

# Turning an (Occasional) Blind Eye: Selective Enforcement of Franchisee Post-Term Non-Compete Covenants

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Post-term non-compete covenants barring former franchisees from operating competing businesses are common in franchise agreements. As discussed in prior *Franchise Law Journal* articles, such restrictive covenants are enforceable in many circumstances.<sup>1</sup> Just because a franchisor *can* seek to enforce its post-term covenants not to compete against former franchisees that are operating competing businesses, does that mean a franchisor



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*must* do so? Like any business, franchisors prefer the flexibility to decide which legal claims to pursue, including whether to prosecute post-term non-compete actions against specific former franchisees. However, a franchisor's failure to consistently enforce its non-compete covenants could jeopardize future enforcement efforts.

This article explores a franchisor's obligation, if any, to enforce non-compete covenants against former franchisees and the implications of selective enforcement of such covenants. Part I summarizes the general law regarding the enforceability of covenants not to compete in franchise agreements.

Part II analyzes whether a franchisor has an obligation to enforce its post-term non-competes against former franchisees that open competing businesses. Absent contractual language requiring a franchisor to take action to protect the system from competition, a franchisor generally cannot be compelled to sue former franchisees for non-compete violations.

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1. See, e.g., Barbara A. Bagdon & Mary M. Kellerman, *When Will Courts Issue Preliminary Injunctions to Enforce Restrictive Covenants in Franchise Agreements*, 28 *FRANCHISE L.J.* 141 (2009); Peter J. Klarfeld & Mark S. VanderBroek, *Law on Covenants Against Competition Shifts Toward Greater Enforceability by Franchisors*, 31 *FRANCHISE L.J.* 76 (2011).

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Part III addresses the implications and risks of a franchisor's selective enforcement of its post-term covenants not to compete against former franchisees. The general takeaway is that, as long as a franchisor can rationally explain its prior non-enforcement decisions, past selective enforcement will not bar future enforcement efforts. However, depending on the circumstances, inconsistent enforcement can give rise to arguments by a former franchisee that the non-compete covenant does not serve a legitimate business purpose or is not reasonable, that the franchisor waived the covenant or should be estopped from enforcement, that enforcement would be impermissibly discriminatory, or that the franchisor will not be irreparably harmed by the competition.

## I. Background: Non-Compete Covenants in Franchise Agreements

### A. General Standard

The interpretation and enforcement of a non-compete clause in a contract is controlled by state law.<sup>2</sup> As such, practitioners should review the governing state statutory or common law to determine whether a non-compete covenant is enforceable. A handful of states generally refuse to enforce covenants not to compete,<sup>3</sup> but most states will enforce "reasonable" restrictive covenants. Although a fifty-state survey is beyond the scope of this article, a few generalizations can be made about state laws regulating non-competes. To be valid, a non-compete must be intended to promote a legitimate business interest separate and apart from restraining ordinary, fair competition.<sup>4</sup> In addition, the scope of the non-compete must be reasonable in duration and geography.<sup>5</sup> Courts have held reasonable post-term durations ranging from six months to five years<sup>6</sup> and geographic restrictions of up to 100 miles.<sup>7</sup> In some

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2. *In re Se. Banking Corp.*, 156 F.3d 1114, 1121 (11th Cir. 1998).

3. See CAL. BUS. & PROF. CODE § 16600; N.D. CENT. CODE § 9-08-06; OKLA. STAT. § 15-219A.

4. See, e.g., *Novus Franchising, Inc. v. Livengood*, No. 11-1651 (MJD/TNL), 2012 WL 38580, at \*7 (D. Minn. Jan. 9, 2012) ("The rationale for enforcing a non-competition covenant is based on the freedom of contract. However, it is well settled that only a legitimate business interest may be protected by a non-competition covenant. If the sole purpose is to avoid ordinary competition, it is unreasonable and unenforceable.") (internal citation and quotations omitted); *Vantage Tech., LLC v. Cross*, 17 S.W.3d 637, 644 (Tenn. Ct. App. 1999) (to serve a "legitimate business interest," a non-compete clause must protect some interest "over and above ordinary competition" such that, without the non-compete, "an unfair advantage in future competition" would arise).

5. See, e.g., *Singas Famous Pizza Brands Corp. v. New York Advertising LLC*, 468 F. App'x 43, 46-47 (2d Cir. 2012) (holding that a ten-mile geographic scope of a franchise agreement's post-termination non-compete clause was reasonably calculated toward furthering franchisor's legitimate interests in protecting its knowledge and reputation as well as its customer goodwill).

6. *Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp.*, 511 F.3d 535, 547 (6th Cir. 2007).

7. See, e.g., *Techworks, LLC v. Wille*, 770 N.W.2d 727 (Wis. Ct. App. 2009).

instances, courts may have the authority to modify (or blue pencil) non-compete covenants that are overbroad.<sup>8</sup>

### B. *Legitimate Business Purposes*

Courts have recognized several legitimate business purposes that can justify a covenant not to compete in the franchise context. These include the following: (1) protecting a franchisor's trade secrets and proprietary information, (2) preserving goodwill and avoiding customer confusion, (3) refranchising, and (4) sending a message to the system and discouraging "breakaway" franchisees.

#### 1. Protecting Franchisor's Trade Secrets and Confidential Information

Franchising is not simply the distribution of goods and services; it is the conveyance of valuable knowledge. Franchisors typically invest substantial time, money, and effort developing an operational system that is proven to be successful and replicable. By design, this information is not readily available to the public. Many franchisees lack the experience and expertise to "go it alone," and indeed this is one reason a franchisee may be attracted to the franchise concept in the first place. On the other hand, franchisors would not be willing to turn over their secrets and proprietary methods to a new franchisee if the franchisee, after receiving the franchisor's confidential information and learning the business, could take down the franchisor's marks and open a competing business. Thus, franchisors must be able to safeguard their trade secrets and confidential and proprietary systems beyond the term of the franchise agreement. The post-term non-compete covenant is intended to vindicate these legitimate business interests and protect the franchisor (and the system) against unfair competition.<sup>9</sup>

#### 2. Preserving Goodwill and Avoiding Customer Confusion

Another legitimate business interest that justifies enforcing a non-compete restriction is protecting the system's goodwill and avoiding customer confusion after the expiration or termination of the franchise agreement. When the franchise term ends, the franchisor usually desires to preserve the value of the goodwill that has attached to the location. If a former franchisee converts to a competing brand, the result is likely to diminish the system's goodwill in the market.<sup>10</sup> Indeed, some courts have analogized the issuance of a franchise to the sale of a business, where the franchisor conveys the benefit

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8. See, e.g., FLA. STAT. § 542.335(1)(c).

