Exclusive Remedies: The Elusive Exclusive Remedy

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What is an exclusive use right?

Defining "primary" use:

- percentage of sales;
  - How to access another tenant's sales data?
- percentage of floor area; and
  - How to measure another tenant's space?
- descriptive terminology.
  - Vague definitions can be problematic (i.e., yoga wear, home decor, bath products).

Landlord to verify the sales or square footage to determine if a violation has occurred.

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Who do you represent and what should you seek?

Landlords:

- narrow the scope of the exclusive;
- broaden the scope of carveouts;
- get a longer cure period; and
- restrict tenant's remedies.

Tenants:

- seek broader rights;
- limit cure period; and
- seek remedies that can be enforced faster and easier.

How can a lawyer make an impact and control the fate of his/her client?

- Getting involved in the letter of intent stage to ensure that the LOI contains client-favorable terms.

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How long does an exclusive use right last?

A deal point?

- Full lease term
  - o including option terms
  - o transferable in connection with assignments and sublets.
- Initial term only
  - o Non-transferable

How is the right to an exclusive use enforced?

Is the exclusive conditional?

- Tenant cannot be in default (beyond applicable notice and cure period).
  - Monetary, material non-monetary
- Tenant may lose protections due to a change in the use from the permitted use.
  - Permitted use should address future changes, such as menu changes, seasonal and/or products.
- Tenant may lose protections as to any products that Tenant discontinues selling or services Tenant discontinues providing.
- Tenant may lose protections if tenant is in breach of a continuous operations covenant.
  - Except out permitted closures:

    force majeure
    casualty and condemnation
    renovations
    change of ownership
    holidays
    inventory

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What are the carveouts to violating the exclusive use?

Examples of carveouts that do not violate the exclusive use provision:

- Exclusive may not apply to "existing" tenants.
  - What if an existing tenant changes its use to a use that violate the exclusive use?
  - What if an existing tenant assigns the lease to a transferee that will use the premises for a use that violates the exclusive use?
- Exclusive may not apply to tenants with larger square footage.
- Exclusive may not apply to "replacements of existing tenants".
- Exclusive may be restricted to a "zone" and exclude other parts of the Center.

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What happens if a tenant is in violation of the conditions for an enforceable exclusive?

Is the exclusive waived?

- How long is the exclusive waived?
  - Remainder of Term
  - Until violation is cured

Is the remedy tolled?

- No remedy available while a tenant is in violation (or default) of any of the conditions for the exclusive.

Negotiation points:

- Monetary default (with a caveat for good faith monetary disputes) or a material non-monetary default that continues after the applicable notice and cure periods.
- Change of use violation.
- Waiver of exclusive and then re-instatement after the default has been cured?

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When is a tenant entitled to an express remedy for breach of an exclusive and what remedy is sufficient?

Negotiation points:

- Small/weak tenants may not get a specific remedy. Instead, they may be entitled to "any remedies at law or in equity" (e.g., breach of contract).
- If tenant has an express remedy, how long is Landlord's cure period before the remedy is effective?
- If Landlord fails to cure, is the remedy retroactive to the first day of the violation?
    - If Landlord cures, tenant is not entitled to remedy or, if applicable, the remedy lapses.
- Is tenant entitled to a remedy only if tenant can prove monetary harm? For example, a year-over-year decline in sales (by a negotiated percentage).
- Substitute Rent: Most exclusive remedies require the tenant to continue to operate and allow tenant to pay reduced rent for a limited period of time.
    - For example: Tenant pays 50% of Base Rent for 12 months and, if the violation continues, then Tenant must terminate the Lease or resume paying 100% of the Base Rent.

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What is a rogue tenant and is a remedy available for a rogue tenant violation?

- Rogue tenant: a tenant who violates the terms of its lease by selling the protected merchandise or offering the protected service.
- Non-Rogue tenant: a tenant that has the legal right to engage in the activity giving rise to the alleged violation of the exclusive use provision.
- Should landlord be required to sue the rogue tenant as part of landlord's commercially reasonable efforts to cure the rogue tenant violation?

Can a landlord maintain flexibility while granting tenant an exclusive use?

- Landlords can grant exclusive rights that only apply in specific portions of the shopping center (a so called "Exclusive Zone" or "Exclusive Area").
- A protected tenant's lease would allow other tenants to operate for the protected use so'long as any business engaging in such activities are situated a certain distance away from the protected tenant's premises.

