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Franchise Law

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I. INTRODUCTION

ALTHOUGH this Survey period did not see significant developments in Texas state or federal franchise and business-opportunity case law, Texas did make some noteworthy changes to many of its dealership statutes, which are discussed in sections III and VI *infra*. In addition, several United States Supreme Court cases and Texas cases demonstrate how jurisdictional rulings continue to impact the manner in which franchise and distribution companies will do business in Texas and elsewhere.

II. PROCEDURE

A. JURISDICTION

This Survey period, a number of federal and state cases focused on jurisdictional issues. Most notably, the United States Supreme Court handed down decisions in two cases involving manufacturing and distribution businesses, which will likely impact jurisdictional determinations in future franchise and dealership disputes.

In *Goodyear Dunlop Tires Operations, S.A. v. Brown*, the Court asked: "Are foreign subsidiaries of a United States parent corporation amenable to suit in state court on claims unrelated to any activity of the subsidiaries in the forum State?"[1] The dispute in *Goodyear* arose when two children from North Carolina died in a bus accident in Paris that was allegedly caused by a defective tire manufactured in Turkey.[2] The children's parents sued The Goodyear Tire and Rubber Company and three of Goodyear USA's foreign subsidiaries in North Carolina state court.[3] The Goodyear subsidiaries, incorporated in Luxembourg, Turkey, and France, contested the personal jurisdiction of the North Carolina courts.[4] They argued that North Carolina's attempted exercise of jurisdiction was improper because the Goodyear subsidiaries were not registered to do business, did not have operations, did not advertise or solicit business, and did not sell or ship tires (including the type of tire that allegedly caused the Paris bus accident) in the state.[5]

The North Carolina Court of Appeals held that the state court had general jurisdiction over the Goodyear subsidiaries because they created "continuous and systematic contacts" with the state by "plac[ing] their

1. Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2850 (2011).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.* at 2852.

tires 'in the stream of interstate commerce without any limitation on the extent to which those tires could be sold in North Carolina.'"[6] The North Carolina Supreme Court did not review the case.[7] In granting certiorari, the United States Supreme Court considered the limits of general jurisdiction for only the third time since the landmark case of *International Shoe*.[8]

In *International Shoe*, the Court held that the Due Process Clause of the Fourteenth Amendment allows state courts to exercise jurisdiction over nonresident defendants when the defendants have sufficient "'minimum contacts'" with the state and jurisdiction complies with "'traditional notions of fair play and substantial justice.'"[9] Specific jurisdiction is proper under the Due Process Clause if the defendant engaged in "'continuous and systematic'" activity in the state in which litigation occurs and "that activity gave rise to the episode-in-suit," or engaged in "'single or occasional acts'" in the state and the lawsuit relates to those acts.[10] In contrast, the Due Process Clause permits general jurisdiction over a party even if there is no connection between the actual controversy and the forum state in "instances in which the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it . . . ."[11]

In *Goodyear*, the Supreme Court unanimously determined that the North Carolina appellate court erred in finding that the presence of a few of the Goodyear subsidiaries' tires in North Carolina due to the "'stream of commerce'" justified general jurisdiction over the Goodyear subsidiaries.[12] A stream-of-commerce analysis can bolster a *specific* jurisdiction determination, but is not relevant in evaluating whether *general* jurisdiction exists.[13] The connection between the Goodyear subsidiaries and North Carolina was "attenuated" and not of the "'continuous and systematic'" nature required to justify general jurisdiction over a party under the Due Process Clause.[14] If the Court had affirmed the decision of the North Carolina Court of Appeals, it would have created the undesirable consequence that "any substantial manufacturer or seller of goods would be amenable to suit, on any claim for relief, wherever its products are distributed."[15] Because the Goodyear subsidiaries were "in no sense at home in North Carolina," the state courts did not have jurisdiction

6. *Id.* (quoting Brown v. Meter, 681 S.E.2d 382, 394 (N.C. Ct. App. 2009)).

7. *Id.* at 2853.

8. *Id.* at 2854 (citing Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952) and Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408 (1984)); Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

9. Goodyear, 131 S. Ct. at 2853 (quoting *Int'l Shoe*, 326 U.S. at 316).

10. *Id.* (quoting *Int'l Shoe*, 326 U.S. at 317–18).

11. *Id.* (quoting *Int'l Shoe*, 326 U.S. at 318).

12. *Id.* at 2851 (quoting Brown v. Meter, 681 S.E.2d 382, 394–95 (N.C. Ct. App. 2009)).

13. *Id.* at 2855.

14. *Id.* at 2851, 2857.

15. *Id.* at 2856.

over the subsidiaries "on claims unrelated to anything that connects them to the State."[16]

The second United States Supreme Court case concerning jurisdiction this Survey period was decided on the same day as *Goodyear*. A majority of the Court determined that specific jurisdiction did not exist under the facts of *J. McIntyre Machinery, Ltd. v. Nicastro*, but the Court was divided in its rationale.[17]

McIntyre involved a products-liability suit filed in New Jersey state court against a manufacturer from England, J. McIntyre Machinery.[18] The New Jersey courts rationalized exercising jurisdiction over McIntyre because of its activities in the United States generally, including selling its machines, sending company officials to trade shows, and seeking United States patents for its technology.[19] Up to four of McIntyre's machines ended up in New Jersey through the stream of commerce.[20] Although no evidence showed McIntyre targeted New Jersey, the New Jersey courts found that they could exercise jurisdiction because McIntyre distributed its machines "'through a nationwide distribution system'" and did not "'take some reasonable step to prevent the distribution of its products'" in New Jersey.[21]

The United States Supreme Court reversed, finding New Jersey lacked jurisdiction over McIntyre.[22] Writing for the four-justice plurality, Justice Kennedy noted that the general rule under the Due Process Clause of the Fourteenth Amendment is that "the exercise of judicial power is not lawful unless the defendant 'purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'"[23] The plurality noted that the New Jersey Supreme Court's reliance on the stream-of-commerce doctrine in a products-liability case like *McIntyre* was at odds with this purposeful-availment principle because simply seeking to sell machines in the United States did not reveal an intent to "invoke or benefit from the protection of [New Jersey's] laws."[24]

The Court speculated that its 1987 decision in *Asahi* "may be responsible in part" for the New Jersey Supreme Court's erroneous decision.[25] In *Asahi*, the portion of the opinion at issue in *McIntyre* was unable to command a majority. In his concurrence on behalf of four justices, Justice

16. *Id.* at 2857.
17. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2785 (2011) (plurality opinion) (Kennedy, J.); *id.* at 2791 (Breyer, J., concurring in the judgment).
18. *Id.* at 2786.
19. *Id.*
20. *Id.* at 2786.
21. *Id.* at 2786 (quoting Nicastro v. McIntyre Mach. Am., Ltd., 987 A.2d 575, 592 (2010)).
22. *Id.* at 2791.
23. *Id.* at 2785 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).
24. *Id.* at 2785, 2791.
25. *Id.* at 2786 (citing Asahi Metal Indus. Co. v. Superior Court of Cal., Solano Cty., 480 U.S. 102 (1987)).

Brennan found that jurisdiction can arise from placing a product "'into the stream of commerce'" because if a party knows that a product is marketed in a particular state, it can foresee the possibility of a lawsuit there.[26] Justice O'Connor, writing the plurality opinion for four justices on this issue, explained that putting a product in the stream of commerce is insufficient to establish specific jurisdiction; rather, a defendant only has the requisite minimum contacts with a forum state when it "'purposefully direct[s]'" action toward the state.[27]

The plurality in *McIntyre* rejected Justice Brennan's "rule based on general notions of fairness and foreseeability," and adopted Justice O'Connor's requirement of purposeful availment, finding it more consistent "with the premises of lawful judicial power."[28] The question, the plurality explained, is "whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct."[29]

Justices Breyer and Alito concurred in the *McIntyre* judgment, but declined to announce "a rule of broad applicability without full consideration of the modern-day consequences" and without the participation of the Solicitor General.[30] Justice Breyer explained that it was proper to reverse the New Jersey decision simply because Nicastro did not show jurisdiction was constitutionally proper under existing precedent.[31] In Justice Breyer's view, under existing precedent, a "single isolated sale" is insufficient to establish jurisdiction, and the facts as stated by the New Jersey Supreme Court did not show anything more.[32]

In addition to these two important decisions, federal and state courts in Texas and the United States District Court for the Eastern District of Pennsylvania also considered how jurisdictional issues relate to franchises and dealerships in Texas.

