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ARTICLE

DRAFTING, INTERPRETING, AND ENFORCING COMMERCIAL AND SHOPPING CENTER LEASES

JOHN M. TYSON

I. INTRODUCTION

According to the International Council of Shopping Centers, 56% of all retail sales are derived from businesses located within a shopping center. General practitioners representing small retail

1. An earlier draft of this Article was presented at the North Carolina Bar Association Commercial Real Property Seminar, March 1992. The author gratefully acknowledges the research and preparation assistance by Marcelina K. Crisco, a former student and 1992 law graduate of Campbell University. Appreciation is also expressed to Dean Patrick K. Hetrick for his research, support, review and comments on the outlines and drafts of this article.

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3. New Members of Congress Need to Know About ICSC Issues, Government Affairs Report, Volume 15, Number 3, September 1992, at 6. Specifically, this article recites the figure of 56% as the amount of all non-automotive retailing

275
business clients are very likely to be faced with reviewing and interpreting a commercial or shopping center lease.

The attorney's role in commercial real estate transactions requires a greater use of the counsellor portion of the license to practice law. In negotiating, the successful attorney will learn how to be a deal maker, not a deal breaker. In reviewing documents, a clear understanding of your client's ultimate goals is critical.4

A lease is a conveyance of real property that creates an estate for a term, or at will. To be valid, a lease must contain four essential elements. The first element is the identity of the landlord and tenant. Both the landlord and the tenant must have the capacity to enter a binding contract. The second element is a description of the leased premises. The description can be by reference to an extrinsic document which describes the property conveyed with sufficient certainty. The third element is an agreement on duration of the term. The fourth and final element is the rental or other consideration to be paid.5

A lease does not have to be in writing or under seal to be valid.6 However, in North Carolina, the Statute of Frauds requires all leases of more than three years in duration to be in writing and signed by the party to be charged.7 This provision has been interpreted to mean "the one against whom relief is sought."8

North Carolina's recordation statute, the Conner Act, states that:

no lease of land for more than three years shall be valid to pass any property interest as against lien creditors or purchasers for a valuable consideration from the donor, bargainer, or lessor but from the time of registration thereof in the county where the land lies . . . .9

that is conducted in shopping centers.

4. The rights and obligations of landlord and tenant to a residential lease are now primarily governed by statute. N.C. GEN. STAT. § 42-38 to § 42-44 (1991). This presentation shall only address selected leasing issues in a non-residential context. The designation of landlord will be used to describe an owner, grantor or lessor, while the designation of tenant will be used to describe the lessee, grantee or occupant.


This statute has been interpreted to require the party asserting a superior right to be a bona fide purchaser for value. The presence and importance of notice by the party asserting a superior right over a prior, but non-recorded, interest by the tenant has been subject to differing interpretations in North Carolina. Where a successor to the landlord has actual prior notice of tenant’s possession and leasehold, and acted with fraudulent intent or where tenant’s interest was mistakedly omitted from the recorded instrument, courts preserve the tenant’s interest.

The statutes also provide a method for recordation of memoranda of leases and options.

A lease of land... may be registered by registering a memorandum thereof which shall set forth:

1. The names of the parties thereto;
2. A description of the property leased;
3. The terms of the lease, including extensions, renewals, options to purchase if any; and
4. Reference sufficient to identify the complete agreement between the parties.

II. THE LEASE AS A CONVEYANCE

The traditional and majority rule regards a leasehold interest as a conveyance of lands or tenements to an entity (tenant-lessee) from another in rightful possession (landlord-lessee) for a term of years or at will.

Under this rule, a tenant gains the status of an owner for the term. The tenant has the right to use or not to use the property for any lawful purposes, so long as the lease does not compel or restrict use. The common law does not favor restraints on the use of


land. Therefore, any restraints on alienation of property are strictly construed.

The main duty of a tenant is to pay rent. This obligation is an independent covenant, and is not excused by wrongful acts or omissions of the landlord, or by damage to or destruction of the leased premises by acts of God or by third parties. In addition to paying rent, a tenant must not waste or abuse the property and must maintain, repair, replace and rebuild the premises in the absence of an agreement to the contrary.

Unless otherwise agreed, it is the landlord's duty to pay taxes. However, a tenant who occupies land without a rental obligation has the duty to pay taxes.

The landlord also has an implied duty to provide quiet enjoyment for tenant. This implied covenant protects a tenant against "[u]nauthorized entry and repossession of the leased premises by the lessors or those acting under their direction." Other duties of landlord include putting tenant into possession and mitigating damages.

The common-law principle of *caveat emptor* warns the tenant and continues to govern commercial lease transactions. Case law places the duty to inspect on the tenant. The landlord does not impliedly covenant fitness of the premises for a specific purpose or

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III. THE LEASE AS A CONTRACT

The minority and emerging view interprets a lease as an executory contract in addition to being a conveyance of a leasehold interest. "Leases share the qualities of both contracts and conveyances and are interpreted as are other agreements unless there is a conflict with principles of property law." 25 "A lease is in the nature of a contract and is controlled by the principles of contract law." 26 North Carolina continues to follow the majority rule, stated earlier, that a leasehold interest is a conveyance of an estate in land. 27

IV. GENERAL RULES OF CONSTRUCTION

A written agreement is presumed to embody all of the parties' negotiations. The parol evidence rule provides "that in the absence of fraud or mistake or allegation thereof, parol testimony of prior or contemporaneous negotiations or conversations inconsistent with the writing or which tend to substitute a new or different contract from the one evidenced by the writing is incompetent." 28

A contract is to be interpreted as written, and "if there is no dispute with respect to the terms of the contract and they are plain and unambiguous there is no room for construction." 29 The reason for enforcement of agreements as written and the courts' reluctance to vary or add to a lease or other contract is because "[a] lease agreement, like any other contract, involves a bargained-for exchange between the parties. Absent some violation of law or transgression of a strong public policy, the parties to a contract are basically free to make whatever agreement they wish, no matter

27. WEBSTER'S REAL ESTATE LAW, supra note 5, at § 230.
how unwise it may appear to a third party."^30

In *Neal v. Marrone,*^31 the North Carolina Supreme Court stated:

where the parties have deliberately put their engagements in writing in such terms as import a legal obligation free from uncertainty, it is presumed the writing was intended by the parties to represent all their engagements as to the elements dealt with in the writing. Accordingly, all prior and contemporaneous negotiations in respect to these elements are deemed merged into the written agreement.^32

Where a contract is complete in itself and, as viewed in its entirety, is unambiguous, its language is the only legitimate evidence of what the parties intended. The intention of the parties cannot be determined from the surrounding circumstances but must be gathered from a four-corners examination of the contractual instrument in question.^33

If an ambiguity arises, the lease will be construed against the party who drafted the document. In *Columbia East Associates v. Bi-Lo, Inc.,*^34 the court stated, "[w]here the contract is susceptible of more than one interpretation the ambiguity will be resolved against the party who prepared the contract."^35

Further, in North Carolina, a successor-in-interest to the party who drafted the lease is subject to the obligations of its predecessor. The court of appeals found no error in a trial court instruction that "the lease should be construed against the party who drafted the instrument . . . [even though the current landlord] . . . did not in fact draft the lease agreement."^36

Some courts go even further and hold that a lease must be construed favorably to the tenant and against the landlord. In *Davis v. Wickline,*^37 the Virginia Supreme Court held "a contract of a lease is to be construed favorable to the lessee and against the les-

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35. *Id.* at 262.
37. 135 S.E.2d 812 (Va. 1964).
A U.S. district court, applying Louisiana law under the *Erie* doctrine, stated: "Louisiana jurisprudence has developed a strong tradition of interpreting any ambiguity in a contract of a lease against the lessor and in favor of the lessee, regardless of which party prepares the lease." In *Carl A. Schuberg, Inc. v. Kroger Co.*, the court stated that "[u]nclear portions of a lease are construed against the lessors, unless the lessee drafted it." In this case, Kroger, the tenant, drafted the lease, but the court held that the presumption of free alienability of land overrode construing the lease against Kroger.

A corollary rule of construction is that a lease will be strictly construed against forfeiture. The court stated that a lease provision that could cause forfeiture of the leasehold estate must be stated in terms so clear and explicit that no other construction is possible.

A further basic rule of contract construction is that the purposes of a contract must not be illegal nor violate public policy. The courts will look at what is fair, reasonable and just. "[T]he law has developed the concept of unconscionability so as to prevent the unjust enforcement of onerous contractual terms which one party is able to impose upon the other because of significant disparity in bargaining power (e.g. Uniform Commercial Code § 2-302)"

Closely related to the concepts of illegality and unconscionability is the canon of construction that contracts in restraint of trade are strictly construed.

V. **Construing Specific Express Lease Provisions**

A threshold construction question to be considered by the court is whether the lease is a fully integrated document. The more detailed, complete and specific the written agreement appears, the more likely a court will find that it contains all the agreements of

38. Id. at 814.
the parties. In *People's Drug Stores, Inc. v. Mayfair, N.V.*, the lease contained the following merger clause:

> this instrument embodies all the agreements between the parties hereto in respect to the premises hereby leased, and no oral agreements or written correspondence shall be held to affect the provisions hereof. All subsequent changes and modifications to be valid shall be by written instrument executed by the landlord and tenant.

The court held "this clause is evidence of the intention of the parties to the lease that it constitutes their entire agreement, and that conflicting oral agreements should not be allowed to vary its terms."

Analogous to a merger clause is an entire agreement clause. In *Dover Shopping Center, Inc. v. Cushman's Sons Inc.*, the trial court refused to allow parol evidence on the ground that it would contradict the express terms of the lease. The applicable lease provision provided:

> Landlord has made no representations or promises with respect to the demised premises except as herein expressly set forth. This lease contains the entire agreement between the parties hereto; and any agreement hereafter made shall not operate to change, modify, terminate or discharge this lease in whole or in part unless such agreement is in writing and is signed by the party sought to be charged therewith.

