Friday, November 5, 2021
10:30 AM - 11:45 AM

Seminar 18

Hot Topics in Bankruptcy: The Changing Landscape for Tenants and Landlords

Presented to

2021 U.S. Law Conference
San Francisco Marriott Marquis
San Francisco, CA
November 3-5, 2021

by:

Brian A. Audette
Senior Counsel
PERKINS COIE LLP
131 S. Dearborn St., Ste. 1700
Chicago, IL 60603
Baudette@perkinscoie.com

Jamila Justine Willis
Partner
DLA PIPER LLP (US)
1251 Avenue of the Americas
New York, New York 10020
Jamila.Willis@dlapiper.com

I. Applicable Bankruptcy Basics

A. Property of the Estate

The commencement of a bankruptcy case creates an "estate," which estate is generally comprised of, among other property, "all legal or equitable interests of the debtor in property as of the commencement of the [bankruptcy] case." 11 U.S.C. § 541(a)(1). Bankruptcy courts interpret property of the estate broadly. *See e.g.*, *Riverwood Gas & Oil LLC v. Bureau of Land Mgmt. (In re Riverwood Cas & Oil, LLC)*, No. 2:18-ap-01057, 2019 WL 1766985, *3 (Bankr. C.D. Cal. April 3, 2019); *Morris v. Nat'l Ins. Fire Ins. Co. of Pittsburgh (In re Eastwind Group, Inc.)*, 303 B.R. 743, 746 (Bankr. E.D. Pa. 2004); *Ochs v. Lipson (In re First Cent. Fin. Corp.),* 238 B.R. 9, 16 (Bankr. E.D.N.Y. 1999). Unexpired leasehold interests constitute property of a debtor's bankruptcy estate. *See e.g.*, *Brattleboro Housing Auth. v. Stoltz (In re Stoltz)*, 197 F.3d 625, 629 (2nd Cir. 1999). However, property of the estate does not include:

> any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case . . .

11 U.S.C. § 541(b)(2). The application of the foregoing to leases that terminate "at the expiration of the stated term of such lease" suggests that leases terminated by a landlord due to a tenant's default may not be excluded from property of the estate pursuant to section 541(b)(2) of the Bankruptcy Code. *See e.g.*, *In re Indiana Hotel Equities, LLC*, 586 B.R. 870 (Bankr. E.D. Mich. 2018).

B. The Automatic Stay

The automatic stay codified at 11 U.S.C. § 362 applies "automatically" when a debtor files its bankruptcy petition and remains in effect until the end of the case or until the stay is lifted. The automatic stay stops most actions against the debtor to provide the debtor with necessary "breathing room" to formulate its reorganization strategy or, in many instances, orchestrate an orderly and efficient sale of assets.

Section 362(a)(1)-(8) of the Bankruptcy Code enumerates certain prohibited actions, including:

a) The commencement or continuation of any judicial, administrative, or other action or proceeding against the debtor that could have been commenced before the bankruptcy filing, or to recover a claim against the debtor that arose prior to the bankruptcy filing;

b) Enforcement of a judgment obtained before the bankruptcy case;

c) Any act to obtain possession of property of the estate or to exercise control over property of the estate;

d) Create, perfect or enforce a lien against property of the estate;

e) Create, perfect or enforce against a debtor's property any lien that secures a claim arising before the bankruptcy filing;

f) Collect, assess, or recover a claim against the debtor that arose before the bankruptcy filing;

g) Setoff any debt owing to the debtor that arose before the commencement of the bankruptcy case against a claim against the debtor; and

h) Commencement or continuation of a proceeding before the U.S. Tax Court regarding a corporate debtor's tax liability for a taxable period the bankruptcy court may determine or concerning the tax liability of an individual debtor for a taxable period ending before the bankruptcy filing.

1. Landlord-Specific Prohibitions

Landlords must be aware of certain actions they may not take upon a bankruptcy filing that such landlord might otherwise take in the ordinary course and in the absence of a bankruptcy filing. For instance, the automatic stay prohibits landlords from, *inter alia*: (1) unilaterally applying a security deposit against unpaid rent (§ 362(a)(7)); (2) demanding payment of pre-petition rent (§ 362(a)(6)); (3) terminating a lease due to the bankruptcy filing or the debtor's insolvency (§ 362(a)(3)); (4) commencing a lawsuit against a debtor that could have been commenced against the debtor prior to a bankruptcy filing (§ 362(a)(1)); or (5) continuing a lawsuit already in progress against the debtor (§ 362(a)(1)).