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What happens in a real-life dispute over the violation of a tenant's exclusive use?

- Cases that deal with exclusive violations and the exclusives that are at issue:

  Snyder's Drug Stores, Inc. v. Sheehy Properties, Inc., 266 N.W.2d 882

  - Tenant operates a drug store with a restaurant inside. Broad exclusivity provision prohibits landlord from leasing to the same "type[11] of restaurant as plaintiff.
  - Court considers the menu, food preparation and service at Tenant's restaurant and a proposed McDonald's, and determines they are not the same "type[11] of restaurant.
  - Snyder's Drug Exclusive:
    - "39. Except for the demised premises [Snyder's store], no part of the premises described in [the lease agreement] shall be used in any manner for the sale of food products for consumption on the premises or the sale of drugs or medicines, including patent, proprietary or common household remedies, during the term of this Lease and any extensions thereof. Said restriction shall apply especially, but not exclusively, to drug stores, pharmacies, apothecaries, restaurants, cafes, coffee shops and fountains.[11]

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- Paragraph 2 of the rider further provides:

  "2. Paragraph 39 to the contrary notwithstanding, the restriction as to restaurants shall only apply to the type of restaurant operated by [Snyder's] in the demised premises."

- As noted, Paragraph 39 of the lease agreement prohibits the leasing of any other part of the shopping center premises for "the sale of food products for consumption on the premises." The restriction applies "espec'ially, but not exclusively, to restaurants, cafes, coffee shops and fountains." Standing alone, this paragraph is a broadly worded covenant against competition which would be entitled to a broad construction limited only by the public policy constraints set forth above.

- The lease as executed, however, contains a rider modifying the covenant and making the restriction applicable only to restaurants of the "type" operated by Snyder's.

- This case highlights how, without the qualification in the rider, the broad scope of the exclusive could have been void as against public policy.

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Violynne, Inc. v. Cogshell Group, LLC, 2005 Conn. Super. LEXIS 965

- Exclusive use clause prohibited landlord from leasing any other commercial unit "to a person or entity engaged in a business the same as or similar to that carried on by the Tenant."
- Court considered appearance of two spaces, primary food service, and menus, and holds that the restaurants were not "similar" (and tenant's exclusive use was not violated).
- The exclusive use provision of the lease provided:

> "Exclusivity. Landlord shall not lease any other commercial unit of Riverwalk Condominiums to a person or entity engaged in a business the same as or similar to that carried on by the Tenant." The tenant protected by the exclusive use and plaintiff in the case {Prime Time Cafe) operated a restaurant with seating for 50 people and served and offered food for takeout and catering *off* the premises by special arrangement. Tenant argued that its exclusive use was violated when landlord leased another premises in the condominium complex to Bogue's Alley LLC ("Bogue's"). Bogue's advertised its business as a "well rounded market and deli", but all food was "to go" because Bogue's premises did not contain tables for sit-down service.

- The respective menus from Prime Time and Bogue's indicated that the names of some food items were remarkably **similar,** and in some cases, **the same or overlapping.**
    - While the Prime Time offered takeout on an incidental basis, its **primary** business was the operation of **a sit down** restaurant·.1n contrast, the **primary** business of Bogue's was **takeout** with all food packaged in "to go" containers.
    - The court had to determine if they were "similar."
        - They looked different.
        - Their primary food service was different.
        - One catered primarily to sit down diners while the other exclusively prepared food to go. One restaurant had tables, while the other did not have tables for diners to sit down.
        - One had a restaurant permit, while the other did not.
        - While there were some items on the respective menus which *resembled* each other, that did not of itself make their operations "similar."

- **Bogue's was found by this court not to be a business the same as or similar to that carried on by Prime Time Cafe.** Moreover, Bogue's was not competing or interfering with the business of Prime Time Cafe.
- This case highlights the importance of effective drafting to properly define a tenant's primary business.
- The court struggled to interpret the lease's overly broad language and such description should have been narrowly drafted to accurately describe the plaintiff's business.
- This case also highlights that two restaurants can coexist (and not compete or interfere with one another) even if their menus contain foods with remarkably similar names, and in some cases, the same or overlapping food items, specifically because of the way the businesses are operated.