THE COST OF EDUCATION: AN UPDATE ON SELECTED ISSUES IN FLORIDA FRANCHISE LAW

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I. INTRODUCTION: WHAT IS A FRANCHISE?

Franchising is a significant and accepted aspect of American business. Franchises are found in a host of product and service enterprises ranging from fast-food restaurants, dry cleaners, pack-and-ship stores, to clothing outlets. Although the term "franchise" has no universal definition, most franchises, wherever located, share some common elements. First, a franchise is a contractual arrangement where the franchisee engages in the sale of products or services in accordance with the franchisor's designated methods and procedures.[2] Second, a franchise creates a significant ongoing relationship between the franchisor and franchisee. This relationship includes the licensed sale of the franchisor's products by the franchisee, and the franchisee's use of trademarks and service marks, trade secrets, processes, or goodwill owned and/or developed by or with the franchisor, as well as supply materials developed and produced by the franchisor.[3] The franchise agreement can also include provisions relating to mutual assistance and cooperation with respect to advertising, training, and financing geared to ensure the success of the franchise venture for both parties.[4] Often, the franchisee has not been previously involved in any business similar to the franchised business and any operational knowledge is obtained from information and training provided to the franchisee by the franchisor.

A. Florida Franchise Act[5] Requirements:

Florida law enumerates four specific elements that determine the existence of a franchise. The Florida Franchise Act[6] states in pertinent part:

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[2] See generally Deborah S. Coldwell, et al., Franchise Law, 53 SMU L. REV. 1055, 1056 (2000); 27 FLA. JUR. 2D Franchise Contracts § 1 *et seq.* (2000); 62B AM. JUR. 2D Private Franchise Contracts § 24 (1990).

[3] Id.

[4] Id.

[5] Interestingly, the Florida Legislature never designated Fla. Stat. § 817.416 the "Florida Franchise Act." See Chapter 71-61, Laws of Florida. However, courts and commentators alike have given it this title. See Hotels of Key Largo, Inc. v. RHI Hotels, Inc., 694 So.2d 74 (Fla. 3d DCA 1997); Burger King Corp. v. Austin, 805 F.Supp. 1007 (S.D. Fla. 1992); Glenn J. Waldman, The Florida Franchise Act – Protection for the In-State Franchisor or Out-of-State Franchisee?, 73 FLA. B. J. 1999. For convenience sake, § 817.416 will be referred to here as the "Florida Franchise Act."

(b) The term "franchise or distributorship" means a contract or agreement, either expressed or implied, whether oral or written, between two or more persons:

1. Wherein a commercial relationship of definite duration or continuing indefinite duration is involved;

2. Wherein one party, hereinafter called the "franchisee," is granted the right to offer, sell, and distribute goods or services manufactured, processed, distributed or, in the case of services, organized and directed by another party;

3. Wherein the franchisee as an independent business constitutes a component of franchisor's distribution system; and

4. Wherein the operation of the franchisee's business franchise is substantially reliant on franchisors for the basic supply of goods.

(c) The term "goods" means any article or thing without limitation, or any part of such article or thing, including any article or thing used or consumed by a franchisee in rendering a service established, organized, directed, or approved by the franchisor.

Accordingly, in order for a "franchise" to exist in Florida, each of the above factors must be satisfied.[7] Of equal import, the standards of the act apply to distributorships as well. Florida is unusual in that the two systems – franchises and distributorships – are defined by the same standards.

The Florida courts have not yet spoken on these elements as they determine the existence or non-existence of a franchise in Florida. However, one federal court decision sheds some light on the "basic supply of goods" element.[8] The 11th Circuit Court of Appeals addressed the argument that, because the franchisor did not itself supply the goods used by the franchisee, the business operation could not be termed a "franchise" under Florida law.[9] The court rejected this argument. Where the franchisor established a network of approved suppliers who packaged approved products under the franchisor's label, the franchisees were required to purchase from the approved suppliers, and the franchisor collected a royalty fee by means of surcharges on the sales of the suppliers, the court found that the franchisee was substantially reliant on the franchisor for the basic supply of goods. Accordingly, the business arrangement satisfied the requirements under the Florida Franchise Act and was held to be a franchise.[10] Although not expressed by

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[6] Fla. Stat. § 817.416 (2000).

[7] This accurately describes a "generic" franchise. Florida law does impose additional rules for franchises relating to the sale of beer and malted liquors (Fla. Stat. § 563), motor vehicles (Fla. Stat. § 320.60-320.70) and farm equipment (Fla. Stat. § 686.40-686.418). Insofar as those chapters impose additional franchise requirements specific to those industries, they will not be discussed here.

[8] Boca Mar Properties, Inc.v. International Dairy Queen, Inc., 732 F.2d 1550 (11th Cir. 1985).

[9] Id. at 1552.

[10] Id.

the court, this rationale suggests that substantial, as opposed to strict compliance, is sufficient under the statute to render a business enterprise a franchise under Florida law.

The Florida Franchise Act imposes few requirements for a franchise relationship to arise. Furthermore, it applies to distributorships as well, using the terms "franchise" and "distributorship" interchangeably. As compared to typical "franchise" definitions, the Florida law does not require the existence of elements commonly associated with a franchise arrangement. Indeed, the Florida Franchise Act's requirements are far less restrictive than those promulgated by the Federal Trade Commission ("FTC").[11] First, there is no apparent requirement of a franchise fee payment. All that is required is that the franchisee be "granted the right to offer, sell, and distribute goods or services" in conjunction with the franchisor.[12] Although payment of a fee is a common, if not universal element in franchise arrangements,[13] and is required under FTC regulations, under the Florida statute it seems possible that a franchise grant could be supported by considerations other than the payment of a fee. There is no authority in Florida to clarify this issue. Secondly, there is no requirement that a franchisee have any substantial association with the franchisor's trademarks, another fairly universal factor in the franchisor-franchisee relationship and also an element under the FTC's regulations.[14] The Florida Franchise Act is silent on this issue, and it therefore cannot be considered as indicative of the existence of a franchise under Florida law. Finally, the franchise agreement may be written or oral, express or implied, and of a fixed or indefinite duration.[15] It is therefore possible that a franchise under Florida law will not qualify as such under Federal law. It is equally possible that parties to a business arrangement in Florida may create a franchise without even knowing or intending it. In sum, it is extremely easy for a business arrangement to be deemed a franchise in Florida.

B. The Inadvertent Franchise:

Situations can exist where a franchisor-franchisee relationship was never sought or intended by the parties, but was nevertheless found to exist as a matter of law. Indeed, it is possible that parties may consciously seek to avoid their relationship being termed a "franchise," yet are ultimately adjudged to hold that status. This phenomenon is often referred to as the "inadvertent franchise."[16]

The Florida cases have yet to address this phenomenon, but the likelihood of an "inadvertent franchise" arising under the Florida Franchise Act is exceedingly strong. As mentioned, a franchise agreement may be express or implied, written or oral,[17] and many of the common indicia of a franchise, required both by Federal law and the law of other

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[11] 16 C.F.R. § 436.2 (1999).
[12] Fla. Stat. § 817.416 (1)(b)2.
[13] See Coldwell, et al., supra note 2, at 1056.
[14] Id.; 16 C.F.R. § 436.2 (1999).
[15] Fla. Stat. § 817.416(1)(b)-(1)(b)1.
[16] See James R. Sims, III, and Mary Beth Trice, The Inadvertent Franchise and How to Safeguard Against It, 18 FRANCHISE L. J. 54 (1998).
[17] Fla. Stat. § 817.416(1)(b).

jurisdictions before a franchise can be held to exist, are unnecessary in Florida. Under these circumstances, a franchise may exist although the parties never coined their relationship as such or even if they sought to avoid the franchise designation. To repeat: any relationship, express or implied, written or oral, definite or indefinite in duration, where one party is granted the right to sell and distribute goods or services under the direction of the other, where the party is reliant on the other for the goods, and the party is a component of the other's distribution system, constitutes a franchise in Florida. Of course, that same definition applies to distributorships as well, adding an uncertainty regarding whether there is any appreciable difference between a franchise and a distributorship in Florida. Few other jurisdictions are so relaxed in their requirements. Accordingly, an "inadvertent franchise" can arise in Florida quite easily.

