International Franchise Association
57th Annual Legal Symposium
May 4-6, 2025

What's New in the World of Noncompetes? Tips to Embrace and Traps to Avoid for the Savvy Franchise Lawyer

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1. An Introduction to Franchise Agreement Noncompetes[1]

Among a business venture's many goals, few rank higher than certainty. Certainty enables growth. Certainty permits the ambitious and forward-looking to surpass their competitors. The basic contract seeks to provide exactly that. Binding contracts ensure that which can be ensured and enable the entrepreneurial to build, secure in the knowledge that the ground will not give out beneath them.

The same is true for franchise agreements. Certainty as to the terms, rights, and obligations of the franchisor and franchisee to allow for growth. Those in our field of practice understand the value created by combining a franchisor's brand and a franchisee's business acumen. In the right circumstances, the former receives a return on their brand investment and the latter a reliable source of goodwill on which to build a business. Unfortunately, as with any sophisticated legal transaction, the certainty cannot hold. Despite best efforts, good things may fall apart.

Inevitably, franchise agreements end. But certainty need not end just because the franchise relationship has. Well-crafted noncompete provisions can provide ongoing certainty that a franchisee will not use a franchisor's know-how, training, system, and trademarks to devalue the franchisor's brand—or the competitiveness of other franchisees' businesses. Noncompetes can only provide that valuable certainty, however, if they account for the host of rules that different jurisdictions apply to those provisions. Franchise lawyers therefore need to understand the ins and outs of noncompete agreements and their treatment in any jurisdiction where they do business.

2. A Brief Explanation of Noncompetes

a. A Noncompete's Role in a Franchise Agreement

When a franchise relationship ends, franchisors may have little recourse. Their obligations were frontloaded, granted early on to the franchisee in the form of training, branding, and investment in exchange for now-evaporated promises. After furnishing training and tools, what stops an uncooperative franchisee from merely changing the name on the sign out front and continuing otherwise unimpeded? Perhaps more worryingly, how can a franchisor be sure that a former franchisee will not take their valuable institutional knowledge to a competitor? Damages in this context are often speculative—so how can a franchisor prove the profits a competitor diverted or the extent to which the franchisor's brand was devalued through untoward competition?[2]

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[1] The authors wish to recognize and thank the following for their assistance in the research and writing of this paper and preparation of the PowerPoint: associates Sam Mallick, J. Wilson Miller, and Austin Sabin of Haynes and Boone, LLP; articling student Sebastian Zhou of Cassels Brock & Blackwell LLP, and associate Silas Petersen of Larkin Hoffman.

[2] *Victory Lane Quick Oil Change, Inc. v. Darwich*, 799 F. Supp. 2d 730, 736 (E.D. Mich. 2011) ("The loss of fair competition and customer relationships that results from the breach of a non-compete agreement are the kinds of

Given that any sort of economic damages may be difficult to ascertain after the fact, a noncompete agreement provides some level of certainty.[3] Should a former franchisee use a franchisor's know-how outside the bounds of the franchise agreement, a noncompete permits the franchisor to—early on—enjoin the problematic conduct, and hopefully prevent the damage from occurring in the first place.

Covenants against competition in franchise agreements date back centuries,[4] and though the laws that govern franchise noncompetes are various, the underlying principles are consistent. A signatory to a noncompete clause must acknowledge, as a condition of becoming a franchisee, that they will not compete against the franchisor counterparty. Courts generally uphold these agreements where they are (1) ancillary to an otherwise enforceable contract, (2) based on valuable consideration, (3) reasonable as to time and territory in protecting the franchisor's interests, and (4) not against public policy.[5] In other words, courts enforce noncompete agreements when they are reasonably limited. "In the current climate of increased judicial and legislative scrutiny of noncompetes, the reasonableness inquiry becomes critical."[6]

b. Differences in Noncompetes Between the Franchise, Employment, and Corporate Acquisition Context

Last year, the Federal Trade Commission announced the final iteration of a new rule that sought to severely restrict noncompete enforceability in an employer-employee context.[7] This shone a spotlight on noncompete agreements: In April, searches for

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injuries for which monetary damages are difficult to calculate."); *Hall v. Edgewood Partners Ins. Ctr., Inc.*, 878 F.3d 524, 530 (6th Cir. 2017) ("Although lost profits alone are calculable and compensable through monetary damages, loss of goodwill is not.").

[3] "Certain types of contractual covenants, like covenants not to compete, by their nature lend themselves principally to enforcement by injunction because of the difficulty of arriving at a dollar figure for the actual damage done as a result of the breach." *Surgery Ctr. Holdings, Inc. v. Guirguis*, 318 So. 3d 1274, 1282 (Fla. Dist. Ct. App. 2021) (quoting *Corp. Mgmt. Advisors, Inc. v. Boghos*, 756 So. 2d 246, 247-48 (Fla. 5th DCA 2000)).

[4] Michael R. Gray, Natalma M. McKnew, & William Woodbridge Sentell III, *Covenants Against Competition in Franchise Agreements,* xiii (4th ed. 2023).

[5] *Id*. *See also* Nina Greene & Ellen Lokker, *Don't Stop Me Now: Updating the Current Legal Status of Contractual Provisions Restricting Competition*, 6 American Bar Association (2012) (noting that franchise agreement noncompetes will be enforceable so long as they are reasonable as to the scope of the restricted activity, geography, and time); *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 681 (Tex. 1990) ("An agreement not to compete is in restraint of trade and therefore unenforceable on grounds of public policy unless it is reasonable."). Note also that because noncompetes are generally attached to an otherwise enforceable franchise agreement, prongs one and two of this test are easily met and rarely contested. Jason M. Murray & Michael R. Gray, *The Enforcement of Covenants Against Competition*, 2 American Bar Association (2005)

[6] Jess A. Dance & Alexander C. Goffinet, *NASAA Supports Reasonable Post-Term Non-Competes in Franchise Agreements*, Polsinelli, February 17, 2025. https://www.polsinelli.com/publications/nasaa-supports-reasonable-post-term-non-competes-in-franchise-agreements (last visited March 13, 2025).

[7] *FTC Announces Rule Banning Noncompetes*, Federal Trade Commission, April 23, 2024. https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes (last visited March 13, 2025).

"noncompete" surged fourteen-fold[8] and the topic made the front page of the New York Times.[9] As one in five American workers is currently subject to a noncompete clause,[10] the rule could have made a significant impact on all kinds of businesses.

A federal judge enjoined the rule's enforcement.[11] Despite this delay at the federal level, however, NASAA released a statement on the same topic in January of 2025.[12] Though largely a retelling of the present state of the law as to noncompetes, the statement took care to emphasize that that "non-competes should be narrowly drawn and reasonable," making note of many alternatives a franchisor can employ to protect their assets without the use of a noncompete.[13] Though not ground-breaking, the emphasis of the statement may be a signal of regulators' shrinking patience for poorly tailored, overexpansive noncompete agreements.[14]

It remains unclear how universally this increased scrutiny will be applied, however. Restrictive covenants in the employer-employee context are often the target of increased public outcry and higher scrutiny.[15] Notably, while the proposed FTC rule would have banned noncompetes as to employees, it did not do so for noncompetes between franchisors and franchisees. This exemption is indicative of a broader trend in the law on noncompete agreements—namely that courts view noncompete covenants between employers and employees much more skeptically and with more suspicion than other noncompete variants.[16] This is not surprising. A new employee has much less bargaining power than a potential franchisee, rendering serious negotiations difficult. Furthermore, a

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[8] According to Google Trends, searches for the term "noncompete" reached a 2024 peak during the week of April 21-27, the same week of the FTC's announcement. The week prior, similar searches were approximately one-fourteenth the volume.

[9] J. Edward Moreno, *F.T.C. Issues Ban on Worker Noncompete Clauses*, N.Y. Times, April 23, 2024.

[10] *Id*.

[11] *Ryan, LLC v. Fed. Trade Comm'n*, No. 3:24-CV-00986-E, 2024 WL 3879954 (N.D. Tex. Aug. 20, 2024). *See also* J. Mark Gidley et al. *White & Case Non-Compete Resource Center (NCRC)*, White & Case, February 11, 2025. https://www.lexology.com/library/detail.aspx?g=5c11f2e8-9a4c-463d-9e65-0c99d9b1d0ef (last visited February 21, 2025).

[12] North American Securities Administrators Association, *Post-Term Non-Compete Provisions in Franchise Agreements Should Be Reasonable*, February 21, 2025. https://www.nasaa.org/wp-content/uploads/2025/02/NASAA_Franchise_Advisory_Noncompetes_2-21-2025.pdf

[13] *Id*. at 5 (Mentioning trademark laws, trade secrets laws, post-termination requirements to de-identify branding, prohibitions on customer solicitation, bans on the use or disclosure of the franchisor's confidential information, requirements for the reassignments of URLs, cleansing of social media, and obligations to alter post-termination SEO practices).

[14] *See* Dance, *supra,* note 6.

[15] *BP Products N. Am., Inc. v. Stanley*, 669 F.3d 184, 189 (4th Cir. 2012) (Generally, a stricter test of reasonableness is applied in employment covenant cases than in sale covenant cases.

[16] Restatement (Second) of Contracts § 188 cmt. b (1981) "[C]ourts have generally been more willing to uphold promises to refrain from competition made in connection with sales of good will than those made in connection with contracts of employment."

noncompete provision enforced against an individual is likely to inflict much greater hardship and—potentially—run afoul of more ardently-protected rights.[17] For these and other reasons, some jurisdictions outright refuse to honor employment noncompetes entirely.[18] In states that do enforce them against employees, employers must show not only that such a restriction is reasonable as to "time, geographical area and scope of prohibited business activity."[19] Often, employers must also demonstrate "additional special circumstances"[20] that justify the noncompete's necessity.

States are friendlier to noncompete agreements ancillary to corporate acquisitions. This is unsurprising—the same arguments that weigh in favor of protecting employees carry much less force when brought on behalf of sophisticated corporate sellers. "Courts are less likely to declare a [noncompete] covenant to a purchaser invalid… because the seller has bargaining power that a typical incoming at-will employee would not be expected to have."[21] And, the competition from a high-level officer of an acquired company poses a more serious risk.[22] Some courts have gone further than mere acceptance, however, holding that even where no express covenant not to compete has been signed, sellers are still bound by an implied noncompete covenant in favor of a buyer.[23] While not the majority rule, this is indicative of the greater tolerance for noncompetes in a corporate context.

Between these two extremes of scrutiny, franchise agreement noncompetes find themselves in middle ground. Interpretations of which of the two categories franchise noncompetes most resemble vary widely by jurisdiction. Some courts hold that a restraint against a franchisee is more akin to a restraint against an employee and deserving of the same skepticism.[24] Considering the authority a franchisor and a boss have over a

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[17] *See generally* § 13:13. Validity of restrictive covenants made ancillary to contracts of employment including financial disincentive provisions; illustrative cases, 6 Williston on Contracts § 13:13 (4th ed.).

[18] Cal. Bus. & Prof. Code § 16600.5 (West).

[19] *Bus. Records Corp. v. Lueth*, 981 F.2d 957, 961 (7th Cir. 1992).

[20] "If a noncompete covenant is attached to an employment agreement] the covenantee must show additional special circumstances, such as a near-permanent relationship with his employee's customers and that, but for his association with the employer, the former employee would not have had contact with the customers, or the existence of customer lists, trade secrets or other confidential information." *Aquila Inv. Group, LLC v. Hiller*, No. 16-CV-2351, 2019 WL 13227324, at *12 (C.D. Ill. May 31, 2019).

[21] *Lueth*, 981 F.2d 957 at 959. *See also Jiffy Lube Intern., Inc. v. Weiss Bros., Inc.*, 834 F. Supp. 683, 691 (D.N.J. 1993) ("Covenants ancillary to the sale of a business are accorded far more latitude [than the employment variety] in New Jersey.") (internal quotations omitted).

[22] Notably, the FTC's proposed 2024 rule would not have invalidated noncompetes with senior executives already in place. 16 CFR 9102(a)(2).

[23] *In re Wojtkun*, 596 B.R. 74, 76 (D. Mass. 2019) ("Massachusetts law imposes on certain voluntary sellers of a business an implied covenant not to compete.").

