‘Hell or High Water’ Clause

Even Superstorm Sandy Cannot Wash It Away

By Michael A. Sabino and Anthony Michael Sabino

Little embellishment is needed to describe the devastation wrought by Superstorm Sandy upon the East Coast, particularly the New York/New Jersey area. Alas, too many residents and businesses alike are still painfully inching toward recovery from this unprecedented natural disaster. And now, as if Sandy did not cause enough damage, it has the temerity to become the basis for a new legal precedent.

The case in question is grounded upon two very fundamental precepts of contract law. The first is that performance under a contract is excused when such performance is rendered impossible. To be sure, courts have consistently held the bar rather high for claiming that defense, by distinguishing impracticality or mere inconvenience, which is not an excuse, from true impossibility, which is more forgiving of a failure to perform.

Yet set in exquisite counterpoise to the foregoing axiom that excuses nonperformance is the equally valid maxim that parties shall be held to the terms of the contract which they bargained for, even when those terms become onerous to perform, presuming the terms are explicit that performance must


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be rendered no matter the intervening circumstances. In the leasing context, this invokes the accepted concept of “hell or high water” clauses, provisos not unfamiliar to the leasing industry. We addressed this a decade ago (my, how time flies when you’re in a recession), see Sabino, “Come ‘Hell or High Water,’ the Lessee Must Pay,” 23 LJN’s Equipment Leasing Newsletter 3 (September 2004), available at http://bit.ly/1dfI2Uk. The fundamentals have remained unchanged. Once a lessee agrees to such a clause within the lease agreement, its performance simply cannot be excused, and it must comply with the lease terms, no matter what.

These were the opposing forces that were joined for battle in General Electric Capital Corp. v. FPL Service Corp., ___ F.Supp.2d ____ (N.D. Iowa 2013), 2013 WL 6238484 (“FPL”). In a decision to be no doubt embraced by the industry, a federal judge in Iowa ruled that the “hell or high water” clause found therein was enforceable, even when placed against the impossibility of performance inflicted by Sandy’s unabashed power. But as we will explore later on, the victory itself may make such harsh provisos far less common, as lessees resist a clause that obligates them even when performance is truly impossible. And within this otherwise staid opinion, there is a shadow that portends of a judicial dissent that might someday work to expunge “hell or high water” clauses from the leasing landscape as surely as Superstorm Sandy eradicated homes and businesses from existence.

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**BACKGROUND**

The facts can be synthesized easily enough. GECC, the vast conglomerate that includes equipment leasing among its many domains, leased a pair of expensive copiers to FPL, an office services company (and not to be confused with FPL, Florida Power & Light), based in Oceanside, NY. As the name of the lessor’s hometown clearly reveals, Oceanside is on south side of Long Island, and directly subject to the fury of the Atlantic Ocean. Your authors can bear personal witness to the unimaginable devastation wrought by Sandy upon this picturesque community. FPL’s premises were virtually wiped out by the superstorm, and specific to the case at hand, the two leased copiers were virtually annihilated.

FPL had only made approximately a year and a half of payments on the relevant five-year lease. In the wake of Sandy’s destruction, FPL refused to make any further payments to the lessor. GECC repossessed what was left of the copiers, and then disposed of them to a remarketer. It then pursued FPL for the remainder of the obligations due GECC as the lessor, an amount exceeding a quarter of a million dollars, not an insignificant sum. GECC based its claim for payment upon the “hell or high water” clause found within the lease accord, providing that lease payments had to be made by the lessee, no matter what happened to the underlying property. As indicated herein above, FPL grounded its refusal to pay upon the impossibility of performance doctrine.

**THE RULING IN IOWA**

District Judge Mark Bennett of Iowa’s federal Northern District quickly disposed of a few preliminary items. The case came before him on GECC’s motion for summary judgment, which the court found appropriate because there was no material dispute as to the underlying facts, and thus the controversy could be decided simply as a matter of law (see Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (the longstanding summary judgment standard)).