The reasons why a party might seek to avoid the franchise moniker are complex.[18] However, in Florida at least, a brief look at the second part of the Florida Franchise Act exposes some possible motivations. First, the statute imposes civil and criminal liability for: (1) intentionally misrepresenting the prospects or chances for success of a proposed franchise; (2) intentionally misrepresenting or failing to disclose the total required franchise investment; and (3) intentionally misrepresenting or failing to disclose efforts to establish more franchises than is reasonable to expect the market or market area for a particular franchisee to sustain.[19] In addition, the act allows for recovery of all moneys invested in the franchise and costs and attorneys fees incurred in bringing the action.[20] Finally, the Florida Department of Legal Affairs is empowered to bring legal action, separately or jointly with the Department of Agriculture and Consumer Services, to enjoin violations of the act.[21] Therefore, a party seeking to avoid this potential criminal and civil liability might be motivated to have their business arrangements deemed something other than a franchise. Given the broad sweep of the Florida act, this can be a daunting challenge.

C. When the Franchise Ends: Concerns for the Franchisor:

As with any business venture, franchise arrangements have the potential for breakdown and termination. When this happens, the franchisor finds itself faced with a number of significant problems. First, the franchisor has commonly allowed its name and trademarks and service marks to be associated with the franchisee. How can the franchisor prevent the franchisee from continuing to operate under its name and marks? It has likely trained the franchisee in its methods and processes and made the franchisee privy to its confidential business information and trade secrets. What can the franchisor do to prevent the franchisee from using this knowledge against it? Finally, what of the customers and goodwill generated for the franchisee through its affiliation with the franchisor? Who owns the customer lists and goodwill when the franchise agreement ends?

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[18] Sims & Trice, supra note 16, at 54.
[19] Fla. Stat. § 817.416(2).
[20] Fla. Stat. § 817.416(3).
[21] Fla. Stat. § 817.416(4).

This section will address Florida and related national law issues of ownership of goodwill, trade secrets, and the like at the termination of the franchise agreement. Following sections will discuss some of the remedies available to a franchisor to protect its interests in these assets, including enforcement of restrictive covenants and non-compete agreements. The novel aspect of royalties, a form of a quasi post-termination license sometimes designated as an "education fee" provision, and the potential impact of liquidated damages and restrictive covenant law principles on this new post-termination contractual remedy, are also examined.

II. CUSTOMER LISTS, TRADE SECRETS, GOODWILL & TRAINING:

This section discusses some of the common issues which can arise under a franchise agreement relating to ownership of certain franchise assets. Authority reflecting the state of the law in general is examined to show court treatment of these issues. Florida cases are discussed for contrast here and with greater detail in the following sections. A general understanding of the problems often associated with ownership of customer lists, existence and misappropriation of trade secrets, business goodwill, and the affect of franchisor training is helpful for the issues that follow.

A. Are Customer Lists a Trade Secret?

Nationally, courts are split over whether customer lists should be protected as comprising a "trade secret."[22] To merit protection, courts scrutinize the manner in which customers lists are created and maintained.[23] Common factors courts consider in making

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[22] Some courts have granted trade secret protection to customer lists. See General Business Services Inc v. Rouse, 495 F. Supp. 526 (E.D. Pa. 1980) (customers lists treated as trade secret); Town and Country House and Home Service, Inc. v. Evans 189 A.2d 390 (Conn. 1963) (enjoining use of plaintiff's customer information by former sales manager when understanding existed between him and the plaintiff that, if employed, he would keep secret any trade and business secrets and information of the plaintiff that might come to him, especially as to its customers). Other courts have not granted such protection. See Reidman Agency, Inc v. Musnicki, 435 N.Y.S.2d 837 (N.Y. A.D. 1981) (names of insurance customers were not trade secrets and insurance business was not unique; therefore, upon return by insurance salesman of production report containing customers names and policy information of salesman's former employer, former employer was not entitled to injunction prohibiting salesman from future solicitation of customers); Go Van Consolidators, Inc. v. Piggy Back Shippers, Inc., 306 A.2d 164 (R.I. 1973) (customer list was not trade secret where former employer made no effort to protect its secrecy). Florida courts have also addressed this issue. See e.g. Mittenzwei v. Industrial Waste Service, Inc., 618 So.2d 328 (Fla. 3d DCA 1993) (in the absence of a non-compete clause, former employee was free to contact anyone with whom she had established a relationship while employed by former employer).

[23] See Republic Systems & Programming, Inc v. Computer Assistance, Inc., 322 F. Supp. 619 (D. Conn. 1970) (to merit protection afforded for trade secrets, a customer list must consist of customers whose trade and patronage have been secured by years of business efforts and advertising and expenditure of time and money; substantial element of secrecy

this determination include the expenditure of time and money, the level of secrecy involved, and the difficulty in acquiring the information.[24]

B. Protection of Customer Lists Under the Uniform Trade Secrets Act:

The Uniform Trade Secrets Act ("UTSA") combines common law trade secret principles into a unified legislative scheme.[25] Currently, twenty-five states, including Florida, have adopted the UTSA to limit conflict and provide uniformity to trade secret law. The UTSA gives a trade secret owner the right to protection from the misappropriation of trade secrets. The UTSA provides for damages and injunctions, and sets up specific guidelines for determining what constitutes a trade secret.[26]

The Florida UTSA sets forth three-part test to determine the existence of a trade secret.[27] First, a trade secret must be information; second, it must have actual or potential independent economic value based on its secrecy; and third, it must be reasonably maintained in secret.[28] The UTSA also provides a uniform set of guidelines to follow in determining whether a trade secret exists.[29]

A number of Florida courts have considered whether customer lists will be protected as trade secrets. In Unistar Corp. v. Child,[30] the Second District Court of Appeal held that a customer list will be considered a trade secret if it can be shown that a

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must exist to extent that there would be difficulty in acquiring information except by use of improper means).

[24] See id.; see also Clifford McFarland Read & Lundy, Inc. v. Michael Brier & Co., Inc., 1998 R.I. Super. LEXIS 68 at *12 (May 13, 1998) citing Salsbury Laboratories, Inc. v. Merieux Laboratories Inc., 908 F.2d 706, 713 (11th Cir. 1990) (owner of a trade secret must take reasonable precaution to protect its secrecy).

[25] Uniform Trade Secrets Act, 14 ULA 329 (Supp. 1988).

[26] Fla. Stat. § 688.008 (2000).

[27] The UTSA defines a trade secret as follows: "Trade secret means information, including a formula, pattern, compilation, program, device, method, technique or process, that: (a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." UTSA § 1(4).

[28] Fla. Stat. § 688.001(4).

[29] Comment b of the UTSA is a frequently cited authority with respect to defining a trade secret. It enunciates six factors to be considered when determining whether a plaintiff's information is a trade secret: (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

[30] 415 So.2d 733 (Fla. 3d DCA 1982).

great deal of time and money went into the compilation of the list. However, a customer list will not be considered to be a trade secret if the customers are members of a readily ascertainable class.[31]

The Third District Court of Appeal also addressed this issue in Sethscot Collection, Inc v. Drbul.[32] The Sethscot court made a distinction between an "active" customer list and a "prospective" customer list. "The active customer list is a distillation of the prospective customer list and contains the names of approximately 6,800 sororities and fraternities that have actually ordered from the plaintiffs in the past eight years. Moreover, the active customer list is confidential and not readily ascertainable to the public."[33] As such, the court protected the active customer list as a trade secret. However, the court held that the prospective customer list was "readily ascertainable to the public and not the product of any great expense or effort," and therefore did not qualify as a trade secret entitled to protection and did not warrant an injunction.[34]

C. Ownership of Customer Lists:

Who owns the customer list? This question is significant in determining whether a customer list can be classified as a trade secret. Other factors need to be evaluated when making this determination. For instance, is it the name recognition of the franchisor that originally attracted the customer? Is it the quality of the service? Is it the individual personnel that induced the customer to return?

