NEW YORK UNIVERSITY
JOURNAL OF LAW & BUSINESS

VOLUME 15 SPRING 2019 NUMBER 2

FRANCHISEE INDEPENDENCE: STILL AWAITING CUSTOMER RECOGNITION

ROBERT W. EMERSON*

* J.D., Harvard Law School; Huber Hurst Professor of Business Law, University of Florida.

INTRODUCTION

Consider this hypothetical scenario.

Bob, a customer, enjoys a particular food chain, known as Joe's Burrito Place. Bob has visited this particular establishment in many cities all over the country. There are large billboards for the establishment located along the interstate, each showing the same colors: a yellow background with blue type in a particular font. Moreover, all the establishments have identical pictures on the walls; the same basic design and layout; the same all-in-one style beverage fountain; and, of course, the same menu. The employees wear the same uniforms in all establishments and have the same greeting for all patrons when they enter the store: "Welcome to Joe's!" There is even a primary website: www.Joes.com.

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

Bob has come to believe, based on the above circumstances, that all Joe's Burrito Place establishments are owned by one corporate entity. However, while there are many simi-

larities between the establishments, every Joe's actually has a different owner—each with different resources, liability coverage, operations, and policies. The illusion of all Joe's being the same is an intentional, fundamental feature of the franchise network of which each Joe's restaurant is a part, and if for some reason Bob is ever harmed by the actions of a Joe's establishment, Bob's recovery will be limited to the assets of that individual establishment's owner.

A. *A Control and Liability Dilemma*

This is the scenario that haunts so many franchises as well as the third-party relationships, principally with customers, upon which profitable franchised systems typically rely. Federal and state regulations, as well as franchisor-imposed rules in the franchise agreement (e.g., the operations manual),[1] limit the franchisee's ability to run his/her business as he/she sees fit. In addition, these franchisor-imposed, franchise network "regulations" overseeing franchisee activities could present numerous problems involving issues of liability.[2] If the

---

1. The growth and regulation of the franchise system are discussed in numerous articles. *See* MARK ABELL, THE LAW AND REGULATION OF FRANCHISING IN THE EU 12–15 (2013) (offering a chronology of franchising); Robert W. Emerson, *Franchise Terminations: "Good Cause" Decoded*, 51 WAKE FOREST L. REV. 103, 138–41 (2016) (providing a brief history of the earliest franchised businesses in the United States and elsewhere); Robert W. Emerson, *An International Model for Vicarious Liability in Franchising*, 50 VAND. J. TRANSNAT'L L. 245, 246–48 (2017) (stating franchised business statistics worldwide); *A Brief History of Franchising*, FRANCHISE-LAW, http://www.franchise-law.com/Franchise-Law-Overview/A-Brief-History-of-Franchising.shtml (last visited Jan. 28, 2019) (giving a brief timeline of key developments in franchising, including regulatory history).

2. *See* Awuah v. Coverall N. Am., Inc., 707 F. Supp. 2d 80, 84 (D. Mass. 2010) (finding an employer-employee relationship between a janitorial services franchisor and its franchisees); *see also* Robert W. Emerson, *Assessing* Awuah v. Coverall North America, Inc.*: The Franchisee as a Dependent Contractor*, 19 STAN. J.L. BUS. & FIN. 203 (2014) (examining *Awuah*, the franchise business model, franchising disclosure standards and legal requirements, and the limitations of agency and contract law in addressing problems unique to franchising; noting that franchisees are often prone to cognitive errors and psychological biases leaving them ill-equipped to make sound investment decisions, and concluding that franchisees need additional protections, including the right to form associations and enter into collective bargaining agreements with the franchisor); Robert W. Emerson & Steven A. Hollis, *Bound by Bias? Franchisees' Cognitive Biases*, 13 OHIO ST. BUS. L.J. 1 (2019) (discussing how the franchisees' psychological predispositions exac-

franchisor exerts too much control over the daily operations of its franchisee, it may be held vicariously liable for the negligence of the franchisee or his employees.[3] However, if the franchisor fails to sufficiently regulate its franchisee, the franchisor risks damaging its business reputation and may even violate federal regulations.[4]

