"Come Hell Or High Water": Lessons In Risk Allocation in Commercial Contracts

The COVID-19 pandemic and resulting market and deal-related disruptions have caused market participants to put renewed focus on risk-allocating provisions in their commercial contracts. These provisions, including best efforts clauses, material adverse effect (MAE) and force majeure clauses, and ordinary course of business covenants, are all mechanisms to address or shift transactional risk. At the extreme end of the risk allocation spectrum are provisions by which parties intend to exclude any excuse for performance "between the devil and the deep blue sea"—or, as the idiom has evolved, to require performance "come hell or high water." The inclusion of these provisions in commercial contracts can effectively shift risk and drive the outcome of disputes between parties—although the extent they will do so depends on their context and use.

Deal practitioners should understand that how hell-or-high-water provisions have been interpreted and applied by courts analyzing different types of commercial contracts is not always the same. The language, function, and effect of hell-or-high-water provisions can and do vary substantially, with significant differences in particular in the lease context, where they are historically standard fare, compared to the M&A context, where they are relatively newer features.

In both finance leases and commercial real estate leases, hell-or-high-water provisions have long been present, and tend to be consistently shaped. In these contexts, a hell-or-high-water provision irrevocably binds the lessee to make payment under any and all circumstances—even if, for example, the leased equipment is lost or destroyed or the real estate becomes unusable. Common hell-or-high-water language describes an obligation to make payment as being "absolute and unconditional." Generally speaking, courts strictly enforce hell-or-high-water provisions in these contexts as an absolute payment obligation, sufficient to overcome common law contractual defenses such as impossibility or frustration of purpose. Pandemic-era litigation solidified this application. Accordingly, parties who include a hell-or-high-water provision in finance and commercial real estate leases should expect that provision to unconditionally allocate the risk of failing to perform—whether making such a payment or carrying out a certain obligation—to the payor or obligor.

The outcome is less cut-and-dry in the M&A context. There, provisions characterized as "hell or high water" are often negotiated where obtaining antitrust or regulatory approval is a condition precedent to closing a transaction. Such provisions may require a party—or in this context, sometimes, both parties—to take "all necessary steps" to obtain approvals. In this way, M&A "hell or high water" provisions mandate effort, requiring actions in furtherance of obtaining regulatory approvals, such as compliance with government demands for information, support for a particular strategy such as divestiture, or participation in litigation over regulatory challenges to a transaction. But in contrast to a payment guarantee in the lease context, effort does not guarantee outcome—either of regulatory approval or of a closing.

Recent decisions in the M&A context illustrate that when approvals are not obtained, courts do not apply a bright-line rule to determine whether "all necessary" steps were in fact taken. Rather, the provisions are analyzed analogously to other "efforts" covenants that govern the parties' obligations prior to closing, which generally require a fact-intensive analysis by any court asked to

interpret or apply them. As the law regarding the application of these provisions continues to evolve in Delaware, recent decisions have signaled that even a party that breaches a pre-closing hell-or-high-water obligation may not be held liable, because breaching conduct may nevertheless be held to be immaterial to, or not the sole cause of, a merger's failure. In this regard, the M&A hell-or-high-water provisions—notably, not governed by precedent from finance or commercial real estate lease jurisprudence—are distinct from clauses that unconditionally shift payment risk to a lessee.

Disputes will likely continue to arise regarding the ability of antitrust and regulatory efforts clauses to drive transaction outcomes and affect the parties' rights and remedies, including the ability to close or to seek damages for failed deals. Particularly if the federal antitrust regulatory environment continues to move towards more stringent consideration of transactions, market participants may see an uptick in litigation around the use of these provisions.

I. "Hell Or High Water" In Lease Contexts: An Unconditional Obligation

Hell-or-high-water provisions are commonly used in both finance and commercial real estate leases. In these contexts, the clauses take a consistent form: they mandate unconditional payment and operate to allocate risk to the lessee.