There are numerous exceptions to the automatic stay, one of which is particularly noteworthy for landlords. For example, the automatic stay does not operate as a stay of "any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property." 11 U.S.C. § 362(b)(10).[1] However, courts have narrowly construed this section and determined that it only applies when a lease of non-residential real property expires by its terms and is not necessarily applicable when a landlord terminates a lease prior to bankruptcy due to the tenant's default. *See Indiana Hotel Equities*, 586 B.R. 870. Consequently, it may be advantageous for landlords to include in their leases that the expiration of the stated term of the lease includes early termination due to the tenant's default. Doing so may maximize the likelihood that a lease that is terminated prior to the bankruptcy filing is excluded from property of the estate and that the automatic stay will not restrain the landlord from retaking possession.

2. Lifting The Automatic Stay

According to section 365(d)(1) of the Bankruptcy Code, a bankruptcy court shall grant relief from the automatic stay "for cause." While the Bankruptcy Code does not define "cause," with respect to a landlord, such cause may include: (1) a debtor's failure to pay post-petition rent;[2] or (2) the landlord terminated the debtor's lease

---

[1] The exception to the automatic stay in section 362(b)(10) of the Bankruptcy Code pertaining to leases that terminate "by the expiration of the stated term of the lease" mirrors section 541(b)(2) of the Bankruptcy Code that excludes from property of the estate leases that terminate "by the expiration of the stated term of the lease."

[2] As an additional or alternative remedy, a landlord may also move to compel the debtor to either assume or reject the lease for failing to pay post-petition rent.

prior to the bankruptcy filing.[3] Nevertheless, determining whether a landlord has actually terminated a lease prior to a bankruptcy filing is not always an easy task, and landlords must consult applicable state law to determine if termination actually occurred prior to bankruptcy. In many states, termination is not complete until the landlord actually obtains an order of possession.

Practice Pointer: Even if the landlord is confident that it properly terminated a lease prior to the bankruptcy filing, it may be wise to nevertheless seek relief from the automatic stay out of an abundance of caution to avoid running afoul of the stay.

II. Debtor's Treatment of Contracts and Leases

Section 365 of the Bankruptcy Code provides that, subject to bankruptcy court approval, a debtor "may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). In addition, and subject to certain limitations, a debtor may assign an executory contract or unexpired lease after it has assumed such contract or lease. *See* 11 U.S.C. § 365(f).

A. Rejection

1. The Applicable Standard

A debtor's decision to reject a lease is subject to the business judgment rule. Thus, a debtor must only show "that rejection of the [lease] will likely benefit the estate." *See In re Weaver Oil Co., Inc.*, No. 08-40379-LMK, 2008 WL 8202063, *2 (Bankr. N.D. Fla. 2008). Indeed, rejection is routinely granted unless the bankruptcy court "finds that the [debtor's] conclusion that rejection would be advantageous is so manifestly unreasonable that it could not be based on sound business judgment, but only on bad faith, whim, or caprice." *Id*. Accordingly, it is extremely difficult to successfully oppose a debtor's decision to reject a lease.

2. Determining the Effective Date of Rejection

Typically, rejection is effective at the time the bankruptcy court enters an order authorizing rejection of a lease. *See In re Romacorp, Inc.*, No. 05-86818-BJH-11, 2006 WL 6544088, *3 (Bankr. N.D. Tex. Feb. 2, 2006) (stating that "[t]his Court follows the rule that rejection of an unexpired lease is generally effective as of the date of the entry of an order of the court approving such rejection."). However, bankruptcy courts may authorize retroactive lease rejection to the date the rejection motion is filed or an earlier date if the debtor surrendered the premises to its landlord. *See In re At Home Corp.,* 392 F.3d 1064 (9th Cir. 2004) (holding that "a bankruptcy court, in exercising its equitable powers under 11 U.S.C. § 105(a), may approve the retroactive rejection of a nonresidential lease when 'necessary or appropriate to carry out the provisions of' § 365(d)."); *see also In re Chi-Chi's, Inc.*, 305 B.R. 396, 399 (Bankr. D. Del. 2004) (authorizing retroactive rejection of nonresidential lease to the date the debtor surrendered the premises to enable the landlord to enter into an agreement with sub-tenants).

