REAL ESTATE COUNSELORS

Temporary Shutdown:
When Retail Closures are Permitted

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- **Introduction** –The federal government can shut down for weeks. A retail tenant may have a pressing need to temporarily shut-down operations, yet may find that it does not have the same privilege.

  Retail leases commonly have what is known as a "continuous operations" clause. Such a clause requires a tenant to operate its business in the leased premises continuously, during the landlord's standard business hours, throughout the term of the lease.

- **Continuous Operations**

  o **Landlords**. Landlords have a continuous operation clause in their lease for a number of valid reasons. A landlord does not want to have empty stores in its shopping center. Dark stores in a center are bad for the center's profitability and reduce the draw of customers to the shopping center. More customers drive up the tenant's sales and the sales of other business operations in the shopping center. Also, tenants rely on the customer traffic from an anchor tenant and those tenants who have leverage may have negotiated rent abatements and other remedies if the anchor tenant closes. Most significantly, many retail leases require the tenant to pay the landlord a percentage of gross sales (in exchange for a lower fixed monthly rent amount), so the landlord insists on having tenant operating continuously to maximize sales, and in turn, rent.

  o **Tenants**. Retail tenants are generally averse to a continuous operation clause because of the inflexibility it creates in the operation of their business. An experienced commercial real estate attorney will review the continuous operation clause with the client and negotiate key exceptions so the tenant does not find itself in an untenable situation at some point during its lease term.

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- **Key Issues.** Here are some key points of consideration when reviewing and negotiating a continuous operations provision:

  - **Operating Hours** – Leases that require continuous operations will set out specific hours and days when the tenant must be open for business. A well advised tenant should confirm that the hours make sense for the tenant's business operations. Tenants with negotiating leverage may try to get the right not to be open unless the majority of other tenants are also open for business.

  - **Inventory** – In many retail businesses, a tenant may need to shut down for a number of days to take inventory. Absent specific negotiations to permit a temporary closure of the business for the periodic taking of inventory, the tenant may be in breach of the lease if its shuts down.

  - **Remodeling** –The tenant may also want to negotiate the right to temporarily close if it anticipates that it may need to remodel the premises at some point during the lease term. For example, a franchise restaurant tenant may have to shut down and change its signage and other design elements if its franchisor modifies the franchise graphics.

  - **Force Majeure** – As the tenant is unlikely to anticipate every possible need for closure, the astute tenant will negotiate a permitted closure provision to include for reasons of force majeure. Force majeure could include strikes, riots, acts of God, shortages of labor or materials, war, governmental approvals, laws, regulations, or restrictions, or any other cause of any kind which is beyond the reasonable control of the tenant.

- **Your Transaction** – The issues discussed in this article may not necessarily apply to your transaction, and your transaction may raise issues not addressed in this article. In all cases, we advised you to consult an experienced commercial leasing broker and experienced commercial real estate attorney to make sure the issues for your transaction are properly addressed.

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