Chapter 11

To Infinity and Beyond: Extending Your Lease to Its Secondary Term in the Appalachian Basin

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§ 11.01. Introduction.

The continuation of oil and gas leases has been a subject of interest, a point of contention, and a basis for litigation for lessors and lessees practically from the time that such leases were first entered into. Perhaps one of the most litigated areas in this fertile ground is the issue of whether an oil and gas lease reaches its secondary term, terminates at the conclusion of the primary term, or terminates even sooner.

It comes as no surprise that this age-old issue has received renewed interest in the Appalachian Basin as the amount of leasing activity, development and investment has skyrocketed with the focus on newly accessible shale gas resources in that region. This new set of circumstances raises the stakes for all parties involved and presents new questions of law
or questions that have not been addressed in decades or more by the courts in the region — in other words, the perfect recipe for litigation. These issues can only be expected to continue or increase as many leases from the initial wave of shale-gas activity in the Appalachian Basin reach the end of their primary term and as operators are forced to make decisions on how best to preserve their investments in these leases.

The primary driver of lease preservation into the secondary term is production from the leasehold. Indeed, production of natural gas is the central purpose of the oil and gas leases. However, a number of related questions and common lease provisions can also affect whether a lease will reach its secondary term or terminate at the end of the primary term or sooner. While there are a number of such related issues, this chapter will consider certain questions that commonly arise for operators in the Appalachian Basin as leases progress through and approach the end of their primary terms. Specifically, we will focus on how those issues are or have been treated by the statutes and courts in the Appalachian Basin states of Pennsylvania, West Virginia and Ohio, both historically and in more recent decisions that have been issued.

In Section 11.02, we look at what courts have considered to be “commencement of operations” sufficient to satisfy such a requirement in a lease. In Section 11.03, we discuss how delay rentals and forfeiture provisions have been treated by courts of the Appalachian Basin states. In Section 11.04, we look at certain issues that are unique to dual-purpose leases that may be held by production or storage activities. In Section 11.05, we discuss what circumstances may arise that will cause a court to equitably extend a lease and estop it from terminating. In Section 11.06, we consider certain cases that have addressed arguments that leases were extended by force majeure. Finally, in Section 11.07, we address the issue of pooling and unitization and how it may affect whether a lease extends to its secondary term. While this chapter is not intended to be a comprehensive discussion of these complex issues, it should serve a primer for those who face any of the issues set forth above.
§ 11.02. Commencement of Operations.

A common question that lessees often face as a lease approaches the end of its primary term is what constitutes commencement of operations. This terminology — commencement of operations or some variation it — may appear in various locations in an oil and gas lease, including in the habendum, drilling, and rental clauses of a lease. Depending upon the language contained in the lease, commencement of operations will often be a means to extend a lease beyond its primary term or a requirement to ensure that the lease does not expire before the end of the primary term. As a result, a lessee will need to determine what action it must take in order to satisfy any obligations it may have under the lease and to ensure its continued interest in a leasehold.

Courts in the Appalachian Basin states have generally held that preliminary work prior to the actual drilling of a well is sufficient to satisfy a “commencement of operations”-type requirement in a lease. Additionally, the courts have typically included some requirement of good faith on the part of the lessee, such that the lessee is performing the work to complete a well and produce gas and not simply to hold a lease for speculative purposes. Finally, depending upon the posture of the cases, courts have generally required diligence on the part of a lessee in continuing the work to completion after having commenced it.

While this represents a general framework commonly applied by the courts in Pennsylvania, West Virginia and Ohio, each case is likely to turn on the precise language in a lease, of which there are seemingly unlimited variations. For instance, in the cases discussed below, the courts generally considered lease language requiring “commencement of operations,” which arguably leaves open the question of whether the slightly different terminology of “commencement of drilling” or “commencement of drilling operations” in a lease would lead to a different result. Courts of other states have diverged on this issue. Additionally, a lease may itself define what will

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1 See, e.g., Muhlbach v. Stewart, 4 Ohio Supp. 226 (Ohio Com. Pl. 1934) (suggesting that change in lease language from “well in process of being drilled” to “commence a well” may reflect an intention of the parties that the lessee was to commence a well, “not necessarily operate a bit in the ground”).
amount to “commencement of operations,”2 and, in such a case, a court is likely to enforce the lease terms agreed upon by the parties themselves. Therefore, the starting point of every inquiry should be the lease terms themselves, which can then be filtered through the applicable precedents discussed below.


Pennsylvania courts have employed an analysis largely consistent with the general discussion above in considering whether a lessee has commenced operations under an oil and gas lease. The issue of commencement appears to have been first considered by the Pennsylvania Supreme Court in Henderson v. Ferrell.3 In Henderson, the lessee had covenanted to “commence operations on the premises within 30 days” from the date of entering the lease, or the lease would otherwise be forfeited.4 On the last day of the 30-day period, the lessee drove a stake at the location of a proposed well and began unloading lumber on the premises before being denied access by the lessor.5 The supreme court affirmed the trial court’s conclusion that the lessee had the right to commence work under the lease, as it had done so, and that if he did so in good faith and with the intent to continue the work according to the lease, the lessor could not interfere with the work.6 The supreme court noted that the question of whether the lessee commenced operations in good faith and with an intent to continue with due diligence were both factual questions to be decided by a jury.7

More recently, a Pennsylvania trial court considered the issue of commencement and concluded that a lessee had commenced operations as required by a lease where the lessee took a number of preliminary steps

