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Limiting the Vicarious Liability of Franchisors for the Torts of Their Franchisees

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Limiting the Vicarious Liability of Franchisors for the Torts of Their Franchisees

Joseph H. King, Jr.*

Vicarious liability plays a crucial role in the torts system. It is this doctrine, after all, that will often determine whether tort law operates not only in principle, but practically to shift losses of accidents from victims to defendants with the financial wherewithal to satisfy the judgments. Notwithstanding this centrality, vicarious liability has received relatively sparse attention from torts scholars. One area particularly in need of thoughtful dialogue is the matter of the appropriate role of vicarious liability in the context of franchising. Given the central role of franchising in the United States and the world economies, this omission is especially unfortunate. This Article recommends the following approach to the crucial matter of whether or when the franchisor-franchisee relationship should be deemed sufficient to support vicarious liability. It proposes that if the franchisor satisfies both of the following preconditions, then its vicarious liability (under either an actual or apparent agency rationale) based on the torts of its franchisees or its franchisees' employees would be precluded. Those preconditions are: First, the franchisor must have taken reasonable steps to require that notice be prominently displayed by its franchisees clearly indicating that the franchised units are owned and operated by independent franchise entities. Second, and in addition, the franchisor must also require that its franchisees carry reasonable levels of liability insurance. If either of these preconditions is not satisfied, the franchisor would remain subject to the potential application of the rules governing vicarious liability, the outcome of which would depend on whether the plaintiff could satisfy the elements required for vicarious liability to the same extent as would otherwise be the case. Moreover, if the franchisor remains subject to the rules governing vicarious liability, I further suggest that the courts restrictively define those rules.

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I. Introduction

While you were looking over the title page of this Article, trying to decide if you wanted to read it, a new franchise opened somewhere. A new one appears in the United States every eight minutes.¹ Have you ever wondered whether or when a franchisor like McDonald's can be held liable for the injuries caused by one of its franchised restaurants even if it did nothing wrong? That is what this Article is about. And, while you read this, another one has just opened.

Gary Schwartz, the late and esteemed torts scholar, lamented the fact that "the vicarious liability doctrine—despite its fundamental status—is often hidden or obscured."² This statement has been the reality with respect to the question of the potential vicarious liability of franchisors for the torts caused by their franchisees.³ Given the central role of franchising in the United States and the world economies, this omission is especially unfortunate. Fifteen years ago, with the franchising phenomenon mushrooming, one commentator observed, "the remarkable growth of this industry has far surpassed efforts by the courts and legislatures to develop a cohesive body of franchise law."⁴ The lack of

1. See INT'L FRANCHISE ASS'N, ABCS OF FRANCHISING, at <http://www.franchise.org/resourcectr/faq/q4.asp> (2003) (describing the rate of franchising in the United States) (on file with the Washington and Lee Law Review).

2. Gary T. Schwartz, *The Hidden and Fundamental Issue of Employer Vicarious Liability*, 69 S. CAL. L. REV. 1739, 1740 (1996). Schwartz goes on to say that "[a]s a practical matter employer vicarious liability is not only untouchable, it is essentially invisible." *Id.* at 1745. Clarence Morris also wrote that vicarious tort liability resides "[i]n its own special corner of the labyrinth of legal doctrine." Clarence Morris, *The Torts of an Independent Contractor*, 29 ILL. L. REV. 339, 339 (1934).

3. With so much riding on the rules of this amorphous and volatile legal milieu, the excitement among various interest groups is undeniable. Consider, for example, the number of amicus briefs filed in one important case before the Illinois Supreme Court. See *O'Banner v. McDonald's Corp.*, 670 N.E.2d 632, 633 (Ill. 1996) (allowing four organizations to file amicus briefs before affirming summary judgment in favor of McDonald's on an apparent agency claim by a customer who slipped and fell in a McDonald's restaurant).

4. Michael R. Flynn, Note, *The Law of Franchisor Vicarious Liability: A Critique*, COLUM. BUS. L. REV. 89, 89 (1993). Indeed, some recent cases have readily acknowledged that the matter of franchisor vicarious liability for the torts of franchisees was a matter of first impression in the jurisdiction. See, e.g., *Kerl v. Dennis Rasmussen, Inc.*, 672 N.W.2d 71, 74 (Wis. Ct. App. 2003) (noting that the court had never dealt with vicarious liability in such a context), *aff'd*, 682 N.W.2d 328 (Wis. 2004).

clarity, predictability, or analytical integrity continues,⁵ as does the onrush of litigation seeking to impose vicarious liability on franchisors.⁶ With the amorphousness of the rules and the fact-specific nature of the issue, coupled with at least the perception of the franchisor as a "deep pocket,"⁷ it should come as no surprise that franchisors are routinely joined as defendants in tort claims for injuries arising out of the operations of franchisees.⁸

A brief introduction to franchising here may be useful. Franchising is not a type of industry, but rather is "a method of marketing goods and services."⁹ Fundamentally, "[t]he franchise system depends on an effective monopoly, in which a franchisee will pay to participate."¹⁰ The franchisor is "the person or company that grants the franchisee the right to do business under [the franchisor's] trademark or trade name."¹¹ The franchisee is "the person or company that gets the right from the franchisor to do business under the

5. See Rupert M. Barkoff, *Indemnification Provisions in Franchise Agreements: Unanticipated Liability for the Franchisee*, N.Y. L.J., Jan. 17, 2003, at 3 n.2 ("These conflicting principles cause great consternation to lawyers and clients who must together try to discern the boundaries of the safe zone, where control is adequate to protect the franchisor's goodwill, but not so stringent as to create liability."); John L. Hanks, *Franchisor Liability for the Torts of Its Franchisees: The Case for Substituting Liability as a Guarantor for the Current Vicarious Liability*, 24 OKLA. CITY U. L. REV. 1, 3 (1999) (stating that "the law of franchisor liability for the torts of their franchisees remains unsettled, with courts unable to achieve a consensus in their approach").

6. See 2 GEORGE W. MYKULAK & JOHN S. RHEE, *BUSINESS TORTS IN MASSACHUSETTS* § 15.7.1 (Mass. CLE 2002) (noting that "[n]ationally, there has been a recent spate of litigation seeking to impose vicarious liability on franchisors for the tortious conduct of their franchisees").

7. See Barkoff, *supra* note 5, at 3 (observing that "when a third party is injured by a franchisee operating under the franchisor's mark, the plaintiff will look to all possible pockets for recovery, and the franchisor's pocket is usually the deepest of them all"). Sometimes the plaintiff also may be unable to identify which franchisee it was, which may serve to focus attention on the franchisor. See *Wilson v. Good Humor Corp.*, 757 F.2d 1293, 1303 (D.C. Cir. 1985) (addressing a claim for the death of a child who was killed when she ran into the street in response to the ringing of the distinctive Good Humor bell, and agreeing that there was insufficient evidence of reliance to support apparent agency).

8. 2 MYKULAK & RHEE, *supra* note 6, § 15.7.1 (noting that plaintiffs tend to join the franchisor).

9. MARTIN MENDELSON, *THE GUIDE TO FRANCHISING* 1 (6th ed. 1999); see *Kerl*, 682 N.W.2d at 331 (stating that "franchise is a business format").

10. See Note, *Liability of a Franchisor for Acts of the Franchisee*, 41 S. CAL. L. REV. 143, 144 (1968) (describing the basis for a franchise relationship). The franchisor's "monopoly" may consist of the ownership of a trademark, patent, trade secret, or other commercially desirable interest. *Id.*

11. BARBARA BESHSEL, IFA EDUC. FOUND., *AN INTRODUCTION TO FRANCHISING* 4, at www.franchise.org/edufound/intro2franchising.pdf (2001) (on file with the Washington and Lee Law Review).

franchisor's trademark or trade name."¹² Professor Paul H. Rubin describes the nature of the franchise relationship:

A franchise agreement is 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 this product.

...

[T]he 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.¹³

According to the International Franchise Association, there are 1500 franchise companies operating in the United States through more than 320,000 retail units.¹⁴ It is estimated that franchising operations account for more than 40% of all retail sales in the United States, "that franchising employs more than 8 million people, . . . and [that] approximately one out of every 12 retail business establishments is a franchised business."¹⁵

Some authorities trace the roots of franchising back to the Middle Ages. In order for a sovereign to collect taxes from peasants and others, "he or she would grant to a high Church official the right to collect the tax . . . [and for] this right the high Church official would pay the sovereign a lump sum and other special favors—and thus the first franchise-like business arrangement was

12. *Id.*

13. Paul H. Rubin, *The Theory of the Firm and the Structure of the Franchise Contract*, 21 J. LAW & ECON. 223, 224, 228 (1978).

14. See INT'L FRANCHISE ASS'N, ABCS OF FRANCHISING: FRANCHISE FACTS, at <http://www.franchise.org/resourcectr/faq/franchisefacts.asp> (2003) (providing facts about franchising in the United States) (on file with the Washington and Lee Law Review).

15. INT'L FRANCHISE ASS'N, ABCS OF FRANCHISING, at <http://www.franchise.org/resourcectr/faq/q4.asp> (2003) (on file with the Washington and Lee Law Review). The average initial investment for franchisees is under \$318,975, excluding real estate. INT'L FRANCHISE ASS'N, ABCS OF FRANCHISING, at <http://www.franchise.org/resourcectr/faq/q15.asp> (2003) (on file with the Washington and Lee Law Review).

born."¹⁶ Commercial franchising in the United States probably began with the Singer Sewing Machine Company in the 1850s and following the Civil War.¹⁷ That system of franchising gradually declined until the early 1900s, when the basic pattern of modern franchising emerged with the automobile franchise agreement.¹⁸ The franchising method of selling products and services developed broadly in the 1950s and 1960s, and "various federal and state regulatory schemes governing franchising arose primarily in the 1970s and 1980s."¹⁹ In its current incarnation, there are two basic types of franchise arrangements, product distribution and business-format systems, with auto dealerships being a common example of the former and the fast-food industry, exemplified by McDonald's, representing the latter.²⁰ Following the Second World War, when Americans became more affluent and mobile, franchise operations as we have come to know them—typified by the quick-serve restaurants—became omnipresent.²¹

Modern franchising is a topic of much scholarship. Perhaps the most common explanation for the rise of the franchising business model of independent firms, rather than reliance on wholly owned subsidiary units, "is 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."²² According to this capital-acquisition explanation, "companies only pursue franchising because it allows them to expand quickly

16. PETER M. BIRKELAND, *FRANCHISING DREAMS* 1 (2002).

17. See CHARLES L. VAUGHN, *FRANCHISING* 19 (2d ed. 1979) (discussing the history and development of franchising in the United States); Kevin M. Shelley & Susan H. Morton, "Control" in *Franchising and the Common Law*, 19 *FRAN. L.J.* 119, 119 (2000) (tracing development of franchise law in the United States).

18. See VAUGHN, *supra* note 17, at 19, 35 (describing the role of the automobile industry in spurring the development of the franchise business form).

19. Shelley & Morton, *supra* note 17, at 119.

20. See BIRKELAND, *supra* note 16, at 2–3 (describing and providing examples of the product distribution and business-format type systems).

21. See William B. Cherkasky, *Introduction to Franchising and the International Franchise Association*, in *THE FRANCHISING HANDBOOK* 1, 1 (Andrew J. Sherman ed., 1993) (describing the development of franchising and the formation of the International Franchise Association).

22. Rubin, *supra* note 13, at 225; see, e.g., *Kerl v. Dennis Rasmussen, Inc.*, 682 N.W.2d 328, 337 (Wis. 2004) (stating that the franchise relationship "enables franchisors to spread the capital cost of enlarging the market for their goods and services by transferring most of those costs to local franchisees"); Shelley & Morton, *supra* note 17, at 121 (stating that "[t]he franchising method of distribution was developed in response to the massive amounts of capital required to establish and operate a national or international network of uniform product or service vendors, as demanded by an increasingly mobile consuming public").

without taking on debt or relinquishing control through stock offering."²³ Others, however, have offered alternative explanations. For example, Professor Rubin, in his seminal article, discounted the primacy of the capital-acquisition rationale because one would have to assume the unavailability of capital through the normal capital markets and because it ignores the option of selling shares in the franchisor to fund growth.²⁴ Instead, Rubin points to another explanation, saying:

[F]ranchising is usually undertaken in situations where the franchisee is physically removed from the franchisor, and thus where monitoring of the performance and behavior of the franchisee would be difficult. In this situation, it pays to devise control mechanisms which give the franchisee an incentive to be efficient—to avoid shirking and excessive consumption of leisure

...

The simplest way to motivate the franchisee is to give him a share of the profits of the franchise.²⁵

Other commentators have noted additional incentives for franchising, including both a desire by franchisors to share some of the market risks inherent in consumer fickleness and price fluctuation and the perception that franchised dealers, with their stakes in the business, have greater motivation and rapport with the local community than do managers employed by the franchisor.²⁶

A franchisor may be potentially liable for injuries arising from the operations of a franchisee under a variety of legal theories. These include not only so-called direct liability²⁷ based on the franchisor's own tortious conduct

23. BIRKELAND, *supra* note 16, at 4 (noting and questioning this explanation).

24. See Rubin, *supra* note 13, at 223–26 (using the theory of the firm to explain the structure of the franchise contract, rejecting the capital market argument for the franchise relationship, and offering an argument based on the economic theory of monitoring and control).

25. *Id.* at 226; see *Kerl*, 682 N.W.2d at 337 (stating that the franchise arrangement enables franchisors "to reach new, far-flung markets without having to directly manage a vast network of individual outlets").

26. See VAUGHN, *supra* note 17, at 19–20 (summarizing the benefits of a franchise relationship). See generally DONALD N. THOMPSON, *FRANCHISE OPERATIONS AND ANTITRUST 21* (1971).

27. The term "direct" liability can be a little confusing here because, technically speaking, a franchisor-corporation can only act through its employees and agents, and thus ultimately even its "direct" liability arising from the franchisee's operations (and to which the franchisee may also have contributed) is vicarious liability. But it is vicarious in the sense that it is based on the tortious conduct of the franchisor's own immediate employees and its own immediate operations, independent of the franchisee. It is called "direct" for present purposes because it

and the tortious conduct of the franchisor's own immediate employees, but also, under certain circumstances, vicarious liability for the tortious conduct of its franchisees and persons employed by the franchisees.²⁸ Vicarious liability in general has three core requirements. First, there must be a legally sufficient relationship between the person causing the plaintiff's injury and the vicariously liable defendant. Second, the person causing the plaintiff's injury must act tortiously. And finally, the tortious conduct by the tortfeasor must have occurred within the scope of that legally sufficient relationship with the vicariously liable defendant.

Part II of this Article addresses the first core element of vicarious liability, the legally sufficient relationship. More specifically, I discuss the relationship requirement in the context of the potential vicarious liability of franchisors for the tortious conduct of their franchisees and of the employees and agents of their franchisees.²⁹ Thereafter, in Part III, I suggest an alternative approach that can limit the potential scope of vicarious liability for franchisors. I propose that application of the traditional vicarious liability principles be limited in the franchisor-franchisee context as follows: If the franchisor satisfies both of the following preconditions, then its vicarious liability for the torts of its franchisees and its franchisees' employees (based on either actual or apparent agency) would be precluded, and the plaintiff would be limited to seeking redress against the franchisees and the franchisees' employees for their torts. First, the franchisor must have taken reasonable steps to require that its franchisees prominently display a notice clearly indicating that the franchised units are owned and operated by the independent franchise entity. Second, the franchisor must require that its franchisees carry reasonable levels of liability insurance. If either of the preceding preconditions is not satisfied, the franchisor would remain fully vulnerable to vicarious liability and would be liable if the plaintiff could satisfy the requisite elements. Moreover, under my

does not depend on a vicarious tie-in to the franchisee or the franchisee's own employees.

28. This Article will address the vicarious tort liability of franchisors. Accordingly, in this Article, I will not address the potential direct liability of franchisors for the torts of the franchisor's actual employees whose tortious conduct may cause (perhaps in conjunction with the tortious conduct of its franchisee) injuries to a franchisee's customers or otherwise within the context of the franchisee's operations; nor will I address the potential products liability (except to the extent liability for harm caused by a defective product depends on vicarious liability principles) of a franchisor for a product based on the franchisor's design, manufacture, or distribution of products that are subsequently sold or distributed by its franchisees; nor will I discuss potential liability issues in connection with products that are manufactured by others under a license from the franchisor or bearing its logo or trademark.

29. For the sake of simplicity, when discussing the vicarious liability of franchisors for their franchisees, the term franchisee should be understood for present purposes to include the employees and agents of the franchisee as well.

proposal, when the franchisor remains subject to the rules governing vicarious liability for the torts of its franchisees and franchisees' employees, I suggest that the courts rigorously define those rules. Specifically, I suggest that for actual agency, the franchisor must have control over the specific conduct or aspect of the franchise operation that caused the injury. And, for apparent agency, the reliance-justifiable-reliance requirement should include all four of its analytical components. Finally, I explain why I believe such limitations on the vicarious liability for franchisors are justified and sensible.

II. Vicarious Tort Liability of Franchisors

A. Potential Bases for Franchisor Tort Liability Arising out of Franchisee Operations

A franchisor may be potentially liable for injuries arising from the operations of a franchisee under a variety of legal theories. These potential bases include both direct liability based on the franchisor's own conduct and that of the franchisor's own immediate employees, and vicarious liability for the tortious conduct of its franchisees and its franchisee's employees. Thus, for example, a franchisor may face potential direct liability³⁰ based on allegations that the franchisor failed to carefully select its franchisees;³¹ that 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;³² the franchisor

30. See 2 MYKULAK & RHEE, *supra* note 6, § 15.7.2 (discussing direct liability for franchisors); Randall K. Hanson, *The Franchising Dilemma Continues: Update on Franchisor Liability for Wrongful Acts by Local Franchisees*, 20 CAMPBELL L. REV. 91, 105-09 (1997) (discussing negligence claims brought against franchisors for injuries suffered at franchised stores).

31. See Flynn, *supra* note 4, at 97 (commenting that when a franchisor can "avoid some accidents by more carefully selecting and monitoring their franchisees," the "franchisor's carelessness in these areas could perhaps be adequately answered by conventional negligence principles. In such cases the claim of franchisor liability is not vicarious but direct: that the franchisor's negligence in regulating the franchisee caused the accident").

32. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 14 cmt. d (1998) (noting that trademark licensors may be subject to product liability "when they participate substantially in the design, manufacture, or distribution of the licensee's products"); RESTATEMENT (SECOND) OF TORTS § 400 (1965) ("One who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer."); Melissa Evans Buss, *Products Liability and Intellectual Property Licensors*, 27 WM. MITCHELL L. REV. 299, 306-10

negligently designed the layout or structure of the franchised unit;³³ the franchisor leased the land and was subject to potential duties as lessor of land held open to the public;³⁴ the franchisor negligently required the franchise to adopt the specific injurious procedures at issue;³⁵ 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,³⁶

(2000) (discussing the development of various theories of trademark licensor liability for a licensee's products or services); Robert W. Emerson, *Franchisors' Liability When Franchisees Are Apparent Agents: An Empirical and Policy Analysis of "Common Knowledge" About Franchising*, 20 HOFSTRA L. REV. 609, 617-19 & nn.21-22 (1992) (discussing product liability of franchisor); see also David J. Franklyn, *Toward a Coherent Theory of Strict Tort Liability for Trademark Licensors*, 72 S. CAL. L. REV. 1, 48 (1998) (proposing liability of trademark licensors of defective products when any one of five conditions is present); David Laufer & David Gurnick, *Minimizing Vicarious Liability of Franchisors for Acts of Their Franchisees*, 6 FRAN. L.J. 3, 5-6 (1987) (discussing direct negligence, breach of warranty, and product liability actions against franchisors).

33. See *Morse v. McDonald's Corp.*, No. CV0003794275, 2001 WL 1468875, at *2-3 (Conn. Super. Ct. Nov. 6, 2001) (holding that a jury question was presented on whether the franchisor was directly liable based on its control over the design of restaurant building, its standards for the layout and design of the building, the "McDonald's System" of operating the restaurant, or the original construction of the premises, which may have been by the franchisor).

34. See Robert N. Davis, Jr., Comment, *Service Station Torts: Time for the Oil Companies to Assume Their Share of the Responsibility*, 10 CAL. W. L. REV. 382, 396-97 (1974) (referring to a "public use doctrine," creating potential direct liability of lessor, who leases land contemplating that members of the public will be admitted to the land, for injuries resulting from dangerous condition that "existed at the time the operator took possession of the station under the lease").

35. See *Read v. Scott Fetzer Co.*, 990 S.W.2d 732, 733-34 (Tex. 1999) (holding that independent contractor status is not dispositive when the defendant-manufacturer mandated that its distributors market the vacuums "solely through in-home demonstration;" it also created a corresponding duty "to act reasonably with regard to the detail required in-home sales").

36. The line separating claims involving an undertaking of responsibilities by the franchisor sufficient to create a duty for the purposes of direct liability from claims based on franchisor control sufficient to support vicarious liability under an actual agency theory may be indiscernible, if a line exists at all. See Michael D. Joblove & William Killion, *Third-Party Liability Still Lurks*, NAT'L L.J., Nov. 17, 2003, at 15 (noting that some courts have focused narrowly "on a franchisor's specific control over the injury-causing activity, something akin to a direct negligence case"); *infra* Part II.B.2 (discussing actual agency requirements for franchisor vicarious liability). One court has stated in connection with direct liability:

There is no general direct duty to provide a secure workplace owed by a franchisor to employees of its franchisees. However, a duty may arise depending on the extent of control a franchisor has over the operations of the franchise

. . . .

Where courts have found a duty, the duty has arisen because the franchisor had control over the specific "instrumentality" which allegedly caused the harm.

Helmchen v. White Hen Pantry, Inc., 685 N.E.2d 180, 181-82 (Ind. Ct. App. 1997).

such as the security,³⁷ food safety program,³⁸ or specified equipment that was responsible for the accident.³⁹ Most tort claims against franchisors, however, are based on allegations of vicarious liability rather than direct liability.⁴⁰

Simply stated, "Vicarious liability is liability for the tort of another person."⁴¹ Thus, when a victim suffers a tortious injury and the tortfeasor is party to a legally sufficient relationship with another, the victim may have a tort claim against the tortfeasor for his direct liability and against the other for vicarious liability (and occasionally for direct liability as well). Vicarious liability in general has three core requirements: First, there must be a legally sufficient relationship—one that the law recognizes will support the imposition of vicarious liability—between the person who caused the plaintiff's injury (*A*) and the vicariously liable defendant (*B*). Second, *A*, whose conduct caused the plaintiff's injury, must have been acting tortiously. And finally, the tortious

37. *See, e.g.*, *Wunder v. Mobil Oil Corp.*, 2002 WL 31500966, at *1 (Conn. Super. Ct. Oct. 24, 2002) (stating in a case where a cashier employed by franchisee-service station was shot and killed during an attempted robbery that there was a triable issue in the claim against the franchisor "as to whether or not Mobil exercised control over security at the Mobil Mart premises"); *Decker v. Domino's Pizza, Inc.*, 644 N.E.2d 515, 517–19 (Ill. App. Ct. 1994) (affirming a verdict for the plaintiff against the franchisor in a case where the franchisee's employee was injured during attempted robbery, and reasoning that "[r]egardless of whether defendant initially had a duty to protect plaintiff against the criminal acts of third parties, defendant voluntarily undertook to establish a security program to deter robbery and to protect its employees from harm in the event of a robbery"); *Khan v. Shell Oil Co.*, 71 S.W.3d 890, 893–94 (Tex. App. 2002) (holding that a claim against the franchisor by employee-attendant of service station shot during armed robbery was for the jury to decide whether Shell owed a duty, where the franchisor had control of many security-related decisions), *rev'd*, 138 S.W.3d 288 (Tex. 2004).

