



1-1-2013

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Recommended Citation

Swanson, Joshua A. (2013) "The Hand of God: Limiting the Impact of Force Majeure Clause in an Oil and Gas Lease," *North Dakota Law Review*. Vol. 89: No. 2, Article 2.

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THE HAND OF GOD: LIMITING THE IMPACT OF THE FORCE MAJEURE CLAUSE IN AN OIL AND GAS LEASE

JOSHUA A. SWANSON*

ABSTRACT

Lease disputes remain a hot topic in North Dakota oil and gas litigation. An increasing topic of litigation in disputes between oil companies and mineral owners is whether the “force majeure” clause applies to save an oil and gas lease from expiring. Commonly referred to as the “act of God” clause, oil and gas companies are beginning to use the force majeure clause as a catch-all savings provision in an attempt to hold leases where they have been unable to engage in timely drilling operations. There is limited case law in North Dakota to guide litigants as to whether the force majeure clause operates to hold their lease. Recent cases out of New York, including the much publicized *Aukema v. Chesapeake Appalachia*, dealing with that state’s moratorium on hydraulic fracturing, indicate the force majeure clause in oil and gas leases may not be as broad as oil companies envision them. This Article focuses on the growing importance of the force majeure clause in oil and gas leases and discusses what mineral owners can do to protect themselves against the unintended consequences of allowing the force majeure clause to turn every event into an “Act of God” that extends their lease indefinitely without production or drilling operations.

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I. INTRODUCTION

We are told in the Book of Job, “The Lord gave, and the Lord hath taken away.”¹ Putting aside its ecclesiastical meaning, what the Lord hath given to some by way of mineral rights can also be taken away, to the extent it is devalued by certain language in an oil and gas lease. Almost without exception, every oil and gas lease contains a force majeure clause. The force majeure clause is commonly referred to as the “Act of God” clause with certain events specifically defined by the terms of the lease acting as an affirmative defense excusing performance under the lease.² What triggers the force majeure clause depends on the language in the lease, as the parties are free to define what qualifies as a force majeure event.³ This clause has become increasingly important as oil and gas companies maneuver to protect their interests in leases from expiring in light of the decision in *Aukema v. Chesapeake Appalachia*.⁴ In *Aukema*, the United States District Court for the Northern District of New York held that a directive from the New York Governor, which resulted in a moratorium on horizontal drilling and hydraulic fracturing pending completion of certain environmental impact assessments, did not qualify as a force majeure event excusing the lessees from performing under the terms of the subject leases.⁵

Considering the potential impact of *Aukema*, mineral owners should anticipate that oil and gas companies will seek to expand the terms and scope of the force majeure clause in their leases by giving a broader definition to those force majeure qualifying events, saving a lease from expiring despite a lack of production and drilling operations. Mineral owners can protect themselves by being diligent in reviewing language in a

1. The full verse at *Job* 1:20-21 (King James) reads, “Naked came I out of my mother’s womb, and naked shall I return thither: the Lord gave, and the Lord hath taken away; blessed be the name of the Lord.”

2. Recall that an oil and gas lease is a contract, and “[t]he same general rules that govern interpretation of contractual agreements apply to oil and gas leases.” *Egeland v. Cont’l Res.*, 2000 ND 169, ¶ 10, 616 N.W.2d 861, 864 (quoting *Johnson v. Mineral Estate, Inc.*, 343 N.W.2d 778, 780 (N.D. 1984)).

3. See, e.g., *Maralex Res., Inc. v. Gilbreath*, 76 P.3d 626 (2003). In *Maralex Resources*, the parties each argued they were the rightful lessee to the disputed minerals. The lessee to the original lease argued “[t]he lease did not terminate because the problem with line pressure was beyond their control and therefore triggered the force majeure clause, which applies when production ceases due to events beyond the control of the well operators. See *Sun Operating Ltd. P’ship v. Holt*, 984 S.W.2d 277, 282 (Tex. App. 1998).” *Maralex Res.*, 76 P.3d at 636. As is the case in North Dakota, the Court explained, “New Mexico has no cases interpreting a force majeure clause. What types of events constitute force majeure depends on the specific language included in the clause.” *Id.* The Court held the original lease terminated as the problem with the line pressure did not constitute a force majeure event excusing performance. *Id.* at 319.

4. 904 F. Supp. 2d 199 (N.D.N.Y. 2012).

5. See *Aukema*, 904 F. Supp. 2d at 209-11.

proposed lease and by pushing for a very specific and narrowly-defined force majeure clause limiting what is considered a force majeure qualifying event. The failure of mineral owners to give the force majeure clause its proper due could result in mineral rights being tied up indefinitely without production and without any additional consideration being paid by the oil company to continue to hold the subject lease.

