

## You May Not Be as Exclusive as You Think

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For many tenants, one of the most important provisions in a lease is the exclusive right to operate their businesses. As a recent case, *RARE Hospitality Management, Inc. v. River Roads Restaurant Pads, LLC*, 08 CH 37609, illustrates, this provision should be carefully crafted and reviewed by the landlord and tenant to make sure that the provision achieves the intended result.

The basic facts of the case, based upon the allegations in the various pleadings, are as follows: The operator of high-end steakhouses (Capital Grille) entered into a long-term lease in 2006 as a tenant of outparcel space in connection with a newly constructed InterContinental Hotel. The lease provided that:

During the Term...Landlord shall not allow the operation of a high-end steakhouse-themed restaurant on the Hotel Site. This restriction...shall include, but not be limited to, Morton's, Ruth's Chris, Stonewood, Del Frisco's ...and any other full service high-end steakhouse-themed restaurant concepts serving liquor with price points above \$22.00 per entrée.

During the lease negotiations, the landlord may have indicated that an Italian restaurant would be opening in the hotel, the build-out for which was almost complete. Instead, the landlord apparently entered into negotiations with the operator of a restaurant that promoted itself as Wildfire: Steaks, Chops and Seafood. It appears that those negotiations contemplated that the landlord would obtain the consent of Capital Grille prior to moving ahead with Wildfire. Prior to the opening of Capital Grille, the landlord requested such consent, but Capital Grille refused to approve the competing restaurant. After an exchange of letters in which the landlord asserted that opening a Wildfire Restaurant could not be prohibited since it was not a "steakhouse-themed restaurant" (Wildfire promotes seafood as well), the landlord proceeded to execute a lease allowing Wildfire to operate in the hotel. Capital Grille filed a lawsuit that is still pending in the Circuit Court of Cook County, Illinois, asking the court to enjoin the opening of the Wildfire restaurant. The Circuit Court of Cook County denied Capital Grille's motion for a preliminary injunction. It stated, in part, that the exclusive provision

in the Capital Grille lease specified by name a number of prohibited restaurants, but did not specifically prohibit Wildfire; the general restriction was otherwise too vague to be applied for the purpose of entering a preliminary injunction.

What could the landlord and the tenant have done to avoid this dispute? One idea would be not only to specify names of restaurants that are included in the restriction, which of course is a good idea, but also to specify the types of restaurants that are excluded. In other words, the lawsuit might well have been avoided if the lease provision included language such as:

This restriction shall not include restaurants such as Wildfire, Cheesecake Factory or any other full-service restaurant that also features food types other than steak, such as seafood.

Perhaps a better solution would be to define a “steakhouse-themed” restaurant as one where at least 50 percent of the entrée items are steak, because that quantitative test that can be easily verified. A further problem with the Capital Grill lease clause is the specified price point (\$22). If the lease is for an extended period, the careful draftsman should provide for an adjustment in the price point.

The sample provision below highlights various issues that should be addressed in a lease where exclusive rights are granted to the tenant (see Clause A) and where exclusive rights have been granted to other tenants (see Clause B). In negotiating exclusive provisions, some pointers for the landlord to keep in mind are as follows:

- If the exclusive right is for the sale of a particular type of merchandise, take care in specifying the merchandise;

e.g., a sporting goods store may request an exclusive right with respect to sporting apparel, but specify what that includes: sweat pants, leggings, etc.

- Make sure that there are appropriate exceptions for incidental sales of certain types of merchandise by other tenants. In response, the tenant might ask for a definition of “incidental” so that the exception does not swallow up the restriction. The definition could be based upon the square footage of the store or the amount of linear feet of shelving that is devoted to selling the competing merchandise. Be careful when tying incidental to a gross sales test, as that number, in most instances, is very difficult to verify.
- Keep track of all exclusive rights that have been granted, so that inconsistent protections are not granted to multiple tenants. For clarity, it is often best, from both the landlord and tenant perspectives, to attach an exhibit containing verbatim copies of any exclusive rights existing in any leases so that the tenant knows exactly what uses may be restricted. Inserting only summaries of clauses allows for errors in interpretation.
- Agree, in the exclusive language only, not to enter into a lease that will permit another occupant to use its premises in violation of the exclusive right. This way, the landlord does not assume the risk that another tenant may violate an exclusive right, even though the tenant agreed to observe the exclusive right. This is not to say that the landlord should not use reasonable efforts to prohibit another tenant’s violation; rather, the landlord would not be liable for such action.
- In the event of disputes, such as in the

Capital Grille–Wildfire restaurant situation described above, the landlord will often ask the tenant to waive any claim for damages. The tenant will likely ask for more concessions, however. A compromise might include an agreement that the tenant will only pay base rent, and not percentage rent, until the issue is resolved; or, perhaps the landlord will grant the tenant the right to terminate the lease if the conflict cannot be resolved within a specified period.

