Money for Nothing: Problems with Holding Franchisors Liable for the Negligence of Franchisees

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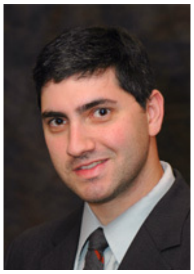

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In recent years, courts in Georgia and elsewhere have been faced with increasingly creative attempts to impose liability on franchisors for negligent acts by their franchisees. To someone who misunderstands the purposes and realities of the modern franchise model, this would seem to make sense. After all, the franchisor shares in the revenue earned by the franchisee, so why should the franchisor not share in the risk?

While there are some situations in which franchisors undoubtedly should be subjected to liability for franchisees' acts, the tests applied by courts in many jurisdictions cast too wide a net. As a result, franchisors may be subjected to potential liability for requiring a certain level or type of decor, service, or product, or for assisting or advising their franchisees in making decisions on how to operate their businesses. This makes little sense and is counterproductive, as it actually *disincentivizes* franchisors from attempting to ensure a higher quality of service, product, or experience to those patronizing or interacting with franchisees. Georgia courts' approach to potential franchisor liability in this context is more well-reasoned, but any test, if abused or applied mechanically, has the potential to result in unreasonable or inequitable results. Regardless of the specific rule, test, or standard applied, however, courts in Georgia and elsewhere should be careful to analyze the facts of the applicable relationship and render a decision in keeping with the realities of modern franchise relationships. If the relationship is truly one of franchisor and franchisee, it should be difficult to impose liability on the franchisor for the negligence of the franchisee.

I. History and Purposes of the Franchisor-Franchisee Relationship

"[A] franchise is a commercial arrangement between two businesses which authorizes the franchisee to use the franchisor's intellectual property and brand identity, marketing experience, and operational methods."[1] Stated another way, "[f]ranchising is a system for the selective distribution of goods and/or services under a brand name through outlets owned by independent businessmen, called franchisees."[2] "The franchisor provides the knowhow and brand identification, and the franchisee enjoys the right to profit and runs the risk of loss."[3] "The franchisor controls the distribution of his goods and/or services through a contract," commonly called a franchise agreement, "which regulates the activities of the franchisee, in order to achieve standardization."[4]

As one court explained, "[a] franchise relationship is a marriage of convenience."[5] The relationship benefits the franchisor by enabling it "to spread the capital cost of enlarging the market for its goods and services by transferring most of those costs to local franchisees."[6] In addition, the franchisor gains the ability "to reach new, far-flung markets without having to directly manage a vast network of individual outlets."[7] The franchisee benefits from the arrangement in that it "mitigates the risks of starting a new business by enabling [the franchisee] to capitalize on the good will and established market associated with the franchisor's trademark or trade name."[8] Moreover, "[t]he burdens of starting and operating a business are eased considerably by the franchisor, which provides quality and operational methods and standards, and may offer management training programs to the franchisee."[9]

Largely for those reasons, the popularity of the franchise model has increased significantly in recent decades in the United States.[10] Although the franchisor can realize significant benefits from the franchise model, it also presents significant challenges. Two of the most prevalent and significant challenges faced by franchisors are protecting their brand and trademark, and avoiding potential vicarious liability for the acts or omissions of franchisees. "Franchisors are in a unique position regarding potential vicarious liability, because the Lanham Act[11] places an affirmative duty upon a licensor of a registered trademark to take reasonable measures to detect and prevent misleading uses of its mark by its licensees or suffer cancellation of its federal registration."[12] Essentially, to avoid running afoul of the Lanham Act, franchisors must exercise control over their franchisees sufficient to "guarantee that third parties dealing with the franchisee will receive goods or services of the quality which they have learned to associate with the trademark."[13] As a result, a franchisor is in the difficult position of having to exercise enough control to protect its trademark and brand while not exercising so much control that the franchisor will be deemed vicariously liable for the torts of its franchisees or licensees.[14]

Georgia's state and federal courts long have recognized "the need for controls over the use of a trade name, in a franchise agreement authorizing such use."[15] Apart from being required by federal law to protect its trademark, the purpose of imposing rules and regulations on franchisees is to enable the franchisor to ensure a similar experience at all franchised locations, to maintain uniform service within all locations bearing the franchisor's brand, and to ensure continuing customer goodwill toward the franchisor's brand.[16] As the Georgia Court of Appeals has explained, courts "must be mindful of the special relationship created by [franchise] agreement[s], for a franchisor is faced with the problem of exercising sufficient control over a franchisee to protect the franchisor's national identity and professional reputation, while at the same time foregoing such a degree of control that would make it vicariously liable for the acts of the franchisee and its employees."[17]

II. Georgia Law Regarding Franchisors' Potential Liability for Acts of Franchisees

In Georgia, it is generally difficult to hold a franchisor liable for the acts of its franchisee. "It is well settled that to impose liability on a franchisor for the acts of a franchisee, a plaintiff must show that the franchisor has obligated itself to pay the franchisee's debts or that the franchisee is not a franchisee in fact but a mere agent or alter ego of the franchisor."[18] In this context, "[t]he test to determine whether an agency relationship exists is whether the contract gives, or the [franchisor] assumes, the right to control the time and manner of executing the work, as distinguished from the right merely to require results in conformity to the contract."[19] As a practical matter, that sets a high bar, as "[t]he franchisor is permitted to exercise sufficient control over a franchisee to protect the franchisor's national identity and professional reputation, while at the same time forgoing such a degree of control that would make it vicariously liable for the acts of the franchisee."[20] Moreover, Georgia courts will look to the language of the applicable franchise agreement, and where it expressly provides that the franchisee is not the agent or legal representative of the franchisor and does not have authority to act in that capacity, that contractual intent will be enforced as long as the parties have not acted to the contrary.[21]

The Georgia Court of Appeals has specifically rejected arguments that "specific and even strict requirements concerning operation of the franchise" in a franchise agreement were sufficient to create an agency relationship between franchisor and franchisee.[22] Such strict franchise agreements are permissible for the purposes of "ensuring conformance with a certain level of quality and protecting [the franchisor's] professional reputation," and do not result in an agency relationship.[23]