The plaintiff asserted fraud, but the court upheld the exclusion of the parol evidence because it related to representations of future events.

**A. Assignment and Subleasing**

A provision controlling assignment and subleasing of the demised premises is found in many commercial leases. An assignment is a conveyance of a tenant's entire interest in the property, while a sublease is a conveyance of only part of the term of the lease. In a sublease, the original tenant retains a reversion of some portion,

46. Id. at 449, 274 S.E.2d at 369.
47. Id.
49. Id. at 788.
however short, of the original term of the lease.\textsuperscript{50} In North Carolina, the merger doctrine holds that a sublease for the entire remaining term is deemed to be an assignment.\textsuperscript{51}

The general rule is that all contracts are assignable, in the absence of an express agreement to the contrary. Where a restriction on assignment is present, it is strictly construed as a restraint against alienation.

With regard to subletting and assignment in particular, this Court has long held that a lessee may freely transfer the demised premises without the lessor's consent, absent a covenant in the lease restricting the right of assignment. Also, the general rule is, that covenants against subletting are strictly construed against the lessor.\textsuperscript{52}

Because these restraints are strictly construed, a prohibition in a lease against assignment will not be construed as a prohibition against subleasing.\textsuperscript{53} Equally, a prohibition against subleasing is not breached by an assignment to the new tenant, called the assignee.\textsuperscript{54}

\section*{B. Percentage Rental Provisions}

Many commercial leases contain percentage rental provisions. Usually there is a base, fixed or minimum rent and an additional rent based on a percentage of sales in excess of a fixed dollar figure. For example: minimum annual rent of $50,000.00 plus 1\% of gross annual sales in excess of $5,000,000.00. This last figure is called the breakpoint, or the minimum level of sales that must be achieved in order for percentage rent to be payable. The natural breakpoint is achieved by dividing the fixed annual rent by the specified percentage figure. The amount of percentage varies depending on the type of business conducted in the premises. Generally, the tenant pays the base rental or the percentage of sales,

\begin{itemize}
\item 50. Walgreen Arizona Drug Co. v. Plaza Center Corp., 647 P.2d 643, 645 (Ariz. 1982) (sublease one day shorter than assignment).
\end{itemize}
whichever is greater.

North Carolina general statutes provide:

No lessor of property, merely by reason that he or she is to receive as rent or compensation for its use a share of the proceeds or net profits of the business in which it is employed, or any other uncertain consideration, shall be held a partner of the lease.\(^{55}\)

Several issues arise when construing percentage rental provisions. “Although percentage leases are generally governed by the rules of law applicable to ordinary leases, the peculiar features of provisions making rental dependent in some way upon the percentage of income from, or gross sales of business on the leased premises frequently present difficult questions of construction.”\(^{56}\) A definition is needed to determine what constitutes sales: gross sales, gross receipts, gross income or net income. Generally, the term used is gross sales. What is included in or excluded from gross sales also needs to be defined: sales for cash, credit, services, warehouse stock and telephone sales. In Downtown Assoc., Ltd. v. Burrows Bros. Co.,\(^{57}\) the court held telephone sales made from a new location were not attributable to the subject premises.

The tenant will want to exclude items where little or no profit is made, such as sales to employees, transfers to other stores, void sales, refunds and accommodation sales. In Cloverland Farms Dairy, Inc. v. Fry,\(^{58}\) the sale of lottery tickets was illegal when the lease was signed. The court held that proceeds received from the sale of state lottery tickets would not be included in gross sales. The court also determined that the tenant’s commission was to be included in gross sales.\(^{59}\) Another factor to consider is whether percentage sales include gross sales from a third party like a sublessee.

\(^{55}\) N.C. GEN. STAT. §42-1 (1991); Perkins v. Langdon, 237 N.C. 173, 74 S.E.2d 645 (1953) (lessor and lessee are not partners); State v. Keith, 126 N.C. 1114, 36 S.E.2 169 (1900). “In dealing with property subject to a lease with a percentage rent, the parties should be aware that one district court concluded that a sale of a franchised restaurant property, subject to a lease calling for fixed rent and percentage rent, was a sale of a security under the Securities and Exchange Act of 1934.” The court found the purchase to be an investment by the purchaser, who was not participating in the day-to-day operations of the business. R. LIFTON, PRACTICAL REAL ESTATE IN THE 80’S at 457, (2d ed. 1983) (citing Huberman v. Denny’s Restaurants, Inc., 337 F.Supp 1249 (N.D. Cal. 1972)).

\(^{56}\) Food Fair Stores v. Blumberg, 200 A.2d 166 (Md. 1964).

\(^{57}\) 518 N.E.2d 564 (Ohio Ct. App. 1986).

\(^{58}\) 587 A.2d 527 (Md. 1991).

\(^{59}\) Id. at 530.
licensee or concessioner. In *Coxe v F.W. Woolworth Co.*, the court held that after a tenant under a percentage rental provision discontinued use, percentage rent was also discontinued pursuant to the lease. However, once the premises was subleased, the percentage rental provision did not resume. The lease was silent as to any reactivation of the percentage rent. The court stated, "this obligation [of percentage rent] has no further contingent event on which it can be reactivated; it is of no other force and effect.""61

Another consideration is the parties' positions if the percentage rental breakpoint is never reached. "It has been held that where the percentage lease provides no minimum guarantee rental or a purely nominal guarantee, the tenant is under an implied obligation to conduct business in good faith.""62

C. Covenants Against Competition

A covenant against competition, or a restriction on use is another lease provision often incorporated into commercial leases. Such a covenant may restrict the tenant from operating certain types of businesses in the premises and elsewhere within a defined radius from the premises. Such a covenant may also limit the tenant to a particular use within the leased premises. The terms of such a provision may demonstrate that the parties contemplate additional business of the tenant outside the area."63

Contracts containing covenants against competition are in restraint of trade, and are strictly construed."64 Covenants restricting use are also strictly construed as restraints on alienation."65 Covenants against competition must be in writing and supported by consideration."66 To be valid, a covenant against competition or use, must be reasonable as to time, territory and terms."67 Although some cases have interpreted a covenant not to compete in an em-

60. 652 F. Supp. 64 (M.D. La. 1986).
61. Id. at 70.
65. Id. at 1284.
67. Id. at 167.
ployment contract, the same principles have been applied to a commercial lease containing restrictive covenants.\(^6\)

The courts will look to the facts of each case to determine what is a reasonable restriction on time, territory and terms. In *Suburban Centers, Inc. v. Big Bears Stores Co.*,\(^6\) Big Bear opened a new supermarket 1.5 miles from the leased premises and closed the subject premises. The former store remained vacant and the landlord for that shopping center asserted that the one mile restriction was unreasonable. Landlord sought to lease space in the center free of the restriction. The court held that an exclusive use granted to tenant, where landlord could not lease to another supermarket any part of the shopping center or other property within one mile thereof, for use as a supermarket, was not an unreasonable restriction as to territory.\(^7\)

In *Kauder, Klotz & Vennitt v. Rose's Stores, Inc.*,\(^7\) the tenant, Roses, opened another store 1.9 miles from the subject premises. The lease for the subject premises contained an express covenant to operate. Roses kept the old store open, but sales, and consequently percentage rental, declined. The landlord claimed that Roses intentionally diverted sales to the new store. The court held that Roses did not breach its obligation of good faith by opening the store. The court said to hold Roses in breach of its obligation of good faith would be to “write a restriction against competition into the lease when none existed.”\(^7\)

**D. Abandonment and Forfeiture Clauses**

A forfeiture of a leasehold clause grants the landlord the right of reentry and repossession of the premises in the event that the tenant discontinues operation or defaults on the lease. In some leases, the landlord must give notice of default to the tenant in order for the tenant to have an opportunity to remedy the breach. In other cases, the tenant must notify the landlord if the tenant elects to discontinue business operations, placing the option on the

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70. Id.
72. Id. at 1284; See also Lowe's of Shelby, Inc. v. Hunt, 30 N.C. App 84, 226 S.E.2d 232 (1976).
landlord to terminate the lease. A forfeiture clause may be drafted to shift the burden of action in favor of the tenant or the landlord. A lease may also incorporate a liquidated damages provision within the forfeiture clause.

A lease may also contain a clause describing abandonment of the premises and the landlord's rights on abandonment. Abandonment does not occur until the tenant, "with the intent to abandon, does something, or fails to do something, that results in an absolute relinquishment of the premises." Even if a tenant ceases business in a center, continuing to pay base rent or exercising control over the premises to forestall competition, such actions would not constitute abandonment.

E. Continuous Occupancy

A lease may expressly require the tenant to use or occupy a minimum amount of space in the premises. In *CBL & Assoc., Inc. v. McCrory Corp.*, CBL was the landlord of a mall in Georgia in which McCrory, the tenant, operated a 9,306 square foot store, under a twenty year lease with a percentage rental provision. After operating for ten years and losing over $50,000 during the last two years of the lease period, McCrory sought to close its store. The lease contained the following express covenant to continuously operate: "Tenant agrees to . . . operate one hundred percent (100%) of the lease premises during the entire term . . . with due diligence and efficiency so as to produce all of the Gross Sales (sic) which may be produced by such manner of operation."

