# FRANCHISE INDEPENDENCE: AWAITING PUBLIC RECOGNITION

Robert W. Emerson*, 2015

## I. Introduction

Consider a hypothetical.

Bob, a customer, enjoys a particular food chain, known as Joe's Burrito Place.

Bob has visited this particular establishment in many cities all over the country. There are large billboards for the establishment located along the interstate. The colors are always the same: blue type on yellow background in a particular font. The employees wear the same uniforms in all establishments. The establishments all have identical pictures on the walls, the same basic design and layout, the same all-in-one style beverage fountain, and of course the same menu. The employees have the same greeting for all patrons who come into the store: "Welcome to Joe's!" There is even a primary website, www.Joes.com.

Bob loves going to Joe's. Joe's is a clean, friendly establishment that always does things right: when employees mop they properly mark the wet area of the floor; the employees are respectful toward the customers; the restrooms are tidy; the food is always fresh, tasty, and delivered in a timely fashion; and if there is ever any incident, Bob believes that Joe's Burrito Place has the resources to make it right.

Bob has come to believe, based on the above circumstances, that all Joe's Burrito Place establishments are owned by one corporate entity. In actuality, however, each Joe's is owned by someone different. While there are many similarities between the establishments, each Joe's has an owner with different resources, different liability coverage, and different corporate policies. The illusion of all Joe's being the same was intentionally created through under the idea of franchising. Because each Joe's Burrito Place is owned by a different owner and not a single entity, if for some reason Bob is ever harmed by the actions of a Joe's establishment, Bob's recovery will be limited to the assets of that individual establishment owner.

This is the example that haunts so many franchises and the third party relationships, principally with customers, upon which profitable franchised systems typically rely.

### A. Franchising

Franchising is one of the most popular and fastest growing forms of business. The number of workers employed by franchised businesses has increased significantly —from about 3.5 million in 1975, to approximately 7 million in the early 1990s, to 10 –11 million by 2010.[1]

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* J.D., Harvard Law School; Huber Hurst Prof., Univ. of Fla.

[1] These are the number of employees working directly for franchised outlets. Nat'l Econ. Consulting (NEC), *The Economic Impact of Franchised Businesses, Volume II: Results for 2005*, (Int'l Franchise Ass'n Educ. Found., Washington, D.C.), Jan. 31, 2008, at 6, *available at* http://www.franchisesmith.com/site/1040fran/Economic_Impact_of_Franchising_2008.pdf [hereinafter NEC, *The Economic Impact]*. Altogether, franchising indirectly accounts for almost twice as many jobs — 21 million — representing an expanding proportion of the total private-sector workforce (15.3%). *Id.* at 7, 11–12. That is up, in four years time, from 18 million jobs, slightly less than 14% of all private sector jobs. *2008 Event Summary: Franchise Symposium Material Consultation Paper on Franchising Legislation Manitoba Law reform Commission*, 8 ASPER REV. INT'L BUS. & TRADE L. 181, 187 (2008) [hereinafter, *2008 Event Summary*]. The number of direct employees

In the United States, franchised businesses account for one-third of all retail sales,[2] with approximately 900,000 operating franchised units[3] yielding well over a trillion dollars in annual retail sales.[4] Franchised businesses are also responsible for twice as many indirect jobs[5] (as many as 21 or 22 million) as the above direct job figure.

The American concept of franchising is expanding rapidly throughout the world.[6] Collectively, these businesses have accrued hundreds of billions of dollars in annual sales.[7] The franchisee is not completely free to run the business as she sees fit; rather, she must comply with federal and state regulations, as well as the rules imposed by the franchisor in the parties' agreement or in ancillary documents (e.g., the operations manual).[8]

The franchisor's regulation of the franchisee presents numerous problems, including issues of liability. If the franchisor exerts too much control over the daily operations of its franchisee, it may be held vicariously liable for the negligence of the franchisee or his employees.[9] However, if the franchisor fails to sufficiently regulate its franchisee, the franchisor risks damaging its business reputation, and may even violate federal regulations.[10]

Apparent authority can also pose significant problems. Under the doctrine of apparent authority, even when the franchisee acts without any actual authority from the franchisor, an

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was as high as 11 million in 2005 and almost certainly came down some during the economic downturn of 2008–2010. *See* Robert W. Emerson, *Franchise Encroachment*, 47 AM. BUS. L.J. 191, 198 &n.30 (2010).

[2] This has long been franchising's rough percentage of the total retail economy, since at least the year 2001. ROGER D. BLAIR & FRANCINE LAFONTAINE, THE ECONOMICS OF FRANCHISING 26–27 n.28 (2005). For earlier statistics, see U.S. DEPT. OF COMMERCE MINORITY BUSINESS DEVELOPMENT, *available at* http://www.commerce.gov/os/ogc/minority-business-development-agency.

[3] *Franchise Businesses to See Slow Growth in 2010*, PRNEWSWIRE, Dec. 16, 2009, *available at* http://www.prnewswire.com/news-releases/franchise-businesses-to-see-slow-growth-in-2010-79411122.html (discussing the report, *Franchise Business Economic Outlook for 2010*, prepared by PricewaterhouseCoopers LLP (PWC) for the International Franchise Association's Educational Foundation, *see* http://www.franchise.org/Franchise-News-Detail.aspx?id=48494 (last visited March 2, 2012);*see* also, *HIGHLIGHTS OF THE 2010 FRANCHISE BUSINESS ECONOMIC OUTLOOK*, INT'L FRANCHISE ASS'N, *available at* http://www.franchise.org/uploadedFiles/IFA_NEWS/EconOutlook%20FactSheet2010.pdf (last visited March 2, 2012)). That is up from almost 770,000 franchise establishments in 2001. Nat'l Econ. Consulting (NEC), *The Economic Impact of Franchised Businesses, Volume II: Results for 2005* (Int'l Franchise Ass'n Educ. Found., Washington, D.C.), Jan. 31, 2008, at 12, *available at* http://www.franchisesmith.com/site/1040fran/Economic_Impact_of_Franchising_2008.pdf.

[4] As of 2006, franchising generated an overall output of $1.53 trillion. *Small Company Trends in 2007*, THE TRIBUNE (Northern Colorado), Dec. 31, 2006, *available at* http://www.greeleytrib.com/article/20061231/BUSINESS/112310347 [hereinafter *Small Company Trends*]; NEC, *supra* note 3, at E-1.

[5] Emerson, *supra* note 1, at 198.

[6] Emerson, *supra* note 1, at 196–97 n.24 (detailing the numerous statistics indicating the phenomenal growth of franchising worldwide, be it throughout Europe as well as such diverse and important national economies as those of Australia, Brazil, China, India, and Japan).

[7] *2008 Event Summary*, *supra* note 1, at 187 (reporting that based on a study conducted in 2001, "more than 767,000 franchised businesses directly employ[ed] 9.8 million people, with a payroll of $229 billion and an economic output of nearly $625 billion;" also noting that franchising in 2001 accounted for 11% of the private sector payroll and 9.5% of the private sector economic output —more than $1.53 trillion).

[8] The growth and regulation of the franchise system will be discussed in more detail in Section II.

[9] *See* W. MICHAEL GARNER, FRANCHISE AND DISTRIBUTION LAW AND PRACTICE § 9:42 (2011).

[10] Lanham Act, 15 U.S.C. §§ 1051–1129 (2008). The franchisors' liability will be discussed in detail in Section III. Case law will be provided to indicate the standards the courts apply when determining whether a franchisor may be held vicariously liable.

injured third person may successfully sue the franchisor for the franchisee's wrongs.[11] The issue is whether a customer reasonably concluded, from the franchisor's acts or omissions, that the franchisor controls the franchisee. If a court finds the franchisee to have apparent authority, then the wrongful acts of the franchisee will be ascribed to the franchisor even though there is no actual agency relationship between franchisor and franchisee.[12]

Several recent surveys undertaken for this Article—available in the Appendix—demonstrate that the general populace remains ignorant of the fundamental structure of franchising. The survey results, collected from patrons of the quick service food industry, are most likely reflective of younger Americans, who have been found to be the primary benefactors of this industry.[13] Without a clear understanding of the basics (who owns and operates the franchise), people lacking a strong business or law background can hardly be expected to grasp the oft-complex legal concepts of independent contracting and agency that spring from the franchisor-franchisee relationship. Answers to the surveys actually evince a deep misunderstanding as to which parties are held accountable for harm caused by franchisees. Moreover, even when people understand the basic law (franchisors' limited or nonexistent liability for acts of their non-agent franchisees), this knowledge in no way guarantees acceptance of the law as being good public policy.

Many courts have adopted what observers have labeled the "common knowledge" doctrine, which assumes people generally know if they are patronizing a franchise or a corporate-owned business.[14] However, the overall lack of "common knowledge" indicated by the surveys begs important questions for (1) the case law on apparent authority/agency by estoppel, (2) franchisor and franchisee conduct directed toward a franchisee's present or potential customers, and (3) public policy as to risk distribution. Before one examines these matters, it is necessary to consider certain general principles of franchising and agency law.

While the franchising format has become a very popular way for many firms to expand their businesses, more regulations may be needed to police those that choose to franchise. This Article discusses such changes in franchising legislation, including modifications to the Restatement of Agency.[15] These new modifications may ultimately change a court's analysis of the law when deciding franchisor liability.

Although the risk of liability may motivate franchisors to police more actively the actions of their franchisees, many court holdings and commentaries sometimes reflect a belief that holding franchisors liable is not the best way to deter a franchisee's negligence.[16] Some commentators find that vicarious liability actively discourages franchisors from asserting control over franchisees.[17] As such, franchisors are typically engaged in a difficult dance—monitoring their franchisees, even in effect compelling behavior from them, but without actually controlling

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[11] *See* W. MICHAEL GARNER, FRANCHISE AND DISTRIBUTION LAW AND PRACTICE § 9:44 (2014)

[12] Robert W. Emerson, *Franchisor's Liability when Franchisees Are Apparent Agents: An Empirical and Policy Analysis of "Common Knowledge" About Franchising*, 20 HOFSTRA L. REV. 609, 626 (1992).

[13] Denise Lee Yoh, *2 Target Markets for Restaurants*, QSR MAGAZINE (November 2011), *available at http://www.qsrmagazine.com/denise-lee-yohn/2-target-markets-restaurants.*

[14] *Id.* at 610–12, 645–48.

[15] *See infra* Section V(b).

[16] *See infra*, I.

[17] Jennifer Arlen & W. Bentley MacLeod, *Beyond Master-Servant: A Critique of Vicarious Liability*, *in* EXPLORING TORT LAW 15 (Stuart Madden, ed., Camb. Univ. Press, 2005) (discussing how vicarious liability can discourage a principal from asserting control over a franchisee).

them.[18] These subjects, as well as alternative approaches, such as allocating risk and taking loss prevention steps, are discussed throughout this Article with case law examples.[19]

## II. Background: Franchise Growth and Regulation

If the claims of many franchisors and their advocates are to be believed, the American dream of owning one's own business is alive and thriving today because of the success of the modern-day franchise.[20] The Code of Federal Regulations (C.F.R.) defines a franchise as "a continuing commercial relationship" in which the franchisee sells goods or services "identified by a trademark [or] trade name," with the franchisee "required or advised to meet quality standards prescribed by [a franchisor who] has authority to exert a significant degree of control over the franchisee's method of operation, including but not limited to the franchisee's . . . management [and] marketing plan."[21]

### A. History of Franchising

Based on a public licensing concept dating back at least to the Middle Ages, if not Ancient Rome,[22] the modern franchise reputedly is one of the most profitable means of doing business.[23] Private-sector franchises began during the mid-19th century with the founding of

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[18] *See infra* notes 110–117 and accompanying text.

[19] *See infra* Section V.

[20] In fact, someone's dream comes true every eight minutes according to the International Franchise Association. *See* INT'L FRANCHISE ASS'N, ABCS OF FRANCHISING, *available at* http:// www.franchise.org/resourcectr/faq/q4.asp (2003) (noting that a new franchise opens every eight minutes in the United States).

[21] Charles S. Hale, II., *Market Impact in the Information Age: Protecting Hotel Owners From Hotel Management Companies*, 108 W. VA. L. REV. 573, 575–76 (2005) (quoting 16 C.F.R. § 436.2(a) (2005)); *see also* Paul H. Rubin, *The Theory of the Firm and the Structure of the Franchise Contract*, 21 J.L. & ECON. 223, 224, 228 (1978) (defining the franchise relationship as: a contract between two (legal) firms, the franchisor and the franchisee: "The franchisor . . . has developed some product or service for sale; the franchisee is a firm that is set up to market this product or service in a particular location. The franchisee pays a certain sum of money for the right to market his product . . . . The franchisor may provide . . . assistance . . . [that] include[s] site selection; training programs, either on the job or institutional; . . . standard operating manuals; . . . ongoing advice; and . . . [guidance on] physical layout of the plant and advertising. . . . The main item purchased [by the franchisee] is the trademark of the franchise.").

[22] *See 2008 Event Summary*, *supra* note 1, at 185 (noting that, during the Middle Ages, the English Kings desired "to avoid the costs and administrative burden of hiring, paying and supervising tax collectors;" therefore, the Crown "granted officials the right to collect and keep the Crown's taxes in return for a fee").

[23] *See* Sean Obermeyer, *Resolving the Catch 22: Franchisor Vicarious Liability for Employee Sexual Harassment Claims Against Franchisees*, 40 IND. L. REV. 611, 613–14 (2007) (commenting, "franchised businesses today provide almost ten million jobs in the United States with a combined payroll of more than $229 billion dollars … franchises account for 3.2% of all business establishments and 7.4% of all private-sector jobs in the United States … [and] 'franchised business provided more jobs in 2001 than the financial activities industry (including banks, insurance carriers, and real estate), construction industry, or information industry (including software and print publishing, motion pictures and videos, radio and television broadcasting, and telecommunications carriers and resellers.'"). *See also* Miller v. McDonald's Corp., 945 P.2d 1107, 1110 (Or. Ct. App. 1997); Emerson, *supra* note 12, at 614–15 (commenting, "[t]he private franchise continues to be a business phenomenon, comprising an ever-increasing portion of total retail sales and services.").

such businesses as the Singer Sewing Machine Company[24] and the McCormick Harvesting Machine Company.[25] These early franchised businesses used a product distribution scheme, which allowed them to develop "a large distribution network for [their] products without having to invest large sums of economic and human capital in the process."[26]

Essentially, these early forms of franchising assisted the companies by permitting "franchisors" to sell their products to a particular demographic without having to deal with the responsibilities of managing the retail distribution of the goods.[27] However, as these early franchised companies quickly learned, such a "hands-off" approach was not necessarily in the best interest of their companies' reputations. The actions of the selling agent (*i.e.*, the franchisee) reflected upon the company (*i.e.*, the franchisor) and, if the agent performed poorly, the company's reputation would be tarnished.[28]

To mitigate those risks, a new concept of franchising, the Business Format Model (BFM), developed after World War II.[29] Under this new franchising scheme, the franchisor allows another independent party, the franchisee, "to market its products and/or services under the franchisor's name and trademark using a pre-developed 'system' or method of doing business, which the franchisor has created."[30] The BFM lets a franchisor possess more control over the franchisee in order to ensure the acts of the independent agent do not damage its business reputation.[31] In practice, the franchisee purchases the right to sell the franchisor's goods in a particular demographic, but the franchisor maintains the right to ensure the franchisee carries out business in accordance with standards and specifications.[32] For example, franchisors may require a franchisee to follow comprehensive operation and training manuals or to use particular

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[24] *Id. See also* Obermeyer, *supra* note 23, at 614 (identifying the fact that Singer sold salesmen the rights to sell its machines); Robert W. Emerson, *Franchising and the Collective Rights of Franchisees*, 43 VAND. L. REV. 1503, 1507 (1990).

[25] Obermeyer, *supra* note 23.

[26] Obermeyer, *supra* note 20. Today, auto dealerships are a common example of this form of franchise arrangement.

[27] Obermeyer, *supra* note 20.

[28] *See id.* at 615 (noting, "a single wayward agent's poor business practices might tarnish the company's reputation for a whole geographic segment of the population."). *See also 2008 Event Summary*, *supra* note 1, at 185 (noting that while the Singer Sewing Machine Company franchise ultimately failed, "the private sector franchising concept began to take hold.").

[29] *See generally* Obermeyer, *supra* note 23, at 615–16. One of the first businesses to be successful under this new concept of franchising was the Coca-Cola Company. Other modern companies which have successfully utilized this business format include General Motors and oil refineries. *See 2008 Event Summary*, *supra* note 1, at 185.

[30] Obermeyer, *supra* note 23, at 615.

[31] *See 2008 Event Summary*, *supra* note 1, at 190–91 (commenting "[t]he franchisor's reputation is at risk, as the general public will often not distinguish between individual franchise outlets and the larger organization."); *cf.* Arthur L. Pressman, *Making the Case for the Benefits of Uniformity and Predictability*, FRANCHISING BUS. & LAW ALERT, July 2004, at 3 (noting "[t]here is a name for the doing of business under a trademark without a uniform business method of marketing approach or cohesive and extensive quality control: licensing. Licensing permits a licensee to use a mark registered to another to identify a product or service without strict adherence to controls and methods developed by the licensor.").

[32] In fact, the "franchisee exclusively identifies with the franchisor, and adopts its entire business system, including its product, brand name, operating manual and marketing strategy. There is 'an almost complete merging of the business identity of franchisee and franchisor, so that the public perceives each franchised outlet as part of a larger chain of identical outlets, all offering the same high quality goods and services.'" *Id.* at 187–88 (quoting A.J. Trebilcock, *Introduction to Franchising*, FRANCHISING 101, Ontario B. Ass'n (2001), *available at* http://www.oba.org/en/pdf/Franchising101.pdf.).

professional and advertising services.[33] To ensure the quality of products or services across large demographic areas, the franchisor must endeavor to make certain that *all* franchisees produce a consistent product or service.[34] Businesses that have followed the BFM of franchising include McDonald's, Panera Bread Company, Burger King, Subway, H & R Block, Mini Maid, Two Men and a Truck, Budget Rent-a-Car, Holiday Inn, and any number of other businesses that seem to be located on every corner of every town or city in every state throughout the nation.[35]

### B. Business Structure of the Franchisee

The franchisee has been characterized as a "quasi-independent manager and also a quasi-dependent small business owner."[36] First, the franchisee is labeled a "manager" because his overall control is limited and he is often greatly regulated by the franchisor,[37] principally through the franchise agreement itself,[38]including such terms as the franchisor's reserving the right to inspect the business premises to ensure the franchisee is operating it in accordance with the franchisor's standards.[39] Other regulations may include a mandate that the franchisee obtain the franchisor's approval before selecting a site for a new location, as well as a requirement that the franchisee adheres to franchisor-specified building and design specifications."[40]

The franchisor-franchisee relationship is also governed by federal law, including the Federal Trade Commission's (FTC) franchising disclosure rules[41] and the Federal Anti-

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[33] *See* Obermeyer, *supra* note 23, at 616. *See also 2008 Event Summary*, *supra* note 1, at 191 (noting franchisors will manage the potential risk posed by allowing a franchisee to represent its product by requiring franchisees to adhere to "minimum standards in relation to the appearance and operation of its business … [and] [f]ranchisees are generally required to comply strictly with the operational methods established by the franchisor, and are frequently required to purchase supplies and inventory directly from the franchisor or from a designated supplier.").

[34] Both franchisor and franchisee contribute to the success of the business.

[35] *See* Obermeyer, *supra* note 23, at 615. The fast-food industry is most likely to be associated with franchising and, indeed, fast-food chains commonly utilize the business-format type of franchising method. The business-format franchise "has grown much more than traditional franchising in the last few decades." Francine Lafontaine & Roger D. Blair, *The Evolution of Franchising and Franchise Contracts: Evidence from the United States*, 3 ENTREPRENEURIAL BUS. L.J. 381, 387, 392 (2009).

[36] *See id.*at 617.

[37] *Id.*

[38] *Id.*

[39] *See id.* Nearly all franchise contracts contain clauses specifying the franchisor's right to inspect a franchisee's business premises, products, supplies, and marketing methods. Robert W. Emerson, *Franchise Contract Clauses and the Franchisor's Duty of Care Toward Its Franchisees*, 72 N.C. L. Rev. 905, 972 (1994) [hereinafter Emerson, *Franchise Contract Clauses*] (91% of franchise contracts examined in 1993); Robert W. Emerson, *Franchise Contract Interpretation: A Two-Standard Approach*, 2013 MICH. ST. L. REV. 641 [hereinafter Emerson, *Standards*] (finding that 95% of franchise contracts examined in 2010 had such a clause).

[40] Almost all franchise contracts contain clauses concerning site location, where the franchisor picks the site or, more typically, the franchisee selects the site but needs to get the franchisor's approval. Emerson, *Franchise Contract Clauses*, *supra* note 39, at 972 (such clauses found in 71% of franchise contracts examined in 1993, with franchisor selection in 18% of all the contracts and franchisee-selection-but-with-franchisor-approval-required in 53% of all the contracts); Emerson, *Standards*, *supra* note 39 (finding that by 2008 the percentage of franchise contracts with site selection clauses had risen to 99%, with only 4% having the franchisor pick the site, but 95% requiring that the franchisee obtain the franchisor's approval of the site that the franchisee chose). *See also* Obermeyer, *supra* note 23, at 617 (also noting that the franchisee may be required to adhere to the franchisor's marketing and advertising schemes).

[41] Pursuant to its rulemaking authority under 15 U.S.C. §§ 41, 46 (1976), the FTC on December 21, 1978 promulgated the original franchise rule, which required franchisors to disclose information to prospective franchisees. 16 C.F.R. § 436.1-.3 (1991) (effective date Oct. 21, 1979). In 2007, after years of hearings and

Trademark laws, including the Lanham Act.[42] The FTC requires franchisors, or franchise brokers, to "furnish any prospective franchisee," with specified information, such as:

> the official name and address and principal place of business of the franchisor, and the parent firm or holding company of the franchisor . . . the name under which the franchisor is doing or intends to do business . . . [and] the trademark, trade names, service marks, advertising or other commercial symbols . . . which identify the goods, commodities, or service to be offered, sold, or distributed by the prospective franchisee, or under which the prospective franchisee will be operating.[43]

Despite the FTC's disclosure rules, a majority of states have enacted general "business opportunities," or franchise legislation.[44] Unfortunately, the common law notions of vicarious liability and agency are not included within each individual state's "business opportunities" laws. Therefore, while each state may apply its own franchise legislation, courts must still analyze a franchisor's liability for the torts of its franchisee under common law principles.