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2 See, e.g., Bertani v. Beck, 479 A.2d 534, 534-35 (Pa. Super. Ct. 1984) (quoting lease that provided that “[d]rilling operations or mining operations shall be deemed to be commenced when the first material is placed on the leased premises or when the first work, other than surveying or staking the location, is done thereon which is necessary for such operations”).
3 Henderson v. Ferrell, 38 A. 1018 (Pa. 1898).
4 Id. at 1018.
5 Id.
6 Id.
7 Id. at 1018-19.
necessary to actually begin drilling a well. The habendum clause of the lease in *Pemco Gas, Inc. v. Bernardi* provided that the lease would continue “as long after commencement of operations” as certain requirements were met. Prior to the expiration of the primary term of the lease, the lessee had surveyed the property, negotiated with the lessor regarding the location of the well and a right-of-way to the well, entered into an agreement with the lessor regarding removal of timber, negotiated with an adjoining landowner for a right-of-way, performed grading and clearing work on the leasehold, received a drilling permit from the state, and contacted a drilling company regarding performing the drilling. The court broke its analysis into two parts: (1) whether the lessee had commenced operations, and (2) whether the lessee had done so in good faith. The court found in favor of the lessee on each of these issues. Although the lessee had halted its operations due to the fact that the lessor had attempted to lease to a third party, the court cautioned the lessee that it must make a diligent effort to complete a well on the leasehold property within a reasonable time of the court’s decision.

A more recent decision by a federal court in Pennsylvania illustrates the complexities that may be added to the analysis by a more detailed lease agreement. In *Good Will Hunting Club, Inc. v. Range Resources, Inc.*, the federal district court denied cross-motions for summary judgment by the parties that related to the issue of whether a lease expired at the end of its primary term. In making its decision, the court noted that it was assuming that the lessee had properly “commenced a well” during the primary term of the lease for purposes of deciding the cross-motions, but the court concluded that the lease language was ambiguous as to whether this was sufficient to continue the lease into a secondary term and the issue therefore could not be

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9 *Id.* at 87.
10 *Id.* at 87-89.
11 *Id.* at 93.
12 *Id.* at 93-100.
13 *Id.* at 100.
decided at the summary-judgment stage. Specifically, the court found that the lease language contained a patent ambiguity that resulted from attempting to read two sections of the lease in conjunction with one another. In that case, the "commencement" requirement appeared in a covenant to commence a well during the primary term and an incorporation of that requirement in the habendum clause.


Although there do not appear to be published decisions by the West Virginia courts of recent vintage that address the issue of commencement of operations, the decisions available indicate that West Virginia courts apply a liberal analysis for determining whether operations have commenced. In Fleming Oil & Gas Co. v. South Penn Oil Co., the West Virginia Supreme Court of Appeals addressed the question of what actions constituted commencement of operations. In that case, the lease contained a covenant by the lessee to "commence operations for a test well within one year" from the date of the lease. The court held that the covenant would be met "no matter how slight may have been the commencement of any portion of the work which was a necessary and indispensable part of the work required. . . ." The court concluded that the lessee’s activities — which included performing preliminary surveys, locating the well, making a contract for drilling, cutting and hewing timber for the derrick, and contracting to have equipment hauled to the site for drilling — were sufficient to satisfy this standard.

In the decision of Todd v. Manufacturers’ Light & Heat Co., the West Virginia Supreme Court of Appeals also indicated that a good-faith and diligence standard is part of the analysis. There, the habendum clause of the

15 Id. at *4.
16 Id.
17 Id. at *1.
18 Fleming Oil & Gas Co. v. South Penn Oil Co., 17 S.E. 203 (W. Va. 1893).
19 Id.
20 Id. at 206.
21 Id. at 203-04, 206.
lease provided that the lease would continue “...as long after commencement of operations as the said premises are being operated for the production of oil or gas...”23 The court noted that the lessee commenced a well approximately three month before the expiration of the 10-year primary term of the lease.24 In Syllabus Pt. 3, the court held that, under the terms of the lease, as long as “a well is commenced and the work of drilling diligently and in good faith prosecuted but not completed” at the expiration of the lease, the lease will continue in force based on the terms of the habendum clause.25 Once again, the inquiry into a party’s good faith and whether it exercised reasonable diligence will typically be an issue of fact.26


Ohio courts have considered the issue of commencement of operations on several occasions, setting forth a standard similar to that used by the Pennsylvania and West Virginia courts. In Duffield v. Russell, an Ohio appellate court considered the question of whether a lessee had commenced operations within 60 days from the date of the lease, as required by the drilling and rental clause of the lease, and did so with a *bona fide* intent to perform according to the lease.27 According to the court, on the final day of the 60-day period, the lessee staked a location for the well and contracted with the lessor for timber to construct a derrick, some of which was cut that day.28 The court concluded that there was “no question but that what [the lessee] did upon that day was a commencement of operations,” relying in part on the earlier decisions of its sister state courts in Fleming and Henderson.29 In its analysis, the court also considered the lessor’s actions, which the

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23 *Id.* at 446.
24 *Id.* at 447.
25 *Id.* at Syl. Pt. 3.
26 Perrine v. Mert Dev., Inc., 355 S.E. 2d 53 (W. Va. 1987) (reversing grant of summary judgment because determination of whether lessee had acted diligently and in good faith in producing gas from the leased premises so as to prevent termination of a lease was a question of fact).
28 *Id.* at 473.
29 *Id.* at 474.
court concluded reflected an understanding by the lessor that the lessee had operated consistent with the lease.\textsuperscript{30}

