SUMMARY MEMORANDUM

TO: T. Farrell Bacon, Esquire

FROM: National Legal Research Group, Inc.
Keith A. Braswell, Senior Attorney

RE: Mississippi/Property/Landlord And Tenant/Validity Of Restrictive Covenant

FILE: 44-27820-229 January 22, 1999

YOUR FILE: Anticompetition Covenant

STATEMENT OF FACTS

Counsel represents the Lessor, which entered into a long-term lease agreement (hereinafter the "Lease") with S&H. Paragraph 30 of the Lease is an anticompetition covenant. Paragraph 30 provides as follows:

> LESSOR, for itself, LESSOR'S principal owners, its directors or its officers and stockholders, successors, assigns and vendees, covenants (and as a condition thereto) not to let, use, or permit or suffer to be used, any building, owned by Lessor or in which LESSOR has any interest, now or hereafter erected [within the boundaries of the said Center as delineated in said Plat, future enlargement or extension thereof, or] within one thousand five hundred (1,500) feet of the Center (Schedule "B") for:
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> (a) So-called supermarket or self-service grocery store
>
> (b) Grocery store or department
>
> (c) Meat market or department
>
> (d) Produce market or department
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> . . . .
>
> (g) Delicatessen or department
>
> It is understood that this provision shall not apply to those Lessees presently in said shopping center which may engage in any lawful business granted under their respective leases but it is further understood and agreed that the existing leases were made subject to the restrictive covenant contained in that certain lease dated . . . by and between . . . as Lessor and . . . as Lessee.

The premises leased by S&H was occupied and used as a grocery store until recently when S&H decided to vacate. S&H could continue to pay rent and keep the building vacant. Similarly, S&H could sublet to a nongrocery store.

What concerns the Lessor is the fact that S&H might continue to insist upon its right to enforce the anticompetition covenant despite the fact that the premises is either vacant or

being used by a subtenant who will not operate a supermarket or grocery store in the demised premises. In order for the shopping center to thrive, the Landlord believes that at least one grocery store must be allowed to operate at the shopping center.

DISCUSSION OF AUTHORITY

I. Enforceability Of Anticompetition Covenants And Antitrust Implications

A. General Overview

The overall situation faced by the Landlord in the instant case is well summarized by Emanuel Halper in his treatise on shopping center leases. Halper writes:

> Shopping center landlords who discover that a tenant has stopped doing business are profoundly disappointed. A vacant store of any kind, whether rented or not, has a depressing effect upon a shopping center. Shopping center merchants depend upon each other's presence to draw customers to the shopping center. When one of them stops doing business, the draw is reduced. When the anchor tenant, such as a department store or a supermarket, stops conducting business, the aroma of death may permeate the atmosphere.

1 Emmanuel B. Halper, *Shopping Center and Store Leases* § 9.02 at 9-78 (1996).

There is no question that, in general, restrictive covenants are not favored by the courts. 3 Milton R. Friedman, *Friedman on Leases* § 28.1 (1996). Moreover, it has been said that, as a black-letter rule of law, all doubt should be resolved in favor of the free use of property and against covenants which restrict the free use of land. *Id.*

The general rule with regard to commercial lease anticompetition covenants has been stated as follows:

> Although the courts will not tolerate unreasonable restraints upon trade, and frown upon restrictions upon the free use of land, *there is no doubt of the validity, under ordinary circumstances*, of a restriction imposed by a lessor,

> ancillary to a leasing of part of his property, upon the remainder of the property owned or controlled, or subsequently acquired, by him, and designed to prevent, during the term of the covenantee's lease, a use of such property in a manner competitive with the lessee-covenantee's business, or a part thereof.

Annotation, *Lease—Covenant Against Competition*, 97 A.L.R.2d 4, § 3 at 11 (1964) (footnotes omitted; emphasis added).

Nationally, there is ample authority for the rule that the courts *will enforce* anticompetition covenants contained in leases where the restraint imposed by the covenant is reasonable and where there is actual or constructive notice of the restrictive covenant. *Hibbett Sporting Goods, Inc. v. Biernbaum*, 391 So. 2d 1027 (Ala. 1980); *Gatea v. G.M.S. Development Corp.*, 398 So. 2d 1296 (La. Ct. App. 1981); *Patuxent Development Co. v. Ades of Lexington, Inc.*, 257 Md. 298, 263 A.2d 584 (1970); *Reeve v. Hank*, 37 Del. Ch. 25, 136 A.2d 196 (1957); *St. Louis Union Trust Co. v. Tipton Electric Co.*, 636 S.W.2d 357 (Mo. Ct. App. 1982); *Alexander's Department Store v. Arnold Constable Corp.*, 105 N.J. Super. 14, 250 A.2d 792 (Ch. Div. 1969); *Dennis & Jimmy's Food Corp. v. Milton Co.*, 99 A.D.2d 477, 470 N.Y.S.2d 412 (1984); *Gillen-Crow Pharmacies, Inc. v. Mandzak*, 5 Ohio St. 2d 201, 215 N.E.2d 377 (1966). *See generally* Annotation, *supra*, 97 A.L.R.2d 4 (and cases cited therein); 3 Friedman, *supra*, § 28.1 at 1413-14; 1 Halper, *supra*, §§ 9.01 et seq. (use restrictions are commonplace and typical and will be enforced).