The doctrine of apparent authority can also pose significant problems. Even when the franchisee acts without any actual authority from the franchisor, an injured third person may successfully sue the franchisor for the franchisee's wrongs.[5] The issue is whether a customer reasonably concluded, from the franchisor's acts or omissions, that the franchisor was in control of the franchisee when the wrong was committed. Something as simple as failing to notify customers of the existence of a franchise relationship could lead to implications of apparent authority. If a court finds the franchisee to have apparent authority, then the wrongful acts of the franchisee will be ascribed to the franchisor, even though there is no actual agency relationship between the franchisor and franchisee.[6]

B. *How the Article Proceeds*

In Part I of the Article, we further examine how apparent authority arises in franchising. We proceed in Parts II and III to consider franchisor liability under the Restatement of

---

erbate the disparity in power between franchisors and franchisees, with sound judgment undermined by cognitive biases such as anchoring, confirmation bias, the bandwagon effect, and escalation of commitment; reporting a survey of franchisees conducted for the article and providing empirical evidence of the limited perspective and flawed decision-making of most persons who buy a franchise; concluding that legal frameworks and business practices, both domestic and international, offer promising means to combat franchisees' cognitive biases).

3. *See* W. MICHAEL GARNER, FRANCHISE AND DISTRIBUTION LAW AND PRACTICE § 9:42 (2017).

4. Lanham Act, 15 U.S.C. § 1064(5) (2006). The franchisors' liability will be discussed in detail in Part III. Case law will be provided to indicate the standards the courts apply when determining whether a franchisor may be held vicariously liable.

5. *See* GARNER, *supra* note 3, § 9:44.

6. Robert W. Emerson, *Franchisors' Liability When Franchisees are Apparent Agents: An Empirical and Policy Analysis of "Common Knowledge" About Franchising*, 20 HOFSTRA L. REV. 609, 626 (1992).

Agency and, generally, third-party reliance. In Part IV, the Article studies the "common knowledge" doctrine. Part V summarizes and analyzes the results of surveys conducted for this Article, which are found in the Appendix; it demonstrates that there simply is no "common knowledge" as a factual matter. In Part VI, the Article explores possible changes to the Restatement or to other apparent authority dogma. Finally, the conclusion proposes a simple set of improvements, in law and in business practice.

I.
How a Franchisor May Be Liable for Its Franchisee's Torts: Apparent Authority

Courts employ a variety of legal theories in deciding whether to hold franchisors liable for the torts of their franchisees. While the franchisor may be held directly liable based on its own conduct,[7] a court is more likely to find a franchisor liable under the theory of *respondeat superior*.[8] The mere existence of a franchise relationship does not give rise to an agency relationship between franchisor and franchisee.[9] A franchisor may be held liable for his franchisee's torts if: (a) the franchisor gave the franchisee explicit authority to undertake a harmful action;[10] (b) the franchisee exercised authority

---

7. *See generally* Joseph H. King, Jr., *Limiting the Vicarious Liability of Franchisors for the Torts of Their Franchisees*, 62 Wash. & Lee L. Rev. 417, 425–27 (2005) (listing further examples of when a franchisor may be held directly liable). For example, a franchisor could be held directly liable to an injured third party if he failed to carefully select a responsible and diligent franchisee and the plaintiff was injured as a result of the franchisor's negligence. *Id.*

8. That is, an agency relationship has been created between the franchisor and the franchisee and, therefore, the franchisor will be held vicariously liable for the torts of its agent, the franchisee. *See* Naik v. 7-Eleven, Inc., No. 13-4578 RMB/JS, 2014 WL 3844792, at *4 (D.N.J. 2014) (setting forth six factors in determining whether an employment relationship existed between a franchisor and a franchisee).

9. Cain v. Shell Oil Co., 994 F. Supp. 2d 1251, 1252 (N.D. Fla. 2014).

10. This is known as *actual agency*. Actual authority is that which is actually granted, and it may be expressed or implied. *See* 3 Am. Jur. 2d *Agency* § 68, Westlaw (database updated Aug. 2018); *id.* § 66 ("Actual authority is such as a principal intentionally confers upon the agent or intentionally or by want of ordinary care allows the agent to believe him—or herself to possess."); Ripani v. Liberty Loan Corp., 95 Cal. App. 3d 603, 611–12 (3d Dist. 1979) (finding the existence of actual authority shows the principal author-

not explicitly granted by the franchisor, but based on explicit authority encompassing the harmful action; or (c) the franchisor expressed no direct authority to the franchisee, but third parties reasonably believed the franchisee was acting for the benefit of the franchisor.[11] As such, there are three forms of authority with which the agent may conduct business: actual authority,[12] inherent authority,[13] or apparent authority.[14] Some courts have held franchisors liable for their franchisees' torts in the absence of an established agency relationship, instead basing liability on such theories as third-party reliance, loss prevention, or risk spreading.[15] However, whether a

---

ized the agent to enter into a contract on behalf of the principal); *In re* Palmdale Hills Prop., LLC, 457 B.R. 29 (B.A.P. 9th Cir. 2011) (holding that general authorization to act on the principal's behalf allows an agent to perform acts without specific permission).

