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ARTICLES

The Continuing Saga of the Winn-Dixie Exclusive

By Howard K. Jeruchimowitz – October 15, 2018

Going on its sixth year and two trips to the Eleventh Circuit Court of Appeals, the case of *Winn-Dixie Stores, Inc. v. Dolgencorp* has demonstrated how difficult it is to define and enforce an exclusive especially one not well defined in the lease itself. This article explores the latest battle in the *Winn Dixie* interpretation and enforcement of a grocery exclusive in a shopping center.

Overview of Exclusives

An exclusive in a shopping center lease typically prohibits the landlord from leasing to other tenants who display or sell certain goods or services at other parts of the shopping center, or prohibiting a specific tenant or type of tenant. This benefits the tenant, by keeping out competitors, and benefits the landlord/developer, by enabling them to maintain a balanced and diversified tenant mix. *See* Kim Annello, Prime Shopping Center Real Estate: Exclusive Use Restrictions in an E-Commerce World*."*

Because exclusives often are covenants on real property and run with the land, *i.e.*, bind future owners and lessees of the premises, courts strictly construe them. Thus, exclusives often are defined narrowly or contain parameters, such as: a) a percentage or dollar amount of sales at the store location, b) primary vs. incidental use (i.e., percentage of food items sold at a theater compared to total theater revenue), c) a specified area or amount of shelf space at the store, or d) excluding specific named tenants.

Exclusives have been challenged as unreasonable, overly broad, and contrary to public policy. They are strictly construed by the courts and, if the provision is ambiguous, courts will interpret the exclusive narrowly. State contract law governs the interpretation of restrictive covenants and the enforcement of an exclusive. Thus, the same language in an exclusive could be enforced differently in different states.

The *Winn-Dixie* Saga

The most recent and comprehensive case on the power of exclusives is *Winn-Dixie* in the Federal District Court of Florida and the Eleventh Circuit. The plaintiff and tenant Winn-Dixie sued competitors and cotenants, Dollar Store and Big Lots, to enjoin their sale of "groceries" at 97 different locations in shopping centers in Florida, Georgia, Alabama, Mississippi, and Louisiana where Winn-Dixie was a tenant. The federal district court in Florida and the Eleventh Circuit were forced to address whether the grocery exclusives Winn-Dixie sought to enforce ran with the land under the law of five different states. Both courts also had to define "staple and fancy groceries" and "sales area" set forth in the grocery exclusive under the five different states' law.

Although there are multiple-reported decisions for this case, this article focuses on the two main ones in the district court and the Eleventh Circuit.

District Court Decision I
Back in 2012, the district court (886 F. Supp. 2d 1326 (S.D. Fla. 2012)) analyzed the exclusive for the 97 stores in the five states and found as follows:

- The restrictive covenants were enforceable in Florida, Alabama, and Georgia, but not enforceable under Louisiana or Mississippi law due to differences in those states requirements for covenants that run with the land. 886 F. Supp. 2d at 1336–1339.
- In applying the grocery exclusive, the district court found the term "staple or fancy groceries" difficult to define, but to include only food and nonalcoholic beverages. *Id.* at 1339–1342
- The district court found the term "sales area" to be limited to the footprint of the display unit, excluding aisle space. The district court declined to imply an additional restriction in the covenant that grocery sales be "incidental to the [defendant's] business." *Id.* at 1342–1345.

Given this narrow interpretation, the district court entered injunctive relief as to only 14 locations, all located in Florida (11 Big Lots stores, one Dollar Tree, and two Dollar General). The district court declined to award injunctive relief for the remaining 83 stores for various reasons, including distinguishing language in the grocery exclusives, the fact that some stores were closed, and/or evidence that the stores' sales of grocery items did not exceed the 500-foot limit. The district court refused to award compensatory damages to Winn-Dixie, finding its damages expert's opinion too speculative. *Id.* at 1346–47. It refused to award punitive damages because the "grocery exclusives sought to be enforced against the Defendants are rife with ambiguities and the scope of their restrictions are uncertain at best." *Id.* at 1347.

Eleventh Circuit Decision I
The Eleventh Circuit affirmed in part and reversed in part certain of the district court's finding as to the breath or the restrictive covenant and the findings for particular stores. 746 F.3d 1008, (11th Cir. 2014).

- The Eleventh Circuit found that the district court, applying Florida law, interpreted "staple of fancy groceries" and "sales area" too narrowly as to only food items, including nonalcoholic beverages, and measuring sales area only by shelving space, but not necessarily narrow under Alabama and Georgia depending on those states' laws.
- With respect to 54 of the stores, the Eleventh Circuit relied on the Florida Appellate Court's decision in *Winn-Dixie Stores, Inc. v. 99 Cent Stuff-Trail Plaza, LLC*, 811 So.2d 719 (Fla. 3d DCA 2002) ("*99 Cent*"), and found that for the 41 stores in Florida, "groceries" must be read broadly to include food and "many household supplies (as soap, matches and paper napkins)," and sales area "includes fixtures and their proportionate aisle space." As to the remaining 11 stores in Alabama and two in Georgia, the Eleventh Circuit reversed and remanded for interpretation of the covenant terms in accordance with the appropriate law of each of those states.