If it is name recognition that keeps the customer coming back, then a strong argument exists that the franchisor owns the customer list. However, if it is the remarkable service of an individual franchisee establishment, then the franchisee can make a colorable claim to ownership of the customer list, assuming this remarkable service exceeded that which was required under the franchise agreement. These questions need to be considered on a case-by-case basis. A bright line rule, which automatically assigns ownership of the customer list to the franchisor, may impair competition, discourage franchisee innovation, and unfairly allow the franchisor to control the ex-franchisee indefinitely. Conversely, assigning ownership of the customer list to the ex-franchisee may deprive the franchisor of his hard work, "leads," and other resources invested in the development of the franchise customer base. Where the franchisor set in motion the acts which led to the development of the customer list, the franchisor's claim would seem even stronger.

D. Training:

Practically all franchisors furnish some training to their franchisees. This training can be simple or highly technical depending upon the nature of the franchise business. To a certain extent franchisees may expect the franchisor's assistance and the promise of

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[31] Id.
[32] 669 So.2d 1076 (Fla. 3d DCA 1996).
[33] Id. at 1078.
[34] Id. at 1078.

such aid is often a significant reason for the franchisee's decision to buy a franchise. In effect the franchisee purchases training, uniformity of approach, and knowledge based on experience.[35] In dispensing its "blueprint for a successful business" to franchisee trainees, the franchisor sells or rents his experience to the franchisees in the form of training.[36]

Without some assurance that his franchisees will be unable to use the knowledge acquired from the franchisor to compete against him, a franchisor may be less likely to train his franchisees adequately, resulting in a diminution of the system's overall quality.[37] A franchisor who sells franchisees the knowledge of franchise operations should be able to rely upon the franchisee's reciprocal obligation not to compete.[38]

E. What Is Customer "Goodwill" and Who Owns It?

Customer "goodwill" is a concept that is not easily defined.[39] One court described "goodwill" as:

> [t]hose intangible advantages of incidents which are impersonal and attached to the thing conveyed, the favor which the management of the business had won from the public and the probability the old customers would continue their patronage in the future. Goodwill is based upon the prospective profits to result from voluntarily continued patronage of the public. It indicates that value which inheres in the fixed and favorable consideration of customers arising from an established and well-conducted business.[40]

Regardless of how goodwill is described, the significant question at the termination of a franchisor-franchisee relationship is: who owns it? The Texas Supreme Court considered the issue in Hill v. Mobile Auto Trim, Inc.[41] Franchisee Hill entered into a car trim franchise agreement for $42,000 plus five percent of his gross revenues. The franchise agreement contained a three-year, post-term covenant against competition. When Hill failed to pay his royalties, the franchisor obtained an injunction against Hill for operating a competing business. The Texas Court overturned the injunction on the grounds that the covenant was an oppressive interference with Hill's use of previously acquired car trim repair skills, and wrongly prevented Hill from engaging in a "common calling."[42] Hill had not only his own training and experience but also his own customer

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[35] Gillian K. Hadfield, Problematic Relations: Franchising and the Law of Incomplete Contracts, 42 STAN L. REV. 927, 943 (1990).
[36] Id.
[37] Id.
[38] Id.
[39] See Boggs v Couturier, 321 N.W. 2d. 794 (Mich. Ct. App. 1982).
[40] Id. at 796-797; quoting Colton v. Duvall, 237 N.W. 48, 49 (Mich. 1931).
[41] 725 S.W. 2d. 168 (Tex. 1987).
[42] Id. at 172.

goodwill, which was a protected interest separate from any goodwill held by the franchisor.[43]

The Texas Supreme Court decided that the franchisee should be permitted to use his own goodwill and skills to compete against the former franchisor. Furthermore, a total ban on competition was too overbroad and unfairly deprived the franchisee of his own equity and investment.[44]

Two other federal courts also reached a similar conclusion in O.V. Marketing Assoc. v. Carter [45] and Proimos v. Fair Automotive Repair.[46] In both cases, the non-compete agreements were disregarded because the franchisees would be greatly injured by the lost value of their new business's trade name and goodwill.[47]

Another argument proposed in favor of an ex-franchisee's ownership of goodwill relates to advertising. In a franchised system, the creation of goodwill through advertising is sometimes not financed by the franchisor. It is primarily financed through the franchisee himself through mandatory contributions to the franchise system's advertising cooperative.[48] Many franchise agreements require the franchisee to make continual advertising expenditures, usually into funds that the franchisor controls or strongly influences.[49] Often, franchisees must spend a substantial amount on advertisements before they have even opened their businesses.[50]

Under this logic, it is argued that if franchisors use franchisee funds to help create the system's goodwill, they should not be permitted to prevent ex-franchisees from using the resulting customer contacts, at least in a limited fashion.[51] Former franchisees worked and paid money specifically to establish this goodwill and ex-franchisees deserve judicial recognition of their efforts in appropriate cases.

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[43] Id. at 171-172.

[44] But see Fla. Stat. § 542.335(1)(g)1, discussed infra.

[45] 766 F. Supp. 960 (D. Kan. 1991) (refusing to enforce the non-competition clause and permitting former franchisee, who had unilaterally terminated the franchise agreement, to open a competing store at the same premises; franchisor failed to prove that any legitimate interests were in danger, where there was no unique training, customer lists or trade secrets provided, and the only information exchanged was within the general knowledge of retailers).

[46] 808 F.2d 1273, 1277 (7th Cir. 1987) (denying a preliminary injunction against the franchisee for breaching a post-termination covenant because the franchisor failed to show prospective, irreparable injury while the franchisees would be greatly injured through the lost value of their new business's trade name and goodwill).

[47] But see Fla. Stat. § 542.335(1)(g)1, discussed infra.

[48] See Robert W. Emerson, Franchise Contract Clause and the Franchisor's Duty of Care Towards its Franchisees, 72 N.C. L. Rev. 905, 968 (1994).

[49] See id.

[50] See id.

[51] See id.

Although advertising and franchisee-created goodwill are strong arguments in favor of an ex-franchisee's ownership of goodwill, the franchisor, as discussed above, should be able to rely upon the franchisee's reciprocal promise of non-competition simply because the franchisor sold the knowledge and the idea to the franchisee in the first instance. Additionally, the former franchisee would likely not be in the position he is now but for the efforts and the innovative ideas of the franchisor.

As this discussion illustrates, the ownership of customer lists, goodwill and trade secrets, and the skills imparted through training, have been and remain central issues of dispute in franchise arrangements. Because of the potential for disagreement regarding the disposition of these franchise assets when a franchise agreement ends, franchisors must use care in their franchise agreements and relationships to protect their interests. This is perhaps no more true than in Florida, where the law regarding restrictive covenants and non-compete agreements, a staple of franchise agreements, has been frequently amended with oftentimes bewildering results and unexpected (and unwelcome) outcomes for franchisors.

III. RESTRICTIVE COVENANTS AND NON-COMPETE AGREEMENTS:

Restrictive covenants and non-compete agreements are one of the best remedies available to a franchisor to protect its interest in its trademarks, service marks, trade secrets, processes and other confidential business information.[52] Although money damages remain available to compensate a franchisor for the wrongful use of these assets by a franchisee, establishing an appropriate amount of damages can be difficult.[53] By preventing the franchisee from using these assets in the first place, a franchisor can better-serve its long-term interests and preserve its goodwill, name recognition, integrity of trademarks and service marks, and market share, while stopping competition from the franchisee made possible by the franchisor's own training and business methods, rather than waiting to seek money damages which may be difficult to prove.

