FRANCHISORS' LIABILITY WHEN FRANCHISEES ARE APPARENT AGENTS: AN EMPIRICAL AND POLICY ANALYSIS OF "COMMON KNOWLEDGE" ABOUT FRANCHISING

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I. Introduction ........................................... 610
II. Franchisor Vicarious Liability ............................... 614
   A. Franchise Growth and Regulation ......................... 614
   B. The Apparent Authority Doctrine in the Franchising Context ..................... 617
      1. Direct Liability and Actual Agency Compared .................................. 617
      2. Apparent Authority .................................. 624
   C. Justification for Franchisor Liability ................... 629
      1. Third Party Reliance ................................ 630
      2. Spreading Risk ................................... 634
      3. Loss Prevention ................................... 636
   D. Apparent Authority Cases ................................. 638
III. The "Common Knowledge" Doctrine ......................... 645
IV. "Common Knowledge" Disproved .............................. 648
   A. Purpose and Methodology of Surveys ...................... 648
   B. The Surveys' Results ................................ 651
      1. Knowledge About Franchising .......................... 651
         a. Business Characteristics ......................... 651
         b. Large Business Chains: Franchised or Centralized? .................. 652
         c. Understanding What Franchises Are ............. 656
      2. Knowledge and Beliefs About the Vicarious Liability of Franchisors .......... 658

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I. INTRODUCTION

Starting with an Iowa case over fifty years ago, courts have referred to “a matter of common knowledge” about franchising or comparable licensing relationships. When reviewing the use of the franchisor’s logo or other signs by the franchisee, courts have stated, “it is a matter of common knowledge that these trademark signs are displayed throughout the country by independent dealers.” The ultimate...
mate conclusion appears to be that the public has come to understand, for instance, that the General Motors Corporation ("GMC") is distinct from various Chevrolet, Buick, or other GMC dealerships,\(^3\) that Texa-

eral Motors Corp, 392 So. 2d 40, 44 (Fla. Dist. Ct. App. 1981) (described infra note 3); Pitts v. Ivester, 320 S.E.2d 226, 228 (Ga. Ct. App. 1984) (involving a gas station franchisee who threatened plaintiffs with a pistol and fired two shots, but there was no apparent authority on the part of franchisor, Exxon Co., U.S.A. and citing Manis v. Gulf Oil Co., 185 S.E.2d 589 (Ga. Ct. App. 1971)); Ragsdale v. Harris, 293 S.E.2d 475, 477 (Ga. Ct. App. 1982) (citing Manis in upholding summary judgment for defendant, where dog at franchised service station attacked plaintiff, who sued franchisor Amoco Oil Co. under the doctrine of apparent authority); Manis, 185 S.E.2d at 591 (Ga. Ct. App. 1971) (citing Coe, and using language very similar to that of Reynolds); Crittendon v. State Oil Co., 222 N.E.2d 561, 564 (Ill. App. Ct. 1966) (holding that signs at service station warranted the belief that "State Oil" products were sold there but the assumption that the station operator was an agent in repairing and driving the plaintiff's car); Washington v. Courtesy Motor Sales, Inc., 199 N.E.2d 263, 265 (Ill. App. Ct. 1964) (finding common knowledge that "Authorized Ford Dealer" is just a trademark sign); Levine v. Standard Oil Co., 163 S. 2d 750, 751 (Miss. 1964) (noting that franchisor signs and uniform emblems were no indication of agency, although the decision rested upon interpretation of actual, not apparent, agency); Elkins v. Husky Oil Co., 455 P.2d 329, 332 (Mont. 1969) (citing Coe extensively); Westerdale v. Kaiser-Frazer Corp., 80 A.2d 91, 92, 94 (N.J. 1951) (concluding that it is not common knowledge "that a manufacturer of automobiles supervises and controls its dealers and the method of marketing its product"; indeed, the court implicitly found common knowledge about dealer independence—a lack of apparent authority—that signs prominently displaying the manufacturer's name, as well as products, do not hold out the service agreement dealer as the manufacturer's agent "but rather is of the type that is commonplace among all dealers who sell products which have a trade name carrying substantial goodwill"); Shaver v. Bell, 397 P.2d 723, 727-28 (N.M. 1964) (using language similar to that of Reynolds, and also quoting Coe); Shaffer v. Maier, No. CS900573, 1991 WL 256493, at *3 (Ohio Ct. App. Dec. 4, 1991) (upholding the "common knowledge" doctrine vis-a-vis franchised sales of aviation fuel); Coe, 377 P.2d at 818 (Okla. 1963) (using language very similar to that of Reynolds); see also Planning Comm'n of City of Falls Church v. Berman, 180 S.E.2d 670, 673 (Va. 1971) (in a zoning case involving a franchised Red Barn restaurant, noting "[i]t is a matter of common knowledge that numerous national franchise chains operating...recognize and identify with certain products, food or services"). But see Beck v. Arthur Murray, Inc., 54 Cal. Rptr. 328, 331-32 (Dist. Ct. App. 1966). In Beck, the court noted that the "common knowledge" cases may speak only to the particular types of businesses found in those cases.

Just because it is 'common knowledge' that certain businesses are independently owned, this is not a matter of 'common knowledge' for all businesses. On the contrary, it is equally 'common knowledge' that certain nationwide businesses are not independently owned but are owned by a single organization which operates by chains or branches.

Id. Citing, inter alia, this reasoning, the U.S. Court of Appeals for the Third Circuit found that the common knowledge rule was not applicable in a case involving a franchised drugstore. Drexel v. Union Prescription Centers, Inc., 582 F.2d 781, 796 n.23 (3d Cir. 1978).

3. See, e.g., Ortega v. General Motors Corp, 392 So. 2d 40, 44 (Fla. Dist. Ct. App. 1981) (stating, "[t]he fact that [an independent truck dealership] displayed signs advertising that it sold GMC trucks, parts, and accessories, does not lead to the inference that...deal-
co, Inc. generally is not bound by the acts of "Texaco" gas stations,\(^4\) that the Howard Johnson Company lodging and restaurant chain is neither the owner nor the operator of the local Howard Johnson's.\(^5\)

Thus, some judges come to find no reasonable reliance on an alleged apparent agency between franchisor and franchisee. But are these judges properly taking judicial notice of what they surmise to be common knowledge? Empirical evidence indicates that they are not. Indeed, what may be "common knowledge" to a judge is, in fact, \textit{terra incognita} to the public.\(^6\)

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4. \textit{See, e.g.,} Sherman v. Texas Co., 165 N.E.2d 916, 917 (Mass. 1960). In Sherman, the Supreme Judicial Court of Massachusetts affirmed a directed verdict in favor of Texaco. At an independent service station leased from Texaco, the plaintiff had been injured when a station attendant started a hydraulic lift and caused the plaintiff to fall. Texaco signs simply constituted a representation that Texaco gasoline was sold at the station, and the plaintiff's erroneous, additional assumptions about Texaco were insufficient to raise a jury question, according to the court; \textit{see also} Ragsdale v. Harris, 293 S.E.2d 475 (Ga. Ct. App. 1982) (holding that a limited right of inspection of products to determine adherence to quality and trademark authorizations, and the proper display of trademarks, did not indicate that Amoco Oil controlled the operation of the service station). As with Chevron, U.S.A., Inc. v. Lesch, 570 A.2d 840 (Md. 1990), courts in gas station cases may distinguish between selling petroleum products (perhaps apparent authority to act on behalf of the franchisor) and furnishing repair services (no apparent agency).

5. \textit{See, e.g.,} Trust Co. of Chicago v. Sutherland Hotel Co., 58 N.E.2d 860 (Ill. 1945) stating:

\begin{quote}
[The] mere similarity in the corporate name of defendant to the name under which the hotel was operated does not prove that defendant was operating the hotel. It is common knowledge that the names by which hotels are known to the public are often those of an individual who has no interest in the management of the business or the ownership of the building.
\end{quote}

\textit{Id.} at 863.

The senior Vice President and General Counsel for the Howard Johnson Company actually concedes that franchise customers may "conclude that they are dealing not with an agent but with the principal since franchised locations are often indistinct from company-operated locations." William Cureto, \textit{Living With Franchisees and Trying to Live Without Them}, Remarks at the ABA's Fifth Annual Forum on Franchising 4 (Nov. 4, 1982). Actually, even an admission that the franchisee reasonably appears to be \textit{only} an agent, not the principal, can create liability for the supposed principal—the franchisor. Flanagan v. Beagles, Bus. Franchise Guide CCH ¶ 9265, at 2 (Tenn. Ct. App., Oct. 6, 1988) (reversing the trial court's directed verdict for the defendant manufacturer, whose president in a letter conceded to its dealer's customer—the plaintiff—that the manufacturer's dealers are "[a]ll too often . . . considered as agents of" the manufacturer).

6. On occasion, judges recognize that they are ill-equipped to estimate the public's knowledge, or lack thereof. In Triangle Publications, Inc. v. Rohrlich, 167 F.2d 969, 976 (2d Cir. 1948), Judge Jerome Frank dissented from a decision that the defendant's use of the term "Miss Seventeen" would confuse purchasers into thinking that its girdles were associated
Several surveys undertaken specifically for this article\(^7\) indicate that the general populace tends to be ignorant of the basic structure of franchising. Without a clear understanding of the basics—who owns and operates the franchise\(^8\)—lay people can hardly be expected to grasp the oft-complex, legal concepts of independent contracting and agency that spring from the franchisor-franchisee relationship. Answers to the surveys actually evince a deep misunderstanding as to which parties are held accountable for harm caused by franchisees. Moreover, even when people understand the basic law (franchisors' limited or no liability for acts of their non-agent franchisees),\(^9\) that knowledge in no way guarantees acceptance of the law as being good public policy.

If, as the surveys seem to indicate, there is no "common knowledge," what are the implications for (1) the case law on apparent authority/agency by estoppel,\(^10\) (2) franchisor and franchisee conduct

with the plaintiff's "Seventeen" magazine:

[A]s neither the trial judge nor any member of this court is (or resembles) a teenage girl or the mother or sister of such a girl, our judicial notice apparatus will not work well unless we feed it with information directly obtained from 'teenagers' or from their female relatives accustomed to shop for them. Competently to inform ourselves, we should have a staff of investigators like those supplied to administrative agencies. As we have no such staff, I have questioned some adolescent girls and their mothers and sisters, persons I have chosen at random. I have been told uniformly by my questionees that no one could reasonably believe that any relation existed between plaintiff's magazine and defendant's girdles.

*Id.* In Rohrlich, the contrast between the judges' experience and that of the group whose knowledge mattered was stark. For less obvious differences, however, do judges fully appreciate that they are far from representative of the general populace? It has long been noted that judges may unconsciously endow the mythical, ordinary person—the general public—with more analytical skills and more reasoned insights than are really present; in essence, the court creates the average person in its own image, and it may view with skepticism any claim that this person is actually less careful and less intelligent than his creator. See, e.g., Edward S. Rogers, *The Unwary Purchaser: A Study in the Psychology of Trade Mark Infringement*, 8 Mich. L. Rev. 613, 617 (1910).

7. See infra notes 171-85 and accompanying text for a description of the surveys' methodology; see also Surveys, infra app. [Complete copies of the survey responses are on file at the Business Law & Legal Studies Department, College of Business Administration, University of Florida, Gainesville, Florida].

8. The owners and operators are independent, that is, legally separate entities from the franchisor itself. See infra note 15. Most people do not know that basic fact. See infra notes 225-31 and accompanying text.

9. Commentators note that a key reason for franchising is to distance the franchisor from legal culpability for its franchisees' actions. See, e.g., Scott P. Sandrock, *Tort Liability of a Non-Manufacturing Franchisor for Acts of Its Franchisee*, 48 U. Cin. L. Rev. 699, 699 (1979) (somewhat overstating the franchisor's protection by calling it, without qualification, "the present unaccountability of the franchisor for the acts of its franchisees").

10. For a discussion of the tort theory (agency by estoppel) and the contractual theory
directed toward present or potential customers of the franchise, and (3) public policy as to risk distribution? Before one examines these matters, however, it is necessary to consider certain general principles of franchising and agency law.

II. FRANCHISOR VICARIOUS LIABILITY

A. Franchise Growth and Regulation

Much has been written on the history, "practical" problems, and economics of franchising.11 The private franchise12 continues to be

(apparent authority), see RESTATEMENT (SECOND) OF AGENCY § 8 cmt. d (1958). In essence, the theories have been treated by courts and commentators alike as interchangeable. See infra note 48 and accompanying text. The general concepts are outlined infra notes 45-51 and accompanying text.


12. The United States Department of Commerce defines franchising as "a form of marketing or distribution in which a parent company customarily grants an individual or a company the right, or privilege, to do business in a prescribed manner over a certain period of time in a specified place." U.S. DEPT’ OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 778 (110th ed. 1990) [hereinafter BUREAU OF THE CENSUS]. Another definition of franchising is:

... [A] system for the selective distribution of goods and/or services under a brand name through outlets owned by independent businessmen, called “franchisees.” Although the franchisor supplies the franchisee with know-how and brand identification on a continuing basis, the franchisee enjoys the right to profit and runs the risk of loss. The franchisor controls the distribution of his goods and/or services through a contract which regulates the activities of the franchisee, in order to achieve standardization.

ROBERT ROSENBERG & MADELINE BEDELL, PROFITS FROM FRANCHISING 41 (1969). For a comprehensive treatment of the franchising concept, as defined by the commentators, see Robert W. Emerson, Franchising and the Collective Rights of Franchisees, 43 VAND. L. REV.
a business phenomenon, comprising an ever-increasing portion of total retail sales and services.\textsuperscript{13} Indeed, economic growth may have "outstripped the growth of a theory of law for dealing with the franchisor-franchisee relationship."\textsuperscript{14}

Agency\textsuperscript{15} may be one such "outstripped" area of the law. Although the Federal Trade Commission ("FTC") promulgated a franchising disclosure rule,\textsuperscript{16} most states have enacted general "business opportunities" or franchise legislation,\textsuperscript{17} and all states have one or

\begin{footnotesize}
\begin{enumerate}
\item See FT. LAUDERDALE SUN-SENTINEL, Sept. 18, 1990, at D1. Domestic franchises were expected to account for $716.4 billion in retail sales in 1990—a third of the nation’s total. The number of franchises in the United States was expected to grow to 533,000 establishments in 1990, an increase of more than 90,000 since 1980, despite a rash of gasoline franchise terminations. \textit{Id.} Even more impressive is the growth in franchising sales volume, over 114% during the 1980s. \textit{Id.}; U.S. DEP’T OF COMMERCE, FRANCHISING IN THE ECONOMY 1986-88, 3-4 (1988); see also Jeffrey A. Tannenbaum, Franchisees Weigh Joint Action to Gain Protections, \textit{WALL ST. J.}, Sept. 28, 1992, at B2 (franchising sales volume rose 13.1% in 1991 and was expected to increase 14.7% more in 1991). In recent years, a new and significant upsurge in franchising has developed. Ripley Hotch & Meg Whittemore, \textit{Franchising: Find That Niche}, 75 \textit{NATION’S BUS.} 35 (Feb. 1987).
\item See infra note 32 and accompanying text. In contrast, "an independent contractor is one who contracts to do something for another, but is not controlled by the other or subject to the other’s right to control with respect to his physical conduct in performing the contract-ed service." Southern Pac. Transp. Co. v. Continental Shippers Ass’n, 485 F. Supp. 1313, 1316 (N.D. Mo. 1980); accord \textit{BLACK’S LAW DICTIONARY} 770 (6th ed. 1990) (stating, an independent contractor agrees "to do a piece of work according to his own methods and is subject to his employer’s control only as to end product or final result”); also citing \textit{RESTATEMENT (SECOND) OF AGENCY} § 2 (1958); see also supra note 8 (describing the independent contracting nature of franchising).
\item Pursuant to its rulemaking authority under 15 U.S.C. §§ 41-58 (1976), the FTC promulgated the rule on December 21, 1978. 16 C.F.R. § 436.1-3 (1991) (effective date Oct. 21, 1979). This regulation is generally referred to as the FTC Rule.
\end{enumerate}
\end{footnotesize}
more franchising statutes geared toward specific industries. These


18. As of May 1992, thirty-seven states, the District of Columbia, and the United States
laws are not directed toward the common law issues of agency and vicarious liability. Franchisor responsibility for the acts of franchisees thus remains a problem resolved by venerable principles of common law agency re-set to fit the franchising mold.

B. The Apparent Authority Doctrine in the Franchising Context

1. Direct Liability and Actual Agency Compared

“Direct” liability of franchisors, whether via franchisor negligence, breach of warranty, strict liability, fraud, or some


19. They usually concern disclosures to prospective franchisees. For instance, the FTC Rule requires information on: franchisor trademarks and service marks, business experience, criminal and civil liabilities, bankruptcies and audited balance sheets, franchisee payments, financing, training and suppliers, site selection, franchise operation, termination, modification, repurchase and assignment, total number of franchises and company-owned outlets, and the number of outlets terminated, not renewed, or reacquired. 16 C.F.R. §§ 436.1-.3 (1991).

Some states mandate registration by franchisors. Some even prohibit or restrict franchisor actions or franchisor-imposed contract terms concerning: franchise advertising, the financial condition of prospective franchisors, repurchases of franchises and/or franchisee property, minimum time limits for notices prior to franchise termination or non-renewal, minimum initial duration of franchise term, discriminatory treatment among franchisees, rebates from suppliers to franchisees, franchisee covenants not to compete, franchisee payments, franchisee exclusive territories, franchise transfers by the franchisee, franchisee managerial personnel, purchase requirements imposed on franchisees, and generally, the performance standards required of franchisees. See generally ZEIDMAN ET AL., supra note 14; Pittsogoff, supra note 14; Zeidman, supra note 14. However, other than a New York statute declaring privity of contract between certain types of franchisors and their franchisees' customers, legislation simply has not set standards for establishing vicarious liability. See N.Y. GEN. BUS. LAW § 394-d (McKinney 1984) (governing instruction in dancing or other "physical or social skills"); see also Dinberg v. Arthur Murray, Inc., 331 N.Y.S.2d 65 (App. Div. 1972) (permitting a defunct franchisee's customer to recover from the franchisor under the statute); Totten v. Saionz, 327 N.Y.S.2d 55 (App. Div. 1971) (upholding and applying the statute against a franchisor whose franchisee breached its dancing lesson contracts with the plaintiff); Weil v. Arthur Murray, Inc., 324 N.Y.S.2d 381 (Civ. Ct. 1971) (broadly interpreting a related statute, N.Y. GEN. BUS. LAW § 394-b, as a consumer protection measure; and regardless of whether that statute was in effect for this case—the dance lesson contracts predated the statute—finding that Arthur Murray, Inc. sufficiently controlled the franchisee as to be liable for the unused value of dance lessons that the plaintiff purchased from the franchisee).

20. See, e.g., Cook v. Branick Mfg., Inc., 735 F.2d 1442 (11th Cir. 1984) (holding that the franchisor met its duty to warn of unsafe equipment and unsafe practices by informing
the franchisee’s supervisory personnel; judgment against injured plaintiff, an employee of the franchisee, who alleged that he was never warned); Wise v. Kentucky Fried Chicken Corp., 555 F. Supp. 991 (D.N.H. 1983) (a franchisee’s employee was injured by a defective pressure cooker and thereupon sued the franchisor because the franchisor (i) required the franchisee to use that particular type of cooker and (ii) failed to warn about certain defects called to its attention by the cooker’s manufacturer; the franchisor’s summary judgment motion was denied); Cullen v. BMW of N. Am., Inc., 531 F. Supp. 555 (E.D.N.Y.), rev’d on other grounds, 691 F.2d 1097 (2d Cir. 1982), and cert. denied, 460 U.S. 1070 (1983) (a BMW franchisee received from a customer, Cullen, an $18,000 advance on a car purchase, but the franchisee never delivered the car or returned the money; the franchisor was held liable to Cullen because it was aware of the franchisee’s insolvency and unscrupulous business practices yet failed to take adequate measures to terminate the franchise and protect customers); Steagall v. Civic Center Site Dev. Co., C.A. No. 74-3, § H (E.D. La. 1977) (verdict holding franchisor Howard Johnson Company liable for failing to take adequate measures to safeguard guests from a murderer); Papastathis v. Beall, 723 F.2d 97 (Ariz. Ct. App. 1986) (affirming a judgment that the franchisor was liable for its negligent inspection, selection, and recommendation of soft drink dispenser racks; a can fell off of a rack at a franchisee’s store and caused serious head injuries, ultimately perhaps lethal, to the plaintiff’s decedent); Cohen v. Southland Corp., 203 Cal. Rptr. 572 (App. Dep’t Super. Ct. 1984) (customer of a franchised 7-Eleven store was injured during an armed robbery; summary judgment for franchisor Southland was overruled, with case remanded for trial on whether Southland had taken reasonable precautions or otherwise met its duty to keep store patrons reasonably safe from would-be robbers); Coty v. United States Slicing Mach. Co., 373 N.E.2d 1371 (Ill. App. Ct. 1978) (in violation of federal law and the franchise agreement, the franchisee permitted a minor to operate a meat slicing machine; there was no franchisor control over the franchisee’s day-to-day operations, so no franchisor liability to the injured minor); O’Boyle v. Avis Rent-A-Car System, Inc., 435 N.Y.S.2d 296 (App. Div. 1981) (Avis held to be negligent in overseeing its franchisee’s operations; an unlicensed employee of a service station/Avis franchisee had taken an Avis car and caused a fatal accident). Foreign nations also may permit direct negligence actions against franchisors.

FRANCHISING COMMITTEE SECTION OF ANTITRUST LAW (ABA), SURVEY OF FOREIGN LAWS AND REGULATIONS AFFECTING INTERNATIONAL FRANCHISING 41-42 (Canada), 45-46 (France), 25 (Hong Kong), 37-38 (New Zealand), 41 (Philippines) (but case law is undeveloped), 27 (Republic of Korea), 22 (Singapore), 26 (Sweden), 27 (Switzerland part) (Philip F. Zeidman 2d. ed. 1990) [hereinafter FOREIGN SURVEY].

21. See, e.g., Kosters v. Seven-Up Co., 595 F.2d 347, 353 (6th Cir. 1979) (holding that a franchisor can be found liable for breach of warranty when the franchisor sells a defective product; the consumer relied on the trade name, which gave the intended impression that the franchisor was responsible for and stood behind the product); Harris v. Aluminum Co. of Am., 550 P. Supp. 1024 (W.D. Va. 1982) (for eye loss arising from a defective twist-off cap, franchisor Coca-Cola Company could be liable for breach of implied warranties of merchantability and fitness, especially because of Coca-Cola’s extensive advertising campaign); Hayward v. Holiday Inns, Inc., 459 F. Supp. 634 (E.D. Va. 1978) (holding that plaintiff injured at a franchised motel could proceed with the claim that the franchisor impliedly and expressly warranted the safety of the motel through its national advertising campaign); Fraser v. U-Need-A-Cab, Ltd., 43 O.R.2d 389 (Ont. Ct. App. 1983), aff’d, 50 O.R.2d 281 (Ontario 1985) (customer telephoned the franchisor’s central dispatch office to order a taxi cab; the fact that the franchisor dispatched a franchisee owned, not a franchisor-owned cab, did not absolve it from breach of warranty or direct negligence claims arising from the plaintiffs’ injuries suffered when leaving the cab); Thomas P. McGarry, Note, The Franchisor as “Seller” Under Strict Liability in Tort—Kosters v. Seven-Up Co., 28 DePaul L. Rev. 1105 (1979)
other theory of recovery, is based on the franchisor's own acts or omissions.\textsuperscript{24} Often, claims of direct liability may be combined with vicarious liability theories of recovery based on an alleged agency between franchisor and franchisee. The franchisor of a retail chain may suffer an onslaught of such cases, perhaps for a variety of reasons, or perhaps because of a recurring problem with just one aspect of the chain's format and operations.\textsuperscript{25}

(General discussion of Kosters case and vicarious liability concepts related thereto). For foreign franchising law in this area, see FOREIGN SURVEY, supra note 20, at 43-44 (Australia), 41-42 (Canada), 19 (Denmark) (no rulings yet), 27 (Mexico), 41 (Philippines) (no rulings yet).