- For the remaining 43 states where the district court denied all relief, the Eleventh Circuit affirmed on all grounds and specifically discussed that the restrictive covenants were unenforceable under the laws of Louisiana because they were not "clearly apparent from the title documents," and Mississippi because there was no privity of estate between Winn-Dixie and the Dollar General tenant.
- Importantly, the Eleventh Circuit agreed with the district court's treatment of compensatory and punitive damages only further confirming difficulty in proving them.

District Court Decision II
Upon remand from the Eleventh Circuit, the district court probably best summarized the ordeal over these exclusives:

I am once again tasked with the job of defining "groceries" as the term is used in a grocery exclusive, which is being applied to variety stores located in shopping centers with a major grocery store. ***The amount of attorney and judicial time and resources that have been expended in an attempt to define this seemingly simple but evolving term is astounding.*** After working on this case for over four years, it is apparent that the marketplace is rapidly and continually evolving and grocery stores are selling more and different products than ever before. Crafting a list of products that are considered groceries is a daunting task, especially in light of ever-expanding offerings. This may be a case where I am "faced with the task of trying to define what may be indefinable."

Winn-Dixie Stores, Inc. v. Dolgencorp, LLC, 2015 U.S. Dist. LEXIS 178867, at *7–*8 (S.D. Fla. April 17, 2015). (emphasis added). Even though the Eleventh Circuit had directed the District Court to simply rely on the "dictionary definition" of groceries in its interpretation, it noted that the parties had submitted 12 separate dictionary definitions of that single term. *Id.* at *11.

The district court found that the exclusive was still not violated in Alabama and Georgia because these states did not define "groceries" or "sales area" and, therefore, the court defined them narrowly to just food and the display unit excluding aisle space. 2015 U.S. Dist. LEXIS 178867, at *16-*32. For the Florida stores, the court had to consider the broader definition for groceries and sales area under the 2002 Florida *99 Cent* case precedent. *Id.* at *32–*46. The district court divided the Florida stores to pre- and post-2002 *99 Cent* case. For exclusives before that case, the district court applied a narrow definition to the exclusive for food only and the display unit excluding aisle space. For the post-*99 Cent* case, the district court applied the broader definition and interpreted the *99 Cent* definition to food and household supplies "associated with the preparation and service of food, as well as he maintenance of a clean kitchen (as the primary place where food is prepared)." *Id.* at *45*–46. As to "sales area," for defendants' Florida stores that executed lease agreements after February 2002, the court adopted its preliminary definition, which includes "fixtures and their proportionate aisle space." *Id. at *47.*

After remand, only seven of the original 97 stores were enjoined from selling "groceries" based on this decision, the remainder were found not to be in violation or merely ordered to reduce

their shelf space designated for "groceries." 2015 U.S. Dist. LEXIS 178867, at *53–*54. In a subsequent decision, the total number of stores with leases were executed after February 2012 (post-*99 Cent* case) is increased to 14. *Winn-Dixie Stores, Inc. v. Dolgencorp, LLC*, 2015 U.S. Dist. LEXIS 178873 (S.D. Fla. June 3, 2015).

Eleventh Circuit Decision II
In a blistering opinion, the Eleventh Circuit spoke again and reversed the district court as to the Florida stores:

After we have remanded a case with specific instructions, attorneys rarely attempt to have the district court defy our mandate. And even if they try it, a district court is seldom misled into that kind of error by them. This is one of those rare cases where the attorneys representing one side successfully urged the district court to act contrary to our mandate. Of course, we reverse that part of the judgment.

Winn-Dixie Stores, Inc. v. Dolgencorp, LLC, 881 F.3d 835, 839 (11th Cir. 2018). The Eleventh Circuit reiterated is mandate was clear without room for confusion or genuine doubt and really meant for the District Court to apply the broader definitions for groceries and sales area from the *99 Cent* case for all 41 Florida stores. *Id.* at 843–48.

Therefore, the Eleventh Circuit remanded the case yet again (now in its sixth year) to apply the *99 Cent* definition to all the Florida stores and not just the 14 with leases executed after February 20, 2012. 881 F.3d at 849. Narrower than Winn-Dixie wanted, the Eleventh Circuit affirmed the definition applied by the district court based on the *99 Cent* case to be food and household supplies "associated with the preparation and service of food, as well as he maintenance of a clean kitchen (as the primary place where food is prepared)." *Id.* at 849–51.

As opposed to other states (Alabama and George, for example), the courts in Florida were controlled by binding precedent (th*e 99 Cent* case). But, even so, the Eleventh Circuit still returned to the guiding principle that "covenants are strictly construed in favor of the free and unrestricted use of property." 881 F.3d at 850.

Conclusion
Six years later, it appears the *Winn-Dixie* case may have reached its last leg. Looking back, the question remains whether it was worth it. It is a good reminder to draft and define the exclusive well in the lease. It is also serves as a solid reminder that no one exclusive applies the same in each state and will depend on whether the exclusive runs with the land and how the state will define the terms of the exclusive. And the courts will likely still apply exclusives strictly and narrowly unless binding precedent provides otherwise. The lesson for drafting attorneys is to define terms as specific as you can; understand the particular state the lease is in; be reasonable with its interpretation; and, although litigation may sometimes be unavoidable, think through whether it is best to litigate over a provision rather than come to a sensible business solution. Otherwise, your lease may be the next *Winn-Dixie* saga.

Howard K. Jeruchimowitz is a litigation shareholder at Greenberg Traurig, LLP. He is also cochair of the Emerging Issues Subcommittee of the Section of Litigation's Real Estate, Condemnation and Trust Litigation Subcommittee.