Orazi v. Hilton Hotels Corp. involved a negligence and loss-of-consortium action resulting from a slip-and-fall at a Hampton Inn franchise hotel in Allen, Texas.[33] The plaintiffs brought suit in Pennsylvania state court. After removing the case to federal court, the Texas hotel and its franchisee owner moved to dismiss the suit for lack of personal jurisdiction.[34]

The court found that the plaintiff's complaint did not establish either general or specific jurisdiction over Hampton Inn, a corporate citizen of Delaware located in Allen, Texas, or Allen Stacy, a Hilton franchisee in-

26. *Id.* at 2788 (quoting *Asahi*, 480 U.S. at 117).
27. *Id.* at 2788–89 (quoting *Asahi*, 480 U.S. at 112).
28. *Id.* at 2789, 2790.
29. *Id.* at 2789.
30. *Id.* at 2791, 2794.
31. *Id.* at 2791.
32. *Id.* at 2792.
33. Orazi v. Hilton Hotels Corp., No. 09-cv-05959, 2010 U.S. Dist. LEXIS 123472, at *2 (E.D. Pa. Nov. 22, 2010).
34. *Id.* at *4–5.

corporated in Texas.[35] In some cases, a court can impute to the defendant the contacts of a different defendant or a nonparty to establish jurisdiction (for example, imputing to the principal the contacts of an agent that is empowered to bind the principal, or imputing to the principal the contacts of an agent when the agent performs services that the principal would otherwise have to perform).[36] The court in *Orazi,* however, refused to impute Hilton's contacts to Hampton Inn or to Allen Stacy simply because the plaintiffs booked their hotel room on the Hilton or Hampton Inn website and Philadelphia-area Hampton Inns engaged in some advertising and promotion of rewards and loyalty programs that potentially benefited the Hampton Inn in Allen, Texas.[37] Even though Allen Stacy authorized Hilton to make reservations on its behalf, the record was not clear regarding whether Allen Stacy was bound by the reservation without confirming it.[38] Therefore, the court could not determine if a binding agency relationship existed.[39] It could only confirm that Hilton and Allen Stacy had "a franchise relationship that involve[d] some services."[40] It would violate due process to find that relying on a "system of common advertising and branding—typical of most franchised businesses"—would allow a court with jurisdiction over a franchisor to automatically have jurisdiction over one of its franchisees.[41] On the facts alleged, neither general nor specific jurisdiction was appropriate for Hampton Inn or for Allen Stacy.[42]

Despite not finding a prima facie showing of jurisdiction over Hampton Inn and Allen Stacy, the court in *Orazi* found that the plaintiffs were "entitled to jurisdictional discovery limited to information regarding Defendants' contacts with Pennsylvania and the relationship between and among the Defendants."[43] This limited discovery was appropriate because the plaintiffs pled sufficient facts to show that there *could be* relationships that established jurisdiction.[44] The court waited to determine the appropriateness of the motion to change venue until the end of jurisdictional discovery.[45]

In *Dontos v. Bruno*, the Dallas Court of Appeals affirmed the trial court's order that it did not have personal jurisdiction over the defendant, Mark Bruno.[46] The plaintiff, Dontos, was a franchisee of 24/seven Vending USA Limited, New Zealand ("24/seven").[47] Bruno, a resident of Connecticut, was the president of a company that also licensed the 24/

35. *Id.* at *11–12.
36. *Id.* at *8–9.
37. *Id.* at *11-12, 29, 33–34.
38. *Id.* at *15, 18.
39. *Id.* at *15, 18–19.
40. *Id.* at *20.
41. *Id.* at *22.
42. *Id.* at *13, 30.
43. *Id.* at *34–35.
44. *Id.* at *35–36.
45. *Id.* at *44–45.
46. Dontos v. Bruno, 339 S.W.3d 777, 779 (Tex. App.—Dallas 2011, no pet.).
47. *Id.*

seven brand name.[48] When 24/seven stopped supporting its franchisees near Dallas, Bruno had some limited interactions with Dontos.[49] Bruno was not a party to the franchise agreement with Dontos, not an employee of 24/seven or of the bank supplying a loan to Dontos, and not a former owner or seller of Dontos's franchise or vending routes.[50]

State statutory and federal due process requirements only allow courts to exercise personal jurisdiction over a nonresident defendant if the defendant has minimum contacts with Texas and the exercise "does not offend traditional notions of fair play and substantial justice."[51] The minimum-contacts requirement is satisfied by a nonresident defendant's purposeful availment of the forum state.[52] Purposeful availment occurs when the *defendant's* contacts show that the defendant is purposefully seeking a "benefit, advantage or profit" in the jurisdiction.[53] In this case, specific jurisdiction was inappropriate because Dontos did not "establish any substantive connection between Bruno's contacts with Texas and the operative facts of the litigation."[54] The court of appeals affirmed the trial court's order to dismiss.[55]

The Eastern District of Texas considered the question of how to allocate jurisdiction between court and administrative proceedings in *Ford Motor Co. v. Bob Tomes Ford, Inc.*[56] In a dealership dispute, Ford Motor Company alleged that the dealer, Bob Tomes Ford, Inc., breached its dealership contract by selling Subaru vehicles when the contract provided that the dealership would be exclusively for Ford, Lincoln, and Mercury vehicles.[57] Tomes moved to dismiss the suit Ford brought in federal court because it had already initiated an administrative proceeding with the Texas Motor Vehicle Commission to stop Ford's purported attempt to terminate Tomes's Lincoln franchise.[58]

The court had to consider whether it had jurisdiction over the dispute and, if so, whether the Commission should resolve the dispute.[59] The

48. *Id.*
49. *Id.*
50. *Id.* at 779, 781.
51. *Dontos*, 339 S.W.3d at 780 (citing Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 414 (1984)). In order for a Texas court to exercise personal jurisdiction over a nonresident defendant, the jurisdiction must be (1) authorized by the Texas long-arm statute and (2) consistent with the Due Process Clause of the Fourteenth Amendment. *See* CSR Ltd. v. Link, 925 S.W.2d 591, 594 (Tex. 1996) (orig. proceeding). Since the Texas Supreme Court has interpreted Texas's long-arm statute to "reach as far as the federal constitutional requirements of due process will allow," Texas courts can and often do skip the first step. Retamco Operating, Inc. v. Republic Drilling Co., 278 S.W.3d 333, 337 (Tex. 2009).
52. *Dontos*, 339 S.W.3d at 780 (citing Moki Mac River Expeditions v. Drugg, 221 S.W.3d 569, 575 (Tex. 2007)).
53. *Id.* (emphasis added).
54. *Id.* at 781.
55. *Id.* at 779.
56. Ford Motor Co. v. Bob Tomes Ford, Inc., No. 4:10cv482, 2010 U.S. Dist. LEXIS 135092, at *3–4 (E.D. Tex. Dec. 21, 2010) (mem. op.).
57. *Id.* at *1.
58. *Id.* at *2–3.
59. *Id.* at *3–4.

court noted that under the exclusive jurisdiction doctrine, "the Legislature grants an administrative agency the *sole* authority to make an initial [jurisdictional] determination."[60] However, if the statutory construction is less clear, and both a court and an agency could have authority to make an initial jurisdictional determination, trial courts allocate power based on the primary jurisdiction doctrine.[61]

In *Ford*, the statute at issue was section 2301 of the Texas Occupations Code, pertaining to the Sale or Lease of Motor Vehicles.[62] Section 2301.151(a) provides that "[t]he board has the exclusive original jurisdiction to regulate those aspects of the distribution, sale, or lease of motor vehicles that are governed by this chapter, including the original jurisdiction to determine its own jurisdiction."[63] Considering that the claims at issue in the dispute (regarding whether Tomes violated his franchise agreement) related to provisions under section 2301, the court determined that the Commission had exclusive jurisdiction and recommended that the case be dismissed.[64]

The lessons from these cases are at least twofold: 1) a litigant should always challenge jurisdiction in a venue in which it has not purposefully availed itself of the laws of that jurisdiction; and 2) if an administrative agency has exclusive original jurisdiction, the litigant should take care to file in the proper venue in order to avoid incurring fees over a losing venue squabble.

B. Forum Selection

In *Safety-Kleen Systems, Inc. v. McCoy Freightliner, Inc.*, a truck dealership defendant located in West Virginia moved to dismiss for lack of personal jurisdiction a lawsuit filed in Texas regarding money allegedly owed for clean-up services after an oil spill.[65] The plaintiff contended that a forum-selection clause in an agreement signed by the defendant after the start of the clean-up services provided for jurisdiction in Texas.[66]

The court in *Safety-Kleen* reminded litigants that freely signing a reasonable forum-selection clause shows that a party "has either consented to personal jurisdiction or waived the requirements for personal jurisdiction in that forum."[67] Under federal law, the presumption is that forum-

60. *Id.* at *5.

61. *Id.* at *4. Under the primary jurisdiction doctrine, trial courts defer to administrative agencies when: "(1) an agency is typically staffed with experts trained in handling the complex problems in the agency's purview; and (2) great benefit is derived from an agency's uniformly interpreting its laws, rules, and regulations, whereas courts and juries may reach different results under similar fact situations." *Id.*

62. *Id.* at *5–6.

63. *Id.* at *6 (citing Tex. Occ. Code Ann. § 2301.151 (West 2012)).

64. *Id.* at *7.

65. Safety-Kleen Sys., Inc. v. McCoy Freightliner, Inc., No. 4:10-CV-608, 2011 WL 665812, at *1 (E.D. Tex. Jan. 21, 2011) (adopted by United States District Judge Michael H. Schneider on February 14, 2011 (Safety-Kleen Sys., Inc. v. McCoy Freightliner, Inc., No. 4:10-CV-608, 2011 WL 2009958, at *1 (E.D. Tex. Apr. 11, 2011))).

