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Breach of Quiet Enjoyment Can Constitute Constructive Eviction

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The concepts of “quiet enjoyment” and “constructive eviction” are often intertwined, and yet the exact relationship between them is often unclear.[1] A recent appellate case in Pennsylvania, upholding a jury verdict, *Sears, Roebuck & Co. v. 69th Street Retail Mall, L.P.*, [2] provides some insight on the contemporary view of these doctrines and their relationship to one another.

Covenant of Quiet Enjoyment

The covenant of quiet enjoyment is one of the most fundamental rights obtained by a tenant in a lease, and it is also one of the most complex. It certainly means something far different from the right to be free from loud and obnoxious noises, although as it turns out, there have been cases where the covenant is invoked to avoid noisy neighbors.[3] *Black’s Law Dictionary* (10th ed., 2014) defines the “covenant for quiet enjoyment” as providing “that the tenant will not be evicted or disturbed by the grantor or a person having a lien or superior title.” The scope and breadth of this protection is at issue in many cases.

The covenant of quiet enjoyment is an especially important legal concept in part because in nearly every jurisdiction, it is deemed part of a lease under common law even if the words are never mentioned in the lease.[4] So the covenant of quiet enjoyment will either be explicitly mentioned in the lease (an “express covenant”) or, if not, it will be deemed to be incorporated into the lease (an “implied covenant”).[5] Since the *Sears* case involved failures by the landlord and its agents to fulfill the landlord’s express obligations under the lease, the types of other parties covered by the covenant of quiet enjoyment were not an issue in this case.[6] However, it is worth noting that the express covenant of quiet enjoyment typically suggested by landlords in many leases actually reduces the protection provided to the tenant.[7]

Constructive Eviction

Black’s Law Dictionary (10th ed., 2014) defines “constructive eviction” as a “landlord’s act of making premises unfit for occupancy, often with the result that the tenant is compelled to leave.” The doctrine of constructive eviction arose as a remedy for tenants because early common law doctrine provided that the tenant’s obligation to pay rent was suspended only for a physical dispossession of the premises.[8] Although this limited remedy was suitable in the early period of development of the common law, when leaseholds were primarily for agricultural land and the landlord’s obligations were very limited, the doctrine presented problems in dealing with leases of urban residential and commercial land, where the condition of valuable and extensive structures is a critical element of the lease.[9]

To rectify this narrow doctrine, the courts eventually ruled that serious interference with the tenant’s use of the premises by the landlord was an eviction, even if there was no physical expulsion of the tenant.[10] The interference could occur for a variety of reasons, including the landlord’s failure to maintain, repair and construct the premises if required by the lease.

Traditionally, and in most jurisdictions today, there are at least three requirements for a claim of constructive eviction, all of which the tenant must meet:

1. There is a material act by the landlord (or its agent) that substantially interferes with the use and enjoyment of the premises;
2. The act must permanently deprive the tenant of the use and enjoyment of the premises; and
3. The tenant must abandon the premises within a reasonable time after the commission of the act.

In some jurisdictions, in addition to the elements described above, a constructive eviction also requires (a) that the landlord intend that the tenant no longer enjoy the premises[11] or (b) a notice and opportunity for the landlord to cure the breach.[12]

Breach of the Covenant of Quiet Enjoyment and Constructive Eviction

In the early case law surrounding the covenant of quiet enjoyment, many courts ruled that the covenant was only violated in the event of an eviction (actual or constructive).[13] In jurisdictions that follow this doctrine, the tenant must, at a minimum, provide evidence of constructive (or actual) eviction in order to recover damages for breach of the covenant of quiet enjoyment.[14] However, as reflected in the *Sears* case, a less direct relationship between the two doctrines has evolved in other jurisdictions.

Case Summary

In March 2014, after a seven-day jury trial, Sears prevailed in a lawsuit against both Sears's landlord and the landlord's leasing agent for, inter alia, constructive eviction.[15] Sears, a tenant since 1988, alleged that after Sears had refused a buyout of Sears's leasehold interest in 2006, the maintenance of the building deteriorated. Sears described some of the conditions as "horrific," including "falling bricks from the facade," "leaks in the interior, slipping hazards," "neglected landscaping," "concrete chunks falling from the garage ceiling," "a rat infestation," "homeless people living in the garage and illicit activity, including drug sales and prostitution in the parking garage."

Decision

The *Sears* case illustrates the modern view that a breach of the covenant of quiet enjoyment does not require a constructive eviction, but a constructive eviction does require a breach of the covenant.[16] The court wrote as follows:

However, to contextualize our review of that case, we first must note that constructive eviction is one species of a violation of the lessee's right to quiet enjoyment. While one might gain relief for such a violation without being constructively evicted, one cannot be constructively evicted absent such a violation. In effect, constructive eviction occurs when a lessor's violation of a lessee's entitlement to quiet enjoyment is so extreme as to interfere seriously with the lessee's ability to use the leasehold as it was intended to be used, and the violation prompts the tenant to abandon the property within a reasonable amount of time.

A critical element of the court's decision with respect to the elements of constructive eviction is the determination that the "substantial interference" element is not something that is measured by each individual breach of the lease by the landlord. The court specifically rejected any argument that it was appropriate to isolate each of Sears's numerous issues and evaluate each issue standing alone in determining if there was a constructive eviction. Instead, the court accepted Sears's argument that there were a "thousand knives" cutting at Sears's leasehold interest and went on to cite another case favorably where a court ruled that "problems that might not constitute a constructive eviction were they isolated, rare and promptly addressed by the landlord may rise to a constructive eviction when they persist, remain unremedied and substantially interfere over time with the tenant's quiet enjoyment of the leasehold."

In addition, the court indicated that "a business' commercial 'attractiveness' has bearing upon the constructive eviction inquiry in the commercial context." Specifically, the court cited the testimony from Sears regarding conditions that "made the Premises considerably less attractive to customers," indicating that the "substantial interference" required for a constructive eviction may include matters that have an adverse impact on a tenant's ability to conduct business successfully, even if such factors do not make it "impossible" to conduct such business.

The court also indicated that it would not punish a tenant for the lengthy period before abandonment of the premises, as long as the circumstances justified the tenant's conduct, and indicated that it "was incumbent upon courts to be sympathetic to the facts and circumstances of a given case." For example, although Sears did not vacate the premises until three years after the issuance of its notices of default to the landlord, the court determined that it was reasonable for the jury to conclude that "Sears sought to adhere to the Lease until the thousandth cut finally prompted Sears to decide in December 2011 to begin the process of abandoning the Premises." Furthermore, although it took Sears until May 2012 to vacate the Premises physically, the court specifically indicated that such a period of time should be evaluated in light of the "arduous process of winding down and liquidation" in light of the "scale of the Premises and Sears' operations." The court's thinking on this issue is best encapsulated in its statement that "Packing up a department store is not a weekend's affair."

In addition, the court specifically rejected any argument that the availability of self-help as a remedy for a tenant (a remedy available to Sears under the lease) prevents a tenant from pursuing a constructive eviction claim and the associated rent abatement.

Conclusion

The *Sears* case affirms the increasingly prevalent view of the covenant of quiet enjoyment as enforceable—even in the absence of any eviction (physical or constructive)—and an understanding that the elements necessary for a constructive eviction (e.g., substantial interference, deprivation of use of the premises and abandonment of the premises) must be evaluated in light of the business operations contemplated at the premises.

Specifically, while the *Sears* case requires the tenant to meet substantial burdens to prove constructive eviction, the decision establishes that:

- Individual matters may be aggregated in determining whether the tenant has been constructively evicted;
- Matters that interfere with the particular nature of a tenant's business may be considered in evaluating whether the tenant's use of the premises has been impaired;
- The availability of self-help to a tenant does not limit a tenant's right to claim a constructive eviction; and
- The time necessary for a tenant to vacate the premises may be evaluated in light of the nature of interference with tenant's use and the demands of winding down tenant's operations.

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[1] Meislek, Ira. "What Is This Thing Called Quiet Enjoyment? (In the Context of Commercial Leases)," August 5, 1997. http://www.meislik.com/articles/quiet_enjoyment_commercial_leases/.

[2] 2015 WL 5778622 (Pa. Super. Ct. 2015).

[3] *Biocchini v. Gorn Management Co.*, 69 MD. App. 1, 515 A.2d 1179 (1986).

[4] There is discussion surrounding New Jersey and Wisconsin. See "Covenants of Quiet Enjoyment, General," *Friedman on Leases*, 29:2:1 (pp. 29-2).

[5] The covenant can also be totally disclaimed by the parties, although this is not customary. "As-is" and other similar language may create a waiver of the covenant. See "Limiting the Covenant of Quiet Enjoyment" by Emily K. Bardon in *Law Journal Newsletters*, May 2016. Although in the *Sears* case it is not clear if the covenant was express or implied, there was no dispute that the covenant was in effect under the lease.

[6] The *Sears* case also involves claims against the landlord's leasing and development manager. However, the *Sears* case did not involve claims regarding the behavior of unrelated third parties (e.g., other tenants).

[7] This is achieved by limiting the covenant to interference by "Landlord or any other person or persons claiming by, through or under Landlord," which nullifies the implied covenant and limits the landlord's liability to the actions of the landlord or those whose rights are derivative of the landlord's. See "Express Covenants of Quiet Enjoyment," *Friedman on Leases*, 29:2:3 (pp. 29-10).

[8] Rapacz, Max P. "Origin and Evolution of Construction Eviction in the United States," *DePaul Law Review*, Volume 1, Issue 1, Fall-Winter 1951, p. 73. This was called the doctrine of "independent covenants" and followed typical common law views of real estate conveyancing.

[9] Hicks, John. "The Contractual Nature of Real Property Leases," 24 *Baylor L. Rev.* 443 (1972), pp. 445, 451.

[10] Alternatively, the courts could have elected to interpret the leases in accordance with contract doctrines that would have led to "mutually dependent" covenants. Instead the courts elected to adopt a remedy relating to a real property concept, eviction, rather than ordinary contract principles. See "The Contractual Nature of Real Property Leases," *Id.* p. 461. Some courts, recognizing that the continued expansion of the doctrine of "constructive

evictions” is not an adequate remedy in light of modern real estate practices, have overturned the common law doctrine of “independent covenants” in favor of “mutually dependent” covenants. See *Wesson v. Leone Enterprises, Inc.* 437 Mass. 708.

[11] The lack of discussion regarding this issue in the *Sears* case indicates that intentionality was not a requirement for constructive eviction in Pennsylvania. However, even in other jurisdictions where such intentionality is required, the courts have limited the impact of this element by providing that such intent can be presumed based upon a landlord’s understanding of the impact of its actions. See chapter 7 “Landlord’s Duties and Liabilities” by Janet M. Johnson, Schiff Hardin, LLP, in *Commercial Landlord-Tenant Practice* (2007), Illinois Institute for Continuing Legal Education.

[12] Notice was not an issue in this case, as the court noted that Sears had sent a “series of notices of default” to the landlord over the years. Even in jurisdictions where notice and opportunity to cure are not formal requirements, it seems wise as a matter of equity to establish that the landlord refused to correct the problem, with the possible exception where it is indisputably clear that the landlord was aware of the situation.

[13] If the tenant is merely seeking damages for a landlord’s failure to perform an affirmative covenant in a lease, there is no necessity to allege a breach of the covenant of quiet enjoyment, since the doctrine of independent covenants is not a barrier to the tenant’s pursuing a claim for damages. The importance of a claim for breach of the covenant is that the “use and enjoyment” of the premises may cover aspects of the landlord’s behavior that are not breaches of explicit provisions of the lease, and if a claim of constructive eviction is upheld on account of the breach, the tenant’s obligation to pay rent may be suspended.

[14] “Tenant Remedies” by Kurt D. Nondorf and Theresa R. Nassif, Real Estate Law Conference, South Texas College of Law CLE, June 5-6, Houston, Texas.

“A Balancing Act: Juggling Competing Interests in Shopping Center Redevelopment” by James B. Jordan and Renne J. Magnant, International Council of Shopping Centers, 2007 United States Shopping Center Law Conference.

[15] Sears also prevailed on a separate claim in the case against the landlord’s management agent for intentional interference in contractual relations based upon actions taken against Sears by the management company that were outside the scope of the management agent’s authority.

[16] The benefit for a tenant of allowing claims for breach of the covenant of quiet enjoyment without an eviction (actual or constructive) is that it allows a claim for damages for types of breaches that do not rise to the level necessary for a constructive eviction and, perhaps more importantly, allows claims for damages without requiring the tenant to vacate the premises.

Does “Any Other Lawful Use” Really Mean It?