The use of restrictive covenants and non-compete agreements is permitted as a legislatively created exception to the rule under the Florida Antitrust Act of 1980 that "every contract, combination, or conspiracy in restraint of trade or commerce in this state is unlawful."[54] Because such agreements are specific exceptions to the legislative policy encouraging business competition, they can only be analyzed by reference to the statute permitting the exceptions. However, because of two significant amendments to the

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[52] See generally Robert W. Emerson, Franchising Covenants Against Competition, 80 IOWA L. REV. 1049 (1995).

[53] See e.g. Corporate Management Advisors, Inc. v. Boghos, 756 So.2d 246, 248 (Fla. 5th DCA 2000) (damages sustained by former employer, where former employee resigned company to work for competitor and had knowledge of confidential information and solicited former employer's customers, could not be readily calculated or compensated by money damages); Miller Mechanical, Inc. v. Ruth, 300 So.2d 11, 13 (Fla. 1974) (because damages for breach of non-compete agreement are so difficult to show, injunctive relief becomes a favored remedy).

[54] Fla. Stat. § 542.18 (2000).

statute in 1990 and again in 1996, different provisions apply depending upon when the restrictive covenant or non-compete agreement was entered into.[55] Agreements entered into before June 28, 1990 are subject to the old version of Fla. Stat. § 542.33 (before 1980 designated § 542.12); agreements entered into on or after June 28, 1990 and before July 1, 1996 are subject to the current version of § 542.33; and agreements entered into on or after July 1, 1996 are subject to the current § 542.335.[56] "The rules governing contracts effective in each period are quite different, and practitioners will continue to find "traps for the unwary" so long as contracts effective before July 1, 1996, continue in force."[57] Because of the potential for disagreements between franchisors and franchisees based on agreements entered into long ago, franchisors and their counsel must be conversant in the three statutory schemes and their significant differences.

A. Agreements Prior to June 28, 1990:

At common law, agreements that restricted competition and employment were disfavored by the courts.[58] However, in 1953, the Florida Legislature enacted Fla. Stat. § 542.12 (later designated § 542.33) and for the first time explicitly authorized contractual restraints on competition.[59] The Supreme Court explained that the statute was "designed to allow employers to prevent their employees and agents from learning their trade secrets, befriending their customers and then moving into competition with them."[60] As to both employers and licensors (franchisors), the statute imposed the requirement that the restriction be reasonably limited in both time and area and that the employer or licensor/franchisor continue to carry on a like business therein.[61] The Court also explained that "[i]n determining the reasonableness of such an agreement, the courts employ a balancing test to weigh the employer's interest in preventing the competition against the oppressive effect on the employee."[62]

The original statute, unfortunately, suffered sufficient vagueness and led to conflicting decisions and uncertainty in enforcement.[63] To understand the conflict one need look no further than two decisions of the Second District Court of Appeal which staked out opposing views of the statute. First, in Sarasota Beverage Co. v. Johnson,[64] the Second District held that when faced with a valid non-compete agreement, a court

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[55] See John A. Grant Jr., and Thomas T. Steele, Restrictive Covenants: Florida Returns to the Original "Unfair Competition" Approach for the 21st Century, 70 FLA. B. J. 53, 55 (Nov. 1996).
[56] Id.
[57] Id. See also American Residential Services, Inc. v. Event Technical Services, Inc., 715 So.2d 1048 (Fla. 3d DCA 1998); Tri-County Sweeping Services, Inc. v. Lawson, 757 So.2d 1290 (Fla. 4th DCA 2000).
[58] Grant & Steele, supra note 55, at 53.
[59] Id.
[60] Miller Mechanical, Inc., 300 So.2d at 12.
[61] See Fla. Stat. § 542.33 (1989).
[62] Miller Mechanical, Inc., 300 So.2d at 12.
[63] Grant & Steele, supra note 55, at 53.
[64] 551 So.2d 503 (Fla. 2d DCA 1989).

may only determine whether the agreement is reasonable as to time and area.[65] The previously enunciated standard that courts were to balance all of the elements generally required for the issuance of an injunction, including the possible negative impact on the former employee as contrasted with the potential negative harm to the former employer, was not a relevant consideration when passing on a non-compete agreement.[66] The economic hardship defense, slowly eviscerated in the cases, was finally specifically barred. No such inquiry was allowed under the Sarasota Beverage court's reading of the statute. In marked contrast, the same court, less than two years later, announced a different view. In Hapney v. Central Garage, Inc.,[67] the Second District, facing a non-compete agreement executed in 1988, articulated that a party seeking enforcement must plead and prove a legitimate business interest in order to be granted protection.[68] This opinion entrusted a significant element of discretion in the trial court when considering claims to enforce non-compete agreements, and provided a defense to enforcement not previously available. However, the outcome in Hapney is best-explained by the fact that the court there was looking through the lens of the 1990 amendments to the statute, which were just recently enacted when the court made its decision, and applied retrospectively by the court.

The Supreme Court settled the debate between the Sarasota Beverage and Hapney decisions in Gupton v. Village Key & Saw Shop, Inc.[69] The court expressly disapproved Hapney to the extent that it held the 1990 amendments to § 542.33 were applicable retrospectively, and reaffirmed that "under the 1989 version of the statute, the trial court's authority is limited to determining the reasonableness of time and geographic area limitations."[70] Accordingly, for non-compete and other restrictive covenants entered into before June 28, 1990, the trial court's discretion is strictly curtailed: if the agreement is otherwise valid, the party seeking enforcement continues to carry on a like business,[71] and the time and scope provisions are reasonable (or the court can make them so),[72] the agreement will be enforced, without need for showing a legitimate business interest to

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[65] Id. at 506.
[66] Id.
[67] 579 So.2d 127 (Fla. 2d DCA 1991).
[68] Id. at 134.
[69] 656 So.2d 475 (Fla. 1995).
[70] Id. at 479, fn. 2.
[71] This requirement does not appear to apply when a franchisor grants an exclusive territory. See International Bartending Institute, Inc. v. Baird, Bus. Franchise Guide CCH ¶10,222 (Fla. 13th Cir. Ct. 1993) (permitting breakaway franchisee to avoid non-compete provision on basis that franchisor was not carrying on like-business in area of exclusive franchise territory would lead to absurd result and run counter to intention of statute; franchisor should not have to haphazardly set up new business just to enforce bargained-for restriction in valid franchise agreement).
[72] Auto Club Affiliates, Inc. v. Donahey, 281 So.2d 239, 244 (Fla. 2d DCA 1973) (if covenant is unreasonable as to time and space restrictions, trial court has jurisdiction to determine based on facts of case what would be reasonable and enforce agreement as modified).

protect or any consideration of the defendant's possible hardships should enforcement be granted.

B. Agreements After June 28, 1990 But Before July 1, 1996:

In an apparent effort to correct the deficiencies of the prior law, the Florida Legislature amended Fla. Stat. § 542.33 in 1990. The amendment addressed the corporate sale and employer-employee/independent contractor relationship and added that "the court shall not enter an injunction contrary to the public health, safety, or welfare or in any case where the injunction enforces an unreasonable covenant not to compete or where there is no showing of irreparable injury."[73] Accordingly, the legislature granted more discretion to the courts when passing on non-compete agreements. The amendment also added, significantly, that the "use of specific trade secrets, customer lists, or direct solicitation of existing customers shall be presumed to be an irreparable injury."[74] This addition reduced one of the hurdles in obtaining injunctive relief. The amendment did not alter the language applicable to licensors.