Thus, for example, setting "general standards to maintain the franchise and provide for evaluations to ensure compliance, and reserving the right to inspect or evaluate a franchisee's compliance with the franchisor's standards and to terminate the franchise for noncompliance is not the equivalent of retaining day-to-day supervisory control of the franchisee's business operations as a matter of law."[24] Similarly, the Georgia Court of Appeals has rejected the argument that retaining "authority to require the use of certain bookkeeping forms, to conduct monthly inspections, and to require termination of employees causing the facility to fail the inspections amount[s] to day today supervisory control over [a franchisee], for it seems clear that this authority simply serve[s] as a means of achieving a desired level of uniformity and quality within the system of [the franchisor's] franchises."[25] The same is true of "reserving the right to inspect or evaluate a franchisee's compliance with the franchisor's standards and to terminate the franchise for noncompliance"[26] or requiring franchisees to purchase from certain suppliers.[27] The fact that a franchisor responds or reacts to an incident involving negligence on the part of its franchisee also cannot be used to establish supervisory control by the franchisor of the franchisee.[28]

The Georgia Court of Appeals recently reaffirmed some of the general principles of Georgia law regarding franchisor liability. In *Kids R Kids International, Inc. v. Cope*,[29] the plaintiff sought to hold a daycare franchisor liable for injuries suffered by the plaintiff's minor child at the "Kids R Kids" branded daycare center operated by a franchisee. The trial court denied the franchisor's motion for summary judgment, but on appeal, the Court of Appeals reversed.

The franchise agreement at issue in *Cope* imposed detailed standards as to advertising, operating hours, decor (including furniture and equipment), employee training and hiring, and record retention. The agreement also gave the franchisor the right to inspect the franchisee's school for compliance with the requirements. But the agreement specifically provided that the franchisee would "assume responsibility for the day today management and operation of the [school] and supervision of personnel." The Court of Appeals held that since the franchisor had not reserved the right to control the time, manner, or method in which the franchisee's own employees "actually executed the standards required in the Franchise Agreement, there was no evidence that [the franchisee] was an actual agent of [the franchisor] for purposes of vicarious liability."[30]

Georgia law makes it even more difficult for a plaintiff to hold a franchisor liable under a theory of apparent agency. In *Cope*, the plaintiff argued that the franchisee was the franchisor's "apparent agent" because "all signage and documentation" at the franchisee's daycare center, as well as shirts worn by the franchisee's employees, bore the franchisor's name and trademarks. The plaintiff also presented evidence that there was no sign or plaque present and visible at the daycare center indicating that it was independently owned by the franchisee or by anyone other than the franchisor.

The Court of Appeals reaffirmed that under Georgia law, "merely displaying signs or a trademark may be insufficient to establish an apparent agency relationship."[31] Similarly, "a failure to post a sign stating that someone other than the franchisor owns and operates a business is insufficient, standing alone, to show apparent agency" under Georgia law.[32] Indeed, as the Court of Appeals reiterated in *Cope*:

> To establish the required elements of apparent agency, it is not enough that the plaintiff believe that an agency relationship exists. Neither is it sufficient that the agent represent his status as agent. It must be established that the principal held out the agent as its agent."[33]

The Court of Appeals held that the plaintiff's "apparent agency" argument was foreclosed by the plain language of the enrollment agreement between the franchisee and the plaintiff. Specifically, the enrollment agreement stated that the plaintiff acknowledged that the daycare center, "while a [Kids R Kids] franchise, is independently owned and operated and that neither [Kids R Kids] nor any [Kids R Kids] center other than the one whose name appears at the heading of this form is responsible for the actions or obligations of this [c]enter."[34] In light of that language, the court held that the plaintiff could not have justifiably relied on any alleged agency relationship between the franchisor and franchisee, and the court declined to reach the merits of the plaintiff's "apparent agency" claim.[35]

It is not entirely clear whether, given different facts, Georgia law would permit a franchisor to be held liable under a theory of apparent agency. *Cope* suggests as much, in that before rejecting the plaintiffs apparent agency claim, the Georgia Court of Appeals analyzed the claim as if it could be viable. In any event, however, it appears that under Georgia law, a franchisor can insulate itself from any such potential liability in most instances by requiring franchisees to provide an appropriate notice to customers and invitees to the effect that they are patronizing a franchised location.

III. The Law of Franchisor Liability for Acts of a Franchisee in Other U.S. Jurisdictions

A. The "Control Test"

Traditionally, in determining whether a franchisor could be held liable for the negligent acts of its franchisee, courts typically looked to the degree of control exercised by the franchisor over its franchisee's business.[36] Under what is sometimes dubbed the "control test," the question of "[w]hether a franchisor owes a duty of care to its franchisee's employee...turns on the extent of the franchisor's retained control over the property and the daily operation of the restaurant, respectively."[37] Generally, a duty on the part of the franchisor to the franchisee's customers, employees, or invitees would arise only when the franchisor "retain[ed] control of day-to-day operations" of the franchisee and not where the franchisor merely retained "the right to inspect the quality of the operation and control over the work to the extent necessary to implement that right."[38]

In *Hoffnagle v. McDonald's Corp.*, the plaintiff sued the franchisor of the fast food restaurant in which she worked after she was the victim of an assault and attempted kidnapping on the restaurant's premises. The plaintiff, an employee of the franchisee who worked at the restaurant, sued the franchisor, which in turn moved for and was granted summary judgment. The plaintiff appealed, contending that the terms of the applicable franchise agreement created a duty on the part of the franchisor to the franchisee's employees.

