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## Franchise Law

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# FRANCHISE LAW

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## I. INTRODUCTION

Texas courts continue to dissect procedural issues that franchisors often face during litigation, and this Survey period produced some important reminders for franchisors to consider as they negotiate franchise agreements. Other Texas cases during this Survey period should prompt franchisors to remain diligent with protection of their intellectual property as well as provide valuable insight on the evidentiary requirements of frequently litigated franchising issues, including various common law and statutory claims unique to the franchising model.

## II. PROCEDURE

### A. PERSONAL JURISDICTION

In *Jani-King Franchising, Inc. v. Falco Franchising, S.A.*,<sup>1</sup> the Dallas Court of Appeals analyzed whether the state district court had personal jurisdiction over a foreign franchisee, its branch manager, and its shareholders.

Falco, a Belgium-based company, and its principals approached Jani-King, a Texas corporation and franchisor of commercial cleaning services, about acquiring rights to a Jani-King franchise in Belgium. “Jani-King and Falco entered into a Regional Franchise Agreement . . . . The Agreement granted Falco an exclusive right to operate a Jani-King regional franchise in Belgium for an initial term of 20 years in exchange for . . .

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1. No. 05-15-00335-CV, 2016 WL 2609314, at \*1 (Tex. App.—Dallas May 5, 2016, no pet.) (mem. op.).

certain fees and royalties.”<sup>2</sup> After Falco fell behind on its payments to Jani-King, defaulted on reporting obligations, and noticed its intent to terminate the franchise agreement, Jani-King discovered that Falco had established a competing business and misused Jani-King’s confidential information.<sup>3</sup> Jani-King sued Falco and its principals for fraud and other torts, alleging that they had “misrepresented the causes for Falco’s poor performance, misrepresented revenue from sales, led Jani-King to believe Falco was dedicated to the relationship when it was not, and concealed the fact that they were violating the non-compete agreement.”<sup>4</sup> The alleged misrepresentations by Falco’s principals occurred during meetings they attended in Texas and by written communication with Jani-King. The alleged misrepresentations by Falco’s branch manager—the transmission of incomplete and inaccurate reporting—occurred via e-mail to Jani-King.<sup>5</sup>

Falco and its principals entered a special appearance to dispute personal jurisdiction.<sup>6</sup> The trial court granted all of the individual special appearances but denied Falco’s special appearance.<sup>7</sup> The question of jurisdiction was addressed on interlocutory appeal by the court of appeals.

The appellate court first held that the fiduciary-shield doctrine did not protect the individuals from the court’s jurisdiction because the individuals’ acts were tortious acts for which they could be personally liable.<sup>8</sup> The court then analyzed the individuals’ contacts with Texas in order to determine whether the court could assert specific personal jurisdiction.<sup>9</sup> The court found that Falco’s branch manager lacked sufficient contacts to support personal jurisdiction because “communications through telephone and email regarding negotiation and performance of a contract between [a] Texas plaintiff[ ] and [ ] foreign defendant[s] were not meaningful contacts of the foreign defendant with Texas.”<sup>10</sup> However, because the other principals made fraudulent statements and omissions while present in Texas regarding the franchise’s performance, payment assurances, and competing enterprise (which were core to Jani-King’s claims), the court found that Jani-King alleged sufficient facts to support personal jurisdiction as to Falco’s principals.<sup>11</sup>

Finally, the court of appeals confirmed that Texas courts had personal jurisdiction over Falco.<sup>12</sup> Of particular significance, the court noted that

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2. *Id.*

3. *Id.* at \*2.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at \*3.

10. *Id.* at \*4 (citing *KC Smash 01, LLC v. Gerdes, Hendrichson, Ltd., L.L.P.*, 384 S.W.3d 389, 393–94 (Tex. App.—Dallas 2012, no pet.)).

11. *Id.* at \*4–6.

12. *Id.* at \*8.

Falco purposefully availed itself of the privilege of doing business in Texas because (1) Falco's representatives "negotiated and entered into the Agreement which contemplated systematic and continuing contacts with Jani-King in Texas over a twenty [ ] year period"; (2) "Falco agreed to the jurisdiction of U.S. courts"; (3) "Falco performed tasks under the contract [in] Texas"—e.g., training, meetings, payments; and (4) Falco "agreed to apply Texas law to any dispute with Jani-King[.]"<sup>13</sup> Similar to its analysis of jurisdiction with respect to Falco's principals, the court determined that the claims were substantially related to Falco's contacts and that jurisdiction over Falco comported with traditional notions of fair play and justice.<sup>14</sup>

*Jani-King* shows Texas courts' consistent application of the Texas long-arm statute and their willingness to protect franchisors or franchisees against foreign parties who have reaped the benefits of doing business in Texas and invoked the protections afforded by Texas law.

## B. FORUM SELECTION

*Appliance Alliance, LLC v. Sears Home Appliance Showrooms, LLC*<sup>15</sup> demonstrates Texas courts' continued willingness to enforce forum-selection clauses in franchise agreements. A former franchisee and its owners sued Sears for wrongful termination, breach of contract, and "numerous [other] state law torts, including defamation, conversion, trespass, and tortious interference" regarding the parties' franchise relationship and Sears's repossession of the plaintiffs' franchise locations.<sup>16</sup> Sears removed the case from state to federal court and then filed a motion to transfer venue based on the forum-selection clause contained in the various agreements governing the parties' business relationship, which required litigation in Illinois.<sup>17</sup> The U.S. District Court for the Northern District of Texas granted Sears's motion to transfer the case to Illinois.<sup>18</sup> In doing so, the district court noted that the forum-selection clauses in the parties' agreements supported transfer and that such clauses "should be given controlling weight in all but the most exceptional cases."<sup>19</sup> This ruling is important because it confirms that franchisors should be able to enforce forum-selection clauses in their franchise agreements.<sup>20</sup>

In *Rainbow International LLC v. Scruggs*, the parties entered into two agreements: the Termination Agreement (executed May 31, 2007) and

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13. *Id.* at \*7–8.

14. *Id.*

15. No. 3:15-cv-01707-M, 2015 WL 9319179, at \*1 (N.D. Tex. Dec. 23, 2015). Haynes Boone attorneys Deborah S. Coldwell and Jamee M. Cotton represented Sears in this matter.

16. *Id.*

17. *Id.* at \*1, \*8.

18. *Id.* at \*8.

19. *Id.* (quoting *Saye v. First Specialty Ins. Co.*, No. 3:14-CV-202-M, 2014 WL 1386565, at \*3 (N.D. Tex. Apr. 9, 2014)).

20. *See id.*

the Settlement Agreement (executed September 1, 2009).<sup>21</sup> “At issue [was] whether a Termination Agreement provision titled ‘Applicable Law, Jurisdiction, and Venue’ remain[ed] in force in light of the [subsequent] Settlement Agreement[.]”<sup>22</sup>

Rainbow alleged claims for “breach of contract, federal and common law service mark infringement, federal unfair competition and false designation of origin, unfair trade practices, and common law unfair competition.”<sup>23</sup> Scruggs asserted that the U.S. District Court for the Western District of Texas “should dismiss the case because it lack[ed] personal jurisdiction, venue [was] improper, and forum non conveniens should be exercised.”<sup>24</sup>

Scruggs argued that “the Settlement Agreement, which [*did*] *not* contain any choice of law, venue, or forum provision akin to the Termination Agreement, superseded the Termination Agreement.”<sup>25</sup> The district court disagreed and found that the Settlement Agreement did not supersede the Termination Agreement; therefore, the Applicable Law, Jurisdiction, and Venue provision contained within the Termination Agreement was valid and enforceable.<sup>26</sup> The Termination Agreement specifically stated that it could only be amended “*by written instrument designated as an amendment* to [the] Termination Agreement and executed by all of the parties.”<sup>27</sup> Neither party disputed that “the Settlement Agreement . . . [was] not designated as an amendment to the Termination Agreement.”<sup>28</sup> The district court noted that if Scruggs had “intended for the Settlement Agreement to supersede the entirety of the Termination Agreement, then the Settlement Agreement should have contained a clause” making that designation.<sup>29</sup> Instead, “the Settlement Agreement was drafted to specifically address alleged breaches of the Termination Agreement[—not] as a full replacement of the Termination Agreement.”<sup>30</sup> The district court also found that venue was proper because Rainbow had satisfied the requirements of 28 U.S.C. § 1391(b).<sup>31</sup>

Finally, the district court found that the defendants had not met their burden under the doctrine of forum non conveniens.<sup>32</sup> First, Scruggs “failed to explain what specific court should be the alternate forum. Second, each case that [Scruggs] cited in which the court granted dismissal based on forum non conveniens grounds involved a foreign court as the

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21. Rainbow Int’l LLC v. Scruggs, No. W:15-CV-162, 2015 WL 11622491, at \*1 (W.D. Tex. Dec. 14, 2015).

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at \*3.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at \*4.

31. *Id.* at \*4–5.

32. *Id.* at \*5–6.

proposed alternative forum.”<sup>33</sup> In this case, the district court noted that there was no evidence that Scruggs was “seeking to have any court outside of South Carolina serve as the forum in this case.”<sup>34</sup> The district court also noted,

The applicable case law strongly suggest[ed] that forum non conveniens is reserved exclusively for cases in which the proposed alternative forum is a judicial body located outside of the United States. Only in exceptional circumstances (which [did] not apply here) might forum non conveniens require dismissal of a case so that it can be subsequently filed in a state court.<sup>35</sup>

Accordingly, the district court denied Scruggs’s motion to dismiss for lack of personal jurisdiction and improper venue.<sup>36</sup>

The *Rainbow* case reflects the importance of careful drafting as it relates to subsequent agreements. In particular, a subsequent agreement should specifically address which provisions of any prior agreements it is replacing and state that the subsequent agreement is entirely replacing any prior agreements between the parties.

