COMMENT

FORCE MAJEURE: HOW LESSEES CAN SAVE THEIR LEASES WHILE THE WAR ON FRACKING RAGES ON

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I. INTRODUCTION

Hydraulic fracturing unlocked an abundance of previously inaccessible oil and gas reserves, launching the modern day shale era.[1] Consequently, hydraulic fracturing was pushed into the spotlight, with all its praise and concomitant criticism.[2] Today, the war on hydraulic fracturing rages on deep in the trenches of American municipalities, ferociously banging on lawmakers' doors.[3] States and localities are responding to the hype by enacting not-in-my-backyard laws that preclude the industry from using what producers regard as the only method available to produce shale—fracking.[4] With lessees unable to produce, lessors are turning to the courts

1. *See* Brandon H. Barnes & James A. Pardo, *The Fine Print of Natural Gas Property Rights: Cautionary Lessons from Western Ohio and New York*, LEXOLOGY (Nov. 7, 2012), http://www.lexology.com/library/detail.aspx?g=68c09a94-2892-4217-a09e-33227aff1ce6 (explaining how advancements in technologies enable an operator to "use fewer wells to access more natural gas that, just a few years ago, was entirely unobtainable"). The year 2004 is often credited "as the beginning of the modern shale era, when gas prices first boosted production from the Barnett and other shales." Laura H. Burney, *Oil, Gas, and Mineral Titles: Resolving Perennial Problems in the Shale Era*, 62 U. KAN. L. REV. 97, 103 n.32 (2013).

2. *See* Alex Ritchie, *Fracking in Louisiana: The Missing Process/Land Use Distinction in State Preemption and Opportunities for Local Participation*, 76 LA. L. REV. 809, 811 (2016) (noting the wide interest hydraulic fracturing has garnered from the media and public).

3. *See* Tripp Baltz, *Two Anti-Drilling Initiatives Don't Make Colorado Ballot*, 16 Daily Env't Rep. (BNA) A-6, 168 DEN A-6 (BL) (Aug. 30, 2016) (indicating two anti-fracking initiatives, one of which would have increased local government's authority to regulate production and ban hydraulic fracturing, failed to collect enough signatures to qualify for Colorado's November ballot, thus ending a campaign that set "the oil and gas industry and its supporters against environmentalists and community groups pursuing much tighter regulatory controls over drilling activities"). Although the war on hydraulic fracturing is world-wide, this Comment focuses on the opposition taking place throughout the United States. *See* Danielle Bochove & Robert Tuttle, *Quebec Paves Way for Oil, Gas Exploration with New Plan*, MONTREAL GAZETTE, http://montrealgazette.com/business/quebec-paves-way-for-oil-gas-exploration-with-new-plan?__lsa=07bd-3651 (last updated Dec. 12, 2016, 11:33 A.M.) (quoting a Canadian-based company's tweet that said "Quebec's government just voted down an amendment to ban fracking in a triumph of science over 'leave it in the ground' lunacy"); Kelly Gilblom, *U.K. Grants First Fracking Rights After Ban Ends*, 39 Int'l Env't Rep. (BNA) 709, 39 INER 709 (BL) (June 1, 2016) (reporting an oil and gas company received permission to hydraulically fracture a "natural gas well, surmounting last-minute protests and reviving a practice not used in Britain for five years"); Holger Hansen & Andrea Shalal, *German Government Agrees to Ban Fracking Indefinitely*, REUTERS, June 21, 2016, http://www.reuters.com/article/us-germany-fracking-idUSKCN0Z71YY (indicating Germany's coalition government has followed France by banning hydraulic fracturing indefinitely due to German citizens' strong opposition to the drilling activity).

4. *Cf.* Joshua A. Swanson, *The Hand of God: Limiting the Impact of the Force Majeure Clause in an Oil and Gas Lease*, 89 N.D. L. REV. 224, 230 n.23 (2013) (alleging Wall Street is concerned the domestic energy boom "could go bust if regulations . . . restrict these practices" since the boom presents certain risks, such as the "fierce political battle to ban fracking . . . even though the technology has been widely used in U.S. oilfields since it was developed" (quoting Daniel Fisher, *How to Play the Shale Boom's Next Phase*, FORBES (Nov. 27, 2013, 8:12 AM), http://www.forbes.com/sites/danielfisher/2013/11/27/how-to-play-the-next-phase-of-the-shale-boom/)). Various terminology is used to refer to

and crowding dockets with lease termination suits.[5]

hydraulic fracturing. The process is informally alluded to as "fracking," "frac'ing," "fracing," "fraccing," "hydrofracturing," and "hydrofracking." Christopher S. Kulander, *Shale Oil and Gas State Regulatory Issues and Trends*, 63 CASE W. RES. L. REV. 1101, 1103 (2013); Thomas E. Kurth et al., *American Law and Jurisprudence on Fracing*, 58 ROCKY MTN. MIN. L. INST. § 4.01, § 4.02, at 4-6 (2012) (citation omitted); John R. Nolon & Steven E. Gavin, *Hydrofracking: State Preemption, Local Power, and Cooperative Governance*, 63 CASE W. RES. L. REV. 995, 996 (2013). *Compare* PATRICK H. MARTIN AND BRUCE M. KRAMER, WILLIAMS & MEYERS, MANUAL OF OIL AND GAS TERMS 475 (LexisNexis Matthew Bender 2012) (defining "hydraulic fracturing" as "[a] mechanical method of increasing the permeability of rock, and thus increasing the amount of oil or gas produced from it"), *with id.* at 403 (describing "[f]racking, or hydrofracturing," as "a method used to stimulate production of a well" by fracturing the formation to create "passages through which oil or gas can flow" (quoting T.W. Phillips Gas & Oil Co. v. Jedlicka, 42 A.3d 261, 264 (Pa. 2012))). Fracking is regarded as the only economically viable method of production in shale plays. *See Hydraulic Fracturing—Frequently Asked Questions*, KAN. CORP. COMM'N (revised Aug. 22, 2012, 14:06:47), http://kcc.ks.gov./conservation/faq_hydraulic_fracturing.htm (on file with *St. Mary's Law Journal*) (contending fracking has made "wells economic to complete and produce that otherwise would not be economical"). For purposes of this Comment, the term "fracking" will be used to refer to hydraulic fracturing.

5. Due to the significantly higher royalty and bonus payments modern leases promise in active shale plays, lessors have pled for courts to terminate the leases they entered pre-shale era so they can seek the lucrative leases the "boom" has to offer. *See* Bruce R. Huber, *The Durability of Private Claims to Public Property*, 102 GEO. L.J. 991, 1008 n.76 (2014) (explaining the recent frequency of termination suits is caused by lessors who are "eager to exit their leases and negotiate new leases on better terms" because mineral rights owners who leased their interest before the natural gas boom received smaller payments than those who waited (citations omitted)). While lease termination lawsuits are by no means uncommon, the stakes in such causes of action were raised due to the "unprecedented levels of activity in shale plays." Craig L. Stahl & Emmie M. Gooch, *Keeping Leases Alive: The Evolving Law of Lease Termination in Today's Unconventional Shale Plays*, 59 ROCKY MTN. MIN. L. INST. § 27.01, § 27.01, at 27-3 (2013). However, lessees' competitive race to acquire shale leases came to a halt in 2013. Austin Brister & Jonathan Baughman, *Lessor-Lessee Relations After Shale's Honeymoon Period*, LAW360 (Sept. 25, 2015, 10:44 AM), https://www.law360.com/texas/articles/704637/lessor-lessee-relations-after-shale-s-honeymoon-period. Shortly following the "land grab phase," lessors and lessees enjoyed a shale boom honeymoon period to their business relationship, especially in light of then-high commodity prices. *Id.* Yet, in light of the significant industry downturn after the price collapse of 2014, this honeymoon phrase might be strained by falling oil prices and lessees attempting to maintain their leases with minimum production, which some contend will be the new incentive underlying an uptick in lease termination litigation. *Id.*; *see also* Clifford Krauss, *Oil Prices: What to Make of the Volatility*, N.Y. TIMES, https://www.nytimes.com/interactive/2017/01/09/business/energy-environment/oil-prices.html (last updated Mar. 10, 2017) (discussing the price volatility during the two-and-a-half-year downturn plaguing the industry, which is the worst it has experienced "since at least the 1990s," and noting the uncertainty as to when prices will return to pre-2014 norms). However, despite the downturn, leases remain extremely lucrative for lessors in shale plays that are known to be successful. *See* Gaurav Sharma, *Making America 'Crude' Again: U.S. Oil and Gas Industry Feels the Trump Effect*, FORBES (Jan. 27, 2017, 04:36 PM), https://www.forbes.com/sites/gauravsharma/2017/01/27/making-america-crude-again-us-oil-and-gas-industry-feels-the-trump-effect/#10250c982091 (noting the Permian shale basin has constantly maintained considerable activity, and noting acreage values in the Permian Basin have increased to over $30,000 an acre). Comparatively, Apache Corporation recently announced the discovery of a new shale play, dubbing it Alpine High, which contains "at least [three] billion barrels of oil and another [seventy-five] trillion feet of natural gas in just two of the five shale formations underneath its acreage." Matthew DiLallo, *I Still Can't Believe Apache Corp. Spent $399 Million on Securing*

While the war on fracking led to an abundance of anti-industry legislation and regulations,[6] these laws may serve as a double-edged sword; that is, it might provide lessees just the defense they need to keep their leases in effect. In other words, fracking bans may be the new "Act of God" in force majeure law, which excuses nonperformance caused by supervening events.[7] Under the force majeure clauses in their leases, producers can argue their leases have not terminated because fracking bans constitute a governmental disturbance depriving lessees of the only viable method of performing production obligations. With that argument, producers could extend their leases and patiently wait for temporary moratoria to expire and bans to be invalidated by the courts. In sum, lessees can defend their leaseholds by contending "can't frack, can't drill." Although this defense was recently rejected in two New York termination suits,[8] many commentators have criticized the decisions as policy based.[9]

Part II of this Comment provides an overview of fracking and the controversy surrounding its utilization. Part III discusses pertinent provisions of the oil and gas lease. Part IV examines the common law doctrines in the contexts of a contractual framework and oil and gas leases, as well as defenses asserted under force majeure clauses contained in oil and gas leases. Further, Part IV concludes with an in-depth review of force majeure defenses wherein acts of governmental entities were alleged to

This Massive Shale Discovery, MADISON.COM (Apr. 17, 2017), http://host.madison.com/business/investment/markets-and-stocks/i-still-can-t-believe-apache-corp-spent-million-on/article_8a163a00-701d-51fe-a833-3013d8cc0093.html. Because the industry overlooked this portion of the Permian Basin, Apache was able to lease over 300,000 acres overlaying Alpine High at an average of $1,300 per acre, which is "far less than the $30,000 companies pay in other parts of the Permian." David Hunn, *How One Old-School Scientist Found the Biggest Oil Field This Year*, HOUS. CHRON., http://www.houstonchronicle.com/business/energy/article/How-one-old-school-scientist-found-the-biggest-10827483.php (last updated Jan. 6, 2017, 10:47 AM); *see also* Swetha Gopinath & Ernest Scheyder, *Apache Discovered a Giant Oil Field in Texas and Its Shares Are Leaping*, BUS. INSIDER (Sept. 8, 2016, 10:08 AM), http://www.businessinsider.com/apache-discovers-alpine-high-oil-field-in-texas-2016-9 (asserting improvements in technologies will enable the company "to exploit the area, an overlooked part of the otherwise expansive Permian Basin").

6. *See, e.g.*, Kurth et al., *supra* note 4, § 4.01, at 4-4 (stating regulators at all levels of government "are clamoring to protect their turf or carve out new turf from existing regulatory regimes" because of fracking concerns).

7. *See* A. Michael Sabino, *Force Majeure to Apply Small Comfort to Some Crisis-Affected Contracts*, NAT. GAS & ELECTRICITY, Dec. 2008, at 1, 3 (indicating force majeure is frequently likened to Acts of God or events brought about "exclusively by violence of nature . . . without the intervention of man" (alteration in original) (quoting *Force Majeure*, BLACK'S LAW DICTIONARY (5th ed. 1979))).

8. Beardslee v. Inflection Energy, LLC (*Beardslee IV*), 798 F.3d 90, 94 (2d Cir. 2015) (per curiam), *aff'g* 904 F. Supp. 2d 213 (N.D.N.Y. 2012), *and conforming to answer to certified question*, 31 N.E.3d 80 (N.Y. 2015); Aukema v. Chesapeake Appalachia, LLC, 904 F. Supp. 2d 199, 210 (N.D.N.Y. 2012).

9. *See infra* notes 344–45 and accompanying text.

preclude a party's contractual performance. Part V outlines the two recent New York cases discarding the lessees' force majeure defense and the criticism garnered by the decisions. Part VI addresses the viability of the "fracking bans as force majeure" defense under the plain language of oil and gas lease clauses and the common law doctrines of force majeure. It also compares states' public policy approaches to oil and gas production and fracking. To avoid the uncertainty inherent in courts' public policy considerations, Part VI concludes with suggestions for redrafting the force majeure clause contained in shale-era leases.

II. THE WAR ON FRACKING

Fracking has unleashed a giant—the modern shale play. Shale production, a form of unconventional drilling and production, was deemed unattainable and commercially unfeasible for seventy-five years due to the low permeability and porosity in shale formations.[10] While producers were aware that natural gas or oil was contained in shale, its inaccessibility left it untouched.[11] Unlike production from conventional reservoirs, production from unstimulated shale formations flows at minimal rates, rendering them uneconomical.[12] Developers eventually reached the literally earth-

10. Kulander, *supra* note 4, at 1102; Marianne Lavelle, *Forcing Gas Out of Rock with Water*, NAT'L GEOGRAPHIC NEWS (Oct. 23, 2010), http://news.nationalgeographic.com/news/2010/10/101022-energy-marcellus-shale-gas-science-technology-water.html; *see also* L. Poe Leggette et al., *Federal Regulation of Hydraulic Fracturing: A Conversational Introduction*, 33 ENERGY & MIN. L. INST. § 22.01, § 22.03, at 801 (2012) (explaining hydrocarbons do not flow far in shale formations due to their low permeability, which "means that the empty pore spaces in between the grains within the rock are not well-connected"). To explain the porosity and permeability issues in shale plays one author wrote:

> Shale is a fine-grained sedimentary rock, which clay-sized grains lay flat as sediments accumulate. Compaction of these deposits, combined with pressure lithifies it into thinly layered rock, similar to many plates lying upon each other. Shale's low porosity and permeability is due to this plate-like structure since these plates close off pathways between pores. Porosity is described as void spaces within the rocks while permeability is the interconnectedness of these void spaces which allow fluid and gas to flow. The porosity of shale is often due to grains of rock or other minerals . . . . The permeability is due to the natural joints in the shale, both vertical and horizontal, which are created during formation. Porosity and permeability differs in each shale play.

Leggette et al., *supra*, § 22.03, at 801 n.5.

11. *See Aukema*, 904 F. Supp. 2d at 203 (indicating the Marcellus Shale was not produced, despite knowledge of its gas potential, because of the expense and difficulty associated with producing the formation); Barnes & Pardo, *supra* note 1 (explaining how advancements in technologies enable an operator to "use fewer wells to access more natural gas that, just a few years ago, was entirely unobtainable"); Peter Hayes & Steven M. Sellers, *Fracking Boom Likely to Trigger More Litigation, Lawyers Say*, 46 Env't Rep. (BNA) 2779, 46 ENR 2779 (BL) (Sept. 18, 2015) (crediting directional drilling and fracking for enabling "extraction of oil and gas deposits in previously inaccessible shale formations").

12. *See* Kurth et al., *supra* note 4, § 4.02, at 4-6 (contrasting production from "tight" rock

shattering realization that production from shale plays was possible by creating artificial fractures, rather than relying upon naturally occurring fracture zones.[13]

A. *The History of Fracking*

Although fracking is by no means a new process,[14] advances in horizontal drilling have made its use routine.[15] Producers fracked vertical wells for decades but this was an unviable method of producing "areas underlain by large shale formations found often a mile or more below the surface."[16] However, technological drilling advances enabled operators to utilize directional drilling, which involves drilling vertically and then horizontally.[17] Directional drilling "allows the drill stem and borehole to follow the horizontal structure of the shale formations and proceed thousands of feet to exploit gas reserves far from the well head."[18] This drilling technique, however, is not fracking; rather, fracking is the process

formations, which are difficult to extract from because they do not allow oil and gas to pass "through and up a well" but rather restrict the flow of gas and oil to preexisting cracks, with "'gusher' well[s] in which reservoir pressure underground pushes oil up the wellbore"); *see also* Vanessa Klass, *What's the Big Fracking Deal?*, 42 W. ST. L. REV. 159, 162–63 (2015) (detailing how conventional techniques easily enable production from reservoirs, consisting of porous and permeable rock formations that contain "significant amounts of oil and gas within their pore spaces," but noting conventional methods could not access shale oil and gas as the lack of permeability in tight sand and shale formations did not allow the oil and gas therein to flow to the surface); Lavelle, *supra* note 10 (describing "conventional production" as drilling into and extracting natural gas "out of 'traps,' or folds and pockets in underground sandstone layers").

13. Kurth et al., *supra* note 4, § 4.02, at 4-6.

14. *Id.* at 4-7 (dating the first test of hydraulic fracturing as 1903). However, the precise date and location of the first commercial use of hydraulic fracturing is unclear. *Compare id.* (claiming the first commercial use was in 1948), *with A Historic Perspective*, FRACFOCUS CHEMICAL DISCLOSURE REGISTRY, http://www.fracfocus.org/hydraulic-fracturing-how-it-works/history-hydraulic-fracturing (last visited May 10, 2017) (alleging the first commercial use of fracking "as a well treatment technology designed to stimulate the production of oil or gas likely occurred in either the Hugoton field of Kansas in 1946 or near Duncan Oklahoma in 1949").

15. *See* Leggette et al., *supra* note 10, § 22.01, at 799 (noting that attempts to increase the permeability of the formations persisted for at least sixty years, and in the past thirty years ultimately resulted in successfully "enhancing the permeability of seemingly impermeable shale rock"); Stahl & Gooch, *supra* note 5, § 27.01, at 27-2 to -3 (reporting that "up to 95% of all wells drilled in the United States" in 2011 were fracked, "accounting for 43% of U.S. oil production and 67% of U.S. natural gas production" (citation omitted)); *A Historic Perspective*, *supra* note 14 (estimating up to 35,000 wells, either vertical or horizontal and oil or natural gas, are fractured each year due to developments in technology, and over 1 million producing wells have utilized the fracking process).

16. Nolon & Gavin, *supra* note 4, at 996.

17. Liz Klingensmith & Wolf A. McGavran, *Bright Lights, Big Oil*, HOUS. LAW., Nov./Dec. 2014, at 16, 16, http://issuu.com/leosur/docs/thl_novdec14/19?e=2928138/10421460.

18. Nolon & Gavin, *supra* note 4, at 996 (citing Lavelle, *supra* note 10).

implemented upon completion of the drilled hole.[19]

B. *The Fracking Process*

Fracking is the method of artificially increasing the rock's porosity and permeability by forcefully creating new fractures or maintaining or expanding existing fractures.[20] The fractures stimulate production in both new and preexisting wells.[21] Pumping fracking fluids down a well at a high pressure creates the artificial fractures.[22] Proppants act to keep the fractures open, thus, allowing the formerly trapped hydrocarbons to be released from rock formation that was previously considered too impermeable.[23] The type and amount of additives utilized depends upon the well and formation.[24] Much of the fracking debate centers on the fluids, proppants, and pressure used in this process.[25]

19. *Hydraulic Fracturing: The Process*, FRACFOCUS CHEMICAL DISCLOSURE REGISTRY, http://www.fracfocus.org/hydraulic-fracturing-how-it-works/hydraulic-fracturing-process (last visited May 10, 2016); *see also* Kurth et al., *supra* note 4, § 4.02, at 4-5 (describing fracking as a "completion technique").

20. Leggette et al., *supra* note 10, § 22.01, at 799, § 22.04, at 803; Klingensmith & McGavran, *supra* note 17, at 16; *see* also MARTIN & KRAMER, *supra* note 4, at 475 (defining hydraulic fracturing as a "method of increasing the permeability of rock, and thus increasing the amount of oil or gas produced from it").

21. Klingensmith & McGavran, *supra* note 17, at 16.

22. Laura H. Burney & Norman J. Hyne, *Hydraulic Fracturing: Stimulating Your Well or Trespassing?*, 44 ROCKY MTN. MIN. L. INST. § 19.01, § 19.02[3][c], at 19-11 (1998); Leggette et al., *supra* note 10, § 22.08, at 813. While shale is dense, it is also brittle, which allows for fracturing to easily occur. Thomas E. Kurth et al., *Shaking Up Established Case Law and Regulation: The Impacts of Hydraulic Fracturing*, ADVOCATE, Winter 2011, at 18, 22, http://www.heinonline.org/HOL/Page?handle=hein.barjournals/adsbate0057&div=9&start_page=31&collection=barjournals&set_as_cursor=0&men_tab=srchresults.

23. "Proppants" are solid materials, such as sand, "pumped into the induced fractures along with fracing fluid to hold open the fractures so the gas can flow." Kulander, *supra* note 4, at 1107 n.10 (citing Kurth et al., *supra* note 4, § 4.02, at 4-7); *see also* Nolon & Gavin, *supra* note 4, at 996–97 (summarizing the fracking process and the proppants role in holding the fissures open allowing the gas to be released (citations omitted)); Rebecca Jo Reser & David T. Ritter, *State and Federal Legislation and Regulation of Hydraulic Fracturing*, ADVOCATE, Winter 2011, at 31, 37, http://www.heinonline.org/HOL/Page?handle=hein.barjournals/adsbate0057&div=9&start_page=31&collection=barjournals&set_as_cursor=0&men_tab=srchresults (stating the process "causes the fracture of rock and the release of natural gas which would otherwise be trapped"). The newly created fractures are "channels for the oil and gas to flow through the reservoir into the well," thereby increasing the production rate and the ultimate recovery. Burney & Hyne, *supra* note 22, § 19.02[3][c], at 19-11.

24. For a directory of additives used in fracking, see *Hydraulic Fracturing: The Process*, *supra* note 19; *see also* Kulander, *supra* note 4, at 1108 (discussing laws requiring disclosure, and categorizing FracFocus as "the most common forum for public disclosure regarding the type and concentration of chemicals used in fracing fluid").

25. *See* Klingensmith & McGavran, *supra* note 17, at 19 (considering the claims in numerous causes of action and finding many allege proppants and fracking fluids damage their property and person).

C. *They Are Freaking Out: The Fracking Controversy*

Fracking opponents and proponents have been taking federal, state, local, judicial, and regulatory bodies by storm.[26] Opponents have been calling for increased regulation and legislation due to a perceived harm to their property or person, the public's health, and the environment.[27] Nationwide, legislatures and courts are sifting through allegations that fracking is a nuisance,[28] causes earthquakes,[29] contaminates ground water,[30] results in pollution,[31] and more.[32] On the other hand, fracking proponents are lobbying for decreased regulation or legislation.[33] To

26. Also prevalent is a debate concerning the appropriate body to legislate fracking since the implications of fracking are nationally realized. *See* Nolon & Gavin, *supra* note 4, at 997–98 (contending that the debate is complicated since fracking benefits "are national, regional, statewide, and local in nature" and concerns with fracking fall within the legal jurisdiction of each level of government). However, since much of the existing or developing fracking laws emanate from state and local bodies, this Comment focuses on the effect of those laws. *See* Reser & Ritter, *supra* note 23, at 31 (recognizing fracking is regulated primarily by states).

27. Nolon & Gavin, *supra* note 4, at 998 (citations omitted); Klingensmith & McGavran, *supra* note 17, at 19.

28. *See* Jake Rutherford, Comment, *Don't "Frac" This Up: Denton's Frac Ban and the Appropriate State Legislative Response*, 47 TEX. TECH L. REV. 843, 852 (2015) (relating the nuisance concerns to media coverage, well locations, and production logistics).

29. *See* Klingensmith & McGavran, *supra* note 17, at 19 ("One novel breed of lawsuit born by the current boom is those alleging that oil and gas operations have caused damaging earthquakes.").

30. Nolon & Gavin, *supra* note 4, at 998 (citing N.Y. STATE DEP'T OF ENVTL. CONSERV., REVISED DRAFT, SUPPLEMENTAL GENERIC ENVIRONMENTAL IMPACT STATEMENT ON THE OIL, GAS AND SOLUTION MINING REGULATORY PROGRAM (2011), http://www.dec.ny.gov/data/dmn/rdsgeisfull0911.pdf).

31. *Id.* (citing N.Y. STATE DEP'T OF ENVTL. CONSERV., REVISED DRAFT, SUPPLEMENTAL GENERIC ENVIRONMENTAL IMPACT STATEMENT ON THE OIL, GAS AND SOLUTION MINING REGULATORY PROGRAM (2011), http://www.dec.ny.gov/data/dmn/rdsgeisfull0911.pdf)).

32. *See generally* Ritchie, *supra* note 2, at 810–11 (enumerating concerns of environmentalists and citizens such as a perceived threat to aesthetics, property values, and lifestyles and unease over the economic and social impacts on the local area regarding boom and bust cycles, noise, housing shortages, increased truck traffic, and damage to roads). For a chart detailing pending litigation, see Hayes & Sellers, *supra* note 11.

33. *See* Hayes & Sellers, *supra* note 11 (reporting fracking proponents, such as the oil and gas industry, are pressuring state legislatures to enact legislation that would preempt localities from passing anti-fracking ordinances); *see also* Nushin Huq, *Oil Industry Urged to Focus on Long Term During Economic Downturn*, 16 Daily Env't Rep. (BNA) A-19, 63 DEN A-19 (BL) (Mar. 31, 2015) (acknowledging the gravity of continuing the industry's lobbying efforts to ensure lawmakers remained educated about fracking's effects and hear more than "one side of the story," especially in light of a presidential candidate's "fairly outrageous comments" about the process and regulating it out of business despite the fact that more than half of the nation's oil and gas production is achieved by way of fracking); Sun Sentinel Editorial Board, Editorial, *Welcome News on Proposed Fracking Ban*, SUNSENTINEL (Dec. 7, 2016, 8:21 PM), http://www.sun-sentinel.com/opinion/editorials/fl-editorial-fracking-ban-20161207-story.html (announcing oil company lobbyists failed to procure a statewide ban on fracking prohibitions in Florida). In addition, the industry is investing millions to defeat grassroots campaigns that seek to implement local fracking bans. *See* Paul Rogers,

support such requests, proponents highlight the economic[34] and political benefits derived from fracking,[35] and the waste that would result in its absence.[36]

This controversy has pushed states and localities coast-to-coast to implement legislation and regulations prohibiting, or greatly restricting, fracking operations.[37] Vermont became the first state to prohibit fracking

Fracking Ban: Environmentalists Declare Victory on Monterey Measure Z, MERCURY NEWS, http://www.mercurynews.com/2016/11/09/fracking-ban-environmentalists-declare-victory-on-monterey-measure-z/ (last updated Nov. 9, 2016, 5:22 PM) (noting the $5 million the industry spent to defeat a local ban in Monterey County, California, which was advocated for by Vermont Senator Bernie Sanders, Leonardo DiCaprio, and "other leading liberals").

34. *See A Historic Perspective*, *supra* note 14 ("The ability to produce more oil and natural gas from older wells and to develop new production once thought impossible has made the process valuable for US domestic energy production."); KSE Focus, *States Take Wait and See Approach on Fracking Regulation*, CONGRESS.ORG (July 9, 2015), http://congress.org/2015/07/09/states-take-wait-and-see-approach-on-fracking-regulation/ (stating fracking pushed the United States to the forefront of natural gas production and to third place for most oil production). In addition to the national economic securities bestowed by fracking, production furnishes several advantages to local economies. *See* Caitlin Conrad, *Big Oil Files Suit Against Monterey County over Measure Z*, KSBW8, http://www.ksbw.com/article/big-oil-files-suit-against-monterey-county-over-measure-z/8506033 (last updated Dec. 16, 2016, 1:39 PM) (admitting Monterey County's fracking and production ban is anticipated to cause a $8 million loss in tax revenue, $5.5 million of which funds local schools); Jackie Stewart, *Ohio Voters Have Spoken: A Fracking Ban Would Be a Disaster*, CLEVELAND.COM (Dec. 25, 2016, 12:33 PM), http://www.cleveland.com/metro/index.ssf/2016/12/ohio_voters_have_spoken_a_frac.html (embracing fracking's ability to awaken Ohio's job growth and "unlock a multitude of other benefits as well"); *see also* Eric Schlabs, *Legal Challenges to Fracking Regulation*, REGBLOG (Aug. 18, 2015), http://www.regblog.org/2015/08/18/schlabs-fracking-regulation/ (contending state and local governments that embrace and encourage fracking do so on account of the economic benefits the boom provides, such as job growth and lower consumer gas bills).

35. *See* Kulander, *supra* note 4, at 1102 (recognizing that fracking has provided the United States energy independence so that the country is less dependent upon importing hydrocarbons from unfriendly and unstable countries).

36. *See* Ritchie, *supra* note 2, at 851 (analyzing how a ban creates both economic and physical waste); *A Historic Perspective*, *supra* note 14 ("Without hydraulic fracturing, as much as 80 percent of unconventional production from such formations as gas shales would be, on a practical basis, impossible."). Exemplifying the potential waste of vital resources is the estimation that the Marcellus Shale "contain[s] up to 489 trillion cubic feet of natural gas" while New York used merely 1.1 trillion cubic feet of natural gas in 2012. Beardslee v. Inflection Energy, LLC (*Beardslee II*), 761 F.3d 221, 224 & n.4 (2d Cir. 2014) (citation omitted), *certifying questions to* 31 N.E.3d 80 (N.Y. 2015).

37. *See* Andrew Ba Tran, *Where Communities Have Banned Fracking*, BOS. GLOBE (Dec. 18, 2014), https://www.bostonglobe.com/news/nation/2014/12/18/where-communities-have-banned-fracking/05bzzqiCxBY2L5bE6Ph5iK/story.html (reporting over 400 states, counties, districts, cities, and towns have sought to implement bans on fracking or the practices associated with it).

in 2012.[38] Most recently, New York[39] and Maryland[40] passed not-in-my-backyard legislation, while other legislatures have contemplated ban proposals.[41] Moreover, hundreds of local governmental bodies have also enacted fracking bans.[42] In reaction, other states, such as Texas, have fortified production by legislatively forbidding the passage of local bans.[43]

38. Vermont's ban has been categorized as symbolic, however, due to the low prevalence of natural gas within the state's borders. *Id.*

39. N.Y. DEP'T OF ENVTL. CONSERV., FINDINGS STATEMENT: FINAL SUPPLEMENTAL GENERIC ENVIRONMENTAL IMPACT STATEMENT ON THE OIL, GAS AND SOLUTION MINING REGULATORY PROGRAM: REGULATORY PROGRAM FOR HORIZONTAL DRILLING AND HIGH-VOLUME HYDRAULIC FRACTURING TO DEVELOP THE MARCELLUS SHALE AND OTHER LOW-PERMEABILITY GAS RESERVOIRS (June 2015), http://www.dec.ny.gov/docs/materials_minerals_pdf/findingstatehvhf62015.pdf [hereinafter 2015 N.Y. FINDINGS STATEMENT: FINAL SUPPLEMENTAL GENERIC ENVIRONMENTAL IMPACT STATEMENT].

40. *See* Timothy B. Wheeler, *Maryland Assembly Session Gives Environmentalists 'Reason to Celebrate,'* BAY J. (Apr. 12, 2017), http://www.bayjournal.com/article/maryland_lawmakers_give_environmentalists_reason_to_celebrate (discussing a proliferation of environmental legislation in Maryland, including a recently passed fracking ban that settled a six-year debate in the state regarding the use of fracking). Before the promulgation of Maryland's formal fracking ban, the state implemented a two-year fracking moratorium. Sabrina Shankman, *Fracking Ban About to Become Law in Maryland*, INSIDE CLIMATE NEWS (Mar. 28, 2017), https://insideclimatenews.org/news/23032017/fracking-ban-maryland-larry-hogan (reporting the effective date of the fracking ban precedes the expiration of the fracking moratorium, meaning the use of fracking in Maryland will cease before it even started).

41. *See* KSE Focus, *supra* note 34 (listing the U.S. Congress, in addition to "Arizona, Florida, Hawaii, Illinois, Massachusetts, Nevada, New Hampshire, New Jersey, [and] Oregon" as legislative bodies that have considered fracking bans); *see also* Rogers, *supra* note 33 (noting California state lawmakers' have disapproved of enacting a statewide fracking ban); Stewart, *supra* note 34 (praising Ohioan citizens for voting, six years in a row, in opposition to a ballot measure that would prohibit fracking because a ban would adversely affect the state); Sun Sentinel Editorial Board, *supra* note 33 (urging that a statewide ban on fracking would be a positive start, and acknowledging two bills before the Florida legislature that would either ban fracking or allow voters to approve of a constitutional amendment that would prohibit the practice).

42. *See* KSE Focus, *supra* note 34 (indicating ordinances banning fracking have been passed by municipalities in twenty-three states); *see also* Kurth et al., *supra* note 22, at 26. (listing Pittsburgh's local ban, which passed in 2010 (citation omitted)); Tran, *supra* note 37 (identifying over 200 local communities that enacted local fracking bans in New York before the statewide ban); Paul Rogers, *Fracking: Oil Company Sues to Overturn San Benito County Fracking Ban; Could Affect Other Counties*, MERCURY NEWS, http://www.mercurynews.com/2015/03/02/fracking-oil-company-sues-to-overturn-san-benito-county-fracking-ban-could-affect-other-counties/ (last updated Aug. 12, 2016, 3:11 AM) (recognizing the growing trend in California localities of passing fracking bans); Sun Sentinel Editorial Board, *supra* note 33 (measuring Florida citizen's disapproval of fracking based upon the fact that eighty cities and counties enacted local fracking bans).

43. Oklahoma and Texas have both passed bans on fracking bans, and a Louisiana statute has been interpreted to have the same effect. KSE Focus, *supra* note 34; *see also* Ritchie, *supra* note 2, at 819, 829, 834, 837 (interpreting Texas's and Oklahoma's preemption statutes that permit for some local authority pertaining to the site of a well, and comparing these statutory provisions to an extreme preemption law in Louisiana that forbids local governments from impeding oil and gas activities authorized by the state, including by prohibiting drilling in certain locations); Jerry Iannelli, *South Florida*

Producers have been left jumping hurdles due to the trending promulgation of various fracking-specific laws[44] and as courts nationwide determine the validity of these laws.[45] Courts have been divided in their decisions as some cases have resulted in successful outcomes for the industry, but others elucidate the growing opposition to development.[46] However, while

Senator Wants to Ban Fracking Across Florida, MIAMI NEW TIMES (Dec. 22, 2016, 8 AM), http://www.miaminewtimes.com/news/south-florida-senator-wants-to-ban-fracking-across-florida-9008080 (indicating a prohibition on local fracking bans in Florida was never enacted and it backfired by inspiring counties to pass bans in retaliation). Accordingly, the issue of a fracking ban as an act of force majeure is largely irrelevant in Texas absent a change in the state's legislation. However, Texas case law pertaining to force majeure, as well as oil and gas in general, is still pertinent to the discussion. The fracking boom has resulted in development of shale plays in states with little to no oil and gas jurisprudence, and when these states are confronted with lease disputes, Texas's rich oil and gas law will provide guidance. *See* Klingensmith & McGavran, *supra* note 17, at 18–19 (asserting most states could possibly become oil and gas jurisdictions and since they have little corresponding oil and gas jurisprudence, they will look to other states, such as Texas, for persuasive precedent); *see also* Beardslee v. Inflection Energy, LLC (*Beardslee II*), 761 F.3d 221, 228 (2d Cir. 2014) ("Currently, however, there is a 'dearth of authority in New York relating to oil and gas leases' . . . ." (quoting Wiser v. Enervest Operating, LLC, 803 F. Supp. 2d 109, 117 (N.D.N.Y. 2011))), *certifying questions to* 31 N.E.3d 80 (N.Y. 2015). For an example of a state court turning to Texas jurisprudence for force majeure case law, see Maralex Res., Inc. v. Gilbreath, 76 P.3d 626, 636–37 (N.M. 2003).

