the current industry crisis. Concerns about bankruptcy court assessments of oil and gas contracts, when put in context, should not outweigh the other benefits the bankruptcy process can provide to distressed oil and gas companies.

121. Califano, *supra* note 71 ("Chapter 11 of the Bankruptcy Code, at its very core, allows a company facing a crisis to maximize value, preserve jobs and operations and weather a crisis.").