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A lease defines “Permitted Use” to include a primary use, “as well as any other lawful use.” Is the tenant actually permitted to conduct any use of its premises as long as the use is not illegal? Or must the tenant’s “other lawful use” be related to its permitted primary use?

The general rule is that a lease for a specific purpose is generally regarded as permissive rather than restrictive and does not limit the use of the premises by the tenant to such purposes: “A mere statement of the purpose of a lease or words that describe the use of the premises are deemed permissive rather than restrictive.”[1] Where a landlord claims that a commercial lease imposes limitations on the permitted use of the leased premises, all doubts are to be resolved in favor of a construction that least restricts use of the premises.[2]

Case Law

Nonrestrictive

In *Chicago Title & Trust Co. v. Southland Corp.*,[3] the landlord brought a declaratory judgment action requiring the determination of whether the phrase “any other lawful purpose” in a tenant’s lease permitted the tenant to use the premises for any use (selling freshly made sandwiches) other than its permitted use as a grocery store so long as its other use was lawful. The lease provided, “Lessee is hereby given the privilege of using the leased premises as a grocery store for the sale of food, packaged beverages (alcoholic and non-alcoholic) and hard and soft goods or for any other lawful purpose.”[4] The Southland Corporation was the assignee of the lessee’s interest in the lease. The lessor plaintiff argued “that the phrase ‘any other lawful purpose’ refers back to the types of goods that may be sold in the store, whereas defendant claimed that the phrase allows for any other lawful use of the premises in addition to use as a grocery store.”

The court distinguished cases where the principal permitted use was qualified by the word “only,” which word was not contained in the lease. The court then applied the general contract rule that when determining the intentions of the parties to a lease, words used in the lease should be given their common and generally accepted meaning. Applying that rule, the court concluded that the phrase

“...any other lawful purpose” permits the tenant to use the premises for uses other than a grocery store so long as that use is lawful. “When determining the intentions of the parties to a lease, words used in the lease should be given their common and generally accepted meaning. (*Kurek v. State Oil Company* (1st Dist.1981), 98 Ill.App.3d 6, 8, 53 Ill.Dec. 643, 424 N.E.2d 56). We believe the language in article 26, “any other lawful purpose,” permits the lessee to use the premises for uses other than a grocery store so long as that use is lawful.[5]

The appellate court also stated, “The clear and unambiguous provision in the lease contains descriptive words permissive in nature and does not contain any clauses restricting the rights of the tenant, except as to ‘lawful use.’ If the parties had intended otherwise, they could have inserted simple words of limitation, which they did not.”

In *Western Assets Corp. v. Goodyear Tire & Rubber Co.*, Goodyear was the tenant under a lease that permitted it “to use and occupy the premises for the sale of such products and furnishings of such services as in Goodyear service stores generally, including but not limited to the servicing, storing and repairing of motor vehicles, and the selling to consumers and to others in the servicing of tires, tubes, oil and other lubricants, motor and tire accessories and kindred products, or for any other lawful purposes.”[6] The Seventh U.S. Circuit Court of Appeals held, “Because the lease clause allowed Goodyear to use the warehouse as a wholesale tire center ‘and for any lawful purpose,’ we hold that under Illinois law, Goodyear’s use of the building was not limited to the operation of a tire center but could also be used ‘for any lawful purpose.’” [7]

Ambiguous

The Supreme Court of Hawai‘i examined a permitted use clause in a lease that provided:

The demised premises shall be used only for educational, recreation (including vacation residence for members and staff of Lessee's school and church), agricultural, health care and humanitarian uses. No dwellings shall be constructed or used on the demised premises except for faculty, administrative staff, students and employees.[8]

Finding that the word "including" as it appears in the parenthetical phrase in the first sentence of the use provision could be interpreted as expansive or restrictive in its meaning, the Supreme Court of Hawai'i found the provision to be ambiguous and remanded the case to the circuit court to determine whether the lease permits the tenant to use cabins as vacation residences for the general public. "In making this determination, the fact-finder may consider additional evidence, including parol evidence, regarding the intent of the parties at the time of drafting."

Unambiguously Expansive

In a case decided by the Vermont Supreme Court, the lease permitted the tenant to use the premises for "the sale of goods and any other lawful use including without limitation, a use as supermarket for the preparation, storage, display and sale of groceries, meats, fish, delicatessen products, fruits, vegetables, bakery and dairy products, candy, tobacco products and beverages, and for the sale of such other goods and the rendition of such services as the Tenant may from time to time elect." The lease also permitted the tenant to assign or sublet the premises for any lawful use. The Supreme Court of Vermont determined that the lease plainly and unambiguously permitted tenant's assignee to divide the premises into two spaces with one being used as a pharmacy and the other for another retail business. "Thus, although the parties undoubtedly expected the tenant to use the premises, at least initially, as a supermarket, the lease explicitly allows other lawful uses. See *St. Paul Mercury Ins. Co. v. Lexington Ins. Co.*, 78 F.3d 202, 206-07 (5th Cir. 1996) (word 'including' is generally given expansive reading, even without additional language of 'without limitation')."[9] The court went on to find, "The parties could have drafted this provision to restrict use of the premises to the operation of a supermarket... But, for whatever reasons, the parties to the lease in this case chose to allow any lawful use of the premises. We conclude that the lease's expansive use provision permits any reasonable, lawful use of the premises, including its use as a Brooks Pharmacy or other reputable retail establishment."

Related to the Principal Use

In *Sky Four Realty Co. v. C.F.M. Enterprises, Inc.*,[10] the court went even further in its analysis of the impact of the word "only" in the permitted use provision of a lease. The only issue before the court was whether the sale of lottery tickets was consistent with the use clause under the lease. The court found that cases holding the other lawful use must be related to the principal use where the lease permitted only "the sale of" groceries need to be distinguished from cases where the lease does not restrict the tenant to the "sale" of specified items. The lease in *Sky Four Realty* required that the premises be "used" only for a convenience food market. The court found that "use" as a convenience store does not necessarily exclude the sale of lottery tickets, and that the sale of lottery tickets is consistent with the use clause in the subject lease.

In *TOC Retail, Inc. v. Gulf Coast Oil Co.*,[11] a Louisiana federal district court applied Mississippi law and held that use of leased premises as a parking lot was not a "related purpose" or "similar purpose" to its former use under the lease as service station/convenience store. The lease did not contain any provision specifically restricting the use of the property to that use. In addition to that permitted use, the lease stated that the property may be used at "Lessee's option for the conduct of any other lawful business thereon."

The federal district court reviewed Mississippi law as determined by the Mississippi Supreme Court in two cases. In *Delta Wild Life & Forestry, Inc. v. Bear Kelso Plantation, Inc.*, 281 So.2d 683, 686-687 (Miss. 1973), the Mississippi Supreme Court stated, "As a general rule it may be said that a tenant is entitled to use leased premises for any lawful or valid purpose, without interference on the part of the landlord, so long as such use is not forbidden by any express provision of the lease or by some necessarily implied construction of the instrument." [12]

In *Ewing v. Adams*,[13] the Mississippi Supreme Court came to the same conclusion as in *Bear Kelso* but added a caveat. It addressed restrictions in a lease that property be used as a drive-in movie theater and found that "while not restricting the use of the property to that particular purpose, neither does it mean that the lessee has a completely unrestricted right of business use of the property." [14] It also discussed cases from other jurisdictions, explaining the permissive nature of restrictions and the requirement that any restrictions must be clearly defined and not left to implication. The *Ewing* court agreed with the Ohio Supreme Court in *Bevy's Dry Cleaners and Shirt Laundry, Inc. v. Streble*,[15] which had written, "Uses similar or related to the general scope of the described use will not be prohibited as between the lessor and the lessee. We cannot speculate on a solution to the problem presented if, for example, [lessee] elects to operate on its premises a foundry, slaughterhouse or some other instrumentality inconsistent with the type of construction, the character of the building or the adjacent

properties.”[16]

In *TOC Retail*, the Louisiana federal district court determined that “the question is whether the use of the leased premises as a parking lot constitutes a ‘use similar or related to the general scope of the described use’ in the lease (citation omitted) which is not injurious to the landlord.” The *TOC Retail* court found that use of the premises as a parking lot is not similar or even closely related to use of the premises as either a service station or convenience store, or both, and thus decided in favor of the landlord.

Impact of Applicable Laws

Zoning laws may also affect a tenant’s right to use the premises for “any other lawful use.” Some courts, citing retailing trends, have shown a willingness to recognize self-service fuel pumps as an accessory use at convenience stores under the “customarily incidental” standard. Other courts have been obliged by relevant ordinance language to treat self-service gas pumps as a “gasoline station” or “automobile service station” use rather than an accessory retail use.[17]

State laws may also work to limit a tenant’s right to conduct any lawful use within its leased premises. For example, California Civil Code Section 1930 provides, “When a thing is let for a particular purpose the hirer must not use it for any other purpose; and if he does, he is liable to the letter for all damages resulting from such use, or the letter may treat the contract as thereby rescinded.” For this reason, it is critical that a tenant insist upon including specific language in the use clause of its lease that permits it to use the premises for any lawful purpose.

Conclusion

In the scenario presented at the beginning of this article, it appears clear that the tenant should prevail in the declaratory judgment action and be permitted to continue preparing and selling freshly made sandwiches as a permitted lawful use of the premises. However, the result could be different depending on the existence of other contractual restrictions imposed on its premises or the effects of zoning or other laws.

Mitchell S. Block (May 31, 1953–January 19, 2017) enjoyed a 36-year career in the area of real estate law, concentrated on the representation of restaurants, retailers and developers in the acquisition, development, sale, leasing and governance of retail properties. He represented national restaurant and retail chains, small retail tenants and shopping center landlords, as well as oil field waste disposal and other industrial clients, warehouse owners and office tenants. Both within and beyond his legal career, he was known by all as a kind and decent man—one of the “good guys” in this world. He is greatly missed by his colleagues, friends and family, but most of all by his wife of 33 years, Sara, and their two children, Allen and Whitney.

[1] *Alchemy Commc’ns Corp. v. Preston Dev. Co.*, 148 N.C.App. 219, 558 S.E.2d 231, 235 (2002).

[2] *Monmouth Real Estate Inv. Trust v. Manville Foodland, Inc.*, 196 N.J.Super. 262, 482 A.2d 186, 189 (N.J.Super.Ct.App.Div.1984).

[3] 111 Ill. App. 3d 67, 443 N.E.2d 294 (1982).

[4] *Id.*, at 296.

[5] *Id.*

[6] 759 F.2d 595, at 596 (7th Cir. 1985).

[7] *Id.*, at 600.

[8] *Hawaiian Ass’n of Seventh-Day Adventists v. Wong*, 305 P.3d 452, at 462 (Hawai’i 2013).

[9] *Downtown Barre Development v. C & S Wholesale Grocers, Inc.*, 857 A.2d 263, at 268, 2004 VT 47 (Vt. 2004).

[10] 128 A.D.2d 1011, 1012-13, 513 N.Y.S.2d 546, 547 (1987).

[11] 886 F. Supp. 1306 (E.D. La. 1995).

[12] *Id.* at 1312.

[13] 573 So.2d 1364 (Miss.1990).

[14] *Id.* at 1365.

[15] 2 Ohio St.2d 250, 208 N.E.2d 528 (1965).

[16] *Ewing*, 573 So. 2d at 1369-70.

[17] *Alessi v. Millcreek Tp. Zoning Hearing Bd.*, 814 A.2d 278 (Pa. Commw. Ct. 2002).

Drones in the U.S. Retail Market

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What is that? Is it a bird...is it a plane? No, it's a Slurpee and a chicken sandwich being brought by drone to a Reno, Nevada, backyard in what 7-Eleven is calling the first package delivered via drone in the United States.[1] It is also a great example of a retailer anticipating the changing demands and habits of shoppers and staying one step ahead of them through smart adaptation. As retailers scramble to be the next ones with the latest technological advancements, one wonders if the fast-food "touchdown" in the Nevada backyard portends the future of the industry. This article examines the prospects of drones both in terms of their potential uses within retail and their inherent limitations, and the impediments posed by potential legal liability issues and the current regulatory framework in the United States.

Retailer success has largely been determined by the ability to optimize many factors, chief among them being convenience and delivery time. The 1890s saw the advent of the telegraph and railroads. Retailers such as Sears and Montgomery Ward listened to consumer demands and quickly took advantage of this new infrastructure by "bringing the stores to people" through the rapid processing and transportation of catalog orders nationwide.[2] The twentieth century brought the personal automobile, which again forced retailers to adapt to the consumer's new preference for in-person shopping. Retailers like Walmart and the Gap quickly took over the market with new inventory management software and infrastructure that allowed them to better anticipate consumer demand and react with maximum efficiency. More recently, Amazon.com announced that its new subsidiary, Amazon Prime Air, would be able to deliver packages to customers within 30 minutes of an online order—using drones.[3] While there are still many hurdles, it is conceivable that this is the logical next step in the advancement of retail.

