Force Majeure Clause - May the Force Be With You and Save Your Oil and Gas Lease

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In Star Wars, the force means an “energy field created by all living things... It binds the galaxy together.”¹ In French, force majeure means superior force. In a fee oil and gas lease, the force majeure clause is designed to protect the lessee from being liable for damages or the lease from terminating for causes beyond the lessee’s control. The lease typically contains numerous clauses designed to protect the lessee and save the lease when particular events occur. Such clauses include the shut-in royalty, dry hole, cessation of production, continuous drilling, and entirety clauses. We have addressed most of these clauses before.² The force majeure clause is often thought of as the savings clause of last resort. Force majeure clauses vary widely and their application depends on the specific language of the clause.

**Force Majeure Events: “Judge me by my size, do you?”³**

The events covered by the force majeure clause can vary from narrowly defined events to broad acts of God. Some clauses are limited to excusing performance only when it is prevented by governmental actions through laws, rules, regulations, or orders. For example:

> All terms and express or implied covenants of this lease shall be subject to all Federal and State Laws, Executive Orders, Rules, or Regulations, and this lease shall not be terminated in whole or in part, nor Lessee held liable in damages, for failure to comply therewith if compliance is
Other force majeure clauses excuse performance for a comprehensive array of events. For example:

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The force majeure clause will only excuse the performance identified therein. Care should be exercised in determining whether the clause applies to the performance of general or specific covenants or conditions. Generally, failure to perform a covenant will not automatically result in termination of the lease; however, failure to perform a condition will automatically cause the lease to terminate. Following are some examples of the types of performance that may excused in the force majeure clause:

- all terms and express or implied covenants;
  - lessee’s obligations whether express or implied;
  - drilling operations or compliance with the provisions of this lease, both expressed and implied;
  - drilling, working or production operations; or
  - performance or operations.

The force majeure clause may only apply to part of the lease term, i.e., the primary term or secondary term. For instance, if rentals are due during the primary term and a force majeure event occurs, some forms excuse the rental payment; however, others require payments continue to be made, and others are silent on payment. If the lease is in the secondary term and a force majeure event occurs, the clause may require a royalty or a minimum royalty payment during the force majeure event to keep the lease alive without drilling or production. For example:

If after the expiration of the primary term and while the lease is in force and the lessee cannot maintain the same in effect because prevented by force majeure, then
the lease will nevertheless continue, but lessee will pay to the owners as royalty an amount equal to ___ dollar per year for each acre retained hereunder.\textsuperscript{11}

If payments are due after the beginning of the force majeure event, the force majeure clause should describe when the payments are due, such as a reasonable time after the occurrence of the event, with subsequent payments due on the anniversary date of the lease, and calculation of a prorated amount due if the event occurs and ends on a date other than the anniversary date.

The force majeure event typically must prevent, delay, interrupt, or make impossible performance of the specified covenants or conditions. Although performance may appear impossible, some courts are willing to look at alternatives the lessee should have attempted before invoking the force majeure clause.\textsuperscript{12} The force majeure clause comes into effect only if the performance is rendered impossible unless the subject clause contains less exacting terms, then, in some cases, it may be invoked if performance is unreasonably burdensome.\textsuperscript{13}

\textbf{Reconciling Lease Provisions: "Use the Force, Luke."\textsuperscript{14}}

To use the force majeure clause, it must be reconciled and construed along with all the other provisions of the lease. Generally, courts will refuse to excuse performance under the force majeure clause if another clause is applicable, such as excusing production by the payment of shut-in royalties.\textsuperscript{15} Similarly, courts have been willing to find that a cessation of production for whatever reason is not relieved by the force majeure clause if the lease contained a cessation of production clause requiring commencement of operations for drilling or reworking on the leased premises within a defined amount of days and the force majeure event did not prevent commencement of drilling or reworking operations.\textsuperscript{16}

The interplay of the habendum clause\textsuperscript{17} and force majeure clause was the subject of two nearly identical cases in which the lessees claimed as a force majeure event the State of New York’s highly publicized moratorium, and now ban, on high volume hydraulic fracturing (“fracking”) of horizontal wells. The lessees invoked the force majeure clause claiming that the fracking moratorium prevented them from drilling on the leased lands prior to the expiration of the primary term.\textsuperscript{18} On appeal of one of the cases to the United States Second Circuit Court of Appeals, the federal Court of Appeals asked the state court\textsuperscript{19} to answer two previously unanswered questions of state law: (1) under New York law did New York’s moratorium constitute a force majeure event; and (2) if so, does the force majeure clause modify the habendum clause and extend the leases’ primary terms?\textsuperscript{20}

