

LEASE EXCLUSIVE PROVISIONS



COUNSEL'S CORNER

Winn-Dixie owns and operates grocery stores across the county. Because of its size and positioning as an anchor tenant, WD is able to insist on using tenant-friendly leases that contain a provision allowing only WD to offer grocery products in its shopping centers.

The effect is to limit competitors to selling grocery items in 500 square feet or less of their retail space.

In 2011 WD filed lawsuits against Big Lots, Dollar General and Dollar Tree claiming they had violated WD's exclusive rights in 97 stores in five States. The District Court denied WD's claim in 43 stores, but allowed the litigation to proceed in the remaining 54 sites.

The Court reviewed the non-compete covenants and focused on the prohibition that precluded other stores from selling *groceries*. Lacking a definition of the term *groceries* in the leases, the District Court determined that *groceries* means "food items" and "beverages, including but not limited to bottled water, soda, and energy and coffee drinks, but excluding alcoholic beverages."

Based on those definitions, the Court granted WD injunctive relief in 37 of the 54 stores. WD appealed.

The Circuit Court took a broader definition of the term *groceries*, and concluded that it includes not only food items but also "many household supplies" as well as fixtures and proportionate aisle space.

It took this federal court 35 pages to chastise the lower court and one lawyer – unnamed here – who represented Big Lots and Dollar General. Ultimately the Circuit Court determined that an expanded definition of *groceries* should apply. That definition would include "food (excluding prepared foods) and beverages (excluding alcoholic beverages) and many household supplies (as soap, matches, [and] paper napkins)."

And that “household supplies” means items “associated with the preparation and service of food, as well as the maintenance of a clean kitchen.”

The Judgment was remanded to the District Court with instructions to apply the broader definition. Winn-Dixie wins and will be allowed to exclusively sell groceries, using an expansive definition of that word.

See *Winn-Dixie Stores, Inc. v. Dolgencorp, LLC, Big Lots Stores, Inc. and Dollar Tree Stores, Inc.*; No 15-12990; United States Court of Appeals for the 11th Circuit, January 31, 2018: <http://media.ca11.uscourts.gov/opinions/pub/files/201512990.pdf>.

Lessons Learned:

1. I didn't address this issue, but it's relatively unusual that one tenant can lawfully sue another to enforce an exclusive restriction. Usually the offended tenant beats on the landlord, who then directs its ire towards the tenant attempting to compete.
2. I have seen too many leases to count that contain imprecise language regarding an exclusive right. This case puts a spotlight on such provisions. If your lease doesn't state with crystal-clear clarity the rights and duties of both parties, then keep drafting.
3. In my experience, this is only one of the areas that typically lacks clarity. The others are ROFOs, ROFRs, knockout (early exit) clauses, percentage rental provisions, mid-term security deposit application language, tenant self-help remedies, Guaranty-limitation language, SNDAs, and Estoppel Certificate provisions.

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