

# FRANCHISE LAW

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## I. INTRODUCTION

**T**HIS article provides an update of case law and legislative efforts that have had, or will have, an impact on franchise and dealership law in Texas and the Fifth Circuit. During the Survey period, there were significant changes to the Federal Trade Commission's (FTC) Rule on Franchising and the disclosures that franchisors make to potential franchisees.<sup>1</sup> There were also noteworthy developments in the anti-trust area: the United States Supreme Court reversed ninety-six year old precedent related to vertical minimum resale price agreements<sup>2</sup> and the Texas Supreme Court clarified the reach of the Texas Free Enterprise and Antitrust Act of 1983.<sup>3</sup> While this update is not meant to detail all cases that dealt with franchise and distribution law during the Survey period, it does provide an overview with highlights of the most important legislative developments and cases.

## II. FRANCHISE BASICS

### A. THE AMENDED FTC FRANCHISE RULE

The long awaited Amended FTC Rule (the "Amended Rule") was released in early 2007. The new disclosures must be used for all franchises offered or sold after July 1, 2008. The Amended Rule requires franchisors to use a new disclosure format, now called a Franchise Disclosure Document ("FDD") rather than a Uniform Franchise Offering Cir-

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1. 16 C.F.R. §§ 436.1-11 (2008).

2. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007).

3. *Coca-Cola Co. v. Harmar Bottling Co.*, 218 S.W.3d 671 (Tex. 2006).

cular (“UFOC”).<sup>4</sup> Franchisors will find many things to like about the Amended Rule, including exemptions for high investment franchises and for sales to certain high net worth franchisees.<sup>5</sup> This will eliminate compliance obligations altogether for some franchisors.

The Amended Rule addresses many of the concerns raised by the franchising community since the proposed Revised Rule was issued in 1999: Franchisors are now allowed to deliver disclosure documents electronically and must do so fourteen calendar days (rather than “business” days) before the franchisee makes a payment to the franchisor or signs a franchise related agreement.<sup>6</sup> The “first personal meeting” requirement is eliminated. Franchisors must give a prospective franchisee a completed agreement seven days before signing if the franchisor has made a change to the standard form of agreement provided with the disclosure document.<sup>7</sup> Financial performance representations (formerly earnings claims), remain optional.<sup>8</sup> New franchisors may continue to phase in the financial audit requirement if they have not previously had audits.<sup>9</sup> Franchisors are no longer required to disclose information about franchise brokers.<sup>10</sup>

Franchisees are granted additional protection under the Amended Rule as it prohibits the use of merger and integration clauses to deflect liability for disclosures made in the FDD.<sup>11</sup> Franchisors are also now required to disclose franchisor-initiated litigation, the use of confidentiality clauses and the existence of franchisee associations.<sup>12</sup> Many franchisors may find that registration takes longer this year as state examiners adjust to the Amended Rule. The Amended Rule is part of a 398-page document with which franchisors, their lawyers and state examiners will need to become familiar to meet the new requirements.

### III. PROCEDURE

#### A. JURISDICTION

The Dallas Court of Appeals explored the issue of personal jurisdiction over out-of-state corporate officers in *Wolf v. Summers-Wood, L.P.*<sup>13</sup> In *Wolf*, the plaintiffs sued the president, Wolf, and vice-president, Reid, of the defendant franchisor.<sup>14</sup> Wolf and Reid each filed special appearances, arguing that the court did not have personal jurisdiction over

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4. 16 C.F.R. § 436.3(a) (2008).

5. *Id.* § 436.8.

6. *Id.* § 436.2.

7. *Id.*

8. *Id.* § 436.5(s).

9. *Id.* § 436.5(u).

10. *See* 16 C.F.R. § 436.5(b).

11. *Id.* § 436.9.

12. *Id.* §§ 436.5(c), 435.5(t).

13. 214 S.W.3d 783 (Tex. App.—Dallas 2007, no pet.). Haynes and Boone attorneys Deborah S. Coldwell, Ben Mesches and Altresha Burchett-Williams served as counsel for Linda Wolf and Julie Reid in this matter. *Id.* at 786.

14. *Id.* at 787.

them.<sup>15</sup> The trial court denied the special appearances, and Wolf and Reid filed an interlocutory appeal.<sup>16</sup>

The court first analyzed whether the court had general jurisdiction over the officers. “General jurisdiction is present when the defendant’s contacts in a forum are continuous and systematic so that the forum may exercise personal jurisdiction over the defendant even if the cause of action did not arise from or relate to activities conducted within the forum state.”<sup>17</sup> Wolf and Reid argued that the fiduciary shield doctrine barred the exercise of general jurisdiction.<sup>18</sup> “The fiduciary shield doctrine protects a nonresident corporate officer or employee from a trial court’s exercise of general jurisdiction over the individual when all of the individual’s contacts with Texas were made on behalf of the employer.”<sup>19</sup>

The plaintiffs argued that the officers used their franchisor corporate form as a sham to perpetrate fraud, but the court noted that the plaintiffs did not offer any evidence establishing how this was done.<sup>20</sup> The court held that, “[b]ecause appellees did not meet their burden of presenting evidence of a corporate fiction or sham or that Wolf and Reid used the corporate form to perpetrate a fraud, the burden did not shift to Wolf and Reid to produce any evidence in support of their fiduciary shield argument.”<sup>21</sup> In addition, the court noted Wolf’s and Reid’s affidavits, which stated that Wolf and Reid did not live in Texas and had only remote personal contacts with Texas. Outside of those, their only contacts with Texas were made solely on behalf of their company.<sup>22</sup> Therefore, the court concluded that the court lacked general jurisdiction over Wolf and Reid.<sup>23</sup>

The court went on to analyze specific jurisdiction. “[S]pecific jurisdiction is established if the nonresident defendant’s alleged liability arises from or is related to activity conducted within the forum.”<sup>24</sup> Wolf and Reid claimed that because they were not parties to the contract individually the breach of contract claim could give rise to specific jurisdiction. Additionally, they argued that the evidence was legally and factually insufficient to support specific jurisdiction on the tort claims.<sup>25</sup> The court agreed. Because Wolf and Reid had not signed the contract as individuals, specific jurisdiction did not arise from the breach of contract claim.<sup>26</sup> Additionally, the plaintiffs did not allege specific individual acts by Wolf

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15. *Id.*

16. *Id.*

17. *Id.* at 788.

18. *Id.* at 789.

19. *Id.* at 790.

20. *Id.*

21. *Id.*

22. *Id.* at 790-91.

23. *Id.* at 791-92.

24. *Id.* at 789.

25. *Id.* at 792.

26. *Id.*

or Reid in support of their tort claims.<sup>27</sup> After concluding that specific jurisdiction did not exist, the court of appeals reversed the trial court and ordered that Wolf and Reid be dismissed from the case.<sup>28</sup>

Personal jurisdiction was also an issue in *Lathrop v. Personalysis Corp.*<sup>29</sup> In *Lathrop*, the defendant, Kenneth Lathrop, a Washington state resident, worked for a Washington-based authorized distributor and licensee of the plaintiff, a Texas company.<sup>30</sup> The plaintiff provided special software that performed personality analysis, and Lathrop provided consulting services based upon the results.<sup>31</sup> Lathrop signed multiple non-compete and non-disclosure forms while working in Washington.<sup>32</sup> When Lathrop left his employer and developed and marketed his own personality test, the plaintiff sued in Texas.<sup>33</sup> Lathrop filed a special appearance, arguing that he did not have sufficient minimum contacts with Texas.<sup>34</sup>

The court analyzed Lathrop's contacts with Texas to determine if specific jurisdiction existed.<sup>35</sup> The court found that all written agreements between Lathrop and his Washington state employer before August 16, 2001, contained forum selection and choice of law provisions designating Washington State, while Lathrop's first agreement directly with the plaintiff on August 16, 2001, contained a Texas choice of law clause and no forum selection clause.<sup>36</sup> The court found that the deletion of the forum selection clause that designated Washington provided some evidence that jurisdiction in Texas was anticipated.<sup>37</sup> The court also analyzed Lathrop's training visits to Texas, and found that these visits were rooted in Lathrop's relationship with the plaintiff.<sup>38</sup> The court noted Lathrop's telephone calls to Texas and his receipt of confidential information while in Texas.<sup>39</sup> The court concluded that Lathrop failed to negate all bases of personal jurisdiction, and that the evidence was legally and factually sufficient to support a finding of specific jurisdiction.<sup>40</sup>

## B. CLASS ACTIONS

In *Exxon Mobil Corp. v. Gill*,<sup>41</sup> the Thirteenth Court of Appeals of Texas reviewed a trial court's decision certifying the statewide class. Exxon filed an interlocutory appeal following class certification. The appel-

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27. *Id.*

28. *Id.* at 793.

29. No. 14-06-00074-CV, 2006 Tex. App. LEXIS 9423 (Tex. App.—Houston [14th Dist.] Oct. 31, 2006, no pet.) (mem. op.).

30. *Id.* at \*1.

31. *Id.* at \*1-2.

32. *Id.* at \*2-5.

33. *Id.* at \*5.

34. *Id.* at \*5-6.

35. *Id.* at \*13, 23.

36. *Id.* at \*14-15.

37. *Id.* at \*15.

38. *Id.* at \*16-17.

39. *Id.* at \*22-24.

40. *Id.* at \*26.

