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Lease Leverage

Gaining The Upper Hand

As Retail Market Rebounds, So Do Legal Disputes

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Mega-bankruptcy cases like Circuit City, Borders and Blockbuster that shuttered thousands of store have played themselves out, with commercial landlords moving on to the next generation of tenants.

While the local retail landscape has recovered in recent years, legal disputes between landlords and tenants remain a common occurrence in all real estate cycles. It all comes back to leverage: the side with the upper hand in negotiations typically can write lease language to their advantage, which plays out in court if the relationship goes sour. A handful of words can decide whether a landlord can collect in big-ticket rent disputes.

“Sometimes there’s more (dispute) activity in an up market than a down market, oddly enough,” said Vincent Pisegna, an attorney at Krokidas & Bluestein LLP in Boston.



A Demand For Exclusivity

Retailers have been rethinking their store footprint sizes in response to the online shopping migration, with chains including Best Buy and Staples rolling out smaller prototypes. Mindful of getting the best financial performance out of their real estate, retailers are more likely to demand exclusive use clauses in leases designed to prevent other retailers in the same center from selling

similar merchandise.

“If you’re in an expensive area like Newbury Street, you’re paying premium rent and you want to make sure there’s a certain amount of exclusivity,” said Peter McGlynn, an attorney with Bernkopf Goodman LLP in Boston. “That’s often on the bargaining table. But you’ve got to be careful. If there are restrictions on use, the courts are going to look at those carefully and make sure they’re not overly restrictive.”

The practice has long been common among supermarket companies, which typically seek to be the only grocer in a shopping center.

But the expansion of discounters such as Wal-Mart and Target into the grocery business has laid the groundwork for increasing litigation, prompting traditional grocers to withhold rent until a court rules whether their rights have been infringed.

West Bridgewater-based Shaw’s Supermarkets took its landlord to court after Wal-Mart installed a dairy cooler in its Falmouth store, claiming its exclusive rights to sell groceries in the same shopping center were violated. The case went to the Supreme Judicial Court, which ruled in the landlord’s favor.

As the brick-and-mortar landscape becomes increasingly competitive, more categories of tenants, such as health clubs, are demanding exclusive use clauses, leading to more frequent disputes with landlords.

“Sometimes they’re legitimate complaints, and sometimes it’s an opportunity to tweak the landlord by saving rent,” Pisegna said. “We’re seeing more exclusive use clauses and restrictions in shopping centers, so when you see that type of thing, you’re going to see some more disputes.”



Exclusive lease clauses have long been popular with supermarkets, which seek to be the only grocer in a shopping center.

Such clauses can ban sales of particular merchandise, or limit them to a maximum square-footage or percentage of sales, said Paul Bauer, an attorney at Bowditch & Dewey LLP in Boston.

A Ruling Against Landlords

A 2013 Supreme Judicial Court ruling has given landlords more incentive to plan ahead for the early exit of a tenant. The case stemmed from the departure of a dental office from a property in Boston’s Downtown Crossing in the third year of a 10-year lease.

Typically, a landlord can sue a departed tenant for damages equal to the lost rent, or if they find a replacement tenant, the difference between the two rents. But the SJC ruled that in *1000 275 Washington St. Corp. v. Dental Office*, the landlord had to wait until the end of the 10-year lease term before it could seek damages.

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