3. Consequences of Rejection

Rejection does not automatically constitute a termination of the applicable contract or lease. Rather, rejection is deemed to constitute a pre-petition breach of the lease by the debtor. However, a debtor's rejection of a lease coupled with its surrender of the premises—as is often the case in large retail bankruptcies—may be deemed a termination of the lease. *See In re Northwest Airlines Corp.*, 383 B.R. 575, 583 (Bankr. S.D.N.Y. 2008).

4. Claims Resulting from Rejection

Upon rejection of a lease, a landlord is entitled to file a "rejection damages" claim against the debtor's bankruptcy estate. Because rejection is deemed a pre-petition breach of the applicable lease, a rejection damages claim constitutes an unsecured claim against the debtor's estate.[4] Further, the rejection damages claim is subject to a "cap" set forth in section 502(b)(6) of the Bankruptcy Code, which provides that such claim is generally comprised of: (a) all unpaid pre-petition rent, plus (b) rent owed under the applicable lease for the greater of (i) one

---

[3] If the landlord's pre-petition termination of a lease due to a tenant's default does not constitute "the expiration of the stated term of the lease" thereby rendering the automatic stay inapplicable pursuant to section 362(b)(10) of the Bankruptcy Code, such termination may still constitute grounds for the landlord to get relief from the automatic stay to retake possession of the premises.

[4] Generally, holders of unsecured claims share pro-rata in the distribution of assets, if any, remaining after all secured, administrative, and priority claims have been fully satisfied.

year, or (ii) fifteen percent of the remaining term of the lease, but not to exceed three years of rent. This cap is applicable even if the landlord procured a judgment in excess of the cap prior to the bankruptcy proceeding.

Applicable case law suggests that both letters of credit and security deposits must be applied to a landlord's "capped" damages claim under section 502(b)(6) and not a landlord's total damages claim. *See, e.g., In re AB Liquidating Corp.*, 416 F.3d 961 (9th Cir. 2005) (holding that letter of credit proceeds must be applied to the "capped" damages claim and not a lessor's total damage claim and indicating that the result would be the same with respect to a security deposit held by a landlord.).

B. Assumption

Section 365 of the Bankruptcy Code provides, in pertinent part, as follows:

> (b)(1) If there has been a default in an . . . unexpired lease . . . the [debtor] may not assume such . . . lease unless, at the time of assumption of such . . . lease, the [debtor]—
>
> > (A) cures, or provides adequate assurance that the trustee will promptly cure, such default other than a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property, if it is impossible for the [debtor] to cure such default by performing nonmonetary acts at and after the time of assumption, except that if such default arises from a failure to operate in accordance with a nonresidential real property lease, then such default shall be cured by performance at and after the time of assumption in accordance with such lease, and pecuniary losses resulting from such default shall be compensated in accordance with the provisions of this paragraph;
>
> > (B) compensates or provides adequate assurance that the [debtor] will promptly compensate, a party other than the debtor to such . . . lease, for any actual pecuniary loss to such party resulting from such default; and
>
> > (C) provides adequate assurance of future performance.

11 U.S.C. § 365(b)(1).

1. Cure of Defaults Under Lease

The monetary "cure" claim a debtor must pay a landlord in connection with a lease's assumption typically consists of all unpaid amounts owed by the debtor to the landlord under the lease as of the date of assumption, *including rent and other charges arising both before and after the commencement of the debtor's bankruptcy case*. A landlord may include its "reasonable" attorneys' fees in a cure claim and courts may consider several factors in determining whether and to what extent to include such fees and costs, including "(1) the amount of the dispute relative to the attorneys' fee requested, (2) the Debtor's good faith effort to estimate and resolve the cure claim, (3) the Debtor's compliance with the [Bankruptcy] Code, and (4) whether the issue is a matter of first impression." *In re Crown Books Corp.*, 269 B.R. 12, 19 (Bankr. D. Del. 2001). A nonmonetary default arising from a debtor's failure to operate in accordance with a lease for nonresidential real property must be cured at and after the time of assumption and the landlord is entitled to recover losses resulting from such default.

