



# IFA LEGAL SYMPOSIUM

# Judicial Update

May 5, 2021

# Joint Employer: Recent filings and decisions, as well as state and federal regulatory actions

# Speaker

- Dawn Diaz

# Joint Employer - Franchising

When the franchisee and franchisor may be deemed jointly and severally liable for labor and employment laws asserted by the franchisee's employees.



# Where have we been and where are we going?

- 2015 – NLRB expanded joint employer with Browning-Ferris
- Significant impact to franchising over the next 4 years
- 3/16/2020 – DOL's FLSA Joint Employer Final Rule takes effect. Establishes a 4-factor test.
- 4/27/2020 – NLRB's new Final Joint-Employer Rule goes into effect. Returns to the direct control joint employer standard.
- 9/8/2020 – NY federal judge invalidates portions of the DOL's joint employer rule.
- Trump administration appeals the decision to the 2<sup>nd</sup> Circuit Court of Appeals.
- Biden Administration proposed rule should be made public soon.
- Protecting the Rights to Organize (PRO) Act 2021 passes the House of Representatives.



# Recent Case Law

## Pennsylvania:

*Gina Diflavis v. Choice Hotels International, Inc., et al.*

Emphasized 4-factors:

1. Authority to hire and fire
2. Authority to promulgate work rules and assignments, set conditions of employment
3. Day-today supervision, employee discipline
4. Control of employee records



# Recent Case Law

## Ohio:

*Branning v. Romeo's Pizza*

## Tennessee:

*Alford v. CNG Rests., LLC*

Three Factor test asks whether:

1. The entity exercise authority to hire, fire and discipline the employee;
2. The entity has control over the employee's pay and insurance, and
3. The entity supervises the employee



# Recent Case Law

## North Carolina:

*Elsayed v. Family Fare, LLC*

6 factors:

1. Whether the putative joint employers jointly determine, share or allocate the power to direct, control, or supervise the worker, by direct or indirect means;
2. Whether the putative joint employers jointly determine, share, or allocate the power to directly or indirectly hire or fire the worker;
3. The degree of permanency and duration of the relationship between putative joint employers;
4. Whether, one putative joint employer controls, is controlled by, or is under common control with the other putative joint employer;
5. Whether the work is performed on a premises owned or controlled by one or more of the putative joint employers; and
6. Whether the putative joint employers jointly determine, share, or allocate responsibility over functions ordinarily carried out by an employer.



# Recent Case Law

## New York:

*Griffith v. Coney Food Corp.*

And

*People v. Domino's Pizza, Inc.*

Both courts used the economic realities test and applied the 4-factor formal control test and the 6-factor functional control test. The federal court in *Griffith* concluded that the franchisor was the employer of the franchisee's employee.

The Supreme Court found that in applying both tests material issues existed as to Domino's being the joint employer of its franchisee's employees. This court looked to case law that held franchisor's right to inspect its franchisee's operations is not a factor that would create a joint employment relationship.



# Recent Case Law

## California:

Salazar et al v. McDonald's Corp. et al.

The 9<sup>th</sup> Circuit Court of Appeals found McDonald's not to be a joint employer.

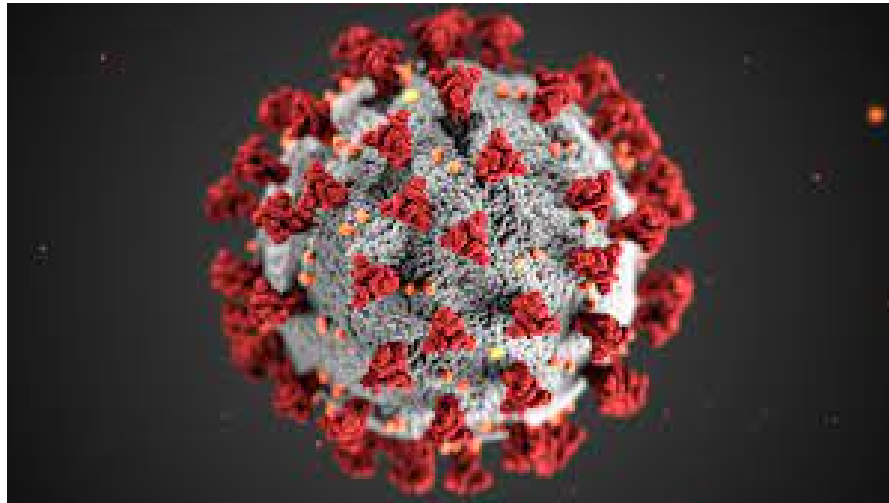
Did not retain direct or indirect control over its franchisee's employees hiring, firing, wages, hours, or material working conditions.

McDonald's did exercise control over the work performed at its franchises for quality control and maintenance of brand standards.

The court stated that even though McDonald's was likely aware of the violation of CA's wage and hour laws, there was no evidence it had the necessary control over the franchisee's employees.



# Force Majeure and Insurance COVID-19 Decisions and Trends



# COVID-19 Insurance Coverage Cases



- Many businesses are filing claims with insurers under “Business Interruption” and “Civil Authority” provisions of their policies.
- Vast majority of insurers have denied claims, resulting in thousands of lawsuits filed.
- Most courts are granting insurers’ Motions to Dismiss, typically finding no physical damage.
- No rulings yet from appellate courts.

# *Diesel Barbershop, LLC v. State Farm Lloyds*, 479 F.Supp.3d 353 (W.D. Tex. 2020) (Case No. 5:20-cv-461)

- Early case granting insurer's Motion to Dismiss.
- Court looked at whether there was a physical loss to the premises: "the loss needs to have been a distinct, demonstrable physical alteration of the property."
- COVID-19 orders did not render physical damage to insured's properties.
- Virus exclusion also barred coverage because COVID-19 ultimately caused the closure of the barbershops.
- Dismissal was with prejudice.

# *Henry's Louisiana Grill, Inc. v. Allied Ins. Co. of America*, 2020 WL 5938766 (N.D. Ga. Oct. 6, 2020)

- Motion to Dismiss granted.
- Insureds argued that they pled a “physical loss” because their dining room was unavailable.
- Court disagreed—COVID-19 has never been identified on the premises; therefore, there can be no physical change of the premises.
- Decision has been appealed to the 11th Cir. The Restaurant Law Center has filed an amicus brief.

