

HBA Oil Gas & Mineral Law Section

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Old Law, New Controversy



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Shale Boom Leads to Infrastructure Surge



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In re Sabine Oil & Gas Corporation



In re Quicksilver Resources, Inc.



Upstream v. Midstream



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In re Tristream



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Upstream v. Midstream



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The Business Judgment Rule/Standard

- **A standard of judicial review of corporate director conduct, *not* a standard of conduct in and of itself. The rule sets forth a presumption that, “in making a business decision the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action was in the best interest of the company.” *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 52 (Del. 2006) (quoting *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)).**



The Business Judgment Rule/Standard

- **“a rule of law that insulates an officer or director of a corporation from liability for a business decision made in good faith if he is not interested in the subject of the business judgment, is informed with respect to the subject of the business judgment to the extent he reasonably believes to be appropriate under the circumstances, and rationally believes that the business judgment is in the best interests of the corporation.”** *Am. Soc’y for Testing & Materials v. Corppor Cos.*, 478 F. 3d 557, 572 (3d Cir. 2007) (internal quotations omitted).



The Business Judgment Rule/Standard

- **In bankruptcy, a debtor's decision to assume or reject an executory contract or unexpired lease is reviewed under this standard, and deference is given to the debtor's decision unless there is bad faith or a gross abuse of discretion. *See, e.g., In re Orion Pictures Corp.*, 4 F.3d 1095, 1099 (2d Cir. 1993); *In re Gardiner, Inc.*, 831 F.2d 974, 975 n.2 (11th Cir. 1987).**



The Business Judgment Rule/Standard

- **A court will not substitute its own judgment for the debtor's judgment. "As long as assumption [or rejection] of a lease appears to enhance a debtor's estate, court approval of a debtor in possession's decision to assume the lease should only be withheld if the debtor's judgment is clearly erroneous, too speculative, or contrary to the provisions of the Bankruptcy Code." *Richmond Leasing Co. v. Capital Bank, NA*, 762 F.2d 1303 (5th Cir. 1985).**



Real Covenants: Elements

- 1. Relates to a thing in existence or specifically binds the parties and their assigns;**
- 2. Original parties intended it to run with the land;**
- 3. The successor to the burden has notice;**
- 4. Touch and Concern; and**
- 5. Privity (Vertical and, potentially, horizontal).**



Intent

- **Intent is required.**
- **Not dispositive. Courts will look past blanket statements which evidence the parties' intent to create a real covenant if the other elements are not met.**



Touches & Concerns the Land



Touch and Concern

- **Something that affects the “nature, quality or value of the thing demised, independently of collateral circumstances, or if it affect[s] the mode of enjoying it.”**
Westland Oil Dev. Corp. v. Gulf Oil Corp., 637 S.W.2d 903, 911 (Tex. 1982).



Things that Touch and Concern Real Property

- **Area of Mutual Interest Agreement.** *Westland Oil Dev. Corp. v. Gulf Oil Corp.*, 637 S.W.2d 903, 911 (Tex. 1982).
- **Water Purchase Contract.** *Wimberly v. Lone Star Gas Co.* 818 S.W.2d 868, 870 (Tex. App.—Fort Worth 1991, writ denied).
- **Gas Sales Contract.** *Prochemco, Inc. v. Clajon Gas Co.*, 555 S.W.2d 189, 190 (Tex. Civ. App.—El Paso 1977, writ ref'd n.r.e.).
- **Transportation Fee in Gathering Contract.** *Newco Energy v. Energytec, Inc.*, 739 F.3d 215 (5th Cir. 2013).

What does not Touch and Concern Real Property

- **Contractual Provision Relating to Indemnity for Environmental Clean Up Costs. *In re El Paso Refinery, LP*, 302 F.3d 343, 356 (5th Cir. 2002).**



Privity of Estate

- **Two Types of Privity, Vertical and Horizontal.**
- **Vertical privity involves a mutual or successive relationship to the same rights in the property.**
 - **The classic example of vertical privity is of a producer that sells its leasehold interest to another producer.**
- **Horizontal privity requires a simultaneous existing interest between the original parties as either landlord and tenant or grantor and grantee. *Energytec*, 739 F.3d at 222.**



Is Horizontal Privity a Requirement Under Texas Law?

- **No definitive pronouncement on the issue from the Texas Supreme Court.**
- **Restatement 3rd has abandoned the horizontal privity requirement.**



Texas Cases Specifically Requiring Horizontal Privity

- ***Wayne Harwell Prop. v. Pan Am. Logistics Ctr., Inc.*, 945 S.W.2d 216, 218 (Tex. App.—San Antonio 1997, writ denied).**
- ***Clear Lake Apartments, Inc. v. Clear Lake Utilities Co.*, 537 S.W.2d 48, 51 (Tex. App. 1976).**



Texas Cases Which Do Not Require or Analyze Horizontal Privity

- ***Wimberly v. Lone Star Gas*, 818 S.W.2d 868, 870 (Tex. App.—Fort Worth 1991, writ denied).**
- ***Prochemco, Inc. v. Clajon Gas Co.*, 555 S.W.2d 189 (Tex. Civ. App.—El Paso 1977, writ ref'd n.r.e.).**
- ***Westland Oil Dev. Corp. v. Gulf Oil Corp.*, 637 S.W.2d 903, 911 (Tex. 1982).**



Equitable Servitudes

Equitable servitudes may be binding upon a successor in interest even though the traditional legal test (*and specifically horizontal privity*) for a covenant running with the land is not met.



In re Sabine — Horizontal Privity



In re Sabine — Horizontal Privity

“In light of the fact that numerous Texas courts have expressly included horizontal privity in their analyses, *the Court is not persuaded that the requirement of horizontal privity has been abandoned under Texas law*, and therefore ... the Court shall consider the issue of horizontal privity.”



In re Sabine — Horizontal Privity



In re Sabine — Touch & Concern



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In re Sabine — Touch & Concern

(1) Sabine “simply engaged Nordheim and HPIP to perform certain services related to the hydrocarbon products *produced* by Sabine from its property”,



In re Sabine — Touch & Concern

(2) “the covenants at issue are properly viewed as identifying and delineating the contractual rights and obligations with respect to the services to be provided”



In re Sabine — Touch & Concern

(3) because the covenants “concern only the Products *produced* from real property—[not the real property itself—they] affect only Sabine’s personal property rights.”



In re Sabine — Touch & Concern



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Motion to Reject

v.

Adversary Proceeding



Drafting Considerations



Drafting Considerations: Touch and Concern

- **Producer hereby exclusively dedicates to the services, this contract and to the gathering system, all of its interest in and to the oil and gas leases set forth on Exhibit “A” (the “Leases”) and commits to deliver to the gathering system all gas owned or controlled by Producer which is produced from the Leases.**



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