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THE SHOPPING CENTER RADIUS CLAUSE: CANDIDATE FOR ANTITRUST?

by Elizabeth Steele

The suburban shopping center is a twentieth century phenomenon. Although incipient models of modern shopping centers emerged early in the century, the substantial population shift to suburban areas and increasing dependence on automobiles which followed in the wake of World War II were the impetus for their development. The business of shopping center construction, which surfaced in 1940, skyrocketed after the war. By 1976 these centers accounted for forty-four percent of all retail sales in the United States, a clear indication that the suburban retail shopping center plays a significant role in modern economic development.

Retailing is perhaps the most competitive business in the United States. That one of its most significant developments during the past decade has been the growth of planned shopping centers strongly indicates that shopping center development is itself a highly competitive industry. In response, private entrepreneurial developers have frequently included various restrictive clauses designed to protect themselves or their tenants in the lease of shopping center space. In the past, legal conflicts over such clauses have been analyzed in terms of property or contract principles.

As the number and importance of shopping centers in the fabric of commerce has increased, however, such clauses have inevitably become subject

5. See Why Shopping Centers Rode Out the Storm, Forbes, June, 1976, at 35. This data excludes household and automotive centers.
8. Antitrust Update, supra note 6, at 5.
to scrutiny under the antitrust laws.  

One such clause, the "radius" clause, which is typically included in shopping center leases, has as yet escaped definitive antitrust treatment. Nevertheless, a challenge appears inevitable. In light of such prospective litigation, this Comment analyzes the potential federal antitrust challenges to which the radius clause may be subject.

I. THE MODERN SHOPPING CENTER AND EARLY LEGAL CHALLENGES

There are three basic categories of shopping centers—neighborhood, community, and regional. The nature of each is determined more by the nature of its major tenants than by its location or building size. A neighborhood center has as its principal tenant a food supermarket, generally surrounded by several satellite stores, and is designed to satisfy the surrounding neighborhood's needs for convenience goods. Next in size is the community center, whose tenants include a junior line department store or variety store, in addition to supermarket and miscellaneous smaller stores. Finally there is the regional center, the focus of much recent litigation and the central concern of this Comment. The regional center has as its anchor tenant at least one full line department store of local or national ownership, and various satellite stores which provide the center's component offering of shopping goods. A variation of the regional center is the super-regional center which includes three or more department stores and significantly greater floor space.

Before embarking on the project of developing a regional shopping center, the foresighted entrepreneur engages in a market analysis designed to project the center's ultimate cost and the likelihood of success. The most rudimentary analysis first takes into account the projected trade area, that is, the area containing people who are likely to purchase a given class of goods or services from a particular firm or group of firms, and then

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10. See Practising Law Institute, Shopping Centers 1976, at 254 (1976) [hereinafter cited as SHOPPING CENTERS 1976].
12. Urban Land Institute, Shopping Center Development Handbook 3 (1977) [hereinafter cited as DEVELOPMENT HANDBOOK].
13. Id.
14. Id. at 4.
15. Id. at 81.
16. Id. at 4-5.
17. While suburban and neighborhood centers are more numerous, the restrictive impact of radius clauses is more easily demonstrated, and hence analyzed, in the case of the regional center; the basic antitrust analysis would, however, be the same for each kind.
18. Tenants fall into three categories: the national chain store, which is part of business operations in four or more metropolitan areas in three or more states; the independent store, which has business operations in not more than two outlets in one metropolitan area; and the local chain store, which does not fall into either of the other categories. DEVELOPMENT HANDBOOK, supra note 12, at 71.
19. Id.
20. For a more thorough discussion of market analysis, see Community Builder, supra note 4, at 287-98.
considers its net spendable income and existing and potential competition. These factors are evaluated in light of the proposed tenant composition and estimated sales volume to determine whether the area can support a new shopping center. The guiding criterion in shaping the tenant composition is close duplication of the ranges in price and merchandise once found only in the central business district.

Development of the tenant mix begins with the search for anchor tenants, whose selection is as important to the developmental stages as it is to the center's ultimate operation. Firm commitments from blue chip triple-A tenants, usually department stores, are crucial to securing mortgage financing. Furthermore, the anchor tenant's image is important in drawing smaller satellite tenants to the center, and, once the center has opened, the anchor tenant generates the major volume of customer traffic. Because the developer is so concerned with securing commitments from anchor tenants, he may be willing to grant various concessions such as low base rentals, low percentage rent, "exclusive" clauses assuring that the store will be the only one of a particular type, or provisions for store participation in subsequent tenant selection decisions. To secure his own interests, the developer may demand a variety of primary provisions specifying that the tenant operate continuously, that the tenant engage in a particular type of business, and the terms of rental; he may

21. See id. at 277, which cautions the developer against projecting a shopping center's success solely on purchasing power within the trade area without gauging the competitive draw of other retail facilities within the area.

22. See DEVELOPMENT HANDBOOK, supra note 12, at 69. The classic central business district model of tenant composition is copied not because downtown represents the shopping center's primary competition but because it represents an optimal mix of retailers. Significantly, it is this mix which the shopping center's competitors, i.e., other shopping centers, will seek to duplicate.


25. Cf. COMMUNITY BUILDER, supra note 4, at 284 n.21 (indicating that the anchor's image will determine the type of customers who will be drawn, hence the type of satellites who will be attracted to the shopping center).

26. See DEVELOPMENT HANDBOOK, supra note 12, at 81; Eagle, supra note 23, at 601.

27. See Eagle, supra note 23, at 600.

28. See S. FEINBERG, supra note 2, at 31.

29. See SHOPPING CENTERS 1976, supra note 10, at 249, for an explanation of the purpose of the exclusive clause.

30. An illuminating example of developer concessions to department store control of center decisions is the recently invalidated Sears lease containing provisions which conditioned any store's entry into the center on Sears' approval, and gave Sears the right to approve the tenant's total floor space, to specify the price range, fashion, type, or quality of merchandise sold, to limit discount advertising, pricing, or selling, to prescribe the hours of operation, and to approve the store's location. See Consent Order, Sears Roebuck & Co., (1977) 3 TRADE REG. REP. (CCH) ¶ 21,218, at 21,122.


32. See, e.g., id. § 6.01, at 169.

33. See, e.g., id. §§ 2.01-02, at 167.
also demand secondary provisions which give him a comprehensive regulatory power over the business conduct of the individual merchants. From the developer's viewpoint, such lease covenants, while undeniably restrictive to smaller operations, are the price such operations must pay for the benefits of participating in a prime shopping center area.

The first antitrust challenge to a restrictive lease covenant in a shopping center context arose in *Savon Gas Stations Number Six, Inc. v. Shell Oil Co.* In *Savon* the court of appeals affirmed the trial court's finding that an exclusive covenant providing that defendant Shell be the only gas station in the center was not an unreasonable restraint of trade under federal and state antitrust law. Next, in *Dalmo Sales Co. v. Tysons Corner Regional Shopping Center* plaintiff Dalmo Sales Co. contended that it had been excluded from the shopping center because certain key tenants had exercised exclusionary veto powers contained in their leases, and that this constituted a group boycott. The court denied the request for injunctive relief to prevent leasing of the contested retail space to another store, stating that Dalmo had not met its burden of showing substantial likelihood of success at trial on the merits.

The *Dalmo* case, however, was taken up by the Federal Trade Commission, which issued a complaint against Tysons Corner and its three major department store tenants. Almost contemporaneously, the FTC filed a similar complaint against Gimbels Bros., beginning what was to become an extensive investigation of such restrictive covenants. At issue in both *Tysons Corner* and *Gimbels* were lease provisions granting key tenants the

34. See, e.g., id. §§ 5.01-.05, at 168-69 (dealing with construction, alteration, relocation and financing of improvements and additions); id. § 6.03, at 169 (noncompetition clause); id. §§ 11.01-04, at 171 (dealing with the installation and removal of signs, awnings, fixtures, etc.); id. §§ 18.01-03, at 174 (dealing with restrictions on advertising and membership in the merchant's association).


37. 309 F.2d at 310.


40. In this and subsequent shopping center challenges, the FTC has relied on § 5 of the Federal Trade Commission Act which declares unlawful "[u]nfair methods of competition . . . and unfair or deceptive acts or practices in commerce." 15 U.S.C. § 45(a)(1) (1976). Although early decisions interpreted this section narrowly, the Supreme Court soon made it clear that the Commission could invoke § 5 to challenge conduct that constitutes an "incipient" Sherman Act violation. See, e.g., *FTC v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392 (1953); *FTC v. Beech Nut Packing Co.*, 257 U.S. 441 (1922). Gradually, § 5 was construed to prohibit trade practices which may conflict with, though not necessarily violate, the basic policy of federal antitrust law. See, e.g., *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966). *FTC v. Sperry & Hutchison Co.*, 405 U.S. 233 (1972), provides the most expansive reading to date of the Commission's authority to go beyond the letter and the spirit of federal antitrust law in defining unfair competition.


right to disapprove leases to prospective tenants, the right to limit floor space available to other tenants, and the power to exercise continuing control over the conduct of the satellite tenants' business operations.\textsuperscript{43} The FTC charged that these clauses were restraints of trade under the Sherman Act,\textsuperscript{44} as well as unfair methods of competition within the scope of the FTC Act.\textsuperscript{45} Gimbels and all but one of the respondents in the \textit{Tysons Corner} investigation settled the administrative litigation by consent decree, under which they agreed to cease and desist from numerous anticompetitive practices in connection with their lease of shopping center space.\textsuperscript{46}

City Store, however, elected to litigate, contending that the mere existence of unexercised exclusionary powers did not constitute an antitrust violation.\textsuperscript{47} The result was significant. In its final order to cease and desist the FTC ruled that the approval rights encompassed in the lease created an imminent danger of per se anticompetitive harm. Because the arguably legitimate business objectives which might be furthered by the agreement could be secured by substantially less restrictive means, the Commission ordered the lease reformed.\textsuperscript{48} While the impact of an FTC consent order is qualified in that it is deemed to apply only to those parties subject to the order,\textsuperscript{49} the wider implications of this order are important. It demonstrates that the FTC is not only willing to investigate lease provisions of a restrictive nature, but is also prepared to call to muster per se illegality\textsuperscript{50} in pursuit.