# *TJBC, Inc. v. The Cincinnati Ins. Co.*, 2021 243583 (S.D. Ill. Jan. 25, 2021) (Case No. 20-cv-815-DWD)

- Motion to Dismiss granted.
- “Mere loss of use or diminishment in value of Plaintiff’s business without underlying tangible damage or loss to the business property or structure is not enough to trigger coverage under the policy.”
- Case appealed to the 7th Circuit.

# *Studio 417, Inc. v. Cincinnati Ins. Co.*, 478 F.Supp.3d 794 (W.D. Mo. 2020) (Case No. 20-cv-03127-SRB)

- Insurer’s Motion to Dismiss denied.
- Court found that insured had adequately alleged a physical loss—COVID-19 is a “physical substance” attached to the insured’s property and made it unsafe.
- Insurance policy did not have a virus exclusion.
- Court stated that issues could be revisited on summary judgment.
- Decision heavily criticized and distinguished.

# *Henderson Rd. Rest. Sys., Inc. v. Zurich Am. Ins. Co., 2021 WL 168422 (N.D. Ohio Jan. 19, 2021) (Case No. 1:20-cv-1239)*

- Court granted summary judgment to the insured.
- Court found that the insured's business operations were suspended because of "direct physical loss of or damage to property at the premises".
- Courts within the N.D. of Ohio have subsequently criticized and distinguished opinion.

# *SMR Hospitality III LLC v. Robert J. Provost*, Case No. 7:21-cv-00980-TMC

- Malpractice case against the insured broker.
- Complaint alleges that broker offered less coverage in 2020, than in 2019 and did not communicate availability of coverage for pandemics.
- Complaint also alleges that broker failed to timely submit claims to the insurer for business interruption losses.
- Is this a potential new trend?

# Force Majeure

- Provision found in many contracts
- Relieves or suspends parties from performance of certain obligations based on certain defined events.
- The law governing force majeure varies by state.
- The contract terms matter.



# *In re Hitz Rest. Grp.*, 616 B.R. 374 (Bankr. N.D. Ill. 2020)

- Commercial landlord-tenant case.
- Restaurant/debtor argued it was excused from paying rent under the Force Majeure provision due to stay-at-home orders.
- Court agreed and partially excused obligation to pay rent for April, May and June 2020. Rent for March was required to be paid in full as it arose before the pandemic.
- Because restaurant was able to offer carryout and delivery, it had to pay a portion of rent due to Landlord for April, May and June.

# *E2W, LLC v. Kidzania Operations, S.a.r.l., No. 1:20-cv-02866-ALC (S.D.N.Y. 2020)*

- Franchisee sued Franchisor for breach of parties' Franchise Agreement when Franchisor attempted to terminate agreement.
- Franchisee was required to open and operate 10 amusement park franchises by specific dates. Franchisee's financing fell through due to COVID-19 franchisee could not meet its deadlines. Franchisor sent notice of termination and franchisee invoked the Force Majeure provision.
- Court granted injunctive relief pending arbitration.

# *Palm Springs Mile Assocs., Ltd. v. Kirkland's Stores, Inc.*, 2020 WL 5411353 (S.D. Fla. Sept. 9, 2020) (Case No. 20-21724-Civ-Scola)

- Tenant filed Motion to Dismiss based on affirmative defense of Force Majeure in Lease Agreement.
- Court denied the Motion to Dismiss.
- There was no causal connection alleged in the Complaint between the government restrictions and tenant's inability to pay rent.
- Force Majeure is also an affirmative defense, which is not proper to resolve on a motion to dismiss.

# *JN Contemporary Art LLC v. Phillips Auctioneers LLC*, 2020 WL 7405262 (S.D.N.Y. Dec. 16, 2020) (Case No. 20-cv-4370-DLC)

- Contrary to *Palm Springs Mile Assocs*, court granted Motion to Dismiss based on the Force Majeure.
- Court found that the COVID-19 pandemic was a “natural disaster” that fell within the category of force majeure events.

# Franchise Regulation, Registration and Disclosure: Current trends and activity in the areas of anti- poaching and Item 19 FPRs/COVID 19

## Anti-Poaching

- Background
  - DOJ/FTC Antitrust Guidance for Human Resource Professionals (Oct. 2016)
  - Krueger/Ashenfelter paper “Theory and Evidence of Employer Collusion in the Franchise Sector” (Sept. 2017)
  - Booker/Warren Bill “End Employer Collusion Act” (S.2480) (March 2018)
  - Washington State AODs (2018)
  - Multi-State Investigation (2018)

# Anti-Poaching

- Numerous Private Actions
  - Carls Jr.
  - McDonalds
  - Pizza Hut
  - Jimmy Johns
  - Cinnabon
  - Little Caesar

# Anti-Poaching

## *Jarvis Arrington et al. v. Burger King Worldwide, Inc.* (S.D. Fla 2020)

- From at least 2010 to September 2018, all Burger King franchise agreements contained the following provision:

Neither BKC [Burger King Corporation] nor Franchisee will attempt, directly or indirectly, to entice, induce, or attempt to entice or induce any employee of the other or of another Franchisee of BKC to leave such employment, or employ such employee within six (6) months after his or her termination of employment with such employer, except with the prior written consent of such employer.

# Anti-Poaching

- Plaintiff Jarvis Arrington - Line cook at a franchised Burger King restaurant in Dolton, IL. Sought to work at a franchised Burger King location in Chicago.
- Plaintiff Sandra Munster - GM at a franchised Burger King restaurant in Ottawa, IL. Applied for a job at a franchised Burger King location in Marseilles, IL.
- Plaintiff Geneva Blanchard was a crew member at a franchised Burger King restaurant in Slidell, LA. She experienced a reduction in pay and reduced shifts.
- Burger King owned 50 BK restaurants in Miami area. No company-owned BK restaurants in IL or LA.

# Anti-Poaching

- Allegation: “As a result of Defendants’ and their co-conspirators’ collusive and anticompetitive conduct...[the plaintiffs were] paid artificially depressed wages and suffered decreased benefits and job mobility.” Restraint was horizontal and unreasonable. Therefore per se unlawful under Sherman Act. If vertical, subject to “quick look” analysis.
- District Court: Grants BK’s Motion to Dismiss. BK and franchisees legally incapable of conspiring under Section 1 of Sherman Act. Cites *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984).
  - Arrangement between BK and its f/ees similar to divisions within a single corporation. Unity of interest- not independent centers of decision-making. Cited uniformity of operations, payment of royalties joint advertising, other factors.
  - “in the absence of uniformity guaranteed by the Burger King franchise agreement, there would be no franchise and hence, no independent source of economic power. The relationship here is more than merely symbiotic. It is totally derivative.” Moreover, the court noted that “the success of [Burger King] and its franchisees is wholly dependent on systemwide uniformity.”