An Ohio court of appeals revisited and reaffirmed the \textit{Duffield} analysis nearly 85 years later in \textit{Kazar v. Meridian Oil & Gas Enterprises, Inc.}\textsuperscript{31} In \textit{Kazar}, the lessee was required to “begin operations for the commencement of a well,” and by the date required to do so, had surveyed, staked and cleared the well site and filed necessary documents with the Securities and Exchange Commission.\textsuperscript{32} The court concluded that these steps “constituted a commencement of operations” under the lease, thereby extending the lease under a drilling operations clause.\textsuperscript{33}

Ohio courts also analyze whether a lessee acted in good faith in commencing operations to determine whether a lease may be extended according to its terms.\textsuperscript{34} Therefore, despite the relatively minimal amount of steps necessary to “commence operations,” if the court or a jury determines that the actions were taken merely as a pretext to extend the lease, the actions will not be sufficient to extend a lease.\textsuperscript{35}

\section*{§ 11.03. Delay Rentals.}

A covenant or obligation to pay delay rentals in an oil and gas lease is another common provision that often may dictate the continued validity or early expiration of a lease. Although the rise of the paid-up oil and gas lease has limited the impact that delay rentals may have upon leases, many leases continue to include delay-rental provisions.

\begin{itemize}
\item \textsuperscript{30} Id. at 475.
\item \textsuperscript{31} Kaszar v. Meridian Oil & Gas Enters., Inc., 499 N.E. 2d 3 (Ohio Ct. App. 1985); see also H.J.T. Co. v. Meridian Oil & Gas Enters., Inc., No. 1010, 1980 WL 352294 (Ohio Ct. App., Nov. 10, 1980) (affirming determination that lessee’s actions constituted a “beginning of operations for the commencement of a well” where the lessee had surveyed and staked the well site, obtained a drilling permit, cleared the well site, and ordered and received culvert pipes for the drilling job).
\item \textsuperscript{32} Id. at 4.
\item \textsuperscript{33} Id. at 5.
\item \textsuperscript{34} See, e.g., Barclay Petroleum, Inc. v. Perry, No. CA-89-7, 1990 WL 79029 (Ohio Ct. App., May 31, 1990).
\item \textsuperscript{35} Id. at *2 (finding that installation of pipe by lessee was insufficient to continue lease where evidence supported trial court’s finding that the action was not taken in good-faith performance of the lease).
\end{itemize}
The decisions by the courts of the Appalachian Basin states addressing delay rentals are myriad. Therefore, the following discussion attempts to set forth the general parameters of how courts in these states analyze and apply delay-rental provisions and treat non-payment of delay rentals.


Payment of delay rentals will generally only serve to excuse development under a lease during the primary term of a lease. Although leases will often clearly reflect this fact, even where lease language may suggest otherwise, courts have generally refused to permit parties to extend leases beyond their primary term merely through the continued payment of delay rental payments. For example, in *Western Pennsylvania Gas Co. v. George*, the Pennsylvania Supreme Court held that a lessee could not continue a lease beyond the two-year primary term by paying delay rentals, despite a habendum clause that provided that the lease would continue “as much longer as oil or gas is found in paying quantities or the rental paid thereon.”36 This rationale was cited to and applied again by the Pennsylvania Superior Court in *Hite v. Falcon Partners* in reaching a similar result.37 The West Virginia Supreme Court of Appeals and the Ohio Supreme Court have reached similar conclusions as well.38


Delay rental payments under oil and gas leases developed as a means to relieve a lessee of a duty to develop a leasehold promptly after entering into an oil and gas lease.39 Provisions addressing delay rentals are generally found in the portion of a lease referred to as the “drilling and rental clause,”

37 Hite v. Falcon Partners, 13 A.3d 942 (Pa. Super. Ct. 2011) (holding that delay rentals would serve to excuse development of the leasehold only during the one-year primary term of the lease, rather than indefinitely, as argued by the lessee).
38 Brown v. Fowler, 63 N.E. 76 (Ohio 1902) (holding that drilling and rental clause that provided for payment of delay rentals to prevent forfeiture of lease did not extend term of lease that was set at two years in the habendum clause). See also Bettman v. Harness, 26 S.E. 271 (W. Va. 1896) (holding that lessee could not extend lease beyond primary term by payment of delay rentals set forth in lease).
which addresses the obligations of a lessee to continue a lease through its primary term.40

Although a comprehensive discussion regarding drilling and rental clauses is beyond the scope of this chapter, a brief overview of the common types of drilling and rental clauses will assist in discussing how these lease provisions are treated in the Appalachian Basin. Based on the provisions of the drilling and rental clauses, leases are commonly described as one of two types: “or” leases and “unless” leases. Under an “or” lease, the “lessee covenants to do some alternative act, usually to drill a well or to pay periodic rentals, to maintain the lease during its primary term. Simply put, the lessee must ‘drill or pay.’”41 Under an “unless” lease, the lessee does not covenant to perform any act, but unless the lessee performs the action required, typically drilling or paying rental, by the time specified, the lease will automatically terminate.42 In other words, “‘if’ no well is drilled, the lease terminates ‘unless’ rentals are paid.”43

Courts in Pennsylvania, West Virginia and Ohio have generally analyzed the impact that payment and, more importantly, non-payment of delay rentals has on the validity of oil and gas in similar ways. As a general rule, under an “or” lease, a lessor will be limited to an action for damages in the event of non-payment of delay rental, unless the lease contains a forfeiture clause providing otherwise.44 Under an “unless” lease, in the event of non-payment of delay rentals, the lease will expire automatically.45 In some cases, the drilling and rental clause will contain some requirement for commencement of operations, and, therefore, the analysis set forth in Section 11.02, supra, also may be relevant to the question of whether a lease remains valid.