Mississippi, like other jurisdictions, will enforce anticompetition covenants contained in shopping center leases. For example, in *Parker v. Lewis Grocery Co.*, 246 Miss. 873, 153 So. 2d 261 (1963), the court addressed a situation where the landlord agreed not to lease, to any other person in the shopping center, space for use as a supermarket. The court found

that the provision was reasonable, valid, and not antagonistic to public policy. Accordingly, it would be enforced.

Based upon the foregoing authorities, it can be generally stated that covenants to refrain from competition, or to refrain from leasing to a competitor, if reasonable in territory, time, and person, will be enforced by the courts.

B. Antitrust Implications Of Anticompetition Covenants Contained In Shopping Center Leases.

It has been said on many occasions that restrictive commercial covenants, being restraints on trade, are disfavored by the courts and will be strictly construed. 3 George W. Thompson, *Commentaries on the Modern Law of Real Property* § 1146 (1980). However, if they are deemed reasonable, particularly with regard to time and space limitations, they will be enforced. Annotation, *Covenant as to Competition—Area*, 46 A.L.R.2d 119, § 5 (1956). Whether or not a given restraint of trade is unreasonable, and therefore unenforceable, depends largely on the particular facts and circumstances of each case. In ascertaining whether a given restraint on trade is unreasonable, the court must be guided by what has been termed the "rule of reason." *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). As interpreted by the Supreme Court of Ohio, the "rule of reason" is stated as follows:

> "Contracts in restraint of trade are not illegal except when unreasonable in character. When such contracts are incident and ancillary to some lawful business and are not unreasonable in their scope and operation they are not illegal."

C.K. & J.K., Inc. v. Fairview Shopping Center, 63 Ohio St. 2d 201, 407 N.E.2d 507, 509 (1980) (quoting *List v. Burley Tobacco Growers Co-op Association*, 114 Ohio St. 361, 151 N.E. 471 syl. pt. 4 (1926)).

There is absolutely no question whatsoever that the anticompetition covenant contained in the Lease at issue undoubtedly constitutes a restraint of trade. As stated by Emanuel B. Halper, an expert on restrictive commercial covenants:

> Almost every use clause in a shopping center lease is a contract in restraint of trade because, in the use clause, the landlord usually restricts the type of merchandise the tenant may sell and the services the tenant may render from the demised premises. Similarly, exclusive clauses and restrictive covenants in shopping center leases are restraints of trade. In these clauses, tenants may prohibit the landlord from leasing to some competing merchants, insist upon the right to approve other tenants, or obligate the landlord to limit the type of merchandise other tenants may sell and the types of services other tenants may render.

1. Halper, *supra*, § 9.07[2] at 9-123. However, Halper is quick to also point out that "[t]he fact that such clauses are 'restraints of trade' in the generic sense does not necessarily make then illegal under the antitrust laws." *Id.*; *see Standard Oil Co. v. United States*. Thus, the real question in the present case is not whether the restrictive covenant contained in the Lease amounts to a restraint of trade, but rather whether it constitutes an unreasonable restraint of trade.

The modern trend of authority in cases which only involve a partial restraint of trade, such as the one here, is that such restrictions are lawful and enforceable. Annotation, *supra*, 97 A.L.R.2d § 3. In fact, today, it is only in a small number of cases where the issue of restraint of trade arises. Most courts which have addressed the issue presented here have found that restrictive covenants contained in shopping center leases are reasonable restraints

of trade and do not violate federal or state antitrust or unlawful-restraint-of-trade statutes. *Goldberg v. Tri-States Theatre Corp.*, 126 F.2d 26 (8th Cir. 1942); *Marin County Board of Realtors v. Palsson*, 16 Cal. 3d 920, 130 Cal. Rptr. 1 (1976); *Pensacola Association v. Biggs Sporting Goods*, 353 So. 2d 944 (Fla. Dist. Ct. App. 1978); *Mendell v. Golden-Farley of Hopkinsville, Inc.*, 573 S.W.2d 346 (Ky. Ct. App. 1978); *Grempler v. Multiple Listings Bureau of Hartford County, Inc.*, 258 Md. 419, 266 A.2d 1 (1970); *C.K. & J.K., Inc. v. Fairview Shopping Center*; *Karam v. H.E. Butt Grocery Co.*, 527 S.W.2d 481 (Tex. Civ. App. 1975). Each of these cases suggests that restrictive covenants contained in shopping center store leases are more apt to be held reasonable than if contained in other types of leases. The following cases appear relevant in this regard.