- The landlord may ask to exclude large tenants from the restriction, provided that their primary business is not a competing business. As a result, the landlord will avoid losing a potential major tenant due to a restriction granted to an earlier smaller tenant.
- If the tenant ceases to use the premises for the restricted use, or if a bankruptcy court requires that a competing business be permitted to operate, the restriction should be waived.

In short, representatives of the landlord and the tenant, as well as their counsel, should take particular care in negotiating the exclusive provisions in their leases in order to avoid the pitfalls that can be encountered and the cost of litigation that may result.

### **Sample Provision**

#### ***A. Exclusive Rights***

1. Landlord reserves the right to lease any portion of the Project to such other tenants as Landlord, in Landlord’s sole discretion, deems appropriate, whether or not engaged in the same or similar business for which Tenant is permitted to use the Premises under this Lease. Notwithstanding the foregoing, Land-

lord agrees that during the Term of this Lease, Landlord will not hereafter voluntarily enter into a lease of space in any portion of the Retail Component designated on Exhibit A as being subject to the exclusive right provided for herein for the operation of a **[insert description of exclusive right]** as its primary use (“Competing Business”), which results in the operation of such Competing Business, nor will Landlord voluntarily permit any existing tenant in such restricted areas of the Retail Component to change its use to include such an operation (to the extent such existing tenant’s lease gives Landlord control as to whether to permit such change), provided it is understood and agreed that the foregoing restrictions in connection with a Competing Business do not apply (i) to any portions of the Retail Component leased to **[insert names of existing major tenants that are exempt from the exclusive right, e.g., a large grocery store that does not agree to be subject to exclusives for the benefit of others]**, or any of their successors, subtenants, assigns or other occupants of their space during such time as any of their leases, or any amendments, substitutions, or renewals thereof, are in effect, or (ii) to portions of the Retail Component leased to a tenant which is leasing [20,000] or more rentable square feet that does not agree to be bound by such restriction, provided at the time such portions are leased to such tenant’s primary business is not a Competing Business, or (iii) at any time after Tenant for any reason (other than temporary interruption due to casualty or if required by Landlord) first ceases to use and operate the Premises for the Permitted Use.

2. For the purposes of interpretation of the provisions of this Section A, a Competing Business will, subject to the other provisions of this Section A, be deemed to include businesses such as **[insert names of particular businesses that are intended to be prohibited as a competing business]**, but will not be deemed to include businesses such as **[insert names of particular businesses that are not intended to be prohibited as a competing business]**.
3. It is understood that such restriction shall in no way prevent the providing of incidental **[insert permitted incidental competing business]** by occupants of the restricted area, provided the products constituting such incidental sales do not exceed for any particular occupant [\_\_\_\_\_ square feet of its floor area][\_\_\_\_\_ linear feet of its shelf space].
4. A Competing Business shall not be considered to be permitted by Landlord (and, therefore, Tenant shall not be entitled to any remedies) if the Competing Business has been permitted to assume a lease or operate its business based upon or as a result of a bankruptcy, insolvency or similar action; or if the Competing Business has been permitted to operate as the result of an action or order by a court of competent jurisdiction.
5. In the event any Competing Business is operated contrary to the provisions hereof at any time during the Term of this Lease, Tenant's sole and exclusive

remedy shall be to require Landlord to promptly commence appropriate legal proceedings to exercise its rights, and vigorously prosecute the same, to enjoin and prohibit any such violation.

6. Tenant acknowledges that Landlord has made no representations as to the presence of any specific tenant or number or types of tenants at the Project as of or after the Commencement Date, hours or days that such other tenants shall or may be open for business, or gross sales which may be achieved by Tenant or any other tenants at the Project. A vacation or abandonment of its premises or cessation of business in the Project by any other tenant or occupant shall not release or excuse Tenant from Tenant's obligations under any provision of this Lease.

#### ***B. Prohibited Activities***

Tenant shall not use or occupy its Premises or any other portions of the Project for or in respect of, or engage in, any of the matters or uses described in Rider \_\_ hereto **[insert on rider verbatim exclusive language from leases that grant other tenants exclusive uses]**, or permit such use, occupancy or activity by any other person or entity occupying the Premises or under its control or direction, it being understood, however, that such limitation is not meant to imply that Tenant or others can use or occupy the Premises or any other portions of the Project for any use other than the Permitted Use.

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