40  6 Williams and Meyers, Oil and Gas Law § 605.
42  Id.
43  Id.
44  West Virginia has statutorily inserted such a forfeiture provision into leases in that state, as will be discussed infra.
45  Warner, 329 S.E. 2d at 92.
[a] — Pennsylvania.

In Pennsylvania, if a lease does not contain a provision for forfeiture in the event of non-payment of delay rentals, the lessor is limited to an action to collect the rental owed under the lease. In such a situation, the lease may be terminated by the lessor only upon proof that the lessee has abandoned the lease, which requires proof that the lessee intended to give up the lease.

Where an “or” lease contains a forfeiture provision, courts in Pennsylvania require that the lessor declare the forfeiture before the tenancy created by the lease will end. In *McKean*, the Pennsylvania Supreme Court affirmed a finding that a lessor could not enforce a forfeiture under a lease where the lessor received the delay-rental payment from the lessee before the lessor declared a forfeiture. More recently, a federal court in Pennsylvania dismissed a complaint seeking forfeiture of a lease where the lessee made a delay-rental payment 23 days late but within the 90-day period to cure a breach under the lease and where the lease did not contain a “time is of the essence” clause.

Pennsylvania courts follow the accepted rule that an “unless” lease will terminate automatically if either of the conditions of drilling or payment of delay rentals do not occur by the time specified in the lease. In *Bertani v. Beck*, the Pennsylvania Superior Court reversed a decision granting summary judgment in favor of a lessors’ claim for delay rentals that they sought from a lessee. In that case, the lease was an “unless” lease, and the lessors sought to recover two years of delay rentals from the lessee, which the lessee had not paid. The court held that the unambiguous language of the lease indicated that the lease would terminate by a certain date unless drilling commenced.

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47 Id.
49 Id. at 955-56.
53 Id. at 534-35.
or the lessee made the specified delay rental. The court held that the lease did not require the lessee to make the delay rental payment.

[b] — West Virginia.

West Virginia appears to be unique among the Appalachian Basin states in that its Legislature has enacted a statute that addresses the issue of delay rentals under certain oil and gas leases and the lessor’s rights in the event of non-payment. That statute provides that any oil and gas leases in West Virginia for which delay rentals have not been paid when due will terminate within 60 days from the date upon which the lessor makes written demand for payment of the delay rental, unless there is a dispute regarding the amount of or entitlement to delay rental payments. The statute specifies that the written demand should be made by certified mail, return receipt requested, and, upon a lack of payment within the time allowed, the statute provides a means for lessors to submit the notice of cancellation of the lease to the clerk of the relevant county commission. Operators should be aware of the statute in case it provides for a different result than the terms of a lease. Although Section 36-4-9a provides a statutory “cure” period for payment of delay rentals, the West Virginia Supreme Court of Appeals has cautioned that repeated failure to pay delay rentals on time may result in a finding of an equitable forfeiture of a lease.

The West Virginia Supreme Court of Appeals also has clarified that Section 36-4-9a does not apply to leases containing an “unless” drilling and rental clause, and that lessors therefore need not comply with the notice obligations of the statute for such a lease to terminate in the absence of development or payment of delay rentals. In Warner, the court addressed a group of leases that the lessors argued were “unless” leases. Based on this, the lessors argued that, where the lessee failed to

54 Id. at 536.
55 Id.
56 W. Va. Code § 36-4-9a.
57 Id.
59 Id.
60 Id. at 93.
make timely delay rental payments, the lessors were not required to provide notice and demand under Section 36-4-9a for the leases to terminate.61 Although the court concluded that it was unclear whether the leases were ultimately “unless” leases and remanded the case to determine this issue, the court proceeded to address the applicability of Section 36-4-9a to an “unless” lease and concluded that the statute did not apply.62 According to the court, the statute was not intended to address such leases because “unless” leases terminate automatically upon non-payment of delay rentals, and requiring notice and demand would be inconsistent with this.63

[c] — Ohio.

Ohio courts treat drilling and rental clauses in leases in a similar manner to Pennsylvania courts. Where an “or” lease does not contain a forfeiture provision, Ohio courts generally will not determine that a lease has been forfeited for failure to pay delay rentals.64 Ohio courts have held that, where an “or” lease does contain a forfeiture provision, a lessor may enforce a forfeiture of the lease for failure to pay delay rentals by providing notice of the election to the lessee.65 Ohio courts also follow the generally accepted principle that an “unless” lease terminates upon the failure of the lessee to pay delay rentals required by a lease.66

61  Id. at 92.
62  Id. at 94-95.
63  Id.
64  See, e.g., Wohnhas v. Shepherd, 119 N.E.2d 861, 863 (Ohio Com. Pl. 1954) (“There is no forfeiture clause in the lease in question and therefore the mere nonpayment of rental is not sufficient to warrant a court in decreeing a forfeiture.”).
65  See, e.g., Murdock-West Co. v. Logan, 69 N.E. 984 (Ohio 1904) (holding that lease was void where lessee failed to complete producing well and failed to pay delay rentals for additional month and where lessor had declared the lease to be void); Woodland Oil Co. v. Crawford, 44 N.E. 1093, 1096-97 (Ohio 1896) (“The proper construction to be placed upon such an agreement is that, upon failure of the lessee to drill a well, or pay the rental, or both, as the case may be, the lessor may elect to put an end to the lease, and enforce payment of the promised rental, or sue for damages for failure to drill the well; or he may elect to have the lease continue in force to the end of the term, and enforce the drilling of wells and the payment of rentals as provided in the lease.”).
66  Brown v. Fowler, 63 N.E. 76, 78 (Ohio 1902); see also Van Etten v. Kelly, 64 N.E. 560, 562 (Ohio 1902) (holding that, under an “unless” lease with a covenant to drill and where delay rentals have not been paid, the lessor has the option to consider the lease terminated
§ 11.04. **Dual-Purpose Leases.**