# Anti-Poaching

- BK: Supports Dist. Ct. decision. Alternatively, the constraint is vertical and thus subject to rule of reason analysis. Quick look is not proper b/c overall effect is not readily apparent.
- DOJ: “[t]he court should have followed the analysis set forth in American Needle evaluating how the franchise system allegedly operates in practice, and determined whether the complaint plausibly pleaded that the franchisor and franchisees had disparate economic interests concerning employee hiring.”
- AAI: The existence of a vertical agreement in one market does not dictate the standard to be applied in all markets (i.e., a franchisor and franchisee can have a vertical relationship in one market and a horizontal relationship in another).
- IFA: F/As are vertical arrangements and therefore must be evaluated under a ROR analysis. BK’s Miami restaurants do not compete against franchised restaurants in IL or LA. Case law supports ROR even if plaintiffs sought employment at BK units in Miami. The No-hire clause is ancillary to a pro-competitive agreement and therefore the ROR should apply. The clause incentivizes f/ees to invest in training, promotes environment of cooperation among franchisees and promotes sharing of information among franchisees.

# FPRs and COVID 19

- June 2020: NASAA Franchise and Business Opportunity Project Group released guidance titled, “Disclosing Financial Performance Representations in the Time of COVID-19”
  - Addressed need to update FPRs based upon material changes caused by COVID
  - Rejected premise that FPR consisting entirely of pre-COVID-19 data should in all cases be permitted if the pre-COVID data is factually accurate – must also have reasonable basis.

# FPRs and COVID 19

- Must disclose material facts necessary to make the statements presented not misleading.
- Material changes to f/or's business model may also require disclosure.
- Factors to consider – e.g., impact of COVID, data in FPR, changes to system, etc.

# FPRs and COVID 19

- 2021 Informal Survey of State Administrators
  - No new NASAA Guidance Needed
  - Rejection of Disclaimers
  - Excluded Units
  - FPRs based on Partial 2020 Data
  - Improved Business Results in 2020
  - PPP Loans

# Update on the Application of the ABC Test to Franchising in California

May 5, 2021



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# Conceptualizing Franchise Relationships

**Landlord?**



**OR**

**Master?**



# California Independent Contractor Tests before 2018

- ***Borello***—Balance common law factors like control over means and manner, right to immediate termination, agreement, form of payment, and right to hire helpers.
- ***Martinez v. Combs*** (irregular relationships)—Suffer or permit work, or “engage,” or exert control over wages.

# The *Patterson Gloss*



A franchisor loses independent contractor status

**ONLY** if it has retained **general right of control** over factors relevant **day-to-day aspects** of the workplace behavior of the franchisee's employees.

# April 30, 2018 *Dynamex* Decision Changed the Rules in California

***New Rules: Simple as A B C***

- A. Is there a right to **direct or control** the work?
- B. Is the work part of the company's **regular business** activities?
- C. Is the worker in a separate trade, such as a plumber?

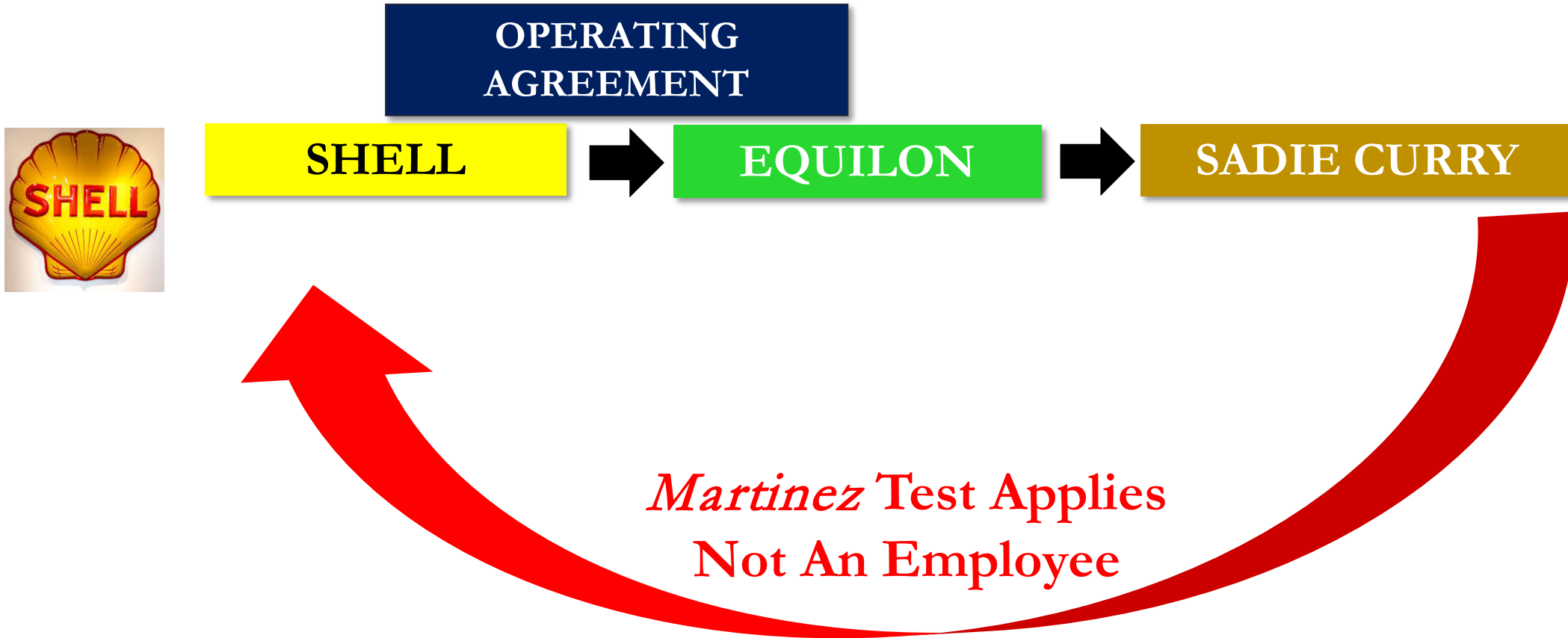


If **Yes** to *Any* Factor, there is an employment relationship.