### C. ARBITRATION AND CLASS ACTIONS

Franchisors often directly own and operate restaurants within their franchise systems. Unsurprisingly, franchisors—alongside their franchisees—are at risk for class action lawsuits associated with the operation of their corporate-owned franchises. The following case illustrates how carefully and consistently incorporating arbitration provisions into employment agreements could prevent conditional class certification.

Mexican Restaurants, Inc. (MRI), the franchisor of Casa Olé Mexican restaurants, recently faced a potential class action lawsuit for alleged illegal compensation practices at its corporate-owned franchise stores.<sup>37</sup> In *White v. Turner*, the U.S. District Court for the Southern District of Texas addressed the arbitrability of the employees’ claims as well as the class certification issues associated therewith.<sup>38</sup> Although sued alongside one of its franchisees, the district court noted that the franchisor and franchisee were not joint employers of the employees who were working solely at the franchisee’s locations, and the district court addressed the claims against MRI separately.<sup>39</sup>

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33. *Id.* at \*6 (internal citation omitted).

34. *Id.*

35. *Id.* (internal citations omitted) (citing *Amini Innovation Corp. v. Bank & Estate Liquidators, Inc.*, 512 F. Supp. 2d 1039, 1042 (S.D. Tex. 2007) (“Only when the more convenient forum is a foreign country can a suit brought in a proper federal venue be dismissed on grounds of forum non conveniens.”) (quoting *In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147, 1159 n.15 (5th Cir. 1987), *vacated on other grounds*, *Pan Am. World Airways, Inc. v. Lopez*, 490 U.S. 1032 (1989))).

36. *Id.*

37. *White v. Turner*, No. H-15-1485, 2016 WL 1090107, at \*1 (S.D. Tex. Mar. 21, 2016).

38. *Id.* at \*1–2.

39. *Id.* at \*2.

MRI filed a motion to compel arbitration based on its written agreements with its employees “requiring arbitration of all employment-related disputes with MRI,” including claims arising under the Fair Labor Standards Act.<sup>40</sup> Although only one of the two employees involved produced a signed, written agreement evidencing the arbitration provision at issue, the district court considered evidence presented by MRI “that during the relevant period, [MRI] . . . required every employee and prospective employee to sign an arbitration agreement as a condition of employment.”<sup>41</sup> However, due to the franchisor’s document-retention policy, the personnel files for the employee at issue had been destroyed.<sup>42</sup> In its analysis, the district court noted,

Although the [Federal Arbitration Act] requires a written agreement to arbitrate if the agreement existed but cannot be produced because it [was] lost or destroyed, a court may still enforce it and compel arbitration if the moving party can show its contents and that it was not lost or destroyed in bad faith.<sup>43</sup>

Because the employee did not dispute the existence of the agreement—i.e., made no unequivocal denial—the district court found “[t]he existence, content, and enforceability of the agreement between [the employee] and MRI [was] not in issue.”<sup>44</sup> The district court found that the employees entered into valid arbitration agreements covering all claims against MRI.<sup>45</sup> Consistent with the Federal Arbitration Act’s mandate to enforce valid arbitration agreements, the district court granted MRI’s motion to compel arbitration and dismissed all claims against MRI without prejudice in favor of arbitration.<sup>46</sup>

Still remaining, however, was the employees’ motion for conditional class certification. The employees argued that the district court should conditionally certify a collective action because some of the employees may have state law defenses as to the validity of the arbitration agreements.<sup>47</sup> The district court rejected the employees’ argument and denied conditional certification because the claims of the representative plaintiffs were dismissed, and the request was therefore moot.<sup>48</sup>

The *White* case demonstrates the importance of consistently applying and maintaining records reflecting the terms under which franchisors wish to operate—especially in the alternative dispute context. A well-drafted arbitration clause including limitations on class actions or collec-

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40. *Id.* at \*1.

41. *Id.* at \*3–4.

42. *Id.*

43. *Id.* at \*3 (internal citation omitted) (citing FED. R. EVID. 1004; TEX. R. EVID. 1004; *Bituminous Cas. Corp. v. Vacuum Tanks, Inc.*, 975 F.2d 1130, 1132 (5th Cir. 1992)).

44. *Id.* at \*3–4.

45. *Id.*

46. *Id.* at \*2–4.

47. *Id.* at \*4.

48. *Id.* at \*4–5.

tive actions may result in less overall litigation and more manageable conflict resolution.

### III. INTELLECTUAL PROPERTY: TRADEMARKS

In *Choice Hotels International, Inc. v. Frontier Hotels, Inc.*, the U.S. District Court for the Southern District of Texas granted Choice Hotels' motion for summary judgment, finding that a former Choice Hotels franchisee continued to use Choice Hotels' trademarks after termination of their franchise agreement.<sup>49</sup>

"Choice Hotels offers hotel and motel services through several well-known brands such as CAMBRIA SUITES®, COMFORT INN®, COMFORT SUITES®, SLEEP INN®, and RODEWAY INN®. Choice Hotels owns approximately twenty-four [ ] different trademark registrations related to the 'COMFORT' family of marks."<sup>50</sup> Choice Hotels entered into a franchise agreement with franchisee Frontier, who was required to provide certain fees and monthly financial data to Choice Hotels.<sup>51</sup> After notices of default went unheeded by Frontier, Choice Hotels sent a notice of termination and demanded that Frontier cease using Choice Hotels' registered trademarks.<sup>52</sup> "Section eleven (11) of the [franchise] agreement stat[ed] that upon termination, the former franchisees must '[i]mmediately discontinue any and all use of our Intellectual Property [and] refrain from using the Brand Marks to identify the Hotel . . . .'"<sup>53</sup>

"After the termination of the franchise agreement, Choice Hotels learned that [Frontier]" was still using Choice Hotels' trademarks and "Choice Hotels received a customer complaint . . . regarding [Frontier's] hotel."<sup>54</sup> The guest complained "that she had a poor experience at the hotel and had been unable to log the complaint on Choice Hotels' website. Choice Hotels advised the customer that this was because [Frontier's] franchise agreement had been terminated."<sup>55</sup> Thereafter, "Choice Hotels sent [Frontier] written notice advising them to cease and desist with the use of all COMFORT INN® marks," but photographs taken in subsequent months showed that Frontier continued to use Choice Hotels' trademarks on the hotel's exterior and internet advertisements.<sup>56</sup> Choice Hotels sued Frontier for violations of the Lanham Act and false designation of origin, as well as Texas common law trademark infringement, and Texas common law unfair competition. Choice Hotels moved for summary judgment.<sup>57</sup>

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49. *Choice Hotels Int'l v. Frontier Hotels, Inc.*, No. H-15-2355, 2016 WL 4367993, at \*3-4 (S.D. Tex. Aug. 15, 2016).

50. *Id.* at \*1 (internal citation omitted).

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* (internal citation omitted).

56. *Id.* at \*2.

57. *Id.* Frontier failed to respond to the motion for summary judgment, so the motion was unopposed.



The district court began its analysis by noting that its determination of whether Frontier was “liable to Choice Hotels for trademark infringement and false designation of origin pursuant to the Lanham Act as well as for trademark infringement and unfair competition pursuant to Texas Common Law” required only a single inquiry “because the facts that support a claim for trademark infringement under the Lanham Act also support a claim for false designation of origin under the Lanham Act.”<sup>58</sup>

The district court considered whether Choice Hotels had satisfied the elements of a Lanham Act claim, which first requires a legally protected mark, and then that

a person “uses (1) any reproduction, counterfeit, copy, or colorable imitation of a mark; (2) without the registrant’s consent; (3) in commerce; (4) in connection with the sale, offering for sale, distribution, or advertising of any goods; (5) where such use is likely to cause confusion, or to cause mistake or to deceive.”<sup>59</sup>

The district court found that “Choice Hotels [had] submitted unopposed evidence that it legally owned the COMFORT INN® family of marks”; that the record clearly showed Frontier “continued to use Choice Hotels’ legally protected COMFORT INN® trademarks long after the termination of the franchise agreement as well as the . . . cease and desist letter”; and that Frontier’s “use of the marks was clearly in connection with the sale, offering for sale, and advertising of services[—the] evidence show[ed] visible COMFORT INN® marks in a photo uploaded by [Frontier] to a hotel booking site advertising the property.”<sup>60</sup> Finally, the district court found that there was “uncontested evidence in the record of actual consumer confusion” due to the customer’s complaint.<sup>61</sup> Accordingly, there was uncontested evidence that there was “no genuine issue of material fact regarding [Frontier’s] engagement in trademark infringement against Choice Hotels” and the court granted Choice Hotels’ motion for summary judgment.<sup>62</sup>

This case serves as a good reminder to franchisors to diligently protect their trademarks. For example, franchisors should follow up with franchisees after termination to ensure that they are no longer using their protected trademarks, and take appropriate action if needed.

#### IV. COMMON LAW CLAIMS

##### A. FRAUD AND MISREPRESENTATION

Franchisees’ tort-based claims for fraud, fraudulent inducement, and negligent misrepresentation often face challenges from franchisors at the

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58. *Id.* at \*3 (citing *Choice Hotels Int’l, Inc. v. Patel*, 940 F. Supp. 2d 532, 538 (S.D. Tex. 2013); *Philip Morris USA Inc. v. Lee*, 547 F. Supp. 2d 667, 674 (W.D. Tex. 2008)).

59. *Id.* (quoting *Am. Rice, Inc. v. Producers Rice Mill, Inc.*, 518 F.3d 321, 329 (5th Cir. 2008)).

60. *Id.*

61. *Id.* at \*4.

