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Franchise Law

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I. INTRODUCTION

Although this survey period did not have any single "blockbuster" development for franchise and distribution case law in Texas, a number of cases were decided on very frequently litigated issues in franchising, including liability and appropriate remedies for Lanham Act violations, the proper construction of franchise agreements with multiple amendments, vicarious liability, and the definition of "consumer" under the Texas Deceptive Trade Practices Act. In addition, this survey period saw a bankruptcy court analyze an interesting choice of law issue, perfectly highlighting the potentially dispositive difference that critical issue may make. Another court, in an opinion analyzing something as mundane as a dispute over the proper breadth of discovery, provides guidance for analyzing very contentious issues in franchise litigation, such as the extent to which information from non-party franchisees is discoverable. Taken as a whole, this survey period produced several decisions which have the potential to become frequently cited cases in Texas franchise law.

II. PROCEDURE

A. CHOICE OF LAW

A very interesting choice of law decision came out of the bankruptcy court in *Allegra Network, LLC v. Ruth (In re Ruth)*.[1] The *Allegra* proceeding arose out of the bankruptcy filing of an Insty-Prints franchisee in Texarkana.[2] Prior to the bankruptcy filing, the franchisee had been in the Insty-Prints system since 1984.[3] The original franchise agreement was renewed several times, and after the first renewal, the original franchisor assigned its rights under the franchise agreement to a successor franchisor, Allegra.[4] When the time came to renew the franchise again, the second renewal, signed in 2006, contained a choice of law clause specifying the application of Michigan law.[5] The original franchisor was based in Minnesota.[6] Eventually, Allegra brought suit against the franchisee for past-due royalties and to enforce the covenant not to compete in the franchise

1. Allegra Network LLC v. Ruth, Ch. 13 Case No. 10-50184, Adv. No. 10-5009, 2013 WL 139265 (Bankr. E.D. Tex. Jan. 10, 2013).
2. *Id.* at *2.
3. *Id.* at *1.
4. *Id.* at *2.
5. *Id.*
6. *Id.* at *1.

agreement.[7] The franchisee then filed a Chapter 13 bankruptcy petition.[8]

The specific issue the *Allegra* opinion addresses is whether the covenant not to compete found in the 1984 franchise agreement was enforceable.[9] It turns out that the Michigan choice of law provision inserted into the second franchise agreement renewal in 2006 was determinative of that question.[10] In the litigation, Allegra "insiste[d] upon the application of Michigan law to interpret the viability of this and other covenants contained within the Franchise Agreement."[11] However, the bankruptcy court noted that a Michigan statute repealed in 1985 declared that any covenant not to compete was deemed illegal and void.[12] The court cited multiple Michigan cases holding that any covenant entered into prior to the statute's repeal remained unenforceable.[13] The court analyzed the renewals to the franchise agreement, found that they constituted mere extensions to the original 1984 agreement as opposed to new agreements, and consequently held that the covenant not to compete was void and unenforceable.[14]

Allegra is especially interesting because the court expressly recognized that both Texas law (where the franchisee was located) and Minnesota law (where the original 1984 franchisor was based) would have enforced the covenant not to compete.[15] It was only the mid-term change of the choice of law provision to Michigan law that rendered the covenant unenforceable.[16] *Allegra* demonstrates the potentially crucial impact of choice of law in general, as well as its importance in the franchise context in particular. Like the franchise at issue in *Allegra*, franchisee-franchisor relationships are often long-term, complex relationships, and the impact of choice of law on all aspects of the relationship may not always be immediately apparent. *Allegra* highlights the potential hidden perils of changing choice of law in the middle of a franchise relationship.

B. Arbitration

Franchise agreements containing arbitration provisions often have explicit exceptions to the arbitration requirement for specific causes of action, such as for injunctive relief. In *Dickey's Barbecue Restaurants, Inc. v. Mathieu*, the Northern District of Texas analyzed these exceptions.[17] In this case, the franchisor, Dickey's Barbecue, brought suit against its franchisee, Mathieu.[18] Dickey's terminated Mathieu for breaches of the franchise agreement and brought claims for declaratory relief (seeking a declaration of breach of the

7. *Id.* at *2.
8. *Id.*
9. *Id.* at *3.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at *4.
15. *Id.* at *3.
16. *Id.*
17. Dickey's Barbecue Restaurants, Inc. v. Mathieu, No. 3:12-CV-5119-G, 2013 WL 5268976 (N.D. Tex. Sept. 18, 2013).
18. *Id.* at *2.

franchise agreement), injunctive relief (to prevent Mathieu from operating the restaurant), breach of contract (relating to the franchise agreement), and fraudulent inducement (relating to an aborted agreement by Mathieu to sell the restaurant to Dickey's).[19] Mathieu moved to dismiss or stay based on the arbitration provision in the franchise agreement.[20]

The court first examined whether Dickey's claims were subject to the franchise agreement's arbitration provision because the franchise agreement "does not contain a clear indication that the parties intended for an arbitrator to decide the issue of arbitrability."[21] Dickey's primary argument was that, although the franchise agreement contained a very broad arbitration provision, its claims fell under the exceptions in the provision for injunctions and actions for "monies owed."[22]

Turning to Dickey's claims, the court held that the declaratory judgment claim must be submitted to arbitration because "[a] declaratory judgment is, by definition, not a claim for monies owed."[23] However, Dickey's injunction request was not subject to arbitration because of the explicit exception in the franchise agreement's arbitration provision for actions for injunctive relief.[24] Here, Mathieu argued that the action for an injunction was moot because he was no longer operating the restaurant and was willing to represent to the court that he would not do so in the future.[25] The court noted, however, that a "mere disclaimer of intention to revive the wrongful conduct," although relevant in determining whether an injunction would be appropriate, did not moot Dickey's request for injunctive relief.[26]

The court then analyzed Dickey's breach of contract and fraudulent inducement claims.[27] Dickey's breach of contract claims involved failure to meet system standards, as well as failure to pay past due royalties, and Dickey's sought future royalties for premature termination of the franchise agreement.[28] The court held that most of Dickey's breach of contract claims would clearly be subject to arbitration, noting that the exception for an action for "monies owed" did not equate to "damages," and that lost future royalties were a form of damages, not monies owed.[29] The court stated that Dickey's claim for past due royalties would fall under the exception to arbitration; however, because "claims that are factually intertwined with arbitrable claims must be arbitrated," and because the court could not "conclude with positive assurance that Dickey's breach of contract claim regarding past due payments is not at least factually intertwined with arbitrable claims," all of the breach of contract claims should