CBL sought a mandatory injunction to force McCrory to keep its store open. The court refused to grant an injunction on the grounds that landlord's loss was purely economic, that landlord had an adequate remedy at law, and the court would not exercise its discretionary equitable power where specialized knowledge, skill and judgment would be required to implement its orders over a

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75. Century Shopping Center Fund I v. Crivello, 456 N.W.2d 858, 863 (Wis. 1990), (petition for rev. denied).
78. Id. at 808.
long period.79

F. Options to Renew

Options to renew or extend lease terms are found in most commercial leases. Absent an express provision to renew, there is no implied right to renew the lease.80 "A covenant which in general terms provides a right of renewals will be construed as granting only one renewal."81 Covenants for perpetual renewal are not favored by law.82 In North Carolina, the brightline rule is that a perpetual right of renewal must contain words of perpetuity like, "forever," "for all times," or "in perpetuity."83 Language that the lease is to be "automatically renewed or successively renewed" does not satisfy the rule.84 Some states have held that the word "successive" implies a perpetuity.85

To be effective, an option to renew must be supported by consideration. If the lease renewal is triggered by notice to the landlord, it is a condition precedent to renewal. A tenant who holds over the original term without notifying the landlord of his intent to renew, is deemed to have a month-to-month tenancy.86 If there is a renewal provision that does not require the lessee to give notice to the landlord of his intent to renew, and the landlord accepts tenant's rent, the tenant is deemed to have exercised a renewal.87 A

82. Id. at 470, 329 S.E.2d at 348.
83. WEBSTER’S REAL ESTATE LAW, supra note 5, at § 277, (citing Lattimore v. Fisher’s Food Shoppe, Inc., 313 N.C. 467, 471, 329 S.E.2d 346, 348 (1985)).
84. Lattimore, 313 N.C. at 470, 329 S.E.2d at 348.
87. WEBSTER’S REAL ESTATE LAW, supra note 5, at § 292, citing Kearney v.
lease may provide that if a landlord has not received notice of tenant’s intent to exercise an option, that option will continue until landlord has advised tenant of non-receipt of notice. Tenant’s option right will continue until notice is given or passage of the period of time set forth in the lease.

A sublessee may not exercise an option to renew that was granted in the original lease. There is no privity of contract or estate between the original lessor and the sublessee. 88

VI. IMPLIED COVENANTS

In addition to the express provisions agreed to by the parties, “there exists in every contract certain implied-by-law covenants, such as the promise to act in good faith in the course of performance.” 89

Courts will seek the true intention of parties as inferred from the whole lease agreement. A court “will view the agreement from the time it was made.” 90 This intent may also be gleaned from lease negotiations. Where the lease is silent or contains an ambiguity, it may “be necessary at trial to receive extrinsic proof as to the history of the relationship between the parties, their reasonable expectations, and all other factors bearing upon their intention in entering into the lease.” 91 It may be stated generally that:

implied covenants are not favored in the law; and courts will declare the same to exist only when there is a satisfactory basis in the express contract of the parties which makes it necessary to imply certain duties and obligations in order to effect the purposes of the parties to the contract made. 92

The Supreme Court of California set forth five prerequisites

Hare, 265 N.C. 270, 144 S.E.2d 636 (1965).
which determine whether implied covenants exist:

(1) The implication must arise from the language used or it must be indispensable to effectuate the intention of the parties; (2) it must appear from the language used that it was so clearly within the contemplation of the parties that they deemed it unnecessary to express it; (3) implied covenants can only be justified on the grounds of legal necessity; (4) a promise can be implied only where it can be rightfully assumed that it would have been made if attention had been called to it; (5) there can be no implied covenant where the subject matter is completely covered by the contract.\(^93\)

In Walgreen Ariz. Drug Co. v. Plaza Center Corp., the Arizona court stated that "[i]t is not enough to say that it is necessary to make the contract fair, that it ought to have contained a stipulation which is not found in it, or that without such covenant it would be improvident, unwise or operate unjustly."\(^94\)

The Tennessee Supreme Court stated in Kroger Co. v. Chemical Securities Co., that the reason for these rules is "[t]he courts have no rightful authority to make contracts for litigants."\(^95\) "Abs­ent illegality, contracting parties are free to bargain as they see fit. When the bargained-for agreement is reduced to writing, a court may not make a new contract for the parties or rewrite the existing contract."\(^96\)

A. Factors that Mitigate Against the Presence of Implied Covenants to Operate

Generally, equity will not compel an affirmative act by a party where other means of redress are available to the aggrieved party. An owner of real property is not required to make any affirmative use of his property. Legal possession has never required actual use or occupancy. In jurisdictions where a lease is regarded primarily as a conveyance of real property, as opposed to a contract, courts

will interpret use and occupancy clauses merely as a restriction on use, and not a compulsion to use. 87

In *Kauder, Klotz & Vennitt v. Rose's Stores, Inc.,* 88 a U.S. district court, applying North Carolina law under the *Erie* 99 doctrine, interpreted an express use and continuous operations clause. The lease provided:

The Tenant shall use and occupy the entire buildings on the demised premises for sales by Tenant at retail of merchandise and for no other purpose.

Tenant shall diligently and continuously operate and conduct its retail business throughout the entire term and shall use all proper and reasonable efforts consistent with good business practice to the end that the gross sales of such business shall throughout the entire lease term be as large as possible. 100

The court found that “[t]he language of the lease provides that the [tenant] has an obligation to diligently and continuously operate its business in [the premises] and to use all proper and reasonable efforts to make gross sales as large as possible.” 101 Tenant had paid substantial percentage rental in the past. While keeping the subject store operating, tenant also opened a new store 1.9 miles away. The court refused to imply any further duty or restriction on the tenant. “It is the conclusion of this court that the [tenant] has breached no obligation imposed by the lease.” 102

In jurisdictions that apply rules of contract construction to leases, landlords generally have not been successful in securing the presence of implied covenants to continuously occupy or operate. One reason for the court's reluctance to imply any covenant is the presumption that agreements reduced to writing represent all of

89. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).
101. *Id.*
102. *Id.* at 1284. *But see* United Dominion Realty v. Wal-Mart Stores, 413 S.E.2d 866, (S.C. Ct. App. 1992). In this case, the South Carolina Court of Appeals analyzed similar language contained in the lease and held that the tenant, Wal-Mart, breached its lease by failing to operate a discount store on the leased property. The court used a contract analysis to reach their conclusion.
the parties’ understandings. Therefore, the exclusion of any express obligation on the tenant to operate or occupy in the lease is substantial evidence that no duty to conduct business was intended. "The parties did not agree to nor bargain for [tenant’s] continuous occupation of the premises, and we are not authorized to rewrite the contract to create such a provision." Where parol evidence has been admitted showing that lease negotiations excluded an express covenant to operate, courts have refused to imply an operation covenant.

If a lease contains substantial or reasonable fixed rental, most courts have also refused to imply an obligation on the tenant to operate. The main duty of a tenant is to pay rent. Most courts regard the fixed rental as the primary consideration for the lease and view percentage rental as an expectation or "bonus." This is particularly true where percentage rent was possible, but never paid. Most leases with percentage rent clauses also contain provisions that expressly disclaim any representations of sales volume that may be derived from the premises.

Another express lease provision that negates an implied duty


107. Id. at 2.


to operate is tenant's right to assign or sublease. In *Cascade Drive Ltd. Partnership v. Wal-Mart Stores, Inc.*, the Fifth Circuit stated: "[w]e agree with the district court that the express broad sublet provision in this lease is inconsistent with an implied obligation of continuous operation . . . ." However, the Arizona Court of Appeals has held that "[t]he presence of a right to assign or sublet is not necessarily inconsistent with an implied covenant of continuous operation. The two covenants can be harmonized to permit subletting or assignment to a business of the same character." The presence of an express use or operating covenants in leases of other tenants in same center where the subject lease is silent has been held to negate the assertion that an implied duty to operate exists. In *Kroger Co. v. Bonny Corp.*, "[t]hey limited certain tenants to particular sales area and not others; they required covenants against vacancy and abandonment of certain tenants and not of others. The leases were executed around the same time; it is therefore perfectly obvious that the landlord, in its individual dealings with separate tenants, tailored the leases according to the exigencies of the situation." "Plaintiff negotiated several contracts during that period with other tenants in the shopping center. Some of those contracts specifically included continuous occupancy clauses. Under these circumstances, we find the parties' intent did not encompass Kroger's being bound by a continuous occupancy clause."
The courts have also reviewed other leases of the subject tenant to determine whether an express provision to operate is present or if the tenant had a policy regarding such clauses. "The record reveals that [the tenant] . . . had a specific policy of not binding itself to continual occupancy clauses."\(^{117}\) Evidence of lease negotiations were admitted at trial that showed that the tenant had never put restrictions in its leases whereby it would guarantee to operate any particular facility.

In *GMS Management Co., Inc. v. Pick-N-Pay Supermarket, Inc.*,\(^{118}\) the landlord asserted that the use clause contained in tenant's lease implied a duty to continuously operate. Tenant asserted that the use provision was restrictive rather than mandatory and, "... submitted and incorporated copies of leases of various other tenants in the shopping center. These leases contained specific clauses, in addition to the 'use' clauses, which provided that the tenants were required to continuously use the premises for the stated purpose throughout the entire lease term."\(^{119}\) The court affirmed the trial court's holding that "[c]lauses similar to this one have been construed in many cases, and it has never been held to be an agreement to occupy and use the demised premises, but only to restrict the purpose for which the premises may be used."\(^{120}\)

If a lease expressly grants tenant the right to remove fixtures or equipment, courts have held that no implied covenant to operate was intended. "[I]n the face of express provisions in the contract, allowing lessee to . . . remove fixtures from the premises, such a covenant could not be implied."\(^{121}\)

In many cases, a landlord is asserting a duty on a shopping center tenant to operate under the theory of economic interdependence, and the harm to the remaining tenants that would result in the center if the tenant ceased operations. Where a lease pertains to a free-standing building, this factor is not at issue. In *Stevens v. Mobile Oil Corp.*,\(^{122}\) the landlord of a gas station whose lease contained a percentage rent clause claimed the lease obligated the tenant to continue to operate a service station. The court held that

\(^{117}\) *Carl A. Schuberg, Inc.*, 317 N.W.2d at 610; *Accord Kroger Co. v. Chemical Sec. Co.*, 526 S.W.2d 468, 473 (Tenn. 1975).


