ARTICLES

Because of *Winn-Dixie*: The Common Law of Exclusive Use Covenants

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I. INTRODUCTION

As a condition of entering into a lease for space in a shopping center, tenants with significant bargaining power often require landlords to promise that no other occupant of the shopping center will sell certain goods or services. This promise, contained in the lease, is known as an

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"exclusive use covenant" because it establishes the beneficiary's right to be the exclusive provider of particular goods or services in a defined area.[1] Grocery store tenants, like Winn-Dixie, typically require the landlord to promise that no other tenant will sell more than a de minimus amount of food items intended for off-premises consumption. Over the past decade, so-called "dollar stores" retailers, like Dollar Tree, Dollar General, and Family Dollar, selling discount, convenience products, including food items, have aggressively expanded.[2] Grocery store chains, fearing increasing competition from the dollar stores,[3] have relied upon exclusive use covenants to protect themselves from the dollar stores.[4]

In particular, Winn-Dixie has been involved in litigation against several dollar store chains for more than a decade.[5] Winn-Dixie filed a string of lawsuits, each addressing a violation of an exclusive use covenant in a single shopping center, until 2011, when it filed lawsuits in federal court against the owners of three national dollar store chains, alleging breaches of its exclusive use covenant at 136 shopping centers in Alabama, Florida, Georgia, Louisiana, and Mississippi.[6] The three

1. *See generally* Part II.

2. *See* Brad Thomas, *Dollar Stores Take On Wal-Mart, and Are Starting to Win*, FORBES (Apr. 16, 2012), http://www.forbes.com/sites/investor/2012/04/16/dollar-stores-take-on-wal-mart-and-are-starting-to-win/ ("Dollar Tree (DLTR), Family Dollar (FDO) and Dollar General (DG) have all grown into dominating dollar store chains that are nibbling away market share from a diverse spectrum of retailers.").

3. *See* Venessa Wong, *Dollar Stores Want to Be Grocery Stores, But Cheaper*, BLOOMBERG BUS. (July 15, 2014), http://www.bloomberg.com/bw/articles/2014-07-15/as-more-consumers-buy-groceries-at-dollar-stores-food-manufacturers-look-for-shelf-space.

4. *See, e.g.*, Hanna v. ENS Mgmt., L.L.C., No. D057781, 2011 WL 3806950 (Cal. Ct. App. Aug. 29, 2011); Glimcher Props., L.P. v. Bi-Lo, L.L.C., 609 S.E.2d 707 (Ga. Ct. App. 2005); Mark-It Place Foods, Inc. v. New Plan Excel Realty Trust, 804 N.E.2d 979 (Ohio Ct. App. 2004); Wakefern Food Corp. v. Chestnut Hill Plaza Holdings Corp., No. 18040, 2001 WL 515069 (Del. Ch. May 4, 2001).

5. *See, e.g.*, Sandifer P'ship, Ltd. v. Dolgencorp, Inc., No. 3:04-cv-01238, 2005 WL 2063790 (M.D. Fla. Aug. 24, 2005) (Winn-Dixie was an intervening party, seeking legal and equitable remedies against both Sandifer and Dollar General, based on its claim that the exclusive use provision in its lease at a shopping center in Jacksonville, Florida had been violated by Dollar General); Dolgencorp, Inc. v. Winn-Dixie Stores, Inc., 2 So. 3d 325 (Fla. Dist. Ct. App. 2008) (Winn-Dixie filed a lawsuit seeking to enjoin Dollar General from violating its exclusive use covenant at Jensen Beach Plaza in Martin County, Florida); Winn-Dixie Stores, Inc. v. Dolgencorp, Inc., 964 So. 2d 261 (Fla. Dist. Ct. App. 2007) (Winn-Dixie filed a lawsuit seeking to enjoin Dollar General from violating its exclusive use covenant at Crest Haven Shopping Center in Palm Beach County, Florida); Winn-Dixie Stores, Inc. v. 99 Cent Stuff-Trail Plaza, L.L.C., 811 So. 2d 719 (Fla. Dist. Ct. App. 2002).

6. *See* Winn-Dixie Stores, Inc. v. Dolgencorp, L.L.C., 746 F.3d 1008, 1016–17 (11th Cir. 2014) ("Winn-Dixie initially identified 136 stores in all as being in violation of the restrictive covenants. Of these original claims, Winn-Dixie at trial pursued its rights as to only ninety-seven stores."). *See also* Winn-Dixie Stores, Inc. v. Dollar Tree Stores, Inc., No. 9:11-cv-80638 (S.D. Fla. June 1, 2011); Winn-Dixie Stores Leasing, L.L.C. v. Big Lots Stores, Inc., No. 9:11-cv-80641

lawsuits were consolidated into a single case, *Winn-Dixie Stores, Inc. v. Dolgencorp, L.L.C.*[7] The district court reached a split decision, and the parties cross-appealed.

On March 5, 2014, the Eleventh Circuit Court of Appeals issued its decision in *Dolgencorp*. The court considered the interpretation of key terms in the exclusive use covenants,[8] the enforceability of the covenants directly against the dollar store defendants,[9] and the remedies available to Winn-Dixie.[10] The opinion concluded years of litigation between the parties,[11] but it also left important questions regarding exclusive use covenants unsettled. This article outlines the history of the dispute between Winn-Dixie and the dollar stores, the doctrinal issues addressed by the Eleventh Circuit, the broader implications of the decision, and the lingering uncertainties that face retail landlords and tenants with respect to exclusive use covenants, particularly in Florida.

Part II begins by introducing the law and usage of exclusive use covenants in the retail real estate industry. It examines how exclusive use covenants are used by retail tenants and landlords and how they are interpreted and enforced at common law. Part III unpacks the Eleventh Circuit's decision in *Dolgencorp* and related cases previously decided by Florida state and federal courts. Finally, Part IV argues that *Dolgencorp* reveals fundamental confusion regarding the interpretation, enforceability, and remediation of exclusive use covenants at common law.

II. Exclusive Use Covenants and the Common Law

Exclusive use covenants are a type of covenant. Colloquially, the word "covenant" means "promise" or "agreement." At common law, however, the word has a very specific meaning—it is a written promise to take an action or to refrain from taking an action.[12] Common law covenants begin as "personal covenants."[13] A personal covenant is con-

(S.D. Fla. June 1, 2011); Winn-Dixie Stores, Inc. et al v. Dolgencorp, L.L.C., No. 9:11-cv-80601 (S.D. Fla. May 20, 2011).

7. *Dolgencorp*, 746 F.3d at 1018 ("On February 1, 2012, the court consolidated Winn-Dixie's actions against Dollar General, Dollar Tree, and Big Lots.").

8. *See id.* at 1021.

9. *See id.* at 1038.

10. *See id.* at 1035, 1037–38.

11. *Id.* at 1016 (stating that the initial lawsuit was filed in 2011).

12. 9 Richard R. Powell, Powell on Real Property § 60.01[2], at 60-4 (Patrick J. Rohan ed., 1968) ("A covenant is an agreement or promise of two or more parties that something is done, will be done, or will not be done.").

13. *E.g.*, Caulk v. Orange Cnty., 661 So. 2d 932, 933–34 (Fla. Dist. Ct. App. 1995); *see also* 20 Am. Jur. 2d *Covenants, Conditions, and Restrictions* § 19 (2015) [hereinafter *Covenants, Conditions, and Restrictions*].

tained in a written contract, such as a lease.[14] If one party breaches a personal covenant, the non-breaching party may be entitled to the specific remedies set forth in the contract or, if the contract does not stipulate remedies, monetary damages.[15] A personal covenant is always binding upon the original parties to the contract, and, if permissible under the terms of the contract, the covenant may also bind the successors and assigns of the original parties.[16] A real covenant is a particular type of covenant that concerns real property.[17] Although personal covenants are creatures of contract law, real covenants are servitudes, a category of property interests.[18] The rules regarding their interpretation, enforcement, and remediation are therefore shaped by both contract and property law.[19] Like personal covenants, real covenants bind the original parties to the contract.[20] However, real covenants may more broadly bind successors to the property interests of the original parties.[21] Unlike

14. *See Caulk*, 661 So. 2d at 933–34; *Covenants, Conditions, and Restrictions*, *supra* note 13, § 19.

15. *See* Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 271–72 (1979) ("The purpose of contract remedies is to place a disappointed promisee in as good a position as he would have enjoyed had his promisor performed. Contract law has two methods of achieving this 'compensation goal': requiring the breaching party to pay damages, either to enable the promisee to purchase a substitute performance, or to replace the net gains that the promised performance would have generated; or requiring the breaching party to render the promised performance. Although the damages remedy is always available to a disappointed promisee under current law, the remedy of specific performance is available only at the discretion of the court. Moreover, courts seldom enforce contract clauses that explicitly provide for specific performance in the event of breach. . . . Under current law, courts grant specific performance when they perceive that damages will be inadequate compensation. Specific performance is deemed an extraordinary remedy, awarded at the court's discretion. . . .") (citations omitted); *see also Covenants, Conditions, and Restrictions*, *supra* note 13, § 42 (stating that the ordinary remedy for breach of a covenant is damages).

16. *Covenants, Conditions, and Restrictions*, *supra* note 13, § 18.

17. *Id.* § 19; *see also* Susan F. French, *Servitudes Reform and the New Restatement of Property: Creation Doctrines and Structural Simplification*, 73 CORNELL L. REV. 928, 950 (1988) ("Covenants impose obligations on the owner or possessor of land to do or refrain from doing something. Affirmative covenants require the land owner or possessor to pay money or to do some other deed; negative covenants require the land owner and possessor to refrain from doing something on the land.").

18. *See* Susan F. French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261, 1261–62 (1982) ("The law of easements, real covenants, and equitable servitudes is the most complex and archaic body of American property law remaining in the twentieth century. These devices, referred to in this Article collectively as servitudes, are used to effectuate private arrangements for the use of land. These private arrangements are used extensively to secure a wide variety of economic, aesthetic, and personal advantages to the owners and occupiers of land.").

19. *See id.* at 1269–70.

20. *See Covenants, Conditions, and Restrictions*, *supra* note 13, § 19.

21. *See id.*; *see also* POWELL, *supra* note 12, § 60.01[2], at 60-5 ("If certain requirements are met, either the benefit or the burden is capable of devolving on a successor to the property interest of either the covenantor or the covenantee. Where the benefit and the burden devolve, it is said that the covenant 'runs with the land.'") (footnotes omitted).

personal covenants, the traditional remedy for the breach of a real covenant is equitable relief—specific performance or injunctive relief—rather than monetary damages.[22]

A. *Lease Covenants (Personal Covenants)*

Most retailers rent space in a multitenant building, such as a shopping center, neighborhood center, or mall. All retailers desire to be located near other businesses that appeal to the same customer base. Some retailers seek to co-locate with businesses that sell complementary products. For example, soft goods (clothing and bedding) retailers typically want to locate themselves near other soft goods retailers.[23] Other types of tenants, such as nail salons, take-out pizza restaurants, ice cream parlors, and grocery stores, take the opposite approach;[24] they want to be protected from close proximity to competitors who sell similar products or services.[25] The idea is that people shop for goods, like food, differently than they shop for soft goods, like clothing. Consumers may visit a variety of stores to assemble the pieces of an outfit, but they will only purchase a meal or spa service on a particular day from a single retailer—they will not purchase pizza from one retailer, breadsticks from another, and a salad from a third. The tenants that sell goods and services that have ready substitutes (i.e., commodities) commonly

22. *Covenants, Conditions, and Restrictions*, *supra* note 13, § 42. At common law, real covenants were enforced at law (with money damages) and equitable servitudes were enforced at equity (with specific performance or injunctive relief). At modern U.S. common law, the two concepts have largely merged, and "[a]ctions at law for damages based on theories of real covenants have almost been replaced in the courts by suits in equity." POWELL, *supra* note 12, § 60.01[6], at 60-12; *see also* Tanya D. Marsh & Andrea K. Marsh, *Tangled Up in the Common Law: Restrictive Covenants and the Equitable Remedy of Injunctive Relief*, 48 RES GESTAE, Sept. 2004, at 34, 34 ("In our modern courts, in which law and equity have merged, plaintiffs can seek monetary damages, equitable relief like an injunction or specific performance, or some combination of those remedies.").

