

When Will Courts Issue Preliminary Injunctions to Enforce Restrictive Covenants in Franchise Agreements?

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Franchise agreements almost always include covenants not to compete. Enforcement of these covenants comprises an increasing amount of litigation between former franchisees and their franchisors. Often, litigation involving restrictive covenants centers on the question of whether a court should issue a preliminary injunction to enforce the noncompete agreement, potentially forcing a former franchisee to cease operation of its business. This article will analyze recent case law regarding the enforcement of restrictive covenants in franchise agreements and identify where franchisors have succeeded and where they have failed in their attempts to obtain preliminary injunctive relief to enforce noncompete provisions in franchise agreements.

This article first reviews the applicable law regarding the enforceability of restrictive covenants generally and when included in franchise agreements specifically. This article then describes general concepts concerning preliminary injunctions and points out some differences across state lines. Finally, the bulk of this article surveys recent case law involving franchisors that sought preliminary injunctive relief to enforce their noncompetes and identifies some general trends of the law pertaining to the enforcement of such restrictive covenants.

Covenants Not to Compete

Restrictive covenants appear primarily in three types of agreements: employment contracts, contracts for the sale of a business, and franchise agreements. Due primarily to the negative public policy implications of contracting away employment rights, restrictive covenants in sale of business contracts are more readily enforced than restrictive covenants in employment contracts.¹ Noncompete covenants in franchise agreements are largely viewed as a hybrid of employment and sale of business contracts and thus comprise a distinct category of restrictive covenants. Like sale of business restrictive covenants, franchise agreement restrictive covenants aim to protect the goodwill associated with the franchisor's marks, and the benefits that the franchisor derives therefrom, by preventing former franchisees from misappropriating use of the marks and confidential business operations. And, like employment contract restrictive covenants, the law recognizes the disparity in power between the franchisor and the franchisee.

Covenants in franchise agreements often prohibit the franchisee, and sometimes certain key employees, from competing with the franchised business by operating or working in

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or for the same or a similar business. Franchise agreements typically contain two different types of restrictive covenants: in-term covenants, prohibiting competition while the franchisee is operating the franchised business; and post-term covenants, prohibiting competition after the expiration or termination of the franchise agreement. The cases discussed in this article deal solely with attempts to enforce post-term restrictive covenants.

A post-term restrictive covenant in a franchise agreement generally defines a time period following termination or expiration of the franchise agreement during which the restriction is effective, along with the specified geographic area in which the restriction applies. Both of these provisions must be reasonable. For example, courts have held to be reasonable franchise agreements restricting post-termination competition for one to two years within a single county or five miles from the original location.² Franchise attorneys should note that some states have statutes governing the enforceability of restrictive covenants.³

In the past, courts frowned upon restrictive covenants. In fact, courts used to regularly hold that restrictive covenants in franchise agreements constituted agreements in restraint of trade and were therefore void as contrary to public policy.⁴ However, courts now regularly enforce restrictive covenants that are within a lawful contract, reasonable, and not contrary to the public interest.⁵

Preliminary Injunctions

Preliminary injunctions are an extraordinary form of relief that serve a limited purpose—preserving the status quo of the parties until a full trial on the merits of the dispute can be held.⁶ The status quo is defined as “the last peaceable, uncontested status of the parties which preceded the actions giving rise to the issue in controversy.”⁷ Prohibitive injunctions seek to preserve the existing state of the relationship by prohibiting conduct that would alter it, while mandatory injunctions alter the existing relationship by requiring the subject of the injunction to take some action (as opposed to refraining from action).⁸ The status quo is preserved when irreparable harm is prevented.⁹

Therefore, in the context of a noncompete covenant, a franchisor seeking a preliminary injunction wants to alter the status quo by ordering enforcement of a restrictive covenant (i.e., ordering a former franchisee to comply with the covenant by ceasing to operate a business that competes with the franchise). Franchisors generally argue that the status quo, as the last peaceable status of the parties, should be defined as the time before the franchisee engaged in the conduct that allegedly violated the noncompete covenant. If successful in making this argument, the franchisor likely will have much more success in obtaining a preliminary injunction because courts look more favorably upon prohibitive injunctions. A former franchisee defending against a preliminary injunction, on the other hand, generally wants to preserve the status quo by preventing termination of its business and will argue that the status quo includes continuing to engage in the conduct that the franchisor seeks to prevent.

When a court decides whether or not to issue a preliminary injunction, it does not conduct a full trial on the merits; thus, findings made by a court at the preliminary injunction stage are not binding on the trial court.¹⁰ Additionally, an agreement to submit disputes to arbitration does not prevent a court from issuing a preliminary injunction prior to the initiation of arbitration proceedings in order to preserve or restore the status quo.¹¹

Four-Factor Approach to Preliminary Injunctions

Although jurisdictions vary slightly in their approaches to determining when a preliminary injunction should be granted, there is general agreement as to the factors that courts will consider in deciding whether to issue a preliminary injunction. Courts consider, in varying combinations, whether the plaintiff will suffer irreparable injury if an injunction is not issued (or, somewhat interchangeably, whether an adequate remedy exists at law); the plaintiff's likelihood of success on the merits; the balance of harms between the plaintiff and the defendant; and the effect of any proposed injunction on the public interest.

In some jurisdictions, the party seeking the injunction must satisfy all four factors; other jurisdictions will issue a preliminary injunction upon establishing only one of the factors.¹² Yet another group of jurisdictions requires that the party seeking the injunction establish irreparable injury or inadequacy of legal remedies, and the court will then engage in a balancing of harms.¹³ Often, if a party seeking an injunction has a very strong argument establishing one of the factors, a court will issue an injunction even if the arguments as to the other factors are weaker.¹⁴

Irreparable Injury

All jurisdictions require the party seeking the injunction to establish that it will suffer an irreparable injury if an injunction is not issued. Failure to establish irreparable injury will result in denial of a request for a preliminary injunction.¹⁵ Generally, an irreparable injury is one that cannot be remedied with an award of monetary damages; in other words, the plaintiff does not have an adequate remedy at law and therefore must pursue the equitable remedy of an injunction.¹⁶ As a result, the irreparable injury sought to be prevented by the preliminary injunction must be something more than a loss of business or customers, such as damage to goodwill or intellectual property

or loss of the ability to franchise the former franchisee's territory, that will occur unless the former franchisee ceases its activities immediately.