62. *Id.*

motion to dismiss and summary judgment phases that these claims are barred by the economic loss rule or that franchisees have no evidence of any false statements or material omissions. A yogurt franchisee faced such arguments and ultimately had its tort claims dismissed by the U.S. District Court for the Northern District of Texas.<sup>63</sup> The U.S. Court of Appeals for the Fifth Circuit considered and upheld the district court's dismissal of the franchisee's tort-based claims in *Yumilicious Franchise, L.L.C. v. Barrie*.<sup>64</sup> After Yumilicious brought an action against franchisee-defendants for breaches of two franchise agreements, the franchisees counterclaimed that Yumilicious fraudulently induced them to enter into the two franchise agreements and asserted claims for fraud, negligent misrepresentation, and fraudulent inducement, among others.<sup>65</sup> The district court summarily dismissed these counterclaims, which the Fifth Circuit upheld.<sup>66</sup>

First, as to the negligent misrepresentation claim, the Fifth Circuit upheld the district court's determination that this claim "failed in part because [there was] no evidence that Yumilicious's actions caused injury and in part because [the claim] was barred by the economic loss rule."<sup>67</sup> The Fifth Circuit explained that the economic loss rule "generally precludes recovery in tort for economic losses resulting from the failure of a party to perform under a contract."<sup>68</sup> As such, "the rule restricts contracting parties to contractual remedies for those economic losses associated with the relationship, even when the breach might reasonably be viewed as a consequence of a contracting party's negligence."<sup>69</sup> The Fifth Circuit rejected the franchisees' argument that *Formosa Plastics Corp. USA v. Presidio Engineers and Contractors, Inc.*,<sup>70</sup> which exempts "the independent injury requirement for fraudulent inducement claims," protected the negligent misrepresentation claim from the application of the economic loss rule.<sup>71</sup> In affirming the lower court, the Fifth Circuit explained that the franchisees' argument fails since *Formosa's* "rejection of the independent injury requirement in fraudulent inducement claims does not extend to claims for negligent misrepresentation or negligent inducement."<sup>72</sup>

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63. *Yumilicious Franchise, L.L.C. v. Barrie* (*Yumilicious I*), No. 3:13-CV-4841-L, 2015 WL 1856729, at \*8 (N.D. Tex. Apr. 23, 2015), *aff'd*, 819 F.3d 170 (5th Cir. 2016). *Yumilicious I* was discussed at length in the 2016 edition of the *SMU Annual Texas Survey*. See Deborah S. Coldwell, et al., *Franchise Law*, 2 SMU ANN. TEX. SURV. 159, 173–76 (2016).

64. (*Yumilicious II*), 819 F.3d 170 (5th Cir. 2016).

65. *Id.* at 173.

66. *Id.* at 173–74.

67. *Id.* at 177.

68. *Id.* at 177–78 (quoting *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 12 (Tex. 2007)).

69. *Id.* at 178 (quoting *Lamar Homes*, 242 S.W.3d at 12–13).

70. 960 S.W.2d 41 (Tex. 1998) (rejecting the independent injury requirement for fraudulent inducement claims).

71. *Yumilicious II*, 819 F.3d at 178.

72. *Id.* (quoting *D.S.A., Inc. v. Hillsboro Indep. Sch. Dist.*, 973 S.W.2d 662, 663 (Tex. 1998) (per curiam)).

As to the fraudulent inducement claim, to which the economic loss rule is inapplicable under *Formosa*, the Fifth Circuit upheld dismissal of the claim on evidentiary grounds and also looked to the disclaimer of reliance as an additional ground to defeat the fraud-based claims.<sup>73</sup> In affirming the dismissal of the fraudulent inducement claim, the Fifth Circuit agreed that the franchisees failed to “introduce[ ] any evidence that Yumilicious made false statements or material omissions.”<sup>74</sup> Stressing that “[p]leadings are not summary judgment evidence,”<sup>75</sup> the Fifth Circuit determined that “[w]ithout affidavits, declarations, . . . or some other concrete evidence concerning” the alleged false statements or material omissions, no triable issue of fact existed on the franchisee’s fraudulent inducement claims.<sup>76</sup> Furthermore, the Fifth Circuit found that “[e]ven if [the franchisee] had introduced evidence showing a triable issue of fact” on the issue of whether misleading statements or omissions occurred, the fraudulent inducement claim still failed because “the franchise agreement contain[ed] an explicit clause . . . disclaim[ing] reliance on any express or implied statements about potential volume, profits, or success of the business.”<sup>77</sup>

The Fifth Circuit noted that “[u]nder Texas law, a statement disclaiming reliance is sufficient to waive fraud-based claims.”<sup>78</sup> Thus, although the district court had not considered Yumilicious’s argument that the franchise agreement’s disclaimer of reliance waived representations outside the franchise disclosure document, the Fifth Circuit cited contractual waiver-of-reliance provisions in the franchise agreement as an additional basis for upholding the dismissal of the fraudulent inducement claims.<sup>79</sup>

*Yumilicious II* is a useful reminder that, while the economic loss rule is not applied to fraudulent inducement claims, this rule can defeat misrepresentation-based claims for a party’s failure to perform under a contract. In addition, *Yumilicious II* reiterates the requirement that the party with the burden of proof must provide concrete evidence of the false statements or omissions at the summary judgment phase. Finally, *Yumilicious II* indicates a willingness by courts to enforce a properly drafted waiver-of-reliance clause that expressly disclaims the alleged misstatements at issue. However, whether the alleged misstatements are expressly disclaimed, and therefore contradict the terms of the franchise agreement, is often not clear cut, as was the situation in the next case—*Mercedes-Benz USA, LLC v. Carduco, Inc.*<sup>80</sup>

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73. *Id.*

74. *Id.*

75. *Id.* (quoting *Wallace v. Tex. Tech Univ.*, 80 F.3d 1042, 1047 (5th Cir. 1996)).

76. *Id.*

77. *Id.*

78. *Id.* (citing *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 181 (Tex. 1997)).

79. *Id.*

80. No. 13-13-00296-CV, 2016 WL 1274535, at \*1 (Tex. App.—Corpus Christi Mar. 31, 2016) (mem. op.), *set aside, opinion not vacated*, No. 13-13-00296-CV, 2016 WL 4939377 (Tex. App.—Corpus Christi Sept. 15, 2016, no pet.) (mem. op.).

*Carduco* also involved a disclaimer-of-reliance provision, but with different results. In this case, a jury found the automobile franchisor, Mercedes-Benz, and its employees liable for fraudulent inducement, and it also found the employees liable for negligent misrepresentation.<sup>81</sup> The Corpus Christi Court of Appeals upheld the jury's findings of fraudulent inducement and negligent misrepresentation based on Mercedes-Benz's misrepresentation that a purchaser of an automobile franchise could relocate to McAllen, Texas, and Mercedes-Benz's failure to disclose to the purchaser its intent to allow the addition of a new dealership in the McAllen area.<sup>82</sup> Plaintiff Carduco, Inc. purchased the assets of his son's existing Harlingen Mercedes-Benz dealership with the intent to move the dealership to McAllen.<sup>83</sup> Evidence was presented that Mercedes-Benz had approved the previous dealership's relocation to McAllen and that Mercedes-Benz was aware that Carduco intended to relocate to McAllen.<sup>84</sup> At around the same time, Mercedes-Benz allegedly entered into negotiations with another dealer to open up an exclusive dealership in the McAllen area, and Carduco's official request to relocate to McAllen was denied.<sup>85</sup> Mercedes-Benz also failed to preserve emails from potential witnesses once it became aware of possible litigation, so the jury was given a spoliation instruction.<sup>86</sup>

After reviewing the evidence, the court of appeals determined that reasonable jurors could have found that Mercedes-Benz intentionally did not inform Carduco about Mercedes-Benz's approval of the new dealership in the McAllen region, that the region could only support one dealership, that opening a new dealership in the McAllen area would have a negative effect on Carduco's business, and that Mercedes-Benz intentionally reassigned affluent demographic areas to the new McAllen dealership.<sup>87</sup> Relying on *Playboy Enterprises, Inc. v. Editorial Caballero, S.A. de C.V.*,<sup>88</sup> Mercedes-Benz argued that Carduco's claims for fraudulent inducement and negligent misrepresentation failed because Carduco relied on oral representations that directly contradicted the express terms of the Dealer Agreement, and therefore were not justified as a matter of law.<sup>89</sup> The court rejected Mercedes-Benz's argument for a number of reasons. First, the court determined that the jury could have found that Mercedes-Benz made representations or non-disclosures that did not directly contradict the Dealer Agreement, which provided that: (1) Carduco understood that

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81. *Id.* at \*3.

82. *Id.* at \*11, \*15.

83. *Id.* at \*2.

84. *Id.* at \*10–11.

85. *Id.* at \*2.

86. *Id.* at \*22–23.

87. *Id.* at \*10–12.

88. 202 S.W.3d 250, 258 (Tex. App.—Corpus Christi 2006, pet. denied) (“[R]eliance upon an oral representation that is directly contradicted by the express, unambiguous terms of a written agreement between the parties is not justified as a matter of law.”) (quoting *DRC Parts & Accessories, L.L.C. v. VM Motori, S.P.A.*, 112 S.W.3d 854, 858 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (en banc)).