In *Parker v. Lewis Grocery Co.*, an action was brought by a shopping center tenant against the landlord and others in order to enjoin the violation of a restrictive covenant prohibiting other shopping center tenants from operating a grocery store. The defendants argued that the covenant was unenforceable since it was an unreasonable restraint of trade. Recognizing the uniqueness of shopping centers, the Mississippi Supreme Court stated:

> Shopping centers are of comparatively late vintage. Tremendous outlays of venture capital and risk are required and entailed from the supermarket tenant as well as the developer-landlord. Restrictive covenants in the nature of ancillary and reasonable restraints are absolutely required to induce investors to place a new venture in such untried area. Hence, restrictive covenants, by modern authority, are deemed not antagonistic to the public interest, but, on the contrary, consistent therewith.

153 So. 2d at 272. Accordingly, the court found that the injunctive relief requested by the plaintiff was justified.

In *C.K. & J.K., Inc. v. Fairview Shopping Center*, a shopping center tenant sued the landlord and another tenant for allegedly entering into an agreement which amounted to an illegal restraint of trade. Specifically, the agreement in question involved a restrictive covenant whereby the defendant landlord granted the defendant tenant the exclusive right to sell wine and hard liquor on the shopping premises. The plaintiff based his case primarily upon an Ohio statute which made it illegal to enter into agreements which unreasonably acted to restrain trade. After citing numerous cases in which restrictive covenants contained in shopping center leases were upheld as to their validity, the Ohio Supreme Court stated:

> We join these courts in finding that, ordinarily, a provision in a shopping center lease granting a lessee the exclusive right to carry on a certain line of business in the shopping center does not constitute an illegal restraint of trade under R.C. Chapter 1331, so long as the scope and effect of the restriction is not unreasonably broad. We do so out of recognition of the fact that lease restrictions are often necessary in order for a shopping center to obtain a desirable tenant.
>
> The restriction in the case at bar is not unreasonably broad in scope or effect. The restriction does not affect the entire community, only the shopping center (a restaurant with a full liquor permit operates across the street). In addition appellant is permitted to sell beer. As a consequence, appellees have not violated R.C. Chapter 1331.
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> We have already held that the restrictions in leases before us are reasonable in scope and effect and are necessary in order to obtain desirable tenants. These restrictions are not void as contrary to public policy.

407 N.E.2d at 510. Based upon the foregoing, the Ohio Supreme Court upheld the validity of the restriction.

Similarly, in *Savon Gas Stations v. Shell Oil Co.*, 309 F.2d 306 (4th Cir. 1962), an action was brought under the Sherman Antitrust Act in order to challenge a restrictive covenant contained in a shopping center lease. There, the court upheld the validity of a

covenant which gave the defendant the exclusive right to operate a service station on the shopping center premises. The court found that the restriction in question could not be characterized as imposing an "unreasonable or undue restraint upon . . . commerce" because legitimate needs of a shopping center often require that such restrictions be utilized. *Id.* at 309.

Another leading case as to the antitrust implications of anticompetition covenants appears to be *Schnitzer v. Southwest Shoe Corp.*, 364 S.W.2d 373 (Tex. 1963). There, an action was brought by a shopping center tenant, Southwest Shoe Corporation (hereinafter "Southwest Shoe"), against the landlords for damages resulting from an alleged breach of a lease provision giving Southwest Shoe the exclusive right to sell shoes in the shopping center. Southwest Shoe also requested a temporary injunction, during the pendency of the suit, to prevent a forfeiture of the lease for nonpayment of rent. The landlords appealed from an order of the trial court granting a temporary injunction in favor of Southwest Shoe.

The facts revealed that there were two landlords, Schnitzer and Alpard, who separately owned adjoining buildings located on Garland Road in Dallas, Texas. Schnitzer and Alpard agreed to operate the properties as an integral unit and were interested in developing them as a shopping center. With this purpose in mind, Schnitzer negotiated a five-year lease of his premises to Southwest Shoe. The lease contained a provision which gave Southwest Shoe an exclusive right to sell shoes in the building located on the premises *and in buildings of other owners* who joined Schnitzer in ratifying the exclusive occupancy provision. Alpard ratified the exclusive occupancy restriction by signing the lease. Subsequently, however, Alpard leased *his adjoining premises* to a lessee who had no notice

of the restriction. Later, Alpard's lessee leased to a subtenant *who sold shoes* as part of its business. Thereafter, Southwest Shoe refused to make further rental payments and filed suit for damages and injunctive relief.