II. A FORCE MAJEURE EVENT IS WHATEVER THE LEASE SAYS IT IS

There is no set of stone tablets containing a list of events that do, or do not, automatically qualify as force majeure events. The common law doctrine of force majeure has, in most instances, fallen by the wayside in favor of the specific terms bargained for by the parties to the lease. Traditionally, as noted by Corbin, force majeure was “a phrase coined primarily for the convenience of contracting parties wishing to describe the facts that create a contractual impossibility due to an ‘Act of God.’”⁶ Today the idea of performance excused by an event beyond the contracting parties’ control, although not defined as a force majeure event under the terms of the lease, falls more appropriately under the umbrella of the common law defense of impossibility.⁷ Although the concepts behind force majeure and the defense of impossibility are similar, they are two separate affirmative defenses that should not be confused.⁸ Courts will look to the

6. *Perlman v. Pioneer Ltd. P’ship*, 918 F.2d 1244, 1248 n.5 (5th Cir. 1990) (citing 6 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1324 (1962)).

7. Like Corbin, *supra* note 6, in *Nissho-Iwai Co. v. Occidental Crude Sales*, the United States Court of Appeals for the Fifth Circuit recognized the traditional concept of force majeure as meaning “[a]n event which is beyond the control of the contractor.” 729 F.2d 1530, 1540 (5th Cir. 1984) (citing Squillante and Congalton, *Force Majeure*, 90 COMM. L.J. 4, 5 (1979)). However, the Fifth Circuit recognized this traditional concept of force majeure was more appropriately included under the common law defense of impossibility as force majeure is a contractually-defined event: “The common law defense of impossibility due to Act of God [sic] requires the defendant to prove that an excusing event is beyond his control, and contractual force majeure provisions typically incorporate this requirement.” *Id.* at 1540 (citing *Eastern Airlines v. McDonnell Douglas*, 532 F.2d 957, 991 (5th Cir. 1976)); *cf.* *Golsen v. ONG Western, Inc.*, 756 P.2d 1209, 1223 (Okla. 1988) (stating “[i]t should be recognized that the contract in question modified the common law definition of force majeure and that contractual terms negotiated between consenting parties may alter the common law definition.”) *Id.*

8. In *Tallackson Potato Co. v. MTK Potato Co.*, the North Dakota Supreme Court explained that to establish the defense of impossibility, the party claiming the defense “[m]ust demonstrate that, among other things, its performance is strictly impossible or impracticable because of extreme and unreasonable difficulty, expense, injury or loss, and that the [party’s] failure rendered its performance not only subjectively but also objectively impossible or impracticable.” 278 N.W.2d 417, 424 (N.D. 1979). In other words, the party “must show that it cannot perform and that performance could not be completed by anyone.” *Id.* Further, the party claiming the defense must show “[p]erformance is made impracticable without his fault by the occurrence of an event

language of the contract itself to determine whether a particular event qualifies to excuse performance under force majeure.⁹

There are two common boilerplate force majeure clauses found in North Dakota oil and gas leases. Both are addressed in *Aukema*. The first is a more limited force majeure clause, excusing the failure to perform only when such performance is prevented by government rule, order, law, or regulation: “[t]his lease and its expressed or implied covenants shall not be subject to termination, forfeiture of rights, or damages due to failure to comply with obligations if compliance is prevented by federal, state, or local law, regulation or decree.”¹⁰ The second is a more expansive force majeure clause, excusing the failure to perform when such performance is prevented by everything from wars, to riots, lightning, explosions, and the failure to obtain materials, among others:

In the event lessee is rendered unable in whole or in part, by a force majeure to carry out its obligations under this lease, other than to make payments of amounts due hereunder, its obligations so far as they are affected by such force majeure shall be suspended during the continuance of an inability so cause. The term ‘force majeure’ as used herein shall be Acts of God, strikes, lockouts, or other industrial disturbances, acts of the public enemy, wars, blockades, riots, epidemics, lightning, earthquakes, explosions, accidents or repairs to machinery or pipes, delays of carriers, inability to obtain materials or rights of way on reasonable terms, acts of public authorities, or any other causes, whether or not of the same kind as enumerated herein, not within the control of the lessee and which by the exercise of due diligence lessee is unable to overcome.¹¹

the non-occurrence of which was a basic assumption on which the contract was made” *Red River Wings, Inc. v. Hoot, Inc.*, 2008 ND 117, ¶ 56, 751 N.W.2d 206, 226.

9. *See infra* notes 13-21.

10. *Aukema*, 904 F. Supp. 2d at 204. Similar language in many North Dakota leases provides:

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.

See, e.g., Standard Producers Lease Form 88.

11. *Aukema*, 904 F. Supp. 2d at 206. Note that force majeure does not excuse performance when the force majeure event relied on was caused by the lessee or could have been prevented by the lessee. “A force majeure clause cannot be invoked to excuse performance where the delaying condition was caused by the lessee and could have been prevented by the exercise of prudence, diligence, and care.” *Erickson v. Dart Oil & Gas Corp.*, 474 N.W.2d 150, 156 (Mich. Ct. App. 1991) (citing *Edington v. Creek Oil Co.*, 690 P.2d 970, 974 (Mont. 1984)).