\(^{119}\) *Id.* at 74.

\(^{120}\) *Id.* at 75, citing *Weil v. Ann Lewis Shops, Inc.*, 281 S.W.2d 651, 654 (Tex. Ct. App. 1955).

\(^{121}\) *Bastian v. Albertson's, Inc.*, 912, 643 P.2d 1079, 1082 (Idaho 1982).

the economic interdependence theory did not apply.

The intent and good faith of tenant in closing or moving its business is another factor courts have used to negate the presence of an implied covenant to continuously operate. "[T]he lease . . . prohibits the lessee from unreasonably diverting business to another location merely to reduce liability for rent. . . . We find no evidence indicating that the diversion of business from the premises was unconscionable or made in bad faith." 123 The court refused to imply a duty on the tenant inconsistent with the express provisions of the lease. 124 "There is no suggestion that [tenant] stopped using the space in any bad faith to reduce sales volume. . . ." 125

A factor supporting a claim of good faith in closing or moving a business is a tenant's profitability. In Parrish v. Robertson, 126 a three-year restaurant lease provided for a base rental plus 10% of the net profits. After eighteen months the tenant closed and moved to another location. The landlord sought the percentage in addition to the base rental. The court rejected this contention stating that "it can hardly be contended that the [tenant] would have been obligated to continue. . . if they were losing money. Acting in good faith . . . they could close the business thus limiting their obligation under the contract to the payment of base rental. . . ."

Another factor to consider in finding good faith is whether substantial expenditures may be required to improve the premises to meet current building or zoning codes. In Stevens v. Mobile Oil, 127 the court refused to imply a duty to operate a service station where that use was non-conforming and where major renovation and expense would be involved.

An analogous fact situation occurred in Powell v. Socony Mobile Oil Co. 128 The landlord asserted that a covenant for tenant to comply with all laws and regulations required tenant to continuously operate in order to protect a non-conforming use. The court held otherwise.

If another tenant has re-occupied the premises after the sub-

125. In re Goldblatt Bros., Inc., 766 F.2d 1136, 1140 (7th Cir. 1985).
ject tenant has closed, courts have held that this is some evidence of good faith and mitigation of damages by the subject tenant which negates an implied duty to continuously operate. 129

The lease may contain a forfeiture or landlord's reentry clause if tenant has closed. As noted earlier, such clauses are strictly construed. 130 In Kroger Co. v. Chemical Securities Co., 131 the lease provided that "if the tenant voluntarily vacates the premises and [it] remains vacant for one year, the landlord has the right to cancel the lease and re-enter the premises." 132 Tenant closed and sublet the premises to another tenant with a different use. Landlord sought to imply a covenant against subletting. The court held that the lease contained neither an implied covenant of continuous occupancy nor an implied covenant against subletting.

B. Factors and Express Lease Provisions that Mitigate Toward the Finding of an Implied Covenant to Continuously Operate

Where an ambiguity in a lease arises, or where a situation is not addressed in the lease, courts will add covenants that are implied-by-law before construing the lease. The presence or absence of certain express provisions represent the intent of the parties which guide the court's conclusion on whether covenants to use or operate were intended.

The courts will first determine the identity of the party who prepared the agreement and construe the lease against the party that drafted the document. 133 Further, if a standard, printed form was used, or if a party refused to negotiate, courts have held that implied covenants exist. 134

Most shopping center tenants seek exclusive rights to sell specified products or services in the center or within a defined radius from the premises. 135 In exchange for these rights, a landlord

131. 526 S.W.2d 468 (Tenn. 1975).
132. Id. at 470.
133. Id. at 470.
will seek to limit tenant’s use of the premises to those specified
exclusive uses in tenant’s lease. Many landlords will also attempt
to restrict a tenant from selling certain products or services if land-
lord has given or may give an exclusive use for those products and
services to another tenant. To harmonize the leases of various te-
nants and to satisfy a dominant tenant’s demand for exclusive
rights, a landlord may require the presence of express restrictions
in co-tenants’ leases of uses specifically allowed in the dominant
tenant’s lease.

Landlords may further seek to commit tenant to continuously
use and occupy the premises for the conduct of business specified
in the lease. As stated earlier, the majority rule is that a lease pro-
vision that requires tenant to use and occupy the premises for a
particular business is construed as a limitation on use. The tenant
is not compelled to occupy the premises for any purpose whatso-
ever. This view is consistent with interpreting the lease as a con-
veyance of an estate. One commentator has said that a comprehen-
sive express use clause should contain certain elements to be valid:

The tenant shall conduct its business in the demised premises
continuously on all days and hours during which the shopping
center is open.
The tenant shall keep its store continuously and fully stocked
with top quality merchandise.
The tenant shall keep its store fully staffed with employees.
The tenant shall operate its store as a typical operation of its
kind as presently conducted in the vicinity in which the demised
premises are located (the landlord will permit no similar opera-
tion in the shopping center).
The tenant shall use its best efforts to achieve a maximum sales
volume in the demised premises.
The tenant shall conduct its business under the name designated
as the tenants business name.
The tenant shall utilize at least ______ percent of the floor area
of the demised premises for retail sales activities. 136

Although this list is not comprehensive, it provides the land-
lord with guidelines in drafting express continuous operation and
use covenants.

In the landmark case of Jenkins v. Rose’s 5, 10 and 25c

Ct. App. 1967). See also Century Shopping Center Fund I v. Crivello, 456 N.W.2d
858, petition for review denied (Wis. 1990).
136. David F. Fishman, What counsel must know about Continuous Use
Stores, Inc.,\textsuperscript{137} Roses paid base and percentage rental for three years. During the last year, Roses did not operate a business in the store and paid only the base rental. The landlord admitted "there is no express covenant in the lease that the store will be operated," but contends that such covenant is "implied in the very terms of the contract and the nature of the lease."\textsuperscript{138} The court held:

Apart from the question of liability for waste, it seems that the tenant is under no obligation, in the absence of specific provisions therefor, to occupy or use, or continue to use, the leased premises, even though one of the parties, or both, expected and intended that they would be used for the particular purpose to which they seemed to be adapted or constructed.\textsuperscript{139}

However, other courts have held that the presence of a percentage rental clause in a lease is evidence of the parties' intent that the tenant would operate a business in the premises.\textsuperscript{140} In addition to presence of percentage rental, courts have looked to the adequacy of the base rental and the payment history of percentage rent and have implied a covenant to continuously operate.\textsuperscript{141}

Some leases contain a lowered threshold at which percentage rent becomes payable. This provision is known as an "unnatural breakpoint," and can show that the parties placed a higher importance on the payment of percentage rental as a part of the total

\begin{footnotes}
\item[137] 213 N.C. 606, 197 S.E. 174 (1938).
\item[138] Id. at 609, 197 S.E. at 175.
\item[139] Accord GMS Management Co., Inc. v. Pick-N-Pay Supermarkets, Inc., "Where a lease provides for rental based on a percentage of sales with a fixed substantial adequate minimum, and there is no express covenant or agreement to occupy and use the premises, no implied covenant or agreement will be inferred that the lessee is bound to occupy and use the premises for the purpose expressed in the lease. Under such a lease, lessee has no obligation to occupy and use the premises for any stated definite period of time and his obligation under such a lease is limited to the payment of the basic minimum rental to the end of the term when he no longer occupies and uses the premises for purpose expressed in the lease." Id., citing Kretch v. Stark, (C.P. 1962), 26 O.02d 385.
\end{footnotes}
rental.\textsuperscript{142} Obviously, there are no sales from a vacant or closed building. Where the fixed rental is purely nominal, or not substantial, courts have implied a duty on the tenant to operate a business in good faith.\textsuperscript{143}

The position, store size, customer base and length of commitment that a tenant makes to the shopping center has led many courts to the conclusion that a center’s economic existence is dependent upon this tenant. A tenant in this position has been referred to as an “anchor,” “major” or “magnet” tenant.\textsuperscript{144} Generally, an anchor tenant occupies a major portion of the total space in the shopping center.\textsuperscript{145} Usually, the premises was built to suit the specific needs of the tenant in accordance with plans provided by the tenant. In most cases, the tenant exercises veto power over the location of its store in the shopping center, the parking area and other provisions of the site plan and layout.\textsuperscript{146} “[T]he primary function of an anchor is to draw customers into the center. This, in turn, attracts satellite tenants, increases their business and enables the landlord to charge higher rents, resulting in an overall enhancement of the value of the shopping center.”\textsuperscript{147}

Other indications of the importance of a particular tenant are the length of the lease term and the landlord’s use of the anchor’s lease to obtain financing for the shopping center.\textsuperscript{148} If the tenant is considered to be an “anchor tenant,” the courts have been more likely to find an implied duty to operate.

The relative importance of a particular tenant can be shown by co-tenant leases containing rights against the landlord due to actions by the anchor tenant.\textsuperscript{149} For example, a co-tenant may have

\begin{itemize}
  \item \textsuperscript{142} Lippman, 280 P.2d at 780.
  \item \textsuperscript{145} Id.
  \item \textsuperscript{146} Id.
  \item \textsuperscript{147} Marquis, Albert G. \textit{Implied Covenants of Continuous Occupancy in Shopping Centers}, \textit{Journal of Property Management}, July/August 1990, pg 60-61.
  \item \textsuperscript{148} Hornwood v. Smith’s Food King No. 1, 772 P.2d 1284, 1286 (Nev. 1989).
  \item \textsuperscript{149} Columbia East Assoc. v. Bi-Lo, Inc., 386 S.E.2d 259, 260 (S.C. 1989),
\end{itemize}
the right to reduce rental, close its business or even be able to cancel its lease based upon the absence of the anchor tenant. These factors can support landlord's assertion that a particular tenant is an anchor tenant and as such, the anchor has the implied duty to continuously operate.