19. *See id.*
20. *Id.*
21. *Id.* at *3 (citing AT & T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 649 (1986)).
22. *Id.* at *5.
23. *Id.* at *6–7.
24. *Id.* at *7–8.
25. *Id.*
26. *Id.* at *8 (citing U.S. v. W.T. Grant Co., 345 U.S. 629, 633 (1953)).
27. *Id.* at *9.
28. *Id.* at *8–9.
29. *Id.*

be submitted to arbitration.[30] Finally, the court concluded that Dickey's fraudulent inducement claim must be arbitrated.[31]

Arbitration provisions are relatively common in franchise agreements. The exceptions to arbitration at issue in *Dickey's*, for actions for monies owed and for injunctive relief, are also common. *Dickey's* is an example of a court analyzing these exceptions in the context of a wide variety of claims. Of note is the discussion on the breach of contract claim. Even though a portion of that claim was an action for "monies owed" that would fall under an exception to arbitration, because *Dickey's* also included claims for damages resulting from breaches of system standards and for premature termination, the court concluded that all of the breach of contract claims must be arbitrated.[32]

C. DISCOVERY

Although all franchise cases are unique, certain issues tend to arise on a regular basis in franchise litigation. In particular, disputes over the proper scope of discovery, especially involving third-party franchisees or aspects of the franchise system not directly at issue, are common in franchise cases. The case *Meltzer/Austin Rest. Corp. v. Benihana Nat'l Corp.* illustrates several of these types of disputes.[33] *Meltzer* involved claims by a Benihana franchisee, Meltzer, that Benihana unfairly applied its system standards to the franchisee's restaurants and misrepresented facts "regarding its intent to enter into a new franchise agreement."[34] The parties had a number of disputes over discovery issues that are resolved in the *Meltzer* opinion; the discussion below highlights the more notable rulings.

The first dispute involved franchise agreements. Meltzer requested that Benihana produce every franchise agreement that Benihana had executed for the past ten years on the theory that Benihana made misrepresentations that it would enter into a new franchise agreement with Meltzer on terms at least as good as other franchisees.[35] The court held that this request was overbroad because Meltzer could only identify two particular franchisees named by Benihana in its alleged misrepresentations.[36] The court held that Meltzer was entitled to franchise agreements with these specific franchisees; however, it limited the request to the specific period of time during which the misrepresentations were allegedly made.[37]

Meltzer also sought documents showing the reasoning behind Benihana's decision to change certain system standards that were relevant to the plaintiff's

30. *Id.* at *9 (citing Jack B. Anglin Co. v. Tipps, 842 S.W.2d 266, 271 (Tex. 1992)).
31. *Id.*
32. *See id.* at *8–9.
33. Meltzer/Austin Rest. Corp. v. Benihana Nat'l Corp., No. A-11-CV-542-LY-AWA, 2013 U.S. Dist. LEXIS 41838 (W.D. Tex. March 26, 2013). Haynes and Boone, LLP serves as counsel for Benihana National Corporation in this matter.
34. *Id.* at *7–8.
35. *Id.* at *6–7.
36. *Id.* at *11.
37. *Id.* at *11–12.

defaults.[38] The court held that, although the system standards themselves were relevant, the reasoning behind the changes was not.[39] The court allowed Meltzer discovery of Benihana's standards in general but limited this discovery to the time frame of the events giving rise to the suit.[40]

The primary discovery dispute in *Meltzer* was over information on the performance of the plaintiff's franchises.[41] Meltzer requested "information related to the value of Meltzer's franchises in Austin and San Antonio, financial reports of Benihana's franchise and corporate stores, and inspection and consulting reports regarding Meltzer's Benihana franchises as well as other Benihana franchises and corporate stores."[42] Meltzer argued that, because New York law applied to the franchise agreements, the implied covenant of good faith and fair dealing found in New York law meant that Benihana's disparate treatment of other franchisees was discoverable.[43] Benihana argued that the implied covenant was limited to the terms of the agreements; therefore, information concerning other franchisees was not discoverable.[44] Applying New York law, the court held that the exercise of discretion contemplated by the franchise agreement in applying system standards meant that Benihana's treatment of other franchisees could be relevant.[45] The court limited Meltzer's requests, however, noting that financial information regarding other franchisees was not relevant because Meltzer's restaurants were not defaulted for financial performance reasons, and that consulting reports and mystery shopper reports would only need to be produced for restaurants that had been found in violation of the relevant system standards.[46]

Like the *Meltzer* plaintiff, franchisees often want to discover information about other franchisees to show disparate treatment, while franchisors, for a number of reasons, do not generally want to reveal non-public information concerning their relationship with other franchisees. Although a portion of the *Meltzer* court's opinion applied New York law to reach its holding, the opinion provides a guide as to how a court may analyze requests for information concerning third-party franchisees in discovery.

III. THE FRANCHISE RELATIONSHIP, TERMINATION, AND NONRENEWAL

A. MOTOR VEHICLE DEALER STATUTE

In 2013, the Texas Legislature amended the laws regulating motor vehicle

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38. *Id.* at *14–16.

39. *Id.* at *16–17 ("Whether the dinnerware supplied by Edward Don & Company is actually of lesser quality, as Meltzer alleges, is irrelevant to the whether Meltzer complied with Benihana's changed requirement regarding its standard dinnerware.").

40. *Id.* at *18–19.

41. *See id.* at *23.

42. *Id.* at *23–24.

43. *Id.* at *25.

44. *Id.* at *25–26.

45. *Id.* at *26–32.

46. *Id.* at *34–38.

dealers, manufacturers, and distributors.[47] Specifically, Texas Senate Bill 854 prohibits a franchisor from coercing or attempting to coerce a franchisee to relocate an existing dealership to property that is subject to a specific use agreement that limits the franchisee's ability to add a line-make or prohibits the sale or sublease of the property for a purpose other than the operation of a dealership.[48]

B. TERMINATION AND NONRENEWAL

In *Mailing & Shipping Systems, Inc. v. Neopost USA, Inc.*, the parties disputed the length of the notice period—thirty days or ninety days—required for Neopost to terminate its dealership agreement with Mailing and Shipping Systems (Mailing & Shipping).[49] Mailing & Shipping had previously entered into a dealership agreement with Neopost's predecessor-in-interest "to sell, install, and maintain [Neopost's] postage meters and mailing machines [in parts of] Texas and New Mexico."[50] The terms of the dealership agreement, however, were not maintained in a single document, but arose through course of dealing and documents, including dealer policy manuals, that were exchanged during the parties' twenty-four-year business relationship.[51]

After Mailing & Shipping failed to meet its assigned sales quotas, Neopost notified Mailing & Shipping of the termination of the dealership agreement effective in fifty days.[52] Thereafter, Mailing & Shipping sued Neopost for breach of contract for terminating the dealership agreement without providing adequate notice.[53] In the lawsuit, Mailing & Shipping argued Neopost was required to give ninety days' notice pursuant to the 2011 Dealer Policy Manual, which stated: "*Except as otherwise provided in a written agreement with Dealer*, [Neopost] shall give [Mailing & Shipping] ninety (90) days prior written notice of intent to terminate . . . ."[54] Neopost, on the other hand, argued that a 1988 letter between Mailing & Shipping and Neopost's predecessor, which stated that the "arrangement [was] subject to termination by [Neopost] upon 30 days written notice," set a shorter notice period.[55]