## AB-5 is now Labor Code § 2750.3

- For the purposes of **the Labor Code and the wage orders**, a person providing services is an employee unless the hiring entity proves:
  - A.** The person is free from control and direction  
**AND**
  - B.** The work is outside the usual course of the hiring entity's business  
**AND**
  - C.** The person is engaged in an independent trade.

# The Equilon Cases

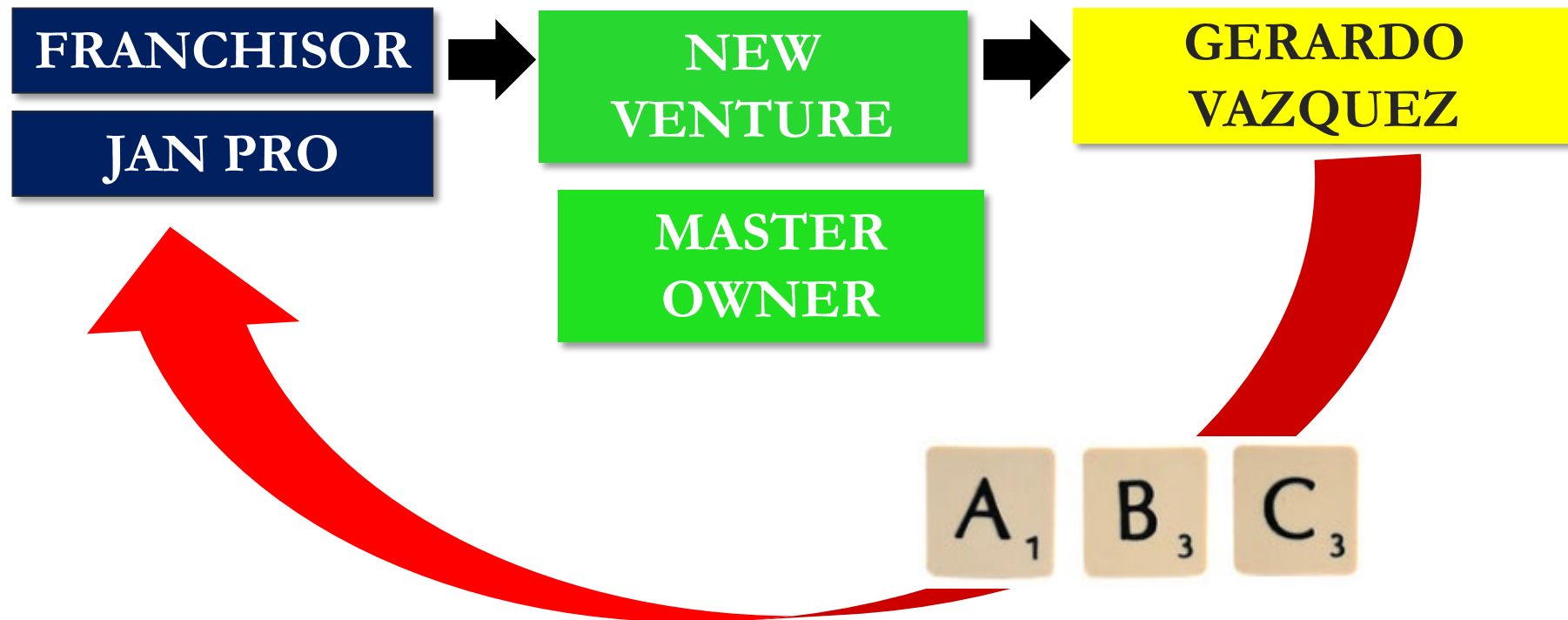


# The Six *Vazquez* Opinions

- ***Vazquez v. Jan-Pro Franchising Int'l, Inc.***

**923 F.3d 575** (9th Cir. 2019), *rehearing granted, opinion withdrawn*, **930 F.3d 1107** (9th Cir. 2019), **939 F.3d 1045** (9th Cir. 2019), **939 F.3d 1050** (9th Cir. 2019), **10 Cal. 5th 944** (Cal. 2021) and **986 F.3d 1106** (9th Cir. 2021).

# Vazquez v. Jan-Pro (9<sup>th</sup> Circuit)



# Vazquez Reasons Why ABC Test Should Apply to Franchises

- The franchisor **designed** and implemented the framework
- By designing the system, the franchisor is the “**agent of misclassification**”
- The franchisor is **not indifferent** to how much work is done
- The franchisor continuously **profits** from work done
- The franchisor’s business **depends on someone doing the work**

# Expenses and Losses

## California Labor Code §2802:

- (a) An employer shall indemnify his or her employee for all **necessary expenditures or losses** incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her **obedience to the directions of the employer**
- (c) Necessary expenditures or losses includes **attorney's fees** incurred by the employee enforcing the rights granted by this section.

# *Fleming v. Matco Tools*

- Matco's franchise structure here more closely **mirrors a typical employee-employer relationship**. If it was possible to apply the ABC test to the franchises at issue in *Vazquez*, I see no reason why the test cannot be applied to the franchises at issue in this case. The ABC test likely applies to this case.



“Hiring party” is assumed as to a putative employer. The only steps in the ABC test are whether A, B, **or** C are met and whether there is there an exemption. There is **no “zero step”** to contest hiring party status. *People v. Uber*

