

PUBLICATION

Franchisors Must Act Quickly to Obtain Injunctive Relief on Non-Competition Covenants

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A recent case from the U.S. Eighth Circuit Court of Appeals reaffirms the important principle that a franchisor, or any business, that seeks a preliminary injunction to prevent harm from a covenant breach must act quickly. The case is *Novus Franchising, Inc. v. Dawson*, --- F.3d ----, 2013 WL 3970250 (8th Cir. 2013).

Novus operates automotive glass repair franchises and its principal place of business is in Minnesota. Michael Dawson purchased a Novus franchise in Virginia for two counties, including the Richmond metropolitan area. The 2008 franchise agreement included a non-compete covenant. Essentially, the covenant provided that "you, your Owners, the Personal Guarantors, and the members of your ... immediate families will not, for a period of two years after the termination or expiration of this Agreement, ... own, operate, lease, ... conduct, engage in, consult with, be connected with, have any interest in, or assist any person or entity engaged in" a business that is in any way competitive with or similar to the "Business" if that business is located within your area of primary responsibility.

In October 2010, Dawson stopped paying royalties he owed under the franchise agreement. Four months later, in February 2011, Novus sent him a Notice of Default letter, informing him he had materially breached the franchise agreement. In October 2011, Novus sent a letter terminating the franchise agreement. Dawson continued to operate an automotive glass repair business which advertised itself as "Novus Glass by CarMike, Inc." Novus filed suit in February 2012 in federal district court in Minnesota asserting a variety of claims for breach of the franchise agreement, conversion of Novus's equipment, trademark infringement and other claims. On March 26, 2012, Novus filed a motion for preliminary injunction seeking (1) to enforce the non-compete covenant and (2) seeking to prohibit Dawson from using the Novus marks and products in his business. The district court granted Novus's motion for preliminary injunction to prohibit Dawson from using Novus's marks and products, but did not grant Novus's motion to enforce the non-compete covenant.

Novus appealed the ruling. The Eighth Circuit Court of Appeals noted that requests for preliminary injunction are analyzed under four factors: "(1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." In refusing to enforce the franchise agreement's non-compete covenant, the district court focused on the irreparable harm factor.

The parties cited several cases about whether it was appropriate to infer irreparable harm from the breach of a valid and enforceable non-compete clause. Dawson argued the 17-month delay between the time he stopped paying royalties and the time Novus sought injunctive relief rebutted any inference of irreparable harm.

The Court of Appeals held "[a]t a minimum, Novus's failure to seek injunctive relief for a period of seventeen months after Dawson quit paying royalties 'vitiates much of the force of [Novus's] allegations' of irreparable harm." Additionally, the court questioned whether the alleged injuries—a loss of customers or goodwill—were really irreparable or whether they could be adequately addressed at trial through damages. Ultimately, the Court of Appeals held the trial court did not abuse its discretion by holding that Novus failed to show irreparable harm and by denying Novus's request for preliminary injunction to enforce the non-compete covenant.

Novus did obtain injunctive relief prohibiting Dawson from using the Novus marks and products in his business, which was to be expected. The court left Novus to prove its damages if Novus is successful at trial. Novus appealed the non-compete issue to the Eighth Circuit to preserve its enforceability in this and other circumstances when the timeline would not be elongated. After all, proving damages in non-competition covenant cases is challenging, and could lead to longer and more expensive litigation.

This case reminds franchisors who seek a preliminary injunction, whether for breach of a covenant not to compete, misappropriation of trade secrets, or trademark infringement, that they should act promptly after the harm begins. The beneficence of enlightened franchisee relations, or benign neglect of franchisee default, produces the predictable but undesired consequence of unenforceable covenants. Courts don't recognize a franchisor's situation, after a 17-month delay, as "urgent" or compelling.