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The Real Estate Institute of New York University



*Separating the clothiers
in a shopping center is no easy task.*

People and Property: Use Clauses in Apparel Store Leases

Emanuel B. Halper



PEOPLE JUST DON'T UNDERSTAND what real estate developers have to go through in order to reach that wonderful moment when they can take the golden pair of scissors in hand and cut the ribbon at the grand opening of a shopping center.

Consider the time we flew from Steubenville, Ohio, to Yahoo. Why would anybody who is truly self-seeking want to leave Steubenville to go to Yahoo? You wouldn't put one foot in Yahoo if you weren't concerned about the folks who live there. Look, they just don't have one decent medium-priced clothing store in town. That's what

led Wally Juniors, a rapidly expanding chain store organization, to make a deal with a client of mine named Harry.

Harry owned a shopping center in suburban Yahoo near where the best folks in town live. For

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years and years the shopping center was fully rented except for a 1,000-square-foot pizza parlor that changed hands annually.

Plans were drawn for a major expansion of the shopping center when a 25,000-square-foot unit became vacant because of the bankruptcy of a prominent variety store chain. Harry was concerned that because the variety store was closed, the people of Yahoo would have a hard time buying thingamabobs, who-zee-whatsits, teremententems, and other essential merchandise advertised on late night TV. Fortunately, Nick Tromba, the well-known broker, pointed out to Harry that the people of Yahoo had a greater need for the latest men's and women's fashions from Paris and Rome.

Harry agreed that on his last trip to Yahoo, the clothes he saw displayed a noticeable lack of chic.

Nick and Harry agreed that there was only one thing to do. That was to contact Brent V. Firestone, Chairman of the Board of Wally Juniors, the nation's leading merchant of fashion clothing.

Brent was duly sympathetic. But his concern for the folks at Yahoo grew substantially when advised that he could have the space for \$2 per square foot and that all the fixtures he needed were available for \$5,000.

Hence, it was primarily our duty as good citizens to negotiate a lease and negotiate we did. As negotiations go, this one seemed to go smoothly. Nick Tromba was superb at helping us settle our differences. I don't know what we would have done without him.

The lease was ready for signature except for one point that Nick couldn't solve. It was the use clause. Wally Juniors wanted the right to sell any kind of clothing and accessories it wanted to sell and it didn't want anyone else to sell clothing. Harry didn't agree.

Brent V. Firestone wouldn't budge and Harry wouldn't budge.

So Nick Tromba decided that there was nothing left to do but to go to Yahoo and negotiate there where we could see just how much the people of that town needed Wally Juniors.

When we got there, Mayor Norman Butcher graciously received us in his office. He advised that he'd sit with us all night until we resolved our differences. Having a vacancy in the town's only shopping center was a blot on his reputation. Civic pride was at stake. A vacancy symbolized hopelessness, blight, and welfare rolls. Something had to be done to save Yahoo and if something had to be

done, Norman Butcher would do it. Why look up there on the wall next to the mournful figure of a bull moose. There was the very pair of scissors the mayor used at the ribbon-cutting ceremony held when the variety store opened for business in Yahoo. Now the store was vacant and the scissors were rusty.

Mayor Butcher stated that the best way to get folks to sign an agreement is to put all the lawyers and businessmen in one room, lock the doors, and throw the keys away. Everyone agreed. Sandwiches were brought in and cocktails were served. The mayor and Nick Tromba urged the parties on, and Harry and Brent fenced with each other for an hour.

Suddenly Harry decided he had had enough. He made a grand gesture and double-timed it to the door. He pulled the door and found that it was really locked.

Brent V. Firestone was claustrophobic. He kicked at the door and shoved at the windows. He begged Mayor Butcher to let him out. But the mayor said that nobody would get out until he saw a signed lease. Firestone screamed at Norman Butcher, but Norman Butcher just turned away. Next, Firestone made another assault on the windows and doors. But nothing budged. Harry sat in a corner for a while counting his money and then counted it again.

The mayor saw that Harry and Brent V. Firestone were too excited to concentrate on the subject. There was a need for a sober and fearless citizen to outline the issues and problems clothing store landlords and tenant confront when they focus on use and exclusive clauses. Naturally, I was elected. And here is the substance of what I said.