38. *See Hyde v. Schlitzsky's, Inc.*, 561 S.E.2d 876, 877–78 (Ga. Ct. App. 2002) (recognizing in principle the potential for direct franchisor liability based on undertaking a duty, such as "the day-to-day operation of the restaurant or that it assumed the right to control the manner of executing the work of the restaurant," but finding the rule inapplicable here).

39. *See Whitten v. Kentucky Fried Chicken Corp.*, 570 N.E.2d 1353, 1354, 1357 (Ind. Ct. App. 1991) (finding sufficient evidence to support jury question on direct liability of a franchisor that had made provisions for modification of fryers to conform to franchisor-approved models and required use of franchisor-approved equipment if available, in case arising from a burn suffered by the plaintiff caused by use of fryers); RESTATEMENT (SECOND) OF TORTS § 414 (1965) (addressing liability of an employer for negligently exercised control retained over an independent contractor).

40. It is not unusual for a plaintiff to argue all three grounds for liability: direct liability, vicarious liability under actual agency, and vicarious liability under an apparent agency theory. *See, e.g.*, *Anderson v. Turton Dev., Inc.*, 483 S.E.2d 597, 600–01 (Ga. Ct. App. 1997) (granting summary judgment for franchisor on claims under all three theories); *Little v. Howard Johnson Co.*, 455 N.W.2d 390, 392 (Mich. Ct. App. 1990) (*per curiam*) (same).

41. DAN B. DOBBS, *THE LAW OF TORTS*, § 333, 905 (2000).

conduct by A, the tortfeasor, must have occurred within the scope of the legally sufficient relationship with B, the person against whom vicarious liability is asserted. From the standpoint of B, "vicarious liability is strict liability."⁴² As such, vicarious liability represents an important exception to the usual parameters of the tort liability system that makes the tortfeasor alone responsible for his torts.⁴³ Therefore, as one thoughtful judge reminds us, "Because vicarious liability is a severe exception to the basic principle that one is only responsible for his or her own acts, we proceed with caution when asked to impose vicarious liability on an innocent party, doing so only in accordance with well-settled law."⁴⁴

My focus in this Article will be on the requirement of a legally sufficient relationship to support a claim for vicarious liability. This requirement can be satisfied by establishing either the existence of an actual sufficient relationship, such as employer-employee or actual agency relationship, or by meeting one of the exceptions to the relationship requirement. The most important of these exceptions, for the purposes of franchisor vicarious liability, is the so-called apparent agency exception.

To illustrate, suppose that Ed Employee delivers pizza for his employer, ABC Corporation. If Ed looks at his map while making a delivery and as a result hits a pedestrian, Paula Plaintiff, Ed may be subject to liability for his own negligence. Moreover, because Ed committed his tort while engaged in the scope of his employment with his employer, ABC may be vicariously liable. Now let's assume that Ed was visibly intoxicated and unsteady and that ABC sent him out on the road anyway. If Ed is so unsteady at the wheel that he crashes into Paula, ABC may be subject to both vicarious and direct liability.⁴⁵ The vicarious liability is based on the employer's relationship with the tortfeasor, whereas the employer's direct liability is for instantiated rather than imputed tortious conduct.

Now, assume that the pizza business owned and operated by ABC (that employs Ed) is a franchise. It sells pizzas under the Premier Pizza trademark in accordance

42. *Id.* § 333, at 906.

43. See Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 9–10 (1996) (providing a general rule). LoPucki writes of the general rule:

[O]ne member of a household or close social group may own property of unlimited value while another owns nothing and is therefore judgment proof. The same is true of artificial entities recognized by law.

Id.

44. *Lewis v. Physicians Ins. Co.*, 627 N.W.2d 484, 488 (Wis. 2001).

45. On the topic of potential direct liability of employers, see generally RESTATEMENT (SECOND) OF TORTS §§ 410–415 (1965); Fleming James, Jr., *Vicarious Liability*, 28 TUL. L. REV. 161, 166 (1954) (stating that when a master or principal "has actually exercised control . . . and [in] cases where the master has negligently missed an actual chance to exercise control" where he had a duty to do so, there may be potential direct liability because such cases may involve principal or master's "own fault").

with a franchise agreement between ABC (the franchisee) and Premier Pizza, Inc. (the franchisor). When might a victim of Ed's negligence also be entitled to recover damages from Premier, the franchisor?⁴⁶

B. The Relationship Requirement for Franchisor Vicarious Liability

1. In General

A plaintiff seeking to hold a franchisor vicariously liable may satisfy the requirement that the franchisor has a legally sufficient relationship with the franchisee in either of two ways. First, "[a] franchisor may be held liable for acts of his franchisee when the actual relationship between them is that of principal and agent or master and servant."⁴⁷ Alternatively, the plaintiff may

46. If Ed, ABC, and Premier all were held jointly and severally liable, that does not, of course, mean that Paula actually could receive three times the amount of money appropriate to compensate her for her personal injury. Although Paula might obtain judgments against multiple defendants for the same injury, she would be entitled to only one satisfaction. See generally RESTATEMENT (SECOND) OF TORTS § 900(1)(b) & cmt. b (1979) (stating that satisfaction of the judgment by payment in full for the plaintiff's injury discharges the cause of action not only for the tortfeasor, "but for any joint tortfeasor who is liable for the same injury").

47. *Jones v. Filer, Inc.*, 43 F. Supp. 2d 1052, 1055 (W.D. Ark. 1999); see *Butler v. McDonald's Corp.*, 110 F. Supp. 2d 62, 65 (D.R.I. 2000) (noting, in a case arising when a minor child was injured when he pushed against a glass door and it shattered, that "[v]icarious liability often arises from an employer-employee relationship or a principal-agent relationship"); *Roessler v. Novak*, 858 So. 2d 1158, 1161 (Fla. Dist. Ct. App. 2003) (stating that "a principal may be held liable for the acts of its agents that are within the course and scope of the agency").

Although plaintiffs seek to prove the existence of an actual agency relationship in most vicarious liability claims against franchisors based on an actual relationship, occasionally a plaintiff will contend that vicarious liability should be based on a joint enterprise relationship. Generally speaking, a joint enterprise may support the imposition of vicarious liability. See DOBBS, *supra* note 41, § 340, at 933 (noting that most courts restrict the joint enterprise doctrine "to cases in which the parties have a community of pecuniary, not merely social interest"); see also Brendan J. McCarthy, Comment, *Expect the Unexpected: The Need for Control to Impose Vicarious Liability in Strategic Alliances*, 54 CASE W. RES. L. REV. 649, 659–61 (2003) (discussing joint ventures and vicarious liability). In general, a joint enterprise has been described as "an undertaking to carry out a small number of activities or objectives, or even a single one, entered into by members of the group under such circumstances that all have a voice in directing the conduct of the enterprise." RESTATEMENT (SECOND) OF TORTS § 491 cmt. b (1965). In those circumstances, "[t]he law then considers that each is the agent or servant of the others, and that the act of any one within the scope of the enterprise is to be charged vicariously against the rest." *Id.* The essential elements are: "(1) an agreement, express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose, among the members; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control." *Id.* cmt. c. The problem, of course, is that proving that a traditional franchisor-franchisee relationship constituted a joint enterprise is problematic for much the same reason that the proof of actual agency is difficult—the plaintiff must establish the requisite control by the franchisor. See, e.g.,

rely on an exception to the sufficient relationship requirement, particularly the apparent agency exception.⁴⁸ In the two subsections that follow, I discuss the actual agency and the apparent agency bases for satisfying the sufficient-relationship requirement for imposing vicarious liability on a franchisor for the torts of its franchisee because these are the grounds that figure most centrally in the crucial relationship requirement for vicarious liability of franchisors.

2. Actual Agency

The traditional rule for determining whether an economic relationship will be legally sufficient to support the imposition of vicarious liability depends on the so-called "control" test.⁴⁹ The Restatement of Agency defines a servant (for the purposes of a vicarious-liability-supporting master-servant relationship) as one "who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control."⁵⁰ For the purposes of vicarious liability in general, "the courts ignore how well or prudently the master exercised his right of control: the mere presence of the right leads to liability."⁵¹ Some version of a control test is also typically applied by the courts deciding whether an actual agency relationship exists between a franchisor and franchisee, thereby creating a basis for vicarious liability.⁵² Although

BP Exploration & Oil, Inc. v. Jones, 558 S.E.2d 398, 404 (Ga. Ct. App. 2001) (rejecting a joint venture argument because the mutual control required was not proven because the franchisor had no right to control the time, manner, and method of operations).

48. In addition to the apparent agency exception, other potential exceptions include the nondelegable duty and inherently dangerous activity exceptions. See *infra* notes 86–87 (discussing the nondelegable duty and inherently dangerous activities doctrines).

49. See James, *supra* note 45, at 165 (stating that the most common test is "control or the general right of control"); McCarthy, *supra* note 47, at 653 (stating that "[a]n essential element in the principal-agent relationship, in which vicarious liability is imposed on the principal, is some degree of control by the principal over the conduct of the agent"); James B. McHugh, Comment, *Risk Administration in the Marketplace: A Reappraisal of the Independent Contractor Rule*, 40 U. CHI. L. REV. 661, 669 (1973) (referring to the test in general as the right of control test).

50. RESTATEMENT (SECOND) OF AGENCY § 220 (1958).

51. McHugh, *supra* note 49, at 670–71. Most courts articulate the control test in terms of the right of control. See, e.g., Miller v. McDonald's Corp., 945 P.2d 1107, 1110 (Or. Ct. App. 1997) (stating that "most if not all other courts that have considered the issue, [have] applied the right to control test"). However, the cases are not unanimous on whether the inquiry should focus on actual or potential right of control. Flynn, *supra* note 4, at 92.

52. See Ciofo *ex rel.* Booker v. Shock, No. 193310, 1997 WL 33347978, at *2 (Mich. Ct. App. May 16, 1997) (stating that the "test for a principal-agent relationship is whether the principal has the right to control the agent"); Miller, 945 P.2d at 1110 (stating that "[t]he relationship between two business entities is not precisely an employment relationship, but . . .

occasionally a court will invoke the list of factors enumerated in the Restatement as considerations in deciding the agency question,⁵³ most franchisor cases apply the control test without explicitly relying on the ten Restatement factors. Most courts in the franchisor context do, however, elaborate on the control test in several respects. Although most courts are quick to point out that in general "[c]ontractual declarations of the nature of the relationship are relevant, but do not bind a court,"⁵⁴ many courts often narrow the control test in important ways in the franchisor context. Courts commonly

the right to control test for vicarious liability in that [actual agency] context as well"); *Kerl v. Dennis Rasmussen, Inc.*, 682 N.W.2d 328, 337 (Wis. 2004) (noting that most courts that have addressed the matter "have adopted the traditional master/servant 'control or right of control' test to determine whether the relationship between the franchisor and the franchisee should give rise to vicarious liability"); *McCarthy*, *supra* note 47, at 661 (noting that the test for the vicarious liability of franchisors "has generally focused on the extent of control [the franchisor] can exercise over the franchisee").

53. See, e.g., *Jones v. Filer, Inc.*, 43 F. Supp. 2d 1052, 1056 (W.D. Ark. 1999) (listing the ten factors). The *Jones* court stated:

In deciding whether a given individual or entity is an agent or an independent contractor, the Arkansas courts have considered the ten factors found in § 220 of the Restatement (Second) of Agency: (a) the extent of control which, by agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business.

Id.

54. *Lauffer & Gurnick*, *supra* note 32, at 3; see also *Mann v. Prudential Real Estate Affiliates*, No. 90C5518, 1990 WL 205286, at *3 (N.D. Ill. Dec. 10, 1990) (stating that although a declaration in the franchise agreement expressly excluded an agency relationship, that declaration does not automatically or "solely decide the issue"); *Parker v. Domino's Pizza, Inc.*, 629 So. 2d 1026, 1027 (Fla. Ct. App. 1993) (stating the nature and extent of the relationship "not controlled by descriptive label employed by the parties themselves" in their franchise agreement); *Kerl*, 682 N.W.2d at 335 (stating in principle that the mere fact that language or "label" in the franchise agreement describes the franchisee as an independent businessman "is not by itself dispositive," and that "the test looks beyond labels to factual indicia of control or right to control"); RESTATEMENT (THIRD) OF AGENCY § 1.02 cmt. a (Tentative Draft No. 2, 2000) (stating that "[w]hether a relationship is characterized as agency in an agreement between the parties or in the context of industry or popular usage is not controlling," but rather "[w]hether a relationship is one of agency is a legal conclusion made after an assessment of the facts of the relationship and the application of the law of agency to those facts"); *Emerson*, *supra* note 32, at 623 (noting that contractual disclaimers in franchisee agreements are not conclusive).

require that control relate to the day-to-day operations of the franchisee.⁵⁵ The courts also often distinguish between controls designed primarily to insure "uniformity and the standardization of products and services" of the franchisee, and control over the "actual day-to-day work."⁵⁶ Numerous franchising cases have endorsed the daily-operations-control test.⁵⁷ In addition, and most significantly, a number of courts have required that the control by the franchisor not merely relate to the day-to-day operations, but extend "over the specific aspects of the franchisee's business operations from which the injury arose."⁵⁸

55. See *Ciofo*, 1997 WL 33347978, at *1 (stating that "[t]o determine whether a . . . franchisor and franchisee had a principal-agent relationship sufficient to impose vicarious liability on the franchisor, we examine the defendant's control of the franchisee in terms of the defendant's right to take part in the day-to-day operation of the franchisee's business"); *Kerl*, 682 N.W.2d at 341 (requiring that the franchisor must have had "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"); 2 MYKULAK & RHEE, *supra* note 6, § 15.7.1(a) (referring to control over the daily operations of the franchisee); *Joblove & Killion*, *supra* note 36, at 15 (stating that "[t]he traditional test is the right to control day-to-day operations"); Philip F. Zeidman, *Franchising and Other Methods of Distribution: Regulatory Pattern and Judicial Trends*, 1408 P.L.I./CORP. L. & PRAC. 529, 683 (2004) (stating that in the franchising context, "courts have measured the extent of the franchisor's control over the day-to-day operations of the franchised business").

56. *Little v. Howard Johnson Co.*, 455 N.W.2d 390, 394 (Mich. Ct. App. 1990); see *Shelley & Morton*, *supra* note 17, at 122 (stating that "absent a finding of actual day-to-day operational control," courts have "declined to assert liability upon franchisors based solely upon enforcement of uniform standards across a franchise system").

57. See, e.g., *Kaplan v. Coldwell Banker Residential Affiliates, Inc.*, 69 Cal. Rptr. 2d 640, 642 (Cal. Ct. App. 1997) (stating that the test for actual agency is the right to control the means and manner of the "daily activities of franchisee's business"); *BP Exploration & Oil, Inc. v. Jones*, 558 S.E.2d 398, 401 (Ga. Ct. App. 2001) (stating that the plaintiff must show that the franchisor retained "right to control time, manner, and method" of gas station's operation); *McGuire v. Raddison Hotels Int'l, Inc.*, 435 S.E.2d 51, 53 (Ga. Ct. App. 1993) (stating that the test was the right "to direct or control the time, manner and method of performance of the daily operations of the franchise" rather than simply as "a means of achieving a certain level of quality and uniformity within the Radison system"); *Hoffnagle v. McDonald's Corp.*, 522 N.W.2d 808, 813-14 (Iowa 1994) (stating the test in terms of whether the franchisor "retains control of the day-to-day operations," which the court called the "retained control test"); *Sprouse v. Kall*, No. 82388, 2004 WL 170451, at *3 (Ohio Ct. App. Jan. 29, 2004) (stating that whether the franchisor was vicariously liable depended on whether it had control over the daily operations of the franchise unit, and noting that the complaint did not allege such control); *Moussa v. Abdel-Kader*, No. 98-5084-F, 2000 WL 991720, at *4 (Mass. Super. Ct. June 1, 2000) (stating that "[o]ne corporation may be vicariously liable for the misconduct or negligence of another through actual agency if the former corporation has a right not only to set standards but also to control the daily operations of the latter corporation"), *reconsidered and reaffirmed*, No. CV98-5084-F, 2000 WL 1736942 (Mass. Super. Ct. Nov. 20, 2000).

58. Zeidman, *supra* note 55, at 684; see *Joblove & Killion*, *supra* note 36, at 15 (noting that some courts have focused narrowly "on a franchisor's control over the injury-causing activity, something akin to a direct negligence case" and viewed the relevant inquiry as "control

In a well-reasoned recent decision arising from a homicidal assault by an employee of an Arby's franchisee, the Wisconsin Supreme Court discussed the requirement that the franchisor's control or right of control relate to the specific aspect of the franchisee's business responsible for the victim's injury.⁵⁹ The court suggested that such control contemplates supervision of the franchisee's employee who committed the tortious injury, at least when the alleged negligence of the franchisee consisted of negligent hiring and supervision.⁶⁰ The court emphasized that the franchisor's right to terminate the relationship because of an uncured violation of the agreement was not the equivalent of a right to control the daily operation of the restaurant or to manage the restaurant's workforce actively.⁶¹

Although the outcomes of the cases diverge, the daily control test remains a "difficult hurdle."⁶² Accordingly, numerous cases—likely a majority of those addressing the matter—have found the alleged extent of control insufficient to support the imposition of vicarious liability of the franchisor on an actual

over the instrumentality resulting in the harm"); McCarthy, *supra* note 47, at 657–58 (positing that control should be sufficient only when "a firm can expect to be vicariously liable, which will be the case where the firm has a right to control the specific conduct that gave rise to liability"); see, e.g., Mann, 1990 WL 205286, at *4 (articulating a test not merely in general control terms, but in terms of control over the specific "area of the franchisee's business . . . which may have been responsible for the plaintiff's injury"); Parker, 629 So. 2d at 1027, 1029 (stating that the test is the "right to control . . . the manner in which a task is to be performed," and noting that the manual stated "[s]pecifically, a Domino's pizza is delivered within 30 minutes after the order is taken"); McGuire, 435 S.E.2d at 53 (stating that the test was the right "to direct or control the time, manner and method of performance of the daily operations of the franchise" rather than simply "a means of achieving a certain level of quality and uniformity within the Raddison system, and "finding that no documentary evidence "suggests that appellee retain or exercise supervisory control over those persons hired by [franchisee] to provide security in the lounge"); Cole v. Century 21 Real Estate Corp., No. 03-99-00870-CV, 2000 WL 1784317, at *2 (Tex. Ct. App. Dec. 7, 2000) (stating that the franchisor's right of control must have related to the conduct of the franchisee employee during the telephone conversations); O'Bryant v. Century 21 S. Cent. States, Inc., 899 S.W.2d 270, 272 (Tex. Ct. App. 1995) (focusing on mandatory language in the franchise agreement to determine whether the franchisor had a right of control over the matters that plaintiff alleged were tortious); Kerl v. Dennis Rasmussen, Inc., 682 N.W.2d 328, 341 (Wis. 2004) (requiring that the franchisor's control or right of control relate to the specific aspect of the franchisee's business responsible for the victim's injury).

59. Kerl, 682 N.W.2d at 332, 341 (requiring that the franchisor's control or right of control relate to the specific aspect of the franchisee's business responsible for the victim's injury).

60. See *id.* at 336–37 (finding that "[t]o impose vicarious liability where the requisite degree of control is lacking would not serve" the justifications for respondeat superior liability).

61. *Id.* at 342 (finding that provisions in the license agreement were "insufficient to establish a master/servant relationship").

62. 2 MYKULAK & RHEE, *supra* note 6, § 15.7.1(a).

agency theory.⁶³ Nevertheless, a significant number of cases have found, again under the particular facts presented or alleged, that there was sufficient control either to render the franchisor vicariously liable or at least to support submission to the jury under an actual agency theory.⁶⁴

Unfortunately, the courts have often failed to articulate a clear line between "the controls implicit in the franchise relationship . . . versus day-to-day operational control of a business."⁶⁵ Despite the lack of a clear topography for deciding at what point a franchisor's level of control may cross the invisible line creating actual agency, one senses a general reluctance by most (but certainly not all) courts to find sufficient evidence of control to support a finding of actual agency.⁶⁶ There appear to be several reasons for plaintiffs'

63. See, e.g., *Case v. Holiday Inns, Inc.*, 851 F.2d 356 (Table), No. 87-3164, 1988 WL 70401, at *1 (4th Cir. July 5, 1988) (finding for franchisor on the actual agency issue where "the license agreement and the standards manual did not give Holiday Inn" sufficient power to control daily operations); *Jones v. Filer, Inc.*, 43 F. Supp. 2d 1052, 1057 (W.D. Ark. 1999) (finding in favor of the franchisor on actual agency issue because there was no evidence of actual control); *Mann*, 1990 WL 205286, at *5 (finding in favor of the franchisor on actual agency issue); *Wood v. Shell Oil Co.*, 495 So.2d 1034, 1036 (Ala. 1986) (same); *Kaplan v. Coldwell Banker Residential Affiliates, Inc.*, 69 Cal. Rptr. 2d 640, 642 (Cal. Ct. App. 1997) (same); *McGuire*, 435 S.E.2d at 53 (same); *Hoffnagle v. McDonald's Corp.*, 522 N.W.2d 808, 814 (Iowa 1994) (finding franchise did not retain sufficient control); *Moussa v. Abdel-Kader*, No. 98-5084-F, 2000 WL 991720, at *1 (Mass. Super. Ct. June 1, 2000) (finding for franchisor on actual agency issue), *reconsidered and reaffirmed*, No. CV98-5084-F, 2000 WL 1736942 (Mass. Super Ct. Nov. 20, 2000); *Theos & Sons v. Mack Trucks, Inc.*, 729 N.E.2d 1113, 1120 (Mass. 2000) (finding truck manufacturer franchisor not vicariously liable under actual agency theory); *Little v. Howard Johnson Co.*, 455 N.W.2d 390, 394 (Mich. Ct. App. 1990) (finding for franchisor on actual agency issue); *O'Bryant*, 899 S.W.2d at 272 (finding for realty franchisor on actual agency issue); *Kerl*, 682 N.W.2d at 342 (finding in favor of the franchisor on actual agency issue); *Emerson*, *supra* note 32, at 620-22 (stating that the "franchise relationship ordinarily is not considered to be an agency," and that "in most cases the level of franchisor control over franchisees does not rise to that of an actual agency"). See generally Herbert B. Chermiside, Annotation, *Vicarious Liability of Private Franchisor*, 81 A.L.R. 3d 764, § 4(a)-(b) (1977, Supp. 2003).

64. See *Butler v. McDonald's Corp.*, 110 F. Supp. 2d 62, 67-68 (D.R.I. 2000) (holding that the issue of franchisor vicarious liability under an actual agency theory was for the jury); *Giamo v. Congress Motor Inn, Corp.*, 847 F. Supp. 4, 9 (D.R.I. 1994) (holding that the issue of franchisor vicarious liability under an actual agency theory was for the jury where the franchisor's guidelines for renovation and refurbishing and rules for operations went "so far as to direct the facility as to snow removal"); *Parker v. Domino's Pizza, Inc.*, 629 So.2d 1026, 1029 (Fla. Ct. App. 1993) (holding that it was "self-evident" that the actual agency question should have been submitted to the jury, noting the many controls enumerated in the manual); *Miller v. McDonald's Corp.*, 945 P.2d 1107, 1111 (Or. Ct. App. 1997) (holding that the issue of franchisor vicarious liability is a question for the jury under an actual agency theory). See generally Chermiside, *supra* note 63, § 4(b).

65. *Shelley & Morton*, *supra* note 17, at 120.

