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Retail Leasing in the Post-COVID New Normal: Best Practices and What Not To Do

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As the U.S. continues to recover from the events of 2020, including the global COVID-19 pandemic, the resulting government-mandated shutdowns, and the civil unrest that ignited from coast to coast, there are useful lessons to be learned for the retail real estate industry and incorporated into the legal leasing process.

The following materials address those lessons learned, the best practices that have emerged as a result and equally important, what not to do.

Overview of the Impact of 2020 on Retail Real Estate

COVID

As everyone in the retail real estate industry experienced, 2020 was vividly characterized by the global devastation wrought by the COVID-19 pandemic and the resulting government mandated shutdowns. Shopping centers across the country were shuttered and most brick and mortar retail commerce came to a devastating halt. Many retail tenants stopped paying rent and most retailers demanded monetary and other concessions from their landlords, irrespective of the terms of their retail leases.

According to the 2021 Colliers Retail Outlook, at the peak of the shutdown, almost 62% - 5 billion square feet - of all brick-and-mortar retail in the U.S. closed and ultimately, nearly 16,000 stores were permanently shuttered.

Devastating headwinds are nothing new for retail real estate, which has been 'under attack' for many years now, as a result of the emergence of e-commerce, shifting consumer behavior and the increasing fragility of traditional retailers, resulting in flurries of retailer bankruptcies and store closings. Prior to the emergence of COVID, so-called entertainment and experiential retailers began to take the place of traditional retailers, but those uses were especially vulnerable to the limitations imposed by COVID and the likelihood and pace of their re-emergence are far from certain, with the exception of restaurants.

Existing retail leases did not provide a meaningful road map for how landlords and tenants should address the effect of the pandemic and resulting government mandated shutdowns on their businesses. Even in those cases where leases allocated the risk of a business interruption to a third party, namely the issuers of business interruption insurance, that allocation of risk provided no protection to either landlords or tenants. As a result, thousands, or perhaps hundreds of thousands, of retail lease amendments were painstakingly negotiated by retail landlords and tenants of all stripes and types. These COVID lease amendments were both haphazard and consistent.

They were haphazard because they were negotiated one by one based on each retailer's particular circumstances. They were consistent in that they were needed across the spectrums of different geographies, properties and types of retailers and often provided for rent abatements or deferrals. The amendments also often addressed operating requirements, co-tenancy protections and new COVID induced modes and methods of doing business such as the ability of retailers to provide curbside pickup or seat restaurant patrons in outdoor common areas.

CIVIL UNREST

In addition to withstanding the impact of COVID, in 2020 retail landlords and tenants were forced to contend with challenges caused by the civil unrest that followed protests taking place throughout the country.

Wikipedia defines civil unrest as follows: Civil disorder, also known as civil disturbance, civil unrest, or social unrest as an activity arising from a mass act of civil disobedience (such as a demonstration, riot, strike, or ignoring laws) in which the participants become hostile toward authority, and authorities incur difficulties in maintaining public safety and order, over the disorderly crowd. It is, in any form, prejudicial to public law and order.

Many of us watched the national news coverage in disbelief, seeing mass protests and peaceful demonstrations turn into a flurry of chaos. Sadly, the looting of storefronts and violence that ensued resulted in physical property damage, and in some instances, even the loss of life. Businesses affected by this civil unrest were left wondering how they would recover from the damage and recuperate lost sales.

The Insurance Information Institute, Property Claim Services ("PCS") (a unit of a Verisk Analytics), designated the civil unrest in over 100 cities across the United States after the death of George Floyd as a multi-state catastrophe event making the 2020 the first time since 1992 that PCS has compiled significant insured losses for a civil disorder. A preliminary estimate of insured losses from PCS (which is still subject to further evaluation), is more than \$1 billion, marking it as the costliest civil disorder in U.S. history.