9. See, e.g., *Sylvan Learning, Inc. v. Gulf Coast Educ., Inc.*, No. 1:10-CV-450-WKW [WO], 2010 WL 3943643 (M.D. Ala. Oct. 6, 2010) (enforcing a covenant not to compete where the franchisee had "continued to use [the franchisor's] goodwill, method of operation, and client list to operate his own independent learning center after the termination").

10. See, e.g., *Bad Ass Coffee Co. of Haw. v. JH Nterprises, LLC*, 636 F. Supp. 2d 1237, 1249 (D. Utah 2009) ("Defendants' overnight switch to Java Cove may send the message to potential customers that [the franchisor] endorses Java Cove, or that the Defendants no longer stand by [the franchisor]. Such messages are likely to erode [the franchisor's] goodwill in the marketplace.").

of the system's goodwill to the franchisee during the existence of the franchise. After the expiration or termination of the franchise agreement, the franchisor has an interest in preserving its goodwill in the market. As the U.S. District Court for the District of New Jersey explained in *Jiffy Lube International, Inc. v. Weiss Brothers, Inc.*:

One can view a franchise agreement, in part, as a conveyance of the franchisor's good will to the franchisee for the length of the franchise. When the franchise terminates, the good will is, metaphysically, reconveyed to the franchisor. A restrictive covenant, reasonably crafted, is necessary to protect the good will after that reconveyance.<sup>11</sup>

Under this argument, the non-compete protects the franchisor's right to exploit the full value of the franchise's goodwill.<sup>12</sup>

Similarly, because a franchisee is the face of the franchise system in the relevant market, customers can become confused when a former franchisee suddenly begins offering similar products or services under a different name. As a result, some courts have recognized avoiding customer confusion as a reasonable justification for post-term covenants not to compete.<sup>13</sup>

### 3. Refranchising

Closely related to the franchisor's need to preserve goodwill is its desire to "refranchise" in certain territories. An argument can be made that the franchisor, having built goodwill in an area, should be entitled to continue benefiting from such goodwill through a new franchisee in the market. In those instances, a prospective franchisee may be unwilling to enter an existing market and compete against the system's former franchisee.<sup>14</sup> The non-compete covenant therefore protects the franchisor's legitimate business interest in refranchising.

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11. 834 F. Supp. 683, 691 (D.N.J. 1993); see also *Keller Corp. v. Kelley*, 187 P.3d 1133, 1138 (Colo. Ct. App. 2008) ("[O]nce the franchised term ends, the franchisor may well possess an interest worthy of protection in not having the former franchisee use the knowledge, training, and experience gained from the franchisor to compete against it. . . . [T]he covenant not to compete protects the goodwill of the business.")

12. *Jiffy Lube Int'l*, 834 F. Supp. at 692 ("[T]he purpose of the restrictive covenant in this setting is to protect the goodwill of the franchisor.")

13. See, e.g., *Quizno's Corp. v. Kampendahl*, No. 01 C 6433, 2002 WL 1012997, at \*7 (N.D. Ill. May 20, 2002) (granting a franchisor an injunction against a former franchisee and finding "enforcement of the non-compete covenant is essential to allow time for the public to stop associating [the competing business] with Quizno's"); but see *7-Eleven v. Grewal*, 60 F. Supp. 3d 272, 283 (D. Mass. 2014) (declining to award injunction enforcing non-compete covenant when "[c]ustomers would have no reason to associate Defendants' convenience store with the 7-Eleven brand after 7-Eleven's marks are removed from the premises").

14. See *Bad Ass Coffee*, 636 F. Supp. 2d at 1249 (crediting the franchisor's testimony that a prospective franchisee had shown interest in opening another franchise in the same city, but would not do so if the former franchisee was allowed to operate a competing business); see also *Naturalawn of Am., Inc. v. West Grp., LLC*, 484 F. Supp. 2d 392, 402 (D. Md. 2007) (holding that it is "perfectly obvious" that the franchisor will be permanently damaged and shut out of the market where its former franchisee operates a competing business).

#### 4. Discouraging “Breakaway” Franchisees

Franchisees are frequently aware of the status of other franchises in the system. Allowing a former franchisee to violate its contractual obligation not to operate a competing business could send the wrong message to the system, suggesting that the franchisor lacks the resources or wherewithal to enforce the non-compete. In turn, this may encourage other franchisees to follow suit by leaving the system and operating competing business. Thus, enforcement of the non-compete discourages “breakaway” franchisees and protect the integrity of the entire system.<sup>15</sup>

#### C. Remedies to Enforce Non-Compete Covenants

The most common way for a franchisor to seek to enforce a post-term covenant not to compete is through an injunction.<sup>16</sup> If granted, an injunction bars the former franchisee from continuing to operate a competing business within the proscribed geographic area until the expiration of the restricted period. In addition to stopping the unfair competition, injunctions to enforce a non-compete are often preferable to damages actions because the harm to the brand from such competition, including loss of goodwill, is difficult to calculate.<sup>17</sup>

Alternatively, monetary damages may be available in certain non-compete cases where the franchisor’s loss from the non-compete violation can be reasonably estimated.<sup>18</sup> Because an injury will not be deemed “irreparable” if it can be compensated, injunctive relief is not available if monetary damages can be calculated.<sup>19</sup>

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15. *Bad Ass Coffee*, 636 F. Supp. 2d at 1249 (noting that a franchisor representative “testified that his franchisees are a close-knit community, and that he believes they are keeping a close eye on what happens here. If the non-compete clauses at issue are not upheld in this case, it would be reasonable to think that other [of the franchisor’s] franchisees might be emboldened to follow in Defendants’ footsteps.”).

16. “A party seeking a preliminary injunction generally must show the following: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.” *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). “In deciding whether a permanent injunction should be issued, the court must determine if the plaintiff has actually succeeded on the merits (i.e., met its burden of proof).” *Ciba-Geigy Corp. v. Bolar Pharm. Co., Inc.*, 747 F.2d 844, 850 (3d Cir. 1984).

17. *Bad Ass Coffee*, 636 F. Supp. 2d at 1249–50. “A plaintiff satisfies the irreparable harm requirement by demonstrating ‘a significant risk that he or she will experience harm that cannot be compensated after the fact by monetary damages.’” *RoDa Drilling Co. v. Siegel*, 552 F.3d 1203, 1210 (10th Cir. 2009) (citations omitted).

18. *Wichita Wire Inc. v. Lenox*, 726 P.2d 287, 291–92 (Kan. Ct. App. 1986) (loss of identifiable customers who had generated a known dollar amount of business was a calculable injury, allowing plaintiff to recover damages for the non-compete violation).