22. See, e.g., Carter v. Joseph Bancroft & Sons Co., 360 F. Supp. 1103 (E.D. Pa. 1973) (holding a trademark licensor liable in strict liability for a garment that caught fire and severely injured the plaintiff; the licensor had no connection to the manufacture or sale of the garment other than licensing the use of the trademark); Torres v. Goodyear Tire & Rubber Co., 786 P.2d 939 (Ariz. 1990) (tire manufacturer licensor can be held liable for defects in a licensee designed and manufactured tire, inasmuch as it not only granted a trademark license but also took a significant role in setting specifications and approving marketing plans); Kasel v. Remington Arms Co., 101 Cal. Rptr. 314, 323 (Ct. App. 1972) (stating that "as long as the franchisor or trademark licensor can be said to be a link in the marketing enterprise which places a defective product in the chain of commerce, there is no reason in logic for refusing to apply strict liability in tort to such an entity"); City of Hartford v. Associated Constr. Co., 384 A.2d 390, 396-97 (Conn. Super. Ct. 1978) (finding that when a trademarked product fails and causes property damage, the injured party—an ultimate user or consumer of that product—can recover in strict liability from the trademark owner, however distant, who via a franchise agreement licensed that product's composition and use); Connelly v. Uniroyal, Inc., 389 N.E.2d 155, 163 (Ill. App. Ct. 1979), cert. denied and appeal dismissed, 444 U.S. 1060 (1980) (denying a summary judgment for the licensor defendant in a product liability action, the court found irrelevant the fact that the licensor was not a link in the chain of distribution; the licensor's "participation in the profits reaped by placing a defective product in the stream of commerce presents the same public policy reasons for the applicability of strict liability which supported the imposition of such liability on wholesalers, retailers and lessors" (citation omitted)); LOUIS R. FRUMER & MELVIN I. FRIEDMAN, PRODUCTS LIABILITY § 3.03[4][b][viii], at 3-453 to 3-458 (1991); McGarry, supra note 21; Note, Tort Liability of Trademark Licensors, 55 IOWA L. REV. 693, 706 (1970).

23. Spartan Pools v. Royal, 386 So. 2d 421 (Ala. 1980) (franchisor held liable for misrepresentations in one of its sales brochures read by the plaintiffs; the brochure stated that each franchisee had experience in designing and installing pools, when, in fact, the franchisee from whom the plaintiffs purchased their pool had no such experience). For an instance of franchisor liability for its agent's fraud, see Taco Bell of Cal. v. Zappone, 324 So. 2d 121 (Fla. Dist. Ct. App. 1975) (misrepresentations to a prospective franchisee; the agent's actions were of such a nature that third parties were entitled to rely upon them as being within his apparent authority).

24. See generally Ronald V. Sinesio, Annotation, Primary Liability of Private Chain Franchisor for Injury or Death Caused by Franchise Premises or Equipment, 59 A.L.R. 4th 1142 (1988).

25. Domino's Pizza, Inc., whose outlets are nearly 70% franchised, COMPANIES OFFERING FRANCHISES, The Franchise Handbook, Summer 1990, at 105, has recently had to defend over one hundred simultaneously pending lawsuits involving twenty fatalities and numerous injuries;
Vicarious liability, reputedly the most common tort theory of recovery against franchisors, arises from actual agency or apparent agency. While the franchise relationship ordinarily is not considered to be an agency, there have been exceptions to this legal principle, both in labor and employment law, as well as tort law. In one frequently franchised industry—gasoline stations—there are numerous examples of courts finding or permitting juries to find an agency relationship, hence vicarious liability for the would-be franchisor.

This article focuses on apparent agency. As for an actual agency, suffice it to say that it is a consensual, fiduciary relationship in which the agent acts on the principal's behalf, subject to the principal's control. Because a franchise arrangement effectively may provide

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27. The public policy behind imposing liability on principals for their agents' acts is discussed in ELVIN R. LATTY & GEORGE T. FRAMPTON, BASIC BUSINESS ASSOCIATIONS 77-92 (1963). Absent a franchisor/franchisee agency, a franchisor may nonetheless be liable to injured third parties if the damages arise from work of an inherently dangerous or unlawful nature performed by the franchisee. Coe v. Esau, 377 P.2d 815, 819 (Okla. 1963).

28. Sandrock, supra note 9, at 702-03. See, e.g., McMullan v. Georgia Girl Fashions, Inc., 348 S.E.2d 748, 750 (Ga. Ct. App. 1986) (holding that the franchisor was not the principal for a franchised store that allegedly falsely imprisoned the plaintiff customer; noting other cases where the same court also found no actual agency based on a franchise relationship); accord Frey v. PepsiCo, Inc., 382 S.E.2d 648, 650 (Ga. Ct. App. 1989).

29. Emerson, supra note 12, at 1541 n.178.


32. RESTATEMENT (SECOND) OF AGENCY § 1 (1958). The agent has the power to affect the legal relations of the principal for acts that the agent does within the scope of the agency. Id. § 8. The actual "authority to do an act can be created by written or spoken words or other conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal's account." Id. § 26. Manifestations of the principal are made to the agent, not a third party, as is the case with apparent authority. Id. § 8 cmt. a. See infra notes 45-57 and accompanying text.
the franchisor with control over a franchise’s day-to-day operations, including even the most minute details, courts occasionally find a franchise to constitute an agency relationship, or permit juries to make that determination. Still, in most cases the level of franchisor

33. John F. Stuart, Comment, A Franchisor’s Liability for the Torts of His Franchisees, 5 U.S.F. L. Rev. 118, 127-28 (1970); see also Emerson, supra note 12, at 1546 n.203 (citing numerous authors who contend that franchisees may be likened to hired, tightly controlled managers rather than independent contractors).

34. See, e.g., Taylor v. Checkrite, Ltd., 627 F. Supp. 415 (S.D. Ohio 1986) (franchisee check collection business held to be an agent of the franchisor; the person that the franchisee wrongfully listed on a bad check bulletin could sue the franchisor); Beck v. Arthur Murray, Inc., 54 Cal. Rptr. 328 (Ct. App. 1986) (agency found by control franchisor retained over franchisee’s licensees including provisions that franchisee report and transmit payment information to franchisor); Duluth Herald and News Tribune v. Plymouth Optical Co., 176 N.W.2d 552 (Minn. 1970) (agency found by franchisee’s use of the franchisor’s name in executing contract with plaintiff as well as paying with checks imprinted with name of franchisor).

35. Courts denied summary judgment for the franchisor in each of these cases: Hilton v. Holiday Inns, Inc., Bus. Franchise Guide (CCH) ¶ 9663 (S.D.N.Y. Aug. 1, 1990) (the plaintiff, a guest at a franchised Holiday Inn, was injured when the franchisee’s employee tried to drive him to the airport and the car malfunctioned, accelerated out of control, and crashed; Holiday Inns exercised some control over its franchisees’ operations, including scrutiny of vehicles used by the franchisee); Coleman v. Chen, 712 F. Supp. 117, 124 (S.D. Ohio 1988) (in a guest’s “slip and fall” action, Holiday Inns’ periodic inspections and evaluations, its franchising agreements, and its rules of operation all indicated sufficient control that actual agency was a question of fact for the jury); Drummond v. Hilton Hotel Corp., 501 F. Supp. 29, 31 (E.D. Pa. 1980) (in a customer’s “slip and fall” action against Hilton, a factual question of agency was presented by Hilton’s controls over the franchisee, including a requirement that the name presented to hotel guests be simply “Hilton” while it had to disclose the franchisee’s independence from Hilton to suppliers and other persons besides guests); de Carvalho v. Holiday Inns, Inc., Bus. Franchise Guide ¶ 7559 (D.D.C. 1980) (an injured guest provided evidence sufficient to demonstrate an agency relationship; Holiday Inns’ control over the franchisee included, inter alia, the requirement that the franchisee build and maintain the facility according to franchisor specifications, observe the detailed, franchisor-prescribed rules of operation, permit regular inspections to insure compliance, have its manager, housekeeper, restaurant supervisor, and other key employees trained by Holiday Inns, file quarterly and other detailed reports with the franchisor, and not transfer a controlling interest in the hotel without obtaining Holiday Inns’ approval); Hayward v. Holiday Inns, Inc., 459 F. Supp. 634 (E.D. Va. 1978) (the court refused to follow Murphy, described infra note 36, and admitted into evidence documents, including Holiday Inn’s Rules of Operation, which indicated that the franchisor controlled a franchisee’s everyday activities); Ahl v. Martin, 440 N.Y.S.2d 748 (App. Div. 1981) (a critical factual issue remained—the franchisor’s control or right to control the manner in which the tortfeasor franchisee’s store was operated).

Courts overturned summary judgment for the franchisor in each of these cases: Billops v. Magness Constr. Co., 391 A.2d 196 (Del. 1978) (issue of actual agency to be resolved at trial); Greil v. Travelodge Int’l, Inc., 541 N.E.2d 1288, 1293 (Ill. App. Ct. 1989) (the motel franchisor frequently exercised its right to inspect the franchisee’s operations and called safety matters to the attention of the franchisee; thus, this franchisor could be liable under actual or apparent agency to a guest injured while jumping out of a hotel window in an attempt to escape a robber); Jordan v. Robert Half Personnel Agencies of Kansas City, Inc., 615 S.W.2d 574, 582 (Mo. Ct. App. 1981) (the franchisor’s control over the franchisee’s location, office

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control over franchisees does not rise to that of an actual agency, be it for hotels, fast food restaurants, convenience stores, gasoline stations, real estate firms, or other franchised chains, but layout, equipment, office decor, printed material, and use of service marks, as well as receiving monthly reports and inspecting local office records, established sufficient evidence of a possible, actual agency; see also Elder v. Sears, Roebuck & Co., 516 So. 2d 231 (Miss. 1987) (reinstating a jury verdict that Sears was actually the principal, hence vicariously liable, for a catalogue store operator’s negligence in maintaining the store and causing plaintiff’s slip and fall—agency was a question of fact for the jury). The concept that excessive controls over the franchisee can create an agency relationship is discussed in Sandrock, supra note 9, at 703-04.

36. See, e.g., Schear v. Motel Management Corp. of Am., 487 A.2d 1240 (Md. Ct. Spec. App. 1985) (court upheld directed verdict for franchisor Holiday Inns, one of several defendants in hotel guest’s negligence action; guest had brought to his hotel room a large cache of jewelry, furs and clothing which he intended to sell during his stay, and he told a potential buyer the merchandise, gave him the hotel room number, and left the room unattended; the guest’s belongings were then stolen); Murphy v. Holiday Inns, Inc., 219 S.E.2d 874, 877-78 (Va. 1975) (plaintiff sued the franchisor for personal injuries suffered from a fall at the franchised motel, and the court held that a franchise contract does not insulate the contracting parties from an agency relationship; but no agency was established by a franchising arrangement whose purpose was “to achieve system-wide standardization of business identity, uniformity of commercial service, and optimum public good will, all for the benefit of both contracting parties,” inasmuch as day-to-day motel operations and “[a]ll such powers and other management controls and responsibilities customarily exercised by an owner and operator of an on-going business were retained by” the franchisee). Id.

37. See, e.g., McLaughlin v. Chicken Delight, Inc., 321 A.2d 456 (Conn. 1973) (franchisee’s employee accidentally killed the plaintiff’s decedent while delivering chicken in the franchisee-owned automobile; summary judgment for the defendant-franchisor—no actual agency present); Cobb v. Popeye’s, Inc., 373 S.E.2d 233 (Ga. Ct. App. 1988) (franchisor that merely provided supplies and consultation services to franchisee not liable for injuries sustained by plaintiff working outside franchised restaurant; there was no franchisor control over restaurant operations).

38. See, e.g., Wickham v. Southland Corp., 213 Cal. Rptr. 825 (Cal. Ct. App. 1985) (upholding a jury verdict that a 7-Eleven franchisee was not an agent of franchisor Southland, and thus Southland was not liable for an automobile accident arising after the franchisee sold alcoholic beverages to a minor; the franchisee had many elements of control, such as hiring and firing personnel, setting wages, and supervising employees, and the conflicting inferences and issues of fact were best left to the jury); Yassin v. Certified Grocers of Ill., 502 N.E.2d 315, 328 (Ill. Ct. App. 1986) (finding that Certified had, “at most,” a franchise relationship with the store where plaintiff was injured; since the relationship only concerned methods of payment and delivery of goods and had nothing to do with safety, and because Certified’s only remedy for violation of the rules was to terminate the agreement and withdraw the grocer’s right to use its name, there was no evidence of an agency).

39. See, e.g., Wood v. Shell Oil Co., 495 So. 2d 1034 (Ala. 1986) (lease and standard dealership agreement did not make franchisor Shell the principal in a “slip and fall” case; the franchisee controlled exclusively all its employment, advertising, and purchasing decisions, and all franchisor-imposed requirements were to be met according to the franchisees’ own methods of compliance); Albright v. Parr, 467 N.E.2d 348 (Ill. Ct. App. 1984) (oil company sold only petroleum products—it had no actual control over the dealer so as to establish an agency relationship); Watkins v. Mobil Oil Corp., 352 S.E.2d 284 (S.C. Ct. App. 1986)
the courts do consider all aspects of the franchisor-franchisee relationship, with no one factor alone controlling the decision. Even the parties' contractual disclaimers of an agency may not be conclusive. Indeed, one commentator has termed the franchisor's claims (franchisee's selling of Mobil gasoline, permitting employees to wear Mobil's emblem, and displaying Mobil's name on its station and gas pumps did not indicate franchisor power to control the franchisee—thus, no actual agency); Westre v. De Buhr, 144 N.W.2d 734 (S.D. 1966) (oil company leased premises to service station operator, with rental payments based on business volume and lessee expected to promote the sale of the oil company's products; injured party's judgment against oil company, under respondeat superior, for the negligence of the service station operator, was reversed).

40. See, e.g., Mann v. Prudential Real Estate Affiliates, Inc., Bus. Franchise Guide (CCH) § 9732 (N.D. Ill. Dec. 10, 1990) (dismissing plaintiff's vicarious liability action against a real estate franchisor because the franchisor had too little control over its franchisees, including no authority over the franchisee's hiring, payment, and firing of employees; the franchisees were former employees of the franchisee, and they alleged that the franchisee defrauded them and breached their contracts); Realty World/Realty World Franchise Serv. Corp. v. Shaffer, 476 N.Y.S.2d 44 (App. Div. 1984) (barring recovery against the franchisor for a franchisee's conversion of the plaintiff customer's escrow funds; there was no proof of a principal/agent relationship between franchisor and franchisee, nor proof that the franchisor had exercised a "high degree" of control over the franchisee).

41. See, e.g., Coty v. U.S. Slicing Machine Co., 373 N.E.2d 1371 (Ill. Ct. App. 1978) (the franchisor knew that the franchisee employed a minor to operate meat slicing equipment, knew that this violated the federal fair labor standards act, but failed to exercise its right to terminate the franchise; an agency still was absent because the franchisor lacked control over franchisee day-to-day operations, and so the injured employee/minor lost her action against the franchisor for harm caused while operating the meat slicing equipment).

42. See William M. Borchard & David W. Ehrlich, Franchisor Tort Liability: Minimizing the Potential Liability of a Franchisor for a Franchisee's Torts, 69 TRADEMARK REP. 109, 112-13 (1979) (enumerating some factors that courts have held do indicate franchisor control and others that courts have found do not—case citations for each such factor); Dwight Golann et al., In Search of Deeper Pockets: Theories of Extended Liability, 71 MASS. L. REV. 114, 127 n.71 (1986) (listing eleven factors indicating a franchisor's right to control the franchisee, and for each factor naming one or more cases in which it was present); Sandrock, supra note 9, at 702-04 & nn.11 & 13 (outlining the numerous factors courts have considered in determining whether a franchise arrangement also constituted an agency relationship).

43. See, e.g., Drexel v. Union Prescription Centers, Inc., 582 F.2d 781, 786 & n.6 (3d Cir. 1978) (the fact that the franchise agreement expressly denied the existence of an ongoing relationship between Reading Drugstore and Union Prescription Center was not determinative of the matter); Drummond v. Hilton Hotel Corp., 501 F. Supp. 29, 31 (E.D. Pa. 1980) (described supra note 35); Wood v. Shell Oil Co., 495 So. 2d 1034, 1037 (Ala. 1986) (disregarding an agency disclaimer, but finding no agency because Shell had no control over how the dealer was to comply with its lease and dealership requirements); Nichols v. Arthur Murray, Inc., 56 Cal. Rptr. 728, 733 (Ct. App. 1967) (dancing school student brought action against dancing school franchisor for amount prepaid to franchisee for dancing lessons never furnished by the franchisee; contractual disclaimer created non-responsibility only as between the parties to the agreement, not a third party); Kuchta v. Allied Builders Corp., 98 Cal. Rptr. 588, 591 (Ct. App. 1971) (although the franchise agreement stated no agency was created, this contract gave the franchisor too much control over the franchise for that provision to
of little or no control over franchisees as "cutesy" attempts to avoid regulation. 44

2. Apparent Authority

The doctrine of apparent authority rests on the premise that one who causes a third person to believe someone is his agent should bear the loss associated with that third party's reasonable reliance on the presumed agent's supposed authority. 45 Manifestations of agency

be binding); Shoopman v. Pacific Greyhound Lines, 338 P.2d 3, 7 (Cal. Ct. App. 1959) (sufficient evidence existed as to whether a ticket agent was an agent of the franchisor bus company and not an independent contractor); Singleton v. International Dairy Queen, Inc., 332 A.2d 160, 162-63 (Del. Super. Ct. 1975) (described infra note 44); Slates v. International House of Pancakes, Inc., 413 N.E.2d 457, 465 (Ill. App. Ct. 1980) (noting that the intent of franchising parties to exclude the possibility of an agency relationship may not be conclusive—courts must look to the parties' agreement in terms of how it actually operates); Jacobson v. Benson Motors, Inc., 216 N.W.2d 396, 401 (Iowa 1974) (citing cases in which third parties claim that there was an agency relationship between an auto manufacturer and its dealer); Fruchter v. Lynch Oil Co., 522 So. 2d 195, 200 (Miss. 1988) (stating, "[i]f a party holds itself out as offering services to the public and if consumers are reasonably led to believe that they are doing business with that party, a private undisclosed agreement may not be used to thwart a plaintiff's action"); Murphy v. Holiday Inns, Inc., 219 S.E.2d 874, 876 (Va. 1975) (noting how even the franchise parties acknowledged that if their agreement, considered as a whole, established an agency relationship, then their formal disclaimer clause would have no effect); Golann et al., supra note 42, at 128 (stating, "courts have held with uniformity that the parties' characterization of their relationship is not controlling"); infra note 44 and accompanying text.

44. MUNNA, supra note 11, at 14-15. See, e.g., Singleton v. International Dairy Queen, Inc., 332 A.2d 160, 162-63 (Del. Super. Ct. 1975) (in a customer's personal injury case, franchisor Dairy Queen controlled so many details of the franchise operations that issues of actual agency between Dairy Queen and the franchisee had to be resolved at trial, and thus summary judgment for Dairy Queen was denied; the court noted that there was substantial proof of an agency because the franchisor controlled the shape, size, and appearance of the franchised restaurant, mandated that the only sign simply state "Dairy Queen," required all containers to show the "Dairy Queen" name, dictated serving portions and the size and shape of containers, named the suppliers, determined employee uniforms, decided what may be sold by the franchisee, and otherwise kept "the very lifeblood of the [franchisee] in the hands of the franchisor"). Likewise, Munna disparaged the standard provision in many franchising agreements that the franchisee is an independent contractor as "somewhat ludicrous in view of the length of the franchise agreement, the complexity of it, and the detailed requirements to which the franchisee must adhere." MUNNA, supra, at 135; see also supra note 43 and accompanying text.

45. John C. Monica, Franchisor Liability to Third Parties, 49 Mo. L. Rev. 309, 311 (1984). In an apparent agency:

apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.

RESTATEMENT (SECOND) OF AGENCY § 27 (1958) (emphasis added). Again, note that the reliance must be justifiable, that is, reasonable.
usually must originate from the apparent principal, not just the "agent." However, acquiescence to the acts of a purported agent also may suffice to indicate an apparent agency. Apparent authority thus permits the third party to hold the "apparent" principal liable as if an agency did in fact exist. Whether the underlying theory of liability is labelled apparent agency, ostensible agency, apparent authority, or agency by estoppel does not really matter; courts treat the concepts as being essentially identical.

Apparent authority concepts apply in the franchising context.

One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care and skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.

Id. § 267 (emphasis added); see also Gizzi v. Texaco, Inc., 437 F.2d 308, 309-10 (3d Cir.), cert. denied, 404 U.S. 829 (1971); Monica, supra, at 311; Catherine S. Edwards, Note, Theories of Liability for Retail Franchisees: A Theme and Four Variations, 39 Md. L. Rev. 264, 278 (1979); E. Wayne Phillips, Comment, Liability of Franchisors for the Torts of Their Montana Franchisees, 49 Mont. L. Rev. 123, 134 (1988).


47. See Drexel v. Union Prescription Centers, 582 F.2d 781, 796 (3d Cir. 1978); City of Delta Junction v. Mack Trucks, Inc., 670 F.2d 1128, 1131 & n.3 (Alaska 1983); Franklin Distrib. Co. v. Crush Int'l (U.S.A.), Inc., 726 S.W.2d at 931-32; RESTATEMENT (SECOND) OF AGENCY §§ 43, 49 (1958); 1 FLOYD R. MECHEM, supra note 46.


49. See, e.g., Reagin v. Terry, 675 F. Supp. 297 (M.D.N.C. 1986), aff'd, 829 F.2d 36 (4th Cir. 1987), and cert. denied, 485 U.S. 906 (1988) (upholding jury verdict that franchisor Shell Oil Company be vicariously liable, as apparent principal, for harm occurring to a gas station franchisee's customer during a robbery); Beck v. Arthur Murray, Inc., 54 Cal. Rptr. 328, 330 (Ct. App. 1966) (affirming the trial court's holding that Arthur Murray, Inc. was the ostensible principal for its local franchisee; noting that the customer relied on Arthur Murray's advertising and excellent reputation when she chose to pay for dance lessons, and that she testified how no one told her about the independent status of the dance studio nor called her attention to a franchisor disclaimer sign); Billops v. Magness Constr. Co., 391 A.2d 196, 199 (Del. 1978) (finding that there was "no reasonable basis which [could] be derived from the method of operation or the physical environment of the [franchisees'] Hilton Inn from which an ordinary person would have reason to know that he or she was dealing
If an injured party shows the existence of an apparent agency between a franchisor and its franchisee, a court can hold the franchisor liable for its franchisee's acts. The franchisor may foster a belief that the franchisee is its agent in any number of ways, including representations to the community in general by way of advertising.

