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## The Strategic Clause Found In More Retail Leases Today

| By [Jennifer LeClaire](#)  
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Bob Simons

ATLANTA—The continued rise of e-commerce makes it easier for customers to shop—and makes the retail industry [more competitive than ever before](#). Beyond the fallout from the 2008 Great Recession, the shrinking number of potential tenants means developers need to rethink co-tenancy clauses.

GlobeSt.com caught up with **Bob Simons**, a partner with **commercial real estate** firm **Hartman Simons**, to discuss these challenges. In a nutshell, he believes developers need to strike less stringent co-tenancy deals so they have more flexibility.

*GlobeSt.com: What two categories do co-tenancy provisions fall under and what are the implications of each?*

**Simons:** Co-tenancy provisions fall into two categories. The first is an opening co-tenancy, which provides that a tenant need not open its store at full rent unless and until certain other stores, or a certain amount of stores, in the shopping center are open.

An opening co-tenancy is usually found in the context of a shopping center in development, which may still be in the entitlement, lease-up or construction phase, particularly in an outlying area where projections of population growth and income levels have yet to be realized. In that case, a tenant will want assurances the shopping center will be built, occupied and open before it is required to invest its resources in opening a new store. However, an opening co-tenancy may also be found in an existing shopping center that is being renovated or repositioned.

The second category of co-tenancy provisions is an operating co-tenancy. This provides once a tenant has opened and is operating, it will be obligated to stay open at full rent only if certain other stores, or a certain amount of stores, are also operating. An operating co-tenancy is not limited to any particular type of shopping center, since regardless of location or age a tenant will not want to be required to stay open in a center where other stores are closing and the health of a center is declining.

***GlobeSt.com: In the event of a co-tenancy violation what are the tenant's recourse/remedy? What cure rights are available to the landlord?***

**Simons:** The first remedy available to the tenant is rent abatement. Rent abatement is commonly found in a series of clauses located in a lease which entails reducing or even eliminating a portion of the rent.

The amount reduced is generally determined by the percentage of the property that has become affected or uninhabitable because of a certain problem. The second remedy is termination of a lease. The third is to delay the opening and/or rent commencement date. The landlord has the ability to offer the tenant a sunset on the rent obligations.

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