Second, it was clear in the lease, and the parties did not dispute, that Iowa law controlled, and that state was the proper forum for this dispute, given that the parties had previously agreed to these choice of law and forum selection clauses in their contract (parenthetically, we note that this action based upon state law was properly brought in a federal court, for reason of the parties’ diversity of state citizenship).

The choice of law ruling decreeing Iowa state law controlled was of no small import. Judge Bennett swiftly found that Iowa contract law closely tracks the majority view, as expressed in, among other places, the pervasive Restatement (Second) of Contracts. Specifically, generally accepted precepts relieve a party of the duty to perform when fulfilling the contracted-for obligation becomes impractical or the intentions of the parties are frustrated by supervening circumstances. In either event, performance may be lawfully excused. But the law does not stop there, noted the court.

Both of these defenses excusing performance can be overcome by the express language of the parties in the underlying agreement. The Restatement is most explicit that parties may craft such appropriate language that nullifies impracticality and frustration-of-purpose as defenses to nonperformance. Put another way, the parties may be held to obligations that intervening circumstances would have otherwise excused them from performing. And that was precisely the case before this bench.

Judge Bennett found “[t]he parties’ contract contains express language obligating FPL to perform in spite of events that might otherwise justify FPL’s non-performance.” Key to the court’s finding was crucial phrasing, such as lease payments “will continue to accrue without abatement,” that FPL shall remain liable on the lease notwithstanding loss or damage “from any cause whatsoever,” and payment obligations are “absolute and unconditional and are not subject to cancellation [or] abatement.” FPL, ___ F.Supp.2d at ___ (emphasis supplied). Strong words continued on page 6
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Indeed, and language the FPL court found dispositive in the instant case.

THE COURT'S REASONING

The FPL court duly noted the inevitability of such obligatory language constituted a classic “hell or high water” clause. Yet more insightful was the court’s attached parenthetical, wherein the court recognized that such provisos are a commonplace in the leasing industry, and, moreover, have been “uniformly upheld by both state and federal courts.” FPL ___ F.Supp.2d ___ (footnote omitted).

In the case at bar, the FPL court found the “hell or high water” clause herein fully binding. Given that there was no material issue of fact on that point, Judge Bennett ruled in favor of the lessee, and decreed the lessee liable, for reason of the latter’s unexcused failure to perform. To be sure, there was a subissue as to whether the lessor disposed of the copiers in a commercially reasonable manner, and this rendered the court unable to decide the crucial issue of the amount of damages to be awarded. The court denied summary judgment on that point, and set down the damages issue for trial.

Thus, it mattered not, held Judge Bennett, if FPL had leased the copiers or owned them with a counter-vailing secured debt owed to GECC. “[T]he parties’ contract makes FPL’s performance unconditional and assigns the risk of loss to FPL, [and] FPL cannot rely upon supervening impracticability or frustration of purpose to discharge its duty to perform.” Id.

The strength of the clause

But make no mistake, the die had already been cast; FPL had found the lessee liable as a matter of law. The mere calculation of damages would be anti-climactic. What mattered most was that even Superstorm Sandy could not demolish a “hell or high water” clause. And so the industry won the day. But shall we be a lasting victory for the enforceability of “hell or high water” clauses? To that topic, we now turn.

We think it very important to point out while the ruling is, on its face, a victory for lessors on the enforceability of “hell or high water” clauses, nevertheless there is great danger in the opinion’s subtext. Notwithstanding his compulsion to adhere to established law validating such provisos, we commend to our readers Judge Bennett’s gratuitous swipe at these contract elements. For no discernible reason, the court lambasts “hell or high water” clauses, alleging that they “are rarely, if ever, specifically bargained for.” Judge Bennett decries them as “ubiquitous and non-negotiable,” and depletes them as placing all risk upon lessors, even for force majeure. FPL ___ F.Supp.2d ___ n.5. Yet the court cites no substantial authority for such criticism, and provides no substantive evidence for its allegations, particularly the notion that “hell or high water” clauses come into being bereft of true bargaining.

