

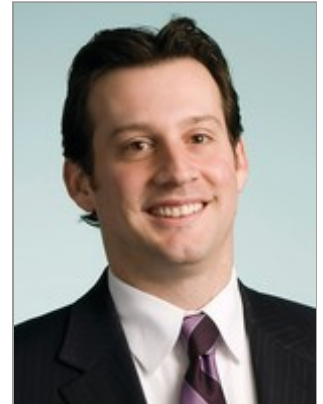


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Tenant Exclusives: Rogue Tenants, Enforcement, And More

Law360, New York (November 4, 2016, 5:35 PM EDT) -- In my last article, I discussed the fundamentals of a tenant exclusive from the tenant's perspective. In this article I will discuss how to address "rogue tenants," the enforcement of an exclusive and whether continuous operation clauses should factor into the exclusive use provision when negotiating a retail lease on behalf of a tenant.

A "rogue tenant" is a tenant that despite being aware of an existing exclusive ignores it and operates in some manner in violation of the exclusive. One of the key factors in addressing the "rogue tenant" scenario is knowledge of the existing exclusive. As I mentioned in my previous article, when representing a tenant in the negotiation of a retail lease in a shopping center it is prudent to require a landlord to include your client's exclusive in all future leases so that all tenants coming into the shopping center are aware of restrictions against its use. I recommend this even if a memorandum of lease containing the exclusive is recorded because not all retail tenants will run a proper title search.



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During the negotiation of a retail lease, the "rogue tenant" concept usually comes up when the landlord is attempting to limit the remedies a tenant may have under its retail lease for a violation of its exclusive. Some landlords will take the position that any violation of the exclusive by another tenant in the shopping center shouldn't trigger any remedies against the landlord because the landlord was not causing the violation. As a response, I usually present the "rogue tenant" concept whereby if the landlord has satisfied all of its obligations under the lease by including the exclusive in all other future tenant leases and the landlord was a true innocent party and did not contribute to the violation, then the landlord can have additional time, usually 180 days, to effectuate a cure before the traditional remedies against landlord (e.g. termination rights or a reduction in rent) can be exercised by tenant.

I continue to keep the enforcement obligations of the exclusive with the landlord because ultimately the landlord is in a better position to enforce the exclusive. The landlord has privity of contract with the rogue tenant through its signed lease or other occupancy agreement. Using the lease as a vehicle to enforce the exclusive provides much more effective remedies against the rogue tenant with swift results. With a lease, the landlord can threaten the rogue tenant with termination and financial penalties that trigger within a short time period — typically 30 days or less. Indeed, the landlord, especially in a situation where the tenant seeking to enforce its exclusive is paying percentage rent, has a financial incentive to enforce the exclusive. Landlords want their shopping centers to operate in a harmonious manner with complimentary uses and without undue direct competition between tenants. Although the landlord continues to have enforcement obligations, this doesn't prevent or restrict the aggrieved tenant from exercising any and all remedies it may have available against the rogue tenant.

Because much of the burden with enforcing the tenant exclusive resides with the landlord, often times landlords will take the position that the exclusive is only valid during the period that a tenant is actively operating its business. I will reject this position during negotiation of the retail lease given the importance and value that a retail tenant places on its exclusive. The failure of a

tenant to continuously operate (unless it exists somewhere else in the retail lease) should not devalue a retail lease that is in good standing. In retail leases where the tenant has paid all of the development costs associated with the building of the store, maintaining value of the lease is critical. A retail tenant may not continue to operate because of temporary market conditions or other financial considerations but if it is a large retail tenant with multiple locations in close proximity to the location that has gone dark, lifting an exclusive could have a material impact on the operations of its other locations and present other economic harm. Additionally, if the tenant is considering a merger with a similar retailer and this location will be part of the portfolio, an existing and enforceable tenant exclusive has real value for the retailer. Landlords will sometimes argue that a tenant exclusive may remain in place during periods of condemnation and casualty which are routine exceptions to any continuous operation clause; however, this fails to address the true economic benefits of the tenant exclusive spread over the geographic market. Unless the tenant, as part of the business deal, has agreed to continuously operate, the only sunset for a tenant exclusive should be the expiration or earlier termination of the lease.

Different retail tenants value their exclusive differently and it is imperative when representing a retail tenant to understand how important a consideration it is for your client. Indeed, the creditworthiness and market power of the retail tenant also plays a significant role in negotiating these provisions and with a large national credit tenant, landlords are more willing to agree to tenant's standard exclusive language to secure a long-term lease thereby adding significant value to the shopping center.

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