# “Employee” Damages Claims

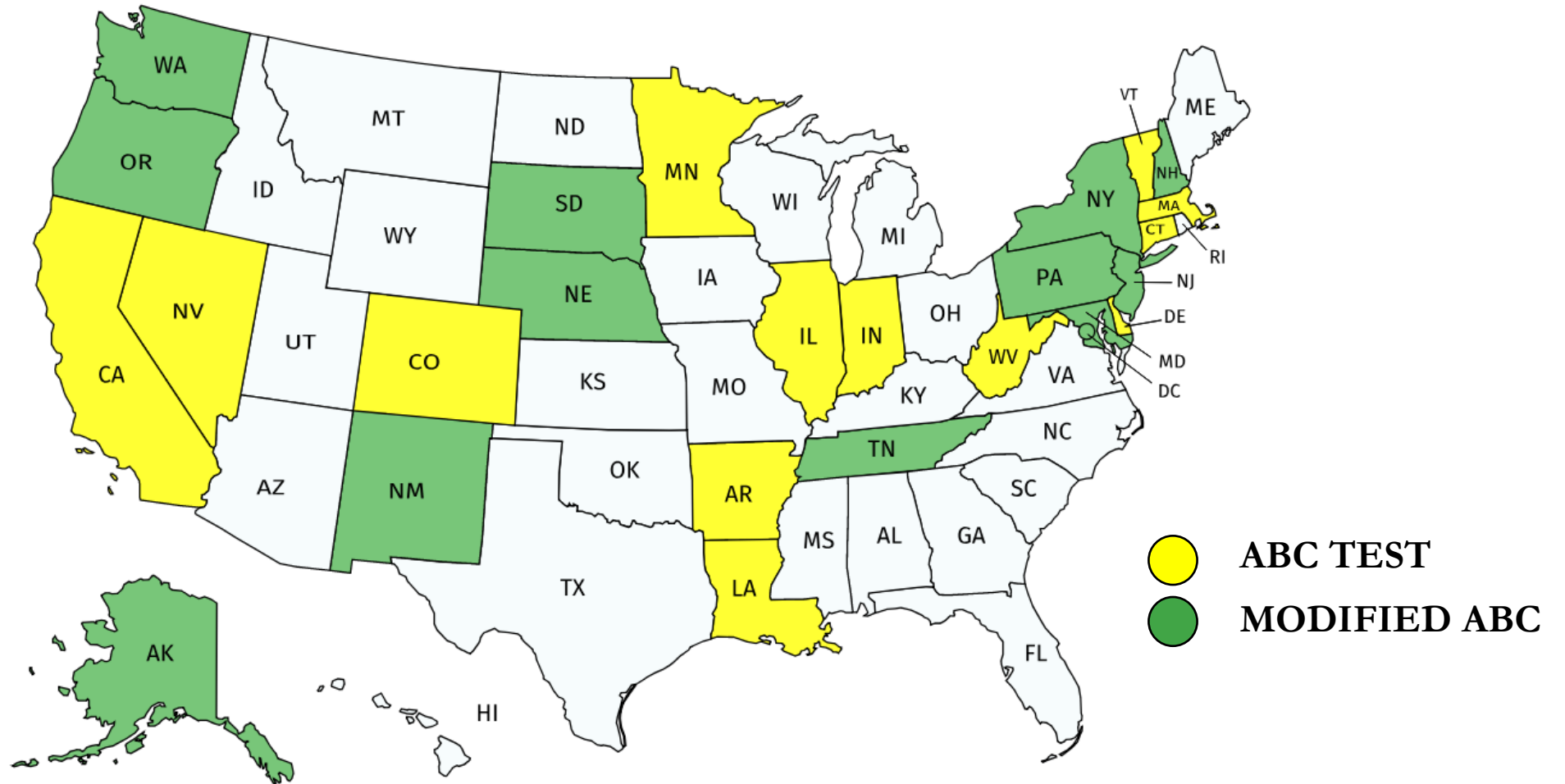
- Money paid is compensation the franchisee need not return.
- If franchisees are employees, § 2802 requires that Matco reimburse them for expenses.
- Franchisees seek return of **franchise fees**, computers, software, fuel, maintenance, cell phones, uniforms, insurance, and the cost of unsold products.
- ***Fleming v. Matco***

# *Patel v. 7-Eleven*

“It cannot be the case, as plaintiffs suggest, that, in qualifying as a franchisee pursuant to the FTC's definition, an individual necessarily becomes an employee. In effect, such a ruling by this Court would eviscerate the franchise business model, rendering those who are regulated by the FTC Franchise Rule criminally liable for failing to classify their franchisees as employees.”



# States Now Using Some Form of the ABC Test



**Selected  
Cases on  
Termination  
&  
Bankruptcy  
2020-21**

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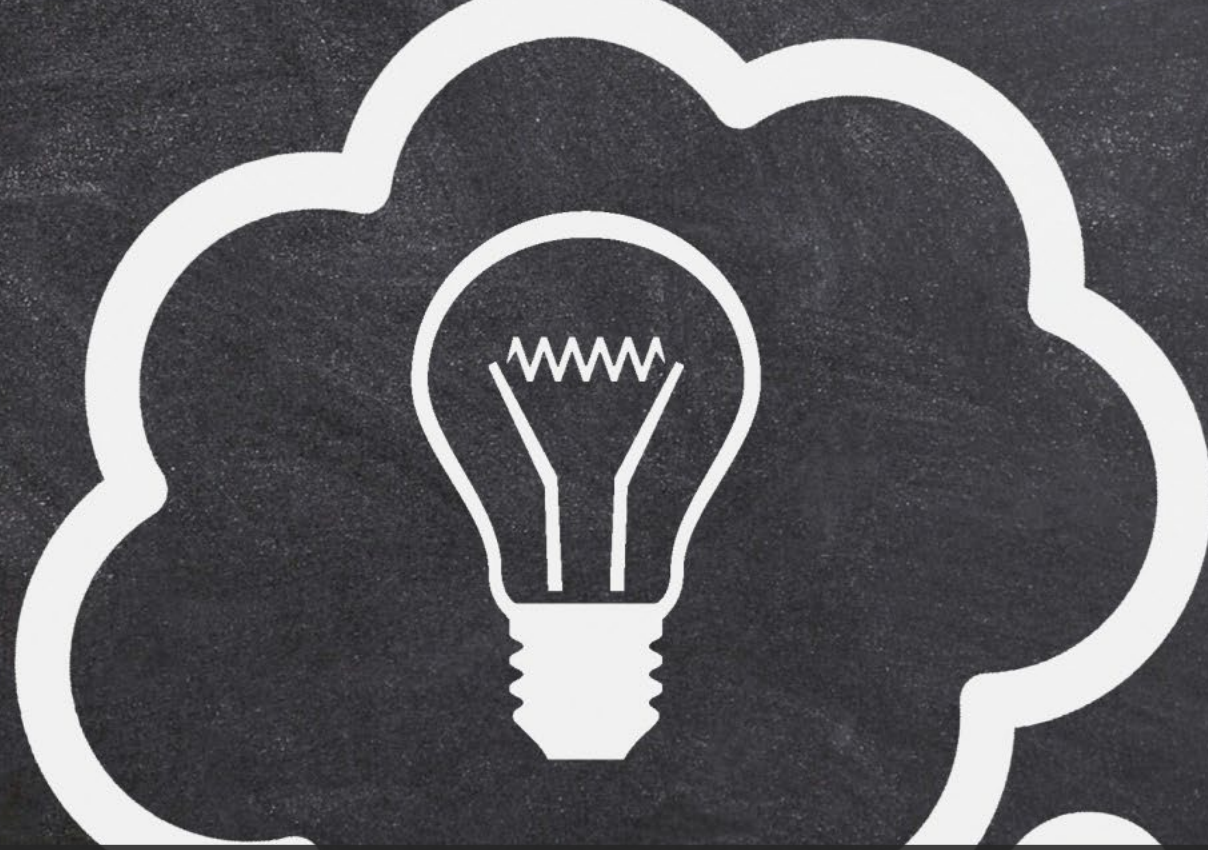
Elizabeth Weldon

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Snell & Wilmer L.L.P.

