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**Raiders of the Lost Ark (of the Covenant Running With the Land),  
and Other Hot Bankruptcy Issues**

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## **INTRODUCTION**

In 2019, at least forty energy companies, including E&P, midstream and oilfield service companies filed for bankruptcy protection under chapter 11 of the United States Bankruptcy Code. Given the current market trends, energy-related filings will continue in at least the near term.

With the resurgence in filings came development in case law and issues not tackled in previous filing cycles. A bankruptcy filing, particularly a chapter 11 restructuring, has significant implications for both the debtor and its counterparties. This paper addresses some of those new and developing issues.

### **Bankruptcy 101: A few basic concepts to set the stage.**

The commencement of a bankruptcy case creates an “estate” comprising virtually all property of the debtor company.<sup>1</sup> It also gives rise to the “automatic stay” – a statutory injunction that enjoins “all entities” from acting to collect on prepetition claims against the debtor or to control or otherwise interfere with estate property.<sup>2</sup>

#### **The Debtor in Possession versus a Chapter 7 Trustee**

In most chapter 11 cases, the debtor company continues to operate its business as “debtor in possession” meaning the debtor company may continue to use, sell, or lease estate property in the ordinary course of business.<sup>3</sup> If necessary, it may also obtain financing to fund

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<sup>1</sup> 11 U.S.C. § 541(a)(1) (providing that the estate includes “all legal or equitable interests of the debtor in property as of the commencement of the case,” subject to certain specified exceptions). Estate property also includes, among other things, any interest in property that the estate acquires postpetition; and any proceeds, rents, or profits from estate property. 11 U.S.C. § 541(a)(6), (7).

<sup>2</sup> 11 U.S.C. § 362(a). There are certain exceptions to the stay related to forward contracts and mineral lien perfection discussed later in the paper.

<sup>3</sup> 11 U.S.C. § 363.

ongoing operations.<sup>4</sup> The case culminates with the confirmation of a chapter 11 plan. This plan may provide for a restructuring of the debtor's business as an ongoing concern or may provide for an orderly liquidation.

In a chapter 7 filing, a debtor typically ceases all operations. A chapter 7 trustee is appointed to administer the estate. The trustee collects and liquidates assets, including pursuing causes of action, for the benefit of all creditors under the supervision of the bankruptcy court. The trustee is the sole party with authority over the debtor's property.

### **Claims and Interests**

In the bankruptcy context, rights of payment are referred to as "claims," and equity interests are referred to as "interests."<sup>5</sup> State or federal non-bankruptcy law giving rise to the claim or interest define that interest. However, the Bankruptcy Code may modify those entitlements or their treatment.<sup>6</sup>

For a claim or interest to receive treatment, it must be "allowed." Typically, a proof of claim needs to be filed for a claim and a proof of interest must be filed for an interest to be allowed under the Bankruptcy Code. "A proof of claim is a written statement setting forth a creditor's claim."<sup>7</sup> For a proof of claim to be valid, it must "conform substantially" to Bankruptcy Form

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<sup>4</sup> 11 U.S.C. § 364. If the debtor in possession seeks to use, sell, lease, or borrow against estate property that is subject to the interest of another party, however, it must ensure that the party's interest is "adequately protected" from diminution in value. 11 U.S.C. §§ 363(e), 364(d)(1)(B).

<sup>5</sup> 11 U.S.C. § 101(5) (defining the term "claim" to include any "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured"); *see, e.g., In re Gen. Teamsters, Warehousemen & Helpers Union Local 890*, 225 B.R. 719, 736 (Bankr. N.D. Cal. 1998) ("An 'interest' is that which is held by an 'equity security holder.'").

<sup>6</sup> *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.").

<sup>7</sup> Fed. R. Bankr. P. 3001(a).

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