

SEPTEMBER

2008

**KEVIN F. JURSKINSKI, ESQ.**  
**COMMERCIAL LEASE NEWSLETTERS**

**Tenants Hours of Operation and Unintended Consequences**

In today's retail market, many Tenants are faltering in their operation of their businesses. There has been a higher vacancy rate in the amount of evictions based upon Tenants being unable to continue in retail operations as a result of the economic downturn.

When a Tenant closes for business permanently, and fails to pay rent, there are a number of remedies that a Landlord can undertake which have been identified in previous commercial newsletters. However, one issue that has arisen as a result of the economic downturn is the Tenant's determination to cut business hours, cut staffing, rethink inventories and/or intermittently cease operations for brief periods of times in order to address downturn in their respective business. These temporary closures or modifications in operations have a negative impact on the Landlord and unintended consequences for the retail center. Commercial Landlords and Property Managers should only consider the following:

**1. Continuous Operation Clauses and Rules and Regulation of the Retail Center:** These should be drafted explicitly and incorporated as part of the original lease agreement so that it is clear to both the Landlord and Tenant and if necessary the trier of fact, to identify the specific obligations of the Tenant in regard to the hours of operations.

In a retail setting, it is important that the overall nature and shopping experience for that particular center is identified and that all Tenants comply with the hours of operation. Certainly the retail center which has its retail shopping locations open for business would also want to have, as an adjunct, their other retail locations open for business at the same time including any restaurants or other service stores which would benefit the overall shopping experience.

If restaurants, coffee shops or retailers decide to curtail their business and close on certain days or close during hours when the center is actually open, it can have a negative impact and effect upon the overall shopping experience of a prospective retail shopper.

Further, and in the event that the shopping center has any of its retail stores “go dark” (either permanently or even temporarily) it may have the unintended consequences that this particular shopper may not return to that center or encourage that shopper to frequent other establishments.

2. **Gross Percentage Rent:** For many leases, the commercial Landlord will have included therein the gross percentage rent so that the Landlord, in addition to the base rent, common area maintenance rent, contribution to real estate taxes and other marketing fund will also have as part of its performan an opportunity to collect percentage rent based upon the Tenant meeting certain sales goals.

The lease should be crafted on this particular point to not only indicate specific rules and regulations of the center, but that the Tenant, under such gross percentage rent of the lease must also be open continuously during the required hours and be fully staffed and fully inventoried to maximize the prospective sales at the location. If a Tenant fails to be fully staffed and inventoried, ceases operations intermittently (even on a temporary basis) or does not operate in good faith in accordance with the terms of the lease, the Landlord will:

- a. Suffer the possibility of having less percentage rent.
- b. Have a situation in which the Tenant, due to failure to operate, may also have an impact upon other Tenants’ sales, thereby creating a double negative effect in non payment of percentage rent and also;
- c. Creating a negative atmosphere in the center by intermittently “going dark”.

All of the above are the result of the Tenant failing to comply with the rules and regulations for hours of operation, failing to by fully staffed or inventoried has a direct correlation to collection of percentage rent and also has an impact upon the Landlord economically as well as an intangible impact and effect upon the overall retail “health” of the center.

3. **Co-Tenancy Clauses:** The commercial Landlord and commercial property and managers must also be cognizant of the fact that in certain specific leases with national retailers there could be a co-tenancy clause requiring a certain portion of the retail center to be leased and fully operational. Failure to do so, may result in the Tenant having the opportunity to either:

- a. Reduce its rent or;
- b. Terminate its lease based upon the failure of the Landlord to meet the co- tenancy clause.

Again, this is another specific potential negative impact upon the Landlord that can be exacerbated by a Tenant failing to maintain hours of operation, failing to be fully operational, staffed and inventoried.

4. **Remedies Contained in Lease.** The Landlord generally has a number of options in regard to its lease agreement to address the violations of a Tenant:

- a. **Breach of Lease and Remedies.** The Landlord may declare that such consistent failure to operate in accordance with the rules and regulations be considered as a violation of the lease with the Landlord having the opportunity to take action accordingly. This is a dramatic remedy but one that should be included in the lease agreement in the event that the Tenant continues to violate the lease agreement.
- b. **Corrective Action:** The Landlord may also provide that the Landlord is afforded certain corrective action for the Tenant's failure to be operational which may include but is not limited to the ability of the Landlord to increase the base rent of the Tenant or alternatively to seek a liquidated damage clause in the form of a per day agreed upon liquidated damages clause.
- c. **A Liquidated Damage Clause:** A liquidated damage clause is a provision contained in the lease which indicates that both the Landlord and Tenant acknowledge that a Tenant "going dark" and failing to comply with the rules and regulations by closing its premises and not being fully operational or taking other actions in violation of the lease may not result in a direct monetary damage to be identified by the Landlord but nonetheless both Landlord and Tenant can agree that because of the inability to identify a specific damage clause but nonetheless identifying the fact that such damage could exist. The Landlord and Tenant can identify a per day liquidated damage provision which the Landlord can seek as additional rent and as an agreed upon liquidated damage clause.

The drafting of such liquidated damage clause needs to be done specifically to avoid such clause being considered a penalty that must be remedy that is consistent to address the harm that is being suffered by the Landlord which may not be quantifiable at the time the lease is entered into, but nonetheless still is recognized as being a potential monetary damage to the Tenant based upon such non compliance.

All of this needs to be taken into account as the Landlord engages in negotiations for the essential lease terms which governs the retail center to anticipate such prospective violations by Tenants and the (direct and indirect) damages which may be suffered by the Landlord as well as the unintended consequences to be suffered by the Landlord from such activities. Such provisions contained in the lease should be clear, concise, and explicit so that there is no misunderstanding of the parties intentions, nor any ambiguity since the lease itself and the remedial provisions should be drafted so that a third party (Trier of Fact) can easily identify and enforce the reasonable rules and regulations, as well as remedial provisions contained in such lease agreement.