44. *See* Kurth et al., *supra* note 4, § 4.11, at 4-117 ("With a patchwork of local laws, regulations, and ordinances to comply with, oil and gas companies will need to spend additional time and money understanding and ensuring compliance with all of the local laws."); *see also* City of Longmont v. Colo. Oil & Gas Ass'n, 2016 CO 29, ¶¶ 25, 28 (invalidating a local ban, which "if left in place, could ultimately lead to a patchwork of regulation that would inhibit the efficient development of oil and gas resources" since fracking would be limited to areas outside of the city's limits and its absence would reduce royalties and increase the cost of production (citing Colo. Mining Ass'n v. Bd. of Cty. Comm'rs, 199 P.3d 718, 731 (Colo. 2009))); Colo. Oil & Gas Ass'n v. City of Longmont, No. 13CV63, 2014 WL 3690665, at *9 (Colo. Dist. Ct. July 24, 2014) (recognizing oil and gas reserves spread across local boundaries and when those localities regulate fracking in different manners, uneven production and waste result), *aff'd*, 2016 CO 29.

45. For the two most recent decisions invalidating a local ban and moratorium, both of which were handed down by the Colorado Supreme Court, see City of Longmont v. Colo. Oil & Gas Ass'n, 2016 CO 29; City of Fort Collins v. Colo. Oil & Gas Ass'n, 2016 CO 28. A few months prior to the Colorado decisions, an appellate court in Louisiana struck down a local attempt to ban fracking. St. Tammany Parish Gov't v. Welsh, 2015-1152 (La. App. 1 Cir. 3/9/16); 199 So. 3d 3, 8. St. Tammany Parish asserted its applicable zoning ordinance, which limited permissible activities in the area to residential uses, prohibited a company from drilling a well pursuant to its state issued drilling permit. *Id.* at 5 & n.1. However, due to a statute forbidding political subdivisions from interfering with drilling operations conducted by a holder of a state issued drilling permit, the court of appeals held the zoning ordinance preempted by Louisiana state law to the extent the ordinance impedes the state's regulatory activity. *Id.* at 8. The Louisiana Supreme Court subsequently declined to entertain St. Tammany Parish's appeal. St. Tammany Parish Gov't v. Welsh, 2016-0650 (La. 16/17/16), 194 So. 3d 1109, 1109.

46. *See generally* Ritchie, *supra* note 2, at 824–27 (regarding New York as an exception to the general view of courts deciding challenges to bans since these opinions, such as those rendered in Pennsylvania, Colorado, Ohio, and New Mexico, typically determine state interests are frustrated by production, drilling, and fracking prohibitions (citations omitted)); Hayes & Sellers, *supra* note 11

producers await the outcome of pending challenges,[47] they want to extend their leases in hopes that temporary moratoria dissolve and bans are invalidated.[48] To continue evaluating whether producers can save their leases as challenges loom throughout American courts, the following parts examine the oil and gas lease and the law of force majeure.

III. THE OIL AND GAS LEASE

The oil and gas lease defines the relationship between the lessee (the producer) and lessor (the mineral owner) and expresses the expectations the parties hope to derive therefrom.[49] Logically, both parties desire a lucrative

(comparing the varied results amongst the states, such as New York and Pennsylvania courts holding local bans are not preempted by state law while Colorado courts reached the opposite conclusion). *Compare City of Longmont*, 2016 CO 29, ¶ 54 (invalidating a local ban and deeming it unenforceable as it was preempted by state law), City of Fort Collins v. Colo. Oil & Gas Ass'n, 2016 CO 28, ¶ 2 (holding a city's five-year fracking moratorium was preempted by state law), St. Tammany Parish Gov't v. Welsh, 2015-1152 (La. App. 1 Cir. 3/9/16); 199 So. 3d 3, 8 (deeming a zoning ordinance's application preempted by a statutory provision reserving the regulatory authority over oil and gas exploration to the state's Commissioner of Conservation), Range Res. Appalachia v. Salem TP., 964 A.2d 869, 877 (Pa. 2009) (basing the invalidation of an ordinance banning fracking on preemption grounds), *and* Ne. Nat. Energy, LLC v. City of Morgantown, No. 11-C-411, 2011 WL 3584376, at *9 (W. Va. Cir. Ct. Aug. 12, 2011) (holding a city had no authority to pass a complete ban on fracking), *with* Wallach v. Town of Dryden, 16 N.E.3d 1188, 1203 (N.Y. 2014) (declaring two town zoning laws prohibiting oil and gas production, including fracking, were not preempted by state regulation and were valid).

47. *See* Conrad, *supra* note 34 (reporting on two oil companies' takings claims in response to Monterey County's fracking and production ban); Jon Hurdle, *Group Intervenes to Defend Delaware River Basin Drilling Moratorium*, STATEIMPACT (July 7, 2016, 11:16 AM), https://stateimpact.npr.org/pennsylvania/2016/07/07/group-intervenes-to-defend-delaware-river-basin-drilling-moratorium/ (detailing a challenge that questions an interstate regulator's authority to unofficially implement a de facto fracking moratorium in the Delaware River Basin since 2010); Rogers, *supra* note 42 (discussing an oil company's suit that contests a voter-approved fracking ban in San Benito County, California on the basis that local California governments lack authority to effectuate fracking bans, and stating the suit could impact the increasing trend of passing local bans in California); *see also* Yvonne Hennessey, *Flaws in NY Court's Ruling of Recent Natural Gas Cases*, LAW360 (May 7, 2013, 12:29 PM), http://www.law360.com/articles/438678/flaws-in-ny-court-s-ruling-of-recent-natural-gas-cases?article_related_content=1 (predicting local bans will be challenged on preemption grounds and "as affecting an unconstitutional regulatory taking and/or inconsistency with a municipality's comprehensive plan for development," especially if wells were already developed or leases were entered in reliance on previous zoning laws that permitted development). For an in-depth discussion of preemption and takings challenges to local fracking bans, see Rutherford, *supra* note 28, at 857–80.

48. For example, North Carolina's ban was lifted and permits were issued beginning in 2015. *North Carolina and Fracking*, EARTHJUSTICE, http://earthjustice.org/features/new-york-and-fracking (last visited June 19, 2016). Other bans have been judicially invalidated. *See Ne. Nat. Energy, LLC*, 2011 WL 3584376, at *9 (determining the state had exclusive control to regulate fracking and, thus, invalidating a local ban).

49. The lease is considered to be both a contract and a conveyance. San Mateo Cmty. Coll. Dist. v. Half Moon Bay Ltd. P'ship, 76 Cal. Rptr. 2d 287, 291 (Ct. App. 1998) (citing Montana-Fresno Oil Co. v. Powell, 33 Cal. Rptr. 401, 404 (Cal. Dist. Ct. App. 1963)).

endeavor, but beyond this objective their interests are often largely divergent.[50] Their conflicting interests have recently taken center stage in a media frenzy regarding the benefits and adverse effects of fracking.[51]

In the majority of leases, the habendum clause establishes the duration of the lease, but other provisions may affect the term it sets forth.[52] The clause usually provides for a primary term set at a fixed period of time, which is followed by the secondary term.[53] During the primary term, the typical lease expires if the lessee does not begin producing or tender delay rental payments.[54] To extend the lease into the secondary term, the lessee must

50. *See* A. W. Walker Jr., *The Nature of the Property Interests Created by an Oil and Gas Lease in Texas*, 11 TEX. L. REV. 399, 399–401 (1933) (emphasizing the courts have been diligent in safeguarding lessors' royalty interests through the advent of implied covenants imposed upon lessees since lessors' and lessees' interests "are frequently conflicting" and the typical lease contains a dearth of express clauses pertaining to lessees' obligations in regards to drilling operations); *see also* Wiser v. Enervest Operating, LLC, 803 F. Supp. 2d 109, 117 (N.D.N.Y. 2011) (indicating the evolution of the standard oil and gas lease is the result of previous conflicts between lessors and lessees); Stahl & Gooch, *supra* note 5, § 27.01, at 27-3 (identifying "the often-competing interests of lessors and lessees and the tremendous value of the natural resources being produced from leases" as the reason for the high-stakes nature of lease termination suits).

51. *See* Reser & Ritter, *supra* note 23, at 33 (opining the public outcries for regulation result from the media's dramatization of the harms of fracking in newspaper articles, documentaries, and television shows); Barnes & Pardo, *supra* note 1 (explaining the alleged "environmental, health, and other community risks" of fracking "have taken center stage in the media").

52. *See* ERNEST E. SMITH & JACQUELINE LANG WEAVER, TEXAS LAW OF OIL AND GAS § 4.3 (2d ed. 2016) (crediting the habendum clause for establishing "the duration of the lessee's interest"); *see also* Sun Operating P'ship v. Holt, 984 S.W.2d 277, 286 (Tex. App.—Amarillo 1998, pet. denied) (acknowledging the habendum clause defines the duration of the lease, but looking to the entire lease to determine if the parties intended for other provisions to affect the lease term (citing Gulf Oil Corp. v. Southland Royalty Co., 496 S.W.2d 547, 552 (Tex. 1973))).

53. RICHARD W. HEMINGWAY, THE LAW OF OIL AND GAS 285 (3d ed. 1991); *see also* Maralex Res., Inc. v. Gilbreath, 76 P.3d 626, 630 (N.M. 2003) ("The typical habendum clause designates a primary term . . . and then provides that the lease remains in effect so long as oil or gas is produced from the land."); Stahl & Gooch, *supra* note 5, § 27.02, at 27-4 (specifying that the primary term is a set period of time, normally ranging from two to ten years, "during which the lease is to remain in force" (citing MARTIN & KRAMER, *supra* note 4, at 403).

54. Historically, lessees were required to begin developing the leasehold immediately after entering the lease. *See* Hite v. Falcon Partners, 13 A.3d 942, 946 (Pa. Super. Ct. 2011) (indicating courts would imply this duty even in the absence of an express contractual obligation (first citing Jacobs v. CNG Transmission Corp., 332 F. Supp. 2d 759, 765 n.3 (W.D. Pa. 2004); and then citing Jacobs v. CNG Transmission Corp., 772 A.2d 445, 452–55 (Pa. 2001))). Consequently, delay rental clauses were developed to relieve lessees of this duty and provide them with greater flexibility. *See Jacobs*, 772 A.2d at 455 (holding there is no implied duty to immediately develop the leasehold if the parties contracted for the payment of delay rentals). Courts, however, strictly interpret the delay rental obligation. If the lease contains an "unless" clause and the lessee fails to remit rental payments to the lessor on or before the date payment is due, the lease automatically terminates. Schwartzenberger v. Hunt Tr. Estate, 244 N.W.2d 711, 716 (N.D. 1976); *see also* Humble Oil & Refining Co. v. Harrison, 205 S.W.2d 355, 360–61 (Tex. 1947) (explaining "unless" leases require lessees to strictly comply with the delay rental terms and, as a result, "a small deficiency in the amount of the payment or a failure to make the payment

either commence "operations" or "production," depending upon the lease language, by the conclusion of the primary term.[55]

The "thereafter" language contained in the habendum clause establishes the secondary term.[56] In the secondary term, the lease remains alive if the lessee obtains "production," which has been interpreted as "production in paying quantities."[57] Accordingly, if production is never established or it

until a short time after its due date terminates the lease" (citations omitted)); HEMINGWAY, *supra* note 53, at 286 (clarifying the "unless" lease will automatically terminate absent delay rental payment or the commencement of operations on the lease's anniversary date, but noting "there is no obligation upon [the lessee] to do either act"). As a result, "paid up" and "or" leases have become more common. *See* Sanchez, Estee A., "Extending Oil & Gas Leases: And So Long Thereafter . . . Happily Ever After?," *Advanced Mineral Title Examination – Oil, Gas, and Mining*, Paper 4, Page No. 4-3 (Rocky Mtn. Min. L. Fdn. 2-14) (contrasting "unless," "or," and "paid up" leases, and clarifying that an "or" clause allows a lessee to choose between paying rentals or commencing and if the lessee fails to do one of the two, the lessee is merely subject to contractual liability, while a "paid up" lease allows the lessee to maintain the lease throughout the primary term by merely making a large lump sum payment at the beginning); *see also* HEMINGWAY, *supra* note 53, at 289 (defining "paid-up" leases to mean leases pursuant to which "the delay rentals are paid in advance for the entire primary term," and affirming lessees turned to such leases to avoid losing a lease due to improper tender of delay rental payments).

55. *See* Stahl & Gooch, *supra* note 5, § 27.02, at 27-4 (explaining the lease will survive the primary term and carry over to the secondary term if certain conditions are met (citing 17 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 50:58 (4th ed. 2013))). The specific terminology contained in the habendum clause is determinative of what conditions the lessee must satisfy to enter the secondary term. *See* Breaux v. Apache Oil Corp., 240 So. 2d 589, 591 (La. Ct. App. 1970) (determining that under a commence operations lease, the lessee's construction of a board road and turn-around were sufficient to enter the secondary term since the lease did not require drilling and, instead, "substantial surface preparations to drill are . . . considered 'commencement' of drilling operations . . . provided that such preliminary operations are continued in good faith and with due diligence until the well is actually spudded in" (quoting Hilliard v. Franzheim, 180 So. 2d 746, 748 (La. Ct. App. 1965))).

56. Such language provides that the lease shall continue past the primary term "for so long thereafter" as oil or gas is produced. Sanchez, *supra* note 54, at 4-4 to -5.

57. *See* HEMINGWAY, *supra* note 53, at 285 (describing the secondary term as "indefinite in duration and . . . dependent upon production for continued existence"). Although the lease fails to explicitly express such a definition, courts have interpreted the term "production" to mean "production in paying quantities." Clifton v. Koontz, 325 S.W.2d 684, 690 (Tex. 1959) (citing Garcia v. King, 164 S.W.2d 509, 511 (Tex. 1942)); *see also* T.W. Phillips Gas & Oil Co. v. Jedlicka, 42 A.3d 261, 268 n.8 (Pa. 2012) (noting some courts use the phrase "in commercial quantities" instead of "in paying quantities" (first citing Texaco, Inc. v. Fox, 618 P.2d 844, 847 (Kan. 1980); and then citing Landauer v. Huey, 352 P.2d 302, 307 (Colo. 1960))); HEMINGWAY, *supra* note 53, at 317 ("[P]roduction sufficient to eventually hold the lease in virtually all jurisdictions requires production in paying quantities."). Under the two-part paying quantities test, production is in paying quantities if production from the well is sufficient to generate an income or a profit that exceeds the operating costs. Maralex Res., Inc. v. Gilbreath, 76 P.3d 626, 630 (N.M. 2003) (citations omitted); HEMINGWAY, *supra* note 53, at 323, 661; *see also* BP Am. Prod. Co. v. Laddex, Ltd., 458 S.W.3d 683, 688 (Tex. App.—Amarillo 2015, pet. granted) (stressing the analysis under this prong of the test must consider production that occurred "over a reasonable period of time" (citations omitted)). If no such profit exists, the well is deemed marginal and, in jurisdictions utilizing the objective test for paying quantities, the court must assess whether, under the circumstances, "a reasonably prudent operator would, for the purpose of making a

ceases during the secondary term, the lease terminates unless a savings clause is asserted.[58] Typical savings clauses include dry hole clauses, cessation of production clauses, continuous drilling operations clauses, shut-in royalty clauses, and force majeure clauses.[59] With the passage of fracking bans, these savings clauses become key for lessees desperate to temporarily hold their leases as they seek to invalidate these laws and regulations on constitutional and preemption grounds.[60] Thus, they are arguing that the force majeure clause precludes termination of their leases since legislation is the reason production has halted.[61]

profit and not merely for speculation, continue to operate a well in the manner in which the well in question was operated." Clifton v. Koontz, 325 S.W.2d 684, 691 (Tex. 1959). However, in jurisdictions that apply the subjective paying quantities test, the question under the second prong of the test becomes whether the lessee was operating the well in good faith and for a profit, which involves considering "the reasonableness of the time period during which the operator has continued his operation of the well in an effort to reestablish the well's profitability." *Jedlicka*, 42 A.3d at 276–77.

58. *See* Hydrocarbon Mgmt., Inc. v. Tracker Expl., Inc., 861 S.W.2d 427, 432 (Tex. App.—Amarillo 1993, no writ) ("It is the rule that a lease may be kept alive after the primary term only by production in paying quantities[] or a savings clause . . . ." (citations omitted)); *see* also HEMINGWAY, *supra* note 53, at 653 (recognizing that during the secondary term, "actual production or contractual substitutes for production" are required to keep the lease alive).

59. *See generally* Stahl & Gooch, *supra* note 5, § 27.02[3][a], at 27-5 to -9 (categorizing the dry hole clause, cessation of production clause, drilling operations clause, delay rental clause, shut-in royalty clause, and force majeure clause as savings clauses). Notably, the pooling clause may also act as a savings clause if production is established within the pooled acreage. *See* Pioneer Nat. Res. USA, Inc. v. W.L. Ranch, Inc., 127 S.W.3d 900, 906 (Tex. App.—Corpus Christi 2004, pet. denied) (concluding a lease that is part of a pooled unit extends beyond the primary term when there is production on any of the tracts within the unit (citing Southland Royalty Co. v. Humble Oil & Ref. Co., 249 S.W.2d 914, 916 (Tex. 1952))); *see also* Laura H. Burney, *The Texas Supreme Court and Oil and Gas Jurisprudence: What Hath* Wagner & Brown v. Sheppard *Wrought?*, 5 TEX. J. OIL, GAS & ENERGY L. 219, 224 (2010) (explaining in the absence of production in paying quantities on a leased tract, the pooling clause saves the lease from termination since "production from anywhere in the pooled unit constitutes production for a lease in the unit, even if the well is not on the leased tract" and, therefore, the "pooling clause is also a lease savings clause").

60. *See* Klingensmith & McGavran, *supra* note 17, at 19–20 (explaining that oil and gas companies are disputing these laws by invoking constitutional challenges and issues of local preemption); *see also* Tripp Baltz, *New Drilling Rules, More Legal Conflicts Over Local Fracking Bans Expected in States*, 15 Daily Env't Rep. (BNA) B-11, 08 DEN B-11 (BL) (Jan. 13, 2015) (noting preemption litigation is currently pending in many states throughout the nation); Hennessey, *supra* note 47 (predicting local bans will be challenged on preemption grounds and as an unconstitutional regulatory taking); Schlabs, *supra* note 34 (listing preemption and Taking Clause challenges as the primary lawsuits used by the fracking industry to oppose enacted bans).

61. *See, e.g.*, Brief for Defendants-Counter-Claimants-Appellants, Beardslee v. Inflection Energy, LLC, 789 F.3d 90 (2d Cir. 2015) (No. 12-4897-cv) (relying on the force majeure clause to fight lease termination in light of the New York fracking moratorium); *see also* Klingensmith & McGavran, *supra* note 17, at 16–17 (stating lessees cannot develop their leases due to bans and, thus, are claiming force majeure).

IV. THE LAW OF FORCE MAJEURE

Force majeure, French for "superior force,"[62] has long been relied upon as a contractual defense.[63] Historically, force majeure "embodied the notion that parties could be relieved of performing their contractual duties when performance was prevented by causes beyond their control, such as an act of God."[64] The common law doctrines of impossibility, impracticability, and frustration of purpose are defenses to breach of contract claims that recognize these excuses to performance.[65] As the discussion below reveals, some courts apply the common law even when faced with an express contractual force majeure clause.[66]

A. *Common Law Force Majeure*

As a general rule of law, a party must perform their contractual obligations or face liability for their failure to do so.[67] The rule of absolute liability stood strong until the nineteenth century when impossibility of performance was recognized as a common law defense to a breach of

62. *See* Fred R. Pletcher & Anthony A. Zoobkoff, *Force Majeure (and Other Useful French Profanities) in Resource Agreements*, 59 ROCKY MTN. MIN. L. INST. § 17.01, § 17.02[1], at 17-3 (2013) (introducing the history of force majeure with the United States Supreme Court's translations of "'force majeure' and the related French phrase '*cas fortuit*,'" which included "'superior force,' 'unforeseen events,' 'overpowering force,' 'fortuitous event or irresistible force,' and 'a fact or accident which human prudence can neither foresee nor prevent'" (quoting Viterbo v. Friedlander, 120 U.S. 707, 727–28 (1887))).

63. *See* Sun Operating P'ship v. Holt, 984 S.W.2d 277, 282 (Tex. App.—Amarillo 1998, pet. denied) (noting the lengthy existence of force majeure law).

64. *Id.* at 282 (citing ARTHUR LINTON CORBIN, 6A CORBIN ON CONTRACTS § 1324 (1962)); *see also* John S. Kirkham, *Force Majeure—Does It Really Work?*, 30 ROCKY MTN. MIN. L. INST. § 6.01, § 6.02[2], at 6-4 (1984) (explaining the force majeure concept is intended to provide a legal standard that implements the doctrine of excuse and allocates the uncertainties accompanying everyday life). Both acts of nature and people qualify as events of force majeure. *Force Majeure*, BLACK'S LAW DICTIONARY (10th ed. 2014).

65. *See, e.g.*, Sabine Corp. v. ONG W., Inc., 725 F. Supp. 1157, 1191 (W.D. Okla. 1989) (granting the plaintiff partial summary judgment on defendant's contractually based force majeure defense and the affirmative common law defenses of impossibility of performance, impracticability, and frustration of purpose). The three defenses are similar and share many of the same elements. *See* Kirkham, *supra* note 64, § 6.03[3], at 6-12 (relating the doctrine of frustration to the doctrines of impossibility and impracticability); *see also* JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 13.12 (6th ed. 2003) (illustrating the similarities and differences between frustration and impracticability by way of example).

66. *See, e.g.*, URI Cogeneration Partners, LP v. Bd. of Governors for Higher Educ., 915 F. Supp. 1267, 1276, 1287 (D.R.I. 1996) (construing a clause that did not mention foreseeability to only apply "to those situations that were demonstrably unforeseeable at the time of contracting").

67. S*ee* PERILLO, *supra* note 65, § 13.1 ("The harsh traditional common law rule was 'pacta sunt servanda;' promises must be kept though the heavens fall." (footnote omitted)).

contract claim.[68] However, the doctrine of impossibility of performance has burdensome requirements.[69] Courts only recognize impossibility as an excuse "when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible."[70] Additionally, parties relying upon the defense must establish that the impossibility resulted from an event that was unforeseeable.[71] Moreover, the event cannot be caused by the fault of the nonperforming party.[72] The harsh burdens imposed by the impossibility doctrine were eventually realized, and the standard evolved into impracticability.[73]

Under the modern doctrine of impracticability, actual impossibility is not required and performance may be excused when it is merely impracticable.[74] To prevail under this standard, a party must show an

68. Kel Kim Corp. v. Cent. Mkts., Inc., 519 N.E.2d 295, 296 (N.Y. 1987) (citing JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 13.1 (2d ed. 1977)); *see also* Pletcher & Zoobkoff, *supra* note 62, § 17.03[1], at 17-7 ("By 1863, the English courts began to relax the sometimes harsh and uncompromising doctrine of absolute liability.").

69. The doctrine is narrowly applied since contracts are meant to allocate the risks inherent in a bargain; therefore, it is only permissible to excuse performance in extreme cases. *Kel Kim Corp.*, 519 N.E.2d at 296 (citation omitted).

70. *Id.*; *see also* Seaboard Lumber Co. v. United States, 308 F.3d 1283, 1294 (Fed. Cir. 2002) (discrediting an impossibility defense since other similarly-situated industry members continued to perform their contractual obligations under the same conditions (citing Jennie-O Foods, Inc. v. United States, 580 F.2d 400, 409 (Ct. Cl. 1978))).

71. The unforeseeability requirement is grounded in contracting parties' ability to allocate risks in a contract. *See* E. Air Lines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957, 991–92 (5th Cir. 1976) (explaining a contract is meant "to place the reasonable risk of performance on the promisor" and, thus, by including a provision in the contract, the "promisor can protect himself against foreseeable events"); *Kel Kim Corp.*, 519 N.E.2d at 296 (requiring impossibility to result from "an unanticipated event that could not have been foreseen or guarded against in the contract" (first citing 407 E. 61st Garage, Inc. v. Savoy Fifth Ave. Corp., 244 N.E.2d 37, 42 (N.Y. 1968); and then citing Ogdensburg Urban Renewal Agency v. Moroney, 345 N.Y.S.2d 169, 170 (N.Y. App. Div. 1973))). As a result, in the absence of a contractual provision allocating the risk of a foreseeable event, an inference arises that the risk was assumed by the party. *Seaboard Lumber*, 308 F.3d at 1295 (quoting United States v. Winstar Corp., 518 U.S. 839, 907 (1996)).

72. *Seaboard Lumber*, 308 F.3d at 1294 (quoting *Winstar Corp.*, 518 U.S. at 904).

73. *See* PERILLO, *supra* note 65, § 13.1 (affirming the modern relaxation of the impossibility standard); Kirkham, *supra* note 64, § 6.05[1], at 6-27 ("[T]he harsh common law standard for excuse has, to some extent, been mitigated by modern concepts based upon commercial impracticability.").

74. *See* RESTATEMENT (SECOND) OF CONTRACTS § 261 cmt. d (AM. LAW INST. 1981) (recognizing absolute impossibility of performance is no longer the standard and a contractual duty may be discharged upon showing performance is impracticable); *see also Seaboard Lumber*, 308 F.3d at 1294 (indicating "actual or literal impossibility of performance" is no longer required, but instead showing commercial impracticability will suffice (citing *Jennie-O Foods*, 580 F.2d at 409; and then citing Hercules Inc. v. United States, 24 F.3d 188, 204 (Fed. Cir. 1994))). The Uniform Commercial Code codified the modern version of impossibility. Jay D. Kelley, *So What's Your Excuse? An Analysis of Force Majeure Claims*, 2 TEX. J. OIL GAS & ENERGY L. 91, 95 (2007) (describing the codified impracticability standard as virtually identical to the common law doctrine (citing Transatlantic Fin. Corp. v. United

unforeseeable event occurred,[75] the risk of which was not allocated between the parties, and this event must have rendered performance impracticable.[76] Impracticability has been defined as performance that "can only be done at an excessive and unreasonable cost."[77]

Unlike the other two common law defenses, the doctrine of frustration of purpose does not require performance to be impossible or impracticable.[78] Rather, the defense discharges performance of contractual duties, absent language or circumstances indicating otherwise, where subsequent to entering a contract, "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."[79] Therefore, the defense applies when a contracting party's purpose for entering the contract is frustrated by a change in circumstances.[80] To constitute a "principal purpose" of the contract, the object must be the

States, 363 F.2d 312, 315 (D.C. Cir. 1966))).

75. Although neither the Uniform Commercial Code or Restatement Second of Contracts adopted the unforeseeability requirement, the element is considered "judicially-required." *See* Sabine Corp. v. ONG W., Inc., 725 F. Supp. 1157, 1174 (W.D. Okla. 1989) (outlining the elements under the Uniform Commercial Code and subsequently stating courts require the event to be unforeseeable (first citing Golsen v. ONG W., Inc., 756 P.2d 1209, 1221 (Okla. 1988) (Kauger, J., concurring); and then citing Bernina Distrib., Inc. v. Bernina Sewing Mach. Co., 646 F.2d 434, 439 (10th Cir. 1981))); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 261 cmt. b (AM. LAW INST. 1981) (asserting the foreseeability of an event is not dispositive and does not "compel a conclusion that its non-occurrence was not a basic assumption" of the contract).

76. *See Transatlantic Fin. Corp.*, 363 F.2d at 315–16 (setting forth the three requirements under the doctrine of impracticability); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 261 (AM. LAW INST. 1981) ("Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render performance is discharged, unless the language or the circumstances indicate the contrary."). The Restatement Second of Contracts deems a law "an event the non-occurrence of which was a basic assumption on which the contract was made," if having to comply with such law renders performance impracticable. RESTATEMENT (SECOND) OF CONTRACTS § 264 (AM. LAW INST. 1981). The rule is based upon the understanding that a basic assumption underlying contracts is that laws will not interfere and make performance of contractual duties impracticable. *Id.* cmt. a. However, such legal intervention only excuses performance where the law makes it impracticable for a contracting party to both comply with the law and perform. *Id.* cmt. b.

77. *Transatlantic Fin. Corp.*, 363 F.2d at 315 (quoting Mineral Park Land Co. v. Howard, 156 P. 458, 460 (Cal. 1916)); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 261 cmt. d (AM. LAW INST. 1981) (finding impracticable performance exists if there would be "extreme and unreasonable difficulty, expense, injury, or loss to one of the parties"). Under this standard, a party cannot prevail by merely exhibiting it could perform at a loss or at more expense than anticipated. PERILLO, *supra* note 65, § 13.9. Rather, the difference in cost must be "so great" as to render performance impracticable. *Mineral Park*, 156 P. at 460.

78. *See* Swanson, *supra* note 4, at 235 (recognizing interference "with the principal purpose of the contract" will suffice to excuse performance under the doctrine of frustration of purpose).

79. RESTATEMENT (SECOND) OF CONTRACTS § 265 (AM. LAW INST. 1981).

80. *Id.* cmt. a.

actual basis of the contract in that both parties understand the transaction would be devoid of sense without it.[81] Moreover, frustration is not considered substantial unless the frustration is severe enough that it cannot fairly be considered a risk the party assumed under the contract.[82]

If a party successfully asserts one of these common law defenses, the defense relieves the nonperforming party from liability for their breach and terminates the contract—a result force majeure clauses seek to avoid.[83]

B. *Force Majeure in the Oil Patch*

In an effort to supplant the narrow confines of the common law doctrines, a force majeure clause is commonly included in the oil and gas lease as a savings clause.[84] By including a force majeure clause, parties to an oil and gas lease can contractually define the force majeure defense[85] and provide for temporary suspension of lease obligations, instead of having the contract terminate as it occurs under the common law defenses.[86] The force majeure clause defines certain contingencies that will constitute a force majeure event and sets forth the obligations of the parties should such an event arise.[87] Accordingly, force majeure has become a "creature[] of

81. *Id.*

82. *Id.*; *see also* Pletcher & Zoobkoff, *supra* note 62, § 17.03[3], at 17-11 (explaining the doctrine of frustration does not excuse performance if performance merely becomes more onerous or expensive but, rather, performance must become radically different and affect the heart and consequences of the contract (citations omitted)).

83. *See* Pletcher & Zoobkoff, *supra* note 62, § 17.03[3], at 17-11 (distinguishing the outcome under the common law defenses with that under contractual force majeure defenses, and finding the force majeure defense does not terminate the contract, as the common law defenses do, but usually only suspends the party's contractual obligations "on a temporary basis for the duration of the supervening event").

84. *See* Kelley, *supra* note 74, at 92 (pointing to the limitations of the common law doctrines as one of the reasons parties elect to include a force majeure provision in their contract); *see* also HEMINGWAY, *supra* note 53, at 442 (stating force majeure clauses are commonly included in oil and gas leases).

85. *See* E. Air Lines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957, 991–92 (5th Cir. 1976) (indicating the protection offered by the doctrine of impracticability can be broadened by contractually specifying excusing contingencies, and refusing to read the unforeseeability element into the contract since the clause did not indicate unforeseeability was required (citations omitted)).

86. *See* Edington v. Creek Oil Co., 690 P.2d 970, 973 (Mont. 1984) ("The *force majeure* clause, if applicable, would have the effect of suspending the clause for termination by reason of cessation of operations."); Pletcher & Zoobkoff, *supra* note 62, § 17.04[1], at 17-12 (favoring a force majeure clause to the common law because "a carefully crafted force majeure clause is capable of responding to a particular business risk in a more event-specific, flexible, measured, and predictable manner, while" merely suspending performance, as opposed to the common law doctrines, which "are blunt instruments of uncertain judicial application that permanently end all contractual obligations"); Stahl & Gooch, *supra* note 5, § 27.02[3][f], at 27-8 (explaining the force majeure clause extends the lease).

87. *See* Pletcher & Zoobkoff, *supra* note 62, § 17.04[3], at 17-14 (echoing that the clause

contract" with its contours based upon the confines set forth by the parties in their agreement, rather than depending upon the delineations of the common law defenses.[88] In comparing the defense under a force majeure clause to the common law defenses, one court stated:

> The theory of force majeure has been existent for many years. Often likened to impossibility, it historically embodied the notion that parties could be relieved of performing their contractual duties when performance was prevented by causes beyond their control, such as an act of God. But, much of its historic underpinnings have fallen by the wayside. Force majeure, is now little more than a descriptive phrase without much inherent substance. . . . [W]hen the parties have themselves defined the contours of force majeure in their agreement, those contours dictate the application, effect, and scope of force majeure.[89]

Due to the frequency with which parties include such a provision,[90] courts should not have to turn to the common law framework when analyzing a defense grounded solely in a force majeure clause.[91] However,

contractually defines what constitutes force majeure by listing "a number of specific events," and categorizing commonly enumerated events as "natural phenomena (e.g., fire, flood, hurricane, tornado, etc.), intervening human events (e.g., war, insurrection, riots, terrorist attack, other civil disturbance, etc.), and commercial disturbances (e.g., changes in law, government actions or restrictions, labo[]r disputes, shortages or interruptions of materials, transportation interruptions, etc.)"); Robert M. Stonestreet, Force Majeure *for Sure? Contractual Coal Supply Obligations in a Changing World*, 30 ENERGY & MIN. L. INST. § 5.01, § 5.03, at 159 (2009) (recognizing that force majeure clauses specify what qualifies as a force majeure event and "usually also address how the occurrence of a *force majeure* event affects the parties' relative obligations"); Swanson, *supra* note 4, at 225 (examining parties' ability to include an "'Act of God' clause" that defines what specific events will excuse performance); *see also* MARTIN & KRAMER, *supra* note 4, at 391 (defining a force majeure clause as a clause in the lease that provides a lack of production shall not automatically terminate the lease and excuses a lessee's performance of covenants if the "failure of production or performance of covenants is due to causes specified in such clause").

88. Sun Operating P'ship v. Holt, 984 S.W.2d 277, 283, 289 (Tex. App.—Amarillo 1998, pet. denied); *see also* Kelley, *supra* note 74, at 98 ("The relief available under a *force majeure* clause depends in large part upon the precise wording of the clause in question." (citations omitted)); Swanson, *supra* note 4, at 233 n.35 (acknowledging that contractual force majeure shares roots with the common law doctrine of impossibility of performance, but noting they are inherently distinct since contractual force majeure must be expressed in the contract).

89. *Sun Operating*, 984 S.W.2d at 282–83 (footnote and citations omitted). Force majeure has also been explained as "a phrase coined primarily for the convenience of contracting parties wishing to describe" a type of event that that might free them of the duties the lease imposes. Perlman v. Pioneer P'ship, 918 F.2d 1244, 1248 n.5 (5th Cir. 1990) (per curiam) (citing ARTHUR LINTON CORBIN, 6A CORBIN ON CONTRACTS § 1324 (1962)).

90. *See* 4 EUGENE KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 53.5 (1990) (recognizing that oil and gas leases commonly set forth a force majeure clause).