# Termination Cases 2020- 21

- Reasons and Ability to Terminate
- Choice of Law Impacting Termination
- Interesting Challenges to Termination



# Reasons and Ability to Terminate

*Servpro Industries, Inc v. Woloski*, No. 3:17-cv-01433, 2020 WL 5629452 (M.D. Tenn. Sept. 21, 2020)

- Termination for conduct reflecting *materially and unfavorably on the system*
- Facts/history critical
- Egregious complaints critical
- No need to validate every complaint



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# Juxtapose 2 Puerto Rico Dealer Protection Act Cases

- ***M30 Brands, LLC v. Riceland Foods, Inc.*, No. 18-1371 (PG), 2020 WL 6084138 (D.P.R. Oct. 15, 2020)**
- **Termination with just cause**
- **Based on failure to sell and market in PR; Virgin Island sales did not matter**
- ***Casco, Inc. v. John Deere Construction & Forestry Company*, Nos. 17-1570 & 17-1571, 2021 WL 791608 (1st Cir. Mar. 2, 2021)**
- **Termination **w/o** just cause**
- **Despite \$150k debt to Deere**
- **Special Circumstances – pretextual termination**

# Choice of Law Impacting Termination



# *Crest Furniture, Inc. v. Ashley Homestores, Ltd.*, No 1:20-cv-01383-NLH-AMD, 2020 WL 6375808 (D.N.J., Oct. 30, 2020)

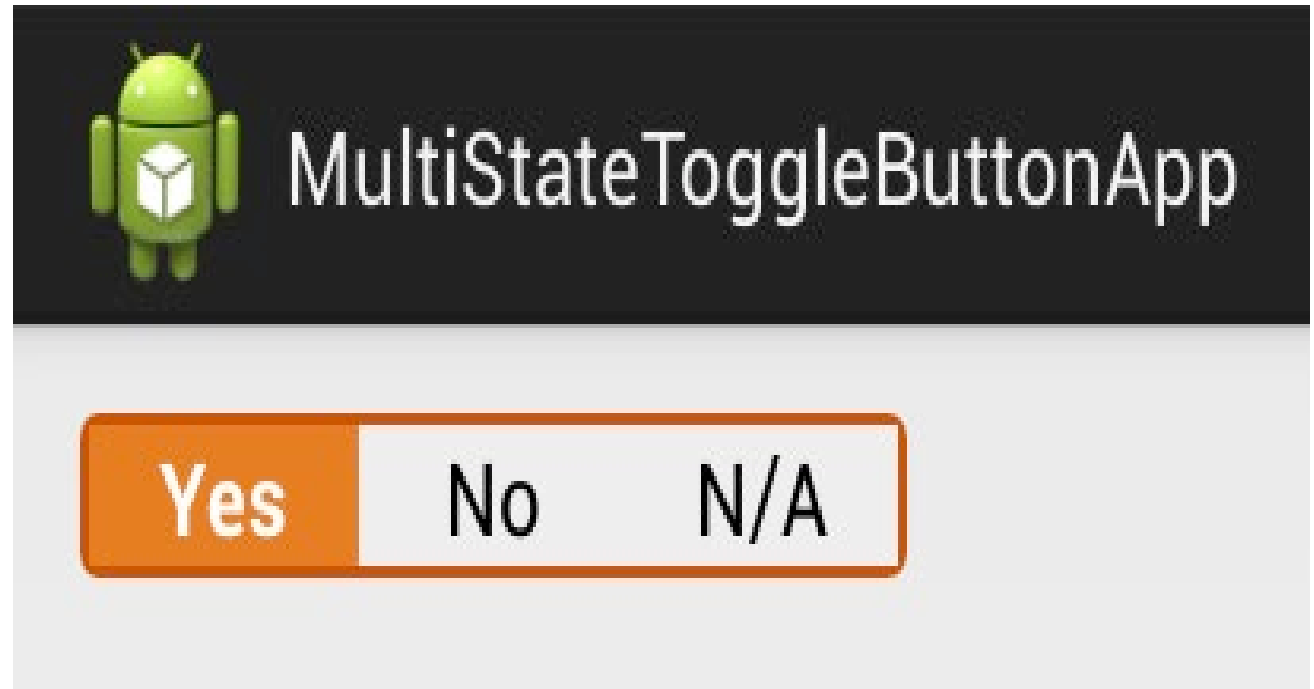
- Multi-unit/state franchisee
- NJFPA+ -- lack of good cause for failure to renew
- Only FAs not renewed in PA; NJ FAs unaffected
- MTD, NJ law and forum OK
- Allegations of “**bundling**” -- treatment as a “unified multi-state franchise”



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*Keen Edge Company, Inc.  
v. Wright Manufacturing,  
Inc., No. 19-CV-1673-JPS,  
2020 WL 4926664 (E.D.  
Wis. Aug. 21, 2020)*

- Multi-state dealer terminated  
> dealer sought TRO/PI
- WI Fair Dealership Law  
apply?
- WI termination notice and  
cure times not met
- IL primary facility
- WI distribution facility, WI  
president at that facility, WI  
sales 20-25% = WFLD  
applied



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A man in a suit is captured in mid-air, jumping across a gap between two dark, jagged rock formations. He is carrying a briefcase in his right hand. The background is a dramatic sunset with a bright sun low on the horizon, casting a golden glow over the scene. The sky is filled with soft, orange and yellow clouds. The overall mood is one of challenge and perseverance.