In the finance lease context, these clauses require that "the lessee [] make payments regardless of defective performance on the part of the lessor, that is, 'come hell or high water.'"[1] Where a lease contains such a provision, the lessee's obligation to pay the lessor is absolute and unconditional, and irrevocable upon receipt of the contracted goods.[2] This means payment is required by the lessee when due "[w]hether the property functions satisfactorily, is useful to the lessee, is suitable for the purpose intended, or is lost, stolen, condemned, or destroyed."[3] Notably, "whether the lessee has any right of offset against the lessor or the lenders, is irrelevant" to the lessee's obligation to make rental payments.[4] "In short, rent payments continue to come hell or high water, without any reduction or offset, even if the lessee is wrongfully dispossessed of the equipment by the lessor."[5] Though a lessee with a legitimate claim is not permitted to make any deductions, the lessee "can still bring a lawsuit against the lessor for any claims."[6]

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1 *See Wells Fargo Bank, N.A. v. BrooksAmerica Mortg. Corp.*, 419 F.3d 107, 110 (2d Cir. 2005) (considering a clause that "makes BrooksAmerica's obligation to pay rent absolute and unconditional") (citing 19 Richard A. Lord, Williston on Contracts, § 53:28 (4th ed. 2004)).

2 *See, e.g., Paulicopter-Cia. v. Bank of Am., N.A.*, 182 A.D.3d 458, 459, 122 N.Y.S.3d 593 (1st Dep't 2020) (explaining that "the 'hell or high water' clause establishes that it was plaintiffs that waived their rights to declare a default, not defendant, since hell or high water clauses 'require[ ] the lessee to make payments irrespective of any defects in performance'").

3 *Hinkel Excavation & Const., Inc. v. Constr. Equip. Int'l, Ltd.*, 2001 WL 34008497, at *5 (N.D. Iowa Apr. 10, 2001).

4 *Id.*

5 *Id.*; *see also* Richard M. Contino, Legal and Financial Aspects of Equipment Leasing Transactions 29 (1979) ("Finance leases frequently contain a "hell or high water" rent commitment. Under this type of obligation, a lessee is required to unconditionally pay the full rent when due.").

6 Richard M. Contino, Legal and Financial Aspects of Equipment Leasing Transactions 29 (1979).

These provisions are uniformly held to be enforceable, even "in the face of various kinds of defaults by the party seeking to enforce them."[7] One reason for this is that the financing party is often distinct from the party sourcing the leased equipment. As explained by the Tenth Circuit: "The essential practical consideration requiring liability as a matter of law in these situations is that these clauses are essential to the equipment leasing industry. . . . Without giving full effect to such clauses, if the equipment were to malfunction, the only security for this assignee would be to repossess equipment with substantially diminished value."[8]

The UCC, moreover, expressly recognizes the use of hell-or-high-water provisions in financing leases. For example, in New York's UCC, Article 2A, Section 407 "codifies the enforceability of a lessee's absolute and unconditional promise to perform under a lease—a promise which is often memorialized through language in the lease known as a 'hell or high water' clause."[9] The Official Comment to the provision confirms the purpose: "This section extends the benefits of the classic 'hell or high water' clause to a finance lease that is not a consumer lease. . . . Thus, upon the lessee's acceptance of the goods the lessee's promises to the lessor under the lease contract become irrevocable and independent."[10]

Similarly, "hell or high water" clauses rendering a lessee's payment obligation to the lessor unconditional are also commonly used in commercial real estate leases.[11] The particular iteration in any given lease agreement may vary, potentially providing for exceptions or condition precedent obligations for the landlord.

Such an unconditional payment obligation is sometimes drafted as an exception to a force majeure provision, whereby the lessee's obligation to pay rent is expressly excluded from allowed excuses for failure to perform other obligations. For example, a force majeure clause may operate as a hell-or-high-water provision by providing that "[n]othing herein shall be deemed to relieve Tenant of its obligation to pay Rent when due."[12]

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[7] *Wells Fargo*, 419 F.3d at 110 (stating that "[a]t the district level, [c]ourts have uniformly given full force and effect to 'hell and high water' clauses in the face of various kinds of defaults by the party seeking to enforce them") (quoting *In re O.P.M. Leasing Servs., Inc.*, 21 B.R. 993, 1006–07 (Bankr. S.D.N.Y. 1982)); *see also Colo. Interstate Corp. v. CIT Group Equip. Fin., Inc.*, 993 F.2d 743, 749 (10th Cir. 1993) (holding that, in the absence of fraud, the lessor's performance is irrelevant to the lessee's obligation to make payment under a hell or high water provision in a finance lease); *Hinkel Excavation*, 2001 WL 34008497 at *6 (collecting cases).