19. *Id.* (because monetary damages were available, injury was not irreparable and thus injunction was not available); see also *7-Eleven v. Grewal*, 60 F. Supp. 3d 272, 283 (D. Mass. 2014) (declining to award preliminary injunction for the violation of a non-compete covenant, when the franchisee had debranded and when “a denial would not render it impracticably difficult to calculate 7-Eleven’s damages at a subsequent adjudication on the merits”).

## II. Current Franchisees Cannot Force a Franchisor to Enforce Non-Competes

As discussed earlier, reasonable covenants not to compete are enforceable in most states. Does the fact that a franchisor *can* seek to enforce its post-term covenants not to compete against former franchisees mean the franchisor *must* do so? That is, does a franchisor have an obligation to protect its current franchisees from competition by former franchisees? Generally speaking, the answer is no. Unless the franchise agreement explicitly imposes an affirmative obligation on a franchisor to take certain steps to protect the system, franchisees typically lack the ability to force the franchisor to take action against other current or former franchisees.<sup>20</sup>

Case law provides examples of the general rule. In *Canba v. LaRoche*,<sup>21</sup> the franchisee owned a Gymboree franchise, which was in the business of providing programs and equipment for child development. She claimed the value of her franchise had been diminished when the franchisor refused to enforce a non-compete covenant against another franchisee, Jane LaRoche, and her former employee and sister-in-law, Maureen LaRoche.<sup>22</sup> The plaintiff alleged that the LaRoches had established a competitive business, notwithstanding the fact that both had entered into a non-compete agreement with the franchisor.<sup>23</sup> The plaintiff filed suit against the franchisor and both LaRoches, arguing that she was a third-party beneficiary under the non-competition agreement executed between the LaRoches and the franchisor.<sup>24</sup> The franchise agreement specifically provided that “Franchisee shall have no right to enforce the obligations of any other franchisees of Gymboree. Franchisee shall not be deemed a third-party beneficiary with respect to any other franchise agreement or other agreement or have any rights to enforce any obligations thereunder.”<sup>25</sup> Relying on that language, the Massachusetts Superior Court dismissed the plaintiff’s claims, noting that the franchisor “did not intend for plaintiff to have a stake in actions on the part of [the franchisor] against any other party.”<sup>26</sup>

In *Shoney’s, Inc. v. Morris*,<sup>27</sup> the franchisee claimed the franchisor had breached its franchise agreements by “permitting the decline of the value and reputation of its trade name . . . causing a reduction in sales at both com-

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20. See Craig Tractenberg, Jean-Philippe Turgeon & Stéphanie Destrempes, *The Franchisor’s Duty to Police the Franchise System*, 36 *FRANCHISE L.J.* 87 (2016).

21. No. CA 955110, 1996 WL 1186959 (Mass. Sup. Ct. Aug. 12, 1996).

22. *Id.*

23. *Id.*

24. *Id.* at \*3.

25. *Id.* at \*4.

26. *Id.*; cf. *Manpower, Inc. v. Olsteen Permanent Agency*, 309 So. 2d 57, 58 (Fla. Dist. Ct. App. 1975) (ruling that the Florida statute on covenants against competition, FLA. STAT. § 542.12, could not be construed to permit a third-party beneficiary to enforce someone else’s noncompetition covenant).

27. 100 F. Supp. 2d 769 (M.D. Tenn. 1999).

pany-owned and franchisee-operated stores.”<sup>28</sup> The franchisee argued that the franchisor had a specific contractual obligation to enforce its brand standards at its own company-owned restaurants.<sup>29</sup> The U.S. District Court for the Middle District of Tennessee disagreed, finding that the franchisor had no implied obligation to maintain a “high level of reputation” among its company-owned stores.<sup>30</sup> The court specifically noted that the language of the franchise agreement required *franchisees* to maintain system standards without creating a concomitant right to enforce those standards against the franchisor.<sup>31</sup>

The U.S. District Court for the Northern District of Alabama reached a similar result in *Creel Enterprises, Ltd. v. Mr. Gatti's, Inc.*<sup>32</sup> The case dealt with a plaintiff-franchisee who owned two Mr. Gatti's pizza restaurants in Birmingham. Another franchisee, B.S.D., owned five Mr. Gatti's restaurants. After all of B.S.D.'s restaurants were shuttered, the plaintiff argued that the franchisor had failed to enforce its quality standards, and that the loss of units in the market had damaged the plaintiff's locations. The court rejected the franchisee's claim, finding that “Plaintiffs have failed to point to any provision in their franchise agreements which obligates Mr. Gatti's to enforce the quality standards provisions in the contracts signed by another franchisee.”<sup>33</sup>

More broadly, courts are resistant to efforts by franchisees to require a franchisor to protect and update the system. For example, in *CMS Enterprise Group v. Ben & Jerry's Homemade, Inc.*, the franchisee claimed the franchisor had failed to establish sufficient “business methods” to deal with changes in competitive market conditions, including the sale of ice cream pints from convenience stores and supermarkets.<sup>34</sup> In the franchisee's view, because a franchisor develops and licenses its business methods, it has a generalized duty to constantly refine those methods to protect the system against perceived internal and external threats. Concluding that the franchisor's general right under the franchise agreement to amend business methods “from time to time” did not “impose an obligation on Defendant to anticipate specific prob-

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28. *Id.* at 775 (internal quotations and citation omitted).

29. *Id.*

30. *Id.*

31. *Id.* Although *Shoney's* was seemingly limited to the franchisor's obligation to maintain its own company stores, the same court later clarified that *Shoney's* has no similar obligation with respect to franchisees. See *Kinnard v. Shoney's, Inc.*, 100 F. Supp. 2d 781, 794 (M.D. Tenn. 2000) (neither the requirement that the franchisees follow the system nor the franchisor's right to inspect the franchisee's restaurants “create an obligation on the part of *Shoney's* to maintain its restaurants according to certain standards or to ensure that the other franchises are maintained according to such standards”).