While the amendment may have sought to clarify the law regarding the enforcement of non-compete agreements, it probably has had the opposite effect.[75] The "reasonableness" and "public health, safety or welfare" considerations may have broadened the trial court's discretion, but they failed to provide objective standards for the exercise of that discretion.[76] "This deficiency permitted the development of differing judicial views on how contractual restrictions upon competition should be evaluated and enforced, and that difference in viewpoints generated unclear, inconsistent, and oftentimes inexplicable results."[77] Consequently, actions to seek enforcement of non-compete agreements entered into between June 28, 1990, and July 1, 1996, which are subject to this "standardless" standard, are likely to be fraught with surprise and uncertainty.

C. Agreements After July 1, 1996:

In 1996 the Florida Legislature created Fla. Stat. § 542.335. The 1996 statute is more comprehensive than the prior statutes, and was created to correct the inadequacies in the prior versions governing restrictive covenants that lead to inconsistency in the application of the law.[78] The current statute sets out that "enforcement of contracts that restrict or prohibit competition during or after the term of the restrictive covenants, so long as such contracts are reasonable in time, area, and line of business, is not prohibited."[79] The statute does not define "reasonable" in terms of area or line of business, but does set forth presumptions as to what constitutes a reasonable time. With

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[73] Fla. Stat. § 542.33(2)(a) (1990 Supp.)
[74] Id.
[75] Grant & Steele, supra note 55, at 53-54.
[76] Id.
[77] Id. at 54.
[78] Grant & Steele, supra note 55, at 53-56.
[79] Fla. Stat. § 542.335(1).

respect to restrictive covenants sought to be enforced against a former franchisee, a restrictive covenant of one year is presumptively reasonable while a restriction of more than three years is presumptively unreasonable.[80] When a restrictive covenant imposes a time period in excess of these presumptions, there must be evidence in the record to rebut the presumption.[81] Where there is no evidence to rebut the presumption of unreasonableness, the court will enforce the restriction only for the maximum time permitted by the statute.[82]

What constitutes a reasonable time, area or line of business restriction is not capable of a fixed definition – the facts of the case will determine.[83] Accordingly, when drafting a restrictive covenant, it is possible that the drafting party may think the agreement reasonable, but a court may ultimately find to the contrary. However, this will not void the covenant in its entirely.[84] Under the prior law (still applicable to restrictive covenants and non-compete agreements entered into prior to July 1, 1996), unreasonable restrictions are modified by the court to make them reasonable, the rationale being that voiding a restrictive covenant altogether would frustrate the intent of the legislature and the parties.[85] When the legislature created Fla. Stat. § 542.335 in 1996, it specifically added that "[i]f a contractually specified restraint is overbroad, overlong, or otherwise not reasonably necessary to protect the legitimate business interest or interests, a court shall modify the restraint and grant only the relief reasonably necessary to protect such interest or interests."[86] Therefore, if a time, area or line of business provision is found overbroad, it will be modified by the court and enforced, not stricken, regardless of when the agreement was entered into. Finally, a restrictive covenant or non-compete agreement that omits one of these terms remains enforceable – the court will supply the missing term.[87]

Although it may seem academic, it bears repeating that all restrictive covenants and non-compete agreements under § 542.335 must be in writing. "A court shall not enforce a restrictive covenant unless it is set forth in a writing signed by the person against whom enforcement is sought."[88]

In a return to the reasoning of the Hapney decision, the 1996 amendment requires that all restrictive covenants or non-compete agreements must be supported by a

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[80] Fla. Stat. § 542.335(1)(d)2.

[81] See Ballasco v. Gulf Auto Holdings, Inc., 707 So.2d 858, 860 (Fla. 2d DCA 1998); Flickenger v. R.J. Fitzgerald & Co., 732 So.2d 33, 34 (Fla. 2d DCA 1999).

[82] Id.

[83] Health Care Financial Enterprises, Inc. v. Levy, 715 So.2d 341, 343 (Fla. 4th DCA 1998).

[84] Id.

[85] Id.

[86] Fla. Stat. § 542.335(1)(c).

[87] Sears Termite and Pest Control, Inc. v. Arnold, 745 So.2d 485, 486 (Fla. 1st DCA 1999).

[88] Fla. Stat. § 542.335(1)(a).

"legitimate business interest."[89] Lack of support by a legitimate business interest renders these agreements unlawful, void, and unenforceable.[90] The burden is on the party seeking enforcement (i.e., a franchisor) to "plead and prove" the existence of the legitimate business interest.[91] A "legitimate business interest" includes, but is not limited to:

1. Trade secrets, as defined in Fla. Stat. § 688.002(4).
2. Valuable confidential business or professional information that otherwise does not qualify as trade secrets.
3. Substantial relationships with specific prospective or existing customers, patients, or clients.
4. Customer, patient, or client goodwill associated with:
   a. A specific geographic location; or
   b. A specific marketing or trade area.
5. Extraordinary or specialized training.[92]

A legitimate business interest can be defined by any number of non-exclusive factors.[93] The benefit of these factors is that they provide the court with a non-exclusive illustration of objective standards to apply when exercising their discretion. These considerations are often the subjects of franchisor-franchisee relationships, and the courts have dealt with similar issues in the context of employer-employee non-compete agreements, finding sufficient grounds to enforce them.[94] Accordingly, trade secrets,

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[89] Fla. Stat. § 542.335(1)(b).

[90] Id. See also Anich Industries, Inc. v. Raney, 751 So.2d 767 (Fla. 5th DCA 2000) (where former employer failed to demonstrate the existence of a legitimate business interest in need of protection, non-compete and confidentiality agreements would not be enforced against former employee who went to work for competitor, where former employee acquired no specialized knowledge, confidential information, pricing information, nor developed customer relationships while working for former employer for less than three months).

[91] Fla. Stat. § 542.335(1)(b). This imposes a burden on the claimant of proper pleading in the petition or claim for relief, as well as an evidentiary burden to show the existence of the interest.

[92] Fla. Stat. § 542.335(1)(b).

[93] These factors are strikingly similar to those suggested by the Hapney court. See 579 So.2d at 131.

[94] See Balasco, 707 So.2d 858 (enforcing nonpiracy agreement as necessary to protect legitimate business interests of auto dealership where former employee of auto dealership solicited other employees to leave and work for competitor where dealership provided specialized in-house training to all employees); Aero Kool Corp. v. Oosthuizen, 736 So.2d 25 (Fla. 3d DCA 1999) (holding that employment agreement with six-month non-compete provision furthered legitimate business interests of former employer where former employer provided significant specialized technical training to former employee who later went to work for competitor); and Lubkey v. CompuVAC Systems, Inc., 787 So.2d 121 (Fla. 2d DCA 2001) (enforcing settlement agreement where former employee agreed not to use confidential information and proprietary software in competing

valuable confidential business information, substantial relationships with existing customers, patients, and clients, associated goodwill, and trademarks and service marks are all properly legitimate business interests a franchisor can seek to protect upon the termination of a franchise agreement. Although the pre-1990 law made the inquiry into "legitimate business interests" unnecessary, the existence of these enumerated factors does provide greater guidance to the courts than the malleable "reasonableness" standard set out in the 1990 amendment.

The statute also requires that the restraint be reasonably necessary to protect the legitimate business interest justifying the restriction.[95] Restated, the relief granted should be no greater – and no less – than what is necessary to protect the business interest in dispute. Again, it is the burden of the party seeking enforcement to plead and prove the reasonable necessity.[96] Where a restriction seeks to provide more protection than is reasonably necessary to foster the complaining parties legitimate business interests, it will not be enforced.[97] Therefore, a franchisor is only entitled to a restriction sufficient to protect its interests, and no more.

A new provision to the statutory scheme provides that a restrictive covenant or non-compete agreement may be enforced by a third-party beneficiary or assignee of the agreement, but only as follows:

1. In the case of a third-party beneficiary, the restrictive covenant expressly identified the person as a third-party beneficiary of the contract and expressly stated that the restrictive covenant was intended for the benefit of such person.
2. In the case of an assignee or successor, the restrictive covenant expressly authorized enforcement by a party's assignee or successor.[98]

This provision mandates that where a third-party beneficiary is known at the time of contracting, the restrictive covenant must indicate that it was intended for the benefit of that specifically identified person to be enforced by them. As to successors and

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business where former employer had legitimate business interest in its propriety software technology).