41. 221 S.W.3d 841 (Tex. App.—Corpus Christi 2007, pet. filed).

late court held that the trial court acted within its discretion in certifying the class.<sup>42</sup> The plaintiffs were three current and former Exxon service-station dealers who participated in Exxon rebate programs during the 1990s.<sup>43</sup> Under various forms of rebate programs, dealers received incentives for activities such as high sales volume or staying open later hours.<sup>44</sup> The plaintiffs claimed that Exxon cheated them out of the economic benefit of the rebates by adding the cost of the rebate programs to the price that the dealers paid for gasoline.<sup>45</sup> The court certified a class consisting of

all persons, partnerships, corporations, associations and entities which are and/or were at the material times Exxon-branded retail service station dealers who owned or operated Exxon branded retail motor fuel stores in the state of Texas and who entered into a standardized contract or agreement with ExxonMobil . . . [, with] material times [meaning] the period during which the rebate programs . . . were in effect in Texas.<sup>46</sup>

The trial court's order included a seven-page trial plan, which outlined a proposal for trying the class action and Exxon's defenses.<sup>47</sup>

The trial court concluded that the class satisfied the four threshold conditions for class certification: 1) numerosity, 2) commonality, 3) typicality and 4) adequacy of representation—a decision reviewed by the appellate court for abuse of discretion.<sup>48</sup> The trial court certified the class under Texas Rule of Civil Procedure 42(b)(3), which requires that common questions of law or fact predominate over those affecting only individual members, and that class treatment of the action be superior to other methods of adjudicating the controversy.<sup>49</sup> Exxon argued that although the trial court's order certified a class of plaintiffs with contract claims, the plaintiffs' claims were instead fraud, which would make it difficult for the class representatives to prove that each member of the class relied on a false representation.<sup>50</sup> The trial court's order stated that the class was certified on 1) breach of the sales agreements; 2) breach of the UCC duty of good faith; and 3) breach of rebate promises.<sup>51</sup> The appellate court had to determine what type of action—whether tort or contract—the trial court certified.

First, based on the large number of potential plaintiffs, the court easily concluded that the class satisfied the numerosity requirement.<sup>52</sup> The court then addressed Exxon's argument that the class lacked commonal-

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42. *Id.* at 849.

43. *Id.* at 845.

44. *Id.*

45. *Id.*

46. *Id.* at 846 (quoting plaintiffs' motion for class certification).

47. *Id.*

48. *Id.*

49. *Id.* at 847 (citing TEX. R. CIV. P. 42(b)(3)).

50. *Id.* (citation omitted).

51. *Id.* at 848 (citation omitted).

52. *Id.* at 849.

ity because the class failed to identify an issue that was applicable to the class as a whole and subject to generalized proof.<sup>53</sup> Exxon alleged that the first two causes of action certified by the trial court—breach of the sales agreement and breach of the duty of good faith—were actually a single cause of action for breach of the open price terms in the sales agreements.<sup>54</sup> Exxon then asserted that the Texas Supreme Court ruling in *Shell Oil Co. v. HRN*,<sup>55</sup> precluded the plaintiffs' cause of action for breach of the open-price terms.<sup>56</sup>

The appellate court agreed with Exxon (and even the plaintiffs' own classification of the claims) that the plaintiffs' first two claims were the same cause of action for purposes of class certification.<sup>57</sup> The court disagreed, however, that *HRN* precluded the plaintiffs' claims.<sup>58</sup> The court stated that the "reality of this case is that the plaintiffs have sued for more than breach of the open-price term under the standardized sales agreements. They have also sued for breach of the promise to provide economic benefits under the rebate programs."<sup>59</sup> The court thus concluded that the plaintiffs in fact shared the common issue of whether *HRN* and a comment to the applicable statutory provision precluded or allowed recovery.<sup>60</sup>

The court next addressed Exxon's argument that the class lacked common proof and common answers. The court found that the class had a common contested liability issue and that the trial court's order identified different types of class-wide evidence offered by the plaintiffs.<sup>61</sup> The court stated that whether Exxon was telling the truth about recouping the rebates was a question that would be determined on a class-wide basis and in fact described the situation as "pretty close to an ideal situation, where class treatment will involve class-wide evidence that has at least the demonstrated potential to uniformly resolve hundreds of disputes."<sup>62</sup>

The court then assessed whether controlling substantive issues would predominate over individual issues, which the Texas Supreme Court has deemed "one of the most stringent prerequisites to class certification."<sup>63</sup> The court had to determine whether the common issues predominated by identifying substantive issues in the case and determine if the predominating issues were common to the class.<sup>64</sup> The court found that the trial court answered the predominance question within its discretion, and that

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53. *Id.*

54. *Id.* at 850.

55. 144 S.W.3d 429 (Tex. 2004).

56. *Exxon Mobil*, 221 S.W.3d at 850.

57. *Id.* at 851.

58. *See id.* at 851-52.

59. *Id.* at 852.

60. *Id.*

61. *Id.* at 853-54.

62. *Id.* at 854-55.

63. *Id.* at 855 (quoting *Southwestern Ref. Co. v. Bernal*, 22 S.W.3d 425, 433 (Tex. 2000)).

64. *Id.*

“it is not necessarily an abuse of discretion to certify a class that might ultimately fail.”<sup>65</sup>

Exxon argued that it would not be able to assert defenses against individual class members.<sup>66</sup> The court disagreed with Exxon’s argument that it would need to cross-examine each class member individually to determine the class member’s individual knowledge of the facts.<sup>67</sup> The court viewed the focus of the case as being on Exxon’s conduct, despite there being some questions that would have to be answered individually, such as damages.<sup>68</sup>

Exxon claimed that the class representatives did not satisfy the typicality requirement because the plaintiffs were not typical of the many Texas dealers who purportedly knew that Exxon factored the cost of rebates into gas prices.<sup>69</sup> The court found that even if some evidence on this issue was conflicting, the trial court did not abuse its discretion in determining that the class representatives satisfied the typicality requirement.<sup>70</sup> The court went on to find that the class representatives were adequate because there was no actual evidence of any class-member conflict and Exxon did not show the trial court abused its discretion.<sup>71</sup>

Finally, the court assessed whether class treatment would be superior to other methods of adjudication and the sufficiency of the trial plan.<sup>72</sup> Exxon argued that class treatment was not superior because the plaintiffs could pursue their claims individually and doing so was economically feasible.<sup>73</sup> The trial court found that the nature and complexity of the plaintiffs’ claims, along with the cost of litigation, made class treatment superior, and the appellate court found no abuse of discretion.<sup>74</sup> The court found that the trial plan was sufficient and rejected Exxon’s arguments of a conflict between the individual class members and Exxon’s difficulty in defending itself.<sup>75</sup> In conclusion, the appellate court found that the trial court conducted a rigorous analysis in accordance with Rule 42 and found no grounds for reversal.<sup>76</sup>

### C. ARBITRATION AND JURY WAIVER PROVISIONS

Arbitration and jury waiver provisions are often analyzed together. A franchise or license agreement many times contains a jury waiver provision when the parties agree to arbitrate in lieu of litigating the dispute before a court. In *Wasserman v. We the People Forms & Services Centers*

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65. *Id.* at 857 (citing *Bernal*, 22 S.W.3d at 435).

66. *Id.*

67. *Id.*

68. *Id.* at 858-61.

69. *Id.* at 861.

70. *See id.* at 861-62.

71. *Id.* at 862-63.

72. *Id.* at 863 (citing TEX. R. CIV. P. 42(b)(3)).

73. *Id.*

74. *Id.* at 864.

75. *Id.*

76. *Id.* at 864-65.

*USA, Inc.*,<sup>77</sup> plaintiffs Martha and Marty Wasserman challenged the defendants' motion to dismiss or stay pending arbitration. In 2004, the Wassermans entered into a franchise agreement with Ira Distenfield, who granted the Wassermans the exclusive right to open and operate We The People ("WTP") stores in Hidalgo and Starr counties. The franchise agreement contained a choice of law provision (California), a mandatory arbitration clause, and a jury waiver clause.<sup>78</sup>

The Wassermans filed suit against Distenfield (and the successor Dollar Financial Group, Inc.) for fraud-based claims, alleging that defendants failed to satisfy their contractual obligations under the franchise agreement.<sup>79</sup> The defendants moved to dismiss or to stay pending arbitration based on the jury waiver and arbitration clauses; the Wassermans did not dispute the wording of the franchise agreement or contest that their claims fell within the scope of the clause. As such, the district court addressed two issues: (i) whether under the franchise agreement the Wassermans validly waived their right to a jury trial, and (ii) whether the arbitration clause was enforceable.<sup>80</sup> The district court concluded in the affirmative to both issues.<sup>81</sup>

The Wassermans argued that they did not waive their right to a jury because the waiver was not a "knowing and intelligent act," as required under California law (which is substantially similar to Texas law). The Wassermans argued they had limited experience with arbitration and did not realize they were waiving their right to a jury. The district court disagreed.<sup>82</sup> The franchise agreement "unequivocally" stated the jury waiver separate and apart from the arbitration provision: "[t]he parties . . . waive the right to a jury trial in any action or proceeding based on, or arising out of, this Agreement."<sup>83</sup> Based on the unambiguous language of the franchise agreement and the Wassermans' failure to rebut the franchise agreement's plain language, the district court concluded that "they 'knowingly and intelligently' waived their right to a jury trial by signing the Franchise Agreement."<sup>84</sup>

After the court concluded that the jury waiver provision was valid, the Wassermans argued that the arbitration provision was substantively and procedurally unconscionable. The Wassermans contended that the "hidden costs" of arbitration rendered the clause substantively unconscionable.<sup>85</sup> The district court again disagreed and highlighted the disclosure made in the arbitration provision: "arbitration will be binding under the rules of the American Arbitration Association (AAA), and that '[e]ach

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77. No. 3:07-CV-0606-D, 2007 WL 2228617 (N.D. Tex. Aug. 3, 2007).

78. *Id.* at \*1.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at \*2 (citing to section 7.11 of the franchise agreement).