In the aftermath of this civil unrest, many businesses quickly discovered that they were underinsured, leading to significant losses. 2020 not only shined a light on flaws in existing commercial leases and insurance policies, but it also helped create trends that will shape the future of the commercial real estate market for years to come.

Landlords and tenants endured physical damage and vandalism, business interruption, loss of revenue and delivery delays as a result of the civil unrest that burned throughout the country in 2020 and we will address what Landlords and Tenants should consider when drafting and negotiating leases as a result.

Overview of Impact of the Pandemic on the Legal Leasing Process

As Sinreich previously wrote in an article published by LoopNet earlier this year titled *Flexibility Beats Hardball in Legal Lease Negotiations*, despite the negative implications of COVID, new retail leases *are* being executed across the country. CoStar reported new leasing activity of 114 million square feet for office, industrial and retail properties nationwide in January 2021. This figure was just 15% below the January 2020 level prior to the emergence of the pandemic.

Adaptability is Critical

In the current post-COVID environment, the landlords, tenants, attorneys and brokers that are working to get new retail leases over the finish line have to be ready to adapt to new and constantly evolving circumstances. As a result, adaptability has become a key characteristic of the process by which a handshake is successfully transformed into a signed lease.

This essential component of adaptability has made the legal leasing process both more resilient and more complicated. Adaptability yields resilience because reasonable requests are more likely to be considered and accepted rather than dismissed simply because they haven't been raised before. Thus, a more adaptable process is likely to be lengthier and more complicated because virtually every aspect of the legal leasing process, and thus the lease, is subject to change. To ensure that every letter of intent results in a signed lease, all parties involved

must be willing to reconsider and potentially re-engineer all aspects of the process, whether it be the initial business terms, the lease document or standard operating procedures.

A Modern Approach to the Leasing Process

From the vantage point of a retail leasing attorney, it's clear that the rules of the game are changing. Those landlords, tenants, attorneys and brokers nimble enough to adjust accordingly will enjoy significant advantages, and those that cling to the past may soon face extinction. Here are three ways that landlords and tenants can modernize their approach to the legal leasing process:

- Throw those dinosaur leases, which address every landlord/tenant issue since the beginning of time, into history's dust bin.
- Consider every issue raised by the other party with an open mind and never resort to the time-worn, tired refrain of "this is the way we've always done it."
- Seek out and embrace new ways to approach roadblocks, whether they be old problems that always get in the way or new issues that have never been encountered.

Lease and Lease Amendment Clauses

Rent:

Retail rents have traditionally consisted fixed rent (which often increases at fixed amounts over the term of the lease), reimbursements by tenants of their proportionate share of the shopping center's operating costs, taxes and insurance, and in some cases, percentage rent based on the tenant's sales. Over the past year, this traditional rent formula for retail leases has shifted to a greater reliance on percentage rent. In some recent leases, percentage rent is the only component of rent for the entire lease term and in other cases, percentage rent is initially the key component of rent and thereafter the rent formula shifts to the more traditional combination of fixed rent, percentage rent and reimbursement of the tenant's share of center-wide costs.

Here is a recent example of a rent provision that provides solely for percentage rent:

From the Rent Commencement Date to and until the Expiration Date, Tenant shall pay on account of each calendar month (or portion thereof), no later than ten (10) days after the end of each such month, _____ percent (____%) of all Gross Sales during such month ("Gross Sales Rent") resulting from all business conducted in, on or from the Premises, each of which payments shall be accompanied by Tenant's Gross Sales Statement for the month with respect to which such payment is made. From and after the Rent Commencement Date, for any day (or portion thereof) when Tenant is required hereunder to be open for business but is not open for business, Tenant's Gross Sales for each such day shall be deemed to be not less than \$_____.

Length of Term and Kick-outs:

For those recently negotiated leases where percentage rent is the key or only component of rent, the duration of the term is often shorter than the typical 5 or 10 year periods we had come to expect. In addition, there are often kick out rights triggered by the tenant's inability to achieve a specified minimum amount of gross sales.

