- BY THE HAND OF GOD -
THE FORCE MAJEURE CLAUSE

By – Joshua A. Swanson, VOGEL LAW FIRM
Force Majeure Defined

- Common in many contracts, including oil and gas leases.
- Affirmative defense freeing party from liability because of an extraordinary event beyond the control of the parties defined by the contract.
Why Does It Matter?

- It’s a savings clause.
- Allows lessee (oil company) to avoid the consequences of automatic lease termination when production ceases or for failure to timely conduct drilling operations.
- Difference between lease expiring -- more $$ $$ $$ for mineral owners -- versus lessee continuing to hold lease at current terms of the lease based on events not contemplated when lease executed.
Important for mineral owners to recognize savings clauses, including force majeure, drilling ops, cessation of production (60/90/120 days), shut-in provisions, continuous ops, and option language.

Failure to ID can lead to expensive litigation or extended lease.
How Do You Protect Yourself?

- Get it out if possible.
- Limit its impact by specifically defining events that trigger the clause, i.e., force majeure, drilling operations, etc.
- Written notice, i.e., to trigger force majeure clause, written notice within 10 days of F-M event.
Looking to the Language of the Lease

- Key: what does the contract say? How is force majeure defined in the lease?
- **Egeland v. Continental Resources, 2000 ND 169, ¶ 10.**
- Same general rules that govern interpretation of contracts apply to leases.
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 prevented by, or if such failure is the result of, any such Law, Order, Rule or Regulation.
The parties' performance under this Agreement is subject to acts of God, war, government regulation, terrorism, disaster, strikes, civil disorder, failure to obtain labor or materials, or any other emergency beyond the parties' control, making it inadvisable, illegal, or impossible to perform their obligations under this Agreement.
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Which Force Majeure Clause Is Better?

- Of previous F-M clauses, which is better for mineral owner?
- Which is better for lessee?
- Why?
Hypothetical

Does Force Majeure Apply?

- Primary term of the lease lapsed April, 15, 2013.
- No production.
- No operations?
- Operator claims the extreme and prolonged winter weather conditions prevent timely operations.
 Depends on the Lease, Right?

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- The parties’ performance under this Agreement is subject to acts of God, war, government regulation, terrorism, disaster, strikes, civil disorder, failure to obtain labor or materials, or any other emergency beyond the parties’ control, making it inadvisable, illegal, or impossible to perform their obligations under this Agreement.
Analysis – Ex. 1

- Key words: force majeure clause applies to covenants.
- Triggering events: laws, order, rules, regs.
- Language so critical.
- Production & drilling ops covenants?
Guiding Principles

- Favor the mineral owner.
- Burden on party asserting FM defense.
- Purpose of force majeure clause.
- Interpreted narrowly, not a MAC truck (don’t let it be a MAC truck).
What are the key words?

The parties' performance under this Agreement is subject to acts of God, war, government regulation, terrorism, disaster, strikes, civil disorder, failure to obtain labor or materials, or any other emergency beyond the parties' control, making it inadvisable, illegal, or impossible to perform their obligations under this Agreement.

Foreseeability – did parties have knowledge of blizzard at time they entered into the lease?
Issue: Does New York’s moratorium on fracking qualify as a government rule, order or regulation that triggered FM clause that saved leases from expiring?

Putting It Together

Aukema v. Chesapeake Appalachia

- FM is an event beyond the control of the parties which prevents performance under a contract and may excuse non-performance.
- When interpreting the contract, the parties’ intention controls.
- Best evidence of parties’ intent is the contract itself.
- Party invoking FM has burden to establish it.
- Mere impracticality or unanticipated difficulty is not enough to excuse performance.
- FM clause must include the specific event that is claimed to have prevented performance.
Facts

Aukema v. Chesapeake Appalachia

- Plaintiffs brought DECA claim seeking declaration that their leases expired at conclusion of primary term, and that leases not extended by force majeure clause.
- NY Governor directed NY Dept. of Environmental Conservation (DEC) to conduct study to address potential new environmental impacts from drilling, including horizontal drilling in Marcellus shale formations.
- DEC stopped processing permit applications for horizontal wells pending completion of study or preparation of site specific EIS.
- Chesapeake argued the directive constituted a moratorium that effectively brought natural gas development in NY “to a screeching halt.”
Directive did not prevent lessee from performing under terms of the lease. Plaintiffs leased Defendants access to premises for a set period of time and granted them the right to explore for natural gas and oil. In the event defendants discovered gas or oil during the primary term and subsequently drilled/produced, defendants were obligated to pay royalties. As defendants did not have an obligation to drill, the invocation of force majeure to relieve them from their contractual duties is unnecessary.
No Force Majeure Event

Aukema v. Chesapeake Appalachia

- Directive did not frustrate purpose of lease, which was to explore, drill, & produce oil and gas.
- Defendants may still explore, drill, produce, and otherwise operate for oil and gas and their constituents.
- Directive put a halt on horizontal drilling, but drilling permits for conventional drilling still issued. The only thing defendants were unable to do during the primary terms was to horizontally drill.
No Force Majeure Event

Aukema v. Chesapeake Appalachia

- Lease didn’t limit lessees right to drill to a specific type of drilling nor a particular formation.

- While defendants submit evidence that horizontal drilling was only commercially viable method of production in the Marcellus Shale & drilling using conventional methods was impractical, mere impracticality is not enough to excuse performance.

- Lessees did not contract for guaranteed production of oil & gas; they contracted for access, exploration, and the right to drill for a set period of time.
The Lesson?

- Careful drafting is always critical.
- Spot the issues before hand and address them in the lease.
- Address these issues in the lease, definitions and tailored drafting can mean big $$$.
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