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Practice Area: Retail Real Estate

A spat about the proper way to interpret the word "sandwich" recently broke out.[1]Typically, such an event would not be noteworthy. It has received more attention because the participants were Justice Antonin Scalia, an Associate Justice on the United States Supreme Court, and Judge Richard Posner, a Judge on the United States Court of Appeals for the Seventh Circuit.

Justice Scalia approved of another judge's use of a dictionary to conclude that "sandwich" means "two thin pieces of bread, usually buttered, with a thin layer (as of meat, cheese, or savory mixture) spread between them." Judge Posner countered that a sandwich need not have two slices of bread, citing the existence of open-faced sandwiches.

This *Update* does not definitively answer the sandwich question. Rather, it highlights the importance of clearly drafting the exclusivity provision of a retail lease—the clause that impacts both a tenant's right to use or not use the premises for certain purposes and a landlord's ability to sign leases with other tenants.

The case that gave rise to the great sandwich debate considered the following exclusivity provision:

> Landlord *agrees not* to enter into a lease, occupancy agreement or license affecting space in the Shopping Center or consent to an amendment to an existing lease permitting use . . . for a bakery or restaurant reasonably expected to have annual sales of *sandwiches* greater than ten percent (10%) of its total sales.[2]

The landlord of a shopping center and the operator of a Panera Bread restaurant had negotiated the exclusivity provision when Panera Bread first went into the shopping center. About five years after they signed the lease, landlord entered into a lease with the operator of a Qdoba. The Panera operator believed that the landlord breached its exclusivity provision because sandwiches would be more than 10% of Qdoba's total sales. The landlord disagreed, noting that Qdoba would be selling tacos, burritos and quesadillas; not sandwiches. The court sided with the landlord. Based on the dictionary definition of sandwich, no breach of exclusivity provision would occur because Qdoba would not be selling sandwiches.

Did the operator of Panera think they would be the only fast-service restaurant in the shopping center? If so, either a term broader than sandwich should have been included in the exclusivity provision or the lease should have explicitly stated that a sandwich includes certain creations that are more than just two thin slices of bread with a thin layer between them.

In negotiating exclusivity provisions, the parties must strive to clearly identify the scope of exclusivity rights. The challenge is to then draft the exclusivity provision in a manner that will lead to a straightforward interpretation.

[1] Richard A. Posner, *The Incoherence of Antonin Scalia*, The New Republic, August 24, 2012 (review of Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012)) [2] *White City Shopping Center, LP v. PR Restaurants, LLC*, 21 Mass.L.Rptr. 565 (2006).