89. *Carduco*, 2016 WL 1274535, at \*3.

he did not have an exclusive right to sell in his area; and (2) Carduco had no right to relocate without approval.<sup>90</sup> The court found that the jury could have found that Mercedes-Benz made other misrepresentations or non-disclosures that did not contradict the two express terms of the Dealer Agreement.<sup>91</sup> Second, the court also rejected Mercedes-Benz's argument that Carduco's claim was precluded by the disclaimer of reliance, which stated that: (1) no representations outside of the Dealer Agreement were made by Mercedes-Benz and its agents; and (2) Carduco did not rely on any extra-contractual representations.<sup>92</sup> The court found that Mercedes-Benz had not shown "a clear and unequivocal disclaimer-of-reliance clause."<sup>93</sup> Moreover, the asset purchase agreement between Carduco and the prior owner of the dealership, which was separate from the Dealer Agreement between Carduco and Mercedes-Benz, "[did] not contain a disclaimer of reliance."<sup>94</sup> Furthermore, the court found that there was "no evidence that the disclaimer of reliance . . . was negotiated, and it [was admittedly] boilerplate," which weighed "in favor of Carduco's claim that the disclaimer [was] not binding."<sup>95</sup> In addition, the court explained that under *Italian Cowboy Partners, Ltd. v. Prudential Insurance Co. of America*, "a disclaimer of reliance . . . negat[ed] the element of reliance in a suit for fraudulent inducement only if the parties disclaimed reliance on representations about a specific matter in dispute."<sup>96</sup> Here, the court found, "there [was] no evidence that Carduco's move to McAllen or that the [new dealership] deal was in dispute at the time the parties entered into the [Dealer Agreement]."<sup>97</sup> Finally, the court rejected Mercedes-Benz's argument that it had "no duty to disclose . . . [because] no confidential or fiduciary relationship[ ]" existed between the parties.<sup>98</sup> The court explained the circumstances giving rise to a duty to disclose in arms-length transactions:

[W]hen: (1) "one voluntarily discloses information, he has a duty to disclose the whole truth"; (2) "one makes a representation, he has a duty to disclose new information when the new information makes the earlier representation misleading or untrue"; (3) "one makes a partial disclosure and conveys a false impression, he has a duty to speak"; and (4) one knows that the other is about to enter into a contract under a mistake as to undisclosed facts, he has a duty to disclose facts basic to the transaction if the other party would reasonably expect a disclosure of those facts because of the relationship between the parties, the custom or trade, or other objective

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90. *Id.* at \*3, \*13–15.

91. *Id.* at \*13–15.

92. *Id.* at \*15.

93. *Id.* at \*15–16.

94. *Id.* at \*16.

95. *Id.*

96. *Id.* at \*17 (citing *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 332 (Tex. 2011)).

97. *Id.*

98. *Id.*

circumstances.<sup>99</sup>

Here, the court found “a duty to disclose arose in at least one, if not all [four of these] situations.”<sup>100</sup>

Waiver-of-reliance provisions have received significant attention in both state and federal courts in Texas, as they have gained popularity in franchise agreements. Because reliance is a necessary element of fraud, these disclaimers are meant to preclude fraudulent inducement and fraud claims. Although such disclaimers can be enforceable, as evidenced by *Yumilicious II*, whether these disclaimers will be enforced can be difficult to predict, as evidenced by *Carduco*. This is because determining whether the alleged misrepresentation directly contradicts the express terms of a franchise agreement depends on how the alleged misrepresentations are defined.

#### B. VICARIOUS LIABILITY

The vicarious liability of a franchisor often depends upon the finding of an agency relationship between franchisor and franchisee. Agency relationships that can impose vicarious liability can be either actual or apparent. While actual agency is generally found if a franchisor has actual control over the instrumentality that causes harm, apparent agency can be found if the franchisor (putative principal) represents that the franchisee (putative agent) is in fact the franchisor’s agent. Thus, it is the acts of the franchisor, and not the franchisee’s acts, that determine whether vicarious liability based on apparent agency exists. The following two cases considered apparent agency arguments.

In *Barragan v. General Motors LLC*,<sup>101</sup> the U.S. District Court for the Western District of Texas considered *when* a franchisor’s argument regarding the existence of an apparent agency relationship between franchisor and franchisee could be considered. In this case, a driver and her brother were killed when the driver lost control of the General Motors (GM) vehicle she was driving with its attached U-Haul trailer.<sup>102</sup> The next friend to the minor children of the decedent sued GM and U-Haul, asserting various claims including manufacturing defect, negligence, and breach of the implied warranty of merchantability.<sup>103</sup> U-Haul moved to dismiss the breach of implied warranty of merchantability claim asserted against it because the complaint alleged that the U-Haul trailer was rented from defendant Kelton’s Inc. and not from U-Haul.<sup>104</sup> Denying the motion to dismiss as to the breach of implied warranty of merchantability claim against U-Haul, the district court stated that the

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99. *Id.* (quoting *Playboy Enters., Inc. v. Editorial Caballero, S.A. de C.V.*, 202 S.W.3d 250, 260 (Tex. App.—Corpus Christi 2006, pet. denied)).

100. *Id.*

101. No. SA-15-CV-854-DAE, 2016 WL 3519675 (W.D. Tex. June 22, 2016).

102. *Id.* at \*1.

103. *Id.* at \*1–2.

104. *Id.* at \*8.

complaint asserted “that Kelton’s [was] a franchise dealer for U-Haul.”<sup>105</sup> As such, the district court determined that whether potential vicarious liability for breach of merchantability fell on U-Haul was an issue of agency.<sup>106</sup> Because “at the motion to dismiss stage, Plaintiffs need not have determined the party on whom liability ultimately falls,” the district court denied U-Haul’s motion to dismiss.<sup>107</sup> The district court could therefore presumably consider the agency issue at summary judgment.

In *Won Kyu Kye v. New Star Realty, Inc.*,<sup>108</sup> the Dallas Court of Appeals considered the agency issue at the summary judgment stage. In this case, Plaintiff Kye “was in California and saw [a newspaper] advertisement . . . [that] offer[ed] three retail alcohol stores in Texas for sale.”<sup>109</sup> Kye then “contacted the broker, . . . [who was with defendant] New Star Realty, Inc., to inquire about the stores.”<sup>110</sup> The broker explained that the areas around the stores were “dry,” meaning that alcohol could not be sold, so “residents of the adjacent ‘dry’ areas would drive to the stores—which were in a ‘wet’ area—to purchase alcohol.”<sup>111</sup> Plaintiff testified that the broker “guaranteed that the surrounding ‘dry’ areas adjacent to the [stores] would stay ‘dry’ forever” and this was why the stores are so profitable.<sup>112</sup> Plaintiff purchased the three stores.<sup>113</sup> “Within a year of his purchase, voters . . . chang[ed] the areas surrounding the stores from ‘dry’ to ‘wet’ . . . [A]s a result, the stores experienced a significant decrease in revenues and eventually closed,” and Plaintiff sued several defendants, including New Star Realty.<sup>114</sup> Plaintiff’s claims against New Star Realty were based on the apparent authority of the individual broker to represent on behalf of New Star Realty that the local laws regarding the designation of “‘wet’ and ‘dry’ areas would never change.”<sup>115</sup>

After the trial court granted summary judgment in favor of the brokerage firm based on a finding that no apparent agency existed, Plaintiff Kye appealed. In upholding summary judgment in favor of the brokerage firm, the court of appeals determined that Kye’s evidence, even if true, did not establish apparent authority.<sup>116</sup> First, the court explained that to determine whether apparent authority exists, only the acts of the principal—here the brokerage firm—are relevant.<sup>117</sup> The court explained that apparent authority arises if the principal knowingly allows an agent to represent that it has authority or if the principal negligently allows the

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105. *Id.* at \*9.

106. *Id.*

107. *Id.*

108. No. 05-15-00110-CV, 2016 WL 3523683 (Tex. App.—Dallas, June 27, 2016, no pet.) (mem. op.).

109. *Id.* at \*1.

110. *Id.*

111. *Id.*

112. *Id.* at \*2.

113. *Id.*

114. *Id.*

115. *Id.* at \*3–4.

116. *Id.* at \*5–6.

117. *Id.* at \*3.

agent to represent that it has authority, and the plaintiff justifiably relies on the representations.<sup>118</sup> As such, apparent authority is based on the principal's acts and "is limited to the scope of responsibility that is apparently authorized."<sup>119</sup>

Here, Kye's evidence related to acts of the broker (the purported agent) and not to New Star Realty (the purported principal)—i.e., the contents of the broker's business cards, the broker's statement that he was vice president of New Star Realty, the broker's use of documents with the New Star Realty corporate logo, and the broker's use of documents identifying both the broker and New Star Realty as the broker.<sup>120</sup>

Nor did the complained-of acts of New Star Realty support Kye's claim of apparent authority.<sup>121</sup> The court explained that to raise a fact issue, Kye would have to provide evidence that New Star Realty "clothed [the broker] with the indicia of authority, leading a reasonably prudent person to believe that [the broker] had the authority to make [the] statement on behalf of [New Star Realty]" guaranteeing that the local areas would remain dry and that Kye "exercised reasonable diligence . . . to ascertain the scope of [the broker's] authority."<sup>122</sup> Here, "evidence that [New Star Realty] identified [the broker] as vice president and referred to the [broker's] Dallas office on [the New Star Realty] website did not raise an issue of fact regarding whether" apparent authority to make the representation existed since "[t]he mere appointment of a person as a 'vice president' does not by itself establish apparent authority."<sup>123</sup>

As *Barragan* emphasized, the existence of apparent agency is a question of fact. Thus, courts will generally not consider whether an agency relationship exists between franchisor and franchisee at the pleadings stage. The *Kye* case emphasized that Texas courts will evaluate claims for apparent agency based upon the actions of the franchisor and not those of the purported-agent franchisee. Thus, the statements of the franchisee and use of the franchisor's logo will generally be insufficient to create apparent authority.

### C. TORTIOUS INTERFERENCE

*Colorado County Oil Co. v. Star Tex Distributors, Inc.*<sup>124</sup> involved competing "jobbers" for the sale of gasoline to a convenience store. In this

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118. *Id.* (citing *Gaines v. Kelly*, 235 S.W.3d 179, 182 (Tex. 2007)).

