# The Intersection of Federal Energy Policy And The Bankruptcy Code

41st Annual Westbrook Bankruptcy Conference
November 18, 2022
Austin, Texas

Robin Russell, Moderator
Hunton Andrews Kurth, LLP

Judge Marvin Isgur
U.S. Bankruptcy Judge for the Southern District of Texas

Alan Tenenbaum
National Bankruptcy Coordinator, Environmental Enforcement Section, U.S. Dept. of Justice

*Nothing herein reflects the view of any government agency

DISCUSSION MATERIALS*

1. Overview: Bankruptcy and the Public Interest
2. Hunton Andrews Kurth: The Nickel Report - Environmental, Social and Corporate Governance: What are the Risks, Really?
3. Hunton Andrews Kurth: The SEC Proposes a Mandatory Climate Disclosure Regime for Public Companies
4. SEC Climate Disclosure Comments Reveal Diversity of Views
5. *Ultra Petroleum Corp.,* 28 F.4th 629 (2022)
6. Contracts Rejected in the Southern District of Texas with FERC - Regulated Rates
7. *Ultra Petroleum Corp.:* Brief of Rover Pipeline LLC as Amicus Curiae Supporting Appellant and Reversal

*The inclusion of a document in the Discussion Materials does not indicate that the moderator or any panel member agrees with the views expressed therein

# 1

# BANKRUPTCY AND THE PUBLIC INTEREST[1]

**By Alan Tenenbaum**

Bankruptcy courts are courts of equity. However, they are not roving commissions to do equity.

That said, the public interest can come into play in bankruptcy cases through statutory provisions and case law seeking to harmonize the Bankruptcy Code with conflicting state and federal statutes.

## The Bankruptcy Code Provisions Requiring Consideration of the Public Interest.

The Bankruptcy Code has several provisions requiring the consideration of other laws reflecting the public interest.

1. Section 362(b)(4), the police or regulatory exception to the automatic stay, permits the continuation of police or regulatory actions by governmental units. Indeed, the test for determining whether an action is police or regulatory has been called the public policy or public interest test (as opposed to a pecuniary interest). The public interest is vindicated by permitting such actions to continue during the bankruptcy case and requiring that the debtor take them into account as it moves forward during the case towards plan confirmation. 28 U.S.C. § 959(b) likewise requires that a debtor in possession comply with applicable nonbankruptcy law in managing or operating its property during the bankruptcy case. By complying with nonbankruptcy law, the debtor is meeting the public interest as reflected by the requirements of applicable nonbankruptcy law.

2. Plan confirmation requirements also can implicate the public interest. Section 1129(a)(3) of the Code provides that a plan may not be confirmed unless it "has been proposed in good faith and not by any means forbidden by law." In many courts, including the Fifth Circuit, this requirement precludes confirmation of plans that would result in illegality or violations of non-

[1] Nothing herein reflects the view of any government agency.

UT LAW CLE THE UNIVERSITY OF TEXAS TEXASLAW

Also available as part of the eCourse
[2022 Jay L. Westbrook Bankruptcy eConference]

First appeared as part of the conference materials for the
41st Annual Jay L. Westbrook Bankruptcy Conference session
"The Intersection of Federal Energy Policy and the Bankruptcy Code"