[24] *Gandolfo's Deli Boys, LLC v. Holman*, 490 F. Supp. 2d 1353, 1357 (N.D. Ga. 2007) ("Georgia law "considers franchise agreements to be analogous to employment contracts"); *Atlanta Bread Co. Intern., Inc. v. Lupton-Smith*, 285 Ga. 587, 589, 679 S.E.2d 722, 724 (2009) ("When such restraints are found in franchise or distributorship agreements, our jurisprudence has held time and again that these restraints are subject to strict scrutiny, receiving the same treatment as noncompetition covenants found in employment contracts.").

franchisee and employee, respectively, this interpretation seems reasonable. Other jurisdictions, however, characterize franchise agreements as more similar to the sale of a business—franchisees, after all, come to the table with a stronger negotiating position than a potential employee can bring to an interview. Courts persuaded by this argument are hence more likely to enforce such a restraint, at least where the restrictions are reasonable.[25]

c. Elements of Noncompetes

There are frustratingly few bright line rules when it comes to restrictions on noncompetes in franchise agreements. Rather, courts take a case-by-case approach, with an eye on the facts and a finger to the wind. The specifics of the parties' positions—the franchisee's alleged behavior, the franchisor's expected value, the industry in which they both operate, the geography from which the enterprise draws customers, and other factors—will drastically influence whatever a court considers reasonable. Nevertheless, courts tend to follow general principles: in most cases, a court will consider a noncompete reasonable where the conditions are not "greater than necessary to protect the seller, oppressive to the buyer, or injurious to the public."[26] Analyses of whether this standard is met usually focus on factors relating to time, geography, barred behavior, and the presence of consideration in the agreement.

i. Time Limitations

An enforceable noncompete must be bound by reasonable time restrictions. No through-line between jurisdictions exist, but common timeframes are often between six months and two years. Restrictions should be "reasonably related to the needs of the business" and may vary on the basis of the duration of the industry's business cycle.[27] Enforcement for more than a handful of years is almost never permitted, and noncompete covenants that with no definite time horizon are usually rejected outright.[28]

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[25] *Keller Corp. v. Kelley*, 187 P.3d 1133, 1139 (Colo. App. 2008) ("the [franchise agreement] constituted an agreement for the purchase and sale of a business under the statute… [and thus] a covenant not to compete running in favor of a franchisor is an enforceable covenant."); *H & R Block Tax Services, Inc. v. Circle A Enterprises, Inc.*, 269 Neb. 411, 422, 693 N.W.2d 548, 556 (2005) ("[W]e conclude that this franchise agreement is akin to a sale of a business… [and] is enforceable."); *Jiffy Lube Intern.* at 691 ("[C]ovenants not to compete in franchise agreements are closer to agreements ancillary to the sale of a business [than to those in an employment context].").

[26] *Liautaud v. Liautaud*, 221 F.3d 981, 985 (7th Cir. 2000).

[27] *Id*. ("For example, in a business where client development takes over a year, a restriction on competition for one to two years is reasonable because of the time it takes to cultivate a client.").

[28] *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 547 (6th Cir. 2007) ("[Michigan courts] have upheld non-compete agreements covering time periods of six months to three years."); *Snelling & Snelling, Inc. v. Reynolds*, 140 F. Supp. 2d 1314, 1318 (M.D. Fla. 2001) "[A] court shall presume a non-compete covenant is reasonable when the time restraint duration is one year or less, and unreasonable when the time restraint duration is more than three years."); *Gandolfo's Deli Boys, LLC v. Holman*, 490 F. Supp. 2d 1353, 1360 (N.D. Ga. 2007) (holding that a noncompete agreement with any sort of tolling provision that potentially extends its duration is invalid).

ii. Geographic Scope

As with time, enforceable noncompetes must be bound by a geographic scope—and once again, reasonableness is the guiding principle. Without hard-and-fast rules, this becomes a fact intensive inquiry and takes into account the needs of the employee and the employers' interests.[29] Approved geographic scopes vary: a court considered a staffing service franchise's fifty-mile radius reasonable;[30] another court similarly approved a pizza franchise agreement's geographic scope of ten miles;[31] yet for a chocolate store franchise, the contractual scope from Oceanside to Tijuana was unreasonable, but the court accepted a ten-mile radius of a business location in San Diego.[32]

iii. Scope of Competitive Behavior

While a franchisor might wish to restrict a former franchisee from participating in a large variety of economic activity, courts will not tolerate such a wide swath. For instance, a court dismissed as overbroad a restaurant franchisor's noncompete agreement that required its franchisee to avoid operating "any casual dining or other restaurant that is in any way competitive or similar to" the franchised business.[33] Without more tailored guidance, the franchisee had no reasonable way to clearly discern and avoid objectionable activity. As such the court declined to provide injunctive relief, clarifying however that if the agreement included a limiting principle clearer than "casual dining," the provision might have been acceptable.[34]

iv. Consideration

As with any contract, a beneficiary of a noncompete provision must provide consideration. As noncompete agreements are generally attached to otherwise-binding franchise agreements, this is infrequently litigated. Where a franchisee does dispute consideration, the presence of an otherwise valid and binding franchise agreement is enough for a court to dispel the argument.[35]

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[29] *Waxing the City Franchisor LLC v. Katularu*, No. 24-CV-02479 (JMB/DJF), 2024 WL 3887109, at *6 (D. Minn. Aug. 20, 2024) ("A geographic restriction limiting the non-compete to this metropolitan area would be reasonable under Minnesota law."); *Singas Famous Pizza Brands Corp. v. New York Advert. LLC*, 468 Fed. Appx. 43, 47 (2d Cir. 2012) ("[W]e conclude that the ten-mile geographic restriction in the Franchise Agreement is reasonably calculated towards furthering Singas's legitimate interests in protecting its "knowledge and reputation" as well as its "customer good will.").

[30] *DAR & Associates, Inc. v. Uniforce Services, Inc.*, 37 F. Supp. 2d 192, 199 (E.D.N.Y. 1999).

[31] *Singas Famous Pizza Brands Corp*, 468 F. App'x 43 at *46.

[32] *Rocky Mountain Chocolate Factory, Inc. v. SDMS, Inc.*, No. 06-CV-01212-WYD-BNB, 2006 WL 8251823, at *4 (D. Colo. Dec. 8, 2006).

[33] *Bennigan's Franchising Co., L.P. v. Swigonski*, No. 3:06-CV-2300-G, 2007 WL 603370, at *5 (N.D. Tex. Feb. 27, 2007).

[34] *Id*.

[35] *Bad Ass Coffee Co. of Hawaii, Inc. v. JH Nterprises, L.L.C.*, 636 F. Supp. 2d 1237, 1245 (D. Utah 2009).

d. Opposition to Noncompetes as Restraints of Trade

Courts generally view restraints on trade with suspicion. This perspective is not new. Section 1 of the Sherman Act, passed in 1890, states that "[e]very contract… in restraint of trade or commerce… is declared to be illegal." As discussed, however, courts have permitted the use of noncompetes in franchise agreements so long as they are reasonable—in spite of the restraints they create.

As the perception of the courts and the public towards noncompetes has grown more skeptical, franchisees have been successful arguing against reasonableness on several fronts.[36]

In some cases, noncompetes have been challenged on the ground of an insufficient protectable interest of the franchisor. Historically, these protectable interests have included the franchisor's goodwill, trademarks, confidential information, ability to refranchise, and the integrity of the franchise system itself.[37] In recent years, however, some courts have entertained and accepted arguments that the contractually stated interest is overbroad, reaching beyond any actual interest a franchisor may possess.[38] For instance, where a mechanic shop's franchise agreement barred the franchisees from conducting "transmission repairs" within a ten mile radius of any other franchisor location for two years, the court considered the restriction overbroad.[39] This was, in part, because though the franchisor did have an interest in the franchise itself, along with any accompanying training programs provided to franchisees, this particular franchisee's familiarity with transmission repair predated the franchise relationship.[40] As such, the franchisor's protectible interest was insufficient. In a case already mentioned, a court considered as overbroad a restaurant franchisor's attempt to bar the franchisee from operating "any casual dining or other restaurant that is in any way competitive or similar to" the franchisor.[41] As such, the court denied injunctive relief.[42] Such a broadly-stated interest was "more limiting than would be required… [and therefore] not reasonable."[43]

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[36] Thanks to Michael R. Gray and Erin Conway Johnsen. Their article, *Noncompete Enforcement Today: Slam Dunk or Red Zone Problem*, W1 American Bar Association Forum on Franchising (2019), was instrumental in preparing this section.

[37] *Id*. at 2.

[38] *Bennigan's Franchising Co., L.P.* No. 3:06-CV-2300-G, 2007 WL 603370, at *5 (demonstrating that a noncompete agreement that fails to properly tailor its restrictions is likely to fail as overbroad).

[39] *Aamco Transmissions, Inc. v. Romano*, No. CV 13-5747, 2016 WL 792498, at *7 (E.D. Pa. Mar. 1, 2016), vacated, No. CV 13-5747, 2016 WL 7374544 (E.D. Pa. June 27, 2016).

[40] *Id*.

[41] *Bennigan's Franchising Co., L.P.*, No. 3:06-CV-2300-G, 2007 WL 603370 at *3.

[42] *Id*.

[43] *Id.*

Franchisees have also challenged the scope of said restrictions. One court held excessive a franchisor's attempt to restrict a franchisee operator of eighteen stores from employment in an area comprising "tens of thousands of square miles."[44] Where smaller scopes are involved, on the other hand, courts are more tolerant.[45]

e. Injunctive Relief

Challenges to noncompetes based on the harm alleged have also found success. As with any injunctive relief, noncompete enforcement generally requires a showing of irreparable harm.[46] Speculative harm is not usually enough.[47] Historically, franchise agreements have contained contractual language that presumed irreparable harm in the event of breach.[48] The strength of that presumption, however—and courts' willingness to entertain it—has since softened in some cases.[49] While reliance on pure contractual language may have once been effective, courts' reticence in recent years to enforce noncompete agreements without an actual showing of this harm has ticked upwards.[50]

In one case, a court declined to presume irreparable harm where plaintiffs delayed bringing an action for several months.[51] In another, a franchisor who claimed that franchisees were "diverting customers" to non-affiliated locations, but who "failed to offer any proof of such diversion, were rebuffed, the court holding that they were "not permitted to rely on mere speculation."[52]

In an especially thorough analysis of the issue, one court considered claims brought by a print shop franchisor that had recently terminated an agreement with the defendant. Despite the court itself ceding that the defendant franchisee was clearly "operating a competing business in violation of the parties' agreed-upon post-termination

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[44] *Baldwin v. Express Oil Change*, LLC, 87 F.4th 1292, 1304 (11th Cir. 2023).

[45] *HOA Franchising, LLC v. MS Foods, LLC*, No. 1:23-CV-04096-ELR, 2023 WL 9692401, at *11 (N.D. Ga. Dec. 20, 2023) ("The scope of competition restricted is measured by the business of the… entity in whose favor the restrictive covenant is given.").

[46] *But see* Tex. Bus. & Com. Code § 15.52(a); *Letkeman v. Reyes*, 299 S.W.3d 482, 486 (Tex. App. – Amarillo 2009, no pet.) ("It is simply enough [for injunctive relief] to prove a distinct or substantial breach.").

[47] *Id*.

[48] Gray & Johnsen at *5.

[49] *Id*. *See also H-1 Auto Care, LLC v. Lasher*, No. CV2118110ZNQTJB, 2022 WL 13003468, at *4 (D.N.J. Oct. 21, 2022) ("The risk of irreparable harm must not be speculative.").

[50] Gray & Johnsen, *Noncompete Enforcement Today: Slam Dunk or Red Zone Problem?* W1 American Bar Association Forum on Franchising (2019). *See also Anytime Fitness, Inc. v. Family Fitness of Royal, LLC*, No. CIV 09-3503 DSD JSM, 2010 WL 145259, at *4 (D. Minn. Jan. 8, 2010) (holding that mere "speculative" harm derived from the violation of a noncompete was insufficient to justify a temporary restraining order.).

[51] *H-1 Auto Care, LLC* at *4 ("Fatal to Plaintiff's showing of irreparable harm in this case, it waited 11 months—a significant amount of time—after learning of Defendants' breach before filing the instant Motion. Courts have regularly found that "a Plaintiff's delay in seeking preliminary injunctive relief is evidence that speedy relief is not needed.").