119. *Id.* at \*4 (quoting *First Valley Bank of Los Fresnos v. Martin*, 144 S.W.3d 466, 471 (Tex. 2004)).

120. *Id.*

121. *See id.* at \*5.

122. *Id.*

123. *Id.* (citing *Elaazami v. Lawler Foods, Ltd.*, No. 14-11-00120-CV, 2012 WL 376687, at \*4 (Tex. App.—Houston [14th Dist.] Feb. 7, 2012, no pet.) (mem. op.)) ("The mere appointment of a person as a 'vice president' does not by itself establish apparent authority as a matter of law for the person to execute employment contracts on behalf of the company.").

124. No. 14-14-00905-CV, 2016 WL 2743452, at \*1 (Tex. App.—Houston [14th Dist.] May 10, 2016, no pet.) (mem. op.).



case, Star Tex supplied gasoline to a “Day & Night” convenience store pursuant to a Dealer Franchise Agreement entered into in 2001, under which the convenience store agreed to buy Citgo-branded gasoline from Star Tex for an initial ten-year term, with an automatic renewal “on a year-to-year basis unless terminated.”<sup>125</sup> Starting in 2001, Star Tex provided Phillips-branded gasoline, although “Day & Night never signed a written amendment agreeing to accept Phillips-branded gasoline from Star Tex.”<sup>126</sup> However, “Day & Night accepted Star Tex’s gasoline deliveries under the Dealer Franchise Agreement for 10 years without complaint.”<sup>127</sup> Prior to the end of the ten-year term, Colorado County Oil Company (CCO), a competing jobber, negotiated to provide Day & Night with Valero-branded gasoline and paid the convenience store a \$50,000 signing bonus.<sup>128</sup> Star Tex was not notified that the Dealer Franchise Agreement was terminated, and Star Tex “discovered the change [in branding] when [it] visited the [Day & Night] store . . . and saw Valero signage in place.”<sup>129</sup>

Star Tex then sued Day & Night for breach of contract and the competing jobber, CCO, “for tortious interference with existing and prospective contractual relations.”<sup>130</sup> After a jury ruled in favor of Star Tex on the breach of contract and tortious interference claims, Day & Night and CCO appealed.<sup>131</sup> Affirming the jury verdict, the Fourteenth Houston Court of Appeals first rejected the argument that, because Star Tex supplied Phillips-branded rather than Citgo-branded gasoline, the 2001 Dealer Franchise Agreement no longer existed and therefore could not be breached by the convenience store or tortiously interfered with by CCO.<sup>132</sup> In doing so, the court of appeals determined that there was substantial evidence, including ten years of delivery of Phillips-branded gasoline without objection by the convenience store, to establish that the delivery of Phillips-branded gasoline was not a material breach of the Dealer Franchise Agreement.<sup>133</sup> Moreover, the court also determined that there was sufficient evidence of intentional interference, acts of interference, and proximate cause.<sup>134</sup> Even if CCO was told by Day & Night “that no gasoline supply contract was in place, . . . the jury reasonably could have concluded that the requisite intent, interference, and causal link were established based on . . . [the] \$50,000 signing bonus.”<sup>135</sup>

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125. *Id.*

126. *Id.* at \*2.

127. *Id.*

128. *Id.* at \*2–3.

129. *Id.* at \*3.

130. *Id.*

131. *Id.* at \*4.

132. *Id.* at \*6–8, \*10.

133. *Id.* at \*7–8, \*10.

134. *Id.* at \*10.

135. *Id.*

## V. STATUTORY CLAIMS

A. TEXAS DECEPTIVE TRADE PRACTICES:  
CONSUMER PROTECTION ACT

In the *Yumilicious II* case, the franchisee asserted counterclaims for, *inter alia*, Deceptive Trade Practices Act (DTPA) violations based upon: (1) alleged inaccuracies and omissions in the franchise disclosure document (FDD); and (2) statements that the franchise could go national and “that [the franchisor] was in the process of negotiating a contract with a national distributor” (but the franchisor ultimately did not consummate the deal).<sup>136</sup> The U.S. Court of Appeals for the Fifth Circuit first examined the sufficiency of the franchisee’s allegations under Section 17.46(b)(24) of the Texas Business and Commerce Code, which “requires intentional omission of a material fact by a Seller for the purpose of duping the customer.”<sup>137</sup> As to the misstatements in the disclosure document, the franchisee claimed that the disclosure document “failed to provide updated disclosures, . . . did not contain disclosures regarding approved vendors or distributors for required products, . . . underestimated start-up costs, and . . . included some but not all [of the] financial performance information previously disclosed.”<sup>138</sup> As to the alleged misstatements in the disclosure documents, the Fifth Circuit noted that the franchisee had not alleged “that Yumilicious knew any details about the start-up costs, financial performance, or other items discussed in the FDD that it allegedly failed to disclose.”<sup>139</sup> Thus, the Fifth Circuit agreed that there could be no liability “under the DTPA for [a] failure to disclose facts about which” Yumilicious was not aware.<sup>140</sup> Nor did the statements regarding going national constitute DTPA violations.<sup>141</sup> Because the parties agreed that Yumilicious was in negotiations to go national, “[t]he failure of those negotiations [did] not make [them] false.”<sup>142</sup> Furthermore, the franchisee’s DTPA claim failed because there were no allegations that the franchisee was a consumer protected by the DTPA, that the franchisee relied on information in the FDD, or that the franchisee suffered injury—which are all required elements under the DTPA.<sup>143</sup>

The Fifth Circuit also rejected the franchisee’s argument that a technical violation of the Franchise Rule was sufficient to state a claim under the DTPA, finding that a technical violation of the Franchise Rule—here “based on allegedly incomplete disclosure [under] the FDD”—is not suf-

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136. *Yumilicious Franchise L.L.C. v. Barrie (Yumilicious II)*, 819 F.3d 170, 174–76 (5th Cir. 2016).

137. *Id.* at 175 (quoting *Sidco Prods. Mktg., Inc. v. Gulf Oil Corp.*, 858 F.2d 1095, 1100 (5th Cir. 1988)).

138. *Id.*

139. *Id.* (footnote omitted).

140. *Id.* (quoting *Robinson v. Preston Chrysler-Plymouth, Inc.*, 633 S.W.2d 500, 502 (Tex. 1982)).

141. *Id.* at 175–76.

142. *Id.*

143. *Id.* at 176.

ficient to state a claim under the DTPA.<sup>144</sup> This holding serves as a reminder that violations of the Franchise Rule are not enough to establish a DTPA claim.

#### B. BANKRUPTCY ISSUES

The *In re Landin* case explored whether a franchisee's bankruptcy discharge should be revoked under several provisions of 11 U.S.C. § 727(a).<sup>145</sup> Defendant franchisee/debtor operated an H&R Block tax preparation store pursuant to the terms of a franchise agreement.<sup>146</sup> After Debtor did not cure various alleged breaches of the franchise agreement, H&R Block terminated the franchise agreement and sued the franchisee, seeking an injunction to enforce the non-compete in the franchise agreement.<sup>147</sup> Debtor then filed for Chapter 7 bankruptcy and "the U.S. Trustee commenced [an] adversary proceeding objecting to [Debtor's] discharge."<sup>148</sup> "The U.S. Trustee allege[d] that Debtor's discharge should be revoked under" various provisions of § 727(a), including Debtor's failure to keep and preserve "adequate books and records for his multiple businesses," including the H&R Block franchise, and for Debtor's failure to account for the loss of millions of dollars in payments received from H&R Block in the years preceding the filing of the bankruptcy.<sup>149</sup>

The Bankruptcy Court for the Western District of Texas agreed that the debtor's bankruptcy discharge should be revoked based on numerous false statements and on lack of transparency, including Debtor's failure to maintain adequate records of his businesses' finances.<sup>150</sup> In order to establish a basis for denial of discharge on these grounds under § 727(a)(3), the Trustee is required to prove by a preponderance of the evidence that the debtor: "(1) failed to keep and preserve financial records; and (2) that this failure prevented the plaintiff from ascertaining the debtor's financial condition."<sup>151</sup> In this case, the evidence established that Debtor "did not maintain separate business bank accounts" for his franchise, but "[i]nstead . . . used personal accounts for all his transactions," including his H&R Block franchise, "his insurance business, his Blimpie sandwich store [business], and his personal expenses."<sup>152</sup> In addition, Debtor "failed to keep any ledgers."<sup>153</sup> In denying the debtor's discharge, the bankruptcy court noted that "[a] debtor's . . . records need not contain

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144. *Id.*

145. *Robbins v. Landin (In re Landin)*, No. 15-50148-CAG, 2016 WL 3049626, at \*2 (Bankr. W.D. Tex. May 20, 2016).

146. *Id.*

147. *Id.*

148. *Id.* at \*1.

149. *Id.* at \*2, \*5, \*10.

150. *Id.* at \*8-9.

151. *Id.* at \*2, \*9 (citing *Robertson v. Dennis (In re Dennis)*, 330 F.3d 696, 703 (5th Cir. 2003)).

152. *Id.* at \*5, \*9.

153. *Id.* at \*9.