# Interesting Challenges In Termination

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Covid-19, Waiver,  
Restrictive Covenants

# Covid-19 Arguments – Weak So Far

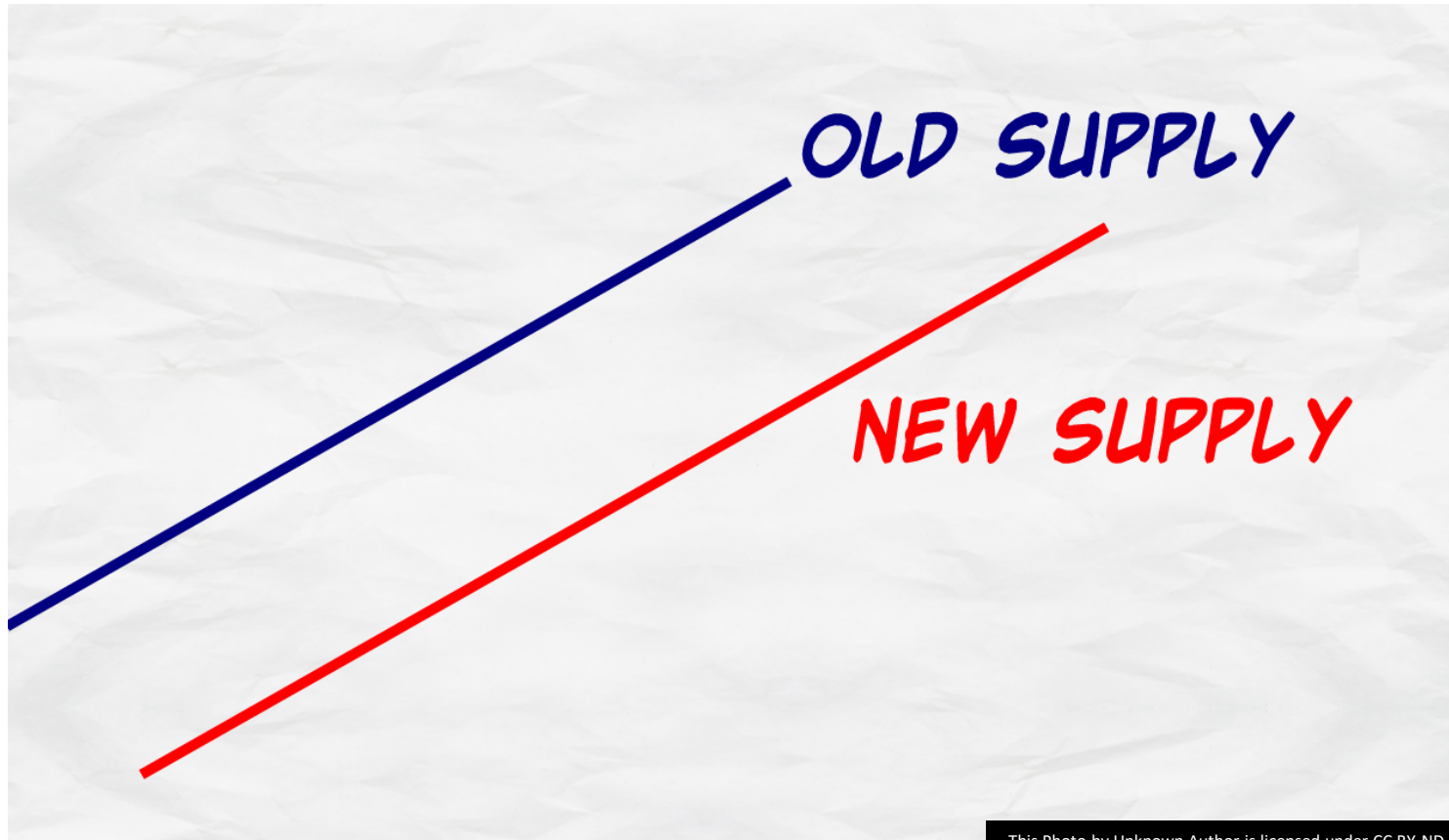
***KFC Corporation v. Kamal*, No. 3:20-cv-279-DJH-CHL, 2020 WL 7634590 (W.D. Ky. Dec. 22, 2020)**

- TX based franchisee
- KY choice of law & venue clause enforceable
- Unfair, unreasonable claim
- Focus on Covid protections in place

***Gus's Franchisor, LLC v. Terrapin Restaurant Partners, LLC*, No. 2:20-cv-2372-JPM-cgc, 2020 WL 5121364 (W.D. Tenn. Aug. 31, 2020)**

- Motion for contempt -- failure to comply with injunction remarks
- Rejected Covid argument that it was in “best interest of store and employees” to keep operating during shutdowns