West Virginia, Ohio and Pennsylvania are somewhat unique in that certain areas in these states have a history of being used for purposes of underground storage of natural gas. In these areas, natural underground formations that are depleted of natural gas and no longer used for production are converted into large storage areas for natural gas produced from other areas. In many instances, oil and gas leases providing for production rights were amended or modified to include the right to use the leasehold for storage purposes in the 1940s and 1950s. Typically, such leases will provide for the right to use the leasehold for storage of gas in exchange for a periodic storage fee. Where challenged, such dual-purpose leases have been affirmed as valid for the purpose of storing natural gas under the leasehold.

Although there are a limited number of cases that address such “dual-purpose leases,” courts in the Appalachian Basin states have had occasion to address the duration of such leases. Most notable among these decisions are two cases decided by the U.S. District Court for the Western District of Pennsylvania relating to the interplay of production and storage rights under such leases. In *Jacobs v. CNG Transmission Corp.* and *Penneco Pipeline Corp. v. Dominion Transmission, Inc.*, two judges in the federal court reached seemingly different results on whether the lessee under dual-purpose leases under which the leaseholds were being used for storage purposes retained their production rights for development of gas-bearing strata beneath the storage fields.
At issue in *Jacobs* and *Penneco* was the question of whether the production and storage rights created in the dual-purpose leases were severable, such that the lessees’ use of the property for storage of gas did not preserve their right to further explore and produce oil and gas from other strata under the leasehold.\(^73\) Both courts in *Jacobs* and *Penneco* concluded that the production and storage rights created under the dual-purpose leases were not severable.\(^74\) However, the courts diverged in their conclusion as to whether the lessee maintained its right to explore and produce under the lease or whether those rights had terminated or been abandoned.\(^75\) Specifically, the *Jacobs* court concluded that the lease in that case included an implied covenant to produce, while the *Penneco* court distinguished the lease before it and concluded that it contained no implied covenant.\(^76\) In particular, the *Penneco* court indicated that it was “unable to reconcile [the *Jacobs* court’s] finding that production and storage rights under the lease agreement were not severable with [its] conclusion that continued use of the property for gas storage did not extend the lease term as to production rights beyond the primary term.”\(^77\) The issues addressed in *Jacobs* and *Penneco* may arise in West Virginia and Ohio, where similar natural gas storage fields have been in use for years and are often held by dual-purpose leases secured by storage rental payments.

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\(^77\) *Penneco Pipeline*, No. 05-49 & 05-537, 2007 WL 1847391 at *25 (W.D. Pa., June 25, 2007).
§ 11.05. Equitable Estoppel.

Courts in limited circumstances will equitably extend the life of an Appalachian oil and gas lease beyond its primary term despite the operator’s failure to satisfy the lease requirements.\(^\text{78}\) In *Wilson v. Xander*, the Supreme Court of Appeals of West Virginia succinctly summarized the competing interests involved when determining whether to equitably extend the term of an oil and gas lease:

In West Virginia, an oil and gas lease for a primary term or for so long as oil and gas are being produced is treated as a determinable estate, that is, subject to a special limitation . . . . When the habendum clause in an oil and gas lease requires drilling or production within the primary term for the lessee to avoid forfeiture and termination of the lease, the courts will normally honor the letter of the lease. . . . In rare cases, however, the lessor may himself hinder the lessee’s performance, precipitating the special limitation and defeasance of the lessee’s estate. Such hindrance gives the lessee a continuing legal excuse for not performing. . . . In such cases, the doctrine of equitable estoppel effectively extends the lease for the reasonable time that justice may require for the lessee to begin production unhindered and avoid the special limitation. . . .\(^\text{79}\)

The *Wilson* court held that the trial court should equitably extend the primary lease term if it found that the landowner’s own actions hindered the operator from commencing production of oil and gas during the three-year primary term of the lease.\(^\text{80}\) The lessor allegedly failed to deliver clear

\(^{78}\) In order to satisfy the elements of an equitable estoppel claim or defense, in West Virginia for example, “there must exist a false representation or a concealment of material facts; it must have been made with knowledge, actual or constructive of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have made with the intention that it should be acted on; and the party to whom it was made must have relied on or acted on it to his prejudice. . . . To raise an equitable estoppel there must be a conduct, acts, language or silence amounting to a representation or a concealment of material facts.” *Jolynne Corp. v. Michels*, 446 S.E.2d 494, 504 (W. Va. 1994) (citations omitted).


\(^{80}\) *Id.*
title to the property despite an express warranty and otherwise engaged in “foot-dragging and conspiracy” designed to delay production to ensure the expiration of the original lease.81

However, in order to take advantage of the doctrine of equitable estoppel, the lessee must demonstrate that it exercised due diligence toward production.82 The Wilson court noted that the lessee could be criticized “for waiting two years of a three-year lease before attempting to clear the title and obtain drilling permits. . . .”83 Nonetheless, the court found that the due diligence issue was a jury question because the lessor’s warranty of the title “might well justify reliance by the lessees and explain their slowness off the mark in clearing the title to the property.”84 In contrast, in Jolynne Corporation v. Michels, the Supreme Court of Appeals of West Virginia acknowledged that assessing the lessee’s degree of diligence is normally a factual question, but held that, where the lessee did little or nothing to return a well to production for a period of 18 years, the lessee failed to exercise due diligence as a matter of law.85