‘full detail,’ but” should enable “the U.S. Trustee to [be able to] ascertain [the debtor’s] financial condition.”<sup>154</sup> The bankruptcy court rejected Debtor’s argument that “the documents he turned over—which included deposits; cancelled checks; and bank statements—[were] sufficient for the U.S. Trustee to ascertain [his] financial condition.”<sup>155</sup> The bankruptcy court noted that “the adequacy of a debtor’s records is determined on a case by case basis [by considering] the ‘debtor’s occupation, financial structure, education, experience, sophistication and any other circumstances that should be considered in the interest of justice.’”<sup>156</sup> The bankruptcy court determined that none of these factors favored Debtor, who was “a sophisticated businessman with extensive experience in [running a] tax preparation [business] . . . [y]et [he] operated all of his businesses through a single bank account” without using ledgers.<sup>157</sup> As such, “the inadequacy of [the] recordkeeping [was] not justified,” and the bankruptcy court denied discharge on this basis.<sup>158</sup>

In addition, the bankruptcy court also determined that the discharge should be denied under § 727(a)(5) for Debtor’s failure to explain “satisfactorily the loss of assets or deficiency of assets to meet the debtor’s liabilities.”<sup>159</sup> The bankruptcy court agreed with the U.S. Trustee that Debtor “failed to explain what happened to [the] more than \$2.7 million . . . received from H & R Block from 2012 to 2014,” given that “when [Debtor] filed [for] chapter 7 bankruptcy . . . in January 2015, his assets only totaled a little over \$100,000.”<sup>160</sup> Nor was Debtor’s testimony “that he was spending lavishly and ‘living large’ after he entered into the [franchise agreement] with H & R Block” satisfactory proof of the loss of assets.<sup>161</sup> “[S]uch general explanations, without documentation, [were] not satisfactory” to meet Debtor’s burden of proof “to explain what happened to the assets.”<sup>162</sup> As such, the bankruptcy court also denied discharge on this basis as well as on several other grounds relating to the Debtor’s other businesses and other property.<sup>163</sup>

As highlighted in *In re Landin*, it is important that debtors keep adequate records not only after filing for Chapter 7 bankruptcy, but also before. Despite the fact that exceptions to discharge are strictly construed against a creditor, this case is a useful reminder that a bankruptcy discharge is a privilege and can be revoked for failure to keep separate business accounts and for failure to account for loss of assets.

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154. *Id.* (citing *Goff v. Russell Co.* (*In re Goff*), 495 F.2d 199, 201 (5th Cir. 1974)).

155. *Id.*

156. *Id.* (quoting *Cadle Co. v. Duncan* (*In re Duncan*), 562 F.3d 688, 697 (5th Cir. 2009)).

157. *Id.*

158. *Id.*

159. *Id.* at \*10.

160. *Id.*

161. *Id.*

162. *Id.* (citing *Chalik v. Moorefield* (*In re Chalik*), 748 F.2d 616, 619 (11th Cir. 1984) (per curiam); *First Tex. Sav. Ass’n, Inc. v. Reed* (*In re Reed*), 700 F.2d 986, 993 (5th Cir. 1983)).

163. *Id.*

## VI. REMEDIES: DAMAGES AND INJUNCTIVE RELIEF

## A. COMPENSATORY DAMAGES

*Colorado County Oil Co. v. Star Tex Distributors, Inc.*,<sup>164</sup> discussed earlier for its tortious interference claims, addressed the evidence required to calculate lost profits as part of damages awarded to an injured party. This case involved a ten-year dealer franchise agreement that covered the sale of gasoline by a gasoline distributor to a convenience store.<sup>165</sup> Under the agreement, the plaintiff agreed to provide “60,000 gallons of Citgo-branded gasoline [every] month for 10 years,” after which the agreement would automatically renew unless terminated.<sup>166</sup> In the year the dealer franchise agreement was set to expire, CCO entered into a similar ten-year contract with the convenience store for the sale of a different-branded gasoline.<sup>167</sup> After a series of communications between the distributor and CCO warning of interference with an existing contract, the distributor eventually filed suit against CCO and the convenience store.<sup>168</sup> The jury found in favor of the distributor and awarded damages from CCO as well as damages and attorney’s fees from the convenience store—which the defendants appealed.<sup>169</sup>

The Fourteenth Houston Court of Appeals affirmed the damages award against CCO for tortious interference.<sup>170</sup> The distributor had offered testimony of the approximate profit per gallon it received under the dealer franchise agreement and multiplied it by the minimum number of gallons (60,000) the convenience store was contractually obligated to buy.<sup>171</sup> CCO contested the approximation, arguing that the figure was “unduly speculative” because it depended on so many variables such as the economy, the cost of gasoline, and whether the distributor paid the gasoline refiner’s invoice on time.<sup>172</sup> In spite of CCO’s contention to the contrary, the court of appeals held that the evidence presented was sufficient to support the damages calculation offered by the distributor because “[r]ecovery for lost profits does not require that the loss be susceptible of exact calculation.”<sup>173</sup> At a minimum, this means that the injured party must present objective facts to support any “opinions or estimates” concerning damages to ensure that they are “reasonabl[y] certain[ ].”<sup>174</sup> Thus, the distributor’s estimate of lost profits, which was based

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164. No. 14-14-00905-CV, 2016 WL 2743452, at \*11–12 (Tex. App.—Houston [14th Dist.] May 10, 2016, no pet.) (mem. op.).

165. *Id.* at \*1.

166. *Id.*

167. *Id.* at \*2–3.

168. *Id.* at \*3.

169. *Id.* at \*4.

170. *Id.* at \*11–12; *see also infra* Part VI, Section D (discussing the damages awarded from the convenience store).

171. *Colo. Cty. Oil Co.*, 2016 WL 2743452, at \*11.

172. *Id.*

173. *Id.* at \*12 (quoting *Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 84 (Tex. 1992)).

174. *Id.* (quoting *Holt Atherton Indus.*, 835 S.W.2d at 84).

on the history of sales to that convenience store and the minimum number of gallons it was contractually obligated to purchase from the distributor, was sufficient to meet this standard.<sup>175</sup>

*Colorado County* serves as an example of the threshold that an injured party must meet to prove lost profits. Specifically, calculations offered need not be exact but must still be based on figures that allow the jury to reach a “reasonably certain” damage calculation. To this end, estimates based on the specific sale history between the distributor and the reseller seem key to offering a reasonable calculation that the court may uphold.

## B. PUNITIVE DAMAGES

*Mercedes-Benz USA, LLC v. Carduco, Inc.*, discussed earlier for its fraud and misrepresentation claims, initially involved a jury award of \$115 million for punitive damages.<sup>176</sup> The jury heard evidence that defendant Mercedes-Benz had fraudulently induced the plaintiff into entering franchise agreements; misrepresented facts concerning an existing Harlingen dealership’s relocation to McAllen, Texas; and “failed to preserve emails from potential witnesses” after learning of the plaintiff’s suit (thereby earning a spoliation instruction).<sup>177</sup> The jury found in the plaintiff’s favor and awarded plaintiff Carduco, Inc. \$15.3 million in compensatory damages and \$115 million in punitive damages, which Mercedes-Benz appealed.<sup>178</sup>

The Corpus Christi Court of Appeals sided with Mercedes-Benz and found the punitive damages award to be “unconstitutionally excessive.”<sup>179</sup> While Mercedes-Benz argued that the punitive damages award was not justified “because there [was] no evidence of fraud or malice,” the court soundly rejected this argument, referencing evidence of Mercedes-Benz’s initial awareness and approval of the Harlingen dealership’s relocation to McAllen and its later plans to add another dealership to McAllen with the goal of terminating the Harlingen dealership.<sup>180</sup> Because these attempts to “work around” the asset-purchase agreement proved Mercedes-Benz’s intent to harm Carduco, the evidence supported a finding of fraud and malice.<sup>181</sup>

Nonetheless, the court of appeals held that the punitive damages award was “grossly excessive” and unconstitutional after reviewing the factors that determine the constitutionality of a punitive damages award, namely “(1) the degree of reprehensibility of the defendant’s conduct; (2) the

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175. *Id.*

176. *Mercedes-Benz USA, LLC v. Carduco, Inc.*, No. 13-13-00296-CV, 2016 WL 1274535, at \*3, \*28 (Tex. App.—Corpus Christi Mar. 31, 2016) (mem. op.), *judgment set aside, opinion not vacated*, No. 13-13-00296-CV, 2016 WL 4939377 (Tex. App.—Corpus Christi Sept. 15, 2016, no pet.) (mem. op.).

177. *Id.* at \*2–12.

178. *Id.* at \*3, \*28.

179. *Id.* at \*30.

180. *Id.* at \*4–12, \*28.

181. *Id.* at \*28 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 41.003 (West 2015) (allowing exemplary damages with clear and convincing evidence of fraud or malice)).

ratio of punitive damages to compensatory damages awarded; and (3) the difference between the punitive damages awarded by the jury and penalties authorized or imposed in similar cases.”<sup>182</sup> Of these factors, the reprehensibility of the conduct is the most important and is further measured by several factors, including whether “(1) the harm inflicted was physical . . . ; (2) the tortious conduct showed an indifference to or reckless disregard for the health or safety of others; (3) the target of the conduct was financially vulnerable; (4) the conduct involved repeated . . . incident[s]; and (5) the harm . . . resulted from intentional malice.”<sup>183</sup>

The court of appeals found that four of these factors weighed in Mercedes-Benz’s favor because the case involved a single incident of economic harm that did not harm the health and safety of others and that targeted an entity that was not financially vulnerable.<sup>184</sup> At best, only the last factor weighed in Carduco’s favor, which was not sufficient to support a finding of reprehensibility.<sup>185</sup> Further, the ratio of compensatory to punitive damages was 7.5 to 1—well above the 4-to-1 ratio that the Texas Supreme Court has established as the constitutional limit.<sup>186</sup> Finally, a review of similar fraud cases and related criminal statutes indicated a maximum fine of \$10,000.<sup>187</sup> While acknowledging that no “mathematical bright line” for determining an exact and appropriate punitive damages award exists, the court held that the punitive damages award was “grossly excessive.”<sup>188</sup> The appellate court proposed a remittur of \$600,000, which it eventually entered upon Carduco’s request.<sup>189</sup>

*Mercedes-Benz* serves as a reminder of the great scrutiny that large punitive damages awards face in Texas. Even in cases where the evidence of intentional fraud or malice is overwhelming, a court may reject punitive damages awards with a significant ratio to compensatory damages, especially if there is little to no evidence of physical harm, harm to the health and safety of others, or repeated misconduct. While juries may dole out such heavy-handed punishments to offending parties, appellate courts seem less willing to support such excessive awards.