66. *Id.*

67. *Id.* at *3 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 n.14 (1985)).

selection clauses are enforceable, and a party seeking to overcome the presumption must prove that the clause is "unreasonable under the circumstances."[68]

Although a federal court must apply federal law to determine whether a forum-selection clause is enforceable, it applies state law to determine whether a party agreed to the clause.[69] Under Texas Law, contract terms "are given 'their plain and ordinary meaning unless the instrument indicates the parties intended a different meaning.'"[70] In *Safety-Kleen*, the contract and the clause were not ambiguous.[71] Additionally, there was no evidence that the forum-selection clause was not freely negotiated, was unreasonable or unjust, or was the result of fraud or overreaching.[72] Even though a Texas court ordinarily would not have personal jurisdiction over the defendant, the court found the forum-selection clause was enforceable and, therefore, jurisdiction was proper.[73]

Nearly three months after upholding personal jurisdiction on the basis of the forum-selection clause, the magistrate judge in *Safety-Kleen* looked at whether the forum-selection clause in the contract at issue precluded the defendant, McCoy, from transferring venue.[74] The court noted a forum-selection clause can be a *mandatory* clause, which permits jurisdiction only in the designated forum, or a *permissive* clause, which "authorize[s] jurisdiction in the designated forum, but do[es] not prohibit litigation elsewhere."[75]

The court in *Safety-Kleen* determined the forum-selection clause in the contract at issue was permissive because it showed that the parties consented to jurisdiction in Texas, but it did not state that adjudication in Texas was mandatory.[76] Since the motion to transfer venue was not precluded by a mandatory venue in the forum-selection clause, the court went on to consider whether transferring venue would serve the "interest of justice," as required by 28 U.S.C. § 1404(a).[77] After analyzing the factors enumerated by the Fifth Circuit in *Volkswagen II*,[78] the court determined the defendant had not satisfied the heavy burden of analyzing each

68. *Id.* at *4.

69. *Id.* (internal citations omitted).

70. *Id.* at *6 (quoting Dynegy Midstream Servs., Ltd. P'ship v. Apache Corp., 294 S.W.3d 164, 168 (Tex. 2009)).

71. *Id.* at *5–6.

72. *Id.* at *6–7.

73. *Id.* at *7.

74. Safety-Kleen Sys., Inc. v. McCoy Freightliner, Inc., No. 4:10-CV-608, 2011 WL 2009958, at *3 (E.D. Tex. Apr. 11, 2011).

75. *Id.* at *4.

76. *Id.* The forum selection clause at issue stated: "This Agreement shall be interpreted and enforced according to the Laws of the State of Texas and the parties agree to submit to the jurisdiction of the courts of the State of Texas for any disputes arising under this Agreement." *Id.*

77. *Id.* at *2, 5.

78. *In re* Volkswagen of Am., Inc., 545 F.3d 304, 315 (5th Cir. 2008) (en banc).

of those factors and showing that the transfer would be "clearly more convenient," and denied the motion.[79]

C. ARBITRATIONS

In *The Salad Bowl Franchise Corp. v. Mason Crane*,[80] Chief Judge Fitzwater of the United States District Court for the Northern District of Texas granted a motion for a preliminary injunction that the plaintiff, The Salad Bowl Franchise Corporation, brought alongside its motion to compel arbitration.[81]

Salad Bowl's franchise agreement contained clauses stating that all disputes would be governed by Texas law and resolved through arbitration in the city of the franchisor's principal offices, which was Dallas, Texas.[82] When the franchisee's limited liability company fell behind on rent for its restaurant in Albuquerque, New Mexico, Salad Bowl terminated the franchise agreement.[83] The franchisee contested the termination and alleged claims of its own; as a result, Salad Bowl initiated arbitration proceedings in Dallas.[84] Although the parties engaged in arbitration, the franchisee never signed the proposed settlement agreement.[85] Two months after the initiation of arbitration, the franchisee and its two members filed suit in New Mexico state court.[86] In response, Salad Bowl filed in the Northern District of Texas a petition to compel arbitration and a motion for a preliminary injunction of the New Mexico proceedings.[87]

The court observed that the Federal Arbitration Act "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed."[88] In this case, the court found that the agreement was valid under Texas law and that three arbitration provisions in the contract clearly showed that the parties agreed to arbitration.[89] The language of the arbitration clauses was "broad" and encompassed the dispute in question.[90] When arbitration clauses are broad, they "are not limited to claims that literally arise under the contract, but rather embrace all disputes having a significant relationship to the contract regardless of the label attached to the dispute."[91]

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79. *Safety-Kleen*, 2011 WL 2009958 at *2, 5–7.
80. The Salad Bowl Franchise Corp. v. Crane, No. 3:11-CV-0043-D, 2011 U.S. Dist. LEXIS 27406, at *1 (N.D. Tex. Mar. 17, 2011).
81. *Id.*
82. *Id.* at *2–4.
83. *Id.* at *3.
84. *Id.* at *4.
85. *Id.* at *4–5.
86. *Id.* at *5.
87. *Id.*
88. *Id.* at *9 (internal quotation marks omitted).
89. *Id.* at *11.
90. *Id.* at *12 (noting that the arbitration clauses referred to "all claims arising out of or relating to th[e] Agreement" and "any disputes arising between Franchisor and Franchisee.").
91. *Id.* at *13 (internal citations omitted).

When it is unclear, a clause "should be construed in favor of arbitration."[92]

The court held that the individuals who did not sign the agreement in their individual capacities were bound by the arbitration provisions under the doctrine of equitable estoppel.[93] Prior Fifth Circuit precedent allows "a signatory to compel another signatory to submit to arbitration against a non-signatory, so long as it is on the subject matter covered under the Agreement and the non-signatory is being sued for his acts as agent for the signatory."[94] The disputes in the New Mexico lawsuit were all related in some way to the franchise agreement, and so the defendants in the Northern District of Texas were equitably estopped from claiming that they were not required to arbitrate the dispute.[95]

The court determined that the factors a court must consider when a party seeks a preliminary injunction along with another motion—like a motion to compel arbitration—were satisfied here.[96] Among other things, irreparable injury would result if the parties were not required to arbitrate because Salad Bowl would then "be deprived of its right to select the forum in which the disputes are resolved—a deprivation that cannot be remedied merely by monetary compensation."[97] The court found this injury and others that the franchisor would face if forced to litigate in New Mexico—despite contracting for another mode of resolution—far outweighed the risk of delay of the state court litigation that would result to the franchisees if the franchisor failed to compel arbitration.[98] Additionally, due to the " 'strong federal policy favoring arbitration over litigation,' "[99] granting the preliminary injunction would "not disserve the public interest."[100]

Salad Bowl reinforced how highly courts in the Fifth Circuit and in Texas regard arbitration. Courts are extremely reluctant to interfere when a franchise or dealership agreement contains a valid arbitration clause. Courts are involved, however, in determining whether an arbitration agreement is valid and enforceable. Practitioners should understand that a valid arbitration clause in an agreement—franchise or otherwise—

92. *Id.* at *13–14 (internal citations omitted).

93. *Id.* at *15.

94. *Id.* at *16.

95. *Id.* at *14–22.

96. *Id.* at *8, 26 (citing Jones v. Bush, 122 F. Supp. 2d 713, 718 (N.D. Tex. 2000) (Fitzwater, J.), *aff'd*, 244 F.3d 134 (5th Cir. 2000) (per curium) (unpublished table decision)). The factors are: "(1) a substantial likelihood that it will prevail on the merits; (2) a substantial threat that it will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury to it outweighs the threatened harm the injunction may do to defendants; and (4) that granting the preliminary injunction will not disserve the public interest." *Id.* at *8.

97. *Id.* at *22–23.

98. *Id.* at *24–25.

99. *Id.* at *25 (quoting City of Meridian v. Algernon Blair, Inc., 721 F.2d 525, 529 (5th Cir. 1983)).

100. *Id.* at *25.

will most likely be enforced, as there is a strong presumption in favor of these clauses.

In *Texas La Fiesta Auto Sales, LLC v. Belk*, the court reminded parties that both federal and Texas courts will not apply the presumption in favor of arbitration until "the party seeking to compel arbitration proves that a valid arbitration agreement exists."[101] *Texas La Fiesta* concerned an employment dispute at a car dealership.[102] At issue were two arbitration clauses—the first in a stand-alone arbitration agreement, and the second in an employment contract that contained a merger clause.[103] It was important to determine which, if any, clause applied to the case because the clauses provided for arbitration governed by different laws—the first under the Federal Arbitration Act (FAA) and the second under the Texas Labor Code.[104] The Houston Court of Appeals first determined it had jurisdiction over the interlocutory appeal because the trial court denied the appellant a potential contractual right of arbitration under the FAA.[105] Next, it found that the trial court was correct in ordering an evidentiary hearing to determine whether a valid arbitration agreement existed.[106] The trial court needed to answer the legal question of whether there was a valid arbitration provision, and particularly, if the provision in the employment contract superseded the stand-alone arbitration agreement.[107] Finally, the court found the trial court did not err in ordering arbitration pursuant to the clause in the employment contract after determining that it superseded the clause in the arbitration agreement.[108] That determination depended heavily on the facts of *Texas La Fiesta*, and was appropriate even though the plaintiff had initially only moved to compel arbitration under the first agreement.[109]

In *Dealer Computer Inc. v. Michael Motor Co.*, the court reviewed an arbitration award after it had been rendered.[110] It acknowledged that courts have narrow discretion in judicially reviewing the results of arbitration for fundamental unfairness.[111] It chose to vacate an arbitration award that would have required a car dealership to pay damages and attorneys' fees to a company that provided computer services to dealerships.[112] The justification behind the court's action was the allowance in

101. Texas La Fiesta Auto Sales, LLC v. Belk, 349 S.W.3d 872, 880 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (citing J.M. Davidson, Inc. v. Webster, 128 S.W.3d 223, 227 (Tex. 2003)).