23. *See* Ira Meislik, *Crafting Exclusive Use Provisions Is No Simple Task Unless You Want to Ignore the "Why" Behind Them*, RUMINATIONS RETAIL REAL EST. L. BLOG (Mar. 1, 2015), http://www.retailrealestatelaw.com/archives/2766 ("[S]ome retailers are benefited by the presence of competitors. For example, in a large (or even a relatively large) shopping center, having multiple shoe stores (or specialty fashion stores) actually benefits each of those retailers. Basically, the 'good will' in those situations is created by the landlord, not by any individual retailer, because it is the shopping center that has created the 'marketplace.'").

24. *See, e.g.*, Benjamin Weinstock & Ronald D. Sernau, *High-End Retail Leasing*, 28 PRAC. REAL EST. L., no. 3, May 2012, at 29, 32 ("Anyone who has negotiated a retail lease certainly has seen the tenant's request that it be the only retailer in the landlord's property permitted to sell a particular product or line of merchandise. The operative theory is that Retailer A wants to [sic] the only upscale bridal shop or jeweler in the property without the need to compete with its traditional rival, Retailer B. . . . The traditional underpinning of the exclusive use clause is a retailer's theory that one supermarket does not want to compete with another supermarket for the same clientele who will buy milk and produce in the nearest or most convenient location.").

25. *Id.*

demand that landlords agree to refrain from leasing other space in the shopping center to competitors.[26] These lease provisions are called "exclusive use covenants" because the landlord promises that the tenant will have the exclusive right to engage in a particular type of business.[27] The breadth and strength of the exclusive use covenant is highly correlated with the size, creditworthiness, and bargaining power of the tenant demanding the provision.[28]

Poorly drafted exclusive use covenants can cause significant problems for both landlords and tenants.[29]

> For example, a landlord has granted an exclusive [use covenant] to a sporting goods store for the sale of sporting goods and sports apparel. The exclusive does not define "sports apparel." An apparel retailer wants to sign a new lease at the center, but sells items such as tennis shoes, sweatshirts, t-shirts and baseball style caps. Do these items constitute sports apparel which would violate the existing exclusive? A new tenant which sells "sports apparel" will likely require the landlord to obtain a waiver or clarification from the tenant which has the exclusive [use covenant] before that new tenant [would be] willing to sign a lease for that center. What if the sporting goods exclusive allows the sale of sporting goods by another tenant on an "incidental basis," but there is no definition of "incidental basis"? Can a new tenant sell sporting goods from 5% of its premises or 50% of its premises?[30]

Poorly drafted provisions lead to confusion, which can lead to a failed

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26. *See, e.g.*, Marc E. Rosendorf & Jill Reynolds Seidman, *Restrictive Covenants—The Life Cycle of a Shopping Center*, 12 PROB. & PROP., no. 6, Sept.–Oct. 1998, at 33, 35 ("One of the most important factors [to a tenant's decision to lease] is the correct retail mix. The tenant wants to ensure that other stores with compatible covenants are open and operating, resulting in a favorable synergy among all shopping center tenants. In addition, the tenant may want to minimize the potential for direct competition with its primary line of business as well as other significant aspects of its use.").

27. Jeffrey N. Brown, *Use Provisions in Commercial Leases*, L.A. L., Jan. 2006, at 21, 21.

28. *See* Ira Meislik, *A Short Diatribe on Granting and Crafting Exclusive Use Rights Provisions in Leases*, MEISLIK & MEISLIK (Apr. 22, 2011), http://www.meislik.com/articles/diatribe_exclusive_use_rights/; *see also* Appellants' Initial Brief at 9–10, Winn-Dixie Stores, Inc. v. Dolgencorp, L.L.C., 746 F.3d 1008 (11th Cir. 2014) (No. 12-14527-B) ("Winn-Dixie is an 'anchor tenant' who drives the development of the shopping center and helps the landlord attract other tenants. As an 'anchor tenant,' Winn-Dixie commits to a long-term lease (usually for 30 years) of 50,000 to 60,000 square feet of rental space.").

29. *See* Brown, *supra* note 27, at 23. *See generally, e.g.*, Ira Meislik, *Why Your Exclusive Use Right Will Be Useless, and Even if It Isn't, Why You Won't Collect Damages for Its Breach*, RUMINATIONS RETAIL REAL EST. L. BLOG (Dec. 1, 2013), http://www.retailrealestatelaw.com/archives/2189 [hereinafter Meislik, *Why Your Exclusive Use Right Will Be Useless*]; Ira Meislik, *Writing Exclusive Use Rights Provisions is Tricky. How So?*, RUMINATIONS RETAIL REAL EST. L. BLOG (Feb. 22, 2015), http://www.retailrealestatelaw.com/archives/2759.

30. Theani C. Louskos, *Unique Issues in Retail Leasing*, *in* COMMERCIAL REAL ESTATE LEASES 553, 559 (ALI-ABA Course of Study, June 3–4, 2010), *available in* Westlaw, SR052 ALI-ABA 553.

deal and unnecessary conflict. As a result, exclusive use covenants are some of the most heavily negotiated and carefully drafted provisions in a retail lease.[31] A well-drafted exclusive use provision: (1) narrowly and precisely defines the goods or services that may exclusively be sold by the tenant; (2) addresses the relationship between the exclusive use covenant and existing leases; (3) defines the area in which the goods or services are restricted to (typically the shopping center, but sometimes a portion of the shopping center); (4) defines the period of time in which the covenant will operate (e.g., when the lease terminates, the tenant ceases selling the restricted good or service, or the tenant is in default);[32] (5) narrowly and precisely carves out incidental exceptions to the restrictive use, if any, by naming particular businesses which are permitted, or allowing competition that does not exceed a certain threshold of shelf space and/or sales; and (6) addresses whether anchor tenants or department stores will be exempted from the restrictions. Landlords often seek to incorporate "rogue tenant" language into exclusive use clauses.[33] This language is designed to insulate a landlord from liability if a third-party (a "rogue tenant") breaches an exclusive use covenant that it is bound to honor.[34]

Common law and statutory law generally disfavor restraints on competition.[35] Exclusive use covenants in commercial leases clearly

31. This is particularly true for tenants selling food (e.g., grocery stores and restaurants) or services that consumers can only use once per trip (e.g., nail salons, hair salons, insurance agents, and banks).

32. This element is important because of the "mercenary fashion" that some retailers, particularly grocery stores, have used exclusive use covenants. *See* DANIEL B. BOGART & CELESTE HAMMOND, COMMERCIAL LEASING: A TRANSACTIONAL PRIMER 108–09 (2d ed. 2011) (discussing Oakwood Vill. L.L.C. v. Albertsons, Inc., 104 P.3d 1226 (Utah 2004)) (grocery store tenant ceased doing business at its original location and relocated to a competing property in the area; court found it permissible, within the "four corners" of the contract, for tenant to continue to pay rent under its original lease in order to prevent landlord from releasing the lease to a competitor). Some courts have limited the application of exclusive use covenants, for example, by refusing to allow retailers to enforce exclusive use covenants after they have stopped operating. *See, e.g.*, Tippecanoe Assocs. II, L.L.C. v. Kimco Lafayette 671, Inc., 829 N.E.2d 512, 516 (Ind. 2005) ("[A] covenant given by a shopping center to a tenant prohibiting the center from leasing to competitors of the tenant is generally enforceable. However, once the tenant or its successor voluntarily relinquishes the original use of the site, the anticompetitive covenant is severed from the occupancy and no longer enforceable to give the tenant or an assignee the right to restrict competition for a location outside the center.").

33. *See* Weinstock & Sernau, *supra* note 24, at 34. A simple example of a "rogue tenant" clause is, "Landlord shall have no liability for any violation of the Exclusive Use Restriction, except, however, where Landlord has caused and/or knowingly participated in such violation."

34. *See id.*

35. *See, e.g.*, FLA. STAT. § 542.33 (2014) ("Notwithstanding other provisions of this chapter to the contrary, each contract by which any person is restrained from exercising a lawful profession, trade, or business of any kind, as provided by subsections (2) and (3) hereof, is to that extent valid, and all other contracts in restraint of trade are void."). *But see* § 542.335 ("Notwithstanding s. 542.18 and subsection (2), enforcement of contracts that restrict or prohibit

restrain trade, but they have become an integral part of the retail real estate industry and are typically upheld by courts.[36] Although courts generally enforce exclusive use covenants, they also strictly construe them.[37] As the Florida Supreme Court held in 1943:

> Public policy favors competition in trade and opposes unreasonable restraints on useful commodities when the public welfare is injuriously affected. . . . Contracts entered into between parties, having as their objectives the removal of a rival competitor in a business, are not to be regarded as contracts in restraint of trade, because they do not close the field of competition but affect only the parties to the agreement.[38]

If the lease does not specify particular remedies for landlord's breach of an exclusive use personal covenant, common law generally provides that the tenant has its choice of two remedies: (1) terminate the lease; or (2) continue the lease and seek equitable and legal relief from the landlord.[39] Relief at law potentially includes the recovery of tenant's "loss of anticipated business profits proven to a reasonable degree of certainty, which resulted from the landlord's default, and which the landlord at the time the lease was made could reasonably have foreseen would be caused by the default."[40] Although the concept is straightforward, the implementation is not—landlords, tenants, and courts have struggled with how to calculate lost profits due to the breach of an exclusive use covenant.[41]

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competition during or after the term of restrictive covenants, so long as such contracts are reasonable in time, area, and line of business, is not prohibited.").

36. *See* J.H. Tigges, Annotation, *Validity, Construction, and Effect of Lessor's Covenant Against Use of His Other Property in Competition with the Lessee-Covenantee*, 97 A.L.R.2d § 3 (1964) ("Although a covenant by a lessor not to use or lease his other property for a purpose competitive with that of the lessee-covenantee involves a partial restraint of trade, it is clear that under ordinary circumstances such restraint of trade is lawful . . . .").

37. *See* 2 RICHARD R. POWELL, POWELL ON THE LAW OF REAL PROPERTY § 17A.02[4], [5][a] (Patrick J. Rohan ed., 1968) ("The words creating the covenant will not be extended beyond their literal meaning. When two constructions of a restrictive covenant are possible, the construction that does not limit the property or that produces the lesser limitation will be adopted. . . . Since a noncompetition covenant restricts the uses that the landlord can make of other property in the shopping center, it is often subject to the same principles of strict construction that govern restrictive covenants generally.") (footnotes omitted).

38. Janet Realty Corp. v. Hoffman's, Inc., 17 So. 2d 114, 116 (Fla. 1943). Furthermore, "[r]estrictive covenants upon a described piece of real estate for reasonable purposes and a reasonable length of time do not violate public policy. . . . A contract by the owner of a theatre building based upon a valuable consideration by the terms of which the building is not being used as a show house or auditorium is not in restraint of trade." *Id.* at 117 (internal citations omitted).

39. *See* RESTATEMENT (SECOND) OF PROP., LAND. & TEN. § 7.1(1)–(2) (1977).

40. *Id.* § 10.2(5).

41. For discussions of the problems in calculating damages resulting from the breach of an exclusive use covenant, see Ira Meislik, *How Can a Tenant Use Self-Help to Enforce Its Own Exclusive Use Rights*, RUMINATIONS RETAIL REAL EST. L. BLOG (June 10, 2012), http://

B. *Real Covenants*

Legally enforceable personal covenants—like exclusive use covenants found in leases—are potentially eligible to be elevated to the special status of "real covenants" because the promises relate to the use of real property.[42] Such covenants may "run with the land," meaning that the burden of the covenant, the benefit of the covenant, or both, may pass to successors of the original parties.[43] Like personal covenants, properly drafted real covenants that restrict the use of land for a particular business purpose—such as exclusive use covenants—have been enforced by courts, despite the restraint on trade, and have been strictly construed.[44] If personal covenants are successfully transformed into real covenants, these contractual promises become "servitudes," a type of property interest that includes the concepts of real covenants and equitable servitudes.[45]

When the English courts of law and equity were divided, the common law sharply differentiated between "real covenants" and "equitable servitudes."[46] Real covenants could only be remedied at law, i.e., with money damages.[47] Equitable servitudes could only be remedied at equity, i.e., with injunctions and specific performance.[48] The criteria required to create the two kinds of servitudes was slightly different, due in large part to the peculiar facts of *Tulk v. Moxhay*, the case that gave rise to the equitable servitude.[49] Professor Susan French, a leading

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www.retailrealestatelaw.com/archives/1014; Meislik, *Why Your Exclusive Use Right Will Be Useless*, *supra* note 29.