Subsequent cases in which the FTC has attacked similar restrictive lease provisions have likewise terminated in consent orders.\textsuperscript{51} All have been attacks on lease restrictions included for the benefit of a major tenant.

\begin{thebibliography}{100}
\bibitem{43} Complaint, Gimbels Bros., \textit{Antitrust Update}, \textsuperscript{supra} note 6, at 26. Complaint, Tysons Corner Regional Shopping Center, \textit{Antitrust Update}, \textsuperscript{supra} note 6, at 32. See also [1970-1973 Transfer Binder] \textit{Trade Reg. Rep.} (CCH) ¶ 20,003, at 22,004 (1972).
\bibitem{44} 15 U.S.C. §§ 1-7 (1976).
\bibitem{45} 15 U.S.C. §§ 45-59 (1976); See Complaint, Gimbels Bros., \textit{Antitrust Update}, \textsuperscript{supra} note 6, at 26; Complaint, Tysons Corner Regional Shopping Center, \textit{Antitrust Update}, \textsuperscript{supra} note 6, at 32. See also [1970-1973 Transfer Binder] \textit{Trade Reg. Rep.} (CCH) ¶ 20,003, at 22,004 (1972).
\bibitem{47} Final Order, Tysons Corner Regional Shopping Center [City Store], [1973-1976 Transfer Binder] \textit{Trade Reg. Rep.} (CCH) ¶ 20,933, at 20,771 (1975).
\bibitem{48} Id. at 20,776.
\bibitem{49} See \textit{International Council of Shopping Centers, FTC Update} 5 (1977) [hereinafter cited as FTC Update]. See also \textit{Antitrust Update}, \textsuperscript{supra} note 6, at 20. A final order of the FTC may be used as prima facie evidence of the violation in subsequent private action under the Sherman Act. FTC Update at 8.
\bibitem{50} See text accompanying notes 158-66 infra.
\end{thebibliography}
Recent challenges to restrictive covenants by private plaintiffs have tackled exclusions,\textsuperscript{52} exclusives,\textsuperscript{53} and other landlord concessions\textsuperscript{54} with varying success.

Developer-landlords, however, are becoming apprehensive.\textsuperscript{55} The continued validity of the radius clause has generated particular concern.\textsuperscript{56} Although such lease provisions have been challenged as antitrust violations,\textsuperscript{57} their legality has not been finally litigated.\textsuperscript{58} Nevertheless, definitive court treatment of the radius clause seems inevitable.

II. DEFINITION OF THE RADIUS CLAUSE

The radius clause is a counterpart to the exclusive clause.\textsuperscript{59} By an exclusive clause, the landlord covenants that the tenant will be the only lessee primarily engaged in a certain business within a certain area, the shopping center itself or other property that is under the landlord’s con-
trol,\(^6\) in order to minimize competition and thereby increase the tenant's business prospects. By a radius clause, the tenant covenants that he will not conduct a competing business within designated environs, usually measured in terms of a straight line radius from the shopping center.\(^6\)

The primary justification for requiring such corresponding commitments is to protect the landlord who depends on income from a percentage rental agreement.\(^6\)

The percentage provision is a standard real estate provision in most retail leases,\(^6\) particularly those of the shopping center industry.\(^6\) Although a number of variations are possible, the most prevalent provides for a guaranteed minimum rental income sufficient to pay the landlord's carrying charges and permit a modest return on his investment, plus a specified percentage of any gross sales above that base rental amount.\(^6\) Developers contend that the percentage lease reflects the basic economic principle that the buyer pay for what he purchases. The shopping center tenant purchases the intangible advantages of location and competitive appeal.\(^6\) If the property is productive, the tenant's business should reflect such productivity\(^6\) and easily accommodate the percentage above base premium. If the property is unproductive, the tenant is responsible only for the minimum rental, thereby cushioning his loss during periods of economic downturn.

The lessor derives several advantages from the percentage lease. One is the assurance that, unlike a fixed rental income, the return on a percentage lease will not be adversely affected by changes in the future buying power of money or increases in maintenance costs in an inflationary economy.\(^6\) Further, such a lease enables him to participate in the success of the center. This premium for the center's success provides an increased yield on his investment, and supplies the incentive to develop and promote after initial creation.\(^6\)

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\(^6\) See cases cited at note 142 infra.


\(^6\) Community Builder, *supra* note 4, at 416-17.

\(^6\) S. McMichael & P. O'Keefe, *supra* note 63, at 34, enumerates three other possible percentage rental arrangements in addition to the base plus specified percentage. The first two are similar—specified percentage of gross sales without a guaranteed minimum and specified percentage of gross sales in addition to a minimum to be established after a fixed time. The third version designates rental as a straight percentage of profits. These are generally offered by a developer who is in a subordinate bargaining position, attributable either to poor location or to a recalcitrant tenant. As a result of the lease terms, he may encounter difficulties in securing adequate mortgage financing. See also Landis, *Problems in Drafting Percentage Leases*, 36 B.U.L. Rev. 190, 190 (1956), indicating that the landlord who has difficulty attracting tenants may lower or omit the minimum base and thereby allow his lessees to share his business risk.


\(^6\) Id.

\(^6\) Community Builder, *supra* note 4, at 418.
The disadvantage to the landlord is that he places his earning potential almost entirely in the hands of the tenant. Without covenants regulating, to some extent, the operation of the tenant's business, the landlord is entirely dependent upon the protection of the courts. In the past, courts have been willing to support landlords' rights under percentage leases to the extent of implying a tenant's covenant to operate the business where there is no fixed minimum or according damages for nonoperation where the minimum is clearly inadequate. Nevertheless, the landlord whose lease contains no covenant regulating such conduct is effectively without remedy should a tenant divert business to another store. Just as base rentals which appear adequate have dissuaded courts from finding implied covenants to operate and generate the percentage income, so also have such adequate rentals militated against implied covenants to devote all efforts to one operation or landlord entitlement to some percentage of a second operation's proceeds. In light of these difficulties it is easy to understand why the landlord to whom anticipated excess rentals are the prime incentive of the percentage lease includes a radius clause as standard fare in such leases.

In actual practice, however, percentage rental income may not be the landlord's sole motivation in including a radius provision. Generally, minimum base rents for major tenants, such as department stores, are low, and the rate of return on department store leases is usually marginal.
or nonexistent. The developer, therefore, must look to the satellite tenants for a fair return on his investment. Thus, while the large department store is in many respects the developer's parasite, without it he will be unable to attract the bread and butter satellites. Moreover, a department store provides the major drawing power of a shopping center, enabling the satellites to operate profitably. In light of the developer's concern with promoting the success of his venture, a radius clause may well be intended to operate as a restraint on a department store's ability to expand to a second site at another shopping center and thereby divert some of the center's overall traffic and income.

The restrictive effect is magnified when, as in the super-regional shopping center situation, not one, but four such concerns are restrained. Similarly, when the developer employs a standard lease and radius restriction for all satellite tenants, regardless of the individual size or nature of the particular business, the radius clause may be unduly restrictive. The validity of such restraint, in light of federal antitrust law, is the concern of the remainder of this Comment.

79. See Community Builder, supra note 4, at 419. For a comparison of the median total rent per square foot of gross leaseable area (GLA) of department stores to that paid by other popular shopping center tenants, see Urban Land Institute, Dollars and Cents of Shopping Centers 1975, at 70, 71 (1975) [hereinafter cited as Dollars and Cents].

80. In terms of gross dollars, the department store is likely to be the developer's single largest rent producer. See Morris, supra note 77, at 688. See also Community Builder, supra note 4, at 421. It is not difficult to surmise, however, that the bulk of the developer's rental income in relation to total leased area is generated by the satellite tenants. For example, the GLA of a typical super-regional shopping center might fall in the range of 940,000 square feet. The median rent receipts of nondepartment store mall shops, i.e., satellite stores, is $4.09 ($3.44 minimum rental plus $.65 overage) per square foot. Dollars and Cents, supra note 79, at 19, 20 (table 3-6). The median gross leaseable area of these mall shops is 400,000 square feet. Id. at 14 (table 3-1). By comparison, the median total rent per square foot for one department store is $1.42, and the median gross leaseable area is 180,000 square feet. Id. at 23 (table 3-11). Given this example, it is interesting to note that roughly 70% of store rental income from such a center containing three department stores would be generated by roughly 40% of store-occupied space.


82. Community Builder, supra note 4, at 419 (comment of Richard M. Hurp). A concise statement of this theory can be found in Shactman v. Masters-Lake Success, Inc., 222 N.Y.S.2d 171 (Sup. Ct. 1961), aff'd without opinion, 16 App. Div. 2d 679, 227 N.Y.S.2d 247 (1962), in which the lessor sued to enjoin the tenant's violation of the radius clause and recover damages. The plaintiff alleged that the defendant "is a key tenant which attracts a great number of customers, thereby contributing to the business of other tenants in the shopping area, and increasing the percentage rent payable by defendants to the plaintiffs." 222 N.Y.S.2d at 172. Significantly, the lessor also elaborated on the tenant's knowledge of his important position in the shopping center and the probable consequences of his breach. The court did not reach the merits, but dismissed the defendant's motion to strike, finding the plaintiff's pleadings sufficient to allege a cause of action.

