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Owners of retail properties, as well as tenants, will feel pandemic's bite

BY JOHN CATALANO *SPECIAL TO THE MIAMI HERALD*

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The "Retail Apocalypse" has been one of the most significant quandaries in the business world for many years, and the repercussions of the novel coronavirus pandemic could become the straw that broke the camel's back for the industry. Malls and stores across the country are shutting their doors as states and municipalities issue emergency orders calling for closures and Americans avoid all unnecessary outings.

It has quickly become apparent that the outbreak of COVID-19 will take a massive toll not only on retail tenants, but also on the owners of retail properties. One of the first places that retailers will look for potential relief will be their lease agreements, which may include *force majeure* clauses and other provisions that are designed to cover business disruptions caused by catastrophes and acts of God.

These provisions will often list events such as floods, earthquakes, war, strikes, government regulations, civil disorder, etc., as triggers that would delay parties' obligations under the contract. The applicability of the spread of COVID-19 as a *force*

majeure triggering event may depend on the exact wording used in the lease. Some may generally stipulate "conditions beyond the parties' control, including but not limited to Acts of God" as qualifying conditions, while others may specify circumstances such as "war, terrorist act, government regulation, disaster or strikes." While leases widely differ in their form, modern leases for most major retail centers include a carve-out that the occurrence of a *force majeure* event does not permit late payment or nonpayment of rent by a tenant.

If a retailer's lease agreement does not include a tenant-friendly *force majeure* provision, a case could still be made for rent deferral or abatement under the common law doctrines of impossibility, impracticability or frustration of purpose. These doctrines come into play when unforeseen events and situations make performance under a contract impossible, unfeasible or prohibitively expensive. The tenants of shuttered malls and shopping centers will need to carefully review their lease agreements and, if appropriate, file claims with their landlords for rent abatements and deferrals based on all the applicable contractual provisions and legal doctrines.

In addition to these lease concessions, retailers as well as their property owners/landlords will look to their insurance policies for coverage for business interruptions and catastrophic business disruptions. These policies are typically designed to cover physical damage to business facilities from fires or natural disasters, and some now even specifically exclude coverage for losses "due to virus or bacteria" as a result of conditions added after the SARS outbreak of 2003.

However, for those policies that do not specifically exclude losses due to viruses, businesses will need to consider the specific exclusions in their policy to determine how to move forward with a claim. State insurance regulators and the courts will ultimately have the final say in determining whether business interruption insurance provisions apply to this global pandemic. In the meantime, property owners and tenants with such coverage will need to carefully document their losses and proceed with the filing of a business interruption claim.

For retailers of all sizes around the country as well as the owners of the spaces they occupy, their ability to withstand and survive the slowdown caused by the COVID-19 outbreak will greatly depend on their efforts to seek and secure financial assistance and concessions from all available sources. With the counsel and guidance of highly qualified

and experienced real estate and insurance attorneys, stores and property owners will be able to put themselves in the best possible position to regain their financial footing in the aftermath of the pandemic.

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