Many commentators have noted the 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 exhor-
tation that licensee operations should be independent of licensor control if the licensor intends to shield itself from vicarious liability.\(^5\)

The former is to ensure the accuracy of the public's belief that it is purchasing goods of uniform quality,\(^5\) while the latter is meant to separate the licensor from the licensee in the public's understanding of a licensee's retail operations.\(^5\) Because of these cross-purposes in law—resulting in licensor/franchisor attempts to comply with the federal trademark law but to avoid the state common law of agency—the courts have recognized the juggling act that often must be performed.\(^5\) Such recognition, though, does not mean that franchisors


53. See, e.g., Michael R. Biggs & Matthew C. Hesse, The Franchisor's Liability When Its Franchisee Goes Public, 5 Franchise L.J. 1, 20-21 (Winter 1986). These franchise attorneys cite cases and conclude as follows:

[T]rademark law, bona fide business considerations, and potential claims based on agency or respondeat superior theories combine to create a tightrope which the franchisor must traverse. If an attempt is made to reduce the indications of an agency relationship in order to rebut potential claims, certain features or benefits of the franchise system may suffer.

Id. (listing the harmed franchising features as including product consistency, trademark protection, and advertising program coordination); accord Arthur I. Cantor, Federal/State Franchise and Dealership Laws, in P.L.I. Corporate Law & Practice No. 589, Distribution and Marketing 105, 240 (1990) (concluding that "a franchisor is often caught in the quandary of at once imposing controls to protect its trademarks while avoiding excessive controls that might lead to an unwelcome finding of vicarious liability"); Kenneth B. Germain, Tort Liability of Trademark Licensors in an Era of "Accountability": A Tale of Three Cases, 69 Trademark Rep. 128, 131-32 (1979) (noting, "the very practices that lead to effective licensing—careful quality control, widespread advertising of the licensed trademark and close supervision of the licensee's modus operandi—are likely to lead courts to conclude . . . that licensors must share the financial responsibility for the torts of their licensees").

54. See, e.g., Dawn Donut Co. v. Hart's Food Stores, Inc., 267 F.2d 358, 367 (2d Cir. 1959) (noting, "the only effective way to protect the public where a trademark is used by licensees is to place on the licensor the affirmative duty of policing in a reasonable manner the activities of his licensees"); Greil v. Travelodge Int'l, Inc., 541 N.E.2d 1288, 1292 (Ill. App. Ct. 1989) (quoting S. Rep. No. 1333, 79 Cong., 2d Sess. (1946), and stating, "[t]he criterion regarding the control necessary to satisfy the Lanham Act is whether such control guarantees that third parties dealing with the franchisee will receive goods or services of the quality which they learned to associate with the trademark").

55. The goal, of course, is to eliminate the potential for a successful apparent authority claim.

56. See, e.g., Oberlin v. Marlin Am. Corp., 596 F.2d 1322, 1327 (7th Cir. 1979) (noting that a failure to monitor the use of a trademark can lead to the loss of trademark rights, see supra note 52, but remarking that this duty to monitor "does not automatically saddle the licensor with the responsibilities under state law of a principal for his agent"); Billops v. Magness Constr. Co., 391 A.2d 196, 197-98 (Del. 1978) (noting that franchisors generally try to maintain some control and to protect the product or services covered by their trademark,
A few commentators seem to believe that present expanded notions of apparent agency frequently have the effect of leaving the franchisor vicariously liable for almost anything done by the franchisee. There are franchisor "horror stories" of liability findings, seemingly based more on a remote franchisor's "deep pockets" than on any real or apparent agency.

One such "tale of terror," as recounted by franchisors, must be the case of Buchanan v. Canada Dry Corp. There, despite the absence of an actual agency, a franchisor was held potentially liable for harm caused when a franchisee's negligently driven truck crashed into the plaintiffs' car. Obviously, the plaintiffs' decedent did not rely on an apparent agency relationship prior to this purely fortuitous tort. Because the accident literally happened "out of the blue" (no reliance-

but if they exercise control over their franchisees' daily operations an actual agency will be created).

57. See, e.g., Greil v. Travelodge Int'l, Inc., 541 N.E.2d 1288, 1292 (Ill. App. Ct. 1989). There, the court found that a motel franchisor may be held liable under actual or apparent agency to a guest injured while jumping out of a hotel window in an attempt to escape a robber. The court overturned summary judgment for the franchisor, which frequently exercised its right to inspect the franchisee's operations and called safety matters to the attention of the franchisee.

58. See, e.g., MCCARTHY, supra note 52, § 18:24, at 859 (stating, "[i]n general, it is accurate to conclude that there is a very substantial risk that a trademark licensor or franchisor will be held liable for the torts of licensees and franchisees") (emphasis added); Germain, supra note 53, at 140 (noting, "once again, both with regard to actual and apparent agency concepts, the principle of accountability has surfaced, here in the form of an unwillingness to summarily cut off plaintiffs' attempts to show that distant franchisors should be seen as so linked with nearby franchisees as to be held vicariously responsible for their torts"); David Laufer & David Gurnick, Minimizing Vicarious Liability of Franchisors for Acts of Their Franchisees, 6 FRANCHISE L.J. 3, 3 (Spring 1987) (opining, "vicarious liability of franchisors is not a per se rule in franchise law as yet") (emphasis added).

59. See generally WILLIAM PROSSER & W. PAGE KEETON, THE LAW OF TORTS § 627 (5th ed. 1984). Of course, the typical franchisor is better able than most franchisees to bear the cost of consumer injuries. It "is more solvent and can spread the costs among a greater number of people." Edwards, Note, supra note 45, at 275. The franchisor can raise the license and royalty fees paid by franchisees, who, in turn, further distribute the costs by passing at least some of these costs onto consumers in the form of higher retail prices. Id. at 277 n.65. Others, though, have argued that it is more difficult for the franchisor to recoup these costs than it is for the franchisee. David Brittain, Note, Franchisor's Liability for Acts of Franchisees: A Risk Administration Perspective, 32 U. Fla. L. Rev. 603, 627 (1980). Moreover, antitrust laws generally prevent a franchisor from controlling the prices charged by its franchisees. 15 U.S.C. §§ 1-7 (1988).


61. Liability depended upon a factual finding that franchisee Southeast-Atlantic (employer of truck driver) was Canada Dry's alter ego. Id. at 616.
inducing franchisor actions beforehand), only a claim of actual agency—without the need to show third party reliance—should have been permitted. Instead, without explanation, the court noted the various indicia of a possible apparent agency, and then spoke of the franchisee as the "alter ego" of the franchisor. Because the court viewed this "alter ego" issue as a factual question, it reversed the defendant franchisor's summary judgment and remanded for a trial. The "alter ego" theory, however, is based on piercing corporate veils and on fighting fraud by the "true" owner/operator of the business entity. Where, then, was the plaintiffs' reliance? As with claims of apparent authority, reliance is an essential element in claims of fraud as well. Obviously, this crucial element of the plaintiffs' action was missing, but the court failed even to mention reliance in making its decision.

C. Justification for Franchisor Liability

In isolation, other judicial holdings have also proven troubling to franchisors. Nonetheless, when the cases are examined in toto, one

62. In Frey v. PepsiCo, Inc., 382 S.E.2d 648 (Ga. Ct. App. 1989), the plaintiffs' vehicle was struck by a Pepsi-Cola delivery truck. The plaintiffs sued not only the bottling company franchisee—which was the owner and operator of the truck—but also sued the franchisor, PepsiCo. The court, however, rejected the plaintiffs' contention that there was an apparent agency: "[u]nless 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." Id. at 650-51 (emphasis added). In most accident cases outside the franchised business' premises, the franchisor as agency issues, if any, strictly involve alleged actual agency, not an apparent agency. See, e.g., McLaughlin v. Chicken Delight, Inc., 321 A.2d 456 (Conn. 1973) (described supra note 37).

63. These indicia included: Franchisee trucks carrying only the franchisor, "Canada Dry" logo; franchisee employees wearing uniforms with only the franchisor insignia; local telephone listings only under the franchisor's name; large signs on the franchisee's premises reading "Canada Dry," with only a small sign stating the franchisee's name; franchisee personnel answering the telephone by saying, "Canada Dry." Buchanan, 226 S.E.2d at 616.

64. Id.
65. Id.
67. BLACK'S, supra note 66, at 660.
68. For instance, in Fernander v. Thigpen, 293 S.E.2d 424 (S.C. 1982), a franchisee's employee was riding home with the franchisee's assistant manager when the employee was killed in an automobile accident. The estate was permitted to sue the franchisor, Burger Chef Corporation, based not just on claims of actual agency, but—alternatively—allegations of apparent authority. Again, where was the reliance?

In its opinion, the Supreme Court of South Carolina never considered the reliance issue; it simply denied the franchisor's motion for summary judgment and held that a factual
can see general patterns—overall policy justifications for franchisor liability based upon third party reliance, risk spreading, and prevention of harm.69

1. Third Party Reliance

Uniform stores, signs and management methods give the consumer the impression that they are dealing with a standardized business operation.70 This impression, in turn, gives greater market value to the franchisor's trademark and the franchised operation generally. Indeed, the franchise contract typically requires franchisees to join in the franchisor's efforts to "fool the customer"; in other words, maintain 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.71 Plaintiffs injured by fran-

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69. See, e.g., Note, Liability of a Franchisor for Acts of the Franchisee, 41 S. CAL. L. REV. 143, 153 (1968) [hereinafter Liability of a Franchisor]. Of course, courts have sometimes invoked broad policy considerations that seem to base franchisor vicarious liability on fundamental notions of fairness. See, e.g., Van Arsdale v. Hollinger, 437 P.2d, 508, 513 (Cal. 1968) (stating these reasons for enterprise liability: the "principal" selected the independent contractor and was "free to insist upon one who is financially responsible, and to demand indemnity from him," the insurance to distribute the risk "is properly a cost of the [principal's] business," and it is of extreme public importance that the contractor meet its duty of care). 70. See, e.g., Stuart, Comment, supra note 33, at 120 & 130 (discussing uniformity of services and products at franchised outlets, hence customer expectations of such uniformity). This notion is further discussed infra notes 136 & 138 and accompanying text.

71. If a franchisee fail to help maintain the charade, it may well be in breach of contract. See, e.g., Craig Food Indus., Inc. v. Weihing, 746 P.2d 279, 281 & 284 (Utah App. 1987) (franchisee's refusal to participate in a franchisor-established advertising cooperative breached the franchisee's promise to advertise "on a scale consistent with the volume of his
chisees may contend that franchisors "should not enjoy the benefits of chain-store marketing methods and national identification with [their franchisees] without assuming concomitant social responsibilities." 72

In many contract suits, particularly those concerning implied agreements, quasi-contracts (implied at law), or oral, express contracts, plaintiffs reasonably may allege that they relied on doing business with a standardized company, not a single franchisee. 73 Courts can enforce these contracts against the franchisor under an apparent agency theory in fairness to the plaintiff and in order to facilitate the functioning of the marketplace. If the franchisee is unable to provide an adequate remedy for its breach of contract, the franchisor should bear the loss if the third party reasonably relied on an apparent agency. A franchisor can avoid this liability by ensuring that third parties know, before the formation of any contract, that the franchisee is an independent entity. 74

The reliance argument can also serve as the basis for tort liability. For example, a consumer who is injured in a “slip and fall” accident inside a franchised retail outlet may contend that he thought he was dealing with a standardized company with high standards of cleanliness. 75 Although there are numerous, reported cases involving

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72. 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); see also Stuart, Comment, supra note 33, at 130. As stated by a court in a class action case brought against a car rental agency and the agency’s licensor/franchisor, agency by estoppel or through apparent authority is particularly applicable where one by license permits another to use his business or trade name. Obviously, the value of the use of the business or trade name, and the advertising promoting the product or service bearing the trade name. When a business or trade name is so used, the public is entitled to assume that transactions they undertake with one using that trade or business name, with authorization to do so, are transactions with the person whose business or trade name is being used.


73. Hoytt v. Docktor Pet Center, Inc., Bus. Franchise Guide (CCH) ¶ 8723 (N.D. Ill. Oct. 10, 1986) (upholding the common knowledge doctrine, but finding that the plaintiff customer in this case may have had reason to rely on the franchisor name, “Docktor,” as a sign of quality about the pets and services provided at a particular store). If the contract between a third party and the franchised business is reduced to writing, proper identification of the parties may clearly demonstrate that the agreement involves a separate legal entity—the franchisee—rather than the franchisor. Furthermore, standardized forms would tend to disclaim any responsibility on the part of the franchisor.

74. Beck v. Arthur Murray, Inc., 54 Cal. Rptr. 328, 331 (Ct. App. 1966). See infra note 81 (on disclaimers); supra notes 43 & 51 and accompanying text (on fostering third party beliefs about an agency relationship.)

75. Reliance cannot be present in some tort cases. Obviously, a person injured in a
franchised ice cream vendors,\textsuperscript{76} gas stations,\textsuperscript{77} hotels,\textsuperscript{78} and other

motor vehicle accident usually would have extreme difficulty contending that he somehow relied on the franchisor's apparent authority over the franchisee whose truck ran into him. Instead, the plaintiff would have to allege an actual agency. \textit{But see} Buchanan v. Canada Dry Corp., 226 S.E.2d 613 (Ga. Ct. App. 1976); \textit{supra} notes 60-65 and accompanying text.

\textsuperscript{76} See, e.g., Wilson v. Good Humor Corp., 757 F.2d 1293, 1303 (D.C. Cir. 1985) (the plaintiffs failed to present evidence that anyone involved in their child's accident relied on Good Humor's general business reputation; no one testified, for instance, that "they permitted the children to buy ice cream in general reliance on the safety reputation of Good Humor vendors," so an apparent agency did not exist).

\textsuperscript{77} See, e.g., Miller v. Sinclair Refining Co., 268 F.2d 114, 118 (5th Cir. 1959) (affirming summary judgment for defendant franchisor Sinclair; the plaintiff had been severely burned at the franchisee's gasoline station, but there was no evidence of plaintiff's reliance on Sinclair's advertising or trademark in choosing to patronize the station); Fisher v. Triplett, Inc., Bus. Franchise Guide (CCH) \textsuperscript{\dagger} 8768 (D. Kan. 1986) (summary judgment for franchisor Amoco Oil Company against plaintiffs who alleged racial discrimination by a franchised Amoco station; no apparent agency—the plaintiffs stopped at the station because a mechanic was on duty, not because it was an Amoco station); Wood v. Shell Oil Co., 495 So. 2d 1034 (Ala. 1986) (in plaintiff's slip and fall case, his mere reliance on logos and display signs was found to be insufficient to prove the franchisee's apparent authority—the reliance was not reasonable); Union Oil Co. of Cal. v. Crane, 258 So. 2d 882, 887 (Ala. 1972) (finding oil company not liable under agency by estoppel for the gas station franchisee's negligence in driving a car into the plaintiff, breaking his leg; there was no reliance on an agency, but instead "strong inferences that the reason [the plaintiff] did business with this service station was because of the personality of [the franchisee]," whom the plaintiff knew personally and continually referred to as the station's owner); Aweida v. Kientz, 536 P.2d 1138 (Colo. Ct. App. 1975) (the plaintiff had never heard of the oil company-franchisor, so there could be no reliance upon that franchisor as an apparent principal); B.P. Oil Corp. v. Mabe, 370 A.2d 554 (Md. 1977) (plaintiff's testimony that he always bought gasoline from BP found insufficient to show reliance); Sanders v. Clark Oil Ref. Corp., 226 N.W.2d 695 (Mich. Ct. App. 1975) (plaintiff did not rely on an apparent agency because he simply came to the franchised station to give a friend a ride home); Watkins v. Mobil Oil Corp., 352 S.E.2d 284, 287 (S.C. Ct. App. 1986) (an employee of a franchised gasoline station physically attacked the plaintiff when he came to the station to buy cigarettes; the plaintiff, however, placed no reliance upon Mobil's apparent control over the premises—there was "no evidence that [plaintiff] Watkins was attracted to the station because it was a Mobil station or that he was enticed by Mobil's advertising to visit the station," and, indeed, "[t]he only reason he selected the Mobil station was because of its proximity to his house"); Mobil Oil Corp. v. Frederick, 615 S.W.2d 323, 325 (Tex. Ct. App.), \textit{aff'd and rev'd in part on different grounds}, 621 S.W.2d 595 (1981) (plaintiff had written a letter calling the franchisee the "owner" of the station, thus tending to show a plaintiff's belief that the franchise was not an agent of franchisor Mobil and thus indicating no reasonable reliance on the franchisor's alleged, apparent control of the station).

\textsuperscript{78} See, e.g., Case v. Holiday Inns, Inc., Bus. Franchise Guide \textsuperscript{\dagger} 9150, unpublished opinion for 851 F.2d 356 (Table), at 6 (4th Cir. July 5, 1988) (plaintiff was robbed at a franchised Holiday Inn; noting that the facts were virtually identical to those of \textit{Hooyman, infra}, the court affirmed a summary judgment because the plaintiff's employer chose the hotel—Case could have stayed at another hotel, but her "unwillingness to change [her employer's] plans" did not create an issue of apparent agency—"Inertia is not reliance"); Velinskie v. Holiday Inns, Inc., No. CV87-3604, 1988 WL 76352 (E.D.N.Y. July 13, 1988) (plaintiff's leg was injured while on a piece of furniture at a franchised Holiday Inn; defen-
businesses in which injured consumers could not show reliance, many can, in fact, demonstrate reliance; yet the franchisor still might prefer to risk liability rather than to post disclaimer signs that, if read and understood, diminish customer goodwill and eradicate, or at least reduce, the consumer's perception of chain-wide uniformity.

In *Duluth Herald & News Tribune v. Plymouth Optical Co.*, the court held a franchisor liable for an advertising debt incurred by its franchisee. Refuting the argument of the franchisor that franchising's vitality as a "new way of business life" is disrupted by a finding of apparent authority, the court wrote as follows:

dant franchisor's summary judgment motion succeeded because the plaintiff did not counter it with an affidavit averring justifiable reliance on an apparent agency); Harwell v. Sheraton Gardens Inn, Bus. Franchise Guide (CCH) ¶ 7626, at 12,555 (N.D. Ga. 1977) ( bitten by bedbugs at a franchised Sheraton Inn, the plaintiff claimed that the franchisor should be liable in *respondeat superior* for the franchisee's negligence; applying Georgia law, the court denied the plaintiff's claim because he did not show that he relied on an apparent agency and that he "was damaged as a direct result of being misled"); Caranna v. Eades, 466 So. 2d 259, 264 (Fla. Dist. Ct. App. 1985) (holding that a hotel franchisor could not be found liable under an apparent agency when a child fell from the franchisee's hotel balcony; there was no evidence that the plaintiff relied on the franchisor's being "in charge"—no indication that the plaintiff depended upon the franchisor's service as presumed principal); Hayman v. Ramada Inn, Inc., 357 S.E.2d 394, 398 (N.C. Ct. App. 1987) (the plaintiff was assaulted while she was a guest at a franchised Ramada Inn; her employer had arranged her stay, and thus no reliance necessary to find an apparent agency could be found; the defendant won a summary judgment, in part, because the plaintiff produced no evidence "that she would have chosen to stay elsewhere or done anything differently had she known that the facility was not owned and operated by the defendant" franchisor).

79. See, e.g., Percival v. Toronto Homeservice Maintenance, Ltd., 9 All Can. W. Ser. 300 (Ont. C.A. 1988) (finding that plaintiffs had no reasonable basis for looking to a guaran-

tee from the franchisor for home contracting work arranged entirely between the plaintiffs and the franchisee).

80. See, e.g., Burkland v. Electronic Realty Assocs., Inc., 740 P.2d 1142 (Mont. 1987) (overturning a summary judgment for franchisor ERA based on a listing containing an "independently owned and operated" disclaimer; the trial court had found that the disclaimer informed third parties of the franchise relationship, that there was no need to explain this disclaimer to the plaintiffs, and that the plaintiffs' failure to notice the disclaimer all made any reliance on an apparent agency unreasonable, but the Supreme Court of Montana held that these were issues to be determined by the trier of fact); McDonald v. Century 21 Real Estate Corp., 331 N.W.2d 606 (Wis. Ct. App. 1983) (holding that case must go to trial—no summary judgment—when the plaintiff's affidavit averts that he assumed the statement on signs and forms, "each office is independently owned and operated," meant each office was responsible for a particular geographic area).

81. See Stuart, Comment, *supra* note 33, at 131 (noting the dilemma of providing dis-

claimer versus maintaining a highly marketable uniformity of products and services). If easily seen and understood, a sign disclaiming franchisor ownership or control may prevent an apparent agency. See, e.g., Hayman v. Ramada Inn, Inc., 357 S.E.2d 394, 398-99 (N.C. Ct. App. 1987) (both the majority opinion and the dissenting opinion agreed on that point).

82. 176 N.W.2d 552 (Minn. 1970).
Franchisers can protect themselves from liability by insuring that their franchisee outlets make it clear to their customers and creditors that they are not dealing with a franchiser but with an independent business as a franchisee. This can be accomplished in the name it employs and in advertising which candidly discloses the relationship which exists.  

Thirteen years ago one attorney-commentator contended that “it is common for oil companies to identify their own stations from those independently owned and operated.” That writer, however, offered absolutely no support for his contention that oil companies commonly do identify, and thus distinguish for the public, their own stations from those of franchised dealers. 

2. Spreading Risk

Franchisor vicarious liability may be justified as a method of spreading both risk and actual losses. It has long been assumed that franchisors “can better distribute the loss [liability or liability insurance] because of [their] superior bargaining position.” If there is no franchisor vicarious liability, the potential insolvency of franchisees can lead to economic inefficiencies. First, there may be inadequate franchisee efforts to avoid wrongs because the franchisee has less incentive to invest in loss avoidance measures than it would if it could be forced to pay in full the possible damages. Second, the parties to a franchise contract deliberately may permit franchisees to

83. Id. at 557-58 (noting also, id. at 558 n.4, “[m]any franchise operations in the form of retail chain outlets employ names such as Gamble’s ‘Authorized Dealer’ or other names to indicate to customers and creditors alike that the outlet is not operated by the franchisor”); 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, 395 (1974) (noting, “the apparent authority doctrine hinges on the continued public ignorance of the fact that the [franchise] operator is only an independent seller of the company’s products,” and thus recommending changes in advertising, in issuing and accepting credit cards, and in posting disclaimers).

84. Sandrock, supra note 9, at 709. He recommended the same technique—disclosure to customers—for other franchisors seeking to avoid an apparent agency. Id.

85. Even if a sign is posted, the question remains: How effective is it? Obviously, obscure or small signs, or those only encountered after one receives goods or services, are of little value in defeating a potential apparent agency.

