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COURT UPHOLDS FORCE MAJEURE DEFENSE for NON-PAYMENT of RENT DUE to COVID-19

In a likely first of its kind decision, the United States Bankruptcy Court for the Northern District of Illinois has held that governmental restrictions imposed in order to combat the spread of the novel coronavirus qualify as a force majeure event and represent a valid reason for a business to suspend performance of its contractual obligations during the pandemic and ongoing governmental restrictions placed on many businesses.

On June 3, 2020, the U.S. Bankruptcy Court held, in *In re Hirtz Restaurant Group*, that a lease's force majeure clause permitted either party to suspend performance due where they were "prevented or delayed, retarded or hindered by . . . laws, governmental action or inaction, orders of government" In that case, a restaurant closed due to Illinois' restrictions on businesses sought Chapter 11 protection and argued its post-petition rent was excused due to the force majeure clause in the lease. The landlord argued the force majeure clause was not applicable because (1) the restaurant was not prevented from making payment (the banks & post office were open), (2) lack of money was not an event of force majeure under the lease, and (3) the restaurant could have applied for governmental assistance to pay rent, but chose not to. The court rejected each line of reasoning, finding the first irrelevant, the lack of money argument unpersuasive insofar as it was not the reason for non-payment, and the third also irrelevant and not required under the force majeure provision.

The court found persuasive the debtor's argument that it could not pay rent because it could not serve customers – the government's restriction on its business was the reason for the lack of funds. However, the court also found the debtor was able to use 25% of the rental space for take-out dining, and assessed its post-petition rent accordingly.

The takeaway here for businesses is that courts are looking at force majeure clauses carefully in light of the COVID-19 pandemic and there may be defenses when and if landlords (or other creditors) begin seeking recovery of unpaid rent as a result of COVID-19. While this does not definitively answer the question of whether, and how, COVID-19 shutdown orders across the country affect contracts with force majeure provisions, it is a helpful jumping off point that may prove instructive for businesses who are unsure of their legal obligations or options. It likewise offers some guidance for commercial landlords who have tenants that have or will not pay rent as a result of the government shutdowns.

Please contact us by phone at [732.747.7100](tel:732.747.7100) or by email info@marksklein.com to discuss this issue and/or if we can assist in any way.