Precedent and Retailer Opportunities for Drone Use

The adaptation of drone use for retail applications is not without precedent in the United States. Drones are already being used in media and entertainment to capture footage for television news coverage and for filming movies. Real estate brokers have been using them to photograph properties for years. There are myriad potential uses in retail that go beyond the most obvious, i.e., product delivery. Walmart, a retailer on the forefront of this technology, intends to use remote-controlled flyers to perform inventory management in its warehouses. By deploying camera-toting drones in their warehouses, Walmart can capture 30 frames per second while scanning products stocked on shelves—doing what would have taken a single employee weeks to complete.[4] Retailers may also consider using drones to provide security for loss prevention and customer/employee safety by flying them over parking lots, and even within store interiors. Retail property surveillance can also be used to improve the user experience of shopping centers by facilitating observation of how vehicles arrive at the site and by collecting data on the effectiveness of signage, the positioning of driveways and the impacts of surrounding roadway traffic.[5]

Technical and Legal Constraints

Since the potential for drone use in retail is compelling, why has there not been a proliferation of flying devices in the airspace above shopping centers? The answers are both technical and legal. As with any new tool, drones currently have technical limitations that hinder their widespread use. For example, battery life and range of use remain short, maximum cargo weight is limited and the ability of drones to adapt to varied topography and variable weather conditions is limited. However, the most limiting factors are legal liability issues and the U.S. regulatory environment.

In December 2016, Amazon announced its first drone delivery to a "real customer" in the United Kingdom, suggesting that these inherent limitations can be overcome if the U.S. regulations adapt. Frustrated with the protracted timeline to commence test flights in the United States, Amazon took its testing operations to the United Kingdom, where regulators approached the proposal with considerably more leniency. The United Kingdom cleared the way for Amazon to fly drones in some rural and suburban areas for distances of two miles without an operator. Amazon is even working with regulators in the United Kingdom to test how operators can successfully operate multiple drones at once. This was all part of a cross-government team tasked with exploring drone technology

through active testing of the technology.[6] Some of the legal issues that have led to the slow advancement of drone use in the U.S. market are explored below.

Legal Liability Issues

A fledgling technology that involves an object hovering in flight above people and private property raises concerns about possible personal injury and property damage. Under the tort theory of negligence, a drone operator could be held responsible for any injury or damage suffered in the event of a mishap.[7] In these cases, the drone operator would need to prove that the incident occurred despite “reasonable care.” But “reasonable care” as applied to drone use has not yet been addressed by the courts.

Because of the newness of the drone industry, there will likely be a ramping-up period for improving both the reliability of the technology as well as the skill level of the operators. Hypothetical scenarios involving both these factors would be a drone being launched with low battery power that results in a crash, or a drone that crashes because of poor depth perception by the remote user.

Privacy and trespass concerns raise the primary legal issues for proponents of drone use. When drones are used for delivery of merchandise, they will employ a combination of GPS and cameras to locate their targets. Their ability to fly at a very low level over adjacent properties while taking photos raises legitimate privacy concerns. The addition of drones to our airspace will likely blur the lines between the incidental intrusiveness required to operate the drone and how its operation affects individuals’ reasonable expectation of privacy. Tort claims related to the invasion of privacy include “intrusion upon seclusion.” A claim for intrusion upon seclusion can arise when someone “intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns.” [8] As drone use expands, courts will have to establish a set of rules to determine if the intentional act of flying a drone is sufficient to give rise to a claim of intrusion upon seclusion.[9] In order to limit exposure to this type of claim, retailers will have to use extreme care in implementing proper safeguards and data retention policies.

Claims of trespass are also likely, as the drones hover over adjacent properties on their pre-delivery descent. Courts have found liability for trespass for items located at 20–30 feet above ground level, including liability found for running wires over a plaintiff’s land.[10] Therefore, it is conceivable that operators of drone flights at a much lower level could be subject to liability for trespass. As the pressure to utilize drones mounts, it will be necessary to reconcile property owners’ rights to control their own low-level airspace with the efforts of drone users to operate small aircraft within national airspace.

Federal Regulatory Constraints

The current regulatory environment is perhaps the greatest stumbling block to the widespread use of drones in retail. In the United States, drones are considered aircraft and are regulated by the Federal Aviation Administration (FAA). The most frequent criticism from advocates of drone use is that the FAA has been too slow to respond to an emerging industry that has boundless potential. The parameters currently placed on drone use act as a de facto prohibition, as they severely limit the range, specifically requiring line-of-sight operations and preclusion for operating over “non-participants.” Critics are quick to identify First Amendment issues that will arise if commercial drone use (which also includes aerial photography and newsgathering) is so severely limited.[11] While safety is the driving factor behind the FAA regulations, they do make a fleeting reference to privacy issues by tying them into the primary goal specifically, by “protecting individuals from the fear of harassing or threatening behaviors.”[12]

Legal practitioners argue that privacy issues are best handled at the state level. They argue that the FAA should provide a reasonable legal framework to facilitate the integration of commercial drone use into our airspace while implementing proper safeguards to limit personal injury and property damage.

While the indoor use of drones for security and inventory management is already happening, their use for delivery of merchandise could be years down the road because this will require the FAA to lift the stringent limitations on the use of the national airspace. For the technology to really take off, a cross-government team and testing program similar to the approach in the United Kingdom could be implemented. Whether the results of such a program will provide the degree of comfort necessary to loosen restrictions and allow widespread drone delivery remains to be seen, but there have been some promising developments.

There have been some legislative and regulatory initiatives that have moved the United States closer to making drone delivery a reality, but we are not there yet. The first policy advance was the FAA Modernization and Reform Act of 2012 (the Act). The Act authorized the Secretary of Transportation to integrate drones into the national airspace by September 2015. The Act provided a platform for hobby drone use so, technically, it led to the

integration of drones into the national airspace, as promised; however, the Act prohibited the commercial use of drones without the express permission of the FAA. This “express permission” came at a price, which was a 120-day review period. In an industry that requires expediency, it is obvious why there has not yet been a drone revolution in retail.

The second initiative came in August of 2016, when the FAA promulgated comprehensive regulations (14 CFR 107) based on the earlier Reform Act. The regulations established a number of commonsense safety requirements for commercial drone use and set limits on speed and altitude (100 mph and 400 feet above ground level).[13] The regulations also eliminated the 120-day review period and established operator standards and certification that can be obtained online. However, the regulations contain additional restrictions that essentially made commercial drone use nearly impossible. The requirement that there be visual line-of-sight (VLOS) is the restriction that has received the most criticism. If a drone must remain within eyesight of the operator at all times, this will limit the delivery range and hinder efficiency to such an extent that retailers simply will not elect to use the technology. The regulations further specify that drones may not operate at night and cannot be flown over “nonparticipants.”[14] These two restrictions are the major impediments to immediate commercial use. They will preclude drone use in all but the most rural areas, which is not where the majority of consumers live.

State Regulatory Landscape

While the federal airspace is regulated by the FAA, a number of states are also implementing regulations related to drone use. As of late 2016, 32 states had enacted laws pertaining to unmanned aircraft, and an additional five states have adopted resolutions.[15] The regulations vary in scope, but many define what constitutes an “unmanned aircraft” and provide a framework regulating how they can be used. The best way for retailers to be sure that they are complying with state laws and/or resolutions is to check with the jurisdiction in which they are operating. The FAA has compiled a fact sheet outlining local and state regulations that can be viewed at www.faa.gov/news/updates/?newsId=84369.

The Future of Retail Drone Use

Will drone use shape the future of retail? Ultimately, that will depend upon whether the FAA expands the modest improvements made in drone regulation to create a legal framework for drone use and operation. The experience in the United Kingdom shows that the demand exists for drone delivery by retailers; however, the approach there was to allow drone delivery as a test program only. No formal changes to the United Kingdom’s legal restrictions on drone use were implemented. The United Kingdom’s cross-government team wants to enable the technology by using Amazon’s tests to inform future policy. If drone delivery can be carried out over time without giving rise to a high number of legal liability cases and/or operational accidents, and the demand from both the retailer and retail consumer for drone delivery use continues, regulators may respond to that pressure and make appropriate changes in current policies and regulations.

However, in the meantime, retailers should examine how drones can enhance other operational aspects of their businesses. As we have described here, drone use need not be limited to delivery. Some retailers are already embracing drone technology to improve their operations within the confines of existing regulations. While 7-Eleven’s delivery of a frozen beverage may seem futuristic to us at this time, just remember that drones were not even recognized by federal law five years ago. As the demand for drone use continues to grow in concert with our understanding and comfort with the technology, it can be expected that regulations will be developed to accommodate that demand, in balance with concerns for safety, privacy and property rights.

Practice Tips

Understand the Risks; Determine Extent of Insurance Coverage. For the time being, drones can be used by retailers in a limited capacity such as property or inventory surveillance. While this can be a great tool, there can be potential pitfalls, including user error or equipment malfunction. Retailers should review the terms of their insurance coverage. Standard commercial coverage generally has an “aircraft exclusion” that usually states that coverage does not apply to damage or injury arising out of the use of aircraft.[16]

Safeguard Personal Consumer Information. Retailers already receive sensitive personal information from consumers. With the potential for drone delivery, the ways in which information security can be compromised will dramatically increase. It is important to anticipate this situation and to review data retention policies and have formal procedures in place to safeguard this information.

Advocate for Change. Many retailers have considered, or will consider, the potential benefit of drone use for their

operations. Changes in regulations to permit drone use more widely will require a change in the cost-benefit assessment of regulators. It is important for retailers to make the economic/efficiency case in Washington, D.C., for the use of drones in the retail industry. This is the necessary first step to bring about modifications in the restrictive regulatory environment for drone use.

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[13] FAA, Operation and Certification of Unmanned Aircraft Systems, Docket No.: FAA-2015-0150; Amdt. Nos. 21-99, 43-48, 61-137, 91-343, 101-9, 107-1, 119-18, 133-15, and 183-16.

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Lease Accounting for Real Estate Lawyers

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As a member of the legal department of a corporation involved in commercial real estate leases, you may be tasked with explaining how to comply with the new lease accounting standards issued by the Financial Accounting Standards Board (FASB). Your knowledge of the accounting treatment of leases, like that of most real estate attorneys, may not be as comprehensive as you would like. This article addresses the current and future lease accounting standards, and hopefully provides sufficient information to enable you to complete your assigned task.

Current Lease Accounting Standards

Introduction to Generally Accepted Accounting Principles. Most attorneys have heard the term “generally accepted accounting principles” (GAAP) and may have seen it referenced in leases. But perhaps not every attorney knows what GAAP actually means, how such “principles” become “generally accepted” and by whom. GAAP is a collection of rules and standards issued by the Financial Accounting Standards Board (FASB), which U.S. companies must use to prepare financial statements intended for distribution to third parties. Internationally, similar standards are titled International Financial Reporting Standards (IFRS) and are issued by the International Accounting Standards Board (IASB). Publicly traded companies are generally required to file audited financial statements with the SEC that are prepared in accordance with GAAP. Such financial statements contain two major components: the balance sheet (listing assets and liabilities) and the income statement (statement of revenue, expenses, profit and loss).

As with other aspects of financial operations of companies, there are FASB rules setting forth the proper method to account for leases. Treatment of leases on the balance sheet and the income statement is at the heart of both current and future lease accounting rules. These rules underwent a material change in February 2016, and thus leased real estate assets now receive focused attention from the C-suite of your company.

Finance Lease or Operating Lease?

According to GAAP, leases are classified as either “finance” or “operating” leases, and current standards require companies to account for those leases in materially different ways.[1]

Finance Leases. A finance lease (or “capital” lease) is understood fundamentally as a financing vehicle for purchase of assets via periodic installment payments (even if the lease calls these payments “rent”). For accounting purposes, an asset that is the subject of a finance lease is deemed to be owned by the lessee, and the rent and other lease payment obligations are treated as a loan. GAAP therefore requires finance leases to be presented on the balance sheet component of a financial statement. The leased property is an owned asset, and the rent and other payment obligations under the lease are disclosed as liabilities akin to debt.[2]

Operating Leases. Conversely, operating leases are treated as a rental vehicle through which a company only obtains a right to use an asset, paying rent for the privilege of doing so. For accounting purposes, an asset that is the subject of an operating lease remains owned by the lessor, and the lessee’s rent and other lease payment obligations are consideration for such use. Current GAAP rules require lessees to list rent paid pursuant to operating leases on the income statement component of a financial statement (not on the Balance Sheet).[3] Lease payment obligations must be calculated on a straight-line basis by totaling the minimum payments over the firm term of the lease, then dividing the same over the firm term of the lease, presenting the annual straight-lined rental amount as rent expense on the income statement.[4] The purpose for straight-line rent itemization is to account for deferred rent payments in later years of the term (e.g., caused by rent holidays, rent escalations, etc.).

