



Steven P. Watten
Strasburger & Price, LLP
2801 Network Boulevard
Suite 600
Frisco, TX 75034
(469) 287-3939
Steve.Watten@strasburger.com
[vCard](#)
[Bio](#)
[Website](#)

[LinkedIn](#)
[Twitter](#)
[Blog](#)
[JD Supra](#)

Issues in Outlet Centers

As our shopping center industry is beginning to turn the corner from its recent economic stress, the Outlet Center industry has been gaining much exposure and momentum in these changing times. As shopping center development in the United States has been relatively stagnant over the past two years, the Outlet industry has been on the move. According to the November, 2009 issue of Value Retail News, total Outlet Center square footage grew by 1.6 million square feet in the eighteen months between April of 2008 and September of 2009 to a total number of pure Outlet Centers in the U.S. of 216.

This article will explore a few of the similarities and differences in issues which may or may not be unique to outlet centers, as well as the pressure points that must be faced so that the Outlet Centers industry is able to fold more non-traditional outlet retailers into the Outlet mix without watering down the Outlet concept's unique attraction to the consumer.

I. WHAT DOES AN OUTLET CENTER LOOK LIKE TODAY?

Today's product is generally first-quality, current styles and seasonal merchandise including men's, women's, children's and teen apparel, sporting goods, athletic footwear, handbags and leather goods, luggage, shoes, cosmetics, accessories and housewares. Outlet Centers built today now offer most customer service and common area features found in traditional retail full price centers.

II. LOCATION OF NEW OUTLET CENTERS

Due to sensitivity issues with cannibalization of the manufacturer's brand in the department stores, historically, Outlet Centers had been built in areas at least 30 miles from a major city or in resort areas. A major part of "outlet shopping" continues to be destination shopping. As Outlets are one of the only shopping experiences historically tied to travel and tourism, so long as people continue to take vacations, "outlet shoppers" will continue to exist. The Outlet Center industry has done an incredible job in conditioning its consumer to see outlets as a planned part of a vacation. Although the "outlet shopper" is increasingly becoming more of a "local" customer, recent studies have shown that the "outlet shopper" continues to come from a radius of 100 miles as compared to a regional mall's customer who comes from a radius of 30 miles.

However, some industry experts believe that price is no longer the primary shopping motivator. Ease of shopping, location and the high price of fuel have become primary reasons for selecting a shopping venue closer to home according to recent research conducted by Tanger Outlet Centers. Also, as department stores have consolidated and have developed strong brands of their own, sensitivity becomes less of an issue. Although industry analysts do not see the Outlets leaving the resort areas, today's Outlet Center developer definitely has a number of centers under consideration in major metropolitan areas.

III. LEASE LANGUAGE ISSUES IN OUTLET VS. FULL PRICE LEASES

A. Pricing and Use

Simple Use Clause from Landlord: "For the sale of women's apparel and related accessories (displays of which shall not exceed 5% of Tenant's sales floor area) manufactured by or for Tenant and bearing the brand or label of Tenant's tradename at a discount of at least 30% of Tenant's manufacturers' suggested retail and for no other purpose. Tenant may not sell any brand name of any other tenant in the shopping center."

Simple Use Clause from Tenant: "For the sale of women's apparel and related accessories and other items typically sold in Tenant's stores for no other purpose without Landlord's consent, which consent shall not be unreasonably withheld."

The Landlord MUST preserve the integrity of the "manufacturers' outlet shopping center," which the Landlord defines as a shopping center that is tenanted primarily by manufacturers that sell their products at a price that is discounted meaningfully from the price at which the customer can typically purchase those products.

What is a "manufacturer"?

A "manufacturer" is a company that makes consumer merchandise (either in its own factories or in factories which they contract to do so), bearing trademarks or trade names that it owns or controls under license, for sale at wholesale or directly to the retail public.

What are the full price vertical retailers selling (i.e. Gap, Chicos, Abercrombie, Banana, Victoria's Secret, J. Crew, etc)?

