

insolvency2020



Sept. 23, 2020, 3:30-4:45 p.m.

ABI: Force Majeure and Business-Interruption Insurance

Darin L. Brooks; Gray Reed & McGraw LLP
Hon. Donald R. Cassling; U.S. Bankruptcy Court (N.D. Ill.)
Shirley S. Cho; Pachulski Stang Ziehl & Jones
Monique D. Hayes; Goldstein & McClintock LLP
George E. Zobitz; Cravath, Swaine & Moore LLP

Educational Materials

A Force To Be Reckoned With: Post COVID-19 Force Majeure and Business Interruption Insurance Issues In Insolvency



Insolvency 2020
American Bankruptcy Institute

Unprecedented Impact

The COVID-19 pandemic has had an unprecedented impact on the nation's brick and mortar businesses, including retail, restaurants, fitness centers.



Relevant Bankruptcy Code Provisions

Section 541 defining property of the estates and construed by courts to include certain insurance policies.

Section 365 generally allows assumption or rejection of executory contracts and unexpired leases. Note: insurance policies are usually executory contracts.

Section 365(d)(3) requiring timely performance of commercial lease obligations (including rent payments) pending assumption or rejection.

In re Hitz Restaurant Group, LLC

Case No. 20 B 05012, 2020 WL 2924523
(Bankr. N.D. Ill June 3, 2020)



Issue: Whether a Lease Agreement's Force Majeure Provision Excused the Debtor's Obligation to Pay Post-Petition Rent

Common Law Doctrine of Impossibility v. Contractual Force Majeure Provisions

Case Specific Lease Provisions re: Government Orders and Lack of Money

Proximate Cause of Non-performance

Hitz Lease Provision

Force Majeure.



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 act of God, fire, earthquake, flood, explosion, actions of the elements, war, invasion, insurrection, riot, mob violence, sabotage, inability to procure or general shortage of labor, equipment, facilities, materials or supplies in the open market, failure of transportation, strikes, lockouts, action of labor unions, condemnation, requisition, laws, governmental action or inaction, orders of government or civil or military or naval authorities, or any other cause, whether similar or dissimilar to the foregoing, not within the reasonable control of the party or its agents, contractors or employees (each, individually and collectively, an event of "Force Majeure"). Lack of money shall not be grounds for Force Majeure.

Faculty

Darin L. Brooks is a partner with Gray Reed & McGraw LLP in Houston and has built a commercial litigation and insurance coverage practice focused on flexibility and variety, allowing him to adapt to clients' changing needs and solve a broad range of challenging problems across several industries, including insurance, energy, banking and health care. He defends clients in complex litigation before state and federal courts, in arbitration and on appeal, with an emphasis on disputes involving insurance, energy, contracts, personal-injury and maritime issues. As leader of the firm's Insurance Practice Group, Mr. Brooks focuses his insurance practice on advising clients on complex coverage issues, providing coverage opinions and resolving related disputes before courts and arbitration panels in Texas and throughout the country. He is also a resource when policy interpretation questions, scope of insurance needs and other insurance issues arise in various disputes and transactions. Mr. Brooks has more than 20 years of experience guiding upstream, midstream and downstream energy businesses to favorable outcomes in all types of complex energy and commercial disputes. He serves as lead counsel in many cases, and also quarterbacks the local teams charged with resolving disputes in faraway venues across the country. Mr. Brooks's practice also includes handling a number of different commercial disputes for a publicly traded bank, credit unions and other financial institutions. In addition, he is highly active in the firm's health care practice, resolving commercial disputes for health care providers and advising on the language used in many of their core agreements. Before starting his private practice, Mr. Brooks worked as a briefing attorney for Hon. Adele Hedges of the Texas Court of Appeals, 14th Judicial District, and as a judicial intern for Chief Justice Alice Oliver-Parrott of the Texas Court of Appeals, First District. He received his B.A. in history in 1993 from Baylor University and his J.D. in 1996 from Baylor University School of Law, where he was a member of Phi Delta Phi and the Harvey M. Richey Moot Court Society.

Hon. Donald R. Cassling is a U.S. Bankruptcy Judge for the Northern District of Illinois in Chicago, sworn in on Jan. 18, 2012. Prior to his appointment, he was a partner at Jenner & Block and at Quarles & Brady in Chicago, where he had a national practice in commercial and patent-infringement law, as well as bankruptcy litigation, and represented chapter 11 debtors in possession, creditors' committees, individual creditors and chapter 11 trustees. Upon graduation from law school, he clerked for Chief Judge John R. Brown of the U.S. Court of Appeals for the Fifth Circuit before returning to Chicago to practice law. Judge Cassling has written and lectured extensively on the UCC, banking law and commercial litigation and has testified as an expert witness on the Illinois UCC. From 2003-11, Judge Cassling wrote "Banking Briefs," a banking litigation column for *The Banking Law Journal*, and served as a member of its board of editors. He has also participated as a faculty member for the National Institute of Trial Advocacy and was selected as an *Illinois Super Lawyer* from 2009-12. Judge Cassling is a member of ABI, the American Bar Association and the National Conference of Bankruptcy Judges. He received his A.B. from Duke University and his J.D. from the University of Chicago Law School, where he was an editor of the *University of Chicago Law Review*.