Likelihood of Success on the Merits

A court considering a party's likelihood of success on the merits will make a cursory review of the information provided by both parties, including claims and defenses. In a franchise case, a franchisor generally must show a likelihood of success on its breach of contract claim, that is, its claim that the franchisee is acting in breach of the covenant against competition contained in the now-terminated or expired franchise agreement.

In some states, the threshold to establish likelihood of success on the merits increases when a party seeks a mandatory injunction, i.e., the party must make a clear or substantial showing of likelihood of success.¹⁷ Therefore, a franchisor will want to argue that it is not seeking to alter the status quo when it seeks a preliminary injunction enforcing a restrictive covenant (and thereby forcing the former franchisee to stop certain behavior). Rather, to avoid the requirement of an increased burden of persuasion, the franchisor should claim that the injunction it seeks is merely preservative of the status quo because the last peaceable, uncontested state was before the former franchisee took the actions that allegedly breached the restrictive covenant. On the other hand, former franchisees will want to argue both that the status quo is the current state of affairs and that the franchisor is not likely to succeed on its claim that the former franchisee is operating a business in breach of the restrictive covenant in the franchise agreement, generally because the restrictive covenant is unreasonable.

Balance of Harms

The balance of harms involves a careful weighing of the harm to the party seeking the injunction if the injunction is not issued against the harm to the other party in the event that the injunction is issued in error (i.e., issued in favor of a party that subsequently loses the case on its merits).¹⁸ In the franchise context, this factor involves the consideration generally of any irreparable harm claimed by the franchisor balanced against any potential harm to the former franchisee in the event that it is forced to close down its business, and particularly of the extent of this harm to the former franchisee if it is later found not to be in breach of any restrictive covenant.

Public Interest

In determining whether to issue an injunction, courts may also consider the public interest. This factor generally looks at the effect of the injunction on nonparties to the suit.¹⁹ Often, considerations of public interest will only come into play once the court determines that the three other factors have been met.²⁰

Preliminary Injunctions: Recent Case Law

Courts grant, and refuse to grant, preliminary injunctions enforcing noncompete covenants in franchise agreements for a variety of reasons. This section will discuss the recent case law involving the relevant factors that courts weigh under each preliminary injunction consideration.

Irreparable Injury

Irreparable injury does not always result from a franchisee's alleged breach of a noncompete covenant. Although an actual breach of a noncompete covenant may result in monetary damages to a franchisor, the risk of economic damages alone is insufficient to support the issuance of a preliminary injunction that will put a former franchisee out of business. Therefore, franchisors seeking a preliminary injunction ordering a franchisee to cease activities that are allegedly in breach of a restrictive covenant must establish something more than monetary loss or economic harm.²¹ Franchisors commonly argue that the irreparable injury is in the form of customer confusion or loss of goodwill and damage to reputation. Additionally, a franchisor will often claim that its irreparable injury is the inability to establish a new franchise in the former franchisee's territory or harm to its ability to enforce existing franchise agreements.²² However, these arguments are only successful in a few contexts, and courts are hardly consistent in their conclusions.

Customer Confusion and Loss of Goodwill

One way of establishing irreparable injury (and perhaps the argument that is generally most successful for franchisors) is to argue that a franchisee's breach results in customer confusion, thereby causing a distinct injury to the franchisor's brand, trademark, and goodwill. For example, in *Atlanta Bread Co. International, Inc. v. Nine Star Enterprises, Inc.*, the court held that a franchisor established irreparable harm resulting from customer confusion when the terminated franchisee operated a deli in the building where he had operated the franchise and continued to sell the franchisor's products.²³ The court noted that until the former franchisee ceased operation, the franchisor lost control of its trademark and reputation.²⁴ These harms, according to the court, could not be remedied with monetary damages.²⁵

However, franchisors may have difficulty establishing customer confusion (and, therefore, irreparable harm) when the former franchisee completely disassociates itself from the franchisor's marks and business system. For example, in *Bennigan's Franchising v. Swigonski*, the court held that the franchisor failed to show irreparable harm when the former franchisee, while continuing to operate a casual dining restaurant in the location where he had operated the franchised restaurant, removed all of the franchisor's marks and substantially decharacterized the restaurant.²⁶ As an additional basis for its holding that the franchisor was unlikely to be irreparably harmed by the former franchisee's alleged breach of the restrictive covenant, the *Bennigan's* court also emphasized the fact that the former franchisee's restaurant was 210 miles from the closest franchised restaurant; it was unlikely that customers would be confused.²⁷

The emphasis that the court placed on these facts—the former franchisee's decharacterization of its restaurant and the significant distance between the former franchisee's restaurant and any franchised business—demonstrates that courts are unlikely to find irreparable harm without a significant risk of customer confusion. Therefore, franchisees seeking to avoid a preliminary injunction that enforces a restrictive covenant often have a strong argument that the franchisor has not suffered an irreparable injury if they can demonstrate a lack of potential

customer confusion. Although a court could ultimately find that a franchisee did breach a restrictive covenant, a franchisor will likely have difficulty establishing a risk of customer confusion at the preliminary injunction stage when the franchisee completely disassociates itself from the franchisor's marks and the former franchisee's business is not in direct competition with an existing franchise store. Courts will not employ the drastic equitable remedy of issuing a preliminary injunction (and thus forcing a business to shut its doors before a trial on the merits has been held) unless the party seeking the injunction can clearly establish that the harm it will suffer cannot be remedied through monetary damages.

For example, the court in *Curves International v. Mosbarger* held that the risk of customer confusion was negligible when the former franchisee's new gym used different equipment and operated at a new location and under a different name than the franchised gym.²⁸ Additionally, a restaurant franchisor was unable to establish irreparable harm when a former franchisee commenced operating a new restaurant at the same location after removing all items relating to the franchise and changing the menu, name, and general look of the restaurant.²⁹ A Canadian court even held that the difference between organic and nonorganic coffee was enough to distinguish a former franchisee's coffee shop from the franchised shop and thus rejected the franchisor's petition for a preliminary injunction.³⁰

On the other hand, in some circumstances, franchisors have successfully claimed that they were irreparably harmed by the loss of goodwill when a former franchisee breached a restrictive covenant. In *Lockhart v. Home-Grown Industries of Georgia, Inc.*, the court granted a preliminary injunction enforcing a covenant not to compete when the franchisor showed that the former franchisee was reaping the goodwill established by the franchisor.³¹ Although the court noted that "loss of sales, profits or market share alone do not constitute the sort of harm sufficient to warrant injunctive relief," the fact that former franchisees continued to operate restaurants in the same location as their franchises and offered almost exactly the same products, thereby attracting the same customers, supported a finding of irreparable harm.³²