1. Same product and season/discounted price?
2. Same product and out of season and overruns/ discounted price?
3. Different product (same quality)/discounted price?
4. Inferior quality/lesser price?
5. Same product and season/same price?

Consumerism ... does the public simply want the Polo pony on their shirt or the Coach emblem on their handbag and not care about the quality, or do they really want the first run quality?

Real value or perceived value?

Who sets the pricing, Landlord or Tenant?

What's good for an individual tenant is not always optimal for the outlet tenants as a whole.

B. Exclusives v. Use

Protecting Tenant's legitimate business interests vs. Handcuffing the Shopping Center.

Two types of Exclusive Protections: (1) protecting others from selling a manufacturer's own goods; (2) protecting others from selling a category of goods.

Backdoor exclusive for a manufacturers own goods: Tanger's concept from Landlord's Simple Use Clause example above states that "Tenant may not sell the brand of any other tenant in the shopping center." The Tenant doesn't need an exclusive on the sale of its merchandise since all other tenants are required to have the same or similar restrictive uses in their leases.

How do landlords protect themselves when the Use Clauses are not so restrictive?

Protecting a Category: When is it appropriate or necessary? Do tenants and their attorneys really know when exclusive

protection is warranted?

Primary Use vs. No Use vs. More than Incidental Use. For Exclusive, how do you define Primary Use?

1. The most sold item?
2. A majority of the business — sales floor area, display area; include adjacent aisles? based on gross sales or sku's?

Define the Restricted Item carefully

Write the exclusive in a way that can easily and clearly go into an exhibit Impact on the leasing of the shopping center. Is it really good for the tenant? Exclude existing leases, other areas of the center

Distinguish between absolute exclusive vs. limiting the use tenancy

Require that tenant be operating the Restricted Use and not be in default.

Issues of lease termination, assignment.

Remedies: Alternate rent? No rent? Revert back to full rent after a sunset period or terminate? Sales decline test?

End of term. Nearing end of Term if the tenant does not renew?

Allow for additional Restricted Use Tenant if shopping center size increases.

What if the tenant fades as industry leader? Perhaps limit the period of exclusivity?

C. Radius Restriction

Weighing the needs of the retailer to expand and the needs of the Outlet Center to remain a unique consumer attraction in the marketplace and to protect its anticipated percentage rental stream.

What other stores can tenant operate in the radius?

Exclude full price stores. How is that defined?

Exclude other trade names of same tenant
What if it's a similar trade name? Look for brand association to the consumer.

What if tenant is operating under a different trade name, but selling the same merchandise?

Especially consider the tenant that sells several lines under the same umbrella trade name

How do we protect the pricing advantage of the outlet structure? Can a Tenant open the exact same store with the exact same pricing within the radius but in a "value center" or other center that's not a traditional Outlet Center?

Do we begin to develop a multi-level radius? One larger radius for Outlet Centers, and one smaller one for non-outlet centers where the pricing may be similar. So the "full" exclusion should be a full-price concept, i.e., where the outlet's prices will be less than the other store, but maintain a limited radius for "value" priced stores and a larger radius for Outlet Centers.

Distinguish between percentage-rent-only leases, no-percentage-rent leases, and everything in between. What is the party's expectation? Agreements to preserve the rental stream.

DISCLAIMER: This article contains information on general legal issues and is not intended to provide advice on any specific legal matter or factual situation. This information is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. Readers should not act upon this information without seeking professional counsel.

ADVERTISEMENT NOTICE: This article/communication may constitute a commercial electronic mail message subject to the CAN-SPAM Act of 2003. If you do not wish to receive further commercial electronic mail messages/communications from the sender, please send an e-mail to steve.watten@strasburger.com and request that your address be removed from future mailings. To update your address, please send an email to steve.watten@strasburger.com including the updated information. Strasburger & Price, LLP, 901 Main Street, Suite 4400, Dallas, TX 75202.