Considering the specific franchisor-franchisee relationship at issue in that case, the Supreme Court of Iowa held that the franchisor had not retained sufficient control over the day-to-day operations of the franchisee's business to render the franchisor liable for injuries to the franchisee's employees on the franchisee's premises.[39] In reaching that conclusion, the court noted that the franchisee owned the business's equipment, operated the business, held the operating licenses and permits, determined employees' wages, provided basic daily training and insurance for employees, and was responsible for hiring, firing, supervision, and discipline of employees at the restaurant. The franchisor, by contrast, retained only the authority to require the franchisee to adhere to the "McDonald's system," to adopt and use the franchisor's business manuals, and to follow "other general guidelines" outlined by the franchisor. The court concluded that the franchisor's "authority is no more than the authority to insure the uniformity and standardization of products and services offered by a franchisor's restaurant," which did "not affect the control of daily operations."[40] Accordingly, the court held, the franchisor had no duty to the franchisee's employees, and the franchisor was entitled to summary judgment.[41]

Similarly, the Supreme Court of Arkansas has recognized that a franchisor cannot be held liable for its franchisee's negligent acts absent a sufficient showing of control by the franchisor over the franchisee's business. In *Franco v. Bunyard*,[42] the plaintiff sought to sue the franchisor of a retail store that sold a pistol to an escaped state prisoner. Apparently, the store sold a firearm to a convicted kidnapper who was serving a life sentence in prison, without requiring the purchaser to present identification of any kind or to sign the required federal form. The escaped convict used the gun to rob a grocery store, and in doing so, he took and shot three hostages. In addition to suing the owner and operator of the store where the escaped prisoner bought the gun, the plaintiff also sued the franchisor. On appeal, the Supreme Court of Arkansas affirmed the grant of summary judgment to the franchisor, holding that since the franchisee "was home-owned and so identified to the public," the franchisee "reserved to itself the ownership, management, and control of the store" in the franchise agreement, and "the vital power of control remained with" the franchisee, the franchisee could not be said to be an agent of the franchisor.[43]

Some jurisdictions apply general principles of agency law without calling it the "control test" but with essentially the same results. North Carolina's Court of Appeals, for example, has held that a franchisor's liability for its franchisee's acts "depends upon the existence of an agency relationship, which is determined by the nature and extent of control and supervision retained and exercised by the franchisor over the methods or details of conducting the day-to-day operation" of the franchisee's business.[44] Ohio courts have held that to determine whether an agency relationship exists between a franchisor and its franchisee, the court "must scrutinize the relationship between persons who are franchisor-franchisee just as it would scrutinize any relationship in determining whether an agency relationship exists," and "[t]he central factor under Ohio law in determining whether an agency relationship exists is the right of control vested in the [franchisor]."[45]

Similarly, the Supreme Court of Alabama have mandated application of general *respondeat superior* law to determine whether a franchisor can be held liable for the acts of its franchisee, meaning that Alabama courts examine whether the franchisor "reserved a right of control over the manner of the [franchisee's] performance" sufficient to create an agency relationship[46] Much like Georgia's appellate courts, however, the Supreme Court of Alabama has held that retaining the "right to supervise the alleged agent to determine if that person conforms to the performance required by a contract with the asserted principal does not, itself, establish control."[47] Likewise, retaining the right to ensure that a franchisee complies with the franchise agreement and the franchisor's operations manual, and even providing training to the franchisee's employees, will not create an agency relationship between franchisor and franchisee under Alabama law, because such steps are "designed to ensure uniformity in service among franchises" and "to encourage compliance with the [franchisor's] operations manual."[48]

While the "control test" sounds similar to the rule applied in Georgia, its application can subject franchisors to greater potential liability. In one case, for example, a Missouri federal district court declined to grant summary judgment to a national restaurant franchisor on the claims of a franchisee's employee for unpaid work time.[49] The only evidence as to the relationship between the franchisor and franchisee apparently was the fact that the franchisor "approved the printing of the [franchisee's] employee handbook before [the franchisee] was allowed to have the manual printed."[50] The district court held that fact sufficient to render the franchisor's relationship with the franchisee "a disputed issue of fact."[51]

B. The "Right to Control" Test

Some courts have held that merely retaining the **right** to control the franchisee's daily operations will establish the level of control necessary to render a franchisor vicariously liable for its franchisee's negligence.[52] Under this "right to control" test, "[i]f, in practical effect, the franchise agreement goes beyond the stage of setting standards, and allocates to the franchisor the right to exercise control over the daily operations of the franchise, an agency relationship exists" between franchisor and franchisee.[53] It appears that in those courts, "[t]he degree of control giving rise to liability depends on the particular facts of each case."[54] As a practical matter, in addition to providing a much lower bar for vicarious liability, this makes it very difficult for a franchisor to obtain summary judgment.[55]

Thus, for example, in *Miller v. McDonald's Corp.*,[56] the Oregon Court of Appeals reversed the grant of summary judgment to a restaurant franchisor in a case brought by a customer injured when she bit into a sapphire inside a Big Mac sandwich purchased at a franchisee's restaurant. The franchisor, McDonald's, had entered into a detailed franchise agreement with its franchisee, 3K Restaurants ("3K"), providing specific standards and requirements for operation of the franchised restaurant but also providing that 3K was not an agent of McDonald's. The Oregon Court of Appeals rejected McDonald's argument that 3K was not its agent:

> [W]e believe that a jury could find that defendant retained sufficient control over 3K's daily operations that an actual agency relationship existed. The Agreement did not simply set standards that 3K had to meet. Rather, it required 3K to use the precise methods that defendant established, both in the Agreement and in the detailed manuals that the Agreement incorporated. Those methods included the ways in which 3K was to handle and prepare food. Defendant enforced the use of those methods by regularly sending inspectors and by its retained power to cancel the Agreement. That evidence would support a finding that defendant had the right to control the way in which 3K performed at least food handling and preparation.[57]

The Oregon Court of Appeals' decision in *Miller* demonstrates the perverseness of the "right to control" test. In *Miller*, McDonald's essentially was subjected to potential liability for the negligence of its franchisee solely because McDonald's imposed standards on its franchisee for food handling and preparation and reserved the right to terminate the franchise for noncompliance with those requirements. There was no evidence that McDonald's knew of some deficiency in those functions by the franchisee or that there was actually something deficient about the standards imposed by McDonald's. Rather, McDonald's was held liable simply because it imposed standards designed specifically to maintain a level of quality and safety in the food served by its franchisees.

In other words, McDonald's could have avoided liability in *Miller* or any other case like it by simply declining to impose any standards whatsoever regarding food handling and preparation. Of course, that could endanger the health of the general public, since franchisees might not have the benefit of a national restaurant franchisor's knowledge and experience regarding food handling and preparation, along with related safety and health issues (or the franchisee simply might not care). Thus, the perverse and unsatisfying result of the "right to control" test is often that a conscientious franchisor who actually imposes standards designed to maintain the quality of its franchisees' products and the safety of its franchisees' customers is subjected to a higher degree of liability than a franchisor that imposes no such controls or standards.