83. A free-standing store that is not a part of a larger organized merchandising development would not be a practical alternative to rental space in a second center because such stores are at so distinct a competitive disadvantage relative to those in regional centers. See Note, The Antitrust Implications of Restrictive Covenants in Shopping Center Leases, 86 Harv. L. Rev. 1201, 1209-10 (1973).

A threshold question in the analysis of any restrictive covenant is whether the conduct required by the covenant so involves interstate commerce as to bring it under the ambit of Sherman Act jurisdiction. Section 1 declares unlawful only those contracts, combinations, and conspiracies which are "in restraint of trade or commerce among the several states." Section 2 is concerned with attempts to monopolize or conspiracies to monopolize "any part of trade or commerce among the several states." Since the more restrained reading of the Act in the early cases, the courts have expanded their conception of its scope to embrace wholly local business restraints which have a deleterious effect on interstate commerce. Yet conduct that may be characterized as "essentially local," having only an incidental effect on interstate commerce, can still be said to fall outside that jurisdiction. The initial difficulty in any antitrust challenge to a restrictive radius clause in a lease will therefore be to demonstrate that the leasing of retail space, a transaction of acknowledged local character, sufficiently involves interstate commerce as to invoke the Sherman Act.

The courts apply two tests in determining whether particular conduct falls under the Sherman Act. Under the "in commerce" test, any activity which occurs within the flow of interstate commerce and affects that flow is conclusively presumed to confer jurisdiction. In contrast, the "affecting commerce" test demands that the activity have an effect which is more than insubstantial. Thus, under the "affecting commerce" test, a purely intrastate activity can fall under the aegis of the Act if its quantitative effect on interstate commerce is deemed sufficient.

Early court decisions dealing with Sherman Act challenges to restrictive lease covenants denied that the particular concern was in commerce or had more than an incidental effect on commerce. In Savon Gas Stations

86. Id. § 2.
87. See United States v. E.C. Knight Co., 156 U.S. 1 (1895), the first Sherman Act case to reach the Supreme Court. The Court refused to reach the validity of a series of mergers in the sugar refining industry. Instead, the Court held that the Act did not extend to restraints affecting manufacture on the ground that it was an essentially intrastate operation, notwithstanding the fact that the vast part of the sugar produced was sold and shipped in interstate commerce.
90. The Sherman Act is enforced by the Antitrust Division of the Justice Department, which has broad investigative powers and which may institute a civil action for injunctive or other relief or seek criminal sanctions. In addition, private persons who have been injured by Sherman Act violations may bring actions in federal courts for treble damages, injunctive relief, or both. See 15 U.S.C. §§ 4, 15 (1976).
Number Six, Inc. v. Shell Oil Co.94 the plaintiff gas station sued for damages under sections 1 and 2, attacking a covenant from the lessor shopping center to the lessee gas station that provided that no other competing gas stations would be permitted to operate on shopping center property. The court observed that the plaintiff's "sale of petroleum products at retail at service stations, considered as an isolated transaction, is local and intra-state in character."95 Acknowledging case authority that a purely local transaction can so substantially affect interstate commerce as to invoke the Sherman Act, and observing that some of the plaintiff station's 300,000 gallon business volume, amounting to $75,000 per year, was purchased directly from out-of-state producers,96 the court nevertheless implicitly refused to find any substantial effect. It is not clear from its discussion, however, whether the court did indeed weigh the substantiality of the effect on interstate commerce and found it to be incidental and inconsequential, or whether it considered the absence of identifiable intent to restrict and injure a business97 indirectly engaged in interstate commerce to be decisive.

St. Anthony-Minneapolis, Inc. v. Red Owl Stores, Inc.98 presents a slightly clearer example of an early application of the "affecting commerce" test to shopping center leases. In that case the plaintiff lessor sought a declaratory judgment that his predecessor's covenant to the defendant lessee not to lease or sell space to another food supermarket within the shopping center or any other property within 2,500 feet of the center was an unreasonable restraint of trade in violation of section 1. Conceding that eighty to ninety percent of the $1,800,000 annual volume of products purchased by the defendant supermarket had "some connection with interstate commerce,"99 the court found that the defendant's business constituted a purely intrastate transaction and the restraint a merely incidental effect on its conduct. Maintaining that the retail sale of goods is an essentially local event, not unlike the local sale of gasoline purchased from a distributor in Savon, the court suggested that evidence as to how the defendant supermarket, or more significantly, a prospective competitor supermarket, would purchase its merchandise would have been appropriate, although not necessarily dispositive.100

Recent FTC consent decrees101 provide a sharp contrast to the Savon and St. Anthony holdings. In Tysons Corner, for example, the Commission did not analyze possible effects on commerce, but instead declared the

94. 309 F.2d 306 (4th Cir. 1962).
95. Id. at 309.
96. Id. at 308. Compare the holding in Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 743 (1976), that existence of restrictive intent is relevant to the jurisdictional issue.
97. 309 F.2d at 306.
99. Id. at 1048.
100. Id.
101. See notes 46 & 51 supra.
course and conduct of the business of the defendant stores\textsuperscript{102} and the conduct of the center's own business to be "in commerce."	extsuperscript{103} This conclusion was based on the stores' interstate purchase of resale goods, use of advertising circulated among various states, and the resultant continuous flow of customer services and customers across state lines.\textsuperscript{104} Moreover, the center's own use of advertisements by news media in commerce to solicit prospective out-of-state tenants, the interstate nature of its lease negotiations and transactions with tenants, and the continuous flow of customers across state lines to transact business at the center were sufficient to accord jurisdiction.\textsuperscript{105} In the ensuing \textit{City Store} litigation, the Commission assumed an ever more intractable stance. Reiterating the particulars of City Store's business which placed it in commerce—the diverse citizenship of the parties who employed interstate mail in agreeing to the terms of the lease, purchases by and deliveries to out-of-state customers, advertising in interstate media—the Commission declared that Sherman Act jurisdiction was proper. The fact that the challenged covenants were embodied in a lease of realty, conventionally considered a local transaction, did not remove the agreement from interstate commerce nor immunize it from antitrust scrutiny.\textsuperscript{106} The \textit{Tysons Corner} progeny have made no more than a token reference to the jurisdictional issue, merely enumerating sales, size, or geographic extent of the concerns under examination.\textsuperscript{107} To the FTC, at least, jurisdiction is not a difficulty.\textsuperscript{108}

Whether allegations of interstate sales, advertising, or solicitation of tenants would satisfy a federal court's concept of "in commerce" jurisdiction is another question. In \textit{Lieberthal v. North Country Lanes, Inc.}\textsuperscript{109} the plaintiff alleged an unlawful conspiracy in violation of sections 1 and 2 to prevent the opening of his bowling alley. The asserted basis for jurisdiction rested on his projected initial investment in equipment and supplies that would be transported through interstate commerce and the defendant's use of interstate advertising to solicit customers. The court, however,
found insufficient involvement in or effects on interstate commerce to merit “in commerce” or “affecting commerce” jurisdiction. In Amajac Ltd. v. Northlake Mall, however, the Georgia district court refused to grant a motion to dismiss a complaint that alleged that all goods sold were purchased out-of-state and that the defendant mall used interstate advertising media, implying that the jurisdiction requirement may have been satisfied. Yet in Sapp v. Jacobs the Illinois district court held that the plaintiff developer’s jurisdictional assertion did not show a sufficient effect on interstate commerce. The mere allegation that the defendants had conspired to monopolize the regional shopping center business in Springfield by depriving other developers of anchor stores, thereby unreasonably restraining the plaintiff’s solicitation of out-of-state tenants, failed to convince the lower court. This decision, however, was reversed, without an opinion to indicate the appellate court’s jurisdictional stance. On the basis of such scant case authority, a tentative conclusion that federal courts would accept the “in commerce” theory of jurisdiction is not warranted. Whether those courts would be willing to extend “in commerce” jurisdiction to businesses of the magnitude of those which the FTC has chosen to attack is still an open question.

In any event, the decision in Hospital Building Co. v. Trustees of Rex Hospital construing the “affecting commerce” test appears to have lowered the jurisdictional hurdle for antitrust challenges to shopping center leases, at least to the extent of withstanding a motion to dismiss. In Hospital Building the plaintiff corporate hospital operator alleged that the defendants, a private hospital, two of its officers, and a health planning agent, had conspired to block the plaintiff’s planned expansion with the intent of monopolizing hospital services in violation of sections 1 and 2. Reversing the lower courts’ dismissal on the pleadings, the Supreme Court found the plaintiff’s averments that it purchased eighty percent of its medicine and supplies from out-of-state suppliers, that a large portion of its revenues came from out-of-state insurers of federal programs, that it paid a management fee to an out-of-state corporation, that its proposed expansion plans were to be financed in a large part by out-of-state lenders, and that a substantial number of its patients travelled from other states, sufficient to satisfy the interstate commerce requirement. Neither the indirectness of the effect on interstate commerce nor the lack of restrictive purpose was relevant in determining whether the conduct at issue met the

110. Id. at 272.
111. The court observed that, on the evidence presented, the alleged restraint affected only that commerce involved in the purchase of initial equipment. Unlike the restraints acknowledged in certain “affecting commerce” cases, this restraint did not affect a continuous flow of materials. The decision suggests that a past history or projected future of interstate purchases, rather than one large transaction, is necessary to show involvement with commerce within the purview of the Act. Id.
114. 547 F.2d 1170 (7th Cir. 1977).
115. 425 U.S. 738 (1976), rev’g 511 F.2d 678 (4th Cir. 1975).
116. Id. at 743-44.
substantial effect standard. Nor was this substantial effect measured against a standard more demanding than that the allegations, if proved, indicate an unreasonable burden on the free and uninterrupted flow of interstate commerce. Further, the Court observed that when, as is the case in antitrust litigation, so much of the proof is in the hands of the alleged conspirators, a dismissal for failure to state a claim should be rigorously evaluated.