91. *See Sun Operating*, 984 S.W.2d at 282–83 (indicating the historic underpinnings of the force

the common law doctrines often sneak back into the oil patch.[92]

1. Force Majeure Means What the Lease Says It Means—"Acts of God" Defined by Contracting Parties

In the absence of production in paying quantities, or another applicable savings provision, a lessee may rely upon the force majeure clause to save the lease from termination.[93] To obtain such a result, a lessee invoking a force majeure clause must establish the affirmative defense.[94]

a. The Scope of the Force Majeure Clause

To establish the force majeure affirmative defense, the lessee must first show the supervening occurrence falls within the scope of events the parties used to define force majeure.[95] Courts have taken a noticeably strict approach, requiring that the event asserted as an act of force majeure actually be listed as a qualifying event in the contract.[96] In doing so, courts construe the force majeure clause by applying rules of contract

majeure defense "have fallen by the wayside").

92. *See* Pletcher & Zoobkoff, *supra* note 62, § 17.04[1], at 17-12 to -13 (indicating some jurisdictions interpret force majeure clauses by examining the language utilized by the clause itself, while others consider the contractually defined defense "in light of the common law doctrines" (citations omitted)).

93. *See* Stahl & Gooch, *supra* note 5, § 27.02[3][f], at 27-8 (stating the purpose of the clause is to extend the lease when events outside of the lessee's control preclude it from complying with its production obligations).

94. *See* Hydrocarbon Mgmt., Inc. v. Tracker Expl., Inc., 861 S.W.2d 427, 436 (Tex. App.—Amarillo 1993, no writ) ("Inasmuch as *force majeure* as an excuse for non[]performance is an affirmative defense, appellants bore the burden of proof to establish that defense." (citing Kodiak 1981 Drilling P'ship v. Delhi Gas Pipeline Corp., 736 S.W.2d 715, 723 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.))). In addition to the two-pronged affirmative defense, if notice is required by the force majeure provision, the lessee will have to demonstrate strict compliance therewith. *See* Sabine Corp. v. ONG W., Inc., 725 F. Supp. 1157, 1168–69 (W.D. Okla. 1989) ("The failure to give proper notice is fatal to a defense based upon a force majeure clause requiring notice." (citations omitted)).

95. *See Sun Operating*, 984 S.W.2d at 285–86 (requiring the lessee to show the purchaser's failure to transport gas and its effect on production was within the scope of a clause that provided an excuse for "any delay or interruption in 'drilling or other operations'" caused by "failure of carriers to transport or furnish facilities for transportation").

96. *See* Maralex Res., Inc. v. Gilbreath, 76 P.3d 626, 636 (N.M. 2003) (limiting events qualifying as force majeure to the specific language of the clause (citing *Sun Operating*, 984 S.W.2d at 283)); Sabino, *supra* note 7, at 7 (asserting courts will not add or delete language the parties contractually agreed to include in their force majeure clause and, therefore, the clause "is only as good as the calamities it anticipates"); *see also* Golsen v. ONG Western, Inc., 756 P.2d 1209, 1213 (Okla. 1988) (refusing to equate inadequate demand of a product with "failure of markets").

interpretation.[97] In *Perlman v. Pioneer Partnership*,[98] the Fifth Circuit described a court's task as follows:

> That a party labels a condition or event a "force majeure" in a contract does not make that event a force majeure in the traditional sense of the term. Therefore, courts should not be diverted by this "red herring." 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.[99]

For this reason, force majeure, when governed by a lease clause, depends not on the common law definition but on the meaning courts attribute to the express terms of the clause.[100] A typical force majeure clause might provide:

97. Courts frequently articulate the notion that contract interpretation rules apply since the lease is both a conveyance and contract. *See* Stroud Prod., LLC v. Hosford, 405 S.W.3d 794, 819 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (Keyes, J., dissenting) ("Rather than being a 'lease' in the traditional sense, an oil and gas lease is a contract, and it is therefore interpreted as such." (citing Tittizer v. Union Gas Corp., 171 S.W.3d 857, 860 (Tex. 2005))); *cf.* 30 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 50:57 (4th ed. 2015) ("[D]espite the often articulated statement that mineral leases . . . are to be interpreted as other contracts, a body of rules has developed which may well be considered *sui generis*." (citations omitted)). Under the rules of contract interpretation, a court's primary concern when construing an unambiguous contract or lease "is to ascertain the true intentions of the parties as expressed in the instrument" since the parties' intent controls. Coker v. Coker, 650 S.W.2d 391, 393 (Tex. 1983) (first citing R&P Enterprises v. LaGuarta, Gravel & Kirk, Inc., 596 S.W.2d 517, 518 (Tex. 1980); and then citing City of Pinehurst v. Spooner Addition Water Co., 432 S.W.2d 515, 518 (Tex. 1968)); *accord Stroud Prod.*, 405 S.W.3d at 819 (Keyes, J., dissenting) (acknowledging courts seek to enforce the parties' intentions as expressed in an unambiguous lease (citing *Tittizer*, 171 S.W.3d at 860)). To do so, the courts must consider the plain language of the lease. *See* BP Am. Prod. Co. v. Zaffirini, 419 S.W.3d 485, 497 (Tex. App.—San Antonio 2013, pet. denied) (requiring courts to examine the language of the entire instrument and attempt "to harmonize and give effect to *all the [lease] provisions*" (alteration in original) (emphasis added) (quoting Valence Operating Co. v. Dorsett, 164 S.W.3d 656, 662 (Tex. 2005))). If a certain or definite interpretation or meaning can be derived from the lease, it is unambiguous and the contract should be enforced as written. *Id.* (first quoting *Coker*, 650 S.W.2d at 393; and then citing Heritage Res., Inc. v. NationsBank, 939 S.W.2d 118, 121 (Tex. 1996))); *see also Sun Operating*, 984 S.W.2d at 283 ("[W]e are not at liberty to rewrite the contract or interpret it in a manner which the parties never intended."). On the other hand, a lease is ambiguous if "its meaning is uncertain and doubtful or it is reasonably susceptible to more than one meaning." *Coker*, 650 S.W.2d at 393 (citing Skelly Oil Co. v. Archer, 356 S.W.2d 774, 778 (1962)). An unambiguous lease normally should be construed against the lessee. *See* 30 WILLISTON & LORD, *supra*, § 50:57 (determining leases are often construed in favor of lessors and against lessees since the lessee is more experienced in drafting and usually drafts the lease). If a contract is susceptible to more than one reasonable interpretation, a court should adopt the construction that will not work a forfeiture. *Sun Operating*, 984 S.W.2d at 284 (citing Kincaid v. Gulf Oil Corp., 675 S.W.2d 250, 256 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.)).

98. Perlman v. Pioneer P'ship, 918 F.2d 1244 (5th Cir. 1990) (per curiam).

99. *Id.* at 1248 n.5 (citing PPG Indus., Inc. v. Shell Oil Co., 919 F.2d 17, 18 (5th Cir. 1990), *aff'g* 727 F. Supp. 285 (E.D. La. 1989)).

100. *See, e.g.*, Sabine Corp. v. ONG W., Inc., 725 F. Supp. 1157, 1170 (W.D. Okla. 1989) (stating

> "All of lessee's obligations and covenants hereunder, whether express or implied, shall be suspended at the time or from time to time as compliance with any thereof is prevented or hindered by or is in conflict with [f]ederal, [s]tate, [c]ounty, or municipal laws, rules, regulations or [e]xecutive [o]rders asserted as official by or under public authority claiming jurisdiction, or Act of God, adverse field, weather, or market conditions, inability to obtain materials in the open market or transportation thereof, war, strikes, lockouts, riots, or other conditions or circumstances not wholly controlled by lessee, and this lease shall not be terminated in whole or in part, nor lessee held liable in damages for failure to comply with any such obligations or covenants if compliance therewith is prevented or hindered by or is in conflict with any of the foregoing eventualities."[101]

However, a more narrowly drafted force majeure clause set forth in another oil and gas lease might state:

> "All express or implied covenants of this lease shall be subject to all [f]ederal and [s]tate [l]aws, [e]xecutive [o]rders, [r]ules and [r]egulations, 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 such failure is the result of any such [l]aw, [o]rder, [r]ule or [r]egulation."[102]

Accordingly, a court's interpretative inquiry is fact intensive because force majeure clauses vary considerably with different events listed or descriptive

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the validity of the defendant's force majeure defense depends upon interpreting the force majeure clause before the court); *see also* Sanchez, *supra* note 54, at 4-30 to -32 (acknowledging the lack of a standard definition of force majeure, and contending the definition, thus, usually consists of a list of events the parties specify as qualifying force majeure events with a catch-all phrase included).

101. MARTIN & KRAMER, *supra* note 4, at 392. The clause is essentially a list of feared contingencies and can be accurately described as intrinsically pessimistic. Sabino, *supra* note 7, at 3, 7 ("A modern force majeure clause represents the ultimate in 'what-ifs' from the direct pessimist."); *see also* URI Cogeneration Partners, LP v. Bd. of Governors for Higher Educ., 915 F. Supp. 1267, 1287 (D.R.I. 1996) (portraying the force majeure clause as a "parade of horribles"). Note, however, to constitute a force majeure clause, the provision does not have to be entitled "force majeure" and the term "force majeure" need not be used anywhere in the contract. *See* Erickson v. Dart Oil & Gas Corp., 474 N.W.2d 150, 154–56 (Mich. Ct. App. 1991) (deeming a clause merely identified by paragraph number to be a force majeure clause although the term was never used in the lease, and proceeding to apply force majeure law). For example, a federal district court analyzed "an 'excuses for nonperformance' clause" as a force majeure clause, although the contract made no mention of force majeure. *See* PPG Indus., Inc. v. Shell Oil Co., 727 F. Supp. 285, 287–88 (E.D. La. 1989) (granting summary judgment "under the force majeure provision" due to an explosion at an oil refinery since the clause provided "fire" and "explosion" were events that would excuse performance), *aff'd*, 919 F.2d 17 (5th Cir. 1990).

102. Kuykendall v. Helmerich & Payne, Inc., 741 P.2d 869, 871 (Okla. 1987).

terminology employed in each lease.[103]

The given facts of a case may squarely fall within the scope of the definition contained in the force majeure clause.[104] For example, where "fire" and "explosion" were both included as contingencies that would excuse performance under a force majeure clause, an explosion at the defendant's oil refinery excused the defendant's decrease in the quantity of ethylene it delivered to the buyer.[105] Yet, not all circumstances are as unambiguously covered by a force majeure clause. If it appears the event is outside the scope of the definition provided for by the contract, the force majeure clause will not save the lease from termination.[106] *Logan v. Blaxton*[107] exemplifies the strict approach courts often take in construing force majeure clauses. At issue was a clause that defined force majeure events to include "Acts of God" and "flood."[108] The court rejected the lessee's force majeure defense, predicated upon excessive seasonal rains that made roads "impassable," since the evidence did not show "the rains . . . constituted a flood" or Act of God preventing performance.[109]

There is a narrow exception that is usually applied to the specificity required in defining triggering events. Force majeure clauses frequently contain a catch all provision to excuse performance, and the phrase typically states something similar to "or other cause beyond the control of the

103. *See* KUNTZ, *supra* note 90, § 53.5 (warning the circumstances the parties list as an excuse to performance is the detail that varies in force majeure clauses the most); Stonestreet, *supra* note 87, §§ 5.01–.02, at 156–57 (describing a court's task as answering "an inherently individualized question that can only be answered on a case-by-case basis" and which is "driven by the language of the contract at issue and the relevant circumstances involved"). *Compare Erickson*, 474 N.W.2d at 155 (quoting the lease's force majeure provision, which provided "any law, order, rule or regulation, (whether or not subsequently determined to be invalid)" qualified as an act of force majeure), *with* Edington v. Creek Oil Co., 690 P.2d 970, 973 (Mont. 1984) (referring to a force majeure clause which defined an event of force majeure to "include state and federal statutes, all orders, rules and regulations of any governmental body (either federal, state or municipal)").

104. *See* Hydrocarbon Mgmt., Inc. v. Tracker Expl., Inc., 861 S.W.2d 427, 436 (Tex. App.—Amarillo 1993, no writ) (acknowledging a Texas Railroad Commission shut-in order was a contingency specifically provided for by the force majeure clause in the lease, but ruling against the lessee on other grounds).

105. *PPG Indus.*, 727 F. Supp. at 287–88.

106. Even if an event would qualify under the common law doctrines, it will not excuse a party's nonperformance under a contractual defense unless it is listed in the clause. Swanson, *supra* note 4, at 225, 229. However, parties can still assert common law defenses in addition to their contractual force majeure defense. *See, e.g.*, Kel Kim Corp. v. Cent. Mkts., Inc., 519 N.E.2d 295, 296–97 (N.Y. 1987) (reviewing the merits of both an impracticability and contractual force majeure defense).

107. Logan v. Blaxton, 71 So. 2d 675 (La. Ct. App. 1954), *abrogated on other grounds by* B.A. Kelly Land Co. v. Augton Co., 47,509–CA (La. App. 2 Cir. 11/14/2012), 106 So. 3d 181.

108. *Id.* at 676 (emphasis omitted).

109. *Id.* at 676–77.

[l]essee."[110] A lessee may rely upon a catch all provision to argue that the occurrence of an event not explicitly listed in the force majeure clause qualifies to excuse performance.[111] To interpret whether the event falls within the scope of the force majeure definition, courts often apply the doctrine of *ejusdem generis*, which "limit[s] the application of general terms which follow specific ones to matters similar in kind or classification to those specified."[112] Courts will analyze the clause's specific terms to determine the common characteristics they share and will exclude a contingency from the scope of the force majeure clause if the event does resemble those characteristics.[113] For example, a court construed a clause's definition to describe events hindering the tenant's "ability to conduct day-to-day commercial operations on the premises."[114] The tenant claimed its inability to procure liability insurance was within the scope of the catch all phrase.[115] The court rejected this, holding the inability to maintain insurance was a materially different event in kind and nature than events frustrating daily commercial operations since maintenance of insurance was meant for the "protection of the landlord's unrelated economic interests."[116] This interpretive principle has its limits, however. While many recognize that the doctrine, by its own terms, only applies when the catch all provision follows an enumeration of qualifying events but not when it precedes the list, others fail to make this distinction.[117] Moreover,

110. Maralex Res., Inc. v. Gilbreath, 76 P.3d 626, 636 (N.M. 2003); *see also* Erickson v. Dart Oil & Gas Corp., 474 N.W.2d 150, 155–56 (Mich. Ct. App. 1991) (considering a clause that stated "any other cause, whether similar or dissimilar . . . beyond the reasonable control of the lessee" in the definition of force majeure); Sun Operating P'ship v. Holt, 984 S.W.2d 277, 280 (Tex. App.—Amarillo 1998, pet. denied) (reviewing a force majeure clause that contained a catch all phrase that said "or as the result of any cause whatsoever beyond the control of the [l]essee").

111. *Maralex Res.*, 76 P.3d at 636.

112. E. Air Lines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957, 988–89 (5th Cir. 1976) (first citing Bumpus v. United States, 325 F.2d 264, 266–67 (10th Cir. 1963); and then citing Ruth v. Pac. Gas & Elec. Co., 100 Cal. Rptr. 501, 509 (Ct. App. 1972)).

113. *Maralex Res.*, 76 P.3d at 636. However, an author recognized that some courts will decline to confine a catch all provision under *ejusdem generis* if the events set forth in the specific list are "not all of the same genus (e.g., some were natural phenomena while others were intervening human events)." Pletcher & Zoobkoff, *supra* note 62, § 17.04[3][a], at 17-16.

114. *Kel Kim Corp.*, 519 N.E.2d at 297. The clause defined force majeure to include "labor disputes, inability to procure materials, failure of utility service, restrictive governmental laws or regulations, riots, insurrection, war, adverse weather, Acts of God, or other similar causes beyond the control of [the] party." *Id.* at 296.

115. *Id.* at 297.

116. *Id.*; *see also Maralex Res.*, 76 P.3d at 636 (rejecting a lessee's argument because an issue with the mechanics of a well was not similar enough to the clause's list of external forces outside of the lessee's control).

117. *Compare* E. *Air Lines*, 532 F.2d at 989 n.90 ("*Ejusdem generis*, by its very terms, applies only

by including a phrase indicating force majeure events include but are not restricted to the listed contingencies, the doctrine's application might be precluded.[118] The applicability of *ejusdem generis* is, therefore, dependent upon the specific wording of the clause and the view the court elects to take.

b. Causation: "Acts of God" Precluding Performance

If the triggering event is encompassed by the terms of the force majeure clause, the lessee must next prove causation.[119] In other words, the lessee must establish the supervening event caused nonperformance as it "prevented, hindered, or delayed (as required by the specific wording of the contract)" the lessee's performance of the obligations imposed by the lease.[120] The causation prong is not satisfied "where there have been

where the general terms of an exculpatory clause follow a more specific listing of excused events."), *Maralex Res.*, 76 P.3d at 636 ("[W]here *general words follow an enumeration* of persons or things of a particular and specific meaning, the general words are not construed in their widest extent but are instead construed as applying to persons or things of the same kind or class as those specifically mentioned." (alteration in original) (emphasis added) (quoting State v. Foulenfont, 895 P.2d 1329, 1332 (N.M. Ct. App. 1995))), *and* Pletcher & Zoobkoff, *supra* note 62, § 17.04[3][a], at 17-16 (noting the interpretive doctrine confines qualifying events to occasions similar to those listed if a force majeure clause sets forth "a detailed list of triggering events *followed by* a catch-all provision" (emphasis added) (citations omitted)), *with Kel Kim Corp.*, 519 N.E.2d at 296–97. (indicating, without qualification, that general terms are confined to circumstances similar in kind and nature to those events specifically listed in the force majeure clause (citation omitted)), *and* Kelley, *supra* note 74, at 99 (stating the doctrine applies when a court interprets "a generic clause and a specific clause together"). Interestingly, however, one treatise reverses the order and states "the broad *introductory language* is cut down by *the specific language that follows*." PERILLO, *supra* note 65, § 13.19 (emphasis added).

118. *See E. Air Lines*, 532 F.2d at 989 & n.90 (declining to apply *ejusdem generis* because its application "would make superfluous the unambiguous words 'including but not being limited to' which precede[d] the specifically listed excuses for delay," and recognizing a treatise criticized one case for departing from this approach since the treatise viewed the phrase as preventing the doctrine's application (citations omitted)); *see also* PERILLO, *supra* note 65, § 13.19 (recognizing the doctrine may be inapplicable if the clause states "including but not limited to" but will be applied if it merely says "including" (citing *E. Air Lines*, 532 F.2d at 988–89)); Kelley, *supra* note 74, at 99 (suggesting "including, without limitation" instead of "including" will limit a court's application of the interpretative doctrine (first citing *E. Air Lines*, 532 F.2d at 988–89 ; and then citing *Kel Kim Corp.*, 519 N.E.2d at 296)). In addition, it has been said the doctrine only applies to ascertain the correct interpretation of an ambiguously phrased force majeure clause. *See E. Air Lines*, 532 F.2d at 989 (qualifying the applicability of the maxim to instances where there is uncertainty as to the meaning of the words used in the clause).

119. If a party is unable to prove causation, the force majeure clause is of no aid in saving the lease from termination even though the force majeure clause defines the exact event as an act of force majeure. Sabine Corp. v. ONG W., Inc., 725 F. Supp. 1157, 1170–72 (W.D. Okla. 1989); *see also* KUNTZ, *supra* note 90, § 53.5 ("[E]ven if the event occurred and is described in the force majeure clause, it will not relieve the lessee of performance unless it in fact prevented performance.").

120. Pletcher & Zoobkoff, *supra* note 62, § 17.04[2], at 17-13 to -14. To determine causation a court will analyze whether completion of the obligation at issue and the level of impact on performance is covered by the applicable force majeure provision. *See* KUNTZ, *supra* note 90, § 53.5 (summarizing

multiple causes for nonperformance, only one of which was an event of force majeure enumerated under the contract."[121] Furthermore, the occurrence *usually* must have actually hindered the lessee's ability to perform, and the mere speculation or possibility that the Act of God will interfere with the lessee's performance will not suffice.[122] In one case, a company contracted to produce calcined alumina products using certain equipment,[123] but every completed production run resulted in dust emissions, which violated regulations and permit requirements.[124] After four years of performing, the producer invoked the force majeure clause "due to environmental concerns" relating to the dust emissions.[125]

the court's analysis as reviewing whether the obligation or performance at issue is embraced by the terminology of the clause and whether an excusing event had the effect of compromising the completion of that obligation or performance); Pletcher & Zoobkoff, *supra* note 62, § 17.04[4], at 17-23 to -24 (including impact, which involves reviewing whether the event satisfies the required degree of impact on performance, and causation, which requires showing the event was the proximate cause of the lack of performance, in the force majeure analysis); *see also Sabine Corp.*, 725 F. Supp. at 1170 (concluding a purchaser was not rendered unable to perform its contractual obligations where the clause was only operative if the purchaser was "rendered unable, wholly or in part, . . . to perform or comply with any obligations or conditions"). One article indicates the level of impact is the modern standard of impracticability if the clause indicates the lessee is rendered "unable to perform," while a higher standard that fails to encompass increased cost of performance applies if the force majeure clause provides performance is "prevented or delayed." Pletcher & Zoobkoff, *supra* note 62, § 17.04[4], at 17-23 to -24. *But see* Butler v. Nepple, 354 P.2d 239, 244–45 (Ca. 1960) (en banc) (applying the impracticability standard and indicating performance can be excused by an "extreme and unreasonable difficulty, expense, injury, or loss" where the force majeure clause excused performance of obligations if the lessee was "prevented from complying" with obligations (citations omitted)). However, the article also indicates a court can impose a different standard than that set forth in the force majeure clause. Pletcher & Zoobkoff, *supra* note 62, § 17.04[4], at 17-24.

121. Pletcher & Zoobkoff, *supra* note 62, § 17.04[4][b], at 17-25 (citing Wheeling Valley Coal Corp. v. Mead, 186 F.2d 219, 223 (4th Cir. 1950)). However, if the occurrence of the specified event would by itself impede performance, the defense may prevail despite the culmination of events. *See Wheeling Valley Coal Corp.*, 186 F.2d at 222 ("If by itself [a specified event] could not have prevented performance, it will not excuse [it] merely because, in combination with nonexcepted c[]auses, it did so." (quoting Hellenic Transp. S. S. Co. v. Archibald McNeil & Sons Co., 273 F. 290, 297 (D. Md. 1921))).

122. As one court stated, "more than the mere possibility or unsupported conclusion of the existence of hindrance by" a force majeure condition is required to relieve a lessee of its contractual obligations. Perlman v. Pioneer P'ship, 918 F.2d 1244, 1249 (5th Cir. 1990) (per curiam). Not all courts are as stringent when analyzing whether a governmental action hindered a party's performance. *See infra* notes 211–13 and accompanying text.

123. Sherwin Alumina LP v. Aluchem, Inc., 512 F. Supp. 2d 957, 960 & n.4 (S.D. Tex. 2007).

124. *See id.* at 961–62 (stating the producer's failure to perform any production "run within the permit" and without "emission events in violation of the regulations" resulted in it relying on the force majeure clause). The producer had to timely report these events to the regulatory agency. *Id.* at 961.

125. *Id.* at 962. The producer was able to perform in 2002, 2003, 2004, and 2005 with the same emissions. *Id.* at 968 n.22. However, the producer declared force majeure in 2006 after undergoing an ownership and management transition. *Id.* at 962.

However, the producer never requested the agency to amend its permit for the equipment, as it did with other permits.[126] The court also pointed out the producer's ability to perform for four years despite using the same equipment and experiencing the same emissions it finally relied upon in declaring force majeure.[127] Moreover, despite the regulatory violations, authorities had never shut down the producer's use of the equipment, ordered equipment repairs, threatened to revoke the permit, or fined the producer for the emissions.[128] The court stated hypothetical or possible future events that could later cause nonperformance do not support a present force majeure defense.[129] Therefore, such invocation was held to be "premature" and "based on what *might happen* with [the agency], not what actually took place with government regulators."[130] In so concluding, the court quoted the Fifth Circuit's statement that "more than the mere possibility or unsupported conclusion of the existence of hindrance by government regulations [is required] to relieve [a party] of [its] obligations under the contract—an actual, material hindrance must occur before performance is excused."[131]

Similar to the actual hindrance standard, a successful force majeure defense is also precluded where a mere condition precedent to performance exists[132] or if there are alternative methods available to satisfy lease obligations, subject to the terms of the contract.[133] In addition, courts

126. *Id.* at 968.

127. *See id.* at 968 n.22 (responding to the producer's claim that it was pointless to seek a permit amendment based upon economic hardship).

128. *Id.* at 967–68.

129. *Id.* at 969.

130. *Id.* at 967–68.

131. *Id.* at 968 (first alteration added) (quoting Perlman v. Pioneer P'ship, 918 F.2d 1244, 1249 (5th Cir. 1990) (per curiam)).

132. In *Baldwin v. Kubetz*, the force majeure clause at issue covered governmental agencies' rules or regulations, and the leased property was subject to a zoning ordinance that the lessee claimed precluded drilling oil wells. Baldwin v. Kubetz, 307 P.2d 1005, 1008 (Cal. Dist. Ct. App. 1957). However, the ordinance did not absolutely prohibit the activity; rather, it set forth a condition precedent to obtaining a zoning exception that would permit drilling. *Id.* The lessee failed to establish causation since it could have performed had it sought the zoning exception available under the ordinance. *Id.* at 1008–09.

133. *See* Pletcher & Zoobkoff, *supra* note 62, § 17.04[4][b], at 17-25 ("If a force majeure clause permits a party to choose to perform its obligations in one of several alternative ways, any of which will discharge its duty under the contract, the fact that a party is unable to perform one or more of those alternatives will not discharge that party's duty to perform, so long as that party remains able to perform at least one of the alternatives." (first citing Fla. Power & Light Co. v. Westinghouse Elec. Corp., 517 F. Supp. 440, 453 (E.D. Va. 1981); and then citing Harriscom Svenska, AB v. Harris Corp., 3 F.3d 576, 580 (2d Cir. 1993))); *see also Perlman*, 918 F.2d at 1246 & n.1, 1249 (denying a lessee relief because the lessee could produce using alternative production processes utilized by the industry, and

generally reject the argument that adverse economic events—those that make performance more expensive than anticipated or that affect the profitability of a contract—can cause nonperformance under the force majeure clause.[134] Notably, however, many of the cases rejecting such argument involved fixed-price contracts under which one party assumed the risk of adverse economic circumstances.[135] Other courts have accepted, or at least entertained, the notion that an unreasonably burdensome expense can cause nonperformance under the impracticability standard.[136]

noting that although the lease's primary purpose was testing the lessee's patented production process, such purpose was stipulated in another contract and not the lease itself).

134. *See* Seaboard Lumber Co. v. United States, 308 F.3d 1283, 1293 (Fed. Cir. 2002) (holding the governmental fiscal decision merely and indirectly made performance unprofitable and did not qualify to excuse performance under the force majeure clause); Sabine Corp. v. ONG W., Inc., 725 F. Supp. 1157, 1171 (W.D. Okla. 1989) (determining the purchaser failed to provide evidence establishing the disparity between the market value of gas and its fixed contract price rendered it unable to perform as called for by the force majeure clause); Golsen v. ONG W., Inc., 756 P.2d 1209, 1212–13 (Okla. 1988) (rejecting the argument that depressed market prices rendering the purchaser unable to market the gas for a profit could excuse the contractual obligation to purchase gas since merely proving performance has become more difficult or expensive than at the time the contract was executed does not suffice and is not unforeseeable); Valero Transmission v. Mitchell Energy, 743 S.W.2d 658, 663 (Tex. App.—Houston [1st Dist.] 1987, no writ) (refuting the contention that an economic downturn in a product's market was "such an unforeseeable occurrence that would justify application of the force majeure provision," and stating contractual obligations are not avoidable merely because performance becomes more economically burdensome than anticipated (citations omitted)); *see also* KUNTZ, *supra* note 90, § 53.5 (indicating performance is not prevented by an event rendering it merely more inconvenient or expensive).

135. *See Seaboard Lumber*, 308 F.3d at 1293 ("A force majeure clause is not intended to buffer a party against the normal risks of a contract. The normal risk of a fixed-price contract is that the market price will change." (quoting N. Ind. Pub. Serv. Co. v. Carbon Cty. Coal Co., 799 F.2d 265, 275 (7th Cir. 1986))); Stonestreet, *supra* note 87, § 5.04[1], at 162 (stating adverse economic events do not constitute triggering "events—at least with regard to fixed-price contracts"—since parties assume the risk of market fluctuations by entering such contracts); *see also Sabine Corp.*, 725 F. Supp. at 1171 (reasoning the purchaser under a fixed price take or pay contract "assumed the risk of a decline in market demand and market price" (citations omitted)); *Golsen*, 756 P.2d at 1213 (arguing the acceptance of an economic force majeure defense is "repugnant" to the very purpose of a take or pay contract at a fixed price, which is to guard against market risks); *Valero Transmission*, 743 S.W.2d at 663 (declining to accept that market conditions cause nonperformance that justify applying the force majeure clause under a fixed price contract since parties enter such long-term contracts due to the uncertainty inherent in the market and for the purpose of avoiding potentially risky price fluctuations by setting a fixed price). However, in one take-or-pay contract case, the court accepted the defense that a failure of the markets suspended contractual obligations under a force majeure clause that included such market failure in the scope of its definition. Kodiak 1981 Drilling P'ship v. Delhi Gas Pipeline Corp., 736 S.W.2d 715, 716, 721 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.).

136. *See, e.g.*, Butler v. Nepple, 354 P.2d 239, 244–45 (Cal. 1960) (en banc) (entertaining the possibility of excusing a lessee's drilling or production obligations where the lessee shows performance would be at an "extreme and unreasonable" price rather than merely showing unanticipated expense or hardship, but rejecting the defense in the case since the lessee failed to present evidence "other than his own characterization of the increased prices" as "grossly overpriced" and "completely out of line

If a court finds the two-step inquiry applicable to force majeure defenses satisfied, a lessee may nonetheless be required to prove elements of the common law doctrines.[137]

2. To Common Law or Not to Common Law: A Jurisdictional Split

Despite the presence of express force majeure clauses, the common law doctrines continue to work their way into lease termination suits partially because force majeure clauses weave the common law elements into the contract.[138] Additionally, some courts read the common law notions into the contracts before them.[139] The majority of courts view the terms set forth in the lease as controlling the meaning and scope of force majeure, with the common law serving only as a mere "gap filler."[140] Some courts,

with the going price").

137. *See generally* Pletcher & Zoobkoff, *supra* note 62, § 17.04[3][b]–[c], at 17-16 to -18, § 17.05[b], at 17-28 to -29 (discussing the split in jurisdictions in regards to whether the lessee must prove the force majeure event was unforeseeable, that the event was beyond its control, and an effort to mitigate or overcome the force majeure event when the clause at issue does not expressly include any of these elements).

138. *See id.* § 17.04[2], at 17-14 ("*Subject to the terms of the contract*, . . . a party [relying on the force majeure clause] . . . must prove that the event in question was beyond its control, was not foreseeable, and that there were no further steps that could have been taken to avoid or mitigate the consequences." (emphasis added) (citation omitted)). In addition, if a contract simply recites "force majeure" or merely sets forth a "boilerplate, catch-all force majeure provision," the parties have incorporated "a body of common law doctrine interpreting the term that is largely indistinguishable from the doctrine of impossibility (or impracticability)." Commonwealth Edison Co. v. Allied-General Nuclear Servs., 731 F. Supp. 850, 855 (N.D. Ill. 1990) (citations omitted).

139. *See, e.g.*, URI Cogeneration Partners, LP v. Bd. of Governors for Higher Educ., 915 F. Supp. 1267, 1287 (D.R.I. 1996) (relying on the doctrine of impossibility when requiring force majeure events to be unforeseeable (citing *In re* A & S Transp. Co. v. Cty. Of Nassau, 546 N.Y.S.2d 109, 111 (App. Div. 1989))). In addition to the elements being added to a lessee's contractual force majeure claim, the common law arises when the lessees assert the common law doctrines as additional defenses. *See* Swanson, *supra* note 4, at 235 (indicating lessees commonly raise the common law doctrines of impossibility and frustration of purpose as affirmative defenses, in addition to relying on the force majeure clause in their lease).

140. *See* Perlman v. Pioneer P'ship, 918 F.2d 1244, 1248 (5th Cir. 1990) (per curiam) ("[T]he 'doctrine' of force majeure should not supersede the specific terms bargained for in the contract."); *Commonwealth Edison*, 731 F. Supp. at 855 (recognizing a contractual force majeure provision supersedes the common law doctrines of impossibility and impracticability (first citing N. Ind. Pub. Serv. Co. v. Carbon Cty. Coal Co., 799 F.2d 265, 276 (7th Cir. 1986); and then citing Wiggins v. Warrior River Coal Co., 696 F.2d 1356, 1359 (7th Cir. 1986))); Sun Operating P'ship v. Holt, 984 S.W.2d 277, 283 (Tex. App.—Amarillo 1998, pet. denied) ("[T]he 'lease terms are controlling regarding *force majeure*, and common law rules merely fill in gaps left by the lease." (quoting Hydrocarbon Mgmt., Inc. v. Tracker Expl., Inc., 861 S.W.2d 427, 436 (Tex. App.—Amarillo 1993, no writ))); Tex. City Ref. v. Conoco, Inc., 767 S.W.2d 183, 186 (Tex. App.—Houston [14th Dist.] 1989, writ. denied) ("Although both sides have ably briefed the common law meaning of force majeure, the common law definition is merely a gap-filler which must yield to party autonomy." (citation omitted)); *see also* Sabine Corp. v. ONG W., Inc., 725 F. Supp. 1157, 1170 (W.D. Okla. 1989) (declining to mandate unforeseeability of a force majeure

however, have expressly or implicitly departed from this approach and categorize the common law doctrines as default rules that are merely modified by the force majeure clause.[141] When a court strays down this path, requirements found in the common law excuses might be imposed, although a literal reading of a lease's provisions would not support this interpretation.[142]

Under the majority view, the fact that an event is not foreseeable is generally not a prerequisite to a viable force majeure claim.[143] Therefore, in those jurisdictions, a force majeure defense can prevail even when the contingency relied upon by the lessee was foreseeable.[144] The parties can integrate this common law element into the affirmative defense by defining a force majeure event as an unforeseeable contingency.[145] For example, force majeure might be defined as "any other cause beyond the unit

event since the clause did not specify such a requirement exists).

141. *See* Pletcher & Zoobkoff, *supra* note 62, § 17.04[2], at 17-12 to -13 (noting courts in some jurisdictions "consider a force majeure clause in light of the common law doctrines of frustration, impossibility, and commercial impracticability" (citing Watson Labs., Inc. v. Rhone-Poulenc Rorer, Inc., 178 F. Supp. 2d 1099, 1110 (C.D. Cal. 2001))).

142. *See* Kelley, *supra* note 74, at 92 (determining the approach might yield an interpretation that would not be derived from a literal reading of the force majeure clause at issue). This approach has been criticized because the interpretation may lead to results the parties to the lease did not intend. *See* Pletcher & Zoobkoff, *supra* note 62, § 17.04[2], at 17-13 (rejecting the approach wherein a court reads the common law elements in as "troubling, given that contractual force majeure provisions were historically adopted for the very reason of avoiding the pitfalls associated with these common law doctrines").