66. This has been true from the beginning. In fact, in the early cases involving oil companies, most courts held that operators were independent contractors as a matter of law. See

relative lack of success. First, many courts construe the control test narrowly, requiring that the control relate to the specific conduct or condition that caused the plaintiff's injury.⁶⁷ This test of control has proven demanding⁶⁸ and has led one commentator to remark that it comes close to requiring a showing of direct negligence on the part of the franchisor.⁶⁹ Second, courts frequently hold that the mere licensing of a trademark or entering into a franchise agreement does not *ipso facto* support a finding of actual agency.⁷⁰ Third, courts frequently seem sensitive to the realities of franchising and marketing of a valuable trademark, which depend as they do on fostering of uniformity in products and services. Accordingly, these courts often distinguish franchisor's setting of standards, which protect the uniformity, quality, and good name of the franchisor's products and services from the control over the day-to-day operations of the franchisees.⁷¹ Thus, as one court observed, "[i]f the law were

Davis, *supra* note 34, at 383 (describing the failure of plaintiffs to recover under a master-servant test). Even today, one article has opined that "[b]ecause most franchise agreements state that the franchisee is an independent business person and shall maintain day-to-day control over the franchised premises, franchisors are in most cases *not* found to be principals and therefore not vicariously liable for the acts or omission of franchisees." Bonnie Mayfield & Eric C. Lund, *Franchisor Liability Under an Apparent Authority Theory*, 24 AM. J. TRIAL ADVOC. 75, 83 (2000); see Hanson, *supra* note 30, at 99 (stating that "the actual agency theory seems to render varying degrees of success for plaintiffs").

67. See *supra* notes 58–59 and accompanying text (discussing the requirement that the control relate to the specific conduct causing the plaintiff's injury).

68. See, e.g., *Kerl v. Dennis Rasmussen, Inc.*, 682 N.W.2d 328, 336 (Wis. 2004) (stating that "only a 'master' who has the requisite degree of control or right of control over the physical conduct of a 'servant' in the performance of the master's business will be held vicariously liable"); *supra* notes 59–61 and accompanying text (discussing test). Plaintiffs in a few cases have, however, managed to overcome even this more particularized control test, at least to the extent of entitling them to reach the jury on the actual agency question. See *infra* notes 75–83 and accompanying text (discussing cases).

69. See *Joblove & Killion, supra* note 36, at 20 (noting that some courts have focused narrowly "on a franchisor's control over the injury-causing activity, something akin to a direct negligence case" and viewed the relevant inquiry as "control over the instrumentality resulting in the harm").

70. See *Chermside, supra* note 63, § 3 (stating that "it is clear that the existence of a private franchise agreement does not *ipso facto* result in the creation of a master-servant or principal-agent relationship between the parties to the agreement"); see also RESTATEMENT (THIRD) OF AGENCY § 1.02 cmt. a (Tentative Draft, No. 2, 2000) (noting, in passing, that "[m]any common legal relationships do not by themselves create relationships of agency," and that "[t]hese include relationships between . . . franchisors and franchisees"). The comment adds that "[w]hether a relationship is one of agency is a legal conclusion made after an assessment of the facts of the relationship and the application of the law of agency to those facts." *Id.*

71. See *Kerl v. Rasmussen*, 672 N.W.2d 71, 75, 79 (Wis. Ct. App. 2003) (stating that more control is required "than the right to control uniformity of appearance" and products, the right to terminate the franchise agreement for noncompliance sufficient, or a "general right of

otherwise, every franchisee who independently owned and operated a franchise would be the true agent or employee of the franchisor."⁷²

Although plaintiffs have often been unsuccessful in establishing an actual agency relationship in claims against franchisors, some decisions have been more favorable to the plaintiffs.⁷³ Some of these cases seem to adopt a control analysis wherein generalized control over the daily operations is enough, rather than require that the control relate to the specific conduct causing the injury.⁷⁴ Several courts have held that the plaintiff was at least entitled to reach the jury, even when the court professed to require proof that the franchisor had control over the specific injurious conduct alleged.⁷⁵ For example, in *Miller v.*

inspection") (internal quotations omitted), *aff'd*, *Kerl v. Dennis Rasmussen, Inc.*, 682 N.W.2d 328 (Wis. 2004); *Moussa v. Abdel-Kader*, No. 98-5084-F, 2000 WL 991720, at *4 (Mass. Super. Ct. June 1, 2000) (noting that it is not alone sufficient that the franchisor merely "has a right . . . to set standards"), *reconsidered and reaffirmed*, No. CV98-5084-F, 2000 WL 1736942 (Mass. Super. Ct. Nov. 20, 2000); *Theos & Sons v. Mack Trucks, Inc.*, 729 N.E.2d 1113, 1120 (Mass. 2000) (finding no actual agency where agreement's requirements "are merely reflective of the ordinary desire of manufacturers to set sufficient minimum performance and quality standards to protect the good name of their trademark that they are allowing another to display"); *Ciofo ex rel. Booker v. Shock*, No. 193310, 1997 WL 33347978, at *2 (Mich. Ct. App. May 16, 1997) (distinguishing provisions in the franchise agreement designed to assure uniformity and standardization of products and services from the control over the daily operations of the franchise).

72. *Kaplan v. Coldwell Banker Residential Affiliates, Inc.*, 69 Cal. Rptr. 2d 640, 642 (Cal. Ct. App. 1997).

73. *See, e.g., supra* notes 74–76 (providing cases representing differing analyses establishing actual agency).

74. *See Butler v. McDonald's Corp.*, 110 F. Supp. 2d 62, 67–68 (D.R.I. 2000) (finding that question of vicarious liability of a franchisor under an actual agency theory was for the jury where franchisor control was evidenced by the franchisor's operational and training manuals; the license agreement and operator's lease and license agreement; the requirement that the franchisee restaurant conform to McDonald's comprehensive system; the frequent and detailed inspections; the taking of profits; and the right of McDonald's to terminate agreement for breach); *Jazmin v. El Centro Foods, Inc.*, No. B162233, 2003 WL 1950478, at *16–17 (Cal. Ct. App. Apr. 25, 2003) (finding sufficient evidence to entitle the plaintiff to reach the jury against fast food franchisor); *cf. Font v. Stanley Steamer Int'l, Inc.*, 849 So. 2d 1214, 1217 (Fla. Dist. Ct. App. 2003) (holding that the issue of franchisor vicarious liability under an actual agency theory in a case involving a vehicular accident was for the jury relying on the requirements in the franchise agreement that franchisees purchase equipment and a van conforming to franchisor's specification, and the facts that the franchisor assigned the franchisee a specified geographical area and required express permission to service the customer's outside location).

75. *See Giamo v. Congress Motor Inn, Corp.*, 847 F. Supp. 4, 9 (D.R.I. 1994) (holding that the actual agency issue was for the jury where the rules for grounds operations "go so far as to direct the facility as to snow removal," including a requirement that "[s]now removal shall be performed when necessary by plowing and /or use of a melting compound. Icy conditions shall be corrected with an appropriate melting compound or traction providing material"); *Parker v. Domino's Pizza, Inc.*, 629 So. 2d 1026, 1027, 1029 (Fla. Ct. App. 1993) (stating that the test was the "right to control . . . the manner in which a task is to be performed," and noting that the

McDonald's Corp.,⁷⁶ the plaintiff was injured when she bit into a heart-shaped sapphire stone while eating a Big Mac sandwich.⁷⁷ The court conceded that "it may be difficult to determine when a franchisor has retained a right not only to set standards but also to control the daily operations of the franchisee."⁷⁸ The court emphasized the fact that the franchise agreement and manuals required the franchisee to use the precise methods established by the franchisor, and that those requirements were enforced by regular inspections and the threat of cancellation of the franchise.⁷⁹ This, the court concluded, constituted sufficient evidence "that the defendant had the right to control [the franchisee] in the precise part of the business that allegedly resulted in plaintiff's injuries," namely the methods for handling and preparing food.⁸⁰ And that, the court wrote, was sufficient to entitle the plaintiff to reach the jury on the actual agency issue.⁸¹ The court distinguished situations where the franchise agreement "did not control how the dealer complied with the requirements" from the situation where a franchisor "retained control over the details of the franchisee's performance" and "the methods by which the franchisee was to carry out its responsibilities in considerable detail."⁸² What this court seems to be implying is that franchisors may increase the risk of vicarious liability if they are more specific in detailing the ways that uniformity in products and services is to be preserved, or at least if they provide mechanisms to realistically enforce those standards.⁸³ The approach of this case underscores the dilemma faced by franchisors in trying to protect and preserve the integrity of their trademark

manual stated "[s]pecifically, a Domino's pizza is delivered within 30 minutes after the order is taken"); *Miller v. McDonald's Corp.*, 945 P.2d 1107, 1111 (Or. Ct. App. 1997) (allowing the jury to determine if the defendant "retained sufficient control").

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

77. *Id.* at 1108.

78. *Id.* at 1110.

79. *See id.* at 1111 (finding that the agreement and manuals specified methods for handling and preparing food).

80. *Id.*

81. *Id.*

82. *Id.*

83. Concerns over potential vicarious liability have even led some commentators to suggest some "drafting considerations" for reducing the risk of vicarious liability by minimizing "the number and kind of provisions in the franchise agreement that authorize the franchisor to control means of operating the franchise," and by requiring franchisees to comply with local building code requirements in construction of premises, and with sanitation and cleanliness regulations. Laufer & Gurnick, *supra* note 32, at 6, 25.

and commercial reputation.⁸⁴ Other courts have emphasized that "[t]he existence of an agency relationship is normally one for the trier of fact to decide."⁸⁵

3. Potential Exceptions: Apparent (or Ostensible) Agency

a. Apparent Agency in General

There are several generally recognized exceptions to the vicarious liability requirement that the defendant and the tortfeasor have a legally sufficient relationship. The three major exceptions are the apparent agency, nondelegable duty,⁸⁶ and inherently dangerous activities⁸⁷ doctrines. Of these, the apparent agency⁸⁸ exception has figured most centrally in the franchisor-franchisee context.

In general, "[e]ven in the absence of actual agency, a corporation may be vicariously liable for the tortious conduct of another corporation that was its apparent

84. See *infra* Part III.B.3 (discussing the tension between a franchisor's concern to exercise control over the use of its intellectual property and its desire to shield itself from vicarious liability).

85. *Font v. Stanley Steamer Int'l, Inc.*, 849 So. 2d 1214, 1216 (Fla. Dist. Ct. App. 2003).

86. See generally *Bagot v. Airport & Airline Taxi Cab Corp.*, No. C1-00-1291, 2001 WL 69489 (Minn. Ct. App. Jan. 30, 2001) (rejecting nondelegable duty arguments in a claim against the franchisor in conclusory fashion); RESTATEMENT (SECOND) OF TORTS §§ 416–426, 428–429 (1965) (providing background information on the nondelegable duty); DOBBS, *supra* note 41, § 337, at 920–26 (noting that nondelegable duties may be imposed on an enterprise for the torts of its independent contractors when deemed appropriate to do so "as a matter of policy," and identifying types of situations where the courts may be inclined to consider finding a nondelegable duty, such as activities involving special or peculiar risks or where statutes so provide).

87. See generally RESTATEMENT (SECOND) OF TORTS §§ 427–427A (1965); McHugh, *supra* note 49, at 664–65.

88. Courts have used a variety of phrases to label this exception, including apparent agency, ostensible agency, apparent authority, or agency by estoppel. See *Butler v. McDonald's Corp.*, 110 F. Supp. 2d 62, 68 (D.R.I. 2000) (mentioning apparent agency, agency by estoppel, and ostensible agency); DOBBS, *supra* note 41, § 338, at 926 (using apparent authority and apparent agency); Emerson, *supra* note 32, at 625 ("[C]ourts treat the concepts as being essentially identical."); Joblove & Killion, *supra* note 36, at 20 (noting that apparent agency has also been termed "agency by estoppel"). I will use the apparent agency label in this Article because it is the most common terminology. Most authorities agree that for the purposes of the franchisor-franchisee context, the label does not appear to be that important. See 2 W. MICHAEL GARNER, FRANCHISE AND DISTRIBUTION LAW AND PRACTICE § 9:43 (2003) (stating that while the "terminology is different, the result is the same"); Emerson, *supra* note 32, at 625 (stating that the label of apparent agency, ostensible agency, apparent authority, or agency by estoppel, "does not really matter" because most courts treat the concepts as being essentially the same). Some authorities, however, do apparently care about the terminology. See *Miller v. McDonald's Corp.*, 945 P.2d 1107, 1111 n.4 (Or. Ct. App. 1997) (stating that they are distinct concepts while acknowledging that they are used interchangeably in practice).

agent."⁸⁹ Two realities of franchising help make the apparent agency doctrine especially relevant in this franchising setting. 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 are owned and operated by the principal company and which are franchised by it. And second, the trademark, uniformity, and standardization that undergirds 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.

The apparent agency doctrine is the theory that poses the biggest threat of vicarious liability to franchisors.⁹⁰ Unfortunately, the franchisor cases addressing the apparent agency doctrine have been characterized by unpredictable outcomes and divergent results.⁹¹ There are two core requirements needed or that should be needed to establish an apparent agency for vicarious liability purposes. First, the defendant (here the franchisor) must have engaged in representing conduct, creating an impression that the person who committed the tortious conduct was its agent; and second, the plaintiff must have relied in fact and justifiably relied on the resulting representations.⁹² As I explain, I believe this lack of clarity in the cases is in large measure attributable to the failure of most courts to explain clearly the nature of the reliance-justifiable-reliance requirement for apparent agency, and in particular the failure to identify and articulate its four (by my count) components.

The outcomes of the cases involving attempts by plaintiffs to hold franchisors vicariously liable based on apparent agency have been divided. Although the cases on the issue of apparent agency are somewhat more evenly divided than the cases

89. *Moussa v. Abdel-Kader*, No. 98-5084-F, 2000 WL 991720, at *4 (Mass. Super. Ct. June 1, 2000), *reconsidered and reaffirmed*, No. CV98-5084-F, 2000 WL 1736942 (Mass. Super. Ct. Nov. 20, 2000).

90. Hanson, *supra* note 30, at 105.

91. Cases have been inconsistent when determining whether there was sufficient evidence of apparent agency either to render the franchisor vicariously liable or at least to support submission to the jury. *See Chermiside, supra* note 63, § 5(a) (citing cases that hold franchisor actually or potentially liable); *id.* § 5(b) (citing cases that hold franchisor not liable); Hanson, *supra* note 30, at 100 (finding "divergent outcomes on similar cases when an apparent agency theory is asserted").

92. *See Sims v. Marriott Int'l, Inc.*, 184 F. Supp. 2d 616, 617 (W.D. Ky. 2001) (stating that the plaintiff must show "both that Marriott acted in a manner that would lead a reasonable person to conclude that the operator of the Nassau Marriott was an agent of Marriott and that Plaintiffs acted in reliance of that representation"); 2 GARNER, *supra* note 88, § 9:43 (commenting that "[a]n apparent agency relationship may exist when the franchisor, through its acts or other manifestations of its presence, leads third parties to believe that an agency relationship exists between the franchisor and franchisee or that the franchisee is the same entity as the franchisor"); Zeidman, *supra* note 55, at 684 (stating that "[t]he theory of apparent authority bases vicarious liability on (1) the representation that an agency relationship exists, and (2) the plaintiff's reasonable reliance on the representation to his or her detriment").

addressing the actual agency theory, probably a majority of cases addressing the apparent agency question have also found for one reason or another that the plaintiff has failed to present sufficient evidence to reach the jury on that question.⁹³ Nevertheless, quite a few cases have found that there was sufficient evidence at least to entitle the plaintiff to reach the jury on the apparent agency claim.⁹⁴ The representing conduct and reliance preconditions to the apparent agency exception to the relationship requirement are discussed in the subsections that follow.

b. Representing Conduct ("Holding Out")

The first precondition of apparent agency is representing conduct by the franchisor, creating an impression that the franchisee engaging in the tortious conduct was the franchisor's agent.⁹⁵ The root idea of the apparent agency

93. See *infra* notes 104, 106, and accompanying text (citing apparent authority cases with outcomes adverse to the plaintiff).

94. See *Gizzi v. Texaco, Inc.*, 437 F.2d 308, 310 (3d Cir. 1971) (finding that the question of vicarious liability of Texaco under apparent agency was for the jury); *Sims*, 184 F. Supp. 2d at 617 (finding that the question of vicarious liability of Marriott under apparent agency was for the jury); *Butler v. McDonald's Corp.*, 110 F. Supp. 2d 62, 70 (D.R.I. 2000) (finding that the question of vicarious liability of the franchisor under apparent agency was for the jury); *Giamo v. Congress Motor Inn, Corp.*, 847 F. Supp. 4, 9 (D.R.I. 1994) (finding that the question of vicarious liability of cooperative under apparent agency was for the jury); *Watson v. Howard Johnson Franchise Sys., Inc.*, 453 S.E.2d 758, 759 (Ga. Ct. App. 1995) (finding that the question of vicarious liability of the franchisor under apparent agency was for the jury); *Hoytt v. Docktor Pet Center, Inc.*, No. 85-C-6850, 1986 WL 11619, at *9 (N.D. Ill. Oct. 10, 1986) (finding that the question of vicarious liability of the franchisor under apparent agency was for the jury); *Moussa*, 2000 WL 991720, at *18 (finding the question of vicarious liability of the franchisor for alleged torts of taxi driver based on apparent agency for the jury); *Burkland v. Elec. Realty Assoc., Inc.*, 740 P.2d 1142, 1145 (Mont. 1987) (finding that the question of vicarious liability of the franchisor under apparent agency was for the jury); *England v. Select Sires, Inc.*, No. 01A01-9705-CV-00204, 1998 WL 313704, at *28 (Tenn. Ct. App. June 12, 1998) (affirming a verdict for the plaintiffs against the Tennessee Artificial Breeding Association based on vicarious liability under the apparent agency doctrine); *Adams v. Duncan Transfer & Storage of Morristown*, 757 S.W.2d 336, 339 (Tenn. Ct. App. 1988) (affirming a judgment for the plaintiff against the franchisor under apparent agency principles).

95. See, e.g., *Sims*, 184 F. Supp. 2d at 617 (stating that the plaintiff must show "that Marriott acted in a manner that would lead a reasonable person to conclude that the operator of the Nassau Marriott was an agent of Marriott"); *Coldwell Banker Real Estate Corp. v. DeGraft-Hanson*, 596 S.E.2d 408, 410 (Ga. Ct. App. 2004) (stating as one of the requirements that "the alleged principal held out another as its agent"); *Moussa*, 2000 WL 991720, at *3 (stating that the plaintiff must show that his belief was caused by the "manifestations" of apparent principal, "either made directly through trademarks, signs, or advertising"); *Little v. Howard Johnson Co.*, 455 N.W.2d 390, 394 (Mich. Ct. App. 1990) (stating that "the alleged principal must have made a representation that leads the plaintiff to reasonably believe that an agency existed"); RESTATEMENT (SECOND) OF AGENCY § 267 (1958) (stating the rule in terms of one "who represents that another is his servant or other agent"); Emerson, *supra* note 32, at 624-25

doctrine is that even if there was not an actual sufficient relationship between the franchisor and franchisee upon which to pin vicarious liability, we may nevertheless excuse that requirement when the franchisor has created the appearance of an agency relationship, and the plaintiff detrimentally relied upon the existence of an agency relationship. Extrapolating, then, one would expect that the appearances necessary to support an apparent agency would consist of facts that created an appearance that the franchisor possessed that level of control over the specific conduct in the daily operations of the franchisee that caused the harm to make the plaintiff believe that such control was the reality.

There is no consensus on precisely what is required to satisfy the representing conduct requirement. Some courts have explained that "[i]t is not sufficient that the agent represent its status as an agent; it must be established that the principal held out the agent as its agent."⁹⁶ A variety of types of conduct have at least been considered by courts in addressing or in deciding whether evidence was sufficient to reach the jury on the requirement of representing conduct by the franchisor.⁹⁷ Some courts have pointed to the

(stating that manifestations of agency must originate from conduct or acquiescence by the principal); Shelley & Morton, *supra* note 17, at 120 (stating that an apparent agency is created by a "manifestation by principals to third persons that another is their agent"); see also RESTATEMENT (SECOND) OF AGENCY § 8 cmt. a (1958) (stating that apparent agency results "from a manifestation by a person that another is his agent"); *id.* § 27 (stating that, with one exception not relevant here, apparent authority "is created as to a third person by written or spoken words or any other conduct of the principal" that creates a reasonable appearance of an agency relationship). Although the Restatement of Agency requires, for apparent agency purposes, that the conduct of the party against whom vicarious liability is asserted has manifested the appearance of an agency relationship, the Restatement of Torts is silent on whether such representing conduct is required here. See *infra* note 117 (quoting Restatement text that applies apparent agency concepts to independent contractors); DOBBS, *supra* note 41, § 338, at 928 (stating that the Restatement of Agency "requires that the employer manifest or create the appearance that the employee is a servant," but that the language of the "Restatement of Torts imposes no such requirement . . . [and] it requires only that the services be accepted in the reasonable belief that they are delivered by the defendant rather than an independent contractor"). Notwithstanding the silence of the Restatement of Torts, most apparent agency cases, at least those involving franchisors, seem to accept expressly or impliedly the requirement of some representing conduct by the party against whom vicarious liability is asserted under an apparent agency analysis.

96. *DeGraft-Hanson*, 596 S.E.2d at 411 (denying an apparent agency claim against franchisor for alleged intentional infliction of emotional distress by franchisee, and finding *inter alia* the failures of the franchisee to indicate clearly its independent status were insufficient "because they were made by the alleged agent, not by the alleged principal").

97. See *Zeidman*, *supra* note 55, at 684 (mentioning evidence of "uniform appearance and architecture; advertising in the name of the franchisor; telephone listings in the name of the franchisor only; letterhead stationery bearing the franchisor's name only; and answering the telephone with the franchisor's name") (internal citations omitted).

franchisor's advertising,⁹⁸ signs and name used by franchisee,⁹⁹ forms used by franchisees bearing the franchisor's inscription,¹⁰⁰ the franchisor's awareness of the franchisee's failure to display signs indicating franchisee's status,¹⁰¹ insignia and color scheme on the franchisee's vehicle,¹⁰² and cooperation among franchised retail units.¹⁰³ A number of courts have found, under the facts presented, that there was not sufficient evidence of representing conduct by the franchisor to support a claim of apparent agency.¹⁰⁴

98. See *Gizzi*, 437 F.2d at 310 (applying New Jersey law and noting that although the trial court has said that the advertisement "Trust your car to the man who wears the star" could not possibly be construed to apply to installing new brakes systems or selling used cars, "the evidence of advertising by the franchisor, while no means amounting to an "overwhelming case of liability," was one on which "reasonable minds could differ," and therefore for the jury); *Watson*, 453 S.E.2d at 759 (noting that the franchisor used numerous billboards to advertise but did not refer to the franchisor as the owner and operator, and knew that the franchisee did not display the plaque at the registration area with the required language to indicate that the facility was independently owned and operated by the franchisee as required by the franchise agreement); *Adams*, 757 S.W.2d at 337-38 (relying on the facts that the yellow pages listing referred to the franchisee, Duncan, as agent for franchisor, North American Van Lines and depicted a van inscribed with franchisor's name on the truck trailer, identifying labels placed on the plaintiff's items bore the inscription and logo of franchisor, and the use by the franchisee of an inventory form bearing the franchisor's name).

99. See *Sims*, 184 F. Supp. 2d at 617 (noting that the plaintiff read about the hotel on the Internet and that in phone calls, hotel staff never spoke of the hotel as anything other than a Marriott); *Hoytt*, 1986 WL 11619, at *3 (noting that "Docktor knowingly permitted the franchisees to use its name and did not, apparently, demand a prominently posted disclaimer").

100. See, e.g., *England v. Select Sires, Inc.*, No. 01A01-9705-CV-00204, 1998 WL 313704, at *15-16 (Tenn. Ct. App. June 12, 1998) (affirming a verdict for the plaintiffs based on vicarious liability under the apparent agency doctrine, and noting that the association furnished its technician-customers promotional paraphernalia including "breeding receipt" forms bearing the association name below the technician's signature); *Adams*, 757 S.W.2d at 338 (relying in part on the use by the franchisee of an inventory form bearing the franchisor's name).

101. See *Hoytt*, 1986 WL 11619, at *3 (stating that "Docktor knowingly permitted the franchisees to use its name and did not, apparently, demand a prominently posted disclaimer"); *Watson*, 453 S.E.2d at 758-59 (noting the franchisor's awareness of the franchisee's failure to display plaque indicating that the facility was franchised).