The actual impact of Hospital Building on the Sherman Act interstate commerce requirement is readily apparent from Ballard v. Blue Shield, Inc. In Ballard the circuit court reversed a dismissal on the pleadings, finding that unanswered factual questions militated against dismissal. In effect, the plaintiff chiropractors were given the opportunity to go forward with discovery in order to prove to what extent, if at all, the defendant's actions reduced the sale of therapeutic equipment manufactured outside the state and hence affected commerce. Thus, the antitrust plaintiff who alleges a restraint on trade must be allowed the opportunity to discover proof that the trade does bear some requisite relation to interstate commerce. Only in the absence of a showing that the challenged conduct places an unreasonable burden on free and uninterrupted flow of interstate commerce will jurisdiction be denied.

Precisely what constitutes an allegation of unreasonable restraint on the free flow of commerce seems to vary with the fact situation. Lieberthal v. North Country Lanes, Inc. suggests that there must be a continual flow of goods or services through commerce, rather than a one time involvement. In light of the FTC numbers-oriented decisions, the observation in Plum Tree, Inc. v. N.K. Winston Corp. that "the essence of the problem is sometimes quantitative rather than qualitative" is particularly apt.

A standard based on predictable flow and a numerically demonstrable quantity is suggested by two recent federal court decisions. In Payless Drug Stores, Inc. v. City Products Corp. the plaintiff retail store corporation asserted that the restrictive, exclusive, and protective covenants in the shopping center's lease of space to a variety store tenant, and the shopping center's consequent refusal to rent to the plaintiff, violated section 1. The court found that the interstate nature of activities of the plaintiff and the defendant and the $4 million in projected annual sales of merchandise in

117. Id. Although the effects in Savon were arguably "merely incidental," this disavowal of the need to show intent seems to undermine its distinguishing rationale. See text accompanying note 95 supra.
118. 425 U.S. at 746.
119. Id.
120. 543 F.2d 1075 (6th Cir. 1976).
121. 332 F.2d 269 (2d Cir. 1964).
122. See note 111 supra.
123. See text accompanying notes 102-07 supra.
125. Id. at 88.
the plaintiff’s prospective store, ninety-five percent of which was to be purchased outside the state,127 "directly and substantially" affected interstate commerce.128 In *Evans v. S.S. Kresge*,129 a case delayed pending Supreme Court disposition of *Hospital Building*, the dollar quantity of out-of-state purchases was also the touchstone. In *Kresge* a local food store operator challenged the licensing practices and coordinated marketing requirements of the defendant discount store operator as an illegal restraint of trade. Reversing the district court’s summary dismissal for lack of subject matter jurisdiction, the court of appeals compared the total dollar volume of out-of-state purchases to other amounts for which subject matter jurisdiction had been allowed, and concluded that jurisdiction was mandated.130

In sum, the "affecting commerce" jurisdictional requirement can apparently be satisfied by a showing of predictable and recurrent out-of-state purchases.131 Moreover, the interstate nature of either one or both of the business concerns, and the inevitable interstate nature of their corollary transactions, would apparently enhance the degree of substantiality. While the interstate nature of the business of a shopping center itself may be more difficult to demonstrate if the center is not located near the major access highways of several states,132 the interstate character of the business of tenant department stores, especially outlets of national chains, should be comparatively easy to prove. A frustrated developer might assert both the interstate character of his proposed tenants and that of his financial and construction intermediaries to establish such an effect.133 The most onerous burden of proof will probably fall to the small, locally owned and operated satellite store which is less likely to generate the requisite minimal flow of interstate transactions.

**IV. ANTITRUST ANALYSIS**

**A. Developments Outside Federal Law**

Early English common law suggested that any agreement to refrain from conducting a lawful trade or business was invalid.134 By an early date, however, such restraints received a qualified legitimacy if they served

127. *Id.* at 66,678.
128. *Id.*
130. *Id.* at 1189.
131. A mere allegation of dollar volume of purchases that are comparable to or in excess of the prevailing Sherman Act minimum would be sufficient, according to the *Kresge* court’s limited reading of *Rex Hospital*. That the court examined aspects other than proposed sales suggests, however, that jurisdiction based solely on purchases travelling through interstate commerce might require a substantially greater affected volume than jurisdiction grounded on other interstate contacts as well.
132. See Complaint, Tysons Corner Regional Shopping Center, [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,720, at 21,763 (1972), in which this factor was stressed.
133. See note 175 infra.
to promote or induce a legitimate business transaction. An agreement that neither unduly restricted the activities of the promisor nor harmed the public interest would be allowed to stand. When American courts considered restraint of trade problems during the nineteenth century, they followed the lead of the English courts. The emergent American rule indicated that a promise to refrain from competition that is ancillary to a contract for the transfer of goodwill or other property will not be deemed a restraint of trade if it is reasonable.

In the context of this common law tradition, a radius clause is no more than the lessee's covenant not to compete with itself or the parent center for a period of years. As such, the clause should not be deemed to violate antitrust law unless blatantly unreasonable. What standard of reasonableness a court should invoke is not clear. While the more conventional radius clause cases involving anticompetition agreements in sale of business and employment contract cases provide some guidelines, they fail to take into consideration the peculiar nature of the shopping center enterprise.

The few appearances of a radius clause before state courts have failed to clarify the issue. In Irving Investment Corp. v. Gordon the New Jersey Supreme Court explicitly avoided judicial comment on the extraterritorial validity of a clause restraining lessees' activities within one-quarter mile of the leased premises. The court refrained from passing on the lower court's holding that "the restrictive covenants were invalid and unenforceable

136. See Baum, supra note 134.
137. RESTATEMENT OF CONTRACTS § 515(e) (1932).
138. There are two paradigmatic ancillary agreements not to compete. The first is an agreement by the seller not to initiate a similar business in a prescribed area for a stated period of time, often as a means of assuring a complementary transfer of goodwill. See Mitchell v. Reynolds, 1 P. Wms. 181, 24 Eng. Rep. 347 (Q.B. 1711). An analogous covenant is that given by a lessor or vendor of land not to lease or sell other real estate to a competing interest. See generally Annot., 97 A.L.R.2d 4 (1964). The second is an agreement by the buyer that he will not engage in a competing line of business proximate to seller's operations for a certain period as a means of protecting the seller's vested interest; the shopping center radius clause falls into this category. See Sound Ship Bldg. Corp. v. Bethlehem Steel Corp., 387 F. Supp. 252 (D.N.J. 1975), aff'd, 533 F.2d 96 (3d Cir.), cert. denied, 429 U.S. 860 (1976) (although this case involved a Sherman Act challenge to the restrictive covenant, the fact situation and the court's observation that "a seller of a business or property may legitimately need to protect himself . . . from injury at the hands of the buyer" epitomizes the classic model. 397 F. Supp. at 255). Similarly, post-employment covenants restricting a former employee from engaging in a similar trade within a given area for a specific duration serve to protect the employer's established business, often more specifically, his competitive advantage or trade secrets. See generally Blake, Employee Agreements Not to Compete, 73 HARV. L. REV. 625 (1960).

When assessing the reasonableness of such restraints, the courts have inquired into the specificity and justifiability of the time and geographic provisions of the covenants. See generally Annots., 45 A.L.R.2d 77 (1956), 46 A.L.R.2d 119 (1956). Because such covenants have traditionally dealt with individuals or small business concerns rather than operations as complex or extensive as regional shopping centers, the precedential value of holdings construing the reasonableness of a restraint of particular duration or area is limited to the underlying rationale.

139. 3 N.J. 217, 69 A.2d 725 (1949).
with respect to any area or place outside the confines of the demised premises . . . 140. The court based its decision, instead, on the lack of legitimate business purpose in restrictions on leasehold property by the corporate lessor for the benefit of another disconnected corporation. In Alexander’s Department Store, Inc. v. Arnold Corp. 141 the New Jersey superior court considered the mirror question whether a successor landlord’s after-acquired land could be bound by the original covenant not to lease to any of a list of designated stores within a five-mile radius of the leased premises. The court buttressed its finding that the restriction was reasonable in time and geographic scope by noting the tenant’s reciprocal agreement not to operate a competing store within that same radius for the period of the lease; as the agreements worked in concert to assure the effectiveness of the percentage lease, both were implicitly legitimate. 142

A more recent Texas case is hardly more illuminating. In Neiman-Marcus v. Hexter 143 the defendant shopping center developer persuaded the defendant specialty department store to relocate at his center by offering to assume the store’s lease at its former location. As a condition of assignment, the developer agreed not to sublease the premises to potentially competitive stores for a minimum of twenty years. 144 Pursuant to its new lease at the developer’s center, the department store agreed not to conduct any retail business within five miles of the center. 145 The plaintiffs, owners of the assigned premises, alleged that the two agreements operated in concert to restrain trade by eliminating competition with the department store in its new location. The court did not agree, finding that the store’s restriction on the developer’s use of the former premises was saved from antitrust illegality as an exercise of “one of the inherent rights incident to the ownership of real property.” 146 Almost as an afterthought the court observed that “the same may be said of” the developer’s right to exact from the lessee a covenant not to compete within a certain area. 147 The case cited in support of this observation, 148 however, stands for the proposition that a lessor has a right to control the use of his premises, thus casting doubt on the precedential value of Neiman-Marcus. 149

140. 69 A.2d at 727.
143. 412 S.W.2d 915 (Tex. Civ. App.—Fort Worth 1967, writ ref’d n.r.e.).
144. Id. at 916.
145. Id. at 917.
146. Id.
147. Id.
149. The full significance of its precedential value might lie in the dearth of any contrary
Lerner v. Lums\textsuperscript{150} involved a suit for a declaratory judgment to determine the validity of a radius restriction in the lease between Tysons Corner Regional Shopping Center and Tysons Corner Lumco. The lease prohibited the defendant from operating another restaurant using the name “LUMS” within a five-mile radius of the shopping center; further, the gross sales of any operation established in violation of the clause were to be added to the center’s sales for purposes of percentage rent calculation. Observing that its evaluation need not take into consideration the reasonableness of the restraint over the entire one hundred square miles affected but only in relation to the location of defendant’s offending operation, the Fairfax, Virginia court of chancery concluded that the disputed restaurant was located within an area that could “adversely affect” the center and that the center’s objectives in including the restraint were likewise reasonable.