102. *Id.* at 876.

103. *Id.* at 875–76.

104. *Id.*

105. *Id.* at 878.

106. *Id.* at 883.

107. *Id.* at 880.

108. *Id.* at 884.

109. *Id.* at 883–84.

110. Dealer Computer Servs., Inc. v. Michael Motor Co., 761 F. Supp. 2d 459, 461–64 (S.D. Tex. 2010).

111. *Id.* at 464.

112. *Id.* at 460–61.

the FAA to vacate arbitration awards "where there was evident partiality or corruption in the arbitrators, or either of them."[113]

The parties had contractually agreed to arbitrate any disputes between them.[114] A dispute arose, and a panel of "three neutral arbitrators" formed and eventually held in favor of the computer company.[115] Although the arbitrator appointed by the computer company revealed to the AAA that she had served on another panel involving a dispute with the computer company, she did not clarify that the prior arbitration involved "a contract nearly identical to the one at issue in the Michael Motor Arbitration," the same damages expert, and two additional witnesses that were not designated in the Michael Motor arbitration.[116]

The court found that when there is suspicion of "evident partiality or corruption in the arbitrators," parties do not need to prove actual bias; rather, "evident partiality" can exist if the arbitrator does not disclose a "significant compromising connection to the parties."[117] Applying that standard to the facts of this case, the court found evidence of evident partiality because the arbitrator's exposure to the facts and evidence in the prior arbitration "create[d] a reasonable impression that she had prejudged at least some of the issues in the arbitration."[118] Michael Motor did not waive the right to object to the arbitrator's evident partiality, despite not raising an objection before the arbitration award, because Michael Motor "did not have sufficient information to object during the arbitration."[119]

III. THE FRANCHISE RELATIONSHIP, TERMINATION, AND NON-RENEWAL

The 82nd session of the Texas Legislature saw a large amount of activity in the dealer and distributor area. There were significant statutory developments concerning motor-vehicle dealers, boat dealers, and "equipment" dealers during the Survey period. Some of the most consequential of these developments concern the right to terminate a dealership or distributorship.

A. THE FAIR PRACTICES OF EQUIPMENT MANUFACTURERS, DISTRIBUTORS, WHOLESALERS, AND DEALERS ACT

In 2011, Texas passed the Fair Practices of Equipment Manufacturers,

113. *Id.* at 464.
114. *Id.* at 460–61.
115. *Id.* at 461.
116. *Id.* at 461–63.
117. *Id.* at 464-65 (citing Positive Software Solutions, Inc. v. New Century Mortg. Corp., 476 F.3d 278, 282–83, 285 (5th Cir. 2007) (en banc); Fidelity Fed. Bank, FSB v. Durga Ma Corp., 386 F.3d 1306, 1312 (9th Cir. 2004)).
118. *Id.* at 465.
119. *Id.* at 467 (declining to decide if a party must have "actual knowledge" of conflict or be "on notice" to have sufficient information to object with respect to waiver of nondisclosure objections).

Distributors, Wholesalers, and Dealers Act.[120] The Act adds Chapter 57 to the Texas Business and Commerce Code. The new statute not only includes an anti-waiver provision, but also provides that the choice of any other state's law besides that of Texas is void, and that any provision in a contract that requires a dealer to pay attorneys' fees incurred by an equipment supplier is void.[121] Presumably, suppliers would still be able to take advantage of Chapter 38 of the Texas Civil Practice and Remedies Code to recover fees should there be a suit based on the agreement itself.

The new law applies to persons who are "primarily" engaged in the business of selling, leasing, repairing, or servicing "equipment," as well as persons that manufacture or distribute "equipment."[122] "Equipment" is defined to include products used in connection with agriculture, raising livestock, landscaping, and "industrial, construction, maintenance, mining, or utility activities or applications."[123] These are very broad terms, especially the "industrial," "construction," and "maintenance" categories, none of which are defined further. Note that some of the categories covered by the new statute, most notably farm implements and tractors, were covered by Chapter 55 of the Business and Commerce Code, which the new law repeals.[124] The new statute uses much broader terms, however, and includes "for, or in connection with" language that could catch some businesses that may seem outside the statute's coverage.[125]

There are various provisions regulating the sale or transfer of a dealership, as well as a requirement that a dealership cannot be terminated absent good cause as defined by the statute.[126] The statute makes a distinction for "single-line" dealers, which, in general, obtain at least seventy-five percent of their equipment from one supplier and meet certain minimum sales volume requirements.[127] "Good cause" is defined in part for non-single-line dealers to include the dealer failing "to substantially comply with essential and reasonable requirements imposed on the dealer under the terms of the dealer agreement," which is potentially open to a wide range of interpretation.[128] The notice of termination must be sent at least 180 days before the effective date of termination, with a mandatory 60-day cure period.[129] For single-line dealers, the statute leaves out the "essential and reasonable requirements" language and has only a 90-day notice requirement.[130] Finally, the statute includes multiple

120. Fair Practices of Equipment Manufacturers, Distributors, Wholesalers, and Dealers Act, 82d Leg., R.S., ch. 1039, §§ 1–5, 2011 Tex. Sess. Law Serv. 1901, 2645 (West) (current version at TEX. BUS. & COM. CODE ANN. §§ 57.001–57.402 (West Supp. 2011)).

121. TEX. BUS. & COM. CODE ANN. § 57.003, 57.051 (West Supp. 2011).

122. *Id.* § 57.002(3), (20).

123. *Id.* § 57.002(7).

124. Fair Practices of Equipment Manufacturers, Distributors, Wholesalers, and Dealers Act, 82d Leg., R.S., ch. 1039, § 3.

125. *Id.* § 2.

126. TEX. BUS. & COM. CODE ANN. §§ 57.101–03, 57.153, 57.202.

127. *Id.* § 57.002(15).

128. *Id.* § 57.154(a)(1).

129. *Id.* § 57.155(a).

130. *Id.* §§ 57.203–04.

sections dealing with warranty claims and the return of equipment, and it provides for a private cause of action for a dealer against a supplier which may include an award of attorney's fees and costs.[131]

B. Motor Vehicle Dealer Statute

Texas also amended its motor-vehicle dealer statute in 2011.[132] The most notable change to this statute is the addition of a requirement that a manufacturer make additional payments to a dealer when terminating the dealer in certain circumstances.[133] The new payment requirements apply when a dealer is terminated because the manufacturer discontinues a product line, ceases to do business in Texas, changes the "distributor or method of distribution" in Texas, or does not comply with the statute's established requirements for termination.[134] The required payments include reimbursement for construction costs if a new dealership is completed within two years of the termination, costs of upgrading or altering the dealership within two years of termination, and the value of the goodwill associated with the franchise as of either the date of termination or the date the manufacturer announced the intention to terminate.[135] These changes, which only affect agreements entered into or renewed after September 1, 2011,[136] appear motivated by recent economic difficulties experienced in the automotive industry, and will work to shift more of the risk of future expansion onto the manufacturers, as opposed to the franchisee dealers.

The motor vehicle statute was amended in other ways as well. The statute made more explicit the factors that a manufacturer may consider when reviewing an application to transfer ownership in a dealer.[137] The statute makes it unreasonable for a manufacturer to require a dealer "to substantially change, alter, or remodel" an existing dealership prior to ten years after the last such change, provided that the last change was made in compliance with the manufacturer's specifications.[138] Manufacturers are now required to pay dealer claims under incentive programs within thirty days after the claim is approved.[139] The claim will be deemed approved unless it is rejected within thirty-one days of receipt, and manufacturers must provide written notice with the reasons for rejection.[140] Finally, there are new provisions regarding the use of customer informa-

131. *Id.* § 57.401(a).
132. Act of May 27, 2011, 82d Leg., R.S., ch. 137, §§ 1–17, 2011 Tex. Sess. Law Serv. 449, 644 (West) (current version at Tex. Occ. Code Ann. §§ 2301.002, et seq. (West 2012)).
133. Tex. Occ. Code Ann. § 2301.4651.
134. *Id.* § 2301.4651(a).
135. *Id.* § 2301.4651(b).
136. Act of May 27, 2011, 82d Leg., R.S., ch. 137, §§ 16–17.
137. Tex. Occ. Code Ann. § 2301.359.
138. *Id.* § 2301.467.
139. *Id.* § 2301.4749.
140. *Id.*

tion, property use agreements, and the right of a dealer to protest relocations.[141]

C. Boat Manufacturers, Distributors, and Dealers Statute

The Texas boat manufacturers, distributors, and dealers statute was revised in 2011.[142] The most significant change is the removal of the requirement of good cause for termination, and its replacement with a prohibition on termination by a manufacturer or distributor unless the dealer "defaults" as defined by the statute.[143] The statute defines "default," in general, as a "material" failure to meet the distribution agreement's requirements.[144] The manufacturer must give the dealer notice and a period in which to cure a default, which varies from 30 days to 180 days, depending upon the particular breach.[145] The provision that good cause is not required for the nonrenewal of an agreement was not changed.[146]

The statute was amended in several other ways as well. A prohibition on the appointment of a second "authorized dealer" in an established dealer's territory is now a statutory mandate.[147] Manufacturers now must make "reasonable efforts" to provide their dealers with information concerning the dealer's compliance with the agreed-upon performance standards, which now must be evaluated annually.[148] In addition, the statute was changed to clarify that it applies to persons who sell new boats and new boat motors, outboard *and* inboard, to dealers, and it amends the definition of "dealer" to require buying, selling, displaying, or exchanging a minimum of five boats per calendar year.[149] Note that these changes only affect agreements entered into on or after September 1, 2011.[150]