84. *Id.*

85. *Id.*

party will bear its own costs and expenses in preparing for and participating in the arbitration.’”<sup>86</sup> The court pointed out that the Wassermans could access a complete list of the AAA’s commercial arbitration rules, including the specific costs, on the AAA’s website. Furthermore, the arbitration clause in *Wasserman*, as compared to other authorities, made clear that the parties would split the costs of the arbitrators’ fees. Moreover, the Wassermans acknowledged that their bargaining power was not substantially different from the defendants’. The district court also rejected the Wassermans’ argument that their costs of travel and lodging in California were “burdensome enough to render the arbitration provision unenforceable.”<sup>87</sup> The court emphasized two points: (i) the defendants would be required to incur the same costs if the dispute was litigated in Dallas; and (ii) because the forum selection clause designated California, the Wassermans would be required to incur the same or similar travel and lodging costs even if they resolved this dispute in California courts, rather than arbitration.<sup>88</sup>

Similarly, the district court rejected the Wassermans’ argument that the arbitration provision was procedurally unconscionable due to costs of arbitration.<sup>89</sup> The district court held that because the arbitration provision was not substantively unconscionable, a showing of procedural unconscionability was insufficient to support the Wassermans’ challenge to enforcing the arbitration clause.<sup>90</sup> In conclusion, the district court granted the defendants’ motion and stayed the case pending the outcome of arbitration.<sup>91</sup>

The plaintiffs in *Singh v. Choice Hotel International, Inc.*<sup>92</sup> also challenged an arbitration clause based on the unconscionability defense. In 2003, Kikramjit Singh and other individual entered into a franchise agreement with Choice Hotels for the operation of a “Quality Inn and Suites Airport” hotel in Amarillo, Texas (the “franchise Agreement”). In year one, Singh grossed \$1.29 million in revenues. In 2005, Singh grossed \$969,741.98 in revenues. Singh attributed the decline to Choice Hotels’ dropping of the “Airport” designation.<sup>93</sup> After Singh complained about its listing in the Tour Book as “Quality Inn & Suites,” Choice Hotels inspected Singh’s franchise, gave it a failing grade, and instructed Singh to make more that \$100,000 in repairs. Singh alleges that when he was unable to make the repairs, Choice Hotels terminated the franchise agreements.<sup>94</sup>

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86. *Id.*

87. *Id.* at \*4.

88. *Id.*

89. *Id.*

90. *Id.* at \*5.

91. *Id.*

92. No. 3:07-CV-0378-D, 2007 WL 2012432, at \*1 (N.D. Tex. July 11, 2007).

93. *Id.*

94. *Id.* at \*2.

Singh sued Choice Hotels for breach of contract and violations of the Texas Deceptive Trade Practices-Consumer Protection Act (“DTPA”). Choice Hotels moved to dismiss or to stay pending arbitration in accordance with the arbitration provision in the franchise agreement. Singh argued that the arbitration provision was void as unconscionable. The district court agreed to stay the litigation pending the completion of arbitration.<sup>95</sup>

The court noted that under Maryland law, “an unconscionable bargain or contract is one characterized by ‘extreme unfairness’ that is made evident by ‘one party’s lack of meaningful choice, and contractual terms that unreasonably favor the other party.’”<sup>96</sup> Singh contended that the arbitration clause was so one-sided as to be unconscionable and therefore unenforceable.<sup>97</sup> Singh specifically noted that, pursuant to the arbitration provision, the arbitration was to occur at Choice Hotels’ headquarters, was optional for Choice Hotels but mandatory for Singh, precluded certain claims, was cost prohibitive, and impermissibly denied Singh the right to a jury trial.<sup>98</sup>

The court equated the forum selected in the arbitration clause to a “specialized kind of forum-selection clause.”<sup>99</sup> Singh could not meet his “heavy burden of proof” to avoid the forum agreed to in the arbitration provision.<sup>100</sup> Likewise, the district court was not persuaded by Singh’s lack of mutuality argument. It noted that “[u]nder Maryland law, an arbitration clause is not considered invalid as a matter of law when one party is allowed to litigate certain specific claims instead of having to submit them to arbitration.”<sup>101</sup> Under the arbitration provision, Choice Hotels was allowed to “litigate any claim for indemnification, unauthorized use of its marks, or money owed under the Franchise Agreement.”<sup>102</sup> The court concluded that the mere fact the parties struck an unequal bargain was not grounds for invalidating the mandatory arbitration clause.<sup>103</sup>

The district court also rejected Singh’s argument that the arbitration clause was unconscionable because it precluded discovery. The court noted that the clause was not one-sided, but that both parties were restricted to certain discovery.<sup>104</sup> However, the parties could agree to certain forms of discovery by mutual consent. Moreover, although Choice Hotels did not dispute that the arbitration costs could exceed \$30,000, the

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95. *Id.* at \*6.

96. *Id.* at \*3 (citing *Walther v. Sovereign Bank*, 872 A.2d 735, 743-44 (Md. 2005)).

97. *Id.*

98. *Id.*

99. *Id.* at \*4.

100. *Id.*

101. *Id.* at \*5 (citing *Walther*, 872 A.2d at 748 (“We do not find that exceptions to the arbitration agreement, which allow [one party] to litigate certain specific claims instead of having to submit them to arbitration, are so unfairly oppressive as to make the agreement unconscionable.”)).

102. *Id.*

103. *Id.* at \*5.

104. *Id.* at \*6.

court held that Singh did not meet his burden of proving that the fees for arbitration were excessive when compared with potential litigation costs. Singh's brief and supporting affidavit did not contain a real cost-differential analysis.<sup>105</sup>

Singh argued the denial of a trial by jury was unconscionable because the arbitration clause did not expressly advise him in writing that he was waiving his right to a jury trial. The court denied this argument because neither federal nor Maryland law required that the arbitration clause provide jury waiver notice to Singh. The court concluded that the arbitration clause clearly and unambiguously provided that, with certain inapplicable exception, "any controversy or claim arising out of or relating to this Agreement . . . will be sent to final and binding arbitration."<sup>106</sup> The court noted that the absence of express language in the clause waiving the right to jury trial did not support a different result. Therefore, the district court granted Choice Hotels' motion to compel arbitration and dismiss or stay litigation, and the court ordered the parties to participate in binding arbitration in Maryland in accordance with the terms of the franchise agreement.<sup>107</sup>

In determining the scope of an arbitration clause, both contract and tort claims may be subject to arbitration depending on the language of the specific arbitration provision. In *Sharifi v. AAMCO Transmissions, Inc.*,<sup>108</sup> plaintiff Gholamreza Sharifi ("Sharifi" or "Plaintiff") sued defendant AAMCO Transmissions, Inc. ("AAMCO") to recover for various tort claims arising from the aborted sale of Sharifi's AAMCO franchise. In 1997, Sharifi and AAMCO entered into a franchise agreement for the operation of an AAMCO repair center. The franchise agreement required AAMCO to approve the sale of the business from Plaintiff to a third party. "[B]efore the sale could take place" Sharifi was required to meet "certain conditions precedent," including that all financial obligations were fully paid and satisfied.<sup>109</sup>

In 2005, third party Steen Automotive, Inc. and its President, John F. Steen, Jr., agreed to purchase the franchise by executing an agreement of sale with Sharifi. The agreement of sale provided a closing date no later than March 25, 2005. Subject to the satisfaction of the conditions precedent, "AAMCO approved the purchase on February 23, 2005."<sup>110</sup>

Between the approval of the purchase and the closing date, Steen had many communications with AAMCO's franchise administration director. Based on these communications, Sharifi alleged that AAMCO discouraged Steen from consummating the pending sale with Sharifi, and, instead, to purchase other, less expensive AAMCO franchises in Florida. Sharifi further alleged that AAMCO "conspired to 'kill the deal' by 'falsi-

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105. *Id.* at \*8.

106. *Id.* at \*10 (quoting the Franchise Agreement).

107. *Id.* at \*11.

108. No. 3:07-CV-0718-D, 2007 WL 1944371, at \*1 (N.D. Tex. June 28, 2007).

109. *Id.* at \*1.

110. *Id.*

ying the financial obligations' Sharifi owed AAMCO and by waiting until three days before scheduled closing to notify Sharifi of his outstanding debt in the amount of \$85,312.36."<sup>111</sup> Plaintiff alleged that based on the unpaid, falsified financial obligations, the sale did not close. As such, Plaintiff sued AAMCO for civil conspiracy, fraud and misrepresentations, intentional infliction of emotional distress, intentional interference with business opportunities, and intentional interference with existing contract.<sup>112</sup>

In determining whether Plaintiff's claims were subject to arbitration, the court analyzed whether the tort claims were "so interwoven" with the provisions of the franchise agreement that the tort claims could not be maintained without reference to the franchise agreement.<sup>113</sup> Holding that the tort claims were "so interwoven," the court concluded that plaintiff's tortious interference claims were arbitrable issues. Likewise, the court held that AAMCO could not have committed fraud or conspiracy "but for the contractual relationship." Therefore those claims were also subject to arbitration.<sup>114</sup>

#### IV. TERMINATION OF THE FRANCHISE RELATIONSHIP

To be successful in a claim of wrongful termination under the Texas boat dealer law's prohibition on termination without good cause, the dealership agreement must be in writing.<sup>115</sup> In *East Hill Marine Inc. v. Rinker Boat Co.*, the Fort Worth Court of Appeals affirmed the trial court's order granting summary judgment to Rinker Boat Co. and Gavin Hunt, the appellees.<sup>116</sup> East Hill Marine and Joe Stark, two boat dealers, brought suit against Rinker Boat Co. During the early 1990s, Stark became an authorized Rinker Boats dealer in Fort Worth. There was no written dealer agreement and Stark did not pay any money to Rinker Boat Co. in exchange for the agreement. In September 2004, Rinker Boat Co. sent Stark a letter informing him that they were terminating the dealer agreement because of unsatisfactory sales performance and sub-par performance in the areas of customer service and satisfaction. In March 2004, Rinker Boat Co. entered into a verbal dealer agreement with East Hill Marine. Rinker made the same representations to East Hill Marine as it made to Stark. Rinker told East Hill Marine that it would be the exclusive Rinker dealer in North Dallas for as long as East Hill Marine wanted to be the North Dallas Dealer. East Hill Marine did not pay Rinker to become an authorized dealer. Larry Cochran, the president of East Hill marine, requested a written agreement, but Brinker did not have a written agreement and was not willing to provide with him

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111. *Id.*

112. *Id.*

113. *Id.* at \*3.