As previously noted, and explained more in-depth herein, New York's directive that led to a moratorium on horizontal drilling and hydraulic fracturing did not qualify as a force majeure event under the language of either of these boilerplate clauses. This is not to say these clauses are acceptable for a North Dakota mineral owner. While no North Dakota court has yet had cause to address whether a government moratorium on horizontal drilling or hydraulic fracturing would qualify as a force majeure event, it is highly debatable whether a North Dakota court would reach the same result as the Northern District of New York in *Aukema*.¹²

There is a third force majeure clause also found, but less common, in North Dakota oil and gas leases. This clause contains a key requirement that a mineral owner should insist upon:

This lease shall not be terminated nor Lessee held liable in damages if compliance with covenants in this lease is prevented or hindered by an act of God, of the public enemy, adverse field, weather or market conditions, labor disputes, inability to obtain materials in the open market or transportation thereof, inability to obtain governmental permits or approvals necessary to Lessee's operations, such circumstances of events being hereafter referred to as "force majeure." Lessee shall notify Lessor in writing within fifteen (15) days of the first occurrence of any claimed events defined herein which prevents or hinders any compliance, such notice required in order for said event to qualify as force majeure.¹³

The key language in this third example is the requirement for the lessee (oil company) to provide the lessor (mineral owner) written notice within a set number of days in order to seek the protections of the force majeure clause.

12. See, e.g., *Anderson v. Hess Corp.*, 733 F. Supp. 2d 1100 (D.N.D. 2010). In *Anderson*, the United States District Court for the District of North Dakota addressed what activities qualified as "drilling operations" under the terms of an oil and gas lease in order to extend the lease beyond its primary term. The Court found, as a matter of law, that activities falling short of actual drilling qualified as drilling operations:

Hess Corporation surveyed and staked a well, obtained a permit to drill from the Oil and Gas Division of the North Dakota Industrial Commission, leveled and lazed the pad, dug the drilling pit and lined it with gravel and clay, widened the access road to the well, drilled the rat hole for the main conductor pipe, moved equipment to the location, and drilled the mouse hole . . . [t]he Court finds, as a matter of law, that Hess Corporation engaged in drilling operations, thus extending the leases beyond the primary term.

Id. at 1108, *aff'd*, 649 F.3d 891 (8th Cir. 2011). This case is often cited by oil companies and mineral owners in arguing whether an oil company's activities qualified as drilling operations that extended a lease beyond its primary term.

13. This is similar to the force majeure clause contained in the lease in *Perlman*. *Perlman v. Pioneer Ltd. P'ship*, 918 F.2d 1246 (5th Cir. 1990).

Mineral owners should incorporate this written notice requirement into the force majeure clause in their lease.

According to most courts that have addressed the issue, a force majeure qualifying event is whatever the lease says it is.¹⁴ For example, in *Sun Operating Ltd. Partnership v. Holt*,¹⁵ the Court noted that the scope and application of the force majeure clause was literally dependent on the terms in the contract.¹⁶ The Court will not rewrite a lease to include events within a force majeure clause when, even though such events were indisputably beyond the control of the parties, they were not defined as force majeure events by the lease.¹⁷ Not even a national tragedy of the largest scale, such as the September 11th terrorist attacks, will qualify as a force majeure event unless it is specifically contemplated by the parties.¹⁸ The takeaway is clear: the language in the lease will control whether an event does, or does not, fall within the scope of the force majeure clause. Those relying solely on an expansive common law definition of the force majeure clause based on impossibility or foreseeability are likely to be disappointed by the court.

14. See, e.g., 30 WILLISTON ON CONTRACTS § 77:31 (4th ed. 2013) and case annotations therein.

15. 984 S.W.2d 277 (Tex. App. 1998).

16. The Court explained, “[t]he historical underpinnings have fallen by the wayside. Force majeure, is now little more than a descriptive phrase without much inherent substance. Indeed, its scope and application, for the most part, is utterly dependent upon the terms of the contract in which it appears.” *Id.* at 283. See also *Perlman*, 918 F.2d at 1248 n.5 (citing *PPG Industries v. Shell Oil Co.*, 919 F.2d 17, 18 (5th Cir. 1990) (instructing parties to look to the language in the lease to determine whether performance is excused by the force majeure clause)). “Instead, they should look to the language that the parties specifically bargained for in the contract to determine the parties’ intent concerning whether the event complained of excuses performance.”

17. The Court will not substitute its judgment to rewrite the parties’ force majeure clause. In *Allegiance Hillview, L.P. v. Range Texas Prod., LLC*, the Court expressed the dominant view that, “when the parties have themselves defined the contours of force majeure in their agreement, those contours dictate the application, effect, and scope of force majeure,” and reviewing courts “are not at liberty to rewrite the contract or interpret it in a manner which the parties never intended.” 347 S.W.3d 855, 865 (Tex. App. 2011).

18. In *OWBR, LLC v. Clear Channel Commc’ns, Inc.*, the United States District Court for the District of Hawaii held, in part, that the September 11th attacks did not, by itself, excuse performance as inadvisable under the force majeure clause in the parties’ agreement. 266 F. Supp. 2d 1214 (D. Haw. 2003). The Court recognized the economic hardship and complications the attacks had on the defendant, Clear Channel, who booked a large Hawaiian resort for a music industry conference originally scheduled within a few months of the attacks. Notwithstanding the economic hardship, the Court held the language in the force majeure clause did not excuse performance for economic hardship, even though the hardship resulted from the attacks: “From an economic standpoint, it was certainly unwise, or economically inadvisable, for Defendants to continue with the Power Jam 2002 event. Nonetheless, a force majeure clause does not excuse performance for economic inadvisability, even when the economic conditions are the product of a force majeure event.” See *Butler v. Nepple*, 354 P.2d 239 (Cal. 1960); see also *Stand Energy Corp. v. Cinergy Servs., Inc.*, 760 N.E.2d 453, 458 (Ohio Ct. App. 2001). “The Force Majeure clause does not contain language that excuses performance on the basis of poor economic conditions, lower than expected attendance, or withdrawal of commitments from sponsors and participants.” *OWBR LLC*, 266 F. Supp. 2d at 1223-24.