The usage of common law in each state contributes greatly to the lack of uniformity in this area of law, leaving both parties, but especially the franchisee, in a precarious position.[45] When an area of law is unsettled, a significant portion of the business sector is left with unpredictable liability.[46] For example, tort judgments can be as high as $3M, as was awarded in

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discussion, the Federal Trade Commission (FTC) revised the rule. Disclosure Requirements and Prohibitions Concerning Franchising, 72 Fed. Reg. 15,444 (Mar. 30) (codified at 16 C.F.R. pts. 436-37 (2009) [hereinafter Disclosure Requirements]. The FTC's Franchising Rule, as amended in 2007, requires disclosures about these 23 items: (1) The Franchisor and any Parents, Predecessors, and Affiliates, (2) Business Experience, (3) Litigation, (4) Bankruptcy, (5) Initial Fees, (6) Other Fees, (7) Estimated Initial Investment, (8) Restrictions on Sources of Products and Services, (9) Franchisee's Obligations, (10) Financing, (11) Franchisor's Assistance, Advertising, Computer Systems, and Training, (12) Territory, (13) Trademarks, (14) Patents, Copyrights, and Proprietary Information, (15) Obligation to Participate in the Actual Operation of the Franchise Business, (16) Restrictions on What the Franchisee May Sell, (17) Renewal, Termination, Transfer, and Dispute Resolution, (18) Public Figures, (19) Financial Performance Representations, (20) Outlets and Franchisee Information, (21) Financial Statements, (22) Contracts and (23) Receipts. 16 C.F.R. § 436.5 (2009).

[42] Lanham Act, 15 U.S.C. §§ 1051–1129 (2008). The Lanham Act, enacted in 1946 and amended many times since, sets forth the federal trademark statutes, and it prohibits numerous activities, including trademark infringement, trademark dilution, and false advertising.

[43] 16 C.F.R. § 436.1 (2007).

[44] Fourteen states currently require franchise companies to file or register their franchise offerings with a state agency, including California, Hawaii, Illinois, Indiana, Maryland, Michigan, Minnesota, New York, North Dakota, Rhode Island, South Dakota, Virginia, Washington, and Wisconsin. Further, these states, in addition to Oregon, also have disclosure laws similar to the FTC's disclosure regulations. *See International Franchising Association*, at http://www.franchise.org/industrysecondary.aspx?id=40514 (last visited March 1, 2012).

[45] *See generally*, Boyd Allan Byers, NOTE: Making a Case for Federal Regulation of Franchise Terminations--A Return-of-Equity Approach, 19 Iowa J. Corp. L. 607, 642-643. This note describes the need for uniform laws from the franchisee's perspective as necessary because:

> [T]he structure of the franchise relationship itself, by requiring the franchisee to make nonrecoverable franchise specific investments, subjects the franchisee to risk of economic forfeiture. Market forces alone are insufficient to police franchisor action that is injurious to the franchisee's sunk investment. While market discipline exists, it is not an effective short term deterrent. Moreover, the market offers no protection or remedy for those franchisees who must first suffer economic injury before the market can react to the opportunistic franchisor.

[46] *See, e.g.*, Eric G. Orlinsky, *Corporate Opportunity Doctrine and Interested Director Transactions: A Framework for Analysis in an Attempt to Restore Predictability*, 24 DEL. J. CORP. L. 451, 454-55 (1999) (discussing how different interpretations of corporate laws related to the corporate opportunity doctrine and interested director transactions have caused considerable confusion and unpredictability).

punitive damages in the McDonald's "hot coffee" case.[47] Maintaining general liability insurance for any small business venture will cost a few thousand dollars in annual premiums; factors that increase the cost of insurance are the size of the business, the sector the business is in, the business's past history of insurance claims, and the revenue taken in.[48] Subway provides estimated start-up costs for its franchises and lists the insurance cost for a typical Subway location as ranging from $1,200 to $5,000 per year.[49] The nonuniform franchise laws amongst the states are further enhanced by the high rate of settlement in disputes between franchisors and franchisees, resulting in a lack of case law and judicially created rules.[50]

Alternatively, while the FTC requires disclosure by the franchisor, compliance with the Lanham Act requires the franchisor to "exercise quality control" over the franchisee or face the "risk of loss of the trademark."[51] Thus, while the franchisor is required to disclose pertinent information to the franchisee, the franchisee, nevertheless, remains heavily regulated and dependent upon the franchisor under both the franchise agreement and federal trademark regulations.[52] Courts have described this burden in the franchising context, as "because many franchise relationships include a license to use the franchisor's trade or service mark, the detailed quality and operational standards and inspection rights specified in the franchise agreement are integral to the protection of the franchisor's trade or service mark under the Lanham Act."[53]

The franchisee may also be characterized as a dependent small business owner.[54] She invests her personal funds in the business; this monetary stake in the business gives the franchisee a further incentive to make the business a success.[55] Unlike mere business managers, the franchisee faces a double risk of loss: failure in business deprives the owner-operator of both the job and the initial investment. Consequently, the franchisee is in a notable situation as both a manager and a small business owner.

The franchise format also places the franchisor in an exceptional position. With the

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[47] For a discussion of this case and others, *see* Liability of Vendor for Food or Beverage Spilled on Customer, 64 A.L.R.5th 205.

[48] Information about one insurance provider's general liability insurance policies is available at http://www.insureon.com/products/general-liability-insurance/cost/

[49] Start-up data available at http://www.franchisedirect.com/directory/subway/ufoc/915/.

[50] *See* Judy Rost, Robin Schacter, Andrew Dodd & Edgar Grajeda, *Comparative International Perspective of Arbitration in the Franchising Context*, 31 FRANCHISE L.J. 124, 128 (describing how settlement in franchise disputes is driven by the parties' desire for confidentiality).

[51] Hale, *supra* note 21, at 576. *See* TechnoMarine SA v. Jacob Time, Inc., 905 F. Supp. 2d 482, 490 (S.D.N.Y. 2012) (discussing the requirement as to "support a trademark infringement claim based on non-genuineness of… goods, plaintiff must allege facts to show either interference with quality control procedures or material differences—whether physical or non-physical—from the genuine article).

[52] *See generally 2008 Event Summary*, *supra* note 1, at 190 (noting "[t]he franchisor generally has a vested interest in the success of the franchisee, and often provides detailed training, ongoing advice and mentoring and assistance in the even of a crisis.").

[53] Kerl v. Dennis Rasmussen, Inc., 2004 WI 86, ¶ 33, 273 Wis. 2d 106, 125, 682 N.W.2d 328, 338.

[54] *See* Obermeyer, *supra* note 23, at 617 ("franchisees, much like any other small business owner, have a direct and motivating financial incentive to make their location successful: they want to earn a return on their investment. In addition to the financial investment, franchisees typically make an investment of their time, insofar as most franchise agreements require franchisees to personally manage the daily operations of their location, which is usually done with very little direct supervision by the franchisor on a day-to-day basis.").

[55] *Id.*; *see also 2008 Event Summary*, *supra* note 1, at 190 (noting, in regards to the franchisor, "franchising allows business expansion with little capital investment; expansion can be more rapid, as it is largely financed by franchisees.").

franchisee's economic investment, the franchisor is able to expand his business without contributing a substantial amount of capital.[56] Secondly, the franchisor often benefits from the franchisee's knowledge of local markets[57]—franchisees are likely more adept at tailoring the business to the needs of the particular local demographics.

Lastly, as described above, franchisees who have invested significant amounts of capital into a franchise have strong incentives to ensure that the business succeeds.[58] These incentives benefit the franchisor as the franchisee works hard for a return on her initial investment.[59] The franchisor's capital source[60] is not only tied to the success of the franchise, but the franchisor will also receive regular payments from the franchisee in the form of franchise fees and royalty payments.[61]

Accordingly, the franchisor and franchisee engage in an uncertain enterprise; they may benefit from working together, but they also share the risk of loss by doing business through franchising.[62] If the franchise thrives, both parties should receive sufficient profits. However, if the franchise fails, the franchisee faces the loss of its initial investment while the franchisor risks a lowered reputation in that particular demographic. Ultimately, a franchise could prove to be anything from an enormous success for all concerned[63] to a financial disaster resulting in costly litigation.[64]

## III. Franchisor Liability: How a Franchisor May be Liable for Its Franchisee's Torts

The relationship established between a franchisor and a franchisee raises various questions about liability. For example, a question arises as to who is liable if the franchised unit is sued for a breach of contract or for a personal tort: does the franchisee alone face legal responsibility, or is the franchisor also vicariously liable under the theory of respondeat superior? Courts employ a variety of legal theories in deciding whether to hold franchisors liable for the torts of their franchisees.

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[56] *See generally 2008 Event Summary*, *supra* note 1, at 190; *see also* Obermeyer, *supra* note 2, at 618; Joseph H. King, Jr., *Limiting the Vicarious Liability of Franchisors for the Torts of Their Franchisees*, 62 WASH. & LEE L. REV. 417, 422 (2005) ("that franchising is a method used by the franchisor to raise capital" thereby allowing the franchisor "to expand his business more quickly than would otherwise be the case.") (quoting Rubin, *supra* note 21, at 225).

[57] Obermeyer, *supra* note 23, at 618.

[58] *Id.*

[59] *See id.* at 618–19.

[60] Or at least one of them – each franchisee's initial fee and other outlays.

[61] *See id.* at 619; *see also 2008 Event Summary*, *supra* note 1, at 190.

[62] *See* Hale, *supra* note 21, at 576 (comparing the franchisor-franchisee relationship to a "perfect marriage," that is until the parties interest begin to diverge).

[63] *See id.* (commenting that "franchising has been described as "the perfect marriage between big business and the small businessman: the franchisor obtains new sources of expansion capital, new distribution markets, and self-motivated vendors of its products, while the franchisee acquires the products, expertise, stability, and marketing savvy usually reserved only for larger enterprises.") (quoting Jefferson I. Rust, Note, *Regulating Franchise Encroachment: An Analysis of Current and Proposed Legislative Solutions*, 19 OKLA. CITY U. L. REV. 489, 490 (1994)).

[64] *See 2008 Event Summary*, *supra* note 1, at 192 ( "[i]n the end, both parties to the franchise relationship assume the ultimate risk of costly litigation should the franchise relationship prove unsuccessful.").

As a general matter, the franchisor may be held directly liable based on its own conduct.[65] A court, however, is more likely to find a franchisor liable under the theory of respondeat superior.[66] Under established agency law, a franchisor may be held liable for his franchisee's torts if (a) the franchisor gave the franchisee explicit authority to undertake a harmful action,[67] or (b) the franchisor expressed no direct authority to the franchisee, but third parties reasonably believed the franchisee was acting for the benefit of the franchisor.[68] As such, there are three forms of authority with which the agent may act in accordance: actual authority[69], inherent authority[70], or apparent authority[71]. Some courts have held franchisors liable for their franchisees' torts in the absence of an established agency relationship, instead basing liability on such theories as third party reliability, loss prevention, or loss spreading.[72] Ultimately, whether a franchisor should be held liable for franchisee behavior continues to be a point of debate among the courts.[73] The following section will examine the tests mentioned above, observing the strengths and weaknesses of each.

## A. Testing for Franchisor Liability Under Agency Law

### 1. Direct Liability and Actual Agency Compared

As noted above, a franchisor could be held liable to an injured party due to the franchisor's own negligence. In such a situation, the plaintiff would seek redress from the franchisor because the franchisor's actions were the cause of the plaintiff's injuries. Examples of when a franchisor could be held directly liable include:

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[65] *See generally* King, *supra* note 56 at 425–27 (listing further examples of when a franchisor may be held directly liable). For example, a franchisor could be held directly liable to an injured third party if he failed to carefully select a responsible and diligent franchisee and the plaintiff was injured as a result of the franchisor's negligence. *Id*.

[66] That is, an agency relationship has been created between the franchisor and the franchisee and, therefore, the franchisor will be held vicariously liable for the torts of its agent, the franchisee.

[67] This is known as *actual agency*. *Infra*, section III.a.i; Actual authority is that which is actually granted, and it may be expressed or implied. *See* 3 AM. JUR. 2D *Agency* § 68 (2009); *see also* 3 AM. JUR. 2D *Agency* § 70 (2009) (noting "[a]ctual authority is such as a principal intentionally confers upon the agent, or intentionally or by want of ordinary care allowed agent to believe himself or herself to possess."); Ripani v. Liberty Loan Corp., 95 Cal. App. 3d 603, 611–12 (3d Dist. 1979)(finding the existence of actual authority show the principal authorized the agent to enter into a contract on behalf of the principal.)

[68] This is known as *apparent agency*. *Infra*, section III.a.ii.

[69] Whether the franchise's authority may be implied by the actions of the franchisor is based on "whether the agent reasonably believes, because of the principal's conduct, that the principal desired the agent so to act." Accordingly, "an agent who does not believe that he or she had such authority has no implied authority." 3 AM. JUR. 2D *Agency*, *supra* note 77, at § 72; *see also* Columbia Outfitting Co. v. Freeman, 36 Cal. 2d 216, 219–20 (1950) (holding an agent has no implied authority unless the agent believed that he had such authority to act on behalf of the principal.)

[70] The sole reason for the existence of inherent agency authority is to protect those who are harmed by dealing with an agent. This power is "derived not from actual authority, apparent authority, or estoppel, but solely from the agency relationship." *See* 3 AM. JUR. 2D *Agency* § 68 (2009); *see also* Lind. v. Schenley Industries, Inc., 278 F.2d 79, 85 (commenting that the same facts which support a finding of apparent authority will also support a finding of inherent authority.).

[71] Apparent agency is a power that, while "not actually granted, the principal knowingly permits the agent to exercise or which the principal holds the agent out as possessing." 3 AM. JUR. 2D *Agency*., *supra* note 77, at § 68.

[72] *See* King, *supra* note 56, at 453–54, 469–72, 473–75.

[73] *See* King, *supra* note 56, at 419–20 (commenting that the "lack of clarity, predictability, or analytical integrity continues, as does the onrush of litigation seeking to impose vicarious liability on franchisors.").

> the franchisor supplied a defective product to the franchisee or was otherwise sufficiently involved in the design, manufacture, or distribution of defective products sold by the franchisee to render the franchisor subject to products liability; the franchisor negligently designed the layout or structure of the franchised unit; the franchisor leased the land and was subject to potential duties as lessor of land held open to the public; the franchisor negligently required the franchise to adopt the specific injurious procedures at issue; or that the franchisor voluntarily undertook and assumed a duty to direct the safety aspect of the franchised unit that was responsible for the plaintiff's injury, such as the security, food safety program, or specified equipment that was responsible for the accident.[74]

Whether a franchisor can be found *vicariously* liable for the acts of its franchisee is largely based on whether the plaintiff can establish an agency relationship between the franchisor and franchisee.[75] To establish an agency relationship, the plaintiff must show: "(1) acknowledgement by the principal that the agent will act for him, (2) the agent's acceptance of the undertaking, and (3) control by the principal over the agent."[76] If the plaintiff can satisfy these requirements, the franchisee is viewed as the agent of the franchisor,[77] i.e., the principal.[78] However, a franchise agreement alone is not enough to form a principal-agent relationship.[79]

Whether an agency relationship exists is based largely on the amount and degree of control the principal-franchisor possesses over the agent-franchisee.[80] The franchisor may be held vicariously liable for the acts of the franchisee "only if the franchisor has control or a right of control over the daily operation of the specific aspect of the franchisee's business that is alleged to have caused the harm."[81] If the franchisor does not possess "the right to exercise control over the daily operations of the franchise,"[82] or if the "franchise agreement does no more than insure uniformity and standardization of services,"[83] then the franchisor will not be held

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[74] *Id.* at 425–27.

[75] *See, e.g.*, Drexel v. Union Prescription Ctrs., Inc., 428 F. Supp. 663 (1977, D. PA) (holding that a franchisor may be held vicariously liable for the acts of its franchisee where an agency relationship is established).

[76] *Drexel*, 428 F. Supp. at 663; *see also* Attorney's Title Ins. Fund, Inc. v. Regions Bank, 491 F. Supp. 2d 1087, (S.D. Fla. 2007).

[77] *See* 3 AM. JUR. 2d *Agency* § 2 (2009) (commenting "[a]n 'agent' is one who is authorized by a person or entity to transact business or manage some affair for the person or entity.") (quoting Novamerican Steel, Inc. v. Delta Brands, Inc., 231 S.W.3d 499 (Tex. App. Dallas 2007).

[78] *See* Michael R. Flynn, *The Law of Franchisor Vicarious Liability: A Critique*, 1993 COLUM. BUS. L. REV. 89, 90 (1993) (noting the "court examines the franchise relationship and determines whether, as a whole, it is more like the agency relationship between a master and servant or in independent contractor relationship. If the former, the franchisor — like any 'master' — is subject to vicarious liability through the doctrine of respondeat superior; if the latter, no liability ensues.").

[79] *See* Herbert B. Chermside, Jr., *Vicarious Liability of Private Franchisor*, 81 A.L.R. 3d 764 (1977) (noting Arthur Murray, Inc. v. Smith, 183 S.E.2d 66 (Ga. Ct. App. 1971) (holding a franchise contract under which the franchisee operates a type of business on a royalty basis does not create an agency or partnership relationship with the franchisor); *see also* Revels v. Miss America Org., 641 S.E.2d 721 (N.C. Ct. App. 2007).

[80] *See* 3 AM. JUR. 2d *Agency* § 2 (2009); *see also* Flynn, *supra* note 78, at 90 (commenting "in a franchise relationship, the issue of vicarious liability turns on whether the franchisor's control over the day-to-day operations of the franchisee is so extensive that the franchise relationship is really one of agency.").

[81] Am. Jur. 2d *Private Franchise Contracts* § 298 (2009); *see also* Papa John's Intern., Inc. v. McCoy, 244 S.W.3d 44 (Ky. 2008); *see also* Kelton v. Stravinski, 41 Cal. Rptr. 3d 877 (Cal. Ct. App. 2006); *see also* Kevin Adler, *Developments in Vicarious Liability*, FRANCHISING BUS. & LAW ALERT 1, 5 (Feb. 2010) (discussing that whether a franchisor is vicariously liable is analyzed by courts under a "right to control" standard).

[82] *See* Miller v. McDonald's Corp., 945 P.2d 1107, 1107 (Or. Ct. App. 1997).

[83] *See* Viches v. MLT, Inc., 127 F. Supp. 2d 828 (E.D. Mich. 2000).

vicariously liable for the franchisee's torts.[84] Nevertheless, a franchisor may be held vicariously liable if the "franchisor requires a franchisee to hire, train, and supervise employees in accordance with extensive guidelines and where the franchisor reserves the right to impose discipline upon the employees."[85]

In deciding whether franchisors may be held vicariously liable for the actions of their franchisees, courts have asked, "[d]id the franchisor have the right to control the specific thing that allegedly caused the harm?"[86] However, there must be more than a "general" right to control in order for the franchisor to be liable. The following cases demonstrate when courts have found sufficient franchisor control to establish vicarious liability or, conversely, when control was not enough for courts to impose franchisor liability.

In *Viado v. Domino's Pizza*,[87] an Oregon court ruled that Domino's Pizza was not vicariously liable for the negligence of its franchisee's employee.[88] The plaintiff in *Viado* filed a negligence action against Domino's Corporation, the local franchisee, and the franchisee's delivery driver for the injuries he sustained when the plaintiff's motorcycle collided with the delivery driver's vehicle.[89] In determining whether the franchisor was vicariously liable, the court first looked to see if an agency relationship existed between the franchisor and franchisee. The court noted that in order for such a relationship to exist two elements must be met: "(1) the individual must be subject to another's control; and (2) the individual must 'act on behalf of the other person.'"[90] The court looked at the franchise agreement, the operation manuals, and all the standards that Domino's installed.[91] The court determined that while Domino's did not control every aspect of the franchisee's business, it exercised sufficient control over the day-to-day operations to establish an agency relationship.[92]

The court then analyzed whether an employment relationship existed between franchisor and franchisee. The court determined that while an agency relationship was established, the franchisee was not an "employee" of the franchisor.[93] Instead, the court held that at most the franchisee was a "nonemployee agent" of the franchisor.[94] Ultimately, the court held that Domino's was not vicariously liable for the allegedly negligent driving of its franchisee's employee. While Domino's did have some control over its franchisee, such as the right to "set

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[84] In a few jurisdictions, certain elements of control, such as the right to specify hours of operation are dispositive; more commonly, no single element or fixed combination necessitates a finding of day-to-day control. *See* Flynn, *supra* note 78, at 92.

[85] *See* Miller v. D.F. Zee's, Inc., 31 F. Supp. 2d 792 (D. Or. 1998); *see also* Wood v. Holiday Inns, Inc., 508 F.2d 167 (Alaska Ct. App., 1975) (holding there was substantial evidence in the record indicating a high degree of control over the daily operations of the franchise by the franchisor and, therefore, a jury could reasonably find an agency relationship was established).

[86] Adler, *supra* note 81, at 5.

[87] Viado v. Domino's Pizza, 217 P.3d 199 (Or. Ct. App. 2009).

[88] *Id*. at 212.

[89] *Id*. at 201.

[90] *Id*. at 208 (citing Vaughn v. First Transit, Inc., 206 P.3d 181, 187 (Or. 2006).

[91] Viado, 217 P.3d at 202-04.

[92] Viado, 217 P.3d at 211.

[93] *Id*. at 210. For more on franchisees as possible employees, see Robert W. Emerson, *Assessing Awuah v. Coverall North America, Inc.: The Franchisee as a Dependent Contractor*, 19 STAN. J.L. BUS. & FIN. 203 (2014).