### C. INJUNCTIVE RELIEF

After granting the motion for summary judgment as to liability on all claims, the U.S. District Court for the Southern District of Texas in

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182. *Id.* at \*29–30 (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003); *BMW of N. Am. v. Gore*, 517 U.S. 559, 574–80 (1996)).

183. *See id.* at \*29 (citing *Bennett v. Reynolds*, 315 S.W.3d 867, 873 (Tex. 2010)).

184. *Id.*

185. *Id.*

186. *Id.* (citing *Bennett*, 315 S.W.3d at 873).

187. *Id.* at \*29–30 (citing TEX. PEN. CODE ANN. § 12.34 (West 2011); *State Farm*, 538 U.S. at 418; *Bennett*, 315 S.W.3d at 873; *Acadia Healthcare Co. v. Horizon Health Corp.*, 472 S.W.3d 74, 97 (Tex. App.—Fort Worth 2015, pet. granted); *Bennett v. Reynolds*, No. 03-05-00034-CV, 2010 WL 4670270, at \*5 (Tex. App.—Austin Nov. 18, 2010, no pet.) (mem. op.)).

188. *Id.* at \*30 (quoting *Bennett*, 315 S.W.3d at 873).

189. *Id.*

*Choice Hotels International, Inc. v. Frontier Hotels, Inc.* also held that a permanent injunction against Frontier was warranted.<sup>190</sup> To obtain permanent injunctive relief, Choice Hotels had to establish the following: “(1) success on the merits; (2) that a failure to grant the injunction will result in irreparable injury; (3) that said injury outweighs any damage that the injunction will cause the opposing party; and (4) that the injunction will not disserve the public interest.”<sup>191</sup> While Choice Hotels had already succeeded on the merits of its claims, the district court easily found in favor of Choice Hotels on all the remaining factors.<sup>192</sup> Specifically, the district court pointed to the customer complaints and confusion as evidence of irreparable injury.<sup>193</sup> But even without such evidence, a plaintiff can prove irreparable injury when there is a likelihood of confusion merely by showing that it “lack[s] control over the quality of the defendant’s goods or services . . . , regardless of the actual quality of those goods or services.”<sup>194</sup> The district court also held that any damage faced by the defendants was negligible considering that Choice Hotels was suffering “a loss of goodwill towards its business” and that “the injunction simply require[d] . . . [compliance] with state and federal law[s].”<sup>195</sup> Further, a permanent injunction would actually serve the public interest by eliminating the very use of infringing trademarks that confused customers.<sup>196</sup>

*Choice Hotels* serves as an example of the evidence needed to successfully request a permanent injunction in franchise law cases involving trademark infringement issues. More importantly, *Choice Hotels* reaffirms the rule in federal courts in the Southern District of Texas that, when customer confusion is likely, a plaintiff’s *lack of control* over the quality of the defendant’s goods or services is sufficient to establish an irreparable harm, despite the actual quality of those goods or services. Thus, franchisors might be able to obtain injunctive relief—even without concrete evidence of irreparable injury—if they can show that confusion is likely and that they are unable to control the quality of the franchisee’s products.

#### D. ATTORNEYS’ FEES

In *Colorado County Oil Co. v. Star Tex Distributors, Inc.*, discussed earlier for its tortious interference claims and its compensatory damages issues, the Fourteenth Houston Court of Appeals upheld the grant of attorney’s fees from the convenience store because the evidence showed

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190. *Choice Hotels Int’l, Inc. v. Frontier Hotels, Inc.*, No. H-15-2355, 2016 WL 4367993, at \*4–5 (S.D. Tex. Aug. 15, 2016).

191. *Id.* at \*4 (quoting *VRC LLC v. City of Dallas*, 460 F.3d 607, 611 (5th Cir. 2006)).

192. *Id.* at \*4–5.

193. *Id.* at \*4.

194. *Id.* (emphasis added) (quoting *Quantum Fitness Corp. v. Quantum LifeStyle Ctrs., L.L.C.*, 83 F. Supp. 2d 810, 831 (S.D. Tex. 1999)).

195. *Id.* at \*4.

196. *Id.* at \*5 (citing *Choice Hotels Int’l, Inc. v. Patel*, 940 F. Supp. 2d 532, 543 (S.D. Tex. 2013); *Quantum Fitness*, 83 F. Supp. 2d at 832).



that there was an enforceable contract and the distributor had met the presentment requirement for claims.<sup>197</sup> First, the convenience store argued that attorney's fees should not have been awarded because there was no enforceable contract.<sup>198</sup> Specifically, the convenience store contended that an enforceable contract did not exist because the distributor had materially breached the dealer franchise agreement when it failed to provide Citgo-branded gasoline and did not amend the agreement in writing, thereby excusing the convenience store's later breach.<sup>199</sup> The court rejected this argument, noting that the convenience store (1) non-suited its counterclaim for breach of contract during the trial and (2) failed to offer a specific objection or request to amend the jury charges to include a question regarding the prior material breach.<sup>200</sup> Moreover, the evidence suggested that the alleged breach—i.e., the change in gasoline brand provided by the distributor—was not actually material.<sup>201</sup> Thus, the court found that the convenience store did not preserve the issue on appeal, and even if it had, the distributor's breach was not material.<sup>202</sup>

Second, the convenience store argued that attorney's fees had been improperly awarded because the distributor had not properly presented its claim to the convenience store, as required by Section 38.002(2) of the Texas Civil Practice and Remedies Code.<sup>203</sup> Essentially, "[t]he presentment requirement allows the party against whom the claim is asserted an opportunity to tender performance without incurring an obligation for attorney's fees."<sup>204</sup> The party need not present the claim in any specific form but may simply demand the opposing party's performance.<sup>205</sup> The evidence indicated that while the distributor exchanged several communications with CCO, it never presented a notice or demand to the convenience store regarding its improper termination of the dealer franchise agreement.<sup>206</sup> However, the distributor offered testimony that a distributor-representative visited the convenience store, mentioned the rumors of branding changes, and advised the store: "I said, look, there is some obligation there that you need to fulfill. . . . Fulfill that obligation. Before [you] do anything, if I can help you, I'm willing to help you."<sup>207</sup> Although

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197. *Colo. Cty. Oil Co. v. Star Tex Distribs., Inc.*, No. 14-14-00905-CV, 2016 WL 2743452, at \*4, \*8-9 (Tex. App.—Houston [14th Dist.] May 10, 2016, no pet.) (mem. op).

198. *Id.* at \*4.

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

200. *Id.* at \*5-7.

201. *Id.* at \*7-8.

202. *Id.*

203. *Id.* at \*8 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 38.002(2) (West 2015) (stating that, to recover attorney's fees, the prevailing party "must present the claim to the opposing party or to a duly authorized agent of the opposing party")).

204. *Id.* (citing *Gibson v. Cuellar*, 440 S.W.3d 150, 157 (Tex. App.—Houston [14th Dist.] 2013, no pet.)).

205. *Id.* (citing *Gibson*, 440 S.W.3d at 157).

206. *Id.* The alleged lack of presentment was even more pronounced given the convenience store offered testimony that, at one point, the convenience store called the distributor to request that the Phillips-branded gasoline be removed because the store was switching to Valero-branded gasoline. *Id.* at \*3.

207. *Id.* at \*9.

the convenience store argued that these words only vaguely referenced its contractual obligation, the court rejected this argument, finding that a reasonable fact finder could conclude that these statements were sufficient to meet the presentment requirement.<sup>208</sup> For these reasons, the appellate court found that attorney's fees had been properly awarded to the distributor.<sup>209</sup>

*Colorado County* presents two important lessons in contesting an award of attorney's fees. First, a court is unlikely to overturn such an award based on the lack of an enforceable contract if the issue has not been preserved on appeal. Second, the threshold to meet the presentment of claims requirement is not high. In fact, even an arguably vague reference to contractual obligations may be sufficient to meet the standard and support an award of attorney's fees, so long as a reasonable juror could infer that a claim had been presented.

Similar to the *Colorado County* case, *Yumilicious Franchise, LLC v. Barrie*, discussed earlier for its fraud and misrepresentation claims in *Yumilicious II*, explored whether an award of attorney's fees was justified where a prevailing party allegedly failed to meet another procedural requirement: segregation of fees.<sup>210</sup> In that case, the U.S. District Court for the Northern District of Texas awarded attorney's fees to the franchisor-plaintiff despite objections by the franchisee-defendants that the fees should have been segregated.<sup>211</sup> Franchisor Yumilicious sued franchisee Why Not, L.L.C. and its guarantors for breach of the franchise agreements and past-due payments for royalties and products.<sup>212</sup> The defendants counterclaimed, alleging, *inter alia*, that Yumilicious had fraudulently induced them into entering the franchise agreements.<sup>213</sup> After extensive briefing on the matter, the district court granted summary judgment on Yumilicious's breach of contract claim and dismissed the defendants' counterclaims—a ruling that was eventually affirmed by the U.S. Court of Appeals for the Fifth Circuit.<sup>214</sup> Yumilicious then filed a motion to recover attorney's fees for the work performed by the two law firms it hired, and the magistrate judge granted the majority of fees sought.<sup>215</sup> The defendants objected, arguing that Yumilicious sought fees that were “not reasonable or necessary to the litigation of the contract claim,” but rather were related to legal work performed in defending against the defendants' counterclaims.<sup>216</sup> Accordingly, the defendants contended that

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208. *Id.* (citing *Criton Corp. v. Highlands Ins. Co.*, 809 S.W.2d 355, 358 (Tex. App.—Houston [14th Dist.] 1991, writ denied)).