42. *See* WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY 475 (3d ed. 2000). Put another way, a covenant that does not "touch and concern" some estate in land, will not be treated as a real covenant. *Id.*

43. *See id.* at 470.

44. *See* STOEBUCK & WHITMAN, *supra* note 42, at 470, 477–78; *see also* POWELL, *supra* note 12, § 60.05, at 60-76 ("Insofar as covenants tend to curtail or to hinder full use of land, the public policy in favor of alienability of land comes in to urge strict construction; this is the case, at least, wherever ambiguity opens the door for a policy-dictated construction.").

45. *See supra* note 18 and accompanying text.

46. *See* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 855–66 (3d ed. 1993).

47. *Id.* at 859 ("A real covenant subjects the promisor (or successor) to personal liability for damages, with a damage award collectible out of all the promisor's (or successor's) assets.").

48. *Id.* at 864 ("An equitable servitude is a covenant respecting the use of land enforceable against successor landowners in equity regardless of its enforceability at law.").

49. At common law, courts held that real covenants could not run with the land unless they met five criteria: (1) the parties intended the covenant to run with the land; (2) the covenant touched and concerned the land; (3) there was horizontal privity of estate between the promisor and promise beyond the covenant itself (i.e., successive privity, mutual privity, or landlord-tenant privity); (4) there was vertical privity of estate between the successive owners of the benefited and burdened parcels of land; and (5) a party bound by the covenant (other than the original promisor) had notice of the burden. The case of *Tulk v. Moxhay* arose in an English Court of Chancery and dealt with the enforcement of a promise to maintain the parcel of land known as Leicester Square in London as a "square garden and pleasure ground, in an open state, uncovered with any

authority on servitudes, describes their common law history as "a mess."[50]

In the modern United States, the courts of law and equity have merged, negating the original rationale for the sharp distinctions that existed between real covenants and equitable servitudes. In 2000, the *Restatement (Third) of Property (Servitudes)* dropped the labels "real covenant" and "equitable servitude" and merged the concepts into a single servitude called a "covenant."[51] The Restatement noted that the remedies for the breach of these modern covenants include "any appropriate remedy or combination of remedies" at law or equity.[52] Although the Restatement provided a comprehensive and consistent framework intended to bring clarity to the muddled common law of servitudes, most courts have failed to meaningfully engage with it, neither adopting the Restatement approach nor rejecting it. But many courts, including those in Florida, have indirectly implemented the Restatement's merger of the equitable servitude into the modern real covenant, without acknowledging the significance of that move, by ceasing to talk about the differences between equitable servitudes and real covenants and by treating real covenants as a hybrid.[53] Therefore, even though most courts in the United States have not expressly merged equitable servitudes and real covenants, it is appropriate to discuss the modern real covenant in the language of the Restatement.

In order for a modern real covenant to "run with the land" and bind the successors to the original parties, the common law generally requires

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buildings." (1848) 41 Eng. Rep. 1143 (Ch.). The original parties to the promise did not meet the requirements for horizontal privity of estate then used by the English courts of law. The parties seeking to enforce the promise therefore took their case to a court of equity, the Court of Chancery. The court enforced the promise at equity despite the lack of horizontal privity of estate. *Id.* The English courts, thus, eliminated the requirements of horizontal privity and vertical privity (that the burden to run with the land) with respect to equitable servitudes. *See* DUKEMINIER & KRIER, *supra* note 46, at 864.

50. French, *supra* note 17, at 928 ("The concept of interests running with the land is elegantly simple, but the law governing servitude devices is a mess. I have described it previously as 'the most complex and archaic body of American property law remaining in the twentieth century.'") (quoting French, *supra* note 18, at 1261).

51. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.4 (2000) ("The terms 'real covenant' and 'equitable servitude' describe servitudes encompassed within the term 'covenant that runs with land' and are not used in this Restatement except to describe the evolution of servitudes law.").

52. *Id.* § 8.3(1).

53. *See* DUKEMINIER & KRIER, *supra* note 46, at 866 (citing 5 RICHARD R. POWELL, THE LAW OF REAL PROPERTY 676 (Patrick J. Rohen ed., rev. ed. 1992)) ("The modern union of law and equity, as well as the judicial confusion over which covenants should run at law and which should run in equity, have caused courts, in general, to grant the relief they feel is appropriate without regard to the real or equitable nature of the covenant. In most cases, the appropriate relief has been an injunction against future breaches, and, if necessary, damages for past breaches.").

that the covenant satisfy six criteria.[54] First, the promise must be enforceable between the original parties (i.e., a personal covenant).[55] Second, the real covenant must "touch and concern" the land.[56] Courts have found that covenants touch and concern the land if they require land to be used in a particular way or if they restrict land from being used for certain purposes.[57] Third, the agreement must clearly demonstrate the intent of the original parties to bind the successors to the benefit and burden of the covenant.[58] Fourth, there must be horizontal privity of estate between the original parties to the covenant.[59] This requirement traditionally applied to real covenants but not to equitable servitudes.[60] Now, a liberal horizontal privity requirement that is satisfied by nearly every personal covenant applies to modern real covenants.[61] Fifth, there must be "vertical privity"[62] of estate between the original parties to the

54. *See* STOEBUCK & WHITMAN, *supra* note 42, at 473.

55. *Id.* at 473; *see also* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.1 (2000).

56. STOEBUCK & WHITMAN, *supra* note 42, at 473, 475; *see also* French, *supra* note 17, at 939 ("The touch and concern doctrine has traditionally been stated in the form of an ex ante limit on the creation of servitudes. If the benefit or burden of the covenant does not touch or concern the land, then it does not run with the land. . . . The concept is so difficult to pin down that it can rarely be used as a basis for predicting the enforceability of a particular covenant. Each covenant must be litigated to determine whether it touches and concerns or not.") (footnotes omitted). The Restatement, however, has attempted to eliminate this requirement. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.2 (2000) ("Neither the burden nor the benefit of a covenant is required to touch or concern land in order for the covenant to be valid as a servitude."). Despite the efforts of the Restatement to abolish the touch and concern doctrine, many courts still recite it as a requirement, albeit one easily (i.e., liberally) fulfilled.

57. *See* STOEBUCK & WHITMAN, *supra* note 42, at 475.

58. *Id.* at 473, 480–81; RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.2 (2000).

59. *See* STOEBUCK & WHITMAN, *supra* note 42, at 473, 483. Note that the Restatement drops the horizontal privity requirement completely. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.4 cmt. b (2000) ("As a matter of common law, horizontal privity between the covenanting parties is no longer required to create a servitude obligation."). *But see* Michael Lewyn, *The Puzzling Persistence of Horizontal Privity*, 27 PROBATE & PROPERTY 32 (May/June 2013) ("The Restatement is generally highly influential. But post-2000 cases have generally refused to apply the Restatement's rejection of horizontal privity.").

60. French, *supra* note 18, at 1272–73 ("Horizontal privity, a requirement unique to real covenants, describes the relationship required between the original covenantor and covenantee outside which the burden of promises cannot run. English property law requires a landlord-tenant relationship between the promisor and promisee to satisfy the horizontal privity requirement. American courts, however, have eviscerated this requirement by accepting a grantor-grantee relationship as well as a relationship between the owners of easement interests to satisfy the horizontal privity test.").

61. While the Restatement does not require horizontal privity, many courts still name horizontal privity as a requirement for the creation of a real covenant, but the expansive interpretation of horizontal privity employed by American courts essentially renders this requirement meaningless. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.4 reporter's note (2000).

62. *See* STOEBUCK & WHITMAN, *supra* note 42, at 482 (vertical privity exists when "the burden of a real covenant may be enforced against remote parties [that] have succeeded to the [original party's] estate in land.").

agreement and the successors who seek to enforce it.[63] Sixth, a party to be bound by a real covenant must have acquired the burdened property interest with *notice* of the covenant.[64] Actual notice is not required; constructive notice, created by recording the real covenant in the chain of title of the burdened real property, is sufficient.[65]

As with personal covenants, a non-breaching party to a real covenant may receive specific remedies bargained for in the agreement or, if the agreement is silent, a variety of remedies at law and equity.[66] Typically, beneficiaries of real covenants seek an injunction prohibiting future breaches of the covenant and money damages as compensation for past breaches.[67]

At common law, remedies at law are preferable to equitable remedies like injunctions.[68] Florida law is consistent with the common law's reluctance to award "extraordinary" equitable remedies if the injured party has an adequate remedy at law.[69] A major exception to this rule is for promises regarding real property. In Florida, as in other states, the injured holder of a property interest need not prove that it has no adequate remedy at law in order to avail itself of equitable relief. Instead, "money damages are considered an inadequate remedy at law to a pur-

63. *See id.* at 473, 482; *see also* French, *supra* note 18, at 1273 ("Although vertical privity requirements are stated for all covenants that run with land, virtually all the cases enforcing the requirement involve covenants made in leases."). Note that the Restatement replaces the label "vertical privity" with the equivalent statement that "[a]n appurtenant benefit or burden . . . passes automatically with the property interest to which it is appurtenant." RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 5.1 (2000).

64. *See id.* at 499–500.

65. *See id.* at 500. The common law requirement that a subsequent party have notice in order for the burden of a modern real covenant to run has been replaced by the broader protections afforded bona fide purchasers of property interests under the recording acts. The acts that established state recording systems include statutes similar to FLA. STAT. § 695.01 ("No conveyance, transfer, or mortgage of real property, or of any interest therein, nor any lease for a term of 1 year or longer, shall be good and effectual in law or equity against creditors or subsequent purchasers for a valuable consideration and without notice, unless the same be recorded according to law . . . ."). A real covenant, like all servitudes, is an interest in real property. Therefore, a bona fide purchaser for value does not take real property subject to the burden of a real covenant of which it had no notice. *See, e.g.*, McLeod v. Clements, 755 S.E.2d 346, 349 (Ga. Ct. App. 2014), *aff'd*, 774 S.E.2d 102 (Ga. 2015).

66. *See id.* at 490.

67. *See id.*

68. *See, e.g.*, Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897) ("The duty to keep a contract at common law means . . . that you must pay damages if you do not keep it—and nothing else."); *see also* Tanya D. Marsh, *Sometimes Blackacre Is a Widget: Rethinking Commercial Real Estate Contract Remedies*, 88 NEB. L. REV. 635, 636 (2010).

69. *See, e.g.*, Gomez v. Fradin, 41 So. 3d 1068, 1071 (Fla. Dist. Ct. App. 2010) ("A claim for a permanent injunction is an extraordinary remedy that must only be granted sparingly."); Hiles v. Auto Bahn Fed'n, Inc., 498 So. 2d 997, 998 (Fla. Dist. Ct. App. 1986) ("A party seeking an injunction under general Florida case law must demonstrate: 1) irreparable harm; 2) a clear legal right; 3) an inadequate remedy at law; [and] 4) consideration of the public interest.").

chaser of land because all land is considered unique."[70] A real covenant is a property interest. Therefore, in Florida as with the general common law trend, a non-breaching beneficiary of a real covenant is not required to allege or show irreparable injury[71] or the lack of an adequate remedy at law in order to obtain a court order enjoining activity that violates the covenant.[72]

Traditionally, courts have interpreted restrictive real covenants narrowly because they abrogate a possessor's right to the unrestricted use and alienation of land.[73] However, if the language is clear and unambiguous, the provision will be enforced as written. As the Florida Supreme Court explained:

> Covenants restraining the free use of real property, although not favored, will nevertheless be enforced by courts of equity where the intention of the parties is clear in their creation, and the restrictions and limitations are confined to a lawful purpose and within reasonable bounds, unless the rights created by such covenants have been relinquished or otherwise lost. Such covenants are strictly construed in favor of the free and unrestricted use of real property, but effect will be given to the manifest intention of the parties as shown by the language of the entire instrument in which the covenant appears, when considered in connection with the circumstances surrounding the transaction. Due regard must be had for the purpose contemplated by the parties to the covenant, and words used must be given their ordinary, obvious meaning as commonly understood at the time the instrument containing the covenants was executed, unless they have acquired a peculiar meaning in the particular relation in which they

70. Bermont Lakes, L.L.C. v. Rooney, 980 So. 2d 580, 586 (Fla. Dist. Ct. App. 2008); *see also, e.g.*, Jack Eckerd Corp. v. 17070 Collins Ave. Shopping Ctr., 563 So. 2d 103, 105 (Fla. Dist. Ct. App. 1990) (citing Stephl v. Moore, 114 So. 455 (Fla. 1927)) ("Where an injunction is sought to prevent the violation of a restrictive covenant, appropriate allegations showing the violation are sufficient and it is not necessary to allege, or show, that the violation amounts to an irreparable injury.").