However, the mere loss of some clients does not constitute an irreparable harm. In *Coast to Coast Engineering Services v. Stein*, the court distinguished between the loss of some clients or business opportunities and the loss of an entire business enterprise.³³ The court held that bare allegations that the former franchisee was doing business with some of the franchisor's clients was not a sufficient showing of irreparable injury and that any lost business could be compensated with monetary damages in the event that the franchisor succeeded on its substantive claims.³⁴

A direct interference with customer relations does, however, constitute irreparable harm.³⁵ In *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, the court held that the franchisor would suffer irreparable harm because the former franchisee directly interfered with customer relations by providing the same services that the franchised business provided to the same customers.³⁶ Because the former franchisee's new business was based entirely on retaining customers with which it had developed relationships while a franchise,

the court held that the franchisor was suffering an irreparable loss of fair competition and incalculable damages.³⁷

This distinction between mere loss of business and direct interference with customer relations is not surprising because customer relations mirror goodwill in a franchise relationship. Beyond its marks and business systems, a franchisor's most valuable asset is its reputation in the community, commonly referred to as its goodwill and often reflected through customer relations. Damage to goodwill or customer relations resulting from an alleged breach of a restrictive covenant may be nearly impossible to compensate through monetary damages and is therefore a proper reason for a preliminary injunction to issue.

However, a franchisor cannot establish irreparable injury when a claim of loss of customers, loss of goodwill, or customer confusion is too remote or speculative. For example, in *Curves International*, the court refused to issue a preliminary injunction enforcing a covenant not to compete when the franchisor failed to present any evidence that Curves customers were now attending the former franchisee's new gym.³⁸ Further, the U.S. Court of Appeals for the Ninth Circuit has held that speculative injury is insufficient to support a finding of irreparable harm.³⁹ The court stated that "[a] plaintiff must demonstrate immediate threatened injury as a prerequisite to preliminary injunctive relief."⁴⁰

Inability to Refranchise and Harm to Existing Franchisee Relationships

A franchisor that can demonstrate that it has been unable to establish new franchises in the former franchisee's territory due to a breach of a restrictive covenant likely will be able to establish irreparable injury.⁴¹ The same can be said when a franchisor can show that a former franchisee's breach of a restrictive covenant has harmed the franchisor's relationships with other franchisees and its ability to enforce existing franchise agreements.⁴² Again, however, the franchisor's allegations of harm cannot be too remote or speculative. A simple claim that a franchisor has faced difficulties refranchising a territory should be supported by specific allegations tying the difficulty to the former franchisee's alleged breach.

In conclusion, although franchisors are quick to allege that they will be irreparably harmed by a former franchisee's business activities that might be in breach of a covenant not to compete, such harm, if any, can often be measured in terms of monetary damages. Additionally, any potential irreparable harm may be far too remote and speculative to justify the substantial remedy of issuing a preliminary injunction and forcing a former franchisee to shut down a business enterprise that is potentially not in breach of any restrictive covenant.

Likelihood of Success on the Merits

Whether a franchisor will be likely to succeed on the merits of its claim that a former franchisee is operating a business in breach of its obligations under a terminated or expired franchise agreement is, along with irreparable harm, probably the most extensively considered preliminary injunction factor. As discussed above, the court's role in considering a motion for a preliminary injunction is somewhat limited: courts are not in a position to conduct a full trial at the preliminary injunction

stage, and parties have not gone through the research, discovery, and other fact-finding processes that will reveal the support for their claims and defenses. Therefore, a court's decision in regard to issuing a preliminary injunction to enforce a covenant not to compete often turns on a very limited set of often disputed facts and only a cursory consideration of applicable law.

A former franchisee's best and most commonly asserted argument against the issuance of a preliminary injunction is that the restrictive covenant in the franchise agreement is unenforceable because the covenant itself is invalid under state law or because the contract as a whole is unenforceable. Even at the preliminary injunction stage, courts will often carefully consider the enforceability of the restrictive covenant, and covenants that appear overbroad or otherwise unreasonable will not be enforced.

For example, in *Bennigan's*, the court found that the franchisor was not likely to succeed on the merits of its claim for breach of contract arising out of a former franchisee's operation of a restaurant in the same location where it operated its franchised restaurant.⁴³ The restrictive covenant at issue prohibited the operation of "any casual dining or other restaurant business."⁴⁴ The court held that the term *casual dining* was too broad and pointed out that the franchise agreement failed to adequately define the term.⁴⁵ Although the franchise agreement did provide a list of examples of casual dining restaurants, the court rejected the argument that this list limited the overbroad nature of the prohibited conduct because there was no identifiable "common thread" among the listed examples.⁴⁶ As a result, the court held that the franchisor was not likely to succeed on the merits of its breach of contract claim because the former franchisee would likely be able to prove that the restrictive covenant was unenforceable.⁴⁷

A court reached the same result and refused to issue a preliminary injunction enforcing a covenant not to compete in *Novus Franchising v. Oksendahl*.⁴⁸ In this case, the court held that the restrictive covenant was not reasonable. The covenant could be read to apply to more than the former franchisee's continued use of the franchisor's marks and products⁴⁹; the covenant could reasonably be interpreted to apply to the use of all business products and services that competed with the franchisor's trademarks or products.⁵⁰ Because such a broad restriction was unlikely to be upheld under Idaho law, the court refused to grant the preliminary injunction.⁵¹ The court reached this decision even though it conceded that the franchisor did establish legitimate business interests supporting the restrictive covenant, i.e., protection of goodwill, protection from unfair competition, and potential damage to the franchise system as a whole.⁵²

On the other hand, franchisors can generally establish a likelihood of success on the merits when there is no challenge to the enforceability of the restrictive covenant and the former franchisees are blatantly in breach. In *Lockhart*, the court held that a franchisor established a likelihood of success on the merits where the former franchisees were operating pizza stores at the same locations that they had operated their pizza store franchises; the new stores had menus nearly identical to the menus of the franchised stores; and the former franchisees continued to use the franchisor's marks, signs, and related materials.⁵³ The facts in *Lockhart* are clearly distinguishable from the facts

in *Bennigan's*, where the former franchisees took clear measures to cease use of the franchisor's intellectual property and made the visual changes necessary to distinguish the new restaurant from the franchised restaurant.