[8] *Colorado Interstate*, 993 F.2d at 748.

[9] *In re Republic Airways Holdings Inc.*, 598 B.R. 118, 141 (Bankr. S.D.N.Y. 2019).

[10] N.Y. U.C.C. Law § 2-A-407 Off. Cmt.

[11] *See, e.g.*, *ReliaStar Life Ins. Co. of New York v. Home Depot U.S.A., Inc.*, 570 F.3d 513, 519–20 (2d Cir. 2009) (considering as a "hell or high water clause" a provision in a commercial lease obligating the lessee to make rental payments "unconditionally and absolutely").

[12] *476 Grand, LLC v. Dodge of Englewood, Inc.*, A-2048-10T1, 2012 WL 670020 (N.J. Super. App. Div. Mar. 2, 2012); *see also See A/R Retail LLC v. Hugo Boss Retail, Inc.*, 72 Misc.3d 627 (N.Y. Sup. Ct. 2021) (describing "force majeure provisions" as "in effect" "'hell or high water' provisions" where they "requir[e] payment of rent despite failure of performance by the lessor") (collecting cases); George P. Bernhardt, Jack Fersko, The Impacts of the Coronavirus Pandemic on Real Estate Contracts Force Majeure, Frustration of Purpose, and Impossibility, Prob. & Prop., January/February 2021, at 34, 36 ("Often, force majeure clauses either are not found in leases or, when they are present, tend to be landlord-oriented. It is common, for example, for a force majeure clause in a lease to expressly exclude the tenant's rent obligations.") (citing *476 Grand*).

Since the beginning of the COVID-19 pandemic, courts have seen increased litigation involving lease agreements, as tenants' ability to perform under such agreements—*i.e.*, pay rent owed when due—has been impaired. In this context, courts consistently have upheld provisions imposing an unconditional payment obligation on a lessee, rejecting common defenses such as impossibility and frustration of purpose.[13] For example, one court considering a lessee's defenses against non-payment explained that "the Lease is drafted broadly and encompasses the present situation" because its force majeure clause—which addressed, among other potential events, "restrictive governmental laws or regulations, certain cataclysmic events, or other reason of a similar or dissimilar nature beyond the reasonable control of the party delayed in performing work or doing acts required"—provided that none of these circumstances "shall excuse the payment of rent."[14]

The higher pleading standard applicable to private fund managers, with its corresponding lower volume of prolonged litigation, is in line with the conventional wisdom that private funds, and companies owned by private funds, realize cost savings and greater returns by avoiding the disclosure and compliance regimes applicable to public companies.

II. "Hell Or High Water" In The M&A Context: Breaches That May Not Bite

In the M&A context, transactions that carry antitrust risk—or risk related to other regulatory approvals—use a variety of mechanisms to allocate that risk, such as termination fees or MAE clauses. "Efforts" clauses are another tool for allocating such risks, prescribing the parties' obligations to take efforts to obtain necessary regulatory approvals pre-closing.

"Efforts" clauses can subject parties to a range of required pre-closing efforts, such as "best efforts," "reasonable best efforts," or "commercially reasonably best efforts." Sometimes, efforts clauses are negotiated by parties to obligate one (or both) of the parties to take "any and all actions necessary" to obtain regulatory approvals. Efforts clauses like these have been characterized as hell-or-high-water clauses.[15] While disputes arising under these provisions rarely have been litigated to