It gets worse. Judge Bennett professes his unsolicited view that “I think the default rule should be the opposite:” the lessor “is better able to bear the risk of an act of God because of the sheer number of leases that commercial lessors typically hold. The risk of an act of God should only shift to the lessee” if such an arrangement of liability is precisely negotiated for between the parties. While conceding he was bound by the controlling law, Judge Bennett derides it nevertheless, contending he is aware of no empirical evidence supporting its correctness. Ironically, he commits the same sin he accuses the precedents of committing, in that he too fails to cite any factual data or legal authority that supports his own unorthodox views.

We can only guess as to the motivation behind the good judge’s quest for revision, but we are not here to speculate. At the moment, his unabashed criticism is mere dicta, and there is no present danger to the precedents that even the FPL court concedes it is bound by. Nonetheless, every landslide starts with one small stone. What if other judges decide to join in, and revolutionize the enforceability of “hell or high water” clauses? Indeed, what Superstorm Sandy could not wash away, the man-made forces of continued on page 7
black-robed judges might prove to be more than a match for the liability provisos so carefully crafted by the lessor community.

**CONCLUSION**

Notwithstanding the aforementioned danger, it is time to look to the future (and one, we hope, will not have a repetition of Sandy for many years to come). We think it crucial for the industry and those it serves to seriously rethink the ultimate effect of “hell or high water” clauses. Certainly, such provisos favor the industry, and heavily so. After all, if a federal court will uphold the heavy burdens of such a provision, albeit reluctantly, lessees can be fairly comfortable (but, we trust, not complacent) in the knowledge that even a superstorm shall not excuse lessees from their payment obligations.

This could be a mixed blessing, however, since while a devastated business might still be obligated to pay on the lease for a nonexistent piece of property, the pragmatic issue is will they even be around to pay it? Lessors may take comfort in the “hell or high water” clause as assurance of payment, but if the “high water” washes away the lessee, then what good is it?

In contradistinction, lessees have much to ponder here as well, in light of *FPL*. They must confront a new reality; that while Mother Nature may extinguish their leased property, and possibly their entire business, even Nature’s fury cannot wipe out man’s contractual obligations. This is a burden future lessees must be very mindful of. Then again, confronted with such harsh possibilities, will lessees be willing to enter into leases that hold the potential for such draconian consequences? To be sure, lessees with minimal bargaining power will have little or no choice.

But lessees with more leverage will undoubtedly resist the inclusion of “hell or high water” clauses in their accords. Ironically, while *FPL* upholds the uncontested enforceability of such provisions, the very precedent it establishes may very well impel such clauses into disfavor, as lessees, unwilling to shoulder such open-ended liability, refuse to sign on the dotted line unless the “hell or high water” clause is deleted from the proposed lease.

Finally, what if the day comes that a beleaguered lessee, trapped by a “hell or high water” clause, seizes upon Judge Bennett’s gratuitous criticism, and uses it to fight back against such a proviso’s supposed invincibility? Lessors might find such clauses not as unassailable as they were once thought to be; if nothing else, that side of the industry is in for a bitter and expensive fight at some future date.

At the end of the day, over a year ago Mother Nature put on an awesome display of her power to eradicate the puny constructs of man. Yet, for all the fury Superstorm Sandy unleashed, its titanic forces ultimately proved to be no match for a simple and explicit contract clause. While Sandy’s power bent or broke homes and businesses alike, it was nevertheless unable to wipe out the stringent terms of a “hell or high water” provision in a lease. Whether this is to the good or the ill, it is hard to say. But it is certainly something for lessors and lessees to contemplate when entering into future transactions, now informed that even a superstorm does not necessarily eliminate the legal force of such a clause.