[94] Certainly in light of the fact that the franchise agreement provided that the parties were independent contractors; the franchisor did not compensate the franchisee as its employee; and the franchisee bore responsibility under the agreement for site development and construction; moreover, the franchisee had the ability to advertise and promote itself and ultimately had right to assign away its rights or otherwise transfer its ownership interest in the franchise. Viado, 217 P.3d at 210.

standards for the driver's minimum age, driver's record and more," it lacked the authority to control the day-to-day driving that was the actual cause of the accident.[95] Specifically, the court noted that Domino's lacked the authority to control which route the driver took and therefore lacked the requisite amount of control to establish Domino's vicarious liability.[96]

While the court in *Viado* found that Domino's did not exert enough control over the day-to-day operations of its franchisee to hold it vicariously liable, courts often hesitate to dismiss claims when the franchisor has exerted more control over its franchisee. For example, in *Thompson v. McDonald's Corp.*[97] the court analyzed "whether McDonald's was liable for injuries suffered by a 16-year-old employee who was shot while she was working at its drive-through window at a Los Angles restaurant."[98] The question presented in the case was whether a franchisor could be held liable for design or maintenance defects when the franchisor specified how the restaurant building units must be constructed.[99]

The plaintiff in *Thompson* claimed that McDonald's should be held vicariously liable because it "failed to exercise ordinary care in managing and maintaining the premises in a high-crime area."[100] In 2001, this particular McDonald's restaurant was remodeled in accordance with strict design specifications developed by the franchisor.[101] According to these specifications, "the drive-through window was supposed to shut and lock when an employee pulled his or her hand inside."[102] While working the drive-through window, the injured plaintiff reported that the window did not work as intended and that she was required to turn a knob in order to get the window to lock.[103] She alleged that her injuries stemmed from this defective window when a man was able to reach through the window, grab her arm, pull her through, and shoot her.[104]

McDonald's argued that it was not liable since it did not own, operate, or control that particular franchise.[105] Moreover, McDonald's argued that it did not owe a duty of care to the employee since the shooting was not a foreseeable event.[106] McDonald's argument succeeded at the trial level. However, the appellate court reversed the trial court's ruling on the franchisor's control of the restaurant and the foreseeability of the crime.[107] Ultimately, *Thompson* established that if the franchisor sets the standard as to how a building must be designed, built, maintained, or operated, and if that standard ultimately harms an employee or third party, then the franchisor is liable on account of its control of the instrumentality of the harm.[108] "[I]f you set the standard, you must police it," or run the risk of being held vicariously liable for the defects of such standards.[109]

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[95] *Id.* at 211; *see also* Adler, *supra* note 81, at 6.
[96] *Viado*, 217 P.3d at 211.
[97] Thompson v. McDonald's Corp., 2009 Cal. App. Unpub. LEXIS 4693 (Cal. App. 2d Dist. June 15, 2009); *see also* Adler, *supra* note 81, at 6 (further discussing the *Thompson* case).
[98] Adler, *supra* note 81, at 6.
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] However, McDonald's was successful on the issue of causation. *See id.*
[108] *See id.*
[109] Adler, *supra* note 81, at 6.

The establishment of an agency relationship now largely depends upon the degree of control the franchisor exerts over the franchisee's daily operations.[110] If the franchisor exerts a significant amount of control over the franchise, then the franchisor may be held vicariously liable. However, as explained in Section I, many franchisors retain a predominant amount of control over the franchisee to minimize the risk posed to their reputation if the franchisee does not operate to the franchisor's standards. In fact, franchisors often require franchisees to comply stringently with operational and training manuals or even purchase their supplies and inventory from among a short list of franchisor-approved suppliers.[111] Additionally, franchisors also retain a predominant amount of control over franchisees to comply with federal trademark regulation such as the Lanham Act.[112]

Courts have tried to articulate standards and thereby recognize a protected class of limited franchisor activities. In effect, an inexact safety zone for franchisors has been judicially established, with the franchisor permitted to exercise control over the franchisee up to a point, however imprecise, before the franchisor will be held vicariously liable.[113] In drawing this line (dividing franchisor activities for which only actual, direct liability may arise from those for which vicarious liability may occur), courts focus on the franchisor's interest in retaining a degree of control over the daily operations of the franchisee.[114] Thus, the franchisor's retention over such rights as "the right to enforce standards, the right to terminate the [franchise] agreement, the right to require that franchisees undergo certain training or the mere making of suggestions and recommendation[s]" will not create an agency relationship nor give rise to franchisor vicarious liability.[115] Consequently, the franchisor's requirement that the franchisee

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[110] Another characteristic of the agency relationship is that the agent has the power to bring about or alter business and legal relationships between the principal and third persons and between the principal and agent. *See* 3 AM. JUR. 2D *Agency* § 2 (2009); *see also* Eyerman v. Mary Kay Cosmetics, Inc., 967 F.2d 213, 219 (6th Cir. 1992) (holding that in order to establish an agency relationship the agent must have the power to alter the legal relations between the principal and third parties.); *see also* RESTATEMENT (SECOND) OF AGENCY § 12 (2006) (commenting "[a]n agent or apparent agent holds a power to alter the legal relations between the principal and third persons and between the principal and himself.").

[111] See *2008 Event Summary*, *supra* note 1, at 191. Emerson, *supra* note 39 (a review of franchise agreements for the year 2009 found: 96% of them provided for franchisor-issued operations manuals, with the franchisor having a right to revise these manuals; 98% of them provided for training of franchisees, with 66% stating that training is to be expressly at the franchisee's expense and 95% noting that the franchisor can perform consulting services for the franchisee after the initial training has ended; 98% of the contracts consider goods at the franchise outlet, with 89% providing for quality-control standards and 95% about product line control (what can be sold); 95% of the agreements gave the franchisor a right to inspect supplies; and 50% of the contracts stated that products for the franchise's use or sale must be purchased either from the franchisor or from franchisor-approved vendors, with 14% of the contracts mandating franchisee purchases from the franchisor and 75% requiring franchisee purchase of products from franchisor-approved vendors).

[112] *See* Adler, *supra* note 81, at 5 (noting the Lanham Act's requirement that trademark owners must take appropriate and reasonable steps to police the use of their trademark; specifically, the Lanham Act's language states "right to control" a trademark and "right to control an agent"— consequently, this "right to control" language has created a large conflict between vicarious liability law and the Lanham Act's requirements; while the franchisor may be in compliance with one standard he may be in breach of the other).

[113] *See* 62B AM. JUR. 2D *Private Franchise Contracts* § 298 (2009) (commenting "courts are generally mindful that a franchisor does have a legitimate interest in retaining some degree of control in order to protect the integrity of its marks."); *see also* Flynn, *supra* note 78, at 93 (noting "[a]ny law of vicarious liability will force a franchisor to walk a liability tightrope: the franchisor must balance the need for control against the potential burden of liability.").

[114] *See* Anderson v. Turton Development, Inc., 483 S.E.2d 597 (Ga. Ct. App. 1997) (holding that the franchisor has an interest in safeguarding the uniformity, value, and integrity of the franchise system).

[115] *Id.*

follow specific operational or training manuals, in and of itself, is not sufficient to hold the franchisor liable for the franchisee's tortious conduct.[116] While courts are reluctant to hold the franchisor vicariously liable when it retains rights to assure the integrity and value of its company, courts will hold the franchisor liable when it retains particular rights beyond the point of establishing franchisee standards.[117]

Traditionally, the establishment of an agency relationship also creates a fiduciary bond between the agent and principal.[118] Accordingly, the principal will owe the agent a fiduciary duty "of utmost good faith, trust, confidence, and candor … a duty to act with the highest degree of honesty and loyalty toward another person and in the best interest of the other person."[119] However, in the franchise context, courts have been unwilling to accept the creation of a fiduciary relationship between franchisor and franchisee.[120] In fact, "courts have nearly universally found that there is no general fiduciary relationship in the franchise setting. . . ."[121] Consequently, a franchise establishes a unique relationship between the franchisor and franchisee. While the franchisor may ultimately be held legally responsible under an agency theory for the tortious acts of the franchisee, this agency relationship does not give rise to a fiduciary relationship, as it would in a typical agent-principal relationship. Thus, the distinctive characteristics associated with the franchisor-franchisee relationship create an imperfect, quasi-agency relationship.

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[116] *See id.*; *see also* Raines v. Shoney's, Inc., 909 F. Supp. 1070 (E.D. Tenn. 1995) (holding that the protection of the trademark and service mark is the necessary duty of the franchisor); *see also* Kennedy v. Western Sizzlin Corp., 857 So. 2d 71 (Ala. 2003) (holding that the retained right to supervise the alleged agent to determine if that person conforms to the performance required by a contract with the asserted principal does not, itself, establish control).

[117] "In deciding whether the franchisor's actions give rise to a legal duty, courts typically draw distinctions between recommendations and requirements." 62B AM. JUR. 2D *Private Franchise Contracts* § 298 (2009); *see also* Emerson, *supra* note 12, at 627 (commenting that while courts have recognized the juggling act that must be performed by franchisor's to ensure that they adhere to the requirements of the Lanham Act, but not exert too much control over the daily operations of the franchisee as to be labeled as a "principal" in accordance with agency law, "[s]uch recognition, though, does not mean that franchisors clinging to the Lanham Act will be excused from an apparent agency."). Specifically, the Seventh Court of Appeals has held "the purpose of Lanham Act…is to ensure the integrity of registered trademarks, not to create a federal law of agency."; Flynn, *supra* note 78, at 100 (quoting Oberlin v. Marlin American Corp., 596 F.2d 1322, 1327 (7th Cir.1979); *accord with* Singleton v. International Dairy Queen, Inc., 332 A.2d 160 (Del. Super. Ct. 1975), where the Court denied defendant franchisor's motion for summary judgment based on the absence of an agency relationship with franchisee; Court held "[w]hen an entity can control the size, shape, and appearance of its franchisor's [sic] establishment, impose the nationally known sign 'Dairy Queen' as the only sign for the premises, require all containers to show the name of the parent company, dictate portion control, the size and shape of containers, the uniforms of employees, subject the franchisor to the obligation to obey subsequent rules and regulations, reserve the right to inspect the premises ..., name the suppliers, and even dictate what else may be sold on the premises, there appears little else to establish agency."; Flynn, *supra* note 39, at 101 (quoting *Singleton*,.

[118] The principal-agent relationship is a fiduciary relationship. Other examples of other fiduciary relationships are trustee-beneficiary, guardian-ward, and attorney client. *See* Hale, *supra* note 21, at 577.

[119] *Id.*

[120] *See generally id.* at 578 (discussing the courts holding in Arnott v. American Oil Co., 609 F.2d 873 (8th Cir. 1979) that found that the franchisor oil company did not owe the service station franchisee a fiduciary duty in light of the common interests shared by both parties to make a profit.).

[121] *Id.*

### 2. Apparent (Ostensible) Authority

Another important determination of agency is necessary when the franchisor does not directly give the franchisee the authority to act,[122] but rather, the franchisee acts in accordance with the franchisor's implied control. .

Thus, while the agent may not have the actual authority to act on behalf of the principal, the principal may nonetheless be vicariously liable for the agent's torts if the principal knowingly allows the agent to exercise such authority, or holds out the agent as possessing such authority.[123] The conduct of the principal establishes the agent's apparent authority.[124] The principal is liable for the authority that he has "held out the agent as possessing, or which the principal has permitted the agent to represent that he or she possesses."[125] Thus, apparent authority permits the third party to hold the "apparent" principal liable as if an agency did in fact exist. At its origination, the doctrine of apparent authority rested on the premise that one who causes a third person to believe someone is his agent should bear the loss associated with that third party's reasonable reliance on the presumed agent's supposed authority.[126] However, the three main policy justifications for franchisor liability have been third party reliance, risk spreading, and prevention of harm.[127] The risk spreading facet points to the possibility that an insolvent franchisee may not be able to compensate its tort victim.[128]

> In order to establish a prima facie case of apparent agency, the plaintiff must establish: (1) that the franchisor acted in a manner that would lead a reasonable person to conclude that the operator and/or employees of the franchise were employees or agents of the defendant; (2) that the plaintiff actually believed the operator and/or employees of the franchise were agents or servants of the franchisor; and (3) that the plaintiff thereby relied to his or her detriment upon the care and skill of the allegedly negligent operator and/or employees of the franchise.[129]

If an injured party can establish the existence of an apparent agency between a franchisor and its franchisee under these factors, a court can hold the franchisor liable for its franchisee's acts. Instances of a franchisor's acts that could lead a reasonable person to assume that a franchisee is an agent of the franchisor include "all means and methods that would maintain an image of uniformity among all of the franchises, including national advertising, common signs and uniforms, common menus, common appearance and common standards."[130]

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[122] Thus, the franchisor is not exerting direct control over the franchisee and, therefore, is not legally responsible for the tortious acts of the franchisee under an agency theory of liability.

[123] *See id.* at § 75; *see also* Billops v. Magness Constr. Co., 391 A. 2d 196 (Del. Super. Ct. 1978) (holding an agency relationship may be established from the acts and appearance that lead other third parties to believe an agency relationship exists).

[124] *See* 3 AM. JUR. 2D *Agency*, *supra* note 77, at § 300.

[125] *Id.*

[126] Emerson, *supra* note 12, at 624.

[127] *Id.* at 630.

[128] *Id.*

[129] *See* 3 AM. JUR. 2D *Agency*, *supra* note 77, at § 300; *see also Billops*, 391 A. 2d at 196 (noting that the concept of apparent authority is based upon manifestations by the alleged principal to third persons, and the reasonable belief by those persons that the alleged agent is authorized to bind the principal. These manifestations of the principal may be made directly to the third party or made publicly to the community via signs or advertising).

[130] *See* 3 AM. JUR. 2D *Agency* § 300 (2009); *see also* D.L.S. v. Maybin, 121 P. 3d 1210 (Wash. Ct. App. 2005) (holding franchisor made no representations or acted in any manner to allow third party to believe the establishment

### 3. Franchisor Liability in Accordance with the Restatement of Agency

Courts have often relied on the Restatement of Agency (hereinafter Restatement) to answer the question of how much control a franchisor must exert for it to be held vicariously liable for the wrongful acts of its franchisees.[131] While the test may appear to be straightforward, interpretation of the Restatement has led to different jurisdictions reaching different conclusions for the same or very similar fact patterns.[132] Thus, because many franchises span multiple jurisdictions, a franchisor may find it should maintain a different level of control for a franchisee in one jurisdiction than for a franchisee in another jurisdiction.[133] Following is an analysis of the Restatement's definition of agency and a franchisor's potential liability for its franchisee's torts.

Restatement (Third) of Agency defines "agency" as a "fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act."[134] The establishment of an agency relationship is largely based on whether the parties act as if there is an agency relationship. Nonetheless, an agency relationship may be found regardless of whether the parties disclaim the establishment of such a relationship.[135] Moreover, the franchisor-franchisee relationship alone does not establish an agency relationship.[136] To establish an agency relationship between the franchisor and franchisee, the franchisor must assent[137] to the franchisee acting on his behalf and the franchisee must assent, or consent, to acting on behalf of the franchisor.[138] Additionally, the franchisor must maintain control over the franchisee and the franchisee must remain subject to the franchisor's control.[139]

When reviewing the establishment of a franchise relationship, a court measures both franchisor assent and franchisee consent to the relationship "through written or spoken words or conduct."[140] Thus, the franchisor may give the franchisee actual authority,[141] or the franchisee

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of an apparent agency relationship between himself and franchisee; thus, the franchisor was a third party for franchisees' torts).

[131] Obermeyer, *supra* note 23, at 612.

[132] *Id.*

[133] *Id.*

[134] RESTATEMENT (THIRD) OF AGENCY §1.01 (2006).

[135] *See id.* at §1.02 (explaining "[a]lthough agency is a consensual relationship, how the parties to any given relationship label it is not dispositive."). If the parties claim not to have an agency relationship, but act as if there is an agency relationship, then the court will likely find such relationship was established between the parties.

[136] Thus, under the Restatement (Third) of Agency, a fiduciary relationship is not automatically established between franchisor and franchisee. *See id.* at cmt. a.

[137] *See id.* at §1.01 cmt. c (noting the difference between Restatement (Second) and (Third) of Agency. Whereas, the latter changes the language to "assent," rather than "consent" to "emphasize that unexpressed reservations of limitations harbored by the principal do not restrict the principal's expression of consent to the agent.").

[138] *See id.* at §1.01.

[139] *Id.; see also id.* at cmt. c (commenting "[t]he requirement that an agent be subject to the principal's control assumes that the principal is capable of providing instructions to the agent and of terminating the agent's authority.").

[140] *Id.* at §1.03.

[141] "An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act." *Id.* at §2.01.

may exhibit apparent authority.[142] In the former, the franchisor must give the franchisee express or implied authority to act on his behalf. On the other hand, the latter is a form of authority intended to protect innocent third parties who reasonably concluded that the agent was acting on behalf of the principal, when the principal allowed the agent to so act. If either of these forms of authority is found, assuming such acts are committed within the scope of their employment,[143] the principal will be found vicariously liable for the tortious acts of its agent in accordance with the Restatement (Third) of Agency.[144]

### B. Other Justifications for Franchisor Liability

While courts have been reluctant to hold franchisors liable for the tortious conduct of their franchisees, overall policy justifications have been established, which, at times, can hold franchisors liable even when there is no agency relationship.[145] Horror stories of franchisor liability findings appear largely based on the franchisor's "deep pockets," relative to smaller, less wealthy franchisees. Rather than basing liability on any real or apparent agency theories, findings are focused on franchisors' ability to more adequately indemnify injured parties.[146] Moreover, some courts have established franchisors' liability not in accordance with any agency theory, but rather under a piercing the -corporate veil theory. Under corporate law, when the corporation is nothing more than an alter ego or façade for the personal dealings of the dominant shareholders, then the corporate liability shield does not apply and shareholders can be held personally liable for corporate dealings. In *Buchanan v. Canada Dry Corp.*,[147] the court noted that the franchisee was essentially the "alter ego" of the franchisor.[148] The court reversed and remanded the case in order for the jury to decide whether the franchisee was in fact the franchisor's alter ego and thus liable.[149]

Additionally, other justifications for holding the franchisor vicariously liable for the torts of its franchisee without the establishment of any agency relationship include third party reliance, risk spreading, and prevention of harm.[150]

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[142] "Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." *Id.* at §2.03.

[143] The issue of whether an agent is acting with the scope of employment is addressed by Section 7.07(2) of the Restatement. That section provides that an employee acts within the scope of employment when he performs work assigned by the employer or engages in a course of conduct subject to the employer's control. An employee does not act within the scope of employment when he acts in pursuance of an "independent course of conduct not intended by the employee to serve any purpose of the employer." *Id.* at 7.07.

[144] *See id.* at §7.07. However, it will not be found in the franchisor-franchisee setting, unless the franchisor exhibits control over the franchisee's daily operations.

[145] The ultimate rationale behind holding franchisors vicariously liable for the torts of their franchisees is to adequately compensate injured third parties. *See* Flynn, *supra* note 78, at 97.

[146] *See* Emerson, *supra* note 12, at 628 (noting "the typical franchisor is better able than most franchisees to bear the cost of consumer injuries). However, some commentators argue that it is harder for a franchisor to recoup from a tort action than it is for a franchisee. *Id.* at n.59.

[147] Buchanan v. Canada Dry Corp., 226 S.E.2d 613 (Ga. Ct. App. 1976).

[148] No agency relationship was established between the franchisor and franchisee, but the court found that the franchisor, Canada Dry, may nevertheless be held liable for the injuries plaintiff sustained when the franchisee, Southeast-Atlantic, negligently drove a truck into the plaintiff's car. *Id.* at 616.

[149] Whether Canada Dry could be held liable depended upon whether the franchisee, Southeast-Atlantic, was the franchisor's alter ego in accordance with a corporate veil piercing theory. *Id.*

[150] *See, e.g.*, *Note, Liability of a Franchisor for Acts of the Franchisee*, 41 S. CAL. L. REV. 143, 153 (1968)

### 1. Third Party Reliance

As discussed above, in accordance with the Business Format Model of franchising, many franchisors maintain a predominant amount of control over the franchisee to ensure that the latter does not damage the franchisor's business reputation. This includes maintaining a fair degree of power to make certain that the business is conducted in accordance with explicit standards and regulations. For example, the franchisors may require the franchisee to follow comprehensive operation and training manuals to guarantee a consistent product or service across a vast demographic region. As a result, customers often believe that the franchised businesses consist of separate wholly integrated outlets, when in reality the franchise is a separate, independent business.[151] Such a customer off the street would likely walk into the corner Subway or a Holiday Inn believing that it was merely a "chain" outlet belonging to the larger corporation. However, unbeknownst to the customer, that particular Subway or Holiday Inn is very likely a franchise, which could ultimately alter who the customer could seek indemnification from if the customer was subsequently injured.

While it is ultimately the franchisor's objective to blur any distinction between franchised and company-owned units, that ultimately may harm the franchisor's interests. Customers injured by a franchisee may contend that the franchisor should not enjoy the benefits he reaps with the chain-store rouse without also assuming concomitant social responsibilities.[152] Consequently, a third party may be able to hold a franchisor liable for injuries sustained at or from a franchise if he can demonstrate that (1) the franchisor has directly communicated, or has communicated via signs or other advertisements; (2) the third party has relied upon these manifestations; and (3) the third party's interpretation and reliance upon these manifestations was reasonable.[153]

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[hereinafter *Liability of a Franchisor*]. Of course, courts have sometimes invoked broad policy considerations that seem to base franchisor vicarious liability on fundamental notions of fairness. *See, e.g.*, Van Arsdale v. Hollinger, 68 Cal. 2d 245, 253 (Cal. 1968) (stating these reasons for enterprise liability: the "principal" selected the independent contractor and was "free to insist upon one who is financially responsible, and to demand indemnity from him," the insurance to distribute the risk "is properly a cost of the [principal's] business," and it is of extreme public importance that the contractor meet its duty of care).

[151] Lynn M. LoPucki, *Toward a Trademark-Based Liability System*, 49 UCLA L. REV. 1099, 1104 (2002).