A Florida appeals court reversed a dismissal of a landlord’s complaint seeking specific performance of a rental compensation clause. The lease provision involved in Pensacola Associates v. Biggs Sporting Goods Co.\textsuperscript{151} contained a radius covenant prohibiting conduct of a similar business by the tenant within three miles of the landlord’s premises. This restriction would not apply, however, if the tenant agreed in writing to add the gross sales of the second store to those of the first for purposes of determining the landlord’s percentage rental. The tenant opened a second business but refused to enter into the supplemental agreement prescribed by the lease. In response to the landlord’s attempted enforcement of the covenant, the tenant asserted that the lease covenant worked to restrain trade and, therefore, was void under the applicable Florida antitrust statute. Relying on federal court reluctance to apply the per se rule to contracts affecting trade,\textsuperscript{152} the state court found the landlord’s restriction to be reasonable on its face. Observing that the clause did not work an outright prohibition of the tenant’s second operation, the court noted that the reasonableness of the clause as a means of protecting the landlord’s percentage rental income could present a question of fact which the tenant would be free to answer with evidence.

Most recently, the New Mexico Supreme Court concluded that a two-mile radius restriction was reasonable in time, distance, and purpose to protect the interest of the shopping center developer. In Winrock Enterprises, Inc. v. House of Fabrics, Inc.\textsuperscript{153} a tenant appealed from a permanent injunction prohibiting the establishment of a branch within the radius, contending that the clause constituted an unreasonable restraint of trade. Although some of the center’s tenants had succeeded in obtaining dicta, coupled with authority suggesting the apparent willingness of Texas courts to reform the terms of noncompetition agreements. See, e.g., Justin Belt Co. v. Yost, 502 S.W.2d 681 (Tex. 1973) (employment contract).

\textsuperscript{150} No. 53016 (Va. Ch. Nov. 23, 1977).
\textsuperscript{151} [1978] 5 TRADE REG. REP. (CCH) \textsuperscript{6} 61,816 (Fla. Dist. Ct. App. 1978).
\textsuperscript{152} See text accompanying notes 188-90 infra.
\textsuperscript{153} No. 11,653 (N.M. Sup. Ct. May 10, 1978).
waivers of the lease restrictions, the court was nevertheless convinced that only by such restriction could the interests of the landlord and the other tenants in the center’s ability to attract customers be protected. Moreover, in the court’s opinion, the failure of the defendant’s store to generate a sales volume sufficient to trigger the percentage rent provision was not indicative that the store would not, during the ten-year balance of the lease, eventually generate such a percentage if the covenant were enforced.

B. The Sherman Act

It is apparent from legislative history\(^{154}\) and court commentary\(^{155}\) that the Sherman Act incorporates common law doctrine. That it incorporates the common law exception for reasonable restraints which are ancillary to a legitimate business agreement is indicated by the opinion of then-judge Taft in *United States v. Addyston Pipe & Steel Co.*\(^{156}\)

He acknowledged that:

[C]ovenants in partial restraint of trade are generally upheld as valid when there are agreements . . . by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold . . . or by the buyer of property not to use the same in competition with the business retained by the seller.\(^{157}\)

Subsequently, however, the Court enunciated the doctrine of per se illegality as a qualification to this exception. Thus, a Sherman Act challenge to a shopping center radius clause could be framed in terms of an unreasonable restraint of trade under section 1 or some aspect of monopolization under section 2. The section 1 challenge can take two possible forms: (1) that the restraint is per se illegal, or (2) that it is illegal when evaluated under the rule of reason.

*Contracts in Restraint of Trade: Section 1.*

**Per Se Illegality.** On its face section 1 declares all restraints of trade to be illegal, and the earlier cases reflect this rigid interpretation of statutory language.\(^{158}\) Then-judge Taft in *Addyston Pipe & Steel Co. v. United States*\(^{159}\) was the first to suggest that section 1 applied only to unreasonable restraints of trade. Not until 1911, however, in *United States v. Standard Oil Co.*\(^{160}\) did the Court clearly announce that section 1 codified the

\(^{154}\) See 21 CONG. REC. 2456 (1890) (declaration by Senator Sherman that proposed statutory language, quite similar to that ultimately enacted, does not announce a new principle of law, but applies old and well recognized principles of common law to the complicated jurisdiction of state and federal governments).

\(^{155}\) See, e.g., Apex Hosiery v. Leader, 310 U.S. 469, 494-95 (1940); Addyston Pipe & Steel Co. v. United States, 85 F. 271, 279 (6th Cir. 1898).

\(^{156}\) 85 F. 271 (6th Cir. 1898), aff’d, 175 U.S. 211 (1899).

\(^{157}\) Id. at 281.

\(^{158}\) See, e.g., United States v. Joint Traffic Ass’n, 171 U.S. 505 (1898); United States v. Trans-Missouri Freight Ass’n, 166 U.S. 290 (1897).

\(^{159}\) 85 F. at 381.

\(^{160}\) 221 U.S. 1 (1911).
common law prohibition against unreasonable restraints in formulating its classic exposition of the rule of reason. Some restrictions, however, are so inherently restrictive of trade that they cannot be justified. Northern Pacific Railway v. United States is the classic articulation of the proposition that the effect on competition of certain agreements or practices is so pernicious and without redeeming social value as to warrant conclusive presumption of illegality without elaborate inquiry into the precise harm they have caused or any business justification for their use. Northern Pacific found price fixing, group boycotts, and tying arrangements to constitute such practices; since then, horizontal territorial restrictions have been so classified.

The primary difference between per se and rule of reason allegations is the kind and quantum of proof required to establish an antitrust violation. In theory, the per se rule creates an irrebuttable presumption that the effect of the practice is substantially to restrain trade and that the only underlying intent is to achieve such anticompetitive effect. In practice, however, no antitrust lawyer will exclusively allege, nor will many courts decide without further inquiry, that a particular activity is unjustifiably illegal because it can be labelled a per se restraint. Nevertheless, the attorney seeking to relieve his client of a burdensome restriction will stand a much better chance of success if he can bring the radius clause within the ambit of the per se rule. Of the established categories, group boycott, concerted refusal to deal and market allocation, horizontal restraint seem to lend themselves more readily to the task.

The paradigm of the per se case involving group boycott, refusal to deal is Fashion Originators' Guild of America, Inc. v. FTC (FOGA). In that case, the Guild, an organization of firms that designed and manufactured women's dresses and the textiles used in making them, agreed not to sell to retailers who also carried garments copied by other manufacturers from Guild designs. The FTC challenged this agreement as a restraint on interstate sales and an attempted monopolization. Reviewing the Commission's action, the Supreme Court concluded that the arrangement violated the Sherman Act. The Court was unimpressed with the Guild's argu-

161. Id. at 51.
162. Id. at 61-62.
164. Id. at 5.
165. Id.
169. See, e.g., Van Cise, supra note 168, at 1173, proposing as an alternate judicial principle a rebuttable presumption of anticompetitiveness except for exceptional cases. See generally Flittie, supra note 92, analyzing the gradual lower court erosion of the articulated per se rules.
170. 313 U.S. 457 (1941).
171. Id. at 464.
172. Id. at 467.
ment that its practices were reasonable because necessary to protect its members from style piracy; it found that the Guild's intent to destroy a competitor, its potential power, and its tendency to monopolize precluded a reasonableness or business justification analysis.\textsuperscript{173}

A comparison between the cumulative effect of radius covenants executed by tenants of a shopping center and a group refusal to deal requires an innovative reading of antitrust law. In the shopping center situation each tenant has agreed individually with the developer-landlord not to locate in any other center\textsuperscript{174} within a prescribed radial distance of his center. The composite effect of these individual agreements would appear to be a collective refusal to deal with any shopping center landlord currently or prospectively in competition with the developer within a certain geographic area; this in turn would tend to create a monopoly of shopping centers, or shopping centers with a particular tenant mix, in that area.\textsuperscript{175}

While there is no horizontal agreement in the conventional sense among the various member stores, arguably there is a “hub” agreement involving the central developer and the tenant “spokes.”

This “rimless wheel” conspiracy theory was recently advanced by the plaintiffs in \textit{Elder-Beerman Stores Corp. v. Federated Department Stores, Inc.}\textsuperscript{176} to support an antitrust attack on an exclusive dealing arrangement as a conspiracy in restraint of trade in violation of sections 1 and 2. Although the evidence in that case was insufficient to establish either conspiracy or restraint of trade, the court observed that the theory could be used in a civil case, provided that the evidentiary requirements of conspir-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{173} \textit{Id.} at 468.
\item \textsuperscript{174} Although a tenant may contract not to locate anywhere within the area, business realities would discourage the free-standing store alternative. \textit{See} note 83 \textit{supra}.
\item \textsuperscript{175} This proposition appears less naive when posited against a hypothetical fact situation. Given an established trade area in which the developer landlord operates the only regional center, that center will cover a trade distance area with maximum driving time of twenty minutes, or a radius, depending on access, of roughly eight miles. Development Handbook, \textit{supra} note 12, at 27. The creation of a new center within that trade area will not generate more purchasing power than already exists in the trade area, although it may accommodate new population growth. Instead, if it is successful, it will draw patronage either by sheer novelty or by offering a supply of goods and services not already available at existing stores in the trade area. \textit{Id.} at 29. The developer who, for example, secures a tenant covenant from his four key anchor stores not to operate a competing store within eight miles of his center in effect precludes a prospective competitor from so much as initiating a market study with any one of those four anchors in mind. While the elimination of four possible key tenants may not significantly lessen the prospective developer’s choice of anchor tenants, it may reduce his selection in a certain range of desirability of image, financial rating, and pulling power. Further, if the landlord of an existing fashion center, \textit{i.e.}, a conglomeration of apparel stores, boutiques, and one or more specialty department stores carrying selected high quality merchandise, secures covenants not to compete from his tenants, then a prospective developer’s selection of available tenants may be so limited as to preclude his development of another fashion center within the radius.