Each of the subject leases contained a habendum clause providing that the lease “shall remain in force for a primary term of FIVE (5) years from the date hereof and as long thereafter as the said land is operated by Lessee in the production of oil or gas.” The leases also contained the following force majeure clause:

\begin{quote}
[i]f and when drilling or other operations hereunder are delayed or interrupted ... as a result of some order, rule, regulation, requisition or
necessity of the government, or as a result of any other cause whatsoever
beyond the control of the Lessee, the time of such delay or interruption
shall not be counted against Lessee, anything in this lease to the contrary
notwithstanding. All express or implied covenants of this lease shall be
subject to all Federal and State laws, Executive Orders, Rules or
Regulations, and this lease shall not be terminated, in whole or in part,
nor Lessee held liable in damages for failure to comply therewith, if
compliance is prevent by, or if such failure is the result of any such Law,
Order, Rule or Regulation.

Unfortunately, the state court punted on the first question, rendering it academic by
its answer to the second question. The court stated that the force majeure clause
does not modify the primary term of the habendum clause and, therefore, a force
majeure event cannot be used to extend the leases’ primary terms. Importantly, the
state court found that the habendum clause in the leases does not incorporate the
force majeure clause by reference or contain any language expressly subjecting it to
the other lease terms and the force majeure clause does not refer to the habendum
clause with specificity; therefore, the habendum clause is not expressly modified or
enlarged by the force majeure clause. It found that the phrase in the force majeure
clause “anything in this lease to the contrary notwithstanding” does not supersede
all other clauses in the lease, just those in which it is in conflict, and the habendum
and force majeure clauses are not in conflict during the primary term of the lease.
Additionally, the court stated that the force majeure clause pertains only to express
or implied covenants (the lessee’s obligations) and, in the primary term, the
covenant is to pay rentals (not drilling). As to the secondary term of the habendum
clause, the court did recognize that since the force majeure clause expressly refers
to a delay or interruption in drilling or production, the force majeure clause modified
the secondary term of the habendum clause in which the lessee has the obligation to
produce oil or gas or the lease terminated. The court stated that drilling and
production operations are covenants only applicable to the secondary term of the
lease. Finally, the court made the distinction between termination and expiration
noting that the force majeure clause expressly deals with lease termination,
something that only occurs in the secondary term, rather than lease expiration that
occurs at the end of the primary term. The court stated that if the lessees intended
for the habendum clause to be subject to other provisions of the contract, they could
have expressly done so.21 Accordingly, the United States Second Circuit Court of
Appeals applied the law as set out by the state court and held that under New York
law the force majeure clause did not modify the habendum clause. Therefore, even
if the moratorium was a force majeure event, it did not operate to extend the
leases.22

The lesson of the Beardslee decision is that in similarly drafted leases, the force
majeure clause is basically inapplicable to the primary term and, if the lessee is
prevented or delayed from drilling and the force majeure clause is not applicable,
the primary term of the lease will continue on and the lessee will have no way in
which to extend the lease into the secondary term.

Conclusion: “The Force is strong with this one.”23
To invoke superior force, such force must be understood. In drafting the lease, careful consideration should be given to: (1) the lease play and anticipated operations; (2) defining the force majeure events in the force majeure clause in a sufficient manner; (3) defining the covenants, conditions, and obligations, with consideration to the primary and secondary terms, in the force majeure clause that will be excused upon the occurrence of a force majeure event; (4) incorporating by reference the force majeure clause in the habendum clause and any other pertinent clauses; and (5) reconciling all of the lease provisions. If dealing with the preservation of an existing lease, the safest route may be to request a ratification and amendment of the lease or other such agreement with the lessor confirming the existence and status of the lease and obtaining an extension thereto as necessary; of course, this is assuming that the lessor is willing to execute such an agreement.

Under general principles of contract interpretation, the courts will construe the lease against the party who drafted it, most often the lessee. Fracking bans and other prohibitions on oil and gas exploration and production exist across the country and depending on the results of the 2016 Presidential Elections, lawsuits claiming that the force majeure clause will not save an oil and gas lease during a fracking ban may become more prevalent. Looking ahead, the next impediment may include bans on transporting oil by rail through certain states. If transportation by rail is crucial to the economic viability of the play, then such a ban on the transportation of the oil should be addressed in the lease.

In all your lease endeavors, MAY THE FORCE BE WITH YOU.

