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Force Majeure and Real Estate Litigation COVID-19 Working Groups

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Illinois Bankruptcy Court Holds That *Force Majeure* Clause Excused Nonpayment of Rent Resulting from Government Restrictions on Business Activity

In In re: Hitz Restaurant Group[1], the United States Bankruptcy Court for the Northern District of Illinois became the first court in the country to find that a force majeure clause excused nonperformance of contractual obligations resulting from business closures mandated by government regulations issued to prevent the spread of COVID-19.

In ***Hitz***, a commercial landlord sued the bankruptcy estate of a restaurant group for nonpayment of rent. The defendant restaurant group argued in its defense that it was excused from paying rent by the lease's ***force majeure*** clause because the Governor of Illinois had issued an executive order restricting the operations of restaurant businesses as part of the state's COVID-19 prevention plans. The lease's ***force majeure*** clause stated:

> Landlord and Tenant shall each be excused from performing its obligations or undertakings provided in this Lease, in the event, but only so long as the performance of any of its obligations are prevented or delayed, retarded or hindered by … laws, governmental action on inaction, orders of government. . . .

The Illinois Governor's executive order stated, in pertinent part:

> [A]ll businesses in the State of Illinois that offer food or beverages for on-premises consumption . . . must suspend service for and may not permit on-premises consumption. Such businesses are permitted and encouraged to serve food and beverages so that they may be consumed off-premises . . . through means such as in-house delivery, third-party delivery, drive-through, and curbside pick-up. . . .

The Illinois bankruptcy court emphasized the express language of the lease's ***force majeure*** clause in holding that nonpayment of rent was excused. "Under Illinois law, a force majeure clause will only excuse contractual performance if the triggering event cited by the nonperforming party was in fact the proximate cause of that party's nonperformance." The court determined that "[t]he force majeure clause in this lease was unambiguously triggered by . . . Governor Pritzker's executive order" because: (1)

the order "unquestionably constitutes both 'governmental action' and issuance of an 'order' as contemplated by the language of the force majeure clause"; (2) the order "unquestionably 'hindered' Debtor's ability to perform by prohibiting Debtor from offering 'on-premises' consumption of food and beverages"; and (3) the order "was unquestionably the proximate cause of Debtor's inability to pay rent, at least in part, because it prevented Debtor from operating normally and restricted its business to take-out, curbside pick-up, and delivery."

But the court concluded that the Debtor was "not off the hook entirely" from its obligation to pay rent under the lease. Because the executive order did not prohibit and, in fact, encouraged restaurants to provide carry-out, curbside pick-up, and delivery services, the court determined that "to the extent the Debtor could have continued to perform those services," its obligation to pay rent was not excused. Accordingly, the court held that "Debtor's obligation to pay rent is reduced in proportion to its reduced ability to generate revenue due to the executive order." Pending an evidentiary hearing on this question, the court preliminarily concluded that "Debtor still owes at least 25 percent of the rent" owed to the commercial landlord, which preliminary figure was based on the Debtor's admission that "25 percent of the restaurant's square footage, consisting of the restaurant's kitchen, could have been used for carry-out, curbside pick-up, and delivery purposes."

The opinion of the Illinois bankruptcy court in *Hitz* turned on well-established law on enforcement of *force majeure* clauses in which the primary focus is whether the specific clause at issue encompasses the type of event a contractual party claims is causing its nonperformance. Because the *force majeure* clause in the lease specifically identified business disruption caused by government action as a triggering event, the restaurant group Debtor was able to take advantage of it, at least in part. This same reasoning would apply to any business context in which the contract at issue contains a similar *force majeure* clause excusing nonperformance because of government actions or regulations.

What is interesting and remains to be seen about *Hitz* is whether other courts will also conclude that nonperformance is only partially excused and, if so, how they will determine what portion of nonperformance is excused.

One lesson is clear from *Hitz*, however. Businesses that are unable to fulfill their contractual obligations (or that are parties to a contract with a business that is unable to fulfill its contractual obligations) in part or in full because of COVID-19-related government-ordered business closures and shutdowns should consult with counsel regarding the facts of their specific situation, the specific language of the *force majeure* clause in their contract, the specific language of the government order at issue, and the scope of contractual performance impaired by the government order.

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1. Bankruptcy No. 20 B 05012, 2020 WL 2924523 (N.D. Ill. June 3, 2020).

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