[95] Fla. Stat. § 542.335(1)(c).

[96] Id. See also Austin v. Mid State Fire Equipment of Central Florida, Inc., 727 So.2d 1097 (Fla. 5th DCA 1999) (enforcement of restrictive covenant in employment agreement limited to that which was reasonably necessary to provide reasonable protection to former employer; where former employee provided similar service work with competitor as he had for more than 16 years of career with numerous other employers, former employer could not enjoin former employee from working for competitor, but could only enforce covenant as to disclosure of knowledge of customer and pricing information obtained at former employer where such knowledge was unrelated to responsibilities of former employee's new job).

[97] Id.

[98] Fla. Stat. § 542.335(1)(f).

assignees, the statute seems less specific, only requiring that restrictive covenant indicate that enforcement is authorized by a successor or assignee generally. No cases have come down on this point, but the plain language of the agreement supports this reading. Accordingly, franchisors contemplating third-party beneficiary situations or assignment of restrictive covenants must be aware of this requirement and draft their agreements accordingly. The significance of this provision lies in its application to business transactions where franchises are bought and sold. Small single-franchise transactions to large franchising system acquisitions will all be affected. It is therefore critical that this provision be heeded, or assignees and third-party beneficiaries may find that restrictive covenants and non-compete agreements will not be enforceable by them.

Certain defenses to enforcement have been limited by § 542.335. First, a court "[s]hall not consider any individualized economic or other hardship that might be caused to the person against whom enforcement is sought."[99] That is, the fact that enforcement of a restrictive covenant or non-compete agreement might have negative economic consequences for a franchisee is not to be considered as a defense to enforcement by the court. This unambiguous language chosen by the Legislature clearly eliminates what was, at least for a time, a consideration before the court when ruling on a non-compete agreement.[100] It must be noted, however, that this defense remains viable under covenants not to compete entered into before July 1, 1996. Although in Sarasota Beverage the Second District Court of Appeal declared the defense unavailable under the earlier statute,[101] no other court has ever expressly overruled it. Therefore, given the already uncertain state of the prior law, the likelihood that this defense could be successfully asserted remains.

In addition to abolishing the economic defense for agreements after July 1, 1996, the new amendment instructs that the court "[m]ay consider as a defense the fact that the person seeking enforcement no longer continues in business in the area or line of business that is the subject of the action to enforce the restrictive covenant only if such discontinuance of business is not the result of a violation of the restriction."[102] This represents a significant departure from the prior rule, where the franchisor ostensibly had to show that it continued to carry on a like business during the time and area of the restriction sought in order to obtain enforcement of the restriction.[103] The scope of this pre-1996 requirement has never been fully examined in an appellate court decision. However, the Florida Circuit Court of the Thirteenth Judicial Circuit, Hillsborough County, addressed the issue in 1993, suggesting that the requirement is less than absolute

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[99] Fla. Stat. § 542.335(1)(g)1.

[100] See Auto Club Affiliates, Inc., 281 So.2d at 241 (employer must not deprive employee of a skill on which he depends for his livelihood); Miller Mechanical, Inc., 300 So.2d at 12 (balancing test must weigh employer's interest in preventing competition against oppressive effect on employee); Marshall v. Gore, 506 So.2d 91, 92 (Fla. 2d DCA 1987) (injunction enforcing non-compete agreement must not unduly restrict one's livelihood). These cases were neither expressly followed nor repudiated regarding this proposition.

[101] 551 So.2d at 506.

[102] Fla. Stat. § 542.335(1)(g)2.

[103] Fla. Stat. § 542.33(2)(b).

under the prior law.[104] In that case a breakaway franchisee argued that the franchisor could not enjoin its new operation on the ground that it was not carrying on a like business in the area. The court rejected this argument on the basis that the reason the franchisor was not operating a like business in the area is because the franchisee breached its agreement.[105] The court concluded it was illogical, and would frustrate the purpose of the statute, to require the franchisor to haphazardly set up a new business just so it could enforce and express provision in a valid franchise agreement. Accordingly, the trial judge enforced the non-compete agreement even though the franchisor was not carrying on a like business in the area. Now, whether or not the franchisor continues business in the time and area of the former franchisee is only a consideration, not a total defense as the prior statute might seem to suggest. The date the restrictive covenant was entered into will determine which rule to apply.

The current act also sets forth a number of miscellaneous provisions which are significant. First, a rule of reasonable construction of restrictive covenants is mandated.[106] A court may not employ a rule of construction that requires the court to construe the restrictive covenant narrowly.[107] Moreover, the common law rule requiring that contract ambiguities be construed against their drafter is discarded.[108] Accordingly, a franchisor that drafts a restrictive covenant or non-compete agreement is not forced to bear the burden of any ambiguities. Instead, the court must interpret the covenant in favor of providing reasonable protection to all of the franchisor's legitimate business interests.[109] Of course, this new requirement is not without its own potential set of difficulties. Because neither party is prejudiced if the contract contains an ambiguity, there is no motivating factor for the parties, particularly the drafter, to make the agreement as specific as possible. Whether this provision might actually invite ambiguity and pose a possible violation of public policy is an issue that remains to be explored.

As with the prior law, the court is authorized by § 542.335 to provide temporary and permanent injunctive relief.[110] To that end, however, "[t]he violation of an enforceable restrictive covenant creates a presumption of irreparable injury" to a franchisor seeking to enforce such an agreement with injunctive relief.[111] This broadens the presumption of irreparable injury as to non-compete agreements introduced in the 1990 amendment to franchise and licensing agreements as well. Of note, a franchisor seeking an injunction is required to post an appropriate bond, and no agreement waiving or limiting the amount of the injunction bond will be given effect.[112]

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[104] International Bartending Institute, Inc. v. Baird, Bus. Franchise Guide CCH ¶10,222 (Fla. 13th Cir. Ct. 1993).
[105] Id.
[106] Fla. Stat. § 542.335(1)(h).
[107] Id.
[108] Id.; Compare City of Homestead v. Johnson, 760 So.2d 80, 84 (Fla. 2000) (any ambiguity in contract is to be construed against drafter.)
[109] Fla. Stat. § 542.335(1)(h).
[110] Fla. Stat. § 542.335(1)(j).
[111] Id.
[112] Id.

Finally, the court is empowered to award costs and attorney's fees to a prevailing party in an action to enforce, or challenge the enforcement, of a restrictive covenant, even in the absence of a contractual provision authorizing such an award.[113] No such attorney fee provision existed in the prior statutes. However, a party seeking to recover attorney's fees under this section still must plead entitlement, be it in a claim for relief or answer.[114] Otherwise, such entitlement to attorney's fees is waived.[115] Accordingly, a franchisor should always plead entitlement to attorney's fees under this section when seeking to enforce a restrictive covenant or non-compete agreement.

As can be seen by the prior discussion, the law of non-compete agreements and restrictive covenants in Florida is complex. The time the agreement was executed determines which of three potential statutory schemes to apply. Franchisors and their counsel must take note of which scheme to apply when seeking to enforce a restrictive covenant.

IV. RELIEF IN THE ABSENCE OF A RESTRICTIVE COVENANT:

In the absence of a restrictive covenant, either because an agreement was found void, or no agreement was ever executed through inadvertence or business choice, a former franchisee can potentially wreak havoc with a franchisor's confidential business information and use the franchisor's business practices against it. Nevertheless, even in such dire circumstances, a franchisor may be entitled to relief under the Florida Uniform Trade Secrets Act ("UTSA").[116]

Enacted in 1988, Florida's Uniform Trade Secrets Act provides a civil remedy for the misappropriation of trade secrets in the absence of any agreement for their protection. It may also provide franchisors with an additional remedy against former franchisees, in the absence of a restrictive covenant, to prohibit the use and disclosure of trade secrets owned by the franchisor. When the UTSA is properly invoked, it provides for injunctive relief against an actual or threatened misappropriation,[117] damages, punitive damages,[118] and attorney's fees against a party claiming or defending in bad faith.[119]

The UTSA defines a trade secret as "information, including a formula, pattern, compilation, program, device, method, technique, or process that: (a) Derives independent economic value, actual or potential, from not being generally known to, and

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[113] Fla. Stat. § 542.335(1)(k).

