BANKRUPTCY LAW

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The Small Business Reorganization Act of 2019, or SBRA, became effective in February 2020, just before the coronavirus pandemic took hold of the American economy. In general, SBRA was designed to make Chapter 11 reorganization less expensive and more attainable for small businesses. Initially, SBRA was only available to small-business debtors with debts below $2.725 million. Within a month of SBRA's effective date, in response to the global pandemic, Congress passed the Coronavirus Aid, Relief, and Economic Security Act,[1] which (among other things) expanded SBRA by temporarily increasing the debt limit from $2.725 million to $7.5 million.

While COVID-19 impacted a wide spectrum of industries, the pandemic acutely roiled the retail industry. As of mid-October 2020, 46 major retail companies had filed for bankruptcy protection, exceeding annual filings of any year since 2010.[2] Legacy brands such as Neiman Marcus, JCPenney, Tuesday Morning, J.Crew, and Brooks Brothers (among many others) have all sought bankruptcy protection. The 2020 uptick in retail filings began in April, whereas retail bankruptcy filings historically begin to spike in the winter months, after the holidays.

Another industry impacted by the pandemic has been the oil and gas industry. Bankruptcy courts, particularly in Texas, saw several large energy filings in 2020, including Chesapeake Energy, Ultra Petroleum (again), and many more. This column would be incomplete without mention of the developing caselaw affecting midstream companies. Two decisions in particular—*Ultra Petroleum* in the U.S. Bankruptcy Court for the Southern District of Texas and *Extraction Oil & Gas* in the U.S. Bankruptcy Court for the District of Delaware—addressed the ability to reject midstream contracts given the interplay with concurrent proceedings in the Federal Energy Regulatory Commission, or FERC, and disputes over "covenants running with the land."

In *Extraction,*[3] the Delaware Bankruptcy Court found no such covenants to exist under Colorado law and explained that the debtors would have been able to reject the midstream contracts even if covenants did exist, because rejection would merely give rise to money damages not termination or rescission. The Delaware Bankruptcy Court also found no basis for heightened scrutiny of the debtors' rationale for rejection, explaining that "[t]his is not a proceeding before FERC to modify or to abrogate a filed rate." Earlier in the year, in *Ultra Petroleum,* the U.S. Bankruptcy Court for the Southern District of Texas reached a similar conclusion, authorizing the debtors' rejection of midstream contracts but only after applying heightened scrutiny to the debtors' rationale, given public interests and FERC's concurrent involvement in the dispute.[4]

The U.S. Supreme Court also issued a couple of bankruptcy-related decisions that may impact bankruptcy practice. In mid-January, the late Justice Ruth Bader Ginsburg wrote a unanimous decision in *Ritzen Group Inc. v. Jackson Masonry, LLC,*[5] explaining that bankruptcy court orders are final when they dispose of discrete proceedings within the bankruptcy case. In *Ritzen*, the court held that an order denying a motion for relief from stay, without reservation, was final. In another decision, *Rodriguez v. Federal Deposit Insurance Corp.,*[6] the court invalidated the nearly half-century-old "Bob Richards rule,"[7] which specifies how federal tax proceeds should be allocated among members of an affiliated group of corporations that file consolidated returns. The court reasoned there to be insufficient unique federal interest to support federal common law as to this exercise and, instead, that the state courts are adequately equipped to tackle these types of issues.

NOTES

1. *See* Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136 (2020).
2. Tayyeba Irum and Chris Hudgins, *October retail market: US sales jump; bankruptcies pause after record highs,* S&P Global Market Intelligence (Oct. 16, 2020), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/october-retail-market-us-sales-jump-bankruptcies-pause-after-record-highs-60754703 (defining "major" as public companies with more than $2 million in debt and private companies with more than $10 million in debt).
3. *Extraction Oil & Gas, Inc. v. Elevation Midstream, LLC (In re Extraction Oil & Gas, Inc.),* --- B.R. ---, 2020 WL 6389252 (Bankr. D. Del. Nov. 2, 2020) (citing *Extraction Oil & Gas, Inc. v. Grand Mesa Pipeline, LLC (In re Extraction Oil & Gas, Inc.),* Adv. Proc. No. 20-50816, Adv. D.I. 45 at 17; and *Extraction Oil & Gas, Inc. v. Platte River Midstream, LLC (In re Extraction Oil & Gas, Inc.),* Adv. Proc. No. 20-50833, Adv. D.I. 54 at 24).
4. *In re Ultra Petro. Corp.,* --- B.R. ---, 2020 WL 4940240, 2020 Bankr. LEXIS 2249 (Bankr. S.D. Tex. Aug 21, 2020).
5. 140 S. Ct. 582 (2020).
6. 140 S. Ct. 713 (2020).
7. *In re Bob Richard Chrysler-Plymouth Corp.,* 473 F.2d 262 (9th Cir. 1973).

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