86. Stuart, Comment, supra note 33, at 122; accord Liability of a Franchisor, supra note 69, at 156; John D. Lackey, Comment, Liability of Oil Company for Its Lessee’s Torts, 1965 U. ILL. L.F. 915, 920. But see Brittain, Note, supra note 59, at 626 n.159 (stating, “that the franchisor operates at a more general level of business sophistication than the franchisee, however, does not compel a conclusion that the former is the superior loss-spreader”).
risk insolvency because the potential for insolvency—rather than full coverage of losses—seems to increase the expected profits for both franchisee and franchisor. Finally, the true costs of production for each franchisor-franchisee enterprise are understated, with the resultant expansion of market entrants and production levels inappropriately high.\footnote{87} Even without the potential for franchisee insolvency, in a typical franchising relationship, where the franchisor can more easily bear economic risks than its franchisees,\footnote{88} the absence of franchisor vicarious liability may place economically excessive risks on the franchisee.\footnote{89} The transaction costs to shift some of the risk to the franchisor may be exorbitant, causing the franchisor to overcompensate franchisees in other aspects of the relationship instead of taking on some of the liability risks.\footnote{90} Alternatively, these risk-shifting transaction costs may be absorbed. Either way, the transaction costs are ultimately passed on in the form of increased production costs, smaller operations, and higher prices.\footnote{91}

With respect to vicarious liability under apparent authority, it can prove economically sound unless the winning plaintiff really did not rely on an apparent agency or that reliance was unjustified.\footnote{92} The enforcement of apparent representations about skills, financial soundness, and authority of the franchisee all have economic utility.\footnote{93} But, according to one commentator, burdens of loss only should shift to

\footnote{87. Alan O. Sykes, \textit{The Economics of Vicarious Liability}, 93 \textit{Yale L.J.} 1231, 1244 (1984). Attorney Sykes' economic analysis here and in succeeding notes, although referring to principal and agent, does so in the broad economic terms that encompass, \textit{inter alia}, franchisors and franchisees. \textit{Id.} at 1259.}

\footnote{88. \textit{See supra} note 86 and accompanying text; \textit{infra} notes 95-96 and accompanying text.}

\footnote{89. Sykes, \textit{supra} note 87, at 1245; Lackey, Comment, \textit{supra} note 86, at 920.}

\footnote{90. Sykes, \textit{supra} note 87, at 1245.}

\footnote{91. \textit{Id.} According to one commentator:}

\footquote{The capacity to spread losses beyond the tortfeasor to consumers and other capital holders has been a primary justification for enterprise liability. Directly related to this proposition is the thesis that the loss-spreading aspect of enterprise liability causes an efficient allocation of societal resources through the price system. Brittain, Note, \textit{supra} note 59, at 625 (citing Guido Calabresi, \textit{Some Thoughts on Risk Distribution and the Law of Torts}, 70 \textit{Yale L.J.} 499, 520 (1961)). As Alan O. Sykes indicates, however, the burden of transaction costs "may explain why some [parties] forego efficient risk sharing in favor of the added profits from the evasion of liability." Sykes, \textit{supra} note 87, at 1245.}

\footnote{92. Sykes, \textit{supra} note 87, at 1276-77.}

\footnote{93. \textit{Id.} at 1277; \textit{see also} Note, \textit{Liability of a Franchisor}, \textit{supra} note 69, at 156 & 160 (contending that it is fair and economically efficient to impose liability on a franchisor who could have decreased substantially the probability that a franchisee's acts or omissions would harm a third party, and recommending that franchisors maintain the necessary control over franchisees to prevent such harm).}
franchisors when they can defray the cost of paying losses or insuring against losses. This defraying of costs can be accomplished through franchisor ability to control franchisee prices. That, of course, may be effectuated indirectly, through increases in royalties or other fees. Commentary indicates that in most instances the costs can, in fact, be passed along to the franchisees’ customers.

3. Loss Prevention

Franchisor controls relate most directly to a third justification of franchisor liability: prevention of loss. In effect, this rationale rests upon the same two public policy precepts undergirding the actual agency principle of respondeat superior. First, the franchisor is in a good position to select responsible franchisees and to ensure that they exercise a high degree of care when dealing with their customers. Second, the imposition of vicarious liability encourages the franchisor to maintain as high a standard as possible during its selection and supervising processes.

While usually focussed on tort claims, the loss prevention argument may serve equally well in a contract context. The franchisor probably maintains a high degree of control over its franchisees’ books to ensure that it receives the proper amount of royalties and other fees. Imposing vicarious liability simply encourages franchi-

94. Brittain, Note, supra note 59, at 627. However, it is also asserted by some commentators that:

[i]f the losses caused by operation of the franchise are not spread to the consumers of the franchised product, the franchisee, and the franchisor in some cases, has externalized some of his costs. If imposition of these costs on [the franchisor] causes his failure, then economic theory suggests that he should fail, in order to avoid an improper allocation of resources.

Note, Liability of a Franchisor, supra note 69, at 157.

95. Brittain, Note, supra note 59, at 627; Note, Liability of a Franchisor, supra note 69, at 157. More direct controls, such as price maintenance formulae and exclusive purchase requirements, often run afoul of the antitrust laws. See, e.g., Brittain, Note, supra note 59, at 627-29.

96. See, e.g., Note, Liability of a Franchisor, supra note 69, at 156 (further stating, “[t]he assumption underlying the loss-spreading argument is that the franchisor will be able to pass on to the consumer the added costs”).

97. Edwards, Note, supra note 45, at 275 (stating, “the franchisor remains in the position to select financially responsible franchisees and to require that they obtain insurance”); Stuart, Comment, supra note 33, at 122 (noting that franchisor liability operates as a strong incentive for proper selection of franchisees, hence, protection of the public interest); accord Lackey, Comment, supra note 86, at 920.

98. See, e.g., Edwards, Note, supra note 45, at 277 n.65; Lackey, Comment, supra note 86, at 920.

FRANCHISORS' LIABILITY

sors to maintain the same degree of control over their franchisees' contractual dealings with third parties.

Of course, there is the risk that a tort or contract loss prevention rationale may become so extensive (and expensive) as to cover virtually all actions undertaken by franchisees, no matter how far removed from franchisor supervision or even contemplation. Moreover, adequate insurance may not be obtained or maintained by franchisees, particularly if the premium costs are high. Comments from informed observers indicate that adequate insurance still is often just a recommended—not a required, procured, and consistently verified—aspect of franchisee business operations. Despite the risk of a contrived, overbroad interpretation of vicarious liability issues, and apart from practical considerations such as the effects under agency law of meeting Lanham Act requirements, there is a fundamental moral principle supporting a reasoned, moderate extension of liability to franchisors: "a franchisor should not reap the benefits created by public recognition of its name and yet be held to no duty to assure the quality of the product" or services associated with that name.

100. See generally Peter W. Huber, Liability: The Legal Revolution and Its Consequences 153-61 (1988) (noting that the mere threat of litigation may deter parties from socially beneficial innovations). Loss prevention explanations, however, generally are based on economic efficiency models. Rather than impose franchisor liability for every third-party loss caused by franchisees, liability is only to be meted out on a franchisor whose "exercise of reasonable care and control" could have "substantially reduced" the likelihood of a loss. Liability of a Franchisor, supra note 69, at 155.

101. William B. Rees, Quality Standards, in P.L.I. COM. L. & PRACTICE HANDBOOK NO. 525, 1990; BUSINESS STRATEGIES & COMPLIANCE ISSUES 585, 602-03 (1990) (recommending that franchisors require franchisees to maintain comprehensive liability insurance, but noting, "[w]ith the high cost of liability insurance, experience has shown that some franchisees have completely eliminated coverage or reduced the levels of coverage to unacceptable limits").

102. For a recommendation that franchisors require franchisees to obtain insurance, see Cantor, supra note 53, at 244; Darrow et al., Problems Common to Franchising, in THE FLORIDA BAR, FLORIDA FRANCHISE LAW AND PRACTICE 127, 250 (1984); Germain, supra note 53, at 140; Rees, supra note 101. But see Glickman, supra note 99, § 10.11, at 10-136 (1991) ("Most franchise agreements require the franchisee to carry public liability insurance in specified amounts with insurance companies satisfactory to the franchisor."). Of course, even franchisor-imposed insurance requirements may prove inadequate. For instance, in Drexel v. Union Prescription Centers, Inc., 582 F.2d 781 (3d Cir. 1978), the plaintiff in a wrongful death action sought compensation from the franchisor pharmacy. Clearly, even if the franchisee obtained the $100,000 to $300,000 in insurance coverage mandated by the franchise agreement, id. at 803, that was well below the damages sought by the plaintiff.


104. Sandrock, supra note 9, at 710. This same commentator claims that franchisees may receive better legal protection from the unfair practices of franchisors than customers receive
D. Apparent Authority Cases

In the leading case of *Gizzi v. Texaco, Inc.*, the Third Circuit Court of Appeals overturned a directed verdict for franchisor Texaco. The franchisee had negligently repaired the brakes on a car that it subsequently sold to the plaintiff, who was injured when these brakes failed. There was no actual agency between Texaco and its franchisee. The appellate court, however, held that an apparent agency may have been manifested by communications directly to the plaintiff or, indirectly, by signs or other advertising to the community. The court found that (1) the Texaco insignia, as well as its national advertising slogan, "Trust Your Car to the Man Who Wears the Star," could have led the plaintiff to rely reasonably on an apparent agency, and (2) the matter was a question of fact for the jury to determine.

*Gizzi*’s broad approach has been criticized. Still, many courts have found an apparent agency. They have done so despite (a) attempted disclaimers of franchisor responsibility and (b) claims that no "reasonable" interpretation of a franchisor’s actions would infer agency from a mass advertising campaign or from customary quality standards imposed on all of the franchisees. In numerous other deci-
sions, judges have let the jury decide the apparent agency question.\textsuperscript{112}

In bygone days, either of these two defenses—agency disclaimers and lack of reasonable reliance on advertising—probably would have succeeded, with nothing else necessary.\textsuperscript{113} On the other hand, while

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(described \textit{infra} note 125); Kuchta v. Allied Builders Corp., 98 Cal. Rptr. 588 ( Ct. App. 1971) (described \textit{infra} note 125); Vowels v. Arthur Murray Studios, 163 N.W.2d 35 (Mich. Ct. App. 1968) (described \textit{infra} note 125); Duluth Herald & News Tribune v. Plymouth Optical Co., 176 N.W.2d 552 (Minn. 1970) (described \textit{infra} note 125); Lindstrom v. Minnesota Liquid Fertilizer Co., 119 N.W.2d 855 (Minn. 1963) (holding a distributor liable to its independent lessee's supplier; the plaintiff supplier reasonably believed that the lessee was acting as the distributor's agent, as manager of the distributor's branch store).

\textsuperscript{112}. In the following cases, the courts denied or reversed a summary judgment ("SJ") or a directed verdict ("DV") for the defendant franchisor: Drexel v. Union Prescription Centers, Inc., 582 F.2d 781 (3d Cir. 1978) (holding it was a violation of the franchise contract requiring the franchisee to use both his own name and that of the franchisor, where, the franchisee pharmacy's advertisements, prescription labels, cash register receipts, and medicine bags all simply bore the franchisor's name; however, the franchisor may have acquiesced to this "holding out" of an agency, and thus the apparent agency issue was sufficient to go to a jury—SJ reversed); Broock v. Nutri/System, Inc., 654 F. Supp. 7 (S.D. Ohio 1986) (described \textit{infra} note 125); Drummond v. Hilton Hotel Corp., 501 F. Supp. 29 (E.D. Pa. 1980) (described supra note 35); City of Delta Junction v. Mack Trucks, Inc., 670 P.2d 1128 (Alaska 1983) (overturning DV and declaring that it was for the jury to consider franchisor Mack's acquiescence to franchisee use of agency indicia); Singleton v. International Dairy Queen, Inc., 332 A.2d 160 (Del. Super. Ct. 1975) (SJ denied—franchising arrangement raised fact issues about the existence of an actual or apparent agency); Buchanan v. Canada Dry Corp., 226 S.E.2d 613 (Ga. Ct. App. 1976) (described \textit{supra} notes 60-65 and accompanying text); Clark v. Texaco, Inc., 222 N.W.2d 52 (Mich. Ct. App. 1974) (SJ reversed—holding that a franchised gas station's customer who was bitten by a watchdog had an apparent authority cause of action against the franchisor based on the principal of apparent authority); Johnston v. American Oil Co., 215 N.W.2d 719 (Mich. Ct. App. 1974) (relying upon \textit{Gizzi} and thus overturning SJ for defendant; plaintiff permitted to go forward on her suit arising from gas station proprietor's shooting to death her husband—the claim was that Amoco advertising established an agency via apparent authority or estoppel); Shadel v. Shell Oil Co., 478 A.2d 1262 (N.J. Super. Ct. Law Div. 1984) (SJ denied—Shadel had been injured by the gas dealer's employee, but, citing \textit{Gizzi}, the court found jury questions as to whether the dealer had been clothed with apparent authority to act on behalf of Shell); Chevron Oil Co. v. Sutton, 515 P.2d 1283 (N.M. 1973) (citing \textit{Gizzi}, the New Mexico Supreme Court overturned a SJ for defendant Chevron; based upon Chevron's advertising, signs, uniforms, and credit card privileges the court concluded that Chevron controlled the franchised station whose faulty auto repairs led to the death of Sutton's wife).

\textsuperscript{113}. See, e.g., \textit{RESTATEMENT (SECOND) OF AGENCY} § 258 cmt. d (1958) (dealing with disclaimers—stating that notification to third persons of would-be agent's lack of authority generally absolves a purported principal from any liability for the "agent's" actions); \textit{id.} § 267 cmt. a (addressing reasonableness— noting that a manifestation of apparent authority can only be used against the apparent principal with respect to the subjects in which the apparent authority arises—areas "consistent with the apparent authority"—otherwise, there is no justifiable reliance on the part of an injured third person). Even since \textit{Gizzi} the defenses often have succeeded. See Salisbury v. Chapman Realty, 465 N.E.2d 127, 131 (Ill. App. Ct. 1984) (holding no apparent authority, but noting that a franchise agreement required the franchisee

\textbf{FRANCHISORS' LIABILITY}

639

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31
these defenses have been weakened, the present courts still look beyond what a plaintiff claims he believed. They look to issues such as whether the plaintiff truly relied on this belief when deciding to deal with a franchisee114 and whether the plaintiff's alleged belief—and reliance thereon—was justifiable.115

Of course, many cases then turn on circumstances peculiar to that plaintiff. There also may be circumstances legally significant only to certain services or industries. For instance, innkeepers historically

real estate firm to display prominently a certificate announcing its status as an independent franchisee; Hayman v. Ramada Inn, Inc., 357 S.E.2d 394, 398 (N.C. Ct. App. 1987) (no apparent authority—the franchise agreement required the hotel franchisee to display "prominently at the front desk" a "clearly visible sign" noting its independent ownership and operations; the court ignored the question raised in dissent, id. at 399 (Cozort, J., dissenting): Why was there no indication that this requirement actually was followed?).

114. There are a number of cases in which reliance was not found. See, e.g., Hofherr v. Dart Indus., Inc., 853 F.2d 259, 252-63 (4th Cir. 1988) (holding no reliance where plaintiff testified that she chose the defendant drug store because her husband had recommended it, not because she believed it to be the franchisor's store); Arceneaux v. Texaco, Inc., 623 F.2d 924, 927 (5th Cir. 1980), and cert. denied, 450 U.S. 928 (1981) (affirming the trial judge's decision to exclude evidence of apparent authority when the plaintiff already had admitted that he chose the franchised Texaco station simply because of convenience—"he needed gas and the Texaco station was more accessible than other stations"); Cullen v. BMW of N. Am., Inc., 531 F. Supp. 555 (E.D.N.Y.), rev'd on other grounds, 691 F.2d 1097 (2d Cir. 1982), and cert. denied, 460 U.S. 1070 (1983) (finding no reliance, but finding franchisor liability because of its own negligence; described supra note 20); Manis v. Gulf Oil Corp., 185 S.E.2d 589, 591 (Ga. Ct. App. 1971) (finding no showing of reliance on an apparent agency); Schear v. Motel Management Corp., 487 A.2d 1240, 1249 (Md. Ct. Spec. App. 1985) (holding that plaintiffs established no reliance on the Holiday Inn name in deciding to stay at a franchised Holiday Inn where they were robbed because there was no evidence that the plaintiffs relied on Holiday Inn's advertisements, but chose the franchised hotel because of its proximity to their daughters' homes); Willett v. Pilotte, 109 N.E.2d 840, 842-43 (Mass. 1953) (injured plaintiff who had entered onto a service station lot to purchase Christmas tree suggested nothing that would indicate her reliance on a belief that she was dealing with the station rather than an independent nurseryman). Also, for whatever reason, plaintiffs may fail to state the elements of an apparent agency claim. See, e.g., Murphy v. Holiday Inns, Inc., 219 S.E.2d 874 (Va. 1975) (at trial, motel guest injured in a slip and fall failed to allege that Holiday Inns held itself out as the principal, nor did she claim any reliance on an apparent agency; it was too late to raise the matter on appeal); Fruchter v. Lynch Oil Co., 522 So. 2d 195 (Miss. 1988) (plaintiff, injured at a gas station, unsuccessfully sued the landlord/distributor as an alleged actual principal for the defendant franchisee, but failed to sue the franchisor, Shell Oil Company—against whom perhaps an apparent authority argument would have worked—because the defendant landlord/distributor was a mere "middleman," dealing only with Shell products and services, not its own, there were no actions upon which the public could base a belief that it was doing business with this distributor and thus no claim of apparent agency was viable); Juander v. City of Philadelphia, 431 A.2d 1073, 1079-80 (Pa. Super. Ct. 1981) (holding that reliance on an apparent agency did not exist when the plaintiff simply fell as she walked on the sidewalk of an Exxon Company franchisee).

115. For cases in which no justifiable belief or reliance were present, see supra notes 62, 68 & 75-79 and accompanying text.
have owed a high duty of care to their business invitees, perhaps even to protect them from criminal harm by third parties. Also, landlord-tenant law may determine liability questions for injured business invitees. Consequently, in this era of consumer protection regulation, franchisors may be forced to monitor closely, and even to control and correct, the behavior of franchisees—in order to deter and remedy deceptive or other wrongful acts.

In cases not involving gasoline stations, courts may be less likely to find that consumers have a common body of knowledge about franchising, and some courts may even adopt a more liberal attitude about plaintiffs’ need to show reliance on an apparent agency. In *Beck v. Arthur Murray, Inc.*, although the plaintiff did not prove that she believed the franchisee to be the franchisor’s agent, there was an apparent agency because no one directed her attention to a disclaimer nor told her that the business was independently owned.


117. *See, e.g.*, *Giger v. Mobil Oil Corp.*, 823 F.2d 181 (7th Cir. 1987) (holding that franchisor was not liable for plaintiff’s injury because of an allegedly dangerous condition because the franchisee’s service station lease gave exclusive control over the franchisee’s premises to the franchisee); *Wright v. Mr. Quick, Inc.*, 486 N.E.2d 908 (Ill. 1985) (evaluating both the franchisee’s sublease and the franchise agreement collectively, the court determined that the duty to repair and maintain the premises rested with the franchisee; thus, only the franchisee was liable to an injured third party).

118. *See, e.g.*, North Carolina *ex rel.* Thornbug v. AAMCO Transmissions, Inc., Bus. Franchise Guide (CCH) ¶ 8859 (N.C. 1987); *Kelley v. AAMCO Transmissions, Inc.*, Bus. Franchise Guide (CCH) ¶ 8860 (Mich. 1987). In both cases, consent judgments obtained by the state attorneys general required AAMCO to record and tabulate all customer complaints against franchisees and to implement extensive corrective programs; *see also* Porter & Dietsch, Inc. *v. FTC*, 605 F.2d 294 (7th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980) (applying a strict liability standard against a retailing chain for using advertisements containing the manufacturer’s misleading claims about a weight loss product and plan); *People v. Ludwig Baumann & Co.*, 288 N.Y.S.2d 404 (Sup. Ct. 1968) (holding franchisor liable for “bait and switch” advertising of its franchisee even though done without its knowledge—trade name licensees have a duty to prevent fraud or other misuse of their name).

119. *See infra* notes 243-44 and accompanying text.

120. Edwards, Note, *supra* note 45, at 281 & n.91. In one area, involving taxicab operations that are often franchised, evidence that a defendant franchisor company’s name and colors are on the taxicabs may create a prima facie case for apparent authority. *Thomas v. Checker Cab Co.*, 238 N.W.2d 558, 560, 561 n.1 (Mich Ct. App. 1975) (citing cases from several jurisdictions).

Likewise, in *Drummond v. Hilton Hotel Corp.*, the franchisor required that only the Hilton name was to be displayed in the hotel's common areas and in the guest rooms. The court decided that a jury had the right to determine whether an apparent agency existed.

Numerous other apparent agency decisions also have resolved the reliance issue by turning, at least in part, to manifestations of agency and assumptions of the plaintiff which were unique to the case at hand. To give just one example, in *Crinkley v. Holiday Inns*, 501 F. Supp. 29 (E.D. Pa. 1980), Hilton did require all franchisees to disclose to each supplier and creditor that they were independent entities and that Hilton retained no liability for debts. Thus, Hilton sought to avoid contractual responsibility while ignoring vicarious liability for franchisees' torts.

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123. Id. at 32. Interestingly enough, Hilton did require all franchisees to disclose to each supplier and creditor that they were independent entities and that Hilton retained no liability for debts. Thus, Hilton sought to avoid contractual responsibility while ignoring vicarious liability for franchisees' torts.
124. Id.
125. See, e.g., *Crinkley v. Holiday Inns, Inc.*, 844 F.2d 156 (4th Cir. 1988) (described *infra* notes 126-32 and accompanying text); *Broock v. Nutri/System, Inc.*, 654 F. Supp. 7, 11 (S.D. Ohio 1986) (plaintiff's decedent had read about Nutri/System and its guarantee of weight loss, and she allegedly undertook the Nutri/System program with the incorrect belief that it would not be harmful to her child, whom she was nursing; while there was no *actual* agency relationship, *id.* at 7-10, the court found a genuine issue of material fact about apparent agency: whether the decedent reasonably believed Thin, Inc., which she "had never heard of," to be simply a Nutri/System agent); *Standard Oil Co. v. Gentry*, 1 So. 2d 29 (Ala. 1941) (plaintiff was unaware that the Standard gas station in question had just recently changed from a company operation to an independent dealership; after an unsatisfactory experience with another station run by an independent dealer, the plaintiff resumed his patronage of the Standard station and subsequently was injured; the jury's verdict favoring the plaintiff, on grounds of apparent authority, was affirmed); *Kuchta v. Allied Builders Corp.*, 98 Cal. Rptr. 588 (Ct. App. 1971) (construction franchisor intentionally or negligently led homeowner reasonably to believe that it and a franchisee were part of the same business operation; the franchisee and franchisor referred to each other, respectively, as the branch office and main office, both referred to themselves as "Allied Builders," both used the same advertising, calls to one were frequently returned by the other, and the homeowner-construction contract was with "Allied Builders System." These and other factors justifiably caused third parties, including the plaintiff homeowner, to feel that the franchisee was authorized to act on behalf of the franchisor—indeed, in the homeowner's eyes, the franchisor and franchisee were really one in the same); *Vowels v. Arthur Murray Studios*, 163 N.W.2d 35 (Mich. Ct. App. 1968) (a local, franchised dance studio went out of business; a customer obtained a judgment against the franchisor for the cost of dance lessons still owed to her, with the court finding that the franchisee's use of the franchisor's name on contracts, its use of the franchisor's logo as its letterhead on stationery, and indications that the franchisee was a manager for the franchisor all creating an ostensible agency); *Duluth Herald & News Tribune v. Plymouth Optical Co.*, 176 N.W.2d 552 (Minn. 1970) (for three years the franchisor failed to determine whether the franchised optical company was exceeding its authority, and thus it was held liable for advertising fees that the franchisee owed to the plaintiff newspaper; the local company had operated under the franchisor's name, continued to order advertising under that name, and used the name on franchisee's checks, at the franchisee's place of business, and in its telephone book listing. The trial court finding of apparent authority was upheld by the
Inc., the plaintiffs had been robbed by a gang of "Motel Bandits" who burst into their room at a Holiday Inn. The court noted that the defendant franchisor "engages in national advertising . . . without distinguishing between company-owned and franchised properties." A Holiday Inns directory also failed to make such distinctions, and a sign in the hotel restaurant was the only indication that the hotel in Crinkley was independently owned. One of the plaintiffs testified that when he and his wife contracted with the franchisee he "did not know the difference between a franchise inn and a company owned inn," and he further stated, "[I] would be greatly surprised to find out that [the franchisor] was not involved in the operation of the [franchised inn] beyond the franchise agreement." The Fourth Circuit Court of Appeals upheld a jury verdict against Holiday Inns because the jury reasonably could have concluded that (1) the franchised hotel was operated so as to appear company owned, and (2) this appearance of national ownership and control was a purpose of the franchise agreement.

