OFFICIAL PUBLICATION OF THE MINNESOTA STATE BAR ASSOCIATION

VOLUME LXXVII NUMBER VIII
SEPTEMBER 2020
www.mnbar.org

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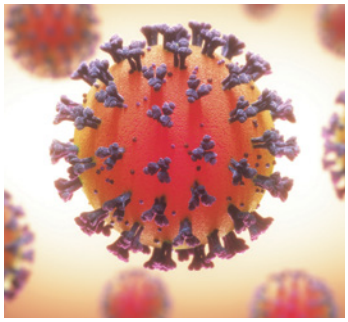

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Force Majeure *Hitz* Home, Excuses Rent Obligation

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In nearly every state, public officials have issued stay-at-home and other closure orders to stem the spread of coronavirus. As a result, businesses across the country have been unable to operate, generate revenue, or satisfy obligations, including rent due under commercial real estate leases. Confronted with the risk of liability for breaching their obligations, companies have increasingly looked to *force majeure* provisions in contracts as a defense to claims of non-performance.

A *force majeure* is an event that can neither be controlled nor anticipated, such that performance under the contract becomes impossible or impracticable. *Force majeure* clauses in agreements generally suspend a party's obligation to perform during the event and rarely provide for termination of the contract. Most notably, these clauses typically include some reference to unforeseen governmental action or regulation.

The United States Bankruptcy Court for the Northern District of Illinois recently issued one of the first decisions applying a *force majeure* clause to excuse a commercial tenant's rental obligations in the wake of a covid-19 government-mandated shutdown. The court in *In re Hitz Restaurant Group*, 2020 WL 2924523 (Bankr. N.D. Ill. 6/3/2020), found that an executive order issued by the governor of Illinois limiting restaurants to carryout, curbside pickup, or delivery triggered the language of the lease, which specifically excused lease obligations in the event performance was "delayed, retarded, [or] hindered by… laws, governmental action or inaction [or] orders of government." As a result, the court partially excused the tenant from its obligation to pay rent.

Hitz Restaurant Group operated a restaurant in Chicago and leased its space. Hitz did not pay its rent for February 2020 and, at the end of the month, filed a Chapter 11 bankruptcy petition. Hitz then did not pay any of its postpetition rent for March, April, May, or June, notwithstanding the fact that section 365(d)(3) of the Bankruptcy Code requires a debtor to timely perform all rental obligations under a lease arising after the filing. The landlord moved the bankruptcy court to order Hitz to pay postpetition rent and "to timely perform all future rent obligations."

The *force majeure* clause in Hitz's lease provided that the "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 or inaction, orders of government…. Lack of money shall not be grounds for Force Majeure." The bankruptcy court found that the "shelter in place" order "unambiguously" triggered the *force majeure* clause in the lease, as it constituted both "governmental action" and an "order of the government."

The landlord argued that rent was still payable since the tenant's failure to perform was simply due to a lack of money, which was expressly carved out of the *force majeure* clause. The court rejected the argument and agreed with the tenant that the executive order, as well as subsequent orders extending the limitation on restaurant activity, was the proximate cause of the tenant's inability to pay rent, since it impeded the tenant's ability to fully operate and generate revenue.

Since the tenant was not forced to completely shut down, the court found that the tenant's "obligation to pay rent is reduced in proportion to its reduced ability to generate revenue due to the executive order." The tenant was required to pay only 25 percent of the rent for the periods during which restrictions applied since the tenant was limited to carryout, curbside pickup, and delivery, which comprised approximately 25 percent of the premises. Notably, the court wanted to reduce the amount of rent owed by the amount of revenue lost, but the parties failed to provide that information to the court.

The *Hitz* decision is significant. It is not only a case of first impression in a developing area of law, but also stands for the proposition that covid-19 closure orders are the type of "governmental action" that excuses performance under a *force majeure* provision. Most states' governors have issued similar orders restricting or prohibiting business activities for tenants. Some of the other key takeaways from the decision include the following:

■ **The language of the lease matters.** The court based its ruling on the specific language of the agreement, underscoring the need for carefully drafted leases. Like any other contract provision, the specific terms of the *force majeure* clause controls, and the lease in *Hitz* did not have language providing that the payment of rent is required notwithstanding a *force majeure* event. It only stated that a "lack of money" would not be grounds for *force majeure*. Additionally, landlords should ensure that leases include a provision that makes the obligation to pay rent an obligation independent of all other covenants in the contract.

■ **The tenant was afforded temporary relief under broad language.** It is noteworthy to observe that the *force majeure* event in *Hitz* was not the pandemic itself but the government shutdown order, as the lease defined an excuse event to consist of "governmental action" or "orders of government." From the landlord's perspective, explicit qualifiers (not broad categories) should be used in leases to narrowly detail the circumstances under which performance may be excused. It is also worth noting that the rent relief afforded the tenant applied only for so long as the government order precluded full use of the premises.

■ **Force majeure clauses are (and remain) strictly and narrowly construed.** The substance of the *Hitz* ruling does not depart from principles that have been applied in the pre-covid era, namely that *force majeure* clauses are strictly and narrowly construed. Language matters, and drafting provisions that have historically been viewed as "boilerplate" now require increased attention.

■ **A partial excuse of performance may be found appropriate if limited uses are allowed.** The *Hitz* court found that the restaurant tenant's "obligation to pay rent is reduced in proportion to its reduced ability to generate revenue due to the executive order." The court might have reached a different result if the lease was an office lease, depending on the language of the applicable order and permitted use. The concept of tying rent amounts to allowable tenant use could prove to be a serious point of contention in future litigation, as courts confront the practical effects of various state orders.

■ **Courts may be willing to go to extraordinary lengths to fashion equitable remedies to deal with the unprecedented restrictions created by covid-19.** The court in *Hitz* rejected the landlord's attempt to reframe tenant's argument as an inability to pay rent due to a "lack of money," which would have been excluded as a viable excuse pursuant to the *force majeure* provision. In doing so, the court embraced the tenant's position that the proximate cause of its inability to pay rent stemmed from the executive order and its impact on the business. Similarly, recent decisions in other cases, such as *Pier I Imports, Inc.*, Bky Case No. 20-30805 (Bankr. E.D. Va. April 2020), have permitted the tenant to defer the payment of rent to certain landlords, emphasizing that "Covid-19 presents a temporary, unforeseen and unforeseeable glitch in the administration of the Debtors' Bankruptcy Cases."

Prior to the pandemic, *force majeure* clauses were viewed as boilerplate provisions buried in contracts and worthy of little attention. The historic enormity of covid-19 and its economic impact has placed these clauses at issue. Now lawyers are spending a significant amount of time parsing the language of these provisions to guide clients on the impact of the pandemic on their business agreements. Courts will undoubtedly continue to be required to address the specific language of the *force majeure* clauses in addressing requests for relief under leases and other agreements. ▲

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