[52] *Big O Tires, LLC v. Felix Bros., Inc.*, 724 F. Supp. 2d 1107, 1119 (D. Colo. 2010).

covenant not to compete," it still held that the franchisor had failed to meet its burden of showing irreparable harm.[53] All claims of lost business were compensable as money damages;[54] only weak evidence supported claims of any consumer confusion;[55] plaintiffs had not demonstrated any misappropriation of trade secrets;[56] and the court dismissed the argument that not enjoining the defendant would send the wrong message to other franchisees.[57] Rather, the plaintiff's reliance on the presumption of irreparable harm was, alone, inadequate.[58] While the franchisor had shown a likely breach of the covenant not to compete, it had not shown sufficient ongoing irreparable harm from the mere existence of the "competing company" to warrant the first form of preliminary injunctive relief the franchisor sought.[59]

f. Views on Noncompetes in Mexico and Canada

i. Mexico

While neither Mexico's code nor courts address noncompetes directly, several aspects deserve to be noted.

The Mexican Constitution guarantees the right to pursue a livelihood, provided that such employment is lawful.[60] As the state is prohibited from barring someone their right to a profession, franchise noncompetes become more complicated if the franchisee is an individual.[61] As in the United States, however, limitations on the noncompete's scope of territory, time, and prohibited behavior make the noncompete more tolerable under Mexican law, as a restriction that is not an outright prohibition is more likely to survive scrutiny.[62]

Notable as well for a franchisor, the Mexican government's main anti-trust body, COFECE, considers noncompete agreements as part of its criteria when analyzing mergers.[63] Should a noncompete fail to meet the organization's criteria, the parties may

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[53] *Postnet Int'l Franchise Corp. v. Wu*, 521 F. Supp. 3d 1087, 1093, 1103 (D. Colo. 2021).

[54] *Id*. at 1104.

[55] *Id*.

[56] *Id*.

[57] *Id*. at 1105 ("If any of these sorts of things were shown to be true, an injunction might be warranted.").

[58] *Id*.

[59] *Id*.

[60] Michael R. Gray, et. al, *Covenants Against Competition in Franchise Agreements* 682 (4th ed. 2023).

[61] *Id*.

[62] *Id*.

[63] *Id*.

amend the noncompete(s) in the interest of seeking COFECE's approval—otherwise, the merger may be blocked.[64]

ii. Canada

Noncompete provisions in Canada receive similar treatment to noncompetes in the United States. Canada likewise requires that a noncompete be reasonable in scope, based on a "proprietary interest," be limited as to the "temporal and special features," and not be against "competition generally."[65] Though the terminology may be different, the core analysis is similar. Notably, Canada maintains a similar distinction between noncompetes in an employment and corporate acquisition context, and places franchise noncompetes somewhere in the ambiguous middle.[66]

Generally, "Canadian courts take a strict approach to the enforcement of non-competition agreements and will not rewrite it to make it reasonable and enforceable."[67]

3. U.S. Federal Rulemaking Affecting Noncompetes

a. 2024 FTC Noncompete Ban

As discussed *supra*, on April 23, 2024, the FTC finalized and promulgated a rule banning most employment noncompetes.[68] The rule would have banned employers from imposing noncompetes on a wide swath of workers, including independent contractors and unpaid workers as well as employees.[69] The rule also applied retrospectively, meaning that agreements executed before the Rule's effective date would also be invalidated.[70] The rule included limited exceptions for existing noncompetes for "senior executives" as well as for "sale-of-business" agreements.[71] It would have superseded all contrary state laws.[72] In addition to rendering covered noncompetes unenforceable, the rule made efforts to enforce noncompetes a violation of the FTC Act, which could have resulted in fines and penalties.[73]

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[64] *Id.* at 684.

[65] Mike Melvin & Alex Warshick*, Reasonableness and the Enforceability of Franchise Non-Competition Covenants*, The Franchise Voice (2017).

[66] Edward Levitt, et. al.*, Non-Competition Covenants in a Canadian Context* 28.

[67] *Id.* at 31.

[68] 16 C.F.R. § 910.1.

[69] *Id.*

[70] *Id.*

[71] *Id.* at §§ 910.1, 910.3(a).

[72] *Id.* at § 910.4(a).

[73] *Id.* at § 910.2.

Despite the broad definition of "worker," the rule explicitly excluded noncompetes between a franchisor and franchisee.[74] The FTC's commentary still indicated the agency was interested in potential regulation of noncompetes: "franchisor/franchisee non competes may in some cases present concerns under Section 5 [of the FTC Act] similar to the concerns presented by non competes between employers and workers."[75] Franchisors and franchisees that have noncompetes with their employees would still have been affected by the rule.

b. Legal Challenges to the Ban

The FTC noncompete rule was scheduled to go into effect on September 4, 2024, but a nationwide injunction issued by the U.S. District Court for the Northern District of Texas on August 20, 2024 prevented its enforcement.[76] In *Ryan LLC v. Federal Trade Commission*, the plaintiff argued that the FTC exceeded its statutory authority in implementing the rule.[77] The court agreed with the plaintiff, holding that the plain text of the FTC statute does not grant it authority to make substantive rules regarding unfair methods of competition, only regarding unfair or deceptive practices.[78] The court also noted that the FTC had for an extended period of its history disclaimed substantive rulemaking authority, and Congress never amended the statute to give it such authority.[79] Finally, the court held that the rule was arbitrary and capricious because its categorical noncompete ban did not properly take into account the evidence and reasoning cited by the FTC.[80] The FTC filed an appeal with the Fifth Circuit on October 18, 2024. On January 2, 2025, the FTC filed its opening brief in the Fifth Circuit. Briefing is expected to be completed in February.[81] In the ordinary course, a decision is expected later this year.[82] While on appeal, the district court's order vacating the noncompete rule remains in effect — meaning employers do not need to comply with the rule's notice requirements and, unless prohibited under applicable state law, noncompetes remain enforceable.[83]

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[74] *Id.* at § 910.1.

[75] J. Mark Gidley et al. *White & Case Non-Compete Resource Center (NCRC)*, White & Case, February 11, 2025. https://www.lexology.com/library/detail.aspx?g=5c11f2e8-9a4c-463d-9e65-0c99d9b1d0ef (last visited March 4, 2025).

[76] *Ryan LLC v. Fed. Trade Comm'n*, 746 F.Supp.3d 369 (N.D. Tex. 2024).

[77] *Id.* at 384.

[78] *Id.*

[79] *Id.* at 385-87.

[80] *Id.* at 387-89.

[81] Lauren W. Linderman , Charles F. Knapp , Daniel G. Prokott , Bryan K. Washburn, *FTC Files Opening Brief in Fifth Circuit Appeal Defending Noncompete Rule* https://www.faegredrinker.com/en/insights/publications/2025/1/ftc-files-opening-brief-in-fifth-circuit-appeal-defending-noncompete-rule (last visited March 13, 2025).

[82] *Id.*

[83] *Id.*

It is worth noting that the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo* in June 2024 overturning *Chevron* deference[84] makes the FTC's position more difficult as courts may no longer defer to federal agencies' reasonable interpretation of statutes.[85]

The U.S. District Court for the Middle District of Florida has also granted a preliminary injunction preventing enforcement of the noncompete rule, though this injunction applies only to the plaintiff, as a nationwide injunction was not requested.[86] Like the *Ryan LLC* court, in *Properties of the Villages* the court held that the FTC did not have statutory authority to promulgate the rule.[87] The court also held that the plaintiff was likely to succeed on its argument that the FTC Rule violates the major questions doctrine.[88] The FTC appealed the court's order to the Eleventh Circuit on September 24, 2024.

c. Noncompete Outlook Under the Trump Administration

The FTC is yet to officially back off its appeals of *Ryan LLC* or *Properties of the Villages*, or to rescind the noncompete rule, but it is widely predicted to take a softer view on noncompetes under the Trump administration. In December 2024, then-President-elect Trump announced that he would replace outgoing FTC chair Lina Khan with Andrew Ferguson, who had served as a commissioner of the FTC since July 2023. Ferguson assumed the chair following Trump's inauguration. Ferguson was often a critic of the FTC's initiatives under Khan, and he issued a dissent to the noncompete rule in 2024.[89]

In a move likely to predict future action favorable to noncompetes, the NLRB rescinded two Biden-era general counsel memoranda regarding noncompetes on February 14, 2025.[90] One memorandum, GC 23-08, took the position that noncompetes restricting employees not in management generally violate the NLRA.[91] The other memorandum, GC 25-01, provided employees restricted by noncompetes with financial remedies

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[84] *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[85] *See generally Loper Bright Enterprises v. Raimondo*, 603 US 369, 144 S.Ct. 2244 (2024)

[86] *Properties of the Villages v. Fed. Trade Comm'n*, No. 24-cv-316, 2024 WL 3870380 (M.D. Fla. Aug. 15, 2024).

[87] *Id.* at *4-*5.

[88] *Id.* at *6-*7.

[89] Dissenting Statement of Commissioner Andrew N. Ferguson, Federal Trade Commission (June 28, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-noncompete-dissent.pdf. *See also* Andrew W. Vail et al., *The Rule Is Dead*, Jenner & Block, January 2025 ("[I]t is almost certain that the rule will be dead if Mr. Ferguson is confirmed as FTC Chair. Such an outcome would be no surprise for the second Trump Administration, given President-Elect Trump's own use of restrictive covenants in business and other contexts.").

[90] Rachel Fendell Satinsky & Tanner McCarron, *Rescission of NLRB General Counsel Memos on Non-Compete Agreements Indicates Shift in Enforcement Priorities*, Littler, February 19, 2025. https://www.littler.com/publication-press/publication/rescission-nlrb-general-counsel-memos-non-compete-agreements-indicates (last visited March 13, 2025).

[91] *Id.*

against employers apart from merely invalidating the agreement.[92] The withdrawal of these memoranda is a strong signal that the Trump administration will generally take a permissive stance regarding noncompetes.

4. U.S. State Legislation and Regulation Affecting Noncompetes

A number of U.S. states regulate the use of noncompetes. The states that have outright banned noncompetes include California, Minnesota, North Dakota, and Oklahoma, though Oklahoma's and Minnesota's statutes do not prohibit franchise noncompetes.[93]

Though California law has long rendered noncompetes void with limited exceptions, the state legislature enacted two laws that went into effect on January 1, 2024, further restricting the use of noncompetes. First, SB 699 provides employees with a private cause of action for damages against employers attempting to execute or enforce noncompetes.[94] Notably, this law purports to apply "regardless of whether the contract was signed and the employment was maintained outside of California."[95] AB 1076 codifies California case law invalidating noncompetes in the employment context, with limited exceptions, and imposes a notification requirement on employers.[96] Section 16600 of the California Business and Professions Code had already generally banned all noncompetes in California, including in the franchise context.[97]

A new bill to broadly ban noncompetes in New York was introduced on February 10, 2025, in the New York State Senate.[98] New York's governor vetoed a similar noncompete ban in 2023, but the new bill does not have as broad a scope as the 2023 bill, with exceptions for highly compensated employees and business owners in the sale of

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[92] *Id.*

[93] *See* Cal. Bus. & Prof. Code § 16600; Minn. Stat. § 181.988; N.D. Cent. Code § 9-08-01; 15 OK Stat § 219A.

[94] Mojan Anari, *Non-Compete Clarity: California Employers Must Provide Notice of Non-Competes to Employees By February 14, 2024*, Akerman, February 8, 2024. https://www.akerman.com/en/perspectives/hrdef-non-compete-clarity-california-employers-must-provide-notice-of-non-competes-to-employees-by-february-14-2024.html (last visited March 13, 2025.)

[95] *Id.*

[96] *Id.*

[97] Cal. Bus. & Prof. Code § 16600(a) ("Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."). *See also* Theo S. Arnold, *Try Poking It with A Stick: Post-Term Noncompetes in California Certainly Look Dead*, 38 Franchise L.J. 55, 79 (2018) ("Although federal and non-California state courts have occasionally enforced post-term noncompetes against California litigants through evasion or unawareness of current California law, franchisors seeking to remain in compliance with the state's dictates are left with the stark reminder that post-term noncompetes are at best unlikely to be enforced, and at worst may subject them to substantial damages for the attempt.").

