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The Puzzling Persistence of Horizontal Privity

By Michael Lewyn

Traditionally, the burden of a restrictive covenant runs with the land (that is, it can burden assignees of the original parties to the covenant at law, such that monetary damages can be recovered) only if the original parties to the covenant were in horizontal privity—that is, when the parties had some interest in the same land, such as landlord-tenant or grantor-grantee. See John G. Sprankling, *Understanding Property Law* § 33.04, at 564–65 (3d ed. 2012). Today most scholars oppose the horizontal privity requirement. See Jesse Dukeminier et al., *Property* 851 (7th ed. 2010). In 2000 the American Law Institute proposed elimination of that requirement. Restatement (Third) of Property, Servitudes § 2.4 (2000). Despite the apparent scholarly consensus, the post-2000 case law generally has reinforced the status quo.

This article describes the post-2000 case law and seeks to explain why courts have refused to overturn the horizontal privity requirement. The “Background” section of this article briefly describes the evolution of covenant law, the next section discusses post-Restatement case law, and the final section suggests reasons why the law has not changed.

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Background

At common law, landowners could enforce two types of easements against persons not party to the original easement: affirmative easements (to allow a landowner to travel through another's land) and negative easements (contracts giving a landowner the right to prevent incompatible uses on other land). See Andrew Russell, *The Tenth Anniversary of the Restatement (Third) of Property, Servitudes: A Progress Report*, 42 U. Tol. L. Rev. 753, 756 (2011). Common-law British courts limited negative easements to only a few types of situations (such as interference with a neighbor's air rights and windows) partially because England lacked a system for recording property until 1925, which meant that purchasers of land might be bound by a negative easement that they could not possibly discover. See Dukeminier et al., at 843. Because of the common-law courts' refusal to expand negative easements, contract rights and duties generally could not be delegated to successors of the original parties to the contract. See Sprankling, § 33.01, at 556.

Because American recording laws ensured that purchasers were bound by their predecessors' transactions only if they had notice of those transactions, American courts were more willing to allow landowners to use recorded contracts to limit the rights of their successors in interest. But instead of expanding the concept of negative easements, American courts used contract doctrine to allow such bargains by creating the concept of "real covenants."

In 19th-century England, the burden of contract rights could run with the land (that is, be enforceable against the successors of the original parties to the contract) only when the contract was between a landlord and a tenant. See Dukeminier et al., at 849. American courts expanded this concept by allowing contracts (which they described as "real covenants") to run with the land when the original covenant was between a buyer and a seller. American courts reasoned that just as a landlord transferred an

estate to a tenant, a seller transferred an estate to a buyer. Id. at 850. Thus, a grantor-grantee relationship, like the landlord-tenant relationship, created something that the courts called "horizontal privity"—so if the latter type of agreement ran with the land, the former should run as well. Id. The logic behind this expansion is liberty of contract: if A and B agree to restrict each other's use of land in perpetuity, the law should respect each owner's

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autonomy to make that contract. See Sprankling, § 33.03, at 558–59.

In recent decades, most scholars have favored expanding real covenants still further by allowing the burden of real covenants to run with the land even in the absence of horizontal privity. Most scholars oppose the horizontal privity requirement for two reasons: first, most commentators view restrictive covenants as socially beneficial because allowing covenants to run with the land increases liberty of contract for the original parties to the covenant; and, second, the privity requirement is easily evaded through "straw" transactions. For example, if two neighbors wish to create a restrictive covenant that will run with the land, the first neighbor will convey the land to the second, and the second will reconvey the land back to the first with a deed including the covenant. Because the second deed places the two neighbors in a grantor-grantee relationship, it places the two landowners in horizontal privity. See Sprankling, § 33.07, at 572.

For many years, courts ignored the weight of scholarly commentary on horizontal privity. In 2000, the American Law Institute, a highly influential

group of academics, judges, and attorneys, sought to change this status quo by issuing the Restatement (Third) of Property. The Restatement rejected the privity requirement, reasoning that the rule "serves no necessary purpose and simply acts as a trap for the poorly represented." See Restatement (Third) of Property: Servitudes § 2.4, cmt. b (2000).

Case Law

The Restatement is generally highly influential. But post-2000 cases have generally refused to apply the Restatement's rejection of horizontal privity. Reported cases in six states (North Carolina, Washington, Ohio, Virginia, Oklahoma, and Connecticut) endorsed the horizontal privity requirement for the enforcement of restrictive covenants. No post-2000 cases adopted the Restatement's view to the contrary. The majority of these cases found that horizontal privity existed and declined to even mention the Restatement, but two post-2000 cases refused to enforce the burden of covenants at law based on the absence of horizontal privity. One state discussed (but did not adopt) the Restatement.

Cases Finding Horizontal Privity

Cases Ignoring the Restatement.