[152] Agosto v. Leisure World Travel, Inc., 304 N.E.2d 910, 913 (Ohio Ct. App. 1973) (discussing third party beneficiaries, apparent authority, and agency by estoppel).

[153] If the plaintiff cannot establish reliance on the manifestation then the franchisor will not be held liable. Caranna v. Eades, 466 So.2d 259 (Fla. Ct. App. 2d Dist.1985; Hart v. Marriot Intern., Inc., 304 A.D.2d. 1057 (3d Dept. 2003)). *See* AM JUR PRIVATE FRC., *supra* note 81, at § 301. However, the following examples of reliance were found sufficient to establish the appearance of an apparent agency relationship: (1) plaintiff expressly relied on the franchisor's name and the quality it represented (*Billops*, 391 A.2d at 196; (2) plaintiff used an "800" telephone number to make reservations (Fogel v. Hertz Inter., Ltd., 141 A.D.2d 375 (1st Dep't 1988)); (3) plaintiff specifically called a trade name establishment, not just any establishment, and lacked awareness that any of the establishments were individually owned (Orlando Executive Park, Inc. v. P.D.R., 402 So.2d 442 (Fla. Dist. Ct. App. 5th Dist. 1981); (4) plaintiff was familiar with national advertising, which led to a decision to patronize the business (Crinkley v. Holiday Inns, Inc., 844 F.2d 156 (4th Cir. 1988); (5) plaintiff's real-estate agents relied on the reputation of a real estate company that licensed a smaller real estate company to use its trademark (Ago v. Begg, Inc., 705 F. Supp. 613 (D.D.C. 1988). An example of when a franchisor was not held liable because the plaintiff failed to establish a showing of reasonable reliance was found in Hofherr v. Dart Industries, Inc., 853 F.2d 259 (4th Cir. 1988) (plaintiff testified she patronized a franchised pharmacy because someone told her it was reliable, not because it was associated with the national organization). *Id.*

In response, a franchisor may defend against liability by arguing that it should not be liable for the franchisee's torts where there was no agreement as to an agency relationship between the franchisor and franchisee.[154] However, courts are unlikely to accept such arguments as the modern trend has established that an agency relationship "may exist even if the principal did not actually subjectively intend to create an agency relationship, as long as the third party's reliance upon the principal's statement and conduct was reasonable."[155] Thus, even though there is no agreement between the franchisor and franchisee that an agency relationship has been established, a court may nevertheless infer a relationship based upon the parties' manifestations and third party interpretations of the relationship. If an apparent agency relationship is found, the franchisor will likely be found liable for the franchisee's torts.

The emphasis on third party reliance yet again places the franchisor in a difficult situation. While the franchisor may face liability if the third party reasonably relies on manifestations made by the franchisor, the franchisor may nevertheless prefer to risk liability than to post disclaimer signs. Such signs may potentially thwart the franchisor's attempt to induce the customer into believing that every store is wholly integrated and uniform. This disclaimer risks both customer goodwill and a diminished impression of uniformity across the business.[156] Therefore, although signs may save a franchisor from vicarious liability by expressly disclosing to customers that they are patronizing an individual franchise rather than an integrated business, [157] they may also result in the loss to a franchisee of clientele and capital.

### 2. Spreading Risk

The risk spreading theory is a second rationale for why courts may hold the franchisor liable for the torts of its franchisee in the absence of an agency relationship. Franchisors, in comparison to franchisees, are in a better position to distribute potential losses and face variable risks.[158] Many commentators and courts have noted this is due to the franchisor's "superior bargaining position,"[159] in addition to the fact that franchisors are likely to be more established business professionals with greater capital backing than franchisees.[160] Because the essential

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[154] *See, e.g.*, Wheat v. Kinslow, 316 F.Supp. 2d 924, 930 (D. Kan. 2003) (supporting the proposition that there would need to be an "agreement" between the franchisor and franchisee).

[155] *Standard Builders Suppliers*, 614 N.Y.S.2d at 634.

[156] *See* Emerson, *supra* note 12, at 633.

[157] *See* Duluth Herald & News Tribune v. Plymouth Optical Co., 176 N.W.2d 552, 557–58 (Minn. 1970) (stating that "[f]ranchisers can protect themselves from liability by insuring that their franchisee outlets make it clear to their customers and creditors that they are not dealing with a franchiser but with an independent business as a franchisee. This can be accomplished in the name it employs and in advertising which candidly discloses the relations which exists.").

[158] Commentators have noted that some courts have held franchisors vicariously liable to "create an incentive for the [franchisor, who is subject to vicarious liability] to take steps with respect to its [franchisor] … to reduce the risks of accidents." King, *supra* note 56, at 469–70.

[159] *See, e.g.*, Luso Fuel Inc. v. BP Prod. N. Am., Inc., 2009 WL 1873583 (D.N.J. June 29, 2009) (citing Westfield Centre Serv., Inc. v. Cities Serv. Oil Co., 432 A.2d 48, 54 (N.J. 1981); Goldwell of New Jersey, Inc. v. KPSS, Inc., 622 F. Supp.2d 168 (D.N.J. 2009); Mustang Mktg., Inc. v. Chevron Prod., Co., 406 F.3d 600 (Cal. Ct. App. 2005) (all noting the franchisor's superior bargaining position in comparison to the franchisee's).

[160] However, some commentators believe that franchisees are in a better position to spread risks than they are given. *See, e.g.*, Flynn, *supra* note 78, at 97 (commenting "it is true that franchisors are generally larger than franchisees and thus better able to spread costs. However, the franchisees themselves have some ability in this respect: like any small business owner, a franchisee can raise prices to cover loses. They are thus unlike employees, who typically have no ability to spread costs."); *see also* Jackson Hewitt, Inc. v. Childress, 2008 WL 834386, *7 (D.N.J., 2008)

rationale behind vicarious liability is to ensure that the injured party is wholly compensated for his injuries,[161] many commentators have argued that it is proper to hold the franchisor liable for his franchisee's torts. In the event that only the franchisee is found liable for negligence, injured third parties may be left uncompensated if the franchisee is left insolvent by such an action.[162] Thus, in light of a franchisor's capital surplus, these commentators suggest that franchisors should indemnify injured parties to ensure that they are made whole for their injuries.[163] Conversely, many commentators have attacked the position that a franchisee is not economically able to cover his negligent acts, and have taken the position that franchisees are now more sophisticated and competently capitalized than ever before.[164] Additionally, franchisees are increasingly likely to carry liability insurance. As a result, franchisees are often in an equal if not better position to indemnify injured parties.[165]

Although it has been seen that a justification for holding franchisors vicariously liable is to ensure that injured parties are adequately indemnified. This shifting of liability to franchisors to ensure that the injured parties are made whole may also incentivize franchisees to neglect efforts to avoid risks. Franchisees will have less incentive to avoid wrongs[166] if franchisors are required to foot the bill for the franchisee's torts.[167] Although commentators have noted that if liability was placed on the franchisee such a modification could place the franchisee in a heightened risk of economic loss,[168] as noted above, others believe that franchisees are not economically struggling to a degree that would disable them from compensating injured parties.[169] In fact, many commentators note that the modern day franchisee is "relatively quite wealthy."[170] Regardless of whichever party ultimately absorbs the costs of liability, the net result will be increased production costs, smaller operations, and overall higher transaction costs.[171]

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(quoting the *Jiffy Lube* Court that "the franchisee and franchisor are in a more equitable bargaining situation than the typical employer-employee relationship." Jiffy Lube Int'l, Inc. v. Weiss Bros., Inc., 834 F. Supp. 683, 691 (D.N.J. 1993)).

[161] Flynn, *supra* note 78, at 97.

[162] *Id.*

[163] Some commentators have justified shifting the damages to the franchisor in light of the franchise agreement, which "normally provide[s] for continuing royalty payments by the franchisee to the franchisor (in effect a form of benefit without any risk of direct liability), placing the burden of compensation on the franchisor is equitable."). *See id.* at 89.

[164] King, *supra* note 56, 474.

[165] *Id.* at 475.

[166] That is, the franchisee will nave less incentive to procure an efficient level of liability insurance. *See* Flynn, *supra* note 78, at 94.

[167] *See* Emerson, *supra* note 12, at 634 (citing Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231, 1244 (1984) (discussing whether holding a principal vicariously liable for the wrongs of his agent is economically efficient, or whether the agent should be held liable for his own wrongs); *see also* King, *supra* note 56, at 471 (noting shifting the liability to franchisors may in fact "diminish overall safety incentives" because "the franchisee [will] live[ ] to play another day" and continue to cut safety corners since he will not be held liable for his torts); moreover, allowing franchisees to escape liability may negatively affect the reputation of the business, because franchisees will be more likely to cut safety corners (knowing that the franchisor will be held liable for their torts), which will ultimately impact the trademark reputation. *Id.* at 472.

[168] *See* Emerson, *supra* note 12, at 635.

[169] *See, e.g.*, Flynn, *supra* note 78, at 96 (noting "the notion that franchisors are consistently better able to adequately compensate victims is far from certain.").

[170] *See id.*

[171] Increased prices may also be passed along to the franchisee's customers. Emerson, *supra* note 12, at 635–36.

### 3. Loss Prevention

Lastly, many courts have held franchisors vicariously liable absent an agency relationship based on a loss prevention theory. Under this theory, courts hold franchisors rather than the franchisees liable because the franchisors select the potential tortfeasor.[172] Under this theory, if the franchisee commits a wrong, the fault would shift to the franchisor because the franchisor chose an irresponsible and careless franchisee.[173] Moreover, some courts may hold the franchisor vicariously liable because it will further persuade him to maintain continually high standards while selecting and supervising the franchisee.[174] Additional methods a franchisor may use to prevent loss, and thus justifications for holding the franchisor vicariously liable, include franchisors' ability to adopt safety-oriented requirements in the franchise agreement; franchisors' safety training programs; and franchisors' ability to monitor and sanction franchisees who fail to meet safety regulations.[175]

On the other hand, some commentators have suggested that the franchisor's selection of an irresponsible franchisee would not give rise to vicarious liability but rather direct liability.[176] Furthermore, another basis for why franchisors should not be held vicariously liable for their franchisees' torts is that it is not realistic to hold the franchisor liable to prevent the franchisee from committing wrongs.[177] Various cost considerations and even state and federal laws may limit the franchisor's ability to ensure that the franchisee is not negligent.[178] This theory may expand to cover every action taken by the franchisee, leaving the franchisor essentially liable regardless of how much supervision or control he exerted over the franchisee.[179]

Clearly, the issue as to whether a franchisor should be held vicariously liable for his franchisee's torts is a slippery slope. The fundamental moral principle that "a franchisor should not reap the benefits created by public recognition of its name and yet be held to no duty to assure the quality of the product [or service associated with that name]," suggests a basis for holding the franchisor vicariously liable.[180] Yet where does one draw the line on vicarious liability? When is the interpretation too broad, subjecting franchisors to liability for every action

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[172] This loss prevention argument may be used by the courts to hold the franchisor liable in a breach of contract case, too. *See id*. at 636.

[173] *See id*. (commenting "the franchisor is in a good position to select responsible franchisees and to ensure that they exercise a high degree of care when dealing with their customers."); *see also* Flynn, *supra* note 78, at 97 (commenting "franchisors could avoid some accidents by more carefully selecting and monitoring their franchisees.").

[174] *See* Emerson, *supra* note 12, at 636.

[175] *See* King, *supra* note 56, at 470–71.

[176] This would be direct liability since "the franchisor's negligence in regulating the franchisee caused the accident." Flynn, *supra* note 78, at 97.

[177] *Id*.

[178] It would be impractical to hold franchisors liable since the basis of a franchise is to allow the franchisor to distribute its good or services across a vast demographic without having to create a massive sales association. However, holding the franchisor vicariously liable for the franchisee's tort limits the entire notion of a franchise. If broad inspections by the franchisor were required then essentially a large sales infrastructure would be created. Moreover, many state laws have limited the franchisor's ability to terminate the franchise agreement and, therefore, franchisors are left with no bargaining power to adequately compel franchisees to prevent wrongs. *Id.*; *see, e.g.*, Thomas M. Pitegoff and W. Michael Garner *Franchise Relationship Laws*, in FUNDAMENTALS OF FRANCHISING LAW, 194 (noting many states require "good cause" to terminate a franchise agreement).

[179] *Id.* at 637.

[180] *Id.* (quoting Scott P. Sandrock, *Tort Liability of a Non-Manufacturing Franchisor for Acts of Its Franchisee*, 48 U. CIN. L. REV. 699, 710 (1979)).

of their franchisees? And how is the notion of vicarious liability accorded with such state and federal regulations?

We may first consider these questions by dealing with an element at the heart of franchising: the trademark. Section 1127 of the Lanham Act provides: "A mark shall be deemed to be 'abandoned' if either of the following occurs: [w]hen its use has been discontinued … [or when] any course of conduct of the owner … causes the mark … to lose its significance."[181] Specifically, the Lanham Act is significant to franchisors because the concept of a franchise is to allow an independent party, *i.e*. the franchisee, to conduct business under their trademark, and the Act requires franchisors to maintain a degree of control over their trademark or risk losing it.[182] However, if a franchisor maintains too much control over the daily operations of the franchise, he risks being held vicariously liable for the franchisee's torts under an agency theory of respondeat superior.[183]

Thus, while some commentators argue that the franchisor is in a superior position to prevent wrongs,[184] many others oppose this position.[185] Ultimately, the notion of holding a franchisor vicariously liable for the torts of his franchisee is at best questionable in light of the traditional concept of the franchisor-franchisee relationship.[186]

### C. Apparent Authority Cases

A finding of apparent authority is one of the most common means by which a court will hold a franchisor liable for the actions of his franchisee. As discussed above, even if an actual agency relationship is not established between the franchisor and franchisee, the franchisor could nevertheless be held liable for the franchisee's torts. As described above, apparent authority principles can come into play if the franchisor acted in a manner that gave the third party the impression that the franchisee was the franchisor's agent, and the third party reasonably relied on

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[181] Lanham Act, *supra* note 42, at § 1127; *see also* King, *supra* note 56, at 468.

[182] Franchisors may also violate the Lanham Act in situations of franchise tie-in. *See generally* Robert W. Emerson, *Franchising and Consumer's Beliefs About "Tied" Products: The Death Knell for Krehl?*, 45 FLA. L. REV. 163, 176–77 (1993).

[183] *See generally* Flynn, *supra* note 78, at 100–01 (noting that within the last 40 years franchisors have begun to exert more control over franchisees daily operations in order to ensure the quality of the product or service and the reputation of its business name; yet, such control could position the franchisor to be liable for its franchisee's torts, while not exerting the proper amount of control over the franchise's day-to-day operations could risk non-compliance with the Lanham Act; many commentators have argued that franchisors should not be held vicariously liable based on the amount of control they have asserted to ensure that they are in compliance with the Lanham Act; however, courts generally do not consider the discrepancy between agency principles and the Lanham Act and the issue remains largely unresolved.); *see also* King, *supra* note 94, at 468–69 (commenting the Lanham Act places the franchisor "in a quandary, trying to protect the goodwill and reputation of his trademark, while at the same time avoiding so much control or appearance of control that it is deemed to have crossed the actual or apparent agency line.").

[184] The essential rationale of holding a franchisor vicariously liable for the torts of its franchisee is to "create incentives for franchisors to control the conduct of their franchisees in ways that might reduce the likelihood of injuries to their customers." King, *supra* note 56, at 470.

[185] *See generally id.* at 470–73 (noting several flaws in the theory of holding franchisors vicariously liable for their franchisee's torts; moreover, King notes that "there are already more than ample incentives for the franchisor [to prevent the franchisee from committing torts] without the indeterminate threat of vicarious liability," including such market incentives as avoiding bad publicity and the threat of potential direct liability).

[186] *See id.* at 483 (commenting the "threat of franchisor vicarious liability for the torts of franchisees subverts the essential nature of the business relationship chosen by the parties to the franchise and the roles pragmatically allocated to the franchisees within that relationship.").

this created representation to his detriment.[187] Different jurisdictions define these vague requirements differently and have left little to no clear precedent for franchisors in their attempts to determine whether their actions could be construed as creating an agency relationship.[188]

Leaving the liability question open can prove to be detrimental to the franchisor. The very nature of franchising – to produce a good or service and market it over a vast demographic – is crippled by the lack of clarity on franchisor liability. Without any clear standards to follow, franchisors are required to adjust their business associations to each individual jurisdiction. That is, franchisors have to ensure that in each jurisdiction where they operate a franchise they are not creating an appearance of an agency relationship in accordance with how that particular jurisdiction may define such an "apparent authority" relationship. It is no wonder that the apparent authority doctrine poses the most risk to franchisors' liability.[189]

Many different courts have defined what could potentially be interpreted as creating an apparent agency relationship. For example, the Third Circuit Court of Appeals in *Gizzi v. Texaco, Inc.*[190] held that in order for the franchisor to be held liable under an apparent agency theory, there needed to be both "manifestations by the alleged principal to the third party" and a "reasonable belief by the third person that the alleged agent [wa]s authorized to bind the principal."[191] The court went on to explain further that these manifestations by the principal could "be made directly to the third person, or may be made to the community, by signs, or advertising."[192] Lastly, the court noted that "[i]n order for the third person to recover against the principal, he must have relied on the indicia of authority originated by the principal,"[193] and "such reliance must have been reasonable under the circumstances."[194]

The *Gizzi* Court enumerated numerous elements a plaintiff must satisfy in order to establish a prima facie case of apparent authority, and noted that so long as this initial burden can be met the issue is generally viewed as a question of fact for the jury to decide.[195] Some commentators have criticized the notion of holding the franchisor liable under a theory of apparent authority. In fact, one commentator noted that holding a franchisor liable under this theory was wholly inconsistent with the concept of a franchise because:

> First, many franchisors own and operate some of their retail units and franchise some. The problem is that members of the consuming public will often not know which

[187] *See generally id.* at 438–39 (discussing the requirements to establish an apparent authority case).
[188] *See id.* at 439.
[189] King, *supra* note 56, at 439 (noting the "apparent agency doctrine is the theory that poses the biggest threat of vicarious liability to franchisors.").
[190] Gizzi v. Texaco, Inc., 437 F.2d 308 (3d Cir. 1971). In *Gizzi*, a service station selling the franchisor's products had negligently repaired the brakes of a vehicle and sold it to plaintiff who was subsequently injured when the brakes failed to properly work. Plaintiff filed an action against the franchisor alleging it was vicariously liable under the apparent authority doctrine, since the franchisee service station sold the franchisor's gasoline and automotive products, the franchisor owned pieces of equipment in the franchised service station, and in its advertising, the franchisor urged reliance on men wearing such oil company insignia. *See id.* at 309–10.
[191] *Id.* at 309.
[192] *Gizzi*, 437 F.2d at 308 (quoting RESTATEMENT (SECOND) OF AGENCY §§ 8, 8B, 27 (1964). In a way, *Gizzi* actually broadens the original apparent authority definition beyond just directly holding out the agent to a third party. There need not be direct contact at all. One can simply put up advertising with a logo, and that could be enough for liability.
[193] *Gizzi*, 437 F.2d at 308 (citing Bowman v. Home Life Ins. Co. of America, 260 F.2d 521 (3dCir. 1958); RESTATEMENT (SECOND) OF AGENCY§ 267 (1964).
[194] *Gizzi*, 437 F.2d at 308 (citing N. Rothenberg & Son, Inc. v. Nako, 139 A.2d 783 (N.J. Super. Ct. App. Div. 1958).
[195] *Gizzi*, 437 F.2d at 310.

> [franchises] are owned and operated by the principal company and which are franchised by it. And second, the trademark, uniformity, and standardization that undergird a brand name product or service may also support a belief that the retail unit selling that product or service is operated by the principal company rather than operating as a franchised unit independently owned and operated.[196]

After the *Gizzi* ruling, many franchisors attempted to limit their exposure to liability by posting declaimers of their responsibility.[197] Moreover, many franchisors have argued that it is not "reasonable" for a third party to assume that an apparent agency relationship has been established in situations where a franchisor participates in mass advertising campaigns or where he imposes quality standards upon his franchisees.[198] While these defenses likely would have been victorious forty years ago, in today's increasingly franchised society they are less likely to hold merit with the courts. In fact, some courts have found such liability despite the franchisor's attempt to disclose to third parties that they are occupying a franchise wholly independent from the franchisor.[199] Yet, franchisors still have some defense. As observed by the *Gizzi* Court, the plaintiff "must have relied on indicia of authority originated by the principal [the franchisor], and such reliance must have been reasonable under the circumstances."[200] The plaintiff must actually depend on the franchisee's supposed agency and, of course, be justified in supposing the franchisor to be the principal.[201]

Another example of just how divided the courts are regarding the issue of franchisor liability was demonstrated in the case of *Papa John's Intern., Inc. v. McCoy*.[202] In this case, the plaintiff customer filed an action against the franchisee[203] and the franchisor of a pizzeria for defamation and malicious prosecution.[204] Specifically, comments made by the franchisee's employee to police resulted in the customer being charged with unlawful imprisonment.[205] The plaintiff argued that the franchisor was vicariously liable for the torts of its franchisee. Ultimately, The *McCoy* court followed the rule for franchisor liability established in the *Kerl* case, which held that "a franchisor may be held vicariously liable for the tortious conduct of its franchisee only if the franchisor has control or a right of control over the daily operation of the specific aspect of the franchisee's business that is alleged to have caused the harm."[206] The *McCoy* court found that the franchisor was not liable because it "had no control over the franchisee's employee's isolated and allegedly intentional, tortious conduct."[207]

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[196] King, *supra* note 56, at 439.
[197] Emerson, *supra* note 12, at 639.
[198] *Id.*
[199] *See, e.g.*, *Crinkley*, 844 F.2d at 166–67 (holding that a motel could be liable for its franchisee's torts regardless of a sign stating that the franchise (Holiday Inn-Concord) was not operated by Holiday Inns, but rather by the franchisee (TRAVCO)).
[200] *Gizzi*, 437 F.2d at 308 (citing *Nako*, 139 A.2d 783 (N.J. Super. Ct. App. Div. 1958).
[201] *See* Emerson, *supra* note 12, at 640 n.114 (describing a number of cases in which no reliance was found).
[202] Papa John's Intern. Inc., v. McCoy, 244 S.W.3d 44 (Ky. 2008).
[203] RWT, Inc., a Papa John's franchisee. *Id.* at 47.
[204] *Id.*
[205] *See Id.* at 48 (describing that the charge as customer McCoy detaining employee Burke for over an hour and half to two hours after delivering a pizza to McCoy; subsequently, McCoy was arrested and charged with unlawful imprisonment and a story regarding the arrest was ran in a local newspaper).
[206] Kerl v. Dennis Rasmussen, Inc. 682 N.W.2d 328, 341 (Wis. 2004).
[207] *McCoy*, 244 S.W.3d at 56.

