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Exclusive use and related use restrictions for commercial lease contracts - by Vincent Pisegna

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Probably the hottest area of dispute today between commercial landlords and tenants involves the regulation and enforcement of exclusive use and related restrictions in commercial leases. As the "shopping mall" concept evolves to that of a "shopping center", marketing professionals are increasingly sensitive to the mix of uses in centers. Shopping centers provide a greater diversification of uses -- from residential to entertainment to office to hotel -- thereby necessitating greater monitoring of the mix of uses.

From both the landlord or tenant perspectives, the most important goal in negotiating an exclusive use or similar lease restriction is to clearly define that restriction. In a recent case, Winn-Dixie v. Dolgencorp. LLC, 746 F. 3d 1008 (11th Cir. 2014), the 11th Circuit Court of Appeals was called upon to decide what "staples or fancy groceries" meant. Winn-Dixie filed an omnibus lawsuit seeking to enforce a provision in 97 of its store leases throughout the southeast which gave Winn-Dixie an exclusive for "staples or fancy groceries". The question was whether that phrase included non-food goods like soap and matches. The court, relying oddly on a dictionary definition of "groceries", concluded that the exclusive did include non-food goods.

Another common feature of an exclusive or restriction is carve outs for particular uses. For example, in a recent case involving a supermarket anchor tenant in a regional mall, the lease included the following carve outs from the provision which granted the supermarket an exclusive in the center regarding the sale of food: high end chocolates, Starbucks or Panera, sit-down restaurants, replacement uses for current tenants, and stores with no more than 10% of gross floor area for listed permitted foods like candy and gum.

The granddaddy of all carve outs, of course, is the grandfather clause which exempts from any exclusive or use restriction uses in the center which exist at the time that a new lease is entered into. It is now often the case that a new lease in a center will include an attachment with copies of the actual exclusives and restrictions then in existence at the time of the lease, and require the new

tenant to comply with the exclusives and restrictions.

As to the geographical scope of exclusives and restrictions, landlords and tenants will sometimes require the other to refrain from certain uses outside the center itself. For example, if a landlord wants to restrict a chain restaurant from establishing a competing restaurant in the area or if a retailer wants to prohibit the landlord from establishing competing uses in an adjacent property, the landlord or tenant will do so in the lease.

The typical remedy for breach of an exclusive or restriction by a landlord is a liquidated damages provision allowing the tenant to withhold a significant portion of its rent so long as the violation continues. Landlords will often insert a provision that allows a substantial cure right by landlord in the event of a violation of an exclusive or restriction. That cure right often prohibits resort to the liquidated damages provision so long as landlord vigorously seeks to enforce the exclusive or restriction including initiating litigation.

One last note. The bankruptcy code presents some sticky problems for a landlord in the event of a tenant bankruptcy. While the provisions of §365(b)(3) of the code now require a party who purchases a lease from a bankruptcy estate to assure, among other things, that use restrictions continue, the code prohibits such provision to the extent it operates as an anti-assignment provision. For example, in In re: Rickel Home Centers, 240 B.R. 826 (D. Del. 1998) the landlord's use restriction was deemed by the court to be overly-restrictive and, therefore, unenforceable as an anti-assignment provision.

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