The U.S. District Court for the Western District of Texas, applying Texas law, found that the letter was an "agreement" for purposes of the exception to the ninety-day notice provision in the 2011 Dealer Policy Manual because the letter constituted a "manifestation of mutual assent."[56] Even though the letter lacked Mailing & Shipping's signature, statements in the letter, such as "[w]e are pleased that your company will be representing us and we appreciate your

47. Act of May 22, 2013, 83rd Leg., R.S., ch. 1338, § 1, sec. 2301.483, 2013 Tex. Sess. Law Serv. 3550, 3551 (West).
48. *Id.*
49. Mailing & Shipping Sys., Inc. v. Neopost USA, Inc., 937 F. Supp. 2d 879, 884 (W.D. Tex. 2013).
50. *Id.* at 880.
51. *Id.* at 880–81.
52. *Id.* at 882.
53. *Id.* at 883.
54. *Id.* at 885.
55. *Id.*
56. *Id.* at 885–86.

confidence in our products," and the parties' subsequent conduct led the court to find that the letter was a written agreement falling within the ninety-day notice period exception.[57] The court granted Neopost summary judgment on Mailing & Shipping's claim for breach of the dealership agreement by providing insufficient notice of termination.[58] This case serves as an excellent reminder, in light of the long-term nature of the typical franchise relationship, of how the parties' obligations to each other may be amended or modified over multiple "agreements."

Mailing & Shipping Systems is also notable in that Mailing & Shipping argued that a duty of good faith and fair dealing applied to the contract.[59] The court observed that this duty "does not exist in all contractual relationships" in Texas, and "the Texas Supreme Court has explicitly 'declined to extend this common-law duty to all franchise agreements.'"[60] However, the court did note that "the duty of good faith and fair dealing . . . may apply to [a] 'distributorship agreement' where the sale of goods is 'the dominant factor or essence' in such a contract," pursuant to section 1.304 of the Texas Business and Commerce Code.[61] The court did not determine whether the duty applied in this dealership case because it found that even if the duty applied, there was no evidence of a violation.[62] Because the defendant did not breach any contractual duty, the defendant had no additional obligations pursuant to a duty of good faith and fair dealing.[63] This case affirms that even if a plaintiff convinces a court that the statutory duty of good faith found in the Texas Business and Commerce Code applies, the plaintiff will still need to tie it to the violation of a specific contractual obligation.

IV. INTELLECTUAL PROPERTY

The U.S. District Court for the Southern District of Texas rendered two decisions involving Choice Hotels International concerning the unauthorized use of trademarks.

In *Choice Hotels Int'l, Inc. v. Bhakta*, Choice Hotels International, Inc. (Choice Hotels) filed a motion for summary judgment to determine that it had properly terminated a franchise agreement with its franchisee, JBI, and that the franchisee and its agent, Bhakta, violated Choice Hotels' rights under the Lanham Act and Texas common law by continuing to use Choice Hotels' trademarks after termination.[64] After Choice Hotels terminated the franchise agreement due to the condition of the hotel, the franchisee and Bhakta continued to use the trademarks.[65] The court granted Choice Hotels' motion for

57. *Id.* at 886.
58. *Id.* at 887.
59. *Id.* at 888.
60. *Id.* at 889 (emphasis added).
61. *Id.*
62. *Id.*
63. *Id.*
64. Choice Hotels Int'l, Inc. v. Bhakta, No. 2:11-CV-00411, 2013 WL 1403526, at *1 (S.D. Tex. Apr. 5, 2013).
65. *See id.*

summary judgment.[66]

The *Bhakta* court reiterated that to succeed on a claim of trademark infringement and false designation of origin or unfair competition, Choice Hotels had to show "(1) it possesse[d] a legally protectable mark; and (2) JBI and Bhakta used the same or similar marks in commerce in a manner likely to confuse potential customers as to the affiliation, connection, or association of JBI/Bhakta with [Choice Hotels]."[67] The "likelihood-of-confusion test" was satisfied as a matter of law because the *exact* (as opposed to *similar*) marks were used after termination of the franchise agreement, and there was also "uncontroverted evidence of actual confusion."[68] The actual confusion was shown by JBI customers' complaints to Choice Hotels about the hotel during the time of the unauthorized use of the marks, and JBI customers contacting Choice Hotels with demands for rewards credits for their stays in the hotel.[69] Moreover, proof of trademark infringement under the Lanham Act was proof of infringement under Texas common law, and the same evidence that would support the Lanham Act infringement claim also supported a Texas common law claim of unfair competition.[70]

Although the court noted that the defendants in *Bhakta* did not properly plead the affirmative defense of acquiescence, the court nonetheless examined it and determined that it would not have saved the defendants even if they had properly raised it.[71] The court explained that acquiescence "is an equitable defense that requires proof that: (1) [Choice Hotels] knew or should have known of JBI and Bhakta's continued use of the trademark; (2) [Choice Hotels] made implicit or explicit assurances to JBI and Bhakta that use was permitted; and (3) JBI and Bhakta relied on the assurances."[72] The court examined the evidence in the case and determined that the second element of the acquiescence defense—that the franchisor made assurances—was not satisfied.[73] The email correspondence relied upon by the defendants was not inconsistent with Choice Hotels' termination of the franchise agreement and did not amount to an assurance by Choice Hotels that use of the trademarks was permitted.[74] The court also found that it was "important to note" that the defense was not available in any case because defendants had received a cease and desist letter and *continued* to engage in the infringing activity.[75] The court also noted that defendants "[r]emarkably" continued the infringing activity after the lawsuit was filed.[76] This case reinforces the importance of the language

66. *Id.*
67. *Id.* at *3 (citing 15 U.S.C. §§ 1114, 1125(a); Am. Rice, Inc. v. Producers Rice Mill, Inc., 519 F.3d 321, 329 (5th Cir. 2008); and Philip Morris USA, Inc. v. Lee, 547 F. Supp. 2d 667, 674 (W.D. Tex. 2008)).
68. *Id.* at *1, *3.
69. *Id.* at *3
70. *Id.* at *4.
71. *Id.* at *5.
72. *Id.* at *4.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*

contained in cease and desist notices, particularly when the franchisee may have grounds for an acquiescence defense.