Minnesota Supreme Court); D. E. Evins, Annotation, Status of Gasoline and Oil Distributor or Dealer as Agent, Employee, Independent Contractor, or Independent Dealer as Regards Responsibility for Injury to Person or Damage to Property, 83 A.L.R.2d 1282, § 5, at 1292-1300 (1962) & 202-03 (Supp. 1991) (cases finding tort liability through agency or no liability because of independent contractor status); supra notes 62, 68 & 75-79 (discussing cases in which no reliance was found).

126. 844 F.2d 156 (4th Cir. 1988).
127. Id. at 158-59.
128. Id. at 166.
129. This is still the case. Holiday Inn Worldwide Directory 6-117 (eff. May, 1992) (listing and thoroughly describing every Holiday Inn hotel in the United States, but not indicating which are franchised and which are company-owned).
130. 844 F.2d at 166-67.
131. Id. at 167. Plaintiffs need not contend that they knew nothing about franchising or that they believed a franchised business chain was completely integrated, i.e., centrally owned. All that needs to be shown is a reasonable belief that the particular business in question was owned or otherwise controlled by the national organization (the franchisor). See, e.g., McDonald v. Century 21 Real Estate Corp., 331 N.W.2d 606 (Wis. Ct. App. 1983) (concluding that the plaintiffs reasonably relied on their "impression" that the franchisee represented the franchisor despite disclaimers both in advertising and in franchisee-customer contracts); Golann et al., supra note 42, at 127. Nonetheless, a number of apparent authority cases involve plaintiffs with the same sort of complete ignorance as Mr. Crinkley proclaimed for himself. See, e.g., Coleman v. Chen, 712 F. Supp. 117, 124 (S.D. Ohio 1988) (stating "[p]laintiff has indicated that she was unaware that any of Holiday Inns, Inc.'s individual outlets were owned by private companies").
132. A similar holding thirteen years earlier involved the same hotel chain. In Wood v. Holiday Inns, Inc., 508 F.2d 167 (5th Cir. 1975), the appellate court overturned a judgment notwithstanding the verdict that the trial judge entered in favor of the franchisor. It held that apparent authority could reasonably be found inasmuch as the franchise agreement required
Certainly, apparent agency requires more than simply a franchisee's use of the franchisor's logo. In the "slip and fall" case of Gonzales v. Walgreens Co., the plaintiffs' attorney only began to flesh out an apparent agency argument after the District Court granted Walgreens' motion for summary judgment. She then cited cases such as Drexel v. Union Prescription Centers, Inc. In Drexel, however, there was evidence that the franchisor, "by strictly controlling the manner in which the franchisee was perceived by the public, created an appearance of ownership and control purposefully designed to attract the patronage of the public." With no similar evidence in Gonzales, the plaintiffs' bare reference to use of Walgreens' logo did not, by itself, create a genuine issue of material fact as to apparent agency.

Gizzi, Drexel, and their progeny reveal, however, that a franchisee's apparent authority to bind the franchisor can arise apart from franchisor acts, statements, or acquiescence aimed at or otherwise specifically affecting just the plaintiff. In other words, mass advertising, company signs, and other indications of a possible agency may suffice; courts will examine such general circumstances for their actual or readily-presumed effects on a plaintiff. Certainly, this...
Determining what constitutes franchisor "manifestations" of agency, and what is "reasonable" reliance thereon, may ultimately turn on a sense of what is commonly known. Such knowledge is what adds nuance and meaning to the glut of packaged claims and assorted "come-ons" to which the ordinary consumer is subjected. Thus, absent special circumstances, "common knowledge" may itself be the standard of reasonableness that both guides and then serves to limit the potential customer's "reliance" on agency.

III. THE "COMMON KNOWLEDGE" DOCTRINE

A number of cases have held that it is "common knowledge" that independent outlets often display signs indicating they sell certain well-known, trademarked goods; the customers thus cannot reasonably rely upon these signs as "manifestations" of agency, permitting them to obtain relief against the trademark licensor (franchisor) for the acts of an apparent agent, the licensee (franchisee). This doctrine first arose in decisions involving gasoline dealerships, but it has been invoked in cases involving other types of dealerships or franchises. There is no well-articulated reason to accept the "com-
mon knowledge" defense while restricting it to only one industry from the vast array of franchised businesses serving the public.

The "common knowledge" doctrine has proven controversial. One commentator deplored the fact that there are no surveys in this area, and he further opined, "[I]t is not hard to believe that there are many people . . . who believe that all service stations or drive-ins or clothes cleaners displaying the same name are run by the same company." The particulars of a case, though, may reveal why courts sometimes so readily embrace the doctrine.

One recent case was *Chevron U.S.A., Inc. v. Lesch*. The plaintiffs had been badly burned and their home destroyed by an explosion in their garage. They contended that an employee at a franchised Chevron station negligently repaired their automobile's gasoline tank, which led to the explosion. Chevron's liability, if any, rested exclusively on apparent agency. The trial judge stated that there were no representations by Chevron of an agency relationship, nor was there any evidence of reliance by the plaintiffs. He also concluded that reliance would not have been justified or reasonable. Summary judgment for Chevron was granted.

The Maryland Court of Special Appeals reversed and remanded. It determined that "Chevron's efforts to prevent the public from distinguing between branded stations and its own outlets were of long standing and were diligently pursued." Not only did it find numerous Chevron-initiated or Chevron-condoned indicia of agency, but also Chevron's actions and admissions were directly related to the reasonableness of the plaintiffs' reliance upon an apparent agency. For instance, the court noted that the Chevron Station Acquisition Manual freely acknowledged, "[t]he public is often unable to distinguish be-

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146. Stuart, Comment, supra note 33, at 130 (cited in Drexel v. Union Prescription Centers, Inc., 582 F.2d 781, 797 n.23 (3d Cir. 1978)).
147. 570 A.2d 840 (Md. 1990).
148. Id. at 842.
149. Id. at 841. The other defendants were the repairman, the franchisee, and the "jobber" corporation that sold the Chevron petroleum products to the franchisee. Id.
151. Id. at 1295.
152. Id. at 1299. The court found that the trier of facts might reasonably conclude that Chevron had "enmeshed itself in Sir Walter Scott's epigram: 'Oh what a tangled web we weave when first we practice to deceive.'" Id. at 1300.
153. Id. at 1305.

http://scholarlycommons.law.hofstra.edu/hlr/vol20/iss3/3
between a jobber station [a franchisee] and one of ours [a company owned station].” Emphasizing that Chevron’s actions were recognized by Chevron “as making it impossible for the public to distinguish” the franchised Chevron station from Chevron U.S.A., Inc., the Court of Special Appeals held that there was evidence of the reasonableness of the plaintiffs’ reliance.

Maryland’s highest court reinstated the trial judge’s summary judgment for Chevron. Its decision rested entirely on the ground that the plaintiffs’ belief in an agency relationship was not reasonable. The court recited the “common knowledge” line of reasoning that many courts have followed. It went beyond, however, the judicial presumption of public awareness that independent dealers display the franchisor’s trademarks. The Maryland Court of Appeals held that just because the franchisor’s credit cards are commonly accepted at a service station, and the similarity in types of purchases made with those cards, do not indicate that a national oil company is the station’s “employer.” The Court of Appeals also recognized that, under different circumstances, a Chevron advertising campaign could have resulted in an apparent agency. Here, however, Chevron U.S.A.’s extensive, “We Care” advertising program took place nine years before the accident. In addition, there was no evidence that the plaintiffs saw any of the promotional materials except for some decals simply bearing the words “We Care” and the Chevron hallmark.

Ultimately, the plaintiffs’ claim may have fallen as much because of the depth of their own knowledge, as because of “common knowledge.” They had used the local station for repairs when it was a Sinclair station and when it was a BP station. They knew that the station was privately owned and operated.

154. Id. at 1297 & 1305.
155. Id. at 1305.
157. Id. at 846. This line of reasoning assumes that the general public is aware that the only representation made by such displays is that the oil company’s gasoline is sold at the service station.
158. Id. See supra notes 1-5 and accompanying text.
159. Here, that company, Chevron, furnished the credit card slip and cooperated with the credit card company and the issuing bank. Id. at 847.
160. Id.
161. Id. (citing Gizzi v. Texaco, Inc., 437 F.2d 308 (3d Cir.), cert. denied, 404 U.S. 829 (1971); Chevron Oil Co. v. Sutton, 515 P.2d 1283 (N.M. 1973)).
163. Id. at 849.
164. Id. at 849 & n.9.
ron U.S.A. "would stand behind any repair," and that the station was "being backed up by the major concern of Chevron," was, therefore, unreasonable.

While all "common knowledge" cases have peculiarities, Lesch may be typical. That is, whether at the trial or the appellate level, judges use the "common knowledge" doctrine to remove the case from the fact finding stage, the trial itself. Usually, that means a summary judgment instead of a jury proceeding. Therefore, the major, if not entire, rationale for pre-trial dismissal is a factual premise—"common knowledge"—that has never been tested. The surveys in this article are meant to furnish such a test.

IV. "COMMON KNOWLEDGE" DISPROVED

A. Purpose and Methodology of Surveys

The assumption underlying the decision in Lesch and other cases is, of course, that certain knowledge is in fact "common," something "that every intelligent person has." Courts have not required the production of evidence (surveys, studies) to support a finding of common knowledge, but have simply taken judicial notice of it. In essence, they have determined that such knowledge is a fact, something judges and jurors "already know"—a matter admitted without proof because it is "universally regarded as established." Alas, these courts are wrong! As the following survey results demonstrate, there is little, if any, common knowledge about franchising, dealerships, or other such arrangements. Moreover, public assumptions about the law fly in the face of judicial calculations based on so-called common knowledge.

In-depth surveys were presented to two groups: college business

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165. Id. at 846 (quoting the plaintiffs).
166. Id. at 848 (quoting the plaintiffs).
168. As Part IV, infra indicates, survey tests of the "common knowledge" premise show that it is extremely inaccurate.
169. Common knowledge "[i]s what [a] court may declare applicable to action[s] without necessity of proof. It is knowledge that every intelligent person has, and includes matters of learning, experience, history, and facts of which judicial notice may be taken." BLACK'S LAW DICTIONARY 276 (6th ed. 1990) (emphasis added). Id. at 275 (stating that common knowledge is "[i]nformation widely shared by substantial number of people. See Judicial notice").
170. Id. at 848 (defining "judicial notice"). See Lesch, 570 A.2d at 846-47 (noting that it is common knowledge that independent gasoline stations display the trademarks of gasoline suppliers).
law students (328)\textsuperscript{171} and, to compensate for the relative youth of the college group (median age of 21), a set of older individuals (250, median age of 45).\textsuperscript{172} Both of these groups, especially the Older Group ("OG"), were far better educated than the typical American adult,\textsuperscript{173} and OG members were far more likely than the general public to have a managerial or professional job.\textsuperscript{174} Almost all members of the college student group had work experience,\textsuperscript{175} and about half had worked for a franchise, much more than any other survey group.\textsuperscript{176} It seems to be a fair assumption that, if these two groups did not match the populace in knowledge, they should have been superior.\textsuperscript{177} The typical OG respondent was a person with a college degree and some graduate school training, holding a high-level professional position, and having—by virtue of age—more than an average amount of learning through living.\textsuperscript{178} As for members of the student

\textsuperscript{171} On October 18, 1989 and February 16, 1990, self-administered questionnaires were distributed in five upper-level, undergraduate classes in business law at the University of Florida's College of Business Administration. Every student completed a survey. The average completion time was about ten minutes. For complete results, see infra app., Poll A.

\textsuperscript{172} These same surveys were conducted by members of the business law classes and the author. Again, they were not random, but each student was to have one or more persons age 30 or over complete a survey. Complete results are in the Appendix, infra.

\textsuperscript{173} According to the Census Bureau, the median level of education for Americans 25 years old and older is high school, with no college course work. BUREAU OF THE CENSUS, supra note 12, at 441.

\textsuperscript{174} When compared to the community, the respondents in both groups were less likely to have held a "blue collar" job such as a factory worker, truck driver, craftsman, or machine operator. Less than 5% had ever held such a job, while the national average for such employment (looking simply at present job holders) is over three times higher. Id. at 389-91 (putting such "operators, fabricators, and laborers at 15.5% of the total work force").

\textsuperscript{175} Approximately half of the respondents were employed, mainly part-time, with almost all of the remaining respondents having been previously employed.

\textsuperscript{176} Compare public survey respondents—only 27.7% stated that they had worked for a franchise, 70.8% said "No," and 1.5% did not know. This work was mainly at restaurants/fast food outlets or retail stores. As one would expect, the college students' work tends to have been wage-paying (presumably low-level) jobs in service, clerical, and sales positions.

\textsuperscript{177} Indeed, a random telephone survey of the public seems to confirm this assumption. The public respondents generally knew less than both the student and OG respondents, in each of the following areas: The usual ownership of a McDonald's restaurant (infra app., Poll A, Question 6; infra app., Poll B, Question 1(a)), whether certain business characteristics indicate national ownership (infra app., Poll A, Questions 1-3 & 7-9; infra app., Poll B, Questions 3(a)-3(e)), requirements vel non that signs state a business' ownership (infra app., Poll A, Question 13; infra app., Poll B, Question 4(a)), possible stockholder liability for corporate negligence or breaches of contract (infra app., Poll A, Questions 24 & 26; infra app., Poll B, Questions 4(f)-4(g)), and what constitutes a franchise (infra app., Poll A, Question 14; infra app., Poll B, Question 6(b)).

\textsuperscript{178} As of 1988, the median age of Americans was about 32.3 years, far less than the OG median of 45 years. BUREAU OF THE CENSUS, supra note 12, at 13. If one counts only
group, while younger and presumably less experienced than the average adult, their overall higher level of education, exposure to some business law generally, and specific interest in business may have made them more familiar with the concepts tested in the survey.

There were also shorter random surveys of the public at large and of patrons at franchised businesses. For these two surveys as well, the average respondent was better educated than the average adult American. In addition, the only poll asking for income levels, the telephone survey, indicated a median household income level of between $25,000 and $29,999, comparable to the national average but certainly higher than the average for the Gainesville, Florida community where the surveys were conducted.

Combined, the in-depth surveys and the random telephone and on-site surveys offer insight into what the public knows, or does not know, about franchising. They also reveal popular attitudes about vicarious liability and other concepts important to franchised businesses.

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179. The students' median age was 21, far less than the national median. Id.
180. The vast majority were business majors.
181. None of the areas covered by the questionnaire had been studied or discussed in class. Legal topics touched upon in the survey included agency, franchising, vicarious liability, insurance, and corporations.
182. In May 1990, the University of Florida Bureau of Economic and Business Research conducted a random telephone survey of 307 adults. Also, a brief survey of customers at franchised fast-food and ice cream outlets were conducted in the summer and fall of 1990. One of every three adult customers was surveyed, and a total of 399 surveys were completed. See infra app., Poll B.
183. Public respondents, on average, had three years of college education rather than the national average of none. The franchise customers' median level of education was "Some College Education," with over 17% having a college degree, another 6% also having attended graduate school, and an additional 12% having a graduate or professional degree. As stated previously, supra note 173, the average American adult has only a high school education.
184. BUREAU OF THE CENSUS, supra note 12, at 442 (Table No. 715).
185. See, e.g., Almanac '91: The Fact Book for North Central Florida, GAINESVILLE SUN, Feb. 24, 1991, at 12 (noting that in 1987 the local area ranked 271st out of 318 United States metropolitan areas in per capita income); UNIVERSITY OF FLORIDA BUREAU OF ECONOMIC AND BUSINESS RESEARCH, FLORIDA STATISTICAL ABSTRACT 112 (Anne Shermyen ed. 1990) (showing that the Gainesville locale—Alachua County, Florida—consistently has had a much lower per capita income than the United States as a whole; in 1988, for instance, Alachua's per capita income was less than 83% of the national average).

Complete demographics are on file with the Business Law and Legal Studies Department, College of Business Administration, University of Florida, Gainesville, Florida.
B. The Surveys' Results

1. Knowledge About Franchising
The respondents were asked a series of questions to determine their knowledge as to the display of trademarks, the existence of franchises, and the significance of a franchisor-franchisee relationship, including the prospects of franchisor vicarious liability.

a. Business Characteristics

The first questions on the in-depth survey concerned gas stations displaying a well-known company logo or trademark, selling only that brand of gasoline, accepting the brand-name credit card, being listed in telephone books and advertisements under the nationally-known trade name, and having attendants wearing uniforms with the trade name insignia. While courts have found it to be "common knowledge" that such stations are independently owned, the surveys show that, separately or in combinations, those factors indicate a company-owned gas station to about two-thirds of the student respondents, and even higher—about 80%—for the OG or random telephone survey respondents. The number of those who are definite about such company ownership (most view it as just probable) increases sharply if the company distributes a list of gas stations which includes this gas station (i.e., does not differentiate between franchisees and others).

With respect to a diet center, the numbers are often even higher: 77-80% of the students surveyed and 63-72% of the OG found signs, products and services, uniforms, telephone listings, advertisements, or a list of centers indicate company—not local—ownership. When all such characteristics are present, the numbers go to a level where, by a margin of seven to one for the students and seven to two for the OG, the respondents find it likely that the center is owned and operated by the national company.

186. E.g., Gulf, Shell, Texaco.
187. See supra notes 2, 4, 144, 147-67 and accompanying text.
188. That is after factoring out the approximately 5% who have no answer except, "Do Not Know." Infra app., Poll A, Questions 1, 2 & 3.
189. Id.; infra app., Poll B, Question 3.
190. See infra app., Poll A, Question 4. This increase only registers for the college student group, not the OG. Id.
191. Id. at Questions 7-10.
192. Id. at Question 11. Actually, for a plaintiff to recover under an apparent authority
tion of characteristics, doubters as to company ownership decreased from the 17-19% range to approximately 12% for students, and from about 23-29% to less than 21% for the OG. A similar decline occurred vis-a-vis gasoline stations.

Over 75% of both the student and OG respondents (more than 80% of those with an answer) thought it definite or probable that businesses are not required to display signs or use letterheads stating who the business' owner is; the public respondents, however, were less knowledgeable—more than half believed that there is such a requirement.

b. Large Business Chains: Franchised or Centralized?

Concerning an extremely familiar, indeed ubiquitous, fast food restaurant, McDonald’s, the student respondents split fairly evenly between those who thought that a McDonald’s restaurant is definitely or probably owned by the McDonald’s Corporation itself and those who disagreed. The OG was more likely to believe a McDonald’s restaurant is owned by the national corporation. Ironically, these two groups, despite their relative ignorance, may nonetheless have more “common knowledge” about some other types of franchising than about gas stations. The courts have sometimes found the public’s knowledge to be the exact opposite, simply to retain the common knowledge doctrine as first applied to gas stations without extending it to more recent forms of franchising, including hotels, stores, and restaurants. Results of the random telephone survey support the

claim, it is not necessary that he believed the franchisee was company owned. The plaintiff need only show a reasonable belief that the franchisee was authorized to bind the franchisor. See, e.g., Golann et al., supra note 42, at 127. The two concepts, however, “often merge.” Id. Certainly, if the public reasonably believes the franchised outlet is company owned, then that element in proving apparent authority (belief in authority to bind the company) has been met quite easily.

193. See infra app., Poll A, Question 11.
194. That decline was from 28.4-1% to 25.3% for students and from 20.4-22.4% to 14.8% for the OG. Id. at Questions 1-5.
195. Id. at Question 13.
196. See infra app., Poll B, Question 4(a). The student and OG respondents could also be quite ignorant, given to sheer speculation; they greatly overestimated the percentage of retail sales made by franchisees. Infra app., Poll A, Questions 20 & 21 (but most acknowledged that they were not sure of the answer). The median response of 60% is far above the actual figure of approximately 33%. See supra note 13 and accompanying text.
197. See infra app., Poll A, Question 6.
198. Id. Nearly 60% of the OG respondents with an opinion thought corporate ownership definite or probable. Id.
199. For instance, the successful, franchisor defendant in Chevron U.S.A., Inc. v. Lesch,
hypothesis that these courts misread the relative state of "common knowledge," since only 9.9% of the respondents correctly answered that most Chevron gas stations are locally owned and operated, while 57.0% erroneously believed that they were mostly nationally owned and operated, and 28.0% incorrectly concluded that most were dually owned and operated both nationally and locally. Not only are those figures abysmal in absolute terms (less than 10% correct); they also are abysmal when compared with the knowledge about non-gasoline, franchised systems such as McDonald’s, Nutri/System, and ComputerLand. While the public respondents generally remained wrong about these systems’ ownership and operations, they were substantially more likely to know about these franchised organizations’ typically local ownership and operations than they were to know the same about Chevron.

Especially interesting, as possible long-term indicators, are the survey results showing that perhaps younger persons—here, the student respondents—usually know the most about franchising. For instance, the OG respondents and the franchised business customers

570 A.2d 840 (Md. 1990) argued that gasoline companies market a discrete product that distinguishes them from hotel franchisors or others. Reply Brief of Appellant at 4, Id. The court in Orlando Executive Park, Inc. v. P.D.R., 402 So. 2d 442, 450 (Fla. Dist. Ct. App. 1981), aff’d sub nom. Orlando Executive Park, Inc. v. Robbins, 433 So. 2d 491 (Fla. 1983) may have posited such a distinction. There, a guest who was assaulted at a franchised Howard Johnson Motor Lodge claimed that the franchisor was the apparent principal for a franchisee which allegedly failed to provide adequate security measures. Permitting this apparent authority contention, the lower appellate court noted that the gasoline cases concerned representations about a product, gasoline, not about a “standard of service, car repair, or maintenance of premises.” Id. The Florida Supreme Court may also have drawn such a distinction from gasoline station cases when it held that the Orlando Executive Park jury could have found that franchisor Howard Johnson “represented to the public that it could find a certain level of service at this motel.” Orlando Executive Park, Inc. v. Robbins, 433 So. 2d at 494 (emphasis added); see also Drexel v. Union Prescription Centers, Inc., 582 F.2d 781, 796 n.23 (3d Cir. 1978) (described supra note 2 and infra note 255); Ago v. Begg, Inc., 705 F. Supp. 613, 619-20 (D.D.C. 1988), aff’d, 911 F.2d 819 (D.C. Cir. 1990), later proceeding sub nom. Farmer v. Mount Vernon Realty, Inc., 720 F. Supp. 223 (D.D.C. 1989) (differentiating real estate franchisor’s licensing of trade name from gasoline and automobile franchisors’ licensing arrangements because the real estate franchisee “sells” not just a product, but her expertise, advice, and fiduciary capacity); Beck v. Arthur Murray, Inc., 54 Cal. Rptr. 328, 351-32 (Dist. Ct. App. 1966) (described supra note 2 and infra note 255); see infra note 255 and accompanying text.