Here is a recent example of a such a kick out clause exercisable by the tenant:

In the event Tenant does not achieve Gross Sales of at least _____ (the "Minimum Gross Sales") during the _____ month through the _____ month of the Term (the "Reporting Period") and provided that Tenant is not in default hereunder beyond notice and all applicable cure periods, Tenant shall have the option to terminate this Lease ("Tenant's Termination Option"), which Tenant's Termination Option shall be exercisable by way of notice thereof to Landlord ("Tenant's Termination Notice"). In the event that Tenant's Termination Option is timely exercised, this Lease shall terminate and be of no further force or effect on the date that is _____ days after Landlord's receipt of Tenant's Termination Notice. In the event that Tenant does not timely exercise Tenant's Termination Option, then Tenant's Termination Option shall be null and void and be of no further force or effect. Tenant shall only be permitted to exercise Tenant's Termination Option if Tenant shall have operated its business in accordance with the requirements of this Lease on each day during the Reporting Period. Tenant shall submit to Landlord, within thirty (30) days following the expiration of the Reporting Period, its Statement of Gross Sales in the form required pursuant to this Lease and Landlord shall have the right, exercisable within sixty (60) days after its receipt of same, to audit Tenant's Gross Sales related to the Reporting Period. Landlord shall promptly notify Tenant of the results of such audit. In the event that such audit discloses that Gross Sales generated during the Reporting Period equaled or exceeded the Minimum Gross Sales, Tenant's exercise of Tenant's Termination Option shall be null and void and

of no force and effect. Tenant's Termination Notice shall be accompanied by Tenant's payment of the Unamortized Tenant Improvement Allowance Amount (as hereinafter defined). The term "Unamortized Tenant Improvement Allowance Amount" as used herein shall mean the unamortized Tenant Improvement Allowance as of the date on which this Lease will terminate as a result of the exercise of Tenant's Termination Option. For purposes of such reimbursement, the Tenant Improvement Allowance shall be amortized on a straight line basis over the Term. If Tenant's Termination Option is rendered null and void as a result of Landlord's audit of Tenant's Gross Sales during the Reporting Period, Landlord shall reimburse to Tenant the Unamortized Tenant Improvement Allowance Amount theretofore paid by Tenant to Landlord pursuant to this Section.

Force Majeure Provisions

Force majeure provisions in recently completely leases have often been expanded to explicitly include pandemics and other public health crises. The specific leasehold obligations that tenants have been most concerned about in the event of another public health crisis include completing their tenant improvements on a timely basis, opening no later than a particular date and continuously operating, as well as the payment of rent during time periods when they are unable to operate. Unsurprisingly, landlords have strenuously objected to agreeing in advance to future rent abatements or deferrals during periods that the tenant is unable to operate. The outcome of these negotiations depend, as with all other negotiations, on the relative bargaining strength of the parties.

Description of force majeure events in recent lease clauses have included the following:

#1:

"the Coronavirus pandemic (or any other pandemic or similar health emergency that may occur in the future)"

#2:

"a pandemic or other public health emergency declared or recognized by the Centers for Disease Control, the World Health Organization or any governmental authority that directly affects the State or municipality in which the Shopping Center is located"

#3:

"Pandemic" means the infectious disease designated as "2 (sars-cov-2)", also commonly referred to as "covid-19" or simply "the coronavirus", including any mutation or similar evolution thereof"

Future Pandemic Relief Provisions

Examples of future pandemic relief in some recent leases include the following:

#1:

"Notwithstanding anything to the contrary in this Lease, to the extent that Tenant is delayed or prohibited as a result of [COVID-19] from (i) accepting the Premises (ii) occupying the Premises, (iii) performing Tenant's Work, (iv) upon completion of Tenant's Work, obtaining a final certificate of occupancy (or equivalent) for the Premises to open to the public as a retail store, and/or (v) from operating (including staffing) the Premises, or Landlord is delayed or prohibited as a result of [COVID-19] from satisfying the delivery conditions on a timely basis, then Tenant may elect, in Tenant's sole discretion, to:

(X) refuse to accept the delivery of the Premises until the end of the Pandemic Delay Period and delay the delivery date (even if the delivery conditions are satisfied and the delivery date would otherwise occur) by the amount of time equal to the Pandemic Delay Period, and/or

(y) delay the Rent Commencement Date by the amount of time equal to the Pandemic Delay Period, provided that if Tenant opens the Premises for business to the public, the Rent Commencement Date shall be the date on which Tenant so opened the Premises.

Notwithstanding anything to the contrary in this Lease, to the extent that Landlord is unable to comply with Landlord's obligation to deliver the Premises in the condition required herein as a result of the Pandemic, then Landlord's obligation to so deliver the Premises shall be delayed an amount of time equal to the Pandemic Delay Period.

The term "Pandemic Delay Period" means the total aggregate period of time that compliance by Landlord or Tenant with the foregoing obligations are delayed as a result of the Pandemic, plus a reasonable time for re-mobilization, whether on one or more occasions."

#2:

"Notwithstanding Tenant's obligation herein to continuously operate its business at the Premises, Tenant may, in response to any pandemic, epidemic or other public health crisis, elect to cease operating the Premises for business to the public for the Permitted Use, provided Tenant has also elected to cease operating a majority of its other retail locations in _____. In the event Tenant so ceases operation of the Premises, Tenant shall be required to re-open the Premises for business to the public for the Permitted Use no later than ten (10) days after the date on which Tenant has re-opened the majority of its other retail locations in _____. In addition, notwithstanding anything in this Lease to the contrary, Tenant may, subject to Landlord's reasonable approval, or as required to comply with governmental orders or mandates during the existence and continuation of any public health crisis: (X) adjust its operating hours to conform with the operating hours of Tenant's other retail locations in _____ or to comply with any governmental orders or mandates regarding operating hours for businesses; and (Y) close the Premises from time to time in order to perform any enhanced cleaning procedures that Tenant determines should be implemented for the protection of Tenant's employees and customers."

#3:

"In the event that the Shopping Center is closed for business to the public or Tenant is required to close the Premises for business to the public, in either case, in order to comply with governmental requirements related to any public health crisis and provided Tenant shall not be in default hereunder beyond notice and any applicable cure period, the Base Rent payable hereunder shall be abated for each day on which the Shopping Center or the Premises is required to be closed, not to exceed ____ days in the aggregate during the Term of this Lease. During the period of any such closure and for a period of ____ days thereafter, all co-tenancy requirements set forth in this Lease shall be deemed satisfied. In addition the Percentage Rent Breakpoint shall be reduced by 1/365th for each day of any such closure."

Phased Resumption of Full Rent Payment for Restaurateurs

In some jurisdictions, governmentally mandated closures were relaxed in phases over time. The following is an example of a phased approach to resumption of a restaurant tenant's obligation to pay full rent:

Conditional Abatement of Certain Fixed Minimum Rent Payments.

3.1 Subject to the terms of this Lease Amendment and provided that no default on the part of Tenant is outstanding hereunder or under the Lease following notice thereof from Landlord and the expiration of all applicable cure periods, Landlord hereby agrees as follows:

3.1.1 Tenant shall not be required to pay Fixed Minimum Rent for and on account of the period commencing on _____ and ending on _____ (the "First Abatement Period").

3.1.2 Tenant shall not be required to pay seventy five percent (75%) of the Fixed Minimum Rent for and on account of the period commencing on the day following the expiration of the First Abatement Period and ending on the date on which Governmental Mandates (as hereinafter defined) prohibiting indoor restaurant dining are lifted (the "Second Abatement Period"). During the Second Abatement Period, Tenant shall pay twenty five percent (25%) of the Fixed Minimum Rent due and payable on account of the Second Abatement Period as and when due and payable pursuant to the Lease.