Although the removal of the "good cause" provision and its replacement with new, more detailed statutory requirements appears to provide more certainty as to when termination is warranted, a closer look at the new requirements shows that, in most cases, argument over what is "good cause" will simply be replaced by argument over what is "material." For example, the listed "defaults" under the statute include a "material failure" to meet stocking requirements and a "material failure" to pay obligations to the manufacturer.[151] Consequently, the new provisions

141. *Id.* §§ 2301.480–82, 2301.6521–22.
142. Act of June 17, 2011, 82d Leg., R.S., ch. 1148, §§ 1–14, 2011 Tex. Sess. Law Serv. 2769, 2966 (West) (current version at Tex. Occ. Code Ann. §§ 2352.001 et seq. (West Supp. 2011)).
143. Tex. Occ. Code Ann. § 2352.053(a).
144. *Id.* § 2352.0523.
145. *Id.* § 2352.0524.
146. *Id.* § 2352.053(b).
147. *Id.* § 2352.0522(a).
148. *Id.* § 2352.0521.
149. *Id.* § 2352.001.
150. Act of June 17, 2011, 82d Leg., R.S., ch. 1148, §§ 13–14, 2011 Tex. Sess. Law Serv. 2769, 2977 (West).
151. Tex. Occ. Code Ann. § 2352.0523(a)(1)–(2).

requiring manufacturers to make "reasonable efforts" to provide distributors with information concerning compliance with performance standards may be the most meaningful changes to the statute.

IV. INTELLECTUAL PROPERTY

A. UNAUTHORIZED USE

In re MCC Humble Auto Paint, Inc.[152] shows how a franchisor may act to protect its intellectual property in the bankruptcy context. In *Humble*, Maaco terminated a Texas franchisee for failure to pay franchisee fees.[153] After the termination, Maaco filed suit in federal court in Pennsylvania and sought a preliminary injunction to force the former franchisee to de-identify as a Maaco franchise.[154] The franchisee filed for bankruptcy under Chapter 11 in Texas on the day of the scheduled preliminary-injunction hearing.[155] Maaco then sought relief from the automatic stay in the bankruptcy court to seek an injunction to prevent the former franchisee from conducting any operations.[156]

An interested party in a bankruptcy proceeding may seek to lift the automatic stay "for cause."[157] Cause is determined by a "totality of circumstances" standard.[158] The testimony in the case showed that, although the debtor had taken certain steps to stop using Maaco's intellectual property, it still had Maaco signs up and used the Maaco name on employee uniforms and business cards.[159] The *Humble* court held that, "[w]ith respect to cause, it is clear that Debtor should not be permitted to use the Maaco name."[160] Although the bankruptcy court found the debtor's testimony as to its efforts to stop using the Maaco name credible, it held that there was a "substantial risk of harm" to Maaco to the extent that it had not completed its efforts.[161] The court held that, although Maaco should not be permitted to seek an injunction to stop the debtor from conducting "all" business, "the automatic stay should be conditioned on Debtor's removal of Maaco signs and identification."[162]

Humble shows that bankruptcy courts are willing to take steps to protect a franchisor's intellectual property. Although the "for cause" standard in the automatic-stay context is somewhat nebulous, the *Humble* court was clear that protection of intellectual property is an extremely

152. *In re* MCC Humble Auto Paint, Inc., No. 11-34994-H3-11, 2011 WL 3799764, at *2–3 (Bankr. S.D. Tex. Aug. 25, 2011).
153. *Id.* at *1.
154. *Id.* at *1–2.
155. *Id.* at *2.
156. *Id.*
157. *Id.* at *3; *see* 11 U.S.C. § 362(d)(1) (2006).
158. *In re MCC Humble*, 2011 WL 3799764, at *3 (citing *In re* Reitnauer, 152 F.3d 341, 343 n.4 (5th Cir. 1998)).
159. *Id.* at *2.
160. *Id.* at *3.
161. *Id.*
162. *Id.*

important consideration. Still, the *Humble* court did not grant Maaco all the relief it requested, and instead of shutting down the debtor, the court conditioned the protection of the stay on the completion of de-identification, which is a reminder that bankruptcy courts are ultimately courts of equity.

The Eastern District of Texas provided a comprehensive discussion of the laches defense to trademark infringement in *Gruma Corp. v. Mexican Restaurants, Inc.*, which is particularly relevant to prospective franchisors.[163] In *Gruma*, a trademark holder, Gruma, sued MRI after it learned that MRI was planning to embark on a franchising campaign to offer "Mission Burritos" franchises to third-parties.[164] MRI asserted the defense of laches, arguing that Gruma knew or should have known about its use of the "Mission Burritos" trademark since 1995, fourteen years before filing suit, and that the delay in filing was "inexcusable" and caused prejudice to MRI.[165] In deciding Gruma's partial motion for summary judgment, the court analyzed the laches defense separately as to (1) MRI's native Houston-area restaurants, and (2) its plans to expand outside the Houston area.

For the Houston-area locations, the court held that questions of fact existed as to the laches defense.[166] Specifically, the court found that a reasonable jury could conclude that knowledge of MRI's ongoing alleged infringement in Houston by one of Gruma's employees, who was in charge of retail sales for the Houston area, should be imputed to Gruma for laches purposes.[167] The court found that a fact question existed as to whether MRI's ongoing alleged infringement meant that Gruma should have known of the infringement based on MRI's open use of the trademarks in question.[168]

The court analyzed the planned franchising-based expansion differently. The court found that the laches defense did not apply to the planned expansion.[169] Citing *Conan Properties, Inc. v. Conans Pizza, Inc.*,[170] the court held that for purposes of an injunction regarding the expansion, it did not matter "[w]hen Gruma first learned of the alleged infringement" in Houston.[171] Following *Conan Properties*, the court reasoned that Gruma should not be barred from asserting its rights outside the Houston area based on *de minimis* local infringement because, otherwise, trademark owners such as Gruma would be forced to bring infringe-

163. Gruma Corp. v. Mexican Rests., Inc., No. 4:09-CV-488, 2010 WL 5390139 (E.D. Tex. Dec. 2, 2010), *adopted by* 2010 WL 5387624, at *2–4 (E.D. Tex. Dec. 22, 2010).

164. *Gruma*, 2010 WL 5390139, at *1.

165. *Id.* at *2–3.

166. *Id.* at *5.

167. *Id.* (citing *In re* Hellenic, 252 F.3d 391, 395 (5th Cir. 2001)).

168. *Id.*

169. *Id.* at *6.

170. Conan Props., Inc. v. Conans Pizza, Inc., 752 F.2d 145 (5th Cir. 1985).

171. *Gruma Corp.*, 2010 WL 5390139, at *7–8.

ment suits in all such *de minimis* situations.[172] Finally, the court rejected MRI's argument that Gruma's failure to sue other infringers should estop it from suing MRI, holding that, "Nowhere does the Fifth Circuit state that not protecting a mark against one defendant's infringement precludes protecting the same mark against the infringement of another."[173]

Gruma thus provides a cautionary note for future franchisors. Even if a prospective franchisor has been immune from trademark litigation to date in its original home market, due diligence is called for before embarking on an expansion plan. Relying on a laches defense to trademark-infringement claims once expansion plans are announced may be unsuccessful.

B. Cyber Squatting

Last year's Texas franchise-law update included discussion of a cybersquatting case, *Century 21 Real Estate LLC v. Gharbi*.[174] *Century 21* involved a terminated Century 21 franchisee's continued use of websites containing Century 21's trademarks.[175] The Bankruptcy Court for the Western District of Texas held that there was insufficient evidence to grant summary judgment to the franchisor, Century 21, on its Anticybersquatting Consumer Protection Act ("ACPA") claim because the failure to modify the websites as soon as a franchise is terminated is not necessarily evidence of the "bad faith" required under the ACPA.[176] On March 3, 2011, the court followed up its earlier opinion with a holding that the franchisee, Gharbi, was in fact liable under the ACPA.[177]

The court again noted that unlike in many ACPA cases, in this case Gharbi had the legal right to use the Century 21 trademarks in his websites at the time he registered them.[178] The court still found that Gharbi had a bad faith intent to profit from the use of a trademarked name, however, because (1) he did not have any rights in the name after termination, and (2) after termination Gharbi instructed his website-hosting company to use his Century 21-marked websites as "pointers" to direct traffic to a new website.[179] The court held that the ACPA's "safe harbor" provision—providing that there can be no finding of bad faith if "reasonable grounds to believe that the use of a domain name was a fair use or

172. *Id.* at *8 ("Even if the Court accepts MRI's argument that Gruma should have known of MRI's predecessor's use of 'Mission Burrito' as early as 1995, laches does not bar Gruma's injunction so far as it seeks to enjoin use outside the Houston, Texas area.").

173. *Id.*

174. Century 21 Real Estate LLC v. Gharbi, No. 08-11023-CAG, Chapter 7, Adv. No. 08-01099-CAG, 2010 Bankr. LEXIS 1247 (Bankr. W.D. Tex. April 19, 2010), *see* Deborah S. Coldwell, Altresha Q. Burchett-Williams, William D. White, and Suzanne A. Loonam Trigg, *Franchise Law*, 64 SMU L. Rev. 295, 311–12, 318–19 (2011).

