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Exclusives and related use restrictions in commercial leases - by Vincent Pisegna

November 24, 2017 - Spotlights

Vincent Pisegna
Krokidas & Bluestein

One of 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 today 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, like a sit down restaurant, for example. 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.

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.

Vincent Pisegna is a partner at Krokidas & Bluestein LLP, Boston.

New England Real Estate Journal - 17 Accord Park Drive #207, Norwell MA 02061 - (781) 878-4540