102. See *Moussa v. Abdel-Kader*, No. 98-5084-F, 2000 WL 991720, at *3 (Mass. Super. Ct. June 1, 2000) (relying on the fact that the cab of the owner and member to the "radio subscription agreement" with Checker bore Checker decals, color, and insignia, and stating that "[b]y transforming Miri's cab visually into a Checker cab, Checker must have recognized that prospective customers might believe that Checker owned or controlled the cab"), *reconsidered and reaffirmed*, No. CV98-5084-F, 2000 WL 1736942 (Mass. Super. Ct. Nov. 20, 2000).

103. See *Hoytt*, 1986 WL 11619, at *3 (noting that the cooperation among the stores "might fairly create the appearance of a national connecting network among stores, and so a central organization").

104. See *Mann v. Prudential Real Estate Affiliates, Inc.*, No. 90-C-5518, 1990 WL 205286, at *5 (N.D. Ill. Dec. 10, 1990) (granting the franchisor's motion to dismiss apparent agency vicarious liability claim, finding that the plaintiffs failed to allege "acts or words" by the

Plaintiffs have enjoyed some success in establishing sufficient evidence of representing conduct to open the door to an apparent agency argument for vicarious liability. However, as I will discuss in the following subsection, the reliance-justifiable-reliance requirement, at least when fully recognized by the courts in its four components, has often slammed the door closed.

c. Reliance in Fact and Justifiable Reliance

When a plaintiff's vicarious liability claim against a franchisor based on apparent agency fails, it is usually because the plaintiff has failed to offer sufficient evidence to satisfy the reliance-justifiable-reliance requirements. Nevertheless, outcomes on the reliance-justifiable-reliance issues have gone both ways, with the plaintiff sometimes successful at least in being allowed to reach the jury¹⁰⁵ and sometimes not.¹⁰⁶ As I will explain below, one of the

franchisor that would create an impression of an agency relationship); *Mobil Oil Corp. v. Bransford*, 648 So. 2d 119, 120–21 (Fla. 1995) (approving the summary judgment in favor of the franchisor, and holding that "the facts that Mobil owned property, that Mobil products were sold in the station, that Mobil trademarks and logos were used throughout the premises, . . . that the franchise agreement with Mobil required the use of Mobil symbols and the selling of Mobil products," and that Mobil sent representatives to the station to provide various routine franchise support services were "legally insufficient" to support apparent agency theory because they did not reach the "minimum level of a 'representation' necessary to create an apparent agency"); *BP Exploration & Oil, Inc. v. Jones*, 558 S.E.2d 398, 403–04 (Ga. Ct. App. 2001) (finding that "it is common knowledge that independent gasoline stations use the trademarks, emblems, and colors of national oil companies," and therefore given this knowledge, the failure to post a sign indicating that the station was independently operated does not, standing alone, "permit an apparent agency finding"); *Anderson v. Turton Dev., Inc.*, 483 S.E.2d 597, 601 (Ga. Ct. App. 1997) (affirming a summary judgment in favor of the franchisor on the vicarious liability question, finding that although there was evidence that the franchisee failed to notify guests with signs and written material that it was independently operated, there was no evidence "that the franchisee, with the knowledge of the franchisor, held itself out as being operated by the franchisor"); *McGuire v. Raddison Hotels Int'l, Inc.*, 435 S.E.2d 51, 54 (Ga. Ct. App. 1993) (affirming a summary judgment in favor of the franchisor on the vicarious liability question, finding that "[s]ince apparent or ostensible agency theory focuses on the actions of the principal rather than the agent, appellant's focus on the signs bearing the 'Radisson' name is misplaced because the display of any signs, though authorized by the franchise agreement, is controlled by [the franchisee], not appellee [Radisson]").

105. See, e.g., *infra* notes 125, 128, 154, 166, 172–74 (citing cases favorable to the plaintiff on the issue of reliance).

106. See, e.g., *Mann*, 1990 WL 205286, at *5 (holding that the facts alleged failed to support any inference that the plaintiffs "could reasonably have believed" that the franchisee's alleged misrepresentations concerning the viability of its business were authorized or binding on the franchisor); *Wood v. Shell Oil Co.*, 495 So. 2d 1034, 1039 (Ala. 1986) (affirming a summary judgment for the franchisor based in part on the absence of evidence that (1) the plaintiff did business with that gas station "because of a desire to do business with a more

problems in this area comes from the fact that courts often fail to appreciate, or at least to explicate, that the concept of reliance-justifiable-reliance is a hydra with four heads, all of which should be satisfied to meet the justifiable reliance requirement for the purposes of apparent agency.

It is therefore perhaps a misnomer to refer to the reliance requirement (or the justifiable reliance requirement) in the singular. Correctly understood, what we really have is a tetrad consisting of four distinct components. Two of these relate to reliance in fact (actual reliance) and are subjective in the sense that they depend on the plaintiff's subjective thought process and on the effect of the representing conduct by the franchisor on the plaintiff. The other two components relate to justifiable reliance and are, in this context, more objective in their orientation. For the sake of simplicity, I will refer to them collectively in the general apparent agency context as the four components of the reliance-justifiable-reliance requirement. Satisfaction of all four of the following components should be required to satisfy this core requirement of apparent agency. First, the plaintiff must prove reliance in the sense that he actually

responsible party (i.e., Shell Oil)," or (2) "that might indicate that Wood's reliance on Parker Shell was in any way attributable to his confidence in Shell Oil"; *Frey v. PepsiCo, Inc.*, 382 S.E.2d 648, 650–51 (Ga. Ct. App. 1989) (affirming a summary judgment for the franchisor on the apparent agency question, noting pointedly that "[u]nless the appellants chose to be hit by the Bottler's truck, [the apparent agency] doctrine has no application under the present circumstances, inasmuch as it requires reliance on the apparent agency relationship"); *O'Banner v. McDonald's Corp.*, 670 N.E.2d 632, 634–35 (Ill. 1996) (approving summary judgment for the defendant-franchisor, noting that the plaintiff failed to show that "he actually did rely on the apparent agency in going to the restaurant where he was allegedly injured," because he "gave no indication as to why he went to the restaurant in the first place"); *Theos & Sons, Inc. v. Mack Trucks, Inc.*, 729 N.E.2d 1113, 1121–22 (Mass. 2000) (holding that neither the use of a trademark and other logos of the defendant nor the representation by the franchisee as an authorized parts dealer of the defendant was sufficient to raise a genuine issue of material fact that the plaintiff reasonably believed that an agency relationship existed for nonwarranty work); *Little v. Howard Johnson Co.*, 455 N.W.2d 390, 394 (Mich. Ct. App. 1990) (noting the absence of evidence that the plaintiff "was harmed as a result of relying on the perceived fact that the franchisee was an agent of defendant" or "which indicated that plaintiff justifiably expected that the walkway would be free of ice and snow because she believed that defendant operated the restaurant"); *Phillips v. Rest. Mgt. of Carolina, L.P.*, 552 S.E.2d 686, 695 (N.C. Ct. App. 2001) (affirming summary judgment for the franchisor, noting that there was no evidence that the plaintiff "would have chosen to eat elsewhere or done anything differently had he known that the restaurant at issue herein was not owned and operated by Taco Bell"); *Myszkowski v. Penn Stroud Hotel, Inc.*, 634 A.2d 622, 630 (Pa. Super. Ct. 1993) (rejecting apparent agency claim by a disc jockey who "simply agreed to show up at the designated place, on the designated night and play music," and "would have performed the service she had contracted to at most any location the campus ministry group had designated"); *Watkins v. Mobil Oil Corp.*, 352 S.E.2d 284, 287 (S.C. Ct. App. 1986) (ordering judgment for the franchisor on the apparent agency question because there was no evidence that the plaintiff went to the service station "because it was a Mobil station or that he was enticed by Mobil's advertising to visit the station").

believed the truth of the representation—in other words that he, in fact, subjectively believed that the franchisee was an agent of the franchisor (because he believed that the franchisor had sufficient control over the franchise operations). Second, the plaintiff must have relied on the representation in the sense that he, in fact, actually attached importance to it. He must have detrimentally relied by a change of position in response to the franchisor's representing conduct. These first two components are essentially old-fashioned causation requirements—the representing conduct must have had an impact on the plaintiff's course of action. Third, the plaintiff must have been justified in believing the truth of the representation—that is, justified in believing that the franchisee was an agent of the franchisor. And finally, the plaintiff must have been justified in attaching importance to that reasonable belief. In other words, he must have been justified in detrimentally changing his position in response to it. This fourth component is sometimes referred to as the requirement that the misinformation must have been material to the plaintiff's decision.

Although most of the franchisor cases addressing the apparent agency exception have failed to identify the four components, occasionally a case comes along which seems to do so, or at least appears cognizant of all four dimensions. In *Little v. Howard Johnson Co.*,¹⁰⁷ the plaintiff suffered a slip and fall on a restaurant walkway that had allegedly not been adequately cleared of snow and ice.¹⁰⁸ The restaurant was being operated as a franchise.¹⁰⁹ The plaintiff asserted various bases of liability against the franchisor, including direct liability, vicarious liability based on the actual nature of the relationship by alleging actual agency, and vicarious liability based on apparent agency.¹¹⁰ With respect to the reliance-justifiable-reliance requirement of apparent agency, the court's opinion contains language that can be read to embrace all four of its components. The court seems to require an actual belief in the misinformation, stating that "[t]he person dealing with the agent must do so with belief in the agent's authority."¹¹¹ The court also acknowledged the requirement that the plaintiff have actually attached importance to that belief, noting that here the plaintiff had failed to offer sufficient evidence "that she was harmed as a result of relying on the perceived fact that the franchisee was an agent of defendant," or that she "expected that the walkway would be free of ice and snow because

107. *Little*, 455 N.W.2d 390.

108. *Id.* at 392.

109. *Id.*

110. *Id.*

111. *Id.* at 394 (quoting *Grewe v. Mt. Clemens Gen. Hosp.*, 273 N.W.2d 429, 434 (Mich. 1978)).

she believed that defendant operated the restaurant."¹¹² The court also recognized that the plaintiff's belief in appearance of agency must be justifiable—or in other words that "this belief must be a reasonable one."¹¹³ Finally, the court seemed to endorse the requirement that the plaintiff's decision to attach importance to her belief in the agency relationship—that the franchisor Howard Johnson Corporation operated the restaurant—must have been justifiable (reasonable).¹¹⁴ Thus, the court rested its decision in favor of the franchisor in part upon the fact that the plaintiff failed to present evidence that "indicated that plaintiff justifiably expected that the walkway would be free of ice and snow because she believed that defendant operated the restaurant."¹¹⁵

There may be a number of explanations for the failure of many courts to delineate clearly the four components of this requirement of apparent agency. One reason for the confusion may stem from the fact that the matter of apparent agency is addressed by two Restatements, and that the key sections of those Restatements, namely Section 265 of the Restatement (Second) of Agency¹¹⁶ and Section 429 of the Restatement (Second) of Torts,¹¹⁷ are neither clear nor consistent on the matter.¹¹⁸ There may also be confusion because the apparent agency doctrine may arise in different types of factual settings, perhaps with different policy concerns. The analysis of cases may, for example, occasionally diverge, depending on whether the question involves a vicarious liability claim against a hospital (or HMO) or a franchisor.¹¹⁹ And on a more fundamental

112. *Id.*

113. *Id.* (quoting *Grewe v. Mt. Clemens Gen. Hosp.*, 273 N.W.2d 429, 434 (Mich. 1978)).

114. *Id.*

115. *Id.* at 394.

116. See RESTATEMENT (SECOND) OF AGENCY § 265 (1958) (stating in part that "[a] master or other principal is subject to liability for torts which result from reliance upon, or belief in, statements or other conduct within an agent's apparent authority").

117. See RESTATEMENT (SECOND) OF TORTS § 429 (1965) (applying apparent agency concepts to independent contractors). It states:

One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants.

Id.

118. See *infra* notes 145–48 and accompanying text (discussing the language of both Restatements more extensively).

119. See DOBBS, *supra* note 41, § 338, at 929 (citing cases that differ on the question of whether vicarious liability should be more readily found in hospital cases). Professor Dobbs says "public policy concerns with health care" may justify making hospital cases "stronger cases for vicarious liability," and thus, cases in which a more-readily satisfied rule for the reliance requirement is justified or explicable. *Id.* Compare *Roessler v. Novak*, 858 So. 2d 1158, 1163–

level, there seems to be uncertainty generally about the theoretical underpinnings of the apparent agency exception. Is it really based on notions of misrepresentation?¹²⁰ Or is apparent agency based on principles of estoppel?¹²¹ Or is the concept grounded in contract? I believe, for the purposes

64 (Fla. Dist. Ct. App. 2003) (Altenbernd, C.J., concurring) (describing the apparent agency doctrine in the hospital setting as "inefficient, unpredictable and, perhaps most important, a source of avoidable litigation," but noting that "[t]his theory works reasonably well to create vicariously liability for isolated cases of negligence involving motor vehicles or premises liability" and citing franchisor cases), *and* *Jennison v. Providence St. Vincent Med. Ctr.*, 25 P.3d 358, 366–67 & n.12 (Or. Ct. App. 2001) (suggesting in a case involving a hospital that the court might apply an apparent agency rule that more closely resembled Section 429 of the Restatement of Torts, whereas for a franchisor-franchisee situation it might apply Section 267 of the Restatement of Agency), *with* *Loynd v. Emerson Hosp.*, 13 Mass. L. Rep. 61, 2001 Mass. Super. LEXIS 118, at *8–10 (Mass. Super. Ct. 2001) (suggesting that the court might use similar principles for apparent agency in both the franchisor and hospital contexts). For general background of the doctrine in the hospital setting, see generally J.D. LEE & BARRY A. LINDAHL, *MODERN TORT LAW: LIABILITY AND LITIGATION* § 25:141 (2d ed. 2002 & Supp. 2004).

Two Illinois cases—one a claim against an HMO and the other against a franchisor—illustrate the ambiguous analysis sometimes seen when a later case tries to reconcile the policy dynamics involved and the reliance requirement in the two types of situations. See *Petrovich v. Share Health Plan of Illinois, Inc.*, 719 N.E.2d 756, 768–69 (Ill. 1999) (discussing the issues in the HMO context); *O'Banner v. McDonald's Corp.*, 670 N.E.2d 632, 634–35 (Ill. 1996) (discussing the element of reliance in the franchising context).

120. See Alan O. Sykes, *The Economics of Vicarious Liability*, 93 *YALE L.J.* 1231, 1276–77 (1984) (noting that in the absence of reliance the economic soundness of apparent agency, as applied to vicarious liability, becomes questionable when based on notions of misrepresentation). Sykes states:

[I]t is highly implausible that customers suffer the tort because of reliance on apparent agency. It is unlikely, for example, that customers who slip on a patch of grease have done so because of reliance on any representation about the safety of the station or its ability to pay damages in the event of such an occurrence. Absent reliance, the economic rationale of deterring misrepresentations about the skill or authority of an agent cannot support vicarious liability Thus, the requirement of reasonable or justifiable reliance in the apparent authority rule is efficient, and it is certainly questionable whether the mere display of brand name logos and products at a service station constitutes a reasonable basis for any specific customer beliefs about the skill or financial status of the enterprise and its employees Absent reasonable reliance by a customer on material representations about the skill [or] financial soundness . . . of an agent, considerations of apparent agency have no economic significance, and efficient rules of vicarious liability can rest solely on the analysis of transaction costs and agent solvency

Id. (internal footnotes omitted).

121. See *Roessler*, 858 So.2d at 1161 (stating that the rationale for apparent authority is that the principal should be estopped to deny authority "when the principal permitted an appearance of authority in the agent"); *O'Banner*, 670 N.E.2d at 634 (stating that "[t]he doctrine is based on principles of estoppel. The idea is that if a principal creates the appearance that someone is his agent, he should not then be permitted to deny the agency if an innocent third party reasonably relies on the apparently agency and is harmed as a result").

of tort claims for personal injury or property damage, that the misrepresentation rationale makes the most sense and is most consistent with a full blown four-component reliance analysis.¹²²

i. Actual Reliance: Belief in the Truth of Statement

Most authorities that have addressed the matter have recognized that apparent agency in the franchisor context requires that the plaintiff prove that he actually believed the truth of representation, or in other words that plaintiff in fact believed that the franchisee was an agent of the franchisor.¹²³ For example, in *Mann v. Prudential Real Estate Affiliates, Inc.*,¹²⁴ the plaintiffs had taken jobs with a franchisee, which failed financially, resulting in loss of their jobs.¹²⁵ They alleged fraud and negligent misrepresentation and also sued the franchisor—Prudential.¹²⁶ The court granted the franchisor's motion to dismiss, based in part on the plaintiffs' failure to allege any facts to prove that they did not know that the franchisee, their employer, was independently owned and operated.¹²⁷

122. See Sykes, *supra* note 120, at 1276–77 (arguing that apparent agency doctrine must depend on some element of reasonable reliance in order to maintain economic significance).

123. See, e.g., *Butler v. McDonald's Corp.*, 110 F. Supp. 2d 62, 69 (D.R.I. 2000) (noting the requirement "that the plaintiff actually believed the operator and/or employees of the franchise restaurant were agents or servants of the franchisor"); *Kaplan v. Coldwell Banker Residential Affiliates, Inc.*, 69 Cal. Rptr. 2d 640, 643 (Cal. Ct. App. 1997) (stating that "[t]he person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one;" further "such belief must be generated by some act or neglect of the principal sought to be charged; and the third person in relying on the agent's apparent authority must not be guilty of negligence"); *Mobil Oil Corp. v. Frederick*, 615 S.W.2d 323, 325 (Tex. Ct. App. 1981) (noting that the erroneously excluded letter-evidence in which plaintiff referred to the franchisee as the "owner" of the service station operation would indicate the absence of reliance by the plaintiff, which was required for apparent agency), *aff'd and rev'd in part on other grounds*, 621 S.W.2d 595 (Tex. 1981); *DOBBS, supra* note 41, § 338, at 928 (referring to this kind of reliance as reliance "in a loose or attenuated sense"); 2 *GARNER, supra* note 88, § 9:43 (stating that it must be proven "that the plaintiff actually believed that [the franchisee and franchisee's own employees] were agents of the franchisor"); *Davis, supra* note 34, at 390 (stating that "[t]he third person must reasonably believe that the other is the alleged principal's agent. Furthermore, he must rely on that belief to his detriment").

124. *Mann v. Prudential Real Estate Affiliates, Inc.*, No. 90-C-5518, 1990 WL 205286 (N.D. Ill. Dec. 10, 1990).

125. *Id.* at *1.

126. *Id.* at *2.

127. *Id.* at *5. The plaintiffs were former employees of the franchisee. *Id.* at *1. The franchisor and franchisee had agreed that the franchisee would expressly and publicly disclose that it was independently owned and operated. *Id.* The court found that the plaintiffs had failed to allege that as employees of the franchisee they were not familiar with that requirement. *Id.* at

Nevertheless, the plaintiffs in some cases, at least in the absence of some direct evidence disproving such a belief,¹²⁸ seem to have been able to make a case for the jury by testifying as to their belief that franchisee operated the business.¹²⁹ For example, in *Moussa v. Abdel-Kader*,¹³⁰ the "taxi ride from Hell" case,¹³¹ the plaintiff relied on an apparent agency doctrine in his vicarious liability claim against Checker Cab for the alleged torts of the cab driver.¹³²

*5. According to the court, the most that plaintiffs alleged as to their knowledge was that they knew that the franchisor was "associated with the venture and were familiar with the established reputation of Prudential in the community as a provider of insurance benefits and financial services." *Id.* (internal quotations omitted).

128. Direct evidence tending to disprove an actual belief in an agency relationship between the franchisor and franchisee may prevent the case from reaching the jury on that question. *See Mobil Oil Corp.*, 615 S.W.2d at 325 (reversing a decision by the trial court that erroneously excluded letter-evidence in which the plaintiff referred to the franchisee as the "owner" of the service station operation, thus indicating the absence of reliance by the plaintiff, as required for apparent agency). The state supreme court, however, reversed the decision to remand, holding that the franchisor was entitled to a judgment on the apparent agency issue, thus averting a new trial. *Mobil Oil Corp. v. Frederick*, 621 S.W. 2d 595, 595 (Tex. 1981).

129. Some courts suggest that mere testimony by the plaintiff that he believed that the local business was operated by the franchisor is not sufficient "in itself" to support the actual-belief component of the reliance requirement. *Wood v. Shell Oil Co.*, 495 So. 2d 1034, 1039 (Ala. 1986). The *Wood* court observed:

that the fact that the plaintiff testifies that the lessor oil company's distinctive logo displayed upon signs, literature, products, and employee uniforms led him or her to assume that it was operated by the oil company is not sufficient, *in itself*, to create an inference of 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.

Id. But, even in the same jurisdiction other cases seem more willing to find such evidence sufficient, at least when coupled with other evidence. For an example of a court sending such a case to the jury, see *Malmberg v. Amer. Honda Motor Co., Inc.*, 644 So. 2d 888, 891 (Ala. 1994). In *Malmberg*, the plaintiff testified that she relied on advertisements, signs, plaques, and brochures for her belief that she was dealing with the franchisor. *Id.* at 890. The court noted that specific representations were made to the plaintiff by the franchisee, which was generally instructed by the franchisor, regarding the scope of warranties. *Id.* at 891. *See generally* *John Deere Constr. Equip. Co. v. England*, 883 So. 2d 173, 182 (Ala. 2003) (deciding that the plaintiff had "failed to prove any reliance" that would support a theory of either apparent authority or agency by estoppel).

130. *Moussa v. Abel-Kader*, No. 98-5-084-F, 2000 WL 991720, at *14 (Mass. Super. Ct. June 1, 2000) (stating that "[b]y transforming Miri's cab visually into a Checker cab, Checker must have recognized that prospective customers might believe that Checker owned or controlled the cab"), *reconsidered and reaffirmed*, No. CV98-5084-F, 2000 WL 1736942 (Mass. Super. Ct. Nov. 20, 2000).

131. *Id.* at *1.

132. *Id.* at *4.

The court found that there was sufficient evidence of apparent agency and therefore denied the motion for summary judgment made by the franchisor—Checker Cab.¹³³ In doing so, the court pointed to evidence that the plaintiff "indeed believed that he was entering a Checker Cab" based on his deposition that he "chose to hire this particular cab only because he recognized the logo and believed that the cab was from a reputable cab company."¹³⁴

One must wonder how often customers go to a McDonald's, for example, because they believe that particular restaurant is owned and operated by the national corporation rather than by a franchisee, or instead go for the convenience, food, price, service, menu, or closest restroom. None of these depends on whether the details are controlled by the franchisor or franchisee. As one commentator has noted:

Try to recall how many times you have patronized a filling station. How many times have you stopped to fill up your tank, ask directions, or purchase a drink from a filling station with a food mart? Over a thousand? Maybe five thousand? Did you ever wonder who really operated the filling station, or whether you could recover from the station in the event of injury?¹³⁵

ii. Actual Attaching Importance to the Statement (Detrimental Reliance)

The second component of the reliance requirement is that the plaintiff must have, in fact, attached importance to his belief that the franchisor was in control of the franchise operations, or in other words, the plaintiff must have detrimentally relied by changing his position in response to his belief. Many cases contain language that seems to recognize this component,¹³⁶ although the

133. *Id.* at *6.

134. *Id.* at *5.

135. Brett A. Brosseit, Note, *Buyers, Beware: The Florida Supreme Court's Abrogation of the Apparent Authority Doctrine Leaves Plaintiffs Holding the Tab for Torts of Franchisees—Mobil Oil Corp v. Bransford*, 23 FLA. ST. U. L. REV. 837, 838–39 (1996).

