

Schools are closing, major events have been cancelled, businesses are telling workers to stay home, and Texas oil and gas producers are preparing to see how the coronavirus will affect their operations.

Many oil and gas contracts – leases and JOAs for example - have force majeure clauses. These clauses allow contracting parties to suspend or terminate performance when certain circumstances arise that are beyond their control. These clauses, if applicable, could potentially save a contracting party millions of dollars in penalties and fees.

Recently, a Houston court interpreted a force majeure clause in a drilling contract. *TEC Olmos, LLC v. ConocoPhillips Company** examines just how specific contracting parties need to be in drafting force majeure clauses in order to avoid liability.

TEC Olmos was to test-drill on ConocoPhillips' lease in search of oil and gas. The contract set a deadline to begin drilling and contained a liquidated damages clause requiring Olmos to pay \$500,000 if it failed to begin drilling by the specified deadline. The contract's force majeure clause identified several events that would suspend the drilling deadline, followed by a "catch-all" provision for events beyond the reasonable control of the party affected. The clause stated:

"Should either Party be prevented or *hindered* from complying with any obligation created under this Agreement, other than the obligation to pay money, by *reason of* [... several enumerated causes ...] or *any other cause* not enumerated herein but which is *beyond the reasonable control of the Party whose performance is affected*, then the performance of any such obligation is suspended during the period of, and only to the extent of, such prevention or hindrance, provided the affected Party exercises all reasonable diligence to remove the cause of **force majeure**. The requirement that any **force majeure** be remedied with all reasonable diligence does not require the settlement of strikes, lockouts or other labor difficulties by the Party involved."

(Emphasis added). After the contract was executed, the price of oil dropped significantly, causing TEC Olmos to miss the drilling deadline in the contract. TEC Olmos invoked the force majeure clause to extend the drilling deadline. The effort was unsuccessful. The court held that an event not specifically listed in the force majeure clause – but that could fall within a "catch-all" provision – had to be unforeseeable in order to allow a party to suspend or terminate performance.

WHAT DOES THIS HAVE TO DO WITH COVID-19?

It is unclear whether a Texas court would find that the coronavirus falls within the "catch-all" provision. However, based on *TEC Olmos v. ConocoPhillips*, contract writers should take note of the specificity required when interpreting force majeure clauses. With the rising fear of coronavirus and uncertainty as to how it will continue to affect Texas businesses, it is advisable

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CORONAVIRUS AND THE ENERGY INDUSTRY: DRILLING INTO FORCE MAJEURE CLAUSES

by Preston Kamin and Ryan Frankel
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to add, when practical, “disease” or “pandemics” to the list of events constituting force majeure, rather than relying on “catch-all” provisions to cover the coronavirus or other specific pandemics. Parties face significant and unnecessary risks by relying on a “catch-all” provision to cover the effects of a pandemic such as coronavirus when Texas law allows parties to protect themselves by simple, yet methodical, drafting.

If you have any questions on the interpretation or application of a force majeure clause, give us a call or send us an email.

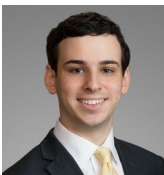
*ConocoPhillips was represented by Darin Brooks, Meagan Glover and John George of Gray Reed.

ABOUT THE AUTHORS



Preston Kamin, Partner

Preston Kamin handles complex commercial disputes for businesses in the oil and gas industry in courthouses across Texas. His clients include growing businesses across the energy industry including, oilfield services companies, E&P companies and offshore companies. Preston can be reached at pkamin@grayreed.com or 713.986.7204.



Ryan Frankel, Associate

Ryan Frankel joined Gray Reed's litigation department after participating in the firm's 2018 summer associate program. During law school at The University of Texas School of Law, Ryan served on the editorial board for The Review of Litigation, was a member of the Texas Journal of Oil, Gas, and Energy Law and was involved with several moot court and mock trial competitions. He can be reached at rfrankel@grayreed.com or 713.986.7194.