143. *See Perlman*, 918 F.2d at 1248 (refusing to require an event to be unforeseeable because "the 'doctrine' of force majeure should not supersede the specific terms bargained for in the contract"); E. Air Lines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957, 991–92 (5th Cir. 1976) (rejecting a jury instruction on unforeseeability since the language of the clause did not limit the defense to unforeseeable events); *Sabine Corp.*, 725 F. Supp. at 1170 (refusing to read an unforeseeability requirement into a force majeure clause that was silent as to unforeseeability of force majeure events); *Sun Operating*, 984 S.W.2d at 288 n.4 ("[T]o imply an unforeseeability requirement into a force majeure clause would be unreasonable. This is so because in naming specific force majeure events in the clause the parties undoubtedly foresaw the possibility that they could occur, and that is why they enumerated them to begin with."); Pletcher & Zoobkoff, *supra* note 62, § 17.04[3][b], at 17-17 (criticizing the minority approach for conflicting "with the inherent nature and purpose of a force majeure clause, since the very listing of force majeure events implies they were foreseeable").

144. *See Perlman*, 918 F.2d at 1248 (concluding the force majeure event could be foreseeable because the clause did not mandate it be unforeseeable and the common law elements should not be applied if the contract itself did not integrate them); *E. Air Lines*, 532 F.2d at 991–92 (holding a promisor should be excused from nonperformance upon the occurrence of an anticipated, particular event that was provided for in a contract, even if it was foreseeable at the time the parties entered the contract).

145. *See* Pletcher & Zoobkoff, *supra* note 62, § 17.04[3][b], at 17-16 (clarifying the force majeure clause can, but does not have to, incorporate unforeseeability because the element is not necessary under contractual force majeure (citation omitted)).

operator's reasonable ability to foresee or control."[146] Nonetheless, even when the clause makes no mention of foreseeability, some courts adopt this element from the common law doctrines, requiring the lessee to prove the event was unforeseeable as part of its affirmative defense.[147] As one court adopting the element reasoned:

> What distinguishes the Biblical plagues described in [the force majeure clause] from a failure to procure zoning permission is the question of foreseeability. . . . *[F]orce majeure* clauses have traditionally applied to unforeseen circumstances—typhoons, citizens run amok, Hannibal and his elephants at the gates—with the result that the [c]ourt will extend [the clause] only to those situations that were demonstrably unforeseeable at the time of contracting.[148]

Therefore, despite the clause's silence as to the foreseeability of an event, the court rejected the defense since failure to obtain zoning permission was foreseeable, or not "beyond the realm of imagination," when the contract was executed and, thus, could have been listed.[149]

Closely related to unforeseeability is the control element,[150] which requires an event of force majeure and its cause to be beyond the lessee's control.[151] The element of control obstructs force majeure defenses if the

146. This force majeure definition was set forth in identical language in both an agency's regulations and an oil and gas lease at issue in Alaskan Crude Corp. v. State of Alaska, Dep't Nat. Res., Div. of Oil & Gas, 261 P.3d 412, 415 (Alaska 2011).

147. *See* Gulf Oil Corp. v. Fed. Energy Regulatory Comm'n, 706 F.2d 444, 452–53 (3d Cir. 1983) (holding an event must be unforeseeable and unanticipated to excuse nonperformance despite the force majeure clause's silence on the matter).

148. URI Cogeneration Partners, LP v. Bd. of Governors for Higher Educ., 915 F. Supp. 1267, 1287 (D.R.I. 1996).

149. *Id.* at 1276, 1287. The court relied upon an opinion dealing with the doctrine of impossibility in explaining its reasoning. *See id.* at 1287 (concluding "the law of *force majeure*" did not apply because the event was foreseeable at the time the contract was entered (citing *In re* A & S Transp. Co. v. Cty. Of Nassau, 546 N.Y.S.2d 109, 111 (App. Div. 1989))). In addition to relying upon the common law, the court was also relying upon the doctrine of *ejusdem generis* when reaching this conclusion. *Id.* (quoting Kel Kim Corp. v. Cent. Mkts., Inc., 519 N.E.2d 295, 296–97 (N.Y. 1987)). Another court similarly stated that a force majeure clause only excuses performance if the alleged event was unforeseeable when the parties entered the contract. Valero Transmission v. Mitchell Energy, 743 S.W.2d 658, 663 (Tex. App.—Houston [1st Dist.] 1987, no writ). Although that court did not indicate whether the clause incorporated the foreseeability element, it held the force majeure clause was inapplicable since an economic downturn is a foreseeable event. *Id.*

150. *See* Sun Operating P'ship v. Holt, 984 S.W.2d 277, 288 n.4 (Tex. App.—Amarillo 1998, pet. denied) (indicating the lack of an unforeseeability requirement does not excuse negligence on the part of the lessee although negligence "encompasses an element of foreseeability" and arguing that nonperformance resulting from the lessee's negligence could fall under the control element).

151. *Id.* at 290. When the control element is applied, any event caused by the lessee is precluded

nonperforming party affirmatively caused the force majeure event or, in some courts, if the party "could have taken reasonable steps to prevent it."[152] As explained above, clauses often include a catch all provision that attempts to include other events outside the lessee's control within the force majeure definition.[153] Such a phrase may integrate the common law control element into the defense depending upon the specific wording of the entire force majeure clause.[154] Under the doctrine of *ejusdem generis*,[155] it is generally held that parties contractually exclude all events within the reasonable control of the lessee when the phrase follows the list of specific events but does not limit force majeure in such a manner when the phrase precedes the more specific force majeure definition.[156] Accordingly, the

from qualifying as a force majeure event. *See* Edington v. Creek Oil Co., 690 P.2d 970, 974 (Mont. 1984) ("Where the action of the governmental unit to shut in the well[] . . . is brought about and continued in force by the wrongful or improper action of the lessees, they cannot rely on the *force majeure* clause to escape the other termination provisions of the . . . lease.").

152. Nissho-Iwai Co., Ltd., v. Occidental Crude Sales, Inc., 729 F.2d 1530, 1540 (5th Cir. 1984) (citations omitted).

153. *See* PPG Indus., Inc. v. Shell Oil Co., 727 F. Supp. 285, 287 (E.D. La. 1989) (identifying the force majeure clause to include "any circumstances (except financial) reasonably beyond [the party's] control" (emphasis omitted)), *aff'd*, 919 F.2d 17 (5th Cir. 1990); Maralex Res., Inc. v. Gilbreath, 76 P.3d 626, 636 (N.M. 2003) (reviewing a force majeure clause that said "or other cause beyond the control of the [l]essee"); Hydrocarbon Mgmt., Inc. v. Tracker Expl., Inc., 861 S.W.2d 427, 435 (Tex. App.—Amarillo 1993, no writ) (interpreting a clause that provided, in its definition of force majeure, "or otherwise by operation of force majeure (which term includes any other similar or dissimilar cause, occurrence or circumstance not within the reasonable control of lessee)").

154. *See* Kelley, *supra* note 74, at 105 (stating the precise contractual language impacts the elements that must be established to have nonperformance excused). If the common law element applies, proving an event was not within the lessee's control becomes part of the affirmative defense. *See Maralex Res.*, 76 P.3d at 637 (considering the element part of the affirmative defense and, thus, placing the burden of proof on the lessee (citing *Sun Operating*, 984 S.W.2d at 282)). However, courts vary in whether the standard is absolute control or reasonable control despite the precise terminology employed in the catch all phrase. *See* Pletcher & Zoobkoff, *supra* note 62, § 17.04[3][c], at 17-18 (noting some courts apply a reasonable control exclusion, which carries "a less onerous burden of proof," even though the catch all provision does not contain the term "reasonable" (quoting *Sun Operating*, 984 S.W.2d at 280)). *Compare Maralex Res.*, 76 P.3d at 636–37 (failing to adopt a reasonableness standard when applying a catch all provision that included causes "beyond the control of the [l]essee"), *with Sun Operating*, 984 S.W.2d at 280, 288 (requiring events to be outside the lessee's "reasonable control" although the catch all provision read "any cause whatsoever *beyond the control* of the [l]essee" (emphasis added)), *and PPG Indus.*, 727 F. Supp. at 287–88 (applying a catch all provision that explicitly encompassed the reasonable control standard).

155. *See supra* notes 112–18 and accompanying text.

156. *See* E. Air Lines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957, 988–89 (5th Cir. 1976) (providing the doctrine limits the meaning of general terms that follow specifically enumerated terms "to matters similar in kind or classification to those specified" (first citing Bumpus v. United States, 325 F.2d 264, 266–67 (10th Cir. 1963); and then citing and then citing Ruth v. Pac. Gas & Elec. Co., 100 Cal. Rptr. 501, 509 (Ct. App. 1972))); Pletcher & Zoobkoff, *supra* note 62, § 17.04[3][c], at 17-17 (distinguishing between contracts that make the element applicable to any asserted force majeure event

Supreme Court of New Mexico interpreted the scope of a force majeure clause and found the control element applied where force majeure was defined to include governmental actions, "an act of God, of the public enemy, labor disputes, inability to obtain material, failure of transportation, or other cause beyond the control of the [l]essee."[157] The alleged force majeure event, in this instance, was the necessity to cease producing and build the well's pressure since the existing pressure was insufficient to force gas against the high pressure in the transporter's pipeline.[158] The court held a well's internal mechanical operations resulting in insufficient pressure was not encompassed by the catch all phrase as it did not share the common characteristic, (external events, such as natural disasters, beyond the lessee's control), but the court indicated pressure issues within the *transporter's* pipeline would constitute a qualifying external event.[159] On the other hand, where the catch all terminology preceded the specific list of events, another court held performance could be excused by an explosion, which was an event specifically listed in the clause, "regardless of whether the explosion was 'reasonably beyond [the party's] control.'"[160]

However, even in the absence of catch all language, some courts may still require the event to be outside a lessee's control.[161] A Texas court read the

versus those that confine the element's application to events encompassed by the catch all phrase). *Compare Sun Operating*, 984 S.W.2d at 287 (Tex. App.—Amarillo 1998, pet. denied) (requiring any event invoked as force majeure to be outside the lessee's reasonable control since "the parties have evinced an intent that all force majeure events be outside the lessee's reasonable control where the lease names specific force majeure events and then follows that enumeration with a catch-all referring to acts beyond the lessee's reasonable control"), *with PPG Indus.*, 727 F. Supp. at 287–88 (concluding the nonperformance could be excused regardless of whether the event was outside its control since the language *preceded* the list of events followed by a disjunctive and precedent applying the element to every event recited only do so where the control phrase "*follows* and *clearly modifies* by reference the enumerated contingencies"). Some, however, fail to differentiate between the placement of the catch all provision in relation to the specific list. *See supra* note 117 and accompanying text.

157. Maralex Res., Inc. v. Gilbreath, 76 P.3d 626, 636 (N.M. 2003).

158. *Id.* at 636–37.

159. *Id.* The court reasoned that the lessee failed to prove the pipeline's pressure was abnormally high, rather than the well's pressure being too low, in order for this to qualify as an external event. *Id.* at 637.

160. *PPG Indus.*, 727 F. Supp. at 287–88 (quoting *E. Air Lines*, 532 F.2d at 992). The force majeure clause provided performance was excused "to the extent [it] is delayed or prevented by any circumstances (except financial) *reasonably beyond its control or by fire*, *explosion*, mechanical breakdown." *Id.* at 287. The court refused to apply the control element to the specifically listed events since the clause used "or," which is disjunctive, rather than the conjunctive "and." *Id.* at 287–88. In addition, the court distinguished other cases where the catch all language "*follows* and *clearly modifies*" the enumerated contingencies. *Id.* at 288.

161. *See* Pletcher & Zoobkoff, *supra* note 62, § 17.04[3][c], at 17-18 (commenting on the tendency of some courts to impose the control requirement, "notwithstanding the specific wording of the force majeure clause" (citations omitted)). Other jurisdictions will not read the requirement in when the

element into the contractual defense and held a force majeure clause excuses a lessee's nonperformance "*only* when caused by circumstances beyond the reasonable control of the lessee."[162] Thus, the shutting in of a well due to the lessee's regulatory violations was not an act of force majeure because the shut in was within the reasonable control of the lessee.[163]

Finally, a lessee might be required to show that the force majeure event could not be overcome by reasonable diligence,[164] which is the element of mitigation.[165] Unlike the control element, mitigation focuses on the nonperforming party's ability to "diligently remediate *after* the unexpected event occurred."[166] Mitigation demands a bona fide attempt to dissolve the interference preventing the party's performance of its contractual obligations.[167] It does not, however, require the party "to exert heroic

clause is silent on the lessee's ability to control a force majeure event. *See, e.g.*, Perlman v. Pioneer P'ship, 918 F.2d 1244, 1248 (5th Cir. 1990) (per curiam) (negating the existence of a control element since the lease did not require an act of force majeure to be beyond the lessee's reasonable control).

162. Atkinson Gas Co. v. Albrecht, 878 S.W.2d 236, 241 (Tex. App.—Corpus Christi 1994, writ denied) (emphasis added) (citing Hydrocarbon Mgmt., Inc. v. Tracker Expl., Inc., 861 S.W.2d 427, 435–36 (Tex. App.—Amarillo 1993, no writ)).

163. *Id.*

164. *See Perlman*, 918 F.2d at 1249 (requiring the lessee to show remediation where it was required by the force majeure clause).

165. *See* Commonwealth Edison Co. v. Allied-General Nuclear Servs., 731 F. Supp. 850, 859 (N.D. Ill. 1990) (identifying the roots of the mitigation requirement to be the duty of good faith (citations omitted)).

166. Sun Operating P'ship v. Holt, 984 S.W.2d 277, 283 (Tex. App.—Amarillo 1998, pet. denied). In explaining this difference, the Texas Court of Appeals distinguished a case on several grounds including the fact that the opinion expounded upon the party's ability to avoid foreseeable injury before it occurred. *Id.* (citing Nat'l Compress Co. v. Hamlin, 264 S.W. 488, 490 (Tex. Civ. App.—Dallas 1924, writ dism'd w.o.j.)). In addition, the court implicitly differentiated the two elements when it distinguished another case because that force majeure clause not only set forth a mitigation requirement but also a control element. *Id.* at 284 (quoting United Gas Pipe Line Co. v. Fed. Energy Regulatory Comm'n, 824 F.2d 417, 432 n.19 (5th Cir. 1987)). Some courts, however, tend to conflate control and mitigation. *See* Gulf Oil Corp. v. Fed. Energy Regulatory Comm'n, 706 F.2d 444, 455 (3d Cir. 1983) (conditioning the success of a force majeure defense on the party establishing its due diligence in trying to overcome the effects of the event and its inability to "*prevent* or minimize its happening" despite doing everything in its control (emphasis added)); Erickson v. Dart Oil & Gas Corp., 474 N.W.2d 150, 155 (Mich. Ct. App. 1991) (indicating force majeure clauses do not excuse performance where the party could have "prevented" the circumstance by exercising diligence, prudence, and care, but then stating a party's failure to consider or use available mechanisms "to overcome" the contingency is considered to be "a lack of due diligence" (first citing Edington v. Creek Oil Co., 690 P.2d 970, 974 (Mont. 1984); and then citing Woods v. Ratliff, 407 So. 2d 1375, 1378–79 (La. App. 1981))).

167. *Commonwealth Edison*, 731 F. Supp. at 859. The "bona fide, good faith effort" standard is the general standard used when applying the mitigation requirement. Pletcher & Zoobkoff, *supra* note 62, § 17.04[5][b], at 17-29 (citations omitted). However, a few courts apply a more stringent standard and confine "force majeure events to those that cannot be overcome by 'any means whatsoever.'" *Id.* (citing Haby v. Stonlind Oil & Gas Co., 228 F.2d 298, 306 (5th Cir. 1955)).

efforts."[168] Rather, the lessee is expected "to explore or utilize available options to overcome the delaying condition."[169] For a lack of diligence to destroy a force majeure defense, it must cause "the failure to remove the force majeure condition."[170] Therefore, if exercising due diligence to overcome a triggering event would not impact the existence of that circumstance, this causation qualification relieves the nonperforming party from exercising any diligence at all.[171]

Contracting parties incorporate the mitigation requirement by including language such as "[l]essee shall use all reasonable efforts to remove such force majeure"[172] or "the cause of suspension . . . shall be remedied insofar as possible with reasonable dispatch."[173] However, such language does not require remediation efforts that contradict other contractual provisions.[174] Where a hurricane damaged a pipeline and, thus, prevented a producer from delivering natural gas at agreed-upon locations, the purchaser argued that the "reasonable efforts" phrase required the producer to perform at another delivery location.[175] The court upheld the producer's force majeure defense and concluded that requiring an alternate location would conflict with both the agreement to relieve delivery obligations upon an event of force majeure and the express agreement specifying the point of delivery.[176] Although parties may contractually breathe this notion into their force majeure clause,[177] some courts read the element in even when the clause is

168. *Commonwealth Edison*, 731 F. Supp. at 860 (citing Glickman v. Coakley, 488 N.E.2d 906, 912 (1984)).

169. *Erickson*, 474 N.W.2d at 155 (citing *Woods*, 407 So. 2d at 1378–79)); *see also Gulf Oil Corp.*, 706 F.2d at 455 (requiring the party to show it diligently attempted to overcome the effects of the alleged force majeure occurrence).

170. *Commonwealth Edison*, 731 F. Supp. at 859.

171. *Id.* at 863.

172. Perlman v. Pioneer P'ship, 918 F.2d 1244, 1246 (5th Cir. 1990) (per curiam). A similar clause provided that the party invoking force majeure must put forth "its best efforts to remedy its inability to perform." URI Cogeneration Partners, LP v. Bd. of Governors for Higher Educ., 915 F. Supp. 1267, 1276 (D.R.I. 1996).

173. Sabine Corp. v. ONG W., Inc., 725 F. Supp. 1157, 1166 (W.D. Okla. 1989); Golsen v. ONG W., Inc., 756 P.2d 1209, 1211 (Okla. 1988); *see also Commonwealth Edison*, 731 F. Supp. at 859 (quoting a force majeure provision that required the party affected by a force majeure event to "use its best efforts to remedy the cause in the shortest practicable time").

174. *See* Va. Power Energy Mktg., Inc. v. Apache Corp., 297 S.W.3d 397, 403–04 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (declining to interpret a mitigation requirement as requiring performance that would render express contractual terms meaningless).

175. *Id.* at 403. The force majeure clause required a party relying on the clause to "make reasonable efforts to avoid the adverse impacts of a *Force Majeure* and to resolve the event or occurrence once it has occurred in order to resume performance." *Id.*

176. *Id.* at 403–04.

177. *See Perlman*, 918 F.2d at 1249 (urging the lessee should have "ma[d]e a reasonable effort to

silent on mitigation.[178]

To provide a more thorough analysis of the fracking bans as force majeure defense, this Comment next reviews the application of force majeure clauses where governmental actions were the alleged impediment to contractual performance.

C. *Governmental Interferences as Acts of Force Majeure*

1. Acts of Government Within the Scope of the Force Majeure Clause

Intervening government acts are commonly included in the list of force majeure events that will suspend obligations under the lease.[179] However, the descriptions of governmental actions that will qualify as a force majeure event vary between narrowly drafted explanations[180] and more encompassing illustrations that list a wide range of government acts[181] or include a phrase that attempts to serve as a catchall for any governmental action.[182] Examples of broadly enumerating the list of triggering events

remove the force majeure condition . . . . by beginning the permitting process or by using an alternative method of drilling for coal seam gas" since the force majeure clause expressly obligated remediation efforts); Gulf Oil Corp. v. Fed. Energy Regulatory Comm'n, 706 F.2d 444, 448 n.8, 454–55 (3d Cir. 1983) (concluding the party failed to meet its burden of proving it acted "expeditiously and efficiently" to overcome the force majeure event "by doing everything within its control to . . . minimize the event's occurrence and its effects" since the clause required remediation "with all reasonable dispatch" and excluded any events "which by the exercise of due diligence the party claiming force majeure is able to overcome").

178. *See* Kelley, *supra* note 74, at 106 (addressing a split in judicial views on "whether, in the absence of an express provision, there exists an implied covenant to use reasonable efforts to overcome the *force majeure* event"); *cf.* Sun Operating P'ship v. Holt, 984 S.W.2d 277, 283 (Tex. App.—Amarillo 1998, pet. denied) (criticizing the trial court's jury instruction as rewriting the contract because the provision did not obligate "the lessee to 'exercise[] due diligence and take all reasonable steps to avoid, remove and overcome the *effects* of 'force majeure'" and made no requirement that the lessee "act reasonably to *remediate* the result caused by the force majeure event" (alteration in original)).

179. *See, e.g.*, Frost Nat'l Bank v. Matthews, 713 S.W.2d 365, 367 (Tex. App.—Texarkana 1986, writ ref'd n.r.e.) (interpreting a force majeure clause that suspended the lessee's obligation to comply with the lease due to "operation of force majeure, [or] any [f]ederal or [s]tate law or any order, rule of regulation of governmental authority").

180. *See* Stroud Prod., LLC v. Hosford, 405 S.W.3d 794, 816 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (Keyes, J., dissenting) (reciting a force majeure provision that only included "federal or state law" as a qualifying governmental restraint).

181. *See* E. Air Lines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957, 963 n.6 (5th Cir. 1976) (analyzing a force majeure clause that defined force majeure events as "any act of government, governmental priorities, allocation regulations or orders affecting materials"); URI Cogeneration Partners, LP v. Bd. of Governors for Higher Educ., 915 F. Supp. 1267, 1276 (D.R.I. 1996) (rejecting a force majeure defense under a clause that included "appropriation or diversion of steam energy, equipment, materials or commodities by rule or order of any governmental or judicial authority having jurisdiction thereof; any changes in applicable laws or regulations affecting performance").

182. *See* Hydrocarbon Mgmt., Inc. v. Tracker Expl., Inc., 861 S.W.2d 427, 435 (Tex. App.—

include: "any federal or state law, or any order, rule or regulation of governmental authority";[183] "any laws, orders, rules, regulations, acts, or restraints of any governmental body or authority, civil or military";[184] and "any law, order, rule or regulation, (whether or not subsequently determined to be invalid)."[185] Conversely, a narrower clause might merely state a "inability to obtain equipment due to governmental order or action, . . . regulation by [s]tate or [f]ederal action" qualifies as an act of force majeure.[186] By excluding a broad phrase for government actions[187] or by failing to list acts of local, municipal, or regulatory bodies,[188] the parties might enable a court adopting a narrow interpretation to hold a specific governmental act is outside the purview of the force majeure clause because an event must be recited in the clause to excuse performance.[189]

However, when analyzing the force majeure clause's scope, most courts broadly interpret definitions of governmental interference.[190] Courts

Amarillo 1993, no writ) (reviewing a force majeure clause that provided "any [f]ederal or state law or any order, rule or regulation *of governmental authority* asserting jurisdiction" qualified as a force majeure contingency (emphasis added)); *see also Frost Nat'l Bank*, 713 S.W.2d at 367 (quoting a clause that listed "any [f]ederal or [s]tate law or any order, rule of regulation of governmental authority").

183. Landry v. Flaitz, 157 So. 2d 892, 896 (La. 1963) (emphasis omitted).

184. Golsen v. ONG W., Inc., 756 P.2d 1209, 1211 (Okla. 1988).

185. Erickson v. Dart Oil & Gas Corp., 474 N.W.2d 150, 155 (Mich. Ct. App. 1991); *see also* PPG Indus., Inc. v. Shell Oil Co., 727 F. Supp. 285, 287 (E.D. La. 1989) (indicating the force majeure clause defined "compliance with any law, regulation, order, recommendation, or request of any governmental authority" as a qualifying contingency), *aff'd*, 919 F.2d 17 (5th Cir. 1990). In addition, some clauses specifically delineate multiple, distinct types of governmental action as excusing events, such as decisions regarding the issuance of permits. *See, e.g.*, Perlman v. Pioneer P'ship, 918 F.2d 1244, 1246 (5th Cir. 1990) (per curiam) (listing "inability to obtain governmental permits or approvals necessary or convenient to [l]essor's operations" as a force majeure contingency (emphasis omitted)).

186. Lamczyk v. Allen, 134 N.E.2d 753, 754 (Ill. 1956).

187. *Compare id.* (quoting the force majeure clause which limited qualifying government restraints to federal and state regulations or inability to obtain equipment due to governmental interference, without including a catch all phrase pertaining to acts of the government), *with Hydrocarbon Mgmt.*, 861 S.W.2d at 435 (including "any [f]ederal or state law or any order, rule or regulation *of governmental authority* asserting jurisdiction" (emphasis added)).

188. *See* Stroud Prod., LLC v. Hosford, 405 S.W.3d 794, 816 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (Keyes, J., dissenting) (quoting the force majeure clause which limited acts of government to "federal or state law"); *see also* Frost Nat'l Bank v. Matthews, 713 S.W.2d 365, 367 (Tex. App.—Texarkana 1986, writ ref'd n.r.e.) (indicating the force majeure clause included "any [f]ederal or [s]tate law or any order, rule of regulation of governmental authority" in its scope).

189. *See* Kel Kim Corp. v. Cent. Mkts., Inc., 519 N.E.2d 295, 296 (N.Y. 1987) (concluding nonperformance will only be excused if the event is specifically included in the force majeure clause (citing United Equities Co. v. First Nat'l City Bank, 363 N.E.2d 1385 (N.Y. 1977) (mem. op.))).

190. *See* Pletcher & Zoobkoff, *supra* note 62, § 17.04[3][d][v], at 17-22 to -23 (recognizing the specific lists of governmental acts found in the force majeure clause are broadly interpreted (citing E. Air Lines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957, 994–96 (5th Cir. 1976))). Indeed, one commentator noted a broad range of governmental acts are recognized as force majeure events. Kirkham, *supra* note 64, § 6.03[4], at 6-14. This approach is akin to how courts interpret governmental

recognize the clauses are "directed at governmental action generally."[191] Based upon that reasoning, an injunction issued by a state court was held to qualify under a clause that limited force majeure events to "all [f]ederal and [s]tate *[l]aws*, *[e]xecutive [o]rders*, [r]ules or [r]egulations."[192] The court concluded the court order "was an intervening act by the state" as it was issued by a state court and carried the full force of state law.[193] Other courts have also viewed forms of governmental interference as force majeure events, even though the clause at issue did not specifically list that particular type of event.[194] Indeed, as the United States Court of Appeals for the Fifth Circuit concluded when interpreting a generally worded clause, "fundamentally coercive acts of [g]overnment, *whatever* their form, constitute an excuse for breach."[195] In that case, the defendant was sued for delivery

interferences under the common law defenses. *See E. Air Lines*, 532 F.2d at 994 (noting neither the common law defenses nor the force majeure defense require technical or formal governmental actions); Kirkham, *supra* note 64, § 6.03[4], at 6-14 (equating this form of restraint on performance with "impossibility by legal prohibition" (quoting RSB Mfg. Corp. v. Bank of Baroda, 15 B.R. 650, 654 (S.D.N.Y. 1981))). The doctrine of impracticality acknowledges a supervening governmental intervention may "emanate from any level of government" and that distinctions between technical terms (such as regulation, law, and order) should be disregarded. RESTATEMENT (SECOND) OF CONTRACTS § 264 cmt. b (AM. LAW INST. 1981).

191. N. Nat. Gas Co. v. Approx. 9117 Acres in Pratt, Kingman, & Reno Ctys., 114 F. Supp. 3d 1144, 1155 (D. Kan. 2015) (first citing Fransen v. Conoco, Inc., 64 F.3d 1481, 1488 (10th Cir. 1995); and then citing Watts v. Atl. Richfield Co., 115 F.3d 785, 795 (10th Cir. 1997)), *appeal docketed*, No. 15-3286 (10th Cir. Nov. 17, 2015).

192. *Id.* at 1155–56 (emphasis added). Since the clause specifically only listed "*executive* orders," the lessor contended that a judicial order did not qualify as evinced by the plain language of the clause. *Id.* at 1156. The court rejected this argument and indicated this would contradict the portion of the clause referencing federal and state laws since those laws "are governmental restraints enacted by legislatures and applied to specific cases by the courts." *Id.*

193. *Id.*

194. *See* Frost Nat'l Bank v. Matthews, 713 S.W.2d 365, 367–68 (Tex. App.—Texarkana 1986, writ ref'd n.r.e.) (holding a regulatory agency's shut in of a well "clearly . . . within the language of the lease's *force majeure* provision" as the clause listed "any [f]ederal or [s]tate law or any order, rule of regulation of governmental authority," although it did not specifically reference shut-in orders). Alternatively, many opinions do not even acknowledge that the form of the governmental action complained of is not specifically listed in the clause and, instead, reject the force majeure defense on other grounds. *See* Baldwin v. Kubetz, 307 P.2d 1005, 1009–10 (Cal. Dist. Ct. App. 1957) (indicating an ordinance did not hinder the lessee's performance instead of rejecting the defense on the basis that the clause did not list municipal ordinances as force majeure contingencies); Erickson v. Dart Oil & Gas Corp., 474 N.W.2d 150, 155–56 (Mich. Ct. App. 1991) (declining to accept a lessee's force majeure defense under the control element, but failing to indicate "bureaucratic delay" was not listed in the force majeure provision relied upon); Edington v. Creek Oil Co., 690 P.2d 970, 973–74 (Mont. 1984) (rejecting a force majeure defense under the control element instead of holding a shut-in order was not mentioned in the force majeure clause).

195. *E. Air Lines*, 532 F.2d at 994 (emphasis added). The court stated precedent adopts this view regardless of whether the defense is predicated upon a force majeure provision or the common law impossibility defense. *Id.*

delays caused by its compliance with the federal government's informal and indirect "'jawboning' policy," which required the aviation industry to afford preference to military projects over civilian production during the Vietnam war.[196] The purchaser refuted the seller's defense, alleging the government's policy could not be viewed as an act of government due to its illegal and unconstitutional nature because it was not set forth in a formal published regulation, as required by statute.[197] The Fifth Circuit rejected this argument and recognized that even invalid or informal acts of government can qualify as force majeure events.[198] As the court explained, nonperformance is excused when it is caused by a government order, even where that intervening government act is "technically deficient" or "illegal," and regardless of "how informally presented or politely phrased that demand may have been."[199] The court, therefore, held the defendant had a viable force majeure defense due to its good faith compliance with an informal governmental policy imposed upon the entire aviation industry.[200]

However, not all courts are as lenient when determining if an intervening government act is within a force majeure clause's scope. In a case brought under a force majeure provision contained in both a regulation and a lease, a lower court held the event did not qualify as a force majeure contingency because the regulation merely listed decisions made by *judicial bodies*, while the order the lessee claimed hindered performance was issued by a *quasi-judicial* body.[201] In addition, a United States District Court judge refuted a defendant's force majeure defense because the clause did not specifically include "'failure to obtain zoning approval' among the parade of horribles triggering" the defense.[202]

2. Governmental Actions Causing Nonperformance

Courts also vary in analyzing the causation prong of the defense when the alleged act of force majeure is governmental action impeding performance. As explained above, courts often require a force majeure event to actually

196. *Id.* at 964. Apparently, the aviation industry agreed to the informal policy. *Id.* at 983.

197. *Id.* at 992. The force majeure clause encompassed "any act of government, governmental priorities, allocation regulations or orders affecting materials. *Id.* at 963 n.6.

198. *Id.* at 994, 996.

199. *Id.* at 994–95, 995 n.107.

200. *Id.* at 996.

201. Alaskan Crude Corp. v. Alaska, Dep't Nat. Res., Div. of Oil & Gas, 261 P.3d 412, 418 (Alaska 2011). On appeal, the Supreme Court of Alaska affirmed the lower court while declining to rule as to whether a quasi-judicial body qualifies as a judicial body under the force majeure provision. *Id.* at 420 n.32, 422.

202. URI Cogeneration Partners, LP v. Bd. of Governors for Higher Educ., 915 F. Supp. 1267, 1287 (D.R.I. 1996).

hinder the lessee's ability to perform and view the mere speculation of interference as insufficient.[203] In *Perlman*, a lessee was attempting to produce coal seam gas using his own patented process and declared force majeure when the regulatory body refused to permit the process absent studies analyzing its potential impact on water resources.[204] The lessee unilaterally determined his performance was prevented and neither sought the permits nor attempted to begin performing using production processes other than his own.[205] The court stressed that to excuse compliance with lease obligations "an actual, material hindrance must occur."[206] Therefore, the lessee's force majeure defense was rejected as the court concluded his "self-serving conclusion that a force majeure condition existed was" merely speculative as to what would have occurred if the lessee attempted to perform.[207] Accordingly, where a law or regulation does not absolutely preclude performance but merely sets a condition precedent the lessee fails to comply with, courts reject the defense on causation grounds.[208] Actual hindrance of performance does occur, however, where a lessee's operations are shut in or suspended by a governmental body,[209] subject to certain limitations explored below in the discussion of the common law control element.[210]

Other courts appear less demanding when reviewing whether governmental intervention must actually hinder a party's nonperformance,

203. Perlman v. Pioneer P'ship, 918 F.2d 1244, 1248 (5th Cir. 1990) (per curiam).

204. *Id.* at 1246–47.

205. *Id.* at 1247, 1249.

206. *Id.* at 1249.

207. *Id.*

208. *See* Baldwin v. Kubetz, 307 P.2d 1005, 1009–10 (Cal. Dist. Ct. App. 1957) (denying the lessee relief since the zoning ordinance did not bar drilling but instead provided for a zoning exception upon fulfilling a condition precedent, which involved showing it was probable oil was underneath the tract and the lessee had the owner's permission to apply); Landry v. Flaitz, 157 So. 2d 892, 897 (La. 1963) (rejecting a claim that force majeure excused production obligations while awaiting the formation of a unit and issuance of an allowable since a temporary allowable would have been issued upon satisfactorily filing a plat and establishing that the operators owned the surrounding leases).

209. *See* Hunter Co. v. Vaughn, 46 So. 2d 735, 736 (La. 1950) (concluding the lessee's "right to drill a well on the tract covered by the lease was in effect taken away from them by the" commission's pooling order); Kuykendall v. Helmerich & Payne, Inc., 741 P.2d 869, 871 (Okla. 1987) (determining the force majeure provision excused the lessee's drilling obligations where an application imposed a statutory drilling prohibition during pendency of an administrative spacing proceeding); Frost Nat'l Bank v. Matthews, 713 S.W.2d 365, 368 (Tex. App.—Texarkana 1986, writ ref'd n.r.e.) (holding Railroad Commission shut-in orders are "clearly" covered by the language of the force majeure provision and, thus, "the lease shall be extended while and so long as the lessee is prevented by the order of a governmental authority from producing gas from the leased premises").

210. *See infra* notes 241–52 and accompanying text.

however.[211] The Fifth Circuit went as far as to indicate that a party can be excused from performance without resisting the governmental act and that the mere anticipation of governmental action can suffice to excuse contractual duties.[212] Indeed, the court went on indicate "the 'apprehension of restraint, something much less than actual government compulsion, may suffice to dissolve the obligation of a contract.'"[213]

In addition, if there are multiple causes for nonperformance, not all of which are listed in the force majeure clause, a defendant can still establish causation if one of the enumerated contingencies that occurred was capable of hindering performance by itself.[214] Therefore, in reviewing a defense that claimed multiple contingencies qualified under the "acts of the government . . . or other causes beyond the control of the [l]essee" phrases in the clause,[215] the court analyzed which event actually resulted in nonperformance.[216] The court determined that the various governmental actions did not actually impede the operator's performance, but rather they merely made operations unprofitable and aggravated the operator's financial struggles.[217] Instead, the court attributed nonperformance to the operator's financial difficulties, which were exacerbated by an unexpected

211. *See* N. Nat. Gas Co. v. Approx. 9117 Acres in Pratt, Kingman, & Reno Ctys., 114 F. Supp. 3d 1144, 1164 (D. Kan. 2015) (accepting an argument that a state court order precluded a parties' performance although it was not a complete bar to production but rather made complying with lease obligations unreasonably expensive or burdensome by depriving the lessee of payments for gas sold from its wells), *appeal docketed*, No. 15-3286 (10th Cir. Nov. 17, 2015).

