

## Nebraska Court Refuses to Invoke Blue Pencil Rule and Deems Post-Term Noncompete Unenforceable

In *Unlimited Opportunity, Inc. v. Waadah*, 2015 Neb. LEXIS 71 (Neb. Apr. 10, 2015), the Supreme Court of Nebraska affirmed a district court's ruling that the post-term noncompete covenant contained within the parties' franchise agreement was unreasonable, and therefore unenforceable. Unlimited Opportunity, d/b/a Jani-King of Omaha, ("JaniKing") is a subfranchisor of professional cleaning and maintenance services. In 2008, Jani-King granted Waadah a franchise in the Omaha, Nebraska area, which franchise later was terminated. The parties' franchise agreement contained a post-term noncompete clause which restricted participation in a competitive business within: (i) the territory granted to Waadah under the franchise agreement for a period of two years; and (ii) *the territory of any other Jani-King® franchisee for a period of one year*. Jan i-King terminated the franchise agreement in 2010 because Waadah attempted to divert JaniKing® customers to his own janitorial business. Waadah subsequently formed a competing business in his former franchised territory, and Jani-King filed suit. Although Jani-King's claims relied on the two-year portion of the provision, the district court concluded that the geographic scope of the one-year covenant was unreasonable because it restricted competition outside Waadah's franchised territory, and therefore held the entire noncompete clause unenforceable.

On appeal, the Nebraska Supreme Court echoed the district court's analysis and decision. The enforceability of a noncompete covenant under Nebraska law is based in part on whether the covenant is reasonable in space and time. As a result, such covenants must be limited in geographic scope. The court agreed that because JaniKing® franchisees operate across the globe, the one-year covenant not to compete in any franchisee's territory was similar to having no geographic restriction at all. Although Jani-King's claims relied on the two-year, geographically-limited restraint, the district court refused to sever the broader one-year restraint and deemed the entire noncompete provision unenforceable. The high court affirmed the district court's dismissal of Jani-King's claims, noting that Nebraska precedent has consistently declined to apply the "blue pencil rule," which enables courts to reform covenants to make them enforceable.

This case is a frightening reminder for franchisors of a court's unwillingness to reform noncompete provisions, even when franchisee activity is egregious. Franchisors subject to Nebraska law need to carefully draft noncompete provisions in light of prevailing Nebraska law as to what is deemed "reasonable."

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