

Easements and Covenants Running with the Land

As the casebook explains, the differences among easements, real covenants, and equitable servitudes are essentially historical. Because the different doctrines developed over time, and in different courts, the terminology and requirements for each can vary.

The underlying problem, which you should keep in mind, is this: two or more adjacent or nearby landowners may wish to create their own “private” land use regime, or a developer or other landowner who is subdividing land may wish to do the same.¹ Two or more people can create enforceable contractual obligations among themselves, but how will they make the scheme binding on successors – how will they enable successors to the benefited or dominant parcel be able to enforce the promises on successors to the burdened or servient estate? If they don’t have that ability, sales of the lots by the original promisor and promisee will undermine the land use regime they’ve created. For example, A, who owns beachfront property, might agree to grant an easement to B (who owns a lot across the street) to walk across A’s lot to get to the beach. A is going to want money because having that easement on her lot diminishes the value of her property. B may be willing to pay for the easement because it makes his house more valuable; it may not be on the beach, but it has convenient access to the beach. But B may not want to pay for the easement unless he knows that (a) he can assure future buyers of his lot that they’ll also have that access, and (b) he can be sure that a sale by A of her lot to a new owner (say, X) will not end the easement – in other words, that X will be bound, too.

The question you always need to ask in analyzing any set of facts is this: is there some theory (easement, covenant, equitable servitude) which would support the running of the benefit or the burden (or both, if necessary), **and** get your client the relief (injunction or damages or both) that he or she wants? In theory, you need to analyze each set of facts under all three theories; just because something doesn’t qualify as a real covenant, for example, doesn’t mean that it might not be enforceable as an equitable servitude.

In addition to the reading you have in the casebook, you may find the following tables and charts useful.

First, as to whether it’s likely to be viewed as an easement, real covenant, or equitable servitude, consider the following chart for some rules of thumb:

¹ These are private in the sense that they are not legislative initiatives, as in the case of zoning, but of course they are still publicly enforced through a government agency (i.e., the courts).

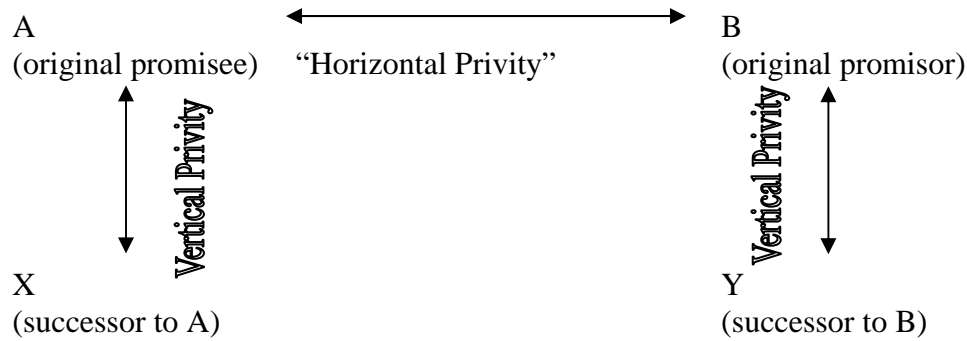
		Action or restraint	
		Do Something	Refrain from Doing Something
Where the Action or Restraint Takes Place/ Applies	On one's own land or in relation to one's own land	<p><i>A promise to do something on one's own land:</i> Typically a covenant or equitable servitude: e.g., (i) A promises to maintain a drainage ditch on A's land to keep water from draining onto B's land, or (ii) A, living in a private subdivision, promises to make monthly homeowners' association payments</p>	<p><i>A promise to refrain from doing something on one's own land</i> Typically a negative easement (some states limit the types) or restrictive covenant (real covenant or equitable servitude): e.g., A promises not to build anything on A's lot that would block the view to the lake for B, who owns an adjacent parcel.</p>
	On Another's Land	<p><i>A right to do something on another's land:</i> Typically an easement: e.g., A grants to B (who lives across the street from A) the right to cross A's ocean front property to get to the beach.</p>	<p><i>An obligation to refrain from doing something on another's Land:</i> [no easement or covenant running with the land; this is just the owner's right to exclude]</p>

Keep in mind that the above chart simply shows what you'd typically expect.

Second, the following chart may also be useful in summarizing the issues you need to address for each. (It doesn't cover prescriptive easements.)

Type	Requirements for the Burden or Benefit or Both to Run		
	Writing, Intent, Notice	Test of Appropriateness	Party Relationships
Easements	Y	Appurtenant versus in gross (for benefit/dominant estate)	Successor to dominant/servient estates?
Real Covenants	Y	Touch and Concern	Privity (may include horizontal or vertical or both)?
Equitable Servitudes	Y	Touch and Concern	Who is it appropriate to have enforce the promise? (E.g, nearby benefited landowner; a homeowners' association?) And against whom can it be enforced (typically the occupant of the land originally owned by the promisor)

Third, vertical and horizontal privity are relevant only to real covenants, though in all cases you do have to ask whether successor parties may enforce or be burdened by a promise someone else made. When you're thinking about what "privity" is, keep in mind that the terms horizontal and vertical refer to the following chart:



To ask whether there's "horizontal privity" is simply to ask about the relationship between the two original parties, A and B. It has nothing to do with the relationship between A and X or B and Y. In England, only landlords and tenants were in horizontal privity. In most U.S. states, there is "horizontal privity" between A and B if, and only if, the promise by A to B or vice versa was made in connection with a conveyance of the land from A to B or B to A. In other words, there is horizontal privity only if the promise occurred when one of the parties subdivided a plot of land and sold part of it to someone else. There is no horizontal privity if A and B are just two nearby neighbors, each of whom bought their property separately, and they just decide one day to enter into a land use agreement.

To ask whether there is "vertical privity" is simply to ask whether the successor (X or Y above) succeeded to the other's entire interest. It has nothing to do with the relationship between A and B. If X just gets a life estate or a term of years from A, then there is no vertical privity between A and X. (That might prevent the burden of the covenant from running with the land; it would almost certainly not prevent the benefit from running).

Fourth, keep in the mind the question of relief. If you're looking for an injunction, that would be available through an easement, a real covenant, or an equitable servitude. If you're looking for damages, on the other hand, that may be available only for an easement or real covenant – not for an equitable servitude (though this may vary from state to state).