2 Fee Lease 101 Series
3 Yoda, The Empire Strikes Back (1980)
4 4-6 Williams & Meyers, Oil and Gas Law § 683.1 (citations omitted).
7 Vortt Exploration Co., Inc. v. EOG Resources, Inc., 2009 Tex. App. LEXIS 4113 (Tex. App.–Eastland, May 29, 2009); Maralex v. Resources, Inc. v. Gilbreath, 76 P.3d 626 (N.M. 2003) (if the cessation of production was caused by the pressures in a third party pipeline, it would be beyond the control of the lessee; however, if the cessation was caused by insufficient pressure within the well, it would not be an external cause beyond the lessee’s control).
8 Schroeder v. Snoga, 1997 Tex. App. LEXIS 4030 (Tex. App.–San Antonio July 31, 1997) (Commission shut-in order was caused by the operator’s violation of the Commission’s rules); Edington v. Creek Oil Co., 690 P.2d
970 (Mont. 1984) (Commission shut-in order for a seepage issue could have been resolved by the lessee); Caddell v. Threshold Dev. Co. 609 S.W.2d 871 ( Tex. App.-Amarillo 1980) (a lockout by the lessor was within the meaning of the force majeure clause).

9 Yoda, The Empire Strikes Back (1980).

10 Older lease forms may contain conditions such as payment of rentals during the primary term or payment of shut-in royalties in the secondary term. In that case, failure to timely and appropriately make the payments will result in the lease automatically terminating.

11 4-6 Williams & Meyers, Oil and Gas Law § 683.1 (citations omitted).

12 See Logan v. Blaxton, 71 So. 2d 675 (La. Ct. App. 1954). Although the force majeure clause identified floods as an event and heavy rainfall made roads impassable and impracticable to transport crude oil to market, the court found that the rains were seasonable and could be predicted and the evidence of impossibility was not demonstrated, i.e. that roads could not be improved, alternative routes were not available, or smaller trucks could not be used to transport the oil to market.

13 Id.


15 See Welsch v. Trivestco Energy Co., 221 P.3d 609 (Kan. App. 2009) (bankruptcy of a gas purchaser is covered by the shut-in royalty clause, not the force majeure clause. The unavailability of purchasing and transportation services did not prevent the lessee from paying shut-in royalties and the force majeure clause was not triggered).


17 The habendum clause sets forth the term of the lease. It typically divides the lease into the primary term of a fixed number of years and the secondary term “for so long thereafter as oil or gas is produced.”

18 Aukema v. Chesapeake Appalachia, LLC, 904 F. Supp. 2d 199 (N.D.N.Y. 2012); Beardslee v. Inflection Energy, LLC, 904 F. Supp. 2d 213 (N.D.N.Y. 2012). These cases were decided on the same day, by the same judge, with the same results. The court found that the moratorium did not prevent the lessees from performing under the leases and drilling by other methods, i.e. drilling a conventional vertical well. The lessees had the right to drill, but were not required to do so; it was merely an option and “invocation of a force majeure clause to relieve them from their contractual duties is unnecessary.” Beardslee, 904 F. Supp. 2d at 220. The Beardslee decision was appealed by the lessees.

19 The New York Court of Appeals, being New York’s highest appellate state court.

20 Beardslee v. Inflection Energy, LLC, 761 F.3d 221 (2nd Cir. 2014).

22 Beardslee v. Inflection Energy, LLC, 798 F.3d 90 (2nd Cir. 2015).

23 Darth Vadar, Star Wars (subtitled Episode IV: A New Hope) (1977)

24 Mora County, New Mexico was the first county in the United States to ban “any corporation to engage in the extraction of oil, natural gas, or other hydrocarbons within Mora County” and prohibiting the use of water for fracking, among other related activities. The District Court held that the ban was preempted by state law. SWEPI, LP v. Mora County, 2015 U.S. Dis. LEXIS 13496 (D.N.M. Jan. 19, 2015). Similarly, Fort Collins and Longmont, Colorado’s recent bans have also been held to be preempted by state law and outside their authority and struck down. City of Fort Collins v. Colo. Oil & Gas Assn, 2016 CO 28 (May 2, 2016); City of Longmont v. Colo Oil & Gas Assn, 2016 CO 29 (May 2, 2016).

25 Hillary Clinton outlines a series of conditions on fracking stating, “You know, I don’t support it when any locality or any state is against it…. I don’t think there will be many places in America where fracking will continue to take place.” The New York Times, “Transcript of the Democratic Presidential Debate in Flint, Mich,” March 6, 2016. Bernie Sanders advocates for a total ban on fracking, “We need to put an end to fracking not only in New York and Vermont, but all over this country.” The New York Times, “Bernie Sanders Proposes Fracking Ban and Attacks Hilary Clinton on the Environment,” April 11, 2016.