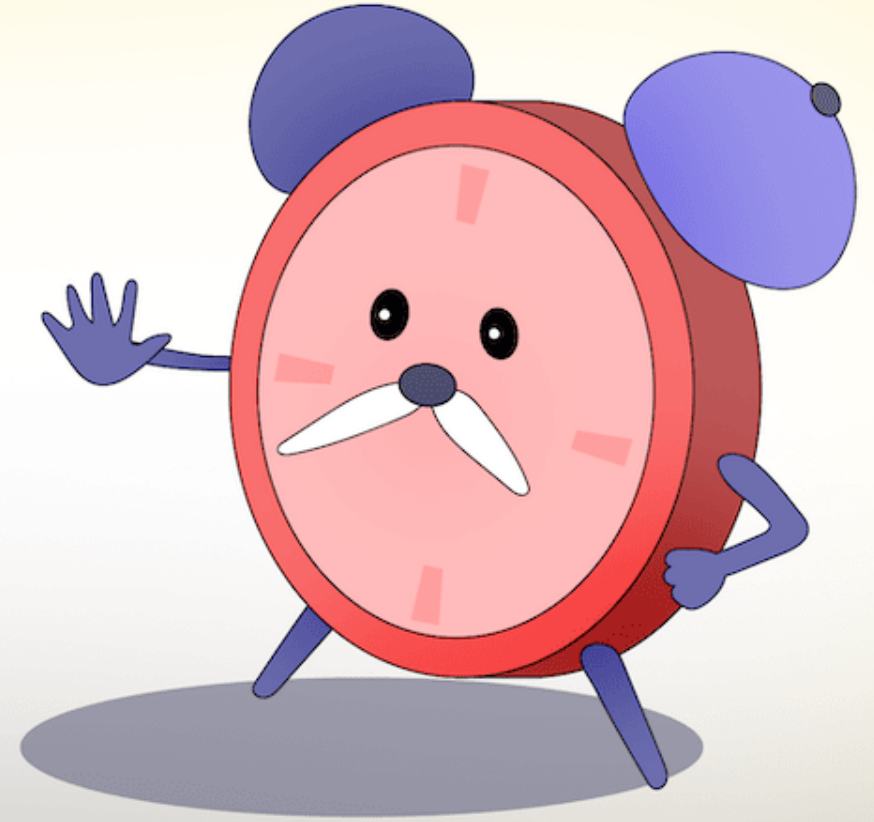
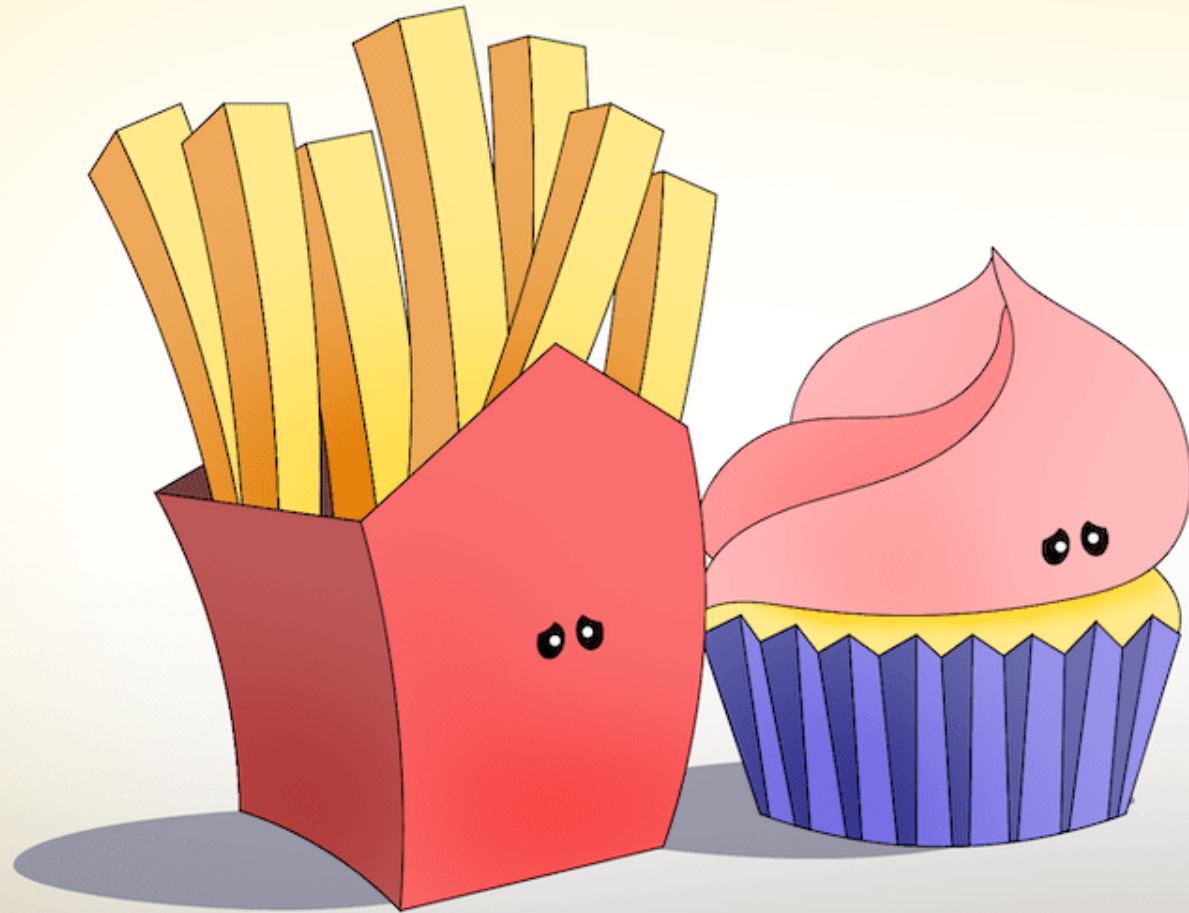
# Waiver Claim



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**Little Caesar Enterprises, Inc. v. Little Caesars ASF Corporation, No. 19-2335, 2021 WL 37544 (6th Cir. Jan. 5, 2021)**

- Keep using those non-waiver reservations in termination related communications
- Franchisee continued to operate stores after termination
- Franchisor continued to supply ingredients
- Court rejected argument that this waived the termination – in part on preservative language in termination communication



# Restrictive Covenants

***ComForCare  
Franchise  
Systems, LLC v.  
ComForCare  
Hillsboro  
McMinnville  
Corporation, 815  
Fed. Appx. 80 (6th  
Cir. 2020)***

- CFS sought PI to stop franchisee from serving patients
- Mostly granted PI, BUT denied to the franchisee's provision of services to 79 existing patients
- Too hard to find new caregivers: "health-care providers are not commodities"

*Mainstream  
Fashions  
Franchising, Inc. v.  
All These Things,  
LLC, 453  
F.Supp.3d 1167 (D.  
Minn. 2020)*

- Motion for PI to stop the franchisees from operating their businesses
- Granted as to marks & products
- Denied as to continuing operation
- Lack of evidentiary record as to enforceability of post-termination noncompetition provisions
- Focus >>> stores were the franchisees' sole livelihood

*Delivery.com Franchising, LLC v. Moore*, No. 20-20766-CIV-COOKE/GOODMAN, 2020 WL 3410347 (S.D. Fla. June 19, 2020)

- Mandatory injunction rejected – sought to enforce FA and require franchisee to onboard
- Breach of contract likely, but high standard for mandatory injunction
- Franchisor – no business in area – no risk of irreparable harm
- Balance of harms to family-operated business



# Bankruptcy Cases 2020-21 Covid-19

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Courts are working hard to  
account for Covid-19 realities



*In re Sanam Conyers Lodging, LLC,*  
619 B.R. 784 (Bankr. N.D. Ga. 2020)

- Chapter 11 – 5 year plan approved under feasibility standard
- Pandemic had to factor into reorganization
- Detailed analysis of current events, specific to location and area
- Sources of customers, governor’s position on business, football season, Master’s Golf Tournament, rural location, debtor’s efforts to pivot

*In re Pier 1 Imports, Inc.*, 615 B.R. 196  
(Bankr. E.D. Va. 2020)

- Relief from rent during case during shutdowns
- Rent not wiped away – accrued but delayed
- “Admin expense” - paid before confirmed
- Still paid all insurance, utility, security
- Focused on complete shuttering as non-essential, alternative efforts to maintain liquidity



**Thank You! Please see our  
paper for more cases on  
termination and bankruptcy.**