According to the court, the principal question was whether, as a matter of law, the lease violated the antitrust laws of Texas. The Texas Supreme Court began by stating:

> Texas statutes expressly prohibit trusts, monopolies and conspiracies in restraint of trade. Art. 7426, as applicable here, defines a "trust" as "a combination of capital, skill or acts by two or more persons * * * for * * * any or all the following purposes:
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> "1. * * * to create or carry out restrictions in the free pursuit of business authorized or permitted by laws of this State.
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> * * * * * * * * *
>
> "3. To prevent or lessen competition in the * * * sale or purchase of merchandise, produce or commodities * * *."
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> Art. 7429 prohibits all trusts, monopolies and conspiracies as defined in Art. 7426 and other statutes and declares them to be illegal. Art. 7437 provides that any contract or agreement in violation of the pertinent statutes is "absolutely void and not enforceable either in law or equity."

Id. at 374.

According to the Texas Supreme Court, the clear purpose of the contract between Schnitzer, Alpard, and Southwest Shoe was to create and carry out restrictions regarding the free pursuit of the business of selling shoes on the property owned by Schnitzer and Alpard and, to that extent, to prevent or lessen competition with Southwest Shoe in the sale of shoes. The court said: "Unless the contract of the parties comes within some recognized exception to the statutory prohibition, it is in violation of the statute as a matter of law." *Id.*

Importantly, the court stated as follows:

> The rigidity of our antitrust, monopoly and restraint of trade statutes has undoubtedly been softened in certain exceptional situations. See State v. Gulf Refining Co., Tex.Civ.App., 279 S.W. 526, 530, writ refused, and cases there cited. One of the exceptional situations is that in which an owner, lessor or one in control of premises agrees with another person that the other person shall have an exclusive right or privilege in or on the premises or that the other person will sell on the premises only the products or merchandise of the owner or lessor. Fort Worth & D. C. Ry. Co. v. State, 99 Tex. 34, 87 S.W. 336, 70 L.R.A. 950; Celli & Del Papa v. Galveston Brewing Co., Tex.Com.App., 227 S.W. 941; Edwards v. Old Settlers' Ass'n., Tex.Civ.App., 166 S.W. 423, writ refused; Redland Fruit Co. v. Sargent, 51 Tex.Civ.App. 619, 113 S.W. 330, no writ history; Cox v. Humble Oil & Refining Co., Tex.Com.App., 16 S.W.2d 285. For discussions of cases of this type, see 3 T.L.R. 349-362; 6A Corbin on Contracts 62, § 1389; 90 A.L.R. 1449. Contracts or agreements of this character are upheld when they are collateral or incidental to a lawful lease or grant of premises in which the lessor or grantor has a property interest.

Id. at 374-75.

Southwest Shoe took the position that the validity of the agreement before the court was governed by the decisions set forth above. It argued that, "inasmuch as Alpard was interested with Schnitzer in the joint development of a shopping center, it is only a reasonable relaxation of the antitrust statutes to hold the agreement valid." *Id.* at 375. The Texas Supreme Court disagreed and found that "[n]one of the cases on which Southwest relies has gone so far." *Id.* The court went on to state:

> If the agreement before us related only to the premises owned and leased by Schnitzer the exclusive right given Southwest would be valid as collateral and incidental to the lease of Schnitzer's premises. *But if two landowners may validly enter into this type of agreement with a lessee of premises of one only, so could a dozen or all in a given area*. We are unwilling thus to extend this exception to the antitrust laws.

Id. (emphasis added). Accordingly, the court concluded that Southwest Shoe was not entitled to the relief it sought.

Importantly, in *Schnitzer*, the Texas Supreme Court recognized that anticompetition covenants contained in leases do not, typically, run afoul of the Texas antitrust statutes. Indeed, the court cited a number of cases which expressly support the proposition that anticompetition covenants contained in leases constitute an exception to the antitrust statutes. In *Schnitzer*, the problem lay in the fact that the anticompetition covenant in question purported to be binding not only as between the tenant (Southwest Shoe) and the landlord (Schnitzer), but also as to an adjoining landowner (Alpard).

Finally, in *Genovese Drug Stores, Inc. v. Bercrose Associates*, 563 F. Supp. 1299 (D. Conn. 1983), a drug store which leased property in a shopping center brought an action against the owners of the shopping center and the operator of a drive-in film processing business. The action was for injunctive relief and the enforcement of a restrictive covenant prohibiting the owners of the shopping center from leasing any portion of the premises to a drive-in operation whose principal business was the processing of photographic film for development. The restrictive covenant contained in the plaintiff's lease specifically included a restriction against, but not limited to, drive-ins known as Foto-Mat. The covenant did not restrict anyone, including Foto-Mat, from opening and operating an in-line store within the shopping center for selling and processing film. In June of 1982, the landlord and Foto-Mat executed a lease which allowed Foto-Mat to open a drive-in kiosk for the purpose of selling and processing film. Injunctive relief was immediately sought by the plaintiff.