71. *Id.*

72. *See, e.g.*, Chick-Fil-A, Inc. v. CFT Dev., L.L.C., 652 F. Supp. 2d 1252, 1263 (M.D. Fla. 2009), *aff'd*, 370 F. App'x 55, 56 (11th Cir. 2010); Autozone Stores, Inc. v. Ne. Plaza Venture, L.L.C., 934 So. 2d 670, 673 (Fla. Dist. Ct. App. 2006) (quoting RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 8.3 cmt. b (2000)) ("'[I]njunctive relief is normally available to redress violations of . . . restrictive covenants [affecting real property] without proof of irreparable injury or a showing that a judgment for damages would be inadequate. The value of a restrictive covenant . . . is often difficult to quantify and may be impossible to replace.'") (alterations in original).

73. *See, e.g.*, Leamer v. White, 156 So. 3d 567, 572 (Fla. Dist. Ct. App. 2015) (quoting Wilson v. Rex Quality Corp., 839 So. 2d 928, 930 (Fla. Dist. Ct. App. 2003)) ("[R]estraints [on the use of real property] 'are not favored and are to be strictly construed in favor of the free and unrestricted use of real property.'"); Orlando Lake Forest Joint Venture v. Lake Forest Master Cmty., 105 So. 3d 646, 648 (Fla. Dist. Ct. App. 2013) ("A use restriction on land must be strictly construed in favor of unrestricted use of the land."), *review denied sub nom.* Lake Forest Master Cmty. Ass'n v. Orlando Lake Forest Joint Venture, 118 So. 3d 221 (Fla. 2013).

> appear, or in respect to the particular subject-matter involved, or unless it clearly appears from the context that the parties intended to use them in a different sense.[74]

Florida law therefore sets forth a two-part test for real covenants. First, the court must evaluate whether the covenant is unambiguous.[75] Second, if it determines that the language is subject to more than one interpretation (i.e., the covenant is ambiguous), it must strictly construe the language in favor of the "free and unrestricted use of real property."[76]

III. *Winn-Dixie Stores v. Dolgencorp*

A. *The* Winn-Dixie *Exclusive Use Covenant*

Winn-Dixie Stores, Inc. is a privately held company that operates nearly 500 grocery stores in five southeastern states, with most of its stores located in Florida.[77] Winn-Dixie is owned by Bi-Lo Holdings, which identifies itself as the fifth-largest conventional supermarket company in the United States based on store count.[78] Grocery stores extensively use exclusive use covenants to limit competition in the shopping centers that they anchor.[79] Winn-Dixie is no exception.[80] Like many anchor tenants, Winn-Dixie utilizes a form lease.[81] As a result, there is significant consistency in the wording of certain lease provisions, including the exclusive use covenant.[82] The Winn-Dixie exclusive use covenant was first drafted in the 1960s and has not been significantly changed since that time.[83] The exclusive use covenant in the Winn-Dixie form lease includes the following language:

> Landlord covenants and agrees that Tenant shall have the exclusive right to operate a supermarket in the shopping center and any enlargement thereof. Landlord further covenants and agrees that it will not directly or indirectly lease or rent any property located within the shopping center, or within 1000 feet of any exterior boundary thereof, for occupancy as a supermarket, grocery store, meat, fish or vegetable market, nor will the Landlord permit any tenant or occu-

74. Winn-Dixie Stores, Inc. v. Dolgencorp, L.L.C., 746 F.3d 1008, 1022 (11th Cir. 2014) (quoting Moore v. Stevens, 106 So. 901, 903 (Fla. 1925)).

75. *Id.*

76. *Id.*

77. *See* Appellants' Initial Brief, *supra* note 28, at 2 (Winn-Dixie has stores in Alabama, Florida, Georgia, Louisiana, and Mississippi).

78. *See About Us*, Winn-Dixie, https://www.winndixie.com/AboutUs/Default.aspx (last visited Aug. 29, 2015).

79. *See* Appellants' Initial Brief, *supra* note 28, at 6–10.

80. *See id.*

81. *See id.* at 8.

82. *See id.*

83. *Id.*

> pant of any such property to sublet in any manner, directly or indirectly, any part thereof to any person, firm or corporation engaged in any such business without written permission of the Tenant; and Landlord further covenants and agrees not to permit or suffer any property located within the shopping center to be used for or occupied by any business dealing in or which shall keep in stock or sell for off-premises consumption any staple or fancy groceries, meats, fish, vegetables, fruits, bakery goods, dairy products or frozen foods without written permission of the Tenant.[84]

The exclusive use covenant generally also includes an exception that allows other shopping center tenants to sell competing items on a de minimus basis:

> [E]xcept the sale of such items is not to exceed the lesser of 500 square feet of sales area or 10% of the square foot area of any storeroom within the shopping center, as an incidental only to the conduct of another business . . . shall not be deemed a violation hereof.[85]

The Winn-Dixie exclusive use covenant is clearly a personal covenant. As such, it is enforceable against the landlord, but not directly enforceable against third-party tenants. However, the Winn-Dixie form lease also contains the following language:

> This lease and all of the covenants and provisions thereof shall inure to the benefit of and be binding upon the heirs, legal representatives, successors and assigns of the parties hereto. Each provision hereof shall be deemed both a covenant and a condition and shall run with the land.[86]

On its face, this language purports to transform all personal covenants in the lease into real covenants.

Like many anchor tenants, Winn-Dixie routinely records a "Short Form Lease," which is also a form document, in the property records of counties where each store is located.[87] The Short Form Lease recites the exclusive use covenant.[88] The cumulative effect of these provisions and actions, Winn-Dixie asserts, is that when the exclusive use covenant is appropriately recorded in its Short Form Lease, the personal covenant contained in the lease is transformed into a real covenant and is therefore enforceable against other tenants who signed their leases after Winn-

84. Amended Complaint at 4, Winn-Dixie Stores, Inc. v. Big Lots Stores, Inc., 886 F. Supp. 2d 1326 (S.D. Fla. 2012) (No. 9:11-cv-80641).

85. Appellants' Initial Brief, *supra* note 28, at 9 (alterations in original).

86. Amended Complaint, *supra* note 84, at 5.

87. Appellants' Initial Brief, *supra* note 28, at 10.

88. Short Form Lease by and Between Homestead Plaza Joint Venture, as Landlord, and Winn-Dixie Stores, Inc., as Tenant at 2 (dated Feb. 5, 1990) (recorded Nov. 7, 1991), *available at* https://www2.miami-dadeclerk.com/officialrecords/Search.aspx (accessed by searching Book 15261, Page 3160, Official Records).

Dixie.[89] This is because those other tenants are in vertical privity with the landlord and have obtained a portion of landlord's property interest in the shopping center, subject to Winn-Dixie's exclusive use covenant. In litigation over the meaning of the Winn-Dixie exclusive use covenant that predates *Winn-Dixie v. Dolgencorp*, Florida's Fourth District Court of Appeal agreed with Winn-Dixie's reasoning, at least with respect to a store in Palm Beach County, Florida, holding that "Winn Dixie's grocery exclusive was a real property covenant that ran with the land and not a personal contract obligation."[90]

B. *The History of the Case*

On May 20, 2011, Winn-Dixie Stores, Inc., together with a number of subsidiary entities, filed a complaint in the United States District Court for the Southern District of Florida against Dolgencorp, L.L.C., the owner of the Dollar General chain.[91] The complaint alleged that Dollar General violated the Winn-Dixie exclusive use covenant at an unspecified number of shopping centers.[92] On June 1 and June 30, 2011, respectively, Winn-Dixie filed nearly identical complaints against Dollar Tree Stores, Inc.[93] and Big Lot Stores, Inc.[94] In February 2012, the three lawsuits were consolidated into a single action that alleged violations of the exclusive use covenants at 136 shopping centers in Alabama, Florida, Georgia, Louisiana, and Mississippi.[95] The number of locations at issue was eventually winnowed down to 97—51 Dollar General stores, 32 Dollar Tree stores, and 14 Big Lots stores.[96] The vast majority of the stores (75) were located in Florida.[97] The others were located in Alabama (13 stores), Louisiana (6), Georgia (2), and Mississippi (1).[98]

A bench trial was held in May 2012. The district court ordered judgment for the plaintiffs in part and for the defendants in part.[99] The parties cross-appealed to the Eleventh Circuit Court of Appeals.[100]

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89. *See* Winn-Dixie Stores, Inc. v. Dolgencorp, L.L.C., 746 F.3d 1008, 1016 (11th Cir. 2014).

90. Winn-Dixie Stores, Inc. v. Dolgencorp, Inc., 964 So. 2d 261, 264 (Fla. Dist. Ct. App. 2007).

91. *See* Complaint at 1, Winn-Dixie Stores, Inc. v. Dolgencorp, L.L.C., 886 F. Supp. 2d 1326 (S.D. Fla. 2012) (No. 11-cv-80601).

92. *Id.* at 1, 6.

93. *See* Complaint at 1, Winn-Dixie Stores, Inc. v. Dollar Tree Stores, Inc., 886 F. Supp. 2d 1326 (S.D. Fla. 2012) (No. 11-cv-80638).

94. *See* Amended Complaint, *supra* note 84, at 1.

95. *See* Winn-Dixie Stores, Inc. v. Dolgencorp, L.L.C., 746 F.3d 1008, 1016–18 (11th Cir. 2014).

96. *See id.* at 1016–17.

97. *See id.* at 1017.

98. *Id.*

99. *See id.* at 1366.

100. *See* Winn-Dixie Stores, Inc. v. Dolgencorp, L.L.C., 746 F.3d 1008, 1020 (11th Cir. 2014).

C. *Issues Before the Eleventh Circuit*

In order to understand the issues before the Eleventh Circuit on appeal, we must first examine the issues before the district court. The district court was tasked with determining: (1) whether the exclusive use covenant was a real covenant running with the land;[101] (2) how to interpret key terms in the exclusive use covenant;[102] and (3) how to calculate damages.[103] Each of these three issues, and the district court's treatment of each, shall be discussed in turn.

1. The "Critical Inquiry": The Nature of the Exclusive Use Covenant

As explained in Part III.A, the Winn-Dixie exclusive use covenant is unquestionably a personal covenant contained in the lease between Winn-Dixie and the landlord at each shopping center. If the terms of the personal covenant are breached, there is no question that Winn-Dixie may sue its landlord. However, the Winn-Dixie litigation was a direct lawsuit against three dollar store chains—Dollar General, Dollar Tree, and Big Lots—that signed leases in the relevant shopping centers after Winn-Dixie. The lawsuit against these third-party tenants could proceed only if the exclusive use covenant had been transformed into a real covenant. The nature of the covenant was, therefore, the "critical inquiry" in the case.[104]

The district court found meaningful differences between the laws of (i) Louisiana;[105] (ii) Mississippi;[106] and (iii) Alabama, Florida, and Georgia.[107] It therefore analyzed the issue separately under each of the three regimes.[108] Because the vast majority of the litigated leases were located in Florida,[109] and because Florida common law is generally con-

101. *See* Winn-Dixie Stores, Inc. v. Big Lots Stores, Inc., 886 F. Supp. 2d 1326, 1336 (S.D. Fla. 2012).

102. *Id.* at 1339.

103. *Id.* at 1345.

104. *See id.* at 1336 ("The parties do not dispute that Defendants are not parties to these leases containing Plaintiffs' restrictive covenants. Accordingly, in order to be enforceable against Defendants, Winn-Dixie's grocery exclusives must be real property covenants running with the land."). Winn-Dixie's argument is implicitly predicated on the idea that the three named retailers were successors of the landlord's estate by virtue of their own leases, although this concept was not directly addressed by either the district court or the Eleventh Circuit.

105. *See id.* at 1338.

106. *See id.* at 1338–39.

107. *See id.* at 1336–38.

108. *See id.* at 1336–39. The district court found that the real covenants in Louisiana and Mississippi did not run with the land, but that those in Alabama, Florida, and Georgia did. *See id.* at 1337–39.