In *Beeren & Barry Investments, LLC v. Equity Trustees, LLC*, No. 05-59, 2007 WL 6013583 (Va. Cir. Ct. June 25, 2007), rev'd on other grounds sub nom. *Beeren & Barry Investments, LLC v. AHC, Inc.*, 671 S.E.2d 147 (Va. 2009), a Virginia court found that an option to purchase was a covenant that ran with the land. The owner of the land sold the subject property and in return received a promissory note that included the option. Id. at *1. The buyer defaulted on a mortgage, and the plaintiff then purchased the land at a foreclosure sale and claimed that the option did not survive the sale. Id. at *1–2.

The court held that the option in fact ran with the land and in particular held that horizontal privity existed. The court noted that, as a rule, horizontal privity existed when a "covenant was made 'in connection

with the conveyance of an estate in land from one of the parties to the other.” Id. at *2. This requirement was met in *Beeren* because the original buyer and seller created the option to purchase on the same date and in association with the sale; thus, the option was part of the same transaction as the sale, creating horizontal privity. Id.

On appeal, the state supreme court agreed that horizontal privity was required for the option to run with the land but did not address whether privity in fact existed. 671 S.E. 2d at 150. Instead, the court reversed on the ground that the parties did not intend for the option to run with the land. Id. at 150–51.

In *Dingle v. Dick*, No. 01AP-142, 2001 WL 1631247 (Ohio Ct. App. Dec. 20, 2001), an Ohio court upheld the horizontal privity requirement. The *Dingle* covenant, between a buyer and a seller of land, provided that the buyer would pay part of the maintenance costs for a private roadway on the seller’s land. Id. at *1. The buyer’s assignees did not pay these costs, and the seller’s assignees sued to enforce the covenant. Id. at *2. The court noted, without discussion, that privity was required for the covenant to run and wrote that horizontal privity exists when “the covenant was created as part of a conveyance of real property between the creating parties.” Id. at *3. Applying this rule, the court found horizontal privity existed because the “covenant was created . . . as part of the [seller’s] conveyance of what is now defendants’ property to the [buyers].” Id.

In 2003, a federal court applying Oklahoma law endorsed the privity requirement. See *Cason v. Conoco Pipeline Co.*, 280 F. Supp. 2d 1309 (N.D. Okla. 2003). The case arose out of an oil company’s 1930 easement across a landowner’s property. Id. at 1314. The easement agreement contained a covenant to arbitrate disputes related to damage to the landowner’s property. Id. After the oil company’s successor cut down trees on the same land to maintain its pipelines, the landowner filed suit, alleging that the trees had been wrongfully removed and that

the arbitration provision did not run with the land and was thus no longer enforceable. Id. at 1314, 1316–17.

The court held that the arbitration provision was a covenant that could not be enforced without horizontal privity and that horizontal privity in fact existed because “[t]he covenant was created in connection with a conveyance of an estate from

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one to the other, i.e., an easement to lay pipelines on the [landowner’s] [p]roperty.” Id. at 1319. In *Cason*, as in *Dingle* and *Beeren*, the court relied on the existence of a grantor-grantee relationship between the covenanting parties, although in *Cason* the grant in question was an easement rather than a fee simple estate.

The Washington appellate court reaffirmed the horizontal privity requirement in the unpublished case of *Weaver v. Ryderwood Improvement and Service Ass’n*, No. 39755-2-II, 2010 WL 3232358 (Wash. Ct. App. Aug. 17, 2010). *Weaver* arose out of a retirement community’s bylaws, which by deed were made binding on persons who purchased land from the community. Id. at *1. The retirement community’s founding developer later assigned its rights to a homeowners association. Id. at *5 n.5. Some years later, assignees of the first buyers sued the homeowners association and asserted that the bylaws did not run with the land. The plaintiffs claimed that privity was absent because the association never owned the land. Id. at *5. After reaffirming

that the horizontal privity doctrine was still relevant, the court rejected this argument because the association had assigned its rights to the defendant. Id. at *5 n.5. In other words, the court endorsed the general view that when the original parties are in a buyer-seller relationship (and thus in privity), an assignment does not prevent the covenant from running with the land.

Citing the Restatement—But Not Adopting It. Unlike the cases discussed above, the Connecticut Supreme Court recently mentioned the Restatement’s opposition to horizontal privity. The case of *Wykeham Rise, LLC v. Federer*, 52 A.3d 702 (Conn. 2012), arose from a school’s sale of its land to a corporation, subject to a set of covenants restricting development of the land. The corporation’s interest was later transferred to the plaintiff, which sued for a declaratory judgment that it was not burdened by the covenant. Id. at 706–07.

The court noted that the new Restatement rejected the horizontal privity requirement and even mentioned the Restatement’s arguments that the privity requirement is outdated and easily evaded. Id. at 714 n.18. But rather than adopting (or rejecting) the Restatement’s view, the court wrote that because “the covenants in the present case were created in the context of a transfer of land and thus satisfy the horizontal privity requirement, we do not address the continuing viability of the horizontal privity doctrine.” Id. So, in Connecticut, the horizontal privity requirement survives—but its future is uncertain.