BASIC STRATEGY FOR APPAREL STORE USE CLAUSES

A clothing store tenant in a shopping center would love to have a use clause in his lease prohibiting any other store in the center from selling men's or ladies' clothing of any kind. You can imagine that the shopping center owner would be completely stymied if he agreed to such a suggestion because that restriction might prevent many other tenants in the center from conducting their normal operations.

Indeed, a landlord must look both backwards and forwards when he negotiates the use clause in a lease. He must be careful that the clause does not permit a product to be sold in violation of the use

clause in an existing lease. And he must not be too liberal in describing the kind of merchandise the tenant may sell and so circumscribe himself unduly in his negotiations with future tenants.

A separate problem, and one that I will not discuss here, is that exclusive use clauses are now being attacked by the Federal Trade Commission and private parties as violation of state and federal antitrust laws. The United States Department of Justice has also attacked some exclusives as anti-trust violations. The results to date are inconclusive and you can't tell for sure how specific exclusives will fare in courts and with the Federal Trade Commission.¹



Once a landlord decides that he's willing to grant an exclusive despite the risks of antitrust violation, the question is then how to organize the use clauses of the leases for that shopping center so that they don't contradict each other. Before going into the specific details of these clauses, here are two general rules worth remembering:

□ If a landlord does grant an exclusive clause, it's much better for him to agree that the shopping center will contain no other (for example) "men's clothing store" than for him to agree that no other tenant will sell men's clothing in the center. So many other tenants sell clothing of some sort that if the

landlord agrees to bar these sales, he may as well forget about having a successful center. Department stores and variety stores sell many kinds of clothing. Many supermarkets and some drugstores sell pantyhose and underwear. Drugstores also sell surgical stockings. Sporting goods stores sell golf and tennis wear, bathing suits, and warm-up suits. Shoes are clothing too.

□ Another way of framing the exclusive clause that protects the landlord is to say that no other store in the shopping center may be used *principally* for the sale of (for example) men's clothing.

ORIGINS OF THE MEN'S CLOTHING STORE EXCLUSIVE

Negotiating use and exclusive clauses in menswear leases used to be a lot of fun. The old-time downtown shopping district landlords included many big, bad fellows. Nor were the people who operated chain clothing stores exactly sissies themselves. Their lawyers negotiated leases with the same intensity as denizens of all-night chess clubs or truly serious bridge players. Sadly, only a handful of these old-timers still are around. But in their heyday, which extended to the early days of shopping center leasing, a duel between counsel for the landlord and the chain apparel stores was a thing of beauty.

The downtown men's apparel merchant made it clear that he didn't want any competition. He insisted on a lease clause that would prohibit the landlord from renting competitive space to another tenant. Well, how many stores could a downtown landlord control anyway? His involvement in retail space normally was limited to the first floor of a tall office building. So, no matter how fierce the landlord might have been when negotiating the repair clause or alterations clause, he tended to be a pussycat on the exclusive clause and go along with a restrictive covenant barring any competing retailer in the same building.

Initially, this tradition was carried over to the shopping center. Landlords agreed to restrictive covenants that prohibited leasing to any other store to be used principally for the sale of men's or boys' clothing. The term "clothing" was usually defined broadly enough to embrace suits, jackets, slacks, and coats, as well as shirts, ties, underwear, socks, pajamas, and robes. The landlord would insist that an exception be made for the sale of men's clothing in a department store, junior department store, and variety store.

¹ See Halper, "Antitrust Laws Visit Shopping Center 'Use Restrictions,'" 4 Real Estate L.J. 1 (Summer 1975).

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As shopping centers grew bigger, landlords discovered there was room for more than one men's clothing store. After numerous verbal battles, landlords were able to get their existing tenants to agree that there could indeed be more than one clothing store so long as each store aimed at different levels of quality and carried different lines of merchandise.

Different Types of Menswear Stores

There are men's apparel stores and there are men's apparel stores. Men's stores which specialize in cheaper lines of merchandise are regularly persuaded to permit higher-priced retailers in the same shopping center. With somewhat less enthusiasm, the high-priced men's stores recognize that a low-price operation is not really much competition.