212. E. Air Lines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957, 994 (5th Cir. 1976).

213. *Id.* at 995 (quoting The Claveresk, 264 F. 276, 282 (2d Cir. 1920).

214. *See* Wheeling Valley Coal Corp. v. Mead, 186 F.2d 219, 222 (4th Cir. 1950) (recognizing the occurrence of a specified event may materially contribute to the "embarrassment of the parties" failing to perform, but the enumerated contingency must be capable of preventing performance on its own to provide an excuse and will not provide a defense merely because it happened in combination with unspecified contingencies (quoting Hellenic Transp. S.S. Co. v. Archibald McNeil & Sons Co., 273 F. 290, 296 (D. Md. 1921))); *see also* Pletcher & Zoobkoff, *supra* note 62, § 17.04[4][b], at 17-25 (reporting courts tend to reject the defense if multiple events caused "nonperformance, only one of which was an event of force majeure enumerated under the contract" (citing *Wheeling Valley*, 186 F.2d at 223)).

215. *See Wheeling Valley*, 186 F.2d at 221 (analyzing a defense based upon a clause that listed "fire, flood, explosion, damage to or destruction of improvements or equipment, riots, strikes, work stoppage, acts of God, acts of the government, acts of the public enemy, failure of car or river transportation facilities for coal, or other causes beyond the control of the [l]essee" as excusing conditions).

216. *See id.* at 221–23 (challenging the lessee's claim that government actions prevented performance, as opposed to merely making performance unprofitable, and examining other factors causing nonperformance, such as the financial restraints of the bankrupt lessee).

217. *See id.* at 221. The court determined the government's seizure of the mines did not halt operations as evinced by their continued operation following the seizure. *Id.* Furthermore, while governmental regulations increased production expenses and restricted the selling price of produced coal, the regulations alone did not cause operations to cease. *Id.*

lawsuit, the operator's loss of customers, governmental control of the mine, and the regulations' effect on market conditions.[218] Interpreting the catch all provision, the court restricted the clause's scope to events that would "directly and of themselves prevent" operations and held it did not encompass the financial difficulties and unprofitable performance the operator faced.[219] In undergoing its analysis, the court stated:

> "It is not sufficient that the happening of one [specified contingency] adds materially to the . . . embarrassment of the parties relying on it, if nevertheless it is still possible to perform. . . . If by itself it [the restraint] could not have prevented performance, it will not excuse merely because, in combination with nonexcepted c[]auses, it did so."[220]

Since the happening of the specified contingency (governmental interference) did not alone cause nonperformance, the court held that the event's occurrence, even when coupled with the combination of the other events that together impeded performance, did not qualify.[221]

As indicated above, courts tend to reject force majeure defenses on causation grounds when the defense is predicated upon governmental actions igniting adverse economic events, meaning those that render performance costlier than anticipated or that impact the profitably of performance.[222] Yet in many of those opinions, an impossibility standard was applied or the contract at issue was a fixed-price contract pursuant to which each party assumes the risk of shifting market conditions.[223] Thus,

218. *Id.* at 221, 223.

219. *See id.* at 222 (interpreting the phrase "causes beyond the control of the lessee" under the doctrine of *ejusdem generis*).

220. *Id.* (second, third, and fourth alteration in original) (quoting Hellenic Transp. S. S. Co. v. Archibald McNeil & Sons Co., 273 F. 290, 297 (D. Md. 1921)).

221. *See id.* at 222–23 (concluding "acts or causes which in conjunction with others merely render such operations unprofitable" did not qualify because the real causes of nonperformance, even when considered in combination with specified events, were not contemplated by the clause (citations omitted)).

222. *See supra* notes 134–36 and accompanying text.

223. *See* N. Ind. Pub. Serv. Co. v. Carbon Cty. Coal Co., 799 F.2d 265, 278 (7th Cir. 1986) ("[A] fixed-price contract is an explicit assignment of the risk of market price increases to the seller and the risk of market price decreases to the buyer . . . ."); Golsen v. ONG W., Inc., 756 P.2d 1209, 1212–13 (Okla. 1988) (analyzing a force majeure clause set forth in a take-or-pay contract under which parties intentionally assume the risk of price fluctuations, and recognizing a distinction between performance that becomes impossible versus that which becomes "more difficult or expensive than at the time the contract was entered into"); *see also* Seaboard Lumber Co. v. United States, 308 F.3d 1283, 1293 (Fed. Cir. 2002) (rejecting a force majeure defense based upon "governmental fiscal or monetary policy decisions" that rendered performance unprofitable, and reasoning that force majeure clauses do not protect parties from ordinary contractual risks, such as market price fluctuations in the context of a

in rejecting such force majeure claims, courts frequently ground their analysis in the purpose of fixed-price contracts, stating: "A force majeure clause is not intended to buffer a party against the normal risks of a contract. The normal risk of a fixed-price contract is that the market price will change."'[224] Indeed, one author noted this distinction, stating: "As a general rule, adverse economic conditions are not considered to be *force majeure* events—at least with regard to fixed-price contracts."[225] On the other hand, when confronted with a force majeure defense arising under an oil and gas lease, some courts have accepted or entertained the argument under the impracticability standard.[226] For example, a federal district court found governmental actions igniting adverse economic circumstances caused multiple lessees' nonperformance.[227] A formation the lessees were producing from was subject to a condemnation action, and to qualify for compensation, the lessees had to show the leases were valid on the date of the taking.[228] Yet, the wells were shut in over a year before the taking, and

fixed price contract). Similarly, the Restatement Second of Contracts rejects the applicability of the doctrine of impracticability to performance that becomes more difficult or expensive due to events such as increased wages, costs of construction, or the price of raw materials since fixed-price contracts are intended to cover such risks. RESTATEMENT (SECOND) OF CONTRACTS § 261 cmt. d (AM. LAW INST. 1981). To qualify as impracticable performance under a fixed-price contract, the difficulty or expense must be "well beyond the normal range. *Id.*

224. *Seaboard Lumber*, 308 F.3d at 1293 (quoting *N. Ind. Pub. Serv. Co.*, 799 F.2d at 275); *see also* Sabine Corp. v. ONG W., Inc., 725 F. Supp. 1157, 1171 (W.D. Okla. 1989) (declining to interpret a force majeure clause in a way that would render the provisions of a take-or-pay contract nugatory because under such a contract, one party assumes the risk of market declines (citations omitted)); Valero Transmission v. Mitchell Energy, 743 S.W.2d 658, 663–64 (Tex. App.—Houston [1st Dist.] 1987, no writ) (holding "a sudden or significant change in price, or the fact that one of the parties may gain or lose during a particular period of the contract, is not sufficient to constitute an extraordinary, unforeseeable event that would excuse performance under the force majeure clause" in a long-term contract because parties are often motivated to enter such contracts due to the uncertainty of future market conditions and to avoid risking price fluctuations by fixing the price (citing Mainline Inv. Corp. v. Gaines, 407 F. Supp. 423, 427 (N.D. Tex. 1976))).

225. Stonestreet, *supra* note 87, § 5.04[1], at 162.

226. *See, e.g.*, Butler v. Nepple, 354 P.2d 239, 244–45 (Cal. 1960) (en banc) (indicating performance could be excused under a force majeure clause upon proof of extreme and unreasonable price). Performance is impracticable if "it can only be done at an excessive and unreasonable cost. Mineral Park Land Co. v. Howard, 156 P. 458, 460 (Cal. 1916) (citation omitted). However, adverse economic conditions do not suffice where performance is merely more expensive than anticipated or if it would simply entail a loss upon the party. *Id.*

227. *See* N. Nat. Gas Co. v. Approx. 9117 Acres in Pratt, Kingman, & Reno Ctys., 114 F. Supp. 3d 1144, 1164 (D. Kan. 2015) (bemoaning the argument that performance was not impossible as neither the clause nor the common law doctrines require absolute impossibility (citing RESTATEMENT (SECOND) OF CONTRACTS § 261 (AM. LAW INST. 1981))), *appeal docketed*, No. 15-3286 (10th Cir. Nov. 17, 2015).

228. *See id.* at 1151–53, 1160, 1165, 1167, 1169 (considering the lessees' motions for summary judgment that sought a ruling deeming the leases in effect on the date of the taking as to the formations

the landowners argued the leases terminated in the absence of production.[229] The lessees asserted a force majeure defense, contending they were precluded from meeting production obligations by two court injunctions: one suspending receipt of payment for gas sales, which was entered a month prior to shutting in the wells, and another enjoining production, which took effect months after the shut ins.[230] The court conceded the first order "was not an absolute bar" to production but held absolute performance was not required and, rather, the force majeure clause saved the leases from termination when the lessees' ability to produce became impracticable.[231] In rejecting the notion that the shut ins were a voluntary business decision, the court stated: "No operator could continue to produce gas for any appreciable length of time in the fact of a court order cutting off all gas payments."[232] Finding the causation element satisfied because the order suspending payment for gas sales "effectively strangled" the lessees' ability to produce, the court held the leases were saved by operation of force majeure and valid on the date of the taking.[233]

3. The Common Law Elements and Governmental Interferences

The common law elements of foreseeability and control are frequently implicated when analyzing claims that an act of government prevented performance. While some courts explicitly hold a governmental interference alleged to be an act of force majeure does not have to be an unforeseeable event or opt to simply remain silent on the issue,[234] other

from which they produced so that the lessees could "share in the compensation paid for the tracts taken").

229. *See id.* at 1152 (reciting the landowners' argument that the leases terminated upon cessation of production). Except for one well, all of the lessees ceased producing in July 2010 while "the date of taking was March 30, 2012. *Id.* at 1148, 1153, 1160, 1162, 1167.

230. *See id.* at 1153 (indicating the first injunction required gas purchasers to withhold payments for gas sales and the second injunction, issued on December 22, 2010, prohibited operators from producing from a certain formation in February 2011).

231. *See id.* at 1164 (concluding the court injunction prohibiting gas sale payments effectively rendered a lessee's performance of production obligations impracticable, "which was sufficient to invoke the force majeure clauses," even though the lessee was not absolutely prevented from performing until the second order enjoining production took effect months late).

232. *See id.* at 1154 n.10. The court harshly rejected the business decision contention, stating: "That's like arguing that closing the air valve on a scuba diver's tank does not bar the diver from continuing to breathe." *Id.*

233. *See generally id.* at 1156, 1158, 1164–66, 1169 (accepting the lessees' force majeure defenses).

234. *See* Perlman v. Pioneer P'ship, 918 F.2d 1244, 1248 (5th Cir. 1990) (per curiam) (rejecting the trial court's conclusion that a regulatory body's actions had to be unforeseeable since the force majeure clause did not contain that requirement); E. Air Lines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957, 991–92 (5th Cir. 1976) (limiting the application of the unforeseeability requirement to events falling under the catch all provision, and concluding that where an act of force majeure was

courts unequivocally state parties are presumed to enter contracts with knowledge of preexisting laws and regulations.[235] Courts making that statement also frequently acknowledge that parties enter leases aware of regulatory agencies' authority to control production[236] and of potential delays inherent in the permitting processes.[237]

A statement of those foreseeability presumptions frequently precedes application of the control requirement.[238] Accordingly, such recitations are often followed by a conclusion that governmental actions resulting from a party's noncompliance with a law or regulation cannot support a force majeure defense where the circumstance was within the party's control.[239]

anticipated by specifically listing it in the clause, as acts of government were, the event qualifies as a force majeure contingency regardless of its foreseeability). *See generally* Kuykendall v. Helmerich & Payne, Inc., 741 P.2d 869, 871 (Okla. 1987) (remaining silent on whether governmental infringement must be unforeseeable when deciding the force majeure clause excused performance because the lessee was statutorily prohibited from performing during the pendency of an administrative proceeding); Frost Nat'l Bank v. Matthews, 713 S.W.2d 365, 368 (Tex. App.—Texarkana 1986, writ ref'd n.r.e.) (deeming a regulatory agency's shut-in order a triggering circumstance within the force majeure clause without mentioning any unforeseeability requirement).

235. 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. Civ. App. 1976, writ ref'd n.r.e.)); Atkinson Gas Co. v. Albrecht, 878 S.W.2d 236, 241 (Tex. App.—Corpus Christi 1994, writ denied) (first citing Hydrocarbon Mgmt., Inc. v. Tracker Expl., Inc., 861 S.W.2d 427, 436 (Tex. App.—Amarillo 1993, no writ); and then citing *Hughes*, 540 S.W.2d at 745); *Hydrocarbon Mgmt.*, 861 S.W.2d at 436 (first citing TEX. NAT. RES. CODE ANN. § 86.090(d) (Vernon 1993); and then citing *Hughes*, 540 S.W.2d at 744–45)); Goldstein v. Linder, 648 N.W.2d 892, 899 (Wis. Ct. App. 2002) (quoting *Erickson*, 474 N.W.2d at 155); *see also* Baldwin v. Kubetz, 307 P.2d 1005, 1008 (Cal. Dist. Ct. App. 1957) (pointing out the defendant was aware an exception to a zoning ordinance was required when the lease was acquired).

236. *See Hydrocarbon Mgmt.*, 861 S.W.2d at 436 (imposing a presumption of knowledge regarding the regulatory commission's ability to shut in a well because of overproduction (first citing TEX. NAT. RES. § 86.090(d); and then citing *Hughes*, 540 S.W.2d at 744–45)); *Atkinson Gas Co.*, 878 S.W.2d at 241 (including regulatory shut-in orders within the presumption of awareness of laws and regulations applicable to parties of an oil and gas lease (first citing *Hydrocarbon Mgmt.*, 861 S.W.2d at 436; and then citing *Frost Nat'l Bank*, 713 S.W.2d at 368)).

237. *Compare Erickson*, 474 N.W.2d at 156 (denying the lessee protection under the force majeure clause because the progress of its permit application was within its control and it failed to provide adequate time "for the predictable timing of the permit process"), *and Goldstein*, 48 N.W.2d at 899 ("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." (quoting *Erickson*, 474 N.W.2d at 155)), *with Kuykendall*, 741 P.2d at 871 (neglecting to mention any such presumption when holding administrative delays while a spacing application was pending statutorily prohibited the lessee from performing its drilling obligations and warranted application of the force majeure clause).

238. *Hydrocarbon Mgmt.*, 861 S.W.2d at 436–37 (stating the presumption and then holding a regulatory commission's shut in of a well was not an act of force majeure since it resulted from the lessee's overproduction, which was in violation of the agency's requirements and within the lessee's control).

239. *See Erickson*, 474 N.W.2d at 155–56 (setting forth the presumption before holding performance was not excused where the delay in obtaining a permit was attributable to the lessee and

Thus, the force majeure clause does not suspend performance and contract termination if the governmental interference "is brought about and continued in force by the wrongful or improper action of the lessees."[240]

However, applicability of the common law control element normally depends upon whether it is incorporated in the clause through the use of a catchall provision.[241] In *Hydrocarbon Management, Inc. v. Tracker Exploration, Inc.*,[242] an operator overproduced the well's assigned allowable, resulting in an agency ordering the well shut in until the overproduction was accounted for.[243] The operator requested to forego the shut in and, instead, make up for the overproduction by producing at a reduced rate.[244] The agency acquiesced but warned it would shut in the well upon a violation of the reduced rate.[245] A subsequent violation resulted in the agency canceling the reduced rate and shutting in the well.[246] Because the force majeure clause included the phrase "occurrence or circumstance not within the reasonable control of lessee," the court held the lessees could not rely upon the clause without establishing that the shut in "constituted an event beyond

was not caused by circumstances beyond its control since the lessee wasted valuable days and there was no unreasonable or unusual bureaucratic delay); *Atkinson Gas Co.*, 878 S.W.2d at 241–42 (placing its statement of the presumption prior to its conclusion that an agency's shut in of a well that resulted from a lessee's noncompliance with the agency's reporting requirements was conduct within its control and did not constitute an act of force majeure).

240. Edington v. Creek Oil Co., 690 P.2d 970, 974 (Mont. 1984). In that case, production was halted by a shut-in order stemming from saltwater seepage. *Id.* at 973. Since the lessee could have corrected the leakage issue by sealing the pit or seeking a variance from the regulatory agency to make the seepage permissible and thereby continue producing, the shut in was not an act of force majeure outside of the lessee's control. *Id.* at 973–74.

241. *See* Perlman v. Pioneer P'ship, 918 F.2d 1244, 1248 (5th Cir. 1990) (per curiam) (concluding a regulatory agency's refusal to issue a permit did not have to be beyond the lessee's control because the clause did not integrate the element into the defense); *Hydrocarbon Mgmt.*, 861 S.W.2d at 436 (basing its requirement that an agency's shut in of a well be outside the operator's control explicitly upon the catch all provision that included an "occurrence or circumstance not within the reasonable control of lessee"); *see also Erickson*, 474 N.W.2d at 155–56 (denying a lessee's invocation of a force majeure clause, which said "any other cause[] . . . beyond the reasonable control of the lessee," because its failure to obtain a permit was within its control); *Edington*, 690 P.2d at 973–74 (rejecting a force majeure defense because preventing and solving the agency's shut in was within the lessee's control under a clause that concluded with a catch all provision that stated "or any other cause . . . *beyond the reasonable control of lessee*"); *cf. Frost Nat'l Bank*, 713 S.W.2d at 367–68 (applying a force majeure clause that did *not* contain control language, and accepting the defense predicated upon a shut-in order that was issued because the previous operator produced without receiving a required, assigned allowable).

242. Hydrocarbon Mgmt., Inc. v. Tracker Expl., Inc., 861 S.W.2d 427 (Tex. App.—Amarillo 1993, no writ).

243. *Id.* at 431.

244. *Id.*

245. *Id.* at 436.

246. *Id.* The operator did not receive the agency's letter until the well ceased producing for other reasons. *Id.* at 431.

their reasonable control."[247] The clause did not save the lease since the shut-in order was the result of the operators' failure to adhere to the agency's requirement, which was within their reasonable control.[248] On the other hand, in *Frost National Bank v. Matthews*,[249] a force majeure defense was asserted under a clause that failed to mention the control element.[250] The Texas Railroad Commission shut in a well because the operator violated its regulations.[251] The court held the clause excused performance and extended the lease "while and so long as the lessee [wa]s prevented by the order of a governmental authority from producing gas from the leased premises."[252] Indeed, as one author has acknowledged, a governmental

247. *Id.* at 436.

248. *Id.* at 436–37.

249. Frost Nat'l Bank v. Matthews, 713 S.W.2d 365 (Tex. App.—Texarkana 1986, writ ref'd n.r.e.).

250. *Id.* at 367–68.

251. *Id.* at 368.

252. *Id.* Notably, in both *Hydrocarbon Management* and *Frost National Bank*, the shut-in orders were the result of a previous operator's regulatory violations. *See id.* at 368 (noting the previous operator brought about the issuance of the shut-in order by producing without an assigned allowable); *see also Hydrocarbon Mgmt.*, 861 S.W.2d at 431 (indicating the well was shut in a month before the lessee became the successor to the previous operator). Presumably, the regulatory violation in *Frost National Bank* was not a bar to the force majeure defense because the force majeure defense did not include the control element. *Compare Frost Nat'l Bank*, 713 S.W.2d at 367–68 (concluding a force majeure clause, which contained no language requiring an event to be beyond a party's control, covered a shut-in order resulting from a regulatory violation), *with Hydrocarbon Mgmt.*, 861 S.W.2d at 436 (explaining the shut-in order must be beyond the lessee's control because the clause stated "occurrence or circumstance not within the reasonable control of lessee"). However, a later case interpreted these two opinions and overlooked the distinction between clauses that do or do obtain the control terminology and the fact that the shut-in orders, in both cases, were issued because of the previous operator's violations. It construed *Frost National Bank* to stand for the principle that governmental interferences do *not* bar the defense if they arise "from events beyond the *present* lessee's control." Atkinson Gas Co. v. Albrecht, 878 S.W.2d 236, 241 (Tex. App.—Corpus Christi 1994, writ denied) (emphasis added) (citing *Frost Nat'l Bank*, 713 S.W.2d at 368). Relying upon the *Hydrocarbon Management* and *Frost National Bank* decisions, the court indicated a force majeure clause does not encompass shut-in orders issued because of "the lessee's failure to comply with [the agency's] regulations, at least *when compliance with the regulation is within the reasonable control of the lessee*." *Id.* (emphasis added) (first citing *Hydrocarbon Mgmt.*, 861 S.W.2d at 436; and then citing *Frost Nat'l Bank*, 713 S.W.2d at 368). It, therefore, rejected the defense because the shut-in order resulted from the lessee violating reporting requirements, which it indicated was the lessee's "own conduct." *Id.* at 242. The clause before the court, however, failed to include a catch all provision that incorporated the control element. *See generally id.* at 241 (quoting the force majeure clause that did not utilize "control" terminology). Therefore, the court seemingly overlooked the fact that (1) *Frost* can be explained by the absence of control language in the clause at issue; (2) the court in *Hydrocarbon Management* relied upon the clause's explicit invocation of the control element when applying the element; and (3) the shut-in orders in both cases were caused by previous operators' conduct. *See Hydrocarbon Mgmt.*, 861 S.W.2d at 436 (basing its holding that the shut in must have been beyond the operators' control on the clause's use of a catch all phrase that said "not within the reasonable control of lessee," and stating the violation was committed by the previous operator); *Frost Nat'l Bank*, 713 S.W.2d at 367–68 (failing to analyze who brought about the violation and remaining

action resulting from conduct within the lessee's control may defeat the defense, but the control inquiry should be disregarded "if the force majeure clause does not mandate that the event be . . . beyond the control of the lessee."[253]

In discussing the mitigation element, courts focus on the nonperforming party's ability to remediate the governmental interference.[254] For example, the regulatory agency in *Perlman* would not permit production using the lessee's patented process absent a study on the process's impact on water resources.[255] Given the clause's requirement that the lessee exert reasonable effort in removing a force majeure event, the Fifth Circuit noted the defense collapsed on mitigation grounds because the lessee should have tried to overcome or remove the alleged force majeure event.[256] The requirement would have been satisfied had the lessee initiated the available permitting process or attempted to use an alternative drilling process that produced less water than his process, thus, easing regulatory stringencies.[257] Notably, the court's mitigation reasoning mirrored its rejection of the defense on causation grounds.[258]

Unlike *Perlman* where permits were available upon satisfying a condition precedent,[259] Judge Posner took a far less stringent approach when presented with an indefinite shut down on the licensing process for nuclear fuel reprocessing, which equated to a moratorium or complete ban.[260] The ban, an act of regulatory force majeure, prevented a nuclear reprocessing

silent on the control element).

253. 30 WILLISTON & LORD, *supra* note 97, § 50:58.

254. *See* Erickson v. Dart Oil & Gas Corp., 474 N.W.2d 150, 155 (Mich. Ct. App. 1991) ("A lessee's failure to explore or utilize available options to overcome the delaying condition can constitute a lack of due diligence." (citing Woods v. Ratliff, 407 So. 2d 1375, 1378–79 (La. App. 1981))); *see also* Sun Operating P'ship v. Holt, 984 S.W.2d 277, 283 (Tex. App.—Amarillo 1998, pet. denied) (describing the mitigation element to require a nonperforming party to diligently *remediate after* a force majeure event occurs).

255. Perlman v. Pioneer P'ship, 918 F.2d 1244, 1249 (5th Cir. 1990) (per curiam).

256. *Id.*

257. *Id.*

258. Before reaching the mitigation analysis, *Perlman* first rejected the force majeure claim on causation grounds, holding the lessee was not actually hindered by any regulation or regulatory agency because the lessee never initiated the permitting process and production was not restricted to his patented process. *Id.* In delineating its mitigation analysis, the court reiterated those same facts. *Id.*

259. *See id.* (indicating the regulatory officials did not absolutely refuse to permit the lessee's operations and would have issued the permit had the lessee complied with the advance study the agency normally required of any process likely to use substantial amounts of water).

260. *See* Commonwealth Edison Co. v. Allied-General Nuclear Servs., 731 F. Supp. 850, 859, 863 (N.D. Ill. 1990) (excusing lack of due diligence where the force majeure event was the termination of licensing proceedings and the environmental hearings that served as a condition precedent to licensing).

plant from doing anything to obtain a license and perform.[261] The plaintiff claimed the facility was not diligent, as was required by the clause at issue, because of certain "foot-dragging" and not taking advantage of an opportunity to potentially lift the ban by responding to the agency's invitation for comments on reopening the licensing proceedings.[262] However, because the lack of due diligence must cause the persistence of a force majeure event,[263] the court held the facility's failure to mitigate made no legal difference.[264] The nuclear reprocessing facility could not obtain a license and overcome the moratorium "even if it had been diligent."[265] Thus, "it exercised all the diligence that was due—none—and" its failure to mitigate was excused by the causation requirement.[266] In reaching this conclusion, Judge Posner explained:

> There is a practical reason for excusing a failure to exercise due diligence in circumstances where it would have made no difference. Diligence is costly, and contract law does not seek to create incentives to incur costs that have no benefits—that serve merely to stake a claim. A party should not be penalized for failing to incur costs that would have conferred no benefit on anybody. That is the situation here. . . . [I]f [the facility] had done all that the principles of due diligence could be thought to require it to do, it still would not have

261. *See id.* at 859, 862 (indicating the indefinite moratorium was an act of regulatory force majeure that suspended the facility's contractual obligations for the period of "years during which [it] could not move an inch toward obtaining an operating license"). In addition to halting the licensing proceedings, the ban also put a stop to pending environmental hearings while studies on the controversial practice of nuclear reprocessing were underway. *Id.* at 854, 858. By the time of the case, no nuclear reprocessing facility had been licensed since the implementation of the moratorium. *Id.* at 854.

262. The court noted the reprocessing facility's "foot-dragging" did not result in the moratorium precluding it from procuring an operating license, and it would not have obtained a license if it even exercised due diligence. *Id.* at 860. Three years after the moratorium went into effect, the agency invited comments on resuming the previously abandoned licensing proceedings. *See id.* (stating the moratorium was ordered in 1977 and the request for comments was issued in 1980). The comments provided an opportunity to attempt to lift the licensing ban, but it came at a time when the industry had written off nuclear spent fuel reprocessing because governmental actions destroyed its commercial viability. *Id.* at 861. Since there was an opportunity to persuade the government to rescind the ban, the court presumed the moratorium qualified as a temporary legal ban impeding performance. *Id.* Even as a temporary act of force majeure, the court held the facility would have been permanently excused from performing, if performance later became possible, because "the cost of performance had so risen that it would be materially more burdensome than if the force majeure event had never occurred." *Id.* at 862.

263. *See id.* at 859 (reciting the requirement of "a causal relationship between the want of diligence and the failure to remove the force majeure condition," which in the case would have been "to obtain an operating license notwithstanding the regulatory moratorium").

264. *Id.* at 863.

265. *Id.* at 860.

266. *Id.* at 863.

> obtained a license; the money spent on diligent pursuit of a license would have been money down the drain.[267]

Furthermore, while the facility could have responded to the regulatory agency's request for comments on potentially rescinding the ban, the court indicated the due diligence requirement does not impose "a duty to exert heroic efforts to change laws, regulations, or policies of general applicability."[268] To emphasize this point, the court compared seeking a change in the law to seeking an available exception to a zoning ordinance, which the duty might necessitate.[269] Another court reviewing a force majeure defense predicated upon the same moratorium reached a similar conclusion.[270] That court held the defendants' failure to submit another application when it seemed the licensing ban might be lifted did not constitute a lack of due diligence because licenses were contingent upon completion of the environmental impact study, which the regulatory agency had also abandoned.[271] Moreover, those defendants sought to overturn the agency's decisions, which evinced a bona fide attempt to remove the impediment to performance.[272]

As compared to the force majeure analysis described in this Part, two recent cases arising out of New York took a strikingly different approach when determining whether a fracking moratorium qualified as an event excusing performance under force majeure clauses contained in oil and gas leases. These cases will be reviewed next.

V. RECENT LITIGATION: THE NEW YORK APPROACH TO THE FRACKING BANS AS FORCE MAJEURE DEFENSE

While lease termination suits and challenges to fracking bans loom in our nation's courts, only two cases to date have specifically presented the issue of whether a fracking ban may constitute an act of force majeure to save a lease from termination.[273] On November 15, 2012, Judge David Hurd of

267. *Id.*

268. *Id.* at 860 (citing Glickman v. Coakley, 488 N.E.2d 906, 912 (Ohio Ct. App. 1984)).

269. *Id.* (comparing how the diligence duty might require seeking a zoning ordinance exception but would not require "oppos[ing] the highest governmental authorities" (citing G.W. Andersen Constr. Co. v. Mars Sales, 210 Cal. Rptr. 409, 416 (Ct. App. 1985))).

270. *See* Babcock & Wilcox Co. v. Allied-General Nuclear Servs., 555 N.Y.S.2d 313, 314 (App. Div. 1990) (indicating the due diligence issues were similarly decided in related litigation (citing *Commonwealth Edison*, 731 F. Supp. 850)).

271. *Id.*

272. *Id.*

273. Beardslee v. Inflection Energy, LLC (*Beardslee IV*), 798 F.3d 90 (2d Cir. 2015) (per curiam), *aff'g* 904 F. Supp. 2d 213 (N.D.N.Y. 2012), *and conforming to answer to certified question*, 31 N.E.3d 80 (N.Y.

the United States District Court for the Northern District of New York (the district court) rendered decisions in the two suits presenting the issue[274]: *Aukema v. Chesapeake Appalachia, LLC*[275] and *Beardslee v. Inflection Energy, LLC*.[276] In each suit, the defendant-lessees contended that the New York fracking moratorium was a force majeure event that extended the lease.[277]

As described in the analysis of these cases below, one could argue that these cases have not actually adjudicated the issue. First, the district court wrote a dizzying analysis in both opinions.[278] Second, in *Aukema*, an ultimate conclusion was never reached on appeal as the appeal was withdrawn,[279] and the appeal in *Beardslee* resulted in two appellate courts curiously sidestepping the issue and passing on the opportunity to determine what will likely become a common defense to lease termination suits.[280]

A. *The New York Fracking Moratorium*

While the state of New York now has a formal permanent fracking ban

2015); Aukema v. Chesapeake Appalachia, LLC, 904 F. Supp. 2d 199 (N.D.N.Y. 2012). While the issue was raised in another New York case, the court never decided whether a fracking ban can qualify as a force majeure event since the case was disposed of on other grounds. *See generally* Wiser v. Enervest Operating, LLC, 803 F. Supp. 2d 109 (N.D.N.Y. 2011) (striking the force majeure argument on other grounds). The court agreed that *if* the moratorium was a force majeure event, the clause would have extended the primary terms of the leases "indefinitely" as long as the lessees continued to tender timely delay rental payments. *Id.* at 121–22. But since the lessees failed to tender one delay rental payment during the primary term, the court refused to hold that the force majeure clause "catapulted the parties . . . into the secondary term" to excuse the lessees' noncompliance with payment of delay rentals. *Id.* at 120 n.9, 124, 126.

274. Beardslee v. Inflection Energy, LLC (*Beardslee III*), 31 N.E.3d 80, 83 n.5 (N.Y. 2015) (recognizing "the same result" was reached in *Aukema* "[o]n the same day, [by] the same court and [j]udge" (citing *Aukema*, 904 F. Supp. 2d 199)), *answering questions certified by* 761 F.3d 221 (2d Cir. 2014).

275. Aukema v. Chesapeake Appalachia, LLC, 904 F. Supp. 2d 199 (N.D.N.Y. 2012).

276. Beardslee v. Inflection Energy, LLC (*Beardslee I*), 904 F. Supp. 2d 213 (N.D.N.Y. 2012), *aff'd*, 798 F.3d 90 (2d Cir. 2015) (per curiam).

277. *Aukema*, 904 F. Supp. 2d at 203; *Beardslee I*, 904 F. Supp. 2d at 217.

278. For example, the court "erroneously" "intermingle[d] the concept behind the common law defense of impossibility with the contractually-based force majeure defense." Swanson, *supra* note 4, at 232 n.29, 233 n.35. The district court set forth nearly identical analyses in both opinions. *See generally Aukema*, 904 F. Supp. 2d 199; *Beardslee I*, 904 F. Supp. 2d 213.

279. *See* Edward McAllister, *Chesapeake Terminates 13,000 Acres of Drilling Leases in New York*, REUTERS, Sept. 9, 2013, http://www.reuters.com/article/us-chesapeake-newyork-leases-idUSBRE9880V220130909 (reporting that Chesapeake agreed to release over 13,000 acres of leased land in New York, bringing its two-year legal battle to an end).

280. *See* Yvonne E. Hennessey, *NY High Court, 2nd Circ. Are No Friends of Fracking*, LAW360 (Aug. 31, 2015, 11:07 AM ET), http://www.law360.com/articles/696645/ny-high-court-2nd-circ-are-no-friends-of-fracking (discussing the courts' avoidance of the issue, and contending "bans and moratoria that prevent or 'delay' operations during the primary term are inevitable" due to the trending push for bans and growing opposition to production nationwide).

in place,[281] such was not the case at the time of the *Aukema* and *Beardslee* litigation. Rather, the lessees declared force majeure due to a 2008 directive they alleged was a de facto moratorium.[282] New York law requires state agencies to prepare Environmental Impact Statements (EIS) to address any activity with potentially significant environmental effects.[283] A Generic Environmental Impact Statement (GEIS) can be used to generally and cumulatively assess separate actions with common and predictable impacts.[284] If a GEIS does not cover a subsequent proposed action, "either a supplemental GEIS ('SGEIS') or a site-specific EIS" is required if the action might significantly affect the environment.[285]

The Department of Environmental Conservation (DEC) promulgated a GEIS in 1992 (1992 GEIS)[286] examining the effects of conventional well fracturing.[287] Eventually, the industry was enticed to unconventionally develop the Marcellus Shale underlying New York, and Governor Paterson issued a directive (the 2008 Directive) requiring the DEC to address the potential effects of horizontal drilling in a SGEIS.[288] Subsequently, Governor Paterson issued an executive order (the 2010 Executive Order), requiring the SGEIS to also cover fracking and precluded the issuance of permits for horizontal drilling and hydraulic fracturing "prior to the

281. 2015 N.Y. FINDINGS STATEMENT: FINAL SUPPLEMENTAL GENERIC ENVIRONMENTAL IMPACT STATEMENT, *supra* note 39; Press Release, N.Y. State Dep't of Envtl. Conservation, New York State Officially Prohibits High-Volume Hydraulic Fracturing (June 29, 2015), http://www.dec.ny.gov/press/102337.html; *see also New York and Fracking*, EARTHJUSTICE, http://earthjustice.org/features/new-york-and-fracking (last visited Apr. 26, 2017) (noting the state's ban was announced in December 2014 and finalized in June 2015 "after seven years of extensive study of the environmental and health impacts of fracking").

282. *Aukema*, 904 F. Supp. 2d at 203, 206; *Beardslee I*, 904 F. Supp. 2d at 217.

283. *Aukema*, 904 F. Supp. 2d at 202; *Beardslee I*, 904 F. Supp. 2d at 215. The court quoted N.Y. ENVTL. CONSERV. LAW § 8-0109(2) (McKinney 2006) in both opinions.

284. *Aukema*, 904 F. Supp. 2d at 202; *Beardslee I*, 904 F. Supp. 2d at 215. Both opinions cited a regulation, which states that Generic Environmental Statements are permissible and "may be broader[] and more general than site or project specific EISs." N.Y. COMP. CODES R. & REGS. Tit. 6, § 617.10(a) (1996).

285. *Aukema*, 904 F. Supp. 2d at 202; *Beardslee I*, 904 F. Supp. 2d at 215–16. Both opinions cited N.Y. COMP. CODES § 617.10(d)(4) and N.Y. ENVTL. CONSERV. § 8-0109(2).