The U.S. District Court for the Southern District of Texas granted in part and denied in part another motion for summary judgment in a different case involving Choice Hotels during this survey period: *Choice Hotels International, Inc. v. Patel*.[77] Like the *Bhakta* case, *Patel* involved claims of trademark infringement under the Lanham Act and Texas common law relating to the unauthorized use of Choice Hotels' trademarks after Choice Hotels terminated a franchise agreement with a husband and wife.[78] In the *Patel* case, Choice Hotels terminated the franchise pursuant to the terms of the agreement and instructed the franchisee to stop using the Choice Hotels marks after the date of termination.[79]

As in *Bhakta*, the *Patel* court noted that all four of Choice Hotels' causes of action—"trademark infringement under the Lanham Act; false designation of origin under the Lanham Act; trademark infringement under Texas common law; and unfair competition under Texas common law"—could be determined with one inquiry because a determination of trademark infringement under the Lanham Act would supply a basis for liability for all causes of action.[80]

There was undisputed evidence that Mr. Patel continued to use the marks in commerce after termination by not properly removing or covering the exterior signs, continuing to print the Comfort Inn logo on customer receipts, and not removing a Wi-Fi message saying "Welcome to the Comfort Inn."[81] As noted earlier, the use of exact marks—which Mr. Patel did in this case—creates a presumption of confusion that makes an analysis of the nondispositive "digits of confusion" that the Fifth Circuit considers to determine whether a likelihood of confusion exists unnecessary.[82] The "digits of confusion" include:

> (1) strength of the plaintiff's mark; (2) similarity of design between the marks; (3) similarity of the products; (4) identity of retail outlets and purchasers; (5) similarity of advertising media used; (6) the defendants' intent; (7) actual confusion; and (8) degree of care exercised by potential purchasers.[83]

Despite Mr. Patel's use of Choice Hotels' exact marks, the court still examined the digits of confusion test "for the sake of completeness."[84] The application of that test to the facts of the case—each of which either favored Choice Hotels or did not decisively favor either party—indicated that there was "no factual dispute regarding a likelihood of confusion."[85]

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77. Choice Hotels Int'l, Inc. v. Patel, 940 F. Supp. 2d 532 (S.D. Tex. 2013).
78. *See id.* at 535–36, 538.
79. *Id.* at 536.
80. *Id.* at 538 (citations omitted).
81. *Id.* at 536–37, 539–40.
82. *Id.* at 540.
83. *Id.* at 540 (quoting Am. Rice, Inc. v. Producers Rice Mill, Inc., 518 F.3d 321, 329 (5th Cir. 2008)).
84. *Id.* at 540.
85. *Id.* at 540–41.

Following that analysis, the court found that there was "no genuine dispute that Mr. Patel used Choice Hotels' legally protected marks in commerce without Choice Hotels' consent and that such use was likely to cause confusion" and, therefore, granted summary judgment under all four causes of action.[86] Because a fact issue remained regarding whether *Mrs.* Patel "actively and knowingly caused the infringement" since her involvement with the operation of the hotel at the time in question was in dispute, the court did not grant summary judgment with respect to her.[87]

Taken together, the *Bhakta* and *Patel* cases are examples of federal courts continuing to strictly enforce the Lanham Act against franchisees who continue to operate their franchises post-termination.

V. COMMON LAW CLAIMS

A. CONTRACT ISSUES

Gold's Gym Franchising LLC v. Brewer is a case from the Texas Court of Appeals in Dallas that involved issues relating to the enforceability of Gold's Gym franchise and guaranty agreements.[88] In *Gold's Gym*, a corporation named GGNYC 2 entered into a franchise agreement in 2005 with Gold's Gym Franchising, LLC (Gold's Gym), Exhibit B of which was a "Full Continuing Guaranty" that provided for personal liability for each of the GGNYC 2 shareholders.[89] The guaranty was purportedly signed by all three shareholders, although one of them, Brewer, contended that his signature was forged.[90] GGNYC 2 and Gold's Gym later entered into another franchise agreement in 2008 that superseded the 2005 franchise agreement; Exhibit B to the 2008 agreement also contained a guaranty on which Brewer's signature was, again, allegedly forged.[91]

Gold's Gym sued Brewer and other involved parties based on, *inter alia*, breach of the franchise agreement and guaranties.[92] Brewer moved for summary judgment.[93] With respect to the breach-of-guaranty claims, Brewer's "motion focused on the first element, the existence and ownership of the guaranty contract."[94] Addressing the forgery allegation, the court of appeals determined that conflicting expert testimony created a fact issue as to whether the signatures on the guaranties were forged.[95] Additionally, the court explained that, if valid, the 2005 guaranty agreement would continue to apply to the 2008 franchise

86. *Id.* at 541.
87. *Id.* at 541–42.
88. Gold's Gym Franchising LLC v. Brewer, 400 S.W.3d 156, 159 (Tex. App.—Dallas 2013, no pet.).
89. *Id.* at 158.
90. *Id.*
91. *Id.*
92. *Id.* at 159.
93. *Id.*
94. *Id.* at 161; *see also id.* at 162 (citing Beverick v. Koch Power, Inc., 186 S.W.3d 145, 150 (Tex. App.—Houston [1st Dist.] 2005, pet. denied)) (reciting the elements of a cause of action for breach of contract).
95. *Id.* at 161.

agreement because it stated on its face that it "shall apply to . . . any license or franchise agreements between the parties replacing the Agreement."[96] The court affirmed prior case law stating that a guarantor "will not be held to the obligations beyond his agreement"; however, that legal principle did not help Brewer in this situation because the continuing applicability of the guaranty was part of the terms of the guaranty when it was purportedly signed.[97] The court of appeals reversed summary judgment in favor of Brewer on Gold's Gym's claims for breach of the guaranties.[98]

Gold's Gym also claimed that even if there had been a forgery on the guaranties, Brewer had ratified the franchise agreements and the guaranties by his conduct.[99] The court found that the trial court did not err in granting Brewer summary judgment on this pleading.[100] With respect to the franchise agreement claims, the court found that Gold's Gym could not succeed on the first element of a breach of contract claim against Brewer because GGNYC 2 was party to the franchise agreement with Gold's Gym, *not* Brewer.[101] Although there was evidence of Brewer acting in accordance with the terms of the franchise agreement, Brewer's actions did not amount to ratification of the contract because "there can be no ratification of a contract by one who is not a party to it unless the original contract purported to be in the name of, or for, the person alleged to have ratified it."[102] Even though the guaranty was incorporated into the franchise agreement and Brewer was identified as a guarantor, Brewer was not a party to the franchise agreement.[103] Brewer's actions were taken as an agent of GGYNC 2, not in his individual capacity.[104] There was also no evidence that Brewer or the Trust ratified the allegedly forged guaranties by performing under them.[105]

Gold's Gym is notable for its discussion of ratification and the impact of a guarantee agreement. Franchise agreements are very often executed alongside companion guaranty agreements, but in some cases the guaranty agreements may not always be executed, or, as in this case, there could be a claim of forgery. *Gold's Gym* provides an analysis of a franchisor's attempt to enforce a guaranty agreement where the basic guaranty obligation is contested.