In addition, one Washington appellate decision also mentioned the Restatement, implying that in a future case it might reject the horizontal privity doctrine. See *Lake Limerick Country Club v. Hunt Mfg. Homes, Inc.*, 84 P.3d 295, 302 (Wash. Ct. App. 2004) (horizontal privity either “is not required, or . . . is met by the original parties’ grantor-grantee relationship”). But, as noted above, a more recent Washington case (*Weaver*) reaffirmed the horizontal privity requirement. Thus, it remains

questionable whether Washington would adopt the Restatement's view if given another opportunity.

Cases Finding No Horizontal Privity

Research disclosed only two post-2000 cases holding that a covenant did not run with the land because of the absence of horizontal privity.

In the 2005 case of *Simmons v. On Faith, LLC*, 2005 WL 3489770 (Va. Cir. Ct. Dec. 8, 2005), a Virginia court relied on the covenant's absence from the burdened party's chain of title. A landowner created covenants affecting his own land and lost the property to a bank in a foreclosure sale, after which the property was transferred to the landowner allegedly burdened by the covenant. Id. at *1.

The court refused to find that horizontal privity required the covenant to run against the burdened landowner, because the original owner was "the sole signatory of the deed and the only party who was involved in creating the restriction." Id. at *2. Thus, the covenant was not "part of a transaction or conveyance," as the horizontal privity doctrine requires. Id. *Simmons* stands for the proposition that no horizontal privity exists in the unusual situation in which there are not two parties to the original covenant.

The recent case of *Cunningham v. City of Greensboro*, 711 S.E.2d 477 (N.C. Ct. App. 2011), dealt with more typical facts. In *Cunningham*, the covenant at issue arose out of agreements between a city and real estate developers, promising that in exchange for the city's extension of water and sewer service to the developers' lands, the developers would (among other things) petition for annexation of their land to the city. After the developers sold part of the affected land to individual landowners, the individuals objected to annexation and sued for a declaratory judgment that the annexations were invalid. In response, the city argued that its covenant with the developers barred the plaintiffs' claim. Id. at 480–81.

The court noted that as a general rule, horizontal privity exists when

the covenant is related to a transaction involving a transfer of an interest in land or an easement held by one covenanting party in the land of another. Id. at 485. The court found no "evidence tending to show that rights of way, easements, or other property rights were created or transferred in connection with [the agreements between the city and the developers]" and accordingly found that the city had failed to show horizontal privity. Id. at 486.

Why Does Horizontal Privity Survive?

Despite the scholarly consensus against the horizontal privity requirement, the momentum in favor of the Restatement's view appears to have halted. Not one reported case rejected the horizontal privity requirement after the Restatement's adoption in 2000, although *Wykeham Rise* implies that the Connecticut courts might do so in an appropriate case in the future. But cf. Sprankling § 33.04(B)(5)(a), at 565 (noting that numerous states had rejected the doctrine before 2000).

None of the cases discussed above explains why the courts retain the horizontal privity requirement. It seems to this author, however, there are at least two possible reasons. First, restrictive covenants generally arise in the context of subdivisions created by covenants between a developer and purchasers. See William B. Stoeckel & John W. Weaver, 17 *Wash. Prac., Real Estate* § 3.14 (2012). In such a situation, horizontal privity exists because the covenanting parties were in a buyer-seller relationship. Because horizontal privity is easy to find, courts have little incentive to engage in a theoretical discussion about whether the doctrine still makes sense.

Second, even when horizontal privity does not exist, a restrictive covenant may run with the land as an equitable servitude. Under the equitable servitude doctrine, a covenant may be enforced in equity against a covenantee's successors in interest in the absence of privity, as long as the original parties intend the covenant to run, subsequent purchasers have

actual or constructive notice of the covenant, and the covenant touches and concerns the land (that is, somehow relates to the use of land). See Sprankling, § 33.04(B)(4)(a)(i), at 561–62.

So even in the absence of privity, a covenant that courts might think of as logically related to the land (for example, a covenant between neighbors not to build a factory on the land) will often be binding on future grantees under an equitable servitude theory. Under that theory, the typical remedy for violation is an injunction—a remedy that some covenant beneficiaries (for example, an outraged homeowner trying to prevent a factory from being built next door) might actually prefer to damages.

Thus, horizontal privity will almost never stand in the way of enforcement of a servitude—at least not in common situations like covenants involving subdivisions. As long as this is the case, the courts are unlikely to reject the horizontal privity doctrine.

It could be argued that *Simmons* and *Cunningham* indicate that the horizontal privity requirement still is a significant trap for the unwary. But those cases involved situations that are (this author suspects) factually unusual. The first case involved a homeowner covenanting with himself—a situation that could never create horizontal privity under the most generous interpretation of the rule. The second case involved a city's use of public services to extort support for annexation from homeowners; perhaps the city in this context was a sufficiently unsympathetic party that the court was not particularly tempted to stretch the law in its favor.

Conclusion

In theory, the horizontal privity requirement in the enforcement of restrictive covenants may, as most scholars think, be obsolete. But as long as courts see no harm in it (and as long as undesirable outcomes can commonly be avoided through the equitable servitude doctrine), it will continue to survive in most states. ■