The dissent in *McCoy* argued that the franchisor should be held liable in accordance with the rule established in *Kerl*. Chief Justice Joseph E. Lambert noted in his dissenting opinion that the franchisor should be held liable under an apparent agency theory based on the customer's "reliance on [the franchise] name, advertising, and the external indicia of responsibility such as the signage and uniforms."[208] The *Gizzi* court applied this same analysis almost forty years earlier.

The holding in *McCoy* exemplifies that even while the courts may adopt a common rule for determining whether a franchisor may be held vicariously liable, such as the rule established in *Kerl*, courts tend to disagree on this issue of whether the franchisor exerted control over the franchise. In *McCoy*, the majority opinion examined the isolated actions of the franchisee's employee (the making of false statements to the police) and determined that the franchisor had no control over such actions and, therefore, was not vicariously liable. Yet, the dissent looked at the broader franchising format to find that the franchisor should have been liable since the customer reasonably believed that the employee was an employee of the franchisor, Papa John's, rather than the franchisee.

Cases such as *Gizzi* and *McCoy* reveal that there is no clear-cut test to determine whether a franchisor is vicariously liable. Many courts may find a franchisor is liable absent specific acts, statements, or acquiescence of the franchisee being his agent.[209] Other courts, however, will require control over the daily operations of the franchise and particularly control over the action that was the cause of the harm.[210] Some courts may even find "mass advertising, company signs, and other indications of possible agency may suffice" to hold a franchisor liable.[211]

In addition to whether the franchisor has exerted "control" over the franchise in the establishment of an agency relationship, courts must consider what constitutes franchisor "manifestations" of control and determine whether a potential plaintiff's reliance was "reasonable."[212] In making such a determination, many courts have turned to what has commonly been referred to as the "common knowledge" doctrine. That is, consumers' "common knowledge" regarding franchisors' manifestations largely sets the "standard of reasonableness that guides and then serves to limit the potential customer's "reliance" on agency."[213]

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[208] *Id.* at 58 (Lambert, Ch. J., dissenting).

[209] *See, e.g.*, *Crinkley*, 844 F.2d at 166–67 (holding franchisor hotel liable for the actions of its franchisee because the franchised hotel was operated so as to appear company owned, and this appearance of national ownership and control was a purpose of the franchise agreement.).

[210] *See, e.g.*, *McCoy*, 244 S.W.3d at 56.

[211] This was the case in *Crinkley* (holding franchisor liable based on national advertising, etc.). Yet, this was the opposite finding in *McCoy* (however, this was the dissent's argument as to why the franchisor should be vicariously liable); *see also* Emerson, *supra* note 12, at 641 (noting Beck v. Arthur Murray, Inc., 54 Cal. Rptr. 328, 330 (Dist. Ct. App. 1966), where plaintiff failed to prove that she believed the franchisor to be the franchisee's principal, *i.e.*, no reasonable reliance on the manifestations; but, the franchisor was nevertheless held liable under an apparent agency theory because, "no one directed her attention to a disclaimer not told her that the business was independently owned."; thus, in this case, the franchisor was held liable because the franchisor failed to actively disclose to the customer that she was patronizing a franchise, wholly independent from the principle business organization).

[212] That is a wholly separate issue from whether the franchisor has exerted "control" over the franchise in the establishment of an agency relationship.

[213] Emerson, *supra* note 12, at 645.

### D. The "Common Knowledge" Doctrine

#### 1. Establishment and Growth

The "common knowledge" doctrine sets forth: "absent unusual circumstances, a third party is deemed to know that the independent contractor actually operated the local outlet, and is solely responsible for his actions."[214] Many courts apply this doctrine to find that franchisors are not liable for the torts connected to their franchisees' independently owned and operated businesses. This is because courts have identified "that independent outlets often display signs indicating they sell certain well-known, trade-mark goods…"[215] Thus, a finding of "common knowledge" indicates that "customers thus cannot reasonably rely upon these signs as 'manifestations' of agency, permitting them to obtain relief against the trademark licensor (franchisor) for the acts of an apparent agent, the licensee (franchisee)."[216]

The "common knowledge" doctrine was judicially created in *Reynolds v. Skelly Oil Co.*,[217] and its progeny.[218] In *Reynolds*, the Supreme Court of Iowa held that the customer's argument that the defendant, Skelly Oil Company, "was estopped [to claim no vicarious liability based on apparent agency] because of the signs displayed and that, because of such signs, there was a presumption that the station was owned by the Skelly Oil Company ha[d] no support in reason or authority."[219] The court compared the appellee's argument to the following situation: "because the word "Chevrolet" or "Buick" is displayed in front of a place of business, General Motors would be estopped to claim that it was not the owner of the business." However, the court found this position illogical, noting "[i]t is a matter of common knowledge that these trademark signs are displayed throughout the country by independent dealers."[220]

The rule created in *Skelly*—that it is a matter of common knowledge that independent dealers display trademark signs in their business and, therefore, it is not reasonable for customers to rely on such manifestations as creating an agency relationship between franchisor and franchisee—largely shielded franchisors from vicarious liability. Many courts have continued to follow the precedent set in *Skelly*,[221] and have held that the presence of signs, emblems, logos, and the like displayed by independent dealers are a matter of common knowledge and do not create any agency relationship between the franchisor and franchisee.[222]

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[214] Howell v. Chick-Fil-A, Inc., 1993 WL 603296 (N.D. Fla., 1993).
[215] *Id.*
[216] *Id.*
[217] Reynolds v. Skelly Oil Co., 287 N.W. 823, 827 (Iowa 1939).
[218] *See, e.g.*, Chevron, U.S.A., Inc., v. Lesch, 570 A.2d. 840 (Md. 1990).
[219] *Reynolds*, 287 N.W. at 827.
[220] *Id.* The reasoning of the *Skelly* court seems strained. The whole idea of "common knowledge" presumes that people actually know there is a distinction between the local owner (the franchisee) and a franchisor.
[221] *See Chevron*, 570 A.2d. at 846.
[222] *See id.* (noting the following cases as demonstrating "common knowledge": "*Watkins v. Mobil Oil Corp.*, 352 S.E.2d 284, 287 (S.C. 1986) (sale of Mobil products, presence of Mobil signs and emblems on uniforms, and station trading as 'North Main Mobil' was not sufficient evidence to establish apparent agency); *Wood v. Shell Oil Co.*, 495 So.2d 1034, 1039 (Ala.1986) (presence of oil company's distinctive logo displayed on signs, literature, products, and uniforms is not sufficient evidence, in itself, to establish apparent agency because it is 'common knowledge among the general public that such a logo is often displayed by independent dealers and that the only representation made by such displays is that the oil company's gasoline is sold at the *service station*'); *Stephens v. Yahama Motor Co., Ltd.*, 627 P.2d 439, 442 (Okl.1981) (display of two Conoco signs at service station not sufficient to establish apparent agency because it is common knowledge that such signs are displayed by independent dealers); *Apple v. Standard Oil, Division of American Oil Company*, 307 F. Supp. 107, 115 (N.D.Cal.1969) (mere fact that service station sold Amoco gasoline and displayed Amoco signs did not constitute a 'holding out' sufficient to give rise to a

One case that followed the *Skelly* Court's "common knowledge" rule was *Chevron, U.S.A., Inc. v. Lesch*. A gas station customer argued the oil company, Chevron, was liable under an apparent agency theory for the torts of its franchisee's employee.[223] Plaintiff and his wife were severely burned and their home was destroyed as a result of an explosion that was initiated in their garage.[224] The Lesches argued that the explosion was a result of the negligent acts of the franchisee Walker Chevron, Inc.'s employee, Malcolm Weeks.[225] They claimed that Chevron, Inc. was liable under an apparent agency theory, since the franchisee "was a "branded station"; that is, it displayed the signs and colors of a particular brand, Chevron, and sold only that brand of gasoline and oil."[226]

Initially, the trial court found that there was no agency relationship between Chevron, Inc. and its franchisee, Walker Chevron; and even if there were reliance by the Lesches on such manifestations of agency, it would not have been reasonable or justified under the circumstances.[227] The Maryland Court of Special Appeals found "Chevron's efforts to prevent the public from distinguishing between branded stations and its own outlets were of long standing and were diligently pursued."[228] The appeals court found numerous indications of agency and of the plaintiffs' reliance upon such manifestations of agency, which were directly related to whether the reliance was reasonable.[229] Specifically, the court of appeals found the reliance reasonable in light of the fact that Chevron's actions made "'it impossible for the public to distinguish the franchised Chevron station from Chevron U.S.A., Inc."[230]

Chevron U.S.A. appealed to the Maryland Court of Appeals, which found that there was no apparent authority and held "[i]t was not reasonable for the [plaintiffs] to conclude that Chevron owned and operated the station, or that it so controlled the employees of the station so as to be considered their master, and therefore responsible for their negligence."[231] It was not reasonable for the plaintiffs to rely on signs and other manifestations displayed at Walker Chevron, Inc., as creating an agency relationship between franchisor and franchisee, because it

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finding of apparent agency."). This is a very nice string of citations and parentheticals. It provides VERY strong authority for the argument and propositions you are making. When I see this kind of support, I feel much more persuaded.

[223] *See* Chevron, 570 A.2d at 844–849.

[224] *Id.* at 841.

[225] *Id.*

[226] *Id.*

[227] Emerson, *supra* note 12, at 646 (noting "[t]he trial court stated that there was no representations by Chevron of an agency relationship, nor was there any evidence of reliance by the plaintiffs.") (citing Lesch v. Chevron, U.S.A., Inc., 542 A.2d 1292, 1294–95 (Md. Ct. Spec. App. 1988)).

[228] *Id.* (citing *Lesch*, 542 A.2d at 1299).

[229] *Id.*

[230] *Id.* (citing *Lesch*, 542 A.2d at 1305).

[231] *Chevron*, 570 A.2d at 849–850. Moreover, the court did not accept the Lesches' argument that since Chevron U.S.A. allowed them to charge their purchase of products and repair on a Visa Card that created an apparent agency relationship between Chevron U.S.A. and Walker Chevron. Rather, the court noted that it was "common knowledge that major oil companies accept credit cards purchases, not only of their products, but of virtually anything sold by a service station . . . [and] that many gasoline service stations accept several different major oil company credit cards." *Id.* at 847. Consequently, the *Chevron* Court held that it was "not convinced that the party furnishing the credit card slip and cooperating with the credit card company and issuing bank enjoys the control of an employee over those whose bill is paid by the charge." *Id.* at 847; *see also* Emerson, *supra* note 12, at 647 (noting that the Maryland Court of Appeals went beyond the traditional "common knowledge" expounded by the *Skelly* Court, which only applied the doctrine in regards to the public's awareness of independent dealers displaying franchisor's trademarks; here, the court expanded the doctrine to find simply because the franchisor's credit cards are accepted at a service station does not necessarily establish an apparent agency relationship between franchisor and franchisee).

was "a matter of common knowledge that these trademark signs are displayed throughout the country by independent dealers."[232] The "common knowledge" attributed to consumers in regards to franchising practices is often so considerable that it serves as a nearly complete bar to reasonable reliance arguments on the part of franchise patrons. This becomes particularly alarming when examining consumers actual knowledge of franchising practices and the frequency with which such knowledge falls far short of anything that could reasonably be considered "common knowledge."

### 2. "Common Knowledge": Not So Commonly Known

The *Skelly* and *Lesch* courts proposed that there are certain elements of a franchise that are generally known to the public. Specifically, these courts held that it is "common knowledge" that franchisors' trademark signs are displayed throughout the country by independent franchised dealers. Courts that have adopted the "common knowledge" doctrine have not done so based on any empirical evidence that consumers have such common knowledge.[233] Rather, courts have taken judicial notice of the doctrine, determining "that such knowledge is a fact, something judges and jurors already know"—a matter admitted without proof because it is universally regarded as established."[234]

## IV. Survey Results: Testing the Validity of the "Common Knowledge" Doctrine

In-depth statistical surveys and reports conducted on the issue have established that the courts' assumption of consumer "common knowledge" is sorely misplaced.[235] In fact, "there is little, if any, common knowledge about franchising, dealerships, [and] other such arrangements."[236] Initially, in 1990, two groups including college business law students and older individuals who occupied a managerial or professional occupation, individuals who theoretically should have possessed more common knowledge regarding franchises than the general public, were tested on their knowledge of franchising.[237] The respondents were asked a series of questions to determine their knowledge as to the displays of trademarks, understanding of the business characteristics of a franchise, the existence of franchises, and the significance of a franchisor-franchisee relationship, including the prospects of franchisor vicarious liability. The results were shocking.[238]

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[232] *Chevron*, 570 A.2d at 846 (quoting from BP Oil Corp. v. Mabe, 370 A.2d 554, 563 (Md. 1977), which in turn quoted *Reynolds*, 287 N.W. at 827).
[233] Emerson, *supra* note 12, at 648.
[234] *Id.* (citing BLACK'S LAW DICTIONARY 848 (6th ed. 1990) (internal quotations removed).
[235] Emerson, *supra* note 12, at 648.
[236] *Id.* (further noting "public assumptions about the law fly in the face of judicial calculations based on so-called common knowledge). Of course, the public's lack of understanding about supposedly basic concepts is not unique to law or business. In the world of science, for instance, studies show a remarkable disparity between what lay people believe about certain matters (e.g., climate change, the disposal of nuclear wastes, concealed handgun permits) and what is in fact the consensus among experts. Dan M. Cahan et al., *Cultural Cognition of Scientific Consensus* (Yale Law School Public Law Working Paper No. 205, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1549444.
[237] *See* Appendix, *infra* at (noting undergraduate level business law students were surveyed in 1990, 2000, and most recently in 2008).
[238] *See generally id.* at 648–58 (describing the "Common Knowledge" doctrine disproved); *see also* Appendix, *infra* at POLL A & B (for results of survey).

The Surveys' Results:

The first five questions pertained to the group's knowledge about franchising,[239] specifically, about gas stations that displayed "a well-known company logo or trademark, selling only that brand of gasoline, accepting the brand-name credit card, being listed in telephone books and advertisements under the nationally-known trade name, and having attendants wearing uniforms with the trade name insignia." The groups' understanding of the ownership of these gas stations was minimal.[240] While many courts have applied the "common knowledge" doctrine to find that consumers universally recognize that such stations are independently owned, the survey displayed that the three test groups believed that such stations were "probably" company owned.[241] The groups were even further mistaken regarding diet centers, believing "signs, products and services, uniforms, telephone listings, advertisements, or a list of centers indicate company—not local—ownership."[242] When all such characteristics are present, the numbers go to a level where seven out of ten student respondents find it likely that the center is owned and operated by the national company. The survey ultimately displayed that even those who should be educated about whether businesses are independently owned and operated are not as sophisticated as the courts would like to assume.

The students were even further off the mark when it comes to whether gas stations are independently or corporately operated. According to the results of two student surveys conducted in 2000 and 2008, "only 19.0% and 15.7% of the respondents correctly answered that most Chevron gas stations are locally owned and operated, while the majority of the respondents erroneously believed that they were mostly nationally owned and operated, and 37.9% and 39.1% incorrectly concluded that most were dually owned and operated nationally and locally."[243] While the results of these studies show a trend that the polling public is more likely to be aware of the franchise relationship in food, hotel, or even retail industries,[244] courts are less likely to extend the "common knowledge" doctrine to encompass such relationships. Courts are more likely to apply the doctrine in the traditional gas station situations, as was the position taken by the *Skelly* and *Lesch* Courts, despite the fact that the public possesses more knowledge regarding these nontraditional franchise situations than they do regarding the traditional one.[245]

Concerning whether commonly recognized chains, indeed ubiquitous, such as McDonald's, were independently or corporately operated, the results are actually getting worse. In 2000, about one out of five students incorrectly assumed McDonald's Corporation definitely or probably owned all McDonald's restaurants, and about half believed that many were jointly

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[239] Including their "knowledge as to the display of trademarks, the existence of franchises, and the significance of a franchisor-franchisee relationship, including the prospects of franchisor vicarious liability." Emerson, *supra* note 12, at 651.

[240] *See* Appendix, *infra* at POLL A, question 5.

[241] Two-thirds of the students mistakenly believed that the stations were company owned. *See id.* at questions 1–5.

[242] *See id.* at question 5. The 2008 Survey results indicate that 73.3% of respondents also held this belief.

[243] *See id.* at question 13. [1990 results: 9.9 correctly answered locally owned/operated, 57 believed they were nationally owned and operated and 28% concluded they were dually owned and operated]. Among the students surveyed in 2008 the correct answers about Chevron were 15.7%, with 41.7% erroneously thinking they were mainly nationally owned and operated, and 39.1% mistakenly selecting dual ownership and operations as descriptive. *See id.* at POLL C, question 1(i).

[244] *See* Emerson, *supra* note 12, at 653 (noting "[w]hile the public respondents generally remained wrong about these systems' ownership and operations, they were substantially more likely to know about these franchised organizations' typically local ownership and operations than they were to know the same about Chevron.").

[245] *See id*. at 653 n.199 (noting numerous cases in which courts are unwilling to extend the "common knowledge" doctrine to other franchise settings).

owned and operated.[246] In 2008, fewer than one-fifth of respondents answered correctly.[247] The 2000 and the 2008 results reveal that students' relative knowledge should not be overemphasized. In most instances, they were, as a group, wrong about businesses' ownership, operations, and potential liability, just as were the other groups.[248] Ironically, these two groups, despite their relative ignorance, may nonetheless have more "common knowledge" about some other types of franchising than about gas stations. That is especially remarkable in light of the fact that the courts have held that there is "common knowledge" about oil company trademarks. The courts have sometimes found the public's knowledge to be the exact opposite, and thus they have simply retained the common knowledge doctrine as *first applied* to gas stations without extending it to more recent forms of franchising, including hotels, stores, and restaurants.[249]

It should not be assumed, however, that the public is more knowledgeable about other franchise relationships. On the contrary, the student respondents were severely mistaken regarding one of the most well-known hotel chains, Holiday Inn—less than 10 percent of respondents knew the majority of the hotels were locally owned and operated.[250] A majority of the student respondents thought the hotel chain was nationally owned and operated. In fact, out of 24 businesses that the 2008 respondents—presumably all franchise customers—were quizzed over, a majority of the respondents only correctly categorized five businesses: Avis Rent-a-Car, State Farm Insurance, Jenny Craig Weight Loss Centers, Olive Garden and Gap.[251] Generally, the student respondents do not seem to know whether a gas station, hotel, fast-food outlet or other restaurant, diet center, car rental store, learning site, tuxedo rental location, or other business is locally or nationally owned and operated.[252] The student respondents were likewise uncertain about two fried chicken chains. First, they erroneously thought, by a margin of four to one, that most Kentucky Fried Chicken outlets are nationally or jointly owned rather than locally owned and operated.[253] Second, they were much less likely to believe that most Church's Fried Chicken restaurants are nationally owned and operated, when in fact they are usually *not* franchised.[254]

In the lodging industry, the student respondents were quite wrong about perhaps the most prominent, predominantly franchised hotel chain—Holiday Inns. In 2000 and 2008, only 7.3% and 8.9% of the respondents, respectively, opined correctly that most Holiday inns are locally owned and operated. These Holiday Inn figures can be compared with a completely integrated operation, that of Motel 6. Approximately three times or five times as many of the student respondents, incorrectly believed that most Motel 6 motels are locally owned and operated than rightly believed that to be the case for a genuinely franchised chain, Holiday Inns.

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[246] *See id.*, question 13.

[247] Surprisingly, the older professional group was more likely to believe that most McDonald's restaurants are corporately owned. *See* Appendix, infra at POLL A, question 6. Thus, this demonstrates that an alarmingly low number of people are able to distinguish between locally and nationally owned-and-operated businesses. Not only were respondents surprisingly incorrect in believing that McDonald's, one of the most well known franchises, were generally nationally owned, but they were also incorrect regarding whether another well recognized franchise, Burger King, was nationally or locally owned.

[248] *See* Appendix C; *See also* Poll B.

[249] An example is the successful franchisor defendant in *Braucher v. Swagat Group, LLC,* 2010 U.S. Dist. LEXIS 26294.

[250] *See*, *infra* at question 13.

[251] *See id.* In the 1990 results, of 11 businesses, only Avis Rent-a-Car was correctly categorized by a majority.

[252] *See id.*

[253] *See* 2008 Survey Results, *infra*, at Question 13.

[254] *Id*.

When the student respondents were questioned about what a franchise is, the majority of the respondents were not able to choose or otherwise offer a valid description of a franchise.[255] For example, in 2000, only 38% of the group noted that a franchise is independently owned and operated, a fundamental element of the franchise structure.[256] The respondents were even more likely to be wrong about the structure of a franchise[257]; and a majority of these respondents were incorrect in their belief that franchises are not independently owned and operated.[258] Generally, only 32.1% of the student respondents provided answers that included *only* correct attributes of franchising, while 37.4% of the student respondents provided answers that included both correct *and* incorrect attributes of franchises.[259] However, more than one in six student respondents thought that the franchisee did not manage it and, altogether, nearly 40% of the student respondents were wrong about the very basics of franchise ownership and management.