Franchisees seeking to avoid enforcement of a restrictive covenant should note that franchisors are going to have a much more difficult time establishing the likelihood of success on the merits when the former franchisee has substantially complied with the terms of the restrictive covenant by operating a business that is unlikely to create customer confusion and by ceasing the use of all of the franchisor's marks and logos and other aspects of the franchisor's business system. Additionally, if a former franchisee finds that compliance with the restrictive covenant essentially precludes it from operating any type of business, the former franchisee should consider arguing that the covenant is unreasonable under state law. The *Bennigan's* case and the *Novus* case demonstrate that courts are reluctant to enforce restrictive covenants that can be interpreted to prohibit a broad array of behavior, and franchisees should use this tendency to their advantage when arguing that a franchisor is unlikely to succeed on the merits of its breach of contract claim.

In other cases, the likelihood of success on the merits turns on whether the franchisor has offered sufficient proof that the franchisee is operating in violation of the covenant not to compete. A franchisor that seeks to enjoin the activities of a former franchisee that is obviously violating a clearly reasonable and enforceable restrictive covenant has the best chance of obtaining a preliminary injunction.

For example, in *Hometask Handyman Services, Inc. v. Cooper*, the court did not hesitate to enforce a covenant not to compete that prevented the operation of a business identical to the franchised business within a twenty-five-mile radius of the former franchisee's territory.⁵⁴ The former franchisee, while operating under a new name, was providing the same or similar services as the franchised business, using the phone number and van color associated with the former franchise, and allegedly using the franchisor's marks in Internet advertising.⁵⁵ The former franchisee's actions in this case more than likely constituted a breach of the restrictive covenant, and the former franchisee did not present any viable challenges to the covenant's enforceability or reasonableness; thus, the court found that the franchisor was likely to succeed on the merits of its claim.⁵⁶

Similarly, a court issued a preliminary injunction when a former franchisee continued to operate a substantially similar business in its former franchise territory, in direct competition with the franchisor and in violation of the covenant not to compete.⁵⁷ The former franchisee had allowed its franchise agreement to expire after discovering that language used in the franchisor's marketing scheme was possibly illegal under state law.⁵⁸ However, the former franchisee continued to operate its business and even acquired most of its customers by soliciting customers with which it had established business relationships as a franchisee.⁵⁹ The court did not hesitate to issue a preliminary injunction, noting that the former franchisee's behavior "presents as blatant and unjustified a repudiation of subsisting contractual obligations . . . as has been known or encountered by this court."⁶⁰

Franchisors seeking to establish a likelihood of success on

the merits of a breach of contract claim for violations of a covenant not to compete must present the court with more than bare allegations that the former franchisee is violating the restrictive covenant. For example, absent supporting evidence that a former franchisee continued to use the telephone and fax numbers associated with the franchised business following termination and continued to hold itself out as a franchise, the franchisor's bare allegations were held insufficient to establish a likelihood of success on the merits.⁶¹

In addition, courts will generally refuse to issue a preliminary injunction to stop an alleged breach of a covenant not to compete when the validity of the former franchisee's post-termination obligations rests on the determination of the franchisee's claims against the franchisor, e.g., where the former franchisee alleges that the franchise agreement, and thus the covenants contained in it, were fraudulently induced. In *Quizno's Master v. Kadriu*, the court refused to issue a preliminary injunction for exactly this reason.⁶² Because the former franchisee alleged that the franchise agreement was fraudulently induced, the court refused to issue an injunction finding that, per the parties' contracts, the validity of the post-termination obligations rested on the determination of the former franchisee's fraud claims, which, per the parties' contracts, were to be decided in arbitration.⁶³

In conclusion, whether a court will issue a preliminary injunction often turns on whether the franchisor is able to establish the likelihood of success on the merits. The ease of establishing a likelihood of success often correlates with the strength of the arguments presented by former franchisees opposing enforcement of restrictive covenants and depends on the actions that the franchisee has actually been taking that arguably violate the restrictive covenant. When defending against a motion for preliminary injunction, franchisees' attorneys should carefully examine the covenant to determine if there are any viable challenges to its reasonableness. In doing so, franchisor attorneys should recognize that courts often strictly construe the terms of restrictive covenants in a manner so as not to prevent the operation of a business that does not impinge upon the franchisor's intellectual property rights and other rights in regard to the franchisor's business system.

Finally, franchisees should remember to point out to courts that any arguments or claims it is presenting that the franchise agreement as a whole is illegal due to fraudulent inducement, misrepresentations, or violations of state franchise acts should lead the court to conclude that the restrictive covenant should not be enforced by means of a preliminary injunction because it is impossible for a franchisor to succeed on a breach of contract claim for a contract that is later found to be illegal.

Balance of Harms

A factor often less determinative than irreparable injury or likelihood of success of the merits is the balancing of harms. Courts often only engage in a balancing of harms once it has already been established that a party will suffer irreparable injury in the absence of a preliminary injunction and that the party has shown a likelihood of success on the merits of its claims. When courts do consider the balance of harms, the inquiry is generally very fact-specific.

The balance of the hardship often will tip in favor of the former franchisee when the former franchisee is operating a business and has contractual obligations as a result. For example, in *Athlete's Foot Brands, LLC v. Whooahh, Inc.*, the balance of the hardship was in favor of the franchisee because the franchisee was operating a business and had signed a multiyear lease.⁶⁴ The franchisor, on the other hand, was not even attempting to open a location in the area covered by the restrictive covenant.⁶⁵

Courts that are balancing harms may also look at the parties' conduct in the performance of the contract. For example, in *Atlanta Bread*, the court held that the balance of harms weighed heavily in favor of the franchisor because it was the franchisee's own actions that effectively caused the termination of the franchise agreement.⁶⁶ Therefore, the court held that this "self-inflicted harm" (that is, the former franchisee's loss of its business) was outweighed by the damage the franchisor was suffering as a result of the former franchisee's continued use of the franchisor's marks and products. As a result, franchisors seeking a preliminary injunction to enforce a restrictive covenant should

consider the cause of the termination of the franchise agreement because that fact may greatly influence the court's decision as to whether the franchisor is being sufficiently harmed to justify forcing a former franchisee to shut down a business. In other words, if a franchisor caused the termination of the former franchisee's agreement, that franchisor is going to have a much more difficult time demonstrating that its harm is outweighed by the harm inflicted on a former franchisee that is forced to shut down its business.