200. See infra app., Poll B, Question 1(f). Respondents surveyed at franchised businesses also were usually mistaken. Id. However, these figures are not as lopsided: 20.4% correctly stated that most Chevron stations are locally owned and operated. Id.

201. Id. at Questions 1(a), 1(c), 1(g) & 1(i).

were more likely than the college students to conclude that McDonald's restaurants are nationally owned, and the random telephone survey showed even more of a disparity from what the students knew, with a margin of three to one of the telephone respondents believing (incorrectly) that most McDonald's restaurants are nationally rather than locally owned and operated. Overall, the student respondents often seemed more inclined than their elders to avoid potentially erroneous assumptions of national, centralized ownership.

Still, the students' relative knowledge should not be overemphasized. In most instances, they were, as a group, wrong about businesses' ownership, operations, and potential liability, just as were the other groups. Indeed, both the random telephone survey and the survey of franchise patrons show that, in general, people simply have no idea about the likely ownership or operation of various large business chains. For instance, respondents tended to believe most Lil' Champ Gas Stations are independently owned and operated when in fact they are all owned and run centrally. Respondents can, as was stated previously, err just as much in the other direction: while incorrectly assuming one chain (Lil' Champ) is franchised, they tend—by almost six to one—to assume (again, wrongly) that another chain (Chevron) generally is owned and operated nationally. The public seems to have no more knowledge about ownership and operations of gas stations than it does of other businesses such as fast-food and hotel chains. That is especially remarkable in light of the fact that the courts have held that there is "common knowledge" about oil company trademarks.

Nearly half of both the public respondents and the franchise cus-

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203. Id. at Question 6; see infra app., Poll B, Question 1(a).
204. See infra app., Poll B, Question 1(a). As for Best Western hotels, a national cooperative with each hotel individually owned and operated, the vast majority of both student and OG respondents mistakenly concluded that use of the Best Western name signified ownership and operation by a national corporation. See infra app., Poll A, Question 12.
205. See infra app., Poll A., Questions 1-6, 14 & 18.
206. Id. at Questions 1-5, 7-12, 16, 22 & 30.
207. See infra app., Poll B, Question 1(b).
208. See supra notes 186-94, 200 and accompanying text.
209. See infra app., Poll B, Question 1(b).
210. Id. at Question 1(i).
211. Most "common knowledge" cases involve gas stations. See, e.g., supra notes 1-5 and accompanying text. For the distinction between service station cases and other franchising cases, see supra note 199 and accompanying text and infra note 253 and accompanying text.
Customer respondents believed that most Nutri-System Weight Loss Centers are nationally owned and operated, while less than 20% of each group correctly surmised that they are, in general, locally owned and operated. Public respondents were likewise ignorant about two fried chicken chains. First, they erroneously thought, by a margin of over four to one, that most Kentucky Fried Chicken outlets are nationally rather than locally owned and operated. Second, they were much less likely to believe that most Church’s Fried Chicken restaurants are nationally owned and operated, when in fact they usually are not franchised.

In the lodging industry, both the public and the franchise customers were quite wrong about perhaps the most prominent, predominantly franchised hotel chain—Holiday Inns. By a twenty-five to one ratio for the public, and a rate of over seven to one for franchise customers, the respondents incorrectly opined that most Holiday Inns are nationally owned and operated. These Holiday Inn figures can be compared with a completely integrated operation, that of Motel 6. Approximately three times or five times as many of the franchise customer or general public respondents, respectively, incorrectly believed that most Motel 6 motels are locally owned and operated than rightly believed that to be the case for a genuinely franchised chain, Holiday Inns.

Of the eleven businesses about which the public and franchise customers were quizzed, a majority of all respondents only answered correctly about one business, namely Avis Rent-a-Car. Roughly three-fourths of the public and two-thirds of the franchise customers stated that they believed most Avis centers are nationally owned and operated. Only two other businesses featured a plurality of correct answers. First, an average of about 44% of the total respondents opined that Motel 6 is nationally owned and operated (51.9% of the public, and 37.1% of the franchise customers). Second, 34.1% and 42.9% of the public and the franchise customers, respectively, stated that most Computerland stores are locally owned and operated.

212. See infra app., Poll B, Question 1(c).
213. Id. at Question 1(j).
214. Id. at Question 1(e). Franchise customer respondents tended to track the public survey results, although they were more likely than the general public to believe most fried chicken restaurants—be they Kentucky or Church’s—are locally owned and operated. Id. at Questions 1(e) & 1(f).
215. Id. at Question 1(d).
216. Id. at Questions 1(d) & 1(h).
217. Id. at Question 1.
218. Id. at Question 1(f). Only two other businesses featured a plurality of correct answers. First, an average of about 44% of the total respondents opined that Motel 6 is nationally owned and operated (51.9% of the public, and 37.1% of the franchise customers). Id. at Question 1(h). Second, 34.1% and 42.9% of the public and the franchise customers, respectively, stated that most Computerland stores are locally owned and operated. Id. at Question 1(g).
mon knowledge" than are gasoline stations, fast-food restaurants, diet centers, or hotels. Almost as many public and franchise customer respondents believed Budget Rent-a-Car is nationally owned and operated as believed Avis to be.219 They were wrong. A very low percentage of the public and franchise customer respondents, only 9.6% and 6.8%, respectively, correctly stated that most Budget outlets are locally owned and operated.220

This ignorance about the ownership and operation of common businesses is not simply general. In their home communities, while they may know more about individual outlets, consumers typically still do not know whether a business is owned and operated by the national company or is instead a franchise. Only about one-third of the public and franchise customer respondents knew that the local Burger King Restaurants and Coldwell Banker Realtors are locally owned and operated.221 That is all the more remarkable in that the local Coldwell Banker franchise explicitly and prominently states in all advertisements that it is independently owned and operated. In fact, the franchise also includes the name of the local owner in the business’ trade name, all logos and listings, and the like.222

c. Understanding What Franchises Are

Most student respondents were able to choose or otherwise offer a description of a franchise noting that it is independently owned and managed.223 Still, should we not be disturbed that more than one in six student respondents thought the party granting the franchise (the franchisor) owned it, that approximately another one-sixth believed the franchisee did not manage it (the franchisor did), and that altogether nearly 40% of the student respondents were wrong about the very basics of franchise ownership and management?224 The OG respondents were farther from the mark. While half recognized that a fran-

219. Id. at Question 1(k).
220. Id.
221. Id at Question 2. In fact, about half of the 399 respondents to on-site surveys at Gainesville, Florida franchised businesses were customers of one of the city’s four Burger King restaurants, all of which are independently and locally owned.
224. Id.
chise is independently owned and managed, almost one-third thought the franchisor managed it, and 18% either thought the franchisor owned it or simply did not know what a franchise is.® Perhaps most alarming, a substantial majority of the students and the OG with incorrect assumptions about franchise fundamentals were actually rather confident about their erroneous beliefs; instead of being unsure about their responses, they were reasonably sure or absolutely certain.226

When we examine the responses of the public and franchise customers, we see that they were even more likely to be wrong about what a franchise is. Half of both groups of respondents offered completely incorrect definitions, and less than one in six of the public or franchise customer respondents provided only correct attributes.227 Altogether, of those who claimed to know what a franchise is, the survey found that few members of the general public, and only a minority of the franchise customer respondents, actually averred that franchises entail independent ownership or independent operations.228 Indeed, less than half of those who thought they knew what a franchise is then managed to mention even one genuine attribute of franchising.229 That seems all the more remarkable after a series of survey questions that delve into matters of local/independent ownership and operation versus national ownership and control.230 Presumably, the prior questions served as a “clue” to some respondents and thereby boosted the number who did note the local/independent nature of franchises. Nonetheless, among both the public respondents and the franchise customer respondents, far more of those surveyed offered answers indicating a belief that franchises are not independently owned and operated than the reverse.231

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225. Id.
226. Id. at Question 15.
227. See infra app., Poll B, Question 6.
228. Id.
229. Id.
230. Id. at Questions 1-3.
231. Id. at Question 6. Of course, to win an apparent authority claim the plaintiff can show something much less than general ignorance about franchising; a justifiable misunderstanding of who controls the particular franchised business will suffice. See supra note 131 and accompanying text.
2. Knowledge and Beliefs About the Vicarious Liability of Franchisors

a. What People Think the Law Is

When questioned about holding franchisors responsible for breaches of contract or negligence by their franchisees, most student and OG respondents felt that it could be done. A few more said "yes" as to breaches of contract (an average of about 61% of those with an answer) than did so for negligence (about 55%).\(^{232}\) While people tended to be doubtful about one's ability to sue and recover equal compensation from franchisor and franchisee, especially with regard to contract breaches,\(^{233}\) they overall tended to believe the legal system afforded one an opportunity to recover from franchisors for what franchisees had done, i.e., through vicarious liability.\(^{234}\)

Widespread misinformation about holding franchisors vicariously liable is clearly demonstrated by the response of 74.8% of the student group, and 70.8% of the OG, who did not know that the franchisor often is not liable for franchisees' negligence or breaches of contract.\(^{235}\) In sharp contrast is the well-understood notion that stockholders are not usually liable for corporate negligence or breaches of contract. For both tort and contract, large majorities of both the student and OG respondents saw no likelihood of recovering from the corporation's owners (the stockholders) directly.\(^{236}\)

Some other findings are: Over 80% of both the student and OG respondents believed that franchisors are legally obliged to guarantee

\(^{232}\) See infra app., Poll A, Questions 16 & 18.

\(^{233}\) Id. at Questions 17 & 19.

\(^{234}\) Id. at Questions 16 & 18; see also id. at Questions 22 & 23 (inquiring as to whether franchisors are required to guarantee, or are doing so anyway, the services and goods provided by franchisees); Question 27 (inquiring as to whether franchisors have to pay judgments against insolvent franchisees); Question 30 (reporting that 74.8% of the student respondents and 70.8% of the OG did not know that franchisors often are not liable for harm caused by franchisees).

\(^{235}\) Id. at Question 30.

\(^{236}\) Id. at Questions 24 & 26; see also supra note 181 (noting that for the student group, these topics had not been covered in class). The student and OG respondents did understand that the corporation itself could be sued and made to pay compensation for corporate negligence. See infra app., Poll A, Question 25. The general public's understanding of the distinction between the corporation and its owners is far less pronounced. In fact, most persons randomly surveyed by telephone felt that stockholders could be forced to compensate parties injured by corporate negligence or breaches of contract. See infra app., Poll B, Questions 4(f) & 4(g).
the services and goods provided by their franchisees, and almost all of these respondents, plus over 80% of the public respondents, felt that even if franchisors are not so required, most franchisors do in fact give such guarantees; about 90% of those students and OG respondents with an opinion thought that franchisees are definitely or probably required to have the type and amount of insurance coverage that will fully cover most potential liabilities, and regardless of whether there actually are any such requirements only a small number of student and OG respondents, 13.2% and 6.8%, respectively, doubted that most franchisees are fully covered; about half of the student and OG respondents with an answer thought that franchisors could be forced to pay judgments entered against insolvent franchisees.

b. Attitudes: What People Believe the Law Should Be

Even after being told that franchisors often are not vicariously liable, most of the student and OG respondents felt that franchisors should be liable for harm caused by franchisees. The surveys of the public and of franchise customers indicate that the vast majority of people believe that national entities should be legally accountable for negligence or breaches of contract by local stores. Apparently, most people simply do not approve of legal walls separating national franchisors from liability for the acts of their franchised outlets. Without articulating it, perhaps many lay people adopt a loss prevention rationale for imposing franchisor liability: the notion that franchisors should be held liable "for any act whose probability of occurrence

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237. See infra app., Poll A, Question 22.
238. Id. at Question 23; see infra app., Poll B, Question 4(b).
239. See infra app., Poll A, Question 28.
240. Id. at Question 29. In fact, that may be far from the truth. For instance, in one field—gasoline stations—the operators are said to be often unable to compensate fully for injuries. Davis, Comment, supra note 83, at 393 n.71. If anything, matters have worsened in recent years, as almost half of the franchised dealers have gone out of business and many of the remainder have become marginal operations. See infra note 256.
241. See infra app., Poll A, Question 27.
242. Id. at Question 31.
243. See infra app., Poll B, Questions 4(d) & 4(e). To give an example from one franchised system, as stated in a dissenting opinion, see Stanford v. Dairy Queen Products of Texas, 623 S.W.2d 797, 806 (Tex. Ct. App. 1981) (Phillips, C.J., dissenting) ("When persons visit a Dairy Queen restaurant they look to Dairy Queen for a favored recipe, quality control, cleanliness and price. They are not looking to whomsoever is inside, 'slinging the hush,' for the stand. They are looking to Dairy Queen as the principal.").
could be substantially reduced in the exercise of reasonable care and control by the franchisor.\textsuperscript{244}

While very few students or OG respondents would hold only the franchisor liable (not the franchisee, also), about 65\% of the students and 80\% of the OG respondents would not leave the franchisor free from all potential liability.\textsuperscript{245} A number (around 12-24\%) would apportion the damages equally between franchisor and franchisee, and about 40-46\% would hold franchisees primarily responsible for the harm they have caused, but require franchisors to pay if the franchisees cannot.\textsuperscript{246}

C. Summary of Findings

The surveys indicate that most people do not see the franchisor as sufficiently removed from the franchisee to escape liability for what the franchisee does. Indeed, the random public survey evinces a near-unanimous belief that national companies should be required to stand behind services and goods sold at local stores.\textsuperscript{247} In effect, it appears that most people would hold franchisors liable for franchisees' actions, in contravention of existing law.\textsuperscript{248}

While some respondents knew that the franchisee owns and operates the franchise, and that business signs or letterheads do not have to disclose ownership interests, most could not recognize the potential existence of a franchise in the very circumstances where courts have found "common knowledge" about independent dealers or trademark licensees.\textsuperscript{249} Most did not know that this legal separation of franchisor and franchisee often translates into franchisor insulation from customer suits against franchisees.\textsuperscript{250} Indeed, when questioned directly, many of the student and OG respondents recognized the liability distinction between a corporation and its owners, but did not see a limitation on franchisor liability for franchisee acts or omissions.\textsuperscript{251}

\begin{footnotesize}
\textsuperscript{244.} Liability of a Franchisor, supra note 69, at 155; see also Sandrock, supra note 9, at 710 ("A franchisor should not reap the benefits created by public recognition of its name and yet be held to no duty to assure the quality of the product.").
\textsuperscript{245.} See infra app., Poll A, Question 32.
\textsuperscript{246.} Id.
\textsuperscript{247.} See infra app., Poll B, Question 4(c).
\textsuperscript{248.} See infra app., Poll A, Questions 31-32; Poll B, Questions 4(d) & 4(e).
\textsuperscript{249.} See supra notes 186-96 and accompanying text; see infra app., Poll A, Questions 1-4 & 7-10; Poll B, Question 3.
\textsuperscript{250.} See infra app., Poll A, Question 30.
\textsuperscript{251.} Id. at Questions 16,18, 24-27; see infra app., Poll B, Questions 4(d)-4(g); see also supra note 236 and accompanying text.
\end{footnotesize}
This article's survey data indicate that it is not necessarily customer reliance, but judicial reliance which is misplaced: reliance on a notion of "common knowledge" about franchises. As one commentator noted, with obvious sarcasm: the initial, "common knowledge" court, in Reynolds v. Skelly Oil Co., 252 "failed to mention on which survey it relied in formulating its rule." 253 It turns out that there simply is no such support—there is no "common knowledge."

V. CONCLUSION

A. The Problem

Franchisors and franchisees generally need accurate information about their rights and responsibilities, and the law of vicarious liability is no exception. As in many areas of franchise law, court treatment of actual and apparent agency issues has varied considerably. Specifically, when dealing with apparent authority and agency by estoppel, courts have gone in different directions; some find third party justifiable reliance on apparent agency, while others find that "common knowledge" about franchise arrangements makes any alleged reliance unreasonable. 254

252. 287 N.W. 823 (Iowa 1939).
253. Stuart, Comment, supra note 33, at 130. (Obviously, the Reynolds judges depended upon no survey to reach their conclusion; presumably, they would have thought a survey unnecessary, anyway.) The commentator went further, however, and argued that the supposedly common knowledge about independent gasoline station dealerships "is unsupported in fact and contrary to the advertising of the oil companies themselves." Id; see supra notes 105-09 and accompanying text. He commended the decision in Beck v. Arthur Murray, Inc., 54 Cal. Rptr. 328 (Dist. Ct. App. 1966) not to apply the common knowledge doctrine to other types of franchising, and he argued that Beck is more realistic than Reynolds. Stuart also alluded to the powers of advertising as well as trade name loyalty. Stuart, Comment, supra note 33, at 130. This comment served as a precursor to Gizzi v. Texaco, Inc., 437 F.2d 308 (3d Cir.), cert. denied, 404 U.S. 829 (1971) (discussed supra notes 105-09 and accompanying text).

254. Of course, regardless of the "common knowledge" doctrine, justifiable reliance may not be present because of circumstances peculiar to a case, including the particular plaintiff. See, e.g., Aweida v. Kientz, 536 P.2d 1138, 1142 (Colo. Ct. App. 1975) (holding that as the plaintiff had never heard of that oil company-franchisor, there could be no reliance upon that franchisor as an apparent principal); Hayman v. Ramada Inn, Inc., 357 S.E.2d 394, 398 (N.C. Ct. App. 1987) (plaintiff was assaulted while a guest at a franchised Ramada Inn; her employer had arranged her stay, and there was no allegation in the complaint or evidence in the record that she would have decided to stay elsewhere or do anything else differently had she known that the defendant franchisor did not own or operate the inn; summary judgment for franchisor); Mobil Oil Corp. v. Frederick, 615 S.W.2d 323, 325 (Tex. Ct. App.), aff'd and rev'd in part on other grounds, 621 S.W.2d 595 (Tex. 1981) (plaintiff had written a letter calling the franchisee the "owner" of the station, thus indicating no reliance on the franchisor's alleged, apparent control of the station); see generally supra notes 62, 68 & 75-
The present situation can be quite confusing, with some judges deciding cases based on "common knowledge" and others evidently limiting the doctrine's application to gas station cases or even denying the concept entirely. Suggestions of common knowledge's demise have proven premature, but its continued vitality is far from over.

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255. See, e.g., Beck v. Arthur Murray, Inc., 54 Cal. Rptr. 328, 331-32 (Dist. Ct. App. 1966). Assessing the common knowledge line of cases, the court contended that the common knowledge doctrine extended only to "those particular businesses" at issue in those cases. The court stated:

"Just because it is "common knowledge" that certain businesses are independently owned, this is not a matter of "common knowledge" for all businesses. On the contrary, it is equally "common knowledge" that certain nationwide businesses are not independently owned but are owned by a single organization which operates by chains or branches."

Id. at 332; see also Drexel v. Union Prescription Centers, Inc., 582 F.2d 781, 796 n.23 (3d Cir. 1978) (noting that other authorities "suggest that [the] application of the common knowledge rule has been confined largely to the context of oil company franchise relationships and certain other specific business operations"); Ago v. Beggs, Inc., 705 F. Supp. 613, 619-20 (D.D.C. 1988), aff'd, 911 F.2d 819 (D.C. Cir. 1990), later proceeding sub nom. Farmer v. Mount Vernon Realty, Inc., 720 F. Supp. 223 (D.D.C. 1989) (described supra note 199); Orlando Executive Park, Inc. v. P.D.R., 402 So. 2d 442, 450 (Fla. Dist. Ct. App. 1981), aff'd sub nom. Orlando Executive Park, Inc. v. Robbins, 433 So. 2d 491 (Fla. 1983) (described supra note 199); see infra note 256 (citing cases where dissenting judges denied the common knowledge doctrine even for the main area of business in which it has arisen—gasoline dealerships).

256. See, e.g., B.P. Oil Corp. v. Mabe, 370 A.2d 554, 564 (Md. 1977) (Levine, J., dissenting). Judge Levine stated that the short answer to the proposition of common knowledge about there being a high proportion of independently owned gas stations is that many stations are company owned, and BP, as a principal, is responsible for the information which came to [customer] Mabe's attention." Id.; accord Watkins v. Mobil Oil Corp., 352 S.E.2d 284, 290-91 (S.C. Ct. App. 1986) (Gardner, J., dissenting). Judge Gardner noted the rapid decline of franchised gasoline stations in proportion to company-owned units during the decades since the "common knowledge" cases first arose (from 250,000 franchised or otherwise independent service stations in 1971 to 135,000 by 1986). Id; see also BUREAU OF THE CENSUS, supra note 12, at 778 (showing a decline of franchised gasoline service stations from 222,000 in 1970 to 112,000 in 1988). In fact, this substantial decrease in independent control, in combination with the increase in stations run directly by national oil companies, might itself be termed a matter of common knowledge.

There is a similar trend in the fast-food industry. See Gillian K. Hadfield, Problematic Relations: Franchising and the Law of Incomplete Contracts, 42 STAN. L. REV. 927, 936 (1990) (from 1.2% company-owned outlets in 1960, to 11.3% in 1971, to 32.0% by 1986).

257. In 1979, two trademark lawyers contended that Drexel v. Union Prescription Centers, Inc., 582 F.2d 781 (3d Cir. 1978), and other, unspecified cases "suggest that the 'common knowledge' cases are now of doubtful authority." Borchard & Ehrlich, supra note 42, at 115 n.44. Nonetheless, several common knowledge cases have been reported since 1979. See, e.g., supra note 2 (citing, inter alia, eight "common knowledge" judicial pronouncements from 1981 to 1991, in Alabama, Florida, Georgia (two), Illinois, Maryland, Ohio, and Oklahoma—with four of them, from Florida, Illinois, Ohio, and Oklahoma, not concerning a gasoline station).
from assured. If judicial speculation gave way to actual information, case resolutions might become more understandable and predictable. Franchisors and franchisees could then better plan their behavior and determine their risks.\footnote{258}

I do not contend that a better understanding of "common knowledge" will completely resolve questions of reasonable reliance. First, the plaintiff's individual circumstances can work to support or undermine a claim of reliance on apparent authority. The public and franchise customer surveys show that for most customers it may be difficult to demonstrate any reliance on an apparent agency. Many people evidently do not often patronize businesses simply because they are nationally owned and operated.\footnote{259} More particularly, when franchise customers were told to assume that franchisor Burger King Corporation is not legally responsible for the goods and services sold at its Gainesville, Florida franchises, most (57.9\%) said that fact would not make them less likely to come to those Burger King restaurants.\footnote{260} Second, even if there is an absence of "common knowledge" about franchising, the question remains: what should people know? It is conceivable a court could decide that reasonable persons must always be responsible for certain basic knowledge. In such a situation, the public's knowledge (or lack thereof) would only serve as a guidepost, not conclusive proof, of what is or is not "reasonable" reliance on an alleged apparent agency.\footnote{261}

Still, while a genuinely empirical approach to "common knowledge" will not resolve all issues of reasonableness, better guideposts are needed. With a stronger handle on what the public believes, franchisors and franchisees would be better able to increase customer awareness and take other measures which could at least presumptively relieve them of an apparent agency.\footnote{262} There would be empirical evidence of the public's existing knowledge and of the effectiveness behind measures to increase that knowledge; in time, such evidence, and the legal analysis thereof, could assist legislatures (or courts) which desired to set clear standards and thereby reduce the inefficien-

\footnote{258. See supra notes 86-96 and accompanying text.}
\footnote{259. See infra app., Poll B, Question 4(b).}
\footnote{260. Id. at Question 5.}
\footnote{262. See infra notes 280-89 and accompanying text.}
cies of a system that presently encourages a subjective, case-by-case, detailed analysis of "reliance." The focus could become development of objective criteria designed to prevent or at least streamline disputes in this area.263

B. Policy Implications and Recommendations: Apparent Authority Approaches in the Absence of Common Knowledge

1. Judicial Action

Common knowledge does not exist. For judges to find a customer's reliance unjustified on an apparent agency relationship, the judges need either to point to individual problems with a claim of reliance264 or to decide that, generally, a reasonable person would know enough not to rely on this supposed agency.265 Judges should not conclude that what seems basic learning to them is in fact "common knowledge" to society at large.266

The absence of common knowledge presents significant implications for franchising's apparent authority case law. The justifiability or reasonableness of a customer's reliance on an apparent agency must no longer be measured according to an idealized, erroneous notion of a marketplace consisting of informed consumers. At the very

263. See infra notes 273, 278, 288-90 and accompanying text.
264. This is a subjective test: the customer did not really rely, or he happened to have information that made any reliance personally unreasonable.
265. This is an objective test: regardless of individual reliance, the plaintiff should not have relied inasmuch as the ordinary, reasonable person would have known not to rely.
266. As stated by Judge Jerrold Powers:

Courts may judicially notice certain facts of common knowledge, but judges must be careful to avoid holding that their personal knowledge, especially of business affairs, is the equivalent of common knowledge by a public generally unsophisticated in the ways of business management. I doubt very much that the average individual would be able, with legal specificity, to name the other party to a contract by which he buys a hamburger, a tank of gasoline, a muffler for his car, or has his tax return prepared, or rents a car, or a motel room.