Shirley S. Cho is an attorney with Pachulski Stang Ziehl & Jones in Los Angeles has more than 20 years' experience advising debtors, creditors' committees, creditors and purchasers. She has represented some of the largest companies in America to restructure billions of dollars of debt, acquirers of assets out of bankruptcy, and dozens of committees of unsecured creditors across a variety of in-

dustries. Ms. Cho also has significant experience representing U.S. debtors involved in cross-border proceedings and has also represented foreign creditors, including Fortune Global top 20 companies, to successfully pursue significant claims in chapter 11. She also has served as an expert on U.S. insolvency law in foreign proceedings. An active member of the community, Ms. Cho was recently appointed to the national Council of Korean Americans and has also served as co-chair of ABI's Bankruptcy Battleground West program, the Annual Insolvency Restructuring Advisors Annual Conference, and on the board of trustees of her law school and Asian Americans Advancing Justice-LA. She has won numerous accolades, including being named as one of *The Best Lawyers in America* every year since 2016 and the *Daily Journal's* Top 100 Women Lawyers in 2019. Ms. Cho has written and lectured extensively on U.S. bankruptcy law. She began her career as a law clerk for Hon. John E. Ryan of the U.S. Bankruptcy Court for the Central District of California. Ms. Cho is admitted to practice in California and New York. She received her B.A. *magna cum laude* in 1994 from the University of California, Berkeley and her J.D. in 1997 from the University of California, Hastings College of the Law.

Monique D. Hayes is a partner with Goldstein & McClintock LLLP in Miami, where she practices in the areas of business transactions, commercial litigation and corporate restructuring. She has extensive experience advising fiduciaries, corporate and nonprofit board members, entrepreneurs and small businesses. She has successfully represented clients in a broad range of matters, including asset sales and acquisitions, finance transactions, bankruptcy plan confirmations, avoidance actions, D&O claim litigation, Ponzi scheme and other fraud litigation. She also has experience representing franchisors in franchisee bankruptcy proceedings. In the innovation and technology sector, Ms. Hayes has represented start-ups, entrepreneurs and founders in corporate formations and restructuring, due diligence and related transactional matters. Ms. Hayes is a member of ABI's inaugural class of "40 Under 40" in 2017 and has been featured in the 40 Under 40 Outstanding Lawyers of Miami-Dade County, received the IWIRC Rising Star Award, and been recognized by *Brickell Magazine* as one of the Top 20 Professionals Under 40. She has also been lauded as a "Florida Rising Star" by *Super Lawyers* magazine and a "Top Up and Comer" by *Florida Trend* magazine. Most recently she received the prestigious Kathryn Heidt Award from the Business Law Section of the American Bar Association. Prior to entering private practice, Ms. Hayes clerked for U.S. Bankruptcy Judge Laurel Myerson Isicoff and was a housing attorney for Legal Services of Greater Miami, Inc. She was an attorney at the law firm Genovese, Joblove & Battista, P.A. before founding The Hayes Firm, PLLC, then moving on to join Goldstein & McClintock, LLLP. Ms. Hayes is a member of the Florida Bar and has been admitted to practice before the U.S. District Courts for the Southern and Middle Districts of Florida. She received her undergraduate degree in political science with honors from the University of South Florida and her J.D. *cum laude* from the University of Miami School of Law, where she was a member of the Bar and Gavel Honor Society, named to the Dean's List, awarded the Dean's Honor Scholarship, and received the C.A.L.I. Excellence for the Future Award in Chapter 11 Bankruptcy Skills.

George E. Zobitz is the managing partner of Cravath, Swaine & Moore LLP's Corporate Department in New York and works in all areas of the firm's Financial Restructuring & Reorganization (FR&R) practice. He focuses his practice on a variety of financings often related to restructuring, including complex syndicated loan transactions, such as acquisition and leveraged finance and asset-based lending. His restructuring experience includes debtor and creditor representations, municipal and sovereign debt restructuring, and bankruptcy M&A. He also co-authored a series of articles published by Lexis Practice Advisor covering a variety of bankruptcy topics from a lender's perspective.

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Mr. Zobitz has been recognized by *The Best Lawyers in America* and *The Legal 500 US* for his bankruptcy and corporate restructuring work and by, among others, *Chambers USA*, *Chambers Global*, *The Legal 500 US*, *IFLR1000* and *PLC Which Lawyer?* for his work in banking and finance. He has also been recognized by *The Legal 500 US* for his transactional work in the broadcast, technology and telecoms industries and for his work in trade secrets. Mr. Zobitz received his B.A. from Franklin & Marshall College in 1991 and his J.D. *cum laude* from New York University in 1995.