A large part of retail lease negotiations is focused on what is happening within the shopping center, such as what uses are allowed or prohibited in the center and who maintains or pays for the maintenance costs of the common areas in the center. However, activities outside the center can also affect the relationship between landlord and tenant in negotiating a lease. Failure to restrict such activities can significantly influence the performance of a tenant. Landlords and tenants alike should consider imposing a restriction on the other party’s ability to engage in or, in the landlord’s case, permit a similar, competing business within a certain radius of the leased premises at issue – a so-called “radius restriction.”

For the landlord, a radius restriction can serve two functions. The first, where applicable, is to protect Landlord’s percentage rent stream. If Tenant operates another store in close proximity to the center, this could dilute Tenant’s sales at the center and reduce percentage rent due to Landlord or perhaps even completely nullify percentage rent if the sales fall below the stipulated base sales threshold. The second is to ensure Tenant’s success at the center by preventing the tenant from negatively impacting its sales at the center, potentially threatening the success of the store long-term. This minimizes the risk of a default by Tenant and also, if applicable, mitigates the risk of termination by other tenants who might have co-tenancy clauses tied to Tenant. Landlord might perceive success of the center as a whole to also depend on the restricted tenant’s success in the center if Landlord believes that particular Tenant will generate significant foot traffic for the other tenants at the center- for example, if Landlord believes that Tenant will bring people to the center who would otherwise not shop there.

Tenants faced with a radius restriction should try to achieve the following: minimizing the restriction’s physical scope, excluding from the restriction Tenant’s existing stores within the radius, limiting the restriction to a certain brand name or set of products if Tenant has
multiple brands or product lines, and ensuring that these restrictions would not apply to a leasehold mortgagee who comes into possession of the leased premises, to ensure the financeability of the lease. Landlords have an incentive to try to keep the restriction as broad as possible within reason and will want the restriction to apply not only to Tenant but to its affiliates.

When the landlord holds nearby properties in addition to the center, radius restrictions can enable Tenant to inhibit landlord’s ability to lease space to a competitive business within a certain radius outside the center. Tenants will want this restriction to be as broad as possible, restricting both landlord and landlord’s affiliates, and restricting centers within the radius acquired by landlord at a later date during the term of the lease. Landlords should make sure that a radius restriction excludes leases (not the specific tenants) in effect as of the date of execution of Tenant’s lease and excludes leases in effect as of the date the landlord acquires a future shopping center. A landlord will want to negotiate exclusions from a tenant’s radius restriction to protect a fee mortgagee if the mortgagee acquires the landlord’s center in the exercise of the mortgagee’s remedies and another center that is located within the restricted radius. It also behooves a landlord to define what is meant by the term “affiliates,” in order that the landlord can avoid violating the radius restriction. Typically the reference would be to entities that are owned or controlled by one or more key principals of the landlord entity. The term “control” would also need to be defined. The restrictions that would apply to Landlord in the typical tenant radius restriction provision would apply to Landlord only while it is holding the landlord’s interest in the lease. Once the lease is assigned, the assigning landlord should be free of the restriction, except if a violation occurs prior to the assignment.

Radius restrictions must be carefully drafted to avoid attack and to ensure that the parties’ interests are adequately protected. The restriction must be reasonable in scope and extent and must be narrowly drawn so as not to unreasonably restrain the restricted party while protecting the economic interest at issue, and its radius must be specifically defined (often 1–5 miles, depending on the surrounding market). The restriction will typically apply for the full term of a lease and should specifically be stated to apply for extensions or renewals thereof as well if the parties so agree. The parties should also document specific remedies for failure to oblige by these restrictions, because typical lease remedies might not be adequate. These remedies could include injunctive relief, termination of the lease, or monetary damages.

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