136. See *Case v. Holiday Inns, Inc.*, 851 F.2d 356 (Table) (4th Cir. 1988) (affirming a judgment for the franchisor, noting that the plaintiff had not made the reservation, that there was not the slightest evidence that she would have refused to stay at that hotel had she known it was not owned and operated by Holiday Inn, that the plaintiff's decision to return to the hotel "does not indicate reliance on any particular characteristic of the Holiday Inn" and at most "shows an unwillingness to change plans" and that "[i]nertia is not reliance"); *Butler v. McDonald's Corp.*, 110 F. Supp. 2d 62, 67, 70 (D.R.I. 2000) (denying the franchisor's motion for a summary judgment where the child and his friends went to this franchise because they "wanted 'McDonald's' food, as they had done on numerous occasions," and thus the issue was for the jury whether plaintiff "relied to his detriment upon the care and skill of the allegedly negligent

analysis is seldom as clear or lucid as it should be. Furthermore, recall in connection with the discussion of the actual agency basis for vicarious liability, that a number of courts have held that the plaintiff must not only satisfy the

operator and/or employees of the franchise restaurant"); *Giarno v. Congress Motor Inn, Corp.*, 847 F. Supp. 4, 9 (D.R.I. 1994) (denying franchisor's motion for summary judgment, and holding that whether the plaintiff believed the inn was operated by Best Western and "relied upon" that belief was "question of fact to be resolved by the fact-finder and not by a court considering a summary judgment motion"); *Malmberg v. Amer. Honda Motor Co., Inc.*, 644 So. 2d 888, 891 (Ala. 1994) (noting the requirement that the plaintiff not only believed there was an agency relationship, but also that the plaintiff acted on such belief to his prejudice); *Wood v. Shell Oil Co.*, 495 So. 2d 1034, 1039 (Ala. 1986) (affirming a summary judgment for the franchisor based in part on the absence of evidence that the plaintiff did business with that gas station "because of a desire to do business with a more responsible party (i.e., Shell Oil)," or "that might indicate that Wood's reliance on Parker Shell was in any way attributable to his confidence in Shell Oil"); *O'Banner v. McDonald's Corp.*, 670 N.E.2d 632, 634-35 (Ill. 1996) (approving summary judgment for defendant-franchisor, noting that the plaintiff failed to show that "he actually did rely on the apparent agency in going to the restaurant where he was allegedly injured," because he gave "no indication as to why he went to the restaurant in the first place," and that "[t]he fact that this was a McDonald's may have been completely irrelevant to his decision"); *Moussa*, 2000 WL 991720, at *5 (noting the requirement that the plaintiff "must establish that he relied in his conduct on the belief that the cab he was entering was owned or controlled by Checker"); *Little v. Howard Johnson Co.*, 455 N.W.2d 390, 394 (Mich. Ct. App. 1990) (noting absence of evidence that the plaintiff was harmed as a result of relying on the perceived fact that the franchisee was an agent of the defendant); *Bahrle v. Exxon Corp.*, 652 A.2d 178, 187-89 (N.J. Super. 1995) (rejecting vicarious liability based on apparent agency claim, holding that the landowners failed to establish "the essential element of reliance" because "[n]ot a single plaintiff testified that they moved into the area ultimately contaminated in reliance on the fact that the station displayed the Texaco insignia" and "was in control" and "would thus prevent it from becoming a source of contamination"), *aff'd*, 678 A.2d 225, 231 (N.J. 1996); *Phillips v. Restaurant Mgt. of Carolina, L.P.*, 552 S.E.2d 686, 695 (N.C. Ct. App. 2001) (affirming summary judgment for the franchisor, stating that the plaintiff must have actually relied on the representation or assertion of agency); *Miller v. McDonald's Corp.*, 945 P.2d 1107, 1110, 1113 (Or. Ct. App. 1997) (finding sufficient evidence to submit the case to the jury because the plaintiff testified that she went to McDonald's "because she wanted to obtain the same quality of service, standard of care in food preparation, and general attention to detail that she had previously enjoyed at other McDonald's restaurants"); *Myszkowski v. Penn Stroud Hotel, Inc.*, 634 A.2d 622, 627, 630 (Pa. Super. Ct. 1993) (rejecting apparent agency claim by disc jockey because the plaintiff did not demonstrate detrimental reliance); *Watkins v. Mobil Oil Corp.*, 352 S.E.2d 284, 287 (S.C. Ct. App. 1986) (ordering judgment for the franchisor on the apparent agency question where the plaintiff went to the station to purchase cigarettes and the only reason he selected the Mobil station "was because of proximity to his house" and there was no evidence he went to the station "because it was a Mobil station or that he was enticed by Mobil's advertising to visit the station"); *cf. Cash v. Six Continent Hotels, No. Civ. A. 03-3611*, 2004 WL 339660, at *3 (E.D. Pa. Feb. 19, 2004) (holding that the plaintiff could not establish apparent agency between a hotel and a tour company because "[the plaintiff] did not rely on the that representation in any way[; s]he would have taken the tour regardless of who was offering it"). For a discussion of this requirement, see generally Emerson, *supra* note 32, at 631-33 nn.75-79; Zeidman, *supra* note 55, at 673 (stating the requirement that the "injured party reasonably believed that the franchisor exercised control over the franchisee and detrimentally relied on that belief").

control test, but must tie the franchisor's control to the specific injurious instrument or conduct in question.¹³⁷ It would stand to reason, therefore, that one relying on apparent agency should similarly have to prove justifiable reliance not merely on a manifestation of agency, but agency with respect to, again, the specific injurious instrument or conduct responsible for the harm in question. There is, in fact, some support for requiring a plaintiff asserting the apparent agency doctrine against a franchisor to establish that he both believed that the franchisor controlled the injurious instrument or conduct and that he attached importance to that belief.¹³⁸ Requiring that the plaintiff's reliance on apparent control by the franchisor be tied to the "specific aspects" of the franchisee's operations that caused the accident seems analogous to the proximate cause requirement in the misrepresentation setting.¹³⁹

Most of the cases recognizing this component of the reliance requirement seem to contemplate that the plaintiff must have attached such significance to his belief of an agency that the belief influenced—was a so-called "but for" factor in—his decision to patronize the local business operation.¹⁴⁰ In

137. See *supra* note 58 and accompanying text (asserting the requirement of specific control and collecting cases in support thereof).

138. *Mayfield & Lund, supra* note 66, at 83–84 (stating that the plaintiff cannot satisfy the reliance requirement by showing a generalized expectation, but rather "must show that the franchisor represented that a particular service or safety level existed and that the plaintiff visited the premises of the franchisee in reliance on the franchisor's representation," and arguing that a franchisee's display of trademarks or resale of trademarked product is not sufficient to establish "that a plaintiff reasonably expected a particular service or safety level based on a representation by the franchisor or that the plaintiff visited the premises of the franchisee in reliance on such representation"); see *Wilson v. Good Humor Corp.*, 757 F.2d 1293, 1303 (D.C. Cir. 1985) (stating that there was insufficient evidence of reliance to support apparent agency because the plaintiffs failed to present evidence that they relied on franchisor's general reputation, such as by presenting evidence that plaintiffs had "permitted the children to buy ice cream in general reliance on the safety reputation of Good Humor vendors"); *Miller v. McDonald's Corp.*, 945 P.2d 1107, 1110 (Or. Ct. App. 1997) (ordering trial on the merits on apparent agency issue where the plaintiff was injured when she bit into a heart-shaped sapphire while eating a Big Mac sandwich, and noting that the plaintiff had testified that she went to McDonald's "because she wanted to obtain the same quality of service, standard of care in food preparation, and general attention to detail that she had previously enjoyed at other McDonald's restaurants").

139. See RESTATEMENT (SECOND) OF TORTS § 548A (1977) (stating with respect to pecuniary losses from fraudulent misrepresentation that the defendant is subject to liability only if "the loss might reasonably be expected to result from the reliance"). The comments explain that "[t]his means that the matter misrepresented must be considered in the light of its tendency to cause those losses and likelihood that they will follow." *Id.* cmt. b.

140. See *Hanks, supra* note 5, at 13 (stating that the plaintiff must show "that but for her reliance, she would not have incurred her loss"); *Mayfield & Lund, supra* note 66, at 91–92 (articulating a but for test). *But see DOBBS, supra* note 41, § 338, at 927 (stating in connection with Restatement of Agency Section 267 and Illustration 1 that "full scale" but-for reliance is

O'Banner v. McDonald's Corp.,¹⁴¹ for example, the potential liability of a franchisor depended in part on whether "the injury would not have occurred but for the injured party's justifiable reliance on the apparent agency."¹⁴² The plaintiff in *O'Banner* was denied recovery from the franchisor for a fall at a franchised restaurant because he gave "no indication as to why he went to the restaurant in the first place."¹⁴³ The type of restaurant was likely completely irrelevant; "[f]or all we know, O'Banner went there simply because it provided the closest bathroom when he needed one or because some friend asked to meet him there."¹⁴⁴

The Restatement provisions are also somewhat ambiguous. The Restatement of Agency has language that seems consistent with this component. For example, Section 265 provides that "[a] master or other principal is subject to liability for torts which result from reliance upon, or belief in, statements or other conduct within an agent's apparent authority."¹⁴⁵ Section 267 also arguably requires that the plaintiff have detrimentally relied, recognizing potential liability of "[o]ne 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."¹⁴⁶ Section 429 of the Restatement of Torts is silent on the requirement of whether the plaintiff must not only have

not necessary). "The principal under this rule, the passenger-plaintiff need not prove that, but for the appearances, she would have taken a different taxi. It is enough if she 'relied' in the sense that she believed the drivers would be safe because they worked for the defendant as a reputable business." *Id.* Dobbs adds that both Restatements, are "likely to call for the same result." *Id.*

141. *O'Banner v. McDonald's Corp.*, 670 N.E.2d 632 (Ill. 1996).

142. *Id.* at 634.

143. *Id.* at 635.

144. *Id.* For a subsequent Illinois case involving HMO liability, see *Petrovich v. Share Health Plan of Illinois, Inc.*, 719 N.E.2d 756, 769-70 (Ill. 1999) (appearing to take a more lenient approach and attempting to distinguish *O'Banner*).

145. RESTATEMENT (SECOND) OF AGENCY § 265 (1958). But Section 8, Illustration 11 is unclear on this requirement. Illustration 11, involving a tort claim, seems to require only—or at least mentions only—reliance in the belief sense:

The Ace Taxi Company employs no drivers but merely receives orders from prospective passengers and puts "Ace Taxi Company" on cabs owned and operated by independent drivers. One of these drivers collides negligently with another automobile, damaging one of his passengers who reasonably believed the Taxi Company to be the employer. The Taxi Company is liable to the passenger but not to the owner of the other automobile.

Id. § 8, illus. 11.

146. *Id.* § 267; see *Watkins v. Mobil Oil Corp.*, 352 S.E.2d 284, 287 (S.C. Ct. App. 1986) (finding no apparent agency, and emphasizing that "[a] party must also prove reliance upon the representation and a change of position to his detriment in reliance on the representation").

believed in the existence of the agency relationship but also must have detrimentally acted on the basis of that belief.¹⁴⁷ All of this has engendered some disagreement on whether or to what extent the language of the two Restatements is consistent.¹⁴⁸

The cases addressing this reliance component have gone both ways on the question of whether the plaintiff had presented sufficient evidence to avoid a summary judgment and reach the jury on the apparent agency ground for vicarious liability.¹⁴⁹ In some situations, the fatal absence of this component from the plaintiff's apparent agency argument is fairly obvious. For example, in *Frey v. PepsiCo, Inc.*,¹⁵⁰ the plaintiff-motorist was injured in an accident with a soft drink bottler's delivery truck owned by a franchisee and driven by that franchisee's employee.¹⁵¹ In affirming a summary judgment for the franchisor on the apparent agency question, the court noted pointedly: "Unless the appellants chose to be hit by the Bottler's truck, that doctrine has no application under the present circumstances, inasmuch as it requires reliance on the apparent agency relationship."¹⁵² In other cases, the plaintiff seems to have failed to offer evidence to support a finding of apparent agency.¹⁵³

147. RESTATEMENT (SECOND) OF TORTS § 429 (1965) (stating that "[o]ne who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services"). *But cf. id.* §§ 310, 311 (stating that one is subject to liability for physical harm caused by a defendant's tortious misrepresentation when the harm results from an act done in reliance on the truth of the representation or misinformation); RESTATEMENT (SECOND) OF TORTS §§ 546, 552, 552D (1977) (stating that one who makes false or misleading statements is subject to potential liability for the pecuniary loss caused by another's course of conduct taken in reliance on the truth of the misinformation).

148. One recent article says that "[i]n general, cases applying sections 267 and 429 yield essentially indistinguishable rules and results." Daniel S. Kleinberger & Peter Knapp, "Apparent Servants" and Making Appearances Matter: A Critique of Bagot v. Airport & Airline Taxi Cab Corp., 28 WM. MITCHELL L. REV. 1527, 1536 (2002). Dobbs seems to vacillate somewhat on the matter, saying on the one hand that "[a]ccording to some" Section 267 (Agency) "requires reliance," and Section 429 (Torts) does not, noting that "[t]he Torts Restatement specifically requires only the 'reasonable belief' that the services are being rendered by the employer." DOBBS, *supra* note 41, § 338, at 927. But then he opines that both Restatements "are likely to call for the same result." *Id.*

149. *See infra* notes 153–54 and accompanying text (discussing those cases).

150. *Frey v. PepsiCo, Inc.*, 382 S.E.2d 648 (Ga. Ct. App. 1989).

151. *Id.* at 649.

152. *Id.* at 650–51. This requirement would also deny application of the apparent agency rule when the plaintiff visited the franchise operation because a mechanic was on duty there, he was supposed to meet someone at that location, the business was conveniently located, someone else had arranged for the plaintiff to visit the establishment, or someone else had recommended the establishment. *See Emerson, supra* note 32, at 632 nn.77–78, 640 n.114 (discussing cases).

153. *See Wood v. Shell Oil Co.*, 495 So. 2d 1034, 1039 (Ala. 1986) (affirming a summary judgment for the franchisor based in part on the absence of evidence that the plaintiff did

Apart from these self-evident situations finding no reliance, the case law becomes more clouded. A number of courts have readily submitted this actual reliance issue to the jury based on the plaintiff's testimony. In *Miller v. McDonald's Corp.*, the plaintiff was allegedly injured when she bit into a heart-shaped sapphire while eating a Big Mac sandwich.¹⁵⁴ Plaintiff testified that she

business with that gas station "because of a desire to do business with a more responsible party (i.e., Shell Oil)," or "that might indicate that Wood's reliance on Parker Shell was in any way attributable to his confidence in Shell Oil"); *O'Banner v. McDonald's Corp.*, 670 N.E.2d 632, 634-35 (Ill. 1996) (approving summary judgment for defendant-franchisor, noting that the plaintiff failed to show that "he actually did rely on the apparent agency in going to the restaurant where he was allegedly injured," because he gave "no indication as to why he went to the restaurant in the first place"); *Little v. Howard Johnson Co.*, 455 N.W.2d 390, 394 (Mich. Ct. App. 1990) (noting absence of evidence that the plaintiff "was harmed as a result of relying on the perceived fact that the franchisee was an agent of defendant" or "which indicated that plaintiff justifiably expected that the walkway would be free of ice and snow because she believed that defendant operated the restaurant"); *Bahrle v. Exxon Corp.*, 652 A.2d 178, 187-89 (N.J. Super. 1995) (rejecting vicarious liability based on apparent agency claim against Texaco, and holding that the landowners failed to establish "the essential element of reliance" because "[n]ot a single plaintiff testified that they moved into the area ultimately contaminated in reliance on the fact that the station displayed the Texaco insignia" and "was in control" and "would thus prevent it from becoming a source of contamination"), *aff'd*, 678 A.2d 225, 231 (N.J. 1996); *Phillips v. Rest. Mgt. of Carolina, L.P.*, 552 S.E.2d 686, 695 (N.C. Ct. App. 2001) (affirming summary judgment for the franchisor, noting that "there [was] no evidence that the trooper would have chosen to eat elsewhere or done anything differently had he known that the restaurant at issue herein was not owned and operated by Taco Bell"); *Myszkowski v. Penn Stroud Hotel, Inc.*, 634 A.2d 622, 630 (Pa. Super. Ct. 1993) (rejecting the apparent agency claim by a disc jockey who "simply agreed to show up at the designated place, on the designated night and play music," and "would have performed the service she had contracted to at most any location the campus ministry group had designated"); *Watkins v. Mobil Oil Corp.*, 352 S.E.2d 284, 287 (S.C. Ct. App. 1986) (ordering judgment for the franchisor on apparent agency question because there was no evidence the plaintiff went to the service station "because it was a Mobil station or that he was enticed by Mobil's advertising to visit the station").

154. *Miller v. McDonald's Corp.*, 945 P.2d 1107, 1108 (Or. Ct. App. 1997); *see also* *Butler v. McDonald's Corp.*, 110 F. Supp. 2d 62, 67, 70 (D.R.I. 2000) (denying franchisor's motion for a summary judgment in claim where the child and his friends went to this franchise because they "wanted 'McDonald's' food, as they had done on numerous occasions," and thus the issue was for the jury whether the plaintiff "relied to his detriment upon the care and skill of the allegedly negligent operator and/or employees of the franchise restaurant"); *Giamo v. Congress Motor Inn, Corp.*, 847 F. Supp. 4, 9 (D.R.I. 1994) (denying the franchisor's motion for summary judgment, and holding that whether the plaintiff believed that the inn was operated by Best Western and "relied upon" that belief was a "question of fact to be resolved by the factfinder and not by a court considering a summary judgment motion"); *Moussa v. Abdel-Kader*, No. 98-5084-F, 2000 WL 991720, at *5 (Mass. Sup. Ct. June 1, 2000) (noting the requirement that the plaintiff "must establish that he relied in his conduct on the belief that the cab he was entering was owned or controlled by Checker," and finding sufficient evidence to reach the jury on this issue because of plaintiff's proof that he "'chose to hire this particular taxicab only because he recognized the logo and believed that the cab was from a reputable company'") (internal quotations omitted), *reconsidered and reaffirmed*, No. CV98-5084-F, 2000 WL 1736942 (Mass. Super. Ct. Nov. 20, 2000).

went to the restaurant "because she wanted to obtain the same quality of service, standard of care in food preparation, and general attention to detail that she had previously enjoyed at other McDonald's restaurants."¹⁵⁵ Defendant argued that it should not be sufficient for the plaintiff to prove that she went to this particular restaurant because it was a McDonald's, but rather that the plaintiff should be required to prove that she went to this restaurant because she believed that all the other McDonald's restaurants that she went to (and on which her opinion of McDonald's restaurants was presumably based) were owned and operated by the franchisor.¹⁵⁶ In other words, defendant contended that the plaintiff should be required to "'link her experiences with ownership of those restaurants by McDonald's Corporation.'"¹⁵⁷ The court rejected this argument, saying that it "demands a higher level of sophistication about the nature of franchising than the general public can be expected to have," ignoring "the effect of its own efforts to lead the public to believe that McDonald's restaurants are part of a uniform national system of restaurants with common products and common standards of quality."¹⁵⁸ The court added that "[o]ther courts have not required the specificity of reliance on which defendant insists."¹⁵⁹ Then the court noted that the plaintiff testified "that her reliance on defendant for the quality of service and food at the Tigard McDonald's came in part from her experience at other McDonald's restaurants" and stated that the jury could find that the plaintiff "believed that all McDonald's were the same because she believed that one entity owned and operated all of them or, at the least, exercised sufficient control that the standards that she experienced at one would be the same as she experienced at others."¹⁶⁰

iii. Justifiable Reliance: Justified in Believing the Truth of the Statement

The third component of the reliance-justifiable-reliance tetrad is based on objective criteria. It requires that the plaintiff must have been justified in believing the truth of representation—justified, in other words, in believing that

155. *Miller*, 945 P.2d at 1110.

156. *Id.* at 1113.

157. *Id.*

158. *Id.* The court characterized the franchisor's argument as "disingenuous" because a jury could find that it was McDonald's "very insistence on uniformity of appearance and standards, designed to cause the public to think of every McDonald's, franchised or unfranchised, as part of the same system, that makes it difficult or impossible for plaintiff to tell whether her previous experiences were at restaurants that defendant owned or franchised." *Id.*

159. *Id.*

160. *Id.*

the franchisee was an agent of the franchisor. In the context of apparent agency, the rule is usually stated in terms of the reasonableness of the plaintiff's belief; the plaintiff "must reasonably believe that the other is the alleged principal's agent."¹⁶¹ The requirement is expressly recognized by both Restatements.¹⁶²

For a time at least, there was a tendency among some courts essentially to hold that it was a matter of "common knowledge" that mere use of trademarks does not support a reasonable belief of agency.¹⁶³ Hanks describes the common knowledge rule, explaining:

161. Davis, *supra* note 34, at 390; *see* Emerson, *supra* note 32, at 624 n.45 (equating justifiability with reasonableness); Zeidman, *supra* note 55, at 673 (stating the requirement that the "injured party reasonably believed that the franchisor exercised control over the franchisee"); *see, e.g.,* Butler v. McDonald's Corp., 110 F. Supp. 2d 62, 70 (D.R.I. 2000) (discussing evidence of apparent agency in terms of whether customers "would reasonably conclude that the restaurant is owned by defendant and operated by defendant's employees"); Giamo v. Congress Motor Inn, Corp., 847 F. Supp. 4, 8 (D.R.I. 1994) (stating that "[a]pparent authority derives from what the principal manifests to the third party and what the third party reasonably believes"); O'Banner v. McDonald's Corp., 670 N.E.2d 632, 634 (Ill. 1996) (stating that apparent agency may apply "if an innocent third party reasonably relies on the apparent agency"); Theos & Sons, Inc. v. Mack Trucks, Inc., 729 N.E.2d 1113, 1121 (Mass. 2000) (stating that the plaintiff must have "reasonably relied on the principal's words or conduct at the time he entered the transaction"); Little v. Howard Johnson Co., 455 N.W.2d 390, 394 (Mich. Ct. App. 1990) (recognizing that the plaintiff's belief in appearance of agency must be "a reasonable one").

162. RESTATEMENT (SECOND) OF AGENCY § 267 (1958) (stating the rule in terms of "[o]ne 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"); RESTATEMENT (SECOND) OF TORTS § 429 (1965) (stating that "[o]ne who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants is subject to liability for physical harm caused by the negligence of the contractor in supplying such services").

163. *See* Brosseit, *supra* note 135, at 842–43 (discussing the common knowledge doctrine); Emerson, *supra* note 32, at 610–12 (discussing the background of the common knowledge doctrine); Mayfield & Lund, *supra* note 66, at 84–85, 88–89 (stating that "courts reason that it is 'common knowledge' that trademarks are displayed by independent business persons, and that the display of trademarks does not create an inference of agency," referring to a "common knowledge" finding "that a trademark does not denote ownership or control of a premises"). Brosseit explains:

To protect franchisors from the potentially broad liability imposed by the apparent authority doctrine, some courts have adopted a theory referred to as the common knowledge doctrine. The common knowledge doctrine assumes that the public understands that oil companies and certain other businesses commonly enter into franchise agreements whereby the franchisee displays the logos, markings, slogans, and other indicia of the franchisor, although the franchisee maintains control over daily business operations. Courts adopting this theory reason that since the public is deemed to understand that the franchisor actually has no significant control over a franchisee, a plaintiff cannot show that he or she relied upon the franchisor's reputation in choosing to do business with the franchisee. Thus, the common knowledge doctrine prevents a plaintiff from proving the element of reliance,

Some courts have ruled that the apparent agency theory is inappropriate in the typical franchising context because any reliance by the public on the fact that franchisors and franchisees use the same trademarks and trade dress and so on is unreasonable as a matter of law. They base this conclusion on their findings that it is common knowledge that franchisees are licensed to use the franchisor's trademark, trade dress and methods of operation, and it is also common knowledge that the franchisees are independent contractors.¹⁶⁴

Although some cases still seem to apply a common knowledge rule to support a denial of an apparent agency,¹⁶⁵ other courts prefer to submit the reasonableness of the reliance question to the jury.¹⁶⁶ Perhaps the failure of many courts even to address the common knowledge approach is due to the fact that when apparent agency cases are decided in favor of the franchisor, the outcome is most often based on a failure to prove the actual (rather than justifiable) reliance under the second component of the tetrad.¹⁶⁷ The common knowledge rule has been roundly criticized by Emerson, who noted that "what may be 'common knowledge' to a judge is, in fact, terra incognita to the public."¹⁶⁸ He conducted a survey showing that most respondents believed that the franchisor company owned and operated the franchised service stations¹⁶⁹

despite the franchisee's display of signs, logos, or other indicia of the franchisor, unless additional facts exist to warrant the plaintiff's reliance upon the franchisor's business reputation.