Distinctions between men's apparel stores are not limited to price. Although price usually correlates with quality, the industry itself has its own special standards of quality. Men's ready-to-wear suits are classified on the basis of the amount of handwork used in producing the garment. A No. 6 suit has the greatest amount of handwork, and a No. 1 suit has the least. The more expensive men's stores tend to specialize in suits with a high degree of hand-tailoring, and the less expensive stores concentrate on the No. 1 suit. Unfortunately, in classifying men's clothing, you can't rely entirely on the amount of handwork. A lot of machine-produced men's suits look swell, wear well, and sell for fancy prices.

Exclusive clauses acceptable to clothing store merchants have tended to limit the total number of men's stores; they try to avoid having more than one store which is reputed to feature either the expensive garment with a greater degree of handwork or the lines which are almost completely mass-produced.

Because so much of the distinction between types of stores correlates with their price structure, you can anticipate some attack on the antitrust front with respect to these distinctions.

Almost all shopping center men's clothing stores are nicely decorated and offer services such as alterations and delivery without charge. However, some merchants offer plain pipe racks and bare decor. Most men's clothing stores which offer services would be distressed by the presence of an underselling competitor who emphasizes low prices made possible by Spartan decor. Another type of underselling merchant whose presence is objectionable is the store which features quality garments purchased as job lots from distressed retailers or

last year's leftover stock of conventional stores and overstocks of manufacturers. These stores offer high-quality garments at cheap prices.

Men's clothing stores which feature a broad range of men's apparel tend to be tolerant of the presence of competitors specializing in particular types of garments, or those geared for particular age groups. Landlords should be careful to draft restrictions in men's clothing store leases so that an exception can be made for stores like shirt shops, slacks stores, unisex shops, formal wear stores, army/navy stores, sporting goods stores, vacation-type clothing stores, and children's wear shops.



Of course, landlords should insist that the exclusive clause be inapplicable to specialty shops and department stores. A specialty shop is a great big store which primarily carries soft lines of merchandise. Clothing is possibly the largest line of a specialty store, but it is not the only line.

Use Clauses in Menswear Leases

When negotiating the use clause, men's clothing retailers insist upon the right to sell men's and boys' suits, jackets and slacks, accessories such as shirts and ties, as well as underwear and robes. Many men's clothing stores carry a line of men's shoes too although the shoe department is usually run by

a concessionaire. Men's clothing stores insist on and need the right to conduct a busheling department (it makes alterations to garments purchased in the store). The menswear operator's use clause must make provision for the use of part of the premises for a manager's office and for storage of merchandise.

Some men's clothiers insist upon the right to sell ladies' clothing. The landlord who gives a men's store the right to sell womenswear may one day find a small ladieswear store in the shopping center that he never noticed before. If the men's clothing store operator realizes that he is not going to achieve the volume he expected originally, he can lower his net rental cost by subletting a part of the premises to a ladieswear store. This is normally not what the landlord anticipated when he drafted the use clause.

EXCLUSIVE CLAUSES IN LADIES' CLOTHING STORE LEASES

Restrictive covenant clauses in leases for womenswear stores in downtown shopping districts developed in much the same manner as those for menswear stores. The downtown shopping district traditions for womenswear also carried over to the early shopping center leases, but here too, the story is vastly different today.

The large ladieswear chains today rarely open a new store in a community-size or neighborhood shopping center. They focus on the regional centers which feature three or more department stores. The ladieswear merchant who agrees to locate in a smaller center is looking for some kind of exclusive dealing arrangement. Were it not for antitrust considerations, the typical landlord might as well give on this point because he can consider himself lucky to find even one ladieswear operator for a small shopping center. On the other hand, the largest of the regional shopping center developers may find themselves powerful enough to refuse to grant any exclusives.

