

COMMERCIAL REAL ESTATE LAW

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The enforceability of go dark provisions: Tenants beware

In the current economic climate, many tenants are finding that the revenue generated by some locations fail to justify the variable expenses incurred for that location and that they would be better off



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closing the store and continuing to pay the rent while they attempt to sublet the location or work out a settlement with

the landlord. In office leases, this is often a black and white decision for a tenant, as the landlord does not usually care if the tenant is in the space, so long as the landlord is collecting rent. For retail tenants,

particularly those in centers or malls, they must first check if their lease has a "go dark" or continuous operat-



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ing provision.

Go dark provisions mandate that a tenant must occupy and use the space and often have minimum operating requirements (hours, employees, etc.). The reason for these provisions is simple: empty spaces can make other prospective tenants question the vitality of a retail center. Additionally, many tenants in a retail center have co-tenancy provisions that allow them to pay a reduced rent or terminate a lease early if a given percentage of square footage

in the center is not occupied (simply being leased is not enough, it must be actively used for retail purposes). Go dark provisions help a landlord to project a vibrant air around a retail center or mall and also give some certainty as to how much space they will have occupied.

When a tenant with a go dark provision attempts to vacate the store, in addition to any claim a landlord might have for unpaid rent, landlords may seek specific performance of the go dark

provision, i.e., a court order compelling the tenant to operate in the space in accordance with the go dark provision. Most courts to which this issue has been brought have refused to grant specific performance. The basic rationale behind the courts' decision is the same: enforcement of a go dark provision would necessarily entail detailed supervision by the court over a long period of time. Instead, courts have traditionally held that violation of a go dark clause was just like any other breach of a lease covenant, entitling the landlord to monetary damages. Tenants should be aware that damages can be severe if the tenant's vacating allows another tenant to pay reduced rent or vacate under a co-tenancy clause.

While most courts have not granted specific performance of go dark clauses, specific performance has been granted in at least one instance by a New Jersey court. In that instance, the landlord was seeking only that the tenant be forced to open for the minimum hours set forth in its lease. The landlord was willing to rely on the tenant's reluctance to suffer damage to its reputation to ensure that the store would be adequately stocked and staffed. In that instance, the court found that the sought performance standards were completely objective and ordered the tenant to remain open.

In summary, when a tenant with a go dark provision is considering ceasing operations, both a landlord and a tenant must examine their potential rights and remedies, not only in terms of the lease, but in terms of the practicability of enforcement of the provision and the effects the breach would have on the entire retail center.

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