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Insights

Navigating the Pitfalls of Exclusive Use Clauses

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In the July/August 2024 issue of the American Bar Association's *Probate & Property Magazine*, attorneys Alvin Miester III and Jonathan B. Cerise prepared an excellent article titled "Protecting Against Competition: Exclusive Use Clauses and Radius Restrictions in Commercial Leases." The article serves as an important reminder of the risks associated with using or granting exclusive clauses to tenants by landlords.

There are some advantages for tenants to have exclusivity for a particular use, such as reduced competition, enhancing the chances for a successful business. For landlords, an advantage could be increased percentage rental in situations where such arrangements exist, as there will likely be no decrease in sales from competition. Additionally, exclusivity contributes to a good tenant mix in the development.

However, an exclusive use clause restricts the landlord from leasing to another tenant who competes with an existing tenant's business. This limitation restricts the pool of potential tenants and requires that the exclusive use clause be narrowly drafted. For example, if the tenant's business sells Reubens, the landlord should not prohibit other tenants from selling sandwiches in general. This would artificially restrict the landlord from signing up deli shops, hamburger vendors, etc. The language must also avoid impacting existing clients.

While exclusive use provisions can be useful, in this author's experience, they often lead to litigation. A common cause is restaurant exclusives where—for example—a landlord gives a tenant the exclusive right to open as a Chinese restaurant, only to have a subsequent Vietnamese restaurant tenant unexpectedly include several Chinese dishes on their menu.

In conclusion, when dealing with exclusive use clauses caution is required.

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