Once correctly told what a franchise is as well as the roles of the franchisor and franchisee in the arrangement, the respondents were questioned about what they thought the law was in this area. Specifically, they were asked whether they believed that a franchisor is liable for a breach of contract or negligence by their franchisee. Interestingly, the respondents were misinformed about a franchisor's vicarious liability, believing a franchisor could be held liable for its franchisee's breach of contract or tort.[260] More than 75% of the respondents were unaware that generally a franchisor is not liable when a franchisee violated a contract or committed a tort. [261]

After learning that a franchisor is not commonly held vicariously liable for its franchisee's torts or breaches of contract, the respondents were asked what they felt the law should be in this area. A majority of the student respondents believed that the law in this area should hold franchisors liable for the harm caused by their franchisees.[262] When public and franchise customers were surveyed regarding whether they believed franchisors should be liable for their franchisee's contract breaches and torts, the majority of them thought that national businesses should be liable for the harm done by local stores.[263] Widespread misinformation about holding franchisors vicariously liable is demonstrated by the response of 74.4% of the students surveyed in 2008 who did not know that the franchisor is often not liable for

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[255] *See* 2000 Survey Results, *infra*, at question 16. In fact, one in six of the student respondents failed to recognize the roles of the franchisor and franchisee in the franchise relationship. These students were unaware that the franchisor did not own the business and did not know that the franchisee managed it. The older professional group was also misinformed with almost one-third believing that the franchisor managed the business and an additional 18% either believing that the franchisor owned the business or simply not knowing what a franchise was.

[256] *Id.* at 656.

[257] *See* 2000 Survey Results, *infra*, at question 16. Half of both of these groups offered incorrect definitions of a franchise.

[258] *Id.* at question 1.

[259] *Id*. at question 16. The paucity of correct responses persists across the decades (*See* 1990 Survey Results, Poll B, question 6(b), indicating that between 49.1% and 50.6% of respondents identified only incorrect attributes of franchising, whereas between 14.5% and 16.5% identified only correct attributes of franchising ; 2000 and 2008 Survey Results, question 16, indicating that 32.1% of respondents identified only correct attributes of franchising, whereas only 6.3% of respondents identified only incorrect attributes of franchising) , though most student respondents were able to choose or otherwise offer a description of a franchise noting that it is independently owned and managed question. *See* 1990, 2000, and 2008 Survey Results, *infra*, at question 18. .

[260] *See* 2008 Survey Results, *infra*, at question 20. An average of 61% believed that the franchisor was liable for its franchisee's breach and 55% believed that the franchisor was liable for its franchisee's negligence.

[261] *Id.*; *see also* Emerson, *supra* note 12, at 657 (discussing other misconceptions regarding franchisor liability). [1990 – more than 70 percent].

[262] *Id.* at question 31.

[263] *Id.* at question 32.

franchisees' negligence or breaches of contract.[264] The surveys indicate that the vast majority of student respondents believe that national entities should be legally accountable for negligence or breaches of contract by the local stores.[265] Specifically, the surveys revealed:

> Most people simply do not approve of legal walls separating national franchisors from liability for the acts of their franchised outlets. Without articulating it, perhaps many lay people adopt a loss prevention rationale for imposing franchisor liability: the notion that franchisors should be held liable for any act whose probability of occurrence could be substantially reduced in the exercise of reasonable care and control by the franchisor.[266]

The surveys indicate that most people do not see the franchisor as sufficiently removed from the franchisee to escape liability for what the franchisee does. The surveys evince a near-unanimous belief that national companies should be required to stand behind services and goods sold at local stores.[267] In effect, it appears that most people would hold franchisors liable for franchisees' actions, in contravention of existing law.[268]

In light of the survey results, the notion of "common knowledge" appears contradictory. In fact, the surveys ultimately demonstrate that there is no common knowledge regarding franchises. The student respondents should have been better educated on the issue of franchises. A majority of those surveyed did not understand the basic elements of a franchise or the roles of the franchisor and the franchisee in the relationship. Moreover, they were incorrect on the topic of whether a franchisor could be held vicariously liable for its franchisee's actions. Even further mistaken were the public and franchise customers who appeared never to know that they were actually a part of these categories. They had no idea whether they were patronizing an independently owned and operated franchise or a nationally owned business. What the courts have deemed "common knowledge" is, perhaps, not so commonly known.

*Still No "Common Knowledge": Decades of Franchising, Yet No Enlightenment*

Even though the "common knowledge" doctrine was judicially created decades ago,[269] time has not enlightened the public to the characteristics of a franchise. The 1990 survey clearly demonstrates the public does not possess "common knowledge" regarding franchising. And, more recent surveys in 2000 and 2008, indicate the public still does not possess any "common knowledge" regarding the attributes of a franchise. In fact, while there has been an apparent increase in franchising knowledge from 1990 to 2000, the results of the 2008 survey demonstrate that some respondents actually have become less familiar with franchises and laws that pertain to them.

The 2000 and 2008 surveys used the same questions as the 1990 survey. However, an additional answer choice of "Don't Know" was included, which changed the distribution for these years. The results of the surveys compared during the 20-year period demonstrated that a decreasing number of those surveyed believe that products are made and distributed by the franchisor. For example, the following question was posed: "*Do you think that fast food*

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[264] *Id.* at question 29.
[265] *Id.* at question 30.
[266] Emerson, *supra* note 12, at 657 (quoting *Liability of a Franchisor*, *supra* note 150, at 155 (internal quotations removed)).
[267] *See* Poll B Question 4(c).
[268] *See* Poll B, Questions 4(d) & 4(e).

[269] The *Skelly* case (Reynolds v. Skelly Oil Co., 287 N.W. 823, 827 (Iowa 1939), discussed *supra* notes 217–222 and accompanying text) was decided in 1939.

*products, such as McDonald's hamburgers, are made and distributed by McDonald's*?"[270] In 1990, out of the 590 respondents, 274 answered "All."[271] In the year 2008, out of 517 respondents, 190 answered "All."[272] In this area, the responses signify the respondents' slight improvement towards understanding franchises.

However, another survey question—"*Do you think that products such as Baskin-Robbins ice cream are made and distributed by Baskin-Robbins?"*—a higher number of the 2008 respondents incorrectly answered this question.[273] Thus, while there has been a decreasing belief that products are made and distributed by a franchisor such as McDonald's, during the past 20 years there has been an increasing belief that products are made and distributed by such franchisors as Baskin-Robbins.[274] Thus, the data seems to indicate that while the public has grown increasingly aware of certain industries' franchising practices over the years, general knowledge has not improved, and at times even declined in regards to other specific franchising industries and practices. [275] Nevertheless, despite these fluctuations, a majority of the sample population still erroneously believed that for all stores, food products are made and distributed by the franchisor.[276]

Summary of Findings:

As it was demonstrated by the initial survey conducted in 1990, the judicially created doctrine of "common knowledge" is contradictory. There was no "common knowledge" when the doctrine was created, and there continues to be no "common knowledge" regarding the attributes of a franchise today.[277] The absence of common knowledge presents significant implications for franchising apparent authority case law. The justifiability or reasonableness of a customer's reliance on an apparent agency must no longer be measured to an idealized, erroneous notion of a marketplace consisting of informed consumers. If judicial speculation gave way to actual information, case resolutions might become more understandable and predictable. Franchisors and franchisees could then better plan their behavior and determine their risks.

In fact, in some areas, the public is even more mistaken regarding the characteristics of a franchise. For example, the noted surveys show there is an overall lack of knowledge of how to identify whether a particular store is locally or nationally owned. In fact, few laypersons can discern the ownership of businesses that they frequently patronize. More and more people assume that a business that serves the public is legally bound to post the identity of the establishment's owner. Moreover, it is apparent that the general public has difficulty understanding even the most basic principles of franchising, and this has remained consistently so for the past few decades.[278]

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[270] *See* POLL C, *infra*, at question 1.
[271] Equaling 46.4%. *Id.*
[272] Equaling 36.7% of the total respondents. This is a decrease of 9.7% during the 15-year span. *Id.*
[273] 43.1% (255) of the 1993 respondents answered "All," whereas 46.6% (241) of the 2008 respondents answered "All." *Id.* at question 5.
[274] *See generally id.*
[275] *See generally id.*
[276] Emerson, *supra* note 12.
[277] The surveys demonstrate that the theory that respondents' knowledge of franchise characteristics and law would increase over time, in light of the general rule of progression in society holds no water here.
[278] In fact when questioned whether the franchisor is "legally obligated to stand behind" the goods or services provided by their franchisee, the respondents in 2008 incorrectly answered this question more frequently than those respondents in 2000. Only 9.78% of the 2008 respondents answered this question correctly, in comparison to the 14.6% who correctly answered it in 2000. There are other survey examples showing an overall decline in

Nonetheless, the courts continue to use the doctrine, regardless of any empirical evidence suggesting there is something in the realm of universally known norms of franchising. Ultimately, the courts utilize the doctrine *in spite* of the empirical evidence that supports the fact that there is no such thing as "common knowledge" regarding franchises. Thus, as it was in 1990, the "common knowledge" doctrine remains, to this day, commonly unknown to the public.

## V. Changes in the Law

The law governing franchisor liability has been controversial and inconsistent since its inception. Many commentators and courts have held that a franchisor should not be held liable for the torts of its franchisee.[279] Yet, many courts still strictly adhere to the apparent authority doctrine, finding a franchisor is subject to vicarious liability for a tort committed by its franchisee when the franchisee is "dealing with a third party on or purportedly on behalf of the principal when actions taken by the [franchisee] with apparent authority constitute the tort of enabling the agent to conceal its commission."[280] The following section examines recent case law and Restatement changes and demonstrates how the question of franchisor liability continues to be a perplexing issue.

### A. Recent Case Law

In *Ohio State Bar Assn. v. Martin*, the Ohio Supreme Court decided that the unauthorized practice of law by a non-lawyer franchisee could not be imputed to its former franchisor under an apparent authority theory.[281] The Ohio State Bar Association charged Terry and Eva Martin (We The People of Cincinnati) and their current franchisor (We The People USA, Inc.) with engaging in the unauthorized practice of law.[282] The Ohio State Bar Association also charged the Martins' former franchisor, IDLD, Inc. with the unauthorized practice of law. The Ohio Supreme Court ultimately ruled the Martins' unauthorized practice of law could not be imputed to its former franchisor under an apparent-agency theory.[283]

In determining that IDLD was not liable for its franchisee's unauthorized practice of law, the court noted:

> In order to establish apparent agency, the evidence must show that the principal held the agency out to the public as possessing sufficient authority to act on his behalf and that the person dealing with the agent knew these facts, and acting in good faith had reason to believe that the agent possessed the necessary authority. Under an apparent-authority analysis, the agent's authority is determined by the acts of the principal rather than by the

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knowledge regarding franchises and franchising law from 2000 to 2008. *See, e.g.*, Emerson, *supra* note 12, at Question 28.

[279] *See, e.g.*, Susan Vincent, *Insuring Against Franchisor Vicarious Liability*, presented at the 34th Annual Legal Symposium, Washington, D.C. May 6–8, 2001, *available at* http://www.franchise.org (discussing franchisor vicarious liability and noting that the franchisor should not be liable because he "does not have the right or authority to control or operate the franchisee's business."); *accord with Crinkley*, 844 F.2d 156 (holding motel franchisor vicariously liable for injuries sustained by a customer who was injured in franchisee's motel).

[280] RESTATEMENT (THIRD) OF AGENCY § 7.08 (2009).

[281] 886 N.E.2d 827 (Ohio 2008).

[282] *Id.* at 831. Specifically, the Martins and We The People USA, Inc. (WTPUSA) allegedly "advised individuals in regards to completing legal pleadings and other documents, provid[ing] advice to individuals about their legal rights, and charg[ing] fees for these services." *Id.*

[283] *Id*. at 830.

> acts of the agent. The principal is responsible for the agent's acts only when the principal has clothed the agent with apparent authority and not when the agent's own conduct has created the apparent authority.[284]

While the Martins admitted to the panel that they engaged in the unauthorized practice of law, their former franchisor had informed them that they were prohibited from practicing law without being licensed members of the Ohio Bar.[285] Moreover, IDLD had "advised the Martins to display signs in their store and verbally inform customers that they were not attorneys and they were prohibited from offering legal advice."[286] Other instructions IDLD gave to the Martins included "not to select forms or legal procedures for customers and not to tell them how to complete the forms." IDLD even warned the Martins "that selecting forms and discussing laws or legal procedures with customers would be construed as the unauthorized practice of law," and told them "to refer customers' legal questions to IDLD's supervising attorney or an attorney of a customer's choice."[287]

The Martins testified in front of the panel they knew that their franchise agreement with IDLD prohibited them from giving legal advice to customers, or from selecting, recommending, or assisting customers in filing legal forms.[288] The Martins, orally and through their service contracts, informed customers that they were prohibited from giving legal advice.[289] In light of the evidence presented, the Ohio Supreme Court held, "there [wa]s no evidence that IDLD represented to the Martins or their customers that the Martins were authorized to commit any of the acts that constituted the unauthorized practice of law."[290] Consequently, the court found that IDLD's franchisee's unauthorized practice of law could not be imputed upon it under an apparent agency theory.[291]

In reaching its holding, the Ohio Supreme Court quoted the *Master Consol Corporation* court's rationale regarding whether an apparent-agency relationship had been established. The court noted that the existence of an agency relationship is determined not by the alleged agent's actions, but rather whether or not the alleged principal has indirectly granted the agent the apparent authority. Consequently, the principal will not be held liable when the agent's own actions have created the appearance of apparent authority in the eyes of the third party. Only when the principal has "clothed" the agent with apparent authority, which causes a third party reasonably to believe that the agent has the authority to act on behalf of the principal, will the principal be liable for his agent's torts.

In *Martin,* the Ohio Supreme Court did not even explore the second prong of the apparent agency analysis. Instead, the court found that IDLD never "clothed" the Martins with the apparent authority to give unauthorized legal advice. Assuming however, that IDLD did indirectly ratify the Martins' conduct, the court never discussed whether IDLD could still have evaded vicarious liability. In order for IDLD to have successfully avoided imputed liability in the second step of the analysis, the court would have been required to find that even if customers believed that IDLD did grant the Martins the authority to act, the customers' belief was not a

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[284] *Id.* (citing Master Consol. Corp. v. Banc Ohio Nat'l Bank, 575 N.E.2d 817, 834 (Ohio 1991)) (citation omitted).
[285] Ohio State Bar Assn. v. Martin, 886 N.E.2d at 833.
[286] *Id.*
[287] *Id.* at 834.
[288] *Id.*
[289] *Id.*
[290] *Id.*
[291] *See id.*

"reasonable" one. Nonetheless, since the court was satisfied that the first prong was not met, analysis under the "reasonableness" prong was unnecessary.

### B. Third Restatement Modifications

Courts have regularly relied on *Restatement (Second) of Agency* (Restatement Second) section 267 to impose liability on franchisors for injuries committed by franchisees.[292] However, Restatement Second has been superseded by *Restatement Third of Agency* (Restatement Third), which was adopted in 2005 and published in 2006. While the new restatement retains much of the same analysis and elements required from the prior restatement, the Restatement Third articulates a heightened analysis of the issue of principal liability. Additionally, the Restatement Third has removed some of the Restatement Second's definitions of agency, as well as absorbed existing concepts into different sections. These changes ultimately could change a court's analysis of the law when deciding principal liability. Specifically, the Restatement Third has impacted how a court may determine a franchisor's liability for the torts committed by its franchisee. The following section examines and compares the Restatement Third and Restatement Second and their impact on franchisor liability.

#### 1. Third Restatement Section 2.05 Amendments

Section 8b of Restatement Second[293] is captured by section 2.05 of the Restatement Third, which operates in a very similar way. Consequently, "courts applying Restatement Third section 2.05 to either an employer-employee relationship or franchisor-franchisee relationship, as they would under Section 8b, should require evidence that the principal caused the complainant third party to believe the franchisee was his agent, and that the third party justifiably and detrimentally took a position based on this belief."[294] The application of the doctrine of agency by estoppel would require the establishment of new precedent in most jurisdictions.[295]

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[292] Chad Wade, *The Double Doctrine Agent: Streamlining the Restatement Third of Agency by Eliminating the Apparent Agency Doctrine*, 42 VAL. L. REV. 341, 374 (2007). Restatement (Second) of Agency § 267 establishes: "One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such." RESTATEMENT (SECOND) OF AGENCY § 267 (2004).

[293] Restatement Second of Agency § 8B, Estoppel—Change of Position provides:

> (1) A person who is not otherwise liable as a party to a transaction purported to be done on his account, is nevertheless subject to liability to persons who have changed their positions because of their belief that the transaction was entered into by or for him, if
>
> (a) he intentionally or carelessly caused such belief, or
>
> (b) knowing of such belief and that others might change their positions because of it, he did not take reasonable steps to notify then of the facts. . . RESTATEMENT (SECOND) OF AGENCY §8B.

[294] Wade, *supra* note 292, at 375. According to § 2.05 Comment b, "detrimental change of position" is defined as the: expenditure of money or labor, an incurrence of a loss, or subjection to legal liability, not the loss of the benefit of a bargain. RESTATEMENT (THIRD) OF AGENCY § 2.05 cmt. b.

[295] Generally, "an individual is estopped from denying an agency relationship is he intentionally or carelessly caused a belief in a third person that one is acting on his behalf or, knowing of the belief, failed to correct the mistake and caused the third party to change position in reliance of that belief." Wade, *supra* note 292, at 363. While many courts have noted the connection between the estoppel doctrine and other agency doctrines, estoppel is a wholly separate. *Id*. Rather, estoppel requires a more stringent form of reliance than other agency doctrines. *Id*. That is, it requires a "detrimental chance in position" rather than a mere "change" as required by other agency doctrines. *Id.*

Moreover, shifting from the apparent agency doctrine to agency by estoppel would likely prevent litigation abuse, particularly from plaintiffs seeking out deeper pockets.[296]

While apparent agency and agency by estoppel require different levels of reliance, cases that cite the Restatement Third as authority do not discuss whether the injured party "detrimentally changed his position."[297] For example, in *Miller*,[298] while there was evidence that the plaintiff visited a McDonald's restaurant in reliance on an expectation of McDonald's quality of service, there was no evidence that the plaintiff would have changed her position if she were aware that the McDonald's corporation was not the actual owner of the franchise she had visited.[299] Similarly, the plaintiff in *Gizzi v. Texaco*[300] relied on Texaco's manifestations that it owned the station where the plaintiff purchased a car.[301] However, he failed to demonstrate that he would have not purchased the car if he thought Texaco did not own the station.[302] Thus, under the theory of agency by estoppel, if the plaintiff fails to provide sufficient evidence that he would have changed his position, he would be precluded from recovering any damages from the defendant.[303]

In comparison, plaintiffs are more likely to recover from franchisors under the apparent agency theory than under the doctrine of agency by estoppel.[304] Many commentators reason that courts must strike an acceptable balance between ensuring that plaintiffs receive an acceptable remedy, and allowing franchisors to adequately protect themselves from damages.[305] However, if courts do not require plaintiffs to establish a detrimental reliance or change of position, as was required in *Miller* and *Gizzi*, then plaintiffs will be able to "recover for conduct that they would have undertaken regardless of the manifestations by the principal."[306] Such an outcome runs the risk of upsetting the desired balance between ensuring adequate remedies and maintaining franchisor protections.