114. *Id.* at \*5.

115. *East Hill Marine, Inc. v. Rinker Boat Co.*, 229 S.W.3d 813, 817 (Tex. App.—Fort Worth 2007, pet. denied).

116. *Id.* at 821.

one. In November 2004, Rinker terminated East Hill Marine's dealership status. In December 2004, Stark and East Hill Marine sued for breach of their dealer agreements and for violations of the Texas Occupations Code.<sup>117</sup>

The Texas Occupations Code (the "Code") restricts a boat manufacturer from terminating a dealer's agreement "unless there is good cause for the termination."<sup>118</sup> Pursuant to section 2352.052 of the Code, the parties must enter into an agreement that contains, among other things, "provisions for termination or nonrenewal of the agreement" and dispute resolution procedures.<sup>119</sup> The court stated that "[w]hile appellants may be correct that the Occupations Code was designed to protect small boat dealers from large and powerful manufacturers, the clear language of the statute requires both parties to enter into a *written* agreement."<sup>120</sup> The court did not agree that various pieces of correspondence, purchase orders, purchase invoices and other documents were sufficient to constitute written agreements between the dealers and Brinker because the documents did not satisfy the "Occupation Code's eight requirements for written agreements."<sup>121</sup> The appellate court found that summary judgment in favor of Brinker Boat Co. was proper because the boat dealer's law contained in the Texas Occupation Code applies only to written agreements.<sup>122</sup>

While the Second Court of Appeals was considering termination under Texas' boat dealer's law, the Third Court of Appeals was considering termination and transfer under Texas' motor vehicle dealer's law. In *General Motors Corp. v. Bray*,<sup>123</sup> the Austin Court of Appeals affirmed part of the trial court's order and remanded certain issues to the Motor Vehicle Division of the Texas Department of Transportation for further proceedings.<sup>124</sup> Hays Mills owned and operated a dealership known as Eaton Motor Company in Athens, Texas for more than thirty-seven years. He decided to retire and agreed to transfer his dealership to Charles Elliott, who owned and operated Elliott Chevrolet, a competitor. An employee in GM's Dealer Network and Development Division contacted both Mills and Eaton and encouraged them to engage in the transaction because of GM's plan to consolidate GM products in one dealership in Athens. Mills and Elliott entered into an asset and stock purchase agreement for the purchase of Eaton Motor Company, which was contingent on GM's approval of the transfer.<sup>125</sup>

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117. *Id.* at 815.

118. *Id.* at 816 (citing TEX. OCC. CODE ANN. § 2352.053(a) (Vernon 2004)).

119. *Id.* at 817 (citing TEX. OCC. CODE ANN. § 2352.052(a) (Vernon 2004)).

120. *Id.* (citing § 2352.051) (emphasis in original).

121. *Id.* (citing § 2352.052(a)).

122. *Id.* at 817-18.

123. 243 S.W.3d 678 (Tex. App.—Austin 2007, no pet.).

124. *Id.* at 680.

125. *Id.* at 680-81.

GM did not approve the transfer of Mills' dealership to Elliott. Elliott did not meet GM's requirements to be a Multiple Dealer Operator because he had low sales scores. In response to GM's rejection of the transfer application, Mills filed a protest with the Motor Vehicle Division of the Texas Department of Transportation (the "Division"). Mills and Elliott contended that the sales scores were affected by market forces that dealers are unable to control. Mills and Elliott asserted that GM violated the Texas Occupations Code because Elliott was a qualified transferee under a provision that provides that "[a] manufacturer or distributor may not unreasonably withhold approval of an application [for transfer of a dealership]."<sup>126</sup> The Division found that GM unreasonably denied the transfer application because of GM's use of unwritten standards where the statute specified that written standards were to be used and that Elliott was qualified, which forced GM to accept the transfer.<sup>127</sup> GM sought judicial review of the decision.<sup>128</sup>

GM asserted that the statute's requirement that a manufacturer use written standards to determine whether a transferee is qualified "simply describes one situation in which a manufacturer's rejection of a transfer applicant would be unreasonable per se" and that the legislature's addition of the words "if any" to the list of transfer considerations reflected the legislature's understanding that not all manufacturers "have written, reasonable, and uniformly applied standards for transfer applicants."<sup>129</sup> The appellate court generally agreed with GM's interpretation but rejected the argument that the legislature had only provided "a bright-line test for one specific factual situation."<sup>130</sup> The court found that a manufacturer who rejects a transfer applicant because of "unwritten, unreasonably and disparately applied standards" did not have as good an argument as a manufacturer who rejected an applicant for other reasons, such as "unacceptable moral character."<sup>131</sup> The appellate court did not answer definitively whether GM's action was unreasonable, but remanded the case to the Division for it to determine whether GM unreasonably denied the transfer application using the court's construction of the statute.<sup>132</sup>

The court also addressed GM's arguments concerning the Division's finding that Elliott was qualified.<sup>133</sup> The court distinguished the question of whether Elliott was qualified with the question of "whether a prospective transferee is acceptable to [a manufacturer or distributor]."<sup>134</sup> The court found that while a manufacturer has the authority to reject a transferee as long as its rejection is not unreasonable, the Division has the authority to decide whether a dealer is qualified in the event of a protest.

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126. *Id.* at 683 (citing TEX. OCC. CODE ANN. 2301.359 (Vernon 2004)).

127. *Id.* (citing TEX. OCC. CODE ANN. § 2301.751(a), (c) (Vernon 2004)).

128. *Id.*

129. *Id.* at 685.

130. *Id.* at 685-86.

131. *Id.* at 686.

132. *Id.*

133. *Id.* at 692 (citing TEX. OCC. CODE ANN. § 2301.360(b) (Vernon 2004)).

134. *Id.*

The court reached this conclusion because of the power granted to the Division under section 2301.101 of the Texas Occupations Code.<sup>135</sup> The court found that the Division's conclusion was supported by the facts. Thus, while holding that the Division erroneously construed section 2301.059 of the Texas Occupations Code and remanded the case to the Division for a determination on that section, the court affirmed the rest of the trial court's order.<sup>136</sup>

## V. INTELLECTUAL PROPERTY

### A. TRADEMARK INFRINGEMENT

As with any claim, it is important to ensure that the proper party is asserting a claim for federal or state trademark infringement. In *Multimin USA, Inc. v. Wales International, Inc.*, plaintiffs Multimin USA, Inc. and Warburton Technology Ltd. ("Warburton") sued several defendants, including Walco International, Inc. ("Walco"), for federal trademark infringement, dilution, infringement of common-law trademark, common law misappropriation, and other state law claims.<sup>137</sup> Warburton is the owner of several trademarks for multimin, a liquid solution of trace minerals injected into animals to correct mineral deficiencies. In March 1999, Warburton and Walco entered into a distribution agreement, whereby Walco became a distributor of multimin for the entire United States. During the term of the distribution agreement, Warburton gave Walco confidential information and trade secrets regarding multimin. In 2003, the distribution agreement between Warburton and Walco expired. In February 2003, Warburton entered into a distribution agreement with Multimin USA, whereby Multimin USA became the exclusive distributor in the United States, Canada, and Mexico. In addition, Warburton purported to assign to Multimin USA the trademark and marketing rights for multimin in the United States.<sup>138</sup>

Following expiration of the distribution agreement with Walco, Walco bottled and sold 'Mineral Max,' which allegedly had the same ingredients as multimin. In late 2003 or early 2004, Warburton formulated a new solution called 'Multimin Cattle'. In February 2006, the defendants, including Walco, bottled and sold 'Mineral Max II,' which allegedly contained "the same formula as Multimin Cattle except for the preservative."<sup>139</sup>

The defendants filed a motion to dismiss Multimin USA's claims for federal trademark infringement and dilution, and common law trademark infringement, among other claims, based on lack of standing. The parties stipulated regarding dismissal of the other claims and presented the in-

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135. *Id.*

136. *Id.* at 694 (noting also that the Division should consider whether the dispute was rendered moot by Elliott's selling the dealership to a third party).

137. No. 4:06-CV-260-A, 2007 WL 1686511, at \*1 (N.D. Tex. June 8, 2007).

138. *Id.*

139. *Id.* at \*2.

fringement claims to the court for consideration.<sup>140</sup>

The United States District Court for the Northern District of Texas noted that although the trademark owner or registrant is generally the proper plaintiff, an assignee of a trademark may also be a plaintiff.<sup>141</sup> However, the transfer of rights must actually constitute an assignment. In order to vest title to the trademark in a party:

the transfer must be absolute and must relate to the entire rights in the trademark. In contrast to an assignment, a license to use a mark does not pass title to the trademark because it is a transfer of limited rights, less than the whole interest which might have been transferred.<sup>142</sup>

Defendants argued that, at most, Multimin USA had an exclusive license, but that this license did not transfer or assign the right to sue. The district court agreed.<sup>143</sup>

Both parties cited *ICEE Distributors, Inc. v. J & J Snack Foods Corp.*,<sup>144</sup> which discussed standing to sue under the Lanham Act.