Brosseit, *supra* note 135, at 842-43.

164. Hanks, *supra* note 5, at 15 (footnotes omitted).

165. See, e.g., *Mann v. Prudential Real Estate Affiliates, Inc.*, No. 90C5518, 1990 WL 205286, at *5 (N.D. Ill. Dec. 10, 1990) (finding that the facts alleged failed to support any inference that the plaintiffs "could reasonably have believed" that the franchisee's alleged misrepresentations concerning the viability of its business were authorized or binding on the franchisor); *Theos & Sons, Inc. v. Mack Trucks, Inc.*, 729 N.E.2d 1113, 1121 (Mass. 2000) (finding that neither the use of a trademark and other logos of the defendant nor the representation by franchisee as an authorized parts dealer of the defendant was sufficient to raise a genuine issue of material fact that the plaintiff reasonably believed that an agency relationship existed for nonwarranty work).

166. See, e.g., *Moussa v. Abdel-Kader*, No. 98-5084-F, 2000 WL 991720, at *5 (Mass. Super. Ct. June 1, 2000) (finding that "the use of trademarks and other logos, when combined with other evidence of apparent agency, may be sufficient to surmount the hurdle of summary judgment"), *reconsidered and reaffirmed*, No. CV98-5084-F, 2000 WL 1736942 (Mass. Super. Ct. Nov. 20, 2000); Hanks, *supra* note 5, at 15 (stating that "other courts have followed a traditional path when confronted with what, in the context of franchising, excepting in the automobile cases, is usually overwhelming evidence supporting a finding . . . that the plaintiff has made a case to go to the jury").

167. See *supra* Part II.B.3.c.ii (discussing the necessity of actual detrimental reliance).

168. Emerson, *supra* note 32, at 612.

169. The two groups surveyed differed somewhat when asked about McDonald's, with one group of respondents split fairly evenly on the question while most of the other group believed that the franchisor company owned the restaurants. *Id.* at 652.

and that the franchisors would be and should be liable for the torts of their franchisees.¹⁷⁰

The common knowledge doctrine was probably a response to a concern about the effects of ready submission of apparent agency questions to the jury. Although that concern is understandable, I believe that the more comprehensive approach I recommend here offers a more prudent solution.

iv. Justified in Attaching Importance to the Statement

The fourth component of the reliance-justifiable-reliance tetrad requires that the plaintiff must have been justified in attaching importance to his belief of the existence of an agency relationship. To rephrase, the plaintiff must have been reasonably justified in detrimentally changing his position in response to his belief in the existence of an agency relationship. The requirement is sometimes articulated in the misrepresentation context as the requirement that the misinformation have been material to the plaintiff's decision.¹⁷¹ The fourth component has seldom been discretely identified or addressed in the apparent agency franchisor cases.

This requirement would mean that even if a plaintiff subjectively and reasonably believed that a restaurant was owned and operated by a specific franchisor and went there for that reason, the plaintiff would also be required to prove that his motive was justifiable—in other words that he was reasonable in considering and being influenced by his belief that an agency relationship existed. In *Miller*, the plaintiff claimed that she was injured when she bit into a heart-shaped sapphire in a Big Mac sandwich.¹⁷² Plaintiff testified that she went to the restaurant "because she wanted to obtain the same quality of service, standard of care in food preparation, and general attention to detail that she had previously enjoyed at other McDonald's restaurants."¹⁷³ From this testimony, the court held

170. *Id.* at 613, 651, 658, 659–60 (stating that "[t]he surveys indicate that most people do not see the franchisor as sufficiently removed from the franchisee to escape liability from what the franchisee does," and concluding that the "general populace tends to be ignorant of the basic structure of franchising").

171. *See* DOBBS, *supra* note 41, § 476, at 1363 (stating that a representation is material "if a reasonable person would want to consider the fact represented in determining whether to enter the transaction," or even if it was not reasonable to consider it, if the defendant knows that "the plaintiff attaches her own idiosyncratic importance to it"); *see also* RESTATEMENT (SECOND) OF TORTS § 538 (1977) (discussing the requirement in the context of misrepresentation).

172. *Miller v. McDonald's Corp.*, 945 P.2d 1107, 1108 (Or. Ct. App. 1997).

173. *Id.* at 1110.

that a jury could find that plaintiff's reliance—her belief in the agency and the importance that she attached to her belief—were "objectively reasonable."¹⁷⁴

But suppose hypothetically that the plaintiff had been injured at a restaurant because a teenage restaurant employee overlooked some of the slippery substance he was cleaning from the floor, and as a result, the plaintiff fell. Would it be reasonable for the plaintiff to assume that this would not have occurred if the unit had been operated by the franchisor rather a franchisee? Or assume that a plaintiff visited a local McDonald's restaurant only because, let's say, the franchisor's new president was from New Zealand, a place that the plaintiff had always wanted to visit. Assume further that this was the crucial consideration in the plaintiff's decision to visit that McDonald's instead of other similar fast food restaurants in the vicinity. Even if the plaintiff actually and justifiably believed that this local McDonald's was operated by the corporate franchisor, would she be able to satisfy the materiality requirement that her "New Zealand" motivation for visiting the restaurant was objectively reasonable? Should the question be whether franchisor ownership-operation was a reasonable consideration in the plaintiff's expectation of the freedom of the floor from spills? Focusing the issue more narrowly, the question might be stated as whether it was reasonable for the plaintiff to be influenced by the belief that the restaurant was operated by a corporate franchisor whose president was from New Zealand with respect to an expectation of the freedom of the floor from spills?¹⁷⁵ It is easy to see from the preceding illustrations how quickly this inquiry can become convoluted or even casuistic.

III. Suggested Approach

A. Proposal

I propose that application of the traditional vicarious liability principles be limited in the franchisor-franchisee context as follows. If the franchisor satisfies both of the following preconditions, then its vicarious liability for the

174. *Id.* at 1114.

175. The plaintiff in the illustration would also encounter difficulty in satisfying the second reliance component, if the court focused narrowly by requiring that the plaintiff prove that she actually deemed both the assumption that the franchisor operated the restaurant and the fact that its president was from New Zealand crucial considerations with respect to the freedom of the floor from spilled liquids. See Sykes, *supra* note 120, at 1276 (commenting that "[i]t is unlikely, for example, that customers who slip on a patch of grease have done so because of reliance on any representation about the safety of the station or its ability to pay damages in the event of such an occurrence").

torts of its franchisees or its franchisees' employees based on either an actual or apparent agency relationship with its franchisees should be precluded, and the plaintiff should be limited to seeking redress against the franchisees and the franchisees' employees for their torts. First, the franchisor must take reasonable steps to require that notice is prominently displayed by its franchisees that clearly indicates that the franchised business units are managed and operated by the franchisee-entity. Second, and in addition, the franchisor must require that its franchisees carry reasonable levels of liability insurance.¹⁷⁶ If either of the preceding preconditions is not satisfied, the franchisor should remain fully subject to the potential application of the rules governing vicarious liability. The outcome would depend on whether the plaintiff could satisfy the established elements for vicarious liability under applicable state law to the same extent as would otherwise be the case. Moreover, if a franchisor does remain subject to the rules governing vicarious liability for the torts of its franchisees and franchisees' employees because it failed to satisfy both of the preceding preconditions, I urge the courts to define those rules rigorously. Specifically, I suggest that actual agency should require that the franchisor have control over the specific conduct or aspect of the franchise operation that caused the injury. I also call upon the courts to articulate the apparent agency reliance-justifiable-reliance requirement to include all four of its analytical components. Let me emphasize that under my proposal, the mere fact that a franchisor does not satisfy the two preconditions would not, ipso facto, support the imposition of vicarious liability. Rather, it would simply mean under my proposal that there would be no bar to the potential application of vicarious liability when it would otherwise be applicable.

Over the years, varieties of proposals addressing the matter of the vicarious liability of franchisors have been advanced.¹⁷⁷ Some have suggested that a reformulation of the criteria for vicarious liability is needed.¹⁷⁸ I believe

176. Ideally, a minimum level of liability insurance should be specified. Therefore, to be most effective, my proposal should be implemented by legislation. National legislation would have the obvious added advantage of affording uniformity and predictability.

177. See Emerson, *supra* note 32, at 667 n.274, 668, 670 (listing a variety of possible ways that the question of franchisor liability might be addressed, including: requiring franchisors to ensure that their franchisees maintain liability insurance or reserves, perhaps with automatic vicarious liability if they fail to do so; placing caps on the types or amounts of vicarious liability of franchisors; making franchisors jointly and severally liable with their franchisee with a right to seek indemnity; and prohibiting vicarious liability based upon apparent agency coupled with a public information campaign to foster knowledge of the true nature of the relationship between franchisees and franchisors). Emerson notes that "[i]f legislators wish to soften the impact on franchisors, a joint liability statute could specify that certain notices, disclaimers, or other forms of information could absolve the franchisor of this liability." *Id.* at 670.

178. See Flynn, *supra* note 4, at 105 (suggesting that liability be based on a "greater

such refashioning proposals do not offer a satisfactory solution. They would largely leave in place essentially the same ad hoc approach to the question of vicarious liability with all of the imponderability and unpredictability that currently plagues the area. Other commentators have proposed that franchisors be held jointly and severally liable for the torts of their franchisees.¹⁷⁹ I believe the joint liability proposal is ill advised. Although it offers a bright-line test, it would largely turn "every franchise relationship into an employment relationship, for liability purposes," by making franchisors subject to liability even when the franchisee had sufficient insurance or assets.¹⁸⁰ In so doing, it would undermine the goals of modern tort law, as I will discuss in more detail later. Others propose some variation of a guarantor rule, whereby the franchisor would become liable for the torts of a franchisee only if that franchisee (or the franchisee's liability insurance) could not satisfy the liability.¹⁸¹ I believe the so-called guarantor proposal would end up

control" test). Flynn would ascertain the proximate cause of the accident and then impose liability on the party that "was in the better position as between the two to avert the accident (i.e., the party that had greater control over whatever proximately caused the accident)." *Id.*; see also Sykes, *supra* note 120, at 1279 (commenting that "[a] more economically sound approach would deny vicarious liability only when the transaction costs of contractual risk allocation are high and the principal has no inexpensive way to maintain loss-avoidance incentives"). Flynn claims that this test "would allow parties to a franchise relationship to consider the marginal risks and benefits of assuming each quantum of control while negotiating the franchise agreement; this should lead the parties to divide the risks of control in an optimal manner." Flynn, *supra* note 4, at 105. But the problem here, of course, is that it would not be the parties at all, but the courts and juries that make these decisions. And indeed, Flynn acknowledges that his proposal "would probably do little to avert the problem of inconsistency in determining liability." *Id.* at 106. Also, difficulties abound in deciding which party had greater control and even what is meant by "control." *Id.*

179. See, e.g., Lynn M. LoPucki, *Toward a Trademark-Based Liability System*, 49 UCLA L. REV. 1099, 1103 (2002) (stating that "[t]rademark owners who authorize franchisees, subsidiaries, affiliates, and other licensees to use the owners' trademarks to identify themselves or their products to customers should be jointly and severally obligated for the licensees' liabilities to those customers"); McHugh, *supra* note 49, at 675-79 (stating that the most rational solution to the independent contractor question "is to expand the scope of legal liability to include both the contractor and the employer . . .," whereby "if the independent contractor commits any tort, the victim would have a cause of action against the employer, the contractor, or both as joint tortfeasors"). These kinds of proposals have apparently been around since the late 1960s when the focus was on the oil companies. Flynn, *supra* note 4, at 104.

180. Flynn, *supra* note 4, at 104.

181. See Hanks, *supra* note 5, at 9 (advocating imposition of a guarantor status on franchisors that would expose them to liability for the torts of the franchisees only if the franchisee was unavailable to be sued or without funds or assets with which to pay a judgment, and thus would make franchisors contingently liable for the torts of their franchisees, the primary contingency being the insolvency of the franchisee); Morris, *supra* note 2, at 343, 345-47 (saying that "[i]f contractors were held to be guarantors of the financial responsibility of their contractors to those who are injured by the contractor's torts committed in the prosecution of the

compounding the uncertainty that already bedevils this area. In effect, the franchisor would be condemned to limbo—and probably made a party—in every tort claim against one of its franchisees as it awaits the outcome of the claim against the franchisee.¹⁸² Under my proposal, the franchisor's satisfaction of the two threshold preconditions would bring closure to the matter by preempting the vicarious liability for franchisee torts.

I believe that eliminating vicarious liability for franchisors for the torts of franchisees is sensible when reasonable efforts have been taken by the franchisor to assure that consumers are afforded reasonable notice of the actual status of the franchised business and that its franchisees are adequately insured. The notice precondition, if implemented in a way that promotes fully informed consumers, should assuage some of the concerns about the ignorance of customers regarding the independent nature of the franchisee business and its potential legal implications.¹⁸³ The proposed notice precondition serves to

enterprise, very few irresponsible persons could find this sort of employment," and advocating liability of principal [or franchisor] when it is reasonable to expect the principal "to exercise his power of selection so as to avoid the employment of judgment proof contractors" and there is more than a "little likelihood that the contractor will commit torts which will injure third persons"); Sykes, *supra* note 120, at 1277–79 (discussing what he calls "a 'financial responsibility exception' to the control test, under which the principal may become liable for the tort of its agent when the agent cannot pay the judgment against him," and saying that although a "rule that imposes vicarious liability contingent on agent insolvency may have significant advantages over other proposals, . . . a more economically sound approach would deny vicarious liability only when the transaction costs of contractual risk allocation are high and the principal has no inexpensive way to maintain loss-avoidance incentives"); John D. Lackey, Comment, *Liability of Oil Company for Its Lessee's Torts*, 1965 U. ILL. L.F. 915, 920 (proposing franchisor liability when the franchisee cannot pay).

182. Some commentators have criticized these proposals as leaving unanswered questions. For example, Professor LoPucki criticizes Hanks's proposal:

[Hanks] fails to say whether he would permit the plaintiff to sue on the guarantee in the initial lawsuit. If he would, the franchisor would [still] be put to a defense in every case. If he would not, a second lawsuit would be necessary whenever the franchisee did not pay the judgment rendered in the first.

LoPucki, *supra* note 179, at 1119.

183. See Hanks, *supra* note 5, at 14–15 (expressing concern about assumptions that merely "because the customer has been advised that the store or other facility is independently owned and operated, that the customer understands the legal implications of that statement," and stating that "[n]ot only is it unlikely that customers understand those implications, but one can be rather certain that the franchisors do not wish for customers to understand them"); LoPucki, *supra* note 179, at 1104–05 (stating that "[t]he selection of a seller or supplier is not only a selection of a product or service, but also a contract for the legal and financial responsibility in the event that the product or service fails or the customer or third parties are injured at any stage of the relationship"). LoPucki says that notice is not enough because customers still "lack the information necessary to evaluate the financial responsibility of the entities whose liability is offered." *Id.* at 1114–15. Another problem is that corporations often are organized into "entity structures" involving multiple corporations. And it is often nearly impossible from the public

enhance the autonomy interests of customers.¹⁸⁴ The goal of improved notice to customers is to make the "invisible"¹⁸⁵ actual relationship sufficiently visible to consumers dealing with franchised commercial operations. The insurance precondition¹⁸⁶ creates incentives for franchisors to insist that their franchisees

record, even if customers were so inclined, to evaluate the entity structure. *Id.* 1108–11. LoPucki adds that "[e]ven the most diligent customer could not independently gather the information necessary to evaluate the entity structure." *Id.* at 1111. LoPucki also comments that "[t]rademarks are the only information available to most actors in the marketplace," and that "[m]ost customers assume that they are dealing with the trademark owner, and even those who realize they are not lack the information necessary to contract meaningfully with the entities that operate behind the trademark's mask." *Id.* at 1103. Further, "[t]he vast majority of customers will have insufficient leverage to force disclosure of the financial information necessary to evaluate the financial responsibility of the persons with whom the customers deal." *Id.* at 1113.

184. A number of commentators have suggested the need for enhanced efforts to assure notice to customers of the independence status of franchisees. *See* Emerson, *supra* note 32, at 668 (noting various possible approaches to the matter of franchisor liability, including legislation automatically imposing vicarious liability on the franchisor unless certain specified notices, disclaimers, and other information were provided to customers, and suggesting the types of information that should be imparted); Laufer & Gurnick, *supra* note 32, at 25 (suggesting steps that should be taken to enhance information to customers, including displaying placards disclosing the independent ownership of the business, answering the franchisee's phone with an identification of its independent ownership, and reflecting in all publications, forms, cards, letters, and other forms of communication, that the local business is owned and operated by the franchisee).

185. *See* LoPucki, *supra* note 179, at 1100, 1104 (describing how large businesses are most often complex arrays of entities whose actual relationships are invisible to contracting customers).

186. There have been calls over the years for, or at least recognizing the possibility of, taking steps to require or to encourage that franchisees are insured, at least in some areas. DOBBS, *supra* note 41, § 336, at 920 (stating that "[i]f employers were always careful to hire solvent and fully insured contractors, the classification as servant or independent contractor would not much matter"); Emerson, *supra* note 32, at 667 n.274, 668, 670 (listing a variety of possible ways that the question of franchisor liability might be addressed, including requiring franchisors to ensure that their franchisees maintain liability insurance or reserves, perhaps with automatic vicarious liability if they fail to do so, and noting the possibility of adopting a rule that would hold the franchisor liable for the franchisee's debts if the franchisor did not ensure that its franchisee had sufficient reserves to meet foreseeable tort claims); Note, *supra* note 10, at 159–60 (proposing to hold franchisors liable for the torts of licensees unless franchisors ensure that their licensees have adequate reserves to meet foreseeable tort and contract claims); *cf.* Brosseit, *supra* note 135, at 862 (suggesting that franchisor oil companies might be required to "insure their franchisees to some prescribed minimum"); Davis, *supra* note 34, at 404–05 (supporting a statutory requirement for each oil company to insure against injuries at its service stations and presumably to include insurance coverage for their service station franchisee-operators); Morris, *supra* note 2, at 347 (advocating liability of the principal when it is reasonable to expect the principal "to exercise his power of selection so as to avoid the employment of judgment proof contractors" and there is more than a "little likelihood that the contractor will commit torts which will injure third persons," and stating that otherwise, if it is desirable that contractors be sufficiently financed, other means should be employed to assure that they are, such as licensing acts and compulsory liability insurance). *See generally* Kerl v.

carry reasonable levels of liability insurance¹⁸⁷ and helps to assure realistic protection for customers. It seems a reasonable condition for franchisors in exchange not only for the benefits they realize from franchising their trademarks,¹⁸⁸ but doing so (under my proposal) free of the amorphousness and costs of potential vicarious liability. And finally, both the curtailment of the potential application of vicarious liability to franchisors when the two preconditions have been satisfied and the limitations on the scope of vicarious liability rules in situations in which they might, under my proposal, still apply (because the preconditions have not been satisfied) are sound for a number of reasons. In the subsections that follow, I explain why I believe that the current ad hoc approach to vicarious liability is inefficient and subverts the goals of tort law that vicarious liability is designed to serve.¹⁸⁹

B. Reasons for Limiting Franchisor Vicarious Liability

1. Consistency and Predictability

The legal principles governing the vicarious liability of franchisors are nothing if not unpredictable and inconsistent.¹⁹⁰ On the issue of actual agency, for example, it has been noted that there are a "staggering number" of potential

Dennis Rasmussen, Inc., 682 N.W.2d 328, 332 (Wis. 2004) (refusing to find sufficient control to support vicarious liability of the franchisor, and noting that the franchise agreement required the franchisee to carry at least one million dollars of liability insurance).

187. See Hanks, *supra* note 5, at 18, 24 (stating that vicarious liability creates an incentive not only for a franchisor "to monitor and discipline their franchisees to assure they take appropriate actions and precautions to avoid unwarranted risks," but also "an incentive for the franchisor to assure that its franchisees are covered by liability insurance to a level that, at the margin, equates the expected benefit to the franchisor of an additional unit of insurance with the cost to the franchisee to purchase the marginal unit of insurance").

188. See Note, *supra* note 10, at 159 (proposing that a burden on the franchisor of ensuring that its franchisees can satisfy foreseeable legal claims is a reasonable exchange for the benefits of franchising trademarks).

189. See generally *Metro N. Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 433 (1997) (explaining the important reasons why common-law courts find it necessary in some types of situations to restrict recovery "to cases falling within rather narrowly defined categories," and pointing particularly to the difficulty courts and juries may experience in separating valid from invalid claims and to the threat of unpredictable recovery). The appropriate response has been for the courts to develop "recovery-permitting categories the contours of which more distantly reflect . . . abstract general policy concerns. The point of such categorization is to deny courts the authority to undertake a case-by-case examination." *Id.* at 436.

190. See Hanks, *supra* note 5, at 33 (discussing the effects of uncertainty surrounding vicarious liability in the franchising setting); McHugh, *supra* note 49, at 662 (noting the unpredictability and uncertainty of the law on this subject).

factors that might be considered by courts as indicators of control.¹⁹¹ Discerning the state of the law in a single jurisdiction is a challenge; extrapolating or divining a comprehensible or predictable synthesis from many jurisdictions is even more elusive.¹⁹² Professor Peter Schuck has admonished us that although "[c]omplexity's costs . . . can be ignored, rationalized, and multiplied for a time, perhaps for a long time," sooner or later "they become unsupportable."¹⁹³ My proposal would inject a dose of desperately needed simplicity and clarity into the chaotic realm of franchisor vicarious liability.

2. Modern Irrelevance of the Historical Underpinnings of Vicarious Liability

The late Fleming James has provided a useful historical overview of the origins of vicarious liability.¹⁹⁴ Intimations of vicarious liability can be discerned in the primitive law of deodads and noxal surrender, calling for "the surrender by the owner of the offending thing or slave."¹⁹⁵ James also noted its derivations in the Roman law of *pater familias*, imposing liability on one for the acts of one's family members and slaves, and in the praetorian edict imposing liability "upon innkeepers and shipowners for the torts of their free servants."¹⁹⁶ He also noted Germanic influences and the influence of medieval principles that a master be liable for at least some acts of servants, such as acts to which the master consented or that were openly dangerous.¹⁹⁷ Vicarious liability caught on in England during the seventeenth century.¹⁹⁸ But the historical

191. Flynn, *supra* note 4, at 91.

192. *See id.* at 93 (adding that "the courts are showing no signs of proceeding to a coherent application of the agency standard"); *see also* McCarthy, *supra* note 47, at 661–62 (noting that the "[t]he analysis courts use to determine whether a franchisor has control sufficient to give rise to vicarious liability for the acts of the franchisee varies greatly among jurisdictions").

193. Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1, 39 (1992); *see* RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 21 (Harv. Univ. Press 1995) (stating that "[t]he proper response to more complex societies should be an ever greater reliance on simple legal rules"). Schuck identifies various system costs of legal complexity, including transaction costs that he analogizes to "friction in mechanics, they are ubiquitous and limit the system's performance." Schuck, *supra*, at 19.

194. *See* James, *supra* note 45, at 164–65 (examining the roots of vicarious liability in various legal systems).

195. *Id.* at 164.

196. *Id.*

197. *Id.* at 164–65.

