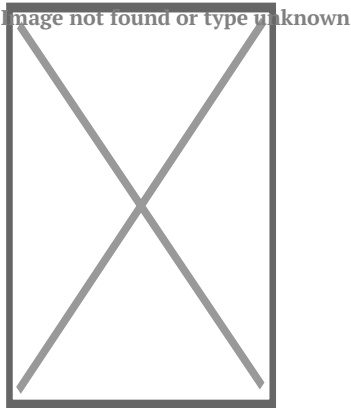


Licensed to Go Out of Business: The Regulations and Legal Issues Pertaining to Inventory Reduction Sales



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The recent announcement of nationwide store closings by well-known retailers Sears, Kmart, and the Limited (including some of their locations in Savannah) provides occasion to discuss the surprisingly complex legal issues associated with going-out-of-business, moving, and other inventory reduction sales. While national chains with well-staffed legal departments may be familiar with the myriad state and local laws regulating such sales, the average consumer, small business owner, and commercial landlord probably do not realize that there are special rules governing the conduct, duration, and advertising of liquidation sales.

Many state and local governments (including Georgia and the City of Savannah) regulate liquidation sales to protect consumers, prevent unfair competition, and preserve the character of a community. Georgia's Fair Business Practices Act limits the duration of a "going-out-of-business sale," a term which the Act uses to describe a variety of inventory reduction promotions conducted outside the ordinary course of business, to 90 days and prohibits a retailer from

“continuing to do business in any manner contrary to any representations which were made regarding the nature” of the sale. The Act also makes it unlawful to misrepresent the identity of the owner of the business holding the sale. Without such rules, some merchants might seek to gain an unfair advantage over competitors by promising shoppers the deep discounts of a distress sale in perpetuity.

The City of Savannah imposes even greater restrictions on specialty sales than does the State and has promulgated 16 ordinances on the subject. For example, the City limits the length of liquidation sales to 30 days, unless the mayor and aldermen approve a longer period. The ordinances also include a licensing requirement, which, among other things, requires a retailer to state the reasons for the “urgent and expeditious disposal of goods,” submit proposed advertising materials for review, and provide a list of all goods that are to be sold. Sellers cannot deviate from their inventories given to the city, preventing them from re-stocking their shelves to take advantage of increased traffic. Any goods marketed in a fire or altered-stock sale must have actually been damaged, and any business advertising a going-out-of-business sale must surrender its business license to the city when the sale is over.

Navigating government regulations is just one legal issue associated with going-out-of-business sales. Commercial landlords who desire to protect their property's value and appearance may include “going dark” clauses in their leases to penalize tenants who fail to actively operate a store during the lease term. Commercial leases may also limit the duration and advertising of a specialty sale to minimize the disruption to other businesses in a shopping center.

A retailer's bankruptcy provides another layer of complication. The United States Bankruptcy Code has its own provisions that allow a debtor to sell inventory that may preempt state or local laws. Thus, many of the rules discussed above may not apply to a business in bankruptcy. For example, bankruptcy courts have excused debtors from local licensing requirements, extended sales beyond the statutory time limit, and declared “going dark” clauses in leases to be unenforceable.

Retailers contemplating a special inventory reduction sale should consult an attorney before simply announcing such promotions to ensure compliance with the applicable government regulations and to consider strategies for maximizing revenues received. Commercial landlords, lenders, competing businesses, and consumers concerned by the way in which a merchant conducts a going-out-of-business sale may also seek out legal advice to address their concerns.

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