32. Bus. Franchise Guide (CCH) ¶ 9825 (N.D. Ala. June 26, 1990), *aff'd*, 933 F.2d 1022 (11th Cir. 1991).

33. *Id.*

34. No. 1991-C-7849, 1995 WL 500847 (Pa. Ct. Com. Pl. Aug. 3, 1995).

lems facing franchisees or to develop new business methods designed to address those problems,” the court declined to impose such a requirement.<sup>35</sup>

Although the previously discussed decisions suggest that courts will not impose on franchisors an implied duty to enforce system standards or otherwise “protect” the system, courts are willing to enforce such a duty if it is expressly stated in the parties’ contract. In *The Jade Group, Inc. v. Cottman Transmission Centers, LLC*, each of the relevant license agreements imposed on the franchisor, Cottman, a contractual obligation to “continue to develop, promote and protect the good will and reputation associated with the Cottman name and marks and other distinguishing aspects of the SYSTEM.”<sup>36</sup> Certain franchisees claimed Cottman had breached this obligation when it acquired another related brand, AAMCO, and shifted resources from Cottman to AAMCO.<sup>37</sup> According to the plaintiff, this resulted in a substantial reduction in the total number of Cottman units, in addition to a loss of critical infrastructure and support.<sup>38</sup>

Cottman moved to dismiss, arguing that the plaintiffs had no legitimate basis to expect that the number of Cottman units would increase in perpetuity.<sup>39</sup> Although agreeing with Cottman that goodwill was not necessarily tied to the number of units, the U.S. District Court for the Eastern District of Pennsylvania nevertheless denied the motion to dismiss, finding that the plaintiff stated a claim under the specific language of the contract.<sup>40</sup> In the court’s view, the franchisee had sufficiently alleged that the franchisor had failed to “develop, grow and protect the brand” as required by the license agreement.<sup>41</sup>

*The Jade Group* is unusual in that the relevant agreements included language that explicitly required the franchisor to “continue to develop, promote and protect the good will and reputation associated with the Cottman names and marks.”<sup>42</sup> While this language might seem vague and aspirational, it was enough to lead the court to deny the franchisor’s motion to dismiss. Ultimately, *The Jade Group* confirms the central importance of the language in the underlying agreement. Although U.S. courts will not impose upon a franchisor an implied duty to protect the system from competitors where the franchisor did not expressly agree to undertake such obligations, courts will hold a franchisor to the terms of its agreements.<sup>43</sup>

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35. *Id.* at \*3.

36. No. 16-01237, 2016 WL 3763024, at \*3 (E.D. Pa. July 13, 2016).

37. *Id.*

38. *Id.*

39. *Id.* at \*7.

40. *Id.*

41. *Id.* (citing *Newark Morning Ledger Co. v. United States*, 507 U.S. 546, 555–56 (1993) (describing “goodwill” as “the expectancy of continued patronage”).

42. *Jade Group, Inc. v. Cottman Transmission Ctrs.*, 2016 WL 3763024, at \*3 (E.D. Pa. July 13, 2016).

43. Although this article is focused on U.S. cases, other jurisdictions have imposed an implied duty on the part of the franchisor to protect and enhance the brand in the face of competition. See *Dunkin’ Brands Canada Ltd. v Bertico Inc.*, [2015] QCCA 624.

### III. Impact of Franchisor's Selective Enforcement of Non-Competes

Even if a franchisor does not have a contractual or legal obligation to enforce its post-termination covenants not to compete against all former franchisees, failure to do so—that is, selective or inconsistent enforcement—could impact the franchisor's ability to enforce its restrictive covenants when it wants to. Faced with a franchisor's lawsuit to enforce a post-termination restrictive covenant, the former franchisee seeking to compete may argue that past inconsistent enforcement by the franchisor: (1) shows the franchisor waived or is equitably estopped from enforcing the restrictive covenant, (2) undermines the franchisor's claimed justification for the non-compete, (3) violates anti-discrimination provisions in state franchise relationship laws, or (4) shows an injunction is not necessary because the franchisor is not being irreparably harmed by the ongoing competition. Although courts are resistant to such arguments against non-competes, the relevant precedent shows that a franchisor must be prepared to explain any prior selective enforcement of its post-term covenant not to compete.

#### A. *Selective Enforcement Defenses of Waiver and Equitable Estoppel Face Uphill Battle*

Faced with an action to enforce a post-term non-compete, former franchisees often argue that a franchisor's past inconsistent or selective enforcement of the covenant against other former franchisees should bar the franchisor's current efforts. Such arguments often take the form of the affirmative defenses of waiver<sup>44</sup> or equitable estoppel.<sup>45</sup>

Courts generally are resistant to selective enforcement defenses—"but he did it too"—where a party breached or is breaching its contractual obligations. Selective enforcement defenses often arise in franchise wrongful termination actions. For example, in *Original Great American Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd.*,<sup>46</sup> a former franchisee that was terminated for underreporting gross sales, among other defaults, challenged its termination by arguing that the franchisor had not terminated other franchisees for similar breaches. The Seventh Circuit rejected the defense, holding that a franchisor's treatment of its other franchisees was irrelevant to the propriety of the termination.<sup>47</sup> As Judge Posner concluded, "[t]he fact that the [franchi-

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44. Waiver is generally defined as the voluntary and intentional relinquishment of a known and existing right. 13 WILLISTON ON CONTRACTS § 39:14 (4th ed. 2017).

45. "The purpose of equitable estoppel . . . is to promote equity and justice in an individual case by preventing a party from asserting rights under a general technical rule of law when his own conduct renders the assertion of such rights contrary to equity and good conscience." *Mazer v. Jackson Ins. Agency*, 340 So. 2d 770, 772 (Ala. 1976).

46. 970 F.2d 273 (7th Cir. 1992).

47. *Id.* at 279. After concluding that the termination was proper, the Seventh Circuit held that the district court should have granted the franchisor's motion for preliminary injunction to enjoin the former franchisee's continued operation under the marks. *Id.* at 282.

sor] may, as the [franchisees] argue, have treated other franchisees more leniently is no more a defense to a breach of contract than laxity in enforcing the speed limit is a defense to a speeding ticket.”<sup>48</sup>

Similarly, in *Deutschland Enterprises, Ltd. v. Burger King Corp.*,<sup>49</sup> the Seventh Circuit affirmed the termination of franchisees for violating the franchise agreement’s in-term covenant not to compete. The franchisees argued the termination was not valid because the franchisor had not enforced the franchise agreement’s in-term non-compete against two other franchisees. The court rejected the franchisees’ selective enforcement defense, finding that they were not “similarly situated” to the other franchisees, both of which were corporate multi-unit franchisees engaged in large-scale hospital-ity operations.<sup>50</sup> Such differences justified the franchisor’s business rationale for enforcing the non-compete in some circumstances but not others.