One of the ways that the law extends the benefits of trademarks and protects incentives to develop them is by allowing trademark owners to license the use of their marks to distributors and franchisees. Such licensing allows more information to be conveyed to more consumers *without the licensor having to risk losing title to its mark.*

It would be antithetical to the basic principles of trademark law to extend to a licensee the rights of an assignee without caution, since deeming a licensee an assignee would allow the assignee to hold the registered trademark owner liable under trademark law, rather than simply under contract law, for diluting the mark by utilizing a similar trademark in the assignee's area.<sup>145</sup>

After reviewing the facts, the district court found "no evidence that Warburton assigned its trademark to Multimin USA."<sup>146</sup> Moreover, the court noted that the distribution agreement made clear that Multimin USA was to be an exclusive distributor of the multimin product, not the assignee of same. The court also acknowledged that while "the *ICEE* court noted that a 'truly exclusive licensee' may constitute an assignee, the [*ICEE*] court also made clear that 'an agreement that sets forth many duties and rights between the parties that are inconsistent with an assignment . . . does not constitute an assignment.'"<sup>147</sup> The Warburton-Multimin USA distribution agreement contained several rights that Warburton retained that were inconsistent with an assignment as well as an exclusive licensee.

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140. *Id.*

141. *Id.*

142. *Id.* at \*3.

143. *Id.* at \*5.

144. 325 F.3d 586 (5th Cir. 2003).

145. *Multimin*, 2007 WL 1686511, at \*3 (citing *ICEE*, 523 F.3d at 598).

146. *Id.* at \*4.

147. *Id.* (citing *ICEE*, 325 F.3d at 598).

Because an action under section 1114 of the Lanham Act may only be brought by the registrant, and an action under section 1125(c) may only be brought by the owner of the mark, the district court held that Multimin USA had not shown that it had standing to sue the defendants for federal trademark infringement or dilution.<sup>148</sup> Also, because a common law trademark infringement action under Texas law confers standing on the registrant of the mark, Multimin USA did not have standing to bring the Texas state law infringement claim. Accordingly, the district court dismissed Multimin USA's claims against defendants.<sup>149</sup>

## B. CYBERSQUATTING

Cybersquatting is using a domain name with a bad faith intent to profit from the goodwill of a trademark belonging to someone else. As the Internet becomes more widely used in franchise and distribution arenas, we can expect more litigation involving allegations of Cybersquatting. During this Survey period, the court in *Pet Silk, Inc. v. Jackson*<sup>150</sup> analyzed Cybersquatting in the Southern District of Texas.

Pet Silk, Inc. ("PSI") "is a Texas corporation in the business of selling pet grooming products through distributors worldwide."<sup>151</sup> Beauty Elite Group holds the registered trademark Pet Silk® and granted PSI the exclusive license for use of the mark. PSI had been operating its website, [www.petsilk.com](http://www.petsilk.com), for fifteen years. PSI's income was derived from online distributors and pet supply retail stores, which consisted of approximately 40 to 50 [total] distributors.<sup>152</sup>

Defendants Maria and Robert Jackson ran California-based MJM Company, an approved distributor of Pet Silk® products. PSI complained that MJM's website too closely resembled PSI's website. Moreover, MJM created a sub-distributor program on its website, which PSI did not approve and asked MJM to remove. PSI experienced additional problems with MJM related to MJM's alleged property rights to Pet Silk® artwork and customer services issues.<sup>153</sup> In July 2006, PSI terminated its relationship with MJM and no longer sold its Pet Silk® products to MJM.<sup>154</sup> However, MJM continued selling Pet Silk® products secured from other distributors. Following termination of the distributor agreement, MJM still held itself out as a PSI distributor and maintained its websites, [www.petsilkonline.com](http://www.petsilkonline.com) and [www.mjm-petsilk.com](http://www.mjm-petsilk.com).<sup>155</sup> Although MJM's website at [www.petsilkonline.com](http://www.petsilkonline.com) informed customers that Pet Silk® products would no longer be available at that site, the site included a hyperlink that directed customers to the [www.mjm-petsilk.com](http://www.mjm-petsilk.com).

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148. *Id.*

149. *Id.* at \*5.

150. 481 F. Supp. 2d 824 (S.D. Tex. 2007).

151. *Id.* at 825.

152. *Id.* at 825.

153. *Id.* at 826.

154. *Id.*

155. *Id.*

com site. The www.mjm-petsilk.com site, among other things, (i) listed MJM companies that offered Pet Silk® products, (ii) contained photograph of Pet Silk® bottles, and (iii) directed customers to pages to order Pet Silk® products as well as products from two other pet grooming lines.<sup>156</sup>

PSI filed a complaint against MJM and sought a preliminary injunction to enjoin MJM from (1) using the Pet Silk® trade name in MJM's domain names, (2) from holding itself out as PSI or as the manufacturer, main distributor, licensee, or any similar relation to Pet Silk® products, and (3) from entering into a distributor agreement where MJM would act as a wholesaler.<sup>157</sup>

The district court outlined the burden that PSI must meet for a preliminary injunction. In analyzing this type of Lanham Act claim, the court noted that in cases where the alleged infringement involves a former licensee, the need for injunction becomes more compelling.<sup>158</sup>

PSI sued MJM based on violations of the Lanham Act, sections 1114(1) and 1125, which combine to protect owners of trademarks from infringement due to dilution and cyberpiracy. In addition, PSI claimed violations of the Texas trademark and unfair competition statute, which is codified as the Texas Business and Commerce Code section 16.26. The district court analyzed the federal and state infringement laws together.<sup>159</sup>

The district court first analyzed the elements of a trademark infringement claim: (1) whether PSI had a valid mark that was entitled to protection; and (2) whether the use of MJM's mark infringes, or is likely to infringe, the mark of the plaintiff (based on a likelihood of confusion).<sup>160</sup> The court found that PSI met the first prong, because PSI's mark had been registered since October 21, 1997. The district court then turned its attention to the real question—whether there was a likelihood of confusion. The court concluded that PSI “easily” met the second prong, because PSI had shown evidence of actual customer confusion.<sup>161</sup> The court disagreed with MJM's contention that the disclaimer on its web site eliminated the chance of ongoing confusion. The district court held that “[a] disclaimer disavowing affiliation with the trademark owner read by a consumer after reaching the web site comes too late.”<sup>162</sup> As such, the court held that PSI met its burden to show likelihood of success on its trademark infringement claim under the Lanham Act.<sup>163</sup>

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156. *Id.* at 827.

157. *Id.* at 828.

158. *Id.* (citing Sunward Elecs., Inc. v. McDonald, 362 F.3d 17, 25 (2d Cir. 2004)).

159. *Id.* at 828.

160. *Id.* at 829 (citing Estee Lauder, Inc. v. The Gap, Inc., 108 F.3d 1503, 1508 (2d Cir. 1997)).

161. *Id.* (citing Elvis Presley Enters., Inc. v. Capece, 141 F.3d 188, 194 (5th Cir. 1998) (“Evidence of actual confusion [is] the best evidence of a likelihood of confusion.”)).

162. *Id.* at 830 (citing PACCAR, Inc. v. TeleScan Tech., L.L.C., 319 F.3d 243, 250 (6th Cir. 2003), *overruled on other grounds*, KP Perm. Make-Up, Inc. v. Lasting Impression I, Inc., 543 U.S. 111 (2004)).

163. *Id.*

Next, the district court considered PSI's claim for dilution. To prove dilution, the court stated that PSI must prove that: (1) PSI's mark was famous and distinctive;<sup>164</sup> (2) "MJM . . . adopted the mark after the Pet Silk® mark became famous"; and (3) "MJM caused a likelihood of dilution of the Pet Silk® mark."<sup>165</sup> Because the Pet Silk® mark had been registered on the Principal Register of the United States Patent and Trademark Office for the last fifteen years, MJM did not contest that PSI's mark was famous. Neither did MJM contest that the Pet Silk®'s name recognition in the pet supply and dog grooming market. Consequently, the district court held that the mark met section 1125(c)(2)(A)'s definition of famous.<sup>166</sup> The district court also held that the mark was distinctive, because it was at least a suggestive mark (i.e., it required the purchaser to use their imagination to reach a conclusion as to the nature of the goods).<sup>167</sup>

The district court presumed that MJM adopted the mark after it became famous, because the mark had been registered for ten years and PSI and MJM's distributorship relationship had begun only four years prior to the filing of this action. To prove dilution, PSI argued (and the court agreed) that the Pet Silk® mark had been diluted by blurring.<sup>168</sup> The court noted that PSI satisfied the definition of blurring: "association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark."<sup>169</sup> The marks proved to be similar because, in fact, they were the same mark, as used in MJM's web domain name. Therefore, the district court held that PSI had presented sufficient evidence that it had a likelihood of success on its federal dilution claim.<sup>170</sup>

PSI's final claim was for cyberpiracy or Cybersquatting. Under section 1125(d) of the Lanham Act:

(1)(A) A person shall be liable in a civil action by the owner of a mark, including a personal name which is protected as a mark under this section, if, without regard to the goods or services of the parties, that person

(i) has a bad faith intent to profit from that mark . . . and

(ii) registers, traffics in, or uses a domain name that

. . .

(II) in the case of a famous mark that is famous at the time of registration of the domain name, is identical or confusingly similar to or dilutive of that mark.<sup>171</sup>

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164. *Id.* The district court noted that the Texas anti-dilution statute only requires distinctiveness, not fame. See TEX. BUS. & COM. CODE § 16.29 (Vernon 2002).

165. *Pet Silk*, 481 F. Supp. 2d at 830.

166. *Id.*

167. *Id.* at 830-31 (noting that the law classifies marks into five different categories: "(1) generic; (2) descriptive; (3) suggestive; (4) arbitrary; or (5) fanciful)."