In a much older case, Eastern Oil Co. v. Coulehan, the Supreme Court of Appeals of West Virginia equitably extended a primary lease term where the landowner took steps to hinder the lessee’s performance during the final hours of the term.86 In Coulehan, the lessee began drilling for oil and gas during the last quarter of the five-year primary term of the lease and located ample quantities of gas about two weeks before the expiration of the term.87 However, rather than commencing production in order to comply with the lease requirement that gas be “produced” during the primary term, the lessee opted to drill deeper.88 Ultimately, the operator located gas in the lower strata 12 hours after the primary term of the lease expired.89

81  Id.
82  Id.; see also Jolynne Corp. v. Michels, 446 S.E.2d 494, 505 (W. Va. 1994).
84  Id.
85  Jolynne, supra, 446 S.E.2d at 505.
86  64 S.E. 836, 840-41 (1909).
87  Id. at 837.
88  Id.
89  Id. at 840.
The court found that during the final days before the expiration of the lease term, the lessor impaired the lessee’s performance by ordering the drillers off the property claiming that the lease had expired when it had not:

The evidence satisfies us that, though the defendant may not have been guilty of serious breach of the implied covenants of his deed, yet he was anxious the lessee should fall [sic] to get to the Indian sand in time, did nothing to aid him, and actually succeeded by his suggestions in preventing work on Sunday, and caused a loss of about 12 hours’ time after midnight... when he had no right of interference, but owed a positive duty to plaintiff to protect it in its rights.90

Absent the lessor’s interference, the drillers testified that they believed they would have produced gas before the time expired.91 The court reasoned that “[a] lessor should not be heard to complain of a default caused by himself, or permitted to take advantage of his own wrong.”92 The court also noted the lessee’s substantial performance under the lease before the primary term expired: “Where there has been such substantial performance of a contract, equity may set aside or disregard a forfeiture occasioned by failure to comply with the very letter of an agreement.”93

At least one court in Ohio has equitably extended the primary lease term for the period of time that the lessor wrongfully enjoined the lessee from engaging in production activities.94 In Staho v. Van Vleck, the lessee had commenced operations to drill for oil in time to complete a well within the five-year primary term of a lease.95 However, the lessor obtained an injunction preventing the lessee from drilling on a particular location within the leased premises, arguing that the lessor had the right to select another

90 Id.
91 Id.
92 Id. at 841 (citations omitted).
93 Id. (citations omitted).
94 Staho v. Van Vleck, 41 N.E. 35 (Ohio 1895).
95 Id. at 36.
The Ohio Supreme Court disagreed and equitably extended the term of the lease, holding:

where a party is prevented from performing his contract by injunction wrongfully obtained, he shall, at the end of the litigation, have as much time in which to perform as still remained at the date of the injunction, the right thereafter to be the same as they would have been in case no injunction had been issued. In short, the time between the issuing of the wrongful injunction and the ending of the litigation is not regarded and cannot be counted to the detriment of the enjoined party. To hold otherwise would permit a man to profit to his own wrong.  

However, in the absence of an injunction, courts in Pennsylvania have refused to equitably extend a primary lease term during the time litigation is pending between the landowner and lessee. For example, the Superior Court of Pennsylvania would not agree to equitably extend a lease term for the period of time necessary for lessee to obtain a judicial resolution of a cloud on the lessor’s title to the land. In Derrickheim, the court agreed that, as a result of the possible title defect, the lessee had no affirmative duty “to drill for oil or make rental payments. However, we cannot agree that the cloud on the title stopped the running of the lease term.” The court explained its reasoning as follows:

The lease specifically stated that it would run for a term of four years “and as much longer as oil and gas is produced in paying quantities.” Since oil and gas was not being produced in paying quantities, the lease did not continue to run past the primary term of four years. The fact that it was “prudent” for Derrickheim to suspend operations upon learning of the cloud on the title does not justify disregarding the express language of the lease. The

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96 Id.
97 Id. at 39.
99 Id. at 479-480.
Pennsylvania Supreme Court has held in cases involving oil and gas leases containing lease terms of a period of years and “as much longer as oil and gas is produced” or similar language, that when oil and gas is no longer being produced, the lessee becomes a tenant at will and the tenancy can be terminated by either party upon notice being given.\(^\text{100}\)

The Federal District Court for the Middle District of Pennsylvania recently relied heavily on the reasoning in *Derrickheim* in ruling that the lessor’s filing of a lawsuit seeking a declaration that certain leases were invalid did not equitably extend the lease term for the time that the lawsuit was pending.\(^\text{101}\) In *Lauchle*, lessors sought a declaration that certain leases were invalid under Pennsylvania’s Guaranteed Minimum Royalty Act.\(^\text{102}\) The court initially ruled that the leases remained valid by relying on a recent Pennsylvania Supreme Court opinion analyzing the Act.\(^\text{103}\) Thereafter, the lessees filed a counterclaim seeking to equitably extend the term of the leases during the time the litigation was pending, and the parties filed cross motions for summary judgment.\(^\text{104}\) The lessees argued that equitable extension was proper because, unlike the circumstances in *Derrickheim*, the lessors had initiated the litigation by seeking a declaration that the leases were invalid.\(^\text{105}\) The lessors relied on case law in Louisiana, Oklahoma and Texas to support their position.\(^\text{106}\) The court rejected the lessees’ contention, granted summary judgment for the lessors, and explained its reasoning as follows:

> We think this distinction puts too fine a point on the matter by placing undue emphasis on the party initiating the legal action. Establishing

\(^{100}\) *Id.* at 480 (citations omitted).


