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FOS NEWS - *Our Clients Come First*

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*Editor: Diane Slomowitz*

## FTC NONCOMPETE BAN BLOCKED NATIONWIDE

*By Kelly Gorman*

As FOS clients know, FOS has been actively monitoring and communicating with clients regarding the Federal Trade Commission ("FTC") rule banning most employment non-competes (the "Rule"), and the multiple lawsuits challenging the Rule's validity.

*See, for example,* **https://foslaw.com/what-to-know-before-the-september-4th-effective-date-of-the-ftcs-noncompete-ban/. https://foslaw.com/update-ftc-noncompete-ban-blocked-nationwide-by-federal-judge/.**

The Rule was initially set to go into effect this month, on September 4, 2024.

In addition to the ban, the Rule required that employers contact existing and former employees under pending non-competes to advise them of the Rule's impact.

On August 20, 2024, however, the Northern District of Texas, in *Ryan LLC v. F.T.C.* (N.D. Texas), issued an order setting aside the Rule nationwide.

As a result of the *Ryan* decision, the Rule did **not take effect on September 4, 2024.**

*Ryan* held that the FTC lacked authority to ban practices it deems unfair methods of competition through overbroad rules like the Rule.

The court noted that the FTC did not adequately consider less restrictive alternatives to address its concerns.

As a result of *Ryan*, employers can, for now, keep their status quo – and continue to maintain and enforce non-competes as state laws allow.

Also, employers need not, for now, notify current and former employees with existing noncompete agreements that they will not be enforced.

As of this writing, no appeal has yet been filed in *Ryan*, but one will almost certainly follow.

An appeal would be heard by the 5th Circuit Court of Appeals in New Orleans before any potential visit to the Supreme Court.

Because the 5th Circuit has a reputation for being business-friendly, some commentators speculate slim odds for the Rule's resurrection in an appeal of *Ryan*.

Employers should also be mindful that the *Ryan* court may not be the last word on the validity of the Rule.

Additional lawsuits have been filed challenging the Rule.

*FTC NONCOMPETE, cont. on pg. 3*

## FOS ON THE MOVE

FOS shareholders **Matthew O'Neill**, **Laurna Kinnel**, **Jacob Manian, Michael Koutnik**, and **Mark Andres** have been selected for inclusion in the 31st Edition of *Best Lawyers in America®*.

**O'Neill** was honored in appellate practice, arbitration, commercial litigation and corporate law.

**Kinnel** was honored in business organizations, corporate law, family law, mergers and acquisitions law, and trademark law.

**Manian** was honored in criminal defense: general practice, white-collar practice and DUI/DWI defense.

**Koutnik** was honored in business organizations, corporate law, land use and zoning law, and real estate law.

**Andres** was honored for his expertise in trusts and estates law.

FOS shareholder **Lauren Maddente** was selected for inclusion in the fifth edition of *Best Lawyers: Ones to Watch® in America,* for business organizations, commercial law, and corporate law.

In addition, **Kinnel** has been named to the 2024 Top 50 Lawyers In America list by America's Top Lawyers.

This award is reserved for the best lawyers who exhibit excellence in their practice, based on nominations by peers, clients, and/or the organization's research team.

## GORMAN DISCUSSES OPPORTUNITES FOR OBTAINING CLE CREDIT

An article by Fox, O'Neill, & Shannon associate attorney **Kelly Gorman** was recently published on the State Bar of Wisconsin's Business Law Blog. Her article, titled: *Paths to CLE Opportunities,* provides advice for other attorneys continuing legal education, including how to increase their knowledge of new and/or important legal issues.

*CLE CREDIT, cont. on pg. 3*

## WILL PROPOSED TITLE INSURANCE CHANGES TAKE HOLD?

*By Michael Koutnik*

As part of a larger effort to make housing more affordable, the Biden Administration proposed eliminating the requirement that federally-backed mortgages include title insurance.

Title insurance is an insurance policy that buyers of property and their lenders may obtain.

The insurance policy provides coverage in the event a defect in title results in losses to the owner or lender.

A title defect is usually a lien or encumbrance that prevents a seller from giving a buyer "clear title," and includes judgments, mortgages, tax liens, options to purchase, and easements.

For example, if a bank is making a loan secured by a mortgage on property, the bank will require that a title insurance policy be issued at closing.

