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Southern District of Texas Bankruptcy Court Opines on Effects of COVID-19 Pandemic on Debtors' Ability to Abate Rent Payments

On December 14, 2020, Bankruptcy Judge Marvin Isgur of the U.S. Bankruptcy Court for the Southern District of Texas issued a 29-page opinion dealing with one of the most oft-discussed issues facing restaurant, retail, and other debtors during the COVID-19 pandemic: "Can we stop paying rent?" The Houston Bankruptcy Court answered that question "No."

The issue arose in the chapter 11 bankruptcy cases of CEC Entertainment, Inc., *et al*, Case No. 20-33163, better known as "Chuck E. Cheese." Chuck E. Cheese is a well-known kid-oriented company that offers a mix of dining and entertainment in venues around the country. CEC and its affiliates filed their cases on June 24, 2020, and, in light of various governmental closures and regulations, filed a "Motion for Order Authorizing Debtors to Abate Rent Payments at Stores Affected By Government Regulations" (the "Abatement Motion") on August 3, 2020. In addition to certain state-law arguments (which this alert will not discuss), the Abatement Motion argued that "the Court can (and should) exercise its inherent, equitable powers to protect the Debtors from paying substantial rent obligations in return for which they receive no—or a significantly limited—benefit." Not surprisingly, many landlords objected to the Abatement Motion.

In its opinion, the Court ruled that "[t]he Court cannot grant CEC's requested relief. While the Bankruptcy Code allows the Court to delay performance of CEC's lease obligations, the Code expressly prohibits delays beyond sixty days after the order for relief. That period has expired." In reaching that conclusion, the Court analyzed Bankruptcy Code section 365(d)(3), which concerns a debtor's obligations under an unexpired leases of nonresidential real property, and provides, in relevant part (emphasis added):

> The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. **The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period**.

The Court interpreted that language to mean that section 365(d)(3) "expressly prohibits the Court from allowing the extensions of more than sixty days after the order for relief," and concluded, after analyzing the text and intent of the statute, that "commercial real property lessees must continue to perform after filing for bankruptcy," and "Section 365(d)(3) unambiguously requires that debtors timely perform obligations under commercial leases."

In reaching its conclusion, the Court recognized that it disagreed, at least in part, with a May 2020 decision of the Virginia Bankruptcy Court in *In re Pier 1 Imports, Inc.*, 615 B.R. 196 (Bankr. E.D. Va. 2020), in which Judge Huennekens considered a similar request by the Debtors to permit them to delay rent payments for a two-month period in light of the global disruption caused by the COVID-19 pandemic. In analyzing Bankruptcy Code section 365(d)(3), Judge Huennekens also recognized that the Code requires commercial lessees to "timely perform" all of their obligations, but also observed that the Code section contains no remedy. In other words, failure by a debtor to comply with Section 365(d)(3)'s directive "does not give the Lessors a right to compel payment from the Debtors in accordance with the terms of the underlying leases. Rather . . . the Lessors are entitled to an administrative expense claim" which are simply required to be paid on the effective date of any confirmed plan. The Court concluded that to compel immediate rent payments would be to elevate those payments to a "superpriority" status—a status not conferred on those claims by the Code. Recognizing the grim realities imposed by the pandemic, the Court explained that "[t]here is no feasible alternative to the relief sought in this Motion."

Returning to the CEC opinion, however, the Court apparently stopped short of compelling rent payments—precisely as Judge Huennekens refrained from doing—observing that although its opinion concerned "[t]he command of § 365(d)(3)," the remedy for violating that command was beyond the scope of the opinion. It remains to be seen whether this willingness of courts to speculate about the effects of violating Section 365(d)(3) (as opposed to requiring timely rejection of a lease) will be limited to the current pandemic or will persist beyond it.

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