168. *Id.* at 831-32.

169. *Id.* at 831.

170. *Id.*

171. 15 U.S.C. § 1125(d) (2000).

MJM used two domain names, which the court stated were “at the very least confusingly similar to the Pet Silk® mark.”<sup>172</sup> The court also found that MJM had the requisite bad faith based on a series of non-inclusive factors:

- “MJM had no trademark or intellectual property rights in the Pet Silk® mark”;
- “MJM incorporated the entire famous trademark unchanged into its domain names”;
- “MJM did not use the Pet Silk® mark until it began selling Pet Silk®’s products, so it [had] no bona fide prior use”; and
- “MJM [had] used the mark commercially with the intent to divert customers to a site selling not only Pet Silk® products but competitors’ pet grooming products as well.”<sup>173</sup>

MJM did not argue one of the valid defenses to Cybersquatting (i.e., “that it believed that the use of the [Pet Silk®] mark was fair use or otherwise lawful”).<sup>174</sup> Therefore, the district court held that PSI “made the showing required by equity that its cybersquatting claim [had] a likelihood of success.”<sup>175</sup>

In addition to likelihood of success on the merits of PSI’s underlying claims, the court found (and MJM did not contest) (i) irreparable injury to PSI, (ii) no, or at least minimal, damages to MJM, and (iii) that the public interest would be served by requiring compliance with Congressional statutes such as the Lanham Act. Therefore, the court ordered a preliminary injunction in favor of PSI.<sup>176</sup>

## VI. COMMON LAW CLAIM

### A. CONTRACT ISSUES

As previously noted, *Barrand* was a franchise dispute between Whataburger, Inc. and two of its franchisees.<sup>177</sup> Several franchisees became disgruntled with Whataburger based on an “ostensibly improper rebate program” between Whataburger and several of its suppliers.<sup>178</sup> Following discovery of this rebate program, several franchisees, including BurgerWorks, Inc., and Barrand, Inc., sued Whataburger seeking restitution and punitive damages for what they perceived to be an “illegal kick-back scheme.” However, “the parties settled before the suit reached trial.”<sup>179</sup>

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172. *Pet Silk*, 481 F. Supp. 2d at 832.

173. *Id.* at 833.

174. *Id.*

175. *Id.*

176. *Id.* at 834.

177. *Barrand, Inc. v. Whataburger, Inc.*, 214 S.W.3d 122, 126-27 (Tex. App.—Corpus Christi 2006, pet. denied).

178. *Id.* at 127.

179. *Id.*

Because each settlement involved a different franchise, a separate settlement agreement existed between Whataburger and each franchisee. Nevertheless, except for the settlement amounts, the terms and language were nearly identical. The settlement agreements included (i) a cash reimbursement to the franchisees, and (ii) an agreement to amend existing franchise agreements. Whataburger and the franchisees executed new franchise agreements, with new terms. Pursuant to the new franchise agreements, the franchisees were allowed to operate restaurants under an initial ten-year period, with two, optional five-year renewal terms.<sup>180</sup>

In 2002, Whataburger sued the franchisees under the settlement agreements seeking a declaratory judgment from the court that it (i) “[had] no legal obligation to grant any new franchise locations and/or franchise agreements [under] the settlement agreements,” (ii) “[had] no obligation to grant new franchise agreements to the [franchisee] relative to their current locations “at the expiration of their current terms, and (iii) “[had] fulfilled all of its obligations under the Settlement Agreements.”<sup>181</sup> The franchisees filed counterclaims against Whataburger “for declaratory relief, breach of contract, breach of the implied covenant of good faith and fair dealing, promissory estoppel, fraud, and negligent misrepresentation.”<sup>182</sup> Whataburger moved for summary judgment, arguing that the summary judgment would dispose of all claims and counterclaims.<sup>183</sup>

In addition to BurgerWorks and Barrand’s responses to Whataburger’s motion for summary judgment, Barrand filed a cross-motion for summary judgment, requesting that the court declare that the settlement agreement must be read to request that Whataburger not unreasonably withhold its consent to new franchise locations that the franchisees request under the provisions of the new franchise agreements. The trial court granted Whataburger’s motion and denied Barrand’s motion. BurgerWorks and Barrand appealed.<sup>184</sup>

BurgerWorks and Barrand contended that the settlement agreement and new franchise agreements “obligat[ed] Whataburger to renew the franchise agreements for existing restaurants and to grant requests for new franchise locations that [were] reasonable.”<sup>185</sup>

In analyzing the summary judgment on Whataburger’s request for declaratory relief, the Corpus Christi Court of Appeals recited that “[t]he interpretation of an unambiguous contract is a question of law for the court to decide.”<sup>186</sup> On the other hand, “[w]hen a contract contains an ambiguity (which is a question of law), the granting of a motion for summary judgment is improper because the interpretation of the instrument

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180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at 128.

185. *Id.*

186. *Id.* at 129.

is a question of fact for the jury.”<sup>187</sup> “[A] contract is ambiguous only if two or more meanings are genuinely possible after application of the pertinent rules of interpretation to the face of the instrument,” not because the parties may offer conflicting interpretations.<sup>188</sup>

The court of appeals analyzed the provisions of the new franchise agreement pertaining specifically to the term and renewal, of the existing restaurants. The court of appeals concluded that these provisions gave “the franchisees the option to renew their contracts, but that they did not contemplate perpetual renewal.”<sup>189</sup> The court further noted that under the new franchise agreements, Whataburger did not have a right to refuse contract renewal; Whataburger was “obligated to extend the [new franchise agreements] upon written notice . . . without consent or approval from Whataburger.”<sup>190</sup>

The court of appeals disagreed with BurgerWorks and Barrand’s interpretation of the new franchise agreement that the renewal option extended more than ten years. Reading each new franchise agreement as a whole, the court held that the agreements “[did] not contemplate an open-ended, indefinite duration.”<sup>191</sup> To read the new franchise agreements as BurgerWorks and Barrand desired, the court held that it would need to effectively nullify the renewal provisions. The court was unwilling to do this because this result would be unreasonable and contrary to the express intent of the settlement agreement and new franchise agreements.<sup>192</sup> The court of appeals concluded that the settlement agreement and new franchise agreements were unambiguous, and worded so that they [could] be given a definite and certain legal meaning.”<sup>193</sup>

BurgerWorks and Barrand next argued that the new franchise agreements provided for new restaurants. They argued that although there was no clause or provision expressly granting a right to new franchise locations, “the reasonableness clause in the Settlement Agreement operate[d] to give them such a right.”<sup>194</sup> The court held that while the settlement agreement did contemplate new franchise restaurants, BurgerWorks and Barrand did not have a contractual right to new restaurants.<sup>195</sup> The court noted a critical distinction. Although the settlement agreement stated that all new franchise agreements shall contain the same terms as those in the settlement agreement, the settlement agreement did not state that Whataburger was obligated to execute new contracts for new restaurants. Therefore, the court affirmed Whataburger’s summary judgment on that issue.<sup>196</sup>

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187. *Id.*

188. *Id.*

189. *Id.* at 130.

190. *Id.*

191. *Id.*

192. *Id.* at 131.

193. *Id.*

194. *Id.* at 132.

195. *Id.* at 132-33.

196. *Id.* at 136.

Next, the court addressed whether Whataburger fulfilled its obligations under the settlement agreement. BurgerWorks and Barrand argued that Whataburger had a continuing obligation to renew contracts for existing restaurants and to execute new contracts for new restaurants. As analyzed above, the court held that executing new contracts, whether for old or new restaurants, was not a continuing obligation for Whataburger under the settlement agreement.<sup>197</sup> In addition, the court opposed Barrand's argument that it was entitled to new restaurants outside of its defined development area under its area development agreement.<sup>198</sup> The court of appeals concluded that Whataburger was entitled to declaratory judgment as a matter of law on that ground.<sup>199</sup>

The court of appeals next addressed Barrand's counterclaims. The court first concluded that the trial court did not err in granting summary judgment to Whataburger on Barrand's request for declaratory judgment.<sup>200</sup> Because the trial court had properly determined that Whataburger was not obligated to renew contracts for existing restaurants or to enter new contract for restaurants, summary judgment to Whataburger was proper.<sup>201</sup> Based on this conclusion, the court held that summary judgment to Whataburger was also proper on Barrand's breach of contract claim.<sup>202</sup>

The appellate court further confirmed a long-standing rule in Texas: the common-law duty of good faith and fair dealing does not extend to all franchise agreements because "a franchisor does not exert control over its franchisee's business comparable to the control an insurer exerts over its insured's claim."<sup>203</sup> The court held that summary judgment was proper on this good faith claim because: (1) the Texas Supreme Court had specifically declined to extend the duty of good faith and fair dealing to all franchise agreements; and (2) to the extent that such a duty was created by the parties' relationship, the court did not have any legal authority or logical basis for concluding that the duty obligated Whataburger to enter new contracts or to extend the contract indefinitely.<sup>204</sup>

Barrand based its claims for promissory estoppel, intentional misrepresentation, and negligence on an alleged oral promise by Whataburger that "so long as Barrand met the otherwise objective criteria for store development, Whataburger would not unreasonably withhold its consent to Barrand's requests to develop additional Whataburger restaurants."<sup>205</sup> After outlining the elements for each of these claims, the court of appeals only addressed the statute of frauds ground for summary judgment, not

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197. *Id.*

198. *Id.*

199. *Id.* at 137-38.

200. *Id.* at 138.

201. *Id.*

202. *Id.*

203. *Id.* at 139.