\(^{102}\) *Id.* at 759 (*citing* 58 P.S. §33)).

\(^{103}\) *Id.* (*citing* Kilmer v. Elexco Land Serv., Inc., 990 A.2d 1147 (Pa. 2010)).

\(^{104}\) *Id.* at 760.

\(^{105}\) *Id.* at 761.

\(^{106}\) *Id.* (*citing* Rougon v. Chevron, USA, Inc., 575 F. Supp. 95 (M.D. La.1983) (Louisiana law); Barby v. Cabot Petroleum Corp., 944 F.2d 798, 799-800 (10th Cir. 1991) (Oklahoma law); Cheyenne Resources, Inc. v. Criswell, 714 S.W. 2d 103, 105 (Tex. Ct. App.1986) (Texas law)).
a party-driven, bright line rule as Chief Defendants suggest would discourage lessors from bringing actions to determine the validity of their leases, since they would risk a finding that they had thus repudiated those agreements even in the event the underlying actions proved unsuccessful. Nor do we think the Pennsylvania Supreme Court would issue such a holding. In making this determination we are mindful of the fact that oil companies, like the Chief Defendants, wield significant, if not exclusive, power in the drafting of oil and gas leases. A determination that Plaintiffs had repudiated their leases via the filing of these actions further tips the balance in favor of the oil companies. Moreover, it would likely dissuade lessors from bringing potentially meritorious actions, which the case sub judice unquestionably was at its inception, in the future. Accordingly, deeming these leases to have been repudiated under the circumstances of this case is both bad law and even worse public policy, and we decline to accept Chief Defendants’ invitation to so penalize Plaintiffs.107

Finally, West Virginia courts have equitably extended the term of a lease beyond the primary term where the lessor by his conduct and by accepting the benefits of the lease “leads the lessee to believe that he will not insist upon production in paying quantities during the primary term...”108 In Greenleaf, the landowner advised the lessee that he would not complain in the event lessee stopped production from one well, drilled a second well, and the second well did not produce gas before the expiration of the primary term.109 Significantly, the lessor also insisted that the lessee continue to provide free gas to his residence from another source during the time that the original well was abandoned and after the expiration of the lease’s primary term.110 Consequently, the court held

having advised the plaintiff that it might abandon that well and drill another, and no advantage would be taken of it should it fail to get

107 Id. at 762 (citations omitted).
109 Id. at 279.
110 Id.
it completed within the year, and having, after the expiration of the year accepted benefits under the lease, lessors cannot now say that this conduct did not amount to an extension of the lease for such a time as would enable the plaintiff to complete the second well.111

§ 11.06. **Force Majeure.**

New York courts have recently addressed the question of whether a force majeure clause in a lease can serve to extend the primary term of a lease. According to one federal court in New York, a force majeure event occurring during the primary term of a lease that allegedly prevents the lessee for engaging in production activities cannot serve to extend the lease beyond the primary term if the lessee fails to make the required delay-rental payments.112 In *Wiser*, landowners commenced an action seeking a declaration that certain leases had terminated due to the expiration of the 10-year primary term of the lease.113 The lessees filed a counterclaim contending that a memorandum issued in July, 2008, by the governor of New York constituted a force majeure event and extended the primary term of the lease because it “effected a de facto moratorium on exploration of the Marcellus Shale formation utilizing horizontal high-volume fracking. . . .”114

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111 Id. at 279. See also Rayl v. East Ohio Gas Co., 348 N.E.2d 390 (Ohio Ct. App. 1975) (where the Court of Appeals of Ohio held that a lessor could not terminate a gas storage lease that was otherwise terminable after reasonable notice while continuing to accept rental payments for 15 months, and free gas for over three years, after commencing the litigation).

112 Wiser v. Enervest Operating, L.L.C., 803 F. Supp. 2d 109 (N.D.N.Y. 2011). See also Aukema v. Chesapeake Appalachia, LLC, No. 3:11-cv-489, 2012 WL 933716 (N.D.N.Y., Mar. 21, 2012) (refusing to stay litigation initiated by landowners seeking a determination as to whether the moratorium constitutes a force majeure event such that certain oil and gas leases expired during the primary term).

113 Id. at 115.

114 Id. at 114-15. By way of background, “in July of 2008 then-New York State Governor David Paterson directed the Department of Environmental Conservation (DEC) to undertake a formal public environment review process in order to update its 1992 Generic Environmental Impact Statement (GEIS) for oil, gas and solution regulatory mining program in New York. . . . The purpose of the ordered study was to address the new high-volume hydraulic fracturing process for extracting natural gas more efficiently. . . . The governor’s memorandum seemingly did not prohibit horizontal or vertical drilling for oil and gas utilizing conventional, low-volume, hydraulic fracturing, and left open the possibility for any entity to apply to the DEC for a permit allowing horizontal drilling in the Marcellus Shale
The lessors countered by arguing that, even if the moratorium constituted a force majeure event, the lease expired because the lessees failed to make the required delay rental payments during the primary term. The parties filed cross-motions for summary judgment on the threshold issue of the failure to make delay rental payments.

