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AN **ALM SIGNATURE AWARD** SERIES

Kluger, Kaplan, Silverman, Katzen & Levine, P.L.

REAL ESTATE Winner

Kluger helps discounters win food fight with Winn-Dixie

REAL ESTATE Winner

by Larry Lebowitz
Special to the Review

Steve Silverman doesn't run the biggest real estate litigation practice in South Florida. But in 2012, he delivered the results for a client in a case with national implications for discount retailers.

Silverman, founding partner of the Kluger, Kaplan, Silverman, Katzen & Levine, P.L. firm in Miami, represents the Dollar Tree Inc. chain of discount stores based in Virginia.

In June 2011, Winn-Dixie sued 48 Dollar Tree stores in five Southern states for allegedly violating a provision in Winn-Dixie leases that restricts dollar stores in the same shopping center as Winn-Dixie from selling certain products in amounts other than what is expressly permitted by the leases.

Many leases were employing language written 30, 40 or 50 years ago during a vastly different era for retail stores and commercial leases, Silverman said.

Winn-Dixie was seeking injunctive relief against Dollar Tree and other discount retailers to restrict their ability to sell "groceries," and, as Silverman puts it, "Winn-Dixie was seeking to broadly define groceries as almost anything sold in a Winn-Dixie supermarket."

Emboldened after winning a couple of smaller state court rulings against specific Dollar General stores, Winn-



Dixie went after Dollar Tree, Dollar General and Big Lots on a much larger scale in West Palm Beach federal court. The cases were consolidated for trial before U.S. District Judge Donald Middlebrooks.

"There was no doubt to us that Winn-Dixie sought to use this litigation as commercial warfare to eliminate what it thought was its competition," Silverman said.

With a few technical exceptions, Middlebrooks ruled largely in favor of the discount chains. The judge narrowly tailored the definition of "groceries" to cover food and beverage items. Dollar Tree and the other discounters declared victory, continuing to compete in a free market with a level playing field.

"This was a huge victory for Dollar Tree, and a big loss for Winn-Dixie," Silverman said. "The litigation of restric-

tive covenants is very active across the country, and other jurisdictions have closely watched this case to see how it might impact their own litigation matters."

Winn-Dixie has appealed to the U.S. Court of Appeals for the Eleventh Circuit. Briefs are due in the coming weeks. Oral arguments have not been set yet.

Beyond Winn-Dixie, other grocery chains have filed similar suits against Dollar Tree and other discount stores with the goal of eliminating them from the market altogether.

"This case set an example that grocery chains will have to compete on their own merits rather than using the courts to kill their competition," Silverman said.

Formed in 2010, Kluger Kaplan is a relatively new firm. Before co-founding

the firm, Silverman was chair of the litigation and dispute resolution department and co-founder of the distressed asset group at the predecessor firm Kluger, Peretz, Kaplan & Berlin.

In four years, the firm has nearly doubled in size from 17 to 28 attorneys, but the focus remains on high-end, complex litigation across a range of disciplines and industries.

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STEVE SILVERMAN
PARTNER

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