The *Bennigan's* court, discussed supra, held that the balance of harms favored the former franchisee because the franchisor would suffer little to no injury if the restrictive covenant was not enforced as the franchisee was no longer using the *Bennigan's* marks and the nearest *Bennigan's* restaurant was 210 miles away from the franchisee's restaurant.⁶⁷ However, the balance of harms will weigh in the franchisor's favor when the former franchisee's operation of its business poses a threat to the entire franchise system.⁶⁸ For example, in *Dry Cleaning To-Your-Door, Inc. v. Waltham*, the court noted that the balance of harms weighed heavily in favor of the franchisor because of the highly territorial nature of the franchised residential dry cleaning pickup and delivery business.⁶⁹ The territorial nature of the franchised business increased the irreparable harm to the franchisor and shifted the balance of harms in its favor because the former franchisee's alleged breach of the restrictive covenant posed a threat to the entire franchise system.⁷⁰

When a franchisor is successful in showing a likelihood of success on the merits yet fails to show irreparable harm, the balance of harms factor is often the tiebreaker. For example, in *Noodles Development, LP v. Ninth Street Partners, LLP*, discussed supra, the franchisor established a likelihood of success on the merits as to the breach of contract claim but failed to show that it would suffer irreparable harm.⁷¹ The

determinative factor, therefore, was that the former franchisee would be forced to close down its business if the preliminary injunction was issued.⁷² The court noted that "an illusory harm to the [franchisor] will not outweigh any actual harm to the [former franchisee]."⁷³ Forcing the former franchisee out of business was a concrete harm, especially considering the fact that the franchisor refused to accept assignment of the former franchisee's leases.⁷⁴ Additionally, the court noted that the former franchisee had taken all steps requested by the franchisor to further disassociate its current restaurant from the franchised business.⁷⁵ Considering these facts, the court refused to issue the preliminary injunction because the balance of harms weighed in favor of the former franchisee.⁷⁶

The court reached the same result in *Sona Laser Centers, Inc. v. Capital Works, LLC*.⁷⁷ In that case, the franchisee had terminated its agreement for the operation of hair removal centers and had transferred its assets, including customer contracts, to the franchisee's wife.⁷⁸ The former franchisee's wife then proceeded to operate hair removal centers at the same

locations but under a different name.⁷⁹ The court held that the balance of harms favored the former franchisee.⁸⁰ The franchisor's claimed harm, i.e., loss of customers' goodwill, was generally compensable by monetary damages and outweighed by the harm that the former franchisee's wife's centers would suffer if the centers were shut down.⁸¹ This case shows that a franchisor's claimed loss of customers in goodwill is not always a sufficient harm to outweigh the harm that will be caused to an individual forced to shut down a business.

In conclusion, courts will generally use the balancing of harms factor when the likelihood of success on the merits is not determinative as to whether a preliminary injunction should issue. The facts to which the courts give weight when balancing harms vary case by case, but each party's role in the termination of the franchise agreement is often considered, along with the nature of the franchise business and the nature of the business being conducted by the former franchisee (in particular, its similarity to the franchised business).

Public Interest

The fourth factor that courts often consider in determining whether to issue a preliminary injunction is public interest. However, a preliminary injunction's potential effect on the public is rarely determinative for the courts.

For example, in a case where the court had already found that the franchisor had established a likelihood of success on the merits and irreparable harm and the balance of harms weighed in its favor, the court simply noted that an injunction would serve the public interest by preventing customer confusion.⁸² In other cases, courts have noted a public interest in enforcement of assumed contract obligations, including a restrictive covenant.⁸³ Similarly, in *Furniture Media, L.P. v. Jantzen*, the court noted that the public interest would not be harmed by

Courts often consider public interest in deciding whether to issue a preliminary injunction.

the enforcement of a restrictive covenant in a franchise agreement because there was no evidence that customers would not be served and because the public had an interest in preventing those that purchased franchises from appropriating the franchisor's knowledge and information.⁸⁴

Essentially, a franchisor has a strong argument that enforcement of a restrictive covenant is in the public interest because the public has an interest in protecting the intellectual property and business systems of the franchisor. Not unexpectedly, franchisors often point to the fact that the public has an interest in contractual obligations being enforced. The franchisee, on the other hand, will point out that the public has an interest in nonenforcement of unreasonable restraints on competition and in ensuring that the public is served and not subject to franchisor-created monopolies. Franchisees also may point out that the public has a significant interest in ensuring that any restrictive covenants that are enforced are only enforced to the extent that they are reasonable. For example, in *Noodles Development*, the court held that an injunction would not serve the public interest because it would only put the former franchisee out of business and would not remedy any wrong to the franchisor.⁸⁵

In sum, although courts considering motions for preliminary injunctions to enforce restrictive covenants will consider the public interest in many cases, a court's decision will often turn on the other three factors. Generally, courts seem to mold their vision of the public interest factor into a form that fits the conclusion reached when considering the other preliminary injunction factors. In other words, any strong argument that the public interest calls for enforcement or nonenforcement of a restrictive covenant is not likely to be very influential unless the party asserting the public interest argument also has made a strong argument as to why the likelihood of success on the merits, irreparable harm, or balance of harms factor weighs in its favor.

Blue Pencil Rule

Courts employ three distinct approaches when faced with an overbroad restrictive covenant.⁸⁶ Some courts simply deem overly broad covenants against competition void and refuse to enforce them.⁸⁷ Others will only modify or "blue pencil" overbroad covenants to the extent that the offensive provision is grammatically severable. The court will then enforce the lawful portion of the restrictive covenant and ignore the unlawful part. In these strict blue pencil states, the court will not modify the covenant to add terms or otherwise rewrite the contract.⁸⁸ The most common approach, however, is for the court to modify the restrictive covenant to make it reasonable and enforceable.⁸⁹

When drafting a restrictive covenant for a franchise agreement, franchisor attorneys should first familiarize themselves with the law of the state that will control the interpretation of the contract to determine which approach that state has adopted. To avoid the risk of having the court materially modify the noncompete covenant or deem it void altogether, franchisor attorneys should draft restrictive covenants no broader than reasonably necessary to protect the franchisor's legitimate business interests.

Likewise, attorneys for franchisees should familiarize themselves with controlling law in order to appropriately advise their clients regarding the enforceability of the post-termination

restrictions imposed by the franchise agreement. Ideally, these conversations should take place prior to signing the franchise agreement so that any proposed modifications to the restrictive covenants as written can be negotiated with the franchisor. At a minimum, franchisee attorneys should ensure that a prospective franchisee, when making the decision to go forward with the purchase of the franchise, has a full understanding of the specific restrictions imposed by the contract and how these restrictions may limit the franchisee's ability to conduct business after the termination of the franchise agreement.

