

## Kiosk Licenses — Open Air Freedom?

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Posted By: Jeffrey E. Mark & Chris A. Jenny & William R. West

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The proliferation of kiosks and carts at major shopping centers across America creates opportunities and risks for retailers looking to secure valuable space at affordable rates. The open air, temporary and mobile nature of kiosks and carts presents unique issues not found in traditional in-line or stand-alone lease arrangements. The following are a few issues to consider when negotiating kiosk and cart license agreements.

**Lease vs. License.** Most kiosks are licensed rather than leased and, depending on the jurisdiction, this distinction can have significant consequences for retailers. Generally, licenses do not grant an "estate" in the premises and therefore are not subject to typical landlord/tenant laws that govern eviction, bankruptcy, eminent domain proceedings and other issues in traditional real estate leases. Consequently, the legal rights of a licensee are far more limited than those of a similarly situated tenant in a lease context. For example, a kiosk license may not survive a shopping center bankruptcy or similar reorganization. Unfortunately for unsuspecting licensees and licensors, referring to an agreement as a license or lease does not necessarily make it so. In fact, courts routinely look beyond the heading of an agreement to determine whether the parties have entered into a real estate lease or a license agreement. Careful consideration should be given to whether the parties desire or intend to create a lease or license and the rights associated with each type of arrangement.

**Test the Waters.** For many retail businesses kiosks are an attractive and affordable way to test out new locations and new product concepts. As a result, license agreements are generally short term and can be tailored to allow a degree of flexibility not normally present in traditional retail leases. For instance, a retailer may want a right to terminate a kiosk license in the event it decides to move into an in-line location at the same shopping center. Similarly, a retailer may want the right to move to other kiosk locations within the same shopping center as they may become available.

**Mine or Yours.** Traditionally, kiosks and carts are supplied as-is by the shopping center and subject to limited modifications by the retailer. However, in some situations shopping centers may permit a retailer to provide its own kiosk that meets certain requirements. In situations where the kiosk is supplied by the retailer, the license agreement should specifically address the conditions of surrender. Issues such as who owns the kiosk at the end of the term and who must restore the shopping center if the kiosk is removed should all be specifically addressed in the license agreement. For example, kiosk agreements routinely require retailers to remove kiosks and restore the premises upon termination, which could include removing plumbed utilities and restoring flooring.

**Operational Issues.** The open air nature of kiosks creates several other operational issues that should be addressed during the negotiation process. For example, retailers often must arrange for separate secure storage in the shopping center – an issue that can be addressed in the kiosk agreement or in a separate storage space agreement. The fact that kiosks are located in common areas of shopping centers also means that they are often subject to liberal relocation rights at the discretion of the shopping center. If location is a critical issue, a retailer should ensure that the kiosk agreement appropriately restricts relocation. Lastly, shopping centers have become increasingly sensitive to nuisance issues commonly associated with kiosk operators. Excessive noise, light and aggressive sales tactics are likely to be prohibited by shopping centers. Depending on the nature of the retail operation and kiosk design, these provisions should be tailored to the specific operations of the retailer so as to allow, for example, interactive computer terminals and appropriate signage.

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