11. This is known as *apparent agency* and is the most important exception in determining franchisor vicarious liability. *See* Emerson, *An International Model*, *supra* note 1, at 250.

12. Whether the franchisee's authority may be implied by the actions of the franchisor is based on "whether the agent reasonably believes, because of the principal's conduct, that the principal desired the agent so to act." Accordingly, "an agent who does not believe that he or she had such authority has no implied authority." 3 AM. JUR. 2D *Agency*, *supra* note 10, § 68; *see also* Camerican Int'l, Inc. v. L & A Juice Co., 879 F.2d 865, 1989 WL 79826 (Table) (9th Cir. 1989) (affirming lower court's finding that agents had implied authority because the agents reasonably believed that they had such authority to act on behalf of the principal); USHA Holdings, LLC v. Franchise India Holdings Ltd., 11 F. Supp. 3d 244, 268 (E.D.N.Y. 2014) (stating that apparent authority is created when a principal induces a third party to believe that he is authorized to act on the principal's behalf).

13. The sole reason for the existence of inherent agency authority is to protect those who are harmed by dealing with an agent. This power is "derived not from actual authority, apparent authority, or estoppel, but solely from the agency relationship." *See* RESTATEMENT (SECOND) OF AGENCY § 8A (AM. LAW. INST. 1958); *see also* Lind v. Schenley Indus., Inc., 278 F.2d 79, 85 (3d. Cir. 1960) (commenting that the same facts which support a finding of apparent authority will also support a finding of inherent authority); Menard, Inc. v. Dage-MTI, Inc., 726 N.E.2d 1206, 1212–16 (Ind. 2000) (holding that inherent authority, rather than actual or apparent authority, was more apt to analyze the actions of the president of a corporation).

14. Apparent agency is a power that, while "not actually granted . . . the principal knowingly permits the agent to exercise or which the principal holds the agent out as possessing." RESTATEMENT (SECOND) OF AGENCY § 8.

15. *See* King, *supra* note 7, at 453–54, 469–72 & 473–75.

franchisor should be held liable for franchisee behavior continues to be a point of debate among the courts.[16]

Another important assessment of factors allegedly indicating a type of agency takes place when the franchisor has not directly given the franchisee the authority to act,[17] but the franchisee has purportedly acted in accordance with the franchisor's implied control. While a supposed agent ("X") may not have the actual authority to act on behalf of the alleged principal (franchisor "Y"), Y may nonetheless be vicariously liable for X's torts if Y knowingly allows X to exercise such apparent authority or holds out X as possessing such authority.[18] Either event involves the franchisor monitoring the franchisee's business operations to a minimum degree. This serves as another example of a challenge franchisors face in exerting some control in the relationship, but not too much so as to become vicariously liable to third parties.

Clearly, an alleged principal's conduct may establish facts meeting the legal elements required to prove the existence of an agent with apparent authority.[19] The apparent scope of the

---

16. *See id.* at 419–20 (commenting that the "lack of clarity, predictability, or analytical integrity continues, as does the onrush of litigation seeking to impose vicarious liability on franchisors"); *compare* Patterson v. Domino's Pizza, LLC, 333 P.3d 723, 739 (Cal. 2014) (holding that a franchisor is liable for the actions of franchisees' employees only when the franchisor retains a "general right of control over factors such as hiring, direction, supervision, discipline, discharge, and relevant day-to-day aspects" of franchisees' employee behavior), *with* Papa John's Int'l Inc. v. McCoy, 244 S.W.3d 44, 55–56 (Ky. 2008) (holding that the franchisor needed to have control "over the daily operation of the specific aspect of the franchisee's business that is alleged to have caused the harm" in order to be liable for the franchisee employee's actions) (citing Kerl v. Rasmussen, 682 N.W.2d 328 (2004)).