The reason is quite clear, and undoubtedly arises from sound and effective business judgment. With respect to countless products or services the message is broadcast far and wide: Buy our product (or use our service) at any of our many places of business. The identity protected is the name identity of the product or the service, to the virtual if not the absolute exclusion of all others.

When such a policy of identity promotion is successful, and a customer is attracted to a place of business by its identifying name, signs, or symbols, simple justice entitles the customer to show that from those appearances, he reasonably thought he was doing business with the company whose identity was so projected.

least, if judges do persist in using the “common knowledge” precedents, they should state forthrightly the public policy basis for its use: lacking a factual foundation—there really is no “common knowledge”—the doctrine would then survive in diminished form as a legal exemplar, a model of what should be. Rather than clinging to the fiction that there is common knowledge about franchising, judges would, if they were so inclined, simply state that basic knowledge about the independent ownership and operation of franchises ought to be common. As a result, these judges would conclude, regardless of what is or is not “common knowledge,” that it may be unreasonable for persons to rely on apparent authority.

Judges should also consider what actions franchisors and franchisees have taken, and what actions they should take, in recognition of the fact that the public lacks adequate information about franchising, about the ownership and operation of chains and individual franchised units, and about the legal implications for potential claims against franchisors. Just as judges may determine that injured plaintiffs have no right to remain almost willfully ignorant of franchising generally or of the ownership/operation particulars at a franchised outlet they patronize, judges may also decide that franchisors must not be accorded protection under agency law if they have made little effort to give the public the “common knowledge” they now lack. In place of the simplistic invocation (or denial) of “common knowledge,” judges may construct a balancing test that weighs the franchisor’s efforts versus those of the parties suing it under apparent agency: what did the franchisor do to inform the plaintiff, what did the plaintiff know, and what should both sides have done or known?

Courts have justified imposing liability on franchisors because they have purposely portrayed their chains as unified business operations. In effect, the franchisors are told to take the bad—possible vicarious liability, with the good—stronger customer loyalty to the chain and its products or services. Ultimately, the franchisor may simply acquire even more of a reason to do right by ensuring that franchisees obtain and maintain adequate insurance or by mandating franchisee indemnity of franchisor vicarious liability, with a bond, insurance, property lien, or other source sufficient to cover potential losses.

267. In other words, the plaintiffs ought to have known better.
268. See infra Part V.B.3.
269. See supra notes 70-71 and accompanying text (commentator’s criticism of franchisor practices allegedly designed to fool the public).
As the survey data make plain that there really is no "common knowledge" whatsoever, it becomes disingenuous of courts to use "common knowledge" to defeat an apparent agency. If a plaintiff's reliance on such an agency was otherwise unreasonable, there remain ways to challenge and defeat a claim of apparent agency. But to take judicial notice of an unproven and seemingly even discredited belief in a "common knowledge" is to make policy judgments without owning up to it. It is the flip side of judicial decision making which finds apparent authority on the flimsiest of grounds when what truly drives the court are the results: providing plaintiffs some recourse by "spreading the risks."  

2. Legislation: Tilting Against Franchisors, and the Formation of Common Knowledge

The absence of "common knowledge" may tilt the calculus a bit more toward allowing recovery against franchisors, thus toward the protection of the consuming public. The survey data indicate that most members of the public simply are unaware that they are at risk—potentially suffering harm and being unable to hold the franchisor vicariously liable. The sole reason not to tilt toward harmed customers may depend upon blaming the consuming public for their own ignorance. Regardless of the absence of common knowledge about franchising, if the plaintiff should have known, then that ought to defeat his apparent agency claim.

A bold stroke in public policy would be not simply to rely on private surveys and case law, but for states to craft statutes that re-

270. See, e.g., Sandrock, supra note 9, at 708 & n.29 (stating that the court in Beck v. Arthur Murray, Inc., 54 Cal. Rptr. 328 (Dist. Ct. App. 1966), may have been motivated by the simple desire to help the plaintiff in the face of franchisee insolvency, and recommending that other courts likewise fashion pro-plaintiff remedies which "spread the risk"); Liability of a Franchisor, supra note 69, at 153-54 (arguing that, in fairness, franchisors should be held liable for injuries to plaintiffs who enter agreements with the franchisee but, because of the franchisee's extensive use of the franchisor's trademark, mistakenly believe that they were contracting with the franchisor); supra notes 66-67, 69-71 and accompanying text. Risk spreading is discussed supra Part II.C.2.

271. See infra note 283. Of course, many do not care and would proceed, anyway, even knowing these risks. See infra app., Poll B, Question 5. But is it fair or efficient to have to determine, in each case, under which category the plaintiff falls? It frankly calls for a lot of supposition in cases where the plaintiff did not learn of the attendant risks (no vicarious liability - franchisor distinct from franchisee) until after he was injured.

272. See supra note 267 and accompanying text; see infra note 273 and accompanying text; see infra notes 278, 288 and accompanying text (on legislation about franchisor-franchisee actions that could limit franchisor liability to third parties injured by the franchisee).
solve, or at least furnish better guidance for, the problems of franchisor apparent agency. Statutes could provide that if a franchisor fosters a consumer perception that it controls franchisee operations, then the reasonableness of relying upon an apparent agency is presumed. The franchisor would no longer be able to challenge the plaintiff's reasons for reliance until it had first altered the advertising, lists, or whatever else seemed to evince a wholly centralized system. The statutes could mandate certain franchisor actions in order to establish a form of "common knowledge," either generally for an entire business chain or for just one franchised unit. Certain disclaimers, types of advertisements, notices of franchisee independence, and the like might be statutorily sufficient as prerequisites to a "common knowledge" or its effective equivalent: lack of reasonable reliance on an apparent agency. A statute could also speak to the type of survey findings or other information that might directly show the public has developed "common knowledge" about a certain franchised chain or even an industry as a whole.

States may simply enact a blanket rule providing franchisor vicarious liability as if the franchisor were the franchisee's employer. Franchisors would thus be put on notice to take whatever measures are necessary to guard against losses. Regardless of what a legislature may or may not do about apparent agency, the legislature could require franchisors to mandate and oversee adequate levels of insurance or otherwise prepare for potential liability. Safeguards may include attempts to prevent franchisee insolvency, provide for in-

273. The law in other nations may recognize that franchisees should register with the government as independent businesses and that they should post conspicuous signs stating that they are franchisees. FOREIGN SURVEY, supra note 20, at 36 (Italy), 22 (Netherlands).

274. Just as a corporation must capitalize adequately in order to insure the limited personal liability of stockholders, so may the franchisor have to ensure that its franchisee has sufficient reserves to meet foreseeable contract and tort claims; if not, the franchisor-franchisee "veil" could be pierced, and the franchisor held liable for franchisee debts. See, e.g., Liability of a Franchisor, supra note 69, at 159-60; accord Clarence Morris, The Torts of an Independent Contractor, 29 ILL. L. REV. 339, 345-47 (1934) (proposing vicarious liability unless the principal cannot reasonably be expected to avoid the use of judgment-proof contractors); Sykes, supra note 87, at 1279 (concluding that courts should only deny vicarious liability "when the transaction costs of contractual risk allocation are high and the principal has no inexpensive way to maintain loss-avoidance incentives"); Lackey, Comment, supra note 86, at 920 (stating that, as a minimal protection for consumers, oil company franchisors should be liable for their franchisee's torts "at least in the case where the [franchisee] is unable to pay for the plaintiff's injuries").

275. In the taxicab industry, many franchisors historically have used separate corporate structures to evade tort liability for the accidents of their franchisees, even though the franchisors actually still controlled the franchisees' operations. A fundamental method of avoiding
demnity clauses, and even place caps on the types or amounts of liability charged to parties who are only vicariously liable. Perhaps the franchisor and franchisee would be jointly liable for any harms caused by the franchisee, with a franchisor, who is solely vicariously liable, entitled to indemnity against the primary wrongdoer, the franchisee. If 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.

Lastly, if legislators wanted to reduce business costs and accept franchisors' arguments about the need to protect franchising from allegedly burgeoning claims of vicarious liability, they simply could conclude that there ought to be a certain level of common knowledge, at least in some situations. Thus, there would be no franchisor apparent authority in those situations because any customer reliance would be unreasonable. A statute that eradicates, reduces, or otherwise limits the apparent authority doctrine in franchising would, one hopes, be in conjunction with a massive public information campaign designed to create, at last, some genuine, common knowledge.

3. Franchisor Efforts to Create Common Knowledge

Responding to the lack of common knowledge, franchisors and franchisees should try to offset the purposeful obfuscation of distinctions between franchisor and franchisee that characterizes so many advertising campaigns. Prominent, understandable disclaimers of

liability has been to have distinct corporate owners for every two or three taxicabs, resulting in a taxi fleet having hundreds of differently titled owners. See, e.g., Mull v. Colt Co., 31 F.R.D. 154, 158-59 (S.D.N.Y. 1962) (cases cited therein). The limited liability of the fleet's "agents"—each of the different corporate owners—can work to the economic advantage of both this agent (franchisee) and the principal (franchisor), with only the injured third persons left worse. Sykes, supra note 87, at 1241-42 & n.36.

276. Whether the franchisor actually enforces such a clause is unclear, however. See, e.g., Sykes, supra note 87, at 1243 & n.39 (citing empirical works from 1948 and 1954).

277. For a joint and several liability proposal, see James B. McHugh, Comment, Risk Administration in the Marketplace: A Reappraisal of the Independent Contractor Rule, 40 U. Chi. L. Rev. 661, 675-79 (1973); see infra note 278 (describing joint and several liability).

278. Joint and several liability permits a plaintiff to collect a judgment from one or more defendants as the plaintiff pleases, so long as no more than one full recovery is had. Alternative rules are discussed in Christopher D. Stone, The Place of Enterprise Liability in the Control of Corporate Conduct, 90 Yale L.J. 1 (1980).

279. Because the statute would be in the interest of franchisors, they could be expected to finance any required information campaign.

280. Of course, Gizzi v. Texaco, Inc., 437 F.2d 308 (3d Cir.), cert. denied, 404 U.S. 829 (1971), discussed supra notes 105-09 and in the accompanying text, already should serve as
franchisor liability, as well as similarly plain notices about independent ownership and operations, should be part of the effort to warn a franchised chain's customers and potential customers that the risks of tort losses and contract breaches are not incurred by the franchisor.\textsuperscript{281} All franchised outlets should include the name of the owner or otherwise indicate that it is distinguishable from the franchisor. Some examples might be: Alfie's McDonald's; Central City Ltd.-Holiday Inn; and Nutri/System of North Florida, Independent Proprietors.\textsuperscript{282} Notices about independent ownership and operations should, if possible, explain that the effect is to render the franchisor—who ought to be directly named—not liable for the acts or omissions of the franchisee. There might even be a statement that, at the franchisee's expense, the franchisor has obtained a basic level of insurance for certain types of losses and that the franchisor—again, directly named—is not in any way vicariously liable for franchisee breaches of contract or torts.\textsuperscript{283} As part of a general information strategy, a franchisor or group of franchisors could disclose the percentage of franchisee outlets in a particular chain or in an industry.\textsuperscript{284} The goal would be to let the average person know how usual it is that a particular restaurant, hotel, fitness center, tax preparation outlet, or whatever is independently owned and operated.\textsuperscript{285}

an incentive.

\textsuperscript{281} See Borchard & Ehrlich, supra note 42, at 125 (arguing that if franchisors advertise the franchisee status of their outlets, courts might more frequently apply the common knowledge formulation).

\textsuperscript{282} Admittedly, even then many customers may still be unaware of the distinction between franchisor and franchisee. See supra notes 221-22 and accompanying text. If the name itself, though, incorporates information about the franchise owner, rather than just having the franchisor name followed by some form of liability disclaimer, that may undermine what one judge referred to as the "common knowledge that the name attached to a business is the catchword and that customers will not tarry to read the explanatory statement." Eastern-Columbia, Inc. v. Waldman, 175 P.2d 934, 941 (Cal. Dist. Ct. App. 1946) (Wilson, J., dissenting), modified and aff'd, 181 P.2d 865 (Cal. 1947) (an unfair competition action).

\textsuperscript{283} The surveys indicate that the general absence of liability for franchising/independent contractor relationships is usually unknown to people. See infra app., Poll A, Questions 16, 18, 22 & 30; Poll B, Question 4(b). When people learn of it, they still tend to oppose this legal approach to tort and contractual liability. See infra app., Poll A, Questions 31-32; Poll B, Questions 4(d)-4(e).

\textsuperscript{284} See Stuart, Comment, supra note 33, at 130 (noting that signs or other advertising that "holds out" all retail dealers—whether franchised or not—as the same, can create reasonable reliance on an apparent agency). My suggestion is that the same mass media advertising that creates the impression of centralized control can be used effectively to erode that belief.

\textsuperscript{285} Perhaps this disclosure need not prove unpalatable to the franchisor, but could be part of a "feel good" public relations strategy noting how much this particular franchised
Although common knowledge in general is nonexistent, perhaps national, regional, or local surveys about particular industries, or even about a single franchised system, could be used to argue for a finding of "common knowledge" in the limited context of certain special cases: for instance, to show it is commonly known that the local Pizza Hut is an independently owned and managed franchise. Moreover, information gleaned from these and other surveys could be used to construct a public information campaign or other devices designed to develop some "common knowledge." Ultimately, just as there are limits in pursuing the shareholders of a corporation, legislatures may need to specify those actions by franchisor and franchisee which would greatly reduce or outright eliminate the opportunity of going after the franchisor's "deep pockets." One simple, contractual measure is a franchise requirement that franchisees notify customers of their independent status and, to be especially protective of the franchisor, to explain briefly the legal significance of that status. As for the company-owned outlets, signs or other notification of that status may cause customers (1) to note the absence of such signs at the franchised locations, and (2) to consider and, if need be, inquire about ownership and operation at other outlets.

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286. Survey evidence could thus be used in ways analogous to its use in trademark infringement cases. For a discussion of survey evidence in the trademark context, see Louis Kunin, The Structure and Uses of Survey Evidence in Trademark Cases, 67 TRADEMARK REP. 97, 131 (1977). Perhaps the polls could conclusively, or at least presumptively, relieve the franchisor of undue concern about apparent agency by ensuring that courts can go beyond an uncertain, inefficient, case-by-case approach in favor of systemic conclusions (e.g., in this geographical area, it has been demonstrated—or refuted—that there is common knowledge about the independence of System X's fast-food outlets).

287. According to the lead counsel for the defendant franchisor in Chevron U.S.A., Inc. v. Lesch, 570 A.2d 840 (Md. 1990), there were no such surveys in that case, nor does he know of any survey ever undertaken with regard to "common knowledge" or otherwise relating to the reasonability of reliance on an apparent agency. Telephone Interview with Donald Sharpe, Partner, Piper & Marbury, Baltimore, Maryland (Aug. 7, 1990).

288. See supra notes 273 and accompanying text; supra note 278 and accompanying text.


290. See supra note 84 and accompanying text (on the supposed, ownership-identification practices of oil companies).
Franchising, as a business and legal format, is still young and definitely dynamic. Matters of risk aversion and accommodation, quality control, customer goodwill, insurance, and other decisions affecting the entire franchise relationship are usually best left to the key players, franchisors and franchisees, for resolution among themselves and with the public. Through the use of surveys if necessary, franchisors and franchisees can endeavor to create “common knowledge” and also to gain public (perhaps even legislative) acceptance of some criteria which presumptively, if not conclusively, evidence the absence of agency.

291. As one commentator viewed it, the law of franchising is certainly both broad and in flux. Franchising law . . . is a modern melange of legal disciplines which includes trademark licensing, antitrust, contracts, securities, taxation, corporations, real estate, financing, and insurance. It is syncretic in nature, and it sorely lacks internal consistency. It is still in its infancy, but is developing rapidly, usually without ascertainable direction, through court decisions and federal and state legislative and regulatory efforts.

JEROME GILSON, TRADEMARK PROTECTION AND PRACTICE § 6.01[1] (1980); accord Sandrock, supra note 9, at 720.

292. But, if these parties do not act, then courts or legislatures, or both, may intervene. See supra Part V.B.1-2.
College Students and "Older Group"

328 students were surveyed and 250 persons age 30 or over—the "Older Group"—were also surveyed. Responses are given in percentages, to the nearest 0.1%, with the left column being the college student responses and the right column being the older group responses. For Questions 1 through 5, suppose that Golly Gas stations are located throughout the United States and that there is a large, nationally-known Golly Gas Company.

1. If a gas station displays signs which say "Golly Gas," the only gasolines it sells are Golly Gas products, and it accepts Golly Gas credit cards, in your opinion does that mean it is owned by the Golly Gas Company?
   - Definitely Yes: 7.6% (students), 19.6% (older group)
   - Probably Yes: 55.8% (students), 48.0% (older group)
   - Probably No: 23.5% (students), 19.6% (older group)
   - Definitely No: 7.6% (students), 2.8% (older group)
   - Do Not Know: 5.5% (students), 10.0% (older group)

2. What if the gas station's attendants are wearing Golly Gas uniforms, with the Golly Gas insignia on their caps and above their name tags? (In your opinion, does that mean it is owned by the Golly Gas Company?)
   - Definitely Yes: 11.9% (students), 17.2% (older group)
   - Probably Yes: 52.4% (students), 49.6% (older group)
   - Probably No: 22.6% (students), 21.2% (older group)
   - Definitely No: 7.6% (students), 0.8% (older group)
   - Do Not Know: 5.5% (students), 11.2% (older group)

3. What if the gas station is listed in the telephone book and in advertisements under the name, "Golly Gas"? (In your opinion, does that mean it is owned by the Golly Gas Company?)
   - Definitely Yes: 10.7% (students), 10.0% (older group)
   - Probably Yes: 51.5% (students), 56.0% (older group)
   - Probably No: 25.3% (students), 20.4% (older group)
   - Definitely No: 5.8% (students), 1.2% (older group)
   - Do Not Know: 6.7% (students), 12.4% (older group)

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

<table>
<thead>
<tr>
<th></th>
<th>1992</th>
<th>2013</th>
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<tbody>
<tr>
<td>Definitely Yes</td>
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<td>0.4</td>
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<tr>
<td>Do Not Know</td>
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<td>8.8</td>
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5. What if there are all of the above circumstances? (Golly Gas signs, products, credit cards, uniforms, telephone listing, advertisements, list of stations) In your opinion, does that mean it is owned by the Golly Gas Company?

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<tr>
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<tbody>
<tr>
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<tr>
<td>Probably Yes</td>
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<td>56.4</td>
</tr>
<tr>
<td>Probably No</td>
<td>20.1</td>
<td>13.6</td>
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<tr>
<td>Definitely No</td>
<td>5.2</td>
<td>1.2</td>
</tr>
<tr>
<td>Do Not Know</td>
<td>4.9</td>
<td>8.0</td>
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6. If a fast-food restaurant is a “McDonald’s,” in your opinion does that mean it is owned by the McDonald’s Corporation?

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<tr>
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<th>2013</th>
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<tbody>
<tr>
<td>Definitely Yes</td>
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<td>19.2</td>
</tr>
<tr>
<td>Probably Yes</td>
<td>30.2</td>
<td>33.2</td>
</tr>
<tr>
<td>Probably No</td>
<td>36.9</td>
<td>24.8</td>
</tr>
<tr>
<td>Definitely No</td>
<td>12.2</td>
<td>12.0</td>
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<tr>
<td>Do Not Know</td>
<td>5.8</td>
<td>10.8</td>
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For Questions 7 through 11, suppose that Dynomite Diet Den health/diet centers are located throughout the United States and that there is a large, nationally-known Dynomite Diet Den Company.

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

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<tbody>
<tr>
<td>Very Likely</td>
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<td>24.4</td>
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<tr>
<td>Somewhat Likely</td>
<td>46.6</td>
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<tr>
<td>Somewhat Unlikely</td>
<td>14.6</td>
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<tr>
<td>Very Unlikely</td>
<td>4.3</td>
<td>15.2</td>
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<tr>
<td>Do Not Know</td>
<td>3.0</td>
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8. What if the health/diet center workers wear Dynomite Diet Den uniforms? (In your opinion, how likely is it that the Dynomite Diet Den Company owns and operates this business?)

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<tr>
<td>Very Likely</td>
<td>25.9</td>
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<tr>
<td>Somewhat Likely</td>
<td>52.1</td>
<td>39.2</td>
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<tr>
<td>Somewhat Unlikely</td>
<td>13.1</td>
<td>13.2</td>
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</table>
9. What if the health/diet center is listed in the telephone book and in advertisements under the name, “Dynomite Diet Den”? (In your opinion, how likely is it that the Dynomite Diet Den Company owns and operates this business?)

- Very Likely: 26.5
- Somewhat Likely: 51.2
- Somewhat Unlikely: 13.1
- Very Unlikely: 4.6
- Do Not Know: 4.6

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

- Very Likely: 33.5
- Somewhat Likely: 46.3
- Somewhat Unlikely: 12.5
- Very Unlikely: 4.3
- Do Not Know: 3.4

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

- Very Likely: 46.6
- Somewhat Likely: 38.1
- Somewhat Unlikely: 8.2
- Very Unlikely: 3.7
- Do Not Know: 3.4

12. Assume that the Best Western International Corp. owns the rights to use of the name “Best Western” by motels or hotels. In your opinion, how likely is it that a hotel or motel called “Best Western” is owned and operated by the Best Western International Corp.?293

293. Actually, the Best Western name and logo is owned by the Best Western International Corporation, but all of the Best Western motels or hotels—about 1,809 in the United States alone—are independently owned and operated. Telephone Interview with Corporate Communications, Best Western International Corporation (Apr. 25, 1990). They are part of a hotel cooperative whose national organization and its members may be deemed the franchisor and franchisees, respectively. See, e.g., Quist v. Best Western Int’l, Inc., 354 N.W.2d 656 (N.D. 1984) (interpreting the franchise definition in the North Dakota Franchise Investment Act).
13. Are businesses which serve the public required to display signs or use letterheads stating who the owner is?