204. *Id.*

205. *Id.* at 140.

the failure to establish justifiable reliance.<sup>206</sup>

Whataburger contended that Barrand's claims failed because they relied on a promise that could not be performed within a year. Barrand claimed that Whataburger had failed to present any evidence that the agreement could not be performed within one year. However, the court focused on Barrand's own pleadings rather than Whataburger's evidence. Based on Barrand's live pleading, Barrand alleged facts that affirmatively demonstrated that the alleged oral contract could not have been and was not in fact performed within one year.<sup>207</sup> Barrand pled that Whataburger first made the oral promise in 1994, and again in 1998, but that the first incident to give rise to a breach occurred in each 2001. Taking Barrand's allegations as true; the agreement was not allegedly breached until seven years after the promise was made. Therefore, Barrand's pleadings "put the agreement squarely within the statute of frauds."<sup>208</sup> The appellate court concluded that the trial court did not err in granting summary judgment to Whataburger on all claims.<sup>209</sup>

When parties exchange several documents and do not memorialize their agreement in a final, signed writing, the issue of whether a contract exists often arises. This makes a breach of contract claim a little more complicated. In *Terex Corp. v. Cubex Ltd.*,<sup>210</sup> Cubex Ltd. ("Cubex") was the manufacturer of mining equipment and Terex Corp. ("Terex") was a distributor.<sup>211</sup> The parties' distributorship agreement was executed in 1995, and it required that the parties provide a 90-day notice prior to any termination, and also granted Terex exclusive rights to distribute Cubex products worldwide, except for Canada. Despite this geographic exclusion, Terex, through its subsidiary Reedrill, began and continued to distribute products in Canada.<sup>212</sup>

In 2002, Cubex and Terex exchanged a series of documents in an attempt to establish their then-existing relationship in writing. The terms of negotiations included: (i) permitting Terex to distribute in Canada, except for the "Marathon section," (ii) requiring that the parties could terminate only for cause; and (iii) a right of the non-terminating party to cure its deficiency. However, although the 2002 final draft was sent to Cubex, Cubex did not sign it.<sup>213</sup>

In May 2006, Cubex gave Terex 90-days' notice that Cubex would terminate the distributorship agreement. Terex filed suit and sought a temporary restraining order and preliminary injunction to enjoin the termination of the distributorship agreement. The district court denied

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206. *Id.* at 141.

207. *Id.*

208. *Id.* at 142.

209. *Id.* at 147.

210. No. 3:06-CV-1639-G, 2006 WL 3542706 (N.D. Tex. Dec. 7, 2006).

211. *Id.* at \*1.

212. *Id.*

213. *Id.*

Terex's request for the temporary restraining order.<sup>214</sup>

In considering Terex's request for the preliminary injunction, the court of appeals analyzed whether Terex had proven a substantial likelihood of success on the merits of Terex's breach of contract claim. Terex alleged that Cubex breached the distributorship agreement because Cubex failed to provide a cause for termination or an opportunity to cure the deficiency. Terex argued that these elements would only be required if the parties had amended the 1995 agreement through the 2002 negotiations, which Cubex argued that they did not.<sup>215</sup> Conversely, Terex argued that the terms of the 2002 negotiations amended the 1995 agreement through the parties course of performance. As such, the question for the court was whether had Terex presented sufficient evidence to demonstrate a likelihood of success on its contention that the terms discussed during the 2002 negotiations were incorporated into the 1995 agreement and that Cubex had breached those additional terms.<sup>216</sup>

For two reasons, the district court held that Terex had not shown a substantial likelihood of success on its breach of contract claim.<sup>217</sup> The district court initially acknowledged that the distributorship agreement was governed by the Texas Uniform Commercial Code ("UCC") because the sale of goods was the dominant factor in distributorship contracts.<sup>218</sup> The court noted that although the UCC required modifications to a contract to be in writing and signed, a party could waive the signed writing requirement if that party attempted to modify the contract in a manner that did not satisfy the provision.<sup>219</sup> Terex argued that Cubex's course of performance proved that Cubex had accepted the terms of the 2002 negotiations. Terex pointed out that it sold products in Canada following the 2002 negotiations pursuant to the terms of the amended agreement. However, the district court found that the sale of products in Canada was not a change in Terex's performance because Terex had been selling Cubex products in Canada for years.<sup>220</sup> Therefore, the district court was unable to identify any change in the course of performance sufficient to indicate a waiver by Cubex of the signed writing requirement.

Second, the district court found that Terex could not meet the statute of frauds requirement of a signature by the party against whom enforcement was sought.<sup>221</sup> The court evaluated whether Terex had established the "merchant exception" to the UCC signature requirement:

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214. *Id.* at \*2.

215. *Id.* at \*3.

216. *Id.* at \*4.

217. *Id.*

218. *Id.* (citing *Cont'l Casing Corp. v. Siderca Corp.*, 38 S.W.3d 782, 787 (Tex. App.—Houston [14th Dist.] 2001, no pet.)).

219. See TEX. BUS. & COM. CODE ANN. § 2.209(b) and (d) (Vernon 1994).

220. *Terex Corp.*, 2006 WL 3542706, at \*4.

221. *Id.* at \*5; see also TEX. BUS. & COM. CODE ANN. § 2.201(a) (Vernon 1994) (A contract governed by the UCC calling for a "sale of goods for the price of \$500 or more" must be in writing "and signed by the party against whom enforcement is sought.").

if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the [signed writing requirement] against such party unless written notice of objection to its contents is given within ten days after it is received.<sup>222</sup>

The court held that the 2002 final draft from Terex to Cubex did not constitute a “confirmation” because it contemplated, on its face, further discussions of the terms.<sup>223</sup> The 2002 draft stated that some arrangements needed to be cleared up and that the draft was for Cubex to review for discussion. As such, the writing was not a confirmation of previously negotiated terms, but was instead an on-going step in an active negotiation.<sup>224</sup> Therefore, the district court held that at that stage of litigation, Terex had not proven “a substantial likelihood that [it would] succeed on the merits of its breach of contract claim.”<sup>225</sup> For this and other reasons, the district court denied Terex’s request for a preliminary injunction.<sup>226</sup>

#### B. VICARIOUS LIABILITY

Often, a court will look to the terms of a license or franchise agreement for the scope of control that the licensor or franchisor exercises over the licensee or franchisee to determine whether a case of vicarious liability exists. Trevor Townsend (“Trevor”) was an employee of Prine, Inc. (“Prine”), “a licensed dealer of Goodyear tires operating under a Dealer Agreement and a Service Mark License.”<sup>227</sup> Trevor was killed in an accident while changing tires on a motor home. Charles Trent Townsend and Jackie Townsend (collectively, the “Townsend”) sued Goodyear Tire & Rubber Co. (“Goodyear”), alleging that Goodyear negligently exercised control over Trevor’s training and the safety of his workplace. Because Goodyear was the licensor, the trial court held that as a matter of law, Goodyear had no duty to Prine’s employees under its contractual arrangement with Prine.<sup>228</sup> The Townsends appealed.

The Fifth Circuit noted Texas law regarding independent contractor: “[o]ne who retains the right of control or exercises actual control over the work of an independent contractor also owes a duty of reasonable care to the contractor’s employees.”<sup>229</sup> The court further noted that, “[f]or liability there must be ‘a nexus between the employer’s duty of care and its right of control.’”<sup>230</sup> The Townsends argued that the dealer and license

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222. TEX BUS. & COM. CODE ANN. § 2.201(b) (Vernon 21994).

223. *Terex Corp.*, 2006 WL 3542706, at \*5.

224. *Id.*

225. *Id.*

226. *Id.* at \*14.

227. *Townsend v. Goodyear Tire & Rubber Co.*, 249 F. App’x 327, 328 (5th Cir. 2007) (per curiam).

228. *Id.*

229. *Id.* (citing *Exxon Corp. v. Tidwell*, 867 S.W.2d 19, 21 (Tex. 1993)).

230. *Id.* (quoting *Hoechst-Celanese Corp. v. Mendex*, 967 S.W.2d 354, 356 (Tex. 1998) (“The more detailed the right of control over the independent contractor’s work, the greater the employer’s responsibility for any resulting injuries.”)).

agreement between Prine and Goodyear created a contractual duty to Trevor because Goodyear retained control over the work, thus making Goodyear vicariously liable. Moreover, the Townsends argued that Goodyear's advertising was indicative of its control because of statements touting the high standards of its retailers.<sup>231</sup>

The Fifth Circuit noted that “[a] general contractor will be liable for an independent contractor’s acts if the contract gives it ‘the right to control the means, methods, or details of the independent contractor’s work.’”<sup>232</sup> In reviewing the license agreement at issue, the Fifth Circuit highlighted that: (i) “Goodyear had the right to ensure its automotive standards were being met;” (ii) “Prine’s employees were adequately trained;” and (iii) “Goodyear [had] the right to inspect the premises.”<sup>233</sup> However, “[t]he focus of the contract [was] Goodyear’s general right of control over Prine’s operations in relation to the quality and standards of service . . . rather than the specific right of control over the safety and training of Prine’s employees.”<sup>234</sup>

The license agreement did not provide specific safety requirements, nor was Goodyear required to do so by any contractual provision. Also, Prine was required to train its employees, but it was not required to use Goodyear’s services for the training. Therefore, the Fifth Circuit held that “[t]he district court correctly determined that Goodyear did not have a duty to Trevor as Prine’s employee.”<sup>235</sup>

## VII. STATUTORY CLAIMS

### A. TEXAS DECEPTIVE TRADE PRACTICES— CONSUMER PROTECTION ACT

In *CK DFW Partners Ltd. v. City Kitchens, Inc.*,<sup>236</sup> the Northern District of Texas addressed the argument that the forum selection and/or choice of law clauses found in a franchise agreement were invalid because they contravened public policy by effectively constituting a waiver of the DTPA. The relevant franchise agreements provided that California law applied to disputes between the parties and that any claims between the parties would be brought in California state court.<sup>237</sup> The court applied federal law to determine whether the forum selection clause mandated that the case be dismissed for improper venue.<sup>238</sup> Under the federal standard, two factors the court considers in evaluating forum selection clauses are whether the selected forum presents a “grave inconvenience,” or whether enforcement of the clause would “contravene a strong public

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231. *Id.*

232. *Id.* at 329 (citing *Dow Chem. Co. v. Bright*, 89 S.W.3d 602, 606 (Tex. 2002)).