109. *See id.* at 1336–37 & n.3 ("38 of the 51 Dollar General stores and 23 of the 32 Dollar Tree stores at issue are located in Florida. All 14 Big Lots stores at issue are located in Florida.").

sistent with the majoritarian common law approach, this article will focus only on the analysis under Florida law.

i. Arguments Before the Federal District Court

The district court noted that, under Florida common law:

> [T]he elements of a valid and enforceable covenant running with the land [arising from a landlord-tenant relationship] are: (1) the existence of a covenant that touches and involves the land; (2) an intention that the covenant run with the land; and (3) notice of the restriction on the part of the party against whom enforcement is sought.[110]

The district court found that the exclusive use covenants did touch and concern the land because "'each exclusive [was] intended to limit or prohibit the sale of certain items, namely groceries or food, by other tenants in the shopping center.'"[111] It found that the intention that the covenants run with the land was expressly set forth in the lease.[112] Finally, it found that the defendant retailers had at least implied actual notice of the exclusive use covenant in all but a handful of the shopping centers in Florida.[113] An appeal followed.

The defendants did not appeal the district court's holding that the exclusive use covenants were real covenants running with the land,[114] so the Eleventh Circuit had no opportunity to reconsider this fundamental issue.[115] Big Lots did argue on appeal that the district court erred in enforcing the exclusive use covenant against third-party retailers that were not parties to the agreement. But rather than making the common law argument that the exclusive use covenant was a personal covenant, Big Lots relied on § 542.335 of the Florida Statutes: "A court shall not enforce a restrictive covenant unless it is set forth in a writing signed by the person against whom enforcement is sought."[116] The Eleventh Cir-

110. *Id.* at 1337 (citing Winn-Dixie Stores, Inc. v. Dolgencorp, Inc., 964 So. 2d 261, 265 (Fla. Dist. Ct. App. 2007)).

111. *Id.* (quoting Order Granting in Part Plaintiff's Motion for Summary Judgment at 7, Winn-Dixie Stores, Inc., v. Dolgencorp, L.L.C., No. 11-80641 (S.D. Fla. Jan. 18, 2012) [hereinafter Order Granting Partial Summary Judgment]).

112. *See id.*

113. *See id.*

114. Winn-Dixie Stores, Inc. v. Dolgencorp, L.L.C., 746 F.3d 1008, 1016 (11th Cir. 2014). Although Big Lots did not appeal the district court's determination on the issue of whether the exclusive use covenant was a covenant running with the land, the district court still believed this to be the "critical issue." *See* discussion *infra* notes 125–56 and accompanying text.

115. Even if the Eleventh Circuit had the opportunity to consider the issue, it is likely that it would have deferred to the summary conclusion by the Florida state court in *Winn-Dixie Stores, Inc. v. Dolgencorp, Inc.*, 964 So. 2d 261, 265 (Fla. Dist. Ct. App. 2007), that the exclusive use covenant was a "real property covenant that ran with the land."

116. *See Dolgencorp*, 746 F.3d at 1038 (citing FLA. STAT. § 542.335(1)(a) (2011)).

cuit dismissed this claim:

> [T]his argument is foreclosed by *Winn-Dixie Stores, Inc. v. Dolgencorp, Inc.*, 964 So.2d 261 [(Fla. Dist. Ct. App. 2007)], in which a Florida intermediate appellate court held that, with respect to § 542.335(1)(a), "'a restrictive covenant' does not include real property covenants running with the land. Rather, the section is directed at personal service contracts not to compete."[117]

The Eleventh Circuit declined to certify the question to the Florida Supreme Court.[118]

Big Lots also argued on appeal that the district court erred in not requiring Winn-Dixie to join indispensable parties—the shopping center landlords—to the lawsuit.[119] The Eleventh Circuit applied Federal Rule of Civil Procedure 19 and concluded that the landlords were not necessary parties:

> [T]he landlords are not necessary parties under Rule 19(a)(1)(A) because the district court could provide "complete relief" among the litigants without joining the landlords. Winn-Dixie sought legal and equitable relief in the form of damages or an injunction against Big Lots. The district court could award all of the requested relief without haling the landlords into court because Big Lots was fully able to pay damages and comply with injunctions.[120]

Given that the covenant being enforced was originally a covenant between landlord and tenant, it seems odd to so casually dismiss the landlord as an indispensible party.

Finally, Big Lots argued that Winn-Dixie could not enforce the exclusive use covenant because it failed to make "'a reasonable [pre-suit] demand for compliance with the restriction after the breach ha[d] occurred.'"[121] The court distinguished the cases cited by Big Lots as concerning "materially different species of covenants" and noted that a pre-suit demand was not required for breaches of a real covenant running with the land.[122] Ultimately the court concluded that Big Lots' argument failed: "Big Lots was on notice of the restrictive covenants and was best positioned to know its own inventory. Even if the [cited] test . . . applied, Winn-Dixie need not have made demand."[123] This is also a chilling holding for commercial real estate landlords and tenants

117. *Id.* (quoting *Dolgencorp, Inc.*, 964 So. 2d at 268).

118. *Id.* at 1038–39.

119. *See id.* at 1039.

120. *Id.*

121. *Id.* at 1040 (quoting Majestic View Condo. Ass'n v. Bolotin, 429 So. 2d 438, 439 (Fla. Dist. Ct. App. 1983)).

122. *See id.* at 1040–42.

123. *Id.* at 1041.

who are accustomed to being notified of lease defaults and receiving a reasonable time to cure them.

ii. *Winn-Dixie v. Dolgencorp* (2007)

Given the district court's own assertion that the "critical inquiry" in this case was the nature of the covenant,[124] it is appropriate to examine the authority it relied upon—the 2007 Florida state court case, *Winn-Dixie Stores, Inc. v. Dolgencorp, Inc.*,[125] which the Eleventh Circuit also mentioned in its partial grant of summary judgment to Winn-Dixie on the issue of whether the exclusive use covenant was a covenant running with the land.[126]Although the 2007 case involved the same parties and the same provision, it concerned a single shopping center and was procedurally unrelated to the federal lawsuit.

In 1996, Winn-Dixie entered into a lease to operate a supermarket in the Crest Haven Shopping Plaza in Palm Beach County.[127] Although the exclusive use covenant contained in the lease was not recited verbatim in the appellate opinion, it was described in a manner consistent with the form exclusive use covenant.[128] The lease contained the standard Winn-Dixie language that each provision should be deemed a covenant running with the land.[129] A short-form lease was also recorded in 1996.[130]

In 1998, Dolgencorp signed a lease to operate a Dollar General store in the Crest Haven Shopping Plaza.[131] A few years thereafter, Winn-Dixie believed that Dollar General was selling more grocery items than permitted and demanded that the landlord enforce the exclusive use provision.[132] The landlord refused, and Winn-Dixie filed a complaint in Florida state court against both the landlord and Dolgencorp, asking for injunctive relief and damages for breach of contract.[133] "Dolgencorp moved for summary judgment, arguing that section 542.335, Florida

124. *See* Order Granting Partial Summary Judgment, *supra* note 111, at 5.

125. *See generally* Winn-Dixie Stores, Inc. v. Dolgencorp, Inc., 964 So. 2d 261, 262 (Fla. Dist. Ct. App. 2007) (holding that the covenant in Winn-Dixie's lease "was one running with the land that was enforceable against Dolgencorp").

126. Order Granting Partial Summary Judgment, *supra* note 111, at 5; *see also* Winn-Dixie Stores, Inc. v. Big Lots Stores, Inc., 886 F. Supp. 2d 1326, 1336–37 (S.D. Fla. 2012). For a related discussion, see *supra* note 117 and accompanying text.

127. *Dolgencorp, Inc.*, 964 So. 2d at 263.

128. *Id.* (noting that the lease "granted Winn-Dixie the exclusive right to sell groceries in Crest Haven, with the exception that other stores could sell groceries, provided that they devoted no more than 500 square feet to such items").

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

Statutes (1998) rendered the grocery exclusive unenforceable against it because Dolgencorp was not a signatory to Winn-Dixie's lease."[134] The trial court granted Dolgencorp's motion, finding that the personal covenant was not a real covenant, that Dolgencorp had no constructive notice of it, and that Florida statutory law rendered the exclusive use covenant unenforceable against Dolgencorp, a third party.[135] Winn-Dixie appealed.[136]

The Florida Fourth District Court of Appeal summarily reversed the trial court, declaring that the exclusive use covenant was a real covenant running with the land, not a personal covenant.[137] The court asserted that "Florida courts have long enforced use restrictions in commercial leases as covenants running with the land."[138] To support that proposition, the court cited an 1878 decision by the Florida Supreme Court entitled *Dunn v. Barton*.[139]

iii. *Dunn v. Barton* (1878)

In this unusual case, a house in Pensacola owned by Mary Barton (the "Barton House") was leased in 1874 to Charles Evans for a term of five years.[140] Evans assigned the lease to W. M. Abbott, who subsequently assigned it to John Dunn, the plaintiff.[141] Dunn operated a "public bar-room" in the house next door.[142] Dunn apparently took assignment of the lease of the Barton House in order to protect his neighboring business from competition.[143] He then leased the Barton House back to Mary Barton in January 1875 for the remainder of the term, and she covenanted to

> [N]ot authorize or permit the premises to be used in any way, or for any purpose that would conflict or come in competition with the business of the said John Dunn, as then carried on in the adjacent building, which was that of a public bar-room, where liquors and wines were retailed and where refreshments were furnished, and that she shall occupy the premises until the end of the lease.[144]

This covenant was both an exclusive use covenant and a covenant to not surrender occupancy of the Barton House. Following the lease from

134. *Id.*
135. *Id.*
136. *Id.* at 262.
137. *Id.*
138. *Id.* at 264.
139. *Id.* (citing Dunn v. Barton, 16 Fla. 765 (1878)).
140. *Barton*, 16 Fla. at 766.
141. *Id.*
142. *Id.*
143. *See id.*
144. *Id.* at 766.

Dunn to Barton, Barton effectively became her own subtenant. A year later, Barton sublet the house to Annie Hazelton, who opened a "restaurant and refreshment saloon."[145] Dunn sued Barton and Hazelton to enjoin the competing business and to prevent Barton from further subletting the premises.[146]

The Florida Supreme Court found that the covenant between Dunn, as landlord, and Barton, as tenant, was a real covenant running with the land, even though it had never been recorded,[147] because "it affect[ed] the mode of enjoyment of the premises."[148] The court held that even though Hazelton had no notice of the covenant, she was bound by it.[149]

It is difficult to reconcile the *Barton* decision to the law of servitudes or the recording acts, either as they existed in 1878 or as they are understood today. The idea that Hazelton, who appears to have paid consideration for her sublease with no actual or constructive notice of the covenant, would be bound by it is stunning. Even if it were persuasively decided, the applicability of *Barton* to the 2007 *Winn-Dixie* case is highly questionable.[150] *Barton* involved a landlord suing a tenant and subtenant to enforce a covenant between landlord and tenant.[151] *Winn-Dixie* involved a tenant suing another tenant to enforce a covenant between landlord and tenant. Certainly, the two cases are different enough that the brief statement of doctrine derived from the *Barton* case is insufficient to permit the Florida district court of appeal to summarily conclude that the Winn-Dixie exclusive use provision was a covenant running with the land, and, indeed, that *all* restrictive use provisions in commercial leases are real covenants.

Based solely on *Barton* and a 1999 case involving a recorded exclusive use covenant for a sports bar,[152] the Florida district court of appeal extracted the three-part test for establishing a "valid and enforceable covenant running with the land arising from a landlord-tenant relationship."[153]

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145. *Id.* at 768.

146. *Id.* at 767.

147. *Id.* at 769.

148. *Id*. at 771.

149. *Id.* at 772–73 ("The sub-lessee is in possession of the estate of his lessor, and he is bound by [lessor's] covenants which relate to the occupation of the premises.").

150. In *Barton*, the Florida Supreme Court did not even attempt to apply the common law test to determine if the unrecorded personal covenant was a covenant running with the land. *See supra* Part III.C.1.

151. *Id.* at 767.

152. *See* Park Ave. BBQ & Grille of Wellington, Inc. v. Coaches Corner, Inc., 746 So. 2d 480 (Fla. Dist. Ct. App. 1999).