2. Adequate Assurance Of Future Performance

The Bankruptcy Code does not define "adequate assurance of future performance." However, bankruptcy courts have found that the phrase should be "given a practical, pragmatic construction in light of the facts of each case." *In re Natco Indus., Inc.*, 54 B.R. 436, 440 (Bankr. S.D.N.Y. 1985). The phrase "does not mean absolute insurance that the debtor will thrive and make a profit." *Id*. Rather, "[r]egarding a lease covenant to pay rent, the test is simply whether it appears that the rent will be paid and other obligations thereunder met." *Id*.; *see also In re Great Atl. & Pac. Tea Co.*, 472 B.R. at 674–75 (citing *In re M. Fine Lumber Co.*, 383 B.R. 565, 573 (Bankr. E.D.N.Y. 2008)); *In re Latitudes Café, LLC,* 2005 Bankr. LEXIS 1543, at *7 (Bankr. D.N.H. 2005). In no event does adequate assurance of future performance require an "absolute guarantee of performance." *In re Great Atl. & Pac. Tea Co.*, 472 B.R. at 674 (citation omitted).

The determination of whether adequate assurance of future performance has been provided requires a court to examine the facts and circumstances surrounding "the nature of the parties, their past dealings and present commercial realities." *In re Gen. Oil Distribs., Inc.*, 18 B.R. 654, 658 (Bankr. E.D.N.Y. 1982). Specific factors that courts have considered in determining whether a debtor has provided adequate assurance of future performance are:

a) financial data indicating an ability to generate an income stream sufficient to meet obligations under the applicable lease;

b) the general economic outlook in the debtor's industry;

c) the presence of a guarantee;

d) the provision of a security deposit, a letter of credit, or similar security;

e) in the case of a newly formed assignee, the experience and qualification of the entity's officers;

f) unaudited balance sheets;

g) detailed tax returns and other financials;

h) cash flow information; and

i) the assignee's performance record.

C. Assumption And Assignment

A debtor may assume and assign a nonresidential lease if the debtor (1) assumes the unexpired lease in accordance with section 365(b)(1) of the Bankruptcy Code and (2) provides adequate assurance of future performance *by the assignee of such lease*. *See* 11 U.S.C. § 365(f)(2). As explicitly provided in the text of section 365(f)(1) of the Bankruptcy Code, it is the assignee's ability to perform under the lease in the future that is relevant, as opposed to the debtor's ability to perform.

1. Anti-Assignment Clauses

Generally, a debtor may assume and assign an unexpired lease of nonresidential real property "notwithstanding a provision in an . . . unexpired lease . . . or in applicable law, that prohibits, restricts, or conditions the assignment of such . . . lease." 11 U.S.C. § 365(f)(1). Courts have recognized that section 365(f) of the Bankruptcy Code was "'designed to prevent anti-alienation *or other clauses* in leases and executory contracts assumed by the [debtor] from defeating his or her ability to realize the full value of the debtor's assets in a bankruptcy case.'" *The Shaw Group, Inc. v. Bechtel Jacobs Co., LLC (In re The IT Group, Inc.)*, 350 B.R. 166, 178-79 (Bankr. D. Del. 2006) (emphasis in original) (internal citation omitted). Consequently, and subject to certain exceptions not typically applicable to landlords for nonresidential real property, clauses in leases restricting assignment or authorizing assignment only upon the landlord's expressed, written consent are unenforceable—the general rationale being that such clauses impair the debtor's ability to maximize the value of its leases for the benefit of its bankruptcy estate.

Not only are express anti-assignment clauses unenforceable, but so too are "'[d]e facto anti-assignment provisions . . . that limit the permitted use of the leased premises, lease provisions that require payment of some portion of the proceeds or profit realized upon assignment, and cross-default provisions.'" *Id*. (internal citation omitted); *see also In re Convenience USA, Inc.*, No. 01–81478, 2002 WL 230772, * (Bankr. M.D. N.C. Feb. 12, 2002) (stating that "where a debtor is a party to a number of unexpired leases, cross-default clauses that would serve to prevent the debtor from assuming some of the leases without assuming the others at the same time are unenforceable under § 365(f).").[5] One need only ask whether the lease provision at issue would impair or interfere

[5] However, an exception may exist when one or more leases and/or contracts containing cross-default or cross-termination provisions are construed as a single, integrated agreement—in which case the whole integrated agreement would need to be rejected or assumed in its entirety. *See Sanshoe Worldwide Corp.*, 139 B.R. at 596-97. Applicable state law governs whether multiple agreements can be construed as a single, integrated agreement. *See id*.

with a debtor's ability to assign the lease to a third party; if the answer is yes, then the provision is likely unenforceable.