Both the landlord and Foto-Mat argued that the restrictive covenant in question was an impermissible restraint of trade. The court, however, found as follows:

> The plaintiff, Genovese, bargained for and obtained the restrictive covenant pertaining to drive-in photo kiosks from its lessor, Bercrose, and the fee owner of the remainder of the Shopping Center, Copaco. A court of equity will enjoin a violation of a restrictive covenant where the restraint imposed by the covenant is reasonable and where there is actual or constructive notice of the restrictive covenant. *See Hartford Electric Light Co.*, *supra*; *Moore v. Serafin*, 163 Conn. 1, 301 A.2d 238 (1972); *Lampson Lumber Co. v. Caporale*, 140 Conn. 679, 685, 102 A.2d 875 (1954); *Dick v. Sears Roebuck & Co.*, 115 Conn. 122, 160 A. 432 (1932).
>
> The well-established rule under the common law is that an anti-competitive covenant ancillary to a lawful contract is enforceable if the restraint upon the trade is reasonable. *Elida, Inc. v. Harmor Realty Corp.*, 177 Conn. 218, 225, 413 A.2d 1226 (1979). The restraint must be limited in its operation with respect to time and place and afford no more than a fair and just protection to the interests of the party in whose favor it is to operate, without unduly interfering with the public interest. *Id.* at 226, 413 A.2d 1226. A prohibition against the conduct of a rival business contained in a deed has been held not to violate public policy where the restriction is limited to a particular piece of land, for a reasonable purpose and for a reasonable length of time. *Dick v. Sears Roebuck & Co.*, 115 Conn. 122, 160 A. 432 (1932).
>
> The Court finds that the restrictive covenant contained in the Bercrose-Genovese Lease was reasonably limited in time and scope because it affected only the property within the Shopping Center, and its duration was limited to the term of the lease. The evidence established that the restrictive covenant provided fair protection for Genovese's legitimate business interests in that the restriction was designed to enhance pedestrian traffic and thus encourage consumer trade and prevent transient, drive-through vehicular traffic. Although restrictive covenants in shopping center leases may be less common today than they were in the past, they are rarely held invalid on the grounds of unreasonableness. *See generally* Annotation: Lease—Covenant Against Competition. 97 A.L.R.2d 4 (1964).

Id. at 1304-05. After concluding that the restrictive covenant did not constitute an impermissible restraint on trade, the court granted an injunction.[1]

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[1]On appeal, *Genovese Drug Stores, Inc. v. Connecticut Packing Co.*, 732 F.2d 286 (2d Cir. 1984), the Second Circuit Court of Appeals reversed the lower court as to the granting of injunctive relief against Foto-Mat on the grounds that Foto-Mat had no notice of the restrictive covenant contained in Genovese's lease. However, the basic principle regarding restrictive covenants as enunciated in the district court opinion remains sound. The Second

The foregoing cases reveal that, *in the typical* case, relief from an anticompetition covenant will not be granted on the basis of antitrust violations. It should be noted at this juncture that shopping center anticompetition covenants have sometimes been the subject of antitrust claims. Occasionally, the FTC has acted to regulate what it regards as unfair competitive practices. In this regard, I have enclosed photocopies of sections from two treatises where the antitrust aspects of anticompetition covenants are discussed.

Normally, however, before a valid antitrust claim can be made, truly egregious conduct must be shown. For example, there is an FTC decision (referred to in the Friedman treatise) where an antitrust violation was found to have occurred. However, the anticompetition covenant in question gave a certain store the right to actually veto tenants from coming into the shopping center. *See Pay Less Drug Stores Northwest, Inc. v. City Prods. Co.*, 1975-2 Trade Cas. (CCH) ¶ 60,385 (D. Or. 1975). That fact, together with other circumstances, convinced the FTC that the anticompetition covenant ran afoul of antitrust laws. Other cases where antitrust claims have been heard have involved practices such as price fixing. One relatively rare case, where a court found an anticompetition covenant to be in violation of antitrust laws, is *Kroger Co. v. Weingarten, Inc.*, 380 S.W.2d 145 (Tex. Civ. App. 1964). A copy of that case has been enclosed for your review.

Overall, the research thus far has revealed no solid basis for successfully arguing that the anticompetition clause in the Lease at issue here constitutes a violation of antitrust laws

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Circuit, after vacating the injunction against Foto-Mat, remanded the case for further proceedings as to the issue of damages for which the landlord might still be liable to Genovese as the result of its breach of the restrictive covenant.

or an impermissible restraint of trade. It may well be possible, however, to put together a plausible argument that the anticompetition clause does (at least given the facts and circumstances which the Lessor anticipates might occur) run afoul of the antitrust laws. While antitrust arguments have not been particularly successful in defeating anticompetition covenants, this does not mean that such an argument is guaranteed to fail in any given case. Nevertheless, it is important to recognize that there is a distinct difference between putting together a plausible argument that the anticompetition covenant here runs afoul of the antitrust laws and actually succeeding on the merits.