153. *See supra* note 110 and accompanying text. This list of three elements set forth by the Florida court includes five of the six elements described *supra* Part II.B. The requirement of "the existence of a covenant that touches and involves the land" includes both the existence of an

iv. The Question of Notice

The third part of Florida's three-part test for establishing a valid and enforceable real covenant is "notice of the restriction on the part of the party against whom enforcement is sought."[154] In the 2007 *Winn-Dixie* case, the Florida state court concluded that Dolgencorp had at least "implied actual notice" of the Winn-Dixie exclusive use covenant:

> Dolgencorp was an experienced commercial tenant with 7,800 stores in 32 states, most of which are located in shopping plazas; it often sought exclusives in its own leases and secured one from Crest Haven. Dolgencorp understood that Winn-Dixie was the anchor tenant at Crest Haven. Dolgencorp was aware that anchor tenants like Winn-Dixie typically secure restrictive covenants in shopping center leases. Under these circumstances, Dolgencorp had the obligation to make further inquiry of the landlord or Winn-Dixie or to examine the shopping center's chain of title to see if Winn-Dixie had recorded its grocery exclusive. In sum, Dolgencorp had reason to know of the existence of Winn-Dixie's restrictive covenant.[155]

In this case, Winn-Dixie's short-form lease had been recorded.[156] But based on this language, combined with the facts of *Barton* and the court's reliance on it, it seems reasonable to conclude that even absent recording, the court still would have found the exclusive use covenant to be a real covenant and would have charged Dolgencorp with notice of it because it *should have known* that a grocery store would be protected by an exclusive use covenant. The burden implicitly placed on the third-party retailer is heavy, particularly given the strong and consistent common law doctrine in Florida that real covenants should be strictly construed to favor the free and unrestricted use of land. Unfortunately, the court never expressly integrated that doctrine into its analysis.[157]

2. The Meaning of the Key Terms

The second major issue considered by the district court was whether there was any ambiguity in the meaning of two key terms used

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enforceable covenant and the touch and concern requirement. *Compare* Winn-Dixie Stores, Inc. v. Dolgencorp, Inc., 964 So. 2d 261, 265 (Fla. Dist. Ct. App. 2007), *with supra* notes 55–56 and accompanying text. The requirement of "an intention that the covenant run with the land" matches the third element described *supra* Part II.B. *Compare Dolgencorp, Inc.*, 964 So. 2d at 265, *with supra* note 58 and accompanying text. The final requirement, notice, also matches. *Compare Dolgencorp, Inc.*, 964 So. 2d at 265, *with supra* notes 64–65 and accompanying text. The Florida test applies only to covenants arising from a landlord-tenant relationship and therefore requires horizontal privity as a precondition. The question of vertical privity is a little more complicated and is discussed *infra* Part IV.

154. *Dolgencorp, Inc.*, 964 So. 2d at 265.

155. *Id.* at 266.

156. *Id.* at 263.

157. *See supra* notes 74–76 and accompanying text.

in the exclusive use covenant—"staple or fancy groceries" and "sales area."[158] The relevant portion of Winn-Dixie's exclusive use covenant reads as follows:

> Landlord further covenants and agrees not to permit or suffer any property located within the shopping center be used for or occupied by any business dealing in or which shall keep in stock or sell for off-premises consumption any staple or fancy groceries, meats[,] fish, vegetables, fruits, bakery goods, dairy products or frozen foods without written permission of the tenant; except the sale of such items in not to exceed the lesser of 500 square feet of sales area or 10% of the square foot area of any storeroom within the shopping center, as an incidental only to the conduct of another business . . . shall not be deemed a violation hereof.[159]

The district court found the key terms to be ambiguous, construed them narrowly, and concluded that it did not have to give effect to a state decision, *Winn-Dixie Stores, Inc. v. 99 Cent Stuff-Trail Plaza*,[160] on the meaning of these terms.[161] The Eleventh Circuit reversed, finding that the district court was bound by the state court's holding in *99 Cent Stuff* and that the key terms were therefore not ambiguous.[162]

i. Arguments Before the Federal District Court

The district court noted that, at common law, real "covenants 'must be construed in favor of the free and unrestricted use of property, but . . . where the terms of a covenant are unambiguous, the courts will enforce such restrictions according to the intent of the parties, as expressed by the clear and ordinary meaning of the terms used.' "[163] The district court also noted that "'[l]anguage in a document is ambiguous when its provisions are fairly susceptible to more than one interpretation.' "[164]

Winn-Dixie asserted that the term "staple or fancy groceries" is clear and unambiguous and should include all goods listed in the Consumer Expenditure Study (CES) published annually by Progressive Grocer.[165] The CES definition includes many non-food items, such as paper products and household cleaning products.[166] The defendants argued

158. Winn-Dixie Stores, Inc. v. Big Lots Stores, Inc., 886 F. Supp. 2d 1326, 1339 (S.D. Fla. 2012).

159. *Id.* (emphasis added) (alteration in original).

160. Winn-Dixie Stores, Inc. v. 99 Cent Stuff-Trail Plaza, L.L.C., 811 So. 2d 719 (Fla. Dist. Ct. App. 2002).

161. *See Big Lots Stores, Inc.*, 886 F. Supp. 2d at 1340.

162. *See* Winn-Dixie Stores, Inc. v. Dolgencorp, L.L.C., 746 F.3d 1008, 1023 (11th Cir. 2014).

163. *Id.* at 1340 (quoting Sweeney v. Mack, 625 So. 2d 15, 17 (Fla. Dist. Ct. App. 1993)) (alteration in original).

164. *Id.* (quoting McInerney v. Klovstad, 935 So. 2d 529, 531 (Fla. Dist. Ct. App. 2006)).

165. *Id.* at 1339.

166. *Id.* at 1339–40.

that the "term is ambiguous and should be interpreted narrowly to include only food items, excluding beverages, snacks, and candy."[167]

The district court noted that there is no universal definition of "groceries," and, indeed, Winn-Dixie does not have an "official company position" on the definition of the term:[168]

> [I]t is evident that different grocery operators in the United States define the term "grocery" differently. In fact, Shawn Sloan, Winn-Dixie's Vice President of Retail Operations, testified that the definition of "staple or fancy groceries" will vary from consumer to consumer depending on what that particular individual purchases from a grocery store.[169]

The district court found that the term "fancy and staple groceries" was subject to more than one interpretation and therefore ambiguous.[170]

Winn-Dixie argued that the term "sales area" included "both the footprint of the display units on which Restricted Products were displayed, plus one half of the adjacent aisle space."[171] The defendants argued that it means "only the footprint of the display unit, with no aisle space included."[172] The district court concluded that the term was ambiguous and therefore construed it narrowly to exclude the aisle space.[173]

ii. The Eleventh Circuit and *99 Cent Stuff*

The Eleventh Circuit reviewed the district court's holding *de novo*, but noted that if either term was ambiguous, the district court's interpretation of it would be reviewed under the clearly erroneous standard.[174] The court's first consideration, therefore, was whether the terms were ambiguous.[175] "At first blush," the court found that both terms appeared to be subject to more than one interpretation.[176] However, it also noted that it could not assess ambiguity without accounting for previous holdings of the Florida appellate courts on the meaning of the same terms.[177] Indeed, Winn-Dixie had previously litigated the meaning of its form exclusive use covenant in a 2002 case against a retailer called 99 Cent

167. *Id.* at 1340.
168. *Id.* at 1339.
169. *Id.* (internal citation omitted).
170. *Id.* at 1340.
171. *Id.* at 1342.
172. *Id.*
173. *Id.*
174. Winn-Dixie Stores, Inc. v. Dolgencorp, L.L.C., 746 F.3d 1008, 1021 (11th Cir. 2014).
175. *Id.* at 1022.
176. *Id.* at 1023.
177. *Id.*

Stuff.[178]

99 Cent Stuff concerned Trail Plaza Shopping Center in Dade County, Florida.[179] The exclusive use lease covenant at issue was consistent with Winn-Dixie's form provision.[180] In 1999, the landlord leased 22,000 square feet in the shopping center to 99 Cent Stuff, a discount retailer.[181] The 99 Cent Stuff lease included a prohibited use covenant that mirrored Winn-Dixie's exclusive.[182] Whether Winn-Dixie's exclusive use covenant was also recorded in a short-form lease was not mentioned by the Florida district court of appeal.

Winn-Dixie complained to the landlord that 99 Cent Stuff was selling more grocery items than were permitted by the exclusive use covenant.[183] The landlord was unable to resolve the issue with 99 Cent Stuff to Winn-Dixie's satisfaction, so Winn-Dixie filed a complaint in Florida state court against both the landlord and 99 Cent Stuff.[184] The trial court granted a temporary injunction against 99 Cent Stuff, but denied Winn-Dixie any relief against the landlord.[185] Winn-Dixie appealed, claiming that the injunctive relief was insufficient.[186]

On appeal, the Third District Court of Appeal stated that the standard for considering the meaning of the exclusive use covenant was as follows:

> Parties are bound by the clear words of their agreements and a subsequent interpretation in conflict with the clear meaning cannot be given effect. Unless the document in question contains a glossary of terms requiring a different meaning, which is not the case here, to find the plain and ordinary meaning of words, one looks to the dictionary. Groceries are generally defined as 'articles of food and other goods sold by a grocer,' and a grocer is defined as 'a dealer in staple food stuffs . . . and many household supplies (as soap, matches, paper napkins).'[187]

The court makes no mention of an obligation to strictly construe the language of the covenant because, as the cited standard makes clear, it

178. *See generally* Winn-Dixie Stores, Inc. v. 99 Cent Stuff-Trail Plaza, L.L.C., 811 So. 2d 719 (Fla. Dist. Ct. App. 2002).

179. *Id.* at 720.

180. *See id.*; *cf. supra* note 84.

181. *99 Cent Stuff*, 811 So. 2d at 720.

182. *Id.* at 720–21. A "prohibited use covenant" restricts a tenant from selling particular goods or services. When an "exclusive use covenant" is included in the leases of tenants other than the benefitted tenant, it is written as a prohibited use covenant.

183. *Id.* at 721.

184. *Id.*

185. *Id.*

186. *Id.* at 720.

187. *Id.* at 722 (alteration in original) (internal citations omitted) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1001 (1986)).

was interpreting a personal covenant—not a real covenant. In fact, it was interpreting two separate personal covenants: the exclusive use covenant between Winn-Dixie and the landlord, and the prohibited use covenant between the landlord and 99 Cent Stuff.[188] Winn-Dixie did not argue that either covenant was a real covenant.

Based on the standard noted above, the court held in *99 Cent Stuff* that the term "fancy and staple groceries" had a clear meaning because "[t]he commonly recognized definition of the term groceries includes more than just food."[189] However, in the very next sentence, the court acknowledged that "it may not be easy to pinpoint each item to be considered groceries."[190] The court also held that the term "sales area" had the clear meaning endorsed by Winn-Dixie:

> Limiting the amount of sales area to just the "footprint" of the actual fixtures is not a reasonable construction of the clause at issue. Shoppers do not arrive by chopper, sending ropes down to hoist up their purchases. Shoppers make their choices while standing in aisles and the 500 square feet provided for in the leases at issue obviously contemplated customers viewing and purchasing products from such aisles.[191]

In the federal case, the district court noted the *99 Cent Stuff* decision but concluded that it was not bound by the holding because "this action involves over 100 leases in five different states dating back to 1957, while *99 Cent* involved one lease executed in 1986 . . . [and] the offerings of grocery stores and supermarkets has evolved during this same period . . . ."[192]

The Eleventh Circuit reversed the district court on this point, stating that it was *Erie*-bound to respect the Florida court's decision in *99*

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188. *Id.* at 720–21.

189. *Id.* at 722. A full discussion of the Florida court's finding that "groceries" has a clear meaning is beyond the scope of this article, but among commercial leasing attorneys, this perfunctory conclusion is very problematic. *See, e.g.*, Ira Meislik, *Can a Bag of Dog Food Be a Pet? Can a Bar of Soap Be a Grocery? Another Unnecessary Fight Over Exclusive Use Rights*, RUMINATIONS RETAIL REAL EST. L. BLOG (Apr. 6, 2014), http://www.retailrealestatelaw.com/archives/2352 ("[The court] could have chosen these [definitions] found by *Ruminations* in other dictionaries: (a) 'Groceries are foods you buy at a grocer's or at a supermarket' (Collins, dictionaries since 1819; also, Cambridge University Press); or (b) 'Groceries are foods you buy at a grocer's or at a supermarket such as flour, sugar, and tinned foods' (Reverso); or (c) '[t]he definition of a grocery is a store where food is bought, or the items for sale there' (Your Dictionary); or (d) 'groceries : food sold by a grocer : food bought at a store' (Merriam-Webster). We could go on.") (emphasis omitted).

190. *99 Cent Stuff*, 811 So. 2d at 722.