Intensive negotiations often take place over use and exclusive clauses in ladieswear leases in the small regional and large community-size shopping centers located in a densely populated area. Ladies' clothing stores in these locations are terrified of competitors. But who is really a competitor? Customers who shop expensive fashion-oriented retailers may be ashamed to be seen in a store which features popular-price clothing. The tenant who confronts a landlord with a clause excluding from

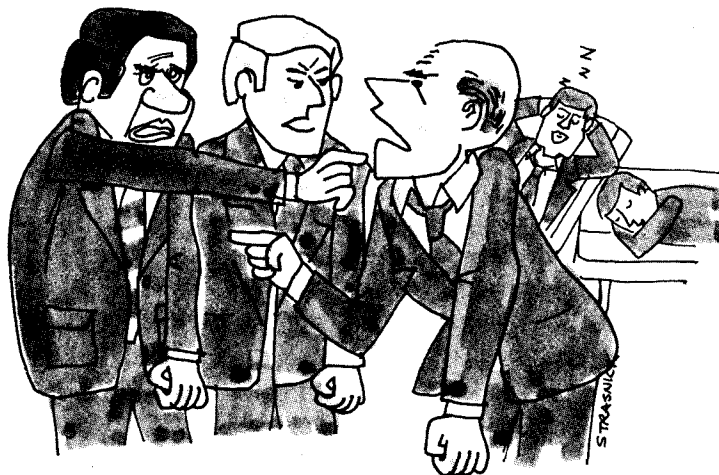
the shopping center any store used principally for the sale of ladies' or female teens' clothes should be prepared to negotiate exceptions. A prohibition against clothing stores catering to similar customers and carrying similar lines should be more than sufficient protection for the tenant. The landlord should be able to include in the center different types of ladies' clothing stores which assure that a wide spectrum of merchandise is available for customers.

Types of Ladieswear Stores

Four major types of stores are used principally for the sale of women's clothing:

□ *The specialty shop.* Some specialty shops place their greatest emphasis on women's and men's clothing. Of course, they usually carry plenty of other stuff. Most specialty shops aim their merchandising at high-income and comparatively well-educated and fashion-conscious customers.

□ *The high-end fashion-image store.* Here one finds expensive ladies' clothes. What else would you expect? Some of the expensive shops have live models to show their merchandise. You can get a hint about the quality of a ladieswear store before you enter. No, not from the merchandise that is displayed in the show window. You can't really determine the quality of a garment through a



window. Look at the expression on the face of the store-window mannequin. If she's got that arrogant rich-girl look, expect to find a sky-high price tag. The operator of this kind of shop dislikes competition from the popular-priced chains. But he is also interested in company and doesn't mind competi-

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tion from a specialty store at all. In fact, he usually insists that the shopping center be anchored by one or more fashion high-end department stores.

□ *The popular-priced ladieswear store.* Here, you can still buy a dress for \$5. Of course, you can spend a lot more. These outlets carry mass-produced garments often of surprisingly high quality and sell them for a relatively inexpensive price. They are picky about the shopping centers in which they locate. A merchant who is very choosy about location may find it impossible to negotiate a restriction against competition. On the other hand, a shopping center developer may well find some of the less creative merchants frightened at the prospect that such a store will be their neighbor.

□ *Specialists for various age, size, and other groups.* The landlord confronted by a tenant demanding that the number and types of womenswear stores in the shopping center be limited should not lose sight of the possibility of leasing to shops that limit their merchandise to a specialized segment of the market. A store may specialize in clothing for particular age groupings: teens, young adults, subteens, or children. In addition, there are specialists in stout women's clothing and outfits for tall girls and petite ladies. One can find maternity shops, bridal shops, coat specialists (including furriers), leisure wear stores, and jean shops. None of these should give much trouble to a full-line womenswear store. They should not be excluded by a restrictive covenant in the lease of a full-line ladieswear store. On the other hand, I doubt whether more than one bridal shop, maternity shop, or jean shop can make it in the same shopping center except one that is really enormous with tremendous traffic. Consequently, the landlord should consider a request by these specialized stores to exclude any other of the same type from the center.

Landlords can have an antitrust problem with just about any agreement they make which amounts to a restrictive covenant. The worst kind of restriction in the eyes of the government is one that excludes stores because they customarily charge less money for their merchandise or one that allocates the market on the basis of the price range of merchandise.