Similar to other contracts, the contours of the force majeure clause in an oil and gas lease are shaped specifically and solely by the language in the lease. In *Perlman v. Pioneer Ltd. Partnership*,¹⁹ the United States Court of Appeals for the Fifth Circuit explained courts should look to the specific language of the force majeure clause and give effect to the intentions of the parties as expressed by that language when interpreting the scope of the force majeure clause.²⁰ The Fifth Circuit held the district court erred when it impermissibly added a foreseeability and control requirement to the force majeure clause in the parties' lease.²¹ The fact that force majeure clauses are interpreted narrowly further assists mineral owners.²² The decision in *Aukema* demonstrates just how narrowly a reviewing court will interpret the force majeure clause.

III. *AUKEMA*: A GAME-CHANGER FOR THE FORCE MAJEURE CLAUSE

The decision in *Aukema* is likely to have an impact on the way oil companies structure the force majeure clause in new leases. At first blush, it appeared the operators were on solid footing as New York's directive resulted in, for all practical purposes, a moratorium on horizontal drilling and hydraulic fracturing in the Marcellus Shale within New York.²³ The

19. *Perlman*, 918 F.2d at 1248 n.5.

20. *Id.* at 1248. While explaining that the case was one of contract interpretation, the Fifth Circuit stated the following:

The language in the force majeure clause in the Lease is unambiguous and its terms were specifically bargained for by both parties. Therefore, the 'doctrine' of force majeure should not supersede the specific terms bargained for in the contract. When the terms of a contract are unambiguous, the courts must give effect to the intentions of the parties expressed by the language they employ.

Id.

21. *Id.* "Because the clause labeled 'force majeure' in the Lease does not mandate that the force majeure event be unforeseeable or beyond the control of [the party invoking the clause] before performance is excused, the district court erred when it supplied those terms as a rule of law." *Id.* The Fifth Circuit ultimately held the force majeure clause did not apply, rejecting *Perlman's* attempt to invoke the clause, finding that the government regulators did not hinder his performance so as to trigger the clause. *See id.* at 1248-49.

22. *See, e.g.*, In re Cablevision Consumer Litig., 864 F. Supp. 2d 258, 264 (E.D.N.Y. 2012) ("[Force majeure clauses] are construed narrowly and will generally only excuse a party's nonperformance if the event that caused the party's nonperformance is specifically identified.").

23. The Marcellus Shale is one of several shale formations, including North Dakota's Bakken formation, which has been unlocked by the staggering successful combination of horizontal drilling and hydraulic fracturing. Wall Street is bullish on the domestic energy boom brought about by horizontal drilling and hydraulic fracturing that, some worry, could go bust if regulations, like New York's directive, restrict these practices. In the December 16, 2013, issue of *Forbes*, writer Daniel Fisher praises the future of domestic energy production resulting from the shale boom, but mentions this future is not one without risks. "The shale boom isn't without risk, of course. One is political: Environmentalists in states not used to the sight of drilling rigs are mounting a fierce political battle to ban fracking (old hands wince at the insertion of a 'k' in a

issue in *Aukema*, and its far-reaching effects, was appropriately summarized by the Defendants, Chesapeake Appalachia (“Chesapeake”) and Statoil USA Onshore Properties (“Statoil”), in their Memorandum of Law opposing the Plaintiffs’ motion for summary judgment and in support of their own cross-motion for summary judgment.²⁴ According to Chesapeake and Statoil, this moratorium brought development in the Marcellus to a “screeching halt” and threatened millions of dollars already invested in developing the formation:²⁵

The question here is whether oil and gas leases between Plaintiffs and Defendants (the “O&G Leases”) were extended in the face of the unprecedented statewide ban on the combined use of horizontal drilling and high-volume hydraulic fracturing (“HVHF”) that has been in existence in New York for four years, i.e., since July 23, 2008, when then-Governor Paterson ordered supplemental environmental review of HVHF under the New York State Environmental Quality Review Act (“SEQRA”) (hereinafter, the “Moratorium”). The Moratorium bans the combined use of horizontal drilling and HVHF pending completion of the supplement to the 1992 generic environmental impact statement (“1992 GEIS”), and this ban has effectively brought natural gas development in New York to a screeching halt. Hanging in the balance are hundreds of millions of dollars that have already been invested by operators toward deep shale development. And, against this backdrop, as leases have reached the end of their

term based on the word ‘fracturing’), even though the technology has been widely used in U.S. oilfields since it was developed in Kansas in the late 1940s.” Daniel Fisher, *How to Play the Shale Boom’s Next Phase*, FORBES, Dec. 16, 2013, available at <http://www.forbes.com/sites/danielfisher/2013/11/27/how-to-play-the-next-phase-of-the-shale-boom/>.