Every lease contains an implied covenant of good faith and fair dealing. Some courts have found bad faith from a tenant closing its business and re-opening in nearby location. Landlords often allege that the tenant is intentionally keeping the former premises vacant or is using the premises only for storage in order to divert sales to the new location. The tenant's breach of the implied covenant of good faith has led the court to find an implied duty to operate, which was also breached when the tenant closed the premises and reopened nearby.

The general rule excludes from evidence all prior and contemporaneous negotiations between the parties to explain, vary or add to the written agreement. However, courts have allowed evidence of negotiations that occurred during an assignment of an existing lease as evidence of the intention of the parties. Also, where terms in the lease are not defined or have "no fixed legal significance," courts have allowed evidence of the parties' negotiations to explain the meaning of those terms.

The presence of an express provision in the lease that allows for a mandatory injunction or other compulsive equitable relief in the event of a breach is another factor that leads a court to imply a covenant to continuously operate. In Dover Shopping Center, Inc. v. Cushman's Sons Inc., the court granted specific performance requiring the tenant to continuously operate where the landlord waived continued judicial supervision and would rely on defend-


A shopping center can be defined as a combination of interrelated retail activities at one location. The interrelationship of the tenants has permitted some courts to find the presence of a duty to operate based on a theory of economic interdependence. In *Ingannamorte v. Kings Super Markets, Inc.*,157 the court distinguished non-shopping center cases by stating "but these cases . . . did not involve a situation where, as here, there are interdependent economic units and the landlord had an obvious interest in the continued active operation of the leased premises far beyond the limited payment of the fixed monthly rental."158 In South Carolina, the court of appeals stated that "[t]wo other tenants entered into lease agreements for space in the center which made specific provisions regarding the operation of [the anchor tenant], in the center."159

The court held that:

[i]t is clear from the record that a major reason [tenant] entered into the lease was the ability of . . . the anchor tenant, to draw customers to the shopping center as a whole. The use of one or more anchor tenants to bring customers to the smaller shops in a shopping center is a common practice. If the anchor were permitted to leave the premises vacant, the landlord's purpose for signing the lease would be defeated.160

The reason for the economic interdependence theory was stated succinctly in 1943 by the Florida Supreme Court which upheld specific enforcement of an express covenant to continuously operate which was contained in the lease of a jewelry store tenant:

Another purpose in enforcing the covenant was to assure to all of the tenants the advantage of continued business activity because a client or customer of any place of business in the locality was a potential client or customer, at least, of all the others. . . The interest of the landlord and its tenants were in this situation in-

158. *Id.* at 843.
160. *Id.* at 262.
extricably bound together.\textsuperscript{161}

Recently the Pennsylvania Superior Court reversed the trial court's dismissal of a complaint seeking an injunction to require tenant to use and occupy the premises. The Court found that the lease did not expressly obligate the tenant to occupy and use the premises. However, the court held that the landlord's complaint stated a claim in spite of the precedent in favor of tenant because the factual situations in those cases were different than "the specific situation presented here, i.e., a completely vacant store front on an interdependent shopping mall where the lease itself contains provisions other than the use clause from which an obligation to use and occupy might be implied."\textsuperscript{162}

VII. REMEDIES AND RELIEF

Many alternative solutions are available for breach of a lease. Parties cannot contract for every type of breach imaginable. Remedies at law have often been favored, but equitable remedies are gaining acceptance in the courts.

A. Remedies at Law

A request for damages is the most common type of relief sought when a lease is breached. Damages are controlled by the principles of contract law.\textsuperscript{163} Compensatory damages for rent owed may be recovered as well as consequential damages. The cause and amount of loss must be shown with reasonable certainty. If damages are conjectural, remote or speculative, they are not recoverable.\textsuperscript{164} "Damages for breach of a contract may include loss of pro-

\textsuperscript{161} Lincoln Tower Corp. v. Ricther's Jewelry Co., Inc., 12 So.2d 452, 453 (Fla. 1943).


\textsuperscript{163} \textit{WEBSTER'S REAL ESTATE LAW}, supra note 5, at § 297.

\textsuperscript{164} Mosley & Mosley Builders, Inc. v. Landin Ltd., 97 N.C. App. 511, 522, 389 S.E.2d 576, 582 (1990) (\textit{Mosley II}). \textit{Accord} Perkins v. Langdon, 237 N.C. 173,
spective profits . . . ." 165 They may also include consequential damages such as diminution of value of the shopping center due to the breach. 166

The Nevada Supreme Court realized the importance of an anchor when it awarded 1 million dollars for diminution in value of the shopping center in Hornwood v. Smith’s Food King No. 1. 167 The court relied on the anchor-tenant theory in awarding damages to the landlord when the tenant, a supermarket, closed. 168 One author described the loss of an anchor tenant as worse than a flood, fire or tornado, because usually there is insurance to cover such disasters. 169 An anchor’s primary functions are to provide certainty of income stream, an identity and stability for the center which, in turn, draws customers, attracts other tenants and increases overall sales. When the anchor vacates, much of this is lost.

A landlord may also be entitled to other damages.

For example, in addition to the devaluation which takes place the moment the anchor leaves, there may be expenses relative to the hardship reaped on the other tenants. Because the gross sales of satellite tenants will decline, it will become difficult for many of them to pay rent. Some will vacate, and others will have to be evicted. This may result in uncollected rents, greater vacancies, eviction expenses, and leasing commissions. 170

The majority rule holds that punitive damages are not recoverable in a breach of a contract. A tort, like fraud, must be proven in addition to a breach of contract for an award of punitive damages. 171 In Oestreicher v. American Nat’l Stores, 172 the “plaintiff charge[d] that by [an] intentional understatement of the gross sales, defendant reduced the rent to which plaintiff was entitled

74 S.E.2d 645 (1953).


168. Id. at 1286.


170. Id. at 64.


Measuring the damages is often difficult. Damages must be foreseeable and ascertainable with a reasonable degree of certainty. 174 There also must be a reasonable basis for computation. "Damages are not rendered uncertain so as to prevent their recovery because they cannot be calculated with exactness. It is enough that the results be only approximate." 175 In Hornwood, 176 testimony was admitted to show the value of the shopping center decreased by 1 million dollars after the anchor tenant left. The court of appeals reversed the trial court's decision that the closing and withdrawal of the anchor tenant was unforeseeable and not compensable.

The rule in Washington Trust Bank v. Circle K Corp., 177 is often cited to measure damages when the tenant breaches a lease. "The measure of damages is the difference between the present worth of the property with the lease less the present worth of the property without the lease." 178 North Carolina follows this rule. 179 The Georgia Court of Appeals followed this rule when it held that "[t]he proper measure of damages is the excess rent reserved under the lease, over the reasonable rental value of the premises at the time of the breach." 180

The Idaho Court of Appeals also upheld this method in determining damages when they found an implied covenant to pay reasonable rent for the full term of the lease. 181

To determine the fair rental value the trial court considered several factors - the value of the property from the perspective of a hypothetical new lessee, the past rental history of the property, the circumstances of the parties on leasing and a fair return on the lessor's investment in the property. 182

173. Id. at 136, 225 S.E.2d at 808.
175. Id.
178. Id. at 1252.
182. Id.
In *Lippman v. Sears Roebuck & Co.*, the court cited the above-stated rule for damages but employed an agreement of the parties from the terms of the lease. The parties made specific provisions for the payment of damages if the tenant ceased to occupy. The tenant did not cease to occupy the premises, it only ceased business operations. The lease also provided for a payment to the landlord upon subleasing: "the average monthly rental paid by the tenant to the landlord during the twelve month period last proceeding such subletting or assignment." The court employed this method to determine rent owed upon discontinuance of business operations.

In *Kauder, Klotz & Vennitt v. Rose's Stores, Inc.*, the landlord requested that damages be determined by imputing sales from a new location to landlord's premises when the tenant opened a new store 1.9 miles away. The lease contained a provision for percentage rent. The landlord claimed that sales were diverted to the new store, diminishing his income. The court denied landlord this measure of damages. Under similar facts, the court denied this type of damage award in *Lowe's of Shelby, Inc.*

Other damages recoverable on breach of a lease include "past due rents, taxes, special damages, repairs and restoration of premises to its former condition . . ." Other remedies at law are an action in abandonment. A landlord often claims that the tenant abandons the leased property when he discontinues business on the premises. A tenant must do something or fail to do something that results in absolute relinquishment of the premises before the landlord can claim abandonment. The landlord can seek an action in ejectment for possession of the premises in cases where the tenant has discontinued business, but continues to pay base rent. In *Ingannamorte v. Kings Super Markets, Inc.*, the landlord sought possession of

183. 280 P.2d 775 (Cal. 1955).
184. Id. at 781.
188. See supra notes 75-76 and accompanying text.
189. Century Shopping Center Fund I v. Crivello, 456 N.W.2d 858 (Wis. 1990), petition for review denied; WEBSTER'S REAL ESTATE LAW, supra note 5, at § 81.
the premises when the tenant discontinued operations of a supermarket but continued to pay monthly rent. The court ordered possession in favor of the landlord unless the tenant resumed supermarket operations at the leased premises within thirty days. 191

In North Carolina, statute controls a summary ejectment. 192 The landlord is the proper person to bring a summary ejectment action. The statute sets forth two situations under which a summary ejectment action can be brought: if the tenant has held over possession of the leased premises after the term has expired, or if any act occurred which caused the estate to cease. The landlord must file a complaint asking to be put into possession of the leased premises. 193 The clerk of court issues a summons for tenant to appear and answer within ten days.

