

DIRT Daily Development for Friday, December 14, 2012  
*Winn-Dixie Stores, Inc. v. Big Lots Stores, Inc.*

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*Winn-Dixie Stores, Inc. v. Big Lots Stores, Inc.*, United States District Court, Southern District of Florida, \_\_\_F.Supp. 2d\_\_\_ (August 13, 2012)

This case raised questions nationally about the tenant's remedies for violation of a retail lease provision that prohibits the use of other property in the same shopping center for a use similar to the tenant's use (a provision of this type is an "exclusive"). Although this case was litigated in federal court in the Southern District of Florida, the court ruled on Winn-Dixie's grocery exclusives in leases of property in Florida, Alabama, Georgia, Louisiana, and Mississippi.

The unique aspect of this case is Winn-Dixie's decision to proceed against other tenants in the shopping center (i.e., Big Lots, Dollar General, and Dollar Tree) - not against the landlord - for the violation of Winn-Dixie's grocery exclusive. Winn-Dixie alleged that its exclusive was violated by the sale within these stores of restricted items in amounts that exceeded those allowed by Winn-Dixie's lease. The court recognized that because these other tenants were not parties to Winn-Dixie's leases containing the use restrictions, Winn-Dixie's grocery exclusions would have to be real property covenants running with the land to permit Winn-Dixie to enforce these covenants directly against the other tenants.

The court found that in Florida, Alabama, and Georgia, the covenants did run with the land and were enforceable against the other tenants. Winn-Dixie's leases stated that the exclusives were covenants running with the land and that each of the defendant tenants had actual, constructive, or implied actual notice of the grocery exclusives (as an example, the court found that Dollar General knew that Winn-Dixie was the anchor tenant, was aware that anchor tenants require exclusives, and had the obligation to make further inquiry or to examine the shopping center's chain of title to see if Winn-Dixie had recorded the grocery exclusive). Winn-Dixie apparently had also recorded short forms of its leases, but it is unclear whether all of the short forms set out the exclusives.

With respect to Mississippi, the court found that there was no privity of estate between Winn-Dixie and the other tenant in the shopping center (only one of the stores was in Mississippi), so the exclusive was not a covenant running with the land.

Five of the Dollar General stores and one Dollar Tree store were located in Louisiana. The court recognized that merely stating that a covenant runs with the land in a Lease does not create immovable rights:

Rather, for a covenant to run with the land in Louisiana, it “can be established only by a title . . . . [T]he real obligation must be clearly apparent from the title documents themselves.” *Leonard v. Lavigne*, 345 La. 1004, 162 So.2d 341, 342 (La. 1964). 2012 WL 3292001 at 4. The court concluded that the grocery exclusives in this case were not covenants running with the land in Louisiana.

With respect to the cases in which the exclusives did run with the land, the court decided that the language of the exclusives was unclear in part because it decided that the phrases “staple or fancy groceries” and “sales area” are ambiguous and that all ambiguities must be resolved in favor of the unrestricted use of the land (in favor of the defendants).

Most important, however, the court found that Winn-Dixie had not proved its damages. Winn-Dixie brought in an economist who prepared an economic model and analysis and testified as to the claimed damages. Much of the court’s lengthy opinion was devoted to the court’s disagreement with this method of proving damages. The court viewed the testimony on sales that can be anticipated to be lost by reason of a non-traditional grocery seller to be speculative and unconvincing. No damages were proximately shown to have been caused by the other tenants’ sales.

The court also considered Winn-Dixie’s request for injunctive relief and analyzed the stores to which this relief might be available (injunction was not available for the stores that had closed or that were located in Mississippi or Louisiana). The court ordered a few stores to cease violating the restriction. With respect to the other stores, the court found that Winn-Dixie had not made a clear showing that the restriction was being violated either because the area in which restricted products was being sold was not large enough to violate the restriction or because the restriction language was too vague to be enforceable.

I understand that this case is being appealed, but retail leasing lawyers that represent tenants across the country are considering ways to make their exclusive provisions more enforceable against other tenants and ways to include enforceable damages against their landlords. Lawyers for landlords and other tenants are also not comforted by this decision, however. It is very fact-based, and in another factual situation, a different result could be reached.

**Prof. Freyermuth’s comment:** Maybe one of our Mississippi DIRTers might help out here, but the idea that lack of privity of estate prevented enforcement of the exclusive seems questionable --- at least to the extent that Winn-Dixie was also seeking injunctive relief (the facts suggest that Winn-Dixie also sought injunctive relief as an alternative to future

damages). The hornbooks and the Restatement traditionally took the view that while privity was necessary to permit enforcement of a covenant against a successor in an action for damages, it was not necessary in an action in equity for an injunction. If the exclusive "touched and concerned" the land and Dollar General took its lease with constructive notice of the Winn-Dixie exclusive, why shouldn't that exclusive be enforced by injunctive relief?