3.1.3 If upon the expiration of the Second Abatement Period, Governmental Mandates restrict the capacity of indoor restaurant dining, Tenant shall not be required to pay fifty percent (50%) of the Fixed Minimum Rent for and on account of the period commencing on the day following the expiration of the Second Abatement Period and ending on the day on which Governmental Mandates restricting the capacity of indoor restaurant dining are lifted (the "Third Abatement Period"). During the Third Abatement Period, Tenant shall pay fifty percent (50%) of the Fixed Minimum Rent due and payable on account of the Third Abatement Period as and when due and payable pursuant to the Lease.

3.2 The Fixed Minimum Rent abated pursuant to Section 3.1 above is hereby collectively referred to as the "Abated Rent". Tenant's failure to pay the Abated Rent shall not constitute a default or Event of Default under the Lease.

3.3 *The abatement of the Abated Rent as set forth in Section 3.1 is hereby conditioned upon Tenant's full and timely payment of all Rent due and payable under the Lease, as modified hereby. If at any time prior to the expiration of the term of the Lease, any failure of Tenant to pay any item of Rent as and when due pursuant to the Lease as modified by this Agreement shall exist beyond notice thereof from Landlord and the expiration of any applicable cure period, all Abated Rent shall be and become immediately due and payable and the provisions of Section 3.1 of this Agreement shall be null and void and of no further force or effect.*

3.4 *The term "Governmental Mandates" as used herein shall mean all applicable federal, state and/or local ordinances, mandates, directives, orders, guidelines and/or phased reopening plans related to the COVID-19 pandemic with which Tenant is required to comply."*

Re-Opening Requirement for Entertainment Tenants

For entertainment tenants, such as movie theaters, the obligation to re-open after the lifting of governmental restrictions was in some cases triggered by their ability to provide their particular form of entertainment. Here is a recent provision addressing the issue for a movie theater operator:

Inability to Operate and Reopening. Tenant's inability to operate within the Premises as a consequence of the COVID-19 crisis shall not constitute a breach or default by Tenant under the Lease and shall not entitle Landlord to any remedies under the Lease, at law or in equity. Landlord and Tenant acknowledge that it remains uncertain as to when Tenant will be able to reopen the Premises for business with the public due to the COVID-19 crisis; however, Tenant agrees to reopen the Premises for business with the public no later than the later of the following dates: (i) the date twenty-one (21) days after the lifting of all "Governmental Mandates" (defined below) with respect to the operation of a movie theatre, and (ii) the date, as determined by Tenant in Tenant's reasonable judgement, when a sufficient number of new first-run commercial film product from the major studios is available for showing in the Premises. The term "Governmental Mandates" shall mean all applicable federal, state or local ordinances, mandates, directives, orders, guidelines and/or phased reopening plans with which Tenant is required or recommended to comply.

Re-Opening Requirement for Retailers dependent on Tourism

For those retailers whose businesses are heavily or fully reliant on tourism, the obligation to re-open after governmentally mandated COVID closures were relaxed had to be based, at least to some extent, on the resumption of tourism in the location of their premises. Here is an example of what such retailer and its landlord agreed to:

Tenant's inability to operate the Premises for business with the public for the Use permitted in the Lease as a result of Governmental Mandates (as hereinafter defined) shall not constitute a breach or default by Tenant under the Lease. Tenant agrees to reopen the Premises for business with the public for the Use permitted in the Lease within fifteen (15) days after the later of (i) the day on which Governmental Mandates prohibiting the operation of the Premises for the Use permitted under the Lease are lifted and (ii) the last day of the month during which the Monthly Report (as hereinafter defined) reflects that the number of international passengers transported by air to the _____ metropolitan area ("International Passengers Transported") equals or exceeds twenty five percent (25%) of International Passengers Transported during the same month of 2019 (for example November 2020 compared to November of 2019 or March 2021 compared to March 2019) (the "Required Reopening Date"). The International Passengers Transported during each calendar month of 2019 is attached hereto as Exhibit A. During the period commencing on the date hereof and ending on the Required Reopening Date, on or before the tenth (10th) day of each calendar month, Tenant shall deliver to Landlord extracts from the latest monthly traffic reports published by the _____ showing the number of international passengers transported to and from _____ International Airport ("XXX") (each such report is herein referred to as a "Monthly Report").] The Monthly Reports for XXX for May 2020 are attached hereto as Exhibit B. The term "Governmental Mandates" as used herein shall mean all applicable federal, state and/or local ordinances, mandates, directives, orders, guidelines and/or phased reopening plans related to the COVID-19 pandemic with which Tenant is required to comply."