286. N.Y. STATE DEP'T OF ENVTL. CONSERVATION, GENERIC ENVIRONMENTAL IMPACT STATEMENT ON OIL, GAS AND SOLUTION MINING REGULATORY PROGRAM (1992), http://www.dec.ny.gov/energy/45912.html [hereinafter 1992 N.Y. GENERIC ENVIRONMENTAL IMPACT STATEMENT].

287. The 1992 GEIS covered conventional drilling and fracking using 20,000 to 80,000 gallons of water. *Aukema*, 904 F. Supp. 2d at 202; *Beardslee I*, 904 F. Supp. 2d at 216. In both *Beardslee* and *Aukema,* the court cited 1992 N.Y. GENERIC ENVIRONMENTAL IMPACT STATEMENT, *supra* note 286.

288. *Aukema*, 904 F. Supp. 2d at 203 (citation omitted); *Beardslee I*, 904 F. Supp. 2d at 216 (citation omitted).

completion of a Final SGEIS."[289] Ultimately, New York issued the final study and formal ban while the *Beardslee* appeals dragged through the New York and federal courts.[290]

B. Beardslee *and* Aukema *in the District Court*

In both *Aukema* and *Beardslee*, the lessors sued their lessees seeking a declaration that their oil and gas leases expired at the end of their primary terms.[291] In each suit, the lessees contended the leases were extended by way of the force majeure clause since, as summarized by the district court in both opinions, the New York fracking moratorium "effectively brought natural gas development in New York State to a screeching halt."[292]

The *Aukema* lessors entered leases with various operators between 2000 and 2006, and Chesapeake eventually acquired the leases.[293] Chesapeake, the lessee, had not commenced operations or established production at the end of the primary term; thus, the leases would have expired on their own terms.[294] However, prior to the expiration of the various primary terms,

289. N.Y. COMP. CODES tit. 9, § 7.41 (2010). The 2010 Executive Order was acknowledged by The New York Court of Appeals acknowledged the 2010 Executive Order was "a statewide moratorium" on fracking. Wallach v. Town of Dryden, 16 N.E.3d 1188, 1192 n.1 (N.Y. 2014). Unlike the conventional well fracturing using 20,000 to 80,000 gallons of water that the 1992 GEIS contemplated, horizontal drilling and fracking involves millions of gallons of water. *Aukema*, 904 F. Supp. 2d at 211; *Beardslee I*, 904 F. Supp. 2d at 221.

290. Beardslee v. Inflection Energy, LLC (*Beardslee IV*), 798 F.3d 90, 92 n.2 (2d Cir. 2015) (per curiam), *aff'g* 904 F. Supp. 2d 213 (N.D.N.Y. 2012), *and conforming to answer to certified question*, 31 N.E.3d 80 (N.Y. 2015).

291. *Aukema*, 904 F. Supp. 2d at 201; *Beardslee I*, 904 F. Supp. 2d at 215. It has been suggested that the lessors wanted their leases declared expired since their leaseholds were tremendously more valuable than they were when they entered the leases with the defendants, and if the leases were declared expired, the lessors could enter new leases with higher delay rental payments and a larger royalty interest. Anthony Michael Sabino & Michael J. Abatemarco, *Federal Court: Fracking Disputes Are Not a Force Majeure*, NAT. GAS & ELECTRICITY (Feb. 14, 2013), http://www.naturalgaselectricitynews.com/article-print-page/federal-court-fracking-disputes-are-not-a-force-majeure.aspx; *cf. Aukema*, 904 F. Supp. 2d at 205 n.9 (mentioning property similar to the lessor's overlying "the Marcellus Shale formation is currently being leased" with delay rentals as high as $5,500 per acre and with royalty interests up to 20%, compared to the lessor's $3.00 per acre delay rental and 1/8 royalty interest); Edward McAllister, *Exclusive: Chesapeake Drops Energy Leases in Fracking-Shy New York*, REUTERS, Aug. 6, 2013, http://www.reuters.com/article/2013/08/06/us-chesapeake-newyork-idUSBRE97517V20130806 (reasoning that if the force majeure clause extended the lease, it would have been under the original terms, allowing the lessees to avoid renegotiating the leases at a higher cost per acre).

292. *Aukema*, 904 F. Supp. 2d at 201, 203; *Beardslee I*, 904 F. Supp. 2d at 215, 217. Due to the very similar, and at times identical, analyses in both opinions, the district court cases will be discussed jointly.

293. *Aukema*, 904 F. Supp. 2d at 204.

294. The district court found Chesapeake "failed to conduct any activities upon the leased premises" to carry over into the secondary term. *Id.* at 209.

Chesapeake notified the *Aukema* lessors of lease extension by way of force majeure, asserting that the 2008 Directive was "a de facto moratorium on the processing of all permit applications for the Marcellus Shale."[295] Notably, Chesapeake argued common law force majeure extended all of the leases, and it only relied on contractual force majeure to save the leases executed by two groups of lessors.[296] The force majeure clauses relied upon were set forth in different leases but similarly provided: 1) the lease was not "subject to termination[] . . . due to failure to comply with obligations if compliance is prevented by federal, state, or local law, regulation[,] or decree";[297] and 2) the lessee's obligations were to be suspended if "acts of public authorities[] or any other causes" not within the lessee's control rendered it unable to perform.[298]

Similarly, the *Beardslee* lessors entered their leases between 2001 and 2006, most of which were subsequently acquired by Inflection in 2010.[299] The *Beardslee* leases would have also expired at the end of their primary terms because Inflection, the lessee, had not commenced operations nor established production.[300] However, Inflection notified the lessors that the 2008 Directive was an "unforeseen governmental action" that extended the leases under the force majeure clause, which stated:

> If . . . drilling or other operations . . . are delayed or interrupted . . . as a result of some order, rule, regulation, requisition or necessity of the government, or as a result of any other cause whatsoever beyond the control of [l]essee, the time of such delay or interruption shall not be counted against [l]essee, anything in this lease to the contrary notwithstanding. All express or implied covenants of this lease shall be subject to all [f]ederal and [s]tate laws,

295. *Id.* at 205–07.

296. *Id.* at 209.

297. *See id.* at 204 (deeming this provision to be the equivalent of a force majeure clause, although it was labeled "[c]ovenants clause").

298. *Id.* at 206.

299. The leases were primarily executed in 2001 with a five-year primary term, and some provided for a five-year extension. Beardslee v. Inflection Energy, LLC (*Beardslee I*), 904 F. Supp. 2d 213, 217 (N.D.N.Y. 2012), *aff'd*, 798 F.3d 90 (2d Cir. 2015) (per curiam). According to the New York Court of Appeals, a lease (or leases) was entered into in 2009 as well. Beardslee v. Inflection Energy, LLC (*Beardslee III*), 31 N.E.3d 80, 81 (N.Y. 2015), *answering questions certified by* 761 F.3d 221 (2d Cir. 2014). By 2008, some of the leases could have already expired if they were entered prior to 2003 with only a five-year primary term. The Second Circuit recognized the breakdown in the timeline and declined to address the issue since some of the leases were still in effect at the time the 2008 Directive was issued. Beardslee v. Inflection Energy, LLC (*Beardslee II*), 761 F.3d 221, 229 n.17 (2d Cir. 2014), *certifying questions to* 31 N.E.3d 80 (N.Y. 2015). The New York Court of Appeals indicated that most of the leases were extended for five-year terms and "the leases were still in their primary terms in 2008, when the alleged force majeure event occurred." *Beardslee III*, 31 N.E.3d at 81 n.1.

300. *Beardslee I*, 904 F. Supp. 2d at 219.

> [e]xecutive [o]rders, [r]ules or [r]egulations, and this lease shall not be terminated, in whole or in part, . . . if compliance is prevented by, or if such failure is the result of any such [l]aw, [o]rder, [r]ule or [r]egulation.[301]

In both *Aukema* and *Beardslee*, the lessees moved for summary judgment under the force majeure clause and common law,[302] arguing the leases were extended because the 2008 Directive was a force majeure event that prevented or delayed their performance.[303] In response, the lessors contended the lessees could have sought a permit for conventional drilling methods or drilled a well in a formation other than the Marcellus Shale thereby rendering performance neither impossible nor prevented.[304] However, the lessees argued the 2008 Directive banned the only commercially viable method of producing from the only viable formation in the counties—the Marcellus Shale.[305] The lessees reasoned that using ineffective, traditional drilling methods "would be unreasonable and irresponsible"[306] or constitute bad faith.[307] To defeat the common law defense, the lessors described the pending SGEIS and moratorium as foreseeable since the 1992 GEIS did not address the effects of high-volume fracking.[308] The *Aukema* lessors also attacked Chesapeake's contractual defense on the basis that the force majeure provision did not specifically enumerate a state agency's preclusion from issuing permits for fracking as a force majeure event.[309]

301. *Id.* at 218.

302. *See Aukema*, 904 F. Supp. 2d at 209–10 (reciting the lessees' arguments supporting their common law defenses of impossibility and frustration of purpose); *Beardslee I*, 904 F. Supp. 2d at 215, 221 n.10 (clarifying the lessees only asserted the common law doctrine of frustration of purpose as a defense and not the doctrine of impossibility). Although the *Beardslee* lessees did not expressly assert the doctrine of impossibility as a defense, the district court considered it anyways. *See Beardslee I*, 904 F. Supp. 2d at 221 & n.10 (noting the lessees did not assert the doctrine of impossibility but rejecting such a defense anyways).

303. *Aukema*, 904 F. Supp. 2d at 209; *Beardslee I*, 904 F. Supp. 2d at 219.

304. *Aukema*, 904 F. Supp. 2d at 209; *Beardslee I*, 904 F. Supp. 2d at 219.

305. *Aukema*, 904 F. Supp. 2d at 209; *Beardslee I*, 904 F. Supp. 2d at 219–20.

306. *See Beardslee I*, 904 F. Supp. 2d at 219–20 (stating the lessee argued drilling in a method which is known not to be profitable is unreasonable, especially since lessees are obligated to pay lessors royalties and produce marketable gas).

307. *See Aukema*, 904 F. Supp. 2d at 209 (explaining the lessee's bad faith argument was based on its "duty of good faith to prudently develop the leaseholds" thus rendering performance impossible). Chesapeake supported its claim of commercial unviability by highlighting its unsuccessful efforts to develop the Marcellus Shale using vertical wells and to produce non-shale formations. *Id.* at 209–10. On this basis, Chesapeake also contended its "inability to extract and develop in a commercially practicably manner equates to a deprivation of the entire property interest, which" effectively destroyed the contract's subject matter. *Id.* at 210.

308. *Beardslee I*, 904 F. Supp. 2d at 219; *Aukema*, 904 F. Supp. 2d at 209.

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

Analyzing the force majeure claims in both cases, the district court said force majeure "relieve[s] 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."[310] It held force majeure did not save the leases from terminating since performance was not prevented and the moratorium did not frustrate the leases' purposes.[311] In finding that performance was not prevented, the district court considered tender of royalty payments as the lessees' only obligation, and since the lessees had no "obligation to drill, the invocation of force majeure to relieve them from their contractual duties [wa]s unnecessary."[312] The court also held the purpose of the leases was not frustrated since the ban only affected horizontal drilling and fracking.[313] Accordingly, without a provision in the leases expressly limiting the drilling method to be utilized or the formation to be developed, it found the lessees could "still explore, drill, produce, and otherwise operate for oil and gas" in accordance with the purpose of the leases.[314] The district court rejected the lessees' argument that the purpose of the leases could not be fulfilled without fracking by simply stating performance cannot be excused due to mere impracticability.[315] In addition, the district court emphasized that there was no contractual guarantee for production but only a contractual right to drill, and the lessees, as the drafters of the contract, could have specified the production methods

310. *Id.* at 210; *Beardslee I*, 904 F. Supp. 2d at 220. Both opinions quoted *Phillips Puerto Rico Core, Inc. v. Tradax Petroleum, Ltd.*, 782 F.2d 314, 319 (2d Cir. 1985). The district court, however, confounded contractual force majeure defenses with those at common law. *See generally* Swanson, *supra* note 4, at 232 n.29, 233 n.35 (reviewing *Aukema* and explaining the ways in which the district court and lessors jumbled a contractual force majeure defense with common law concepts). Moreover, the court in the *Beardslee* opinion indicates this is statement of law applies to the contractual defense, while no such qualification was provided in *Aukema*. *Compare Beardslee I*, 904 F. Supp. 2d at 220 ("The primary purpose of a force majeure *clause* is . . . ." (emphasis added) (Phillips Puerto Rico Core, Inc. v. Tradax Petroleum, Ltd., 782 F.2d 314, 319 (2d Cir. 1985))), *with Aukema*, 904 F. Supp. 2d at 210 ("The primary purpose of force majeure is . . . ." (citing *Phillips Puerto Rico*, 782 F.2d at 319)).

311. *Aukema*, 904 F. Supp. 2d at 210–11; *Beardslee I*, 904 F. Supp. 2d at 220–21.

312. *Aukema*, 904 F. Supp. 2d at 210; *accord Beardslee I*, 904 F. Supp. 2d at 220. Yet, the appellate courts indicated the district court held that even if the moratorium was an act of force majeure, "the force majeure clause would have no effect on the habendum clause and the lease terms" since no obligation to drill existed. Beardslee v. Inflection Energy, LLC (*Beardslee III*), 31 N.E.3d 80, 83 (N.Y. 2015), *answering questions certified by* 761 F.3d 221 (2d Cir. 2014); *accord* Beardslee v. Inflection Energy, LLC (*Beardslee II*), 761 F.3d 221, 227 (2d Cir. 2014), *certifying questions to* 31 N.E.3d 80 (N.Y. 2015). *But see generally Beardslee I*, 904 F. Supp. 2d at 220 (failing to overtly analyze the force majeure clause's effect on the habendum clause).

313. *Aukema*, 904 F. Supp. 2d at 210; *Beardslee I*, 904 F. Supp. 2d at 220.

314. *Aukema*, 904 F. Supp. 2d at 210; *accord Beardslee I*, 904 F. Supp. 2d at 220.

315. *Aukema*, 904 F. Supp. 2d at 210; *Beardslee I*, 904 F. Supp. 2d at 220. Both opinions quoted *Phibro Energy, Inc. v. Empresa De Polimeros De Sines Sarl*, 720 F. Supp. 312, 318 (S.D.N.Y. 1989).

they intended to use or the formations they intended to explore.[316]

Subsequently, the district court rejected the common law defense of frustration in *Aukema* and the common law impossibility and frustration of purpose defenses in *Beardslee* because it deemed the moratorium to be foreseeable.[317] Thus, the district court granted the lessors partial summary judgment since the leases in both cases "terminated at the conclusion of their primary terms" and held neither the force majeure clause nor the common law doctrines could extend the leases.[318]

C. *The Appellate Courts Sidestepped the Fracking Issue*

1. The Second Court of Appeals Certifies Two Questions to the New York Court of Appeals

The district court decision was the end of the road for the *Aukema* lessees,[319] but the *Beardslee* lessees appealed to the United States Court of Appeals for the Second Circuit.[320] The Second Circuit, in turn, certified two questions to the New York Court of Appeals since it believed the case was controlled by "significant and novel issues of New York law concerning the interpretation of oil and gas leases, a legal field that is both relatively undeveloped in [New York] and of potentially great commercial and environmental significance."[321]

The first question asked if New York's moratorium qualified as a force majeure event under New York law.[322] The court questioned whether a ban on the only commercially viable production technique could constitute an act of force majeure when the force majeure clause does not reference

316. *Aukema*, 904 F. Supp. 2d at 210; *Beardslee I*, 904 F. Supp. 2d at 220.

317. The court explained the 1992 GEIS did not contemplate the use of horizontal drilling combined with fracking and additional environmental review by way of a SGEIS or a site-specific EIS would, therefore, be required for permits to be issued. *Aukema*, 904 F. Supp. 2d at 211; *Beardslee I*, 904 F. Supp. 2d at 221.

318. *Aukema*, 904 F. Supp. 2d at 212; *Beardslee I*, 904 F. Supp. 2d at 221.

319. *See* Beardslee v. Inflection Energy, LLC (*Beardslee II*), 761 F.3d 221, 230 n.19 (2d Cir. 2014) (indicating the *Aukema* parties withdrew their appeal from the district court opinion), *certifying questions to* 31 N.E.3d 80 (N.Y. 2015); *see also* Yvonne E. Hennessey, *Drill Baby Drill!: NY State's Fracking Future*, LAW360 (Jan. 8, 2014, 3:07 PM), http://www.law360.com/articles/498684/drill-baby-drill-ny-state-s-fracking-future?article_related_content=1 (reporting Chesapeake settled with the lessors and released their leases).

320. *Beardslee II*, 761 F.3d at 223.

321. *Id.* at 224. Ostensibly, the Second Circuit acknowledged the "case turns on questions of contract interpretation that may not be the typical material for certification" but believed there were public policy implications "integral to the economic and environmental wellbeing of . . . of the State of New York." *Id.* at 228.

322. *Id.* at 229, 232.

"commercial viability"[323] and there was no general prohibition on production.[324] The court seemed especially confounded due to the leases' silence on the drilling method permitted and the absence of a requirement in the lease for operations to be profitable.[325] The court also considered the lessees' justification for the commercial viability argument, which was premised on the implied covenant of good faith, to be troubling.[326]

The second question posed was "whether the *force majeure* clause modifies the habendum clause and extends the primary terms of the [l]eases."[327] The court refused to decide this issue on the "anything in this lease to the contrary notwithstanding" language found in the force majeure clause since the habendum clause did not expressly subject itself to other clauses in the lease and the dearth of guidance from New York case law.[328] Thus, the case went onward to the New York Court of Appeals.

2. The New York Court of Appeals Only Addresses the Second Question

The New York Court of Appeals delivered the lessees a crushing defeat. Only answering the second question ("does the *force majeure* clause modify the habendum clause and extend the primary terms of the leases"), the court held the primary term was not modified by the force majeure clause and the leases were, therefore, not extended.[329] Starting its analysis with the habendum clause, the court indicated the clause failed to expressly subject itself to other lease provisions and did not explicitly reference the force majeure clause.[330] Next, the court determined the force majeure clause's

323. *See id.* at 230 (questioning the commercial viability argument on the basis that New York law requires a force majeure event to be included in the clause to excuse performance (quoting Kel Kim Corp. v. Cent. Mkts., Inc., 519 N.E.2d 295, 296 (N.Y. 1987))).

324. *See id.* (indicating it must be determined whether the moratorium on commercially viable methods can constitute force majeure since conventional drilling was available).

325. *Id.* at 229–30.

326. *See id.* (noting the lessees argued that use of conventional production techniques would result in drilling at loss which would violate the implied covenant of good faith since the purpose of the lease is to achieve production in paying quantities).

327. *Id.* at 229. The court deemed this second question "more fundamental" and conditioned it on the New York Court of Appeals first finding the moratorium can qualify as an act of force majeure. *See id.* at 229–30 (conditioning certification of the second question, pertaining to modification of the habendum clause, on an affirmative finding of whether the moratorium qualified as a force majeure event).

328. *Id.* at 230–31 (emphasis omitted).

329. Beardslee v. Inflection Energy, LLC (*Beardslee III*), 31 N.E.3d 80, 83–84 (N.Y. 2015) (citations omitted), *answering questions certified by* 761 F.3d 221 (2d Cir. 2014).

330. *Id.* at 84 (first citing Wiser v. Enervest Operating, LLC, 803 F. Supp. 2d 109, 121 (N.D.N.Y. 2011); and then citing Sun Operating P'ship v. Holt, 984 S.W.2d 277, 286 (Tex. App.—Amarillo 1998,

language that "the time of such delay or interruption shall not be counted against [l]essee" failed to modify the primary term because it did not specifically reference the habendum clause.[331]

The court next interpreted the phrase "anything in this lease to the contrary notwithstanding" in the force majeure clause.[332] It acknowledged language such as this is construed to "trump *conflicting* contract terms."[333] Nonetheless, the court concluded this language was insufficient to find the primary term modified by the force majeure clause as no conflict existed with the habendum clause's primary term provisions.[334] Since the clause pertained "to a delay or interruption in drilling or production," the court interpreted the phrase to only conflict with and modify the secondary term, when the lessee is obligated to produce to avoid lease termination.[335] In an attempt to further support this conclusion, the court analyzed the second sentence of the force majeure clause providing that "express or implied covenants" of the lease are subject to laws, rules, orders, and regulations and the lease "shall not be terminated . . . if compliance is prevented" thereby.[336] Deeming the lessees' only primary term "covenant" or obligation to be payment of delay rentals, which were not at issue in the case, the court decided the force majeure clause could only apply to drilling or production obligations during the secondary term.[337] It also stated this sentence did not speak to lease *expiration* in the primary term, but only to *termination* in the secondary term.[338] Drilling in the lessees' defeat, the court noted the lessees could have expressly indicated their intention to subject the habendum clause to other lease clauses.[339]

The court chose not to answer the question pertaining to a moratorium as an act of force majeure since it considered the question "academic."[340]

pet. denied)).

331. *Id.*

332. *Id.*

333. *Id.* at 84–85 (alteration in original) (first quoting Bank of N.Y. v. First Millennium, Inc., 607 F.3d 905, 917 (2d Cir. 2010); and then citing BDC Fin. L.L.C. v. Barclays Bank PLC, 29 N.E.3d 877 (N.Y. 2015)).

334. *Id.* at 85.

335. *Id.*

336. *Id.* at 82, 85.

337. *Id.* at 85. However, under an "unless" clause, the lessee does not covenant to pay delay rentals, and if a lessee fails to properly tender delay rentals, the lease will automatically terminate unless the lessee has begun drilling. Sanchez, *supra* note 55, at 4-11; *see also* HEMINGWAY, *supra* note 53, at 288–89 (noting the "unless" clause does not obligate the lessee to tender delay rentals because the clause "is properly construed as creating a common law limitation on the estate").

338. *Beardslee III*, 31 N.E.3d 80, 85 (N.Y. 2015).

339. *Id.*

340. *Id.* at 83–84.

After the New York Court of Appeals denied rehearing,[341] the case went back to the Second Circuit for final disposition.

3. The Second Court of Appeals Affirms the District Court

Bound by the decision of New York's highest court, the Second Circuit affirmed the district court's decision.[342] Accordingly, the Second Circuit concluded the lease's primary terms were not extended, regardless of whether the fracking moratorium qualified as an act of force majeure because the force majeure clause failed to modify the habendum clause.[343]

D. Beardslee *and* Aukema: *The Aftermath*

The New York decisions came as a surprise[344] and have garnered harsh criticism. Some writers disagreed with the courts' election to skim over the main issue—whether a fracking ban qualifies as a force majeure event.[345] The New York court's calculated evasion of the issue is evinced by the fact that the Second Circuit conditioned the certification of this question on the New York court holding the moratorium was a force majeure event.[346] One pundit suggested New York's highest court avoided the main issue because of its political underpinnings.[347] Many others believe the court's rationale was truly grounded in New York's public policy, one that disfavors production and views the oil and gas industry with antipathy, skepticism,

341. Beardslee v. Inflection Energy, LLC (*Beardslee V*), 37 N.E.3d 105 (N.Y. 2015).

342. *See* Beardslee v. Inflection Energy, LLC (*Beardslee IV*), 798 F.3d 90, 91 (2d Cir. 2015) (per curiam) (applying "New York law as articulated by the Court of Appeals"), *aff'g* 904 F. Supp. 2d 213 (N.D.N.Y. 2012), *and conforming to answer to certified question*, 31 N.E.3d 80 (N.Y. 2015).

343. *Id.* at 94.

344. One author said, "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." Swanson, *supra* note 4, at 230.

345. *See* Pete Brush, *2nd Circ. Asks Top NY Court to Examine Fracking Leases*, LAW360 (Aug. 1, 2014, 2:34 PM), http://www.law360.com/articles/563302/2nd-circ-asks-top-ny-court-to-examine-fracking-leases (expressing curiosity as to why the trial judge never determined the existence of a force majeure event); *see also U.S. Circuit Court: NY Landowners Released from Marcellus Leases*, MARCELLUS DRILLING NEWS, http://marcellusdrilling.com/2015/08/us-circuit-court-ny-landowners-released-from-marcellus-leases/ (last visited Apr. 25, 2017) (recognizing every court involved with the *Beardslee* litigation refused to decide if a statewide moratorium is a force majeure occurrence, and urging it should be considered as such).

346. *See* Beardslee v. Inflection Energy, LLC (*Beardslee II*), 761 F.3d 221, 229 (2d Cir. 2014) ("First, whether, in the context of an oil and gas lease, the [s]tate's [m]oratorium amounted to a *force majeure* event; *and* second, *if so*, whether the *force majeure* clause modifies the habendum clause and extends the primary terms of the [l]eases." (second and third emphasis added)), *certifying questions to* 31 N.E.3d 80 (N.Y. 2015), *certifying questions to* 31 N.E.3d 80 (N.Y. 2015).

347. Hennessey, *supra* note 280.

and disinterest.[348] Accordingly, many commentators claim the courts disregarded the parties' intentions and the plain language of the leases by overlooking the occurrence of an event falling squarely within the language of the force majeure clause[349] and by negating the force majeure clause's effect on the habendum clause.[350] Indeed, one commentator opined the decisions would further discourage production in New York since "simple" contracts, and the "plain and simple words" therein, "mean nothing in the Empire State."[351]

One fact is certain: as operators pack up camp and move out of New York, the impact of the bans and judicial decisions such as *Beardslee* and *Aukema* are being felt throughout the state.[352] Other states may wish to

348. *See id.* ("Perhaps this is just a distorted ruling by New York courts which have so far shown no support for the oil and gas industry."); *see also* Charlie Passut, *New York High Court Rejects Extending Oil, Gas Leases*, NAT. GAS INTELL. (Apr. 1, 2015), http://www.naturalgasintel.com/articles/101852-new-york-high-court-rejects-extending-oil-gas-leases (providing statements from the *Beardslee* lessees' attorney who believed the decision was "just another example of New York not being receptive to responsible energy development and going out of its way to make the business climate very hostile" and "to side against the industry"); Emily B. Thomas, *The Second Circuit Court of Appeals Affirms Ruling That New York State's Moratorium on Hydraulic Fracturing Did Not Extend the Primary Terms of Oil and Gas Leases*, LEXOLOGY: BAKER ENERGY BLOG (Sept. 1, 2015), http://www.lexology.com/library/detail.aspx?g=558d92de-9189-4313-8177-309cfe2afb28 (agreeing the decisions "highlight the antipathy this state appears to hold toward the industry overall"); *cf.* Kurth et al., *supra* note 22, at 26, (acknowledging the northeast views fracking "with collective skepticism"). For a list of eighty-nine local bans and ninety-eight moratoria further highlighting New York's opposition to the industry, see *Fracking Bans and Moratoria in NY State*, FRACTRACKER ALLIANCE, http://www.fractracker.org/map/us/new-york/moratoria/ (last visited May 8, 2017).

349. *See* Hennessey, *supra* note 319 (questioning the district court's opinion for "importantly and unfortunately ignor[ing]" the force majeure clause, which "specifically identifie[d] drilling delays as force majeure events"); Hennessey, *supra* note 280 (condemning the decisions for construing the clauses in a way that did not effectuate the lessee's intent and for alarmingly holding the leases terminated at the end of their primary terms, despite the moratorium "undeniably" preventing the lessees from economic development and a force majeure clause "with language like 'delayed,' 'as the result of any other cause whatsoever beyond the control of [l]essee' and 'anything in this lease to the contrary notwithstanding'").

350. *See* Hennessey, *supra* note 280 (refuting the opinions for recognizing the leases "were to be construed with reference to the parties' intentions and the known practices of the gas industry" and yet holding the force majeure clause did not save the leases because it failed to modify the habendum clause despite language, such as "anything in this lease to the contrary notwithstanding"); Passut, *supra* note 348 (reciting the sentiments of the lessees' attorney who called the analysis of force majeure in the primary term "bizarre" since a lease can only get to the secondary term with "drilling" and the force majeure clause specifically mentioned "drilling" delays would not be "counted against the lessee, anything else in the lease to the contrary notwithstanding").

351. *U.S. Circuit Court: NY Landowners Released from Marcellus Leases*, *supra* note 345.

352. *See* Baltz, *supra* note 60 (reciting an industry attorney's assertion that "most of the industry has written off New York state"); John Ferro, *Threat to NY's Fracking Ban Could Come from Congress*, POUGHKEEPSIE J. (Jan. 18, 2015, 11:30 PM), http://www.poughkeepsiejournal.com/story/tech/science/environment/2015/01/18/ny-fracking-ban-legal-threats/21966371/ (predicting the industry

avoid such disgrace with the energy industry,[353] especially if their economy is driven by oil and gas production.[354] Moreover, due to the alleged flaws in the *Aukema* and *Beardslee* decisions, writers have questioned if courts in other jurisdictions would render the same narrow decision.[355]

VI. FRACKING BANS AND MORATORIA: AN ACT OF FORCE MAJEURE

As of the date this Comment was written, *Beardslee* and *Aukema* provide the only case law on the specific issue of fracking bans and moratoria as force majeure events.[356] The defense will arise again, as lessees who are waiting for bans to expire or be invalidated will need to continuously ward off impending lease terminations due to bans halting performance.[357] If courts confronted with this defense allow their decisions to be swayed by

will not challenge a statewide fracking ban "in a state as unfriendly as New York"); Hennessey, *supra* note 280 (implying lessees were nearing their ends with New York by contending *Beardslee* "handed any remaining oil and gas companies with an interest in New York another unwelcomed, albeit expected, blow"); *U.S. Circuit Court: NY Landowners Released from Marcellus Leases*, *supra* note 345 (determining the bans already discouraged lessees from drilling in the state but these opinions will make them "even more gun shy" since their "simple contracts" hold little weight there). Fracking prohibitions heavily impact the economic stability of the communities in which they apply. *See* Stewart, *supra* note 34 (analyzing natural gas development's vital role in bringing manufacturing jobs back to Ohio and the multitude of benefits Ohio would lose if it were to enact a fracking ban); *see also* Conrad, *supra* note 34 (reporting one local ban is expected to deprive the county of $8 million in tax revenue, of which $5.5 million is spent on school funding, in addition to the county potentially accruing "millions of dollars in legal fees" by defending challenges to its fracking prohibition). Royalty owners are also heavily impacted by the bans and the resulting lack of production. *See* City of Longmont v. Colo. Oil & Gas Ass'n, 2016 CO 29, ¶ 28 (finding a local Colorado ban "increases the cost of producing oil and gas and reduces royalties"); Ritchie, *supra* note 2, at 812 ("[A] complete ban on hydraulic fracturing is extreme in the sense that it tends to eviscerate the oil and gas interest owner's ability to produce."); Ferro, *supra* note 352 (discussing how Congress is considering more convenient mechanisms for New York property owners to seek compensation from New York due to the statewide ban depriving the owners of revenue they would have received by selling or leasing their mineral rights).

353. *Cf.* Coastal Oil & Gas Corp. v. Garza Energy Tr., 268 S.W.3d 1, 16 (Tex. 2008) (declining to change the rule of capture to have a distinct application to fracking "because no one in the industry appears to want or need the change").

354. *Cf. id.* at 33 (Willett, J., concurring) ("Because operators of fraced wells lack absolute control, the specter of tort liability will convince many rational operators to forego fracing altogether and leave otherwise recoverable resources in the ground, to the detriment of the [s]tate as a whole.").

355. *See* Swanson, *supra* note 4, at 228 (believing "it is highly debatable whether a North Dakota court would reach the same result as the Northern District of New York in *Aukema*" (citing Anderson v. Hess, 733 F. Supp. 2d 1100 (D.N.D. 2010), *aff'd*, 649 F.3d 891 (8th Cir. 2011))); *see also* Hennessey, *supra* note 319 (contending the courts ignored the clause).

356. Aukema v. Chesapeake Appalachia, LLC, 904 F. Supp. 2d 199 (N.D.N.Y. 2012); Beardslee v. Inflection Energy, LLC (*Beardslee I*), 904 F. Supp. 2d 213 (N.D.N.Y. 2012), *aff'd*, 798 F.3d 90 (2d Cir. 2015) (per curiam).

357. *See* Klingensmith & McGavran, *supra* note 17, at 16–17 (stating lessee's are relying on force majeure since fracking bans keep them from developing leaseholds); *see also* Hennessey, *supra* note 280 ("[B]ans and moratoria that prevent or 'delay' operations during the primary term are inevitable.").

the deep-rooted public policy of their state, as some allege the *Beardslee* courts did, decisions rendered on strikingly similar force majeure clauses will vary from state to state.[358] Alternatively, when courts render decisions solely based upon the clause in the lease—as should be done under the rules of contract interpretation—the defense is likely to prevail under the commonly used language defining acts of government as force majeure, but the outcome will still depend upon the particular facts of the case.[359] The same is likely to be true even in those jurisdictions reading the common law elements into the clause. Rather than risk the politics that can permeate document interpretation, as discussed below, the industry would be wise to redraft their commonly used force majeure clauses so full effect is given to their intended purpose.[360]

A. *A Fractured Policy Approach*

The lease, as a contract, should be interpreted to effectuate the intent of the parties as it is expressed within the four corners of the contract.[361] Nonetheless, courts are known to interpret contracts, at least in part, based upon the public policy of the state.[362] Consequently, it must be asked: if

358. Regardless of public policy or the area of law, decisions vary state to state. *Cf.* Beardslee v. Inflection Energy, LLC (*Beardslee II*), 761 F.3d 221, 231 (2d Cir. 2014), *certifying questions to* 31 N.E.3d 80 (N.Y. 2015) (acknowledging out of state opinions on the habendum clause issue but requesting the New York Court of Appeals provide guidance under New York law); Kodiak 1981 Drilling P'ship v. Delhi Gas Pipeline Corp., 736 S.W.2d 715, 721 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.) (declining to follow another court's reasoning since no court in Texas, either state or federal, has approved of it). However, if courts consider public policy as the *Beardslee* courts are alleged to have done, inconsistencies in case law pertaining to this defense will be exacerbated. *Cf.* Thomas, *supra* note 348 (opining the *Beardslee* decisions reflect New York's antipathy toward the oil and gas industry).

359. *See* Hennessey, *supra* note 280 (expressing alarm over the *Beardslee* conclusion due to language in the force majeure clause such as "'delayed,' 'as the result of any other cause whatsoever beyond the control of [l]essee' and 'anything in this lease to the contrary notwithstanding'").

360. *See, e.g.*, Swanson, *supra* note 4, at 225, 237 (predicting *Aukema* will heavily impact how the industry drafts leases and, especially, the scope of force majeure clauses for years to come in an effort to save future leases from expiring in the absence of production or operations).

361. *See* Coker v. Coker, 650 S.W.2d 391, 393 (Tex. 1983) (explaining that when interpreting an unambiguous contract, a court is primarily concerned with ascertaining the parties' true intentions "as expressed in the instrument" which is accomplished by considering the plain language of the entire lease and trying to "harmonize and give effect to *all the provisions* of the contract" (citations omitted)).

362. *See, e.g.*, Alaskan Crude Corp. v. State of Alaska, Dep't Nat. Res., Div. of Oil & Gas, 261 P.3d 412, 421 (Alaska 2011) (rejecting a force majeure defense, and stating the conclusion was supported by "policy considerations"). As one popular treatise explains:

> [T]here is no unanimity as to the content of the parol evidence rule or the process called interpretation, and . . . the rules are complex, technical[,] and difficult to apply. It would, however, be a mistake to suppose that the courts follow any of these rules blindly, literally[,] or consistently. As often as not they choose the standard or the rule that they think will give rise to a just result in the particular case. . . . [O]ften under a guise of interpretation a court will actually enforce its

courts allow the fracking controversy and public policy of their states to sway their decisions on this defense, what will be the result?[363] It is only fair to acknowledge some states not only support, but also encourage, oil and gas production, in stark contrast to New York's clear anti-fracking views.[364] In states with a tendency to favor lessors or view the oil and gas industry with disdain, one might expect another *Beardslee*-esque decision where the force majeure defense falls deep into the well.[365] On the other

notions of 'public policy' which is 'nothing more than an attempt to do justice.'

JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 3-16 (3d ed. 1987) (footnotes omitted). Even courts acquiesce to this notion. *Cf.* Colo. Oil & Gas Ass'n v. City of Longmont, No. 13CV63, 2014 WL 3690665, at *11 (Colo. Dist. Ct. July 24, 2014) (recognizing binding precedent may have come "at a time when public policy strongly favored the development of mineral resources" and declining to adopt a more anti-production policy), *aff'd*, 2016 CO 29. *See generally* Coastal Oil & Gas Corp. v. Garza Energy Tr., 268 S.W.3d 1 (Tex. 2008) (relying on public policy to reject a fracking trespass cause of action).

363. *Cf.* Burney & Hyne, *supra* note 22, § 19.01, at 19-3 ("When these controversies reach the courts, a traditional policy conflict is also at play: whether to protect property rights or to encourage oil and gas production.").

364. Standing at the polar opposite end of the spectrum from New York would most likely be the state of Texas, whose courts have repeatedly recognized public policy encourages efficient production of the state's abundant oil and gas reserves. *See* John McFarland, *New York vs. Texas*, OIL & GAS LAW. BLOG (May 21, 2015), http://www.oilandgaslawyerblog.com/2015/05/new-york-vs-texas.html (discussing the New York moratorium, and after illustrating the benefits fracking has brought to Texas, concluding that "Texas clearly comes down on the side of the economic advantages that come from its abundance of natural resources"). Courts' inclination of favoring lessees has been described as a "liberal tendency." 30 WILLISTON & LORD, *supra* note 97, § 50:57 (analyzing courts' practice of strictly or liberally construing leases despite "stating the time-honored canon of interpretation that the intention of the parties is to be given effect in the construction and interpretation of oil and gas leases," and finding some courts demonstrate "a decidedly liberal tendency to favor the lessee, at least where the lessee's immediate right to drill is concerned" (footnote omitted)). Equity abhors forfeitures is an adage courts employ to justify their "liberal interpretation or construction in favor of one or the other of the parties." *See id.* (discussing how "courts generally abhor forfeitures" and use such adages to justify adopting a liberal or strict construction "as the equities of each situation may demand"). *Compare* Baldwin v. Kubetz, 307 P.2d 1005, 1009–10 (Cal. Dist. Ct. App. 1957) (negating application of the rule that "equity[] frown[s] upon enforcement of forfeitures" to the cancellation of oil and gas leases), *with* Consumers' Gas Tr. Co. v. Littler, 70 N.E. 363, 366 (Ind. 1904) ("Equity looks with disfavor upon forfeitures, and when such is claimed it will closely scrutinize the demand, and will interpose to prevent it when its enforcement will operate inequitably or unconscionably." (first citing Thompson v. Christie, 138 Pa. 230, 249 (Pa. 1890); and then citing McCarty v. Mellon, 5 Pa. D. 425, 428 (Ct. Com. Pl. of Pa. 1893))), *and* Sun Operating P'ship v. Holt, 984 S.W.2d 277, 287 (Tex. App.—Amarillo 1998, pet. denied) (concluding it would "be tantamount to reading the provisions as requiring a forfeiture when the parties' intent to obtain such a result is hardly clear" if it were to terminate the lease at issue after the occurrence of an event stated in the force majeure clause (citing Kincaid v. Gulf Oil Corp., 675 S.W.2d 250, 256 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.))).

365. *See generally* Beardslee v. Inflection Energy, LLC (*Beardslee III*), 31 N.E.3d 80 (N.Y. 2015) (rejecting a lessees' force majeure defense although it was prevented from producing due to a fracking moratorium), *answering questions certified by* 761 F.3d 221 (2d Cir. 2014); *cf.* Passut, *supra* note 348 (quoting

hand, in states driven by oil and gas-heavy economies and public policy similar to Texas, its consideration could facilitate a lessee's success with this defense.[366] It is worth noting, however, public policy is probably not necessary for this defense to save leases from termination. A properly worded force majeure clause will, at least in theory, allow lessees whose performance is prevented by bans to prevail under a plain reading of the contractual language.

B. *Reading the Force Majeure Clause*

As discussed above, to qualify as a force majeure contingency, an event must be set forth in the definition contained in a force majeure clause.[367]

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the *Beardslee* lessees' attorney as saying the decision was "just another example of New York not being receptive to responsible energy development" because in New York both politicians and courts "seem to go out of their way to side against the industry").

366. Like Texas, other states' economies may greatly depend on oil and gas production. *See Colo. Oil & Gas Ass'n*, 2014 WL 3690665, at *9 (noting fracking "generates a great deal of revenue in" Colorado), *aff'd*, 2016 CO 29; *Hydraulic Fracturing—Frequently Asked Questions, supra* note 4 (stressing the importance of fracking in Kansas, and describing the industry as the second largest in the state, contributing $360 million a year to public projects, roads, and schools out of the $6 billion the industry brings to the state annually and employing over 28,000 residents); *see also Coastal Oil & Gas Corp.*, 268 S.W.3d at 33 (Willett, J., concurring) ("Robust energy production enriches Texas' fiscal bottom line."); KSE Focus, *supra* note 34 (presuming states are hesitant to intervene in the fracking debate since the "industry . . . has proved to be so economically valuable"). Texas has been repeatedly recognized as a very pro-producer state, and many contend the state's courts interject this policy in their decision-making. *See* Burney, *supra* note 59, at 222 (recognizing a "trend" in Texas Supreme Court opinions wherein the court has "consistently . . . favored producers' legal arguments in oil and gas disputes" for over ten to twenty years (citations omitted)); *see also* Rutherford, *supra* note 28, at 847–48, 878–79 (describing Texas' courts and legal framework as "energy-friendly"); McFarland, *supra* note 364 (advancing the view that Texas favors "the economic advantages" derived from production). In addition, even the Texas Supreme Court has strongly expressed its support for the industry. *See Coastal Oil & Gas Corp.*, 268 S.W.3d at 16 ("[T]he law of capture should not be changed to apply differently to hydraulic fracturing because no one in the industry appears to want or need the change."). Moreover, the court has considered the importance and necessity of technological advancements, such as fracking, when ruling against lessors. *See id.* at 29 (Willett, J., concurring) ("[M]aximizing recovery via fracing is essential; enshrining trespass liability for fracing (a 'tres-frac' claim) is not. . . . Texas oil and gas law favors drilling wells, not drilling consumers."). Indeed, other state courts may implicitly or expressly adopt policy justifications like those in Texas due to the indisputable benefits of fracking. Kurth et al., *supra* note 22, at 27 (predicting "widespread hydraulic fracturing will continue and the hunt for prospective shale oil and gas will proliferate" due to the reserves fracking makes available, producers' influence and capital, the royalty payments that result, and the tax revenue and employment opportunities fracking makes possible). Therefore, although the defense can likely stand on its own, a court's consideration of public policy will only strengthen a lessee's argument if they are in a jurisdiction with views similar to Texas' courts.

367. *See* Perlman v. Pioneer P'ship, 918 F.2d 1244, 1248 (5th Cir. 1990) (per curiam) (stressing courts must consider the language contracted for when deciding whether the parties intended the event to excuse performance); *Sun Operating*, 984 S.W.2d at 283 ("[W]hen the parties have themselves defined the contours of force majeure in their agreement, those contours dictate the application, effect, and

Consequently, this defense and its viability are fact intensive and dependent upon the specific contractual language defining force majeure.[368] Although government acts are usually included in the list of events that will excuse performance upon their occurrence, the language varies from general terminology to specific.[369]

As exemplified above, a more encompassing clause might define force majeure as "state and federal statutes, all orders, rules and regulations of any governmental body (either federal, state or municipal)"[370] or "any federal or state law, or any order, rule or regulation of governmental authority."[371] A lessor, like the one in *Aukema*, will likely contend that the clause does not specifically mention the inability to obtain the required permits to frack or contain words similar in nature to the terms "bans" and "moratoria."[372] A federal court adopted such a strict approach when it rejected a force majeure defense on the basis that the clause did not specifically enumerate "failure to obtain zoning approval" as a triggering event.[373] However, while an event must be identified in the force majeure clause to qualify, it typically need not be listed with that degree of precision.[374] This is especially true

scope of force majeure." (citing Hydrocarbon Mgmt., Inc. v. Tracker Expl., Inc., 861 S.W.2d 427, 436 (Tex. App.—Amarillo 1993, no writ))).

368. *See* Stonestreet, *supra* note 87, §§ 5.01–.02, at 156–57 (warning the defense is tackled "case-by-case" and turns on "the language of the contract at issue and the relevant circumstances involved"); *see also Sun Operating*, 984 S.W.2d at 283 ("[Force majeure's] scope and application, for the most part, is utterly dependent upon the terms of the contract in which it appears.").

369. *Compare* Erickson v. Dart Oil & Gas Corp., 474 N.W.2d 150, 155 (Mich. Ct. App. 1991) (including, in the force majeure definition, "any law, order, rule or regulation, (whether or not subsequently determined to be invalid)"), *with Sun Operating*, 984 S.W.2d at 280 (defining force majeure "as a result of some order, requisition or necessity of the government").

370. Edington v. Creek Oil Co., 690 P.2d 970, 973 (Mont. 1984).

371. Landry v. Flaitz, 157 So. 2d 892, 896 (La. 1963) (emphasis omitted).

372. *Cf.* Aukema v. Chesapeake Appalachia, LLC, 904 F. Supp. 2d 199, 209 (N.D.N.Y. 2012) (reciting the lessors' argument regarding the force majeure clause's failure to enumerate a prohibition on the issuance of permits). Some parties draft their force majeure clauses to explicitly state that the inability to obtain permits will suffice as a force majeure event. *See Perlman*, 918 F.2d at 1246 (quoting a force majeure clause that said "inability to obtain governmental permits or approvals necessary or convenient to [l]essor's operations" would qualify as a force majeure event (emphasis omitted)).

373. URI Cogeneration Partners, LP v. Bd. of Governors for Higher Educ., 915 F. Supp. 1267, 1287 (D.R.I. 1996). The force majeure clause included "appropriation or diversion of steam energy, equipment, materials or commodities by rule or order of any governmental or judicial authority having jurisdiction thereof; any changes in applicable laws or regulations affecting performance." *Id.* at 1276. Because the zoning issue was foreseeable, the court reasoned that it should have been listed in the clause. *Id.* at 1287.

374. *See* PERILLO, *supra* note 65, § 13.19 ("Specificity may be important . . . . However, the contingencies need not always be described with particularity."); *see also Sun Operating*, 984 S.W.2d at 285–86 (construing the term "operations" to include "production," as well as considering definitions of the term "carrier," and ultimately concluding that a purchaser who owned a pipeline fell within the scope of the clause, thereby implying exact precision or specificity is not always required).

where the force majeure contingency stems from governmental action.[375] For instance, courts have found that shut-in orders issued by state regulatory agencies fall within the scope of clauses that do not specifically list "shut-in orders."[376] In fact, Judge Richard Posner went further and, in light of an agency's indefinite shut down on licensing proceedings, negated the application of a parenthetical that would have otherwise removed "failure to obtain an operating license" from the force majeure clause's scope.[377] In deciding the parenthetical's effect on the force majeure clause's scope, the judge said the parenthetical could only modify the clause "in the context of a governmental program of processing license applications" but was inapplicable if such a program shut down.[378] Judge Posner held that despite the parenthetical, the shut down on license proceedings qualified as a force majeure event because the clause's scope encompassed "a moratorium on all commercial reprocessing so protracted as to amount, in

375. *See supra* notes 112–19 and accompanying text.

376. *See* Frost Nat'l Bank v. Matthews, 713 S.W.2d 365, 367–68 (Tex. App.—Texarkana 1986, writ ref'd n.r.e.) (accepting a force majeure defense where the event was a shut-in order issued by the state regulatory agency, and finding this to be within the scope of the clause even though the clause did not mention shut-ins but instead said "any [f]ederal or [s]tate law or any order, rule of regulation of governmental authority"). In fact, courts have often made no mention of the fact that an event is not specifically listed in the clause and instead have rejected the defense on other grounds. *See* Baldwin v. Kubetz, 307 P.2d 1005, 1008 (Cal. Dist. Ct. App. 1957) (finding a force majeure defense to be meritless since an ordinance was not actually a drilling ban, rather than finding the event was outside the scope of a clause that did not mention local ordinances but only said "acts, rules or regulations of governmental agencies"); Erickson v. Dart Oil & Gas Corp., 474 N.W.2d 150, 155–56 (Mich. Ct. App. 1991) (refuting a force majeure defense solely upon control grounds even though the event claimed was "administrative" or "bureaucratic delay" in issuing a permit and the force majeure clause merely included "any law, order, rule or regulation" in its scope); Edington v. Creek Oil Co., 690 P.2d 970, 973–74 (Mont. 1984) (warning a shut-in order cannot excuse performance if it results from a lessee's conduct, without deciding whether such order is encompassed by a clause that said "state and federal statutes, all orders, rules and regulations of any governmental body").

377. *See* Commonwealth Edison Co. v. Allied-General Nuclear Servs., 731 F. Supp. 850, 854 (N.D. Ill. 1990) (recognizing nuclear fuel reprocessing facilities were not licensed since the moratorium was initially implemented). The force majeure clause included "failure to obtain or maintain a required permit, license, authorization or permission." *Id.* at 855. In addition, the clause generally alluded to governmental interferences by listing "compliance with any order, judgment, action[,] . . . direction of any court, [g]overnmental officer, department, agency, authority[,] or committee thereof." *Id.* However, the contract also set forth a parenthetical that stated "provided, however, with regard to commencement of commercial operation, failure to obtain an operating license shall not be deemed a force majeure reason." *Id.* at 853.

378. *Id.* at 858. The parenthetical was included so that the facility assumed the risk of failing to obtain a license as quickly as its competitors got licenses and, therefore, did not allocate "the risk of a governmental ban on reprocessing that would affect the other [facilities]" equally. *Id.* Accordingly, the parenthetical only removed the "mere failure to obtain an operating license" from the scope of the force majeure clause. *Id.*

practice though not in form, to an outright ban."[379] Thus, although not specifically mentioned in the clause, it is likely that state and local bans on fracking or prohibitions on the issuance of permits required to frack would satisfy the first step of the force majeure inquiry under a more generally worded clause.[380]

Force majeure clauses do not always include general terms, such as "governmental authority,"[381] and may not specifically list various levels of government, like municipal and local bodies.[382] A lease might merely define a governmental disturbance as a "regulation by [s]tate or [f]ederal action."[383] When faced with such a clause, an issue arises as to whether a local ban would qualify to excuse performance since the clause neither mentions action by a more local level of government nor contains a general reference to governmental actions. Here, the outcome of the defense is possibly contingent upon whether the court takes a strict or liberal construction of the clause.[384] If a court strictly and narrowly interprets a clause that does not mention local rules or orders, the defense might falter since local fracking bans will arguably fall outside the scope of the clause.[385] However, such a narrow approach is unnecessary, as many courts have broadly interpreted the applicability of force majeure clauses to government

379. *Id.* (citation omitted). The court viewed the termination of licensing proceedings and environmental hearings as an act of regulatory force majeure that squarely fell within the force majeure clause's language pertaining to compliance with governmental orders. *Id.* at 859.

380. *See* Sun Operating P'ship v. Holt, 984 S.W.2d 277, 285–86 (Tex. App.—Amarillo 1998, pet. denied) (analyzing whether the lessee met its burden of proof and demonstrated the event fell within the scope of the force majeure clause).

381. *See* Lamczyk v. Allen, 134 N.E.2d 753, 754 (Ill. 1956) (reviewing a force majeure clause that restricted qualifying governmental acts to "regulation by [s]tate or [f]ederal action").

382. *Contra* Edington v. Creek Oil Co., 690 P.2d 970, 973 (Mont. 1984) (reciting the force majeure clause, which provided an act of force majeure shall "include state and federal statutes, all orders, rules and regulations of any governmental body (either federal, state or municipal)"); Frost Nat'l Bank v. Matthews, 713 S.W.2d 365, 367 (Tex. App.—Texarkana 1986, writ ref'd n.r.e.) (indicating the force majeure clause defined a qualifying event to include "any [f]ederal or [s]tate law or any order, rule of regulation of governmental authority").

383. *Lamczyk*, 134 N.E.2d at 754. The clause's only other reference to governmental actions were those that render equipment unavailable. *Id.*

384. *See* 30 WILLISTON & LORD, *supra* note 97, § 50:57 (addressing the tendency of courts to claim rules of contract interpretation are applied to give effectuate the intent of the parties while actually undergoing a strict or liberal construction of the lease, with liberal courts favoring lessees (citations omitted)).

385. *Cf.* Alaskan Crude Corp. v. State of Alaska, Dep't Nat. Res., Div. of Oil & Gas, 261 P.3d 412, 418 (Alaska 2011) (affirming the trial court and declining to rule on the lower court's decision that rejected a defense because performance was halted by an order issued by a *quasi-judicial* body but the force majeure provision listed decisions of *judicial* bodies). For a discussion on courts adopting strict interpretations of force majeure clauses, see *supra* notes 106–09, 202–02 and accompanying text

actions.[386] The United States Court of Appeals for the Fifth Circuit has held "fundamentally coercive acts of [g]overnment, *whatever their form*, constitute an excuse for breach" under contractual force majeure defenses and the common law defense of impossibility.[387] The court went onto recognize informal and technically deficient governmental acts can qualify as force majeure contingencies.[388] Additionally, a federal district court interpreted "all [f]ederal and [s]tate [l]aws, [e]xecutive [o]rders, [r]ules or regulations" to excuse nonperformance caused by a state court injunction since the clause spoke to "forms of governmental restraint that can prevent a lessee from performing."[389] Comparatively, although the common law does not control the contractual defense, the doctrine of impracticability views a supervening governmental intervention as "emanat[ing] from any level of government."[390] Therefore, if a court confronts this issue with a

386. Kirkham, *supra* note 64, § 6.03[4], at 6-14 (claiming courts recognize a broad range of government intervention as force majeure events); Pletcher & Zoobkoff, *supra* note 62, § 17.04[3][d][v], at 17-22 to -23 ("Force majeure clauses that specifically list acts of government have been interpreted broadly, with even informal government policies being found to constitute force majeure events." (citing E. Air Lines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957, 994–96 (5th Cir. 1976))); *see also* N. Nat. Gas Co. v. Approx. 9117 Acres in Pratt, Kingman, & Reno Ctys., 114 F. Supp. 3d 1144, 1155 (D. Kan. 2015) ("[C]ourts have characterized this clause as one directed at governmental action generally." (first citing Fransen v. Conoco, Inc., 64 F.3d 1481, 1488 (10th Cir. 1995); and then citing Watts v. Atl. Richfield Co., 115 F.3d 785, 795 (10th Cir. 1997))), *appeal docketed*, No. 15-3286 (10th Cir. Nov. 17, 2015).

387. *E. Air Lines*, 532 F.2d at 994 (emphasis added). The court explained previous cases have not required acts of government to be "formal or technical" in order to excuse performance. *Id.*

388. *Id.* at 994–95. Under this view, even de facto or informal fracking bans could form the basis for a force majeure defense. For example, the lessees in *Beardslee* asserted force majeure based upon New York's de facto moratorium that existed at the time of suit because New York's formal fracking prohibition was not issued until after the third *Beardslee* opinion was issued. *See* Beardslee v. Inflection Energy, LLC (*Beardslee IV*), 798 F.3d 90, 92 n.2 (2d Cir. 2015) (per curiam) (indicating the prohibition was announced three months after the New York Court of Appeals decided *Beardslee* (citation omitted)), *aff'g* 904 F. Supp. 2d 213 (N.D.N.Y. 2012), *and conforming to answer to certified question*, 31 N.E.3d 80 (N.Y. 2015); Beardslee v. Inflection Energy, LLC (*Beardslee II)*, 761 F.3d 221, 223 (2d Cir. 2014) (recognizing the lessees relied upon a de facto moratorium in declaring force majeure), *certifying questions to* 31 N.E.3d 80 (N.Y. 2015). De facto fracking bans have plagued lessees in other jurisdictions as well. *See* Dave Dewitt, *Fracking Halted by Court Order*, WUNC 91.5 (May 20, 2015), http://wunc.org/post/fracking-halted-court-order (discussing a county court injunction that prohibits the review of fracking permits and constitutes a de facto moratorium on fracking in North Carolina); Susan Phillips & Jon Hurdle, *Battle Re-emerging over Fracking Along Delaware River*, STATEIMPACT (Mar. 14, 2017, 6:00 PM), https://stateimpact.npr.org/pennsylvania/2017/03/14/battle-re-emerging-over-fracking-along-delaware-river/ (reporting on the seven year de facto fracking moratorium in the Delaware River Basin).

389. The court equated a state court order to state "law" since an order requires the application of state law. *N. Nat. Gas Co.*, 114 F. Supp. 3d at 1155–56.

390. RESTATEMENT (SECOND) OF CONTRACTS § 264 cmt. b (AM. LAW INST. 1981). Additionally, "distinctions between 'law,' 'regulation,' 'order' and the like" are considered technical and should be disregarded. *Id.*

similar approach, as would especially be expected in a pro-production state, local bans and moratoria will likely suffice as an act of force majeure so long as the clause contains *some* allusion to a form of government interference. Moreover, if catch all language is included in the force majeure clause, this result is especially likely, regardless of whether the doctrine of *ejusdem generis* is applied.[391]

If a court determines the event falls within the scope of the clause, the lessee must next prove causation.[392] Herein lies the most difficult component of excusing nonperformance caused by fracking bans. To prevail on the defense, producers will have to show fracking bans deprive them of the only method of production available to render performance.[393] Fracking is commonly described as the only economical or commercially viable method of production,[394] and since government policies affecting a contract's profitability without precluding performance are generally held

391. *Ejusdem generis* applies to limit "general terms which follow specific ones to matters similar in kind or classification to those specified." *E. Air Lines*, 532 F.2d at 988–89 (citing Bumpus v. United States, 325 F.2d 264, 266–67 (10th Cir. 1963); and then citing Ruth v. Pac. Gas & Elec. Co., 100 Cal. Rptr. 501, 509 (Ct. App. 1972)). Thus, if a force majeure clause lists specific forms of governmental action and subsequently sets forth catch all language, a lessee will be able to argue that unspecified governmental actions qualify triggering events because they are similar in kind to those enumerated. For example, when applying the doctrine to a clause that included "[l]aw, [o]rder, [r]ule or [r]egulations or if prevented by an act of God, of the public enemy, . . . or other cause beyond the control of the [l]essee," the court identified the common characteristics of the specified events and concluded "external forces beyond the control of a lessee, such as natural disasters or *governmental decisions*" qualified as force majeure events under the catch all provision. Maralex Res., Inc. v. Gilbreath, 76 P.3d 626, 636 (N.M. 2003) (emphasis added). Alternatively, a catch all phrase that precedes the specified list of contingencies enables the lessee to contend that the scope of the clause encompasses specified events, as well as unspecified events beyond its control. *See E. Air Lines*, 532 F.2d at 989 (declining to apply the doctrine of *ejusdem generis* because it would render the "including but not being limited to" words before the list of specified events nugatory, and concluding the clause excused all delays that fell within the catch all phrase's general description, meaning those outside the party's control, "regardless of their similarity to the listed excuses").

392. *See* KUNTZ, *supra* note 90, § 53.5 ("[E]ven if the event occurred and is described in the force majeure clause, it will not relieve the lessee of performance unless it in fact prevented performance.").

393. *See* Beardslee v. Inflection Energy, LLC (*Beardslee II*), 761 F.3d 221, 229–30 (2d Cir. 2014), *certifying questions to* 31 N.E.3d 80 (N.Y. 2015) (questioning the validity of lessees' force majeure defense since the moratorium only banned horizontal drilling combined with fracking and conventional drilling methods were still available). In order to excuse performance, lessees must usually prove actual hindrance of performance by governmental action. Perlman v. Pioneer P'ship, 918 F.2d 1244, 1249 (5th Cir. 1990) (per curiam). Thus, actual hindrance did not exist when a lessee attempted to utilize a personal production process, as opposed to a process accepted industry wide, and the regulatory agency stated the lessee would have to submit the process to a study before a permit would be issued. *Id.* For a discussion of the actual hindrance rule and instances where courts have varied from its stringencies, see supra notes 119–133, 203–221 and accompanying text

394. *See, e.g.*, Rutherford, *supra* note 28, at 851 (explaining how fracking makes shale production economical by increasing the surface area, while "[n]on-fraced shale wells simply are not profitable" (citations omitted)).

not to qualify for a contractual force majeure defense, proving causation might be a steep hurdle for lessees, especially in fracking-opposed courts.[395] However, courts should not equate this defense with an assertion that bans render performance merely more expensive and less profitable or that economics constitute the act of force majeure. Rather, the argument is one of *complete* preclusion of performance caused by a governmental action[396] that deprives the industry of the only accepted method of rendering performance.[397] Despite the contentions of lessors,[398] conventional methods of production simply are not an option under industry standards, which regard fracking as a necessity to producing in shale plays.[399] Accordingly, the defense is bolstered by these industry standards because the defense is not predicated upon deprivation of a method utilized by only a small subset of the industry.[400] In essence, the argument is "can't frack,

395. Seaboard Lumber Co. v. United States, 308 F.3d 1283, 1293 (Fed. Cir. 2002) (first citing Langham–Hill Petrol., Inc. v. S. Fuels Co., 813 F.2d 1327, 1329–30 (4th Cir. 1987); and then citing N. Ind. Pub. Serv. Co. v. Carbon Cty. Coal Co., 799 F.2d 265, 274–76 (7th Cir. 1986)); *see also* Sabino, *supra* note 7, at 7 (clarifying financial disasters are insufficient to excuse nonperformance unless the contract contains a clause to that effect). *Contra* N. Nat. Gas Co. v. Approx. 9117 Acres in Pratt, Kingman, & Reno Ctys., 114 F. Supp. 3d 1144, 1156 (D. Kan. 2015) (holding a state court order which precluded a gas purchaser from making payments for gas subject to a title dispute was an act of force majeure that prevented the lessees from producing gas), *appeal docketed*, No. 15-3286 (10th Cir. Nov. 17, 2015).

396. *Cf.* Baldwin v. Kubetz, 307 P.2d 1005, 1008 (Cal. Dist. Ct. App. 1957) (finding a zoning ordinance was not a complete prohibition on drilling since a permit could be obtained by showing permission from the landowner to develop, an "easily fulfilled" prerequisite).

397. *See* Ritchie, *supra* note 2, at 812 (regarding fracking bans as a "relatively easy way to prohibit all oil and gas production without expressly" doing so because oil and gas in right formations and shale source rock "can be accessed *only* using hydraulic fracturing").

398. In both *Beardslee v. Inflection Energy, LLC* (*Beardslee I*), 904 F. Supp. 2d 213, 219 (N.D.N.Y. 2012), *aff'd*, 798 F.3d 90 (2d Cir. 2015) (per curiam), and *Aukema v. Chesapeake Appalachia*, LLC, 904 F. Supp. 2d 199, 209 (N.D.N.Y. 2012) the lessors argued fracking bans only prevented fracking and that the lessees could still seek a permit for conventional drilling methods.

399. *See* Kurth et al., *supra* note 4, § 4.01, at 4-5 (identifying fracking to be "a practical necessity to promote development of unconventional 'tight' shale reservoirs, particularly oil shale and gas shale"); Rutherford, *supra* note 28, at 865 (contending a fracking ban "over a dense shale formation inexorably prevents drilling of any kind as well as re-fracing" (citing Colo. Oil & Gas Ass'n v. City of Longmont, No. 13CV63, 2014 WL 3690665, at *15–16 (Colo. Dist. Ct. July 24, 2014), *aff'd*, 2016 CO 29)).

400. Comparatively, the Fifth Circuit rejected a force majeure defense where the lessee was attempting to use their own patented process. Perlman v. Pioneer P'ship, 918 F.2d 1244, 1249 (5th Cir. 1990) (per curiam). The regulatory agency would not issue a permit for the process absent studies on the patented process's impact on water resources. *Id.* The court held the lessee was not actually prohibited by the regulatory agency because, in part, he never subjected the process to studies to receive a permit. More importantly, however, the lessee's performance was not prevented because he could have drilled other wells by way of alternative methods used in the state that yield less water than his patented process and that were subject to less regulation. *Id.* at 1246, 1249.

can't drill."[401] When a court considers industry standards to assess a force majeure claim,[402] it is apparent that fracking bans absolutely halt a lessee's ability to produce and perform its contractual obligations.[403] Courts have in fact recognized fracking as a necessary means to production in shale plays, as evinced by industry standards and the lack of shale production prior to technological advancements.[404] For example, the Texas Supreme Court considers fracking as essential, rather than optional, "to the recovery of oil and gas in many areas."[405] The fact that fracking bans cause nonperformance is inherent in the absence of production in shale plays prior

401. An author summarized this contention in a sub-heading aptly entitled "Fracing = Drilling = Fracing: Because Math." Rutherford, *supra* note 28, at 865.

402. The United States Court of Appeals for the Fifth Circuit deemed considerations of "the custom of businessmen in like cases" relevant for contractual force majeure defenses. Perlman v. Pioneer P'ship, 918 F.2d 1244, 1248 n.5 (5th Cir. 1990) (per curiam) (citing ARTHUR LINTON CORBIN, 6A CORBIN ON CONTRACTS § 1324 (1962)).

403. *See* Klingensmith & McGavran, *supra* note 17, at 16–17 (contending state bans on fracking prevent lessees from producing their leased tracts); *see also* Rutherford, *supra* note 28, at 866 (analyzing fracking bans in a preemption context, and concluding that although conventional drilling is still technically available, "a court will look beyond the literal language and contemplate the economic reality; without fracing, further development of the Barnett Shale will not occur" (citing Coastal Oil & Gas Corp. v. Garza Energy Tr., 268 S.W.3d 1, 16 (Tex. 2008))).

404. The Texas Supreme Court has expounded upon the necessity of fracking and has said natural gas contained in imporous and impermeable sandstone formation "cannot be commercially produced without hydraulic fracturing," which "has long been commonplace throughout the industry." *Coastal Oil & Gas*, 268 S.W.3d at 6, 13. The court further explained "fracing is now essential to economic production of oil and gas and commonly used throughout Texas, the United States, and the world." *Id.* at 7. Stressing its necessity, the court stated "hydraulic fracturing is not optional; it is essential to the recovery of oil and gas in many areas," in addition to being essential to the oil and gas industry. *Id.* at 16. In addition, a concurring opinion found hydraulic fracturing is "an essential recovery practice" and "a must-have recovery tool" rather than a mere "luxury" and noted the technique "is vital today and will remain vital tomorrow" since "meeting spiking demand requires advanced techniques to make uneconomical fields economical." *Id.* at 30–31 (Willett, J., concurring). Moreover, as support for its description of fracking as essential and a necessity, the concurrence highlighted the inability to produce shale formations prior to fracking's technological advancements. *Id.* at 32 (recognizing that modern day production of incredible energy supplies that were previously considered depleted or passed over and deemed unrecoverable). It would be surprising if a court with sentiments similar to the Texas Supreme Court rejected the fact that fracking bans deprive lessees of the only method available to produce in shale plays. *Cf. id.* at 29 ("Texas common law must accommodate cutting-edge technologies able to extract untold reserves from unconventional fields."). Texas courts, however, are not alone in recognizing the necessity of fracking. *See generally* Colo. Oil & Gas Ass'n v. City of Longmont, No. 13CV63, 2014 WL 3690665 (Colo. Dist. Ct. July 24, 2014) (considering fracking a standard and widely used completion method in production that has allowed production of formations previously disregarded, and thus finding a local ban of fracking preempted since banning fracking completely "halted development and production" in the locality and noting the contentions that the local ban may constitute a "de facto ban on drilling" since the producers are unable to economically produce their leased tracts), *aff'd*, 2016 CO 29.

405. *See Coastal Oil & Gas*, 268 S.W.3d at 16 (relying upon industry experts' views on fracking when holding "common law liability for a long-used practice essential to an industry is ill-advised").

to the advent of fracking.[406] Accordingly, the impact of the bans, as asserted in the defense, far surpasses mere economic hardship or unprofitability and rises to the level of impracticability of performance.[407]

C. *Drilling in the Common Law (Without the Mess)*

As discussed above, elements of the common law doctrines are injected into the affirmative force majeure defense if a force majeure clause incorporates the elements or a court reads them into the defense.[408] Of the common law elements, the requirement that the force majeure contingency and its cause be beyond the lessee's control[409] presents the least difficulty in this defense. That element obstructs a successful force majeure defense if the lessee affirmatively caused the event or reasonably could have prevented the event.[410] When courts apply the element in the context of governmental interference, the force majeure clause cannot excuse performance if the governmental interference results from the lessee's improper action or noncompliance with the law.[411] Unlike cases involving shut-in orders, fracking bans are not subjectively imposed in response to particular lessees violating laws and regulations while producing.[412]

406. *See* Klass, *supra* note 12, at 163 (emphasizing the import of fracking as it has enabled "drillers to reach previously inaccessible oil and gas deposits that are trapped in tight sand and shale formations thousands of feet underground" (citing Michael MacRae, *Fracking: A Look Back*, ASME (Dec. 2012), https://www.asme.org/engineering-topics/articles/fossil-power/fracking-a-look-back)); *cf.* Sherwin Alumina LP v. Aluchem, Inc., 512 F. Supp. 2d 957, 968 n.22 (S.D. Tex. 2007) (recognizing the party's ability to perform using the same equipment for four years and committing the same regulatory violations through the use of that equipment that it later relied upon in invoking the force majeure clause).

407. *See* Mineral Park Land Co. v. Howard, 156 P. 458, 460 (Cal. 1916) (defining impracticable performance as that which "can only be done at an excessive and unreasonable cost" (citation omitted)); *see also* N. Nat. Gas Co. v. Approx. 9117 Acres in Pratt, Kingman, & Reno Ctys., 114 F. Supp. 3d 1144, 1164 (D. Kan. 2015) (concluding the lessees' performance of production obligations was rendered impracticable by a court order precluding payments for gas sales and, thus, finding the force majeure clause extended the lease), *appeal docketed*, No. 15-3286 (10th Cir. Nov. 17, 2015).

408. *See* Pletcher & Zoobkoff, *supra* note 62, § 17.04[2], at 17-12 to -14 (noting the common law elements of foreseeability, control, and mitigation work their way into the affirmative defense because of the contractual terms in the force majeure clause or because courts sometimes construe the defense "in light of the common law doctrines" (citing Watson Labs., Inc. v. Rhone-Poulenc Rorer, Inc., 178 F. Supp. 2d 1099, 1110 (C.D. Cal. 2001))).

409. Sun Operating P'ship v. Holt, 984 S.W.2d 277, 290 (Tex. App.—Amarillo 1998, pet. denied).

410. A force majeure event is within a lessee's reasonable control and will not excuse performance if "the force majeure itself was created by the lessee." 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)).

411. *Edington*, 690 P.2d at 974.

412. *See* Hydrocarbon Mgmt., Inc. v. Tracker Expl., Inc., 861 S.W.2d 427, 436 (Tex. App.—Amarillo 1993, no writ) (denying a lessee relief under a force majeure clause because the agency's shut-in order was due to multiple violations of a production allowable and after warning the lessee of

Instead, the bans' completely objective application precludes finding a lessee's wrongdoing resulted in a ban's enactment.[413] Moreover, the industry serves no legislative function in promulgating fracking bans and is actively fighting their promulgation through lobbying efforts.[414] Accordingly, the reasonable control element should pose no difficulty to the "fracking bans as force majeure" defense.