175. *See* Coldwell et al., *supra* note 174, at 311.

176. *Id.* at 312.

177. Century 21 Real Estate LLC v. Gharbi, No. 08-11023-CAG, Adv. No. 08-01099-CAG, 2011 WL 831706, at *6 (Bankr. W.D. Tex. Mar. 3, 2011).

178. *Id.* at *5.

179. *Id.* at *5–6.

otherwise lawful" exist—was inapplicable because it was clear from the franchise termination notice that Gharbi no longer had lawful use of the Century 21 marks.[180]

Century 21 provides a lesson for franchisors. Given the ACPA's requirement of an explicit finding of bad faith,[181] and the statute's "reasonable grounds" safe harbor,[182] it is important for a franchisor to make clear in a termination notice that any right to use a previously licensed trademark, in a domain name or otherwise, is immediately terminated. In addition, although the *Century 21* court did not hesitate to find the practice of using a trademarked website as a "pointer" to a new site as evidence of bad faith, it may be prudent for a franchisor to list such actions as specifically prohibited practices after termination, in a franchise or license agreement.

V. COMMON LAW CLAIMS

A. CONTRACT ISSUES

ATC Healthcare Services, Inc. v. New Century Financial, Inc.[183] aptly demonstrates the importance of due diligence when entering into a franchise relationship with an established business. Chicago Nurses, Inc. operated a medical staffing agency and had a factoring arrangement with New Century Financial, whereby New Century managed collections for Chicago Nurses in exchange for providing up-front, discounted payment.[184] New Century also had a perfected security interest in Chicago Nurses' accounts receivable.[185] After this arrangement had existed for some time, Chicago Nurses entered into a franchise agreement with medical staffing franchisor ATC Healthcare Services, Inc.[186] As part of the franchise arrangement, ATC took over collections from Chicago Nurses.[187] Chicago Nurses failed to inform ATC of its arrangement with New Century, however, and ATC failed to search for account liens.[188] New Century brought suit to enforce its security interest.[189]

The *ATC Healthcare Services* opinion is a straightforward application of Article 9 of the Uniform Commercial Code. New Century had a valid, priority security interest in Chicago Nurses' accounts receivable.[190] The court held that under the plain language of the security agreement and Article 9, New Century's security interest continued even after ATC took

180. *Id.* at *6.
181. 15 U.S.C. § 1125(d)(1)(A)(i) (2006).
182. *Id.* § 1125(d)(1)(B)(ii).
183. ATC Healthcare Servs., Inc. v. New Century Fin., Inc., No. 01-10-00940-CV, 2011 WL 2739540 (Tex. App.—Houston [1st. Dist] July 14, 2011, no pet.).
184. *Id.* at *1.
185. *Id.* at *1–2.
186. *Id.* at *2.
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.* at *3–4.

over the accounts.[191] Moreover, New Century's security interest extended to accounts created after the franchise agreement was entered by virtue of the security agreement's "'hereafter acquired'" language.[192] *ATC Healthcare Services* therefore shows that a franchisor considering entering into a franchise arrangement with an existing business should not rely only on the representations and warranties of the prospective franchisee, but should conduct its own due diligence. As in *ATC Healthcare Services*, there may be third parties with enforceable priority rights that could directly impact the franchisor. Although, presumably, the franchisor would have a breach-of-representation or warranty remedy against its franchisee in such a case, the prospect of full recovery may be unclear. A certain amount of independent, prior due diligence, such as a UCC lien search, could prevent problems before they arise.

The Dallas Court of Appeals affirmed the continuing viability of the parol evidence rule in *W.O. Burgers 1, L.L.C. v. Watsonburger of Oklahoma, Inc.*[193] In that case, W.O. Burgers entered into an operating agreement, trademark license, and commercial lease agreement with Watsonburger for a hamburger restaurant in Ardmore, Oklahoma.[194] Burgers contended that it also entered into an oral agreement with Watsonburger for Burgers to manage a Watsonburger store in Durant, Oklahoma.[195] Burgers eventually abandoned the Ardmore store and sued Watsonburger for violations of the Texas Deceptive Trade Practices and Consumer Protection Act, fraud, and breach of contract.[196]

The trial court rendered a verdict for Watsonburger.[197] Burgers argued on appeal that the trial court erred in excluding evidence of its oral agreement with Watsonburger to manage the Durant store.[198] The court held that each of the three written contracts between Burgers and Watsonburger referred specifically to the Ardmore store, and that "evidence of an oral agreement to operate an additional store alters and contradicts the three unambiguous Ardmore Agreements in violation of the parol evidence rule."[199] *W.O. Burgers*, therefore, provides a reminder of the importance of the parol-evidence-rule defense in franchise cases, where the parties' relationship is often defined by very specific contractual agreements.

B. Vicarious Liability

In *Harris v. Houston Livestock Show & Rodeo, Inc.*, the Houston Court of Appeals affirmed that a franchise and distribution relationship

191. *Id.* at *4.
192. *Id.*
193. W.O. Burgers 1, L.L.C. v. Watsonburger of Okla., Inc., No. 05-09-00397-CV, 2011 WL 989051, at *2 (Tex. App.—Dallas Mar. 22, 2011, pet. denied).
194. *Id.* at *1.
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.* at *2 (citing David J. Sacks, P.C. v. Haden, 266 S.W.3d 447, 450 (Tex. 2008)).

does not by itself give rise to joint-interest liability.[200] In *Harris*, the plaintiffs brought suit under the Dram Shop Act against Corral Club and Houston Livestock Show & Rodeo, Inc. after an individual who was provided free alcohol at a bar run by the Corral Club, seriously injured the plaintiffs in a motor-vehicle accident.[201] Houston Livestock and the Corral Club had an agreement in which the Corral Club was allowed to sell alcohol during Houston Livestock's shows in exchange for paying Houston Livestock a share of its total revenue.[202]

The court analyzed whether Houston Livestock could be vicariously liable with Corral Club under a joint-enterprise theory. The elements of a joint enterprise are: (1) an express or implied agreement, (2) a common purpose, (3) a "community of pecuniary interest," and (4) "an equal right to direct and control the enterprise."[203] The court held that the third element did not exist in this case.[204] The court affirmed that, "[A]n indirect, potential financial interest, such as the interest of a franchisor concerning the success of its franchisee, is insufficient to constitute a community of pecuniary interest in the common purpose."[205] The court noted that the percentage of total revenue received by Houston Livestock was a different interest from the revenue-minus-expenses received by the Corral Club.[206] *Harris*, therefore, reinforces that in order to find joint-enterprise liability in a franchise or distribution relationship, there must be some financial connection between the parties, in addition to a traditional royalty as a percentage of revenue.

VI. STATUTORY CLAIMS

A. ANTITRUST

On February 22, 2011, the United States Supreme Court denied PSKS's latest certiorari petition, refusing to review its landmark 2007 decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* (*Leegin I*).[207] Thus, manufacturers requiring resale price maintenance (RPM or vertical price fixing) agreements can continue to rely on *Leegin I*, which struck down the Court's long-standing precedent that such agreements are per se violations of the Sherman Act.[208]

Leegin manufactured and distributed handbags and other "Brighton" brand products.[209] PSKS, the owner of a retail store that sold Brighton

200. Harris v. Houston Livestock Show & Rodeo, Inc., 365 S.W.3d 28, 35 (Tex. App.—Houston [1st Dist.] 2011, pet. denied).
201. *Id.* at 31.
202. *Id.*
203. *Id.* at 34.
204. *Id.*
205. *Id.* (citing St. Joseph Hosp. v. Wolff, 94 S.W.3d 513, 532 (Tex. 2003)).
206. *Id.*
207. PSKS, Inc. v. Leegin Creative Leather Prods., Inc., 615 F.3d 412 (5th Cir. 2010), *cert. denied*, 131 S. Ct. 1476 (2011) (refusing to review Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007) (Leegin I).
208. *Leegin I*, 551 U.S. at 881–82.
209. *PSKS, Inc.*, 615 F.3d at 414.

products, violated Leegin's RPM policy, which set the lowest price that resellers could charge their customers, by selling Brighton products at a discounted price.[210] When Leegin stopped selling Brighton products to PSKS, PSKS sued Leegin for violations of the Sherman Act.[211] A jury awarded nearly $4 million to PSKS, a decision which was appealed and affirmed by the Fifth Circuit pursuant to *Dr. Miles'*[212] per se rule.[213]

In *Leegin I*, the United States Supreme Court overturned *Dr. Miles'* per se rule relating to RPM agreements.[214] In its 2007 decision, the Court determined that RPM agreements are no longer per se violations of the Sherman Act.[215] Rather, such agreements are to be evaluated under "the rule of reason," which weighs the pro-competitive effects of RPM agreements against their anticompetitive effects.[216]