C. The Modern Majority Rule: The "Instrumentality" Test

The all-or-nothing nature of the control test is out of touch with the realities of modern franchise relationships and, thus, can result in absurd results. Depending on the industry and the specific markets in which a particular franchise is operated, the applicable franchise agreement may give a franchisor far greater "control" in certain areas of the business and no control whatsoever in all or most others. Recognizing the limitations and unfairness involved in the control test, an increasing number of courts have adopted a different analysis: the "instrumentality" test.

Under the instrumentality test, "a franchisor may be held vicariously liable for the tortious conduct of its franchisee only if the franchisor has control or a right of control over the daily operation of the **specific aspect of the franchisee's business** that is alleged to have caused the harm."[58] Stated another way, unless the franchisor imposes mandatory policies on the franchisee with respect to the specific "instrumentality" that allegedly caused the harm at issue, there is no potential liability on the part of the franchisor.[59] Thus, for example, where the manager of a franchised fast food restaurant physically assaulted another of the franchisee's employees, whether the franchisor could be held liable would depend on whether the franchisor controlled the essential terms of the manager's employment (i.e., the right to hire, fire, and discipline him).[60]

State or federal courts in at least 16 states and the U.S. Circuit Court of Appeals for the Fourth Circuit have adopted the instrumentality test for deciding cases involving potential franchisor liability for franchisees' acts, over traditional agency principles or the control or "right to control" tests.[61] Like most courts following the control test, courts adopting the instrumentality test embrace "the clear trend in the case law in [most] jurisdictions ... that the quality and operational standards and inspection rights contained in a franchise agreement do not establish a franchisor's control or right of control over the franchisee sufficient to ground a claim for vicarious liability."[62]

As a practical matter, however, the instrumentality test generally is much more favorable to franchisors than the control test. For example, courts applying the instrumentality test generally hold that "the standardized provisions commonly included in franchise agreements specifying uniform quality, marketing, and operational requirements and a right of inspection do not establish a franchisor's control or right to control the daily operations of the franchisee sufficient to give rise to vicarious liability for all purposes or as a general matter."[63] Similarly, courts applying the instrumentality test have held that retaining the right to enforce standards, the right to terminate the franchise agreement for failure to meet standards, and the right to require franchisees' employees to undergo specific training will not render a franchisor vicariously liable for the negligence of the franchisee or its employees.[64] And "the mere making of suggestions and recommendations" to the franchisee does not constitute a sufficient exercise of control by the franchisor to create an agency relationship under the instrumentality test.[65] Nor will requiring payment of a franchise fee, controlling the locations of franchises, providing a training manual, setting business hours of franchised stores, retaining access to each franchised store's electronic point-of-sale system, overseeing operations such as construction, development, marketing, and advertising, and imposing other "uniformity requirements and inspection rights" to the franchised stores and premises result in liability for the franchisor.[66] These are "precisely the types of controls that a franchisor may legitimately exercise over its franchisee without incurring vicarious liability."[67]

In *Allen v. Choice Hotels Int'l, Inc.*,[68] decided under South Carolina law, the Fourth Circuit Court of Appeals applied the instrumentality test to affirm the grant of summary judgment to a hotel franchisor. *Allen* concerned a fire at a Comfort Inn and Suites-branded hotel in which six guests were killed and twelve others were injured. The plaintiffs sought to hold the hotel franchisor liable for the fire for failing to require the franchisee to retrofit the hotel with sprinklers. The franchisor's rules and regulations required the franchised hotel to have life safety systems, including smoke and fire detection, fire extinguishing equipment, emergency exits, and emergency lighting that met or exceeded applicable law or regulations. The franchisor's rules and regulations also recommended installation of an emergency power generator and sprinkler system. But the franchisor did not participate in selection of fire or life safety equipment actually installed at the franchised hotel, specifically including any decision made by the franchisee regarding installation of fire sprinklers.

Considering the evidence, the Fourth Circuit rejected the plaintiffs' contention that the franchisor exercised sufficient control over the hotel's life safety systems to render the franchisor vicariously liable. Rather, the court held:

> [T]he [franchisor's] Rules and Regulations simply ensure[d] uniformity at all Comfort Inn franchise locations. At best, taken together, the Franchise Agreement and Rules and Regulations show that [the franchisee] operated and controlled the Comfort Inn under general guidelines intended to foster consistency throughout the Choice system. Therefore, Appellants have failed to establish that [the franchisor] owed a duty to Comfort Inn guests under this theory.[69]

The Fourth Circuit rejected the plaintiffs' argument that the franchisor's acts of requiring the franchisee to install fire safety systems and making recommendations to the franchisee amounted to a voluntary undertaking to control or regulate the hotel's life safety systems.[70] "Simply providing a list of suggested—but not required—[safety] items does not support [a] contention that [the] franchisor retained or assumed control of the security of its franchisees."[71] Similarly, the court held that "requiring renovations to the hotel and accepting and forwarding hotel-guest complaints to the franchisee does not indicate that [the franchisor] voluntarily undertook to regulate safety systems or make repairs to the hotel."[72]

Not all courts have interpreted the instrumentality test as favorably to franchisors. Massachusetts' Supreme Court, for example, has held that the concept of an "instrumentality" must be "understood broadly, as the particular practice of the franchisee that led to the plaintiff's injury."[73] And in some jurisdictions, the degree of control exercised by the franchisor over the franchisee's operations is *always* deemed to be a question of fact.[74] Depending on how broadly the concepts of "control" and "instrumentality" are defined, the instrumentality test can lead to at least as great a chance for liability on the part of a franchisor for the negligence of its franchisees.