24. Plaintiffs were fifty-five mineral owners that entered into oil and gas leases held by Chesapeake and Statoil. The Plaintiffs brought a declaratory judgment action seeking a declaration that the subject leases expired at the end of their primary terms and were not extended by the force majeure clause. See *Aukema*, 904 F. Supp. 2d at 201.

25. The Court recognized the sheer magnitude of the Marcellus and how horizontal drilling and hydraulic fracturing opened it up:

According to the DEC, the Marcellus Shale is a shale formation extending deep underground from Ohio and West Virginia northeast into Pennsylvania and southern New York. It is as deep as 7,000 feet or more below ground in some areas. See N.Y.S. Dep’t of Env’tl. Conservation, *Marcellus Shale* (2012), available at <http://www.dec.ny.gov/energy/46288.html>. Geologists estimate that it may contain up to 489 trillion cubic feet of natural gas. *Id.* Although the gas potential in the Marcellus Shale is not a new discovery, drilling companies abstained from exploration and extraction because of the difficulty and expense associated with drilling such a deep formation. However, recent advancements in technology and the use of HVHF prompted drilling companies to reconsider opportunities in the Marcellus Shale.

Aukema, 904 F. Supp. 2d at 203.

primary terms, operators have invoked their contractual and common law rights, claiming lease extension under these dramatic, compelling circumstances.²⁶

Chesapeake and Statoil argued New York's directive was a force majeure event that extended the disputed leases because it constituted a state regulation that, in effect, banned the only viable way to develop the Marcellus in the counties where the leases were located.²⁷ While vertical drilling was available, and Chesapeake unsuccessfully drilled vertical wells in an attempt to develop the acres subject to the leases, Chesapeake and Statoil argued the only economically viable and commercially practicable manner to develop the leases was horizontal drilling and hydraulic fracturing.²⁸

The Plaintiffs countered that common law force majeure did not apply to extend the leases beyond their primary terms, because it is a narrow doctrine only excusing performance when the subject matter of the contract is destroyed or the means of performance are rendered impossible.²⁹

26. Memorandum of Law in Support of Defendants' Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment at 1, *Aukema v. Chesapeake Appalachia, LLC*, 904 F. Supp. 2d 199 (N.D.N.Y. 2012) (No. 11CV00489) [hereinafter Memorandum].

27. *See Aukema*, 904 F. Supp. 2d at 209.

28. *Id.* at 209-10.

29. *Id.* at 209. Plaintiffs and the Court appear to be erroneously labeling the defense of impossibility as "common law force majeure." In Memorandum, *supra* note 26, Plaintiffs argue that, "[w]here a parties' [sic] written agreement fails to contain a force majeure clause, there is no basis for a force majeure defense and the doctrine of common law force majeure is inapplicable." *Id.* at 17. In making this argument, Plaintiffs cite several cases, primarily relying on *Gen. Electric Co. v. Metals Res. Group Ltd.*, 741 N.Y.S.2d 218 (N.Y. App. Div. 2002) and *Kel Kim Corp. v. Cent. Markets, Inc.*, 519 N.E.2d 295 (N.Y. 1987). Both *General Electric* and *Kel Kim* discuss the defense of impossibility and properly reference it as such. For example, in *Kel Kim*, the Court of Appeals of New York explained the common law defense of impossibility:

Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract. Applying these principles, we conclude that plaintiff's predicament is not within the embrace of the doctrine of impossibility.

Kel Kim, 519 N.E.2d at 296. The Court then compared the doctrine of impossibility to the force majeure clause in the disputed contract:

For much the same underlying reason, contractual force majeure clauses—or clauses excusing nonperformance due to circumstances beyond the control of the parties—under the common law provide a similarly narrow defense. Ordinarily, only if the force majeure clause specifically includes the event that actually prevents a party's performance will that party be excused.

Id. *See also Gen. Electric Co.*, 741 N.Y.S.2d at 418:

In any event, it is not a basis for reliance upon the impossibility of performance doctrine. The force majeure doctrine is no more helpful to defendant. The parties' integrated agreement contained no force majeure provision, much less one specifying

Plaintiffs argued performance was not impossible because permits were still available for traditional drilling methods, like vertical drilling, and the State's directive was a foreseeable event.³⁰ According to Plaintiffs, under common law force majeure, performance is excused only if the qualifying event is unforeseeable.³¹ Finally, Plaintiffs argued the force majeure clauses in the leases were not triggered because the claimed force majeure—the issuance of permits for horizontal drilling and hydraulic fracturing—was not specifically defined as a force majeure event under the leases.³²

The Court agreed with Plaintiffs, holding the force majeure clauses in the various leases, nor “common law force majeure,” extended the leases beyond the expiration of their primary terms.³³ Alternatively, the Court noted that even if New York's directive was a force majeure qualifying event, it did not save the leases from expiring because the directive did not preclude Chesapeake or Statoil from performing under the terms of the leases.³⁴ The Court began its analysis by describing the general purpose of the force majeure clause, which is to excuse performance under the contract when performance is prevented by a force beyond the parties' control or the purpose of the contract is frustrated.³⁵ As the parties invoking the force majeure defense, Chesapeake and Statoil had the burden to establish a force majeure qualifying event occurred that saved the leases from expiring at the end of their primary terms.³⁶ The Court found, in detriment to Chesapeake and Statoil's position, that “[m]ere impracticability or unanticipated

the occurrence that defendant would now have treated as a force majeure, and, accordingly, there is no basis for a force majeure defense (internal citations omitted).

