

## Illinois Bankruptcy Court Holds that Statewide Shutdown Order Triggered *Force Majeure* Clause

By [Ivan H. Golden](#)

Earlier this month, the United States Bankruptcy Court for the Northern District of Illinois held that a *force majeure* clause in a lease partially excused a restaurant from paying rent after the restaurant closed as a result of a statewide order limiting restaurants and bars to carry-out and delivery service to prevent the spread of COVID-19.<sup>1</sup> The case is among the first to consider whether COVID-19 is a *force majeure* event that may excuse a tenant from paying rent under a lease.

In the case, the debtor, Hitz Restaurant Group (the “Debtor”), leased space from Kass Management Services, Inc. (the “Landlord”). The *force majeure* provision of the lease provided:

Landlord and Tenant shall each be excused from performing its obligations or undertakings provided in this Lease, in the event, but only for so long as the performance of any of its obligations are prevented or delayed, retarded or hindered by ... laws, governmental action or inaction, [or] orders of government.... Lack of money shall not be grounds for Force Majeure.

The Debtor argued this provision of the lease was triggered on March 16, 2020, when Illinois Governor J.B. Pritzker issued an executive order requiring restaurants, bars, food halls, and other establishments to stop allowing on-premises consumption of food and beverages. Such businesses were permitted to offer food and drinks for carry-out, curbside pickup, and delivery, however, provided they had an environment where patrons could maintain adequate social distance.

The Landlord first argued that the *force majeure* clause was not triggered because the executive order did not shut down the banking system or post offices in Illinois. In other words, the Debtor was physically capable of writing and sending a check to the Landlord. The Court called this argument “specious” and rejected it without further consideration.

The Landlord next argued that the Debtor’s failure to pay rent arose from a mere lack of money – which was explicitly *not* grounds for *force majeure* by the terms of the lease. The Court rejected this argument, as well, reasoning that the Debtor was not refusing to pay rent because of a mere lack of money; rather, the Debtor was arguing the shutdown order was the proximate cause of its inability to generate the revenue necessary to pay rent under the lease.

Finally, the Landlord argued that the Debtor could have obtained the money to pay rent by applying for a Small Business Administration loan. The Court noted, however, that there was no requirement in the *force majeure* clause or elsewhere in the lease that the Debtor borrow money to counteract the effects of a governmental action or order contemplated by the *force majeure* clause.

Having rejected the Landlord’s arguments, and having concluded that the *force majeure* clause applied, the Court did not let the Debtor off the hook entirely, however. The Court noted that the Governor’s order did not prohibit the Debtor from offering carry-out, curbside pick-up, and delivery services. On the contrary, the executive order encouraged restaurants, bars, and other eating and drinking

<sup>1</sup> *In re Hitz Restaurant Group*, Case No. 20-05012 (N.D. Ill. Bankr. June 3, 2020).

establishments to offer such services. Thus, to the extent the Debtor could have offered those services and earned revenue, the Court concluded it was not excused from paying rent.

The Court noted that neither party had provided much help in calculating the appropriate rent reduction in light of the *force majeure* event. The Debtor estimated, however, that approximately 75% of its square footage, constituting its dining room and bar, was unusable as a result of the executive order, whereas approximately 25%, constituting its kitchen, could have been used to prepare food for pick-up, take-out, and delivery. As a result, the Court concluded the Debtor was liable for at least 25% of its rental payments for the months of April, May, and June 2020, and that the Debtor will likely be liable for a higher percentage as statewide restrictions on restaurants and bars are gradually lifted.

*In re Hitz Restaurant Group* contains important lessons for landlords and tenants alike. For landlords, the case is a reminder, first and foremost, of the importance of carefully drafting a *force majeure* clause. Had the *force majeure* clause been drafted more narrowly in favor of the landlord, the outcome of the case may well have been different. For tenants, the Court's holding suggests that governmental action in response to the COVID-19 outbreak may excuse payment of rent or other contractual obligations, but only up to a point. To the extent a tenant is able to resume business operations consistent with the Governor's order, even on a limited basis, the tenant is not excused and must continue to pay rent and fulfill its other contractual obligations.

Hahn Loeser's Commercial Services & Restructuring Group is available to assist with force majeure and other contractual performance issues that may arise for your business. If you have questions, please reach out to your primary contact at Hahn Loeser, or contact one of the attorneys listed below for more information.

## ILLINOIS



### BENJAMIN ALTSHUL, ASSOCIATE

Hahn Loeser & Parks LLP  
200 Madison Street, Suite 2700 | Chicago, IL 60606  
baltshul@hahnlaw.com | 312.637.3040



### JOEL COOPER, PARTNER

Hahn Loeser & Parks LLP  
200 Madison Street, Suite 2700 | Chicago, IL 60606  
jcooper@hahnlaw.com | 312.637.3035



### IAN FISHER, PARTNER

Hahn Loeser & Parks LLP  
200 Madison Street, Suite 2700 | Chicago, IL 60606  
ifisher@hahnlaw.com | 312.637.3060



### IVAN GOLDEN, PARTNER

Hahn Loeser & Parks LLP  
200 Madison Street, Suite 2700 | Chicago, IL 60606  
igolden@hahnlaw.com | 312.637.3070

## FLORIDA



### ROBERT COOPER, PARTNER

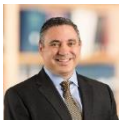
Hahn Loeser & Parks LLP  
2400 First Street, Suite 300 | Fort Myers, FL 33901  
rcooper@hahnlaw.com | 239.337.6730



### JOEL HYATT, ASSOCIATE

Hahn Loeser & Parks LLP  
2400 First Street, Suite 300 | Fort Myers, FL 33901  
jhyatt@hahnlaw.com | 239.337.6725

## OHIO



### ROCCO DEBITETTO, PARTNER

Hahn Loeser & Parks LLP  
200 Public Square, Suite 2800 | Cleveland, OH 44114  
rdebitetto@hahnlaw.com | 216.274.2374



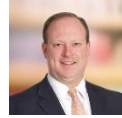
### DANIEL DEMARCO, PARTNER

Hahn Loeser & Parks LLP  
200 Public Square, Suite 2800 | Cleveland, OH 44114  
dademarco@hahnlaw.com | 216.274.2432



### LAWRENCE OSCAR, PARTNER

Hahn Loeser & Parks LLP  
200 Public Square, Suite 2800 | Cleveland, OH 44114  
leo@hahnlaw.com | 216.274.2374



### CHRISTOPHER WICK, PARTNER

Hahn Loeser & Parks LLP  
200 Public Square, Suite 2800 | Cleveland, OH 44114  
cwick@hahnlaw.com | 216.274.2489



### JEFFREY YEAGER, PARTNER

Hahn Loeser & Parks LLP  
65 E. State Street, Suite 1400 | Columbus, OH 43215  
jyeager@hahnlaw.com | 614.233.5128

## CALIFORNIA



### MICHAEL GLEASON, PARTNER

Hahn Loeser & Parks LLP  
600 West Broadway, Suite 1500 | San Diego, CA 92101  
mgleason@hahnlaw.com | 619.810.4310

HAHN  LOESER

CLEVELAND | COLUMBUS | NAPLES | FORT MYERS | SAN DIEGO | CHICAGO

*This Legal Alert was created for general informational purposes only and does not constitute legal advice or a solicitation to provide legal services. This information is current as of the date of the Alert. The information in this Legal Alert is not intended to create, and receipt of it does not constitute, a lawyer-client relationship or reinstate a concluded lawyer-client relationship. Readers should not act upon this information without consulting legal counsel admitted in the state at issue.*