### 2. The Proposal to Remove Apparent Agency from the Third Restatement

The concepts of agency by estoppel and apparent agency, although linked, are distinct.[307] Unfortunately, the court's application of the doctrines has been confusing and inconsistent. Therefore, some scholars suggest eliminating some of the agency doctrines to ensure consistent

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[296] The higher standard of proof would make it more difficult for plaintiff's abuse. *See id.* at 375.
[297] *See* Wade, *supra* note 292, at 376.
[298] Miller v. McDonald's Corp., 945 P.2d 1107, 1109-10 (Or. Ct. App. 1997).
[299] *See* Wade, *supra* note 292, at 376 (citing *Miller*, 945 P.2d at 1112).
[300] *Gizzi*, 437 F.2d 308 (Pa. Ct. App. 1971).
[301] Wade, *supra* note 292, at 376 (citing *Gizzi*, 437 F.2d. at 309).
[302] *Id.*
[303] *Id.* For a discussion of the tort theory (agency by estoppel) and the contractual theory (apparent authority), see RESTATEMENT (SECOND) OF AGENCY § 8 cmt. d (1958).
[304] Wade, *supra* note 292, at 376.
[305] *Id.* at 376–77. For more general commentary, see Harvey Gelb, *A Rush to (Summary) Judgment in Franchisor Liability Cases?* 13 WYO. L. REV. 215 (2013); Deborah DeMott, *A Revised Prospectus for a Third Restatement of Agency*, 31 U.C. DAVIS L. REV. Vol. 1035 (1998).
[306] Wade, *supra* note 292, at 377.
[307] *See id.* at 377 n.240 (noting that apparent agency (or perceived agency as the author has entitled it) "is used to confer liability in the absence of an agency relationship where a third party has justifiably relied on the appearance of an agency relationship" and agency by estoppel "has been used to confer liability in the absence of an agency relationship where a third party has justifiably relied on the appearance of an agency relationship and detrimentally changed position based on that reliance.").

application by the courts.[308] One such commentator, Chad Wade, has suggested removing "the perceived agency [or apparent agency] language from the *Restatement Third* section 7.07 Comment f and expanding section 2.05 in order for agency by estoppel to cover the situations which were previously addressed in the *Restatement Second* section 267.[309] Wade proposes the following amendment to Restatement (Third) of Agency § 7.07 Comment f: [310]

> f. Definition of employee. For purposes of respondeat superior, an agent is an employee only when the principal controls or has the right to control the manner and means through which the agent performs work. The definition has the consequence of distinguishing between employees and agents who are not employees because they retain the right to control how they perform their work. If a person has no right to control an actor and exercises no control over the actor, the actor is not an agent. See § 1.01, Comment f(1).
>
> The fact that an agent performs work gratuitously does not relieve a principal of vicarious liability when the principal controls or has the right to control the manner and means of the agent's performance of work.
>
> A person who causes a third party to believe that an actor is the person's employee may be subject to liability to the third party for harm caused by the actor when the third party justifiably relies on the actor's skill or care and the actor's conduct, if that of an employee, would be within the scope of employment. For the general principle of estoppel, see § 2.05.311

This modification of section 7.07 would lead to the application of agency by estoppel in situations previously addressed by Restatement Second section 267.[312] Perhaps such changes are unnecessary, even for those who favor franchisor liability under apparent authority concepts; as one commentator recently noted, the Third Restatement's "Section 2.03 and its comments afford useful guidance in interpreting apparent authority or apparent agency."[313] Wade suggests this revision would have three primary effects. [314] First, the elimination of perceived agency from the language in section 7.07 forces courts adopting Restatement Third to use agency by estoppel where no agency relationship exists.[315] Second, because Restatement Third section 2.05 has a clearly articulated reliance standard, the modified restatement will be less ambiguous and will provide more guidance for courts when imparting liability on a principal.[316] Third, by eliminating the perceived agency language from section 7.07, the issue of apparent agency by

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[308] Wade, *supra* note 292, at 377.
[309] According to Wade, "[t]hese changes will streamline the law and help guide courts in applying agency by estoppel." *Id.*
[310] *Id.* Amendments are those of Chad Wade, proposed deletions are in the stricken words.
[311] *Id.* at 378.
[312] *Id.* at 377–78.
[313] Gelb, *supra* note 305, at 236. Gelb gives numerous examples related to section 2.03 to support his view. *Id.* at 236-37.
[314] Wade, *supra* note 292, at 378–79.
[315] Wade notes "[c]urrently, the only ways to bind a principal when requirements for an actual agency do not exist, as a matter of law, are to use perceived agency or agency by estoppel." *Id.* at 379.
[316] *Id.*

estoppel is forced into the forefront of Restatement Third.[317] As Restatement Third is currently drafted, the issue of perceived agency and whether or not a person is acting within the scope of employment is hidden away in comment f.[318] The proposed amendment to section 7.07, which includes the deletion of the perceived agency doctrine, will force the agency by estoppel to the forefront of the restatement.[319]

As it exists, Restatement Third Section 7.07 is an inconsistent doctrine.[320] The essential "purpose of section 7.07 is to define when an employer is liable for the tortious acts of an employee."[321] In making such a definition, section 7.07 presupposes an employer-employee relationship. The perceived agency doctrine attempts to answer when one party is liable for the torts of another without the creation of an actual agency relationship.[322] Because these doctrines are attempting to answer different questions within the same Restatement section, by removing the perceived agency language from section 7.07, the restatement will no longer be inconsistent. This clarity will assist courts in maintaining a consistent doctrine for determining whether one can be held liable for the acts of non-agents.[323]

Wade has also proposed the following amendments to Restatement Third section 2.05.[324]

*§ 2.05 Estoppel to Deny Existence of Agency Relationship.*

> A person who has not made a manifestation that an actor has authority as an agent and who is not otherwise liable as a party to a transaction purportedly done by the actor on that person's account is subject to liability to a third party who justifiably is induced to make a detrimental change in position because the transaction is believed to be on the person's account, if
>
> (1) the person, *through manifestations to the third party*, intentionally *caused such belief*, or
> *(2) the person, through lack of due care*, carelessly caused such belief, or
> *(3)* having notice of such belief and that it might induce others to change their positions, the person did not take reasonable steps to notify them of the facts.
>
> Comment: . . .
>
> c. In general. The estoppel stated in this section protects third parties who justifiably rely on a belief that an actor is an agent and who act on that belief to their detriment. The doctrine is applicable when the person against whom estoppel is asserted has made no manifestation that an actor has authority as an agent but *because of manifestations or a lack of due care by the person* is responsible for

[317] *Id.* at 380.
[318] *See id.*
[319] *Id.* The problem may simply arise from the fact that "courts have not always been careful in using terminology in traditional Restatement ways. Occasionally courts may use the term 'agent' when it would be more appropriate to use 'servant' or 'employee.'" Gelb, *supra* note 305, at 218.
[320] *See* Wade, *supra* note 292, at 380.
[321] *Id.*
[322] *Id.*
[323] *See id.*; Emerson, *supra* note 12.
[324] Wade, *supra* note 292, at 381. The proposals are the contribution of Chad Wade. Specifically, the proposed insertions are in italics and the deletions are struck out.

> the third party's belief that an actor is an agent and the third party has justifiably been induced by that belief to undergo a detrimental change in position. *Many times* the person estopped will be responsible for the third party's erroneous belief as the consequence of a failure to use reasonable care, either to prevent circumstances that foreseeably led to the belief, or to correct the belief once on notice of it . . .
>
> d. Rationale. . . *In cases where the third party's belief is caused by a lack of due care, estoppel* is analyzed with doctrinal elements similar to those applicable to a claim of negligent misrepresentation. *See Restatement Second, Torts § 552.*[325]

This revision proposes to expand the scope of agency by estoppel and eliminate the doctrine of perceived agency from the Restatement Third.[326] As written, section 2.05 focuses "on situations where the principal has negligently caused the belief [that the principal has ratified the agent's tortious behavior] or negligently failed to correct the [injured third party's] belief."[327] However, Wade proposes that once the doctrine of perceived agency is removed from the Restatement Third, it will be necessary to expand section 2.05 to include those situations which were traditionally covered by the doctrine.[328]

The amendments proposed above would have a substantial effect on franchise law when determining whether a franchisor is liable for its franchisee's tortious conduct. For example, by applying the facts of the *Miller v. McDonald's* case to the proposed amendment of 2.05, one can see both instances in which McDonald's could be liable, and instances where McDonald's might successfully evade liability.[329] Wade presents the following example of when McDonald's could be found liable for its franchisee's torts:

> Franchisor M engages in a national advertising campaign to promote patronage to its franchisee's restaurant. M does not retain control over its franchisees, although it offers suggestions and tips on how its franchisees may improve its business. Further, although M does not own the franchisee restaurants, it does not require franchisee to notify customers in any way that the restaurant is not owned by M. Customer C, relying on a perceived uniformity of service and products at M restaurants, dines at a M restaurant that is franchised to K. C is burned by negligently produced coffee. C would not have dined at the restaurant if he had known it was not owned by M. M is liable because it held out to the public that M restaurants were a commonly owned enterprise and carelessly caused the belief that all M restaurants were owned by Franchisor M.[330]

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[325] *Id.* at 381–82; *see also id*. for amendments to the illustrations following section 2.05. The illustrations included Gasbarra v. St. James Hospital, 406 N.E.2d 544 (Ill. App. Ct. 1980) (a medical malpractice case, involving a hospital's liability for an independently contracting staff physician's negligence) and Miller v. McDonald's Corp., 945 P.2d 1107 (Or. Ct. App. 1997) (discussed above); they represent when the perceived agency and/or agency by estoppel doctrines are most likely to be applied, *i.e.* in the employer-employee and franchisor-franchisee situation.

[326] Wade, *supra* note 292, at 383 (commenting that agency by estoppel has been submissive to other agency theories. Wade proposes to place agency by estoppel as a principal doctrine to hold one liable for another's tortious acts).

[327] *Id.*

[328] *Id*.

[329] *See* Miller v. McDonald's Corp., 945 P.2d 1107, 1110 (Or. Ct. App. 1997) (holding that there was sufficient evidence for a jury to conclude that Miller was McDonald's agent and therefore, McDonald's could be vicariously liable for its "agent's" tortious conduct).

[330] Wade, *supra* note 292, at 382.

Conversely, Wade presents the following situations in which McDonald's would likely not be held liable for its franchisee's torts:

> Same facts as [above], except that M requires all franchisees to prominently display signs that state the restaurant is not owned by Franchisor M. M is likely not liable because they have placed C on notice that they are not the principal of K; [and]
> Same facts as [above], except that C would have eaten at the M restaurant even if he had known that it was actually owned by K. M is not liable since C did not detrimentally rely on M's holding out.[331]

Most importantly, the proposed deletion of perceived agency from the Restatement Third will help to clarify when a franchisor should be held liable for its franchisee's torts. As explained above, the perceived agency doctrine addresses employee-employer situations, and a franchisee is not generally considered the "employee" of the franchisor. Thus, within the context of perceived agency, franchisor liability has been an inconsistent and confusing issue. However, if the perceived agency doctrine is deleted from the Restatement Third, then franchisor liability will be analyzed in the same, consistent manner as the employer-employee relationship.

## VI. Conclusion

As displayed above, the issue of franchisor liability remains an unsettled topic. While federal regulations, such as the Lanham Act, require the franchisor to exert control over its trademark in accordance with franchise regulations, if the franchisor exerts too much control over the daily operations of its franchisee, then he may be held liable for that franchisee's torts or the torts of its employees. To confuse the issue even more, courts have gone in various directions in regards to apparent authority or agency by estoppel. Some courts have found third-party reliance justifiable based on apparent agency, while other courts have utilized the "common knowledge" doctrine to find that such reliance is unreasonable.

Further clouding the discussion, as demonstrated in the surveys discussed above, there is no such thing as "common knowledge." The surveys indicate that society is quite ignorant of the basic structure of franchising; the ownership of units in large, chain enterprises; and the potential legal consequences for franchisees, franchisors, and third parties. Indeed, the ordinary layperson is not the only person that is relatively unaware of the characteristics of the franchising system. Even those who are associated with or employed by franchisees are unable to define the basic legal principles of a franchise correctly, such as who owns and operates franchises. Thus, those courts that have applied the "common knowledge" doctrine have been doing so erroneously.

The present interpretative unrest over franchisor liability places franchisors and franchisees in a predicament. It is important for franchisors and franchisees to have accurate information regarding their rights and responsibilities to ensure they can comply as required by law. Proposed amendments and recent modifications to the Restatement of Agency are likely to impact franchisor liability for the tortious conduct of franchisees. However, the unrest is not likely to be settled any time soon. One can only hope the following reforms may help to settle the conflict.

First, courts should abandon the "common knowledge" doctrine. The justifiability or reasonableness of a customer's reliance on an apparent agency must no longer be measured according to an idealized, erroneous notion of a marketplace consisting of informed customers.

[331] *Id.* at 382–83.

With the abandonment of the "common knowledge" doctrine, however, more franchisors would likely be held liable, since it would often be found that the injured party did not know the business he was frequenting was a franchise. Thus, legislation should be implemented that would require franchisors to establish a form of "common knowledge."[332] This will protect consumers while also holding liable those franchisors who do not comply with the statute.

Second, franchisors should be required to ensure franchisees post (1) prominent, understandable disclaimers of the franchisor's liability as well as (2) the fact that the business is franchised. To help meet both mandates, all franchised outlets should include the name of the owner and otherwise distinguish the franchisee from the franchisor. Ideally, these declarations of independent ownership should explain to the consumers that the franchisor is not liable for the acts or omissions of the franchisee. These disclaimers may also include a statement about the franchisees' attainment of liability insurance as well as reiterate the point that the franchisor is not vicariously liable for the franchisee's breaches of contract or torts.

While the "common knowledge" doctrine clearly needs to be abandoned, other precautions must be implemented to ensure customers are properly protected. With the above suggestions, consumers should be adequately informed of who may be liable for breaches of contract or torts. Further, the implementation of these proposals will better establish, as a set of fixed principles, the expectations for the franchisor and franchisee. An unsettled area of the law will thereby become more resolved.

## VII. Appendix

***Surveys Examining "Common Knowledge"***

The following questions were asked of 328, 802, and 757 undergraduate business law students at the University of Florida, respectively, in 1990, 2000, and 2008. These students were almost exclusively juniors and seniors, with a median age of 21.

Responses are given in percentages, to the nearest 0.1% and are presented in the right column.

*Part I – General Franchising Understanding and Recognition*

For Questions I through 5, suppose that Golly Gas stations are located throughout the United States and that there is a large, nationally known Golly Gas Company.

1. If a gas station displays signs which say "Golly Gas," the only gasolines it sells are Golly Gas products, and it accepts Golly Gas credit cards, in your opinion does that mean it is owned by the Golly Gas Company?

| | 1990 Poll | 2000 Poll | 2008 Poll |
|---|---|---|---|
| Definitely Yes | 7.6 | 13.0 | 14.1 |
| Probably Yes | 55.8 | 60.3 | 55.6 |

[332] See the second reform, discussed *infra* in the next paragraph of the text.

| | | | |
|---|---|---|---|
| Probably No | 23.5 | 17.3 | 18.5 |
| Definitely No | 7.6 | 3.8 | 5.3 |
| Do Not Know | 5.5 | 5.6 | 6.3 |

2. What if the gas station's attendants are wearing Golly Gas uniforms, with the Golly Gas insignia on their caps and above their name tags? (In your opinion, does that mean it is owned by the Golly Gas Company?)

| | 1990 Poll | 2000 Poll | 2008 Poll |
|---|---|---|---|
| Definitely Yes | 11.9 | 11.9 | 14.1 |
| Probably Yes | 52.4 | 53.1 | 55.6 |
| Probably No | 22.6 | 23.0 | 18.5 |
| Definitely No | 7.6 | 5.2 | 5.3 |
| Do Not Know | 5.5 | 6.8 | 6.3 |

3. What if the gas station is listed in the telephone book and in advertisements under the name, “Golly Gas”? (In your opinion, does that mean it is owned by the Golly Gas Company?)

| | 1990 Poll | 2000 Poll | 2008 Poll |
|---|---|---|---|

| | | | |
|---|---|---|---|
| Definitely Yes | 10.7 | 10.8 | 14.9 |
| Probably Yes | 51.5 | 48.2 | 49.4 |
| Probably No | 25.3 | 23.7 | 20.0 |
| Definitely No | 5.8 | 7.0 | 6.5 |
| Do Not Know | 6.7 | 10.2 | 9.1 |

4. What if the Golly Gas Company regularly distributes to customers, potential customers, other businesses, and anyone who asks, a list of Golly Gas stations which includes this station on that list? (In your opinion, does that mean it is owned by the Golly Gas Company?)

| | 1990 Poll | 2000 Poll | 2008 Poll |
|---|---|---|---|
| Definitely Yes | 20.4 | 16.0 | 17.6 |
| Probably Yes | 45.7 | 51.8 | 49.3 |
| Probably No | 23.5 | 18.8 | 18.0 |
| Definitely No | 4.9 | 4.3 | 4.0 |
| Do Not Know | 5.5 | 9.1 | 11.1 |

5. What if there are all of the above circumstances? (Golly Gas signs, products, credit cards, uniforms, telephone listing, advertisements, list of stations) In your opinion, does that mean it is owned by the Golly Gas Company?

| | 1990 Poll | 2000 Poll | 2008 Poll |
|---|---|---|---|
| Definitely Yes | 24.1 | 25.2 | 29.2 |
| Probably Yes | 45.7 | 50.6 | 46.1 |
| Probably No | 20.1 | 15.3 | 14.0 |
| Definitely No | 5.2 | 13.1 | 3.8 |
| Do Not Know | 4.9 | 5.8 | 6.7 |

6. If a fast-food restaurant is a “McDonald's,” in your opinion does that mean it is owned by the McDonald's Corporation?

| | 1990 Poll | 2000 Poll | 2008 Poll |
|---|---|---|---|
| Definitely Yes | 14.9 | 17.9 | 18.2 |
| Probably Yes | 30.2 | 26.6 | 31.4 |
| Probably No | 36.9 | 34.0 | 32.4 |

| | | | |
|---|---|---|---|
| Definitely No | 12.2 | 15.6 | 11.2 |
| Do Not Know | 5.8 | 5.9 | 6.6 |

For Questions 7 through 11, suppose that Dynomite Diet Den health/diet centers are located throughout the United States and that there is a large, nationally-known Dynomite Diet Den Company.

7. Assume that a health/diet center displays signs which say “The Dynomite Diet Den” and the main services and products it sells are part of the “Dynomite Diet Den” health and nutrition system. In your opinion, how likely is it that the Dynomite Diet Den Company owns and operates this business?

| | 1990 Poll | 2000 Poll | 2008 Poll |
|---|---|---|---|
| Very Likely | 31.4 | 21.9 | 23.0 |
| Somewhat Likely | 46.6 | 54.1 | 50.3 |
| Somewhat Unlikely | 14.6 | 15.6 | 15.7 |
| Very Unlikely | 4.3 | 2.4 | 5.3 |
| Do Not Know | 3.0 | 6.0 | 5.6 |

8. What if the health/diet center workers wear Dynomite Diet Den uniforms? (In your opinion, how likely is it that the Dynomite Diet Den Company owns and operates this business?)

| | 1990 Poll | 2000 Poll | 2008 Poll |
|---|---|---|---|
| Very Likely | 25.9 | 18.1 | 21.3 |
| Somewhat Likely | 52.1 | 54.9 | 52.6 |
| Somewhat Unlikely | 13.1 | 16.8 | 14.7 |
| Very Unlikely | 4.3 | 4.0 | 4.8 |
| Do Not Know | 4.6 | 6.2 | 6.6 |

9. What if the health/diet center is listed in the telephone book and in advertisements under the name, “Dynomite Diet Den”? (In your opinion, how likely is it that the Dynomite Diet Den Company owns and operates this business?)

| | 1990 Poll | 2000 Poll | 2008 Poll |
|---|---|---|---|
| Very Likely | 26.5 | 18.6 | 23.5 |
| Somewhat Likely | 51.2 | 52.7 | 49.0 |
| Somewhat Unlikely | 13.1 | 18.2 | 15.3 |
| Very Unlikely | 4.6 | 3.3 | 4.6 |

| | | | |
|---|---|---|---|
| Do Not Know | 4.6 | 7.3 | 7.4 |

10. What if the Dynomite Diet Den Company regularly distributes to customers, potential customers, other businesses, and anyone who asks, a list of Dynomite Diet Den health/diet centers which includes this center on that list? (In your opinion, how likely is it that the Dynomite Diet Den Company owns and operates this business?)

| | 1990 Poll | 2000 Poll | 2008 Poll |
|---|---|---|---|
| Very Likely | 33.5 | 23.0 | 28.3 |
| Somewhat Likely | 46.3 | 51.3 | 47.6 |
| Somewhat Unlikely | 12.5 | 15.1 | 12.8 |
| Very Unlikely | 4.3 | 3.3 | 3.8 |
| Do Not Know | 3.4 | 7.4 | 7.4 |

11. What if there are all of the above circumstances? (signs, products and services, uniforms, telephone listing, advertisements, list of stations) In your opinion, how likely is it that the Dynomite Diet Den Company owns and operates this business?

| | 1990 Poll | 2000 Poll | 2008 Poll |
|---|---|---|---|
| Very Likely | 46.6 | 34.0 | 38.4 |

| | | | |
|---|---|---|---|
| Somewhat Likely | 38.1 | 43.7 | 40.2 |
| Somewhat Unlikely | 8.2 | 11.9 | 11.1 |
| Very Unlikely | 3.7 | 3.4 | 3.6 |
| Do Not Know | 3.4 | 7.0 | 6.6 |

12. Assume that the Best Western International Corp. owns the rights to use of the name "Best Western" by motels or hotels. In your opinion, how likely is it that a hotel or motel called "Best Western" is owned and operated by the Best Western International Corp.?[333]

| | 1990 Poll | 2000 Poll | 2008 Poll |
|---|---|---|---|
| Very Likely | 43.9 | 32.8 | 33.7 |
| Somewhat Likely | 30.8 | 39.0 | 37.0 |
| Somewhat Unlikely | 13.4 | 16.1 | 16.4 |
| Very Unlikely | 8.5 | 7.5 | 7.8 |
| Do Not Know | 3.4 | 4.5 | 5.0 |

[333] Actually, the Best Western name and logo is owned by the Best Western International Corporation, but all of the Best Western motels or hotels—about 1,809 in the United States alone—are independently owned and operated. Telephone Interview with Corporate Communications, Best Western International Corporation (Apr. 25, 1990). They are part of a hotel cooperative whose national organization and its members may be deemed the franchisor and franchisees, respectively. *See, e.g.*, Quist v. Best Western Int'l, Inc., 354 N.W.2d 656 (N.D. 1984) (interpreting the franchise definition in the North Dakota Franchise Investment Law, a definition similar to those found in other state statutes; upholding the State Securities Commissioner's decision that a "cooperative marketing association" such as Best Western International Corporation is indeed a franchisor covered under the North Dakota statute).