198. *Id.* at 165; *see also* Schwartz, *supra* note 2, at 1746 (stating that vicarious liability was accepted in England in the early 1700s and in America in the early 1800s).

justifications for general application of vicarious liability to modern commercial enterprises certainly seems questionable. Noted historian Edward White described the changes in the economic backdrop:

Vicarious liability was itself a holdover from an earlier conception of negligence as a specific duty arising out of a preexisting status or relationship. A master owed a duty to see that his servants did not injure others because his servants were part of the household and he could be regarded as responsible for their conduct, as an innkeeper was responsible to guests for the condition of his premises. But as applied to large industrial enterprises, the doctrine, particularly in its severest forms, seem[s] antithetical to the trend of late nineteenth-century tort law: to condition the existence of a general duty of care to others on a showing of fault. How could management personnel of a giant industrial combine be said to be fairly accountable for all the careless acts of the combine's employees? Yet the doctrine of respondeat superior, which embodied the vicarious liability principle, held the corporation . . . responsible regardless of what prior steps management might have taken to forestall or prevent an employee's risky act.¹⁹⁹

In short, the historical dynamics of vicarious liability no longer fit the modern context. Add to this the fact that franchising is *sui generis*, neither fish nor fowl. A franchise relationship is neither inherently an agency relationship (although, as we have seen, it can, in the eyes of some courts, readily be deemed so), nor a relationship between classically independent contractors.²⁰⁰ Rather, "the franchise relationship sets out a detailed scheme of control between two autonomous businesses."²⁰¹ Additionally, the face of modern franchising has changed in a number of important respects, with distributorships, such as auto company dealers and oil company service stations, now much less numerous than today's "business format franchise" typified by the fast-food industry.²⁰² Moreover, today we have more affluent franchisees and less capital requirements for business format franchisors,²⁰³ suggesting greater capacity of franchisees to bear and redistribute the costs of tortious accidents.

Consequently, given the limited relevance of the historical underpinnings of vicarious liability and the uniqueness of franchising relationships, it is crucial to eschew a business-as-usual normative approach to the vicarious liability of

199. G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 51 (Oxford Univ. Press, Expanded Ed. 2003).

200. See Flynn, *supra* note 4, at 90 (considering the nature of the franchise relationship).

201. *Id.*

202. See *id.* at 90, 95–96 (discussing the changing nature of franchising).

203. See *id.* at 96 (observing that "many of the current franchise relationships suggest a marriage of the franchisor's intellectual capital and the franchisee's financial capital").

franchisors. Therefore, instead of being driven by historical inertia, I suggest that decisionmakers be guided by considering the role of vicarious liability within the goals of modern tort law, with special sensitivity to the unique realities of present-day franchising.

3. *Dilemmas of Franchisors*

The threat of vicarious liability creates unique dilemmas for franchisors. For starters, the lifeblood of most franchisors is their intellectual property, usually in the form of trademarks.²⁰⁴ And the governing Lanham Act expressly 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."²⁰⁵ Thus, there appears to be a "fundamental conflict between the Lanham Act's requirement that a trademark licensor exercise adequate control over the use of its mark and the agency law exhortation that licensee operations should be independent of licensor control if the licensor intends to shield itself [at least on actual agency principles] from vicarious liability."²⁰⁶

In addition to the perturbations caused by the Lanham Act, an additional source of the dilemma facing franchisors derives from the inherent nature of franchising itself. Franchising depends on the use of shared trademarks, the value of which is sustained by controlling the uniformity and quality of the products and services marketed under the trademark.²⁰⁷ A franchisor is thus caught in a

204. See Franklyn, *supra* note 32, at 93 (discussing various types of trademark licensing).

205. 15 U.S.C. § 1127 (2000). See generally CHARLES R. MCMANIS, *INTELLECTUAL PROPERTY AND COMPETITION IN A NUTSHELL* 158–66 (5th ed., 2000); ARTHUR R. MILLER & MICHAEL H. DAVIS, *INTELLECTUAL PROPERTY: PATENTS, TRADEMARKS, AND COPYRIGHT* 216 (2000); Franklyn, *supra* note 32, at 17–18.

206. Emerson, *supra* note 32, at 626–27. Not all commentators agree on the existence of this dilemma. See David Brittain, Comment, *Franchisor's Liability for Acts of Franchisees: A Risk Administration Perspective*, 32 U. FLA. L. REV. 603, 617–18 (1980) (stating that the apparent dilemma is unconvincing because of the courts' aversion toward abandonment and the controls usually asserted in franchise agreement are not designed to serve the cause of trademark protection at all).

207. See Joblove & Killion, *supra* note 36, at 15 (stating that "[b]ecause franchising necessarily depends upon use of shared trademarks . . . controls are essential in a franchise system"). Another commentator notes:

The last forty years have seen a transition from . . . limited use of franchises to franchise operations which distribute goods and services produced or managed by local franchisees. In these franchises, (especially those which sell services), a much higher degree of control by the franchisor is necessary to protect both the goodwill value of the product and the trade or service mark associated with the business. For

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.²⁰⁸ Thus, we find what has been aptly described as a conflict between two core assumptions about franchising: One is "the uniformity of franchisee operations achieved through standards prescribed and enforced by the franchisor,"²⁰⁹ and the other is "the independent contractor relationship between a franchisor and its franchisees."²¹⁰

It quickly becomes manifest that traditional rules for vicarious liability—elusive and moving targets in their own right—are ill-suited for the franchisor-franchisee relationship. My proposal, which affords franchisors some breathing space while at the same time providing adequate protection to consumers, is sensitive to those dilemmas.

4. Loss Prevention, Risk Reduction, and Incentives

Commentators commonly note that one of the justifications for vicarious liability generally is to create an incentive for the party subject to vicarious liability to take steps with respect to its employees and agents to reduce the risk of accidents.²¹¹ This rationale has sometimes been extended to franchisors, whereby

example, a distributor of gasoline does not really need to specify the exact shape, layout, and color scheme of a service station franchise to protect the trademark on its petroleum products. On the other hand, such details might be critical to the vitality of the service mark of a McDonald's restaurant, a Blockbuster Video store, or a 7-Eleven convenience store.

Flynn, *supra* note 4, at 100.

208. See Zeidman, *supra* note 55, at 539–40 (discussing franchisor control); see also 2 MYKULAK & RHEE, *supra* note 6, § 15.7.2 (noting that "[i]ronically, while exercising more control over the day-to-day activities of the franchise may increase the chances that the franchisor will be found vicariously liable, a franchisor that ignores the actions of its franchisee and its employees may be charged with its own negligence"); Hanson, *supra* note 30, at 105–09 (discussing the dual risks of vicarious and direct negligence liability).

209. Shelley & Morton, *supra* note 17, at 121.

210. *Id.* at 120.

211. See RESTATEMENT (THIRD) OF AGENCY § 2.04 cmt. b (Tentative Draft No. 2, 2001) (stating that "[r]espondeat superior creates an incentive for principals to choose employees and structure work within the organization so as to reduce the incidence of tortious conduct," and explaining that "[t]his incentive may reduce the incidence of tortious conduct more effectively than doctrines that impose liability solely on the individual tortfeasor"); DOBBS, *supra* note 41, § 334, at 908 (declaring employer liability the best deterrent); Robert D. Cooter, *Symposium Discussion*, 56 S. CAL. L. REV. 155, 200 (1982) (stating as a rationale that "it is cheaper to have the employer police his own employees and be subject to a fine if he fails, than to have the state police the employees, and possibly impose imprisonment in the event of wrongdoing"); James, *supra* note 45, at 168 (saying that an employer's "general right of control over his employees

vicarious liability of franchisors is said to create incentives for franchisors to control the conduct of their franchisees in ways that might reduce the likelihood of injuries to their customers.²¹²

There are several flaws with the incentives rationale for franchisor vicarious liability. First, a franchisor is simply not the franchisee's employer. Indeed, imposition of vicarious liability essentially overrides the freedom of the parties to chart the parameters of their relationship and to enjoy the benefits of that relationship, a type of business relationship that was never intended to be that of employer-employee. Second, the supposed incentive to the franchisor is an empty vessel if the franchisor has no realistic opportunity to control the details of the franchisee operations meaningfully.²¹³ While the franchisor can select its franchisees,²¹⁴ adopt some safety-oriented requirements in the

while they are engaged about his business" is the main reason an employer is "strategically placed to promote accident prevention"); Morris, *supra* note 2, at 341 (stating that vicarious liability supplies incentive to employers to punish tortious conduct by employees); Schwartz, *supra* note 2, at 1758 (summarizing some of the incentive arguments, such as the contention that the threat of liability will encourage employers to more thoughtfully select, supervise, and discipline employees, and to consider alternatives to employee efforts, such as "mechanization of particular tasks" or "reduction in the overall scale of the employer's activities").

212. See *Kerl v. Dennis Rasmussen, Inc.*, 682 N.W.2d 328, 336 (Wis. 2004) (recognizing the rationale, but refusing to impose vicarious liability in the instant case); Brosseit, *supra* note 135, at 854 (stating that vicarious liability encourages franchisors to select franchisees that will exercise a high degree of care); Emerson, *supra* note 32, at 636 (stating that the "franchisor is in a good position to select responsible franchisees and ensure that they exercise a high degree of care when dealing with their customers," and that "the imposition of vicarious liability encourages franchisor to maintain high standards during its selection and supervising processes"); Hanks, *supra* note 5, at 18 (discussing this rationale for vicarious liability of franchisors); McHugh, *supra* note 49, at 673 (noting that the absence of vicarious liability could restrict liability to judgment-proof franchisees, thereby producing a misallocation of resources "[s]ince the judgment-proof party does not include the cost of judgments in his decisions, he will not take cost-justifiable steps to prevent accidents"); C. Chester Brisco, Comment, *Liability of a Franchisor for Acts of the Franchisee*, 41 S. CAL. L. REV. 143, 154 (1968) (referring to one of the justifications for franchisor vicarious liability as "prevention of loss").

213. Most franchisors are far removed from the day-to-day operations of the franchisees. Another potential problem is that "state statutes frequently qualify or limit a franchisor's power to terminate a franchise agreement," thus impeding the ability of franchisors to compel franchisees to comply with franchisee agreements. Flynn, *supra* note 4, at 98. See generally Charles S. Modell, *The Accidental Franchise*, BUS. L. TODAY, Jan./Feb. 2004, at 45, 47 (describing so-called "franchise relationship laws," and noting that such laws may "require good cause for termination or nonrenewal of the relationship, and may require advance notice, typically varying from 30 to 90 days, with an opportunity for cure as enunciated in the individual state statute").

214. See Emerson, *supra* note 32, at 636 (stating that the "franchisor is in a good position to select responsible franchisees and ensure that they exercise a high degree of care when dealing with their customers"); Rubin, *supra* note 13, at 228 (stating that franchisors can to some extent police their products and services through selection of those to whom a franchise will be granted).

franchise agreement, offer training programs,²¹⁵ monitor franchisees,²¹⁶ and impose contract sanctions, whether these measures add anything in the way of effective day-day-operational "control" is doubtful. Third, focusing the liability heat on franchisors may actually diminish overall safety incentives. Admittedly, imposing vicarious liability on the franchisor does not in theory free its franchisee from liability because it may also be subject to liability to the victim. However as a practical matter, if the franchisor pays the judgment, the franchisee lives to play another day, except for the largely theoretical threat that a vicariously liable franchisor might seek indemnity against the franchisee. Moreover, this de facto dilution of deterrence is compounded because the franchisee is often the only one really positioned to take effective steps toward meaningful risk reduction.²¹⁷ The dissipation of the threat of liability creates a moral hazard²¹⁸ because it might also prompt some franchisees to cut corners. This tendency may also abet a classic "tragedy of the commons."²¹⁹ Here the

215. See generally Sid Henkin, *Developing Effective Training Programs*, in THE FRANCHISING HANDBOOK 27 (Andrew J. Sherman ed., 1993) (describing the training provided by franchisors, and stating that "[t]raining is the lifeblood of a franchise organization" and that "[w]hen a person purchases a franchise, there is both an explicit and implicit understanding that the franchisor will provide the training necessary to lead the franchisee to success").

216. See Hanks, *supra* note 5, at 18–24 (discussing generally franchisor monitoring of franchisees). Hanks explains:

Not that a franchisor can continuously police franchisees, but neither can anyone else. However, franchisors can and do design detection systems that are based on random, unadvertised visits to the franchisee's store by known and unknown persons looking to uncover evasive behavior by franchisees, as well as implement other detection methods whose nature depends on the specific behavior that is attempted to be detected. Franchisors, because of their many other contacts with and knowledge of the franchisee's operations, are usually in a good position to detect undesirable franchisee behavior.

Id. at 23.

217. See Brittain, *supra* note 206, at 633 (noting the "superiority of the franchisee and his insurer in the risk prevention function"). I would say that the franchisee and his insurer are superior in risk assessment as well.

218. A moral hazard is "the tendency of insurance (or other kinds of protection from harm) to increase losses or other harms." Martha T. McCluskey, *The Illusion of Efficiency in Workers' Compensation "Reform"*, 50 RUTGERS L. REV. 657, 742 (1998). See generally Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237 (1996) (discussing the nature of the moral hazard phenomenon).

219. The tragedy of the commons entered the metaphorical treasury with the publication of a modest article by a then little-known biology professor at the Santa Barbara campus of the University of California. See Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244 (1968) (popularizing the phrase "tragedy of the commons" and discussing its development). Hardin illustrates his tragedy of the commons by imagining a pasture open to all, where each herdsman seeks to maximize his gain, stating "[e]ach man is locked into a system that compels him to increase his herd without limit—in a world that is limited. Ruin is the

"commons" is comprised of the reputation of the trademark and its underlying franchise system. The moral hazard created by the dilution of the deterrence on franchisees "means that someone who is protected from risk can use that protection to their advantage—thereby maximizing their self-interest as all rational economic actors supposedly should."²²⁰ Hence, franchisees may cut safety corners by maximizing sales at the expense of the common reputation.²²¹ Fourth, even if the franchisor were in position to take effective steps to reduce the risks of franchisee operations (which the franchisor seldom is), there are already more than ample incentives for the franchisor without adding the indeterminate threat of vicarious liability. There are strong "market incentives"²²² for the franchisor to avoid the bad publicity that would follow in the wake of some injurious event at one of its franchisees. Bad publicity is "one of the greatest fears of a franchisor"²²³ in part because it can produce a "multiplier effect"²²⁴ from a single adverse event. Also, if a franchisee incurred liability that exceeded its insurance or available assets, the effect might be the loss to the franchise system of an experienced franchisee.²²⁵ And finally, the threat of potential direct liability²²⁶ of a franchisor is a significant deterrent to franchisor negligence even apart from vicarious liability.²²⁷

destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons." *Id.*

220. McCluskey, *supra* note 218, at 746.

221. Making the franchisor the "go to" defendant for franchise operations may tempt some franchisees to take chances designed solely to increase sales and to cut any costs that do not contribute directly to sales, such as safety measures. Professor Rubin explains:

[I]f one franchisee allows the quality of his establishment to deteriorate, he benefits by the full amount of the savings from reduced quality maintenance; he loses only part of the costs, for part is borne by other franchisees. All franchisees would lose something as a result of this deterioration in one franchise: consumers would have less faith in the quality promised by the trademark.

Rubin, *supra* note 13, at 228. This raises the specter of a tragedy of the commons, with the collective value of the trademark and reputation of products and services being the commons.

222. See Hanks, *supra* note 5, at 28 (discussing the ample incentives for monitoring franchisees so that the franchisor's mark will not be abused or devalued).

223. *Id.* at 29.

224. *Id.* at 30.

225. *Id.* at 25.

226. See *supra* notes 30–39 and accompanying text (discussing potential bases for direct liability).

227. See Flynn, *supra* note 4, at 97 (considering the imposition of direct liability on franchisors under conventional negligence principles).

5. Loss Spreading

A central goal of modern tort law is to impose liability on an appropriate party in a position to spread or to redistribute the loss over a wider cohort, rather than leaving it unredressed on a single victim.²²⁸ Loss spreading has also been identified as one of the justifications for vicarious liability in general,²²⁹ and sometimes mentioned as a justification for the vicarious liability of franchisors.²³⁰

The loss-spreading rationale is, however, questionable in the context of franchisor vicarious liability for several reasons. It is doubtful today whether franchisors are always better situated to undertake loss-spreading than their franchisees. Not only are franchisees increasingly well capitalized,²³¹ but the

228. See Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMUL. REV. 163, 182–85 (2004) [hereinafter King, *Goals of Tort Law*] (naming loss spreading as a goal of tort law); Joseph H. King, Jr., *A Goals-Oriented Approach to Strict Tort Liability for Abnormally Dangerous Activities*, 48 BAYLOR L. REV. 341, 351–52 (1996) [hereinafter King, *Abnormally Dangerous Activities*] (stating that "loss spreading is increasingly regarded as one of the dominant rationales for strict liability"). Judge Calabresi, who was a law professor at the time, explained the rationale for loss spreading as follows: "[T]aking a large sum of money from one person is more likely to result in economic dislocation, and therefore in secondary or avoidable losses, than a series of small sums from many people." Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 517 (1961); see also L.W. Feezer, *Capacity to Bear Loss as a Factor in the Decision of Certain Types of Tort Cases*, 78 U. PA. L. REV. 805, 809–10 (1930) (identifying as a "guiding principle" in some cases the beneficent end of imposing liability on "the party who can absorb it with the least injury to himself and in such a way as will produce a minimum of consequential problems of social adjustment for himself or his dependents"); Brittain, *supra* note 206, at 625 (noting that loss spreading "ameliorates the economic hardship which would be worked by casting the burden . . . upon a single individual by distributing the loss in small portions over many persons").

229. See DOBBS, *supra* note 41, § 334, at 908 (describing how an enterprise might spread the loss from injuries); Gregory C. Keating, *The Theory of Enterprise Liability and Common Law Strict Liability*, 54 VAND. L. REV. 1285, 1305 (2001) (stating that it is "socially expedient to spread and distribute throughout the community the inevitable losses occasioned by injuries to employees engaged in industry").

230. See *Kerl v. Dennis Rasmussen, Inc.*, 682 N.W.2d 328, 336 (Wis. 2004) (recognizing the rationale, but refusing to impose vicarious liability in the instant case); Brosseit, *supra* note 135, at 852 (noting in connection with the vicarious of oil company-franchisors that "[t]he risk-spreading justification for nonfault liability rests on the idea that if losses are broadly spread among people and over time, they are the least harmful"); Emerson, *supra* note 32, at 634 (saying that vicarious liability can be justified "as a method of spreading both risk and actual losses"); Flynn, *supra* note 4, at 104 (stating that vicarious liability would encourage the franchisor to spread the costs across the entire business); Brittain, *supra* note 206, at 625 (noting that loss spreading "ameliorates the economic hardship which would be worked by casting the burden . . . upon a single individual by distributing the loss in small portions over many persons").

231. Consider that the average initial investment for franchisees is in the vicinity of \$318,975, excluding real estate. INT'L FRANCHISE ASS'N, ABCS OF FRANCHISING, at

ready availability of liability insurance for franchisees makes them suitable to spread the losses.²³² Furthermore, the distinctive characteristics of individual franchisees in terms of location, employees, management, and loss history, to name a few, make them excellent candidates for individualized insurance assessment. In short, the need to add the franchisor as an additional layer for loss spreading is not a compelling argument for franchisor vicarious liability, especially when one considers the other arguments militating against it.

6. Loss Allocation

A correlative of loss spreading is the goal of loss allocation.²³³ It seeks to identify and to allocate torts losses "to defendants who represent suitable entry points for spreading losses and signaling to consumers that compensating such injuries are costs of the activity to be reflected in the prices charged."²³⁴ The loss allocation goal is sometimes recognized as a justification not only for vicarious liability generally,²³⁵ but also for the vicarious liability of franchisors for their franchisees' torts.²³⁶ In this regard, some commentators have

<http://www.franchise.org/resourcectr/faq/q15.asp> (2003) (providing the initial investment for franchisees) (on file with the Washington and Lee Law Review); see Schwartz, *supra* note 2, at 1756 (noting with respect to vicarious liability in general that the argument that employee-tortfeasors will be insolvent "drives the entire line of analysis," but that even employees today have more assets and that fact makes them more responsive to incentives and deterrents when they were to be on the line of liability).

232. See McHugh, *supra* note 49, at 672 (commenting that "[n]either the independent contractor nor his employer is the inherently superior risk distributor, because either party usually can, with equal facility, contract with an insurance company, which is, of course, highly effective in distributing such risks").

233. See King, *Goals of Tort Law*, *supra* note 228, at 185–86 (naming loss allocation as a goal of tort law).

234. *Id.* at 185; see also Calabresi, *supra* note 228, at 544 (stating that "the failure to show injury costs means that the prices of the goods the industry sells understate their true costs, and that too much is produced in that industry compared to those which are less accident prone").

235. See William O. Douglas, *Vicarious Liability and Administration of Risk I*, 38 YALE L.J. 584, 586 (1929) (stating that one of the most commonly accepted rationales for vicarious liability is based on the premise that "if the new cost item is added to the expense of doing business, it will be ultimately borne by the consumer of the product"); James, *supra* note 45, at 198 (providing that the real question in deciding whether a defendant should be held vicariously liable comes down to whether the defendant "may 'farm out' or 'lop off' some of his affairs and escape liabilities in connection with them"); Morris, *supra* note 2, at 341 (suggesting that vicarious liability means that compensation is paid by one who is able to distribute the loss).

236. See Note, *supra* note 10, at 156 (stating that "economic efficiency is best served if the liability is borne by the enterprise that gave rise to the loss, promoting optimum allocation of resources").

expressed concern that the absence of franchisor vicarious liability might allow a marginally profitable franchisee business to continue to operate "to the mutual benefit of the parties."²³⁷ A franchisee who does not own but leases the property and who has few assets may thus have little at risk. At the same time, in the absence of franchisor vicarious liability, a franchisor would have significantly reduced potential exposure to liability. Thus, the argument goes, limiting liability to franchisees might result in the continued operation of a business that perhaps cannot cover its social marginal costs, thereby encouraging the business principal to use franchisees who have little if anything at risk and who consequently have diminished incentives to avoid losses.²³⁸ But the answer to these concerns is, in my view, not to force the loss allocation process through franchisors, who are seldom in a position to evaluate the risks of the operations, at least when compared to the frontline presence of the franchisee. Rather, liability should remain with reasonably insured franchisees, rather than adding vicarious franchisor liability. The availability of liability insurance for franchisees, when coupled with the obvious advantages of local franchisees in assessing the risks of operation,²³⁹ militates in favor of focusing risk allocation on franchisees for their torts and the torts of their own employees. My proposal creates a framework that promotes this risk allocation profile.

A franchisor is not well positioned to redistribute the losses from tortious operations of a franchisee. Remember, truly informed loss allocation by a

237. See Sykes, *supra* note 120, at 1267 (focusing on the oil companies and service station context); see also Emerson, *supra* note 32, at 634–35 (fearing that a franchisor may wish to risk the potential insolvency of franchisees to "increase the expected profits for both franchisee and franchisor," thereby understating the true costs of production for each franchisor-franchisee enterprise, "with resultant expansion of market entrants and production levels inappropriately high"); McHugh, *supra* note 49, at 673 (noting that "[r]estricting liability to a judgment-proof party defeats the purpose of compensation because it assigns all costs to the victim," producing a misallocation of resources when a judgment-proof party does not include the cost of judgments in his decisions and does not take cost-justifiable steps to avoid accidents).

238. Sykes, *supra* note 120, at 1267–68. Sykes adds, however, that "[i]t does not follow . . . that vicarious liability is appropriate in every service station tort case." *Id.* at 1268.