[98] Leni D. Battaglia et al., *New York State Senate Introduces Bill That Would Ban Non-Compete Agreements*, Morgan Lewis, February 27, 2025. https://www.morganlewis.com/pubs/2025/02/new-york-state-senate-introduces-bill-that-would-ban-non-compete-agreements (last visited April 16, 2025).

businesses.[99] The 2025 bill does not cover franchise noncompetes, as its terms specifically apply to employers and employees. And although this bill remains under committee review with the senate, employers should continue to monitor it.

In addition to state legislatures, the North American Securities Administrators Association (NASAA) issued guidance on noncompetes in the franchise context on January 27, 2025.[100] This guidance reaffirms NASAA's support for the validity of franchise noncompetes, but also clarifies restrictions on what noncompetes are considered "reasonable."[101] Under the guidance, regulators examining post-term noncompetes in franchise agreements will consider whether the restriction promotes the franchisor's legitimate business interests.[102] Relevant to this analysis is whether the scope of the restriction is limited to directly competitive businesses, whether the duration is reasonably necessary to protect the franchisor's business interests, and whether the geographic limitations are only as broad as necessary.[103]

5. U.S. Noncompete Case Law Update

a. LeTip World Franchise LLC v. Long Island Social Media Group, LLC

In *LeTip World Franchise LLC v. Long Island Social Media Group, LLC*, a franchisor of professional development and networking organizations sought a preliminary injunction to stop a former franchisee from violating its noncompete.[104] LeTip World Franchise LLC ("LeTip") alleged that Clifford Pfleger, the owner of a LeTip franchise in Long Island, New York, breached the franchise agreement by misusing LeTip's intellectual property.[105] Specifically, Pfleger added the word "just" above the "LeTip" logo and then affixed the modified logo to his boat.[106] LeTip argued that this "resulted in a phrase deliberately infused with vulgar and sexual innuendo," in violation of LeTip's trademark rights.[107] Pfleger argued in response that when he sent a picture of the

[99] *Id.*

[100] Jess A. Dance & Alexander C. Goffinet, *NASAA Supports Reasonable Post-Term Non-Competes in Franchise Agreements*, Polsinelli, February 17, 2025. https://www.polsinelli.com/publications/nasaa-supports-reasonable-post-term-non-competes-in-franchise-agreements (last visited March 5, 2025).

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] No. CV-24-00165-PHX-SMB, 2024 WL 1285621, at *1 (D. Ariz. Mar. 26, 2024).

[105] *Id.* at *6.

[106] *Id.*

[107] *Id.*

modified logo to LeTip's CFO, the reply, "Looks great," constituted permission from LeTip for Pfleger's use of the logo.[108]

The court rejected this argument, holding that the CFO's texts indicated at best "that he would turn a blind eye to the use of modified logo," not that LeTip was granting permission.[109] The texts did not comply with the franchise agreement's modification clause and the use violated the LeTip Identity Guidelines.[110] Accordingly, the court held that LeTip was likely to succeed in claiming that its termination of the franchise agreement was valid.[111]

The court also held that the franchise agreement's noncompete was enforceable and that LeTip was likely to succeed on the merits of its claim that Pfleger was in breach of the noncompete by opening a competing business networking company in the same location as Pfleger's LeTip franchise.[112] The noncompete at issue lasted for two years and its geographic scope was Suffolk County, New York.[113] The court held that because these were reasonable limits and because the noncompete "properly serves to protect Plaintiff's interest in retaining customers likely sought out by both parties," the noncompete was enforceable under Arizona law.[114] LeTip also made a showing of irreparable harm because Pfleger's competing business was "likely to cause Plaintiff to lose current and prospective customers and good will."[115] Finally, the court held that the balance of equities and public interest factors favored LeTip.[116]

About four months after the District of Arizona granted the preliminary injunction barring LeTip's former franchisee from competing in Suffolk County, New York, LeTip brought a motion for civil contempt and for sanctions alleging that the former franchisee was marketing its competing business in Suffolk County.[117] LeTip argued that the defendants had violated the preliminary injunction by listing the competing business's address in Suffolk County in a social media post, claiming on its website that it had "authority to establish chapters in any city," posting on social media that it was "looking forward to a Suffolk county launch soon," and making a variety of posts on the internet

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[108] *Id.*

[109] *Id.* at *8.

[110] *Id.*

[111] *Id.* at *9.

[112] *Id.* at *9-*10.

[113] *Id.*

[114] *Id.* at *10.

[115] *Id.* at *11.

[116] *Id.* at *11-*12.

[117] *LeTip World Franchise LLC, Plaintiff, v. Long Island Soc. Media Grp. LLC, et al.*, No. CV-24-00165-PHX-SMB, 2024 WL 5434026, at *1 (D. Ariz. July 25, 2024).

that cast LeTip in a negative light.[118] The court denied LeTip's motion, holding that none of this conduct violated the preliminary injunction because it did not constitute competing in Suffolk County, and there was no non-disparagement prohibition.[119]

b. GPI, LLC v. Patriot Goose Control Inc.

In *GPI, LLC v. Patriot Goose Control Inc.*, GPI, LLC ("GPI"), a franchisor in the business of "Canadian goose control," sought a preliminary injunction against a former franchisee for breach of the franchise agreement's noncompete.[120] GPI's franchising system provided franchisees with methods and procedures for the removal of geese in a "waterfowl friendly manner" with the use of "highly trained border collies."[121] GPI alleged that Patriot Goose Control, Inc. ("Patriot Goose") failed to stop using GPI's intellectual property, including its "Geese Police" trademark, and continued operations after the franchise agreement expired.[122]

The court granted GPI's preliminary injunction motion to enforce the franchise agreement's noncompete.[123] First, the court held that the noncompete was "at least partially enforceable" because it was intended to protect GPI's goodwill and customer relationships.[124] Accordingly, the court found that GPI was likely to succeed on the merits of its breach of contract claim, as it was "largely uncontested" that it was engaging in a competing business within the protected territory.[125] The court also held that GPI had made the requisite showing of irreparable harm, citing the threat that Patriot Goose's continued operation will confuse customers about whether it was still a GPI franchise, ultimately hurting GPI's reputation.[126] The court rejected Patriot Goose's argument that because GPI had no nearby franchise locations, it could not be harmed by Patriot Goose's competition, reasoning that this argument challenged the noncompete's scope, not whether GPI suffered irreparable harm.[127] Next, the court held that the balance of hardships weighed in GPI's favor, noting that while Patriot Goose would face economic losses, it could move its business outside of the protected territory covered by the

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[118] *Id.* at *3-*6.

[119] *Id.*

[120] No. CV2320953MASTJB, 2024 WL 1704731, at *1 (D.N.J. Apr. 18, 2024), appeal dismissed, No. 24-1729, 2024 WL 4648160 (3d Cir. Apr. 30, 2024).

[121] *Id.* at *1.

[122] *Id.* at *3-*4.

[123] *Id.* at *5.

[124] *Id.* at *6.

[125] *Id.*

[126] *Id.* at *7.

[127] *Id.*

noncompete.[128] The court also observed that Patriot Goose's violation of the noncompete was voluntary and could have been avoided by working with GPI to extend the term of the franchise agreement.[129] Finally, the court held that the injunction was in the public interest because it protected the public from "confusion," protected GPI's interests, and "ensures that valid non-competition clauses are enforced."[130]

c. National Arena League, Inc. v. WTX Indoor Football, LLC

In *National Arena League, Inc. v. WTX Indoor Football, LLC*, the Northern District of Georgia granted a preliminary injunction prohibiting an arena football team owned by WTX Indoor Football, LLC ("WTX") from playing for the Arena Football League ("AFL").[131] WTX entered into a three year agreement to be National Arena League, Inc.'s ("NAL") exclusive franchise in Odessa, Texas and the surrounding area.[132] After one year in the NAL, WTX, which played under the name "West Texas Warbirds," left the NAL and joined the AFL.[133] NAL sued for breach of contract to enforce the agreement's three-year noncompete.[134]

The court granted the preliminary injunction, barring WTX from continuing its season in the AFL.[135] The court held that the noncompete was likely to be enforceable under Georgia law, despite the fact that the noncompete's geographical scope included the entire United States.[136] The court noted that scope "appears reasonable" because the NAL competes across the United States.[137] To establish irreparable harm, the court relied on NAL's argument that WTX's move to the AFL creates the perception that the NAL is "beneath" the AFL, and that WTX's move will result in NAL losing a portion of its Texas fanbase.[138] The court also held that the balance of harms weighed in NAL's favor because the injunction was necessary to stop the erosion of its market presence and reputation,

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[128] *Id.* at *8.

[129] *Id.* at *9.

[130] *Id.*

[131] No. 1:24-CV-01786-SCJ, 2024 WL 2000647 (N.D. Ga. May 6, 2024).

[132] *Id.* at *1.

[133] *Id.*

[134] *Id.*

[135] *Id.* at *2.

[136] *Id.*

[137] *Id.*

[138] *Id.*

and the harm to WTX from having to withdraw from the AFL season was self-inflicted.[139] Finally, the court held that the injunction was not against the public interest.[140]

d. Real Property Management SPV LLC v. Truitt

In *Real Property Management SPV LLC v. Tuitt*, a property management franchisor sought a preliminary injunction against a California franchisee who attempted to leave the franchisor's system during the term of his franchise agreement and operate a competing business in the same location.[141] After the franchisee purported to unilaterally terminate the franchise agreement, he opened his competing business with its website acknowledging that it was a continuance of the franchised business, using the franchisor's business cards, and continuing to use the franchisor's computer system.[142] At the outset, the court determined that Utah law, not California law, applied.[143] Despite the fact that the franchisee was located in California, the court held that the franchise agreement's choice-of-law provision was enforceable because no California public policy would be affected, as California courts enforce in-term noncompetes.[144]

The court granted the franchisor's preliminary injunction motion, holding that each factor in the court's analysis weighed in the franchisor's favor.[145] First, the court held that the franchisor was likely to succeed in enforcing the in-term noncompete under Utah law.[146] The court observed that in-term noncompetes are necessary for franchisors to protect their goodwill, and that the noncompete's scope was reasonable.[147] Next, the court found that the franchisor would suffer irreparable harm if the injunction were not granted because of the "resulting domino effect" that "could jeopardize" the franchisor's system from franchisees being able to compete against the franchisor.[148] The court also observed that any harm the franchisee would suffer was self-inflicted, noting that the franchisor merely sought to force the franchisee to stop running a competing business,

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[139] *Id.* at *3.

[140] *Id.*

[141] No. 2:24-CV-00184-DAK, 2024 WL 3567866 (D. Utah July 29, 2024).

[142] *Id.* at *1.

[143] *Id.* at *2.

[144] *Id.*

[145] *Id.*

[146] *Id.* at *3.

[147] *Id.*

[148] *Id.* at *4.

allowing him to remain in its franchise system.[149] Finally, the court held that the injunction was in the public interest.[150]

e. Waxing the City Franchisor LLC v. Katularu

In *Waxing the City Franchisor LLC v. Katularu*, a franchisor of personal care studios sought a preliminary injunction against a franchisee to stop him from violating his in-term noncompete.[151] The franchisee, who owned multiple franchise locations in Arizona, began operating another franchisee's Glendale, Arizona location in 2019 without entering into a separate franchise agreement for that location.[152] When the franchise agreement for the Glendale location expired in August 2024, the franchisee converted it into a competing studio in the same location.[153] The franchisor sued, alleging that the franchisee was in breach of the in-term noncompete provisions in the franchise agreements for his other stores, which were in effect until 2026.[154]

The court granted the franchisor's motion, holding that each of the four relevant factors favored the franchisor.[155] First, the court held that the franchisor was likely to succeed on the merits of its claims for breach of contract and trade secret misappropriation.[156] Despite the fact that the noncompete had no geographical restriction, the court held that it was still likely to be enforceable because the court could blue-pencil the agreement to have a reasonable geographical scope, likely the Phoenix metropolitan area.[157] The court also observed that the franchisee's competing business was impeding the franchisor from re-franchising the territory.[158] Additionally, the court held that the franchisor was likely to succeed on its claim for trade secret misappropriation by using the franchisor's client information.[159] Regarding the irreparable harm factor, the court observed that the franchisee's impermissible competition was likely to harm the goodwill of the franchisor's other locations in the Phoenix area and that he was also making it difficult to re-franchise the territory.[160] The court also held that the balance of harms

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[149] *Id.*

[150] *Id.*

[151] *Waxing the City Franchisor LLC v. Katularu*, No. 24-CV-02479 (JMB/DJF), 2024 WL 3887109, at *1 (D. Minn. Aug. 20, 2024).

