

## “CORONAVIRUS AND THE ENERGY INDUSTRY: DRILLING INTO FORCE MAJEURE CLAUSES”

**BY PRESTON KAMIN AND RYAN FRANKEL, GRAY REED**

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 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.

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

### ABOUT THE AUTHORS

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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.

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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.

## OFFSHORE GULF OF MEXICO LEASE SALE GENERATES \$93 MILLION

Despite the recent shift in market conditions and a drop to commodity prices the last two weeks, the federal government proceeded in hosting its region-wide oil and gas lease sale for the Gulf of Mexico on Wednesday, March 18, 2020. Lease Sale 254 offered more than 78 million acres total, including all available unleased areas in federal waters in the Gulf of Mexico. More than \$93 million in high bids for 71 tracts were collected from the latest offshore lease sale, reported the Bureau of Ocean Energy Management (BOEM) this week. This is down substantially from the prior offshore oil and gas lease sale for the Gulf, which brought in \$159 million in high bids for 151 tracts.

Still, federal officials remained optimistic from the results of Wednesday’s Lease Sale 254. “The development of oil and gas assets in the Gulf of Mexico is a highlight of the Outer Continental Shelf,” said BOEM’s Gulf of Mexico Office Regional Director Mike Celata. “The continued presence of large deposits of hydrocarbons in the region will draw the interest of industry for decades to come.”

Revenues received from Outer Continental Shelf (OCS) leases (including high bids, rental payments and royalty payments) are directed to the U.S. Treasury, certain Gulf Coast states (Texas, Louisiana, Mississippi and Alabama) and local governments, the Land and Water Conservation Fund, and the Historic Preservation Fund.

BOEM said it has included appropriate fiscal terms in leasing contracts that take into account market conditions and ensure taxpayers receive fair market value for use of the OCS.