Cf., *supra* notes 6-88 and accompanying text. The Court in *Aukema* ultimately distinguished between the doctrine of impossibility and the force majeure clause grounded in the contract.

30. *Aukema*, 904 F. Supp. 2d at 209.

31. *Id.*

32. *Id.*

33. *Id.* at 210-11. The leases had different variations of the force majeure clause. *See id.* at 203-07. The Court held none of the force majeure clauses applied to save the leases from expiring. *Id.* at 210-11.

34. *Id.* at 210.

35. “The primary purpose of force majeure is to ‘relieve a party from its contractual duties when its performance has been prevented by a force beyond its control or when the purpose of the contract has been frustrated.’” *Id.* at 210 (quoting *Phillips Puerto Rico Core, Inc. v. Tradax Petroleum, Ltd.*, 782 F.2d 314, 319 (2d Cir. 1985)). The Court again seems to intermingle the concept behind the common law defense of impossibility with the contractually-based force majeure defense. While the concept and roots connecting the two may be similar, it is important to note, as explained herein, that a force majeure qualifying event must be specified by the contract. *See supra* notes 14-21. This “general purpose,” or the historical underpinnings of force majeure, as recognized in *Sun Operating Ltd. and Perlman*, “[h]ave fallen by the wayside.” *See supra* note 15 and accompanying text. The Court in *Aukema* does recognize in the same paragraph that the force majeure qualifying event must be specifically referenced in the lease.

36. *Aukema*, 904 F. Supp. 2d at 210.

difficulty is not enough to excuse performance,” and the “[f]orce majeure clause must include the specific event that is claimed to have prevented performance.”³⁷

In ruling that the force majeure clauses did not save the leases from expiring, the Court explained that New York’s directive did not prevent Chesapeake and Statoil from performing under the terms of the leases. Despite the directive and resulting moratorium, Chesapeake and Statoil could still explore, drill, produce, and otherwise conduct operations to extract oil and gas. The only thing they were unable to do—the one thing Chesapeake and Statoil argued they needed to do to develop the leases—was horizontal drilling and hydraulic fracturing.

The purpose of the leases is to explore, drill, produce, and otherwise operate for oil and gas and their constituents. Defendants may still explore, drill, produce, and otherwise operate for oil and gas and their constituents. The Directive put a halt on horizontal drilling using HVHF; drilling permits for conventional drilling methods have, and continue to be, issued in the area of plaintiffs’ lands. The only thing defendants were unable to do during the primary terms was to horizontally drill using HVHF. The leases do not limit defendants’ right to drill to a specific type of drilling nor a particular formation. While defendants submit evidence demonstrating that horizontal drilling combined with HVHF is the only commercially viable method of production in the Marcellus Shale and drilling using conventional methods is impractical, ‘[m]ere impracticality . . . is not enough to excuse performance.’ Defendants did not contract for guaranteed production of oil and gas; they contracted for access, exploration, and the right to drill for a set period of time.³⁸

As the Court recognized, the language in the force majeure clauses at issue did not specifically limit Chesapeake and Statoil’s right to drill to a specific type of drilling, i.e., horizontal drilling and high-volume hydraulic fracturing. The Court went as far to acknowledge that horizontal drilling and hydraulic fracturing were the only commercially viable method of production in the Marcellus and drilling using other conventional methods was not practical. However, as noted herein, mere impracticality or

37. *Id.* (quoting *Phibro Energy, Inc. v. Empresa De Polimeros De Sines Sarl*, 720 F. Supp. 312, 318 (S.D.N.Y. 1989)) (citing *Kel Kim Corp. v. Cent. Markets Inc.*, 519 N.E.2d 295, 296 (N.Y. 1987)).

38. *Aukema*, 904 F. Supp. 2d at 210 (alteration in original) (citations omitted).

economic hardship is not enough to trigger the force majeure clause and excuse performance.³⁹

Furthermore, Chesapeake and Statoil contracted with the knowledge of all government regulations, laws, rules, and orders that could have an impact on their leases. In addition to arguing that force majeure saved the leases from expiring, Chesapeake and Statoil argued the leases should be extended based on the doctrine of frustration of purpose.⁴⁰ In lease disputes involving alleged force majeure events, it is common for oil companies to also raise the affirmative defenses of impossibility and frustration of purpose. The doctrine of frustration of purpose is similar to the defense of impossibility.⁴¹ These defenses excuse performance under the contract when unforeseeable events beyond the parties' control interfere with the principal purpose of the contract (frustration of purpose) or performance under the terms of the contract becomes objectively impossible (impossibility).⁴² Chesapeake and Statoil argued their leases should have been extended because New York's directive and resulting moratorium on horizontal drilling and hydraulic fracturing frustrated the primary purpose of the leases.⁴³

The Court disagreed, finding that New York's directive was foreseeable. To prevail under the frustration of purpose defense, the event frustrating the purpose of the lease must be a "virtually cataclysmic, wholly unforeseeable event" that renders the lease valueless.⁴⁴ Specifically,

39. *Cf.* OWBR LLC v. Clear Channel Commc'n, Inc., 266 F. Supp. 2d 1214, 1223 (D. Haw 2003).

