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5 Things You Need to Know About the Recent Illinois Ruling on Force Majeure and COVID-19

Litigation

The first reported substantive ruling by a judge sitting in Illinois on the legal implications of whether COVID-19 and the resulting governmental shelter-in-place orders relieve a tenant's obligation to pay rent pursuant to a force majeure provision in a commercial lease agreement was entered by U.S. Bankruptcy Judge Donald Cassling on June 3, 2020.

[The ruling in *In re Hitz Restaurant Group, LLC*](#), (N.D. Ill., Case No. 20-05012) came in response to a landlord's motion to force a restaurant tenant to come current on unpaid post-petition rent. The court sided with the tenant and reduced its post-petition rent obligation by 75%.

The ruling already has garnered widespread attention as a potential bellwether on the applicability of force majeure clauses in commercial leases. Here are five things you need to know about this decision:

- 1. The force majeure provision was not as strong as it could have been for the landlord:** Typically, a force majeure provision will state unambiguously that nothing constituting a force majeure event will excuse the payment of rent. The *Hitz* force majeure provision did not. Additionally, most commercial leases include a provision that states something like "the obligation to pay rent shall be independent of all other covenants contained in this lease." In *Hitz*, the force majeure provision stated only that "lack of money" would not be grounds for force majeure. Nor did the *Hitz* lease contain the all-important "rent as independent covenant" language favored by Illinois courts. The court ruled that the force majeure provision was "unambiguously" triggered by Illinois Gov. J.B. Pritzker's March 16, 2020, order prohibiting on-premises consumption of food and beverages. The court's decision hinged on the specific language of the force majeure provision at issue.
- 2. The rent relief is not permanent:** The court ruling allowing for the reduction of rent will apply only as long as the Governor's order prohibits restaurants from providing on-premises service. If the order changes, and there is an easing of restrictions to allow for on-premises dining, then rent becomes due. Notably, although the Governor's order did not ban all service of food and beverages, (i.e., curbside pickup and delivery service are allowed), the court did not consider these circumstances in its determination as to the triggering of the force majeure provision because this argument was not advanced by landlord.
- 3. The ruling will not be binding on state court matters:** The state courts, where the bulk of the non-payment of rent cases have been and will be filed, are not obligated to follow a decision from a federal bankruptcy judge. To be sure, the decision can be used to try to persuade a state court judge as to the right outcome in any given case, but it's just as likely that a state court judge will dismiss the bankruptcy court ruling as a peculiar federal perspective on the issue.
- 4. The stakes were not high in the case:** The monthly base rent obligation in the bankruptcy case was approximately \$10,000, and the court ruling resulted in the tenant paying rent to landlord in the amount of about \$18,000. In a matter involving significantly more dollars, the resources deployed to recover unpaid rent will likely be significantly higher, resulting in a more robust level of advocacy and perhaps a different result.
- 5. Not all leases are created equal:** The lease in *Hitz* was unusual. In Illinois, the case law on force majeure and related concepts of impossibility and frustration of purpose strongly favors the timely payment of rent when the lease contains a clause stating that payment of rent is an independent covenant. In *Hitz*, the lease contained no such provision. We recommend reviewing your force

majeure provision closely to determine if it allows payment relief, as the majority of commercial leases typically will not afford the relief granted in *Hitz*.

While no litigant necessarily wants to be the first to test the waters of a force majeure provision in the COVID-19 era due to the unpredictability of a court's treatment of this novel issue, this bankruptcy decision does little to provide a predictable pathway to commercial landlords and tenants.

If you have questions about this case or would like further information, please contact one of the attorneys in our [Litigation Practice](#) or our [Real Estate Practice](#).