Alternatively, if the competitor shopping center already exists within the radial area, the competitor landlord’s attempts to upgrade his image, a standard device for increasing shopping center productivity, \textit{see} Eagle, \textit{supra} note 23, at 626, will be curtailed to the extent that he will not successfully be able to solicit the participation of any of the clause-restricted stores.

\item \textsuperscript{176} 459 F.2d 138 (6th Cir. 1972).
\end{itemize}
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The court identified the two elements of such a conspiracy to be an overall unlawful plan and knowledge, actual or inferred, that others must be involved. Arguably, a plan by the developer to exclude other developers from proximate competition contravenes the purpose of the Sherman Act and is unlawful. Knowledge that each other tenant is likely to be subject to a similar radius clause is more easily imputed to the larger tenants who, as a condition to their consent to such a disadvantageous lease provision, will demand that other tenants, in particular the other larger tenants, be similarly restricted. Once these two elements are established, any resultant restraint on operations of a prospective competitor in the area could be said to satisfy the requirements of a group boycott, concerted refusal to deal.

Alternatively, a vertical combination designed to eliminate competitors of the developer could be advanced in support of the group boycott theory. Such an arrangement was recently acknowledged in *E.A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Committee* to be one of three categories of per se refusals to deal. A vertical combination among traders at different marketing levels is designed to exclude from the market direct competitors of some members of the combination. A classic example of such a situation appeared in *Klor's Inc. v. Broadway-Hale Stores, Inc.* The plaintiff appliance retailer alleged in that case that a competing retailer had induced or coerced leading appliance manufacturers and distributors to boycott him. Reversing the lower courts' summary judgment, the Supreme Court held that this concerted action was indeed a boycott and fell within that class of restraints that are "unduly restrictive, and hence forbidden." That there was no market-wide impact on competition, as there were numerous other appliance dealers within the trade area, did not mean that there was no public injury. The Court determined that since Congress had delineated the criteria of public harm, the judiciary was not empowered to reinterpret it; injury to a single merchant was therefore held sufficient.

The analogy to the shopping center situation is easily drawn. In return for inducements such as exclusive clauses or veto provisions, particularly in the case of anchor department store tenants, or because of his own

177. *Id.* at 147.
178. *Id.* at 146.
180. As a simple business reality, no businessman would willingly place himself at a competitive disadvantage if he wields the bargaining power to demand that his cotenants be similarly restrained.
182. *Id.* at 186. See also *Antitrust Advisor* 33 (C. Hillis ed. 1971).
184. *Id.* at 211.
185. *Id.* at 213.
186. See Note, supra note 83, at 1232-34.
superior bargaining power, the developer secures commitments from his tenants not to operate a competing establishment within a certain geographic area; in effect, these operate as an agreement not to deal with any of his existing or potential competitors in that area. If, however, even one competitor is injured by reduction of his sources of tenant supply, though there may be a multitude of shopping centers in the general area, then under the reasoning of Klor's, a forbidden injury has occurred.

One qualification to the boycott per se violation has been advanced by the lower federal courts since its Supreme Court articulation in FOGA. Where there is no showing of exclusionary purpose or coercion, the courts have been reluctant to apply the per se doctrine. Rather, they prefer to measure the restraint by the rule of reason test to determine whether it is so burdensome as to be invalid. This stance was taken in Dalmo Sales Co. v. Tysons Corner Regional Shopping Center in which the plaintiff discounter alleged that his exclusion from the center had resulted from a group boycott by tenant stores exercising veto powers of their leases. The court refused to label the tenants' contemporaneous actions per se illegal and, on further inquiry, deemed them to be reasonable. By the Dalmo standard, the concerted inaction inherent in a radius clause refusal to deal would be even less amenable to a per se allegation without some showing of anticompetitive motive and effect.

A second basis for challenging a shopping center radius clause as a per se violation is the market allocation, horizontal restraint theory. The model for the analysis is United States v. Topco Associates, Inc. In that case twenty-five independent regional supermarkets organized a cooperative subsidiary corporation to act as their purchasing agent. Each member, and each new member agreed to sell Topco brands only within a designated territory. The government challenged the arrangement on the grounds that it constituted an illegal territorial division in restraint of trade, and the Court concurred. A horizontal restraint, by the Court's definition, is "an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition."

The Court refused to analyze the reasonableness of what it

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187. See Kucker, supra note 35, at 45.
188. E.A. McQuade Air Tours, Inc. v. Consolidated Air Tour Manual Comm., 467 F.2d 178, 187 (5th Cir. 1972), cert. denied, 409 U.S. 1109 (1973), is itself one of a line of cases in which the court avoided using the per se rule. This line is developed and discussed in Mogul v. General Motors Corp., 391 F. Supp. 1305, 1310-12 (E.D. Pa. 1975).
190. For discussion of the decision's significance, see Comment, The Antitrust Implications of Restrictive Covenants in Shopping Center Leases, 18 VILL. L. REV. 721, 729 (1973).
192. 405 U.S. 596 (1972). In fact, according to Chief Justice Burger's dissent, it is the first statement of per se market allocation without any element of price fixing. Id. at 619. This fact is acknowledged by the majority. Id. at 609 n.9.
193. Prospective applicants whose operations were located within one hundred miles of a member could be approved only by an affirmative vote of 85% of the members. Id. at 602.
194. Id. at 604.
195. Id. at 608.
termed a naked restraint on trade that sought to foreclose a business’ guaranteed freedom to compete in any one sector of the economy. That the horizontal restraint took the form of a vertical arrangement did not ameliorate its horizontal effect. An earlier case, which indicates the Court’s willingness to look through the superficial aspects of such arrangements, and to which Topco refers, is United States v. Sealy, Inc. In that case the horizontal territorial restraint took the form of a vertical licensing agreement in which Sealy, the licensor, agreed with each manufacturer-licensee not to license any other business to manufacture or sell Sealy mattresses within a designated area, and they in turn agreed not to operate outside the area.

The similarities between the Topco and Sealy quasi-vertical arrangements and the shopping center lease situation are superficially apparent. By its consent to lease terms that include a radius clause, each tenant agrees to operate only one business within a geographic sector of the community. This covenant not to locate another store within a particular geographic area in fact constitutes an agreement by the tenant to compete neither with his own business nor with any of his competitors at the shopping center. The prospect of increased competition resulting from a store’s decision to locate a second store at another center within the area, or even to construct a free standing store, poses a threat to the developer’s shopping center income. Arguably, the developer’s main purpose in restricting his tenants’ competitive alternatives is to prevent any mass exodus, or even general trickle, to a second center whose operations would inevitably detract from his own. In effect, this is an agreement not to increase competition above the status quo, thereby minimizing competition within the designated area.

The final product of market allocation, a controlled stabilization of competition within the geographic area, is the same as that of radius clause inhibition of tenant expansion. The difficulty in applying this theory to the shopping center situation, however, lies not in determining the analogous anticompetitive effects that accompany market restriction but in categorizing the quasi-vertical means by which it is engineered. Both in Sealy and in Topco the Court found very significant the illusory nature of the vertical arrangements, particularly the degree to which the same level horizontal members could control the activities of the different level entity.

196. Id. at 610.
198. Id. at 352.
199. While the developer might argue that his radial restriction prevents dilution of competition within the area and greatly enhances that within the center itself, the Topco holding indicates that the Court is not prepared to look beyond per se illegality to weigh such intangibles. See 405 U.S. at 608-10.
200. That there is competition, indeed vigorous competition, within the center is the sine qua non of shopping center development. The opportunity for comparison shopping inherent in the center’s concentrated mix of stores is the primary appeal to the consumer. See Community Builder, supra note 4, at 327.
201. In Topco, for example, the board of directors, composed of appointees or high ranking executives of member chains, effectively controlled operations of the association. See
Tenant stores, especially the satellites, exercise no such control over the developer-landlord. In the sense, however, that the actions of individual shopping center tenants are a composite part of the activities of the shopping center as a unified organism whose interests coincide with that of the developer, the actions which “control” the center’s profitability “control” the developer.

Rule of Reason Analysis. The more appropriate test of shopping center radius clauses is the rule of reason. Unlike per se analysis, a rule of reason analysis carries with it no presumption of harmful effect. Rather, the court seeks to measure the effect of the challenged restraint on competition in light of any legitimate business concern advanced as justification for its imposition. Because the shopping center industry is relatively new to the realm of antitrust analysis, new standards must be developed by application of established legal principles to a unique set of facts.

Formulating a definition of the relevant market in which to test the effect on competition is the first step in rule of reason analysis. A relevant market has been conventionally defined in dual terms. The first is the relevant product market, that is, the range of alternative market substitutes for the product whose distribution on the market place is challenged as an antitrust violation. The relevant geographic market, the specific territorial expanse in which the effects of the restraint will be felt, is the other component. Those few shopping center cases that have sought to define a relevant market attempted to evaluate the effect that exclusionary clauses would have both on the competition in retail goods sold by the respective stores and on the competition in retail space. In Dalmo Sales

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405 U.S. at 598-99. In Sealy stockholders, in effect the thirty licensees, or stockholder nominees were permitted to serve on the board of directors which managed and controlled the business. See 388 U.S. at 352-54.