In *Jackson v. Longagribusiness L.L.C.*, a franchisee brought a claim for negligence against its franchisor when, after the termination of a franchise agreement, farm equipment the franchisee had previously purchased, and which the franchisor had not yet removed, was stolen from the franchisee's property.[106]

96. *Id.* (alteration in original).
97. *Id.*
98. *Id.* at 162.
99. *Id.*
100. *Id.* at 162–63.
101. *Id.*
102. *Id.* (citing Huginnie v. Loyd, 483 S.W.2d 696, 702 (Tex. Civ. App.—Tyler 1972, writ ref'd n.r.e.)).
103. *Id.* at 163.
104. *Id.* at 162.
105. *Id.* at 163.
106. Jackson v. Longagribusiness, L.L.C., No. 14-11-01073-CV, 2013 WL 84921, at *4 (Tex. App.—Houston [14th Dist.] Jan. 8, 2013, no pet.).

The Court of Appeals for the Fourteenth District in Houston found the franchisor owed the franchisee no duty separate from the contractual requirements; any breach of a contractual duty would not support a tort claim of negligence.[107] Testimony regarding common practices of the franchisor that went beyond the terms of the contract was insufficient to give rise to a legal duty in tort.[108] The defendant terminated the agreement pursuant to the terms of the policy manual that was part of the dealership agreement and did not violate a duty of good faith and fair dealing, if one existed at all.[109] *Jackson* is another example affirming the critical importance of the franchise agreement to the franchise relationship; attempts to impart legal duties to the parties outside of the franchise agreement very rarely succeed.

B. Vicarious Liability

Calvasina v. Wal-Mart Real Estate Business Trust explored the issue of a franchisor's liability for the workplace injury of an employee at a franchisee's store.[110] *Calvasina* involved a worker in the tire section at a Wal-Mart store in San Antonio, Texas, who was injured after falling from a platform on the upper level of a tire rack system while performing his job.[111] The worker, Calvasina, was employed by Wal-Mart Associates, Inc., who leased him to Wal-Mart Texas, LLC (Wal-Mart Texas), the store at which he worked in San Antonio.[112] Wal-Mart Texas operated according to a franchise agreement and lease with Wal-Mart Store, Inc. (the Corporation).[113] Previously in the lawsuit, Calvasina had succeeded in obtaining summary judgment that Wal-Mart Texas and the Corporation were not Calvasina's employers, and thus, workers' compensation was not the exclusive remedy for his injuries.[114] In light of that ruling, the defendants filed another motion for summary judgment, arguing that because they were not Calvasina's employers, they owed Calvasina no duty for which they could be liable for negligence.[115] The court disagreed with that broad contention, but nonetheless analyzed the duties owed.[116] The court ultimately denied the motion for summary judgment with respect to Wal-Mart Texas because it found that Wal-Mart Texas may owe a duty to Calvasina as the premises operator.[117] However, the court granted summary judgment to the Corporation.[118]

Calvasina argued that the Corporation had the right to control the security and safety of the tire rack system and retained actual control over the policies relating to the tire rack system; therefore, according to the Texas Supreme Court

107. *Id.*
108. *Id.*
109. *Id.*
110. Calvasina v. Wal-Mart Real Estate Business Trust, 906 F. Supp. 2d 625 (W.D. Tex. 2012).
111. *Id.* at 628.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.* at 634.
118. *Id.* at 641.

precedent in *Exxon v. Tidwell*, the Corporation "incurred a duty to keep the tire rack safe for personnel."[119] The court disagreed. The court looked to the franchise agreement, which assigned responsibility for the store to Wal-Mart Texas.[120] Although the Corporation could inspect the premises at any reasonable time, could provide management assistance, and would promulgate policies and protocol for the store, Wal-Mart Texas retained ultimate control.[121] The franchise agreement was silent with respect to the control of workplace safety specifically, but assigned control of "operations and 'health standards' to Wal-Mart Texas."[122] The court noted that "[m]erely exercising or retaining a general right to recommend a safe manner for the independent contractor's employees to perform their work is not enough to establish liability," so the franchise agreement, which did not give the Corporation control over the "means, methods, or details of the work at Wal-Mart Texas," did not give the Corporation a contractual right to control workplace safety.[123] The court also found that the Corporation's safety protocols and programs did not show that the Corporation had a general right to control workplace safety that would create a duty to Calvasina.[124]

Additionally, even though the franchise agreement required Wal-Mart Texas to use the Corporation's training materials, there was no evidence that the Corporation was contractually responsible for providing training concerning the tire rack or actually controlled providing that training.[125] The court explained that "absent evidence that the Corporation knew that Wal-Mart Texas routinely failed to train its employees and that the Corporation had a contractual right to intervene to correct it, a contract requiring Wal-Mart Texas to conduct training does not create liability for the Corporation if it did not."[126] "To the extent the Corporation retained supervisory control, there [was] no evidence that the Corporation" specifically provided direction regarding the tire rack or knew of unsafe methods being used to operate it.[127] With respect to the training materials, the Corporation owed no duty other than to ensure that the training materials did not increase the risk of harm, which they did not.[128]

The Corporation did not have the requisite control over the tire rack to create a duty.[129] There was no evidence that the Corporation required Wal-Mart Texas to use the particular tire rack in question, or that the Corporation had the right to control how it was installed.[130] The franchise agreement gave the duty to maintain the tire rack to Wal-Mart Texas, and there was no evidence that Wal-Mart Texas could only perform maintenance at the behest of the

119. *Id.* at 634 (citing Exxon v. Tidwell, 867 S.W.2d 19 (Tex. 1993).
120. *Id.* at 635.
121. *Id.*
122. *Id.*
123. *Id.* at 636.
124. *Id.* at 637.
125. *Id.*
126. *Id.* at 638.
127. *Id.*
128. *Id.*
129. *Id.* at 638–41.
130. *Id.* at 639.