[152] *Id.* at *2.

[153] *Id.* at *4.

[154] *Id.*

[155] *Id.* at *5-*10.

[156] *Id.* at *5-*8.

[157] *Id.* at *6.

[158] *Id.*

[159] *Id.* at *8.

[160] *Id.* at *8-*9.

favored an injunction because the franchisee had the opportunity to avoid any harm he would suffer, and the public interest supported protecting the franchisor's information and goodwill with an injunction.[161]

f. Calzone King, LLC v. Midwest Dough Guys, LLC

In *Calzone King, LLC v. Midwest Dough Guys, LLC*, a franchisor of calzone restaurants brought an *ex parte* motion seeking a temporary restraining order against a former franchisee.[162] The franchisor alleged that it terminated the franchisee for filing for bankruptcy and abandoning its franchise location.[163] Following the termination, the franchisee opened a competing calzone restaurant at the same location as the franchised restaurant.[164] The franchisor also presented evidence that the franchisee was using the franchisor's logo in the website of its competing business.[165]

The court granted the franchisor's motion for a temporary restraining order.[166] The court held that the franchisor was likely to succeed on the merits of its claims for breach of the noncompete and for unfair competition.[167] The court also found that there was a threat of irreparable harm because the franchisee's use of the franchisor's trademark was likely to cause customer confusion and because the harm to the franchisor's goodwill and reputation from the franchisee competing was difficult to quantify.[168] In finding that the balance of harms favored the franchisor, the court held that any harm to the franchisee was self-inflicted.[169] Finally, the court held that the injunction was in the public interest because "there is a general public interest in enforcing contracts."[170]

6. International Legislative Developments in Noncompetes

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[161] *Id.* at *9-*10.

[162] No. 8:24CV335, 2024 WL 4008117, at *1 (D. Neb. Aug. 30, 2024).

[163] *Id.* at *4.

[164] *Id.*

[165] *Id.* at *5.

[166] *Id.* at *17.

[167] *Id.* at *8-*9.

[168] *Id.* at *10-*13.

[169] *Id.* at *13-*14.

[170] *Id.* at *14.

a. Australia

Australia is implemented new regulations for franchising in Australia on April 1, 2025. The Competition and Consumer (Industry Codes-Franchising) Regulations 2024 came into effect on April 1, 2025. [171]

As part of these regulations, post-term restraints of trade must not be included in a franchise agreement if the franchisee was entitled to but was not granted an extension or renewal of the franchise agreement, despite their request.[172]

Additionally, on May 7, 2024, the Australian Government released its response to the Final Report of the Review of the Franchising Code Conduct and agreed to implement twenty one of the twenty-three recommendations made by the review in full, including addressing the limitation of unreasonable restraints of trade. Specifically, the Government agreed to direct its Competition Taskforce to consider how restraints of trade and other un-competitive terms in franchise agreements may be affecting franchise workers. It will also request that the Australian Competition and Consumer Commission provide guidance as to when a restraint of trade provision may constitute an unfair contract term under the Australian Consumer Law.[173]

b. Belgium

On February 9, 2024, the Belgian Parliament adopted a legislative proposal modifying article 28 of Book X of the *Belgium Economic Code* on the rules regarding the precontractual information obligations for commercial collaboration agreements, including franchise agreements. The legislative amendment introduced a list of elements that are considered to encompass the key contractual provision. One such element is noncompete clauses, their duration, the conditions and consequences of not achieving them.[174]

c. Canada

There have been several developments in Canada in respect of noncompetes generally, but not directly in respect of franchising. Franchise agreements still remain governed by the common law without any direct legislative interference.[175]

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[171] See Australian Competition and Consumer Commission, *Guidance on Changes to the Franchising Code*. https://www.accc.gov.au/business/industry-codes/franchising-code-of-conduct/beginning-a-franchise-agreement/guidance-on-changes-to-the-franchising-code (last visited April 16, 2025).

[172] *Id.*

[173] Annual Franchise and Distribution Law Developments 2024, page 286.

[174] Annual Franchise and Distribution Law Developments 2024, pages 290-292.

[175] Franchising legislation falls within the ambit of Canadian provinces, not the federal government. The majority of Canadian provinces have enacted franchise legislation, all of which contain statutory obligations of good faith and fair dealing in the performance and enforcement of franchise agreements. This would include statutory duties of good faith in respect of noncompetition provisions as well. However, this duty of good faith is generally the same as or similar to

The general noncompete-related legislative developments include the following:

- The Canadian Competition Bureau (the "**Bureau**") has recently undertaken increased scrutiny of property controls in the Canadian grocery sector, which includes exclusivity and noncompetition covenants. The Bureau has expressed concern that such provisions have anti-competitive effects on the grocery industry in Canada, particularly in light of recent industry consolidation. This scrutiny has taken the form of recent amendments to *Competition Act* (the "***Act***") (which took effect on December 15, 2024), new preliminary enforcement guidelines,[176] and recent enforcement activity.[177]

- In 2023, the Canadian government also enacted amendments to the *Act* to prohibit agreements between and among unaffiliated employers to fix wages or terms and conditions of employment (wage fixing agreements) or not to solicit or hire each other's employees (no-poaching agreements). In respect of wage fixing, the definition of "terms and conditions" of employment includes noncompete clauses.

- In December 2021, the Province of Ontario enacted legislation that banned noncompetition provisions in employment contracts (with exceptions carved out in respect of president and chief executive positions and the sale of businesses).[178] Non-solicitation and confidentiality provisions are still permitted. No other Canadian province has adopted a similar restriction to date. These restrictions have not extended to franchise agreements, either in Ontario or otherwise.

Despite these peripheral developments concerning noncompetes, there does not appear to be any movement towards legislative restrictions on noncompetes in the franchise context.

d. European Union (EU)

On June 1, 2022, the European Union (EU) brought into force new rules that provide exemptions of certain vertical agreements (including franchise agreements) from

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the common law duty of good faith under Canadian law: *Spina v. Shoppers Drug Mart Inc*., 2024 ONCA 642 (CanLII), at para 175, <https://canlii.ca/t/k6j8g#par175>

[176] "Competitor property controls and the Competition Act", Government of Canada. https://competition-bureau.canada.ca/en/how-we-foster-competition/education-and-outreach/competitor-property-controls-and-competition-act.

[177] "Competition Bureau takes action to protect competition in the grocery industry in an Alberta community," Competition Bureau Canada, January 16, 2025. https://www.canada.ca/en/competition-bureau/news/2025/01/competition-bureau-takes-action-to-protect-competition-in-the-grocery-industry-in-an-alberta-community.html

[178] "Non-compete agreements," Ontario Ministry of Labour. https://www.ontario.ca/document/your-guide-employment-standards-act-0/non-compete-agreements

EU prohibitions on anti-competitive agreements contained in Article 101 of the Treaty on the Functioning of the EU (Article 101).[179]

In respect of noncompetes, certain noncompete provisions in franchise agreements are excluded from the protections provided under these exemptions, but if a franchise agreement contains an excluded noncompete provision, the franchise agreement as a whole will continue to benefit from the exemption unless the excluded noncompete provision cannot be severed from the franchise agreement. Post-term noncompetes (which relate specifically to products and services that compete with the franchise-related products and services from the premises/land from which the franchisee operated) should not be longer than one year.[180] In-term noncompetes are generally applicable for the term of the franchise agreement.[181]

e. Netherlands

The Netherlands' *Franchise Act* came into force in January 2021. Like many other international franchise statutes, the purpose of the legislation is to provide protection and rights to franchisees.

Under the *Franchise Act*, noncompete clauses are limited to one year after the end of the franchise agreement. They are also geographically limited to the geographic area within which the franchisee was permitted to operate the franchised business.[182]

f. Poland

In 2023, the Polish government introduced proposed legislation to regulate franchise agreements by way of amendments to the Polish Civil Code. The legislation provided that noncompete clauses imposed on the franchisee would be limited to one year in duration (from the date of the franchise agreement being discharged). The current status of the proposed legislation is unknown.[183]

g. United Kingdom (UK)

On June 1, 2022, the United Kingdom (UK) brought into force new rules that provide exemptions of certain vertical agreements (including franchise agreement) from UK

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[179] "Franchising and the New EU and UK Vertical Block Exemptions," Dr. Robert Hardy, Greenberg Traurig, July 12, 2022. https://www.gtlaw.com/en/insights/2022/7/franchising-and-the-new-eu-and-uk-vertical-block-exemptions.

[180] *Id.*

[181] See Europe Commission*, Annex to the Communication from the Commission, Approval of the content of a draft for a communication from the commission – Guideline on vertical restraints* at p. 29, para. 87(a). 20220510_guidelines_vertical_restraints_art101_TFEU_.pdf (October 5, 2022).

[182] "Dutch Franchise Act into force!," Martine de Koning, International Bar Association, June 7, 2021. https://www.ibanet.org/ifc-dutch-franchising-act-summary-article-june-21#_edn18

[183] "Franchise in Poland," Michal Puk and Aleksandra Urban, Dudkowiak, Kopec & Putra, October 20, 2023. https://www.dudkowiak.com/contract-law-in-poland/franchise-in-poland/

prohibitions on anti-competitive agreements contained in Chapter I of the UK Competition Act 1998.[184] These rules largely mirror the rules implemented in the EU (as discussed above). Generally speaking, under the UK's competition rules, post-term noncompetes must:

- Be limited to the premises from which the franchisee operated;
- Be indispensable to protect know-how;
- Be limited to one-year from the end of the franchise agreement's term; and
- Relate to goods or services which compete with the franchise goods or services.[185]

7. International Noncompete Case Law Update

a. Australia

i. Narellan Franchise Pty Ltd v RBME Pty Ltd

In *Narellan Franchise Pty Ltd v RBME Pty Ltd,*[186] Narellan Group operated a franchise system for swimming pool installation. The Ranieris (Tim and Matthew) were Narellan franchisees for two franchises in the Sydney region through their corporation, RBME.

Each franchise agreement contained a noncompete following termination or expiration of the agreement, prohibiting the franchisee from operating in the business of swimming pool within the restraint area 12 or 6 months after terminating the agreement.

After the expiry of one of the franchise agreements in May 2022, the Ranieris continued to operate a pool installation business through another company, T&M Pools Pty Ltd. Narellan brought an interlocutory relief to enforce the post-contract restraints.

In granting the relief, the court assessed the reasonableness of the noncompete, relying on *KA & C Smith Pty Ltd v Ward* (1998) 45 NSWLR 702: "To assess the reasonableness of the restraint clause, it is necessary to identify the legitimate interests which the clause seeks to protect. This is not a case where the purchaser of a business seeks to protect the goodwill which it has acquired by restraining the vendor from competing; nor is it a case where an employer seeks to protect its confidential information by restraining a former employee from working for a competitor. A franchise agreement has some of the elements of both of these cases, although it is a commercial arrangement closer to the former than the latter… the question is whether the restraints clause in the

[184] "Franchising and the New EU and UK Vertical Block Exemptions," Dr. Robert Hardy, Greenberg Traurig, July 12, 2022. https://www.gtlaw.com/en/insights/2022/7/franchising-and-the-new-eu-and-uk-vertical-block-exemptions

[185] "The impact of the new VBER and VABEO rules for franchises," Ariane Le Strat and Dr. Saskia King, Bird & Bird, November 17, 2022. https://www.twobirds.com/en/insights/2022/uk/the-impact-of-the-new-vber-and-vabeo-rules-for-franchises

[186] *Narellan Franchise Pty Ltd v RBME Pty Ltd* [2022] NSWSC 988.

second franchise agreement is too wide, given the nature of the franchisor's interest and the need to balance the interests of franchisor and franchisee."

The court found that the legitimate interests protected by the noncompete provision included the franchisor's confidential information, knowhow, and goodwill, and granted the injunction.

