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The Perils of Exclusivity

By Jack Garson, December 13, 2004



At the height of the Beanie Baby craze in the mid-90s, a landlord granted a toy store the exclusive right to sell “toys” in the mall. Another tenant, which specialized in the sale of baby care products, started selling Beanie Babies at the cash register.

The toy store, enraged at the perceived infringement of its exclusive right to sell “toys,” immediately sought justice from the landlord, sparking nothing but trouble for the landlord. And so became apparent one of the pitfalls of a tenant’s exclusive right to sell a product: the lack of precision in granting exclusive use rights.

Tenants will often justifiably require exclusive use rights, but landlords can avoid disputes three ways: exclusive use rights must be precisely drafted; landlords must provide for appropriate exceptions to their tenants’ exclusivity; and landlords must establish a system for binding new tenants to the exclusives.

Claims that exclusive use rights violate antitrust law are usually overblown. Generally, exclusives are lawful where the exclusive is necessary and reasonable, and alternatives for the product or service are available in the same market.

The landlord’s first task is to limit the exclusive to a product or service and *not* a type of business. For example, a landlord can grant the exclusive right to sell stationery, instead of the exclusive right to operate a stationery store. That might seem like splitting hairs, but in the former exclusive, the tenant has the exclusive right to sell stationery. In the latter exclusive, questions may arise as to whether another tenant may sell pens, pencils, greeting cards and the like.

Likewise, landlords should precisely describe the particular good or service which the tenant may exclusively sell. “Shoes” is narrower and more precise than “footwear,” since the latter arguably includes the socks sold by clothing stores and the ballerina slippers sold by a dance studio. Similarly, grant the ice cream parlor an exclusive to sell “hand-scooped ice cream sold by the cone,” rather than “ice cream,” thereby avoiding disputes with countless other tenants selling packaged ice cream.

Second, provide for appropriate exceptions to each exclusive. There must be an exception for existing tenants, even where the existing tenants’ use may appear harmless. Consider the situation where you are granting an exclusive right to sell electronic products, such as DVD players. An existing tenant, a video rental store, does not appear to present any concern. However, if the video store lease permits the sale of electronic products, the video store might begin selling DVD players, violating the electronics store’s exclusive.

Many leases, especially with nationals and anchors, contain broad use rights, even use clauses permitting “any lawful retail use.” Therefore, exclusives should be subject to the rights of existing tenants.

Landlords should also include exceptions for the assignees and sub-lessees of existing tenants, for new businesses that replace substantially similar existing businesses at the same property, and for tenants that expand or relocate at the same property. Other types of exceptions may apply, such as limits on the amount of square feet that may be devoted by other tenants to the display and sale of certain products. Overall, the broader the exclusive, the greater the need to provide for exceptions.

Also, the landlord must establish a system for implementing the exclusives. In many situations, it’s appropriate to compile a list of exclusives and attach this list to new leases as a list of prohibited uses. However, merely copying an exclusive from one lease and prohibiting that use in another lease may not protect the parties. Some exclusives must be carefully re-drafted when included in a list of prohibited uses, if they are to have their intended effect.

For landlords, much care should be taken when granting exclusive use rights. To avoid costly disputes and liability later, careful drafting and implementation of exclusives may be about “toys” today—but it will help you avoid trouble tomorrow.

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