Corporation.[131] Although Calvasina criticized the Corporation's policy for being vague and deficient, the court found no evidence that it increased the risk of harm over no policy at all.[132] Also, there was no evidence that the Corporation was aware in its supervisory capacity of instances of Wal-Mart Texas not following the policy.[133]

Calvasina finally argued that the Corporation negligently undertook providing a safe working environment and was liable under the "Good Samaritan Doctrine" examined in section 324A of the Restatement (Second) of Torts.[134] The court found, however, that there was an inadequate demonstration that the Corporation's actions increased the risk of harm to Calvasina, or that it took on more than a supervisory control with respect to the tire racks, and no evidence that it negligently exercised that control.[135]

Calvasina is an example of a court following the more modern trend in vicarious liability as it relates to franchising. Although the *Calvasina* plaintiff brought a direct liability claim of negligence against the franchisor, the opinion's analysis on whether the franchisor owed a duty to the plaintiff follows a traditional vicarious liability analysis in the franchise context.[136] The court did not fixate on the various contractual provisions designed to give the franchisor control over its trademarks; rather, the court focused on which party actually had control over the instrumentality at issue—in this case, training.[137] *Calvasina* is an example of how (most) courts are recognizing, implicitly or explicitly, that the franchising model presents a unique situation for a vicarious liability analysis.[138]

VI. STATUTORY CLAIMS

A. TEXAS DECEPTIVE TRADE PRACTICES—CONSUMER PROTECTION ACT

In *AdvoCare International, L.P. v. Ford*, the Court of Appeals in Dallas considered the scope of "consumer" protection under the Texas Deceptive Trade Practice Act (DTPA).[139] The court found that former distributors claiming the loss of their distributorships did not constitute "consumers" under the DTPA.[140] Because the claims related to the termination of the distributorship instead of the goods or services acquired from AdvoCare, the distributors could not recover damages as consumers or attorney's fees as

131. *Id.* at 639–40.
132. *Id.* at 640.
133. *Id.* at 641.
134. *Id.* (citing Restatement (Second) of Torts § 324A (1965)).
135. *Id.*
136. *See id.* at 631–32.
137. *Id.* at 637–38.
138. *See, e.g.*, Jeffrey H. Wolf & Aaron C. Schepler, *Caught Between Scylla and Charybdis: Are Franchisors Still Stuck Between the Rock of Non-Uniformity and the Hard Place of Vicarious Liability?*, 33 FRANCHISE L.J. 195, 204 (2013).
139. AdvoCare International, L.P. v. Ford, No. 05-10-00590-CV, 2013 WL 505210, at *5 (Tex. App.—Dallas Feb. 5, 2013, pet. denied).
140. *Id.*

prevailing consumers under the DTPA for those claims.[141] Notably, the court pointed out that the outcome may have been different had one of the distributors established that it purchased a "franchise" instead of a wholly intangible property right to sell AdvoCare products.[142]

AdvoCare sells its products through distributors pursuant to distributorship agreements subject to renewal.[143] Between 2003 and 2009, AdvoCare terminated a number of distributorship agreements.[144] Several of the terminated distributors brought suit alleging DTPA violations.[145] The distributors alleged product defects, misrepresentations regarding the goods and services AdvoCare provided, and failure to disclose information regarding the goods and services.[146] The former distributors sought damages related to the value of their lost businesses.[147] The trial court granted judgment for the distributors, and AdvoCare appealed.[148]

On appeal, the court focused on the definition of "consumer" under the DTPA.[149] There are two basic requirements to qualify as a "consumer": (1) "the person must have sought or acquired goods or services by purchase or lease," and (2) "the goods or services purchased or leased must form the basis of the complaint."[150] The court held that even if the former distributors could qualify as consumers based on goods or services acquired, they could not meet the second requirement.[151] The goods or services that the distributors acquired from AdvoCare did not form the basis of their complaint; instead, the basis of their complaint was the loss of their distributorships.[152] Because "[n]either the termination nor the lost value [was] tied to any alleged defective product or service," the court held that the former distributors did not qualify as consumers entitled to protection under the DTPA.[153]

The court also distinguished between relationships expressly excluded under the DTPA—"relationships that convey wholly intangible property rights, such as distributors and sales representatives"—from the purchase of a franchise.[154] Although a franchise is an intangible property right, it may still involve the transfer of goods or services for purposes of the DTPA.[155] A franchisee may qualify as a consumer where collateral services associated with the franchise agreement are clearly an objective of the transaction and not merely incidental

141. *Id.*
142. *See id.*
143. *Id.* at *1.
144. *Id.*
145. *Id.* at *2.
146. *Id.* at *3.
147. *Id.* at *4.
148. *Id.* at *1.
149. *Id.* at *2.
150. *Id.*
151. *See id.* at *4.
152. *Id.*
153. *Id.*
154. *See id.*
155. *See id.* (citing Fisher Controls Int'l, Inc. v. Gibbons, 911 S.W.2d 135, 138–39 (Tex. App.—Houston [1st Dist.] 1995, writ denied)).

to the performance of such a transaction.[156] In *AdvoCare*, the court pointed to the following facts to distinguish the distributors' agreement from that of a qualifying franchise: "They paid a nominal fee, had the right to purchase AdvoCare products at a discount, and to earn income through the multi-level compensation plan based on sales volume."[157] Because none of the former distributors produced any evidence or made any argument that they purchased a franchise instead of a wholly intangible property right—the right to sell AdvoCare's products—the court held that their claims failed as a matter of law.[158] *AdvoCare* is another in a line of Texas cases discussing DTPA "consumer" status in the context of a franchise relationship. The case reaffirms the principle that a "franchisee" may indeed qualify as a consumer under the statute, but that a pure distributor may not.

B. BANKRUPTCY

In *Allegra Network, LLC v. Ruth (In re Ruth)*, discussed above for its choice of law issues, the court determined that monetary damages stemming from the violation of a noncompete constituted a "claim" that may be discharged in bankruptcy.[159] In this case, the creditor franchisor alleged that the defendant franchisees, Chapter 13 debtors, breached a covenant not to compete included within their franchise agreement. As discussed above, the court found that the covenant not to compete was unenforceable under Michigan law.[160] But the court went on to analyze another issue: whether a creditor's right to equitable relief pursuant to a noncompete was a claim that was dischargeable in bankruptcy.[161] The court noted that equitable remedies, such as specific performance, are generally not dischargeable.[162] But "if state law makes monetary damages available as an alternative to specific performance, then the equitable relief sought constitutes a 'claim' dischargeable in bankruptcy."[163] In *Allegra*, the choice of law provision designated Michigan law as the governing law for the franchise agreement.[164] Under Michigan law, monetary damages are available as a remedy to compensate for the violation of a noncompete agreement.[165] Accordingly, the court held that the breach of the covenant not to compete gave rise to a "right of payment," which constituted a claim subject to discharge in bankruptcy.[166]

This holding of *Allegra* emphasizes the importance of identifying applicable state law governing a franchise agreement when evaluating whether a party's equitable remedy is incorporated into the concept of a "claim." This is an

156. *See id.*
157. *Id.* at *5.
158. *See id.* at *14–15.
159. Allegra Network, LLC v. Ruth, Ch. 13 Case No. 10-50184, Adv. No. 10-5009, 2013 WL 139265, at *5 (Bankr. E.D. Tex. Jan. 10, 2013).
160. *See id.* at *4.
161. *Id.* at *5.
162. *Id.*
163. *Id.*
164. *Id.* at *6.
165. *Id.*
166. *Id.*

important holding to note in the franchise context given the frequency of litigation over noncompete provisions contained in franchise agreements. If monetary damages are available under state law, the equitable remedy sought is subject to discharge in bankruptcy.[167] In such a situation, the bankruptcy essentially erases the obligation to pay damages for violating a noncompete. This, however, is not the result across all jurisdictions.[168] Thus, it is essential for a party to focus on the applicable law and the remedies available under that law when addressing bankruptcy issues for franchisees and franchisors.