233. *Id.*

234. *Id.*

235. *Id.*

236. No. 3:06-CV-1598-D, 2007 WL 2381259, at \*1 (N.D. Tex. Aug. 17, 2007).

237. *Id.*

238. *Id.* at \*2.

policy of the forum state.”<sup>239</sup>

The franchisee plaintiffs argued that enforcement of the California choice-of-law provision would result in a waiver of the Texas DTPA, which, in general, cannot be waived.<sup>240</sup> The plaintiffs also argued that if the defendants’ motion to dismiss was granted, they would be denied protection under the relevant California franchise laws as well because those laws do not apply to out-of-state franchisees.<sup>241</sup> The defendants countered that California courts would apply California franchise laws to plaintiffs’ franchises because of the choice-of-law provision combined with the fact that the defendants registered the franchise offering in California, and that honoring the choice-of-law provision would not result in any violation of Texas public policy.<sup>242</sup>

The court held that “the mere deprivation of a right to sue under the DTPA is not a sufficient basis for holding enforcement of a forum selection or choice-of-law clause unreasonable.”<sup>243</sup> The court further found that the plaintiffs did not establish that the California franchise laws would not apply to their franchises, but even if they did not apply, the plaintiffs, “failed to show how such a denial supports the conclusion that enforcement of the forum selection and/or choice-of-law clauses would contravene a strong Texas public policy.”<sup>244</sup>

#### B. ANTITRUST

In 2007, the United States Supreme Court reversed a ninety-six year old precedent in *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*<sup>245</sup> relating to vertical minimum-resale-price agreements. Leegin Creative Leather Products (“Leegin”) designs, manufactures, and distributes leather goods and accessories for women.<sup>246</sup> PSKS operates a women’s apparel store that sold Leegin’s products.<sup>247</sup> Leegin instituted a policy refusing to sell to retailers that discounted below its suggested prices.<sup>248</sup> PSKS sued, alleging that Leegin’s policy violated antitrust law by constituting a vertical minimum-price-fixing agreement.<sup>249</sup>

Supreme Court precedent had long held that vertical minimum-price-fixing agreements such as the one at issue in Leegin were a *per se* violation of the Sherman Act.<sup>250</sup> After analyzing the relevant precedent, the Court concluded that the reasoning that the precedent was based upon

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239. *Id.*

240. *Id.* at \*7.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* at 8.

245. 127 S. Ct. 2705, 2705 (2007).

246. *Id.* at 2710.

247. *Id.* at 2711.

248. *Id.*

249. *Id.* at 2712.

250. *Id.* at 2713.

did not justify a *per se* rule.<sup>251</sup> The Court noted that *stare decisis* has less effect in a Sherman Act case because the Court has traditionally treated the Sherman Act as a “common law” statute with evolving standards.<sup>252</sup> The Court examined relevant economics literature and determined that, “[v]ertical agreements establishing minimum resale prices can have either procompetitive or anticompetitive effects, depending upon the circumstances in which they are formed.”<sup>253</sup> The Court rejected the argument that a *per se* rule is appropriate due to administrative convenience.<sup>254</sup> The Court held that vertical price restraints are now to be judged by the rule of reason.<sup>255</sup> This rule requires the factfinder to take into account all the circumstances of the case in determining whether a particular restraint is unlawful, including information about the businesses involved and the restraint’s nature and effect.<sup>256</sup>

Another significant antitrust decision has recently come from the Texas Supreme Court. In *Coca-Cola Co. v. Harmar Bottling Co.*,<sup>257</sup> five soft drink bottlers with franchises to distribute Royal Crown Cola sued The Coca-Cola Company and several Coca-Cola and Dr. Pepper distributors asserting various antitrust violations, including a violation of the Texas Free Enterprise and Antitrust Act of 1983 (“TFEAA”). The plaintiffs distributed Royal Crown Cola in various territories within the region where the Arkansas, Louisiana, and Texas borders meet, including part of southeast Oklahoma.<sup>258</sup> The plaintiffs alleged that Coca-Cola violated the antitrust laws by its calendar marketing agreements (“CMAs”) with retailers.<sup>259</sup> These agreements can vary, but all essentially provide that “during stated periods of time a retailer will promote a wholesaler’s products in preference to competing products in exchange for payments and price discounts from the wholesaler.”<sup>260</sup> The Royal Crown Cola franchisees argued that Coca-Cola was attempting to monopolize their markets by using very aggressive CMAs with retailers that had no choice but to accept, given Coca-Cola’s market power.<sup>261</sup>

The jury granted a verdict for the plaintiffs.<sup>262</sup> The court of appeals affirmed the verdict, rejecting Coca-Cola’s argument that the trial court “should not have awarded damages and injunctive relief under the TFEAA for conduct that occurred outside Texas.”<sup>263</sup> The court of appeals also held that the evidence was sufficient to support a finding that

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251. *Id.* at 2713-14.

252. *Id.* at 2721-22.

253. *Id.* at 2717.

254. *Id.* at 2718.

255. *Id.* at 2725.

256. *Id.* at 2712-13.

257. 218 S.W.3d 671, 674 (Tex. 2006).

258. *Id.*

259. *Id.*

260. *Id.* at 676.

261. *Id.* at 676-77.

262. *Id.* at 678.

263. *Id.* at 679.

the CMAs sufficiently restricted trade.<sup>264</sup>

The supreme court reversed the court of appeals.<sup>265</sup> The supreme court held that the Texas legislature did not intend for the TFEAA to allow damages and injunctive relief for injuries that occur in other states.<sup>266</sup> The supreme court noted that the plaintiffs did not argue that compensation for their injuries suffered in other states would “promote competition in Texas or benefit Texas consumers.”<sup>267</sup> The supreme court held that TFEAA does not apply to conduct that occurs outside of Texas just because the same type of conduct occurred inside of Texas and caused the same type of harm.<sup>268</sup> Therefore, the plaintiffs’ complaints of injury outside of Texas were not actionable under the TFEAA.<sup>269</sup>

The supreme court further held that the trial court should not have allowed the plaintiffs to assert claims under Arkansas, Louisiana, and Oklahoma law.<sup>270</sup> The plaintiffs did not attempt to show that those states’ antitrust statutes were substantially similar to the TFEAA, and the supreme court held that it would not presume that they were.<sup>271</sup> The supreme court stated that, “[f]or a court in one state to undertake to determine what would benefit competition and consumers in another state would pose a significant affront to the interstate comity sister states should accord each other in our federal system.”<sup>272</sup> The supreme court noted that “refusal to entertain an action based on another state’s antitrust law does not deprive the plaintiff of a forum” because the plaintiff can sue in the other state’s courts.<sup>273</sup>

Finally, the supreme court held that the plaintiffs had failed to provide evidence sufficient to show a “demonstrable economic effect.”<sup>274</sup> The supreme court stated that, “since there is evidence only that [Coca-Cola’s] CMAs *could* have had an adverse effect on competition in a relevant market, not that they actually did, existence of the CMAs *alone* cannot prove [Coca-Cola] engaged in predatory or anticompetitive conduct.”<sup>275</sup> Therefore, the supreme court held that the plaintiffs had failed to show any antitrust violation.<sup>276</sup>

### C. COVENANTS NOT TO COMPETE

In *Bennigan’s Franchising Co. v. Swigonski*, the plaintiffs, Bennigan’s franchising entities, sought to enforce a non-competition agreement

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264. *Id.*

265. *Id.* at 691.

266. *Id.* at 682.

267. *Id.* at 683.

268. *Id.*

269. *Id.* at 684.

270. *Id.* at 688.

271. *Id.* at 684-85.

272. *Id.* at 685.

273. *Id.* at 686.

274. *Id.* at 689.

275. *Id.* at 690.

276. *Id.*

against a former franchisee that had de-identified as a Bennigan's, but continued to operate as a restaurant.<sup>277</sup> New York law applied to the case.<sup>278</sup> New York law upholds covenants not to compete against former franchisees only if they are "reasonable in geographic scope and duration."<sup>279</sup> The plaintiffs sought a preliminary injunction to enforce the covenant not to compete, arguing that former franchisees should not be allowed to "operate restaurants as a Bennigan's but putting other names on them."<sup>280</sup> The court held that because the nearest Bennigan's was over two hundred miles away and the defendants were not still using Bennigan's protected trademarks, the covenant not to compete "is more limiting than would be required to protect the plaintiffs' legitimate business interests."<sup>281</sup> Furthermore, the court held that the covenant language, which prohibited operating or being involved with "'any casual dining or other restaurant business . . . that is in any way competitive with or similar to a Bennigan's Restaurant,'" was unreasonably restrictive.<sup>282</sup> Specifically, the court stated that the franchise agreement did not define "casual dining" or provide any other means to determine its definition.<sup>283</sup> The court denied the request for a preliminary injunction.<sup>284</sup>

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277. No. 3:06-CV-2300-G, 2007 WL 603370, at \*1-2 (N.D. Tex. Feb. 27, 2007).

278. *Id.* at \*2.

279. *Id.*

280. *Id.* at \*5.

281. *Id.* at \*3.

282. *Id.*

283. *Id.* at \*4.

284. *Id.* at \*5.

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