Finance Lease Testing. The rules for determining whether a lease is a finance or operating lease are relatively simple to understand: A lease is a finance lease if any of the following four elements are satisfied:

1. The lease transfers ownership of the underlying asset to the lessee by the end of the lease term.
2. The lease grants the lessee an option to purchase the underlying asset that the lessee is reasonably certain to exercise.

3. The lease term is for the major part of the remaining economic life of the underlying asset; or
4. The present value of the sum of the lease payments and any residual value guaranteed by the lessee that is not already reflected in the lease payments equals or exceeds substantially all of the fair value of the underlying asset.[5]

Most Leases in the United States Are Operating Leases

In practice, the typical structure of commercial real estate deals in the United States rarely satisfies any of the finance lease test criteria. Thus, the vast majority of commercial retail leases in this country are operating leases.

While subtle, the present difference between the treatment of a lease as a *balance sheet* item versus an *income statement* item can be stark, especially when you extrapolate that treatment to the multitude of real estate leases in existence. A company that is the lessee under hundreds of finance leases will be viewed by the investing world as owning a large asset portfolio and having significant accompanying debt. On the other hand, a company leasing the same number of assets via operating leases will be seen as owning few real property assets, but also being debt-free (at least relating to real estate holdings).

Thus, the reality is that the majority of real estate lease obligations in this country are not disclosed on the balance sheets of companies holding significant portfolios of leased real estate assets. It is this reality that is at the heart of the recent changes to the lease accounting rules.

Lease Accounting Rule Changes

Beginning in 2006, the FASB and IASB initiated a joint project to review and update lease accounting standards, in response to criticism and comment from financial statement users that financial statements do not require lessees to recognize operating leases on their balance sheets, and thus do not always provide a faithful representation of a company's leasing transactions or financial picture. Thus, the FASB and IASB set out to create new rules to require lessees to disclose all leases on their balance sheet, regardless of whether they are operating leases or finance leases. [6]

In early 2016, the FASB and IASB finally issued new accounting standards for leases (the IFRS standard was issued in January, the GAAP standard was issued in February) to implement that result. As stated in the FASB 2/25/16 news release announcing the new standard:

Under the new guidance, a lessee will be required to recognize assets and liabilities for leases with lease terms of more than 12 months. Consistent with current Generally Accepted Accounting Principles (GAAP), the recognition, measurement, and presentation of expenses and cash flows arising from a lease by a lessee primarily will depend on its classification as a finance or operating lease. However, unlike current GAAP—which requires only capital leases to be recognized on the balance sheet—the new ASU will require both types of leases to be recognized on the balance sheet.[7]

To comply with the new standard, lessees of operating leases will be required to present each lease on its balance sheet as both an asset and a liability, based upon the present value of all remaining payments over the life of the lease (with adjustments for prepaid rent, tenant allowances and other incentives received from the lessor and initial costs like brokerage commissions, as well as other items affecting the total rent liability over the term).[8]

Because many retail leases contain options to extend the term, it is important to note that the new standards have a new rule that lessees must include lease payments made in option periods within the term of a lease if a lessee is reasonably certain to exercise an option to extend the lease or not to exercise an option to terminate the lease.[9] Additional complexities, not addressed here, are presented by leases with market rental adjustments, CPI or other index-based adjustments and options to purchase. Also, during the term of existing leases, lessees may be required to reassess the previous classification of a leased asset when signing lease amendments affecting the term, or when a periodic review of the company's portfolio changes the likelihood that the company will exercise options to extend (or cancel).[10] As a result, the volume and complexity of the data that a company must reliably centralize and maintain with respect to its lease portfolio has greatly increased. The key takeaways from the new standard are twofold:

1. Operating leases must now be disclosed as both an asset and a liability on the balance sheet; and
2. The method of accounting for operating lease liability for the typical commercial real property lease has become data-intensive and highly complex.

Publicly traded companies are required to use the new standard for their public filings pertaining to any fiscal years commencing after December 15, 2018.[11] For example, if a company's fiscal year dovetails with the calendar year, then that company's first-quarter filing on March 1, 2019, must be compliant with the new standard. The standard applies to non-public companies for fiscal years beginning after December 15, 2019.[12]

Compliance Efforts Are Under Way Today

Today, companies are preparing for reporting in compliance with the new standard in a timely manner, focusing primarily in two areas:

1. Obtaining a software/database solution to assist with reporting and compliance (such as an Integrated Workplace Management System like IBM's TRIRIGA or Accruent's Virtual Premise); and
2. Gathering, centralizing and reconciling enterprise lease data into a single, reliable source of truth. Some data elements that need to be accurately tracked, maintained and centralized include:
 - lease term;
 - lease options;
 - likelihood of exercise of lease options;
 - fixed rent schedule;
 - rent escalation provisions;
 - any other lease payments required of lessee during the term;
 - termination rights (and any fees associated therewith);
 - tenant allowances and other incentives;
 - expected life of leased assets;
 - cap rates upon which the leases may be based; and
 - free rent periods; and several others.

Depending upon the size of a company's real estate portfolio, those software tools and data elements may be in various stages of readiness and integrity for compliance with the new standard.

Conclusion

Hopefully, you have a better understanding of why a member of the legal department of a corporation involved in commercial real estate leases would be tasked with explaining how to comply with the new lease accounting standards. There are three primary areas where your expertise as a company real estate lawyer can add value:

1. Be ready to present a comprehensive picture of how leases are structured (triple/double net, ground leases, length of term, options, rent escalations, percentage rent, etc.). Involve real estate business leaders in this discussion as necessary.
2. Be informed intelligently on how your company keeps its lease portfolio. Is it paper-based? Is there more than one collection of data? What lease data elements do you currently track in what systems? What is the process for data entry, and how do you ensure data integrity? How confident are you in the data's integrity?
3. Make yourself available as a subject matter expert to implement new systems and processes. Your understanding of the lease process can and will be of enormous benefit as your company seeks to bring a new system of compliance into reality.

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[1] FASB Accounting Standards Update No. 2016-02, Leases (Topic 842), February, 2016, pp. 2-4.

[2] Id.

[3] Id.

[4] FASB ASC 842-20-25-6.

[5] FASB ASC 842-10-25-1.

[6] FASB Accounting Standards Update No. 2016-02, Leases (Topic 842), February, 2016, p. 1.

[7] Financial Accounting Standards Board. (2016). "FASB Issues New Guidance on Lease Accounting" [Press release]. Retrieved from www.fasb.org/cs/ContentServer?c=FASBContent_C&pagename=FASB%2FFASBContent_C%2FNewsPage&cid=1176167901466.

[8] Id and FASB ASC 842-10-30-5.

[9] FASB ASC 842-10-30-1.

[10] FASB ASC 842-10-35-1.

[11] FASB ASC 842-10-65-1842-1.

[12] Id.

The “Reasonableness Standard” Has No Standard Interpretation

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We have all seen and/or drafted an assignment and sublease clause into a retail lease. The form of these clauses is driven by a multitude of factors, including the premises itself, the overall development in which the commercial space is located and the identity of the tenant. One issue to be dealt with in the assignment and sublease clause, which affects both landlord and tenant, is whether or not landlord consent is required before a tenant may assign the lease or sublease the premises. If so, is such consent within the landlord’s sole discretion? Or, must the landlord act reasonably? States vary jurisdiction by jurisdiction on whether or not a reasonableness standard will be implied absent specific language. Thus, a tenant will always want a specific consent language in its assignment and sublease clause. A simple provision with consent rights might take the following form:

Tenant has the right to assign this lease or sublet the Premises, or any part thereof, with the consent of the Landlord first had and obtained, which consent shall not be unreasonably withheld.

What does it mean to “unreasonably” withhold consent? A recent decision from an Alabama appeals court may be helpful when faced with an interpretation of this language in any jurisdiction. The case, *Steve Evans v. W.G. Waldrop*, 2016 Ala. Civ. App. Lexis 198 (Ala. Civ. App. Aug. 12, 2016), involved a five-year lease for space within a large commercial shopping center. The assignment and sublease clause in the lease prohibited a transfer without first obtaining the landlord’s consent, which consent “may not be unreasonably withheld.” After one year, the tenant closed its operations, stopped paying rent and began seeking a replacement tenant to which to sublease the space for the balance of the lease term. After a number of failed attempts, the tenant entered into negotiations with a prospective subtenant for the operation of an electronic bingo parlor/game room.

The tenant sought the consent of the landlord by telephone, and explained that the use was for an “arcade” or “game room.” The landlord’s response, given only verbally, was that he would not object so long as the business was “up to par.” There was also testimony from the prospective subtenant in which she stated that she explained to the landlord by telephone that she intended to operate an electronic bingo parlor at the premises and that the landlord indicated his assent to such a use. The landlord testified he did not recall this conversation. Based upon these telephone calls, the tenant entered into a sublease with the prospective subtenant, who then obtained a business license and borrowed funds to open the game room. Shortly thereafter, the landlord expressed his disapproval of the subtenant based, in part, on objections of other tenants within the shopping center. The tenant and his subtenant then mutually rescinded the sublease.

When the landlord brought suit against the tenant for nonpayment of rent, the tenant raised the issue of the landlord’s “unreasonable” denial of consent to the sublease as his defense. It is settled law in Alabama that the tenant has the burden to show that a landlord’s refusal to consent to an assignment or sublease is unreasonable. Courts will review a matter such as this with an eye toward whether or not a landlord’s denial of a particular subtenant or assignee is “commercially reasonable.” Among the factors that this court cited as relevant were:

...the financial responsibility of the proposed assignee or subtenant, whether the new tenant’s use will require alteration of the premises, the legality of the proposed use...the compatibility of the tenant’s use with the uses of the other tenants in the same shopping center.... Courts have held it improper for a landlord to reject an assignee or sublessee on considerations of personal taste, sensibility or convenience. Citing *Rowley v. City of Mobile*, 676 So.2d 316, 319 (Ala. Civ. App. 1995).

The ability of a proposed subtenant to meet its obligations to pay rent and other monthly charges is certainly the crux of the “financial responsibility” factor. The *Evans* court took this a step further and found that the potential success of the subtenant’s business was a legitimate factor for the landlord to consider under the commercial reasonableness standard. In finding that the landlord had acted reasonably in denying consent to the proposed subtenant, the court stated that the evidence concerning the subtenant’s ability to obtain a business license, to pay

the first month's rent and a security deposit, and to borrow funds was speculation and not sufficient to establish the likelihood of success. The court also found that the plaintiff did not provide the landlord with satisfactory information about the subtenant to enable the landlord to make such a determination on his own. The court cited *Rowley* in stating that:

A tenant has the burden of furnishing sufficient information about the proposed assignee to enable the landlord to determine whether it will consent to an assignment.

The court also accepted as reasonable the landlord's concerns for his other tenants in the shopping center. The landlord testified that other tenants objected to the proposed use, and he believed he had a duty to protect their interests. The court noted that although *Rowley* prohibits a landlord from withholding consent due to the landlord's own personal taste, there was no authoritative support to suggest that a landlord cannot consider the personal taste of other tenants in making a determination to deny consent.

Conclusion

Based on the findings in the *Evans* case, landlords may take many factors into consideration when deciding whether to approve an assignment. Though the factors may be enumerated, there seems to be no standard interpretation of their meaning.

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Indemnification and Waiver In Commercial Leases

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This article analyzes the allocation of risk associated with personal injuries and property damage between landlords and their commercial tenants using indemnification and waiver clauses. All sophisticated commercial leases contain such clauses and attempt to answer the following basic question: Who is responsible for injury to property or persons located in or about the leased premises for certain acts or omissions of the parties to the lease? Answering this question requires an examination of the parties relevant to an indemnification analysis, the types of injuries that are covered, the level of care required, typical limitations on indemnification and the impact of state law and insurance on indemnification and waiver clauses.