40. "In addition to relying on force majeure, defendants argue the leases should be extended based on the doctrine of frustration of purpose. They contend the Directive and resulting moratorium wholly frustrate the primary purpose of the leases." *Aukema*, 904 F. Supp. 2d at 211.

41. In *Silbernagel v. Silbernagel*, the North Dakota Supreme Court described these defenses as related. 2011 ND 140, ¶ 13, 800 N.W.2d 320, 329. "[F]rustration of purpose is a defense to a breach of contract claim and constitutes an avoidance of all or part of a plaintiff's contract claim. *WFND, LLC v. Fargo Marc, LLC*, 2007 ND 67, ¶ 18, 730 N.W.2d 841, 851. "[F]rustration of purpose occurs when after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made." *Id.* (quoting *Tallackson Potato Co., Inc. v. MTK Potato Co.*, 278 N.W.2d 417, 424 n.6 (N.D. 1979)). In *Tallackson*, the court also discussed a related doctrine of impossibility of performance and said that to establish impossibility, a defendant must establish its performance is strictly impossible or impracticable because of extreme and unreasonable difficulty, expense, injury or loss, and that [a third-party's actions] rendered [the defendant's] performance not only subjectively but also objectively impossible or impracticable. 278 N.W.2d at 424 n.6. In other words, [the defendant] must show that it cannot perform and that performance could not be completed by anyone." *Silbernagel*, ¶ 13, 800 N.W.2d at 329 (quotations omitted).

42. *See id.*

43. *See* *Philbro Energy, Inc. v. Empresa De Polimeros De Sines Sarl*, 720 F. Supp. 312, 318 (S.D.N.Y. 1989).

44. *Aukema*, 904 F. Supp. 2d at 211 (quoting *United States v. Gen. Douglas MacArthur Senior Vill., Inc.*, 508 F.2d 377, 381 (2d Cir. 1974)).

because the environmental reviews and regulations existed at the time the leases were executed, the Court found “[i]t was foreseeable that a non-conventional drilling method such as HVHF would require additional environmental review.”⁴⁵ As explained in *Erickson v. Dart Oil and Gas Corporation*, Chesapeake and Statoil were presumed to have contracted with knowledge of New York’s laws and regulations, including the environmental review process that could have, and ultimately did, cause delay in developing their leases.⁴⁶ The case law indicates that not only are oil companies presumed to have contracted with knowledge of already existing laws, rules, and regulations, they are also presumed to have contracted with knowledge of any laws, rules, and regulations that are foreseeable. This includes regulations similar to New York’s directive that resulted in the moratorium on horizontal drilling and hydraulic fracturing.

Considering the numerous court decisions on the application of the force majeure defense, and the affirmative defenses of impossibility and frustration of purpose, the result in *Aukema* is not all that surprising. To invoke the force majeure clause, courts are in near unanimous consent that the qualifying event must be specifically provided for in the lease. Likewise, as the above-referenced cases demonstrate, the defenses of impossibility and frustration of purpose provide a high bar for the oil company to successfully raise them as affirmative defenses—namely, that the qualifying event for either impossibility or frustration of purpose must be a “virtually cataclysmic” and “wholly unforeseeable” event.⁴⁷ Moreover, the oil company, rather than the mineral owners, is in the best position to prepare for and address these events in the lease.

The Court recognized as much in *Aukema*. As the party drafting the leases, Chesapeake and Statoil were in the best position to include drilling specifications as to the methods used, i.e., horizontal drilling or hydraulic fracturing, or formations explored, as specific force majeure qualifying events.⁴⁸ Rightfully so, the Court did not let Chesapeake and Statoil hide behind the defenses of impossibility or frustration of purpose when there was a lease governing the relationship between them and the mineral owner.

45. *Aukema*, 904 F. Supp. 2d at 211.

46. “Where governmental action is alleged to be the cause of delay, the parties to the lease are presumed to have contracted with knowledge of any preexisting law that could have caused delay.” *Erickson v. Dart Oil & Gas Corp.*, 474 N.W.2d 150, 155 (Mich. Ct. App. 1991) (citing *Hughes v. Cantwell*, 540 S.W.2d 742, 745 (Tex. App. 1976)). See also *Goldstein v. Lindner*, 648 N.W.2d 892, 899 (Wis. Ct. App. 2002) (“Parties to a lease are assumed to know what laws and regulations will affect the company’s ability to win permits. For that reason a lessee’s failure to secure a permit is not deemed an event of force majeure.”).

47. See *supra* notes 7, 8, 38–43, and accompanying text.

48. “As the drafters of the leases, defendants were in the best position to impose drilling specifications as to the methods used or formations explored.” *Aukema*, 904 F. Supp. 2d at 210.

Under North Dakota law, it is a bedrock principle of contract interpretation that the court construes a lease against the party who drafted it – most often the oil company – who, presumably, looked out for their best interest while drafting the lease.⁴⁹ Chesapeake and Statoil did not include any drilling specifications related to methods used or formations explored as force majeure qualifying events. This was their fault, not the mineral owners.