The title insurance policy assures the lender that the borrower owns the property and that there are no liens on the property that would impair the lender's mortgage.

If, for example, the title insurance policy did not disclose that the property was already encumbered by a mortgage, which would prevent the lender from successfully foreclosing on the borrower and obtaining amounts owed under the mortgage, the lender would have a claim under its policy.

The cost of owner's policies and lender's policies vary from state-to-state and depend on the size of the transaction or loan.

Using the median home sales price in Milwaukee County for July 2024 (approximately $251,000), an owner's policy would cost approximately $1,500.

Using that same median price, a lender's policy related to refinancing a $251,000 loan would cost approximately $500.

Given the amounts at play, some in the title industry have argued that the proposed overhaul, while well intentioned, does not move the needle in making homes more affordable.

Especially when, the argument goes, the savings come at the expense of identifying issues with title pre-closing and providing insurance coverage for buyers and lenders post-closing.

So far, the proposal has not been met with excitement in Congress, but that could change depending on the Congressional makeup after the election.

FOS will continue to monitor the proposed changes and advise of any implementation that would likely impact our clients.

## U.S. SUPREME COURT ENDS *CHEVRON* DEFERENCE

*By Laurna Kinnel*

On June 28, 2024, the U.S. Supreme Court issued a landmark ruling in *Loper Bright Enterprises v. Raimondo*, overturning 40 years of deference to administrative agencies under the *Chevron* doctrine.

This decision has far-reaching consequences that will likely affect the daily lives of everyday Americans.

Under the *Chevron* doctrine, which the Court itself created in 1984, courts have deferred to federal agencies' reasonable interpretations of ambiguous language in federal laws the agencies implement.

For 40 years under this doctrine, the lower courts did not analyze whether an agency's interpretation of an ambiguous federal statute was correct.

Instead, the courts, providing deference to the agency, focused on whether the agency's determination was reasonable.

The rationale for this standard was that agencies are best suited, from their policy and technical expertise in a specific area, to make those choices that Congress, in drafting various statutes, left open.

This judicial deference allowed agencies, from the Food and Drug Administration to the National Marine Fisheries Service (at issue in *Loper*) to the Environmental Protection Agency, to issue thousands of rules and regulations affecting almost every facet of everyday life.

While initially uncontroversial, the *Chevron* doctrine more recently was challenged by those who viewed agencies as having too much undelegated power.

Chief Justice John Roberts, writing for the 6-3 majority, held that such deference to agencies was improper, stating Courts must exercise their independent judgment in deciding whether an agency acted within its statutory authority…," and that it is the role of the court, not an agency, "to say what the law is."

The dissent, meanwhile, argued that overturning *Chevron* deference expands the courts' power at the expense of the administrative agencies, which have particular subject matter expertise.

Justice Elena Kagan charac-

*U.S. SUPREME, cont. on pg. 3*

## BEWARE OF FRANCHISE PERFORMANCE ISSUES

*By Lauren Maddente*

Depending on its terms, a franchise can be a beneficial business opportunity.

Many small businesses find that selling a "known" product leads to an initial upsurge in customers, which the franchisee hopes to retain through hard work and old-fashioned luck.

What happens, however, when a franchisee runs into financial problems?

Many franchise agreements, although approved by the state, can be one-sided in favor of the franchisor.

That can lead to financial disaster.

Take the case of EYM Pizza, one of Pizza Hut's large franchisees, with restaurants across five states, including Wisconsin.

EYM recently filed bankruptcy, after racking up over $20 million in debt, closing 15 restaurants, and unsuccessfully suing Pizza Hut to prevent the termination of the franchise.

EYM is alleged to be either unable or unwilling to live up to its franchise agreement obligations, including payments for vendor services and advertising fees.

This allegedly occurred despite Pizza Hut's claim, understandable given the number of franchises held by EYM, that it entered into temporary forbearance and reinstatement agreements and took other action to help EYM solve its problems.

EYM's situation may be unique, given Pizza Hut's complaint's characterization of EYM as "among the worst of all large Pizza Hut franchises."

Big or small, those contemplating entering into franchise agreements should carefully review their proposed agreements with legal and financial professionals and ensure that they fully understand their rights and obligations before signing them.

Many franchise agreements are not subject to major changes, including those that require state approval.

It is important to understand the required performance, the metrics against which that performance will be measured, the required payment schedule with the franchisor and vendors, and the consequences of breaching the agreement.