On remand, PSKS amended its complaint, alleging that Leegin was involved in a horizontal price-fixing conspiracy and that consumers were required to pay artificially high and anticompetitive prices for Brighton products.[217] The Fifth Circuit affirmed the lower court's dismissal, which applied the new rule-of-reason set forth in *Leegin I*, for failure to properly plead a relevant market in which to perform the rule-of-reason analysis.[218] The Fifth Circuit held that PSKS did not meet its burden of establishing that Leegin's actions had harmed competition because PSKS failed to sufficiently define the relevant products and markets.[219] The two alternative markets proposed by PSKS failed to take into account "interchangeable substitute products" or recognize the "cross-elasticity of demand" for Brighton products.[220] Brighton did not constitute its own market, nor did "'wholesale sale,'" which focused on the distribution level instead of the product.[221] In addition, PSKS did not allege any factors indicating an anticompetitive effect.[222] For example, the court rejected Leegin's claim that the RPM arrangement resulted in "'artificially' high prices" and stated that this argument "defies the basic laws of economics" because absent market power, increased prices "would merely cause [Leegin] to lose sales."[223] Nor did PSKS assert that a group of retailers or one dominant retailer was the source of the RPM policy.[224] The Fifth Circuit also rejected PSKS's horizontal-restraint claim because the pleadings did not allege that "retailers were the source of the price

210. *Id.* at 415.
211. *Id.*
212. Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).
213. *Id.*
214. *Leegin I.*, 551 U.S. at 881–82, 907.
215. *Id.*
216. *Id.* at 882.
217. *PSKS, Inc.*, 615 F.3d at 416.
218. *Id.* at 417–18.
219. *Id.*
220. *Id.* at 418.
221. *Id.*
222. *Id.* at 419.
223. *Id.*
224. *Id.*

restraint."[225] Nor were Leegin's actions as a "dual distributor" supportive of PSKS's horizontal-restraint claim.[226]

In denying PSKS's petition for writ of certiorari, the United States Supreme Court agreed with the Fifth Circuit's application of the rule of reason. However, depending on the state law that applies, uncertainty still exists for manufacturers wanting to control resale prices, as some states hold that RPM arrangements are per se illegal.[227] Although some states approach RPM arrangements as per se violations, Texas looks to federal judicial interpretations of the Sherman Act in applying its state antitrust law.[228] Thus, at least when federal or Texas law applies, manufacturers can continue to rely on *Leegin I* in structuring their RPM policies. In these situations, a substantial legal risk to RPM agreements has been removed.

VII. REMEDIES: DAMAGES AND INJUNCTIVE RELIEF

A. ATTORNEYS' FEES

In *Bennigan's Franchising Co. v. Team Irish, Inc.*, (*Bennigan's I*), the Northern District of Texas considered whether Bennigan's was a prevailing party entitled to attorneys' fees when the parties entered into an agreed judgment, settling only a portion of Bennigan's claims.[229] The court also considered whether the amount of attorneys' fees should be limited to the claim settled.[230] Ultimately, the court determined that Bennigan's was a prevailing party under the parties' franchise agreement, which entitled Bennigan's to attorneys' fees; however, the attorneys' fees were limited to those incurred for the settled claim only.[231]

Bennigan's I involved a typical dispute over violations of a development agreement and the failure to pay royalties.[232] The franchisor and franchisee entered into an agreed judgment, in which the parties stipulated to an award for past-due royalties in favor of Bennigan's, but not for the other four claims.[233] In the agreed judgment, Bennigan's was specifically given the right to seek attorneys' fees.[234] In addition, the franchise agreement awarded "costs and expenses incurred, including

225. *Id.* at 420.
226. *Id.* at 420–21.
227. *See, e.g.*, George Miller Brick Co. v. Stark Ceramics, Inc., 801 N.Y.S.2d 120, 126 (N.Y. Sup. Ct. 2005); Kunert v. Mission Fin. Servs. Corp., 1 Cal. Rptr. 3d 589, 605 (Cal. Ct. App. 2003).
228. TEX. BUS. & COM. CODE ANN. § 15.04 (West 2011) (providing that the Texas Antitrust Act "shall be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes.").
229. Bennigan's Franchising Co. v. Team Irish, Inc., No. 3:11-CV-0364-D, 2011 U.S. Dist. LEXIS 99736, at *7–8 (N.D. Tex. Sept. 6, 2011) (Haynes and Boone attorneys Deborah S. Coldwell, Altresha Q. Burchett-Williams, and Katie Dolan-Galaviz represent Bennigan's in this matter).
230. *Id.* at *14–17.
231. *Id.* at *15–16.
232. *Id.* at *2–3.
233. *Id.* at *3.
234. *Id.*

reasonable accounting and legal fees," to the prevailing party in a proceeding involving amounts owed by the franchisee or enforcement of the franchise agreement.[235] Bennigan's argued that it was entitled to attorneys' fees and costs pursuant to the franchise agreement, the development agreement, the agreed judgment, and section 38.001(8) of the Texas Civil Practice and Remedies Code.[236]

After determining that the right to attorneys' fees should be analyzed under the franchise agreement, the court next considered whether Bennigan's was a prevailing party pursuant to the franchise agreement.[237] The franchisee argued that Bennigan's was not a prevailing party because the past-due royalties award was only conceded in the course of settlement, and the agreed judgment did not address the remaining four claims.[238] The court disagreed, holding that Bennigan's was a prevailing party because Bennigan's "'obtained an enforceable judgment against the defendant[s] from whom fees [were] sought, or comparable relief through a *consent decree or settlement.*'"[239]

The lack of success on all claims was, however, relevant to the amount of fees that could be awarded. Although Bennigan's sought recovery for all fees incurred pursuing its claims, the court limited the fees to those incurred in litigating the settled claim for past-due royalties.[240] Thus, Bennigan's was given additional time to segregate fees incurred for the past-due royalties claim from the unrecoverable claims, or to "establish that segregation is not required because the . . . 'legal services advance[d] both a recoverable and unrecoverable claim.'"[241] Anticipated appellate fees were denied without prejudice for reconsideration following an actual appeal.[242]

In *Bennigan's II*, the court considered the supplemental fee application filed by Bennigan's, which represented a 15% reduction for fees incurred in litigating claims on which it did not prevail.[243] In addition, Bennigan's sought fees for post-judgment briefing.[244] The court determined that the reduction of fees by 15% satisfied Bennigan's obligation to segregate recoverable from unrecoverable fees, and that the fees for litigating the claim and for post-judgment briefing were "reasonable and necessary."[245]

The Bennigan's franchise agreement contained typical wording that might need to be retooled given the holding in *Bennigan's I*. Although

235. *Id.* at *6 n.4.
236. *Id.* at *4–5.
237. *Id.* at *12–14.
238. *Id.* at *12.
239. *Id.* at *13 (quoting Intercontinental Group P'ship v. KB Home Lone Star L.P., 295 S.W.3d 650, 654 (Tex. 2009)).
240. *Id.* at *15–16.
241. *Id.* at *18 (internal citation omitted).
242. *Id.* at *19.
243. Bennigan's Franchising Co. v. Team Irish, Inc. No. 3:11-CV-0364-D, 2011 U.S. Dist. LEXIS 136032, at *5–7 (N.D. Tex. Nov. 28, 2011).
244. *Id.* at *13.
245. *Id.* at *12–13.

Bennigan's II approved a small reduction for attorneys' fees incurred in litigating unrecoverable fees, parties may want to consider modifying their franchise agreements so that fees incurred in litigating both recoverable and unrecoverable claims can be sought. If the parties desire this result, the franchise agreements should allow for the recovery of "all attorney fees" should the franchisor prevail as to "any claim" arising out of the franchise agreement or the relationship of the parties.

B. PUNITIVE DAMAGES

As discussed above in section IV, the *Century 21* court determined that the debtor violated the ACPA.[246] Without evidence of Gharbi's business records (which Gharbi testified were destroyed by vandals) Century 21 opted to seek statutory damages under 15 U.S.C. § 1117(d).[247] Under this section, a plaintiff can seek an amount between $1,000 and $100,000 per offending domain name.[248] Century 21 argued that it should be awarded the maximum award of $300,000, or $100,000 per violation, given Gharbi's "'flagrant and unauthorized'" use of Century 21 marks, as well as the fact that the Gharbi had destroyed the very evidence that would allow the calculation of specific money damages.[249] After noting the lack of guidance in the statute, the *Century 21* court concluded that the Fifth Circuit gave the court "wide discretion in determining the amount of statutory damages" and required that ACPA statutory damages, like copyright statutory damages, "not merely compel restitution of profit and reparation for injury but also . . . discourage wrongful conduct."[250] Although the court noted that Gharbi's conduct was "clearly wrong and intentional," given Gharbi's continued use of the sites after being asked to take them down and warned that continued use could be illegal, the court did not believe that Gharbi's conduct warranted an award of the maximum damages.[251] The court therefore assessed statutory damages of $75,000, or $25,000 for each website.[252]

Turning to attorneys' fees, the court next determined whether this was an "exceptional case" that warranted an award of reasonable attorneys' fees under 15 U.S.C. § 1117(a).[253] The court applied the Fifth Circuit's definition of "exceptional cases" as those that involve "malicious, fraudu-

246. Century 21 Real Estate LLC v. Gharbi, No. 08-11023-CAG, Chapter 7, Adv. No. 08-01099-CAG, 2011 Bankr. LEXIS 864, at *30 (Bankr. W.D. Tex. Mar. 3, 2011).

247. *Id.* at *18–19, 19 n.3.

248. *Id.* at *19–20. (Section 1117(d) provides that "plaintiff may elect . . . to recover, instead of actual damages and profits, an award of statutory damages in the amount of not less than $1,000 and not more than $100,000 per domain name, as the Court considers just.").

249. *Id.* at *20.