When it is applied, the mitigation element requires the lessee to establish its inability to overcome or remove an intervening act of government through the exercise of reasonable diligence.[415] The element demands bona fide contemplation or exercise of available options to eliminate the force majeure contingency.[416] Therefore, in *Perlman*, when the lessee invoked the force majeure clause after it failed to undergo environmental studies to obtain a permit for his *personal*, patented process, the court held the lessee could have mitigated against the alleged impediment by either: (1) attempting to obtain a permit for his process by completing the studies required by the agency for such a process; or (2) utilizing a more commonly employed and less regulated production technique.[417] Such an analysis, however, is largely inapposite in the context of fracking bans that preclude performance. Unlike *Perlman* where the lessee wished to produce using his *personal* process despite the availability of industry-accepted production methods,[418] lessees confronted with fracking prohibitions are absolutely deprived of the *only* industry-accepted method of producing in shale plays.[419] Accordingly, should a court look to alternative means for performance as the Fifth Circuit did, the inability to overcome the effects

potential shut-ins twice).

413. *See* Atkinson Gas Co. v. Albrecht, 878 S.W.2d 236, 241 (Tex. App.—Corpus Christi 1994, writ denied) (construing *Frost National Bank* to preclude implication of the force majeure clause when governmental action is brought about by "events beyond the *present* lessee's control" (emphasis added) (citing Frost Nat'l Bank v. Matthews, 713 S.W.2d 365, 368 (Tex. App.—Texarkana 1986, writ ref'd n.r.e.))).

414. *See, e.g.*, Rogers, *supra* note 33 (discussing the millions of dollars the industry invested in opposing grass roots measures that pushed for local fracking bans).

415. *Erickson*, 474 N.W.2d at 155 (citing Woods v. Ratliff, 407 So. 2d 1375, 1378–79 (La. App. 1981)).

416. *Id.* (citing *Woods*, 407 So. 2d at 1378–79)); *see also* Commonwealth Edison Co. v. Allied-General Nuclear Servs., 731 F. Supp. 850, 859 (N.D. Ill. 1990) (reciting the mitigation requirement implied in every contract, unless waived, to make a good faith attempt in dissolving the condition impeding performance).

417. Perlman v. Pioneer P'ship, 918 F.2d 1244, 1249 (5th Cir. 1990) (per curiam). Alternative methods of drilling, which were used in the state, produced less water and were subject to less strict regulation. *Id.* at 1246, 1249.

418. *Id.* The lease did not require the use of the lessee's personal process. *Id.* at 1246 n.1, 1249.

419. *Cf.* Coastal Oil & Gas Corp. v. Garza Energy Tr., 268 S.W.3d 1, 16 (Tex. 2008) (recognizing fracking is "a long-used practice essential to an industry").

of fracking bans as force majeure is largely inherent in the causation finding as no alternative method of production is available.[420] Moreover, while the lessee may have received a permit for his patented process upon satisfaction of a condition precedent in *Perlman*,[421] the same cannot be said if there is a de facto moratorium under which fracking applications are not even considered.[422] When presented with a regulatory moratorium on the issuance of nuclear fuel reprocessing, Judge Posner concluded a nonperforming party was not required to needlessly exercise due diligence in pursuing a license it would have never received.[423] He reasoned:

> There is a practical reason for excusing a failure to exercise due diligence in circumstances where it would have made no difference. Diligence is costly, and contract law does not seek to create incentives to incur costs that have no benefits—that serve merely to stake a claim. A party should not be penalized for failing to incur costs that would have conferred no benefit on anybody. . . . If [the facility] had done all that the principles of due diligence could be thought to require it to do, it still would not have obtained a license; the money spent on diligent pursuit of a license would have been money down the drain.[424]

Therefore, as considered in the context of de facto fracking bans, a lessee would not be required to mitigate against such a force majeure contingency by seeking a permit that is effectively nonexistent.

Moreover, although the judge was addressing the futile pursuit of a license,[425] as opposed to employing alternative means of performance, this statement provides lessees with several arguments should a court consider "alternative" methods of production in its mitigation analysis. Lessees can contend that even if they had pointlessly attempted to produce using

420. Indeed, the mitigation analysis in *Perlman* mirrored the court's causation finding. *See Perlman*, 918 F.2d at 1249 (concluding the lessee's nonperformance was not caused by the requirement to conduct an environmental study as the lessee could have completed the study and sought a permit for his process or began drilling wells using alternative methods and subsequently relying upon the same facts in its mitigation analysis); *see also supra* notes 392–407 and accompanying text.

421. *See Perlman*, 918 F.2d at 1249 (refuting satisfaction of the mitigation requirement because the lessee could have initiated the permitting process by undergoing the required advance studies).

422. *See, e.g.*, Dewitt, *supra* note 388 (discussing an injunction precluding a regulatory agency from considering any fracking permits, effectuates a fracking ban).

423. Commonwealth Edison Co. v. Allied-General Nuclear Servs., 731 F. Supp. 850, 863 (N.D. Ill. 1990).

424. *Id.*

425. *See id.* (deeming the lack of due diligence as not dispositive even if the nonperforming party attempted to mitigate against the regulatory act of force majeure, it would not have succeeded in obtaining a license).

traditional production methods, such diligence would have conferred no benefit upon the parties to the lease and would have constituted bad faith and irresponsible development because such methods of production are known to be ineffective and commercially unviable.[426] Moreover, utilization of conventional techniques would not enable lessees to remove the force majeure event impeding performance. Rather, such "remediation" efforts would merely serve to preserve a force majeure defense and disable a court from viewing mitigation as requiring the use of production methods the industry rejects as alternatives.[427] Simply stated, lessees can argue what they would "spen[d] on diligen[ce] . . . would have been money down the [well]."[428]

Furthermore, in the same moratorium opinion, Judge Posner also concluded the mitigation standard does not impose "a duty to exert heroic efforts to change laws, regulations, or policies of general applicability."[429] Accordingly, if a court views endeavors to alter laws as the exercise of due diligence, a lessee could satisfy the mitigation mandate. The industry has been attempting to remove such impediments to performance and urging judicial invalidation of fracking bans and moratoria nationwide.[430] Thus, under that measure, the industry has done more than mitigation requires of it by exerting "heroic efforts" and affirmatively seeking "to change laws, regulations, or policies of general applicability."[431] Indeed, parties' attempts to overturn a regulatory agency's decisions have been held to establish a good faith effort to remediate against a governmental force majeure contingency.[432]

426. *See* Beardslee v. Inflection Energy, LLC (*Beardslee I*), 904 F. Supp. 2d 213, 219–220 (N.D.N.Y. 2012) (reciting the lessees' argument that fracking provides the only commercially viable method for satisfying production obligations, which thereby renders use of conventional techniques irresponsible and unreasonable that are knowingly unprofitable, especially because the lessees are bound to "produce marketable gas and provide royalty payments to" the lessors), *aff'd*, 798 F.3d 90 (2d Cir. 2015) (per curiam); Aukema v. Chesapeake Appalachia, LLC, 904 F. Supp. 2d 199, 209–210 (N.D.N.Y. 2012) (indicating the lessees argued that the fracking ban precluded their compliance with their obligation to prudently develop the leaseholds in good faith because utilization of methods known to be ineffective and drilling unproductive formations would constitute bad faith).

427. *Commonwealth Edison*, 731 F. Supp. at 863 (contending contract law does not incentivize needless expenditure of costs in an attempt to merely "stake a claim").

428. *Id.* (depicting money spent on the trivial exercise of diligence as "money down the drain").

429. *Id.* at 860 (citing Glickman v. Coakley, 488 N.E.2d 906, 912 (1984)). In addition, the judge compared seeking a change in the law, which he equated with "oppos[ing] the highest governmental authorities," to taking advantage of an *available* exception to zoning ordinances, which the due diligence requirement might necessitate. *Id.* at 859, 862 (citing G.W. Andersen Constr. Co. v. Mars Sales, 210 Cal. Rptr. 409, 416 (1985)).

430. *See* Klingensmith & McGavran, *supra* note 17, at 16–17.

431. *Commonwealth Edison*, 731 F. Supp. at 860 (citing *Glickman*, 488 N.E.2d at 912).

432. *See* Babcock & Wilcox Co. v. Allied-General Nuclear Servs., 555 N.Y.S.2d 313, 314 (App.

Finally, if a court requires a fracking ban to be unforeseeable to qualify as a force majeure defense,[433] the outcome will largely depend upon whether the lease was executed prior to the promulgation of the ban or moratorium. Lessees who entered into their leases prior to a ban should have little difficulty overcoming the foreseeability hurdle.[434] However, if a lease relationship was entered while a preexisting ban was in effect, a force majeure defense based upon the ban may have little merit since contracting parties are presumed to enter their agreements with knowledge of preexisting laws and regulations.[435] While the bans may not have been foreseeable in days past, they certainly might be considered so moving forward, which should be carefully deliberated when revisiting how to draft force majeure clauses.

D. *Draft Around Fracking Bans and Moratoria*

To avoid the difficulties inherent in public policy infused interpretations[436] and a fact-specific defense, the industry needs to reevaluate the effectiveness of its force majeure clauses. The primary drafting lesson from the *Beardslee* decisions pertains to the force majeure clause's modification of the habendum clause.[437] As explained above, the

Div. 1990) (concluding the defendants established a bona fide attempt to overcome a moratorium on licenses for nuclear reprocessing by engaging in efforts to overturn the regulatory agency's decision to terminate licensing applications and the environmental impact study required to resume licensing).

433. *Cf.* Gulf Oil Corp. v. Fed. Energy Regulatory Comm'n, 706 F.2d 444, 452–53 (3d Cir. 1983) (conditioning an event's classification as a triggering event upon whether it was unforeseeable and unanticipated).

434. A party is generally presumed to have entered a contractual relationship with knowledge of any foreseeable laws. Swanson, *supra* note 4, at 236 (first citing Erickson v. Dart Oil & Gas Corp., 474 N.W.2d 150, 155 (Mich. Ct. App. 1991); and then citing Goldstein v. Linder, 648 N.W.2d 892, 899 (Wis. Ct. App. 2002)). As was contended in reaction to the *Beardslee* and *Aukema* decisions, the industry did not regard a permanent ban as foreseeable in New York, but rather thought a mere study was in the works. *See* Hennessey, *supra* note 319 (challenging the district court's "suspect finding that New York's moratorium was foreseeable," and alleging the industry previously believed the regulatory review of fracking was nearing an end and would be able to produce in the near future but "unfortunately" were mistaken).

435. *Erickson*, 474 N.W.2d at 155 (citing Hughes v. Cantwell, 540 S.W.2d 742, 745 (Tex. Civ. App.—El Paso 1976, writ ref'd n.r.e.)); *see also* URI Cogeneration Partners, LP v. Bd. of Governors for Higher Educ., 915 F. Supp. 1267, 1287 (D.R.I. 1996) (prohibiting a force majeure claim based on a zoning ordinance that existed at the time the contract was entered). While the argument is weaker than the complete lack of a ban, it is possible that when leases were entered during the temporary moratorium in New York, the ban was still not foreseeable as parties expected fracking would be permitted upon completion of the study. *See* Barnes & Pardo, *supra* note 1 (estimating 2,200 leases were entered during this time in anticipation of fracking resuming).

436. *See* discussion *infra* Part VI.A.

437. *See* Hennessey, *supra* note 280 ("[T]he takeaway from *Beardslee* is that oil and gas companies should revisit their lease forms, with particular emphasis on their force majeure and habendum

New York Court of Appeals disposed of the *Beardslee* case by concluding the force majeure defense did not modify the primary term set forth in the habendum clause, because: (1) the habendum clause failed to either expressly subject itself to other lease provisions or "incorporate the force majeure clause by reference"; and (2) the force majeure clause's statement that "the time of such delay or interruption shall not be counted against [l]essee" did not specifically reference the habendum clause.[438] In addition, the court held the "anything in this lease to the contrary notwithstanding" phrase in the force majeure clause merely conflicted with and affected the secondary term (not the primary term), reasoning that: (1) the clause, supposedly, addressed interruptions or delays "in drilling or production," which is an "obligation" imposed upon the lessee only during the secondary term;[439] (2) the clause's second sentence, which focused solely upon governmental actions, only pertained to the lessees' express or implied covenants and, thus, the clause merely related to drilling and production operations in the secondary term because the only "covenant" in the primary term (delay rental payments) was not an issue in the case; and (3) since the second sentence only mentioned lease termination, the entire force majeure clause merely affected the habendum clause's provision on the secondary term, which "addresses the conditions under which the leases . . . terminate, whereas the primary term [provision] deals with lease expiration."[440] In light of the *Beardslee* decision and regardless of whether the force majeure clause is capable of implicitly modifying the habendum clause, it is pertinent that both the habendum and force majeure clauses unambiguously express the intention to have the force majeure clause modify the habendum clause, including both the primary and secondary terms it establishes.[441] To clarify that other lease provisions can alter the

clauses.").

438. Beardslee v. Inflection Energy, LLC (*Beardslee III*), 31 N.E.3d 80, 84 (N.Y. 2015), *answering questions certified by* 761 F.3d 221 (2d Cir. 2014).

439. *Id.* at 85. However, the force majeure clause specifically stated it applied "[i]f and when drilling or *other operations* . . . are delayed or interrupted." *Id.* at 82 (emphasis added).

440. *Id.* at 85.

441. A Texas court explained that the duration of a lease, as provided for in the habendum clause, "may be affected by other provisions in the document, depending upon the intent of the parties." Sun Operating P'ship v. Holt, 984 S.W.2d 277, 286 (Tex. App.—Amarillo 1998, pet. denied) (citing Gulf Oil Corp. v. Southland Royalty Co., 496 S.W.2d 547, 552 (Tex. 1973)). It found the habendum clause enumerates "production (or lack thereof) as the condition generally determining when the lease terminates once the primary term has lapsed." *Id.* However, by assessing the entire instrument without interpreting provisions in isolation from others, the court held "the habendum clause is not the only provision of the lease which addresses production and its continuation" because the force majeure clause "speaks to how delays and interruptions in various activities, including production, should be treated." *Id.* at 286–87; *see also* N. Nat. Gas Co. v. Approx. 9117 Acres in Pratt, Kingman, & Reno

terms set forth in the habendum clause, the habendum clause should include a phrase expressly subjecting it to other lease provisions, such as "[s]ubject to other provisions herein contained."[442] In addition, the standard force majeure clause's phrase "anything in this lease to the contrary

Ctys., 114 F. Supp. 3d 1144, 1158 (D. Kan. 2015) (construing the force majeure and habendum clauses of a lease "as part of a whole," and finding they "evince[d] an intent to extend the lease rather than terminate it so long as production in the secondary term was prevented by a force majeure event" (citations omitted)), *appeal docketed*, No. 15-3286 (10th Cir. Nov. 17, 2015). While clauses expressly made subject to one another were considered in *Sun Operating*, the court's reasoning may signal that courts will recognize that the two clauses implicitly modify one another as they speak to the same subject: the status of the lease in the absence of production. *See Sun Operating*, 984 S.W.2d at 289 (concluding the inclusion of "anything in this lease to the contrary notwithstanding" in the force majeure clause "evinced an intent to allow the lessee to rely upon the clause and its effect regardless of any other provision contained in the document"). Indeed, some courts have recognized express modification of the habendum clause is unnecessary. *See N. Nat. Gas Co.*, 114 F. Supp. 3d at 1159 ("Arguably the force majeure clause is inconsistent with clauses of limitation which operate automatically. However, a number of cases expressly or implicitly hold that a clause of limitation may be modified by a force majeure clause. . . . In effect, the limitation provisions of the lease provide for automatic termination of the lease under certain circumstances, e.g., upon failure of production during the secondary term. The force majeure clause may properly be read as defining the event upon which the lease will terminate, e.g., 'upon failure of production during the secondary term unless such failure was due to force majeure.' Thus, the force majeure clause will modify . . . the habendum clause . . . ." (quoting PATRICK H. MARTIN AND BRUCE M. KRAMER, WILLIAMS & MEYERS, OIL AND GAS LAW, § 683 (LexisNexis Matthew Bender 2014))). Additionally, courts have found the habendum clause's *primary* term to be implicitly modified by the force majeure clause. *See id.* at 1156 n.11 (concluding the primary term of a lease was extended by operation of the force majeure clause despite the absence of language in the habendum clause or force majeure clause that expressly provided for extension of the primary term upon the happening of a force majeure event); Kuykendall v. Helmerich & Payne, Inc., 741 P.2d 869, 871 (Okla. 1987) (agreeing the primary term was extended under a force majeure clause when the lessee was statutorily prohibited from commencing operations even though the force majeure clause did not specifically address the primary term); *cf.* Butler v. Nepple, 354 P.2d 239, 244–45 (Cal. 1960) (en banc) (suggesting such a requirement does not exist by rejecting a claim of force majeure in the primary term on another basis); Landry v. Flaitz, 157 So. 2d 892, 896–97 (La. 1963) (implying the force majeure clause could extend the primary term of a lease by making no mention of the issue, and rather, rejecting the defense on other grounds). The argument for implicit modification is strengthened by the fact that the purpose of the habendum clause is obliterated unless the lessee has an opportunity to actually develop the leasehold. *See* Barnes & Pardo, *supra* note 1 (reasoning the habendum clause is a "boilerplate" clause that prohibits depriving the lessee of an opportunity to effectuate the purpose of the lease).

442. *See Sun Operating*, 984 S.W.2d at 286 (interpreting such language in the habendum clause to mean "the clause is expressly subject to other provisions in the instrument," meaning "other provisions may modify the life of the lease" (citing Stanolind Oil & Gas Co. v. Newman Bros. Drilling Co., 305 S.W.2d 169, 173 (Tex. 1957))); *see also N. Nat. Gas Co.*, 114 F. Supp. 3d at 1153, 1158 (construing a force majeure clause as modifying the duration of the lease term provided in a habendum clause that said "[s]ubject to the provisions herein contained"); *cf. Beardslee III*, 31 N.E.3d at 84 (distinguishing habendum clauses that were "subject to" other lease provisions, and refusing to find the force majeure clause modified a habendum clause that was not expressly subjected to other lease provisions (first quoting Wiser v. Enervest Operating, LLC, 803 F. Supp. 2d 109, 117 (N.D.N.Y. 2011); and then citing *Sun Operating*, 984 S.W.2d at 286)).

notwithstanding" should be retained.[443] Finally, because the habendum clause's purpose is negated absent an opportunity to develop the leasehold,[444] the force majeure clause should be redrafted to clearly permit the clause's application during the primary term of the lease.[445] By utilizing certain language in the force majeure clause, the parties can remove any doubt as to whether the clause is intended to save the lease if a force majeure event prevents the lessee from fulfilling the conditions required to carry the lease into the secondary term. The seemingly most unambiguous method of providing for such modification is to concretely outline the effect of a force majeure event during the primary term[446] with language such as: "[i]f any period of suspension occurs during the primary term, the time thereof shall be added to such term";[447] or "[i]f lessee should be prevented during the last six months of the primary term hereof from drilling a well hereunder by the order of any constituted authority having jurisdiction thereover, the

443. *See Sun Operating*, 984 S.W.2d at 289 (considering language in a force majeure clause providing "anything in this lease to the contrary notwithstanding" and finding such language demonstrated an intent to extend the lease "regardless of any other provision contained in the document").

444. *See* Barnes & Pardo, *supra* note 1 (arguing the habendum clause provides for automatic lease extension if the lessee is producing the leasehold at the conclusion of the primary term but the clause's terms are inoperative if the lessee is deprived of an opportunity to effectuate the lease's purpose, which is to develop the property).

445. *See* Hennessey, *supra* note 280 (stressing the importance of ensuring the habendum and force majeure clauses account for the delays caused by bans in the primary term). Because the force majeure clause usually operates to save the lease from termination when there is a *cessation of production*, which normally would occur in the secondary term, lessees relying upon standard force majeure clauses during the secondary term have a stronger defense. *See N. Nat. Gas Co.*, 114 F. Supp. 3d at 1158 (finding the habendum and force majeure clauses evinced an intent for lease extension, rather than termination, upon the occurrence of a force majeure event preventing *production* in the secondary term (citations omitted)); Hydrocarbon Mgmt., Inc. v. Tracker Expl., Inc., 861 S.W.2d 427, 432 (Tex. App.—Amarillo 1993, no writ) (noting the only methods of continuing the life of the lease *after the primary term* is by operation of a savings clause or production in paying quantities (citations omitted)); *see also* HEMINGWAY, *supra* note 53, at 286 (acknowledging "unless" leases provide for automatic termination on the anniversary date of the primary term if delay rentals are not paid or if operations are not commenced, but noting "there is no obligation upon [the lessee] to do either act").

446. In *Hunter Co. v. Vaughn*, the force majeure clause included multiple paragraphs, one of which specified it applied "after the expiration of the primary term" and the other pertained to a lessee's inability to "drill[] or produce[] any well" due to a force majeure contingency. Hunter Co. v. Vaughn, 46 So. 2d 735, 736 (La. 1950). Therefore, when the lessees' "right to drill a well on the tract covered by the lease was in effect taken away from them by" a regulatory order during the primary term, the court held that the force majeure clause precluded cancellation of the lease. *Id.* at 736–37; *see also* San Mateo Cmty. Coll. Dist. v. Half Moon Bay Ltd. P'ship, 76 Cal. Rptr. 2d 287, 294 (Cal. Ct. App. 1998) (basing its conclusion, in part, on the recognition that leases can provide "that if performance is temporary suspended or excused, the time period of the suspension will not account against the primary term," and noting the lease under review failed to set forth such a provision).

447. PATRICK H. MARTIN AND BRUCE M. KRAMER, WILLIAMS & MEYERS, OIL AND GAS LAW, § 603.2 (LexisNexis Matthew Bender 2014) (citation omitted).

primary term of this lease shall continue until six months after said order is suspended."[448] Although the intent for such modification is not as clear, force majeure clauses may also state that its application precludes *expiration and* termination of the lease in an effort to further modify the primary term.[449] Similarly, to avoid a conclusion that the force majeure clause merely pertains to obligations in the secondary term, the clause might state that it is implicated if the lessee is unable to comply with covenants or any conditions precedent, and if drilling or other operations are delayed or interrupted.[450]

Pertaining to the scope of the force majeure clause and in an effort to circumvent the uncertainty inherent in a strict interpretation of qualifying governmental interferences, the definition should encompass local acts of government and governmental disturbances emanating from "any governmental body."[451] Moreover, it would be provident to delineate

448. *N. Nat. Gas Co.*, 114 F. Supp. 3d at 1166.

449. *Cf.* Beardslee v. Inflection Energy, LLC (*Beardslee III*), 31 N.E.3d 80, 83, 85 (N.Y. 2015) (interpreting a force majeure clause that stated "this lease shall not be terminated, in whole or in part," and concluding the clause was intended to apply to lease termination in the secondary term but not to lease expiration during the primary term), *answering questions certified by* 761 F.3d 221 (2d Cir. 2014).

450. *See id.* at 85 (concluding the force majeure clause's second sentence merely referenced "covenants" and thereby limited its applicability to the drilling and operations obligations in the secondary term since the only "covenant" in the primary term is tendering delay rental payments). The lessee does not have an obligation to drill or tender delay rental payments during the primary term, and the commencement of operations or production is a condition precedent to extending the lease into the secondary term but is not a lease obligation. HEMINGWAY, *supra* note 53, at 286; Stahl & Gooch, *supra* note 5, § 27.02, at 27-4 (citing 17 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 50:58 (4th ed. 2013))). One of the cases the New York Court of Appeals relied upon was *San Mateo Community College District v. Half Moon Bay Ltd. Partnership*, 76 Cal. Rptr. 2d 287 (Cal. Ct. App. 1998). That court was reviewing a force majeure clause that was implicated if the lessee was prevented from complying with its "obligations." *Id.* at 290. The court held the force majeure clause failed to save the lease from expiring at the conclusion of the primary term because the clause only suspended "obligations," meaning "covenants." *Id.* at 292. The court reasoned the force majeure clause can be drafted to apply to particular covenants, to covenants in general, to conditions precedent and covenants, or to covenants, conditions, and limitations, and the failure to specify the clause applies to conditions or limitations set forth in the habendum clause, as well as covenants, will prevent the force majeure clause from continuing the life of the lease past the primary term. *Id.* at 292–93 (citations omitted).

451. As discussed above, if a force majeure clause contains a narrowly drafted description of governmental actions, courts adopting a strict construction of the clause might be able to hold local bans and moratoria emanating from certain governmental bodies are not covered by the clause. *See supra* notes 369–91 and accompanying text. To avoid this, parties can specify, for example, that "[a]cts of any government entity or court having jurisdiction, including the issuance or promulgation of any law, policy, or decision that impacts" performance qualifies as an act of force majeure. Pletcher & Zoobkoff, *supra* note 62, § 17.06, at 17-35; *see also* Edington v. Creek Oil Co., 690 P.2d 970, 973 (Mont. 1984) (quoting a force majeure clause that said "state and federal statutes, all orders, rules and regulations of any governmental body (either federal, state or municipal)"); MARTIN AND KRAMER, *supra* note 4, at 392 (providing a typical force majeure clause that said "[f]ederal, [s]tate, [c]ounty, or

"moratorium[] . . . or restrictions on production or operations," as well as the inability to obtain or renew required permits or licenses from any governmental body, as triggering events,[452] especially in light of the increasing promulgation of fracking bans. Lastly, the inclusion and placement of a catch-all provision should be carefully contemplated.[453]

Due to the district court's reasoning in both *Beardslee* and *Aukema*, the causation standards set forth in the force majeure clause should also be revised. The district court acknowledged that fracking provided "the only commercially viable method of production and [that] drilling using conventional methods is impractical" yet held performance could not be excused due to mere impracticability.[454] Accordingly, the industry should consider specifying that commercially impracticable performance qualifies as the standard of impact.[455] The district court also viewed the absence of a provision that "impose[d] drilling specifications as to the methods used or formations explored" as defeating the lessees' contention that conventional drilling is not a possible means of performance.[456] Therefore, lessees should take this holding into account and should consider specifying drilling processes in the force majeure clause or elsewhere in the lease so that a law or regulation impeding the use of the only commercially acceptable method of production cannot be viewed as still permitting a lessee's

municipal laws, rules, regulations or [e]xecutive [o]rders asserted as official by or under public authority claiming jurisdiction").

452. Pletcher & Zoobkoff, *supra* note 62, § 17.06, at 17-35. Electing to enumerate such impediments to performance is especially wise given the *Aukema* lessors' arguments that the force majeure clause did not specifically list inability to obtain necessary permits. Aukema v. Chesapeake Appalachia, LLC, 904 F. Supp. 2d 199, 209 (N.D.N.Y. 2012).

453. *See* Pletcher & Zoobkoff, *supra* note 62, § 17.06, at 17-38 to -39 (suggesting that if a catch-all is utilized and if the parties desire to avoid application of the doctrine of *ejusdem generis*, they should (1) carefully qualify the catch-all phrase with language such as "whether or not similar to the items in the above list," (2) place the catch-all provision prior to the list of qualifying events and preface the enumerated events with qualifying language such as "including, without limitation" and (3) provide the doctrine "shall not be dispositive in the interpretation of this clause"); *see also supra* notes 112–19 and accompanying text.

454. Beardslee v. Inflection Energy, LLC (*Beardslee I*), 904 F. Supp. 2d 213, 220 (N.D.N.Y. 2012), *aff'd*, 798 F.3d 90 (2d Cir. 2015) (per curiam); *accord Aukema*, 904 F. Supp. 2d at 210. Both opinions quoted *Phibro Energy, Inc. v. Empresa De Polimeros De Sines Sarl*, 720 F. Supp. 312, 318 (S.D.N.Y. 1989).

455. *See* Pletcher & Zoobkoff, *supra* note 62, § 17.06, at 17-40 to -41 (proposing standards of impact such as: "impossible to perform; preventing performance; unable to perform; commercially impracticable to perform; performance under the circumstances would give rise to financial hardship or a gross inequity; delaying performance; interfering with performance; [and] hindering performance" (emphasis omitted)). Commercial impracticability does not excuse performance that is merely more expensive than anticipated or that would entail a loss, but rather performance is commercially impracticable when the difference in cost is so great or is cost-prohibitive. Mineral Park Land Co. v. Howard, 156 P. 458, 460 (Cal. 1916)

456. *Aukema*, 904 F. Supp. 2d at 210; *Beardslee I*, 904 F. Supp. 2d at 220.

performance.[457] And if the lease represents that the parties understand the purpose underlying the lease is production utilizing fracking, a lessee's common law defense of impracticability or frustration of purpose would be bolstered.[458]

Finally, while the bans may not have been foreseeable in the past, they certainly are today with the sweeping promulgation of these laws coast to coast.[459] Hence, the industry should consider an express exclusion of a court's consideration or application of the common law force majeure requirements, especially that requiring an event to be unforeseeable.[460]

457. *See* Swanson, *supra* note 4, at 237–38 (suggesting the outcome in *Aukema* would have been different if the lessees defined force majeure to include "any restriction, regulation, limitation or directive of any kind imposing additional requirements, environmental or otherwise, on horizontal drilling or hydraulic fracturing," environmental reviews on fracking, economic hardships, and "inability to timely obtain permits, even if caused by the oil company's lack of diligence"); *see also* Sabino & Abatemarco, *supra* note 291 (advancing the inclusion of "evolving technologies, shifting regulatory environments, and changing conditions that can impact deals" when drafting force majeure clauses); *cf.* Perlman v. Pioneer P'ship, 918 F.2d 1244, 1246 n.1, 1249 (5th Cir. 1990) (per curiam) (mentioning in its holding that the lessee was not obligated to use his personal, patented process and, thus, should have utilized a more commonly accepted method of production, and noting that while another agreement stated the primary purpose of the lease was to utilize the personal production method, the lease itself did not state that "was the *sole* purpose of the contract" nor did it limit the method of production to the process). Thus, it would be prudent to include language specifying the parties are entering the lease with the intent to develop deep shale and to specifically mention fracking or another commercially accepted advancement in technology. Correspondingly, the parties should consider contractually eliminating the need for a lessee to utilize unviable alternatives by stating a governmental disturbance which deprives the lessee of a commercially accepted method of production shall not require the lessee to render performance in a manner which does not comport with the industry's "usual and customary standards" or which can only be done at commercially unreasonable costs. *See* Pletcher & Zoobkoff, *supra* note 62, § 17.06, at 17-41, 17-43 (expounding upon drafting considerations for impact on performance, causation, and mitigation).

458. *See* RESTATEMENT (SECOND) OF CONTRACTS § 261 (AM. LAW INST. 1981) (indicating the doctrine of impracticability will discharge performance, absent provisions or circumstances mandating otherwise, where following the formation of a contractual relationship, a party's performance is rendered impracticable, not due to his own fault, because of "the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made"); *id.* § 265 (discharging contractual performance under the doctrine of frustration of purpose, where a principal purpose of the contract is substantially frustrated, not at the fault of the nonperforming party, due to the "occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made"); *see also* Swanson, *supra* note 4, at 236 (contending the court rightfully denied the *Aukema* lessees relief under the common law doctrines as the lease failed to stipulate drilling specifications or methods).

459. *See* Hennessey, *supra* note 280 (finding performance delays "inevitable" due to the growing enactment of these laws).

460. *See* Pletcher & Zoobkoff, *supra* note 62, § 17.06, at 17-34 (suggesting parties consider whether the defense should be interpreted with the common law doctrines in mind). The parties can contractually incorporate foreseeable events into the force majeure definition by stating, before the list of qualifying events, "whether or not foreseeable." *Id.* § 17.06, at 17-39. In addition, the clause might specify if the nonperforming party is required to remediate after the occurrence of a force majeure

VII. CONCLUSION

Technological advancements in horizontal drilling and hydraulic fracturing have provided the United States with an unimaginable energy boom, great riches, and heavy debate.[461] The media has grabbed the public's attention with fracking headlines that spell out impending disaster, and public outcries are heard at town halls and state capitols around the country.[462] With the trending promulgation of state and local fracking bans, courts nationwide will face increased numbers of force majeure defenses with lessees arguing "can't frack, can't drill."

In its antiquated roots, common law force majeure excused a party's nonperformance caused by "Acts of God."[463] The doctrine, with regard to oil and gas leases, has undergone drastic transformations over time, eventually settling into a doctrine rooted in the contractual terms parties select for it.[464] The standard force majeure clause in the oil and gas lease, one that includes acts of government within its definition,[465] serves as the heavy artillery necessary to defend leaseholds from the war on fracking. By

event. *Id.* § 17.06, at 17-43. If the clause sets forth such a requirement, the clause should "[s]pecify the appropriate standard for mitigation (e.g., bona fide good faith efforts, reasonable efforts, efforts consistent with the usual and customary standards of the relevant industry, best efforts)." *Id.* Moreover, "a limit on the costs of mitigation" can be specified in the force majeure clause. *See id.* (indicating such a limit might be "at any cost, at reasonable costs, [or] at commercially reasonable costs"). For a thorough discussion of drafting considerations, see generally *id.* at 17.06, at 17-33 to -45.

461. *See A Historic Perspective*, *supra* note 14 ("The ability to produce more oil and natural gas from older wells and to develop new production once thought impossible has made the process valuable for U.S. domestic energy production.").

462. *See* Klass, *supra* note 12, at 160 (criticizing the media, and especially its headlines, for providing the public with negative misconceptions about fracking that cause the uninformed public to fear fracking and to believe the industry is guilty of the numerous allegations hurled against it). It has been contended that the media only broadcasts anti-fracking activists' statements, which "are unsupported by facts." *Id.* at 166.

463. *See* Sabino, supra note 7, at 3 ("[T]he doctrine of force majeure was born, first to excuse performance when disaster strikes, and additionally, to provide a platform upon which thoughtful parties can catalogue the events they fear most, and fashion alternatives and courses of relief as they see fit."); *see also* Swanson, *supra* note 4, at 225 (examining parties' ability to include an "'Act of God' clause" that defines what specific events will excuse performance).

464. *See* Sun Operating P'ship v. Holt, 984 S.W.2d 277, 283 (Tex. App.—Amarillo 1998, pet. denied) (holding "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" (first citing Hydrocarbon Mgmt., Inc. v. Tracker Expl., Inc., 861 S.W.2d 427, 436 (Tex. App.—Amarillo 1993, no writ); and then citing Tex. City Ref., Inc. v. Conoco, Inc., 767 S.W.2d 183, 186 (Tex. App.—Houston [14th Dist.] 1989, writ denied))).

465. *See* Erickson v. Dart Oil & Gas Corp., 474 N.W.2d 150, 155 (Mich. Ct. App. 1991) (including "any law, order, rule or regulation, (whether or not subsequently determined to be invalid)" in the force majeure definition); *see also Sun Operating*, 984 S.W.2d at 280 (reviewing a clause that defined force majeure "as a result of some order, requisition or necessity of the government").

depriving producers of this necessary process, which the industry regards as the sole economical and commercially viable production method in shale plays,[466] fracking bans constitute a governmental action that render lessees unable to perform their contractual obligations. While the cases are fact-specific, the defense should fend off anti-fracking attacks, so long as public policy considerations are not drilled into the force majeure analysis in a judicial effort to defeat the claim. Upon a successful force majeure defense, lessees can suspend their obligations and extend their leases while they wait for bans to expire or be invalidated. In the meantime, however, the industry needs to reload its weaponry and redraft its force majeure clause, as more fracking bans lurk around the corner threatening leases in the modern day shale play.

466. As one author put it: "Fracing = Drilling = Fracing: Because Math." Rutherford, *supra* note 28, at 865.