The interlocutory injunction was not the end of this litigation, however. Narellan sought a permanent injunction, which was refused by the Supreme Court of New South Wales.[187]The court relied on *BB Australia Pty Ltd v Karioi Pty Ltd* [2010] NSWCA 347 and found that Narellan did not purchase any goodwill in the Ranieris' existing business when they entered into the franchise agreement. At the end of the franchise, the Ranieris had to return customer information, de-identify their business, return confidential information, and cease using customer leads. As such, Narellan did not establish a sufficient interest to justify a post-term restraint on competition by the Ranieris and the Ranieris were entitled to any goodwill earned during the term of the franchise agreement. The court also held that the term of the noncompete – one year or six months – was unreasonable, holding that the franchised business had low barriers to entry and that Narellan only required two weeks to train a new franchisee to take over from the Ranieris.

b. Canada

i. Greco Franchising Inc. v Franco Milito

In *Greco Franchising Inc. v. Franco Milito*,[188] Greco Franchising Inc., the franchisor of Greco system of fitness studios, brought an interlocutory injunction application to refrain its franchisee (Milito) from operating a fitness studio outside of the Greco franchise system. The franchisor claimed that the competing fitness studio, which was being operated from the former franchise premises, breached the noncompete clause in the parties' franchise agreement.

The dispute between the parties arose out of the franchisor's response to governmental limitations on fitness operators as a result of the COVID-19 pandemic. The franchisor had rolled out an online fitness program that was optional to the franchisees. The franchisees were not allowed to offer any online programs themselves. The financial terms of the online program were substantially different from regular programs, which permitted the franchisee to retain the membership fees, subject only to payment to the franchisor of a fixed monthly royalty. Instead, the online program involved a split of fees between the franchisor and the franchisee. As a result, the relationship between the parties broke down and the franchisee indicated that it intended to terminate the franchise agreement and rebrand, thus instigating the franchisor's motion for an injunction.

Applying the *RJR MacDonald* injunction test, the Ontario Superior Court of Justice held that the franchisor did not have a strong *prima facie* case in respect of enforcing its noncompete clause. The clause was an in-term one, and the agreement was to expire in

[187] *Narellan Franchise Pty Ltd v RBME Pty Ltd (No 2)* [2022] NSWSC 1590.

[188] *Greco Franchising Inc. v. Franco Milito et al.*, 2021 ONSC 3950 (CanLII), <https://canlii.ca/t/jg63x.

three months. It would therefore be impossible to bring the issues to trial before the expiration of the agreement.

In addition, despite the franchisee's breach, the court found the franchisor was also in breach of the agreement by directly marketing to 248's members, financially restructuring the system, and making major changes to 248's roles and restricting its opportunities to earn revenue through in-studio activities. In essence, the franchisor overhauled the business model and financial structure of the franchise by taking over the mandates of the franchisees. Those changes were contrary to the agreement and significantly different from the original franchise model. As such, the franchisor could not meet the injunction test and the application for an interim injunction was dismissed.

ii. Garcha Bros Meat Shop Ltd. v Singh

In *Garcha Bros Meat Shop Ltd. v Singh*,[189] the franchisor, Garcha, terminated the franchise agreement of the franchisee, SJP, and its principal, Kaur. The franchise, a butcher shop, had been managed by Singh, Kaur's husband. The franchise agreement contained a post-term restrictive covenant that prevented SJP and Kaur from operating at the franchised location for 30 months from the date of termination.

After termination, a company called 112 was incorporated. Singh's cousin, Sandhu, became the sole shareholder, director, and officer of 112. SJP assigned the lease for the franchised location to 112. Singh guaranteed 112's obligations to the landlord. 112 then continued business as a butcher shop at the franchised location under a different name. Another related party, KKS, eventually replaced Sandhu as director and shareholder of 112.

Garcha brought an injunction against SJP, Kaur, Singh, 112, Sandhu, and KKS to prevent them from operating the new butcher shop in breach of the restrictive covenant. The British Columbia Supreme Court granted the injunction. The defendants who were the new operators, namely 112, KKS, and Sandhu, appealed the decision.

The British Columbia Court of Appeal dismissed the appeal, finding that that the franchisor had established a strong *prima facie* case that the appellants, together with Singh, had participated in a group effort to avoid the consequences of the restrictive covenant and had created 112 to further a conspiracy. The court further noted that an injunction could extend to a non-party company and its participants if the company was created to defeat the noncompete obligations.[190] This is a significant development in the common law surrounding noncompetes in Canada, as it provides a strong, appellate-level precedent for extending the application of noncompetes to non-signatories to the franchise agreement. Instead of approaching the issue of the scope of the noncompete by way of "piercing the corporate veil," the court accepted that the issue could be dealt with by way of the tort of conspiracy.

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[189] *Garcha Bros Meat Shop Ltd. v Singh*, 2022 BCCA 36, https://canlii.ca/t/jm246

[190] Id. at para. 46-63. https://canlii.ca/t/jm246#par46

The court also deferred to the motion judge's finding that there was a strong *prima facie* case that the noncompete provision was reasonable in respect of its geographic scope (a ten-kilometre radius from the franchised business), temporal scope (30 months), and scope of competitive behaviour ("any business competitive with or similar to the franchised business"). In respect of this latter factor, it is notable that the court upheld the noncompete despite the franchise agreement failing to contain a definition of the franchised business or a competitive business. The motions judge disposed of this issue by stating:

> "In my view, there is little merit in suggesting the terms in the restrictive covenant "persons, firm, association, syndicate, company, or corporation engaged or concerned with or interested in any business competitive with or similar to the franchise business or franchising businesses similar to the franchise business at the Franchised Location", are insufficient to allow me to conclude that the retail meat shop currently operated by [112] from the Franchised Location is captured by that description."[191]

iii. RFSP Equipment v Singh

In *RFSP Equipment v Singh*,[192] the British Columbia Supreme Court heard applications for interlocutory injunctions restraining the defendants (former franchisees of Freshslice Pizza (Freshslice)) from operating pizza restaurants at various locations. The restaurants had been operating as franchises of Freshslice and then, overnight, de-identified and rebranded as either HellCrust Pizza or Yummy Slice Pizza. Immediately after rebranding, the defendants delivered notices of rescission under British Columbia's franchise legislation. Freshslice subsequently filed for interlocutory injunctions to prevent the former franchisees from operating under the new brand names.

In the franchise agreement, the restrictive covenant provided that the franchisees were prohibited from being involved in a business that is similar to or competitive with Freshslice either at the franchised location or within 5km of any Freshslice restaurant for a period of two years from the date of a transfer, assignment, or termination of the franchise agreements.

Ultimately, the court found that these clauses were not ambiguous and reasonable in their scope of the restricted activity, geography, and timing. However, despite being satisfied that Freshslice had made out a strong *prima facie* case that the former franchisees had in fact breached their contracts, the court declined to grant the injunctions. Because of how radical the rebranding was, the court held that there was no evidence that the brand, goodwill, or reputation of Freshslice would be irreparably harmed by the continued operation of the defendants' restaurants. The court summarized this issue by concluding:

> "In view of the fact that the defendants have completely rebranded their restaurants, there is no realistic possibility of customer confusion or damage to the reputation, brand or goodwill of Freshslice. The evidence that existing franchisees will follow in

[191] Id. at para. 81. https://canlii.ca/t/jm246#par81

[192] *RFSP Equipment v Singh*, 2022 BCSC 538 (CanLII), <https://canlii.ca/t/jnjk7>

the footsteps of the defendants or refuse to renew their franchise agreements is speculative. The evidence has also failed to establish that the defendants are using confidential information, that key locations have been lost, or that market share has been lost. Further, any loss of sales or revenue suffered by Freshslice can be adequately compensated for with an award of damages."[193]

The court further held that the balance of convenience on the injunction favoured the defendant former franchisees, who would be "financially crippled if an injunction was granted."[194]

The decision in *RFSP Equipment* stands in stark contrast to the decision in *Garcha Bros*., which was issued in the same year and where the appellate court upheld a noncompete provision that was arguably less enforceable. However, the decision in *RFSP Equipment* was not appealed and thus there is recent mixed messaging in the British Columbia courts surrounding noncompete provisions.

i. *OPA! Souvlaki Franchise Group Inc. v Tiginagas*, 2024 BCSC 1318

In *OPA! Souvlaki Franchise Group Inc. v Tiginagas*, the franchisor OPA! Souvlaki Franchise Group sought an injunction against a corporation and three individuals who were directors and shareholders of the corporation for breaching the post-term noncompete clause by operating a competing restaurant after selling their franchise business.

Specifically, the franchisee operated two Greek restaurant franchises under the franchisor's brand. After selling the holding company that operated the franchises, the franchisee opened a new competing restaurant within 5km of one of the sold franchises.

The court applied the *RJR MacDonald* injunction test and found the post-term noncompetition provision to be unambiguous as it was both clear and narrow in scope. The 5km range was found to be reasonable. Additionally, the noncompete only restricted the franchisee from operating a specific format of restaurant and a particular type of cuisine, and did not restrict the franchisee from the operation of restaurants generally. As such, the injunction was granted.

c. New Zealand

i. M and L Holdings Limited v. Whenua Productions Limited and Wenyuan Kuang

In *M and L Holdings Limited v. Whenua Productions Limited and Wenyuan Kuang,*[195] the plaintiff, M and L Holdings (M&L), was the area master franchisee of a franchise

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[193] Id. at para. 96. https://canlii.ca/t/jnjk7#par96

[194] Id. at para. 98. https://canlii.ca/t/jnjk7#par98

[195] *M and L Holdings Limited v. Whenua Productions Limited and Wenyuan Kuang*, [2020] NZHC 2541.

system that provided photography services to real estate agents. The business model was known as the Open2view system. M&L granted sub-franchises within the area where M&L was master franchisee. The defendant was a sub-franchisee. The franchise agreement had an initial term of five years. However, the agreement prematurely terminated by the sub-franchisee.

After the termination, the sub-franchisee continued to operate the photoshoot business outside of the Open2view system, in direct breach of the noncompete in the franchise agreement. M&L applied for interim injunction, an account of profits, damages, and costs.

Under the noncompete, the restraining period was defined as either one or two years from the termination date and the restraint area was within the sub-franchisee's territory, "50 kilometers outside" of the territory, and in the territory of any other sub-franchisee.

The court found both the restraining geographical scope and period "arguable matters." The court granted an injunction for only one year after termination until trial and limited the geographic scope to within the territory and within 50 km of the territory.

ii. Water Babies International Limited v. Kelly Jane Williams, Silvana Tizzoni and Coral and Aquamarine Limited [2020] NZHC 1289

In *Water Babies International Limited v. Kelly Jane Williams, Silvana Tizzoni and Coral and Aquamarine Limited*,[196] the franchisor Water Babies operated a franchise system for providing swimming lessons to infants and toddlers. The respondents (the individual Ms. Williams and the company she incorporated for the sole purpose of franchising) was alleged to have breached the post-term noncompete in the parties' franchise agreement by working with Swim Baby, another company that provided baby and toddler swimming lessons. Water Babies applied for interim injunction against Ms. Williams and her company.

In the franchise agreement, the franchisee was not to be engaged, concerned or interested directly in any business which competes with or was similar to the business within the territory two years after terminating the agreement. The franchise agreement between the parties expired in 2019. As of that date, Water Babies had no other franchisees in New Zealand.

The High Court of New Zealand found that noncompete constituted a restraint of trade are *prima facie* void and therefore unenforceable. Nevertheless, the court noted that where the party seeking to enforce the restricted provision establishes that the restriction is reasonable, it may be enforced.

The franchisee alleged that because the franchisor had no protectable interests, the application for injunctive relief should fail. The court disagreed, finding that the noncompete contemplated the franchisor's interest regardless of (the lack of) competition.

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[196] *Water Babies International Limited v. Kelly Jane Williams, Silvana Tizzoni and Coral and Aquamarine Limited* [2020] NZHC 1289

In addition, while it may have been possible for the respondents to argue the restraints of trade was unreasonable if Water Babies had no intention of competing in the region, the restraint of trade provision was to be assessed as at the date of the franchise agreement.

The court found that Water Babies did have protectable interests in respect of the noncompete. They had been operating in Wellington and Auckland since 2017. They had their name and goodwill, and they provided significant materials to Ms. Williams such as manuals, programme modules, know-how, and other franchise operations materials. The court granted the interim injunction.

iii. Whites96 Ltd & Anor v. The Wheel Magician Ltd

Whites96 Ltd & Anor v. The Wheel Magician Ltd[197] is a High Court of New Zealand appellate decision in which a former franchisee appealed an interim injunction granted against it. The franchisor was Wheel Magician, which operated a mobile car wheel repair franchise system. The former franchisee was Whites96. The franchise agreement between the parties contained a post-term noncompete. The duration of the noncompete was 12 months after expiration or termination of the franchise agreement. The geographic scope of the noncompete was "the territory allocated under the agreement and within 20km of the territory of any franchisee."

