



Lessons Learned

A continuing column drawing lessons for franchise systems from franchise litigation and other sources.

By: David E. Holmes, a founding partner of Holmes & Lofstrom, LLP

Non-Competition Clause Enforced Against Wife Who Did Not Sign Franchise Agreement

California-based Franchisors (and even some in other states) sometimes assume that post-term non-competition clauses in franchise agreements may not be enforceable, either because of states' laws with which they're familiar, or due to experience with similar laws in the employment context, where enforcement is, in fact, often difficult.

However, the result in many states can very well be that non-competition agreements will be enforced, including against persons who may not have even signed the franchise agreement, according to a recent federal court case (Merry Maids v. WWJD Enterprises) arising in Nebraska and applying Tennessee law.

The facts, as found by the court, were basically these: The Franchisee had signed a franchise agreement prohibiting competition for one year and within 75 miles of the franchised location. His wife did not sign the franchise agreement. After the franchise agreement expired, the husband funded his wife's opening of a competing cleaning business and transferred the assets of the franchised business to her new business.

The court held that the transfer was essentially a sham and was designed to "park" the husband's business with his wife while he continued to manage it. In effect, the court found that there was a conspiracy between the husband and wife to evade the non-competition clause in the franchise agreement and issued an injunction against the wife.

An interesting wrinkle in the case is that the injunction continued for one year after its date of issuance, not merely one year after expiration of the franchise

■ Northern California Office

4251 S. Higuera St., Suite 401 · San Luis Obispo, CA 93401
Phone: 805.547.0697 · Fax: 805.547.0716



■ Southern California Office

6621 E. Pacific Coast Hwy., Suite 250 · Long Beach, CA 90803
Phone: 562.596.0116 · Fax: 562.596.0416

Lessons Learned

agreement, since the court concluded that the Franchisor was entitled to one year's benefit of the non-competition clause.

The result seems appropriate, and probably expected by most sophisticated observers, since any other result would simply encourage signatories to non-competition agreements to merely find a "straw man" (or woman) to which they could transfer their business and ignore their commitments regarding non-competition. Finally, it's a reminder that the attitudes of some states against enforcement of post-term non-competition agreements is not shared by all states.

David Holmes has practiced domestic and international franchise law for more than 30 years. David earned his undergraduate and law degrees from the University of Southern California. He specializes in franchise law, including structuring franchise systems, drafting registration documents, legal compliance, litigation management and negotiations. He also serves as an expert witness on franchising matters in both federal and state courts and has taught graduate level business law courses at California State University, Long Beach. He contributes to the publications and committees of the International Franchise Association, American Bar Association and California State Bar.