

Can Midstream Agreements be rejected in Bankruptcy or are they immune from rejection as Running Covenants and/or Equitable Servitudes?

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What's all the Hubub? Setting the Stage

- Section § 365(a) of the Bankruptcy Code permits an executory contract agreement to be rejected by a debtor.
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- “Executory contract” is not defined, but most courts accept that the definition is very broad.
- If a contract is rejected, the counterparty may assert a pre-petition claim for damages but generally may not enforce the contract against the debtor.
- However, certain obligations – “interests in property” - may not be rejected pursuant to § 365(f).

Midstream Agreements

- What are they:
 - Pipeline Transportation Agreements
 - Gathering Agreements
 - Processing Agreements
 - “Midstream” generally encompasses gathering and transportation (pipeline, rail, barge, tanker, or truck), storage, processing, and wholesale marketing of crude oil and natural gas [Upstream is exploration and production. Downstream is refining, distribution of refined products, natural gas, NGLs, and retailing.]

What is an interest in property that “Runs with the Land”

- Most basically – it is an interest in real property that is tied to the land in contrast to a contract interest, which is personal to the owner and moves from deed to deed when the land is transferred.
- STATE LAW defines property rights that “run with the land”
 - Example: An oil and gas lease is a fee simple determinable in Texas and a profit-à-prendre in Oklahoma
- Common covenants that run with the land include properly recorded “in rem” interests like mortgages, liens, restrictive covenants, and easements.

REAL COVENANTS AS TAUGHT IN PROPERTY CLASS

Real Covenants Defined:

- A "promise" that "touches and concerns land" whereby the "burdened owner" promises the "benefited owner" (perhaps of a "benefited estate") to do (affirmative covenant) or not to do (negative covenant) something (often, but not always, on a "burdened estate").
or stated otherwise
- a covenant imposing a restriction on the use of land so that the value and enjoyment of adjoining land will be preserved.
- Examples:
 - A deed restriction for a neighborhood development requiring homes of a certain size
 - A property may only be used for certain purposes

How are real covenants different from easements?

- An affirmative easement is a right to do something on the servient estate. An affirmative covenant is a burden to do something regarding real property, including paying money or providing services.
- A negative easement is a "grant," not a "promise," and is confined to the four types at common law (light, air, support, and flow) plus, in some states, view, conservation, and solar energy. In contrast, a negative real covenant can cover virtually any activity.
- An easement is "appurtenant" if there is a "dominant" estate; a real covenant benefit may and a real covenant burden does "run with the land." For both easements and real covenants, if there is no benefited estate, then the benefit is "in gross".
- In case of an easement, there is always a "servient estate." In case of real covenants, there might not be a "burdened" estate, in which case the burden is "in gross."
- Note that if both the burden and benefit of a promise are in gross, then only contract law applies because no interest in real property is involved.

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"The *Sabine* Bankruptcy Decision: Do Midstream Gathering and Processing Agreements Run With the Land in Texas (and elsewhere)?"