By way of summary, anticompetition covenants contained in leases are rarely held invalid on grounds of unreasonableness. Although restrictive covenants contained in shopping center leases are sometimes invalidated by the courts, such cases are the exception rather than the rule and usually involve price fixing or some form of boycotting. *See* Note, *The Antitrust Implication of Restrictive Covenants in Shopping Center Leases*, 86 Harv. L. Rev. 1202 (1973); Emmanuel B. Halper, *The Antitrust Laws Visit Shopping Center "Use Restrictions*," 4 Real Est. L.J. 3 (1975). Here, such is not the case. The conclusion is that it may be difficult (although not impossible) to convince a court that the anticompetition covenant contained in the Lease at issue here violates the antitrust laws.

If you decide that you wish NLRG to prepare a strong advocacy antitrust argument in an attempt to vacate or void the restrictive covenant at issue, let me know. Paul Ferrer, one of our experts in the intricacies of antitrust law, can assist you in this regard.

II. S&H Cases

Two S&H cases were found worthy of review. In *Berkeley Development Co. v. Great Atlantic & Pacific Tea Co.*, 214 N.J. Super. 227, 518 A.2d 790 (Law Div. 1986), a shopping center owner brought an action for a declaration that an anticompetition covenant contained in a lease did not prevent the owner from leasing a store to a new supermarket. S&H had been the original tenant. In the lease was a covenant whereby the landlord pledged not to lease to another supermarket. S&H eventually moved out, and the lease was then assigned to another store which was in the drugstore business. The drugstore objected to the landlord's attempt to rent space in the shopping center to a new supermarket. The court found that the issue was whether the covenant was still valid and whether S&H, the original tenant, could enforce the covenant. (S&H refused to take a position in this regard.)

The decision (a copy of which is enclosed for your review) is very interesting. Moreover, it contains language and rationale which would be somewhat useful in the instant case with regard to making an argument that, once no supermarket business is being conducted in the demised premises, the anticompetition covenant can no longer be enforced. For example, the court noted at one point:

> It is reasonable to assume that when Berkeley and S&H entered the lease agreement, Berkeley had envisioned that a supermarket would be its anchor tenant and that when Berkeley restricted its right to rent out other space in the shopping center to a supermarket, it did so with the understanding that one supermarket would exist within the shopping center.

518 A.2d at 797.

The end result of the decision was that the covenant could not be enforced against the landlord. *However*, note that the decision in *Berkeley* is distinguishable from the instant case. In *Berkeley*, the anticompetition covenant provided that it would be effective "so long

as lessee handles food or other food products at retail." *Id.* at 793. Thus, there was language in the *Berkeley* lease which provided the court with a good reason to conclude that the intent of the parties was that the covenant would be effective *only* so long as the lessee operated a grocery store in the demised premises. Here, the anticompetition covenant has no such language. Nevertheless, *Berkeley* is worth review and might be helpful in constructing an advocacy argument in favor of your client's position.

Another S&H case of interest is *Drabbant Enterprises v. Great Atlantic & Pacific Tea Co.*, 688 F. Supp. 1567 (D. Del. 1988). There, a shopping center and its tenants filed a lawsuit against S&H seeking a preliminary injunction and declaratory relief to prevent S&H from enforcing a restrictive covenant in its lease. The facts revealed that S&H had vacated the store in question but still paid rent and, moreover, still insisted upon compliance with the anticompetition covenant. The aggrieved plaintiffs attempted a variety of arguments in an effort to convince the court that the anticompetition covenant could not be enforced.

The court found that the covenant was still enforceable despite the fact that S&H was no longer operating a grocery store in the premises. In addition, the court refused to grant an injunction since the plaintiffs failed to show a probability of success on the merits of their claims that S&H was engaged in antitrust violations. A copy of this decision is enclosed for you review.

III. Various Approaches To Dealing With The Possible Consequences of The Anticompetition Covenant

It does not appear that anticompetition covenants do not cease simply because a tenant ceases doing business in the demised premises and either sublets or assigns the lease. For example, an anticompetition covenant contained in a lease will pass to an assignee of the original tenant and is subject to enforcement by the assignee. *See*, *e.g.*, *Hollywood Shopping Plaza, Inc. v. Schuyler*, 179 So. 2d 573 (Fla. Dist. Ct. App. 1965). More specifically, I did not find any authority to the effect that when a supermarket tenant, such as S&H, has a lease containing an anticompetition covenant the restrictive covenant is null and void if S&H sublets (or, for that matter, assigns) the lease to a nongrocery store.

Obviously, one way to attack any contract or lease provision is to argue that it is too vague and ambiguous to be enforceable. *See generally* 3 Friedman, *supra*, § 28.1 at 1565 (ambiguities are to be construed against a restriction contained in a lease).