In *Wise v. Kentucky Fried Chicken Corp.,*[75] for example, a New

Hampshire federal district court held that a restaurant franchisor could be held liable in connection with injuries suffered by a franchisee's employee while using a deep fryer at the franchisee's restaurant. The franchise agreement in that case contained a "sophisticated system for selecting, approving, testing, recommending, and maintaining quality control over certain equipment" and also provided that the franchisor would "inform franchisees of proven methods of quality control." The franchisee also was required to follow the procedures set out in a manual provided by the franchisor. Since "the instrumentality alleged to have caused the injury ... [was] purchased with the approval, if not at the direction, of" the franchisor, the district court held that there was evidence from which a jury could find the franchisor liable for the plaintiffs injury.[76]

Similarly, in *Lawson v. Schmitt Boulder Hill, Inc.*,[77] the Illinois Court of Appeals reversed the trial court's grant of a franchisor's motion to dismiss in a case brought by a franchisee's employee arising from an incident in the franchisee's parking lot. The plaintiff in that case apparently was abducted, assaulted, and robbed as she tried to walk into the restaurant after arriving for work one morning. She subsequently sued McDonald's Corporation, alleging that the franchisor's negligence caused the incident. On appeal, the court held that because the franchisor "mandated compliance with [specific] security procedures" and standards regarding parking lot lighting by the franchisee, the franchisor had voluntarily undertaken a duty of care toward the franchisee's employees.[78] Although the court did not specifically say that it was applying the instrumentality test, the only discussion of "control" concerned security procedures and lighting in the restaurant's parking lot, so, as a practical matter, the court followed the instrumentality test.

D. Apparent Agency

Some courts permit the imposition of liability against a franchisor for its franchisee's acts under a theory of apparent agency. Such courts generally base their reasoning on the idea that uniformity between franchised stores, signs, and methods of operation give the impression to customers that they are dealing with a standardized business operation.[79] Stated another way, the franchise model "relies upon a public perception of a national system of restaurants [or stores] with common products and common standards of quality."[80] The franchisor is said to benefit from this impression through an increase in value of its trademark and franchised operations.[81] Moreover, some commentators characterize franchise agreements as "typically requir[ing] franchisees to join in the franchisor's efforts to fool the customer" by "maintain[ing] the illusion that the business consists of uniform, wholly integrated outlets when, at least according to law, the 'chain' actually consists of separate, independent businesses."[82] Thus, the argument goes, "franchisors should not enjoy the benefits of chain-store marketing methods and national identification with their franchisees without assuming concomitant social responsibilities."[83]

The Florida Supreme Court, for example, has held that "[f]ranchisors may well enter into an agency relationship with a franchisee if, by contract or action or representation, the franchisor has directly or apparently participated in some substantial way in directing or managing acts of the franchisee."[84] One Florida federal district court held recently that a franchisor could be subject to tort liability under a theory of apparent agency "if the franchisor ... make[s] a representation that goes beyond the basic franchise relationship by indicating that the franchisor was in substantial control of the business."[85] The Alaska Supreme Court has held apparent authority to be a viable theory of franchisor liability.[86] In that court's view, simply "acquiesce[ing] in a franchisee's use of a corporate logo or a name incorporating a trade name" may create apparent authority in the franchisee on behalf of the franchisor.[87]

Likewise, Hawaii's Intermediate Court of Appeals has held that evidence that a franchisor exercised "actual control" over a franchisee and "manifestations of control" that are apparent to others may be sufficient to create an issue of fact for a claim of actual or apparent agency against a franchisor.[88] And according to Hawaii's federal district court, "a franchisor may also be liable for the tortious acts of the franchisee if an apparent agency relationship exists" through the "franchisor represent[ing] to consumers that a franchisee is the agent of the franchisor causing a consumer to justifiably rely upon the apparent agency."[89]

Generally, those courts that have authorized the potential liability of a franchisor under a theory of apparent agency have held that whether such a relationship exists is a question for the jury.[90] However, if the sole basis for alleged agency is interpretation of the franchise agreement, the issue may be decided by the court as a question of law.[91]

Apart from the paternalistic nature of the rationale relied upon by courts entertaining "apparent authority" claims against franchisors—i.e., that consumers essentially are too naive or too stupid to tell a franchised store from a company-owned store—such a claim is antithetical to the very concept of franchising. If a franchisor is going to be subjected to potential liability for the actions of those employed at a franchised location anyway, there is no reason for a franchisor to permit someone else to benefit from the use of the franchisor's brand or mark. As such, other courts have rejected this argument, or at least have imposed a very high standard of proof on the plaintiff asserting it. The Alabama Supreme Court, for example, rejected the argument that a franchisee was the apparent agent of its franchisor where there was no specific evidence that the franchisor authorized the franchisee's employee to hold himself out as the franchisor's agent.[92] To the contrary, the court found compelling in that case language in the franchise agreement specifically prohibiting the franchisee from acting as the franchisor's agent or binding the franchisor for any purpose.[93]

IV. Comparing Georgia Law on Franchisor Liability to the Test Followed in Other Jurisdictions

In considering potential franchisor liability for acts of franchisees, Georgia has neither adopted nor precisely followed the "control" test, the "right of control" test, or the "instrumentality" test. While the principles espoused by Georgia's appellate courts in such cases are quite similar to those quoted by courts in other jurisdictions following one of the other three tests, Georgia courts have been far more favorable to franchisors than courts in many other jurisdictions. This is exhibited, for example, in the Georgia Court of Appeals' willingness to rely in large part on language contained in a franchise agreement regarding whether the franchisee is the "agent" of the franchisor.[94]

Ultimately, it is arguable that no one approach to deciding franchisor liability is necessarily "correct." As one federal district court recently observed when faced with these issues:

> In the end ... [both] the traditional control test and instrumentality test are largely intellectually bankrupt. The courts probably should have bright-line rules: either all franchisors should he vicariously liable or none should. Either rule is defensible, and would produce certainty to the franchise industry and to the insurance industry that insures the participants. The tests that most jurisdictions are employing, however, are so malleable and manipulable that they create confusion, litigation, and uncertainty, and, worse, any result from the tests looks result oriented, either pro-plaintiff or pro-industry, thus under-mining the integrity of the court process. In the end, it would be best to just pick a rule for franchisors, and let indemnification clauses and/or insurance determine who will pay any judgment. In any case, the franchisors can largely avoid liability and attorney's fees with these devices, by insisting that the franchisees secure insurance policies with the franchisor as an additional insured or through hold-harmless previsions.[95]

While both the control test and the instrumentality test make sense in theory, both tests can produce unpredictable and unreliable results. The rules applied by Georgia's appellate courts seem to make more sense in the context of modern franchise relationships. As outlined above, a well-run franchise will benefit both franchisor and franchisee. Of course, the franchisor benefits by expanding the reach of its brand and reputation, as well as collecting franchise fees or royalties. Franchisees may actually realize an even greater benefit, however, both financially and in a less tangible sense, since franchises allow local ownership and operation of what would otherwise be "national" businesses. Rather than having to compete with McDonald's, franchising allows an individual to open and operate his own McDonald's restaurant. The public benefits, too, by being able to patronize and purchase from brands they know and have come to trust.