The following example of a landlord-friendly indemnification clause from a shopping center lease will provide the basis for this examination:

Tenant will reimburse Landlord and its property manager, and their respective owners, officers, directors, shareholders, affiliates, agents, employees and representatives (collectively, "Landlord Parties") for and will indemnify, defend, and hold harmless Landlord Parties from and against any and all loss or damage sustained by, liability or charges imposed on, and claims or causes of action asserted against, Landlord Parties arising in whole or in part out of or by reason of (1) any accident or occurrence in or on the Premises, any use of or business conducted in or on the Premises, or any hidden or apparent defect in the Premises; or (2) any damage to or loss of any property of Tenant or any person occupying the Premises or any of their respective officers, directors, shareholders, affiliates, agents, employees, or contractors (collectively, "Tenant Parties"), whether this damage to or loss of property occurs on the Premises or on any other part of the Property; or (3) any act, negligence or fault of Tenant Parties, whether occurring on the Premises or on any other part of the Shopping Center. Tenant's reimbursement and indemnity obligations will include, but not be limited to, any and all penalties, assessments, fines, damages, interest, settlement amounts, judgments, losses, reasonable attorneys' fees and other expenses, and will survive the expiration or other termination of this Lease.

The Players

There are three basic categories of players relevant to the indemnification negotiation: the landlord, the tenant and third parties. The landlord and tenant are obvious active participants in crafting the language that will balance the risks of owning and occupying the leased premises and surrounding common areas. The third parties play no role at this stage, but they should be considered, and they fall into two separate subcategories: the party affiliates and everyone else. Most indemnification provisions will begin with language identifying the party affiliates. In the sample clause above, the landlord affiliates are defined as the "Landlord Parties" and include "the landlord and *its property manager, and their respective owners, officers, directors, shareholders, affiliates, agents, employees and representatives...*" These landlord affiliates either control the landlord or are controlled or employed by it and will be responsible for performing the landlord's obligations under the lease and any other actions related to it. Similar language creates the "Tenant Parties."

The second subcategory of third parties, everyone else, consists primarily of the tenant's visitors, guests, licensees and invitees, such as customers, contractors, delivery personnel, employees and others who access the premises for the benefit of the tenant's business. The landlord and tenant must decide whether a claim brought by one of these parties for an injury occurring on the premises is covered by the indemnification provision. In some instances, indemnification provisions *only* cover claims brought by these third parties but not claims brought by the contracting parties themselves. The sample clause does not limit indemnification to any particular group of claimants and provides broad indemnification to the landlord for "any and all loss..." Implicit in this language is the tenant's obligation to indemnify the landlord for claims brought by the landlord's own employees if they are injured in the leased premises, even if such employee's own negligence caused the injury.

The Injury

The indemnification clause will address the type of injuries for which the indemnifying party is responsible. These could include personal injury, death, damage to property and loss of rents. The parties can also agree that *any* injury is subject to indemnification. The sample clause broadly protects the landlord from any loss or damage it sustains. Importantly, the sample clause also protects the landlord from loss associated with an injury to the tenant, even if the injury might have been caused by the landlord's negligence; for example, if the landlord constructed the building and latent defects exist, resulting in water intrusion to the premises. Without more, the sample clause would protect the landlord from injury to the tenant's inventory and other personal property.

While relative negotiating power and sophistication will usually determine how balanced, or unbalanced, the indemnification provision is, the parties should understand how other provisions of the lease affect the indemnification clause. If the tenant is responsible for insuring its premises against these types of injuries, then indemnifying the landlord from loss caused by them may not be burdensome or inequitable, especially if the tenant is also responsible for maintaining the premises. However, this may not be true for injuries sustained in common areas or other portions of the shopping center that the landlord maintains and insures.

Act or Omission

With the parties and the types of compensable injuries identified, the lease must address what types of actions or omissions will entitle a party to indemnification. The indemnification clause may cover intentional misconduct, negligence and strict liability. The sample clause protects the landlord from its own acts or omissions as well as those of the tenant. The inclusion of the phrase "in whole or in part" works to provide coverage to the landlord even if the landlord was the primary cause of the loss. In the water intrusion example, the tenant would want to negotiate an exception to indemnification for defects in the building construction or claims resulting from the landlord's own acts or omissions, such as failure to properly maintain the structural integrity of the building. This "ask" may be part of a broader request that the landlord provide reciprocal indemnification with essentially parallel language.

Hold Harmless and Defend

While indemnification means to pay for the loss suffered by the indemnified party, the "hold harmless" language contains part of the waiver of claims concept. In the sample clause, the tenant agrees to hold the landlord harmless from all claims for which it is also providing indemnification. If the landlord will be responsible for maintaining any part of the premises or common areas, the tenant should exclude those areas of responsibility from the hold harmless provision. Otherwise, the tenant could be barred from recovering from the landlord any damages it suffers from the landlord's breach of its maintenance obligations.

In addition to boilerplate hold harmless language, the landlord should ask for explicit waivers of claims related to specific occurrences. This is especially important if the landlord has agreed to reciprocal indemnification or has agreed to narrow the scope of the indemnification by excluding the landlord claims to the extent caused by the landlord's actions or omissions. These specific waivers typically track areas over which the tenant has reasonable control and/or risks that it can reasonably insure. Examples of these specific waivers can include claims relating to the tenant's failure to comply with applicable laws, including environmental laws; heating, cooling, electrical and plumbing failures; criminal acts, such as shoplifting or assault; the actions or omissions of other tenants of the landlord's shopping center; and roof leaks, broken pipes or the absence or malfunction of fire suppression devices.

The third element of the typical indemnification clause, the obligation to defend, simply obligates one party to provide the other party with a defense against a third-party claim arising out of the occurrences for which such party is providing indemnification. This provision often contains language allowing the indemnified party to participate in the defense, approve counsel, select its own counsel and approve any settlements.

Impact of Insurance

Typically, when a party has agreed to maintain the leased premises, it will also agree to insure them against a variety of injuries, including personal injury, death, damage to property and business interruption. Where the tenant has agreed to maintain and insure areas against these types of claims, the landlord will typically ask for and receive the broad indemnities and waivers described in this article. This should reduce its insurance costs. However, in lease negotiations between parties of roughly equal leverage, the parties should consider which of them has the most control over the risk under consideration and allocate risk accordingly. For example, the landlord typically has control over the common areas and the obligation to maintain them. The tenant should ask for claims associated with these areas to be covered by a reciprocal indemnification provision and to be excluded from its own

indemnification and waiver clauses.

Impact of the Law

Both landlord and tenant should review the state laws that will govern their lease. In general, liability waivers and indemnification provisions are strictly construed by the courts. Attempts by landlords to have tenants waive claims related to their acts or omissions, especially those that are negligent, may not be enforceable at all. To enhance the likelihood of enforcement, such clauses should be clear and conspicuous. To the extent applicable, the landlord should include specific acknowledgments by the tenant that its waivers are tied to risks for which it is responsible, such as security for its premises in connection with a waiver of claims related to criminal activity on the premises. Many states specifically prohibit indemnities that protect a builder from liability created by its sole negligence. This could affect leases in which the landlord is responsible for construction of tenant leasehold improvements.

The Limits of Indemnification

The parties should consider the procedural aspects of indemnification as well. The indemnification provisions should survive the termination of the lease for some definite period of time. The parties may also negotiate a specific claims period during which the party seeking indemnification must notify the other party of the claim. This can include language limiting any recovery to the limits of applicable insurance, but this must be coupled with clear obligations of the responsible party to maintain insurance acceptable to the other party. The landlord should also include language limiting any liability to the value of the real estate that is the subject of the lease.

Conclusion

Whether indemnification and waiver provisions become a major stumbling block to lease formation depends on the flexibility of the parties. Unlike the more critical business components of the lease like rent escalators, exclusives, construction allowances and extension options, indemnification provisions are rarely addressed at the letter of intent stage and become almost the sole responsibility of the attorneys. If the attorneys are willing to acknowledge the respective leverage of their clients in the transaction, the availability and limits of their client's insurance, their client's ability to control the risks the other party seeks to allocate to them, and the impact of state law, a rational, principal-based compromise should be possible without undue delay.

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Matching Lease Obligations and Insurance Coverages

Jo-Ann M. Marzullo and Edward Katersky

With numerous variations in the structure and provisions in leases and different state laws, there is no consistent or uniform approach to the maintenance, insurance and indemnification obligations between landlords and tenants. Each lease must be carefully written and reviewed to understand the obligations of each party—those of the landlord and those of the tenant. Matching current insurance coverage with lease obligations is an important aspect, but with long-term leases, both parties must live with the terms and conditions of the maintenance, insurance and indemnification provisions stated in a lease for many years.

Maintenance

In multi-tenant shopping centers, a decision must be made regarding the maintenance responsibility for the parking lot and sidewalks. Slip, trip and fall accidents are common (and expensive), especially in weather-related circumstances. Some of the considerations may include:

- Who maintains the surface of the sidewalk?
- Does the tenant assume responsibility at its front door or the sidewalk fronting its parcel?
- Who is responsible for the common sidewalks of the shopping center? Is general maintenance of the sidewalks handled differently from snow and ice removal? Most snowplowing contracts are limited to plowing and treating areas accessible by truck—in other words, parking areas and access ways (but not sidewalks). If landlord does not have any on-site personnel at the shopping center, then the duty to remove snow and ice from sidewalks in front of stores may be placed on the tenants.
- Who maintains the surface of the parking lot? In cold weather areas, who is responsible for snow and ice removal? Are there guidelines regarding when snow and ice removal must be initiated? Are there restrictions either in the lease or in shopping center rules and regulations regarding where snow piles can and cannot be located?
- In severe weather (tornadoes, hurricanes, earthquakes, etc.) during which stores, parking lots and sidewalks are displaced, broken or otherwise damaged, which party is responsible for the repair and replacement? Are there time frames for this work in place? “Force majeure” or delay provisions in leases often give additional time for repairs when a party is prevented from acting by forces beyond its reasonable control. The party that has the restoration duty needs to have the insurance proceeds available to it in time to pay for such restoration. For that reason, the party that has the restoration duty usually obtains and maintains the property insurance, and it (or its lender) is the loss payee for the property insurance coverage.

Proceeds

The issue of availability of insurance proceeds to pay restoration costs often is negotiated again with subordination, non-disturbance and attornment agreements (SNDAs), with tenants arguing that they pay for the insurance either directly or through common area maintenance charges, and the insurance proceeds must be used to restore if restoration is possible. (SNDAs are agreements between a tenant and a lender in which, among other things, the tenant agrees to attorn [accept] the lender as a replacement landlord if the landlord defaults under its mortgage and the mortgage is foreclosed; and the lender agrees to observe the duties of the landlord with stated exceptions.)

Coverage

For these reasons, once the responsible party is determined, lease language should reflect the appropriate insurance coverage(s) that must be in place. Policy coverages, limits, allowable deductibles and designation of named insured and additional insured parties must be specific in the lease.

It is common for large, well-financed tenants to purchase property insurance on their building along with their contents, furnishings and improvements because the insurance premiums for the location in question will be lower for a portfolio of stores or properties than for a single or few locations. If the lease allows this scenario, then specific terms and conditions must be imposed on the tenant regarding building insurance coverage: risks to be insured,

limits, deductibles, insurance company ratings, repair and restoration and time frames. Whether self-insurance may substitute for some or all of the required insurance coverage, and under what circumstances it will be allowed, must be stated; such as with the tenant having a minimum available cash or equivalent assets (or if value is in the parent entity, with the parent entity agreeing in writing to make the self-insurance reserve available if a peril event does occur).

Landlords must understand that having a tenant insure the building does not relieve the landlord from all exposures related to the property. While insurance policies are commonly referred to as so-called “all-risk” insurance, all insurance policies contain exclusions for certain losses. Common exclusions include events (uninsured perils) associated with nuclear incidents, war and, in some circumstances, terrorism, earthquake, wind and flood. Should the loss event involve one of those perils and the duty to restore is limited to available insurance proceeds, then the tenant may be under no obligation to repair/restore the building. Although many leases and mortgages (or deeds of trust) require “all-risk” insurance, that type of property insurance has not been commercially available for 30 years. Instead, “special form” insurance is the current description for the broadest form of property insurance.

As an additional note, should one of the above uninsured loss scenarios take place, it may be that neither the tenant’s nor the landlord’s insurance would cover the loss. Landlords (or tenants building their own building) should make specific financial plans to provide funds to repair/restore these damages. Further, time element (business interruption) insurance may not be applicable if the underlying cause of the loss is excluded—or if there is no damage to the particular leased premises—unless endorsements giving greater coverage are in place for inability of employees and customers to get to the leased premises and/or inability for inventory to be shipped to the leased premises.

Evidence of Insurance

Over time, the types of evidence of insurance that the insuring party should produce has changed. For several years now, insurance certificates have not been binding if the coverage stated in the insurance certificate is not actually maintained in the insurance policy itself. Additional insured status and the addition of a location to a blanket policy may be shown on a certified copy of one or more insurance endorsements, but otherwise, the actual policy must be reviewed. One needs to know exactly what insurance coverage is in place, as a policy exclusion could mean there is no coverage for precisely the situation for which insurance was desired. As a drafting tip, because what is sufficient evidence of insurance has changed over time, the language should allow the non-insuring party the right to receive such other evidence documenting that sufficient insurance is in effect.