250. *Id.* at *22 (quoting E. & J. Gallo Winery v. Spider Webs Ltd., 286 F.3d 270, 278 (5th Cir. 2002) (internal quotation marks omitted).

251. *Id.* at *23.

252. *Id.*

253. *Id.* at *23–24.

lent, deliberate, or willful" acts.[254] The *Century 21* court determined that this case was exceptional, given that Gharbi "acted with the bad faith intent to profit from [p]laintiff's marks" and also acted willfully in keeping the websites in operation and as pointers when he was aware of the consequences and was told to stop using the marks.[255] Gharbi, who represented himself pro se at trial, was therefore ordered to pay Century 21's attorneys' fees.[256]

The court next determined whether Gharbi's debt to Century 21 was dischargeable under the Bankruptcy Code, which would mean that the judgment discussed above would be uncollectible.[257] Under 11 U.S.C. § 523(a)(6) of the Bankruptcy Code, recoveries for "willful and malicious" injuries are not dischargeable.[258] In order to qualify as a "willful or malicious" act, "'a debtor must have acted with objective substantial certainty or subjective motive to inflict injury.'"[259] The court discussed the objective and subjective standards set forth by the Fifth Circuit to determine whether Gharbi's conduct was willful and malicious.[260] The court found that Gharbi's conduct was both objectively and subjectively willful and malicious. First, Gharbi's conduct was objectively willful and malicious because he "knew that he would cause harm to the [p]laintiff if he continued to operate the websites."[261] Second, the conduct was subjectively willful and malicious because Gharbi, "in knowing disregard of the rights of the [p]laintiff, continued to operate the domain names."[262] The court found that Gharbi knew he did not have the right to continue to use Century 21's name after his franchise was terminated and continued to use the marks even after he was warned to shut down.[263]

Century 21 gives franchisors a powerful weapon to prevent former franchisees from cybersquatting after termination of the franchise agreement. Even if a franchisor cannot prove damages, the franchisee can be held liable for up to $100,000 for each infringing website, plus attorneys' fees. Furthermore, if a bankrupt franchisee commits a "willful and malicious" injury, the debt is not dischargeable in bankruptcy.

C. Injunctive Relief

As discussed in section IV, in *In re Humble Auto Paint, Inc.*, Maaco, a franchisor of vehicle-painting and body-repair centers, sued its franchisee in a Pennsylvania district court, seeking injunctive relief to enforce its

254. *Id.* at *24 (citing Schlotzsky's, Ltd. v. Sterling Purchasing and Nat'l Distrib. Co., 520 F.3d 393, 402 (5th Cir. 2008) (internal quotation marks omitted)).
255. *Id.* at *24.
256. *Id.*
257. *Id.* at *25.
258. *Id.*
259. *Id.* (quoting *In re* Williams, 337 F.3d 504, 508-09 (5th Cir. 2003)) (internal quotation marks omitted).
260. *Id.* at *25–27.
261. *Id.* at *27–28.
262. *Id.* at *29.
263. *Id.* at *29–30.

noncompetition covenants, post-termination.[264] On the date of the preliminary hearing in Pennsylvania, the franchisee filed for bankruptcy in Texas, thereby staying the Pennsylvania litigation.[265] In the Texas bankruptcy case, Maaco then filed a motion to lift the automatic stay to prevent the debtor franchisee "from conducting any operations."[266] At the hearing, the debtor testified that he was no longer operating as a Maaco Center and had taken steps to de-identify, but that the Maaco signs on the building had not been removed because the debtor could not afford to do so.[267]

Maaco first argued that the stay should be lifted because the debtor no longer had a property interest in the franchise agreement, which was properly terminated pre-petition.[268] The court rejected this argument, finding that the debtor "ha[d] not asserted [a] property interest in the [terminated] franchise agreement."[269] Second, Maaco argued that the stay should be lifted for cause under 11 U.S.C. § 362(d)(1), because Maaco's intellectual property, as reflected in its signage and goodwill, was not adequately protected.[270] Although it was clear to the court that the debtor could no longer use Maaco's name, and that the debtor must therefore fully de-identify, the court allowed the debtor to continue operating as an independent body shop because "the hardship to Maaco d[id] not outweigh the hardship to [the] [d]ebtor" that would result from having to close its business.[271] Therefore, the court conditioned the automatic stay on the debtor's removal of all signs and identification.[272] The enforceability of the covenant not to compete was not presented in the motion to lift the automatic stay, but may be raised by Maaco in the future.

D. Motor Vehicle Dealer Statutory Damages

As discussed in Part III *supra*, during the last legislative session, additional protections were given to dealerships in Texas. These protections appear to address the economic conditions faced by the retail automobile industry in recent years and certain practices by manufacturers and distributors that the Legislature believed jeopardize the viability of franchised dealerships. Effective September 1, 2011, motor vehicle manufacturers, distributors, and representatives are required to make additional payments to a dealer whose franchise was terminated or discontinued under certain situations.[273] Under Senate Bill 529, addi-

264. *In re* MCC Humble Auto Paint, Inc., No. 11-34994-H3-11, 2011 Bankr. LEXIS 3288, at *4–6 (Bank. S. D. Tex. Aug. 25, 2011) (mem. op.).
265. *Id.* at *4.
266. *Id.* at *6.
267. *Id.* at *5–6.
268. *Id.* at *6.
269. *Id.* at *8.
270. *Id.* at *6.
271. *Id.* at *8–9.
272. *Id.* at *9
273. *See* Tex. Occ. Code Ann. § 2301.4651 (West 2004 & Supp. 2011).

tional payments to dealers are required when a dealer is terminated in violation of Texas termination statutes or when a franchisor "terminates or discontinues a franchise by discontinuing a line-make, ceasing to do business in this state, or changing the distributor or method of distribution of its products" in Texas.[274] In these situations, the manufacturer is required to pay the dealer: (1) construction costs for dealerships constructed within two years of termination or rent; (2) upgrade costs made in the two years preceding termination; and (3) the value of goodwill associated with the franchise.[275] The amount of the payments required is based on the percentage of total square feet "attributable to sales, service, and parts suggested by a manufacturer or distributor" and allocated to the terminated or discontinued franchise.[276] In addition, the manufacturer, distributor, or representative must pay the terminated dealer "the depreciated value of computer software that was recommended and required in writing by the manufacturer, distributor, or representative."[277]

VIII. CONCLUSION

During the Survey period, several United States Supreme Court cases impacted how franchise and distribution companies will do business in Texas and throughout the United States. For example, in *Goodyear Dunlop Tires Operations, S.A. v. Brown* and *J. McIntyre Machinery, Ltd. v. Nicastro*, the Supreme Court narrowed a state court's ability to exercise personal jurisdiction over nonresident defendants. In addition, the Supreme Court denied certiorari and refused to review its landmark 2007 decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007). At least when federal or Texas law applies, manufacturers can continue to rely on *Leegin I*, which overturned the Court's previous rule that retail price maintenance agreements were per se violations of the Sherman Act.

Similar to past years, Texas and federal courts also reaffirmed the contractual nature of the relationship between franchisors and franchisees by enforcing a Texas forum-selection clause in *Safety-Kleen Systems, Inc. v. McCoy Freightliner, Inc.* and by compelling arbitration in *The Salad Bowl Franchise Corp. v. Mason Crane.* In *W.O. Burgers 1, L.L.C. v. Watsonburger of Oklahoma, Inc.*, a Texas appellate court also stressed the importance of the written agreement between the parties by affirming the continuing viability of the parol evidence rule.

Throughout the past year, franchisors and other trademark owners also sought to protect their intellectual property rights. In *Gruma Corp. v.*

274. Tex. S.B. 529, 82d Leg., R.S. (2011), (current version at TEX. OCC. CODE ANN. § 2301.4651(a) (West 2004 & Supp. 2011)).

275. *Id.* (current version at TEX. OCC. CODE ANN. § 2301.4651(b) (West 2004 & Supp. 2011)).

276. *Id.* (current version at TEX. OCC. CODE ANN. § 2301.4651(d) (West 2004 & Supp. 2011)).

277. *Id.* (current version at TEX. OCC. CODE ANN. § 2301.465(b)(6) (West 2004 & Supp. 2011)).

Mexican Restaurants, Inc., the court determined that a trademark owner could seek an injunction prohibiting the use of its marks outside of a prospective franchisor's original home market, despite the fact that the prospective franchisor had been using the marks since 1995. Thus, relying on a laches defense to trademark infringement claims to expand may be unsuccessful. In *Century 21 Real Estate LLC v. Gharbi*, the court found that the terminated franchisee was liable under the ACPA for continued use of Century 21 trademarks post termination. Notably, the "safe harbor" provision of the ACPA was not applicable since it was clear from the franchise termination notice that the former franchisee could no longer lawfully use the Century 21 marks. Furthermore, because of the former franchisee's willful and malicious conduct in continuing to use the trademarks post-termination, the debt to Century 21 was not dischargeable under the Bankruptcy Code.

Finally, to address the economic and financial conditions faced by dealers and distributors, the 82nd Legislature of Texas made significant statutory changes concerning motor vehicle dealers, boat dealers, and "equipment" dealers. In particular, these statutes address the right to terminate a dealership or distributorship. For example, a motor-vehicle manufacturer must now make additional payments to a dealer when the dealership is terminated in certain circumstances, including discontinuing a line-make, ceasing to do business in Texas, or changing the distributor or method of distribution in Texas.