The only real way for a franchisor to ensure that trust continues to be well-founded and to ensure that its franchised locations or operations are being conducted properly is through a properly crafted and enforced franchise agreement. A successful franchise arrangement depends on the franchisor's ability to impose detailed requirements and standards on franchisees in dealing with customers and the general public, as well as the right to enforce them. Otherwise, not only is the franchisor's brand or mark and its associated goodwill likely to be damaged, but the public also loses the ability to depend on a particular brand or mark's quality and uniformity of products and/or services offered. By deeming franchisors potentially liable for imposing detailed requirements on their franchisees' operations, courts actually limit the ability of franchisors to ensure that the general public will receive better, safer, and higher-quality products and services from franchisees.

Furthermore, any hard-and-fast rule—whether considering the general degree of control of the franchisee's operations or focusing on a particular "instrumentality"— that would impose liability on a franchisor for purported negligence in attempting to ensure a uniform product or experience completely misses the point. Certainly there are situations in which a **requirement** imposed by a franchisor should result in potential liability—such as if a franchisor actually <u>required</u> franchisees to violate local life safety codes or to use a product known to be dangerous. But deeming a franchisor liable for <u>suggesting</u> or <u>authorizing</u> the use of such things, much less for imposing innocuous, though pervasive, requirements regarding the appearance, level of service, and accoutrements at a franchised location, does not benefit anyone but attorneys who get paid to litigate the lawsuits that follow.

However pervasive the purported "control" of the franchisee's operations, products, services, or appearance, courts should remember and consider the nature and purpose of the franchise relationship, which belies the mechanical imposition of a set "rule" to determine when or whether a franchisor should be held liable for its franchisee's negligence. Rather, each such case should be decided on its own peculiar facts, while keeping in mind the realities of modern franchise relationships and agreements, as well as the degree to which all parties involved benefit from the arrangement.

End Notes

[1] *Kerl v. Dennis Rasmussen, Inc.*, 682 N.W.2d 328, 337 (Wisc. 2004).

[2] *Anderson v. Denny's Inc.*, 987 F. Supp. 2d 1113, 1141 (D.N.M. Nov. 13, 2013), quoting *Murphy v. Holiday Inns, Inc.*, 219 S.E.2d 874, 877 (Va. 1975) (citing R. Rosenberg, Profits From Franchising 41 (1969)).

[3] *Id.* (internal quotes omitted).

[4] *Id.*

[5] *Kerl*, 682 N.W.2d at 337, citing 1 W. Michael Garner, Franchise Distribution Law and Practice. §§ 1:3-1:4 (2003).

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Kerl*, 682 N.W.2d at 337, citing Garner, supra. §§ 1:8-1:9.

[11] 15 U.S.C. § 1501. et seq.

[12] *Id.*, quoting *Rainey v. Langen*, 998 A.2d 342, 348 (Me. 2010) (quoting *Dawn Donut Co. v. Hart's Food Stores, Inc.*, 267 F.2d 358, 366 (2d Cir. 1959)).

[13] *Anderson*, 987 F. Supp 2d at 1141, citing *Greil v. Travelodge Int'l Inc.*, 541 N.E.2d 1288, 1292 (Ill. App. Ct. 1989).

[14] *Id.* at 1141-42. See also *People v. JTH Tax, Inc.*, 212 Cal. App. 4th 1219, 2013 Cal. App. LEXIS 37 (Cal. Ct. App. 2013).

[15] *McGuire v. Radisson Hotels Int'l*, 209 Ga. App. 740, 742 (1) (1993) (physical precedent); *Buchanan v. Canada Dry Corp.*, 138 Ga. App. 588, 591 (1976), citing *Denison Mattress Factory v. Spring-Air Co.*, 308 F.2d 403, 409 (5th Cir. 1962); *Dawn Donut Co. v. Hart's Food Stores, Inc.*, 267 F.2d 358 (2nd Cir. 1959); *E. I. DuPont de Nemours & Co. v. Celanese Corp. of Am.*, 167 F.2d 484 (U.S. Ct. Oust. & Pat. App. 1948); *Morse-Starrett Prods. Co. v. Steccone*, 86 F. Supp. 796 (N.D. Cal. 1949)

[16] *Allen v. Greenville Hotel Partners, Inc.*, 409 F. Supp. 2d 672, 677 (D.S.C. 2006), aff'd. *Allen v. Choice Hotels Int'l*, 2008 U.S. App. LEXIS 9461 (4th Cir. May 1, 2008); *Hayman v. Ramada Inn, Inc.*, 357 S.E.2d 394, 397 (N.C. Ct. App. 1987).

[17] *Kids R Kids Int'l, Inc. v. Cope*, 2015 Ga. App. LEXIS 80, *4 (Mar. 4, 2015), quoting *Pizza K, Inc. v. Santagata*, 249 Ga. App. 36, 37 (2001).

[18] *Ellison v. Burger King Corp.*, 294 Ga. App. 814, 820-821 (4) (2008); *Summit Auto. Group, LLC, Clark Kia Motors Amer., Inc.*, 298 Ga. App. 875, 882-83 (4)(2009).

[19] *Summit Auto. Group*, 298 Ga. App. at 883 (4) (internal citations omitted). See also *Ellison*, 294 Ga. App. at 821 (4).

[20] *Summit Auto Group*, 298 Ga. App. at 883 (4).