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[13] *See Hugo Boss Retail*, at 627 (explaining that courts "readily conclude[]" that lessees under such agreements cannot "rely upon 'frustration of purpose' or similar common law doctrines to provide a remedy that they had expressly bargained away"); *Victoria's Secret Stores, LLC v. Herald Square Owner LLC*, 136 N.Y.S.3d 697 (N.Y. Sup. Ct. 2021) (holding that the parties "express[ly] allocat[ed]" "the risk of tenant not being able to operate its business" by agreeing that "a state law that temporarily caused a closure of the tenant's business . . . would not relieve the tenant's obligation to pay rent"); *35 East 75th Street Corp. v. Christian Louboutin L.L.C.*, 2020 WL 7315470, at *3 (N.Y. Sup. Ct. Dec. 9, 2020) (rejecting impossibility defense because "the parties actually included a force majeure clause in the lease that specifically provided that it would *not* excuse defendant from having to pay rent").

[14] *Valentino U.S.A., Inc. v. 693 Fifth Owner LLC*, 139 N.Y.S.3d 518 (N.Y. Sup. Ct. 2021) (internal quotation marks omitted).

[15] *See, e.g.*, *Akorn, Inc. v. Fresenius Kabi AG*, 2018 WL 4719347, at *46 (Del. Ch. Oct. 1, 2018), *aff'd*, 198 A.3d 724 (Del. 2018) (characterizing as a "Hell-or-High-Water Covenant" a provision requiring defendant to "take all actions necessary" to secure antitrust clearance and requiring efforts that "shall be unconditional and shall not be qualified in any manner"); *Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 965 A.2d 716, 756 (Del. Ch. 2008) (awarding $325 million for breach of multiple covenants including a "come hell or high water" obligation to "take any and all action necessary" to obtain antitrust approval where Hexion "dragg[ed] its feet on obtaining that clearance" including by failing to respond to interrogatories from the FTC). As the Delaware Court of Chancery has recognized, parties may dispute whether a given "efforts" obligation should be characterized as a "hell or high water" provision at all. As that court put it, "[t]he label does not matter. What counts is the plain language of the provision." *In re Anthem-Cigna Merger Litig.*, 2020 WL 5106556, at *96

resolution,[16] courts analyzing them in recent cases have determined that a breach of a hell-or-high-water provision does not necessarily establish a remedy (such as damages or a termination right). This stands in contrast to the bright-line outcomes in the lease contexts.

One relevant factor is that in some M&A agreements, hell-or-high-water efforts clauses are not used to shift the risk from one party to another, but rather to subject both parties to the same unconditional obligations.[17] For example, after the $54 billion merger between Anthem and Cigna failed on antitrust grounds, each party asserted that the other had breached its respective obligations under a hell-or-high-water antitrust efforts clause.

And, despite the "all necessary" steps language, courts have still interpreted hell-or-high-water provisions in the M&A context as mandating effort—i.e., by requiring parties to take all actions necessary to obtain regulatory approvals—but not outcome—i.e., requiring parties to close the transaction no matter what.[18] These provisions do not commit one party to ensuring an outcome, as they do in guaranteeing lease payments, and so these provisions do not provide the same unconditional waiver of relevant defenses.

Instead, as recent decisions of Delaware's Court of Chancery have made clear, claims to enforce such heightened efforts-obligations or for breach of these obligations remain subject to proof of all elements, including causation and materiality—opening the door to scenarios where a party can breach its hell-or-high-water obligation and still not bear the cost of a failed merger. Such analyses are as fact-intensive as they are nuanced.

By way of example, after the failed Anthem-Cigna merger, the court analyzed the parties' mutual obligations to use "commercially reasonable efforts" to take "any and all action necessary or advisable" to obtain regulatory approvals using standard contract interpretation and considering their respective courses of conduct.[19] Anthem accused Cigna of an array of conduct allegedly breaching its

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(Del. Ch. Aug. 31, 2020), *judgment entered*, (Del. Ch. 2020), *aff'd sub nom. Cigna Corp. v. Anthem, Inc.*, 251 A.3d 1015 (Del. 2021); *see also Vintage Rodeo Parent, LLC v. Rent-A-Center, Inc.*, 2019 WL 1223026, at *6 (Del. Ch. Mar. 14, 2019) (characterizing as a hell-or-high-water provision one requiring "commercially reasonably efforts to . . . promptly undertake . . . any and all action necessary or advisable to avoid, prevent, eliminate or remove the actual or threatened commencement of any action by . . . any Government Entity . . . that would . . . prevent the consummation of the Merger or the other transactions contemplated").