If the tenant denies the allegations, a magistrate hears the case. 194 The decision of the magistrate is appealable to the district court. If the landlord prevails, a writ of possession is executed. 195 The tenant, upon notice of execution, has seven days to remove himself and his property from the leased premises. The sheriff is then authorized to remove the tenant’s property and lock the premises if the tenant does not comply with the writ. 196

B. Equitable Remedies

The use of equitable relief to remedy a breach of a commercial leasehold is often sought, but rarely granted. Injunctive relief such as specific performance, forfeiture and restitution are examples of the actions pursued today.

A party seeking equitable relief must prove to the court that it is necessary. Injunctive relief is an extraordinary remedy. Such relief will not be granted unless the party shows good cause. 197 There must be a threshold finding of irreparable harm. "Injunctive relief is not available unless irreparable injury is proven .... The danger sought to be enjoined must be real and immediate." 198 The party

191. Id. at 842.
196. Id.
seeking equity must have clean hands. Damages must be speculative or difficult to prove. In Lincoln Tower Corp. v. Ricther's Jewelry Co., the court stated: "that it would be impracticable if not impossible, to establish the damage to the lessor, or the lessee, resulting from a breach of the covenant and that the remedy at law would, therefore, not be adequate."

Additionally, the party who is to perform must have the capacity to perform. In Lorch, Inc. v. Bessemer Hall Shopping Center, Inc., the court denied injunctive relief when the tenant could not perform. Also, to receive injunctive relief, there must be no adequate relief at law. In Dover Shopping Center, Inc. v. Cushman's Sons Inc., the court looked at the loss to the landlord of percentage sales, and the difficulty in measuring harm that would come from the withdrawal of the "semi-cooperative enterprise" like a shopping center, stating that "[p]laintiff's damages cannot therefore be accurately ascertained and a remedy by way of damages at law would be impracticable and unsatisfactory."

If day-to-day supervision is required, the court will deny a request for specific performance. The court will also deny mandatory compliance with the order if a protracted or repeated intervention by the court is likely. "Courts are reluctant to grant specific performance in situations where such performance would require judicial supervision over a long period of time." In CBL & Assoc., Inc. v. McCrory Corp., the court asserted that even if they were prepared to assume the responsibility of that length [nine years],


201. 310 So.2d 872 (Ala. 1975).

202. But see Lincoln Tower Corp. v. Ricther's Jewelry Co., Inc., 12 So.2d 452 (Fla. 1943)(the court granted injunctive relief, finding the tenant could perform).


the exact nature of what the court would have to do is unclear. To justify ordering specific performance, the contract must be definite, certain and clear, and so precise in its terms as to the thing or things to be done by the party whose performance is sought . . . ."207

Two state courts of appeal found an implied covenant to continuously operate in the presence of broad assignment and subletting provisions and affirmed trial court orders forfeiting the leasehold and allowing restitution of the premises to the landlord.208 Both of these cases are against the great weight of authority holding that leases are strictly construed against forfeiture.209

Many leases now contain provisions for the payment of attorney’s fees. Generally, these clauses provide that the losing party pays.210 The Maryland Court of Appeals recently pro-rated costs nine-tenths to the losing party and one-tenth to the prevailing party.211 Also, some jurisdictions interpret statutes to allow attorney’s fees and costs to be awarded to the prevailing party.212

The North Carolina rule can be found in Stillwell Enterprises, Inc. v. Interstate Equipment Co.,213 which sets forth the proposition that attorney’s fees cannot be recovered unless specifically authorized by statute. "Even in the face of a carefully drafted contractual provision indemnifying a party for such attorney’s fees as may be necessitated by a successful action on the contract itself, our courts have consistently refused to sustain such award absent statutory authority therefor."214 The Stillwell court found the requisite statutory authority for attorney’s fees under N.C. GEN. STAT.


213. 300 N.C. 286, 266 S.E.2d 812 (1980) (citing Hicks v. Albertson, 284 N.C. 236, 200 S.E.2d 40 (1972)).

214. Id. at 289, 266 S.E.2d at 814.
§ 6-21.2. This statute validates an obligation to pay attorney’s fees upon a note, conditional sale contract or other evidence of indebtedness. The court held that a lease for specific goods (pushloading scraper) was other evidence of indebtedness. 215

Prior to adoption of the statute, North Carolina courts ruled that payment of attorney’s fees incurred in collection and breach of contract cases was against public policy and unenforceable. This rule prevails even though the contract contained an express provision allowing such payment. 216

VIII. UNFAIR AND DECEPTIVE TRADE PRACTICES

Unfair trade practices in North Carolina are governed by statute. 217 Pertinent parts read as follows:

75-1.1 (a) Unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce are unlawful.
(b) For purposes of this section, commerce includes all business activities.

75-16 If any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm, or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict.

Case law provides some direction on what is an unfair and deceptive trade practice. In Marshall v. Miller, 218 the supreme court says that “whether a trade practice is unfair or deceptive depends on the facts of each case and the impact [the acts have] on the market place.” 219 One must not look only at the acts of the parties, but the effect of those acts on the consuming public. “A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous or sub-

215. Id. at 294, 266 S.E.2d at 818.
219. Id. at 548, 276 S.E.2d at 403.
stantially injurious to consumers." 220

Few cases deal specifically with unfair and deceptive acts involving commercial leases. In Love v. Pressley, 221 the court of appeals decided that trespass and conversion of property by a landlord could constitute unfair and deceptive practices. Although Love involved a rental of residential housing, this principal was applied in Mosley & Mosley Builders, Inc. v. Landin Ltd. (Mosley II), 222 which involved a commercial lease. In Mosley II, as in Love, the landlord entered the premises and physically removed tenant's merchandise and property from the rented premises. At the time of the eviction, the tenant was in rightful possession of the premises. 223 Testimony was allowed showing that the landlord negotiated with another tenant while plaintiff was in possession. These actions were sufficient to support plaintiff's claim for unfair and deceptive trade practices.

In Spinks v. Taylor, 224 the landlord's padlocking of leased premises for failure to pay rent was not an unfair and deceptive trade practice. Although this case involved a residential lease, the same principle would most likely apply to a commercial lease.

A tendency to deceive is enough to violate the statute. Proof of actual deception is not required. 225 In Marshall v. Miller, 226 the defendant rented mobile home sites to residents in a development that was to include sports facilities, yard care and paved streets. The plaintiff claimed that the defendant misrepresented to plaintiff the services that were to be supplied. The jury found that the defendant led the plaintiff to believe that the services would be furnished. The trial judge concluded as a matter of law that these acts constituted unfair and deceptive acts or practices. 227

Procedurally, it is the province of the jury to find the facts of the case. The determination of whether the acts are unfair or deceptive is a question of law for the court. 228 In this case, the North Carolina Attorney General filed a motion for reconsideration peti-

221. 34 N.C. App. 503, 239 S.E.2d 574 (1977).
223. Mosley II, at 519, 389 S.E.2d at 580.
226. Id. at 548, 276 S.E.2d at 403.
227. Id. at 551, 276 S.E.2d at 398.
tioning the supreme court to review the court of appeal's holding that proof of bad faith is required to establish a violation of N.C. GEN. STAT. § 75-1.1 [hereinafter, 75-1.1].

The N.C. Supreme Court held that a practice is unfair when it has the capacity to deceive and has an impact on the marketplace. The intent of the actor is irrelevant. "This is consistent with the Federal interpretation under 15 U.S.C. 45(a)(1), Sec. 5 of the FTC act." State courts have generally ruled that if the act had a tendency or capacity to mislead or created a likelihood of deception, it is unfair and deceptive.

Nevertheless, in *Libby Hill Seafood Restaurant, Inc. v. Owen*, the court held that the actions of the victim could be material. *Libby Hill* involved a commercial development, not a lease. The plaintiff, Libby Hill, purchased a piece of property from the defendant. The structure that was built on the property developed cracks, deteriorated and was razed. Libby Hill claimed fraud, negligent misrepresentation, breach of warranty and a violation of 75-1.1. The property was previously owned by the City of Winston-Salem and was used as trash dump for 35 years. The defendant knew about the dump on the property and told plaintiff about it before the plaintiff purchased the property.

No independent studies were performed on the soil. The plaintiff relied on defendant’s statement that the dump was not near the proposed building site. The court found the plaintiff’s evidence insufficient to support a claim for unfair and deceptive trade practices. "A party is guilty of an unfair act or practice when it engages in conduct that amounts to an inequitable assertion of its power or position." The plaintiff was a sophisticated buyer and should have verified the defendant’s assertions. The defendant could not have asserted inequitable power over the plaintiff.

Additionally, the plaintiff in *Libby Hill* claimed fraud. Fraud is a separate action from a violation of unfair and deceptive trade practices. Although a finding of fraud can constitute a violation of the act, the converse is not always true. The same course of conduct can support a claim for fraud and for unfair and deceptive

231. *Id.*
232. *Id.* at 700, 303 S.E. at 569.
trade practices. Recovery can only be had on one claim, not both.\textsuperscript{234} Similarly, proof of conduct violative of the Sherman Act is proof sufficient to establish a violation of the unfair and deceptive trade practices statute.\textsuperscript{235}

Tortious injury to business can also be grounds for unfair and deceptive trade practices. In \textit{Century Shopping Center Fund I v. Crivello},\textsuperscript{236} the court allowed a claim for tortious injury to business under Wisconsin law. The complaint alleged that the tenant negotiated with the landlord of a nearby shopping center for a new store and agreed to keep the Century store dark to avoid competition with the new shopping center. The lease with Century contained a mandatory use clause: specifically for a food store. The plaintiff, \textit{Century}, filed a breach of lease claim when the tenant closed the food store, left it vacant and re-opened nearby. The trial court upheld a claim for breach of lease and tortious injury to business. In Wisconsin, violation thereof is punishable by one year imprisonment or by $500.00 fine.