191. *Id.*

192. Winn-Dixie Stores, Inc. v. Big Lots Stores, Inc., 886 F. Supp. 2d 1326, 1340–41 (S.D. Fla. 2012).

Cent Stuff.[193] The Eleventh Circuit correctly acknowledged that "'[w]hether a decision is binding on another [court] is dependent upon there being similar facts and legal issues. . . . [W]here [the policies and] underlying facts are different, then a previous decision should not be binding.'"[194] Although the Eleventh Circuit perhaps correctly concluded that the district court's reasons for dismissing the factual similarity between *99 Cent Stuff* and the federal case were invalid, neither the district court nor the Eleventh Circuit recognized the vital and dispositive difference in the facts—*99 Cent Stuff* dealt with personal covenants while the federal case (according to the court) addressed a real covenant. The standards of interpretation for personal covenants and real covenants are different, and Florida common law requires courts to construe real covenants more strictly than personal covenants and to resolve ambiguities in favor of the free and unrestricted use of land.[195] The Eleventh Circuit characterized the standard used by *99 Cent Stuff* as an "alternate Florida rule of contract construction [where 'o]ne looks to the dictionary for the plain and ordinary meaning of words.'"[196] It failed to recognize that the "alternate rule" had not been previously applied to real covenants, nor did it attempt to rationalize doing so. This is particularly concerning given the Eleventh Circuit's dismissal of Big Lots' argument that it should have been given notice of the alleged breach and an opportunity to cure.

It also did not acknowledge that the *99 Cent Stuff* court made no reference to a strict construction standard. There are valid reasons for having a more forgiving standard of interpretation for personal covenants than real covenants. Personal covenants are enforceable against the original parties—those who had an opportunity to negotiate the specific language and agree upon a meaning. Real covenants are enforceable against third parties who had no role in negotiating the specific language and who may, therefore, be at a significant disadvantage in terms of correctly interpreting it. In a case where the sophistication of the third-party retailers was continuously emphasized, it seems odd that the Eleventh Circuit opted for a dictionary definition of the key terms rather than customary usage in the industry. Whether or not *99 Cent Stuff* was decided correctly, it should not have been binding on the federal case without a more thorough explanation by the Eleventh Circuit.

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193. *See* Winn-Dixie Stores, Inc. v. Dolgencorp, L.L.C., 746 F.3d 1008, 1023–24 (11th Cir. 2014).

194. *Id.* at 1024 (second alteration in original) (quoting U.S. Fire Ins. Co. v. J.S.U.B., Inc., 979 So. 2d 871, 882–83 (Fla. 2007)).

195. *See supra* notes 38, 74–76.

196. *Dolgencorp*, 746 F.3d at 1024 (quoting Beans v. Chohonis, 740 So. 2d 65, 67 (Fla. Dist. Ct. App. 1999)).

3. Remedies for Breach

The third and final issue that the Eleventh Circuit dealt with in *Winn-Dixie* was remedies. Winn-Dixie sought to enjoin the defendant retailers from selling goods in excess of the permitted threshold in the exclusive use covenant.[197] It also sought $90 million to compensate it for profits that it alleged to have lost because of the defendant retailers violation of the exclusive use provision.[198] Under Florida common law, a plaintiff may recover lost profits if it "provide[s] competent evidence sufficient to satisfy the mind of a prudent, impartial person as to the amount of profits lost as a result . . . ."[199] Determinations of "lost profits cannot be based on mere speculation or conjecture."[200] Plaintiff has the burden to prove not only the amount of damages, but also the causal link with defendants' actions.[201]

Winn-Dixie supported its damage claim through the testimony of economist Dr. Patricia Pacey, who developed an economic model based on the performance of Winn-Dixie stores and competitor stores:

> After equalizing other factors, Dr. Pacey claimed that the presence of a Big Lots, Dollar General, or Dollar Tree store within two-tenths of a mile of a Winn-Dixie was correlated with a reduction in non-meat grocery sales of 7.7%, 6.7%, and 5.0%, respectively. Dr. Pacey used these suppression numbers to calculate the monetary damages allegedly sustained by each Winn-Dixie store.[202]

The district court found that Dr. Pacey's report "would not assist a trier of fact" and that its conclusions were not sufficiently reliable.[203] In fact, the report concluded that Winn-Dixie had suffered damages "that exceeded the co-located Dollar General stores total sales."[204] One of the court's chief criticisms was that "Dr. Pacey's economic model and regression analysis . . . failed to take into account that most of Defendants' stores are permitted to sell a certain amount of Restricted Products and that there was not sufficient empirical evidence to show that Defendants were actually causing Winn-Dixie's damages."[205]

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197. *Big Lots Stores*, 886 F. Supp. 2d at 1335.

198. *Dolgencorp*, 746 F.3d at 1015.

199. N. Dade Cmty. Dev. Corp. v. Dinner's Place, Inc., 827 So. 2d 352, 353 (Fla. Dist. Ct. App. 2002).

200. *Id.*

201. *See Big Lots Stores*, 886 F. Supp. 2d at 1345 ("'Essential to recovery, is initial proof of the fact that damage occurred from the defendant's act . . . .'") (quoting Asgrow-Kilgore Co. v. Mulford Hickerson Corp., 301 So. 2d 441, 445 (Fla. 1974)).

202. *Dolgencorp*, 746 F.3d at 1018.

203. *Big Lots Stores*, 886 F. Supp. 2d at 1345.

204. *Id.*

205. *Id.*; *see also Dolgencorp*, 746 F.3d at 1018 ("The district court also took issue with the methods underlying her regression analysis, which calculated damages from 2005 to 2008 based

Following the district court's disqualification of Dr. Pacey's report, Winn-Dixie submitted additional affidavits and testimony to support its claim for lost profits.[206] One expert "testified that violations of grocery exclusives result[ed] in lost sales to Winn-Dixie because '[i]f a loaf of bread is bought in a Dollar General store, that loaf of bread will not be bought at a Winn-Dixie store.'"[207] The district court found the testimony "unconvincing" because it was too vague and speculative, failed to distinguish between permitted and restricted sales, and did not prove proximate cause.[208] Winn-Dixie did not appeal the district court's refusal to award damages for lost profits.[209]

Winn-Dixie appealed the district court's refusal to grant punitive damages, but the Eleventh Circuit affirmed the lower court:

> The district court did not abuse its discretion in determining that Winn-Dixie failed to prove, by clear and convincing evidence, that the Defendants committed the requisite intentional misconduct or gross negligence. The proper construction of the grocery exclusives presents a difficult question of Florida law upon which reasonable observers surely can differ. Winn-Dixie provided no evidence indicating actual intent, nor that Defendants acted in a grossly negligent manner. Instead, the evidence presented indicated that Defendants conducted themselves in accordance with a reasonable interpretation of the grocery exclusives. The district court did not err in denying punitive damages when it found Winn-Dixie failed to meet its burden under Florida law.[210]

IV. AFTER *WINN-DIXIE*

The Eleventh Circuit's decision summarily dealt with, or ignored completely, some important legal issues relating to exclusive use covenants. Given the widespread use of exclusive use covenants in retail leases and the thriving retail real estate industry in Florida, those issues are likely to be considered by state and federal courts in Florida in the near future. It is also likely that the Eleventh Circuit's decision will be

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on recession-period sales data drawn from 2009 and 2010, measured Winn-Dixie foot traffic by assuming that consumers purchase their groceries and meat at the same store, imposed an arbitrary three-mile outer radius to measure competition, alleged damages for items that the Defendants do not sell, and had not been peer-reviewed.").

206. *See Big Lots Stores*, 886 F. Supp. 2d at 1346 (discussing the expert testimony presented).

207. *Id.* (quoting Trial Transcript at 152–53, Winn-Dixie Stores, Inc. v. Big Lots Stores, Inc., 886 F. Supp. 2d 1326 (S.D. Fla. 2012)).

208. *Id.* at 1347.

209. *See Dolgencorp*, 746 F.3d at 1021 (discussing Winn-Dixie's argument that "the district court erred [in] awarding little or no injunctive relief").

210. *Id.* at 1035.

influential beyond Florida, given the similarity between the common law of real covenants in Florida and other states.

A. *The Transformation of Personal Covenants into Real Covenants*

The district court and the Eleventh Circuit did not adequately address how a personal covenant is transformed into a real covenant. The district court held that the exclusive use personal covenant was transformed into a real covenant, binding on third-party retailers because: (i) the lease contained a statement that "[e]ach provision hereof shall be deemed both a covenant and a condition and shall run with the land";[211] and (ii) defendants had constructive notice of the exclusive use covenant because it was recorded in the Short Form Lease.[212] Neither court critically examined the language of the Winn-Dixie exclusive use covenant or considered the impact of its holding.

Neither court addressed whether it would take the Winn-Dixie lease language literally, treating every personal covenant in the lease as a real covenant. A lease includes dozens of personal covenants between landlord and tenant. For example, in a typical shopping center lease, the landlord covenants to pay property taxes, to maintain liability and property insurance on the shopping center, and to repair and maintain the parking lot and structure of the buildings. The landlord then passes these expenses through to its tenants, typically requiring each to pay their pro-rata share. Anchor leases often have provisions that state that if the landlord fails to fulfill its covenants, the anchor tenant may "self-help" and then charge the landlord or, if the landlord fails to pay, to off-set rent. If those provisions are real covenants, may the anchor tenant cure the landlord's default and then directly charge the other tenants in the shopping center a pro-rata share of the costs? Such an interpretation would not be unthinkable given the language of the district court and Eleventh Circuit decisions, but it would significantly upset expectations in the retail real estate industry.[213] The more significant problem on this point was the reliance by the district court and the Eleventh Circuit on the 2007

211. *Big Lots Stores*, 886 F. Supp. 2d at 1337.

212. *Id.* at 1338.

213. In a typical multi-tenant commercial real estate asset, each of the occupants has a direct contractual relationship with the owner (through a lease) and no direct contractual relationship with one another. If one occupant has an issue with another occupant, the standard practice is to rely upon lease language to require the landlord to resolve the issue. For example, if Tenant A is playing loud music and disturbing Tenant B, rather than pursue a nuisance claim, Tenant B appeals to the landlord and requests that the landlord enforce anti-noise rules in Tenant A's lease. The logical extension of the *Winn-Dixie* decision is that all personal covenants in Winn-Dixie's lease (and similar leases) are transformed into real covenants, which are enforceable against other tenants because the other tenants are on implied actual notice of the covenants. Therefore, Tenant B could reasonably assume that Tenant A has an anti-noise covenant in its lease and, rather than

Dolgencorp case and, derivatively, the 1878 *Barton* case without explanation or disclaimer because that legitimizes dangerous precedent.

B. *Restrictions on Landlord vs. Restrictions on Land*

Beyond their discussion of the meaning of the "key terms," the district and circuit courts did not parse the language of the Winn-Dixie exclusive use covenant. A careful deconstruction of the covenant highlights some issues overlooked by the courts. Because Winn-Dixie utilizes a form lease and short-form lease, and purports to copy the exclusive use covenant verbatim from the lease to the short-form lease, the following excerpt from a 1990 Winn-Dixie short-form lease recorded in Miami should be representative of the Winn-Dixie exclusive use covenant. In a single, unnumbered paragraph, the short-form lease includes four separate covenants:

> [1] Landlord covenants and agrees that the Tenant shall have the exclusive right to operate a supermarket in the shopping center and any enlargement thereof.
> [2] Landlord further covenants and agrees that it will not directly or indirectly lease or rent any property located within the shopping center, or within 1,000 feet of any exterior boundary thereof, for occupancy as a supermarket, grocery store, meat, fish, or vegetable market,
> [3] nor will the Landlord permit any tenant or occupant of any such property to sublet in any manner, directly or indirectly, any part thereof to any person, firm or corporation engaged in any such business without written permission of the Tenant; and
> [4] Landlord further covenants and agrees not to permit or suffer any property located within the shopping center to be used for or occupied by any business dealing in or which shall keep in stock or sell for off-premises consumption any staple or fancy groceries, meats, fish, vegetables, fruits, bakery goods, dairy products, or frozen foods without written permission of the Tenant; except the sale of such items in areas not to exceed the lesser of 500 square feet of sales area or 10% of the square foot area of any storeroom within the shopping center, as an incidental only to the conduct of another business . . . ."[214]

In the first provision, the landlord covenanted that Winn-Dixie would have the exclusive right to operate a supermarket in the shopping center. In the second provision, the landlord covenanted that it would not lease or rent any property in the shopping center for use as a super-

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going through the landlord, can directly sue Tenant A. This dramatic expansion of relationships between occupants would significantly increase the uncertain risk of litigation.