Conclusion

As the preceding discussion demonstrates, the case law is highly fact-specific, and franchisees and franchisors will likely find it difficult to predict whether a court is willing to use a preliminary injunction to enforce a restrictive covenant. Franchisors that seek to maximize certainty regarding the enforceability of their covenants should take careful note of the reasonableness of the covenant in terms of geography, duration, and activities covered.

Franchisees seeking to avoid enforcement of a restrictive covenant through a preliminary injunction should focus on attacking the franchisor's ability to demonstrate a likelihood of success on the merits and also should attempt to show that the potential damages that the franchisor may suffer are sufficiently compensable by an award of economic damages. Franchisees should also carefully consider state-specific treatment of restrictive covenants and the availability of any arguments that the contract as a whole may be unenforceable.

Endnotes

1. *Budget Rent-A-Car Corp. of Am. v. Fein*, 342 F.2d 509, 515 (5th Cir. 1965).

2. *See, e.g., ServiceMaster Residential/Commercial Servs., L.P. v. Westchester Cleaning Servs., Inc.*, No. 01 Civ. 2229, 2001 WL 396520 (S.D.N.Y. Apr. 19, 2001) (one-year, single-county restriction valid); *Quizno's Corp. v. Kampendahl*, No. 01 C 6433, 2002 WL 1012997 (N.D. Ill. May 20, 2002) (two-year, five-mile radius from original location restriction valid).

3. *See, e.g., CAL. BUS. & PROF. CODE* § 16600; *COLO. REV. STAT.* § 8-2-113(2). Statutes governing the enforceability of restrictive covenants may prove very useful for former franchisees defending against a motion for a preliminary injunction. For example, in *Pirtek USA, LLC v. Whitehead*, the court held that the franchisor failed to establish a likelihood of success on the merits of its claim that the former franchisee breached the restrictive covenant because the franchisor was not operating or attempting to operate a franchise in the area covered by the restrictive covenant. No. Civ. A. 05-0242-CG-C, 2006 WL 2038651 (S.D. Ala. Apr. 27, 2006). Under a Florida statute governing restrictive covenants, the franchisor's lack of efforts to franchise the covered territory could deem the covenant unenforceable. *Id.* (referencing *FLA. STAT. ANN.* § 542.335(b)).

4. *W. MICHAEL GARNER, FRANCHISE DISTRIBUTION LAW & PRACTICE* § 8.52.

5. *Id.*

6. *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981).

7. *Praefke Auto Elec. & Battery Co., Inc. v. Tecumseh Prods. Co.*, 123 F. Supp. 2d 470, 473 (E.D. Wis. 2000) (citing *Westinghouse Elec.*

Corp. v. Free Sewing Mach. Co., 256 F.2d 806, 808 (7th Cir. 1958)).

8. Dunkin' Donuts Inc. v. Nat'l Donut Rests. of N.Y., Inc., 291 F. Supp. 2d 149, 151 (E.D.N.Y. 2003).

9. See Keller Corp. v. Kelley, 2008 WL 2053006 (Colo. Ct. App. 2008).

10. *Camenisch*, 451 U.S. at 395.

11. Cent. Jersey Freightliner, Inc. v. Freightliner Corp., 987 F. Supp. 289, 295 (D.N.J. 1997).

12. See, e.g., *Watkins, Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003) (noting that party seeking an injunction must prove all four factors); *Capobianco v. Summers*, 377 F.3d 559, 561 (6th Cir. 2004) (holding that the preliminary injunction factors must be balanced; not all must be satisfied); *Dep't of Parks & Recreation v. Bazaar Del Mundo, Inc.*, 448 F.3d 1118, 1124 (9th Cir. 2006) (noting that public interest did not need to be considered when party seeking the injunction failed to establish any likelihood of success on the merits).

13. See, e.g., *Boucher v. Sch. Bd. of Sch. Dist. of Greenfield*, 134 F.3d 821, 823–24 (7th Cir. 1998).

14. See, e.g., *Ellipso, Inc. v. Mann*, 480 F.3d 1153, 1157 (D.D.C. 2001).

15. *Watkins*, 346 F.3d at 844.

16. See, e.g., *Port City Props. v. Union Pac. R.R. Co.*, 518 F.3d 1186, 1190 (10th Cir. 2008); *Nelson v. Nat'l Aeronautics & Space Admin.*, 512 F.3d 1134, 1147 (9th Cir. 2008); *United States v. Miami Univ.*, 294 F.3d 797, 818 (6th Cir. 2002).

17. See, e.g., *Dunkin' Donuts, Inc. v. Nat'l Donut Rests. of N.Y., Inc.*, 291 F. Supp. 2d 149, 151 (E.D.N.Y. 2005); *Summum v. Pleasant Grove City*, 483 F.3d 1044, 1048–49 (10th Cir. 2007).

18. See, e.g., *FoodComm Int'l v. Barry*, 328 F.3d 300, 303 (7th Cir. 2003).

19. See, e.g., *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 966 (9th Cir. 2002); *Reid L. v. Ill. State Bd. of Educ.*, 289 F.3d 1009, 1021 (7th Cir. 2002).

20. *Anderson v. U.S.F. Logistics (IMC), Inc.*, 274 F.3d 470, 475 (7th Cir. 2001).

21. See, e.g., *Athlete's Foot Brands, LLC v. Whooahh, Inc.*, No. 07-33-S-EJL, 2007 WL 2934871 (D. Idaho Oct. 5, 2007); *Total Car Franchising Corp. v. Esh*, No. Civ. A 3:02-CV-0141R, 2002 WL 31757640 (N.D. Tex. Dec. 4, 2002).

22. See, e.g., *Dry Cleaning To-Your-Door, Inc. v. Waltham L.L.C.*, No. 07-cv-01483-WDM-MJW, 2007 WL 4557832 (D. Colo. Dec. 20, 2007) (holding that franchisor suffered irreparable harm by showing harm to territorial integrity); *Furniture Media, L.P. v. Jantzen*, Bus. Franchise Guide (CCH) ¶ 12,749 (D. Ariz. 2003) (finding that franchisor suffered irreparable harm to its existing franchise relationships and its ability to enforce existing franchise agreements); see also *Natural Lawn of Am., inc. v. W. Group, LLC*, 484 F. Supp. 2d 392, 401–02 (D. Md. 2007) (noting that an injunction would be in the public interest because there is public interest in repudiating activities such as the former franchisee's blatant breach of the franchise agreement).