As discussed above, in the instant case, ¶ 30 of the Lease provides as follows:

> LESSOR, for itself, LESSOR'S principal owners, its directors or its officers and stockholders, successors, assigns and vendees, covenants (and as a condition thereto) not to let, use, or permit or suffer to be used, any building, owned by Lessor or in which LESSOR has any interest, now or hereafter erected [within the boundaries of the said Center as delineated in said Plat, future enlargement or extension thereof, or] within one thousand five hundred (1,500) feet of the Center (Schedule "B") for:
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> It is understood that this provision shall not apply to those Lessees presently in said shopping center which may engage in any lawful business granted under their respective leases but it is further understood and agreed that the existing leases were made subject to the restrictive covenant contained in that certain lease dated . . . by and between . . . as Lessor and . . . as Lessee.

After having reviewed a number of cases and authorities, I doubt seriously that a very strong argument could be made to the effect that the above anticompetition covenant is ambiguous and, therefore, unenforceable.

There might be circumstances where a covenant prohibiting a lessor from leasing space in a shopping center to another supermarket might be held to be ambiguous. For example, let us assume that the anticompetition covenant here stated simply that the Lessor was precluded from leasing to another "supermarket." Let us further assume that the Lessor then leased space to a Super Wal-Mart store (one with a grocery department in addition to the typical items carried by Wal-Mart). In such a scenario, an argument might well be made that the term "supermarket," standing by itself, is ambiguous since it is unclear that the parties meant to exclude department stores that have a grocery department. Certainly, a Super Wal-Mart is not a "traditional" supermarket!

Not surprisingly, a number of cases involving anticompetition covenants have involved suits over the meaning of terms contained in an anticompetition covenant. Annotation, *supra* 97 A.L.R.2d 4. In many instances, landlords seek to argue that a proposed new tenant does not carry on the type of business intended to be precluded. The above scenario that I used is a case that falls into this category.

Obviously, the scenario I used above is one where a landlord pledged only to not lease to another supermarket. Here, by contrast, the actual language of the anticompetition clause

is much broader. Not only does the anticompetition covenant here preclude the Lessor from leasing to a supermarket, it also precludes the Lessor from leasing space to a tenant with a grocery store department, meat market, or produce department.

Clearly, the anticompetition covenant here is pretty specific as to the types of activities tenants cannot engage in without being in violation of the covenant. The anticompetition covenant here would undoubtedly preclude the Lessor from leasing to a Super Wal-Mart. Equally obvious is the fact that it would preclude the Lessor from leasing to another "supermarket" such as Kroger, Safeway, or Winn-Dixie. Thus, we would have to say that the covenant here is probably not ambiguous as to the type of store which is precluded from conducting business in the shopping center.

One way of achieving what the Lessor wants to do (i.e., keep a grocery store in the shopping center) would be to make an argument to the effect that S&H is obligated to continue doing business in the demised business through the term of the Lease. This would require making an argument to the effect that the Lease contains an express or implied covenant of continuous operation. This issue was well outside the scope of this particular facet of the research project.[2]

However, note that it is best if there is an express continuous operation covenant in the Lease. This is due to the fact that courts are reluctant to imply a covenant of continuous operation in a lease.[3] *See*, *e.g.*, *Kroger Co. v. Chimneyville Properties, Ltd.*, 784 F. Supp.

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[2]And appears to be within the scope of the research Sarah Price will be conducting for you.

[3]Often, landlords attempt to utilize percentage rental provisions in an effort to argue that there is an implied covenant of continuous occupancy by the tenant. *See generally*

331 (S.D. Miss. 1991) (provision of lease of grocery store premises did not support finding of implied covenant of continuous operation). With regard to implied covenants of continuous operation, you might wish to review the trilogy of decisions rendered in *In re Oklahoma Plaza Investors, Ltd.*: *In re Oklahoma Plaza Investors, Ltd.*, 124 B.R. 108 (N.D. Okla. 1991); *In re Oklahoma Plaza Investors, Ltd.*, 203 B.R. 479 (N.D. Okla. 1994); *In re Oklahoma Plaza Investors, Ltd.*, 203 B.R. 478 (N.D. Okla. 1996). The end result of this trilogy of decisions is that the landlord was unsuccessful in arguing that Wal-Mart was in default of the lease for having ceased doing business in the demised premises. Wal-Mart did, however, continue to pay rent and maintain the premises. One of the landlord's arguments was that Wal-Mart had breached an implied covenant of continuous operation.[4] Thus, if a duty-of-continuous-operation argument is to be made, the strongest argument would be if there was express language in the Lease to that effect.