This is particularly important to the individual owners of entity franchises, many of whom are required to guarantee the franchisee's obligations.

Breaching a franchise agreement can have serious consequences for the franchisee and guarantor, potentially resulting in severe financial losses from which recovery may be very difficult.

If you need assistance reviewing a potential or existing franchise agreement, contact your FOS attorney.

*FTC NONCOMPETE, cont. from pg. 1*

A Pennsylvania federal court (*ATS Tree Services, LLC v. F.T.C.)* refused to enjoin the Rule's enforcement pending that case's final resolution, while a Florida federal court (*Properties of the Villages, Inc. v. F.T.C.*) enjoined enforcement, but only as to its particular plaintiffs.

Whatever these cases' final results, appeals are expected.

And during the interim, state noncompete laws remain operative.

Contact FOS about these decisions, the FTC Rule, or your noncompete agreements' legal compliance.

*U.S. SUPREME, cont. from pg. 2*

terized the decision's seismic shift as a 40-year-old "rule of judicial humility giv(ing) way to a rule of judicial hubris."

Whether loving or loathing the decision, all agree that it will significantly impact the ability of administrative agencies and their executive branch superiors to act without explicit congressional authorization.

Congress can still defer to agencies' authority or expertise, but only explicitly.

Because the decision will likely cause an uptick in legal challenges to existing rules in all sectors, the ruling's true impact likely won't be known for many years.

*CLE CREDIT, cont. from pg. 1*

Gorman serves on the State Bar of Wisconsin Business Law Section Board of Directors. The Business Law Section frequently promotes or puts on legal education programs addressing issues of interest to business attorneys.

Her article alerts attorneys to multiple educational opportunities, providing links to program information, Wisconsin Supreme Court rules, and information regarding attending or sponsoring CLE sessions.

Gorman's article is at https://www.wisbar.org/NewsPublications/Pages/General-Article.aspx?ArticleID=30611.

### FOS INTERN

This summer, FOS participated in the 2024 Honorable Charles N. Clevert, Jr. Internship Program sponsored by the Eastern District of Wisconsin Bar Association.

Under the program, local high school students interested in becoming lawyers were placed in various law firm offices to experience the law firms in action.

The interns also attended functions, including naturalization ceremonies, completed assigned readings, and "interviewed" potential mentors to begin developing long-term legal connections.

Hopefully, FOS attorneys will meet participants across the table in a few years.

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**IN THIS ISSUE**

**Page 1 FTC Noncompete Ban; Best Lawyers; Gorman Discusses CLE Credit**

**Page 2 Title Insurance Changes; U.S. Supreme Court**

**Page 3 Beware of Franchise Performance Issues; FOS Intern**

**Page 4 Get Out The Calculators for Your Pension Plans**

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## GET OUT THE CALCULATORS FOR YOUR PENSION PLANS

*By Olivia Hansen*

Attention pension plan sponsors!

One potential October 31, 2024 filing deadline looms, and a new rule will become effective for new plans on January 1, 2025.

Many single-employer plans use mortality schedules based on plan members' actual ages instead of the standard tables issued by the Internal Revenue Service ("IRS").

Using specific mortality tables can allow employers to more accurately calculate the present value of their plans and the minimum funding required to be maintained by employers.

However, to use a specific mortality table, a plan sponsor must agree to extend the standard 90-day employee review period to 180 days.

Plans must then request IRS approval of specific mortality table selections, this year by October 31, 2024.

In a related vein, beginning January 1, 2025, employers using specific mortality tables will hopefully have more accurate calculation rules to use for their calculations.

These rules address concerns arising from the higher than normal mortality rates from 2020-2023 as a result of the COVID-19 pandemic.

The tragic number of COVID-19 deaths increased the mortality rates for specific plan populations.

If continued, this would overstate future years' mortality figures under these plans.

On July 31, 2024, the IRS published final regulations to address this potential problem.

The IRS outlined up-to-date requirements for single-employer pension plans using specific plan mortality rate tables.

New and existing plans can request to use the plan-specific mortality tables to better adjust their funding.

A request to use a plan-specific mortality table must be completed by October of the respective plan year.

If that occurs, the specific table must be used for valuation tables for plan years beginning on or after January 1, 2025.

Contact your FOS attorney with questions regarding the new rule.

**QUESTIONS?**
**CALL US**
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