23. Bus. Franchise Guide (CCH) ¶ 12,521 (N.D. Ga. 2002).

24. *Id.*

25. *Id.*

26. No. 3:06-CV-2300-G, 2007 WL 603370 (N.D. Tex. Feb. 27, 2007).

27. *Id.*; see also *Athlete's Foot Brands, LLC v. Whooahh, Inc.*, No. 07-33-S-EJL, 2007 WL 2934871 (D. Idaho Oct. 5, 2007) (holding that

franchisor failed to establish irreparable harm because franchisee had removed all signage and other marks from its business after the franchise agreement expired and because franchisor was not attempting to operate a franchise in the location covered by the noncompete covenant).

28. 525 F. Supp. 2d 1310, 1315 (M.D. Ala. 2007).

29. *Noodles Dev., LP v. Ninth St. Partners, LLP*, 507 F. Supp. 2d 1030 (E.D. Mo. 2007).

30. *Second Cup Ltd. v. Niranjana*, Bus. Franchise Guide (CCH) ¶ 7,397 (Ont. Aug. 17, 2007).

31. No. 3:07-cv-297, 2007 WL 268851, Bus. Franchise Guide (CCH) ¶ 13,709 (W.D. N.C. Sept. 10, 2007).

32. *Id.*; see also *Tranfran, Inc. v. Aron Alan, LLC*, No. 1:06-CV-830, 2007 WL 1796235 (W.D. Mich. June 20, 2007) (holding that franchisor would suffer irreparable harm as a result of former franchisee's alleged breach of a noncompete covenant because franchisor lost the ability to maintain control of its reputation and goodwill).

33. 2006 Me. Super. LEXIS 264 (Me. Super. Dec. 16, 2006).

34. *Id.*

35. *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 550 Bus. Franchise Guide (CCH) ¶ 13,748 (6th Cir. 2007).

36. *Id.*

37. *Id.*

38. *Curves Int'l v. Mosbarger*, 525 F. Supp. 2d 1310, 1314–15 (M.D. Ala. 2007).

39. *Athlete's Foot Brands, LLC v. Whooahh, Inc.*, No. 07-33-S-EJL, 2007 WL 2934871 (D. Idaho Oct. 5, 2007).

40. *Id.*

41. See, e.g., *Lockhart v. Home-Grown Indus. of Ga., Inc.*, No. 3:07-cv-297, 2007 WL 2688551, Bus. Franchise Guide (CCH) ¶ 13,709 (W.D.N.C. Sept. 10, 2007); *Naturalawn of Am., Inc. v. W. Group, LLC*, 484 F. Supp. 2d 392 (D. Md. 2007) (holding that franchisor was irreparably harmed because it was unable to rebrand the former franchisee's territory as a result of the alleged breach).

42. See, e.g., *Lockhart*, 2007 WL 2688551.

43. *Bennigan's Franchising v. Swigorski*, No. 3:06-CV-2300-G, 2007 WL 603370, at *4 (N.D. Tex. Feb. 27, 2007).

44. *Id.* at *3.

45. *Id.*

46. *Id.*

47. *Id.* at *4.

48. No. 07-1964 (JRT/FLN), 2007 WL 2084143, at *4 (D. Minn. July 17, 2007).

49. *Id.*

50. *Id.* The covenant prohibited competition with the franchisor's "Business System," which the agreement defined as the "distinctive auto glass repair business products and services associated with the trademarks, trade names, service marks, copyrights . . . licensed to [the franchisor]." *Id.* The parties disputed whether this agreement applied to permanent store locations and mobile units or whether it only applied to one or the other. *Id.* Because the restrictive covenant was not clear on this issue, the court held that the franchisor failed to show a likelihood of success on the merits. *But see Pirtek USA, LLC v. Layer*, Bus. Franchise Guide (CCH) ¶ 13,257 (M.D. Fla. Sept. 23, 2005) (holding that franchisor established likelihood of success on the merits of its breach of contract claim to enforce a restrictive covenant because the covenant was reasonable as to time (two years), distance (fifteen miles of a Pirtek franchise

territory or promotional zone), and line of business (products and services similar to the products and services sold by a Pirtek business)).

51. *Novus*, 2007 WL 2084143.

52. *Id.* at 3.

53. *Lockhart v. Home-Grown Indus. of Ga., Inc.*, No. 3:07-cv-297, 2007 WL 2688551, Bus. Franchise Guide (CCH) ¶ 13,709 (W.D.N.C. Sept. 10, 2007).

54. Bus. Franchise Guide (CCH) ¶ 13,767 (W.D. Wash. Oct. 30, 2007). Notably, the franchisor in *Hometask Handyman* did not attempt to enforce the restrictive covenant as it was written, i.e., covering “a one hundred (100) mile radius from the boundary of your territory, and from any franchised, franchisor-owned or affiliated company-owned premises.” Rather, the franchisor only asked to enforce the 100-mile radius of the franchisee’s territory. The court blue-penciled the agreement and found it to be reasonable when applied only to the former franchisee’s territory plus a twenty-five-mile radius.

55. *Id.*

56. *Id.*

57. *Naturalawn of Am., Inc. v. W. Group, LLC*, 484 F. Supp. 2d 392, 396–97 (D. Md. 2007).

58. *Id.* at 396. The court also rejected the former franchisee’s argument that the restrictive covenant was not enforceable because its language stated that it only applied to “termination” of the franchise agreement, and its franchise agreement had expired. *Id.* at 401. The court rejected this argument, noting that *expiration* is merely a subset of *termination*; therefore, the restrictive covenant clearly applied to an expiration of the franchise agreement. *Id.*

59. *Id.* at 397.

60. *Id.* at 398. The court also held that the restrictive covenant was clearly reasonable under Maryland law because it extended only to the former franchisee’s territory for a two-year period after termination of the franchise agreement. *Id.* at 400.

61. *Pirtek USA, LLC v. Whitehead*, No. Civ. A. 05-0242-CG-C, 2006 WL 2038651 (S.D. Ala. Apr. 27, 2006); see *Noodles Dev., LP v. Ninth St. Partners, LLP*, 507 F. Supp. 2d 1030 (E.D. Mo. 2007) (opining that franchisor did establish the likelihood of success on the merits as to a breach of contract claim when former franchisee continued to operate a restaurant at the location of the former franchised restaurant).