The franchisee terminated the franchise agreement, alleging fault of the franchisor. After termination, the franchisee continued operating the same business. The franchisor brought an application of an interim injunction against the franchisee. The district court found 12 months was a reasonable and damages were generally not an adequate remedy for a breach of the noncompete restraints of trade. The court granted the application, for which the franchisee appealed, challenging the overly restrictive nature of the injunction, among other issues.

The High Court found no merit in the appellant's argument, dismissing the appeal. The court found that "The respondent has a protectable proprietary interest — it has built a successful business model and accumulated goodwill pursuant to that model. The protectable interest is primarily goodwill, but it also encompasses confidential information, operating processes, and other intellectual property. It is entitled to protect its investment in that." The court also held that the noncompete provision was reasonable at the time the parties entered into the franchise agreement. The court also held that the injunction would only apply to the former franchisee's territory and 20km outside of the territory, effectively "blue pencilling" any overbreadth in the noncompete.

[197] *Whites96 Ltd & Anor v. The Wheel Magician Ltd* [2023] NZHC 3046.

d. United Kingdom

i. Dwyer (UK Franchising) Limited v. Fredbar Limited and Shaun Bartlett ([2022] EWCA)

In *Dwyer (UK Franchising) Limited v. Fredbar Limited and Shaun Bartlett,*[198] the court of Appeal addressed the issue of the enforceability of post-contract restrictive covenants in a service-based franchise agreement. Dwyer and Fredbar entered into a ten-year franchise agreement for emergency plumbing and drainage services under the "Drain Doctor" brand. Dwyer was the UK's largest franchise for this business, while Fredbar was owned and operated solely by a plumber, Bartlett, who also guaranteed Fredbar's obligations under the franchise agreement.

The noncompete in the franchise agreement provided that the franchisee cannot be engaged in a business similar to the franchise business within a radius of five miles from the exclusive marketing territory given to the franchisee under the agreement for one year after terminating the agreement.

The franchise agreement was entered into on 22 October 2018. The business was not as profitable as anticipated. The franchisee purported to terminate the agreement in July 2020, alleging misrepresentation and undue influence. Around the same time, the franchisee started operating a competitive business within the exclusive marketing territory.

The franchisor sued and applied for an interim injunction; the injunction was rejected by the motion judge. The motion judge found that the noncompete unreasonable, stating that enforcing the covenants would effectively prevent Bartlett, who was characterized as a largely unsophisticated contractual party, from doing any plumbing or drainage business, even as a subcontractor or employee of another company. The motion judge further took issue with the noncompete extending outside of the protected territory into areas where the franchisor had not established any goodwill. The motion judge declined to limit or sever the noncompete to permit a partial injunction that excluded the "unreasonable" part of the noncompete.

The Court of Appeal dismissed the appeal and declined to adopt a rigid, categorical approach when assessing a restrictive covenant's reasonableness, preferring instead to look at the specific circumstances of the parties. The court reiterated how the bargaining power between parties plays an essential role in assessing a restrictive covenant in franchising: "… where there is inequality of bargaining power… the restrictive covenant is reasonable because of the concomitant interest of the franchisee aligned with the interest of the franchisee. Likewise, where there is inequality of bargaining power, on analysis, a franchise agreement may be more akin to a contract of employment than to a contract for the sale of a business." The court expressed the same sympathies to Bartlett as the motion judge did and declined to "blue pencil" an acceptable noncompete.

[198] *Dwyer (UK Franchising) Limited v. Fredbar Limited and Shaun Bartlett* ([2022] EWCA).

8. Drafting Noncompete Provisions: Learning by Example

Noncompetition provisions are not "one size fits all" and are dependent on a variety of factors relevant to the particular franchise system which the franchisor is operating as well as the legislative parameters on noncompetition provisions within the jurisdiction where the franchisee is operating. That said, it is often helpful to review existing noncompetition provisions for significant national and international brands to examine how they tackle the issue of how to restrain post-term franchisee competition. Below we examine the noncompetition provisions of several brands to highlight their particular treatment of scope, duration, and geographic limits. We have obtained these provisions from the publicly available filings of disclosure documents for these brands from the State of Wisconsin Department of Financial Institutions franchise e-filing website.[199]

a. SUBWAY RESTAURANTS

The Subway noncompetition provision for American franchisees has two components: (a) the noncompetition provision itself, and (b) key definitions that are used in the noncompetition provision, namely those of "Competitive Business" and "Association with a Competitive Business."

The noncompetition provision is as follows:

> **Upon termination of this Agreement by us in accordance with its terms and conditions or by you without cause or upon expiration of this Agreement, you and your owners agree that, for a period of one (1) year commencing on the effective date of termination or expiration or the date on which you and your owners begin to comply with this Section, whichever is later, neither you nor your owners nor any member of such owner's or owners' immediate families shall have any direct or indirect Association with a Competitive Business within a three (3) mile radius of the Approved Location or any Subway® Restaurant in operation or under construction as of the termination or expiration date or the date on which you and your owners begin to comply with this Section, except in connection with the operation of Subway® Restaurants under franchise agreements with us. The restrictions of this sub-section shall not be applicable to the ownership of shares of a class of securities listed on a stock exchange or traded on the over-the-counter market that represent two percent (2%) or less of the number of shares of that class of securities issued and outstanding. You (and your owners) expressly acknowledge that you (and they)**

[199] https://dfi.wi.gov/Pages/Securities/Filings/Franchising.aspx (last visited April 15, 2025).

possess skills and abilities of a general nature and have other opportunities for exploiting such skills. You further acknowledge and agree that the terms of the covenant are reasonable in scope, geography and time. Consequently, enforcement of the covenants made in this Section will not deprive you (or them) of your (or their) personal goodwill or ability to earn a living. To the extent that this sub-section is deemed unenforceable by virtue of its scope in terms of area or length of time, but may be made enforceable by reduction of either or both thereof, you and we agree that the same shall be enforced to the fullest extent permissible under the laws and public policies applied in the jurisdiction in which enforcement is sought.[200]

i. To Whom Does the Provision Apply

The provision is applicable to both the franchisee itself (likely a corporation) and its individual owners. These parties are signatories to the franchise agreement and are bound by the terms of the provision.

The provision sets out that "any member of such…owner's immediate family" is bound by the noncompetition provision. We note that in jurisdictions such as Canada (via the *Garcha Bros*. decision), non-signatories can be bound to the terms of a noncompetition provision via tort actions founded in conspiracy.

ii. Length of Time

The noncompetition provision is limited to one (1) year, which is on the lower end of acceptable rangers for the length of time of such a provision. The date commences on either the date of expiration or termination. Further, if the franchisee does not immediately comply with the provision, the one-year period does not yet begin to run. This is helpful contractual language as it ensures that a franchisee cannot breach the provision yet delay or stall court proceedings to run out the one-year period.

iii. Geographic Scope

The scope of the noncompetition provision is a three (3) mile radius from the location of the restaurant (the "Approved Location") or from any Subway restaurant in operation or under construction at the time of termination or expiration of the franchise agreement or the date of compliance with the noncompetition provision. The scope of this provision is potentially quite significant given the number of locations operated by the brand.

[200]https://apps.dfi.wi.gov/apps/FranchiseSearch/details.aspx?id=636253&hash=1967458529&search=external&type=GENERAL (last visited April 16, 2025).

iv. Reasonableness of the Provision

The provision includes an acknowledgement by the franchisee that the noncompetition provision will not deprive the franchisee of the future ability to earn a living, which, although boiler plate, provides some evidence to support the argument that the provision will not function as a *de facto* unenforceable restraint on trade.

v. Blue Pencil

The provision permits a "blue penciling" of the restrictions contained therein, in that the parties agree that the scope can be made enforceable by reading down unenforceable aspects. However, it must be noted that in certain jurisdictions, courts may decline to read down or "blue pencil" otherwise unenforceable restrictions on competition in order to make them enforceable, particularly where it would involve re-writing the contractual terms agreed to by the parties.

vi. Scope of Conduct

The noncompetition provision forbids "direct or indirect Association with a Competitive Business" as the restriction on conduct by the franchisee. The two definitions are defined as follows:

> **"Competitive Business" means any business that operates, manages, franchises or licenses restaurants or stores that derive more than twenty percent (20%) of its total gross revenue from the sale of any type of sandwiches on any type of bread, including but not limited to sub rolls and other bread rolls, sliced bread, pita bread, flat bread, and wraps, whether for on or off-premises consumption, or via delivery or catering. The word "sandwiches" as used in the previous sentence does not include hamburgers, hot dogs, burritos, or fried chicken sandwiches, and full-service restaurants where customers are served by waitstaff and pay after eating, and Subway® Restaurants operated under franchise agreements with us, are not Competitive Businesses. Examples (without limitation) of Competitive Businesses as of the Agreement Date are the following chain restaurants: D'Angelo Grilled Sandwiches, Jersey Mike's Subs, Jimmy John's, Firehouse Subs, Potbelly, Togo's, Which Wich Superior Sandwiches, Charley's Philly Steaks, Penn Station East Coast Subs, McAlister's Deli, Pita Pit, Schlotzky's, Cousin's Subs, Capriotti's, Quiznos, Jon Smith Subs, Erbert & Gerbert's, Lenny's Grill & Subs, PrimoHoagies, Tubby's Sub Shop, Blimpie's, Super Sandwich, Nardelli's, DiBella's, Deli Delicious, Groucho's Deli, CHēBA Hut, Steak Escape, Miami Grill, Goodcents Deli Fresh Subs, and Great Wraps.**

> **"Association with a Competitive Business" means: 1) having any ownership interest in or serving as director, officer, employee or other representative of a Competitive Business; 2) advising or providing services, on a fee or no fee basis, to any individual or entity engaging in a Competitive Business in a manner which imparts your knowledge of the System; 3) loaning or otherwise providing money, inventory, equipment or supplies to any individual or entity operating a Competitive Business; or 4) leasing, licensing or otherwise granting access to, or the right to use, the property you control to anyone for the operation of a Competitive Business. Association with a Competitive Business does not include your ownership of outstanding securities of any corporation whose securities are publicly held and traded, provided that said securities are held by you for investment purposes only and that your total holdings do not constitute more than two percent (2%) of the outstanding securities of said corporation.**[201]

In the definition of Competitive Business, there is an attempt to focus on and identify unacceptable competitive behavior so as not to create an unenforceable, overbroad restraint on trade. The definition focus on sandwiches, has a minimum percentage of revenue from the impermissible conduct, and identifies exemptions including types of food such as hamburgers, hot dogs, and burritos, and types of restaurants like sit-down restaurants. The provision also identifies potentially competitive franchise systems to ensure that the franchisee does not simply rebrand under another system.

The definition of Association with a Competitive Business is crafted so as to exclude minor or negligible involvement with a Competitive Businesses that would not threaten the interests of the franchisor, such as holding limited securities. However, outside of this limitation, the impermissible conduct is broad, including employment, involvement in ownership or management, providing advisory services, loaning money or other items, and providing access or use of property. The list of impermissible conduct is likely quite broad as a result of historical franchisee conduct undertaken to undermine the noncompetition provision.

b. LIBERTY TAX

The Liberty Tax noncompetition provision in its American franchise agreements is a simpler, more straightforward noncompetition provision as compared with the Subway provision. It reads as follows:

> **Post-Term Covenant Not to Compete. For a continuous, uninterrupted period of two (2) years following the**

[201] *Id*.

termination, expiration, transfer or other disposition of the Franchised Business (or the conclusion of any Holdover Period during which you continue to operate the Franchised Business with or without Liberty's consent or approval), or your removal as a signator to this Agreement, you agree not to directly or indirectly, for a fee or charge, prepare or electronically file income tax returns, or offer Financial Products, within the Territory or within twenty-five (25) miles of the boundaries of the Territory except, if applicable, in your capacity as a Liberty Tax franchisee pursuant to a valid Liberty franchise agreement. If during the two (2) year period described above, you fail to comply with your post-term covenants not to compete, that period of noncompliance will not be credited toward satisfaction of your 2-year obligation for which you failed to comply.[202]

i. To Whom Does the Provision Apply

The noncompetition provision only applies to the signator to the franchise agreement. This may be the result of the franchise being based on the personal service nature of the business, namely the provision of tax services.

ii. Length of Time

The provision applies for two (2) years, which is longer than the Subway noncompetition provision. The agreement specifies additional events from which the time period will be calculated, including termination, expiration, transfer or other dispositions. The provision addresses the application of time limitation to a holdover scenario where the franchisee continues to operate after the term has expired. As with the Subway provision, the two-year term does not commence until the franchisee has started to comply with the provision.

iii. Geographic Scope

The geographic scope of the noncompetition provision is broad in respect of the actual territory (within the franchisee's territory or within twenty-five (25 miles of the boundaries of the Territory). However, unlike the Subway noncompetition provision, there are no restrictions vis-à-vis operating inside or near the territories of other franchisees. As such, a franchisee could operate another tax service business anywhere as long as it was not in or near the Territory, which improves the potential for enforceability of the noncompetition provision.