[21] *Id.*

[22] See *Pizza K, Inc. v. Santagata*, 249 Ga. App 36, 38 (2001).

[23] *Id.*

[24] *Summit Auto Group*, 298 Ga. App. at 883 (4) (internal citations omitted), quoting *Santagata*, 249 Ga. App. 36, 39 (2001).

[25] *Id.* at 38-39.

[26] *Santagata*, 249 Ga. App. at 39; *Schlotzsky's, Inc. v. Hyde*, 245 Ga. App. 888, 890 (2000).

[27] *Santagata*, 249 Ga. App. at 39.

[28] *Hyde*, 245 Ga. App. at 890.

[29] 2015 Ga. App. LEXIS 80 (Mar. 4, 2015).

[30] *Id.* at *5.

[31] *Id.* at *8.

[32] *Id.* at *8-9.

[33] *Id.* at *9, citing *Butkus v. Putting Greens Int'l Corp.*, 222 Ga. App. 661, 663 (1996); *Fortune v. Principal Fin. Group, Inc.*, 219 Ga.

App. 367, 370 (1995); *Watson v. Howard Johnson Franchise Sys.*, 216 Ga. App. 237, 238 (1995). See also *Richmond County Hosp. Auth. v. Brown,* 257 Ga. 507, 507-08 (1987), citing RESTATEMENT, AGENCY, § 267.

[34] *Cope*, 2015 Ga. App. LEXIS 80 at *7-8 (brackets in original).

[35] *Id.* at *8.

[36] See, e.g. *Hoffnagle v. McDonald's Corp.*, 522 N.W.2d 808, 813 (Iowa 1994); *Little v. Howard Johnson Co.*, 455 N.W.2d390, 394 (Mich. Ct. App. 1990); *Franco v. Bunyard*, 547 S.W.2d 91 (Ark. 1977); *Mobil Oil Corp. v. Bransford*, 648 So. 2d 119, 120 (Fla. 1995); *Ottensmeyer v. Baskin,* 625 P.2d 1069, 1071 (Haw. Ct. App. 1981); *Taylor v. Checkrite, Ltd.*, 627 F. Supp. 415, 416-17 (S.D. Ohio 1986); *Myers v. Garfield & Johnson Enters., Inc.*, 679 F. Supp. 2d 598, 61M2 (E.D. Pa. 2010)

[37] *Hoffnagle*, 522 N.W.2d at 813

[38] *Id.*

[39] *Id.* at 814-15.

[40] *Id.* at 814.

[41] *Id.*

[42] 547 S.W.2d 91 (Ark. 1977).

[43] *Id.* at 93.

[44] *Hayman v. Ramada Inn, Inc.*, 357 S.E.2d 394, 397 (N.C. Ct. App. 1987). See also *Miller v. Piedmont Steam Co.*, 528 S.E.2d 923, 926 (N.C. Ct. App. 2000) ("A franchisor is vicariously liable for the tortious acts of its franchisee when an agency relationship exists and the acts are committed within the scope of the agent's authority.").

[45] *Barrett-O'Neill v. LALO, LLC*, 2014 U.S. Dist. LEXIS 109830, *7-8 (S.D. Ohio Aug. 8, 2014), quoting *Taylor v. Checkrite, Ltd.*, 627 F. Supp. 415, 416-17 (S.D. Ohio 1986).

[46] *Kennedy v. Western Sizzlin Corp.*, 857 So. 2d 71, 77 (Ala. 2003); *Carlton v. Ala. Dairy Queen, Inc.*, 529 So. 2d 921, 924 (Ala. 1988).

[47] *Kennedy*, 857 So. 2d at IT, see also *Carlton*, 529 So. 2d at 923.

[48] *Kennedy*, 857 So. 2d at 77.

[49] *Fast v. Applebee's Inti, Inc.*, 502 F. Supp. 2d 996, 1004 (W.D. Mo. 2007).

[50] *Id.*

[51] *Id.*

[52] See, e.g., *Drexel v. Union Prescription Ctrs., Inc.*, 582 F.2d 781, 785-90 (3rd Cir. 1978).' *Anderson v. Denny's Inc.*, 987 F. Supp. 2d 1113, 1142 (D.N.M. Nov. 13, 2013) (internal quotations and citations omitted), citing *Ciup v. Chevron U.S.A., Inc.*, 928 P.2d 263, 267 (N.M. 1996); *Miller v. McDonald's Corp.*, 945 P.2d 1107 (Ore. Ct. App. 1997); *Butler v. McDonald's Corp.*, 110 F. Supp. 2d 62, 66-68 (D.R.I. 2000); *Rainey v. Langen*, 998 A.2d 342, 348-49 (Me. 2010).

[53] *Viado v. Domino's Pizza, LLC*, 217 P.3d 199, 202 (Ore. Ct. App. 2009).

[54] *Anderson*, 987 F. Supp. 2d at 1142

[55] See, e.g., *Anderson*, 987 F. Supp. 2d 1158-60.

[56] 945 P.2d 1107 (Ore. Ct. App. 1997).

[57] *Id.* at 1111.

[58] *Kerl v. Rasmussen, Inc.*, 682 N.W.2d 328, 341 (Wis. 2004) (emphasis supplied).

[59] *Helmchen v. White Hen Pantry, Inc.*, 685 N.E.2d 180 (Ind. Ct. App. 1997).

