What Use Restrictions Can Landlords Impose on Urgent Care Facilities?

Urgent message: Lease "exclusivity of use" provisions prohibiting competing urgent care centers, walk-in medical clinics, primary care offices, etc. are often used in leases to protect an urgent care center, but there are implications for both landlord and tenant.

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"Landlord agrees that no other space in the Fairland Center Building will be leased to anyone who will compete directly with Wedgewood Urgent Care, LLC."[1]

It's not uncommon for an urgent care center to request their landlord to provide use restrictions prohibiting other urgent care centers, primary care offices, chiropractors, podiatric offices—and, in some states, medical marijuana businesses—from being housed in the same building, strip shopping center, or retail development as the urgent care.

The rationale behind such a request is that urgent care volume is driven by potential clients who see a convenient urgent care location and note to use it if an unexpected illness or injury occurs. Since location is a critical component of an urgent care center's livelihood, an owner may pay a premium for prime retail signage and building visibility to enjoy heavy traffic. To protect that premium investment, an owner may ask for guarantees that the landlord won't lease to another medical business in close proximity, typically in the same strip mall or office building.[2]

The urgent care wants to be the "only game in town" in that location and will cry *Foul!* if another urgent care center opens across the parking lot.

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The way an urgent care owner can protect her business from unwanted competition is to negotiate terms into her lease that restrict what types of business can open in the same location. Here, we discuss how restrictive covenants, such as exclusivity, use, and noncompete provisions in a commercial lease can protect an urgent care owner's business.

Restrictions in a Commercial Lease

An *exclusive* or *exclusivity clause* is a term in a lease that creates an obligation by the landlord to restrict further rentals of any business that engages in the same type of business. It's common that this benefit is given to only powerful "anchor" tenants, such as a large supermarket chain, department store, or health club.[3] In this context, it may include prohibitions of specific services rather than a type of business, such as diagnostic imaging, drug screening, or physical therapy. Again, a powerful large tenant such as Walgreens or CVS may ask that all medical businesses are excluded from a development.[4] And a landlord may ask for higher rent in exchange for giving up its right to rent to whomever he wants.

The landlord must incorporate the prohibition from offering urgent care services into future leases with new tenants so these tenants don't violate the landlord's promise to the exiting urgent care.[5]

Restrictive vs permissive use clauses

There are two types of use clauses: restrictive and permissive. A *restrictive use clause* states what a tenant can't do during the duration of the agreement.[6] In effect, a tenant can do anything

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that's *not* on the list. It's best for an urgent care owner faced with the prospect of a restrictive use clause to negotiate the broadest rights to use the space or that prohibits only a few activities.[2]

On the other hand, a *permissive use clause* details the types of activities that are permitted; anything not included in the clause is prohibited.

A permissive use clause isn't recommended for urgent care owners because the onus is on the owner to list every conceivable use in which her business may possibly want to engage when signing the lease. There are differences among urgent care operators as to the exact scope of services that constitutes "urgent care." If an owner subsequently decides to offer an ancillary or specialty service at her urgent care—such as medicine dispensing, weight management, or physical therapy—she would be forbidden from doing this. Again, an owner should be reluctant to entertain this type of use clause because it can be very disadvantageous and severely narrow her potential business opportunities.[2]

A second tenant may want the landlord to reimburse it for any capital cost to replicate, lost business, and relocation expenses in the event that a valid exclusivity claim is made and enforced by another tenant on the landlord. However, the smarter course of action may be to avoid such an entanglement altogether and select a location where that company can be the first and only of its kind and to negotiate its own exclusivity term in its lease.

Contract Enforcement

Getting the terms you want into your lease may be a tough fight; however, once they're included, seeing that they're enforced may be more than half the battle. The Connecticut Supreme Court stated that in construing a written lease, three basic principles must be considered:

1. The intention of the parties is controlling and must be gathered from the language of the lease in the light of the circumstances surrounding the parties at the execution of the agreement
2. The language must be given its ordinary meaning unless a technical or special meaning is clearly intended
3. The lease must be construed as a whole and in such a manner as to give effect to every provision, if reasonably possible[7]

In addition, another court has explained that a commercial tenant trying to enforce an exclusivity restriction in a lease must show that "the activity which allegedly infringes on its exclusivity provision falls clearly within the specific terms of the covenant."[8]

When a violation occurs, and the landlord leases space to a second urgent care or perhaps a Walgreens with a health clinic next to its pharmacy, the first urgent care owner must bring a legal action for breach of contract. The owner may also request injunctive relief, which would stop the landlord from leasing to the second urgent care and be a more immediate remedy.