Civil Unrest

There are a few ways that landlords and tenants can protect themselves in their leases with respect to damage and/or loss resulting from civil unrest.

Damage or Destruction Provisions

The first is a damage and destruction clause that outlines the rights and obligations of both parties in the event that the premises are damaged or destroyed during the lease term as a result of civil unrest. In many cases, casualty provisions are oriented to the landlord and in some cases there is less regard for the situation the tenant is in after casualty damage. Landlords typically have the right to decide, over a period of time following the casualty, whether to restore the premises, and often the tenant only has the right to terminate the lease if the landlord does not comply with its restoration obligations on a timely basis.

As a result of the 2020 riots and civil unrest, some tenants are reconsidering whether they can agree to these standard damage and destruction clauses and are modifying them. Here is a recent example:

"If the Leased Premises or any part thereof or any appurtenance thereto is so damaged by fire, casualty or structural defects, or any occurrence which is beyond Tenant's reasonable control, including, but not limited to damage or loss caused by civil unrest, and which renders the Leased Premises inoperable or unfit for Tenant's purposes, then Tenant shall have the right within ninety (90) days following damage to elect by notice to Landlord to terminate this Lease as of the date of such damage. In the event of minor damage to any part of the Leased Premises that does not render the Leased Premises unusable for Tenant's purposes, Landlord shall promptly repair such damage at the cost of the Landlord. Tenant shall be relieved from paying rent and other charges during any portion of the Lease term that the Leased Premises are inoperable or unfit for occupancy, or use, in whole or in part, for Tenant's purposes as a result of any damage described in this Section."

Insurance Provisions

Property/All-Risk Insurance

Another important consideration is whether the lease requires insurance coverage on the part of either or both parties that will cover damage caused by civil unrest. To ensure that it does, the parties should consider adding the bolded language below to the description of the property or all-risk insurance that the parties are required to carry during the lease term:

*"Building and Personal Property Damage Insurance for the protection of Tenant and Landlord, as their interests may appear, covering the Building and the Premises, including, without limitation all personal property, fixtures and equipment, and other insurable risks in amounts not less than the full insurable replacement cost of such property, for damage or other loss caused by fire, **or other casualty or cause including, but not limited to, vandalism and malicious mischief, theft, water damage of any type, including sprinkler leakage, bursting or stoppage of pipes, explosion, business interruption (for at least twelve (12) months), and other insurable risks.**"*

Business Interruption

Business interruption insurance helps protect against lost income after a covered peril affects a business as the result of a necessary suspension of business operations caused by direct physical loss or damage to the policy holder's premises. Many landlords require tenants to carry business interruption insurance. Most business interruption coverage provides for a "restoration period", which is the length of time that the policy will help pay for lost income while the policy holder restores its business after a covered claim. Every policy is different, but typically there's a 48 to 72 hour waiting period before the period of restoration kicks in. Once it does, the restoration period may last up to 12 months. That means if your business was damaged on April 1, 2020, and the waiting period is 72 hours, the restoration period would start on April 4, 2020 and last until April 3, 2021. The restoration period doesn't terminate when the policy terminates, so even if the policy expires before, coverage continues until the end of the restoration period.

