New case holds that COVID-19 closure order "unambiguously" triggers force majeure *clause*

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As the 2019 novel coronavirus (COVID-19) hit the country in earnest this spring, pubic officials took drastic measures to stem the spread. In nearly every state, public officials issued lockdown, stay-at-home and other closure orders. As a result, businesses across the country have been unable to operate, generate revenue and meet preexisting obligations. Tenants have been unable to pay rent, suppliers have been unable to fill orders and countless other companies across industries face similar challenges.

Faced with the risk of liability for breaching these obligations, companies have increasingly looked to *force majeure* provisions as a defense to non-performance. These defenses have been working their way through the court system, and we are just now learning how courts will receive them.

What is a *force majeure* clause?

Force majeure is a French term translating roughly to "superior force." A *force majeure* provision excuses a party's breach of contract when certain, extraordinary events or superior forces specified in the party's contract cause the party's breach. Such events may include war, strife, labor strikes, acts of terrorism, natural disasters and disease. Most notably for our purposes, these clauses will also typically include some reference to unforeseen governmental action or regulation.

New case decision on COVID-19 and *force majeure*

Just last week, in a case of first impression, a federal court in the Seventh Circuit—which covers Wisconsin, Illinois and Indiana—issued a decision that could help various businesses impacted by the pandemic and the governmental response to it. The case at issue—*In re Hitz Restaurant Group*—concerned a Chapter 11 bankruptcy in the Northern District of Illinois and a creditor's attempt to hold the debtor to its obligation to pay rent. The debtor—the restaurant group—argued that its obligation to pay rent was excused by the lease's *force majeure* clause, which provided:

> 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. (Emphasis added.)

The restaurant group argued that the clause was triggered on the date Illinois' governor issued an executive order addressing the COVID-19 pandemic and closing restaurants for on-premises consumption.

Federal bankruptcy judge Donald R. Cassling issued the opinion of the court and, in conclusive language, held that the *force majeure* clause was "unambiguously triggered" by the governor's closure order. The Court found that the order "unquestionably constitutes both 'governmental action' and issuance of an 'order' as contemplated by the language of the force majeure clause."

The *Hitz* decision is significant. It is not only a case of first impression in what is certain to be a developing area of law, but it also stands as persuasive authority for the proposition that COVID-19 closure orders are the type of "governmental action" that excuse contractual obligations under *force majeure* provisions. Even after *Hitz*, however, important questions remain.

Does it matter whether a closure order inhibits all—or just some—of a business's operations?

Illinois' closure order was not absolute in its prohibition on restaurant operations. The Order "not only permitted, but also encouraged, restaurants to continue to perform take-out, curbside pick-up, and delivery services." As such, the Court found that, "to the extent that [the restaurant group] could have continued to perform those services, its obligation to pay rent is not excused by the *force majeure* clause." The Court therefore reduced the restaurant group's obligation to pay rent in proportion to its reduced ability to generate revenue under the closure order.

In *Hitz*, the Court reduced the restaurant group's rent obligation by 75 percent. In future cases, it will be important to see whether other courts will adopt a "partial enforcement" approach to *force majeure* clauses, and how they will go about apportioning the obligation at issue.

How will courts receive less forgiving *force majeure* clauses?

Absent express language to the contrary, courts commonly apply a standard to *force majeure* provisions that approaches impossibility. In other words, courts commonly ask, on account of the extraordinary event, was it virtually impossible for the non-performing party to perform? In *Hitz*, the creditor made just such an argument, positing that the *force majeure* clause was not triggered because the executive order "did not shut down the banking system or post offices," and, therefore, the restaurant group was "physically able to write and send rental checks . . ." Calling the position "specious," the Court rejected this argument on the grounds that it lacked any support in the language of the *force majeure* clause itself. The clause itself did not require impossibility, it merely required that performance be "hindered." As such, it remains to be seen whether courts will excuse performance under less forgiving *force majeure* provisions.

What about the "lack of money" exception?

The reader may be wondering, "What about that seemingly crystal-clear language in the parties' contract: 'Lack of money shall not be grounds for Force Majeure'?" The creditor in *Hitz* wondered the same thing. But the Court drew a debatable distinction. The Court reasoned that the restaurant group was not arguing that a lack of money caused their failure to pay rent; rather, it argued that the governor's order was "the proximate cause of its inability to generate revenue and pay rent."

This is but one interpretation. The bottom line is, the restaurant group could not perform (*i.e.*, it could not pay rent) because it lacked money (*i.e.*, it could not generate revenue). And the contract expressly carved out "lack of money" as an excuse for non-performance. Creative counsel may develop this argument further in the future and convince a court to rule in favor of the party seeking to enforce the contract's obligations. This may be especially true in those jurisdictions where courts have held that the mere fact that it has become more financially difficult to perform an obligation is not enough of a basis to invoke *force majeure*. After all, financial inability to perform is always a foreseeable risk in the commercial context.

In the context of a global pandemic, how does a party satisfy its duty to mitigate?

Most courts impose a duty of mitigation on the non-performing party. Courts will not hesitate to reject a *force majeure* defense when nonperformance could have been avoided by the nonperforming party. In *Hitz*, the creditor argued that the restaurant group could have obtained the money to pay rent, despite the shutdown order, by applying for a Small Business Administration (SBA) loan. According to the creditor, this failure to avoid nonperformance—or mitigate—precluded the restaurant group from invoking the *force majeure* clause. The Court was not persuaded and rejected the creditor's argument: "[n]othing in [the *force majeure*] clause requires the party adversely affected by governmental action or orders to borrow money to counteract their effects." Thus, while we may now have insight into what parties need *not* do, it will be incumbent upon lawyers and courts in future proceedings to help define what will, in fact, satisfy the duty to mitigate nonperformance.

Need help with a *force majeure* provision related to COVID-19? Best to seek counsel

Application of a *force majeure* provision to the current pandemic requires answers to various legal questions. Whether you are considering invoking a *force majeure* provision, or have experienced one asserted against you, parties are encouraged to seek the advice of counsel with experience in this developing area of the law.