[60] *Gray v. McDonald's USA, LLC*, 874 F. Supp. 2d 743 (W.D. Tenn. May 30, 2012)

[61] See, e.g. *Papastathis v. Beall*, 723 P.2d 97, 100 (Ariz. 1986); *Patterson v. Domino's Pizza, LLC*, 333 P.3d 723 (Cal. 2014); *Bartholomew v. Burger King Corp.*, 2014 U.S. Dist. LEXIS 51158, *9 (D. Haw. Apr. 14, 2014); *Ketterling v. Burger King Corp.,* 272 P.3d 527, 533 (Idaho 2012); *Helmchen*, 685 N.E.2d 180 (Ind. Ct. App. 1997); *In re Motor Fuel Temp. Sales Prac. Lit.*, 2012 U.S. Dist. LEXIS 60879 (D. Kan. Apr. 30, 2012); *Papa John's Int'l, Inc. v. McCoy*, 244 S.W.3d 44, 47 (Ky. 2008); *Depianti v. Jan-Pro Franchising Int'l, Inc.*, 990 N.E.2d 1054, 1064 (Mass. 2013); *Allen v. Choice Hotels Int'l*, 942 So. 2d 817, 825-27 (Miss. Ct. App. 2006); *Wise v. Kentucky Fried Chicken*

Corp., 555 F Supp. 991, 995 (D.N.H. 1983); *Capriglione v. Radisson Hotels Int'l, Inc.*, 2011 U.S. Dist. LEXIS 115145, *6-8 (D.N.J. Oct. 5, 2011); *Hong Wu v. Dunkin' Donuts, Inc.*, 105 F. Supp. 2d 83, 87-88 (E.D.N.Y. 2000); *Martinez v. Higher Powered Pizza, Inc.*, 43 A.D.3d 670, 671 (N.Y. Ct. App. 2007); *Bass v. Gopal, Inc.*, 680 S.E.2d 917, 922-23 (S.C. Ct. App. 2009), citing *Allen v. Greenville Hotel Partners, Inc.*, 409 F. Supp. 2d 672, 676-78 (D.S.C. 2006); *Gray v. McDonald's USA, LLC*, 874 F. Supp. 2d743 (W.D. Tenn. May 30, 2012); *Plunkett v. Crossroads of Lynchburg, Inc.*, 2015 U.S. Dist. LEXIS 1409 (W.D. Va. Jan. 7, 2015); Kerl, 682 N.W.2d at 341; *Allen v. Choice Hotels, Int'l, Inc.*, 276 Fed. Appx. 339, 342 (4th Cir. 2008). See also 62B Am. Jur. 2d, *Private Franchise Contracts* §298 (2011).

[62] *Id.* at 338. See also *Allen v. Greenville Hotel Partners, Inc.*, 409 F. Supp. 2d 672, 677 (D.S.C. 2006).

[63] *Kerl*, 682 N.W.2d at 341.

[64] See, e.g., *In re Motor Fuel Temp. Sales Prac. Lit.*, 2012 U.S. Dist. LEXIS 60879, *67-68 (D. Kan. Apr. 30, 2012); *Thompson v. Jiffy Lube Int'l Inc.*, 2006 U.S. Dist. LEXIS 39113, *42 (D. Kan. June 13, 2006).

[65] See, e.g., *Thompson v. Jiffy Lube Int'l, Inc.*, 2006 U.S. Dist. LEXIS 39113, *41 (D. Kan. June 13, 2006); *Miles v. Century21 Real Estate LLC*, 2007 U.S. Dist. LEXIS 2334, *12 (E.D. Ark. Jan. 11, 2007); *Conrad v. Waffle House, Inc.*, 351 S.W.3d 813, 821 (Mo. Ct. App. 2011).

[66] *In re Motor Fuel Temp. Sales*, 2012 U.S. Dist. LEXIS 60879 at *68-69.

[67] *Id.*

[68] 276 Fed. Appx. 339 (4th Cir. 2008).

[69] *Id.* at 343 (l) (internal citations omitted).

[70] *Id.* at 344 (3), citing *Hong Wu*, 105 F. Supp. 2d at 93-94.

[71] *Id.*, quoting *Hong Wu*, 105 F. Supp. 2d at 93-94 (internal brackets and punctuation omitted).

[72] *Id.*

[73] *Depianti*, 990 N.E.2d at 1064, n.11.

[74] *Helmchen*, 685 N.E.2d at 181 (internal quotations and citations omitted).

[75] 555 F. Supp. 991, 995-96 (D.N.H. 1983).

[76] *Id.* at 995.

[77] 924 N.E.2d 503, 509 (Ill. Ct. App. 2010).

[78] *Id.* at 509-10.

[79] 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, 630 (Spring 1992).

[80] *Bartholomew v. Burger King Corp.*, 15 F. Supp. 3d 1043, 1050 (D. Haw. 2014).

[81] *Id.*

[82] *Id.*

[83] *Id.* at 630-31 (internal quotation and brackets omitted); Charles R. Britt, "Note: Agency—Apparent Authority and Agency by Estoppel: Emerging Theories of Oil Company Liability for Torts of Service Station Operators," 50 N.C. L. Rev. 647, 653 (1972).

[84] *Mobil Oil Corp. v. Bransford*, 648 So. 2d 119, 120 (Fla. 1995).

[85] *Miller v. Thrifty Rent-A-Car Sys., Inc.*, 637 F. Supp. 2d 1029, 1039 (M.D. Fla. 2009) (internal citations and quotations omitted).

[86] *Delta Junction v. Mack Trucks, Inc.*, 670 P.2d 1128, 1130 (Alaska 1983).

[87] *Id.*

[88] See *Ottensmeyer v. Baskin*, 625 P.2d 1069, 1071 (Haw. Ct. App. 1981).

[89] *Bartholomew v. Burger King Corp.*, 2014 U.S. Dist. LEXIS 51158, *12-13 (D. Haw. Apr. 14, 2014), citing *Restatement (Second) of Agency* § 267 (1958); *Cho Mark Oriental Food, Ltd. v. K&KInt'l*, 836 P.2d 1057, 1062 (Haw. 1992).

[90] *Cain v. Shell Oil Co.*, 994 F. Supp. 2d 1251, *2 (N.D. Fla. Jan. 10, 2014), citing *Villazon v. Prudential Health Care Plan, Inc.*, 843 So. 2d 842, 853 (Fla. 2003), *Banco Espirito Santo*

Inti, Ltd. v. BDO Int'l, B.V., 979 So. 2d 1030, 1032 (Fla. Ct. App. 2008); *Delta Junction*, 670 P.2d at 1130.

[91] *Cain*, 994 F. Supp. 2d 1251, *2.

[92] *Kennedy v. Western Sizzlin Corp.*, 857 So. 2d 71, 77-78 (Ala. 2003).

[93] *Id.* at 78.

[94] See pp. 3-4, supra.

[95] *Anderson*, 987 F. Supp. 2d 1113, 1159- 60 (D.N.M. Nov. 13, 2013).