Plate Glass Coverage

In 2020, vandals smashed doors and windows at pharmacies, groceries, liquor stores, tobacco shops and cell phone stores resulting losses arising as a result of both property damage and stolen merchandise. Many retail premises were looted repeatedly over consecutive nights. Needless to say, the plate glass display windows of these premises were damaged or destroyed. Plate glass insurance coverage is a specific type of insurance coverage applicable to the cost of restoring damaged plate glass. Generally, a retail tenant is responsible for insuring and restoring any damaged plate glass in the windows or doors of its premises, and a separate plate glass policy or endorsement is required to cover this risk. These policies or endorsements include limits per window pane and per occurrence.

In most retail leases, plate glass restoration is explicitly excluded from the landlord's maintenance obligations. Here's an example of such an exclusion:

"This Lease is intended to be a net lease; accordingly, Landlord's maintenance obligations are limited to the repair, maintenance and replacement of the Common Areas and Building's roof and maintenance of the foundation piers, structural or load bearing walls and the exterior walls (collectively, the "Building's Structure." The Building's Structure does not include glass or plate glass, doors, special store fronts or office entries, all of which shall be maintained by Tenant to the extent constituting a part of the Premises."

Civil Authority Provisions

Landlords and tenants should also consider, in addition to the above coverage suggestions, adding a "civil authority provision" to their insurance policies to cover lost income and extra expenses in the event the police department or fire department bar access to a specific area as a result of direct physical damage caused to a nearby business by a riot or civil commotion.

Primary vs Additional Insured Status

Other insurance considerations include whether the party suffering the loss as a result of civil unrest is the primary insured party or is an additional insured party. If the tenant is the named insured and the building owner is added an additional insured, under certain circumstances, the owner may not have adequate insurance coverage in the event of damage caused by civil unrest. For example, if a third party unrelated to the tenant causes damage (as in the case of riots), the tenant may be covered but the property owner will not be covered. It is important to understand that coverage extended to the additional insured is limited, in some cases based on the coverage granted to the named insured.

Force Majeure

Both landlords and tenants should include protests, civil unrest and disturbances stemming from third party criminal activity in their force majeure clauses, so that there is no question about whether their inability to comply with leasehold obligations, such as a continuous operation obligation, or an obligation to complete improvements or repairs before a deadline expires, as a result of any of these circumstances will result in a leasehold default.

Here is an example of a description of force majeure events that cover these sorts of circumstances:

- 1) *act of God (such as, but not limited to, fires, explosions, earthquakes, drought, tidal waves and floods);*
- 2) *war, hostilities (whether war be declared or not), invasion, act of foreign enemies;*
- 3) *rebellion, revolution, insurrection, or military or usurped power, or civil war;*
- 4) *riot, commotion, strikes, go slows, lock outs or civil disorder; and*
- 5) *acts or threats of terrorism.*

Security Concerns

After a year of unrest and upheaval, retailers and landlords are taking extra measures to protect their stores and shopping centers, as well as their employees and property. For example, over the past year, at various points in time, major retailers and many property owners boarded up store windows and added extra security at locations they considered vulnerable to attack. Normally, boarded up windows and other physical barriers would be a violation of numerous retail lease provisions. While no lease can cover every eventuality, there may be certain tenants or landlords who choose to address in their leases the need for physical barriers when civil unrest is threatened.

Allocating the Costs

Costs incurred by a landlord to provide extra security personnel, security cameras and physical barriers to protect a shopping center from vandalism during a period of civil unrest would be covered by most common area maintenance costs ("CAM") provisions and thus paid for by the tenants of the center. On the other hand, costs incurred by a tenant to add extra security personnel, cameras and physical barriers to protect their stores would be borne solely by that tenant. Tenants could protect against increases in CAM incurred as a result of the threat or occurrence of civil unrest by capping increases in CAM or explicitly excluding these costs from CAM, although the latter suggestion would likely be objected to by most landlords.