[202]https://apps.dfi.wi.gov/apps/FranchiseSearch/details.aspx?id=636658&hash=621929318&search=external&type=GENERAL (last visited April 16, 2025).

iv. Reasonableness of the Provision

Like the Subway noncompetition provision, there is a specific acknowledgement of the reasonableness of the scope of the noncompetition provision, which reads as follows:

> **10.i. Acknowledgement. You acknowledge and agree that the provisions of Section 10 are reasonable, valid and not contrary to the public interest. You acknowledge and agree that the restrictions contained in this Section 10 are reasonable and necessary to protect the legitimate protectable interests of Liberty, including customer contracts, trade secrets and Confidential Information. You further acknowledge and agree that strict compliance with the restrictions and terms of Section 10, including the mileage and territorial restrictions in Section 10, is reasonable and necessary to protect those interests.**

v. Blue Pencil

Again, like the Subway noncompetition provision, there is specific reference to the parties' ability to blue pencil the provision in case a court determines that it is overbroad and therefore unenforceable.

> **10.h. Modification of Scope of Section 10. If the scope of any restriction in Section 10 is too broad to permit enforcement to the fullest extent, the restriction will be enforceable to the maximum extent permitted by law and may be judicially modified in any proceeding brought to enforce it. Liberty may unilaterally reduce the scope of any restriction contained in Section 10 immediately upon notice to you.**

vi. Scope of Conduct

The limitation of scope of competitive conduct is straightforward in this noncompetition provision: "directly or indirectly, for a fee or charge, prepare or electronically file income tax returns, or offer Financial Products." The provision focuses on the actual conduct of the signator to the franchise agreement, namely preparation or filing returns. There remains a question as to whether the impermissible conduct referred to the Subway Restaurants noncompetition provision (such as ownership or permitting the use of property) would constitute an "indirect" breach for the purposes of the Liberty Tax provision.

c. ANYTIME FITNESS

The noncompetition provision in the Anytime Fitness franchise agreement[203] is similar to the Subway Restaurants provision in respect of its complexity. It reads as follows:

[203]https://apps.dfi.wi.gov/apps/FranchiseSearch/details.aspx?id=638153&hash=1311499276&search=external&type=GENERAL (last visited April 15, 2025).

B. <u>After Expiration, Termination, or Transfer</u>. You will not, directly or indirectly for a period of two (2) years after the transfer by you, or the expiration or termination of this Agreement, on your own account or as an employee, consultant, partner, officer, director, shareholder, lender, or joint venturer of any other person, firm, entity, partnership, corporation or company, own, operate, lease to or lease from, franchise, conduct, engage in, be connected with, have any interest in or assist any person or entity engaged in any fitness center, exercise facility, health club, gym or business which offers exercise classes, personal training, fitness equipment or group training, which is located within the Protected Territory or within a ten (10) mile radius of any Anytime Fitness center, wherever located, whether within the Protected Territory or elsewhere; provided, however, that in metropolitan areas having a population of more than 50,000 persons, the foregoing ten (10) mile radius restriction will be limited to a radius of five (5) miles from any Anytime Fitness center (including the one you formerly operated under this Agreement).

C. <u>Reasonableness</u>. You agree that the scope of the prohibitions set forth in Sections 17.A and 17.B are reasonable and necessary to protect us and the System (including other franchisees of the System). You agree that the prohibitions in Section 17.A must be very broad in order to prevent you from taking information, materials and training we are providing to you on an ongoing basis and using them to either compete with us, or preempt or otherwise restrict our ability to enter new markets. You agree that the time period and the scope of the prohibitions set forth in Section 17.B are the reasonable and necessary time and distance needed to protect us if this Agreement expires or is terminated for any reason. You also agree that you have many other opportunities available to earn a living, and that these restrictions will not preclude you from engaging in a lawful trade or business for which you otherwise have training or experience.

D. <u>Exception</u>. The purchase of a publicly traded security of a corporation engaged in a competitive business or service will not in itself be deemed violative of this Section 17 so long as you do not own, directly or

> **indirectly, more than five percent (5%) of the securities of such corporation.**[204]

i. To Whom Does the Provision Apply

As with the Liberty Tax noncompetition provision, the provision only applies to the signatory to the franchise agreement.

ii. Length of Time

Like the Liberty Tax noncompetition provision, the provision applies for two (2) years, which is longer than the Subway noncompetition provision. The agreement specifies three different events from which the time period will be calculated: termination, expiration, or transfer. The provision addresses the length of time the provision would be operative in the event of non-compliance stating: "if you violate [the noncompete clause], the period of time during which the restriction will remain in effect and be extended until two (2) years after you cease violating the restriction."

iii. Geographic Scope

The geographic scope of the noncompetition provision is unique. It provides that the franchisee will not compete:

> **within the Protected Territory or within a ten (10) mile radius of any Anytime Fitness center, wherever located, whether within the Protected Territory or elsewhere; provided, however, that in metropolitan areas having a population of more than 50,000 persons, the foregoing ten (10) mile radius restriction will be limited to a radius of five (5) miles from any Anytime Fitness center (including the one you formerly operated under this Agreement).** [205]

Much like the Subway provision, the geographic restriction applies to the Protected Territory (a 10-mile radius from the franchisee's location) as well as to the fitness centers of other franchisees. However, the scope is lowered to a five-mile radius in larger urban areas. The provision may amount to a significant restriction on competitive conduct by the franchisee depending on the number of franchise locations across the United States.

iv. Reasonableness of the Provision

Like the Subway noncompetition provision, there is express contractual language that provides the parties' acknowledgement of the reasonableness of the scope of the noncompetition provision.

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[204] https://apps.dfi.wi.gov/apps/FranchiseSearch/details.aspx?id=638153&hash=1311499276&search=external&type=GENERAL (last visited April 16, 2025).

[205] *Id.*

v. Blue Pencil

The franchise agreement provides a broad severability clause, which reads: "[A]ll provisions of this Agreement are severable and this Agreement will be interpreted and enforced as if all completely invalid or unenforceable provisions were not contained herein and partially valid and enforceable provisions will be enforced to the extent valid and enforceable. You and we will substitute a valid and enforceable provision for any specification, standard, operating procedure, rule or other obligation of either of us, which is determined to be invalid or unenforceable and is not waived by the other party."

vi. Scope of Conduct

The scope of conduct prohibited under the Anytime Fitness noncompetition provision is both broad and detailed. The impermissible specific conduct of the franchisee is enumerated, likely to prevent circumvention in untraditional fashions: "on your own account or as an employee, consultant, partner, officer, director, shareholder, lender, or joint venturer of any other person, firm, entity, partnership, corporation or company, own, operate, lease to or lease from, franchise, conduct, engage in, be connected with, have any interest in or assist any person or entity…" The noncompetition provision includes an exemption for limited shareholdings in businesses with publicly traded securities.

The types of business in which the franchisee cannot engage is also broad and includes "any fitness center, exercise facility, health club, gym or business which offers exercise classes, personal training, fitness equipment or group training." As such, there may not be any fitness-based business opportunity that the franchisee can participate in, which may be understandable given the context of this type of franchise business.

d. Conclusion

As can be seen by the representative samples above, noncompetition provisions always contain standard language in respect of time, geographic scope, and scope of conduct, but beyond those staples, franchisors are free to craft provisions to a level of complexity necessary to prevent unfair franchisee competition. Franchisors should consult with their counsel to ensure that their provisions allow them to protect their interests in a manner that is reasonable and not overbroad or potentially unenforceable.

9. Conclusion

As set out in the paper above, noncompetition provisions are unfortunately a moving target for franchisors who operate in the United States and internationally. Whether it is the result of overambitious drafting by franchisors and their counsel, the creativity of franchisee counsel who seek to remove constraints on the future endeavors of their clients, or the reluctance of courts to restrain the commercial conduct of franchisee litigants, the enforceability of noncompetition provisions is often uncertain. Despite this, franchisors can manage the risk to their businesses from the competition of former franchisees through (a) understanding the legal playing field where they operate, whether that is domestically or internationally, and (b) ensuring that their provisions do not attempt to stifle competitive behavior in a manner that overreaches what is actually required to

protect their system. Certainty may remain elusive for noncompetition provisions, but with ongoing diligence and willingness to amend or adapt franchise agreements to jurisprudential and legislative developments, a franchisor can at least obtain reasonable peace of mind on this subject.

BIOGRAPHIES

Deborah S. Coldwell is a partner at Haynes and Boone, LLP and is co-chair of the firm's franchise and distribution practice group. She represents franchisors, distributors, joint ventures, limited liability companies, partnerships, and the individuals who run those companies in jury trials, bench trials and arbitrations. She has litigated across several industries – from hotels and restaurants to health clubs and tax preparation services to product and service-based franchise and distribution networks. Deb is ranked nationally in Band 1 by *Chambers USA*, Chambers and Partners, in the franchise law category. Deb is a past chair of the 2,000-plus member American Bar Association Forum on Franchising. She also served the Forum as the editor-in-chief of the *Franchise Law Journal* and as its publications officer. Deb is currently a Champion at the Center for Women in Law housed at the University of Texas at Austin School of Law and is serving a three year term on the Center's Executive Committee. Education: JD, The University of Texas at Austin School of Law; MAT, Colorado College; BA, Colorado State University.

Scott Kuykendall serves as Assistant General Counsel at Neighborly, the world's largest parent company of home service brands with more than 5,000 franchises in 9 countries. Scott represents 5 of Neighborly' s franchised brands, their corporate owned plumbing stores, oversees all Neighborly' s intellectual property, and manages private equity franchise transactions. Prior to joining Neighborly, Scott was the General Counsel at UAS International Trip Support, a company that provides aviation trip support, executive travel, and air charter. Before that, he served as Corporate Counsel at Era Helicopters, now Bristow, a leader in global vertical flight solutions offering helicopter offshore oil & gas transportation and search and rescue (SAR) services to civil and government organizations worldwide. When not working, Scott enjoys traveling or spending time in the outdoors with his kids and beautiful wife. He received his juris doctor from South Texas College of Law Houston and his Bachelor of Arts degree from Baylor University

Peter Snell is a partner in the Franchise Group at Cassels Brock & Blackwell LLP, assisting clients to expand their franchise businesses in Canada and around the world. With a unique blend of business law and intellectual property law experience, Peter is well positioned to address key intellectual property issues and incorporate them into successful strategic planning. Getting to know his clients and their business is fundamental to Peter's approach, and his understanding of a client's business risks and opportunities is a critical component of his effective expansion strategies. For his work, Peter is highly rated by the world's leading franchise directories including Chambers, Lexpert, Lexology Index, and Best Lawyers in Canada.

James Susag has been the lead trial attorney in numerous franchise trials and arbitrations in state and federal courts across the country and in domestic and international arbitration forums. Jim's experience spans disputes relating to claims of violation of state franchise or dealership laws, trademark infringement, breach of contract, system-standards enforcement, consumer class actions, post-termination rights,

disclosure and registration issues, fraud claims, vicarious liability, independent contractor misclassification and joint employment issues. Jim is a frequent writer and lecturer on franchise-related topics for both the ABA Forum on Franchising and the IFA. He has also served on the IFA Legal Symposium Task Force and has been a contributing author for the ABA Forum on Franchising.