2. Special Considerations for Shopping Centers

When a lease of real property in a shopping center is involved, section 365(b)(3) of the Bankruptcy Code increases the "adequate assurance of future performance" requirements and acts as an exception to the general rule that lease provisions that may restrict or inhibit a debtor's right to assume or assume and assign a lease are unenforceable. That section provides as follows:

> (3) . . . adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance—
>
> (A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;
>
> (B) that any percentage rend due under such lease will not decline substantially;
>
> (C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center; and
>
> (D) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.

11 U.S.C. § 365(b)(3).

Put simply, a debtor that leases space in a "shopping center" and/or such debtor's assignee must continue to comply with use restrictions in the lease upon assumption or assumption and assignment. *See In re Trak Auto Corp.*, 367 F.3d 237 (4th Cir. 2004) (assignment subject to use restriction in shopping center lease).

The Bankruptcy Code does not define "shopping center." Rather, it appears that courts make determinations on a case-by-case basis. Factors to consider in determining whether a lease pertains to space in a "shopping center" include, among others: (a) combination of leases held by single landlord; leases to retail distributors of goods; (b) presence of common parking area; and (c) restrictive use provisions in leases. *See In re Ames Dept. Stores, Inc.*, 348 B.R. 91 (Bankr. S.D.N.Y. 2006) (rejecting ICSC definition of shopping center).

Although it does not appear to have been adopted by any courts, the ICSC defines shopping center as "a group of retail and other commercial establishments that is planned, developed, owned and managed as a single property, typically with on-site parking provided." https://www.icsc.org/research/references/c-shopping-center-definitions

III. Debtors' Obligations Pending Assumption and Assignment

A. General Obligations

Pending the rejection, assumption, or assumption and assignment of a non-residential real property lease, a tenant is required to timely perform its obligations "arising" after the bankruptcy filing. *See* 11 U.S.C. 365(d)(3). Courts often struggle with determining when a debtor must pay its "stub" rent, which is the rent attributable to the date of the bankruptcy filing through the end of the month in which the case is filed. Stub rent is an administrative claim in most jurisdictions. The timing for payment of stub rent depends on the jurisdiction in which the case is pending. Courts adopt one of the two following approaches.

A. Landlord has an administrative expense claim for stub rent, but such rent is not required to be paid until plan confirmation (when all other administrative expense claims are paid). *See e.g., In re HQ Global Holdings, Inc.*, 282 B.R. 169 (Bankr. D. Del. 2002).

B. Stub rent must be paid immediately consistent with Section 365(d)(3). *See e.g., In re Travel 2000, Inc.*, 264 B.R. 444 (Bankr. W.D. Mich. 2001).

If a lease is rejected mid-month some courts provide that rent for the full month is due if it arose prior to the date of rejection. *See, e.g., In re HA-LO Indus., Inc.*, 342 F.3d 794 (7th Cir. 2003). Other courts provide that only a prorated portion of the rent is due for the period prior to the date of rejection. *See e.g., In re Ames Dept. Stores, Inc.*, 306 B.R. 43 (Bankr. S.D.N.Y. 2004). If a lease is rejected as of the date rent is due, *e.g.,* on the first of the month, rejection may prevail and the tenant will not owe a full month of rent. *See In re KDA Group, Inc.*, 574 B.R. 556 (Bankr. W.D. Pa. 2017).

B. Relief for Debtors

Bankruptcy courts may extend, *for cause*, the time for performance of any obligation arising under a lease for non-residential real property within the first 60 days following the bankruptcy filing, *provided, however*, that the time for performance may not be extended beyond such 60-day period. *See* 11 U.S.C. § 365(d)(3). Retail debtors have been relying heavily upon Section 365(d)(3)'s 60-day extension to defer rent that would have otherwise been due within the first 60 days of the case since COVID-19.