214. Short Form Lease by and Between Homestead Plaza Joint Venture, as Landlord, and Winn-Dixie Stores, Inc., as Tenant, *supra* note 88, at 2.

market, grocery store, meat, fish, or vegetable market. In the third provision, the landlord covenanted that it would not permit any tenant or occupant to engage in "any such business" as a supermarket, grocery store, meat, fish, or vegetable market. In the fourth provision, the landlord covenanted that it would not "permit or suffer" any portion of the shopping center to be used by any business "dealing in or which shall keep in stock or sell for off-premises consumption" certain types of food without Winn-Dixie's prior written consent. This last provision was at issue in the federal litigation.[215]

In each of the Winn-Dixie covenants, the landlord agreed that it *personally* would not engage in certain acts—leasing, suffering, permitting. None of the covenants expressly limit the use of the real estate itself. Contrast the wording of the Winn-Dixie exclusive use covenant with the Chick-Fil-A restrictive covenant at issue in *Chick-Fil-A, Inc. v. CFT Development, L.L.C.*:

> 3.02 Use Restriction Benefitting Outlot # 2
>
> (a) Outlot # 1 and Outlot # 3 are prohibited from having any of the following constructed, existing, leased or operated thereon:
>
> (i) a quick-service restaurant deriving twenty-five percent (25%) or more of its gross sales from the sale of chicken; or,
>
> (ii) any of the following specified establishments: Wendy's, Arby's, Boston Market, Kenny Roger's, Kentucky Fried Chicken, Popeye's, Church's, Bojangle's, Mrs. Winner's, Tanner's, Chicken Out, Willie May's Chicken, Biscuitville, Zaxby's or Ranch One.
>
> (b) The restrictions in Article 3.02 may be enforced or waived only by the fee simple owner of Outlot # 2. The restrictions in this Article 3.02 shall run with the land, burdening Outlot # 1 and Outlot # 3 and benefitting Outlot # 2, and the successors, heirs and assigns thereof.[216]

Note that the Chick-Fil-A exclusive use covenant expressly prohibits the land (Outlot #1 and Outlot #3) from being used for particular uses, while the Winn-Dixie exclusive expressly prohibits the landlord from certain actions.

Part of the reason for this difference may be that the Winn-Dixie exclusive is contained in a memorandum of lease, while the Chick-Fil-A exclusive is contained in a deed restriction.[217] However, other memorandums of lease recorded in Florida contain exclusive use covenants that expressly burden the real estate rather than landlord's behavior. For

215. *See Big Lots Stores*, 886 F. Supp. 2d at 1336.

216. Chick-Fil-A, Inc. v. CFT Dev., L.L.C., 652 F. Supp. 2d 1252, 1256 (M.D. Fla. 2009), *aff'd*, 370 F. App'x 55 (11th Cir. 2010).

217. *Id.* at 1255.

example, a 2014 memorandum of lease for a Walgreens contains the following:

> Landlord covenants and agrees that, during the Term and any extensions or renewals thereof, no additional property which Landlord, directly or indirectly, may now or hereafter own, lease or control, and which is contiguous to, or which is within five hundred (500) feet of any boundary of the Leased Premises (the "Landlord's Property"), will be used for any one or combination of the following [exclusive uses].[218]

The memorandum of lease then states that if "Tenant files suit against any party to enforce the foregoing restrictions," Landlord shall cooperate with and reimburse Tenant for its attorneys' fees.[219] This wording strongly suggests that Walgreens intended that the exclusive use covenant run with the land, and also that Walgreens intended to enforce the covenant directly against the retailers who violated it. The Walgreens memorandum of lease subsequently includes the landlord's covenant to "not permit or suffer" any occupant of Landlord's Property from using any portion of the real estate for particular prohibited uses, such as an adult book store or flea market.[220] The formulation of the two covenants suggests that Walgreens intended them to be interpreted and enforced differently.

The Winn-Dixie exclusive use covenant, in contrast, is worded not as a restriction on the *land* (e.g., "the shopping center shall not be used for the sale of grocery items"), but as a restriction on *landlord's behavior*. It did not expressly address whether it would be enforced against the landlord, third-party retailers, or both.

The district court and the Eleventh Circuit failed to address the specific landlord-centric wording of the Winn-Dixie covenant and summarily concluded that the Winn-Dixie personal covenant had been magically transformed into a real covenant. It may be reasonable to conclude that the real covenant would bind a purchaser of the shopping center, the successor to the entire property interest of the landlord, and the assignee of the landlord's obligations under the leases. But both courts went beyond that and summarily concluded that because the real covenant ran with the land, it was enforceable against third parties (the defendants here) by virtue of their leasehold estate from landlord.

As explained in Part II.B, the benefits and burdens of a servitude

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218. Memorandum of Lease by and Between 3Broamigo Development One, L.L.C., as Landlord, and Walgreen Co., as Tenant at 2 (dated Mar. 14, 2014) (recorded Apr. 22, 2014), *available at* https://www2.miami-dadeclerk.com/officialrecords/Search.aspx (accessed by searching Book 29118, Page 4348, Official Records).

219. *Id.*

220. *Id.* at 2–3.

pass with the transfer of the estate, or a lesser derivative estate, that the original parties held in the land.[221] "The most obvious implication of this principle is that the burden of a real covenant may be enforced against remote parties only when they have succeeded to the covenantor's estate in land."[222] Neither the district court nor the Eleventh Circuit explained, or cited any other decision that explained, how the defendants could be fairly expected to understand that, by virtue of their respective leases with the landlord, they were charged with personal covenants that expressly restricted a landlord's behavior. All of the Florida state and federal courts that have considered the Winn-Dixie exclusive use covenant emphasized the sophistication of the other retailers. But no courts have acknowledged that the same sophistication could undercut the retailers' expectation that the Winn-Dixie exclusive could be enforced against them, particularly given the widespread use of covenants with far more precise wording, such as the Chick-Fil-A and Walgreens examples set forth above.

C. *Interpreting Real Covenants vs. Interpreting Personal Covenants*

As discussed in Part III.C.2, the Eleventh Circuit in *Winn-Dixie* held that it was bound to honor the Florida state court decision in *99 Cent Stuff*.[223] However, neither the federal district court nor the Eleventh Circuit acknowledged the difference in the standards for interpreting a personal covenant and a real covenant. By perpetuating the application of the incorrect standard (a standard which ignored the obligation to construe ambiguity in favor of the unrestricted use of land), in this potentially influential case, the Eleventh Circuit has made it more difficult for landlords and retailers to accurately anticipate how exclusive use covenants will be interpreted, at least in Florida. That uncertainty creates no social or economic benefits.

D. *Remedies for the Breach of an Exclusive Use Covenant*

The Winn-Dixie leases apparently did not specify any particular remedies following the breach of the exclusive use covenant—they permitted all remedies at law and equity. In addition, the Eleventh Circuit found that the landlords were not indispensable parties to the litigation.[224] As a result of these two facts, the Eleventh Circuit did not consider how to allocate potential liability between a landlord and a third-party retailer. The equitable relief question is fairly straightforward—

221. STOEBUCK & WHITMAN, *supra* note 42, at 482.
222. *Id.*
223. *See supra* notes 160–62 and accompanying text.
224. Winn-Dixie Stores, Inc. v. Dolgencorp, L.L.C., 746 F.3d 1008, 1016 (11th Cir. 2014).

neither party is disadvantaged by an injunction issued against both because an injunction cannot be divided. Only the defendant retailer's actions will be constrained by an injunction. But the question of the calculation of damages is more difficult. The district court dismissed the elaborate, if misguided, economic model submitted by Winn-Dixie's economist, as well as Winn-Dixie's claim for punitive damages,[225] but significant questions remain about the correct calculation of damages following the breach of an exclusive use covenant. For example, if money damages are an appropriate remedy, how should they be calculated? Who is liable to pay them? Are the landlord and the defendant retailer jointly and severally liable? If so, the risk assumed by landlord and defendant retailer will vary from shopping center to shopping center, depending on the relative size and net worth of the parties involved. Such variables should be immaterial to a determination of the damages suffered by the beneficiary of an exclusive use covenant, or the remedies available to it.

Many anchor leases are different from Winn-Dixie in that they specify the available remedies if their exclusive use covenant is breached. The following example is based on the exclusive use covenants found in the leases of several large, national retailers:

> During the Term of this Lease, no other premises in the Shopping Center may be occupied, except to the extent otherwise permitted under any lease for space in the Shopping Center existing as of the Effective Date, for (a) the operation of a store that sells [list of goods] as its primary use (the "Primary Use Exclusive") or (b) the operation of a store that sells or displays for sale any [list of goods] (the "Exclusive Items"). With respect to all leases for space in the Shopping Center after the date of this Lease, Landlord covenants to include a provision forbidding the tenant from violating the Primary Use Exclusive or selling any of the Exclusive Items. For purposes of the Primary Use Exclusive, "primary use" shall mean the lesser of (10%) of an occupant's total Floor Area or 1,000 square feet of Floor Area.
>
> (a) Upon breach of Tenant's exclusive by Landlord, the Base Rent payable hereunder shall be reduced by fifty percent (50%) for so long as such violation shall continue. Such breach shall not include a situation in which the lease between Landlord and any tenant in the Shopping Center prohibits the tenant therein from violating the exclusive rights granted to Tenant and despite such prohibition, such tenant violates such exclusive rights, unless Landlord fails to comply with any of the provisions of subsection (b) below.

225. Winn-Dixie Stores, Inc. v. Big Lots Stores, Inc., 886 F. Supp. 2d 1326, 1345 (S.D. Fla. 2012).

> (b) If any person or entity other than Landlord shall use any portion of the Shopping Center in violation of the exclusive provisions herein set forth, Landlord shall promptly commence appropriate legal proceedings, and vigorously prosecute the same, to enjoin and prohibit any such violation. If Landlord fails to promptly commence such proceedings, or shall fail thereafter to vigorously prosecute the same, then the remedies set forth in subsection (a) above shall become applicable to such breach, and, in addition to such remedies, Tenant shall have the right (i) to conduct and prosecute such legal proceedings, including, without limitation, an action for injunctive relief, in its own name, at Landlord's expense, or (ii) in the event the right set forth in subclause (i) above is not permitted to be exercised under applicable law, to conduct and prosecute such legal proceedings in the name of Landlord, at Landlord's expense, and Landlord shall cooperate with Tenant with respect to such prosecution, including, without limitation, by executing any documentation or authorization reasonably required by Tenant in connection with such prosecution and by appearing at any hearing or trial with respect to such prosecution.

This exclusive use covenant is significantly clearer than the Winn-Dixie provision. It establishes a restriction on the use of the land and also restricts a landlord's behavior. It specifies remedies if a landlord breaches its lease covenant, and it also specifies remedies if a third-party retailer breaches the covenant running with the land. Note that different remedies are specified for each party—a rent abatement is an appropriate liquidated damages award against a landlord, but meaningless against third-party retailers. The provision clearly allocates responsibility for bringing an action for equitable relief, as well as a landlord's obligation to fund it.

V. No Progress Cleaning Up the Mess

Personal covenants and real covenants are powerful tools in commercial real estate, but they are different tools that serve different purposes. The lines between them are important and should not be blurred. Personal covenants may be freely created and enforced, as long as they do not violate public policy. The common law provides stricter requirements on the creation and enforcement of real covenants. These encumbrances on the free and unrestricted use of real property are permitted to exist despite the strong disfavor of them in the common law. Exclusive use covenants similarly exist despite doctrines in the common law that strongly disfavor restraints on trade. Exclusive use covenants, whether personal covenants or real covenants, are valuable to retail tenants and landlords. Both should continue to be enforced. But the line of Florida cases that culminated in the Eleventh Circuit decision in *Winn-Dixie*

Stores, Inc. v. Dolgencorp, L.L.C. raises significantly more questions regarding exclusive use covenants than it answers. Must personal covenants be recorded in order to transform them into real covenants? What does "implied actual notice" mean and is it fair? Does it matter whether the express language of the covenant restricts the behavior of the landlord or the land? What are the appropriate remedies for the breach of an exclusive use covenant? As Professor Susan French explained, "The concept of interests running with the land is elegantly simple, but the law governing servitude devices is a mess."[226] Unfortunately, in *Winn-Dixie Stores, Inc. v. Dolgencorp, L.L.C.*, the Eleventh Circuit made no progress toward cleaning up that mess and may have instead contributed to it.

226. French, *supra* note 17, at 928.