Issues Involving Multiple Stores

If a particular store is to be separately insured from the rest of the stores in the shopping center, is that store a separate building with fire walls dividing it from other stores? If not, then property insurance may need to be written for all of the stores within each particular building. Do not assume that the store is separately insured.

- Is there a prohibition on overhangs from other stores increasing the fire risk to the leased premises?
- As to liability insurance, did the parties agree to apply a bright-line test requiring that the tenant will insure within the leased premises and the landlord will insure the rest of the shopping center? Does “leased premises” include sidewalks during sidewalk sales, tents or tables during special outside sales events?
- Does the lease require comprehensive public liability insurance? “Comprehensive” insurance has not been sold for decades. What is available is commercial general liability insurance.
- Do the lease indemnifications exceed the insurable obligations of the parties? If so, then the indemnification may be enforceable against the party, but the indemnified will only be able to look to the assets of the indemnifying party for recovery.

Conclusion

The intent of this article is to make both tenants and landlords aware of the multiple scenarios for lease construction and negotiation as well as for interpreting existing lease language. Once language and obligations of the lease are determined, it is imperative that insurance coverage match those obligations. Both parties must understand the extent and limitations that insurance provides and plan accordingly where insurance will not provide financial relief.

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Visibility Covenants in Commercial Leases

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Most commercial leases contain a provision that allows the landlord to make alterations or improvements to its property, or in some cases to relocate the tenant from its original location to other premises in the development. From the landlord's point of view, a redevelopment and/or relocation clause is of great importance because it grants the landlord the flexibility to expand, renovate, alter or even demolish its property with minimal interference from unaccommodating tenants. A tenant, on the other hand, would prefer to delete, or at the very least restrict, any landlord redevelopment or relocation rights that could affect the tenant's right to occupy its particular premises without disruption, or change any physical characteristics or advantages presently enjoyed by the tenant.

In order to preserve as many of the benefits of the original premises as possible, commercial tenants often insist upon a number of basic protections with respect to the terms of the landlord's redevelopment/relocation rights. In addition to concerns regarding access, traffic flow, and the size, location and configuration of a tenant's premises or any relocation premises, commercial tenants often request a covenant to the effect that the "visibility" of the tenant's premises will not be adversely affected by any redevelopment or relocation. The proper interpretation of a visibility covenant comes into sharp focus when a landlord undertakes a major renovation or expansion of its property. If the landlord has covenanted not to interfere with the visibility of the tenant's premises and the tenant makes a claim in that regard, the landlord may be forced to modify its construction plans to some degree, causing potential delays and added construction costs.

This article will address some of the key issues that arise with respect to visibility covenants in commercial leases, and how those issues have been handled by the courts.

The Nature of a Visibility Covenant

A visibility covenant is a type of noninterference clause that operates to preserve the vista or sight line of a tenant's premises upon redevelopment or relocation. Generally, commercial landlords are loathe to grant representations concerning qualitative characteristics, such as visibility, exposure, traffic and access, because they are far too subjective in nature. Instead, landlords typically prefer to rely on objective criteria, such as size, frontage and configuration of the new or relocated premises. Nonetheless, a tenant with superior bargaining power may successfully negotiate a requirement that the landlord maintain the "visibility" of the tenant's premises. In such circumstances, the proper interpretation of the term "visibility," including the specific viewpoint from which visibility must be maintained, becomes paramount. For example, upon redevelopment or relocation, it is incumbent upon a commercial landlord to determine whether a covenant for "visibility" merely refers to an obstructed view of the storefront of the tenant's premises from directly in front of it, or whether the landlord must also maintain visibility of the entire premises (i.e., storefront and any exposed side of the tenant's exterior building whether or not branded) and tenant's signage from adjoining sidewalks, parking facilities and public streets and highways.

The Courts' View on Visibility Covenants

In the 2001 decision *First Windsor Shopping Centres v. Langille*,^[1] the landlord sought to relocate the tenant to alternate premises on the property. Pursuant to a development clause in the lease, the landlord was obligated to provide the tenant with replacement premises having "visibility and access equal to or better than that of the existing premises."

When the tenant refused to surrender its original premises to the landlord, the landlord brought an application for an order declaring the validity of the proposed relocation. The court rejected the landlord's application on the basis that the relocation premises did not have visibility equal to or better than the visibility of the original premises. In so deciding, the court noted that the tenant's original premises fronted the adjacent street, while the proposed relocation premises were not visible from the adjacent street. The court took a liberal view of the term "visibility" and held that the landlord was not entitled to exercise its right to relocate the tenant because visibility from the relocation premises to the nearby street was obstructed.

In another decision, *Stonegate Enterprises Ltd. v. West Oaks Mall Ltd.*,^[2] the landlord undertook to redevelop its shopping centre and relocated the tenant from its original position between two anchor tenants to a short interior mall corridor among fewer stores. Under the lease, the landlord was obligated to provide the tenant with relocation premises in a “similar location” to the original premises.

In rendering its decision, the court held that the proper interpretation of the words “similar location” indicated compatibility with the business-attractive features of the original premises, such as, *inter alia*, visibility and exposure. The court noted that while visibility and exposure relative to vehicular traffic and to the primary mall entrance would remain the same upon relocation, and while the relocation premises allowed customers to gain additional access to the premises from a rear parking lot, the overall visibility of the premises and convenience to shopper traffic would be greatly reduced because the relocation premises were located at a dead end of the shopping centre.

The court noted that a lease is construed like any other agreement, in accordance with the intentions of the parties. The court held that, in this case, the tenant had contracted for a location in an interior mall between two anchor tenants, with the obvious advantage of high visibility. The court held that relocation premises situated at the back end of a much shorter interior mall corridor did not correspond with the tenant’s intentions.

In *First Capital (Northgate) Corp. v. 137th C.T. Grill Inc.*,^[3] the Alberta Court of Appeal spoke to the importance of visibility in the context of a no-build provision. In that case, the landlord proposed to erect a restaurant in the parking area of the shopping centre. However, the lease contained a no-build clause wherein the landlord covenanted not to build any permanent structures in the parking area without the prior written consent of the tenant, not to be unreasonably withheld.

The existing restaurant tenant refused to consent to the development on the basis that it would have a negative impact on the visibility of the tenant’s premises. The landlord brought an application for a declaration that the tenant had unreasonably withheld its consent to the proposed development.

The court sided with the tenant, holding that the tenant’s concern that a free-standing restaurant erected to the west would negatively impact the visibility of the tenant’s premises was a genuine reason for refusing to consent to the development. The court noted that the purpose of the no-build clause was to minimize the possibility of visual interference from the tenant’s premises. The court further noted that restaurants are dependent on high visibility and that visibility to the tenant’s premises would be reduced (albeit not entirely obstructed) if the proposed development of the new restaurant proceeded. The court concluded that the tenant’s concerns as to visibility were not unreasonable.

In the 2016 decision *Bloor Street Diner Ltd. v. Manufacturers Life Insurance Co.*,^[4] the landlord sought to redevelop its commercial building. As part of the redevelopment project, the landlord intended to erect a hoarding wall around the building for a period of approximately eight months. The tenant, a restaurant operator in the building, opposed the redevelopment project, claiming that the construction activities would (1) diminish the visibility of the premises, (2) deprive the restaurant of all natural light, and (3) reduce the seating capacity of the restaurant.

The tenant applied to the court for a permanent injunction barring the landlord from carrying out the redevelopment project. In doing so, the tenant relied on provisions in its lease that prohibited the landlord from carrying out any renovations that would, among other things, materially affect visibility of the premises from the common areas and surrounding streets. The tenant took the position that the loss of natural light and visibility from surrounding streets during the construction phase would cause the tenant to lose its patrons and would ultimately destroy its business.

The landlord maintained that the lease permitted it to carry out the redevelopment project regardless of its impact on the tenant. The landlord also maintained that any disruption and inconvenience to the tenant would be temporary and that the end result would be a more inviting shopping and dining experience benefitting all retail tenants in the building.

The court found in favour of the tenant, holding that the prolonged interference to the tenant’s premises during the construction would dramatically reduce the tenant’s business. The court noted that the lease required the tenant to carry on business as a “first class full-service licensed restaurant,” and that the landlord’s rights to alter the building must be read in conformity with the tenant’s obligation to provide a first-class dining experience for its customers.

The court held that the construction activities would not only affect visibility of the premises from surrounding streets, but would also affect visibility of the surrounding streets from within the premises. The court noted that the restaurant seats facing the street were demonstrably the tenant’s most profitable and that those seats would be surrounded by construction on all sides during the redevelopment. The court found that the loss of natural light and

street views during the construction project would not only result in a material loss in the tenant's revenues, but would also undermine the tenant's ability to offer patrons an enjoyable dining experience and threaten the viability of its business. The court granted the tenant's request for a permanent injunction, preventing the landlord from carrying out the redevelopment project as it intended.

Conclusion

Overall, tenants hold a significant amount of leverage when landlords attempt to exercise redevelopment or relocation rights in the face of visibility or similar covenants. As is evident from the cases summarized above, the risk inherent in attempting to enforce a redevelopment/relocation clause has been compounded by the courts' liberal interpretation of visibility covenants. In particular, the cases above demonstrate that the term "visibility" refers not only to a clear sight line from directly in front of the tenant's premises, but to visibility as a whole (including visibility from adjoining sidewalks, parking facilities and streets, as well as visibility from within the premises to surrounding streets).

Further, as demonstrated in the *137th C.T. Grill* and *Bloor Street Diner* cases, when evaluating the impact of a proposed redevelopment/relocation on visibility, the courts will give strong consideration to the permitted use and location of the premises. In *137th C.T. Grill* and *Bloor Street Diner*, the affected premises were both restaurants that are highly dependent on unobstructed visibility from surrounding streets in order to attract customers. In those cases, the courts determined that given the competitive nature of the restaurant industry, any prolonged interference with visibility of the premises could be disastrous to the tenant's business, as potential customers would avoid the restaurant in favour of the many other restaurants operating in the area.

Due to the subjective nature of visibility covenants and the manner in which they have been treated by the courts, landlords should avoid granting covenants to preserve or provide similar visibility. However, if a landlord must make some representations regarding visibility in the context of a redevelopment/relocation right, the visibility covenant should be clearly defined and carefully drafted to reduce uncertainty and ambiguity and, in the event of a dispute, to mitigate any potential for the courts to adopt a more tenant-favourable interpretation of the visibility covenant than may have originally been intended by the landlord and the tenant.

To this end, any visibility covenant granted by a landlord should contain as many objective elements as possible, including:

1. A clear description of the portion of the premises to be protected by the visibility covenant (e.g., the storefront of the premises or the tenant's exterior signage located on the façade above the storefront of the premises);
2. A clear description of the vantage point from which visibility will be protected (e.g., visibility of the storefront from the parking facilities located within 50 feet directly in front of the storefront of the premises); and
3. A plot on a site plan indicating the specific sight lines or certain area to be protected (e.g., the sight line from the main street intersection at which the shopping centre is situated to the storefront of the premises).

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[1] 2001 CarswellOnt 4860.

[2] 2002 CarswellOnt 1172.

[3] 2002 ABQB 895 ("*137th C.T. Grill*").

[4] 2016 ONSC 3194 (CanLII) ("*Bloor Street Diner*").

Case Briefs

Howard K. Jeruchimowitz and Jarret S. Stephens

ENVIRONMENTAL PROTECTION

An Ohio appellate court found that the Ohio EPA had no duty to disclose information it possessed about the extent of contamination at a facility to an owner who purchased the property “as is” and whose status as the owner of the property was unknown to the EPA. *State v. Republic Environmental Sys., Inc.*, No. 26492, 2015 WL 5783650 (Ohio Ct. App. Sept. 30, 2015).

Republic Environmental Systems (Ohio), Inc., and BRAC, Inc. (collectively, “Sellers”), owned a hazardous waste facility in Dayton’s well field protection zone near a drinking water aquifer. The Ohio Environmental Protection Agency (“Ohio EPA”) sought to close the facility due to numerous complaints about disposal of hazardous materials.

On December 17, 1997, McCabe (“Purchaser”), whose business and expertise included hazardous waste remediation, agreed to buy the facility from Sellers. The Purchase Agreement stated, “the Premises will be transferred ‘as is,’ and the Purchaser will accept the property in the current condition without any other warranty as to the condition (including environmental) of the Premises, any improvements, or personal property thereon.” An addendum to the purchase agreement required that Purchaser assume “...all of Seller’s responsibilities and liabilities to complete closure and other remedial requirements of the Premises...as detailed in Seller’s closure plan for the facility and any consent agreements with governmental authorities.”