202. A good example would be tenant activities in a merchants' association, an organization generally mandated by lease provision. See Kranzdorf, Shopping Centers—Problems of the Developer, 1965 U. ILL. L.F. 173, 192-93. While the merchants' association may be charged with a wide range of activities, including parking lot regulation, business referrals, credit systems, store hours, night openings, centerwide news bulletins, or special newspapers for trade area distribution, its primary purpose is promotion of the center in order to foster its growth. DEVELOPMENT HANDBOOK, supra note 12, at 145-47.

Cooperative advertising, primarily newspaper and radio advertising, is the kind of promotion most often used. It is important to advertise the center because, in the public’s mind, the individual shops within the center must be associated with the image of the center itself . . . . Whatever the promotion activity, the wider the participation by the tenants, the greater the impact and success of the promotion.

Id. at 148 (emphasis added). Whether the landlord serves merely as its agent or actively directs it, the association's operation is largely left to the tenant merchants. Id. at 146; cf. Eagle, supra note 23, at 613 (attributing synergetic qualities to the shopping center).

203. See Loevinger, supra note 167, at 33.


205. See, e.g., United States v. E.I. duPont de Nemours & Co., 351 U.S. 377 (1956), in which the Court suggested that to the extent retail products are interchangeable and demonstrate a cross-elasticity of demand, they constitute a relevant product market.

the relevant geographic market was apparently the mall itself and the relevant product market the retail space within that mall. In *Borman's Inc. v. Great Scott Super Markets, Inc.* the court held that the plaintiff's failure to establish the market against which to assess the effects on competition and trade of the challenged partial exclusionary clause would require it to look solely to the question whether there had been a foreclosure of market alternatives. Without a demonstration by the plaintiff that the particular retail space in the small neighborhood center was so unique that denial of that space foreclosed all market alternatives, in other words, that there were no "product" substitutes, the court considered the limited restraint to be sufficiently justified by the presence of a valid business reason to limit the center to two supermarkets. Both the retail space and individual product markets were factors in the decision in *Pay Less Drug Stores, Inc. v. City Products Corp.* The court appears to have concluded that the trade area serviced by the challenged shopping center comprised the relevant geographic market, as exclusion of the plaintiff variety store deprived it of a sole suitable location. Moreover, the public served by the shopping center was harmed by deprivation of the competition between "parallel product lines" of the plaintiff's and defendant's variety stores. Although the shopping center cases involving exclusion clauses lend little direct assistance to the radius clause situation, they do indicate that the conventional product and geographic markets can be adapted to the retail space model.

Arguably, the relevant geographic market in which the restraint of a radius clause can be measured has been defined by the developer himself. At the minimum, it encompasses that area within which competition would be so acute as to endanger his optimal percentage rental income, that is, the radial area itself. In the process of assessing the actual physical area to be restrained, a developer-landlord considers two factors. The first is the location of his center in relation to established competing centers and potential areas yet to be developed. The second is the nature of the tenant. The more desirable the landlord's commodity—the opportunity to be a part of a shopping center environment—the more willing a tenant will presumably be to consent to a restriction. Similarly, the fewer available alternatives, particularly if the center is the only one in the trade area, the greater the bargaining power the landlord possesses. To a department

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209. By implication, the court itself defined the relevant market to encompass a general (geographic) neighborhood area in which alternative supermarket sites were available.
211. *Id.* ¶ 66,678.
212. In the process of market analysis, the developer will assess the trade area from which will flow the major portion of the continuing patronage necessary for steady support of his shopping center. The center's influence on the trade area, that is, its ability to "pull" customers, is strongest in its primary trade zone and diminishes as distance and driving time increase. *Development Handbook, supra* note 12, at 25.
store, for example, a regional shopping center may be the only desirable location. By contrast, a fast food store or a supermarket can also elect to locate at a community center or neighborhood center, or to erect a freestanding store. Practically speaking, the landlord cannot expect to obtain as great a restriction from a supermarket as from a department store. Thus, a tenant, whether anchor or satellite, who challenges a radius clause can look to his lease for a definition of the geographic market. At the maximum, the geographic market encompasses the area within which the developer seeks to insulate himself from competition, which arguably extends as far as the restraints on his anchor tenants, for it is their pull, undiluted by competition, which he seeks to protect. Thus, a frustrated competitor might legitimately assert this broadest range as the area within which he is restrained from developing.

Similarly, the relevant product market has been defined by the developer to constitute any existing or potential competitive shopping locations. Definition of the product market depends generally on the number of product substitutes, that is, other available retail sites within the geographic market, and relates specifically to the appropriateness of these sites for the particular tenant. Understandably, the product market of alternate retail sites of a large anchor may be quite different from that of a small satellite. As a general proposition, however, trade in retail space is restrained to the extent the shopping center tenant is foreclosed from his market alternatives. Further, to the extent that stores carrying similar product lines are prevented from opening new outlets, competition among goods is also restrained.

Duration of a restraint is one conventional measure of its reasonableness. The time period, like the geographic area encompassed by the clause, may vary with each tenant, depending on the potential life of its lease. For example, it is in the landlord's own best business interest to limit leases to smaller tenants to a maximum of five years. This enables him to renegotiate for higher minimum rent, in relation to tenant performance, or to eliminate poor performance tenants. In contrast, his interest in securing the drawing power and financial ballast of the department stores dictates that their leases be for a minimum of twenty years. In between these extremes are the other major tenants and smaller chain and local tenants, whose terms range from seven to fifteen years. In addition to the lease term, a tenant might assert that the duration of a restraint includes renewal options as well.

Once an analyzing court has assessed the scope of a restraint in the relevant market, it might consider the period during which that restraint would prevail as a measure of its reasonableness. A five-mile radius clause that prevents extensive dollar volume of goods from travelling

213. See Tulley, supra note 59, at 331.
214. See note 138 supra.
through commerce or that hinders other interstate transactions for a period of twenty years would obviously be far less reasonable than one that inhibits only periodic spurts of interstate activity for a brief two-year interlude.\(^\text{217}\)

The second measure of reasonableness is any counterbalancing business interest that the lessor might assert as justification for the restraint. In the case of a radius clause the developer might legitimately advance his interest in maximizing the return on his investment; when tenants' rent is determined on a percentage basis, any dilution in the volume of business directly affects the rent payable.\(^\text{218}\) This justification would be more credible if the radius clause at issue involves high rental satellite stores. A related business interest is the developer's desire to prevent any attrition in the anchor's customer drawing power, since that will affect the volume of business and hence the productivity of the entire center; this interest would be most appropriately advanced in support of a radius clause applied to the lower rental, high volume department stores.

An inquiry into alternative means of achieving the landlord's business purpose is important to determine its legitimacy as justification for the restriction. Assuming the validity of the landlord's contention that a competing second store within the proscribed area would work to the detriment of his percentage rental income, a court might inquire into alternative means of protecting that rental to determine the validity of the radius clause restraint.

The most obvious alternative is to negotiate the base rent to a satisfactory minimum and eliminate the radius clause. Such a solution, however, would meet with protest from both tenant and landlord. For the tenant, the primary appeal of the percentage lease is its responsiveness to business conditions which, at the commencement of operations, may be such that a higher fixed base would seriously endanger prospects of success. For the landlord, its attraction lies in the percentage above base that maximizes his potential return in the event of successful development and thus maximizes his promotion incentive.

Another alternative to a radius clause is to levy a penalty percentage on the sales operations of the second store, a process not unlike the damage provisions which traditionally have been requested by landlords as a remedy for breach of a radius clause.\(^\text{219}\) The percentage might vary with the distance from the center: three percent above base level sales of a second operation within one mile; two percent where the operation is located one

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\(^{\text{217}}\) See PROCEEDINGS, supra note 84, at 21.

\(^{\text{218}}\) This restriction in rental income may well require independent proof. Business realities suggest that no retailer would intentionally endanger an existing operation. A retail store, particularly a nationwide chain seeking to establish a second base of operations in the same area, may be advancing its own business interests, such as greater ability to advertise through shared advertising and more efficient shipment of a possibly wider selection of merchandise, thereby enhancing the profitability of both operations. Cf. PROCEEDINGS, supra note 84, at 7 (questioning the validity of developer's assertion in the face of tenant's business decision).

\(^{\text{219}}\) See Pollack, supra note 61, at 392.
to three miles from the center; one percent where it is located three to five miles away; no percentage if it is located farther than five miles. Indeed, the developer might devise a formula to measure the radial distances in terms of total leased area, or perhaps in terms of the type of tenant.\(^{220}\) A final, related alternative is to provide that a second operation trigger an automatic increase in the base\(^{221}\) or that gross sales of the second operation be added to those of the first.\(^{222}\)

Irrespective of the lack of appeal they may hold for the landlord, the reasonableness of these alternatives depends in large part on the legitimacy of his claim to share proportionately in the center’s success in addition to receiving a minimum assured rental income. The landlord’s entitlement to such “incentive income” is an issue that has been dealt with only peripherally by the courts, principally in landlord-suits for percentage in addition to base rental after the tenant has abandoned the premises. Early cases discussed the parties’ intent as to the function of the guaranteed minimum.\(^{223}\) Where the guaranteed rental was less than the fair rental value of the location, a covenant to continue operations has been implied and damages accorded the lessor for the breach.\(^{224}\) Where, however, the parties could not be presumed to have bargained with respect to the lessee’s earning potential,\(^{225}\) or where the base in itself was sufficient, in the court’s view, to accord the landlord his due,\(^{226}\) such implied covenants have been denied.

