

# Keeping out competition

## How to negotiate exclusivity provisions in commercial leases

**A**lthough commercial leasing and rental rates are coming back in Chicago, new tenants are still able to negotiate certain benefits from their landlords. Among these benefits are exclusivity provisions, which limit a landlord's ability to lease space to a tenant's competitors.

*Smart Business* spoke with Andrew D. Campbell, a partner at Novack and Macey LLP, about exclusivity provisions.

### What is an exclusivity provision?

An exclusivity provision in a lease protects a tenant by prohibiting a landlord from leasing space to others engaged in the same line of business as the tenant. These provisions are especially common in leases for retail tenants, but they can be applied in many contexts.

There are two basic ways to create an exclusivity provision:

1. Expressly identifying the types of businesses to be excluded, or the types of goods that may not be sold in the landlord's other spaces.
2. Creating an implied exclusivity provision.

An implied exclusivity provision arises when a lease provides that a tenant will have 'exclusive' rights — for example, 'tenant shall have the exclusive right to operate a restaurant with a liquor license.'

### Exclusivity provisions restrain trade — are they enforceable?

Yes, exclusivity provisions restrain trade, but this does not render them unenforceable. Courts enforce exclusivity provisions where they do not unreasonably restrain trade. If

an exclusivity provision is reasonably necessary for the tenant, reasonable in duration and territorial scope, and does not unduly prejudice the interests of the public, they are generally enforceable.

But because exclusivity provisions restrain trade, some courts construe these provisions strictly. So, if an exclusivity provision is susceptible to two reasonable interpretations, courts often will choose the interpretation that imposes the least restraint on trade.

### What should an exclusivity provision say?

To avoid disputes, exclusivity provisions should be as clear and specific as possible. For instance, suppose a McDonald's restaurant is leasing space in a mall and it wants an exclusivity provision. A provision that excludes all other 'fast-food restaurants that sell hamburgers' would probably be too vague. It leaves questions unanswered such as to what constitutes 'fast food' and what it means to 'sell hamburgers.'

A better limitation would be to specifically describe the types of businesses to be excluded — for example, excluding 'restaurants that do not have table service and that derive 30 percent or more of their gross sales from the sale of hamburgers.'

An even better limitation would give



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specific examples of restaurants to be excluded — Burger King, Wendy's, Five Guys, etc. A catchall provision at the end of this list, such as, 'all other similar restaurants,' may also be useful in case a relevant competitor was inadvertently omitted from the list. Although catchall provisions lack specificity, courts generally will apply them, but only to the extent the 'other' restaurant is similar to those listed.

### What are a tenant's remedies if a landlord violates an exclusivity provision?

While remedies will vary based on the specific terms in the lease, and the governing state law, tenants' remedies for violation of an exclusivity provision can include repudiating the lease — that is, walking away from any remaining lease obligations — or suing the landlord for injunctive relief and/or damages. So, a tenant may file a lawsuit seeking to preclude a competitor from opening in the landlord's space and/or the tenant may seek monetary damages that may have resulted from the opening of the competing store.

To minimize this risk, landlords should be sure to check the exclusivity provisions in other tenants' leases before signing a new tenant. ●