

# ADMINISTRATIVE WATCH

ADDRESSING ENVIRONMENTAL, ENERGY AND NATURAL RESOURCE ISSUES



## NY Court Holds Gas Leases Terminate Due to Nonpayment of Delay Rental Despite Drilling Moratorium

A federal court in New York recently held that a group of oil and gas leases in New York terminated due to lack of payment of delay rentals, despite the lessee's argument that the leases were extended by the drilling moratorium in effect in New York since 2008. In *Wiser, et al. v. Enervest Operating, L.L.C.*, et al., 3:10-cv-794, the U.S. District Court for the Northern District of New York granted summary judgment in favor of a group of landowners who were seeking a determination that their oil and gas leases, all entered into in either 1999 or 2000, had terminated due to a lack of drilling and a failure to pay annual delay rentals.

According to the Court's decision, the leases at issue included a primary term of ten years and a secondary term for as long thereafter as gas was produced in paying quantities. The leases also included an "unless" clause requiring the lessees to either commence drilling within 90 days or pay an annual delay rental for each year that drilling was not commenced during the primary term. The lessees tendered delay rental payments through 2008, but did not make delay rental payments in 2009. The Court noted that in July 2008, then-New York Governor David Paterson issued a memorandum directing the New York Department of Environmental Conservation to undertake a formal review of high-volume hydraulic fracturing processes used in horizontal drilling. The lessees argued that Governor Patterson's memorandum amounted to a moratorium on drilling in the Marcellus Shale formation, which was a force majeure event under the leases that effectively extended their life.

The Court held that, separate and apart from any force majeure event caused by the drilling moratorium, the leases terminated according to their terms upon the lessee's failure to make annual delay rental payments in 2009. The Court concluded that, assuming the moratorium on drilling was a force majeure event, under the terms of the lease, the event would simply extend the primary term of the leases indefinitely—including the delay rental obligations of the lessees during the primary term. The Court rejected an argument by the lessees that the force majeure event advanced the leases into their secondary term. Additionally, although the leases contained a default provision providing a defaulting party with any opportunity to cure any default, the Court concluded that the "unless" clause did not require the lessors to provide notice of default and resulted in automatic termination of the leases where either of the specified events—drilling or payment of delay rentals—did not occur.

The *Wiser* decision is a cautionary note to lessees to carefully review their obligations relating to delay rental payments and to consider maintaining such payments during time periods that lessees are precluded from drilling or producing under a lease due to regulatory action or other potential force majeure events. While each case is likely to depend upon the terms of the applicable lease, in many cases, the costs associated with continuing delay rental payments are likely to be minor compared to the costs of litigation to attempt to preserve a lease after the fact or the costs of re-leasing acreage at significantly higher current market rates if an earlier lease terminates.

For more information regarding the *Wiser* decision and issues relating to oil and gas leases, contact Kevin K. Douglass at (412) 394-6562 or [kdouglass@bccz.com](mailto:kdouglass@bccz.com) or Christopher M. Buell at (412) 394-5411 or [cbuell@bccz.com](mailto:cbuell@bccz.com).

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