❖ *Questions 13-16 were not a part of the 1990 POLL and were added to the 2000 and 2008 POLLS for the purposes of further examining consumer common knowledge. In each column, the figures represent the 2000 Poll responses on the left side and the 2008 Poll responses on the right side.*

13. For each of the following businesses, tell whether you think most of the stores are locally independently) owned and operated, are owned and operated by the national corporation, are both (that is, jointly) locally and nationally owned and operated, or do you not know? (Correct Answer with asterisk).

| | Locally Owned and Operated | Nationally Owned and Operated | Both (Jointly ) | Don't Know |
|---|---|---|---|---|
| McDonald's Restaurants | 24.6, 18.2* | 18.7, 21.3 | 56.1, 59.5 | 0.6, 1.1 |
| Lil' Champ Gas Stations | 43.2, 51.5 | 18.1, 8.2* | 28.5, 17.0 | 10.3, 23.3 |
| Diet Center | 46.3, 37.7* | 16.5, 9.6 | 6.5, 7.5 | 30.7, 45.2 |
| Holiday Inn | 7.3, 8.9* | 66.5, 58.5 | 24.7, 30.4 | 1.6, 3.3 |
| Church's Fried Chicken | 40.2, 33.8 | 17.1, 18.9* | 33.8, 35.3 | 8.9, 12.0 |
| Avis Rent-a-Car | 5.2, 5.7 | 78.5, 73.7* | 13.1, 13.7 | 3.3, 6.9 |
| Computerland | 49.9, 42.3* | 22.3, 11.0 | 5.6, 4.0 | 22.2, 42.7 |
| Motel 6 | 19.1, 17.4 | 52.1, 45.1* | 24.3, 30.4 | 4.5, 7.0 |
| Chevron Gas | 19.0, 15.7* | 41.3, 41.7 | 37.9, 39.1 | 1.8, 3.3 |
| Kentucky Fried Chicken | 24.2, 17.0* | 23.7, 26.3 | 50.6, 53.8 | 1.5, 2.9 |
| Budget Rent-a-Car | 5.2, 6.7* | 77.0, 66.6 | 14.2, 17.8 | 3.6, 8.7 |
| Steak and Ale | 28.1, 35.0 | 32.4, 18.4 | 35.1, 28.4 | 4.4, 18.0 |
| State Farm Insurance | 17.0, 13.2 | 56.2, 53.8* | 24.4, 29.9 | 2.4, 3.0 |
| Sylvan Learning Centers | 37.7, 19.4* | 29.8, 43.1 | 9.6, 19.0 | 22.9, 18.4 |
| Boston Market | 23.0, 16.5 | 29.9, 27.9* | 44.2, 48.9 | 3.0, 6.6 |
| Ponderosa Steakhouse | 32.9, 34.2* | 29.5, 20.5 | 26.1, 20.0 | 11.4, 25.2 |

| | | | | |
|---|---|---|---|---|
| Captain D's | 40.1, 30.5 | 17.3, 18.4* | 30.1, 29.8 | 12.6, 21.1 |
| CompUSA | 8.7, 6.1 | 73.0, 70.0 | 10.7, 12.3 | 7.6, 11.5 |
| Red Lobster | 17.0, 11.1 | 42.2, 44.9* | 38.3, 39.4 | 2.5, 4.5 |
| Jenny Craig | 12.2, 12.6 | 61.3, 53.9* | 20.5, 23.5 | 5.9, 9.9 |
| Bonanza Steakhouse | 47.5, 41.2* | 12.3, 7.5 | 14.1, 9.1 | 26.1, 42.0 |
| Olive Garden | 14.6, 8.9 | 49.2, 50.6* | 34.2, 37.9 | 2.0, 2.5 |
| Gap | 2.9, 2.0 | 83.3, 84.9* | 13.1, 37.9 | 0.8, 2.5 |
| Gingiss Formalwear | 39.3, 33.4 | 25.4, 11.8 | 11.0, 4.8 | 24.4, 49.9 |

14. Are the following businesses in Gainesville, Florida:

| | Locally Owned and Operated | Nationally Owned and Operated | Both (Jointly ) | Don't Know |
|---|---|---|---|---|
| Burger King | 35.4, 34.7 | 12.3, 10.7 | 48.1, 46.4 | 4.3, 17.3 |
| Coldwell Banker Realtors | 38.0, 40.2 | 23.6, 16.1 | 19.4, 26.3 | 19.0, 17.3 |

15. How much do you agree or disagree with this statement? I often choose businesses because they are owned and operated by national companies.

| Strongly Agree | Agree | Disagree | Strongly Disagree | Do Not Know |
|---|---|---|---|---|
| 4.0, 3.3 | 31.3, 27.7 | 42.2, 44.4 | 15.0, 16.5 | 7.5, 7.9 |

16. Do you know what a franchise is?

| Yes | No | Uncertain |
|---|---|---|
| 80.0, 3.3 | 9.9, 27.7 | 10.1, 44.4 |

Correct

| | % of Total |
|---|---|
| 1. Individual Ownership | **38.0%** |
| **2.** Individual Operations | 2**8.0 %** |
| 3. Trade Mark, Trade Name, Intellectual Property Licensing | **39.1%** |
| **4.** Initial Payment of Fees to Franchisor | **18.2%** |
| **5.** Guidelines Furnished by Franchisor | **23.3%** |
| **6.** Continuous Payments to Franchisor, (Royalties) | **17.9%** |
| **7.** System for Marketing Goods and Services | **7.0%** |
| 8. Contracted Relationship | **6.7%** |

Incorrect

| | |
|---|---|
| A. National, Centralized Operations | **5.3%** |
| B. National, Centralized Ownership | **7.8%** |
| C. Purchase of Company or its stock | **3.0%** |
| D. Subsidiary | 0**.7%** |
| E. Large Corporation | **4.0%** |
| F. Partnership | **1.4%** |
| G. Agency Lease | **0.3%** |
| H. Small Business | **0.3%** |
| I. Branch Locations | **6.5%** |
| J. Store/Restaurant | **17.5%** |
| K. Sole Proprietorship | **0.1%** |
| L. No Royalties | **0.0%** |

| | % of Total |
|---|---|
| Answers that included only correct attributes of franchising: | **32.1** |
| Answers that included both correct and incorrect attributes: | **37.4%** |
| Answers that included only incorrect attributes: | **6.3%** |

Answered attributes were not clearly right or wrong: **24.2%**

***Part II –Understanding Franchising Law***

17. Are businesses which serve the public required to display signs or use letterheads stating who the owner is?

| | 1990 Poll | 2000 Poll | 2008 Poll |
|---|---|---|---|
| Definitely Yes | 2.4 | 7.7 | 8.9 |
| Probably Yes | 14.6 | 24.7 | 27.2 |
| Probably No | 50.0 | 41.3 | 26.2 |
| Definitely No | 25.4 | 17.3 | 15.6 |
| Do Not Know | 7.6 | 9.0 | 12.0 |

18. A store, gas station, restaurant, hotel, or other business which is a franchise—In your opinion, it would be (pick one answer):

| | 1990 Poll | 2000 Poll | 2008 Poll |
|---|---|---|---|
| a. Independently owned and managed by the **franchisee** (the party that was granted | 63.4 | 50.8 | 49.7 |

| | | | |
|---|---|---|---|
| the franchise) | | | |
| | 16.5 | 21.3 | 17.4 |
| b. Independently owned, but managed by the franchisor (the party that granted the franchise) | | | |
| c. A subsidiary company owned by the franchisor | 3.4 | 6.8 | 4.5 |
| d. A ‘branch’ office/operation—owned by the franchising system as a whole, but managed by the **franchisee** | 12.2 | 16.4 | 20.9 |
| e. (at the invitation of the survey, the respondent wrote an answer here that did not conform with any of the answers above) | 4.3 | 2.5 | 3.7 |
| f. Do not Know | 0.3 | 2.4 | 3.4 |

19. Please indicate the degree of certainty you have about your response (how sure you are about your answer) to 14, above.

| | 1990 Poll | 2000 Poll | 2008 Poll |
|---|---|---|---|
| Absolutely Certain | 14.6 | 11.9 | 14.5 |
| Reasonably Sure | 64.6 | 67.4 | 64.1 |
| Not Sure | 19.5 | 19.5 | 18.4 |
| Completely Uncertain | 1.2 | 1.2 | 2.4 |

20. As you may know, franchises are sometimes given by a company, the franchisor, to another person, the **franchisee**. In your opinion, if you have a contract with a **franchisee** (that is, someone who has a franchise) and the **franchisee** breaches (that is, violates) the contract, can you sue and recover a damages award from the franchisor (the company that granted the franchise to the **franchisee**)?

| | 1990 Poll | 2000 Poll | 2008 Poll |
|---|---|---|---|
| Definitely Yes | 8.5 | 11.8 | 13.2 |
| Probably Yes | 50.0 | 54.4 | 50.2 |
| Probably No | 31.4 | 22.9 | 22.5 |

| | | | |
|---|---|---|---|
| Definitely No | 3.4 | 3.5 | 3.3 |
| Do Not Know | 6.7 | 7.5 | 10.7 |

21. Same question as 20, above. In your opinion, can you sue and recover half from the franchisor and half from the **franchisee**?

| | 1990 Poll | 2000 Poll | 2008 Poll |
|---|---|---|---|
| Definitely Yes | 1.5 | 3.3 | 40.2 |
| Probably Yes | 23.2 | 33.7 | 30.9 |
| Probably No | 46.6 | 36.7 | 33.3 |
| Definitely No | 5.2 | 2.5 | 5.9 |
| Do Not Know | 23.5 | 23.9 | 25.5 |

22. Assume that you were hurt because of the negligence of persons working at a business which is a franchise. In your opinion, can you sue and be compensated by the franchisor (the company that granted the franchise)?

| | 1990 Poll | 2000 Poll | 2008 Poll |
|---|---|---|---|
| Definitely Yes | 6.1 | 14.9 | 12.0 |
| Probably Yes | 49.7 | 53.2 | 49.8 |
| Probably No | 33.4 | 21.2 | 25.4 |
| Definitely No | 5.2 | 3.9 | 4.2 |
| Do Not Know | 5.5 | 6.9 | 8.5 |

23. Same question as 22, above. In your opinion, can you sue and recover half from the franchisor and half from the **franchisee**?

| | 1990 Poll | 2000 Poll | 2008 Poll |
|---|---|---|---|
| Definitely Yes | 2.1 | 3.5 | 4.1 |
| Probably Yes | 30.7 | 38.6 | 32.6 |
| Probably No | 42.9 | 34.5 | 36.7 |
| Definitely No | 6.7 | 4.5 | 5.0 |
| Do Not Know | 17.5 | 18.9 | 21.4 |

24. Is the franchisor legally obliged to "stand behind" (that is, in ***677** some way guarantee) the services and/or goods provided by its **franchisees**?

| | 1990 Poll | 2000 Poll | 2008 Poll |
|---|---|---|---|
| Definitely Yes | 26.7 | 24.5 | 26.2 |
| Probably Yes | 55.5 | 54.2 | 52.8 |
| Probably No | 12.6 | 14.6 | 13.2 |
| Definitely No | 1.8 | 3.0 | 2.6 |
| Do Not Know | 3.4 | 3.6 | 4.9 |

25. Regardless of whether franchisors are required to do so, do most franchisors "stand behind" (that is, in some way guarantee) the services and/or goods provided by their **franchisees**?

| | 1990 Poll | 2000 Poll | 2008 Poll |
|---|---|---|---|
| Definitely Yes | 27.6 | 25.5 | 20.9 |
| Probably Yes | 64.7 | 65.5 | 62.6 |
| Probably No | 4.6 | 4.4 | 9.8 |
| Definitely No | 0.6 | 2.0 | 1.7 |

| | | | |
|---|---|---|---|
| Do Not Know | 2.5 | 2.6 | 4.8 |

26. If a local franchise cannot pay a lawsuit judgment against it, can the franchisor be forced to pay the judgment?

| | 1990 Poll | 2000 Poll | 2008 Poll |
|---|---|---|---|
| Definitely Yes | 4.0 | 6.4 | 4.4 |
| Probably Yes | 38.7 | 46.4 | 46.0 |
| Probably No | 34.7 | 25.2 | 23.5 |
| Definitely No | 3.1 | 4.2 | 3.7 |
| Do Not Know | 19.6 | 17.9 | 22.2 |

27. Are franchises required to have the type and amount of insurance coverage that will fully cover most potential liabilities of the business?

| | 1990 Poll | 2000 Poll | 2008 Poll |
|---|---|---|---|
| Definitely Yes | 19.3 | 17.5 | 22.2 |
| Probably Yes | 62.3 | 59.4 | 55.2 |

| | | | |
|---|---|---|---|
| Probably No | 6.4 | 9.6 | 11.2 |
| Definitely No | 0.3 | 2.5 | 1.9 |
| Do Not Know | 8.6 | 11.0 | 9.3 |

28. Regardless of whether they are required to do so, do most franchises have such insurance coverage (as mentioned in 27, above)?

| | 1990 Poll | 2000 Poll | 2008 Poll |
|---|---|---|---|
| Definitely Yes | 10.4 | 15.6 | 15.9 |
| Probably Yes | 69.0 | 62.4 | 58.4 |
| Probably No | 13.2 | 11.8 | 12.6 |
| Definitely No | 0.0 | 1.4 | 1.9 |
| Do Not Know | 7.4 | 8.8 | 11.1 |

29. Did you happen to know that the franchisor often is not liable (made to pay damages) to customers or businesses who have been harmed by the **franchisee**, such as by breach of contract or by negligence?

| | 1990 Poll | 2000 Poll | 2008 Poll |
|---|---|---|---|

| | | | |
|---|---|---|---|
| Yes, I knew that | 25.2 | 21.8 | 25.4 |
| No, I did not know that | 74.8 | 78.2 | 74.4 |

30. Do you agree that the franchisor should be liable for such harms? (Refer to 29, above, if necessary.)

| | 1990 Poll | 2000 Poll | 2008 Poll |
|---|---|---|---|
| Strongly Agree | 7.4 | 6.9 | 8.9 |
| Agree | 42.6 | 50.3 | 43.1 |
| Disagree | 35.6 | 27.7 | 28.4 |
| Strongly Disagree | 8.3 | 6.0 | 7.0 |
| No opinion | 6.1 | 9.0 | 12.4 |

31. More specifically, for the harms stated in 29, above, who should be liable?

| | 1990 Poll | 2000 Poll | 2008 Poll |
|---|---|---|---|
| a. Only the franchisor | 4.3 | 5.0 | 4.2 |
| b. Only the franchisee | 34.7 | 29.1 | 26.3 |

| | | | |
|---|---|---|---|
| c. At first, only the **franchisee**; but, if the **franchisee** is unable to pay, then the franchisor should be required to pay | 39.9 | 35.8 | 36.6 |
| d. Both the franchisor and the **franchisee** equally | 12.0 | 24.0 | 19.8 |
| e. Neither the franchisor nor the **franchisee** | 1.2 | 0.0 | 1.1 |
| f. (state an answer if you do not agree with any of the answers above): | 5.8 | 1.5 | 5.56 |
| g. No Opinion | 2.1 | 4.5 | 6.2 |

- *Questions 32 - 44 were not a part of the Original 1990 POLL (POLL A) and were added to the 2000 and 2008 POLLS for the purposes of further examining consumer common knowledge. .*

32. Assume that you are harmed by criminals who rob or assault you at a local franchise (such as a restaurant or hotel). Further assume that these criminals have not been captured and that, even if they were captured, they would not have any money to compensate you for your harm. In your opinion, can you sue and be compensated by the local franchisee for the harm resulting from the robbery or assault?

| | 2000 Poll | 2008 Poll |
|---|---|---|
| Definitely Yes | 6.1 | 6.3 |
| Probably Yes | 25.8 | 27.9 |
| Probably No | 45.2 | 40.3 |
| Definitely No | 15.5 | 16.6 |
| Do Not Know | 7.3 | 8.7 |

33. Same facts as for the previous question. In your opinion, can you sue and be compensated by the franchisor (the company that granted the franchise)?

| | 2000 Poll | 2008 Poll |
|---|---|---|
| Definitely Yes | 4.0 | 3.4 |
| Probably Yes | 18.9 | 20.1 |
| Probably No | 48.2 | 44.9 |
| Definitely No | 20.4 | 23.4 |
| Do Not Know | 8.6 | 8.1 |

34. For the harm stated in 32, above, who do you believe should be liable? (2000 Results on Top and 2008 Results on the bottom)

| Only the Franchisor | Only the Franchisee | At first, only the franchisee; but, if the franchisee is unable to pay, then the franchisor should be required to pay | Both Equally | Neither | (state an answer if you do not agree with any of the answers above | No Opinion |
|---|---|---|---|---|---|---|
| 5.3, 3.2 | 14.8, 11.8 | 11.9, 12.6 | 10.4, 11.8 | 49.3, 41.6 | 1.3, 8.7 | 7.3, 10.3 |

35. Assume that an Internet (web) site has a link to another Internet (web) site. Does that indicate that these two sites have the same ownership?

| | 2000 Poll | 2008 Poll |
|---|---|---|
| Definitely Yes | 1.9, | 1.9 |
| Probably Yes | 6.7, | 6.9 |
| Probably No | 40.7, | 43.6 |
| Definitely No | 46.2, | 43.5 |
| Do Not Know | 4.5, | 84.1 |

36. Again, assume that an Internet (web) site has a link to another Internet (web) site. Does that indicate that these two sites have overlapping ownership?

| | 2000 Poll | 2008 Poll |
|---|---|---|
| Definitely Yes | 2.8, | 1.9 |
| Probably Yes | 10.4, | 9.5 |
| Probably No | 44.7, | 45.8 |
| Definitely No | 34.6, | 36.5 |
| Do Not Know | 7.5, | 6.2 |

37. Again, assume that an Internet (web) site has a link to another Internet (web) site. Does that indicate that these two sites are operated (managed) by the same people?

| | 2000 Poll | 2008 Poll |
|---|---|---|
| Definitely Yes | 1.8, | 1.9 |
| Probably Yes | 11.0, | 10.6 |
| Probably No | 45.7, | 46.1 |
| Definitely No | 35.8, | 36.1 |
| Do Not Know | 5.8, | 5.3 |

38. Assume that you use a search engine, such as Yahoo!, to find sites on the Internet. Are the listed sites endorsed by the search engine company (for example, Yahoo!)?

| | 2000 Poll | 2008 Poll |
|---|---|---|
| Definitely Yes | 2.8, | 4.2 |
| Probably Yes | 24.5, | 20.5 |
| Probably No | 36.0, | 36.2 |
| Definitely No | 28.5, | 31.3 |
| Do Not Know | 8.3, | 7.7 |

39. Again, assume that you use a search engine, such as Yahoo!, to find sites on the Internet. Are the listed sites owned by the search engine company (for example, Yahoo!)?

| | 2000 Poll | 2008 Poll |
|---|---|---|
| Definitely Yes | 1.6, | 2.6 |
| Probably Yes | 6.3, | 6.6 |
| Probably No | 34.3, | 31.2 |
| Definitely No | 52.1, | 55.5 |
| Do Not Know | 5.7, | 4.0 |

40. Again, assume that you use a search engine, such as Yahoo!, to find sites on the Internet. Are the listed sites affiliated with the search engine company (for example, Yahoo!)?

| | 2000 Poll | 2008 Poll |
|---|---|---|
| Definitely Yes | 3.1, | 2.5 |
| Probably Yes | 25.7, | 14.8 |
| Probably No | 39.9, | 43.5 |
| Definitely No | 24.2, | 32.1 |
| Do Not Know | 7.1, | 7.0 |

41. Assume that you go from one Internet site (A) to another, linked site (B). Further assume that you have been harmed financially because you paid for goods or services from the latter, linked site (B), and you either never received the goods or services, or the goods or services were poor or otherwise not as promised on site B. Can you sue and be compensated by the company that owns and/or operates Site A?

| | 2000 Poll | 2008 Poll |
|---|---|---|
| Definitely Yes | 2.6, | 1.7 |
| Probably Yes | 12.4, | 13.2 |
| Probably No | 45.4, | 42.5 |
| Definitely No | 30.1, | 31.8 |
| Do Not Know | 9.5, | 10.6 |

42. Same facts as the previous question. Also assume that the owners and operators of Site B cannot be found and that, even if found, Site B's owners and operators would have no money to pay. Can you sue and be compensated by the company that owns and/or operates Site A?

| | 2000 Poll | 2008 Poll |
|---|---|---|
| Definitely Yes | 3.5, | 2.9 |
| Probably Yes | 16.7, | 11.5 |
| Probably No | 42.9, | 45.3 |
| Definitely No | 25.3, | 28.3 |
| Do Not Know | 11.5, | 11.8 |

43. Assume that you use a search engine, such as Yahoo!, to find sites on the Internet. Further assume that you have been harmed financially because you paid for goods or services from a listed site, and you either never received the goods or services, or the goods or services were poor or otherwise not as promised on the site. Can you sue and be compensated by the search engine company?

| | 2000 Poll | 2008 Poll |
|---|---|---|
| Definitely Yes | 2.6, | 2.5 |
| Probably Yes | 11.3, | 8.7 |
| Probably No | 41.4, | 36.6 |
| Definitely No | 35.6, | 44.7 |
| Do Not Know | 9.0, | 7.3 |

44. Same facts as the previous question. Also assume that the owners and operators of the listed site cannot be found and that, even if found, the listed site's owners and operators would have no money to pay. Can you sue and be compensated by the search engine company?

| | 2000 Poll | 2008 Poll |
|---|---|---|
| Definitely Yes | 2.5, | 1.3 |

| | | |
|---|---|---|
| Probably Yes | 11.9, | 9.4 |
| Probably No | 42.6, | 36.3 |
| Definitely No | 33.1, | 44.1 |
| Do Not Know | 9.9, | 8.7 |

***Part III –Corporate Franchising Knowledge***

45. Assume that you were hurt because of the negligence of persons working for a corporation. In your opinion, can you sue and be compensated by the individual stockholders (owners) of the corporation?

| | 1990 Poll | 2000 Poll | 2008 Poll |
|---|---|---|---|
| Definitely Yes | 1.2 | 3.8 | 4.2 |
| Probably Yes | 11.0 | 18.0 | 18.6 |
| Probably No | 29.8 | 33.6 | 30.0 |
| Definitely No | 54.6 | 38.7 | 42.4 |
| Do Not Know | 3.4 | 5.9 | 4.4 |

46. Same facts as 45, above. In your opinion, can you sue and be compensated by the corporation?

| | 1990 Poll | 2000 Poll | 2008 Poll |
|---|---|---|---|
| Definitely Yes | 54.0 | 32.1 | 31.8 |

| | | | |
|---|---|---|---|
| Probably Yes | 42.0 | 52.5 | 52.7 |
| Probably No | 2.1 | 9.2 | 7.7 |
| Definitely No | 1.2 | 2.0 | 3.0 |
| Do Not Know | 0.6 | 4.2 | 4.4 |

47. If you have a contract with a corporation and the corporation breaches (that is, violates) the contract, can you sue and recover a damages award from the individual stockholders (owners) of the corporation?

| | 1990 Poll | 2000 Poll | 2008 Poll |
|---|---|---|---|
| Definitely Yes | 1.2 | 4.4 | 4.2 |
| Probably Yes | 13.5 | 18.5 | 16.8 |
| Probably No | 27.3 | 36.0 | 31.7 |
| Definitely No | 55.8 | 35.0 | 39.0 |
| Do Not Know | 2.1 | 6.2 | 8.1 |

48. What percentage of total retail sales in the United States are by franchises? (Please give an estimate, something between 0% and 100%):

| | 2000 Poll | 2008 Poll |
|---|---|---|
| 0-5% of sales | 0.1 | 0.1 |
| 6-15% of sales | 0.4 | 2.6 |
| 16-25% of sales | 2.2 | 7.3 |
| 26-35% of sales | 5.2 | 10.5 |
| 36-45% of sales | 11.4 | 14.6 |
| 46-55% of sales | 11.9 | 8.7 |
| 56-65% of sales | 12.0 | 20.1 |
| 66-75% of sales | 23.0 | 18.8 |
| 76-85% of sales | 21.8 | 12.8 |
| 86-95% of sales | 10.0 | 3.6 |
| 96-100% of sales | 2.0 | 0.9 |