Under precedents such as *Original Great American Chocolate Chip Cookie* and *Deutschland Enterprises*, a franchisor’s failure to enforce the franchise agreement’s contractual provisions (including the non-compete provision) against other franchisees does not render the provision unenforceable against the defendant or excuse the defendant’s contractual violation. Without more, the fact that a franchisor waived certain obligations as to *some* current or former franchisees does not mean it waived the obligations as to *all* franchisees.<sup>51</sup>

Given the few franchise cases analyzing selective enforcement defenses, it is useful to examine non-franchise non-compete cases. Outside of the franchise context, several courts have rejected waiver or equitable estoppel arguments that a company’s prior selective enforcement precludes current efforts to enforce a post-termination non-compete against a former employee. Therefore, many courts recognize that a business should be entitled to make a case-by-case assessment of whether to enforce a non-compete. For example, in *Minnesota Mining & Manufacturing Co. v. Kirkevold*,<sup>52</sup> plaintiff 3M moved for a preliminary injunction to enforce a non-compete against its former employee. The former employee argued that 3M had waived its contractual rights and should be estopped for equitable reasons from enforcing the restrictive covenant based on 3M’s failure to enforce such restrictive

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48. *Id.* See also *Zeidler v. A&W Rest., Inc.*, No. 99 C 2591, 2001 WL 62571, at \*4 (N.D. Ill. Jan. 25, 2001) (“A&W’s treatment of its other franchisees is irrelevant to its treatment of plaintiffs” in plaintiffs’ wrongful termination suit against the franchisor alleging lack of support.); *Bonanza Int’l, Inc. v. Rest. Mgmt. Consultants*, 625 F. Supp. 1431, 1447 (E.D. La. 1986) (“Whether or not [the franchisor] treated defendants differently than other area distributors has no bearing on whether [the franchisor] acted fairly and in good faith in their treatment of defendants under the Area Distributor’s Agreement.”).

49. 957 F.2d 449 (7th Cir. 1992).

50. *Id.* at 453. The court implied that a franchisor may have a reasonable basis to allow sophisticated franchisees to own competitive businesses, as, for example, when a hotel chain owns multiple restaurant concepts.

51. See *Mr. Steak, Inc. v. Bellevue Steak, Inc.*, 555 P.2d 179, 182 (Colo. Ct. App. 1976) (holding that the franchisor’s “actions with regard to other franchises cannot sustain a finding that it waived its rights under the specific terms of its agreement with these defendants”).

52. 87 F.R.D. 324 (D. Minn. 1980).

covenants against other former employees who possessed knowledge of 3M's confidential information. The U.S. District Court for the District of Minnesota rejected the employee's argument that 3M's failure to enforce the non-compete against others constituted an estoppel or waiver. The court found there were many differences between the defendant and the other employees, which factored into the employer's decision not to seek to enforce the other restrictive covenants. Prior non-enforcement against others, the court stated, was "not overly probative of any intent to relinquish its contractual rights or to knowingly mislead so as to estop" enforcement of the covenant.<sup>53</sup> The court went on to conclude that "to hold otherwise would effectively place employers in the precarious position of being compelled to enforce all such restrictive covenants with respect to all its former employees, which might encourage attempts to restrain trade, and which might undermine labor relations."<sup>54</sup>

A similar holding was reached in *Laidlaw, Inc. v. Student Transportation of America, Inc.*,<sup>55</sup> where a group of former executives resigned from Laidlaw and then formed their own competing transportation company. In response to Laidlaw's preliminary injunction motion, the executives argued that the non-compete was not enforceable because Laidlaw had failed to consistently enforce similar non-compete agreements with other former employees. The U.S. District Court for the District of New Jersey rejected the selective enforcement defenses, finding "Laidlaw's actions (or lack thereof) in other instances do not amount to a waiver or estoppel of its contract rights."<sup>56</sup> The court concluded that requiring an employer to enforce every restrictive covenant, without regard to cost-effectiveness or individual circumstances, was "impractical and unfair, not only to [the plaintiff company] but to other former employees."<sup>57</sup> "Whether a restrictive covenant may be enforced depends on its reasonableness *under the particular circumstances*. Plaintiffs may or may not seek to enforce other covenants, but the primary inquiry is whether enforcement of the covenant in *this* case is reasonable."<sup>58</sup> Any other conclusion, the court reasoned, would require every employer to enforce its restrictive covenants against every departing employee, without consideration of expense, need, or the particular circumstance of each individual situation.<sup>59</sup>

On the other hand, some courts have recognized waiver or equitable estoppel defenses where a party inconsistently enforces its non-competes. For example, in *Surgidev Corp. v. Eye Technology, Inc.*,<sup>60</sup> the U.S. District Court for the District of Minnesota refused to enjoin four former officers

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53. *Id.* at 336.

54. *Id.*

55. 20 F. Supp. 2d 727 (D.N.J. 1998).

56. *Id.* at 751. The court nevertheless denied the requested injunction for other reasons. *Id.* at 767-69.

57. *Id.* at 751.

58. *Id.* (emphasis in original).

59. *Id.*

60. 648 F. Supp. 661 (D. Minn. 1986).

who set up a competing company because the plaintiff company had permitted at least twenty-eight other former employees, including high-ranking executives, to leave and join competitors. The court accepted the defendants' waiver and equitable estoppel defenses, finding that "it would be inequitable to permit plaintiff to now rely on a non-compete agreement which it has so blithely ignored in the past."<sup>61</sup> Notably, the magnitude of the past non-enforcement was critical to the court's holding.

Even where a court is receptive to a potential waiver defense, the party claiming waiver of a non-compete bears a heavy burden of proof. Waiver and estoppel are the exception, not the rule. A former employee (or franchisee) generally must demonstrate that the company's prior failures to enforce its restrictive covenants against others amount to a "complete disregard for those provisions."<sup>62</sup> Most courts will not find a complete disregard that supports a finding of waiver as long as the franchisor or employer can offer a reasonable explanation for prior decisions not to enforce its post-term non-compete covenant against others.<sup>63</sup> That is, most courts reject the notion that employers automatically waive the right to enforce restrictive covenants by suing only some employees, noting a company has the right to exercise its business judgment as to whether any prohibited competition was likely enough to warrant legal action.<sup>64</sup>

Finally, some courts have indicated at least a willingness to consider a franchisee's selective enforcement defenses in franchisee non-compete cases. For example, by expressly noting that the defendant-franchisees "have failed to offer sufficient documentation to support this [selective enforcement] de-

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61. *Id.* at 698. See also *Midwest Television, Inc. v. Oloffson*, 699 N.E.2d 230, 237 (Ill. App. Ct. 1998) (adopting *Surgidev* waiver standard and holding that question of fact existed as to whether defendant employer waived the non-compete provision by selective enforcement).

62. *Kempner Mobile Elecs., Inc. v. Sw. Bell Mobile Sys., LLC*, No. 02-C-5403, 2003 WL 1057929, at \*26 (N.D. Ill. Mar. 10, 2003) (citing *Surgidev* for the proposition that the former employee must show the employer's conduct evinced a "complete disregard" for its restrictive covenants to establish a waiver; the court found the evidence did not satisfy the "complete disregard" standard).