The United States District Court for the Western District of North Carolina has held that tortious interference with a contract could constitute an unfair method of competition or an unfair act under 75-1.1. In the final disposition of \textit{American Craft Hosiery Corp. v. Damascus Hosiery Mills, Inc.}, there were not enough facts to support such a claim.\textsuperscript{237} There is not a North Carolina decision dealing with a commercial lease under this issue.

Under N.C. \textsc{Gen. Stat.} 75-1.1(b) the unfair or deceptive acts must affect "Commerce." Commerce includes virtually all business activity. In \textit{Kent v. Humphries},\textsuperscript{238} the court held that the rental of commercial property is trade or commerce within the meaning of the statute. Similarly, in \textit{Wilder v. Hodges}, the leasing of a commercial lot satisfies the requirement of "being in or affecting commerce." The rental of spaces in a mobile home park was considered trade and commerce in \textit{Marshall v. Miller}.\textsuperscript{239}

In \textit{Columbia East Assoc. v. Bi-Lo, Inc.},\textsuperscript{240} the court found that

\textsuperscript{234} Wilder v. Hodges, 80 N.C. App 333, 342 S.E.2d 57 (1986).
\textsuperscript{235} N.C. \textsc{Gen. Stat.} § 75-1.1 (1991).
\textsuperscript{236} 456 N.W.2d 858, \textit{petition for review denied} (Wis. 1990).
\textsuperscript{237} \textit{American Craft Hosiery Corp. v. Damascus Hosiery Mills, Inc.}, 575 F. Supp 816, 821 (W.D.N.C. 1983).
\textsuperscript{239} 302 N.C. 539, 276 S.E.2d 397 (1981).
a commercial tenant had violated an implied covenant of continuous operation by closing its supermarket, keeping the premises vacant to avoid competition and moving to a nearby shopping center. The court denied plaintiff's claim for unfair and deceptive trade practices under South Carolina law because the acts of the tenant did not have an impact upon the public interest. "The act is not available to redress a private wrong where the public interest is unaffected." In North Carolina, the court in Marshall v. Miller and American Craft Hosiery Corp. v. Damascus Hosiery Mills, Inc., emphasize that N.C. GEN. STAT. §§ 75-1.1 and 75-16 are intended to create a private remedy for aggrieved consumers. Section 75-16 authorizes recovery of treble damages for violations of § 75-1.1. Recovery is allowed for injury to a business, a corporation or a person, by violations of this act.

Few defenses are available to an allegation of unfair and deceptive trade acts. The controlling case is Winston-Realty Co., Inc. v. G.H.G. Inc. This case held that contributory negligence on the part of the plaintiff is not a defense to a violation of § 75-1.1. Winston-Realty involved acts of an employment agency. The agency advertised that it pre-screened all applicants. The plaintiff, Winston-Realty, used the defendant employment agency, G.H.G., Inc. and hired a person that the agency recommended. The employee was indicted on charges of embezzlement from the plaintiff. The plaintiff learned that the employee had a history of worthless checks, forgery and embezzlement. The plaintiff sued the defendant for violation of § 75-1.1. The court held that the defendant was guilty. The defendant pleaded contributory negligence on the part of the plaintiff, relying on Libby Hill Seafood Restaurant, Inc. v. Owen.

The court distinguished Libby Hill on the grounds that it was not a contributory negligence case and that the language relied on by the defendant is dicta. The court cites N.C. GEN. STAT. § 75-16 as the remedy for violation of § 75-1.1 noting an absence of contributory negligence language. For purposes of a commercial lease though, this case needs to be scrutinized. Libby Hill involved commercial property, not a lease. Winston-Realty addresses actions of an employment agency. Libby Hill was not overruled by the N.C.
Supreme Court, although *Winston-Realty* presented the court with the opportunity.

Similarly, the defendant's good faith is not a defense to a violation of unfair and deceptive trade practices.\(^{243}\) What is relevant is the effect of the actor's conduct on the consuming public. The *Marshall v. Miller* court explained that there is no "bad faith language" in the North Carolina version of the statute, but that sister states have incorporated such language.\(^{244}\)

Under N.C. GEN STAT. § 75-16 the court awards treble damages for a violation of § 75-1.1 automatically.\(^{246}\) Since a plaintiff cannot recover under a claim of fraud and a claim of unfair and deceptive trade practices, the plaintiff must choose between an award for punitive damages or treble damages. The *Marshall* court looks to the purpose of the statute and explains that treble damages makes the statute more enforceable and it increases incentives in reaching settlements.\(^{246}\)

N.C. GEN STAT. § 75-16.1 also provides for reasonable attorney fees upon a specific finding that defendant willfully violated § 75-1.1. Attorney fees may also be awarded if a plaintiff brings a frivolous or malicious action. An award for attorney fees is under the sound discretion of the trial judge.

**X. Conclusion**

The tenant and the landlord must carefully review the options that are available when negotiating and drafting a commercial lease. Specific lease provisions can be tailored to fit the needs of the parties. Otherwise, some covenants or obligations should be expressly negated to prevent the risk of the courts implying a covenant where neither party has contemplated or intended its existence.

\(^{244}\) Id.
\(^{246}\) Marshall, at 549, 276 S.E.2d at 404.
SAMPLE LEASE PROVISIONS

RESTRICTIVE COVENANT

ARTICLE ___. Landlord warrants and represents to Tenant that:

(i) Landlord has not leased any space in the shopping center for use as a drugstore, health and beauty aid store, a beauty supply store or for the operation of a pharmacy;

(ii) Landlord will not hereafter lease any space in the shopping center for use as a drugstore, health and beauty aid store, a beauty supply store or operation of a pharmacy; and

(iii) Landlord will not permit any tenant or occupant in the shopping center to operate a drugstore, health and beauty aid store, a beauty supply store or pharmacy.

The foregoing restrictions shall be applicable for so long as the Premises are operated as a drugstore with a pharmacy. The foregoing restrictions shall not prohibit the sale of health and beauty aid items by the supermarket and the general merchandise retailer as an incidental part of their respective businesses except that in no event shall they sell any product or service requiring the presence of a licensed or registered pharmacist.

Landlord further warrants and represents to Tenant that the shopping center will at all times be used only for retail and service stores and that within 150 feet of the Premises and within the area outlined in green on Exhibit B, no skating rink, bingo parlor, bowling alley, motion picture or legitimate theater, business or professional offices in excess of ten (10) percent of the total floor area of the shopping center, automobile or motorcycle sales, cocktail lounge, schools or training facilities, health, entertainment or recreational type activities or non-retail or non-service type activities shall be permitted.

Tenant shall have the right to enforce the provisions of this Article by termination of this Lease or appropriate injunctive or other equitable relief.

USE AND OPERATION

1. (a) Tenant shall use and occupy the demised premises solely for the purpose of operating a drugstore with a pharmacy.

During the term of this Lease Agreement, and every extension thereof, Tenant shall not directly or indirectly, conduct any business within two (2) miles of the demised premises in competition
with any business being conducted in the demised premises.

(b) Tenant shall operate all of the demised premises with due diligence and efficiency so as to produce all of the gross receipts which may be produced by such manner of operation, unless prevented from doing so by causes beyond Tenant's control. Subject to inability by reason of strikes or labor disputes, and during the time Tenant shall be required to be open for business, Tenant shall carry on its business in said premises in such manner as shall be reasonably designed to produce the maximum return to Tenant.

(c) Tenant shall devote the maximum possible floor area of the demised premises to the conduct of its business, and shall not use any portion of the demised premises for storage or other services, except for its operations in the demised premises.

PERCENTAGE RENTS

2. In addition to the payment of fixed rent herein reserved, Tenant agrees to pay Landlord as percentage rent for each lease year, the amount equal to __________ of annual gross receipts as herein defined in excess of __________.

As used herein, the term "lease year", shall be determined as follows:

(i) The first lease year shall commence on the first day of the calendar month next following the tenancy date and terminate on the last day of the twelfth month thereafter.

(ii) Succeeding lease years shall each consist of the twelve month period, commencing on the first day of the month following the termination of the prior lease year.

The term, "gross receipts", as used herein is defined as gross sales of Tenant from the demised premises, whether such sales be evidenced by cash, check, credit or charge accounts. Gross receipts shall not include the amount of any sales, use, excise, gross receipts or other tax imposed by any federal, state, municipal or other governmental authority.

This Agreement shall not be construed more strongly against any party regardless of who was more responsible for its preparation.

All rights, powers and remedies provided herein may be exercised only to the extent that the exercise thereof does not violate any applicable laws and are intended to be limited to the extent necessary so that they will not render this Agreement invalid or unenforceable. If any term of this Agreement shall be held to be invalid, illegal, or unenforceable, the validity of the other terms of
this Agreement shall in no way be affected thereby.

This Agreement may be executed in any number of counterparts, each of which, when so executed and delivered, shall be an original, but each counterpart shall together constitute one and the same instrument.

ABANDONMENT

ARTICLE _. In the event that Tenant voluntarily and permanently (i.e. removal of furniture, fixtures and merchandise) closes the Premises for a period in excess of sixty (60) days (except for reasons of casualty, rebuilding, repairing, refixturing), Landlord shall have the right to terminate this Lease at any time prior to the re-opening of the Premises by giving written notice to Tenant. Temporary cessation of operations to make alterations or circumstances beyond the control of tenant, and in any event cessation for a period of less than sixty (60) consecutive days, shall not be considered a discontinuance of operations.