209. *Id.*

210. *Yumilicious Franchise, LLC v. Barrie (Yumilicious III)*, No. 3:13-CV-4841-L, 2016 WL 6275203, at \*1–2 (N.D. Tex. Oct. 25, 2016).

211. *Id.* at \*1.

212. *Yumilicious Franchise, L.L.C. v. Barrie (Yumilicious II)*, 819 F.3d 170, 173 (5th Cir. 2016).

213. *Id.*

214. *Id.* at 173–74, 179.

215. *Yumilicious III*, 2016 WL 6275203, at \*1.

216. *Id.*

Yumilicious should have segregated the fees devoted to challenging those counterclaims.<sup>217</sup>

The district court disagreed with the defendants and affirmed the magistrate judge's findings regarding the reasonableness of hourly rates for attorney's fees in the Dallas legal market.<sup>218</sup> More notably, the district court clarified the rule for segregation of fees under Texas law, which requires "the prevailing party to segregate out hours that were not reasonable and necessary to prosecute claims on which that party prevailed."<sup>219</sup> However, the district court recognized that there are exceptions to this rule. Specifically, fee segregation is not required where the plaintiff must defeat a counterclaim or affirmative defense to prevail on its contract claim.<sup>220</sup> In other words, because Yumilicious had to defeat the defendants' counterclaims and affirmative defenses to win its breach of contract claim, Yumilicious did not have to segregate its attorney's fees for the legal services performed in defeating those counterclaims and affirmative defenses.<sup>221</sup> The *Yumilicious III* holding clarifies that a prevailing party can still collect attorneys' fees without segregating those fees in situations where defeat of counterclaims and affirmative defenses was necessary to succeed on its claim.

## VII. CONCLUSION

This Survey period included franchise cases covering a range of familiar subject matters while also exploring the sufficiency of evidence required when faced with issues such as enforceable contract provisions, vicarious liability, and remedies.

Among the procedural cases, *Jani-King* and *Appliance Alliance* reaffirm well-established rules regarding personal jurisdiction and the enforceability of forum selection clauses in franchise agreements.<sup>222</sup> *Jani-King* serves as a reminder that foreign entities seeking to avoid jurisdiction in Texas should carefully review their actions when conducting business in the state, as Texas courts consistently protect domestic entities against foreign parties who avail themselves of the privilege of doing business here. Meanwhile, the holding in *Appliance Alliance* indicates that Texas courts will continue to enforce forum selection clauses contained in franchise agreements in all but extremely rare cases.

The *Rainbow* decision developed the rules regarding forum selection

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217. *Id.*

218. *Id.*

219. *Id.* at \*2.

220. *Id.* (citing *Varner v. Cardenas*, 218 S.W.3d 68, 69 (Tex. 2007); *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 314 (Tex. 2006)).

221. *Id.*

222. *Appliance Alliance, LLC v. Sears Home Appliance Showrooms, LLC*, No. 3:15-cv-01707-M, 2015 WL 9319179 (N.D. Tex. Dec. 23, 2015); *Jani-King Franchising, Inc. v. Falco Franchising, S.A.*, No. 05-15-00335-CV, 2016 WL 2609314 (Tex. App.—Dallas May 5, 2016, no pet.) (mem. op.).

clauses in a different context: termination and settlement agreements.<sup>223</sup> Although a party may intend that a subsequent settlement agreement supersede the entirety of an earlier termination agreement, a court may still uphold provisions of the earlier agreement (such as a forum-selection clause), depending on the language of the settlement agreement.<sup>224</sup> Essentially, *Rainbow* is a cautionary tale with an important drafting lesson: subsequent agreements should explicitly identify whether specific provisions or the entirety of a prior agreement are being replaced.

For arbitration clauses and class actions, *White* demonstrates how consistently incorporating arbitration provisions into employment agreements can prevent conditional class certification—even in cases where only one of the employment agreements is produced as evidence.<sup>225</sup> In the category of intellectual property, *Choice Hotels* emphasizes the importance of diligently protecting trademarks, especially after the termination of a franchise agreement.<sup>226</sup>

Waiver-of-reliance clauses, an important tool against fraud claims, gained attention in both state and federal courts, as evidenced by *Yumilicious II* and *Mercedes-Benz*.<sup>227</sup> *Yumilicious II* illustrates that a properly drafted waiver-of-reliance clause may be enforced if it expressly disclaims the statement at issue.<sup>228</sup> On the other hand, the court in *Mercedes-Benz* refused to enforce a boilerplate waiver-of-reliance clause because the clause had not been negotiated and did not specifically disclaim the matter at issue.<sup>229</sup>

There were also developments on the subject of vicarious liability in franchise cases, as *Barragan* and *Kye* make clear.<sup>230</sup> The *Barragan* decision indicates that the question of whether a franchisor is vicariously liable for the actions of a franchisee need not be decided at the pleadings stage of a case because the existence of apparent agency is a question of fact.<sup>231</sup> But even once that question is broached, *Kye* demonstrates that Texas courts will look to the actions of the franchisor—not the franchisee—to determine whether apparent agency exists.<sup>232</sup>

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223. *Rainbow Int'l LLC v. Scruggs*, No. W:15-CV-162, 2015 WL 11622491 (W.D. Tex. Dec. 14, 2015).

224. *See id.* at \*3–4.

225. *See White v. Turner*, No. H-15-1485, 2016 WL 1090107 (S.D. Tex. Mar. 21, 2016).

226. *Choice Hotels Int'l v. Frontier Hotels, Inc.*, No. H-15-2355, 2016 WL 4367993, at \*3–4 (S.D. Tex. Aug. 15, 2016).

227. *Yumilicious Franchise, L.L.C. v. Barrie (Yumilicious II)*, 819 F.3d 170, 178 (5th Cir. 2016); *Mercedes-Benz USA, LLC v. Carduco, Inc.*, No. 13-13-00296-CV, 2016 WL 1274535, at \*1 (Tex. App.—Corpus Christi Mar. 31, 2016) (mem. op.), *set aside, opinion not vacated*, No. 13-13-00296-CV, 2016 WL 4939377 (Tex. App.—Corpus Christi Sept. 15, 2016, no pet.) (mem. op.).

228. *See Yumilicious II*, 819 F.3d at 178.

229. *Mercedes-Benz*, 2016 WL 1274535, at \*16.

230. *See Barragan v. General Motors LLC*, No. SA-15-CV-854-DAE, 2016 WL 3519675 (W.D. Tex. June 22, 2016); *Won Kyu Kye v. New Star Realty, Inc.*, No. 05-15-00110-CV, 2016 WL 3523683 (Tex. App.—Dallas, June 27, 2016, no pet.) (mem. op.).

231. *Barragan*, 2016 WL 3519675, at \*9.

232. *Kye*, 2016 WL 3523683, at \*5.

In addition to its contribution on the subject of waiver-of-reliance clauses, *Yumilicious II*—a case that proved to be as significant in 2016 as it was in the previous year—carries several useful reminders with regard to other evidentiary standards for substantive claims.<sup>233</sup> First, *Yumilicious II* reiterates that the economic loss rule can be applied against a negligent misrepresentation claim (though not against a fraudulent inducement claim).<sup>234</sup> Second, this case restates the rule that the party with the burden of proof must provide concrete evidence of false statements or omissions at summary judgment (i.e., pleadings alone are insufficient).<sup>235</sup> Third, the *Yumilicious II* holding reaffirms that technical violations of the Franchise Rule are not sufficient to support a DTPA claim.<sup>236</sup>

As for bankruptcy claims, *In re Landin* highlights the importance of keeping adequate records even before filing for Chapter 7 bankruptcy.<sup>237</sup> This holding could be useful to a future court reviewing a bankruptcy discharge where the debtor failed to keep separate business accounts and records for loss of assets.

In the context of remedies, *Colorado County* provides guidance on evidentiary standards for compensatory damages as well as attorney's fees.<sup>238</sup> Namely, calculations of lost profits need not be exact but should be based on estimates that relate to the specific contract between the parties.<sup>239</sup> Further, the presentment of claims may be proven by arguably vague references to contractual obligations.<sup>240</sup> *Choice Hotels* is notable again for its grant of a permanent injunction in the absence of concrete evidence of irreparable injury. The *Choice Hotels* decision indicates that obtaining injunctive relief may be possible where the party cannot control the quality of its product and where confusion is likely.<sup>241</sup> Finally, the *Yumilicious III* case holds that the segregation of fees is not necessary where counterclaims and affirmative defenses must be defeated for a plaintiff to succeed on its own claims.<sup>242</sup>

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233. *Yumilicious II*, 819 F.3d at 178.

234. *Id.*

235. *Id.*

236. *Id.* at 176.

237. *See* *Robbins v. Landin (In re Landin)*, No. 15-50148-CAG, 2016 WL 3049626 (Bankr. W.D. Tex. May 20, 2016).

238. *Colo. Cty. Oil Co. v. Star Tex Distributions, Inc.*, No. 14-14-00905-CV, 2016 WL 2743452, at \*8-9 (Tex. App.—Houston [14th Dist.] May 10, 2016, no pet.) (mem. op.).

239. *See id.*

240. *See id.*

241. *Choice Hotels Int'l v. Frontier Hotels, Inc.*, No. H-15-2355, 2016 WL 4367993, at \*4-5 (S.D. Tex. Aug. 15, 2016).

242. *Yumilicious Franchise, LLC v. Barrie (Yumilicious III)*, No. 3:13-CV-4841-L, 2016 WL 6275203, at \*1-2 (N.D. Tex. Oct. 25, 2016).