63. See, e.g., *Horne v. Radiological Health Servs., PC*, 371 N.Y.S.2d 948, 959-61 (N.Y. Sup. Ct. 1975), *aff'd*, 379 N.Y.S.2d 374 (N.Y. App. Div. 1976) (noting that the selective enforcement defense could exist, but finding that the defendant-employee did not meet its burden to show waiver because, without more, the employer's lack of uniform enforcement was not enough); see also *Thompson v. Allain*, 377 S.W.2d 465, 468 (Mo. Ct. App. 1964) ("The fact that some of the plaintiffs did not invoke the covenant as to other retiring partners does not amount to a waiver as to defendant. The partnership, as it existed when previous members retired and located in North Kansas City, may have had good reasons for not having objected to such conduct.")

64. See, e.g., *Ajilon Prof'l Staffing, LLC v. Griffin*, No. CV-09-561PHXDGC, 2009 WL 1507559, at \*5 n.2 (D. Ariz. May 29, 2009) ("[T]he fact that enforcement decisions are made case-by-case—as would always be the case in any business—does not suggest that the non-compete provision fails to protect legitimate interests. A business may reasonably conclude that a provision protects very legitimate interests, but that the cost of litigation outweighs the threat presented by a particular former employee's competition."); *Horne*, 371 N.Y.S.2d at 959-61 (in concluding the defendant-employee had not proved the company intended to waive enforcement of its covenants, the court reasoned that the company's dealings with each particular employee had individual facts that affected the company's business judgment).

fense,” the U.S. District Court for the Middle District of Florida in *Medi-Weightloss Franchising USA v. Las Colinas Media Weightloss Clinics LLC* suggested that selective enforcement defenses to non-compete violations are available to franchisees, although the evidentiary burden is high.<sup>65</sup> Where available, a franchisee’s defense to a non-compete based on the franchisor’s alleged inconsistent enforcement is fact specific. It will depend largely on the number of the past instances where the franchisor failed to enforce the post-termination covenant not to compete, how recent those instances were, and the similarities between those former franchisees (and their markets) and the franchisee at issue.

*B. Inconsistent Enforcement May Undermine Claimed Justification or Show the Covenant Is Not Reasonable*

Separate from the affirmative defenses of waiver and equitable estoppel, inconsistent enforcement of a non-compete may jeopardize a franchisor’s ability to establish that the non-compete is reasonable and necessary. As noted earlier, in assessing the enforceability of a non-compete, courts generally ask whether the restriction is reasonably necessary to protect the company’s legitimate business interests. Also, courts require post-term covenants not to compete to be narrowly tailored so that they limit competition only to the extent necessary to protect the legitimate business interests of the franchisor.

Some courts may scrutinize a franchisor’s asserted rationale for seeking to enforce its non-compete in light of its prior failures to enforce the non-compete against other former franchisees. In certain cases, a franchisor’s past non-enforcement may undermine its claimed justification for enforcing the current non-compete; that is, the franchisor may not be able to establish the non-compete is valid and enforceable.

Faced with a post-termination non-compete, a former franchisee could argue that a franchisor’s selective enforcement against other former franchisees shows that a covenant is not reasonably necessary to protect the franchisor’s claimed interest. Under such an argument, the fact that the franchisor has not enforced its non-compete agreements against certain other former franchisees that opened competing businesses would allegedly show that the franchisor either does not have a protectable interest or the non-compete is broader than necessary to protect such interest.

For example, as discussed earlier, several courts have held that protection of a franchisor’s trade secrets and confidential information is a legitimate interest that can support enforcement of a post-termination covenant not to compete. However, the argument for protecting a franchisor’s purported trade secrets—indeed, the argument for the very existence of trade secrets—appears much less compelling where a franchisor knowingly allows other former franchisees that possessed the franchisor’s trade secrets to compete against the franchisor

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65. No. 8:13-cv-990-T-23TBM, 2013 WL 12122070, at \*7 (M.D. Fla. Sept. 4, 2013).

without action. Failure to protect the confidentiality of trade secrets can result in loss of protection for such purported trade secrets.<sup>66</sup> Further, a former franchisee may argue that if a post-term non-compete were really necessary to protect the franchisor's trade secrets, the franchisor would have enforced the non-compete against all former franchisees that launched competing businesses. Accordingly, where a franchisor argues that enforcement of a post-term non-compete is justified by the legitimate business need to protect the franchisor's trade secrets and confidential information, inconsistent enforcement of the restrictive covenant against other former franchisees risks arguments that (1) the information is no longer secret and therefore not a protectable "trade secret" that justifies a restrictive covenant, and/or (2) the franchisor suffers no real harm from non-enforcement.

In addition, franchisors frequently argue that their interest in refranchising the relevant territory supports enforcement of a particular post-term covenant not to compete. In such cases, the franchisor's market-by-market strategy becomes critical evidence supporting the enforceability of a particular non-compete. For example, in *Petland, Inc. v. Hendrix*,<sup>67</sup> a franchisor (Petland) sought a preliminary injunction to bar its former franchisee (Hendrix) from continuing to operate a competing pet store at the site of its terminated franchise location in Stafford, Texas. In response to the franchisor's argument that enforcement of the non-compete was necessary to protect the franchisor's interest in refranchising the Stafford market, Hendrix demonstrated that Petland had permitted three other former franchisees to remain in the pet store business following the termination of their franchise agreements. The U.S. District Court for the Southern District of Ohio was receptive to the franchisee's arguments, but ultimately granted the injunction after finding the franchisor could justify its decision to enforce the post-term non-compete in some cases but not others, stating: "That these former franchisees paid a monetary settlement to Petland supports [Hendrix's] position and . . . this fact might even prove dispositive if the circumstances of the instant case were not inescapably distinguishable."<sup>68</sup> Specifically, the court found that "the company had no intention of refranchising those select markets," while "Petland claims an interest in re-franchising the Stafford market."<sup>69</sup> The court went on to conclude that "[a]ny selective enforcement of the clause here is grounded in credible business reasons and does not serve to render the non-competition clause invalid against [Hendrix]."<sup>70</sup>

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66. *Cf. Motor City Bagels, LLC v. Am. Bagel Co.*, 50 F. Supp. 2d 460, 480 (D. Md. 1999) (finding no trade secret protections where the "plaintiffs simply did not act reasonably in seeking to ensure the secrecy of their plan"); *McAlpine v. AAMCO Automatic Transmissions, Inc.*, 461 F. Supp. 1232, 1256 (E.D. Mich. 1978) ("The subject of a trade secret must be secret, and must not be part of the public knowledge or of general knowledge in the trade or business involved.")