[16] For example, the parties involved in the *Nidec/Whirlpool* merger litigated—though not to conclusion—the hell-or-high-water provision in the merger agreement. That agreement, which provided that Nidec would purchase Whirlpool's refrigeration compressor business, allocated antitrust risk to Nidec through a hell-or-high-water clause obligating Nidec to take all means necessary to secure antitrust approval. Whirlpool sued to enforce that obligation, rather than to terminate the transaction, arguing that Nidec had not taken every possible action to persuade multiple country's regulators. *See* Dkt. No. 1 (Complaint), 19-cv-02155 (S.D.N.Y. Mar. 8, 2019). The suit was dismissed because Nidec's time to perform its antitrust effort obligations had not yet lapsed.

[17] *See, e.g.*, *Anthem-Cigna*, 2020 WL 5106556, at *93 (describing a provision obligating both parties to "take any and all actions necessary to avoid each and every impediment" under multiple sets of applicable law including antitrust).

[18] Of course, litigation also can arise over antitrust efforts clauses absent a higher "hell or high water" threshold. In the failed merger between Tribune and Sinclair, the merger agreement contained a "reasonable best efforts" antitrust provision. After the Federal Communications Commission rejected the merger, Tribune terminated the agreement and sued for breach, asserting that Sinclair had failed to use "reasonable best efforts" and alleging that Sinclair had refused to sell stations in specified markets, proposed divestitures that risked rejection or delay, and engaged in "unnecessarily protected negotiations" with regulators. *See* Tribune Kills $3.9B Sinclair Deal, Files Lawsuit - Law360 (Aug. 9. 2018). The case settled. *See* Sinclair Paying $60M To End Fight Over Failed Tribune Merger - Law360 (Jan. 28, 2020).

[19] *See Anthem-Cigna*, 2020 WL 5106556, at *111-13, *115, *117-20, *130-31.

obligation to take "any and all action necessary" to support Anthem's efforts to obtain antitrust approval. Anthem argued that Cigna had not only failed to take supportive steps, but had intentionally sabotaged regulatory approval including by failing to provide necessary information to the DOJ, refusing to support mediation with the DOJ, denying Anthem access to witnesses for trial over DOJ's approval for the merger, and actively undermining Anthem's defense of the merger at trial through adversarial witness testimony, cross-examination of Anthem's witnesses, refusal to participate in opening or closing remarks or to join Anthem's post-trial briefing in support of the merger, and refusal to join an appeal of the resulting adverse district court decision—all before Cigna prematurely attempted to terminate the merger, triggering Anthem's claims of breach of the parties' agreement.[20]

The Delaware court agreed that Cigna had breached its obligations, explaining that "Anthem had the right to determine the regulatory strategy" and that "Cigna was obligated to accept Anthem's judgment and follow Anthem's lead"; and that "once Anthem opted to pursue a divestiture" strategy, "Cigna was required to support Anthem's divestiture efforts by identifying potential buyers, assisting with the development of a divestiture plan, entering into NDAs, providing due diligence, and advocating for the buyers and the divestiture proposal to the DOJ."[21] The court determined that Cigna did "none of those things," instead "undermin[ing] Anthem's defense" in the litigation against the DOJ and breaching "its contractual commitments by a wide margin."[22]

Despite these rulings—and the court agreeing that these actions "contributed materially to the DOJ's failure to approve the Merger" in breach of Cigna's regulatory efforts obligations—the court nevertheless concluded that Anthem was not entitled to any damages because Cigna demonstrated that the merger would have not have been approved even if it had not breached its obligations. Specifically, the court reasoned that Cigna's breach did not warrant relief because the "the DOJ would have sued" to block the merger even absent Cigna's actions and the court overseeing antitrust litigation "would have ruled against the Merger on the [antitrust] issue even if Cigna had complied with its obligations under the Efforts Covenants."[23]