For example, had Chesapeake and Statoil included language specifying that any restriction, regulation, limitation or directive of any kind imposing additional requirements, environmental or otherwise, on horizontal drilling or hydraulic fracturing, like New York's directive, constitutes a force majeure event preventing the lease from terminating, the Court likely would have found such a force majeure clause saved their leases from expiring. Chesapeake and Statoil were not allowed to hold the Plaintiffs' leases in perpetuity because they failed to account for known contingencies in their leases. Because the responsibility is on the drafter of the lease, the oil companies should take particular notice of this dicta in *Aukema* and draft their leases with more broadly tailored force majeure clauses encompassing directives and restrictions affecting drilling methods.⁵⁰

IV. THE TAKEAWAY FOR NORTH DAKOTA MINERAL OWNERS

While the result in *Aukema* favors the mineral owners, North Dakota mineral owners should not rest in their diligence while reviewing leases. Mineral owners should assume that oil companies will adjust to account for decisions like *Aukema* when drafting new leases. As noted by Sabino and Abatemarco, *Aukema* will strongly influence the drafting of leases for years to come, particularly with regard to the scope of the force majeure clause.⁵¹ Mineral owners should expect that oil companies will seek a broader force

49. “[It] is a cardinal principle of contract interpretation that the court should construe a contract most strongly against the party who prepared it, and who presumedly looked out for his best interest in the process.” In re Gateway Investors, Ltd., 113 B.R. 564, 568 (Bkrtcy. D.N.D. 1990) (citing Graber v. Engstrom, 384 N.W.2d 307, 309 (N.D. 1986); Ray Co. v. Johnson, 325 N.W.2d 250, 252 (N.D. 1982); Farmers Union Grain Terminal Ass’n v. Nelson, 223 N.W.2d 494, 497 (N.D. 1974); N.D. CENT. CODE § 9–07–19 (1943)).

50. Industry has already taken notice. In a recent article appearing in the Natural Gas and Electricity Journal, the authors concluded that *Aukema* will strongly influence the drafting of leases: “In conclusion, *Aukema* may have been a loss to industry participants, but it was the right decision for the right reason. The defendants here knew or should have done a better job of anticipating changing circumstances. They should have drafted a more inclusive *force majeure* clause. As we said at the outset, we have little doubt that this ruling will strongly influence the drafting of exploration leases for years to come.” Anthony M. Sabino and Michael J. Abatemarco, *Federal Court: Fracking Disputes Are Not A Force Majeure*, NATURAL GAS & ELECTRICITY J., Feb. 14, 2013, <http://www.naturalgaselectricitynews.com/article-print-page/federal-court-fracking-disputes-are-not-a-force-majeure.aspx>.

51. See *supra* notes 7, 8, 38-43, and accompanying text.

majeure clause in their lease that incorporates all sorts of contingencies that qualify as force majeure events. The post-*Aukema* force majeure clause could include limitations or new environmental reviews on horizontal drilling and hydraulic fracturing, the inability to timely obtain permits, even if caused by the oil company's lack of diligence and perhaps economic hardships that render exploration or production unfavorable, as force majeure events. Mineral owners should keep in mind that the court will look first and foremost to the language in their lease when determining whether it has terminated because of the force majeure clause.

Mineral owners should oppose these and other broad force majeure terms in their lease. If the oil company refuses to narrow the scope of such a far-reaching force majeure clause, the mineral owner is not without recourse. The mineral owner can always refuse to sign the lease.⁵² If the mineral owner decides that leasing is the best option for them, they should insist on language—no matter the scope of the force majeure clause in their lease—that the oil company is required to provide them written notice within a set number of days of any alleged force majeure event in order to seek the protections of the force majeure clause.⁵³ For example, the mineral owner should insist the oil company provide them with written notice within fifteen days of the first occurrence of the alleged force majeure event in order for the force majeure clause to apply. A mineral owner should insist this written notice requirement be incorporated into the force majeure clause in their lease.

As always, mineral owners should carefully review their lease, and whenever possible, consult with an attorney to ensure their rights are properly protected. Prudence and patience are the touchstones, and taking the time to review and consult with an attorney before agreeing to a lease may save a mineral owner considerable frustration down the road. At a minimum, by exercising these virtues and consulting with an attorney, the mineral owner can make informed decisions with a full understanding of the proposed lease rather than signing away their mineral rights based on fine print they do not fully understand. The fine print matters.⁵⁴ If you are fortunate and the Lord hath given you mineral rights, do not let the oil

52. *Id.*; see also N.D. CENT. CODE § 38-08-08 (1957).

53. See, e.g., *Perlman*, 918 F.2d at 1246.

54. See generally Joshua A. Swanson, *The Fine Print Matters: Negotiating an Oil and Gas Lease in North Dakota*, 87 N.D. L. REV. 703 (2011).

company take them away by devaluing them with an over-inclusive definition of what constitutes force majeure or an “Act of God.”⁵⁵

55. This article is dedicated to my parents David and Denise Swanson, grandparents Jim and Norma Swanson, and great-grandma Norma Swanson for making this article and my legal career possible.