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Avoid falling prey to a bad exclusive use clause

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A Potential Trap: Suppose you own a chain of jewelry stores and just opened your newest store in a medium- sized shopping center. Since you realized how critical an exclusive use clause would be in protecting your investment, you successfully negotiated a clause in your lease whereby the landlord "will not hereafter lease space in the shopping center to any other tenant for the operation of a jewelry store." Six months later the drug store in the shopping center assigns its lease to a jewelry store. You contact the shopping center owner and angrily demand that he enforce the exclusive in your lease against the new tenant. The landlord calmly points to the use clause in the drug store lease which allows the tenant to use the premises for any lawful use. He tells you his attorney has told him that because the drug store tenant recorded a memorandum of its lease prior to your lease, you are subject to the drug store tenant's broad use rights.

Suppose while negotiating the lease you convinced the landlord to have the drug store tenant agree to your exclusive. Six months after you sign the lease the drug store assigns its lease to a discount variety store which begins selling discount jewelry along with other apparel. When you approach the landlord, he says that the tenant is not operating a jewelry store, so there is no violation of your exclusive.

Create a Good Exclusive: Although the jewelry store in the two examples may not be without recourse, it definitely has a big problem that it did not count on. There are ways to avoid these situations:

1. **Check Title.** To find out what rights existing tenants may have to compete with your business you should check the title to the property and get copies of any recorded memorandums of lease. You cannot rely entirely on the memorandum of lease, however, because a memorandum of lease is not always required to set forth the tenant's use clause in order to be effective. Nevertheless, a memorandum of lease may contain useful information.
2. **Check Existing Leases.** You should request copies of existing leases from the landlord, or at least extracts which set forth the use clauses and exclusive use clauses contained in all existing leases. If the landlord is allowed to exclude any financial or other sensitive lease information, most landlords will acquiesce to such a request by the tenant. It is in the landlord's interest to avoid future disputes of this nature. If the existing leases disclose potential weaknesses in the exclusive the landlord is willing to give you, it may then be necessary to negotiate changes in the exclusive, side agreements with other tenants, or other forms of protection in the event another tenant competes with your use. The success of these efforts will depend on your relative bargaining position with the landlord.
3. **Warranty of Completeness.** Since you are relying entirely on the Landlord's diligence in providing you with complete information regarding existing leases, it is appropriate to include in the lease a warranty and representation that the landlord has provided complete and accurate extracts of the use and exclusive use provisions of all existing leases.

4. Drafting Considerations. The second of the two examples cited above points up a common issue in drafting exclusives. Because the exclusive was drafted as a business exclusive (a jewelry store) rather than a product exclusive (the sale of jewelry), the landlord will probably be able to argue successfully that the exclusive has not been violated by the discount variety store's sale of jewelry. Most landlords will resist giving a product exclusive since it requires the landlord to be much more careful in entering into new leases. If a particular product is crucial to a tenant's business success, however, the tenant should negotiate strenuously for the product exclusive. There are a number of other drafting considerations surrounding exclusives which can affect their enforceability, both as a matter of contract law, and from the standpoint of antitrust laws. The assistance of counsel is recommended.

5. Recording. Once you have obtained a good exclusive it makes little sense to leave it vulnerable to challenge by failing to record a memorandum of lease. It is far better to put a future tenant on notice of the exclusive before the tenant has negotiated a lease with the landlord and incurred the cost of opening for business in the shopping center.

If handled with care, an exclusive can be a valuable asset in protecting your business and achieving your market assumptions. Although the above discussion assumes a lease transaction, many of the same principles apply when the transaction involves the purchase of land in an existing or proposed development. There are many pitfalls to be avoided by the retail business and its counsel in dealing with exclusives. Many of these pitfalls can be avoided by careful drafting and review of existing leases.

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