[114] See Aim Target Programs, Inc. v. Family Quest, Inc., 752 So.2d 1270, 1271 (Fla. 2d DCA 2000).

[115] Id.

[116] Fla. Stat. § 688.001 *et seq* (2000). See also Tom Barber, Beyond Noncompete Agreements: Using Florida's Trade Secrets Act to Prevent Former Employees from Disclosing Sensitive Information to Competitors, 72 FLA. B. J. 10 (1998).

[117] Fla. Stat. § 688.003(1).

[118] Fla. Stat. § 688.004.

[119] Fla. Stat. § 688.005.

not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."[120] This definition appears applicable to franchise relations in a number of ways. First, the definition includes compilations, techniques and processes. A franchise often centers on the franchisor instructing the franchisee in the techniques and processes of the franchise business – how to do the job under the franchise system rules. Where these techniques and processes have been patented or copyrighted, a franchisor may already have an appropriate remedy. However, if this is not the case, a franchisor may be able to look to the UTSA. It also is significant because other trade secrets, such as compilations like customer lists, are unlikely to ever be copyrighted or patented.[121] Secondly, the techniques or processes may provide economic value not simply from their disclosure, but from their use as well. That is, a former franchisee who continues to use techniques or processes need not disclose them to others – the former franchisee's continued use is enough to invoke trade secret protection when that use generates an economic return.

The UTSA protects trade secrets from misappropriation. It defines misappropriation in a number of different ways, but the provision franchisors should pay greatest attention to states that misappropriation means that "[a]t the time of the disclosure or use, [the defendant] knew or had reason to know that her or his knowledge of the trade secret was . . . acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use."[122] This standard does not demand actual knowledge by the party to be charged, only that they had reason to know. This is one area where a franchisor can protect itself in the absence of copyrights, patents, or restrictive covenants.

To protects its rights, the franchisor must give the franchisee reason to know that the information is of a confidential nature. Although at the time of termination this may depend on facts which then are out of the franchisor's control, a franchisor can plan in advance for such an eventuality.[123] Information that the franchisor considers a trade secret should be described and, to the extent written down, marked as such.[124] Written confidentiality policies explaining what is confidential and how that information should be stored should be distributed to all franchisees, and acknowledgement of the policy should be recorded by signed receipt or otherwise.[125] To the extent a customer list is involved, records should be kept describing the way in which it was compiled to show its complexity and expense.[126]

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[120] Fla. Stat. § 688.002(4).

[121] Stephen B. Daiker, Taking Steps to Qualify Customer Lists as "Trade Secrets", 66 Fla. B. J. 22 (1992).

[122] Fla. Stat. § 688.002(2)(b)2.

[123] Daiker, supra note 120, at 26-27.

[124] Id.

[125] Id.

[126] Id. See also Unistar Corp. v. Child, 415 So.2d 733 (Fla. 3d DCA 1982) (customer list will be considered a trade secret if it can be shown that a great deal of time and money went into the compilation of the list); Sethscot Collection, Inc. v. Drbul, 669 So.2d 1076 (Fla. 3d DCA 1996) (similar).

A final issue which arises under the UTSA is known as the inevitable disclosure doctrine. The premise of the doctrine is that a former employee or franchisee with knowledge of trade secret information, even with the best of intentions, will inevitably disclose or use such information when working as or for a competitor in a substantially related business.[127] The logical underpinnings of the doctrine in practice are relatively simple. In the franchise context, the franchisee works along side the franchisor, learning its operating techniques and internal policies and procedures. It becomes skilled in the operation of the franchise system and develops significant and specific business acumen at the hand of the franchisor. Ultimately, the franchise agreement terminates, and no non-compete provisions or restrictive covenants come into play. The franchisee then moves into a similar line (or more likely, the same line) of business. The former franchisee opens a business that directly or indirectly competes with the franchisor. The products or services provided are substantially the same as with ended franchise. Although the franchisee may, in good faith, attempt to avoid using or disclosing the secrets and techniques learned while affiliated with the franchisor, the similarities in the business line make this impossible. The knowledge, once learned, cannot be unlearned. Whether consciously or subconsciously, the information known by the franchise will be put into practice, either for the specific aim of undercutting the franchisor or simply because the franchisee, during the course of the franchise relationship, may have become accustomed to and familiar with certain methods of doing business – methods taught by the franchisor – and is comfortable using them. The franchisee may simply not know what else to do, and relies on the previously acquired knowledge to stay afloat. Inevitably, the information taught by the franchisor will be used against it, and the franchisor will suffer loss.

The viability of the inevitable disclosure doctrine under Florida law is in doubt. No Florida state courts have addressed the doctrine.[128] The U.S. District Court, Southern District of Florida, was presented with application of the doctrine pursuant to the Florida UTSA, but declined to apply it.[129] The court opined: "Absent evidence of actual or threatened misappropriation, a court should not allow a plaintiff to use inevitable disclosure as an after-the-fact noncompete agreement to enjoin and employee from working for the employer of his or her choice."[130] The court supported its decision on the basis that injunctions should not issue "merely to allay the fears and apprehensions or to soothe the anxieties of the parties" and required a showing greater than "mere suspicion or apprehension of injury."[131] Accordingly, it refused to issue an injunction on the basis of inevitable disclosure. Whether this position will be adopted by a Florida state court is unknown, but it does suggest that inevitable disclosure is not a strong basis on which to

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[127] Barber, supra note 115, at 15-16.

[128] Del Monte Fresh Produce Co. v. Dole Food Co., Inc., 148 F.Supp.2d 1326, 1336-1337 (S.D. Fla. 2001).

[129] Id.

[130] Id. at 1337.

[131] Id. at 338 quoting International Business Machine Corp. v. Seagate Tech., Inc., 941 F.Supp. 98, 101 (D. Minn. 1992).

support an injunction for disclosure or use of misappropriated trade secrets under the Florida UTSA.

V. OBTAINING INJUNCTIVE RELIEF:

The ability of a franchisor to obtain injunctive relief, either to enforce compliance with a restrictive covenant or non-compete agreement, or to prevent abuses of trade and service marks by a terminated franchisee, is the franchisor's most powerful legal remedy. Although money damages can in some circumstances compensate an aggrieved franchisor, compliance with the termination provisions of a franchise agreement may be the more appropriate objective. Of course, depending upon the relief sought, the franchisor may find itself in either state or federal court, and the differing standards for injunctions in each bear brief mention.

A. Florida Law Standard:

In order to obtain a temporary injunction under Florida law, a party must prove the following elements: (1) that it will suffer irreparable harm unless the status quo is maintained; (2) that is has no adequate remedy at law; (3) that it has a substantial likelihood of success on the merits; and (4) that a temporary injunction will serve the public interest.[132] In the context of the franchisor-franchisee situation, it must be remembered that irreparable harm is presumed where violation of a valid restrictive covenant is shown.[133] Secondly, the party seeking the injunction must have no adequate remedy at law, i.e., a damages remedy. Where damages are capable of determination, the extraordinary remedy of an injunction is inappropriate.[134] Third, the substantial likelihood of success on the merits element requires the franchisor prove that it has "a clear legal right to the relief requested."[135] Finally, the injunction cannot disserve the public interest. However, in the restrictive covenant situation, when a court refuses to enforce a restrictive covenant governed by the 1996 amendments on the basis of public policy, it is required to fully articulate the public policy basis.[136]

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[132] Infinity Radio, Inc. v. Whitby, 780 So.2d 248, 250 (Fla. 4th DCA 2001).

