



by Edward T. Kole

In today's consumer marketplace, it has become the norm for convenience stores, drug stores, supermarkets and retail 'super' stores to offer a wide variety of diverse products, with product lines between these stores often overlapping. Indeed, it is not uncommon for drug stores to sell food products, grocery products and greeting cards (while also renting DVDs); for supermarkets to sell pharmaceutical products and greeting cards (while also renting DVDs); and for retail super stores to sell all of the products sold (or rented) in either type of store. This is the way business is done in the modern age, and is the mode of convenient shopping consumers have come to expect and demand.

For business owners conducting business in a shopping center, this 'product creep' can be problematic, especially for businesses having an exclusive right under their leases to sell certain products and/or product lines. No business wants to compete with its next-door neighbor concerning the same products and/or product lines. And, no business desires such competition when it already has an exclusivity provision under its lease.

Fortunately for business owners in such situations, courts are often willing to enforce restrictive covenants prohibiting other tenants from selling certain products and/or product lines. The New Jersey Supreme Court, for example, in *Davidson Bros. v. D. Katz & Sons*,¹ has even recognized that such restrictive covenants are, in certain situations, pro-competitive and should be enforced.

Courts today recognize that it is not unreasonable for parties in commercial property transactions to protect themselves from competition by executing noncompetition covenants. Businesspersons, either as lessees or purchasers may be hesitant to invest substantial sums if they have no minimal protection from a competitor starting a business in the near vicinity. Hence, rather than limiting trade, in some instances, restrictive covenants may increase business activity.

Courts will enforce restrictive covenants when they are reasonable under the circumstances, and have formulated a multi-factor approach for determining when any given restrictive covenant is reasonable. In particular, in determining

whether any given restrictive covenant should be enforced, courts will examine whether the restrictive covenant serves a legitimate business interest of the business in whose favor it would be enforced. If the covenant no longer serves a legitimate business purpose, it is not likely to be enforced.

Consequently, in the event a shopping center tenant becomes aware of another tenant selling products subject to an exclusivity clause, or becomes aware of a new tenant entering the shopping center that may sell products in violation of such a clause, it is incumbent upon the tenant to enforce that exclusivity clause and/or restrictive covenant. A failure to do so could result in a court later finding that the protections afforded by the covenant have been waived. And, provided that the covenant the tenant is seeking to enforce is reasonable under the circumstances, and serves a legitimate business purpose, a court is likely to enforce that covenant.

Furthermore, while the focus has been on enforcing restrictive covenants, the forgoing factors can also be taken into account to determine whether certain actions can be taken despite the existence of a restrictive covenant. As noted earlier, courts will not enforce a restrictive covenant where, through the passage of time and change of circumstances, there is no longer a legitimate business interest for enforcing the covenant. Consequently, a business owner seeking to open a new location in a shopping center or to commence selling a new product line—but who believes he or she is prohibited from doing so given the existence of pre-existing restrictive covenants—should critically examine the purported restriction. If there is no longer a legitimate business interest in enforcing it, a court may, through a declaratory judgment action, declare the covenant unenforceable, and permit the intended action to go forward.

Thus, in sum, in this age of diversifi-

cation and product creep, it is important for business owners and landlords alike to have an understanding of the law of restrictive covenants. Such covenants can be used to protect a business through enforcement, and new business can be promoted through invalidating unnecessary outdated covenants. Regardless of the perspective, the law regarding restrictive covenants is likely to remain in the forefront in regulating relationships between and among landlords and tenants in modern shopping centers, and business owners are well advised to remain informed of the issues concerning such covenants. ☞

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Endnote

1. 121 N.J. 196 (1990).



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