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Bankruptcy Court Says Force Majeure Clause Partially Excuses Rent Payment Due To COVID-19 Executive Order

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Restaurants, retail stores, and other businesses around the country have been uniquely hit by COVID-19—and by the executive orders shuttering their in-person services that quickly followed in its wake. Recently, the United States Bankruptcy Court for the Northern District of Illinois determined that one such executive order triggered the force-majeure clause in a restaurant group's lease, partially excusing it from paying rent. *See In re Hitz Restaurant Group*, No. BR 20-B-05012, 2020 WL 2924523 (Bankr. N.D. Ill. June 3, 2020).

In *Hitz*, the landlord-creditor sought to compel rent payments in the restaurant group's Chapter 11 bankruptcy proceedings. The restaurant group, however, claimed that Illinois Governor J.B. Pritzker's March 16, 2020, executive order closing "on-premises" food services was a force-majeure event under its lease. The lease contained a broad force-majeure clause:

"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* [emphasis added] . . . . Lack of money shall not be grounds for Force Majeure."

The bankruptcy court, applying Illinois law, agreed with the restaurant group and concluded that "the force majeure clause unambiguously applies, at least in part, to the rental payment which became due" after the governor's order went into effect. But the restaurant group was only partially off the hook: because the governor's order permitted take-out service, it was not excused "to the extent that [the restaurant group] could have continued to perform [take-out] services." The court, under a preliminary finding, reduced the rent obligation by 75 percent but required payment of "at least 25 percent" of the rent to account for a takeout business that the restaurant group could have done under the governor's order.

The court disagreed with the landlord's arguments that the governor's COVID-19 order did not trigger a force-majeure event under the lease. First, the court concluded, the provision's exception that "[l]ack of money shall not be grounds for Force Majeure" did not apply because the governor's order was the proximate cause of the inability to pay rent, and, to the extent the "lack of money" provision conflicted with the "governmental action" provision in the force-majeure clause, the more specific "governmental action" prevailed under Illinois law. Second, the court rejected the landlord's argument that the restaurant group's failure to apply for a Small Business Administration loan barred a force-majeure event, holding that the clause did not require the "party adversely affected by governmental action or orders to borrow money to counteract their effects."

In short, while the *Hitz* decision relies primarily on the broad "governmental action" language in the force-majeure provision of the parties' lease, there are three potential takeaways for both commercial landlords and tenants navigating the COVID-19 legal landscape. First, *Hitz* may pave the way for courts to find a *partial* trigger of a force-majeure provision when COVID-19 government orders merely hobble—but don't totally destroy—a tenant's ability to perform under the contract. Under such a partial-trigger scenario, a tenant's rent payment may be excused—but only for the percentage of the premises, the government order rendered unusable.

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Second, landlords should be wary that a force-majeure clause might be triggered even if a tenant could have continued to perform under the lease by applying for government assistance (like a PPP small business loan).

Finally, the *Hitz* decision underscores that these disputes will turn largely on the particular language of each force-majeure provision and the facts of the case. Commercial landlords and tenants should therefore be alert to the ways in which the force-majeure clauses in their contracts might affect their rights and obligations in the aftermath of COVID-19—and be aware of other claims and defenses (like impracticability) that could be available. So, whether you're a landlord or a tenant, consult with your Miller Canfield attorney to evaluate what effects COVID-19 might have on your lease or contract.

This information is based on the facts and guidance available at the time of publication, and may be subject to change