Notwithstanding Section 365(d)(3)'s apparent prohibition of extending rent deferrals beyond the first 60 days of a case, some courts have nevertheless done just that. In *Modell's Sporting Goods*, the bankruptcy court suspended the bankruptcy case and deferring most expenses—including rent—beyond 60 days pursuant to Sections 105(a) and 305 of the Bankruptcy Code. *See In re Modell's Sporting Goods, Inc., et. al.,* No. 20-14179 (VFP) (Bankr. D. N.J. 2020). Section 305 Code authorizes a bankruptcy court to suspend a case if "the interests of creditors and the debtor would be better served by such . . . suspension." Section 105(a) of the Bankruptcy Code authorizes a bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."

In *Pier 1 Imports*, the bankruptcy court deferred payment of non-critical expenses—including rent—beyond the first 60 days of the bankruptcy case. *See In re Pier 1 Imports, Inc., et al.,* No. 20-30805 (KRH) (Bankr. E.D. Va. 2020). The bankruptcy court reasoned that Section 365(d)(3) of the Bankruptcy Code does not require immediate payment of rent.[6] Rather, the bankruptcy court concluded that landlords have administrative expense claims that must be paid on the effective date of a reorganization plan (*like all other holders of administrative expense claims*). The bankruptcy court held that to compel immediate payment of rent would elevate landlords' claims to super-priority status.

Many debtors have also been relying upon force majeure clauses to obtain relief from rental obligations. The applicability of a force majeure clause is an issue of contract interpretation and governed by applicable state law. *See e.g., Specialty Foods of Ind., Inc. v. City of South Bend*, 997 N.E.2d 23, 27 (Ind. Ct. App. 2013). Courts generally construe such clauses narrowly. *See e.g., Reade v. Stoneybrook Realty, LLC*, 63 A.D.3d 433, 434 (N.Y. App. Div. 2009). Performance may be excused only when the alleged force majeure event is expressly referenced in the contract or lease. *See id*. "Catch-all" provisions in a force majeure clause may provide a basis to excuse performance if the alleged force majeure event has characteristics similar to one or more expressly identified force majeure events. *See e.g., Team Mktg. USA Corp. v. Power Pact, LLC*, 41 A.D.3d 939, 942–43 (N.Y. App. Div. 2007). Also, there must be a causal connection between the alleged force majeure event and a party's inability to perform. *See e.g., In re Bushnell*, 273 B.R. 359, 364 (Bankr. D. Vt. 2001). Finally, the party invoking the force majeure clause must show what action it took to perform under the contract despite the alleged force majeure event. *See e.g., Gulf Oil Corp. v. Fed. Energy Regulatory Comm'n*, 706 F.2d 444, 452 (3d Cir. 1983).

In *CEC Entertainment*, debtors sought to abate rent for locations closed or with limited operations. *See In re CEC Entm't, Inc., et al.*, No. 20-33163, 2020 WL 7356380 (Bankr. S.D. Tex. Dec. 14, 2020). The bankruptcy court concluded that it could not "override" Section 365(d)(3)'s mandate that rent could only be deferred for 60 days after the bankruptcy filing. The bankruptcy court concluded that even though COVID-19 and/or governmental orders limiting operations fit within the applicable force majeure provisions, those provisions expressly provided that the tenants would not be relieved of monetary obligations during a force majeure event. The bankruptcy court also concluded that force majeure clauses superseded the frustration of purpose doctrine, which excuses performance only "when circumstances beyond the parties' control frustrate the purpose of the deal."

---

[6] Section 365(d)(3) of the Bankruptcy Code provides that *"The trustee [or debtor] shall timely perform all the obligations of the debtor . . . arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected…"*

In *Hitz Restaurant Group*, a restaurant operator filed bankruptcy and its landlord moved to compel the immediate payment of rent. *See In re Hitz Rest. Grp.*, 616 B.R. 374 (Bankr. N.D. Ill. 2020). The lease in question included a force majeure clause, which excused performance so long as performance was hindered by laws, governmental action or inaction, or governmental orders. The Illinois Governor had issued an Executive Order that precluded in-person dining but encouraged take-out and delivery service. The bankruptcy court held that the force majeure clause unquestionably applied, in part, thereby reducing the restaurant owner's obligation to pay rent in proportion to its reduced ability to general revenue due to the Executive Order (rent reduced by 75%, which was percentage of business associated with in-person dining).