[133] Fla. Stat. § 542.335(1)(j).

[134] See First Miami Securities, Inc. v. Bell, 758 So.2d 1229, 1230 (Fla. 4th DCA 2000) (upholding trial court's denial of injunction on basis that securities firm did not establish irreparable harm by former employee who solicited former employer's clients at his new place of business where damages could be calculated from commissions derived by former employee at his new place of employment.)

[135] Id.

[136] See Fla. Stat. § 542.335(1)(i): "No court may refuse enforcement of an otherwise enforceable restrictive covenant on the ground that the contract violates public policy unless such public policy is articulated by the court and the court finds that the specified public policy requirements substantially outweigh the need to protect the legitimate business interest or interests established by the person seeking enforcement of the restraint."

B. Federal Law Standard:

A Federal district court may grant temporary injunctive relief if the moving party shows the following: (1) substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest.[137] Although similar to the Florida standard, the Federal rule balances the possible harms between the plaintiff and the defendant. This kind of balancing is specifically excluded as to restrictive covenants by Fla. Stat. § 542.335(1)(g)1. Permanent injunctions are authorized upon a showing of: (1) a violation of the applicable statute or agreement by the defendants; (2) continuing irreparable injury to the plaintiff in the absence of an injunction; and (3) lack of an adequate remedy at law.[138]

Depending on the jurisdiction and the nature of the claim at issue, the Florida or Federal standards may impose a greater burden. With respect to trademark infringement claims under the Lanham Trademark Act,[139] the Federal injunction law will govern. However, enforcement of non-compete agreements and restrictive covenants under Florida law by a court sitting in diversity should be subject to the presumptions and rules of § 542.335(1)(g)1. In Gupton v. Village Key & Saw Shop, Inc.,[140] the Florida Supreme Court announced that the 1990 amendments to the Florida Antitrust Act created new substantive Florida law – they were more than procedural changes.[141] There is no reason to suggest the 1996 amendments are any less substantive given their greater sweep. Therefore, following the principles announced in Erie Railroad Co. v. Tompkins,[142] a Federal court should apply the provisions of the Florida Anti-Trust Act as they relate to restrictive covenants subject to Florida law. This could alter the application of the Federal rule in some circumstances by employing the use of Florida-law based presumptions.

VI. THE EDUCATION FEE PROVISIONS: A NOVEL REMEDY

The remedies discussed above have been aimed at making a recalcitrant franchisee cease and desist from abusing a franchisor's assets: trademarks and service marks, trade secrets, customer lists, and the like. The ultimate aim is to make the franchisee stop. However, a new contractual remedy is emerging. It is not designed to necessarily make a franchisee stop operating under the franchise agreement, but to allow continued operation upon the payment of a fee. The fee does not permit continuing use of trademarks and service marks, but allows the franchisee to put to use the knowledge it

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[137] McDonald's Corp. v. Robertson, 147 F.3d 1301, 1306 (11th Cir. 1998).
[138] Dunkin' Donuts v. Kashi Enterprises, Inc., 119 F.Supp.2d 1363 , 1364 (N.D. Ga. 2000).
[139] 15 U.S.C. § 1114(1)(a).
[140] 656 So.2d 475 (Fla. 1995).
[141] Id. at 476.477.
[142] 304 U.S. 64 (1938).

has acquired from the franchisor – for a price. Although by no means universally applied, such provisions have been referred to as "education fees."

Although education fee clauses appear to be a relatively novel creature in franchise law, they are in the nature of a termination covenant and are relatively uncomplicated. Such an education fee might read:

> FRANCHISEE agrees that, upon the termination of this agreement, if he either owns or operates, directly or indirectly, another business that is in any way similar to the franchise business agreed to herein, the FRANCHISEE shall pay to the FRANCHISOR an EDUCATION FEE for the cost of using the practices, techniques, procedures and/or trade secrets of the FRANCHISOR, in an amount of three percent (3%) of the gross revenue volume of the business, to be paid in quarterly installments, for so long as the FRANCHISEE is involved in any such other business.

The clause shown above is not intended to be indicative of any specific franchise contract, but to simply show what such a provision might look like in any contract. However, this provision shares the characteristics of at least three types of remedies.

First of all, such an agreement has the characteristics of a license. Like a license, it is the grant of a personal right to use the property of another for a specified purpose.[143] As a license, it may be revoked at will by the licensor.[144] With this clause, the franchisee is given the post-termination option of shutting down, or continuing on by payment of the fee, subject to cancellation. Accordingly, this provision has many characteristics of a license.

This type of agreement also has elements of a restrictive covenant. It is aimed at protecting trade secrets and valuable business information, which are interests set out in § 542.335(b) of the Florida Antitrust Act of 1980. It is also in derogation of the common law prohibition on restricting the right to earn a living. Here, the right is curtailed by requirement of the fee payment. Because this provision has the indicators of a restrictive covenant, the question is raised of whether the open-ended time period is valid. Under § 542.335(1)(d)2, a restriction longer than three years is presumed unreasonable. Does the indefinite[145] time period render this fee clause enforceable only for three years in the absence of evidence to the contrary?

A final argument is that the provision is a liquidated damages clause. It is long-settled that the parties to a contract may stipulate in advance the amount to be paid or retained as liquidated damages in the event of breach. In this case, a percentage payment is specified to recover "damages" if the franchisee chooses to continue operating using the franchisor's methods. However, if this is a liquidated damages clause, does the

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[143] Dotson v. Wolfe, 391 So.2d 757, 759 (Fla. 5th DCA 1980).

[144] Id.

[145] LeFemine v. Baron, 573 So.2d 326, 328 (Fla. 1991).

amount or time frame render it a "penalty" and unenforceable?[146] For example, in Bradley v. Health Coalition, Inc., the Third District concluded that "specific performance or an injunction may be granted to enforce a duty even though there is a provision for liquidated damages for breach of that duty."[147] However, a required payment of $50,000 for each client taken by a former employee was determined to be a penalty.[148] Despite that, injunctive relief was still deemed available.[149]

Although this new type of remedy reflects elements from licensing law, restrictive covenants, and liquidated damages, a court facing this clause might have to divide the provision into two parts to analyze it: that which can be made whole by damages and that which requires an injunction. If the parties agree to quantify a payment as to the amount of damages for wrongful use of trade secret information, liquidated damages rules ought to control as to that element and permit the franchisee to operate on payment of the fee. As to trademark and service mark restrictions, those lacking a clearly defined amount of damages would be subject to injunction. Of course, the licensing argument may have the most appeal. It gives the option to continue in the business to the franchisee subject to a royalty or education fee to compensate the franchisor for the specialized training which allows the franchisee to then go into business by themselves. Such a provision can give a franchisor considerably more options to chose from when a franchise agreement ends.

VII. CONCLUSION

Franchising law in Florida poses its own unique challenges, and a franchisor must stay informed of the many nuances in order to best-protect its interests. This includes being mindful of franchise definitional issues and rules governing ownership of franchise assets, like trade secrets and goodwill. Moreover, because three statutory schemes governing the enforcement of restrictive covenants are in play, the franchisor must be cognizant of the different duties imposed on it under these bodies of law. Finally, a franchisor must continue to seek out innovative means to protect its interests, either through enforcement actions under the Uniform Trade Secrets Act or through more unconventional remedies like contractual education fee provisions. Mastering these issues will help to bring about more favorable outcomes for franchisors when disputes cause franchise agreements to end.

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[146] Coleman v. B.R. Chamberlain & Sons, Inc., 766 So.2d 427, 429 (Fla. 5th DCA 2000).
[147] 687 So.2d 329, 332 (Fla. 3d DCA 1997).
[148] Id.
[149] Id.