239. See Douglas, *supra* note 235, at 601 (examining how parties to a transaction apportion risk). Using an illustration of a coal miner and coal trucker, Douglas says the risk-shifting capacities seem equal because both parties can utilize the insurance market. *Id.* He explains that once the coal trucker has agreed to transport the coal, he is "put on guard." *Id.* The coal hauler is the one who must worry about the truck brakes and the reliability of the driver he hires, who "holds the goad to efficient work" by its employees because it pays their salaries and may discharge them, and who consequently "stands in the more strategic position to be cognizant of the various devices available to lessen the probability of injuries to others" with respect to the operations of the coal truck. *Id.* at 601–02. The allocation also gives the trucker "more of that 'control' which an effective, efficient risk preventer needs," than the coal miner has. *Id.* at 601.

franchisor would require the franchisor not only to pass on the costs to its franchisees (and by extension to their customers), but to do so in a systematic way that accurately reflects its liability potential. The franchisor is not situated where it can assess the operational risks of injuries and nimbly recapture those costs in its revenues. Typically, the franchisor charges its franchisee a one-time front-end fee, a recurring periodic royalty based on a percentage of sales, and a periodic advertising fee often based on a percentage of sales.²⁴⁰ A franchisor may also sometimes sell materials, merchandise, and equipment, and rent property to its franchisees. It would hardly seem practical to have royalty percentages or other payments fluctuate not only from one franchisee to another, but also from day to day based on the franchisor's distant perception of the vicarious liability risks of the operations of a particular franchise.²⁴¹ Moreover, another matter is whether or to what extent franchisor controls over the underlying pricing and costs of the goods and services of the franchisees would even be possible without running afoul of federal or state antitrust laws, a question beyond the scope of this Article (and the expertise of its author).²⁴²

7. Corrective Justice

A number of torts theorists have attempted to identify a discrete goal in tort law that is sometimes referred to as the goal of achieving "corrective justice."²⁴³ This slippery concept seems to connote "a goal of using tort

240. See BOND'S FRANCHISE GUIDE 26–27 (Stephanie Woo ed., 15th ann. ed. 2004) (noting that "[r]oyalty fees represent the mechanism by which the franchisor finally recoups the costs it has incurred in developing the business"); see also BIRKELAND, *supra* note 16, at 25 (saying that "[r]oyalties are the key to successful franchising because they provide a steady stream of income to the franchisor"). See generally Lewis G. Rudnick, *Structuring the Franchise Relationship*, 412 P.L.I./COMM. L. & PRAC. 97, 104–05 (1987) (identifying sources of franchisor revenue from franchising).

241. See generally Brittain, *supra* note 206, at 624–32. Brittain finds that "[i]n effect, the franchisor is cut off from spreading to consumers the cost or risks associated with vicarious liability[,] which "amounts to a severance of the capacity to distribute losses from the franchisor and an allocation of the function to the franchisee." *Id.* Brittain adds that "[f]rom a loss-distribution perspective . . . courts should . . . hold as a matter of law that the franchisor is not liable for the franchisee's actions on principles of vicarious liability." *Id.*

242. For preliminary background, see generally GARNER, *supra* note 88, §§ 11:07–11:11, 11:23; Janet L. McDavid & Richard M. Steuer, *The Revival of Franchise Antitrust Claims*, 67 ANTITRUST L.J. 209 (1999); Suzanne E. Wachsstock & Erika L. Amarante, *Antitrust and Franchising: Conspiracies Between Franchisors and Franchisees Under Section 1*, 23 FRANCHISE L.J. 7 (2003).

243. See King, *Goals of Tort Law*, *supra* note 228, at 193–96 (surveying commentators' views of corrective justice).

liability as a vehicle for reestablishing the moral balance between the parties."²⁴⁴ Corrective justice seems inconsistent with the essentially strict liability that is imposed on a vicariously liable defendant.²⁴⁵

Some writers have attempted to finesse the irreconcilability of vicarious liability and corrective justice. Thus, one book suggests construing the tortious "doer as a composite: the-employer-acting-through-the-employee."²⁴⁶ This conceptual sleight of hand led Professor Schwartz to admonish that "insofar as a legal rule does rest on a fiction, the rule itself obviously calls for normative justification."²⁴⁷ Others have attempted to defend a corrective justice rationale for vicarious liability by pointing to the right of the vicariously liable party to seek indemnification from the tortfeasor.²⁴⁸ Again, Schwartz answers that even if a tortfeasor had the financial wherewithal to indemnify another, indemnification claims by vicariously liable defendants are exceedingly rare.²⁴⁹ In short, the notion of tort law as corrective justice, whatever its theoretical merits, would seem to militate against the imposition of vicarious liability on franchisors for franchisee torts.

8. *Deep Pocket*

Commentators have said often enough that vicarious liability is really based on a need to reach the assets of the veritable "deep pocket."²⁵⁰ Judge

244. *Id.* at 193. Professor Atiyah expresses this goal in terms of "public accountability," viewing tort liability as a mechanism for making tortfeasors "publicly accountable for their behavior." PATRICK S. ATIYAH, *THE DAMAGES LOTTERY* 169 (1997).

245. See Oliver Wendell Holmes, *Agency*, 5 HARV. L. REV. 1, 14 (1891) (stating that "common-sense is opposed to making one man pay for another man's wrong, unless he actually brought the wrong to pass according to the ordinary cannons of legal responsibility"); Schwartz, *supra* note 2, at 1750–52 (suggesting that vicarious liability is inconsistent with corrective justice moral (fault-based) underpinnings).

246. ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 186 (1995).

247. Schwartz, *supra* note 2, at 1752.

248. Schwartz attributes this argument to Richard W. Wright. *Id.* at 1753.

249. *Id.* at 1764. Employers in general may decline to bring indemnification claims because they can better achieve the objective of defending the underlying tort claim by securing cooperation of tortfeasor-employee. *Id.* Also, such claims are bound to affect the relationship not only with the subject employee-tortfeasor, but also with workforce in general. *Id.* at 1765. Perhaps the employer sensed that the employee made a genuine effort to be careful, and the employer does not want to threaten that attitude by seeking indemnification. See *id.* (describing a hypothetical truck driver who is usually attentive but causes an accident in a moment of absentmindedness).

250. The term was first used, and actually criticized by Baty, in what Fleming James called

Calabresi, who was a law professor at the time, explained that the deep pocket rationale is based on the premise "that a dollar removed from a rich man caused the rich man less pain than a dollar removed from a poor man, and that therefore, shifting losses from the poor to the rich was in itself a good thing."²⁵¹ The fallacy here is that if this redistributive impulse were the main consideration, and if one were to follow its logic very far, every prosperous company (and I guess likewise every wealthy individual)—say Microsoft and Joe Jamail²⁵²—should be held liable for the torts of anyone as long as the money lasted.²⁵³ Although the deep pocket idea has

a petulant diatribe. See THOMAS BATY, VICARIOUS LIABILITY 154 (1916) (stating that "[i]n hard fact, the reason for the employers' liability is [that] the damages are taken from a deep pocket"); James, *supra* note 45, at 170 (labeling Baty's attack a petulant "diatribe against vicarious liability"). For more recent use of the term, see, for example, Brosseit, *supra* note 135, at 854–55 (saying that "[t]he deep pocket rationale is often represented as the real reason behind vicarious liability").

251. Calabresi, *supra* note 228, at 527. Calabresi adds:

The goals of this type of system could be accomplished either through a government accident compensation program paid out of progressive taxes, or through a system of liability (such as vicarious liability) that tended to put the burden of accidents on more wealthy litigants. Proponents of a pure deep pocket system would likely see enterprise liability as a halfway house to the ultimate goal of social insurance based on progressive taxes, which would probably be the ultimate means of distributing the burden of accident costs on those who could best afford them.

Id.

252. Joe Jamail is a storied and quintessential prosperous trial attorney, who is sometimes dubbed the "Trial Lawyer of the Century." See JOE JAMAIL & MICKEY HERSKOWITZ, LAWYER: MY TRIALS AND JUBILATIONS, "Joseph D. Jamail" bio page (unnumbered) (2003). Jamail represented the plaintiff, Pennzoil, in a case against Texaco and won the largest jury verdict in history at the time in favor of one plaintiff for \$10.53 billion. See *Pennzoil v. Texaco*, 729 S.W.2d 768, 784–85 (Tex. Ct. App. 1987) (describing Pennzoil's damage award); JAMAIL & HERSKOWITZ, *supra*, at 181 (summarizing the case). The case was eventually settled for \$3.3 billion. Steve Quinn, *High Profile: Joe Jamail*, Dallas News.com, <http://www.dallasnews.com/texasliving/highprofile/stories/113003dnlivjamail.696b1.html> (Nov. 30, 2003) (on file with the Washington and Lee Law Review). Reports of the amount of Jamail's fee have differed. Compare Herbert M. Kritzer, *From Litigators of Ordinary Cases to Litigators of Extraordinary Cases: Stratification of the Plaintiffs' Bar in the Twenty-First Century*, 51 DEPAUL L. REV. 219, 221 (2001) (stating that the fee was reportedly \$300 million), and Quinn, *supra* (referring to Jamail's \$400 million "plus" fee in the case), with Harold A. Segall, *An Executive's Lesson in the Law From a Typical Business Encounter*, 23 FORDHAM URB. L.J. 257, 260 n.18 (1996) (mentioning that Jamail was said to have received a fee of \$600 million). During his legal career, Jamail won over \$13 billion in verdicts and settlements and was lead counsel in over 200 personal injury cases where recovery in each was in excess of \$1 million. JAMAIL & HERSKOWITZ, *supra*, at bio page (unnumbered).

253. The prospects of rules driven by such considerations led Calabresi to describe it as "like Robin Hood, take from the rich, by and large, to give to the poor, more or less." Calabresi, *supra* note 228, at 527. He adds:

occasionally been mentioned in the franchisor context,²⁵⁴ the rationale is equally vulnerable in this context as it is generally. If we target well-off franchisors for wealth redistribution, again, why stop with franchisors?

9. Administrative Costs

The administrative costs of subjecting franchisors to potential vicarious liability under actual or apparent agency principles are oppressive and unnecessary.²⁵⁵ As things now stand, franchisors are routinely sued along with their franchisees and their franchisees' employees for tortious injuries arising out of franchise operations.²⁵⁶ Even if a franchisor ultimately prevails on the merits of a vicarious liability claim, it has still been forced to absorb the heavy costs, resource diversions, and institutional distractions of protracted litigation—costs that may be multiplied a thousand fold in the franchise context.

My proposal would offer the courts (or Congress or state legislatures) an efficacious way to stanch these excessive and unnecessary costs.²⁵⁷ A franchisor could avoid application of vicarious liability rules based on its franchisees' and franchisees' employees' torts by taking reasonable steps to

[O]ne might . . . wonder whether it would not be fairer, and more honest, to do this bit of Robin-Hooding openly through social insurance and taxation. These systems seem more likely than a haphazard system of enterprise liability to work fairly and consistently—and make those whom the voters wants [sic] to have pay, in fact pay.

Id. at 528.

254. See Brosseit, *supra* note 135, at 854–55. Brosseit explains:

[A]dvocates of this theory would argue that many franchisees are extremely profitable and the franchisors are better able to cover the costs of accidents than are innocent victims. A franchisor typically receives profits from the actions of the franchisee over the life of the franchise through the use of exclusive dealing contracts. If the franchisor continues to profit from the consumption of franchisor-supplied products, the franchisee can reasonably be expected to shoulder at least a portion of the liability burden.

Id.

255. See Hanks, *supra* note 5, at 9 (arguing that it is "inefficient and unfair to require franchisors to regularly defend themselves at substantial costs and great distances from their central offices against claims of vicarious liability when plaintiffs have adequate remedies against local franchisees who are, after all, the parties responsible for the plaintiffs' injuries and other losses," but nevertheless proposing imposition of potential liability on franchisors as guarantors of the liability of franchisees).

256. See Laufer & Gurnick, *supra* note 32, at 26 (noting that franchisors are increasingly named in lawsuits arising from franchised businesses).

257. See Emerson, *supra* note 32, at 670 (stating that legislation may be warranted to "reduce or outright eliminate the opportunity of going after the franchisor's 'deep pocket'").

assure that its franchisees were displaying and conveying notice to customers of the franchisor's independent status and that its franchisees were covered by reasonable levels of liability insurance. Under my approach, vicarious liability against the franchisor for franchisee torts, as well as most legal and administrative expenses, would be short-circuited.

10. Fairness

Some writers have pointed to what is essentially a fairness argument for vicarious liability.²⁵⁸ Never mind that no one is sure what is meant by "fairness" for the purposes of vicarious liability²⁵⁹—or even tort law for that matter.²⁶⁰ One early article invoked vicarious liability as illustrative of the fact that the judicial notion of "[j]ustice, society's conscience, or whatever it is, conforms like the shape of the jelly fish or the color of a chameleon to the stimuli which reach it."²⁶¹

An often-cited construct for fairness was developed by George Fletcher in his paradigm of reciprocity.²⁶² According to Fletcher's analysis, "a victim has a right to recover for injuries caused by a risk greater in degree and different in order from those created by the victim and imposed on the defendant—in short, for injuries resulting from nonreciprocal risks."²⁶³ Some commentators have offered one explanation for vicarious liability that incorporates Fletcher's paradigm.²⁶⁴ Schwartz, on the other hand, says that Fletcher's reciprocity

258. See Schwartz, *supra* note 2, at 1749–54 (stating that the fairness justification rationale is based on a "deeply rooted sentiment that business cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities") (internal quotations omitted).

259. See *id.* (stating that the fairness rationale rests on ill-defined ethical considerations). In one otherwise well-reasoned opinion, the court actually seemed to meld or to equate the incentive and fairness rationales in the same sentence. See *Kerl v. Dennis Rasmussen, Inc.*, 682 N.W.2d 328, 336–37 (Wis. 2004) (stating that "[i]f a principal does not control or have the right to control the day-to-day physical conduct of the agent, then the opportunity and incentive to promote safety and the exercise of due care are not present, and imposing liability without fault becomes difficult to justify on fairness grounds").

260. See King, *Abnormally Dangerous Activities*, *supra* note 228, at 359–60 (discussing the goal of fairness in strict tort liability).

261. Feezer, *supra* note 228, at 808.

262. See George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 540–42 (1972) (describing the theory behind the paradigm of reciprocity as opposed to the paradigm of reasonableness).

263. *Id.* at 542.

264. See DOBBS, *supra* note 41, § 334, at 909 (providing one explanation of vicarious liability). Dobbs describes this rationale: "When an enterprise . . . engages in systematic or

analysis does not work for vicarious liability, or at least does not work broadly or consistently, because plaintiffs will often be subjecting defendants to reciprocal risks, thereby removing the premise—under Fletcher's paradigm—of an imbalance in risk creation necessary for strict (vicarious) liability.²⁶⁵

Other writers equate fairness with a sort of *quid pro quo*.²⁶⁶ Because the franchisor makes money (a royalty) from the continuing franchise operations, the argument would go, the franchisor should in exchange be willing to pay for the harms caused by those royalty-generating operations. However, this analysis seems flawed for a number of reasons. As Flynn explains,

[I]t does not consider a fundamental difference between a franchise relationship and an employment relationship. The franchisee is not earning a salary, with the residual benefit of all labor accruing to the franchisor. Rather, the franchisee retains all residual profits after paying a fee to the franchisor. If the critical point of this argument is that one should not undertake a risk of liability while receiving no reciprocal possibility of gain (which would be the case in an employment agreement), this is plainly not applicable to a franchise context.²⁶⁷

repeated activity . . . some risks are more or less typical or characteristic of the activity even when no negligence can be shown" and in this sense those enterprises "impose risks that are materially greater than or different from the risks that we all impose upon one another by occasional[ly]" engaging in similar type of activity. *Id.* (internal citations omitted).

265. See Schwartz, *supra* note 2, at 1751 (noting that "Fletcher's reciprocity analysis seems ambiguous in its application to vicarious liability situations, and neither of the ambiguity's resolutions seems to support the rule in its current form").

266. See Brosseit, *supra* note 135, at 855–56 (discussing fairness to consumers in the franchising context). He offers this explanation:

[T]he theories of reliance and estoppel focus on concepts of societal fairness. Those who adhere to this school of thought would argue that the true reason for imposing vicarious liability on franchisors is that franchisors should not be able to enjoy the benefit of chain-store marketing methods and national identification with their franchisees without assuming concomitant social responsibilities The theories of reliance and estoppel hold that uniform stores, signs, and management methods give the consumer the impression that they are dealing with a standardized business operation. This impression gives greater market value to the franchisor's trademark and the franchised operation.

Id.; see also Emerson, *supra* note 32, at 637 (referring to a "fundamental moral principle" that franchisors should not receive benefits from the name recognition in franchising without being required to take responsibility for assuring high quality performance of products and services associated with its name); Scott P. Sandrock, *Tort Liability of Non-Manufacturing Franchisor for Acts of Its Franchisee*, 48 U. CIN. L. REV. 699, 721 (1979) (stating that "[s]o long as the franchisor benefits from the franchise relationship, the public, whose patronage creates the franchisor's profits, is entitled to protection from the negligent acts of the franchisee").

267. Flynn, *supra* note 4, at 98–99; see also *Mann v. Prudential Real Estate Affiliates*, No. 90C5518, 1990 WL 205286, at *5 (N.D. Ill. Dec. 10, 1990) (stating that "the mere fact that a franchisor benefits from the franchisee's business is insufficient to establish an agency

Second, stripped of its fairness gloss, a quid pro quo interpretation is really little more than a risk allocation analysis²⁶⁸—the franchisor benefits financially and that benefit is the medium by which to reflect the costs of accidents engendered by the remunerative (royalty-generating) franchisee operations. But that logic leads down a nonsensical path. Consider corporate shareholders; they receive dividends from a corporation. Does fairness demand that they too pay for the corporation's torts? Or consider an attorney who buys a new computer and is compensated for legal services that are facilitated by the use of the computer: Must she pay for the torts of a Dell employee somewhere?

Putting to one side the lack of an intelligible definition of fairness, one might question a fairness rationale for franchisor vicarious liability on a more visceral level. Is it fair to reward the victim of, for instance, a judgment-proof franchised restaurant but not a victim of a judgment-proof nonfranchised small independent restaurant? And what is so "fair" about imposing liability on a franchisor that was entirely free from fault?

11. Autonomy and Freedom of Enterprise and To Contract

Although it is implicit in the economic literature that there is a "reasonably sharp distinction between transactions within firms and transactions between firms,"²⁶⁹ the modern reality is that there are "many types of transactions which profit-seeking individuals might find worthwhile in the marketplace; products and markets have sufficiently diverse characteristics so that a large number of arrangements might be profit maximizing."²⁷⁰ One thus finds hybrid models, one of which is franchising.²⁷¹ The franchisee can best run "day-to-day operations of the business"²⁷² because "he can produce the desired good (including quality) at least cost."²⁷³ Additionally, the franchisor can "monitor the quality of the good produced, as opposed to the method of production."²⁷⁴ The problem with making franchisors vicariously liable for the torts of their franchisees is that it restructures the essential nature of the parties' relationship

relationship[; w]ere benefit to the franchisor singularly sufficient to make a franchisee the franchisor's agent, every franchise relationship would be an agency relationship").

268. See *supra* Part III.B.6 (discussing loss allocation).

269. Rubin, *supra* note 13, at 223.

270. *Id.*

271. See *id.* (noting existence of hybrid models, such as franchising).

272. *Id.* at 228.

273. *Id.*

274. *Id.*

from a franchise relationship to that of an employer-employee, at least for the purposes of tort law.²⁷⁵

The impetus for the franchising business construct of marketing products and services through independent firms rather than by reliance on wholly-owned subsidiaries is commonly said to be the need for franchisors to raise capital so that they can expand more rapidly.²⁷⁶ But Professor Rubin suggests another, more dominant motivation for franchising. He contends that retaining a source of capital is not the most likely explanation because one would have to assume the unavailability of capital through the normal capital markets and to ignore the option of selling shares in the franchisor to fund growth.²⁷⁷ Rather, he explains:

[F]ranchising is usually undertaken in situations where the franchisee is physically removed from the franchisor, and thus where monitoring of the performance and behavior of the franchisee would be difficult In this situation, it pays to devise control mechanisms which give the franchisee an incentive to be efficient—to avoid shirking and exercising consumption of leisure The simplest way to motivate the franchisee is to give him a share of the profits of the franchise The most important function performed by the local franchisee is . . . managing the day-to-day operations of the business. In fact, the entire justification for franchising turns on the fact that costs of this activity quickly become large (because of control problems), so that it pays to split this function off from the large firm (the franchisor) and to transfer it to the franchisee.²⁷⁸

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. In so doing, vicarious liability undermines the autonomy and freedom of the parties to contract and to engage creatively in freedom of enterprise. In addition, it might discourage enterprises from choosing the franchise model at all²⁷⁹ and instead tip the scale in favor of company-owned-

275. Cf. Flynn, *supra* note 4, at 104 (noting that if we were to impose vicarious liability on all franchisors categorically, they "would have no choice but to adopt the role of employer").

276. Rubin, *supra* note 13, at 225.

277. See *id.* at 226 (criticizing capital market arguments, which "it is clear . . . do not explain franchising").

278. *Id.* at 226–31; see BIRKELAND, *supra* note 16, at 4–5 (stating that "[f]ranchisees control the day-to-day operation of the enterprise while the franchisor controls the trademark value," and that franchising "is an efficient solution to the organizational problems of control since there are economic incentives in place to bind both parties to the trademark").

279. See Note, *supra* note 10, at 157 (saying that a possible disadvantage of vicarious liability is that "[i]t might discourage entry into the market out of proportion to the slight additional cost, because of the specter of a single wrongful death action that could destroy a

and-operated units instead of franchised ones. This then might have the practical effect of excluding many potential entrepreneurs from becoming franchisees and realizing the benefits of business ownership.

IV. Conclusion

Franchising has undergone remarkable and accelerated growth in the last half century. Given the growth in franchising and its central role in the United States and the world economies, the lack of clarity, predictability, or analytical integrity in the law governing the vicarious liability of franchisors is distressing. Matters are exacerbated by the flood of litigation seeking to impose vicarious liability on franchisors driven not only by the amorphousness of the rules and fact-specific nature of the issues, but by the perception of the franchisor as a deep pocket as well.

A franchisor may be potentially liable for injuries arising from the operations of a franchisee under a variety of legal theories. These include not only so-called direct liability based on the franchisor's own tortious conduct and the tortious conduct of the franchisor's own immediate employees, but also vicarious liability for the tortious conduct of its franchisees and persons employed by the franchisees. This Article examined the core requirement of the existence of a legally sufficient relationship between franchisor and franchisee needed to support the imposition of vicarious liability of the franchisor for the tortious conduct of their franchisees and of the employees and agents of their franchisees. In particular, I discussed cases addressing the question of when an actual agency and an apparent agency relationship might exist between a franchisor and its franchisees.

Thereafter, I suggested an alternative approach whereby franchisors might be afforded a way of limiting the potential scope of their vicarious liability. More specifically, I proposed that application of the traditional vicarious liability principles be limited in the franchisor-franchisee context when both of the following are satisfied: First, the franchisor must have taken reasonable steps to require that notice be prominently displayed by its franchisees clearly indicating that the franchised units are owned and operated by the independent franchise entity. Second, and in addition, the franchisor must also require that its franchisees carry reasonable levels of liability insurance. If the franchisor satisfies both of these preconditions, then its vicarious liability for the torts of its franchisees and the franchisees' employees would be precluded, and the

plaintiff would be limited to seeking redress against the franchisee and the franchisee's employees for their torts. If either of the preconditions are not satisfied, the franchisor would then remain fully subject to the potential application of the rules governing vicarious liability, the outcome of which would depend on whether the plaintiff could satisfy the elements required for vicarious liability to the same extent as would otherwise be the case. Moreover, under my proposal, when the franchisor remains subject to the rules governing vicarious liability for the torts of its franchisees and franchisees' employees, I suggested that the courts strictly define those rules. Specifically, I suggested that, for actual agency, the franchisor must have control over the specific conduct or aspect of the franchise operation that caused the injury. And, for apparent agency, the reliance-justifiable-reliance requirement should include all four of its analytical components. Finally, I explained why I believe that such limitations on the vicarious liability of franchisors are justified and sensible, especially considering the unique nature of the franchise relationship. Such limitations are also consistent with the underlying policy goals of modern tort law.

