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Enforcing Co-tenancy Provisions in Leases Can Help Control Costs

By Gregory D. Call, Esq. and Jennifer S. Romano, Esq.

As retailers continue to close underperforming stores in shopping centers, now more than ever is the time to pay attention to co-tenancy provisions in retail leases. Review your leases, gather the facts and submit demands for relief to your landlords if co-tenancy conditions are not satisfied. (Vendors now offer services that track store closings at shopping centers for purposes of co-tenancy claims.) Enforcing co-tenancy rights by the following three steps can be a significant way to control costs:

Review your leases to identify your co-tenancy rights.

The first step in seeking savings based on co-tenancy rights is to read your leases and think about the co-tenancy conditions. Does the lease require that certain anchor stores be occupied and open for business? Does it identify the tenants for the anchor stores? Does it provide a list of alternate anchor stores?

Co-tenancy provisions play a critical role in retail leases.

There may be a provision relating to occupancy of the remainder of the shopping center, such as "80% of leasable space (excluding the anchor stores) is occupied by retail tenants, which are open and operating." How is the percentage calculated under the lease? What is excluded from the denominator?

Once you identify the co-tenancy conditions in the lease, next determine your remedy if the co-tenancy conditions are not satisfied. The lease may provide only for termination. Or, the lease may provide for reduced rent or the opportunity to "go dark." Some leases provide that a tenant is entitled to the remedy immediately, while others provide a grace period or require the tenant to "elect" one of the available remedies. Be familiar with your potential remedies and how and when you must assert them.

Investigate the facts to determine whether the co-tenancy conditions are satisfied. Even if your lease provides that the landlord is required to notify you when co-tenancy conditions are not satisfied, you should not sit back and assume the landlord will do so. You should investigate the facts.

Co-tenancy information can be gathered by searching the Internet, including the shopping center's Web site. A walk-through of the shopping center also can reveal co-tenancy facts. Store management can be asked to report on the tenants of the center.

However, in many situations you will have to submit an inquiry to the landlord to determine the facts supporting a co-tenancy claim. The request should be in writing. It should be specific and in most circumstances should include a request for occupancy information for the entire center, including the tenant and its business, the square feet occupied by each tenant and whether the tenant is open for business. If the lease provides that you are entitled to this information, you should cite the specific provision in your letter. If the lease does not specifically provide for this right, do not be deterred. Ask for it anyway. You are entitled to the facts supporting the obligations under the lease.

Further, it is a good practice to regularly ask the landlord for occupancy information. If the landlord refuses to provide it, you can later argue that any delay in asserting your co-tenancy rights was a result of the landlord's improper conduct.

Convince the landlord that your claim is strong, and you will pursue it. Once you have identified the basis for a co-tenancy claim, submit the claim to your landlord. State your claim in writing. Be clear about the grounds of your claim and the remedy you seek, and cite the relevant provisions of the lease. If your lease requires you to "elect" a particular remedy, be clear that you are doing so. If you have multiple claims based on multiple leases against the same landlord, combine them in a single letter. A landlord may be more responsive to a larger claim.

Be prepared for push-back from the landlord, and be persistent. The landlord may argue a different interpretation of the co-tenancy provision. The landlord also may argue that you waived the co-tenancy rights by waiting too long to assert them. Be prepared with a justification for any delay. For example, if the lease requires the landlord to notify the tenant when co-tenancy conditions are not satisfied, any delay in asserting a co-tenancy right should not be the fault of the tenant.

Finally, hiring a lawyer may be the only way to convince a landlord that you are willing to pursue your co-tenancy claim. When a landlord is faced with the prospect of hiring an attorney to defend a legal claim, a landlord may be more willing to negotiate a resolution.

Co-tenancy and other critical real estate topics will be addressed at the National Retail Tenants Association Conference, Sept. 26-29, 2010, Anaheim, Calif. (retailtenants.com).

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