62. No. 04-C-4771, 2005 WL 948825 (N.D. Ill. Apr. 11, 2005).

63. *Id.*; see also *Sona Laser Ctrs., Inc. v. Capital Works, LLC*, Bus. Franchise Guide (CCH) ¶ 13,359 (E.D. Va. Feb. 7, 2006) (refusing to issue a preliminary injunction to enforce a restrictive covenant because former franchisee had presented substantial evidence showing that the franchise agreements were fraudulently induced and because a significant question existed as to whether the broad scope of the covenants was even enforceable under Virginia law).

64. *Athlete’s Foot Brands, LLC v. Whooahh, Inc.*, No. 07-33-S-EJL, 2007 WL 2934871 (D. Idaho Oct. 5, 2007).

65. *Id.*

66. Bus. Franchise Guide (CCH) ¶ 12,521 (N.D. Ga. 2002).

67. No. 3:06-CV-2300-G, 2007 WL 603370 (N.D. Tex. Feb. 27, 2007).

68. *Dry Cleaning To-Your-Door, Inc. v. Waltham LLC*, No. 07-CV-01483-WDM-MJW, 2007 WL 4557832 (D. Colo. Dec. 20, 2007).

69. *Id.*

70. *Id.*

71. *Noodles Dev., LP v. Ninth St. Partners, LLP*, 507 F. Supp. 2d 1030, 1039 (E.D. Mo. 2007).

72. *Id.*

73. *Id.* (citing *Frank B. Hall & Co. v. Alexander & Alexander, Inc.*, 974 F.2d 1020, 1023 (8th Cir. 1992)).

74. *Id.* at 1033, 1039.

75. *Id.* at 1033.

76. *Id.* at 1040.

77. Bus. Franchise Guide (CCH) ¶ 13,359 (E.D. Va. Feb. 7, 2006).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Atlanta Bread Co. Int’l, Inc. v. Nine Star Enters., Inc.*, Bus. Franchise Guide (CCH) ¶ 12,521 (N.D. Ga. 2002).

83. *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 551, Bus. Franchise Guide (CCH) ¶ 13,748 (6th Cir. 2007).

84. Bus. Franchise Guide (CCH) ¶ 12,749 (D. Ariz. Oct. 29, 2003).

85. *Noodles Dev., LP v. Ninth St. Partners, LLP*, 507 F. Supp. 2d 1039 (E.D. Mo. 2007).

86. In addition to the three distinct approaches discussed below, some states are either undecided or have applied a variety of these approaches. For example, New York courts have modified restrictive covenants to achieve reasonableness in geographic scope, duration, and activity restricted; severed offensive clauses in restrictive covenants; and refused to enforce restrictive covenants in their entirety. See, e.g., *Karpinski v. Ingrassi*, 28 N.Y.2d 45, 51–52, 320 N.Y.S.2d 1, 6–7, 268 N.E.2d 751 (1971) (modifying covenant to restrict practice of only “oral surgery” and not the more general “dentistry”); *Baker’s Aid v. Hussman Foodserv. Co.*, 730 F. Supp. 1209, 1216 (E.D.N.Y. 1990) (enforcing part of a noncompete covenant but severing portions considered to be unreasonable); *Winston Franchise Corp. v. Floyd Williams, Roth Young Pers. Serv. of Memphis, Inc.*, No. 91 Civ. 7963, 1992 WL 7843 (S.D.N.Y. Jan. 10, 1992) (refusing to enforce three-year restrictive covenant in franchise context but enjoining franchisee from using franchisor’s confidential information).

87. For example, Arkansas, Georgia, Nebraska, South Carolina, and Virginia are among the small minority of states that refuse to modify overbroad noncompetition clauses in any manner. See, e.g., *Bendinger v. Marshalltown Trowell Co.*, S.W.2d 468 (Ark. 1999) (overly broad noncompete covenant cannot be modified to render it reasonable even if the contract at issue contains a severability clause); *Watson v. Waffle House*, 324 S.E.2d 175 (Ga. 1985) (overbroad restrictive covenants in franchise agreements are strictly construed against franchisor and deemed void); *CAE Vanguard v. Newman*, 518 N.W.2d 652, 655–56 (Neb. 1994) (covenant must be enforced as written or not at all); *E. Bus. Forms, Inc. v. Kistler*, 189 S.E.2d 22, 24 (S.C. 1972) (same); *Alston Studios, Inc. v. Gress*, 492 F.2d 279, 284 (4th Cir. 1974) (same).

88. Arizona, Connecticut, Indiana, Maryland, and North Carolina are examples of states that follow the strict blue pencil approach. These states refuse to enforce unreasonable covenants against competition only if the unreasonable restrictions are contained in distinctly severable clauses. See, e.g., *Valley Med. Specialists v. Farber*, 982 P.2d 1277 (Ariz. 1999) (en banc) (courts will blue-pencil restrictive covenants to eliminate grammatically severable unreasonable provisions but will not add terms or otherwise rewrite the agreement); *Gartner Group Inc. v. Mewes* (No. CV 91 0118332S), 1992 Conn. Super LEXIS 38, at *11 (Jan. 3, 1992) (blue pencil rule applies only when, after erasing one or

more distinct clauses, the restriction remaining is reasonable); *S. Bend Consumers Club, Inc. v. United Consumers Club, Inc.*, 572 F. Supp. 209, 214–15 (N.D. Ind. 1983) (court permitted to redact severable provisions to make restriction reasonable); *Holloway v. Faw, Casson & Co.*, 319 Md. 324 (1990) (same); *Hartman v. W.H. Odell & Assocs., Inc.*, 450 S.E.2d 912, 920 (N.C. 1994) (same).

89. Jurisdictions adopting the “reasonable modification” approach include Alabama, Alaska, Delaware, District of Columbia, Florida, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Jersey, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin, and

Wyoming. *See, e.g.*, *Data Mgmt., Inc. v. Greene*, 727 P.2d 62, 64 (Alaska 1988) (trial court will reasonably alter a provision to make it enforceable as long as it was originally drafted in good faith); *Ehlers v. Iowa Warehouse Co.*, 188 N.W.2d 368 (Iowa 1971) (applied in employment context) (courts will enforce restrictive covenants to protect employer’s legitimate interests without imposing undue hardship on former employee when the public interest is not adversely affected); *Sidco Paper Co. v. Aaron*, 351 A.2d 250 (Pa. 1976) (courts may grant enforcement limited to those portions of the restrictions that are reasonably necessary for the protection of employer); *Butts Retail, Inc. v. Diversifoods, Inc.*, 840 S.W.2d 770 (Tex. App. 1992) (reforming overbroad covenant in franchise agreement and enforcing modified terms).