While the sale to Purchaser was pending, Sellers (1) began working with the Ohio EPA to develop a closure and cleanup plan and (2) as part of the sale, hired Purchaser to close the facility and clean up the surrounding property. In June 1998, Purchaser closed on its purchase of the facility, but Sellers continued to negotiate the terms of the closure plan with the Ohio EPA. Neither Sellers nor Purchaser disclosed the transfer of ownership to the Ohio EPA.

On approval of the closure plan, to achieve the force and effect of a court order to enforce the closure plan, the State of Ohio filed an action against Sellers alleging violations of Ohio’s hazardous waste laws. The following month, the trial court entered a consent order requiring Sellers (and any successors in interest) to address contamination issues and to close the facility pursuant to the closure plan. Later that year, Purchaser discovered additional soil contamination not specifically addressed in the closure plan.

In July 2007, the State of Ohio filed a motion for contempt against both Purchaser and Sellers for failure to comply with the consent order. On February 13, 2009, the trial court found both Purchaser and Sellers in civil contempt for failing to comply with numerous provisions of the closure plan and for failing to file a revision to the closure plan to account for the additional soil contamination not originally disclosed. Purchaser objected to the imposition of additional cleanup obligations and expenses beyond that which the closure plan identified. The court found that (1) there was “no credible evidence that Ohio EPA intentionally made material misrepresentations to the Purchaser defendants, upon which they reasonably relied...in purchasing the Facility” and (2) Ohio EPA’s shift from its 1998 determination that subsoil remediation was “unnecessary” to later mandating such remediation did not rise to the level of a material misrepresentation.

On October 9, 2009, the trial court entered a separate order imposing stipulated contempt penalties totaling \$14,706,800 on Purchaser and Sellers, holding them jointly and severally liable. On March 2, 2012, the trial court entered a separate judgment against Purchaser for Purchaser’s failure to submit an acceptable amended closure plan. The court imposed \$523,800 in periodic stipulated penalties, plus an additional \$600 for each day until Purchaser submitted an amended closure plan that was acceptable to the Ohio EPA.

On March 13, 2014, Purchaser filed 60(B)(4) and (5) motions for relief from the contempt orders. Purchaser alleged that Ohio EPA failed to turn over documents it possessed about the extent of contamination at the facility prior to the court’s issuing the 2009 contempt order. Purchaser alleged that the Ohio EPA made disclosures of additional contamination at the facility in October 2013. Purchaser also claimed that the Ohio EPA misled it and the trial court by presenting an incorrect and less stringent closure plan to the court at the contempt proceeding. Purchaser claimed that the Ohio EPA’s failure to disclose all information in a timely fashion made it impossible for Purchaser to estimate the cost of necessary remediation work, rendered its attempts to write an acceptable amended closure

plan fruitless and left the closure trust fund underfunded.

The trial court denied Purchaser's request for an evidentiary hearing, and Purchaser appealed. The appellate court held that Ohio EPA did not have a duty to disclose all contamination known or suspected to Purchaser. Under Ohio Adm. Code 3745-55-12(A)(1), the owner or operator is required to identify necessary steps to close the facility and then submit the plan to the EPA for approval. To obtain approval, the plan must be consistent with certain specified rules under Ohio Adm. Code 3745-55-12(A)(2), which does not include disclosure of all contamination of a facility known or suspected by Ohio EPA. The court affirmed the trial court's holding that no duty to disclose existed where the Purchaser was a third party unknown to the EPA.

Landlord and Tenant

The Delaware Superior Court found that a landlord cannot use self-help to remove a tenant who has been given multiple notices and reasonable time to vacate property. *166 Affordable Autos, Inc., v. Dietert*, 2016 Super. LEXIS 134 (Del. Super. Ct. Mar. 24, 2016).

Irvin A. Dietert ("Landlord") and 166 Affordable Autos, Inc. ("Tenant") entered into a lease in 2014 for an 1,800-square-foot building with an attached 700-square-foot building and 10 parking spaces in Wilmington, DE (the "Premises"). Monthly rent under the lease was \$1,900, with first month's rent and a one-month security deposit due on signing. The lease specifically stated that the use of the property was for the "sale of cars and trucks, the repair of cars and trucks, the storage of cars and trucks in all types of condition..." and was to become effective on receipt by Tenant of a car dealership license from the State of Delaware. During the time between execution and effectiveness of the lease, Tenant occupied the Premises pursuant to a verbal agreement with Landlord. During the occupancy period, Landlord (1) became unhappy with the condition of the Premises during Tenant's occupancy, (2) notified Tenant on at least three separate occasions that it needed to vacate the Premises, and (3) changed at least one lock on the property in an attempt to lock Tenant out. When Tenant subsequently failed to attend a meeting regarding Tenant's vacating the property, Landlord unilaterally determined that Tenant had vacated the property, towed four of Tenant's vehicles that were located on and adjacent to the property, disposed of the remainder of Tenant's personal property located at the Premises, and changed the locks to the Premises. Tenant filed an action against Landlord raising a claim for replevin and conversion.

The court noted that under Delaware law, (1) a lease can be written or oral and, therefore, the parties had an occupancy agreement before the written lease became effective and (2) a landlord cannot unilaterally terminate a lease. Since there was no evidence that the parties had established a termination date for the lease or the occupancy, the court held that Landlord wrongfully utilized self-help, exerted dominion and control over Tenant's vehicles and converted Tenant's property. In addition, the court found that to remove a tenant, there must be a summary proceeding through the Justice of the Peace Court when a landlord is owed rent, including where a tenant has abandoned the property with back rent due, or where a tenant unlawfully continues in possession of any part of the premises after the expiration of the rental agreement without the permission of the landlord. Therefore, Landlord wrongfully utilized self-help by removing Tenant's vehicles, and Tenant was entitled to damages for conversion. Additionally, the court held that Landlord's actions unlawfully and unilaterally terminated its occupancy agreement with Tenant because the parties had not agreed on a termination date or a date for Tenant to vacate the property at the time Landlord began to engage in self-help.

The New Jersey District Court held that a landlord may maintain an action alleging breach of contract, but dismissed claims for waste, gross negligence, unjust enrichment and promissory estoppel after the tenant refused to reimburse the landlord for asbestos remediation. *Kinney Bldg. Assocs., L.L.C. v. 7-Eleven, Inc.*, 2016 U.S. Dist. LEXIS 63864 (N.J. Dist. Ct., May 16, 2016).

Kinney Building Associates, L.L.C. ("Landlord") owns a commercial building in Newark, New Jersey. In 2014, Landlord entered into a lease with 7-Eleven, Inc. ("Tenant") for a portion of the building (the "Premises"). In 2015, Tenant provided written notice to Landlord that it had taken possession of the Premises and any conditions precedent under the lease, including Landlord's obligation to "remove or remediate...any and all asbestos-containing materials ("ACM")," were satisfied or waived. Shortly after delivery of the notice, Tenant notified Landlord that it had encountered ACM while core drilling through the floor of the Premises to run waste lines to the building's basement. Landlord paid \$169,785 to remediate ACM disturbed by Tenant and requested reimbursement from Tenant. Tenant refused to reimburse Landlord for the cost of remediation.

Landlord brought suit against Tenant claiming (1) breach of contract, (2) waste, (3) negligence and (4) unjust enrichment and promissory estoppel. Tenant filed a motion to dismiss all of Landlord's claims except for breach of contract.

Breach of Contract: In order to state a claim for breach of contract adequately, the court found that Landlord must allege (1) a contract between the parties, (2) a breach of that contract, (3) damages flowing from the breach and (4) the party stating the claim performed its own contractual obligations. In its suit, Landlord had asserted that Tenant had breached several provisions of the lease by core drilling in the Premises, doing so without adequate precautions to avoid disturbing ACM and releasing ACM, and by failing to reimburse Landlord for the costs of remediating the disturbed ACM. Tenant disagreed with all of Landlord's assertions.

Under New Jersey law, discerning contractual intent is a question of fact unless the provisions of a contract are wholly unambiguous. Landlord asserted that Tenant's core drilling had violated the "Alterations" section of the lease, which stated in relevant part, "[a]ny alterations or additions made by Tenant will be made in compliance with all applicable laws, in a good and workmanlike manner without cost to Landlord...." Tenant disagreed, stating that the "Alterations" provision of the lease only applied to work performed after the initial buildout and, therefore, was not applicable to Tenant's core drilling during its initial buildout of the Premises. On examination of the "Alterations" provision in the lease, the court found that the "Alterations" provision was unclear with regard to whether it applied only to work performed after Tenant's initial buildout and refused to dismiss Landlord's breach of contract claim.

Waste: Landlord alleged that Tenant "committed waste and destruction of [Landlord's] Premises and Building due to...material alteration..." The court dismissed Landlord's claim of waste because it determined that simply drilling holes did not constitute a substantial material change to the property and Landlord, therefore, had failed to support its claim with more than just bare legal conclusions.

Gross Negligence: The court dismissed Landlord's claim of gross negligence because under New Jersey law, a claim for negligence must allege a breach of a duty of care aside from a contractual provision, and Landlord did not plead that Tenant owed any duty other than the terms under the lease.

Unjust Enrichment and Promissory Estoppel: The court dismissed Landlord's claim of unjust enrichment and promissory estoppel because quasi-contract claims such as unjust enrichment and promissory estoppel cannot be maintained where a valid contract fully defines the parties' respective rights and obligations, and Landlord did not dispute the existence or validity of the contract governing the relationship with Tenant.

PROJECT DEVELOPMENT

The Ninth U.S. Circuit Court of Appeals affirmed the district court's summary judgment in favor of federal and local transit agencies and officials on claims under the National Environmental Act brought by nearby shopping center and property owners, finding that the agencies sufficiently vetted the environmental impacts of a subway expansion project in downtown Los Angeles. *Japanese Village, LLC, v. Federal Transit Administration*, No. 14-56837 and No. 14-56973 (9th Cir. 2016).

The project at issue is LA Metro's 1.9-mile underground light rail extension connecting the Metro Gold Line to the 7th Street/Metro Center Station, expected to be completed by 2020. The Ninth Circuit affirmed a district court's decision to grant summary judgment in favor of the Federal Transit Administration and the Los Angeles County Metropolitan Authority ("LA Metro") (collectively, "appellees") on claims they violated the National Environmental Policy Act ("NEPA") leading up to their 2012 approval of the Regional Connector Transit Corridor Project in downtown Los Angeles.

The Ninth Circuit rejected challenges by the Japanese Village Plaza, a shopping center and office complex in the city's Little Tokyo area, and the Westin Bonaventure Hotel located in the financial district of Los Angeles. The Ninth Circuit concluded that the mitigation plan that LA Metro included with the final environmental impact statement (FEIS) for the project was sufficient and did not violate NEPA because it properly weighed construction-related noise and vibration and analyzed alternative tunneling methods.

The Ninth Circuit stated: "In sum, we find that the appellees analyzed and adopted additional mitigation measures for construction-related noise and vibration in Japanese Village after the release of the FEIS, and appellees documented these measures in the June 2012 record of decision." The Ninth Circuit concluded that "the failure to see the need for these mitigation measures at the time the FEIS was released in January 2012, as evidenced by the fact that these measures were analyzed and adopted later, did not violate NEPA." The Ninth Circuit further held that regardless of whether temporary relocation was considered a mitigation measure or a source of harm, appellees did not violate NEPA as long as they took a hard look at each alternative and discussed the extent to which adverse effects could be avoided.

The Florida Court of Appeals overturned the trial court's final order dismissing the complaint challenging

the Town of Cutler Bay's development order approving the development of a shopping center as inconsistent with the town's comprehensive plan because the shopping center project did not include a residential component, finding that the comprehensive plan required any project to include residential uses. *Realty Associates Fund IX, L.P., v. Town of Cutler Bay*, No. 3015-2407, 2016 Fla. App. LEXIS 14132 (Fla. Ct. App. Sept. 21, 2016).

In March 2013, GCF Investment, Inc. ("GCF") filed a development application with the Town of Cutler Bay ("the Town") seeking approval of the site plan for the development of a shopping center called the "Shoppes at Cutler Bay" ("the Project"). In May 2013, the Town granted GCF's development application and issued the development order.

In June 2013, Realty Associates Fund IX, L.P. ("RAF") filed its complaint against the Town, GCF and Publix Super Markets, Inc. ("Publix") (which purchased most of the subject property from GCF) (collectively, "the defendants"), alleging that the Project had no residential component. The defendants moved to dismiss RAF's complaint, arguing that RAF did not cite any language from the Town's Growth Management Plan ("the comprehensive plan") that would require the project to include a residential component.