Womenswear stores may try to exclude other retailers from the shopping center for reasons other than simple fear of competition. The arrogant store-window mannequin in the high-fashion shop doesn't want to be associated with the store-window dummies who wear the "rags" carried by the

"schlock" stores. Their dislike for cheap merchandise is not limited to inexpensive clothing. They fear the aroma of cheap prices and less-than-high quality may intrude upon the atmosphere of the good life which is exemplified by their disdainful expressions.

Ladieswear Use Clauses

Use clauses in ladieswear leases do not present exceptional problems because there are few surprises in the merchandise mix of this type of store. Ladies' clothing stores, of course, want the right to carry all kinds of ladies' garments. Some stores will carry bags, shoes, and cosmetics. Most insist on the right to sell accessories, which include bags, costume jewelry, millinery, and umbrellas.



The developer or landlord should be careful of the ladieswear use clause that permits the sale of shoes. He may have agreed to an exclusive clause in a previously executed shoe store lease. Similarly, if the ladieswear store's use clause permits that store to sell cosmetics, the landlord should check to see whether the existing drugstore lease bars every other store from the sale of "health and beauty aids."

By understanding the merchandising practices of different types of clothing stores, a shopping center developer can find a way of convincing a clothing merchant that there can be several different clothing stores living harmoniously in a shopping center.

A LEASE IS SIGNED

After I finished, the mayor was sound asleep and Nick Tromba was nodding his head with a

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hypnotic rhythm. But Harry and Brent worked hard to come to agreement and get a lease signed.

As crude as Mayor Butcher's theory was it seemed to work. Please don't tell anybody because I fear that real estate negotiators might be subject to constant abuse if it were known that they are likely to come to agreement in a locked room.



Finally they agreed. Nick Tromba took notes and I drafted the use clause. Harry and Brent each asked for minor changes. I redrafted the clause and they shook hands on it. But they both fell asleep in their chairs immediately. Nick and I laid out the papers on the floor and crawled around to put them in the proper order. When the papers were assembled, we awakened Harry and Brent who signed instantly and went back to sleep.

Finished at last. It was 4:15 A.M.

Now I wanted to get out. But I couldn't because Mayor Butcher was so soundly asleep that I couldn't rouse him. So I spent the next few hours sleeping on the floor of the City Hall basement in Yahoo.

When Mayor Butcher awoke the next morning, he saw me asleep on the floor with two fully executed counterparts of the lease clutched in hand.

Mayor Butcher: Young man, you have served the Incorporated Town of Yahoo beyond the call of duty. This kind of service should get you an award.

I: I should hope so, Mayor, but so far all I've gotten out of this is a dirty pair of pants and a stiff neck.

Mayor Butcher: Don't despair! Because of this outstanding achievement, I shall appoint you Deputy Mayor of Yahoo on that glorious day when Wally Juniors opens its store here. You'll get an all-expense trip here on Backwoods Airlines and one night's accommodations at the Roaring Twenty's Motel.

I: I'm overwhelmed.

I couldn't wait until that grand opening day actually happened. Despite my anxiety, Mayor Butcher kept his promise and sent me a proclamation appointing me deputy mayor and perhaps more importantly, he sent my airplane ticket.

The grand opening of Wally Juniors of Yahoo was a big event, at least in the context in which the event took place. The parking field was crowded and traffic backed up for blocks. Schools were closed. Local celebrities shook hands with each other. TV cameras followed every move we made.

And then at the appointed hour, Mayor Norman Butcher displayed his pair of golden scissors to the crowd. He got a spirited round of applause. The Chamber of Commerce threw confetti and the high school cheerleaders gave out with a good old AL-LAGAROO! Then the Mayor spoke:

Mayor: Folks, do you see *this* pair of scissors. I can't tell you what it means to me.

[Cheers]

Mayor: I can't begin to estimate its value!

The mayor held his beloved pair of scissors high above his head and continued his message.

Mayor: Why I wouldn't accept \$500 for *this* pair of scissors! I wouldn't accept \$1,000 for *this* pair of scissors! I wouldn't accept \$2,000 for *this* pair of scissors!

[Silence]

Mayor: Come on folks! Won't anyone even make me an offer?