VII. REMEDIES: DAMAGES AND INJUNCTIVE RELIEF

A. Lanham Act and Damages: Compensatory and Injunctive Relief

In the *Choice Hotels International, Inc. v. Bhakta* case discussed above, the court held that Choice Hotels International (Choice Hotels) was entitled to a permanent injunction based on the franchisee's continued use of Choice Hotels' trademarks after the termination of its franchise agreement.[169] The court also awarded disgorgement of profits in the amount of $105,453.29.[170] To reach that number, the court allowed Choice Hotels to "pick and choose" the transactions on which it sought to recover within the relevant time frame.[171] The court noted that "the owner of the intellectual property is not treated as a 'partner' subject to both profits and losses. . . . Instead, it is like a tort victim and is permitted to pick and choose the transactions on which it will recover."[172] Thus, Choice Hotels properly claimed a right to recover the amounts reflected in the defendant's profitable months and disregarded the months in which the business operated at a net loss.[173]

In addition to lost profits, the court awarded lost royalties and additional damages.[174] For lost royalties, the court awarded damages based on the agreed percentage in the franchise agreement.[175] The plaintiff also sought treble damages pursuant to the Lanham Act based on the former franchisee's continued use of the marks.[176] Based on Choice Hotels' repeated warnings and the termination procedures identified in the franchise agreement, the court found that the defendants intentionally and knowingly continued to use the trademarks.[177] Upon this finding, the court used its discretion and awarded additional damages in the amount of $75,000.[178] The court, however, did not

167. *See id.* at *5.
168. *See id.* at *5 & n.31(citing Sheerin v. Davis (*In re* Davis), 3 F.3d 113 (5th Cir. 1993) (applying Texas law)).
169. Choice Hotels Int'l, Inc. v. Bhakta, No. 2:11-CV-00411, 2013 WL 1403526, at *5 (S.D. Tex. Apr. 5, 2013).
170. *Id.* at *8.
171. *Id.* at *6.
172. *Id.*
173. *See id.*
174. *See id.* at *7.
175. *Id.*
176. 15 U.S.C. § 1117(b) (2006).
177. *See Bhakta*, 2013 WL 1403526, at*8.
178. *Id.*

think the case was "exceptional" as to warrant an award of attorney's fees.[179]

In *Choice Hotels International, Inc. v. Patel*, also discussed above, Choice Hotels was not as fortunate.[180] In that case, Choice Hotels sued two former franchisees for their continued use of its trademarks after the termination of the franchise agreement.[181] Similar to the *Bhakta* case, Choice Hotels sought lost profits, lost royalties, and treble damages.[182] The court, however, found that certain questions of fact precluded summary judgment on monetary damages.[183]

In determining lost profit damages, the court utilized the following non-exhaustive factors as laid out by the Fifth Circuit:

> (1) whether the defendant intended to confuse or deceive; (2) whether sales have been diverted; (3) the adequacy of other remedies; (4) any unreasonable delay by the plaintiff in asserting her rights; (5) the public interest in making the conduct unprofitable[;] and (6) whether it is a case of palming off.[184]

In *Patel*, the court found that the first three factors and the sixth factor weighed against awarding lost profits.[185] The court found that there was a genuine issue of material fact with regard to the first factor because the former franchisee undertook "extensive efforts" to remove Choice Hotels' trademarks.[186] Likewise, the court found that the former franchisee's conduct was "not the type of willful and egregious conduct" for which courts have awarded lost profits.[187] As to the second factor, the court found that the evidence left questions about whether the sales had been diverted.[188] With regard to the third factor, the court found that a permanent injunction was adequate relief.[189] And, finally, the sixth factor weighed against awarding relief because there was no evidence of "palming off."[190] Because issues of material fact remained with respect to Choice Hotels' requests for reasonable royalty damages and treble damages, the court held that the evidence did not support an award of lost profits at the summary judgment stage.[191]

Bhakta and *Patel* are similar cases in many ways, but the outcome of the lost profits analysis differs. The *Bhakta* court did not undertake the same six-factor analysis the *Patel* court used. Had it done so, perhaps a question of fact would have precluded summary judgment in that case, as well. *Patel* shows that even when liability is established on summary judgment on a Lanham Act claim, a

179. *Id.*
180. Choice Hotels Int'l, Inc. v. Patel, 940 F. Supp. 2d 532, 536 (S.D. Tex. 2013).
181. *Id.* at 535.
182. *Id.* at 542.
183. *Id.*
184. *Id.* at 544 (quoting Seatrex, Inc. v. Sonbeck Int'l, Inc., 200 F.3d 358, 369 (5th Cir. 2000)) (internal quotation marks omitted).
185. *Id.* at 544–46.
186. *See id.* at 544–45.
187. *Id.* at 545.
188. *Id.*
189. *Id.* at 546.
190. *Id.*
191. *See id.* at 546–47.

defendant may still raise fact questions with respect to damages.

B. ATTORNEY'S FEES

In *Franlink, Inc. v. GJMS Unlimited, Inc.*, a franchisor that successfully obtained a permanent injunction to enforce a reformed noncompetition agreement against its former franchisee was not entitled to attorney's fees.[192] After obtaining a permanent injunction, the franchisor argued that it was entitled to attorney's fees under the Texas Civil Practice and Remedies Code.[193] Section 38.001(8) provides that "[a] person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for . . . an oral or written contract."[194] The court disagreed, pointing to section 15.51(c) of the Texas Business and Commerce Code.[195] Section 15.51, which governs remedies in actions to enforce noncompetes, only provides for attorney's fees in certain circumstances.[196] The court found that the legislature intended an award of attorney's fees in a single circumstance relating to noncompetition agreements: "In the context of a personal-services agreement, attorney's fees may be awarded to a promisor who satisfies certain evidentiary requirements in defending against enforcement of an unreasonable covenant."[197] The court found that section 15.51(c) applied over the more general Texas Civil Practice and Remedies Code section and did not contemplate an award of attorney's fees in a situation like the one in *Franlink*—dealing with an unreasonable noncompete provision that had previously been judicially reformed to cause the noncompete to be reasonable.[198] In such a case, the court found that the legislature intended to limit the relief available to injunctive relief.[199] Because attorney's fees are not injunctive relief, the court held that section 15.51(c) barred their recovery.[200] *Franlink* is an important holding for franchise practitioners to note given the frequency of litigation over noncompetition agreements found in and ancillary to franchise agreements.