The trial court granted the motion to dismiss, finding that: (1) the project is located on a parcel of land within a mixed-use district along the Old Cutler Road Corridor, (2) it is undisputed that the project does not include a residential component and (3) the provisions that RAF cited in the comprehensive plan do not require the inclusion of a residential component in the project's site plan.

The appellate court reversed the trial court and found that the comprehensive plan required the Project to include residential uses: "We conclude that the plain meaning of the text...is clear and unambiguous. The words 'with residential uses comprising...no less than 20 percent' clearly demonstrate that the drafters of the comprehensive plan intended to require residential uses in all projects located within the Old Cutler Road Corridor, as the plain meaning of the phrase 'no less than' indicates a floor or minimum requirement." The appellate court further found that "[n]othing in the text of the comprehensive plan suggests that this minimum requirement only applies if a developer chooses to include residential uses to begin with, and nothing in the text suggests that this language was only limited to certain projects within the Old Cutler Road Corridor."

The appellate court disagreed that the interpretation would lead to an absurd result because it would require that even the smallest developments include 20 to 80 percent residential uses. The court noted that "the comprehensive plan reflects that it was the Town's intent when it adopted the comprehensive plan to transform the Old Cutler Road Corridor into a town center with residences, workplaces, shops, and civic activity centers in close proximity to one another" and that "the redevelopment of the Old Cutler Road Corridor into a partly residential, pedestrian-friendly town center was of prime importance in the drafting of the comprehensive plan."

Therefore, the appellate court found that the Town might reasonably have intended to require residential uses in all development projects within the Old Cutler Road Corridor in order to ensure the creation of such a town center. The appellate court also found it plausible "that the Town intended to incentivize larger redevelopments within the Old Cutler Road Corridor, as opposed to small piecemeal redevelopment, in order to force developers to create a high quality mixed-use environment, which would be in keeping with the drafters' intention to redevelop the Old Cutler Road Corridor into a town center." Therefore, the court found that including a residential use requirement for all new developments within the Old Cutler Road Corridor is not absurd.

Based on the language of the comprehensive plan, the appellate court found that all new development projects required a residential use component of between 20 and 80 percent; therefore, the approval of the site plan for the shopping center Project was inconsistent with the comprehensive plan.

The California Court of Appeals affirmed that the city's approval of a shopping center project adjacent to an established residential neighborhood and the city's approval of a larger shopping center did not violate the general plan because the acreage and square footage descriptions were reasonably construed by the city as flexible guides to development, not rigid development limitations. *Naraghi Lakes Neighborhood Preservation Association v. City of Modesto*, 204 Cal. Repr. 3d 67 (Cal Ct. App. 2016) (certified for partial publication); 2016 Cal. App. Unpub. LEXIS 4149 (Cal. Ct. App. 2016) (unpublished).

Berberian Holdings, L.P., proposed the construction of a new shopping center on approximately 18 acres of vacant land situated in northeast Modesto. The new shopping center, as proposed, would include approximately 170,000 square feet of floor area, with a grocery store serving as the anchor tenant. Because an established residential neighborhood bordered the project site, the project necessitated a General Plan amendment to redesignate the

project site from mixed-use and residential zoning to commercial, and to rezone the same property from planned development to a new planned development zone, to allow development of a shopping center.

The project site was covered by a neighborhood plan prototype (NPP), and the policies require that “[a] 7-9 acre neighborhood shopping center, containing 60,000 to 100,000 square feet of gross leasable space, should be located in each neighborhood.” In reviewing the site’s entitlement history, the court noted that the same site had been approved for commercial development as a shopping center on two occasions.

The court found no abuse of discretion in the city’s determination that the project was consistent with its General Plan, including the NPP policies. First, the court found that aside from the increased size of the shopping center over the prototypical size, the project fit and was compatible with NPP policies by placing a neighborhood-serving shopping center at the corner of an intersection served by two arterial streets, exactly as depicted on the NPP map, and complying with all other relevant policies. Second, the city’s approval of a larger shopping center did not violate the General Plan because the NPP acreage and square footage descriptions were reasonably construed by the City as flexible guides to development, not rigid development limitations. Finally, the construction was reasonable based on the language of the NPP policies as well as the city’s own past practices in applying the NPP provisions.

The Third U.S. Circuit Court of Appeals found that a shopping center developer and township board of supervisors did not have standing to bring suit alleging that a planned highway project violated the National Environmental Policy Act (“NEPA”). *Maiden Creek Associates, L.P. v. United States Department of Transportation*, 823 F.3d 184 (3d Cir. 2016).

Maiden Creek Associates (“MCA”), which owns 85 acres in Maiden Creek Township, hopes to develop the land into a 600,000 square-foot shopping center. The Board of Supervisors of Maiden Creek Township (“the Board”) has publicly endorsed that the shopping center is vital to the economic well being of the township residents.

The Pennsylvania DOT (“PADOT”) approved a project to improve an adjacent highway that will impede the development of the shopping center. The project would include widening the highway, improving and replacing existing traffic signals and constructing new roundabouts and stormwater retention basins. The project would be undertaken by PADOT on behalf of the United States Department of Transportation and the Federal Highway Administration and would be fully funded by the federal government.

MCA has opposed the construction. Initially, it objected because allegedly the traffic circles would not be able to handle all of the traffic expected to be generated by its shopping center. After publicly presenting the issue, PADOT determined that the design would not preclude the ability to develop. On August 6, 2014, PADOT approved the highway project and found that due to an exclusion under NEPA, neither an Environmental Assessment nor Environmental Impact Statement were required under the Act.

MCA and the Board then filed the lawsuit, alleging that the exclusion approval was based on inaccurate information supplied by PADOT that had not been adequately studied or investigated and, therefore, the findings were arbitrary and capricious. Defendants moved to dismiss for lack of standing because NEPA is meant to protect the environment and that MCA and the Board could not sustain claims because their “sole[ly]” economic pursuits fell outside of NEPA’s “zone of interests.”

On August 20, 2015, the federal district court granted the motion to dismiss. The court concluded that MCA and the Board’s interests were economic and inconsistent with NEPA’s goal of protecting the environment, and that, therefore, they lacked prudential standing to pursue their claims under the statute. The court also denied MCA and the Board’s motion for leave to amend as futile, finding that the new allegations inappropriately rested on injuries to third parties and were otherwise too speculative or generalized to support a claim.

The Third Circuit agreed, finding that MCA and the Board “failed to allege any ‘threatened harms to the ‘physical’ environment –‘the air, land and water which support life on earth,’ ” and upholding the dismissal. The Third Circuit also agreed that an amended complaint would be futile. Although MCA and the Board made more detailed allegations in the proposed amended complaint that came closer to NEPA’s zone of interests, they were insufficient because they either alleged environmental harm to third parties and not the plaintiffs or they alleged speculative harm.

The Third Circuit concluded: “The vast majority of NEPA authority makes clear that economic injury alone does not satisfy the statute’s zone of interests test. To be among those that Congress intended to bring suit under NEPA, a plaintiff’s actual interests must substantially align with the protection of our physical environment.”

***[T]he real interest that MCA and the Board have is developing the region purportedly affected by this highway construction. While MCA and the Board now allege that the Project may result in certain “environmental effects,” the proposed amended complaint makes clear that such harms are only fortuitously aligned with their stated interests. This places them outside the statute’s zone of interests for good reason. To accept NEPA litigants whose interests accidentally overlap with the statute’s intended purpose would not only create a class of plaintiffs far larger than Congress originally intended, it also would serve to distort the effect of NEPA itself.

RESTRICTIVE COVENANTS

The federal district court in Florida found that even though the exclusive identified in the lease by the landlord and relied on by the tenant was different from the actual exclusive, the landlord and tenant not have claims against each other for breach of contract, breach of the covenant of quiet enjoyment and indemnification. *Winn-Dixie Stores, Inc., v. Big Lots Stores, Inc.*, 2016 U.S. Dist. LEXIS 65508 (S.D. Fla. May 18, 2016).

This case is an offshoot of the action that began in 2011 when Winn-Dixie Stores brought an action against Big Stores, Dollar Tree and similar stores for breach of certain exclusives for the sale of “staple and fancy groceries” in certain “sales area.” This part of the dispute centers on a third-party complaint by Big Lots Stores against its landlord and the landlord’s claims against Big Lots with respect to the breach of the Winn-Dixie exclusive.

In this part of the Winn-Dixie lawsuit, Big Lots Stores, Inc. (one of the defendants to the Winn-Dixie exclusive), sued its former landlord Sarria Holdings IV, Inc., for breach of the covenant of quiet enjoyment, breach of contract under the Use Provision, indemnification and negligent misrepresentation. Sarria’s counterclaims against Big Lots included rescission, reformation, breach of contract and possession. The Florida federal district court found that that both Big Lots and Sarria failed to prove their claims.

The court made the following summary of the findings of fact. In late 2001, Big Lots leased a space with Sarria’s predecessor for space at the Homestead Plaza. During that time, Winn-Dixie was a tenant at the shopping center and was granted a restrictive covenant including the exclusive right to operate a supermarket. During the negotiations, Big Lots asked for exclusives with the other tenants, but it was not standard practice to run an independent title search for restrictive covenants in the area.

Exhibit F to the lease described the Winn-Dixie exclusive, which the parties would later learn did not match the actual exclusive use agreement. Big Lots testified that it believed that it was the actual exclusive and had relied on the landlord’s representation. Big Lots executed the lease in May 2002 with Sarria’s predecessor. The lease included a Use Provision referencing Exhibit F, which allowed Big Lots to use and occupy the demised premises for the sale of general merchandise and several other uses, including food, but prohibited Big Lots from using the demised premises primarily as a grocery store or supermarket. In addition, the Use Provision provided that aside from the exclusives in Exhibit F, there were no other exclusive covenants that would restrict Big Lots’ permitted uses.

In August 2003, Sarria purchased the Homestead Plaza. In June 2004, Big Lots was notified that Winn-Dixie had contacted Sarria, complaining that Big Lots was violating the Winn-Dixie exclusive. After requesting a copy of the Winn-Dixie exclusive, Big Lots sent a letter to Sarria in September 2004, stating that Exhibit F was not an accurate portrayal of the Winn-Dixie exclusive and demanded indemnification. Sarria never responded, and Big Lots interpreted the lack of response to mean that Sarria had resolved the issue with Winn-Dixie. The issue remained unaddressed until 2011. During that interim period, Big Lots renewed the lease and remained a tenant.

In June 2011, Winn-Dixie sued Big Lots for being in violation of Winn-Dixie’s grocery exclusive in 19 shopping centers. Big Lots then filed a third-party complaint against Sarria. In January 2012, Sarria sent a letter seeking rescission of the lease and, if no rescission, Sarria claimed that Big Lots was in default of the lease for bringing an action against Sarria for Big Lots’ own conduct. In February 2012, Sarria filed a counterclaim against Big Lots.

In May 2012, the federal trial for Winn-Dixie began, and on August 13, 2012, the district court found that the Winn-Dixie exclusive at Homestead Plaza was a real property covenant running with the land, and Big Lots was in violation of the covenant. Prior to the decision, Big Lots informed Sarria that it was not renewing the lease. In January 2013, at the expiration of the lease, Big Lots vacated Homestead Plaza.

As to Big Lot’s claims against Sarria, the district court found that Big Lots had no claims. First, the district court found that Sarria did not breach the covenant of quiet enjoyment because, even though the quiet enjoyment was limited to the description in Exhibit F rather than the real Winn-Dixie exclusive, both versions of the exclusive limited

Big Lots to the same 500-square-foot sales. Therefore, when Winn-Dixie sued Big Lots to enforce the 500-square-foot sales restriction, Big Lots' use was not interfered with beyond the terms already provided under Exhibit F. Second, the district court found no breach of contract for the same reason. Third, there was no claim for indemnification because the indemnity clause in the lease did not cover the type of damages alleged, and common law indemnity failed because Big Lots did not establish it was wholly without fault. Fourth, Big Lots claimed negligent misrepresentation, but the district court found no material difference between the actual exclusive and the one described in Exhibit F because both included the 500-square-foot limitation.

Finally, the district court found that Sarria had no claims against Big Lots. The district court denied any claim for rescission or reformation as to the use of the 1,000-square-foot term contained in Exhibit F due to lack of mutual or unilateral mistake. It denied a claim for breach of contract in the event of reformation for the same reason; in addition, Sarria failed to prove either breach of contract or damages for breach of contract. Third, the district court denied a claim for possession because Sarria did not prove that Big Lots was in breach of the lease.

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