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<tr>
<td>Definitely Yes</td>
<td>2.4</td>
<td>4.4</td>
</tr>
<tr>
<td>Probably Yes</td>
<td>14.6</td>
<td>11.2</td>
</tr>
<tr>
<td>Probably No</td>
<td>50.0</td>
<td>43.6</td>
</tr>
<tr>
<td>Definitely No</td>
<td>25.4</td>
<td>32.0</td>
</tr>
<tr>
<td>Do Not Know</td>
<td>7.6</td>
<td>8.8</td>
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14. A store, gas station, restaurant, hotel, or other business which is a franchise—In your opinion, it would be (pick one answer):

a. Independently owned and managed by the franchisee (the party that was granted the franchise) 63.4 50.4
b. Independently owned, but managed by the franchisor (the party that granted the franchise) 16.5 31.6
c. A subsidiary company owned by the franchisor 3.4 7.2
d. A “branch” office/operation—owned by the franchising system as a whole, but managed by the franchisee 12.2 4.8
e. (at the invitation of the survey, the respondent wrote an answer here that did not conform with any of the answers above) 4.3 0.4
f. Do not know 0.3 5.6

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

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<tr>
<td>Reasonably sure</td>
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<td>72.0</td>
</tr>
<tr>
<td>Not sure</td>
<td>19.5</td>
<td>8.4</td>
</tr>
<tr>
<td>Completely uncertain</td>
<td>1.2</td>
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16. As you may know, franchises are sometimes given by a company, the franchisor, to another person, the franchisee. In your opinion, if you have a contract with a franchisee (that is, someone who has a franchise) and the franchisee breaches (that is, violates) the contract,
can you sue and recover a damages award from the franchisor (the company that granted the franchise to the franchisee)?

<table>
<thead>
<tr>
<th>Definitely Yes</th>
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<tr>
<td>Probably Yes</td>
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<td>32.0</td>
</tr>
<tr>
<td>Definitely No</td>
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<td>5.2</td>
</tr>
<tr>
<td>Do Not Know</td>
<td>6.7</td>
<td>9.2</td>
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17. Same question as 16, above. In your opinion, can you sue and recover half from the franchisor and half from the franchisee?

<table>
<thead>
<tr>
<th>Definitely Yes</th>
<th>1.5</th>
<th>4.4</th>
</tr>
</thead>
<tbody>
<tr>
<td>Probably Yes</td>
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<td>6.4</td>
</tr>
<tr>
<td>Do Not Know</td>
<td>23.5</td>
<td>20.0</td>
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18. Assume that you were hurt because of the negligence of persons working at a business which is a franchise. In your opinion, can you sue and be compensated by the franchisor (the company that granted the franchise)?

<table>
<thead>
<tr>
<th>Definitely Yes</th>
<th>6.1</th>
<th>12.8</th>
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</tr>
<tr>
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</tbody>
</table>

19. Same question as 18, above. In your opinion, can you sue and recover half from the franchisor and half from the franchisee?

<table>
<thead>
<tr>
<th>Definitely Yes</th>
<th>2.1</th>
<th>6.8</th>
</tr>
</thead>
<tbody>
<tr>
<td>Probably Yes</td>
<td>30.7</td>
<td>26.0</td>
</tr>
<tr>
<td>Probably No</td>
<td>42.9</td>
<td>37.6</td>
</tr>
<tr>
<td>Definitely No</td>
<td>6.7</td>
<td>9.6</td>
</tr>
<tr>
<td>Do Not Know</td>
<td>17.5</td>
<td>20.0</td>
</tr>
</tbody>
</table>

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

| Median response: | 60% | 60% |

21. Please indicate the degree of certainty you have that your previous answer is at or close to the actual figure.

<table>
<thead>
<tr>
<th>a. Absolutely certain</th>
<th>0.3</th>
<th>3.2</th>
</tr>
</thead>
<tbody>
<tr>
<td>b. Reasonably sure</td>
<td>23.6</td>
<td>19.6</td>
</tr>
<tr>
<td>c. Not sure</td>
<td>61.3</td>
<td>56.0</td>
</tr>
<tr>
<td>d. Completely uncertain</td>
<td>14.7</td>
<td>21.2</td>
</tr>
</tbody>
</table>

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

<table>
<thead>
<tr>
<th>Opinion</th>
<th>1992</th>
<th>1994</th>
</tr>
</thead>
<tbody>
<tr>
<td>Definitely Yes</td>
<td>26.7</td>
<td>26.0</td>
</tr>
<tr>
<td>Probably Yes</td>
<td>55.5</td>
<td>54.0</td>
</tr>
<tr>
<td>Probably No</td>
<td>12.6</td>
<td>13.6</td>
</tr>
<tr>
<td>Definitely No</td>
<td>1.8</td>
<td>2.4</td>
</tr>
<tr>
<td>Do Not Know</td>
<td>3.4</td>
<td>4.0</td>
</tr>
</tbody>
</table>

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

<table>
<thead>
<tr>
<th>Opinion</th>
<th>1992</th>
<th>1994</th>
</tr>
</thead>
<tbody>
<tr>
<td>Definitely Yes</td>
<td>27.6</td>
<td>21.6</td>
</tr>
<tr>
<td>Probably Yes</td>
<td>64.7</td>
<td>68.0</td>
</tr>
<tr>
<td>Probably No</td>
<td>4.6</td>
<td>3.6</td>
</tr>
<tr>
<td>Definitely No</td>
<td>0.6</td>
<td>2.8</td>
</tr>
<tr>
<td>Do Not Know</td>
<td>2.5</td>
<td>4.0</td>
</tr>
</tbody>
</table>

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

<table>
<thead>
<tr>
<th>Opinion</th>
<th>1992</th>
<th>1994</th>
</tr>
</thead>
<tbody>
<tr>
<td>Definitely Yes</td>
<td>1.2</td>
<td>2.8</td>
</tr>
<tr>
<td>Probably Yes</td>
<td>11.0</td>
<td>24.8</td>
</tr>
<tr>
<td>Probably No</td>
<td>29.8</td>
<td>25.2</td>
</tr>
<tr>
<td>Definitely No</td>
<td>54.6</td>
<td>36.0</td>
</tr>
<tr>
<td>Do Not Know</td>
<td>3.4</td>
<td>11.2</td>
</tr>
</tbody>
</table>

25. Same facts as 24, above. In your opinion, can you sue and be compensated by the corporation?

<table>
<thead>
<tr>
<th>Opinion</th>
<th>1992</th>
<th>1994</th>
</tr>
</thead>
<tbody>
<tr>
<td>Definitely Yes</td>
<td>54.0</td>
<td>41.2</td>
</tr>
<tr>
<td>Probably Yes</td>
<td>42.0</td>
<td>47.2</td>
</tr>
<tr>
<td>Probably No</td>
<td>2.1</td>
<td>2.4</td>
</tr>
<tr>
<td>Definitely No</td>
<td>1.2</td>
<td>0.8</td>
</tr>
<tr>
<td>Do Not Know</td>
<td>0.6</td>
<td>8.4</td>
</tr>
</tbody>
</table>

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

<table>
<thead>
<tr>
<th>Opinion</th>
<th>1992</th>
<th>1994</th>
</tr>
</thead>
<tbody>
<tr>
<td>Definitely Yes</td>
<td>1.2</td>
<td>2.8</td>
</tr>
<tr>
<td>Probably Yes</td>
<td>13.5</td>
<td>16.4</td>
</tr>
<tr>
<td>Probably No</td>
<td>27.3</td>
<td>40.0</td>
</tr>
<tr>
<td>Definitely No</td>
<td>55.8</td>
<td>32.0</td>
</tr>
<tr>
<td>Do Not Know</td>
<td>2.1</td>
<td>8.8</td>
</tr>
</tbody>
</table>

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

<table>
<thead>
<tr>
<th>Response</th>
<th>1992</th>
<th>1993</th>
</tr>
</thead>
<tbody>
<tr>
<td>Definitely Yes</td>
<td>4.0</td>
<td>8.4</td>
</tr>
<tr>
<td>Probably Yes</td>
<td>38.7</td>
<td>28.8</td>
</tr>
<tr>
<td>Probably No</td>
<td>34.7</td>
<td>37.6</td>
</tr>
<tr>
<td>Definitely No</td>
<td>3.1</td>
<td>4.8</td>
</tr>
<tr>
<td>Do Not Know</td>
<td>19.6</td>
<td>20.4</td>
</tr>
</tbody>
</table>

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

<table>
<thead>
<tr>
<th>Response</th>
<th>1992</th>
<th>1993</th>
</tr>
</thead>
<tbody>
<tr>
<td>Definitely Yes</td>
<td>19.3</td>
<td>34.0</td>
</tr>
<tr>
<td>Probably Yes</td>
<td>62.3</td>
<td>52.4</td>
</tr>
<tr>
<td>Probably No</td>
<td>6.4</td>
<td>9.5</td>
</tr>
<tr>
<td>Definitely No</td>
<td>0.3</td>
<td>0.0</td>
</tr>
<tr>
<td>Do Not Know</td>
<td>8.6</td>
<td>7.2</td>
</tr>
</tbody>
</table>

29. Regardless of whether they are required to do so, do most franchises have such insurance coverage (as mentioned in 31, above)?

<table>
<thead>
<tr>
<th>Response</th>
<th>1992</th>
<th>1993</th>
</tr>
</thead>
<tbody>
<tr>
<td>Definitely Yes</td>
<td>10.4</td>
<td>17.2</td>
</tr>
<tr>
<td>Probably Yes</td>
<td>69.0</td>
<td>65.6</td>
</tr>
<tr>
<td>Probably No</td>
<td>13.2</td>
<td>6.8</td>
</tr>
<tr>
<td>Definitely No</td>
<td>0.0</td>
<td>0.0</td>
</tr>
<tr>
<td>Do Not Know</td>
<td>7.4</td>
<td>10.4</td>
</tr>
</tbody>
</table>

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

<table>
<thead>
<tr>
<th>Response</th>
<th>1992</th>
<th>1993</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Yes, I knew that</td>
<td>25.2</td>
<td>29.2</td>
</tr>
<tr>
<td>b. No, I did not know that</td>
<td>74.8</td>
<td>70.8</td>
</tr>
</tbody>
</table>

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

<table>
<thead>
<tr>
<th>Agreement</th>
<th>1992</th>
<th>1993</th>
</tr>
</thead>
<tbody>
<tr>
<td>Strongly Agree</td>
<td>7.4</td>
<td>11.6</td>
</tr>
<tr>
<td>Agree</td>
<td>42.6</td>
<td>49.6</td>
</tr>
<tr>
<td>Disagree</td>
<td>35.6</td>
<td>28.8</td>
</tr>
<tr>
<td>Strongly Disagree</td>
<td>8.3</td>
<td>5.2</td>
</tr>
<tr>
<td>No opinion</td>
<td>6.1</td>
<td>4.8</td>
</tr>
</tbody>
</table>

32. More specifically, for the harms stated in 30, above, who should be liable?

<table>
<thead>
<tr>
<th>Response</th>
<th>1992</th>
<th>1993</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Only the franchisor</td>
<td>4.3</td>
<td>2.4</td>
</tr>
<tr>
<td>b. Only the franchisee</td>
<td>34.7</td>
<td>19.6</td>
</tr>
<tr>
<td>c. At first, only the franchisee; but, if the franchisee is unable to pay, then the franchisor should be required to pay</td>
<td>39.9</td>
<td>46.0</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td></td>
</tr>
<tr>
<td>d. Both the franchisor and the franchisee equally</td>
<td>12.0 24.0</td>
<td></td>
</tr>
<tr>
<td>e. Neither the franchisor nor the franchisee</td>
<td>1.2 0.0</td>
<td></td>
</tr>
<tr>
<td>f. (state an answer if you do not agree with any of the answers above):</td>
<td>5.8 4.4</td>
<td></td>
</tr>
<tr>
<td>g. No opinion</td>
<td>2.1 3.6</td>
<td></td>
</tr>
</tbody>
</table>

[Then, questions to establish demographics]
POLL B

RANDOM TELEPHONE SURVEY OF THE PUBLIC & PATRONS AT FRANCHISED BUSINESSES

Responses are given in percentages, to the nearest 0.1%, with the top percentage in each column being the general public’s (telephone) responses (307 respondents) and the bottom percentage in each column being the responses of those people surveyed at franchised businesses (399 respondents).

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

<table>
<thead>
<tr>
<th>Locally Owned and Operated</th>
<th>Nationally Owned and Operated</th>
<th>Both (Jointly)</th>
<th>Do Not Know</th>
</tr>
</thead>
<tbody>
<tr>
<td>a) McDonald’s Restaurants</td>
<td>14.0’</td>
<td>43.0’</td>
<td>40.6</td>
</tr>
<tr>
<td>b) Lil’ Champ Gas Stations</td>
<td>36.2’</td>
<td>28.0’</td>
<td>20.1</td>
</tr>
<tr>
<td>c) Nutri System Weight Loss</td>
<td>19.7’</td>
<td>49.3’</td>
<td>17.3</td>
</tr>
<tr>
<td>d) Holiday Inn</td>
<td>3.1’</td>
<td>77.5</td>
<td>15.0</td>
</tr>
<tr>
<td>e) Church’s Fried Chicken</td>
<td>24.1’</td>
<td>38.6’</td>
<td>25.5</td>
</tr>
<tr>
<td>f) Avis Rent-a-Car</td>
<td>4.5’</td>
<td>76.9’</td>
<td>12.4</td>
</tr>
<tr>
<td>g) Computer-Land</td>
<td>34.1’</td>
<td>28.3</td>
<td>11.3</td>
</tr>
<tr>
<td>h) Motel 6</td>
<td>16.6’</td>
<td>51.9’</td>
<td>14.9</td>
</tr>
<tr>
<td>i) Chevron Gas</td>
<td>9.9’</td>
<td>57.0</td>
<td>28.0</td>
</tr>
<tr>
<td>j) Kentucky Fried Chicken</td>
<td>12.3’</td>
<td>51.2</td>
<td>31.1</td>
</tr>
<tr>
<td>k) Budget Rent-a-Car</td>
<td>9.6’</td>
<td>69.1</td>
<td>13.7</td>
</tr>
</tbody>
</table>

http://scholarlycommons.law.hofstra.edu/hlr/vol20/iss3/3
* Correct answer.  

2. a) Are the Burger King Restaurants in Gainesville  
   Locally owned and operated  34.8*  30.2*  
   Nationally owned and operated  16.0  15.2  
   Both (Jointly owned and operated)  42.0  41.6  
   Do Not Know  7.2  12.9  

b) Are Coldwell Banker Realtors in Gainesville  
   Locally owned and operated  37.2*  35.8*  
   Nationally owned and operated  19.1  19.8  
   Both (Jointly owned and operated)  22.5  20.6  
   Do Not Know  21.2  23.9  

3. [only asked of general public (telephone) respondents] If a business such as a fast food restaurant or a gas station (INSERT FROM LIST BELOW), how likely is it that the business is owned and operated by the national company? Would you say it is . . .  

---

294. The figures are as follows (franchisor owned and operated outlets listed first, and franchisee units second):  
   McDonald’s—1,751 and 6,374. Telephone Interview with Customer Relations Office,  
   Lil’ Champ Gas Stations—all outlets are completely integrated, nationally owned and operated. Telephone Interview with National Headquarters Personnel, Lil’ Champ Gas Stations (Apr. 23, 1991).  
   144 (Summer 1990).  
   Holiday Inn—187 and 1,428. Telephone Interview with Mary Locke, Franchise Relations, Holiday Inns, Inc. (May 24, 1991).  
   Church’s Fried Chicken—1,100 and 330. *Companies Offering Franchises*, The Franchise Handbook 118 (Summer 1990).  
   Avis Rent-a-Car—80% and 20%. Telephone Interview with Public Relations, Avis, Inc.  
   (May 10, 1990).  
   Motel 6—all outlets are completely integrated, nationally owned and operated. Telephone Interview with Pat Vanlandingham, Marketing, Motel 6 Corporate Headquarters (May 31, 1991).  
   Budget Rent-a-Car—438 and 3,138. Id at 57.
<table>
<thead>
<tr>
<th>Statement</th>
<th>Very Likely</th>
<th>Somewhat Likely</th>
<th>Not Very Likely</th>
<th>Not at All Likely</th>
<th>Don't Know</th>
</tr>
</thead>
<tbody>
<tr>
<td>a) Sells only products by one national corporation</td>
<td>38.8</td>
<td>42.6</td>
<td>9.3</td>
<td>5.2</td>
<td>4.1</td>
</tr>
<tr>
<td>b) Accepts only one national company's credit card</td>
<td>47.4</td>
<td>26.6</td>
<td>12.6</td>
<td>6.1</td>
<td>7.2</td>
</tr>
<tr>
<td>c) Wear uniforms with one national company's logo</td>
<td>39.9</td>
<td>37.5</td>
<td>12.7</td>
<td>6.2</td>
<td>3.8</td>
</tr>
<tr>
<td>d) Is listed in the telephone directory under one national company's name</td>
<td>39.2</td>
<td>38.1</td>
<td>12.0</td>
<td>6.2</td>
<td>4.5</td>
</tr>
<tr>
<td>e) Advertises under one national company's name</td>
<td>37.1</td>
<td>39.5</td>
<td>12.4</td>
<td>5.5</td>
<td>5.5</td>
</tr>
</tbody>
</table>

* Correct Answer.

4. [a, b, c, f & g only asked of general public respondents] How much do you agree or disagree that . . .

<table>
<thead>
<tr>
<th>Statement</th>
<th>Strongly Agree</th>
<th>Agree</th>
<th>Disagree</th>
<th>Strongly Disagree</th>
<th>Don't Know</th>
</tr>
</thead>
<tbody>
<tr>
<td>a) Businesses which serve the public are required by law to display signs saying who the owner is.</td>
<td>18.3</td>
<td>34.6</td>
<td>37.7</td>
<td>5.3</td>
<td>3.8</td>
</tr>
<tr>
<td>b) National companies usually stand behind the services and goods sold at the local stores.</td>
<td>24.4</td>
<td>57.7</td>
<td>13.1</td>
<td>2.4</td>
<td>2.4</td>
</tr>
<tr>
<td></td>
<td>FRANCHISORS' LIABILITY</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>------------------------</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1992</td>
<td></td>
<td>51.0</td>
<td>41.0</td>
<td>6.6</td>
<td>0.7</td>
</tr>
<tr>
<td>c) National companies should be required by law to stand behind the services and goods sold at the local stores.</td>
<td></td>
<td>33.0</td>
<td>48.3</td>
<td>13.2</td>
<td>2.1</td>
</tr>
<tr>
<td>d) If you are physically hurt at a local store because of the store's negligence, you should be able to sue and be compensated by the national company.</td>
<td></td>
<td>39.4</td>
<td>41.8</td>
<td>12.3</td>
<td>3.1</td>
</tr>
<tr>
<td>e) If a local store breaks a contract it has with you, you should be able to sue and be compensated by the national company.</td>
<td></td>
<td>26.7</td>
<td>48.6</td>
<td>17.0</td>
<td>4.9</td>
</tr>
<tr>
<td>f) If you are physically hurt at or by a corporation because of negligence, you are able to sue and be compensated by the corporation's stockholders.</td>
<td></td>
<td>33.2</td>
<td>35.8</td>
<td>20.8</td>
<td>3.4</td>
</tr>
<tr>
<td>g) If a corporation breaks a contract it has with you, you are able to sue and be compensated by the corporation's stockholders.</td>
<td></td>
<td>14.9</td>
<td>38.2</td>
<td>34.4</td>
<td>5.9</td>
</tr>
<tr>
<td>h) I often choose businesses because they are owned and operated by national companies.</td>
<td></td>
<td>15.2</td>
<td>44.3</td>
<td>31.1</td>
<td>5.5</td>
</tr>
<tr>
<td></td>
<td></td>
<td>12.6</td>
<td>32.5</td>
<td>46.2</td>
<td>3.8</td>
</tr>
<tr>
<td></td>
<td></td>
<td>8.4</td>
<td>23.0</td>
<td>36.3</td>
<td>18.5</td>
</tr>
</tbody>
</table>
5. [only asked of franchise customers] Assume that the national Burger King Corporation is not legally responsible for the goods and services at its Gainesville restaurants. Would that make you less likely to come to those restaurants?
   Yes 33.8
   No 57.9
   Don’t Know 8.4

6. a) Do you know what a franchise is?
   Yes 85.0 83.2
   No 10.1 11.3
   Did Not Answer 4.9 5.5

   b) [Those answering “Yes” were asked] What do you think it is?

   Answers included only correct attributes of franchising 16.5 14.5
   Answers included both correct and incorrect attributes 26.1 30.7
   Answers included only incorrect attributes 50.6 49.1
   Answered attributes not clearly right or wrong 6.9 5.7

   Categories of Correct Elements of a Franchise:

   Independent Ownership 17.2 33.7
   Independent Operations 7.3 16.6
   Trademark, Trade Name, or Other Intellectual Property Licensing 20.3 13.0
   Initial Payment of Fees to Franchisor 2.7 8.7
   Guidelines Furnished by Franchisor 0.8 6.0
   Continuing Payments to Franchisor (e.g., Royalties) 3.4 3.9
   System for Marketing Goods or Services 5.4 1.5
### FRANCHISORS' LIABILITY

<table>
<thead>
<tr>
<th>Contractual Relationship</th>
<th>2.3</th>
<th>3.3</th>
</tr>
</thead>
</table>

**Percentage of Total "Yes" Respondents That Gave At Least One of the Above Correct Responses:**

<table>
<thead>
<tr>
<th></th>
<th>42.5</th>
<th>45.2</th>
</tr>
</thead>
</table>

### Unclear Attributes:

<table>
<thead>
<tr>
<th>Attribute</th>
<th>3.1</th>
<th>5.1</th>
</tr>
</thead>
</table>

### Categories of Incorrect Attributes for a Franchise:

<table>
<thead>
<tr>
<th>Category</th>
<th>18.4</th>
<th>34.6</th>
</tr>
</thead>
<tbody>
<tr>
<td>National, Centralized Operations</td>
<td>25.7</td>
<td>19.6</td>
</tr>
<tr>
<td>Purchase of Company or its Stock</td>
<td>12.3</td>
<td>21.4</td>
</tr>
<tr>
<td>Subsidiary</td>
<td>10.3</td>
<td>6.0</td>
</tr>
<tr>
<td>Large Corporation</td>
<td>7.3</td>
<td>3.6</td>
</tr>
<tr>
<td>Partnership</td>
<td>3.1</td>
<td>0.9</td>
</tr>
<tr>
<td>Agency (Franchisee as Franchisor's Agent)</td>
<td>1.1</td>
<td>1.5</td>
</tr>
<tr>
<td>Lease</td>
<td>1.5</td>
<td>0.9</td>
</tr>
<tr>
<td>Small Business</td>
<td>1.5</td>
<td>---</td>
</tr>
<tr>
<td>Branch Locations</td>
<td>0.8</td>
<td>0.9</td>
</tr>
<tr>
<td>Store</td>
<td>0.4</td>
<td>---</td>
</tr>
<tr>
<td>Sole Proprietorship</td>
<td>0.4</td>
<td>---</td>
</tr>
<tr>
<td>No Royalties</td>
<td>---</td>
<td>0.3</td>
</tr>
</tbody>
</table>

**Percentage of Total "Yes" Respondents That Gave At Least One of the Above Incorrect Responses:**

<table>
<thead>
<tr>
<th></th>
<th>76.6</th>
<th>79.8</th>
</tr>
</thead>
</table>

[Then, questions to establish demographics]