# A Primer On Best Practices In Oil And Gas Bankruptcies — Producers

By **Jarrod Martin and Tyler Greenwood** - July 23, 2021


What is one without the other? Recently, we discussed certain provisions royalty owners should pay attention to with respect to their oil and gas leases and what they can do to protect their oil and gas leases in the event a producer or downstream purchaser files for bankruptcy. This article, however, will focus on the other side of the same coin: certain provisions that producers should pay attention to in order to protect their valuable leases. Such considerations are a necessary endeavor for any producer. Although no energy company is a stranger to the cyclical and tumultuous effects of the oil and gas market, the ever-growing threat of a new "Delta" strain of COVID-19 and the new administration's revocation of the Keystone XL pipeline permit presents a new frontier of the ever-changing regulatory regime.

**Oil and Gas Lease**

As discussed in our prior article, we know that the habendum clause in an oil and gas lease is typically broken into two terms: the primary and secondary terms. Most contractual disputes focus on the secondary term, as it's predicated on conditional events, any one of which automatically terminates a potentially valuable lease.

Savings clauses can potentially prevent the otherwise automatic termination of the habendum clause. When reviewing the royalty lease, careful attention should be paid to the following savings clauses:

- shut-in;
- impossibility;
- impracticability; and
- force majeure.

Relevant to this article is the force majeure clause, which brings forth fertile ground for litigation. A force majeure clause generally provides that the existence of certain defined acts will excuse a party's obligations under the lease or the resulting liability for failure to adhere to the obligations. The existence of a force majeure event will prevent the other party from otherwise seeking damages under the lease or terminating the lease.

Keep in mind that force majeure clauses rely on highly fact-specific circumstances. Many force majeure cases either live or die by the specific language, as courts are hesitant to "expand" the definition of a covered event to another event not presently contemplated under the lease. Careful attention should therefore be spent on considering what you want to be covered and defined under force majeure.

Because COVID-19 and the delta variant of the same are particularly relevant, let's conduct a quick examination of whether it would normally be covered under a force majeure provision. It is rare a lease that will specifically reference a type of contagion. Usually, it will fall under umbrella terms such as "epidemic," "pandemic," or "public health crisis," in which case it will be covered. Such terms, however, might be notably absent in oil and gas leases, as they tend to focus on defining events or acts such as "civil or military acts," or government orders or regulations." In the wake of the extension of the nationwide eviction moratorium and several state orders and regulations still being applicable, such defined acts might give relief to parties of such leases. Subsequent bankruptcy filings might also fall under the broadly defined "government orders" term and give a party relief under the lease.

The fact that an event falls under the defined force majeure provision is only half the battle. Most oil and gas leases tie a "performance standard" to such an event, in which case a force majeure provision will not apply unless the event has "interrupted," "prevented" or made production "impossible." Whether an "event" has caused mere delays, price increases, or made production more inconvenient may not be enough to trigger the force majeure clause. Courts again take a close look at the specific contractual language; a strict performance standard contemplated under the lease will rarely trigger the force majeure provision, whereas a lesser performance standard will be met more favorably.

Finally, keep in mind what performance a force majeure provision actually excuses. Most leases should specifically detail how the force majeure provision is incorporated. Does it only apply to the primary term and subsequently suspend the time limit? Does it apply to the secondary term? Does it only excuse partial performance and thus requires other obligations to still be performed? Such concerns are meant to impress upon you that while a lease might be greater than the sum of all its provisions, those parts must be reviewed carefully and categorically. Chamberlain Hrdlicka can assist clients when it comes to such concerns and has the oil and gas expertise to structure it accordingly.

About the Authors: Jarrod Martin is a shareholder in Chamberlain Hrdlicka's Bankruptcy, Restructuring