The court initially concluded that, even assuming a force majeure event occurred, the terms of the lease required that the lessee make delay rental payments in order to indefinitely extend the primary term of the lease. The lease in Wiser contained an “unless” clause that effectively provided that, after 90 days, the primary term of the lease expired automatically unless gas was produced in paying quantities or lessee made delay rental payments during the primary term of the lease. The lessee conceded that it stopped making the required delay rental payments during the time following the moratorium. The court reasoned that the application of the force majeure provision during the primary term of the lease did not excuse the requirement that delay rental payments continue to be made:

If the force majeure clause was triggered at the time, by the terms of the leases “the delay or interruption shall not be counted against [the] Lessee[s].” As a result, both logic and the unambiguous terms of the leases dictate the conclusion that the primary terms of the leases were then extended indefinitely, which required that defendants

formation after conducting an independent, site-specific, Environmental Impact Statement (EIS).” 115 Id. at 113-14.
115 Id at 115.
116 Id at 121-122.
117 Id. at 120. Specifically, the provision provided:

RENTAL PAYMENT – This lease is made on the condition that it will become null and void and all rights hereunder shall cease and terminate unless work for the drilling of a well is commenced on the leased premises or lands pooled herewith within ninety (90) days from the date of this lease and prosecuted with due and reasonable diligence or unless the Lessee shall pay to the Lessor, in advance, every twelve (12) months until work for the drilling of a well is commenced, the sum of $_______ [calculated on the basis of number of acres] for each twelve (12) months during which the commencement of such work is delayed.

Id.
118 Id.
continue making timely delay rental payments indefinitely in order to avoid termination. Defendants, however, failed to do so.\(^{119}\)

In order to avoid this conclusion, the lessees argued that the lease was automatically extended into the secondary term as a result of the *force majeure* event.\(^{120}\) The court disagreed and distinguished two cases cited by lessees to support their position because the *force majeure* events in those cases occurred during the secondary term, thereby extending the secondary term.\(^{121}\) The court conceded that, in a third case relied on by lessees, the *force majeure* event did occur in the primary term and the lease was extended into the secondary term.\(^{122}\) However, in that case, the court found that “in contrast to the force majeure clause in the instant action, the specific *force majeure* provision at issue in *Hunter* expressly contemplated that the lease would continue beyond the primary term in the event of a *force majeure*.\(^{123}\)

\section*{§ 11.07. Good Faith Pooling and Unitization.}

Generally, Ohio, West Virginia and Pennsylvania recognize the right of operators and landowners to agree to voluntarily pool lands to form a drilling unit.\(^{124}\) Ohio and West Virginia also have adopted mandatory pooling provisions, the applicability and terms of which are beyond the scope of this chapter.\(^{125}\) At least one court in Pennsylvania has expressly

\begin{footnotes}
\footnote{119} Id. at 121-122.
\footnote{120} Id. at 122.
\footnote{121} Id. at 122-23 (distinguishing Sun Operating Ltd. P'ship v. Holt, 984 S.W.2d 277 (Tex. Civ. Ct. App. 1999) and Frost Nat'l Bank v. Matthews, 713 S.W.2d 365 (Tex. Ct. App. 1986)).
\footnote{122} Id. at 123 (discussing Hunter v. Vaughn, 46 So. 2d 735 (La. 1950)).
\footnote{123} Id. The *force majeure* clause at issue in Hunter specifically provided that “if [the] lessee is prevented from drilling or producing any well by reason of *force majeure*, lessee would be relieved of all obligations to drill on the leased premises and the lease would not be subject to cancellation in such event. Paragraph 12(c) also provided[d] that if after the expiration of the primary term and while the lease is in force, lessee could not maintain the same in effect because prevented by *force majeure*, then the lease would nevertheless continue but lessee should pay to the owners, or to the credit of the owners in the depository bank, as royalty an amount equal to $1.00 per year for each acre retained thereunder during the period the lease was so continued in effect after the primary term.”
\end{footnotes}
held that production from a well located on property that has been unitized will extend the term of all leases in the unit as if the well were located on the leased premises.\textsuperscript{126} In Fox v. Wainoco Oil and Gas Co., the court noted that the issue was one of first impression in Pennsylvania.\textsuperscript{127} After favorably discussing the policy reasons for pooling and unitization — namely, to promote development with the minimal amount of waste — the court held that “we believe that the drilling of a well on any tract in the unit satisfies the habendum clause of each tract in the unit and continues the lease in full force and effect so long as oil and gas are produced.”\textsuperscript{128}

However, unitization generally must be carried out in good faith to serve to extend a lease to its secondary term.\textsuperscript{129} For example, in Snyder Brothers, Inc. v. Peoples Natural Gas Co.,\textsuperscript{130} a lessor alleged that the lease should be declared null and void because the lessee had unitized in bad faith “and . . . only to hold onto the . . . lease because drilling had not yet commenced” on the lessor’s tract.\textsuperscript{131} The court, without much analysis, found no bad faith unitization where the one-year primary term of the lease expired in November 1992 and the operator had formed the unit in April 1992 and commenced drilling in September 1992.\textsuperscript{132}

\begin{footnotesize}
\begin{itemize}
  \item[\textsuperscript{127}] \textit{Id.} at 441.
  \item[\textsuperscript{128}] \textit{Id.} at 444.
  \item[\textsuperscript{129}] See, e.g., Kamuck v. Shell Energy Holdings GP, LLC, No. 4:11-cv-1425, 2012 WL 1463594 *1 n.1 (M.D. Pa., Mar. 19, 2012) (citations omitted) (describing the unitization process in a footnote and noting that “[a]n oil and gas lessee’s pooling decision will be upheld unless the lessee pools in bad faith. Where a lessee pools oil and gas leases in good faith, the lessee is relieved of the obligation to reasonably develop each tract separately, or to drill off-set wells on other tracts included in the unit to prevent drainage by a well on one or more of such tracts.”), \textit{rev’d in part on other grounds} 2012 WL 466490 (M.D. Pa., April 27, 2012).
  \item[\textsuperscript{131}] \textit{Id.} at 1231.
  \item[\textsuperscript{132}] \textit{Id.}
\end{itemize}
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