67. No. 204CV224, 2004 WL 3406089 (S.D. Ohio Sept. 14, 2004).

68. *Id.* at \*7.

69. *Id.*

70. *Id.*

The court in *Petland* concluded that the franchisor's ability to offer credible business reasons for its selective enforcement distinguished it from cases like *Patel v. Baskin-Robbins, USA Co.*,<sup>71</sup> where the court denied an injunction because the franchisor failed to present persuasive evidence for its inconsistent enforcement of its non-compete clause. The lesson is that courts will scrutinize a franchisor's rationale for past selective enforcement in assessing whether the franchisor has shown the non-compete is enforceable.

Further, as noted earlier, most courts require a covenant not to compete to be reasonable in scope of prohibited activity, geography, and duration. Selective enforcement of a non-compete covenant may become evidence as to whether the scope of the non-compete is reasonable. For example, in a non-franchise case involving Estee Lauder, the U.S. District Court for the Southern District of New York enforced a post-termination covenant against a former employee but reduced the covenant's duration based on Estee Lauder's treatment of other former employees.<sup>72</sup> After the company sought to enforce a one-year non-compete against a former employee, the former employee responded by producing evidence that Estee Lauder routinely negotiated much shorter post-separation restraints (ranging from three to five months) with other departing executives. Indeed, the company had offered to reduce the former employee's own non-compete to four months. Based on the company's past actions, the court held that a one-year restriction was unnecessary to protect the company's interest. The court granted the company's request for an injunction, but shortened the duration of the non-compete from one year to five months to conform to what was necessary to protect the company's interests based on the company's negotiations with other former employees.<sup>73</sup>

Under such rationale, if a franchisor has allowed other former franchisees to negotiate the terms of the non-compete (e.g., reduced duration, geographic scope, or prohibited practices), a court could find the clause is broader than reasonably necessary to protect the franchisor's interests and therefore not reasonable as drafted. For this reason, franchisors that enter into settlement agreements with competing former franchisees should consider carefully how they describe the matters, especially if the franchisor agrees to waive or reduce the scope of the non-compete's restrictions. Moreover, in settling with or otherwise deciding not to litigate against a former franchisee, franchisors should carefully document why they have agreed to forego enforcement of their non-compete rights in case they must subsequently explain such selective enforcement in future litigation.

Accordingly, it is clear that at least some courts will consider evidence of inconsistent enforcement of post-termination restrictive covenants, or settle-

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71. 264 F. Supp. 2d 607, 612 (N.D. Ill. 2003) (denying the franchisor's motion for a preliminary injunction).

72. *Estee Lauder Cos. v. Batra*, 430 F. Supp. 2d 158, 181–82 (S.D.N.Y. 2006).

73. *Id.* at 181.

ments regarding such covenants, in evaluating whether the covenant is enforceable and reasonable. On the other hand, other courts have concluded that a company's treatment of other former employees has no bearing on the enforceability of a post-termination covenant not to compete against a different former employee.<sup>74</sup>

### C. Selective Enforcement Under State Anti-Discrimination Laws

Former franchisees located in certain states may also attempt to argue that a franchisor's selective enforcement of a post-term covenant not to compete violates anti-discrimination provisions in applicable state franchise relationship laws. Seven states have anti-discrimination provisions in their franchise relationship laws or regulations: Arkansas, Hawaii, Illinois, Indiana, Minnesota, Washington, and Wisconsin.<sup>75</sup> The particular provisions vary from state to state, but these statutes and regulations generally require franchisors to impose the same charges on their franchisees (e.g., franchise fees, royalties, and costs of goods) and to avoid discriminatory treatment of similarly situated franchisees.<sup>76</sup> A franchisor can rebut a claim of discrimination by showing that its treatment was reasonable and based on franchises granted at materially different times.<sup>77</sup>

Such anti-discrimination provisions, however, do not appear to save a former franchisee that is breaching its post-termination covenant not to compete, even if the franchisor's past non-compete enforcement has been inconsistent. For example, in *Precision Enterprises, Inc. v. Precision Tune, Inc.*,<sup>78</sup> the U.S. District Court for the Western District of Washington held that a franchisor could sue one franchisee for violation of a non-competition agreement while not pursuing similar violations by other franchisees because such selective enforcement did not constitute illegal discrimination under the Washington Franchise Investment Protection Act.<sup>79</sup> Similarly, in the *Deutschland Enterprises* case mentioned earlier, the Seventh Circuit held the termination of a franchisee for breaching its franchise agreement's in-term non-compete was not "discriminatory" in violation of the Wisconsin Fair Dealership Law, even though the franchisor did not enforce the non-compete against two

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74. See, e.g., *GCA Servs. Grp., Inc. v. ParCou, LLC*, No. 2:16-cv-02251-STA-cgc, 2016 WL 7192175 (W.D. Tenn. Dec. 12, 2016) (in an employee non-compete case, affirming denial of an employee's request for discovery regarding its selective enforcement of non-compete defense because such information was irrelevant to whether such agreements are enforceable).

75. ARK. CODE ANN. § 4-72-204; HAW. REV. STAT. §§ 482E-6(1)-6(2)(C); 815 ILL. COMP. STAT. 705/18; IND. CODE § 23-2-2.7-2(5); MINN. RULES § 2860.4400, WASH. REV. CODE §§ 19.100.180(2)(c), (2)(j); WIS. STAT. §§ 135.02, 135.03.

76. See, e.g., 815 ILL. COMP. STAT. 705/18.

77. See, e.g., WASH. REV. CODE § 19.100.180(2)(c).

78. *Bus. Franchise Guide (CCH) ¶ 10,472* (W.D. Wash. Oct. 4, 1993).

79. *Id.*; see also *Armstrong v. Taco Time Int'l, Inc.*, 30 Wash. App. 538, 543-44 (1981) (rejecting the franchisee's argument that selective enforcement of non-compete constituted discrimination in violation of Washington Franchise Investment Protection Act; holding in-term and post-termination covenant not to compete, as modified, was enforceable).

other franchisees, where the franchisee at issue was not similarly situated to those other franchisees.<sup>80</sup>

Once again, as long as a franchisor can offer reasonable explanations and distinctions for enforcing its non-compete against some former franchisees but not others, state anti-discrimination provisions in franchise relationship laws should not preclude enforcement.