As part of the negotiation process, an urgent care owner should also include what would happen in this situation. The lease should list the remedies available to the owner.

Real-life examples

Again, it must be emphasized that in court, these provisions are interpreted narrowly and with plain meaning. For instance, a local children's hospital operates a multispecialty facility in a landlord's retail space. The hospital has a use exclusivity clause in its lease for "pediatric urgent care," "pediatric diagnostic imaging," "pediatric physical therapy," and anything similar. If an urgent care operator wants to lease space in the same location and caters to all ages, it may run into a conflict with the hospital. The "all-ages" urgent care is not by definition a "pediatric urgent care" (and is a different business model defined by the Urgent Care Association).[9,10] However, if a court interprets this pediatric restriction literally and verbatim, the all-ages urgent care couldn't see children if this restrictive covenant was enforced.

While the landlord looking to fill its space assures the all-ages urgent care that it has nothing to worry about because it's not a pediatric urgent care, the owner of the urgent care has reason to be concerned in that it may not be able to treat children (ie, administer urgent care to a pediatric patient) if the prohibition were taken literally and enforced as such.

The New Jersey Supreme Court applied a series of reasonableness factors in deciding whether to give effect to anticompetitive clauses in contracts generally. Those factors include:

1. whether the covenant had an effect on the considerations exchanged when the covenant was originally signed
2. whether the covenant clearly and expressly sets forth the restrictions
3. whether the covenant was in writing and recorded
4. whether the covenant is reasonable concerning area,

time, or duration[11]

Finally, in a different state, a lawsuit was brought against the landlord where an urgent care went out of business. The urgent care owner sued the landlord for his business failure because the tenant alleged that the landlord allowed a primary care office to open in a more visible part of the strip center, which diverted patients who would otherwise have uses the plaintiff's center. The urgent care tenant in that case wouldn't have any standing to sue the second tenant. The plaintiff's action is in contract against the landlord.

What if your urgent care is the second tenant?

The issue may arise when an urgent care owner signs a lease for space where there already is a competitor or other business that may decrease its traffic. Ideally, this urgent care owner has done her due diligence and researched the location prior to even entering into contract negotiations. If so, she will have seen the drugstore clinic or medical office that is presently leasing space at the location and will look elsewhere.

If this owner fails to conduct due diligence, hopefully she has negotiated an exclusivity clause into her lease. This would give her some protection to sue the landlord for renting to her when the landlord knew that it already had competing tenants and that the second owner would not be the exclusive provider of urgent care services. A judge may void that lease and award damages to the urgent care owner; however, the landlord may claim that she failed to mitigate her damages by not conducting her own due diligence. This situation is more of a 50-50 proposition in court, and the best plan is to avoid it altogether. In addition, the landlord may have to defend another lawsuit from the original tenant if its lease contained an exclusivity clause.

Note that in some states, such as Rhode Island, restrictive covenants are not favored by the law.[12] As a result, these provisions will be "strictly construed in favor of the free alienability of land while still respecting the purposes for which the restriction was established."[13] Further, the courts in Rhode Island have held that restrictive covenants and exclusivity provisions are enforceable "only if the terms are reasonable in light of the circumstances surrounding the agreement and do not extend beyond what is necessary to protect the beneficiary."[13]

Takeaway

Work with an experienced business attorney to help you negotiate an exclusivity clause. In addition to drafting a binding clause to your benefit, he or she will make certain that the lease also contains the terms of enforcing that clause and spell out the remedies for the landlord's breach.

Also, your attorney will want to add an established amount of monetary damages into the lease so you don't have to prove you lost profits and actual damages. This can save you time and expenses if this unfortunate situation arises.[14,15] ■

Know the regulations in your state.

- The New Jersey Supreme Court applied a series of reasonableness factors to contracts, including whether the covenant had an effect on the considerations exchanged when the covenant was originally signed; whether the covenant clearly and expressly sets forth the restrictions; whether the covenant was in writing and recorded; and whether the covenant is reasonable concerning area, time, or duration.
- In Rhode Island, restrictive covenants and exclusivity provisions are enforceable "only if the terms are reasonable in light of the circumstances surrounding the agreement and do not extend beyond what is necessary to protect the beneficiary."
- The Connecticut Supreme Court stated that in construing a written lease, three basic principles must be considered: 1) The intention of the parties is controlling and must be gathered from the language of the lease in the light of the circumstances surrounding the parties at the executionof the agreement; 2) the language must be given its ordinary meaning unless a technical or special meaning is clearly intended ; and 3) the lease must be construed as a whole and in such a manner as to give effect to every provision, if reasonably possible.

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