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Exclusive use provision in shopping center leases - by Diane Rojas

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Retail shopping center leases often include an exclusive use provision, which prohibits a landlord from renting space in a given shopping center to another tenant that engages in the same type of business as the tenant's primary use (e.g., a grocery store lease that stipulates that a landlord may not rent space in the same plaza to any other store that sells groceries or produce). Less common is for a retail lease to restrict a landlord from leasing any other space in the shopping center to a specifically named competitor. A court might deem such a provision to be a "restraint of trade or commerce," in violation of the Sherman Act.

The Sherman Act declares that every contract in restraint of trade or commerce among the States is illegal, and every person who makes such a contract or engages in such a conspiracy is guilty of a felony, punishable by a fine of up to $1,000,000 for individuals or up to $100,000,000 for corporations, and/or up to 10 years' imprisonment. Courts have seldom held that the mere fact that two parties had an agreement that restricted the behavior of one party was sufficient to consider it antitrust behavior and therefore a per se violation of antitrust law. In evaluating retail shopping center leases and other less obvious scenarios of possible antitrade agreements, courts have instead found that exclusive use provisions require a different structure of analysis. Courts have developed a Rule of Reason test that considers the following factors:

• Facts particular to the business involved;

• Nature of the restraint and its effects; and

• The history of the restraint and the reasons it was adopted.

In most cases, courts have determined that exclusive use provisions in retail shopping center leases are acceptable and do not violate antitrust laws, so long as:

• No specific competitor is called out by name, and

• It is clear that there are alternatives for competitors in the marketplace surrounding the restricted shopping center.

In the instance when a court has found that a lease exclusive use provision did violate The Sherman Act, the tenant had specifically named the competitor it sought to exclude and the excluded competitor showed that it was effectively prevented from competing in the regional marketplace because of lack of alternative shopping centers in which to lease. Because courts will still apply the Rule of Reason test to determine whether a given exclusive use provision has crossed into the realm of restraining trade or commerce, landlords and tenants should consult an attorney before executing a lease with an exclusive use provision, to ensure that they do not violate The Sherman Act.

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