#### D. *Effect of Inconsistent Enforcement on Proving Irreparable Harm*

As mentioned earlier, enforcement of non-compete covenants often arises in the context of a franchisor's motion for a preliminary injunction. To obtain a preliminary injunction, the movant must prove, among other things, that it will suffer "irreparable harm" absent the injunction.<sup>81</sup> Even if a franchisor's inconsistent enforcement of its post-term non-competes does not render them unenforceable or constitute waiver, allowing other former franchisees to compete could jeopardize the franchisor's ability to establish irreparable harm.

As one commentator has explained in the employment context, "it is fair game for the party opposing the injunction to assume that the employer will not be irreparably injured any more than it was in a similar situation in which it did not seek to enforce the covenant against another departing employee."<sup>82</sup> The same can be argued in the franchise context.

In *Baskin-Robbins Inc. v. Patel*, the U.S. District Court for the Northern District of Illinois declined to issue a preliminary injunction based on evidence of the franchisor's selective enforcement of its non-compete.<sup>83</sup> After Baskin-Robbins made a business decision to move away from stand-alone ice cream shops in favor of stores offering ice cream, doughnuts, and sandwiches, many former Baskin-Robbins stores converted to a competing brand, KaleidoScoops.<sup>84</sup> Although Baskin-Robbins had objected to some of the conversions and sought to enforce its non-compete, in many instances it had chosen not to enforce the covenants.<sup>85</sup> In light of the evidence of Baskin-Robbins' past inconsistent enforcement of the non-compete covenants, the court found that the franchisor had not presented sufficient evidence of irreparable harm and denied the requested injunction.<sup>86</sup>

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80. *Deutschland Enter., Ltd. v. Burger King Corp.*, 957 F.2d 449 (7th Cir. 1992).

81. *See eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006); *Ciba-Geigy Corp. v. Bolar Pharm. Co., Inc.*, 747 F.2d 844 (3d Cir. 1984).

82. 4B N.Y. PRACTICE SERIES, COMMERCIAL LITIGATION IN NEW YORK STATE COURTS § 80:34 (4th ed. 2016).

83. 264 F. Supp. 2d 607 (N.D. Ill. 2003).

84. *Id.* at 609.

85. *Id.*

86. *Id.* at 610–11. Although the court denied the requested injunction on the papers, it indicated that it would allow additional evidence at any future injunction hearings. In addition, the court acknowledged that the franchisor *may* have been "influenced by a conclusion that [the defendant] no longer wished to operate a stand-alone store in that location and had no plans to develop a multiple products store there." *Id.* at 609.

In *E.B.N. Enterprises, Inc. v. C.L. Creative Images, Inc.*,<sup>87</sup> the franchisor sought a preliminary injunction enforcing a non-compete covenant after the franchisee repudiated the franchise agreement shortly before expiration and continued to operate a hair salon under a new name. The franchisor argued, among other things, that an injunction was appropriate to “protect its franchise system from the perception that it does not enforce its agreements.”<sup>88</sup> But the U.S. District Court for the Northern District of Illinois rejected the franchisor’s argument, noting that the franchisor had not only failed to present any evidence in support of its conclusion, but it had successfully sought to exclude evidence related to other franchisees. In the court’s view, the franchisor’s attempts to prevent discovery regarding its selective enforcement as to other franchisees meant that it “cannot now claim its need for an injunction rests upon other franchisees.”<sup>89</sup>

On the other hand, other courts have concluded that past selective enforcement will not preclude a finding of irreparable harm as long as the franchisor can offer a rational business explanation for why it sought to enforce its post-term non-compete against some former franchisees but not others. For example, in *Bad Ass Coffee Co. of Hawaii v. JH Enterprises, LLC*, the franchisor sought an injunction after the defendants declined to renew their franchise agreement and converted to a competing business in the same location.<sup>90</sup> The former franchisees argued that the franchisor could not show irreparable harm because it had allowed other former franchisees to open competing businesses and because it lacked a “formalized system to monitor whether former franchisees comply with the non-compete agreements.”<sup>91</sup> Although agreeing that “each of these considerations cuts against a finding of irreparable injury,” the U.S. District Court for the District of Utah nevertheless found that the franchisor was free to forego enforcement of its non-compete agreements in specific instances based on its own business judgment, stating that it did “not believe that making compromises necessarily means that [the franchisor] meant to devalue, or has devalued, their non-competition agreements globally.”<sup>92</sup> The court similarly found that the franchisor was under no obligation to “check up” on franchisees whose agreements had expired, noting that it was reasonable to rely on the franchisees’ contractual promise not to compete.<sup>93</sup>

Similarly, in *Petland, Inc. v. Hendrix*, the U.S. District Court for the Southern District of Ohio granted a preliminary injunction to halt a competing business.<sup>94</sup> There, the evidence showed the franchisor had permitted

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87. No. 09-cv-6279, 2011 WL 1131313 (N.D. Ill. Mar. 28, 2011).

88. *Id.* at \*5.

89. *Id.*

90. 636 F. Supp. 2d 1237 (D. Utah 2009).

91. *Id.* at 1250.

92. *Id.* at 1251.

93. *Id.*

94. No. 204CV224, 2004 WL 3406089 (S.D. Ohio Sept. 14, 2004).

three other former franchisees to remain in the same line of business following the termination of their franchise agreements.<sup>95</sup> The court found it significant that the franchisor had elected to abandon those select markets, whereas it intended to remain in the market where the injunction had been sought.<sup>96</sup> *Petland* illustrates why evidence related to a franchisor's intent to relicense may be dispositive on the issue of irreparable harm.

As long as a franchisor can offer evidence in an injunction proceeding explaining and justifying any prior inconsistent enforcement of its post-term covenant not to compete, such selective enforcement should not preclude a finding that a former franchisee's ongoing violation of its post-term non-compete is irreparably harming the franchisor.

#### IV. Conclusion

Absent contractual language in the franchise agreement requiring a franchisor to take action to protect the system from competition, a franchisor generally cannot be compelled to enforce post-term covenants not to compete against former franchisees. Nevertheless, selective enforcement of restrictive covenants raises various strategic, legal, and business considerations. In many instances, aggressive enforcement reinforces the sanctity of the covenants and promotes system-wide stability. In other cases, a franchisor may have legitimate business reasons to disregard some competition by former franchisees. However, failure to enforce a non-compete covenant consistently can open up a franchisor to arguments that the covenant is not really necessary for its claimed business purpose (such as protection of trade secrets or prevention of customer confusion) or that competition by a former franchisee will not really irreparably harm the franchisor.

A franchisor should therefore carefully assess whether and when to enforce its non-compete covenants against former franchisees. In general, a franchisor's strategic selective enforcement should not prejudice future enforcement efforts, as long as the franchisor can rationally explain prior non-enforcement decisions.

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95. *Id.* at \*7.

96. *Id.*