The issue of sufficiency has, however, received less than enlightening articulation. \textit{Stop & Shop, Inc. v. Ganem}\(^{227}\) qualifies the general proposition that a greater than nominal minimum militates against the implication that the parties contracted for continuous operation.\(^{228}\) In instances where the rent, though larger than a nominal minimum, is significantly below the fair rental value of the property, the parties could well have intended that the lessee operate during the lease to provide the lessor with the benefit of the percentage. The burden of demonstrating such disparity

\(^{220}\) See \textit{PROCEDINGS, supra} note 84, at 21.


\(^{226}\) \textit{347 Mass. 697, 200 N.E.2d 248 (1964).}

\(^{227}\) 200 N.E.2d at 251.
between base and fair rental, however, is on the lessor.\textsuperscript{229} The lessor in \textit{Fox v. Fox Valley Trotting Club}\textsuperscript{230} successfully recovered his percentage income after the tenant had moved operations to another location while continuing to pay the base. From the circumstances of the transaction the court had no difficulty in finding the percentage rental to be material; the parties' knowledge of the prior rental value, that it was insufficient to cover interest and taxes, and that the agreed base rent would provide only one and two-thirds percent on the lessor's investment, in addition to ancillary lease provisions, seemed to be important factors in the court's conclusion.\textsuperscript{231} In contrast, the court in \textit{Kretch v. Stark}\textsuperscript{232} refused to imply such a covenant, finding that the base provided lessor a sixteen percent return on his investment which was undeniably substantial.

Arguably, the shopping center landlord seeking to justify his radius clause as insuring his rental income will need to establish not only that the shopping center would be adversely affected, but also that he has a legitimate interest in protecting it from such adverse effects. Theoretically, the landlord sets the fixed minimum to assure sufficient return to cover fixed costs and to provide a set return on his initial investment.\textsuperscript{233} In a situation where the landlord has trimmed his rental to the bare bones of financing, maintenance, taxes, plus a fixed return on investment, his argument for entitlement to the percentage as a hedge against inflation would be his strongest weapon. Even though special lease provisions, such as escalator clauses and the establishment of a formula for shared common area charges and real estate taxes, may be included to assure the adequacy of the minimum rent structure,\textsuperscript{234} the landlord's calculated return on investment will at best remain static. A court might measure the adequacy of the base by comparing the landlord's return on investment to the prevailing standard for the industry. Depending on the history of the landlord's financing arrangements, the base may indeed supply a satisfactory return on investment.\textsuperscript{235} According to \textit{Ganem}, the landlord's burden would be to demonstrate that because of the center's choice location and optimal tenant mix, its fair rental value as premium retail space far exceeds that fixed minimum. Should the landlord fail to satisfy this burden, a court might well declare the percentage to be no more than a premium to which he has no legitimate business claim in light of the concomitant restraint necessary to insure it.

The landlord's asserted right to ensure that his tenants devote all their efforts to the shopping center and his right to preserve the composite pulling power of the shopping center is not without validity. The developer of a recently opened center might legitimately contend that its economic sur-

\textsuperscript{229} \textit{Id.} at 252.
\textsuperscript{230} 8 Ill. 2d 571, 134 N.E.2d 806 (1956).
\textsuperscript{231} 134 N.E.2d at 808.
\textsuperscript{233} Landis, supra note 65, at 190.
\textsuperscript{234} See Development Handbook, supra note 12, at 132.
\textsuperscript{235} Landis, supra note 65, at 190.
vival depends on the undiluted pull of all tenants working exclusively to promote its success. Once the center has become established within the trade area, however, such restrictions on other operations smack of antitrust. A more reasonable solution would be to sever the radius clause duration from that of the lease and limit the time of the restriction to a span which, in combination with the geographic scope, would assure the initial survival of the center.

Clearly, the validity of such business justifications and the practicality of alternatives will be peculiar to the given fact situation. Generally, a court might be expected to assess the reasonableness of the landlord's existing restraints in light of any alternate means of securing his legitimate business purpose. To this end the court would compare the extent, both in terms of geographic and product market and duration, of the restraint. Presumably, if the radius clause is the only effective means to protect the lessor's legitimate rental income and is necessary to ensure the survival of the center itself, he is on fairly strong footing. A store which has no realistic alternatives within the geographic market and which will be restrained to the radial area only for a reasonably limited period would have little cause to complain. Whether the same can be said of an anchor tenant who is foreclosed from the only alternative shopping center within the area or a prospective developer who is discouraged from opening a second center is another question.

Monopolization: Section 2. An alternative antitrust challenge to a shopping center radius clause could be rooted in the section 2 prohibition against attempts, conspiracies, and actual monopolization. In contrast to section 1, which requires concerted action, section 2 requires only a showing of anticompetitive action by one party. Justice White in *Standard Oil Co. v. United States*, observed that section 2 has a "somewhat broader reach" than section 1 since it could apply to an attempt to monopolize that had not as yet resulted in an unreasonable restraint. In practice, however, section 2 seems to require a greater degree of proof.

The two elements of monopolization are: (1) possession of monopoly power, and (2) attainment of that power by unfair means or use of that power for the purpose of excluding competition. Monopoly power is generally defined as the power to fix or control prices or the power to exclude competition. Its existence is determined by examination of the effect of competition on the relevant market. Early cases gauged monopoly power by its predatory exercise, while later cases played mystifying

236. *Cf.* PROCEEDINGS, supra note 84, at 20 (query whether a clause whose only purpose is to insulate center against possible financial ruin by tenant's opening of second store would be supportable).
237. 221 U.S. 1 (1911).
238. *Id.* at 61.
240. *See E. KINTNER, AN ANTITRUST PRIMER 101 (2d ed. 1973).*
numbers games to determine what degree of market control could safely be entrusted to a single enterprise. Modern courts, on the other hand, seek to determine on the basis of relevant economic data and analysis whether the market strength and power of the challenged entity are compatible with society’s enjoyment of the fruits of competitive enterprise. An allegation that a developer’s across-the-board imposition of radius clauses constitutes an attempt to monopolize the shopping center market within the relevant market area is easier to articulate than to establish. If the landlord’s center is the only one in the relevant area, it might be charged that he has monopolized the market of shopping centers within that area. Yet without a showing of both an attempt by a potential competitor to develop in the area and the failure of that attempt due to enforcement of the radius clause, it would be difficult to establish requisite intent. Further, the landlord might legitimately assert that his market position has been thrust upon him as the original entrant into a new market. The high fashion or specialty store landlord might similarly be charged with monopolizing or attempting to monopolize the market in such stores if no other shopping centers exist within the trade area. Once again, however, it would be difficult to establish that this state of affairs is intentional. The different images, and consequently the different characters of trade populations, which result when several shopping centers coexist in a trade area, might be the cause. Moreover, the developer might legitimately assert that the situation is a product of his superior skill in shaping the personality of his center. The prospective difficulties in proving the developer’s monopolistic intent suggest that this antitrust challenge would be a mere make-weight in comparison to the section 1 attack.

V. Conclusion

A definitive challenge to the radius clause provision in shopping center leases is close at hand. The provision’s prospects of survival without modi-

243. See, e.g., United States v. Aluminum Co. of America, 148 F.2d 116, 424 (2d Cir. 1945).
246. See, e.g., United States v. Aluminum Co. of America, 148 F.2d 416, 429 (2d Cir. 1945).
247. See Eagle, supra note 23, at 612, 626.
248. A telling footnote in the COMMUNITY BUILDER, supra note 4, suggests, however, that there may indeed be such intent. The comments of an executive group member of the Urban Land Institute Community Builder’s Council as to the kind and extent of data required of a landlord by a mortgage lender indicates this would include information as to competition, i.e., competitive sites or monopolistic positions, because “[t]he lending institution wants satisfactory evidence to support a successful operation.” Id. at 289 n.25.
ification would appear to depend on who is the initiator and the nature of the challenge. Should the FTC institute the challenge, its victim is likely to be a regional or super-regional center whose very size may obviate any jurisdictional difficulties. How extensive a restraint on trade or how imminent a threat of per se illegality the FTC will be prepared to find will depend on the terms of the clause and the legitimacy of any asserted business purpose. By contrast, the private challenger, whether anchor store, satellite, or prospective developer, will face the far more demanding task of establishing to the satisfaction of the federal court that the requisite effect on interstate commerce is sufficient to invoke its jurisdiction and that the concomitant burden is sufficiently detrimental to the public to merit interference.

The developer-lessee facing an antitrust challenge should be prepared to substantiate his business justifications. If invalidation of a radius clause would result in diversion of sales and consumer traffic, this diversion should be statistically demonstrable. Further, the developer should be prepared to demonstrate that his radius clause provision is the least restrictive means of achieving his business purpose. Some indication that he has attempted to tailor the clause to the particular tenant and the trade area will strengthen his assertion of reasonableness. On balance, the more limited the geographic range and duration of the clause, the less unreasonably restrictive such a clause will appear. From a practical standpoint, the landlord should provide for the severability of the radius clause so that, in the event of an adverse court disposition, the tenant will not be able to assert illegality as a means of avoiding the lease.

An attack on the radius clause, from whatever source, will raise serious questions about long-established conventions in the shopping center space leasing business. The most prominent by far is the entitlement of the landlord developer to a dollop of cream in addition to his dole of milk. If the prospects of percentage income are the primary incentive for shopping center development, the outcome of the controversy could have serious implications for the industry itself. Should the inquiring court analyze the clause by the rule of reason, as it doubtless will, this weighty policy consideration might bear significantly on the court’s decision, especially where the actual public harm in terms of reduction of competition is negligible. If, however, the percentage rate contention is a spurious argument, radius clause litigation may put to rest an illegitimately exploitative practice. The perspicacity with which an inquiring court probes the issues will be crucial in determining the continued validity of the radius clause in shopping center leases.