Another way of attacking the validity of an anticompetition covenant is to argue that it is unreasonable as to its radius. *See*, *e.g.*, Annotation, *supra*, 46 A.L.R.2d 119. If the anticompetition covenant here extended for some four or five miles from the shopping center, an argument might well be made that the covenant is not subject to enforcement. Here, the anticompetition covenant binds the Lessor as to the shopping center and property within 1,500 feet of the shopping center. A brief perusal of cases collected in the above-cited

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Annotation, *Lease—Store—Continuous Operation*, 49 A.L.R.3d 971 (1971); Annotation, *Percentage Lease—Construction*, 38 A.L.R.2d 1113 (1954).

[4]Regrettably, there was no discussion in these decisions as to the continued validity of an anticompetition clause—if any—contained in the Wal-Mart lease once Wal-Mart ceased actually using the demised premises.

annotation does not suggest that the covenant here is unreasonable as to the territorial extent of the restriction. More in-depth research could, of course, be conducted on this point.

Conceivably, an argument could be crafted to the effect that the covenant should not be enforced since, under the circumstances presented here (i.e., S&H's vacation of the premises), the true intent of the parties would be frustrated. This argument would be based on what is known as the doctrine of commercial frustration.[5] Similar doctrines that might be relied on in an attempt to void the covenant would be mutual mistake of fact and impossibility. I do not know that such arguments would actually work. However, some research on these doctrines might prove fruitful.

IV. Mississippi Cases

No squarely on-point or dispositive Mississippi cases were found during the course of the research. The following are examples of the types of Mississippi cases located. *See*, *e.g.*, *Bender v. North Meridian Mobile Home Park*, 636 So. 2d 385 (Miss. 1994) (where lease provides for reentry by landlord for breach of covenant, landlord may exercise right of reentry); *Farragut v. Massey*, 612 So. 2d 325 (Miss. 1992) (where language of lease is unambiguous, it must be enforced according to its meaning); *Simmons v. Bank of Mississippi*, 593 So. 2d 40 (Miss. 1992) (court has to interpret clauses of commercial lease in a manner that best comports with words of lease considered in their entirety; court needs to seek meaning most coherent with the best justification for the language used); *Frey v. Abdo*, 441

[5]Also known as the frustration-of-purpose doctrine.

So. 2d 1383 (Miss. 1983) (alleged default under commercial lease); *Great Atlantic & Pacific Tea Co. v. Lackey*, 397 So. 2d 1100 (Miss. 1981) (no implied covenant for continuous use would be inferred from lease which provided for percentage rent in addition to a substantial adequate minimum rent; trial court erred in admitting testimony as to fair rental value as of date lessee moved its business into a new building); *Parker v. Lewis Grocer Co.* (in some cases involving construction of lease, parol evidence is admissible); *Stuart v. McCoy*, 163 Miss. 441, 141 So. 899 (1932) (in construing a written lease, intention of parties must be ascertained from the language of the instrument itself where it is not ambiguous); *Thomas Hinds Lodge No. 58 F. & A.M. v. Presbyterian Church of Fayette*, 103 Miss. 130, 60 So. 66 (1912) (language of lease is to be construed most strongly against the lessor as a general rule).

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GOVERNING JURISDICTION

1. Digests

Mississippi Digests, "Landlord and Tenant" 1 et seq., 37 et seq.
So. 2d Advance Sheets checked through 720 So. 2d

NATIONAL

1. Encyclopedias

51C C.J.S. *Landlord and Tenant* §§ 238-246, 337-343
49 Am. Jur. 2d *Landlord and Tenant* §§ 238-268

2. A.L.R.

American Law Reports Index checked
97 A.L.R.2d 4, *Lease—Covenant Against Competition*
90 A.L.R. 1449, *Lease—Covenant Against Competition*
46 A.L.R.2d 119 *Enforceability of Covenant Against Competition as Affected by Territorial Extent of Restriction*

3. Treatises

2 *Powell on Real Property* ¶ 242
5 *Powell on Real Property* ¶ 675
7 Thompson, *Commentaries on the Modern Law of Real Property* §§ 3158 et seq.
6 A. Corbin, *Contracts* §§ 1355 et seq.
L. Simpson, *Handbook on the Law of Contracts* § 182
3 M. Friedman, *Friedman on Leases* §§ 28. 1 et seq.

4. Law Review

47 Mo. L. Rev. 79, *Relief from Burdensome Long-Term Contracts, Commercial Impracticability, Frustration of Purpose, Mutual Mistake* (1982)
27 Cal. L. Rev. 460, *Contracts, Defense of Impossibility* (1939)
4 Real Estate L. J. 3 (1975), *The Antitrust Laws Visit Shopping Center 'Use Restrictions'*
55 Journal Urban Law 1, *The Anti-Trust Implications of Radius Clauses In Shopping Center Leases* by Jay Lentzner

5. Restatements

Restatement (Second) of Contracts § 208

ALL CASES SHEPARDIZED