C. INTEREST

In *Tricon Energy Ltd. v. Vinmar International, Ltd.*, the Fifth Circuit addressed a case of first impression: whether parties could contract for and arbitrators could award a postjudgment rate other than the federal statutory rate.[201] The court held that as a matter of contract interpretation, arbitrators could decide whether a provision allowed them to set the postjudgment rate.[202] In *Tricon* itself,

192. Franlink, Inc. v. GJMS Unlimited, Inc., 401 S.W.3d 705, 706 (Tex. App.—Houston [14th Dist.] 2013, pet. denied).
193. *Id.* at 707.
194. Tex. Civ. Prac. & Rem. Code § 38.001(8) (2008).
195. *Franlink*, 401 S.W.3d at 711–12.
196. *See id.* at 711.
197. *Id.*
198. *See id.* at 712.
199. *Id.*
200. *Id.*
201. Tricon Energy Ltd. v. Vinmar Int'l, Ltd., 718 F.3d 448, 456 (5th Cir. 2013).
202. *See id.* at 458.

however, the arbitrators awarded "post-award interest" instead of postjudgment interest.[203] The court found that this distinction dictated the result in this case.[204] Because it was unclear, the court held that the postjudgment interest should be based on the federal rate, not the rate that the arbitrators determined.[205] Thus, in future cases, it seems that parties may contract at alternative interest rates provided that the arbitrators clearly award "postjudgment" interest and provided that the matter is ultimately an issue of contract interpretation.

VIII. CONCLUSION

This survey period saw franchise and distribution cases covering a range of subject matter very familiar to franchise attorneys.

Among the procedural cases, the *Allegra Network, LLC v. Ruth* case on choice of law and the *Meltzer/Austin Restaurant Corp. v. Benihana National Corp.* case on breadth of discovery are of particular note. Although choice of law is often something of an afterthought, the *Allegra* decision should dispel any notion that it is inconsequential. The modification of applicable law in the middle of the franchisee's term in that case was dispositive on the enforceability of the franchise agreement's noncompete provision.[206] Not only is this case an important reminder for litigators to be mindful of the impact of choice of law, it is important for transactional attorneys to be mindful of the potential consequences of changing choice of law mid-term. And the *Meltzer* case is particularly significant in the discovery context. Franchisees often seek discovery concerning other, non-party franchisees in litigation for a variety of reasons, and franchisors often seek to shield this information. *Meltze*r analyzes these types of discovery requests in several contexts, and it could be useful to a future court analyzing these same issues.

There were few developments in the franchise relationship, termination, and nonrenewal front, although the Texas legislature once again amended the motor vehicle dealer statute, albeit in a relatively minor way. The *Mailing & Shipping Systems, Inc. v. Neopost USA, Inc.* case highlights the type of contract-related issues that may come up in a long-term franchise relationship with multiple agreements, amendments, or modifications arising between the parties, and it also contains a rare analysis of the duty of good faith and fair dealing in the context of a Texas contract.[207]

Two Choice Hotels International decisions, *Choice Hotels International, Inc. v. Bhakta* and *Choice Hotels International, Inc. v. Patel*, highlight the intellectual-property-related developments. Both cases involved a franchisee continuing to use trademarks after termination of its franchise agreement, and both arose in the summary judgment context. *Bhakta* contains an analysis of the

203. *See id.* at 460.
204. *See id.*
205. *Id.*
206. Allegra Network, LLC v. Ruth, Ch. 13 Case No. 10-50184, Adv. No. 10-5009, 2013 WL 139265, at *3 (Bankr. E.D. Tex. Jan. 10, 2013).
207. Mailing & Shipping Sys., Inc. v. Neopost USA, Inc., 937 F. Supp. 2d 879 (W.D. Tex. 2013).

"acquiescence" defense that many franchisees may be tempted to assert when a franchisor does not immediately bring suit after termination.[208] *Patel* represents a relatively straightforward example of a court strictly enforcing the Lanham Act against a franchisee with no active trademark licenses, at least as to liability.[209]

As for common law claims, the *Gold's Gym Franchising LLC v. Brewer* case highlights issues that may arise when a franchisor attempts to enforce a guaranty agreement.[210] Perhaps the most notable common law case this survey period was *Calvasina v. Wal-Mart Real Estate Business Trust*, which analyzed a vicarious-liability-like claim against a franchisor based upon premises liability. The case is significant for franchisors in that the court examined the franchise agreement and all the ways the franchisor could "control" the franchisee by establishing standards, but it still found no liability for the franchisor because the actual workplace was out of the franchisor's control.[211]

In the category of statutory claims, *AdvoCare International, L.P. v. Ford* is notable for affirming that a pure distributorship arrangement is not likely to give rise to "consumer" status under the Texas Deceptive Trade Practices Act, while a traditional "franchise" relationship might.[212]

Finally, in remedies, the two Choice Hotels International decisions demonstrate that, while an injunction may be relatively easy to obtain based upon a finding of liability under the Lanham Act, monetary damages could be more difficult to sufficiently prove at the summary judgment stage. The *Bhakta* court awarded monetary damages on summary judgment, but the *Patel* court conducted a more in-depth analysis and found fact issues that precluded summary judgment, demonstrating that damages should never be taken for granted, even if liability has been determined.[213] And, although a relatively minor point, the *Franlink, Inc. v. GJMS Unlimited, Inc.* case holds that attorneys' fees may not be recoverable if the only other remedy awarded is an injunction based on a noncompetition agreement.[214]

208. Choice Hotels Int'l, Inc. v. Bhakta, No. 2:11-CV-00411, 2013 WL 1403526 (S.D. Tex. Apr. 5, 2013).

209. Choice Hotels Int'l, Inc. v. Patel, 940 F. Supp. 2d 532 (S.D. Tex. 2013).

210. Gold's Gym Franchising LLC v. Brewer, 400 S.W.3d 156 (Tex. App.—Dallas Apr. 22, 2013).

211. Calvasina v. Wal-Mart Real Estate Business Trust, 906 F. Supp. 2d 625 (W.D. Tex. 2012).

212. AdvoCare Int'l, L.P. v. Ford, No. 05-10-00590-CV, 2013 WL 505210 (Tex. App.—Dallas Feb. 5, 2013, pet. denied).

213. *See Patel*, 940 F. Supp. 2d 532; *Bhakta*, 2013 WL 1403526, at *8.

214. Franlink, Inc. v. GJMS Unlimited, Inc., 401 S.W.3d 705, 706 (Tex. App.—Houston [14th Dist.] 2013, pet. denied).