In considering Cigna's parallel challenge to Anthem's compliance to the same hell-or-high-water provision, the court rejected Cigna's contention that Anthem's conduct also amounted to a breach. It held that Anthem's conduct was sufficient to satisfy its obligations because the provision did not entitle Cigna to Monday-morning-quarterback Anthem's strategic choices in its pursuit of regulatory approval. The court was unpersuaded by Cigna's attempt to identify other actions Anthem could have taken, ruling that Cigna's argument that Anthem failed to pursue strategies that could have succeeded in obtaining antitrust approval amounted merely to "ways to criticize Anthem's strategy with the benefit of hindsight" while "[i]n real time, Anthem adopted a reasonable strategy and pursued it, consistent with its obligations under the Regulatory Efforts Covenant."[24]

Another example of a breach—albeit a more technical one—of an efforts clause that was not outcome-determinative is in the lawsuit Akorn filed against Fresnius for specific performance, seeking

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[20] *See* Anthem's Pre-Trial Brief, 2019 WL 2019 WL 859364 (Feb. 18, 2019); Anthem's Combined Answering and Reply Post-Trial Brief, 2019 WL 2904853 (June 28, 2019).
[21] *See Anthem-Cigna*, 2020 WL 5106556, at *113.
[22] *See Anthem-Cigna*, 2020 WL 5106556, at *113, 119.
[23] *Anthem-Cigna*, 2020 WL 5106556, at *127.
[24] *Anthem-Cigna*, 2020 WL 5106556, at *132.

to prevent Fresenius from exercising its termination rights on the ground that Fresenius had breached a clause obligating it to "take all actions necessary" to secure antitrust clearance—an obligation expressly deemed "unconditional" and "not . . . qualified in any manner." The court agreed that Fresenius had breached that obligation: after a lengthy period of Fresenius pursuing regulatory approval in compliance with its obligations until the FTC proposed divestiture by Fresenius rather than Akorn, as previously planned, and Fresenius for a period of only a week adopted a strategy that would have delayed the approval process by two months.[25] But because Fresenius "changed course in approximately a week and returned to" a strategy that put the regulatory approval timeline back on course, the court held the breach was not material.[26] The court concluded that Fresenius was allowed to exercise its termination rights.[27]

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This survey of hell-or-high-water clauses across contexts also provides important practical lessons for drafters of commercial agreements, particularly in the M&A context. Parties may commit to such heightened obligations for various reasons, including increased antitrust or regulatory risk associated with a transaction. However, a contractual obligation to comply with regulators can also provide the government with its own heightened leverage, increasing the cost of compliance.

In practice, regulatory "efforts" provisions generally obligate the party or parties to respond to agency requests, participate in investigations, agree to remedies such as divestitures, and even defend the transaction if challenged in antitrust litigation. But recent jurisprudence provides lessons that should guide the drafting of such provisions:

- Heightened efforts clauses do not mandate outcomes. The breach of a hell-or-high-water provision—whether a technical breach or a willful campaign contrary to regulatory approval—may not determine the outcome of a dispute over a terminated or failed merger. Parties that desire to shift costs based on a failure of regulatory approval should clearly express such expectations and should consider negotiating for specific obligations and consequences. For example, parties may consider following a hell-or-high-water provision's "any and all actions" language with specific required conduct; parties could state that a given party must take actions "including but not limited to" obligatory actions, and specify the consequences for failing to do so.

- Hell-or-high-water clauses are not a stand-in for termination rights. Courts do not appear open to second-guessing strategic decisions regarding regulatory compliance efforts. In order to require specific conduct by one or both parties to a merger, parties should consider enumerating closing conditions rather than relying on heightened efforts clauses.

The bottom line is that since hell-or-high-water "efforts" provisions have not resulted in the same bright-line outcomes as in litigation over lessee unconditional payment provisions, the risks and rewards of these provisions factor in the costs of increased government leverage in transactions with antitrust ramifications.

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[25] *Akorn*, 2018 WL 4719347, at *96–100.
[26] *Akorn*, 2018 WL 4719347, at *100.
[27] *Akorn*, 2018 WL 4719347, at *46.

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