In the event Tenant shall vacate the demised premises or cease selling merchandise therein for a period in excess of six (6) months (except for remodeling or repairs) during any lease year of the term of this lease agreement or any options herein, while the demised premises are usable for the operation of a general mercantile business (excluding temporary cessation of business caused by fire or other casualty) Landlord shall have a ninety (90) day option to cancel this lease beginning the following day after the expiration of the six (6) months closing period and expiring ninety (90) days thereafter (unless Tenant shall have reoccupied the premises or subleased the premises as provided herein). Notwithstanding the foregoing, in the event Landlord exercises its right to terminate and cancel the lease, then it shall pay to Tenant, in consideration for such termination and cancellation, the total amount of the fixed rent reserved for the balance of the then unexpired term of the lease reduced to present worth, using as a criteria a discount rate of ten percent (10%) per annum. For example, if, at the time Landlord exercises its right to cancel and terminate this lease and there are twenty (20) months remaining and the rental per month is $15,000.00, then the amount to be paid by Landlord to Tenant shall be $300,000.00, discounted to present worth at the rate of ten percent (10%) per annum for the twenty (20) month period.
OPTION TO EXTEND

ARTICLE ___. Tenant is hereby given the right to extend the term of this Lease for three (3) additional periods of five (5) years each, upon the same terms, conditions and rent as provided in the original term of this Lease, upon the condition that Tenant notifies Landlord in writing of its intention to extend at least one hundred eighty (180) days prior to the date of commencement of each such extension term and thereupon, this Lease shall be so extended without the execution of any further document. In the event that Tenant fails to timely notify Landlord of its exercise of any extension option, such option(s) to extend shall nevertheless remain in full force and effect for a period of thirty (30) days after receipt of notice from Landlord advising of the date upon which the term of the Lease will expire or stating that a notice exercising an option to extend has not been received.

DRUG STORE LEASE

Percentage Rent.

(a) Tenant shall pay as percentage rent (the "Percentage Rent") a sum equal to the amount, if any, by which two and three fourths percent (2 3/4%) of all gross sales, as hereinafter defined, made in any Lease Year, as hereinafter defined, exceeds Annual Minimum Rent payable during such Lease Year pursuant to Section ___.

(b) The term "gross sales" shall mean the gross sales of merchandise, at retail or at wholesale, made by Tenant on, at or from the Demised Premises, whether sold for cash or on a charge basis, collected or uncollected, sold or contracted to be sold, at, from or through the Demised Premises, including any commissions, charges or fees received by Tenant for services performed within the Demised Premises, and receipts from the operation of coin-operated machines and telephones (this being intended not to be the actual deposits in the telephones and coin-operated machines, but the percentage thereof actually received by Tenant); provided, however, the term "gross sales", as herein used, shall exclude:

(i) receipts from sales to Tenant's employees at a discount;
(ii) credits or refunds to customers for merchandise returned or exchanged;
(iii) receipts from sales in the nature of a transfer to other stores operated by Tenant or its affiliated companies;
(iv) sales from Tenant's tobacco, wine and beer departments;
(v) any sales, excise or similar tax imposed by governmental authority;
(vi) bulk sales; and
(vii) sales of fixtures and equipment.

(c) Tenant covenants and agrees that it will furnish Landlord with a statement showing its gross sales for each Lease Year within thirty (30) days after the close thereof, and the Percentage Rent due for such Lease Year shall be paid with such annual statement. Landlord shall not, without Tenant's prior written consent, disclose any such sales information to third parties at any time.

(d) Tenant further agrees that it will keep separate and accurate records of all gross sales made in, at, upon and from the Demised Premises, in accordance with generally accepted accounting principles; and that it will give Landlord the right, upon three (3) days' written notice and at any and all reasonable hours, to inspect such records and any other books or records which may be necessary to enable Landlord, or a representative of Landlord, to make a full and proper audit of the gross sales for the preceding Lease Year. If Landlord does not make such an audit within one (1) year from the close of any Lease Year, the statement of annual gross sales furnished for any such Lease Year shall be deemed to be correct, and Landlord shall have no right thereafter to contest the same.

(e) The term "Lease Year" is hereby defined as follows: The first Lease Year during the Term shall be the period commencing on the Rent Commencement Date and terminating on:

(i) the day before the first anniversary of the Rent Commencement Date if the Rent Commencement Date is the first day of a month, or
(ii) the last day of the 12th full calendar month following the Rent Commencement Date if the Rent Commencement Date is not the first day of a month.

Each subsequent Lease Year during the Term shall commence on the day immediately following the last day of the preceding Lease Year and shall continue for a period of twelve (12) full calendar months, except that the last Lease Year during the Term shall terminate on the date that this Lease is terminated.

(f) Tenant makes no representation or warranty as to its expected sales in the Demised Premises.

PERCENTAGE RENTAL CLAUSE - SUPERMARKET

In addition to payment of fixed rent herein reserved, Tenant
agrees to pay Landlord as percentage rent for each lease year, the amount, if any, by which one percent (1%) of annual gross receipts as herein defined exceeds the fixed rent. As used herein, the term, "lease year", shall be determined as follows:

(i) The first lease year shall commence on the first day of the calendar month next following the commencement and expire on the last day of the twelfth month thereafter.

(ii) Each subsequent lease year shall commence on the date following the expiration of the preceding lease year and shall end at the expiration of twelve (12) calendar months thereafter or upon this lease, as the case may be.

The term, "gross receipts", as used herein is defined as gross sales in or from the leased premises, whether such sales are evidenced by check, credit or charge account and including telephone sales and orders received in or from the premises, although such orders may be filled elsewhere, all of which shall be net of charge account fee, exchange or otherwise. Gross receipts shall not include transfers to affiliated stores or companies, sales of merchandise for which cash has been refunded, allowances on merchandise claimed to be defective or unsatisfactory, bad debts, service charges on bad checks, revenues generated from video games, vending machines, shampoo machines, or in-store automatic teller machines. Gross receipts shall not include the amount of any sales, use or gross receipt tax imposed by a federal, state, municipal or other governmental authority, further, gross receipts shall not include the sale of tobacco products. Landlord and Tenant agree that Tenant shall be entitled to estimate the sale of tobacco products based on product movement, inasmuch as tobacco products cannot be rung up as a separate department sale.

Within ninety (90) days after the end of each calendar year or termination or expiration of this lease, Tenant shall deliver to Landlord a statement of gross receipts for the preceding calendar year and pay to Landlord the full amount of percentage rent payable to Landlord for the period of such statement. Tenant shall keep at the demised premises or at its general office complete and accurate books of account and records in accordance with accepted accounting practices with respect to all business conducted in the demised premises excluding books and records pertaining to items not included in gross sales. Upon reasonable prior written notice to Tenant, Landlord may, at its own cost, have Tenant’s books and records for the previous year inspected or audited by a certified
COMMERCIAL LEASES

public accountant of Landlord’s selection at reasonable times during Tenant’s business hours for the purpose of verifying Tenant’s gross receipts only for the previous year. If an examination or audit by Landlord shall disclose any deficiency of more than three percent (3%) in the annual statement of gross receipt, then Tenant shall pay Landlord the reasonable cost of examination or audit. Tenant makes no representations or warranties as to the sales which it expects to make in the leased premises, and Landlord agrees to hold in confidence all sales information obtained from Tenant or upon the inspections and audit of Tenant’s books and records, except that Landlord may disclose Tenant’s sales figures to Landlord’s mortgages as reasonably required.

EXCLUSIVE SUPERMARKET

During the term of this lease or any renewals thereof, neither Landlord, its successors, assigns, representatives, nor heirs, will lease, rent or occupy, or permit to be occupied, any premises owned or controlled by Landlord which are within one (1) mile of herein leased premises, to be used for a supermarket, convenience food store, or

1) the sale of packaged or fresh seafood, meat, or poultry for off-premises consumption;
2) the sale of packaged or fresh produce or vegetables for off-premises consumption;
3) the sale of dairy products (excluding cone ice cream) for off-premises consumption;
4) the sale of packaged or fresh bakery products for off-premises consumption; or
5) the sale of grocery items, or any of them, unless such premises are presently so occupied.

Neither shall Landlord sell or otherwise convey any such premises without imposing thereon a restriction to secure compliance herewith. This covenant shall run with the land. Landlord acknowledges that in the event of breach hereof Tenant’s remedies at law would be inadequate and in such event Tenant shall be entitled to cancel this lease, or to full and adequate relief by injunction, or otherwise, at Tenant’s option. The parties hereto agree that Tenant is entitled to know what it is “buying” when it is negotiating this lease agreement, that specifically it is material as to how many supermarkets will be in this shopping center or any extensions thereof. Rental and other considerations are negotiated based upon Landlord’s representations to Tenant that there will
be only one supermarket in this shopping center or extensions thereof.

**ATTORNEY’S FEES**

*ARTICLE —.* If suit shall be brought for recovery of possession of the premises, rent or any other amount due under the provisions of this Lease, or due to a breach of any covenant herein contained on the part of Tenant or Landlord to be kept or performed, and a breach shall be established, the prevailing party shall be entitled to its reasonable and necessary expense incurred therefor, including reasonable attorney’s fees and court costs.

**HAZARDOUS SUBSTANCES**

*ARTICLE —.* Landlord recognizes that in the usual course of a drugstore operation, Tenant may use, store and sell in the Premises hazardous and toxic substances as the same are defined by applicable local, state and federal laws and regulations. Tenant shall indemnify and hold harmless Landlord from any and all claims, damages, fines, judgments, penalties, cost, liabilities or losses arising as a result of any such use, sale, storage, disposal or contamination by such substances to the Premises caused by Tenant, its agents and employees. This clause shall survive the expiration or termination of this Lease.