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

18. *See* 3 AM. JUR. 2D *Agency*, *supra* note 10, § 71; *see also* Billops v. Magness Constr. Co., 391 A.2d 196 (Del. Super. Ct. 1978) (holding an agency relationship may be established from the acts and appearance that lead other third parties to believe an agency relationship exists); H.Y.C. v. Hyatt Hotels Corp., No. 15-887-RGA, 2016 WL 107924, at *1–2 (D. Del. Jan. 8, 2016) (citing *Billops*, 391 A.2d at 198 with approval); Bright v. Sandstone Hosp., LLC, 755 S.E.2d 899, 902 (Ga. Ct. App. 2014) (holding that a hotel franchisor did not hold its franchisee out as its agent because the franchisee displayed its own signage at the hotel stating that it was owned and operated by the franchisee).

19. *See* 3 AM. JUR. 2D *Agency*, *supra* note 10, § 73.

agent's authority governs the mutual rights and liabilities between principals and agents. The principal is liable for the authority that he has actively "held out the agent as possessing, or which he has permitted the agent to represent that he possesses and which the principal is estopped to deny."[20] Case law regularly affirms this fundamental concept in a wide range of decisions, including franchise cases. An example is *Ohio State Bar Ass'n v. Martin*,[21] in which the Ohio State Bar Association charged franchisees Terry and Eva Martin (We The People of Cincinnati), their current franchisor (We The People USA, Inc.), and their former franchisor (IDLD, Inc.) with engaging in the unauthorized practice of law.[22] The Ohio Supreme Court decided that a non-lawyer franchisee's unauthorized practice of law could not be imputed to its former franchisor under an apparent agency theory.[23] In determining that IDLD was not liable for its franchisees' unauthorized practice of law, the court noted:

> In order to establish apparent agency, the evidence must show that the principal held the agent out to the public as possessing sufficient authority to act on his behalf and that the person dealing with the agent knew these facts, and acting in good faith had reason to believe that the agent possessed the necessary authority. . . . Under an apparent-authority analysis, an agent's authority is determined by the acts of the principal rather than by the acts of the agent. The principal is responsible for the agent's acts only when the principal has clothed the agent with apparent authority and not when the agent's own conduct has created the apparent authority.[24]

---

20. Pearson v. Agric. Ins. Co. of Watertown, N.Y., 25 So.2d 164, 167 (Ala. 1946).

21. Ohio State Bar Ass'n. v. Martin, 886 N.E.2d 827 (Ohio 2008) (per curiam).

22. *Id.* ¶ 1.

23. *Id.* ¶ 4.

24. *Id.* ¶ 41 (citing Master Consol. Corp. v. Banc Ohio Nat'l Bank, 575 N.E.2d 817, ¶¶ 818, 822 (Ohio 1991)). While the Martins admitted to the panel that they engaged in the unauthorized practice of law, their former franchisor had informed them that they were prohibited from practicing law without being licensed members of the Ohio Bar. *Id.* ¶ 42. Moreover, IDLD had "advised the Martins to display signs in their store and to verbally inform customers that they were not attorneys and that they were prohibited from

The Martins testified that they knew their franchise agreement with IDLD prohibited them from giving legal advice to customers, or from selecting, recommending, or assisting customers in filing legal forms.[25] The Martins, orally and through their service contracts, informed customers that they were prohibited from giving legal advice.[26] In light of the evidence presented, the Ohio Supreme Court held "there [wa]s no evidence that IDLD represented to the Martins or their customers that the Martins were authorized to commit any of the acts that constituted the unauthorized practice of law . . . ."[27] Consequently, the court found that IDLD's franchisee's unauthorized practice of law could not be imputed to it under an apparent agency theory.[28]

We thus see how, if—unlike *Martin*—the supporting proof is forthcoming, apparent authority permits a third party to hold the "apparent" principal liable as if an agency relationship did in fact exist. Indeed, apparent authority as a legal doctrine owes its origins to the basic supposition 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."[29] In order

---

offering legal advice." *Id.* Other instructions IDLD gave to the Martins included "not to select forms or legal procedures for customers and not to tell them how to complete forms." *Id.* IDLD even warned the Martins "that selecting forms and discussing laws or legal procedures with customers would be construed as the unauthorized practice of law," and told them "to refer customers' legal questions to IDLD's supervising attorney or an attorney of a customer's choice." *Id.*

25. *Id.* ¶ 43.

26. *Id.*

27. *Id.* ¶ 44.

28. *Id.* In reaching its holding, the Ohio Supreme Court quoted the *Master Consol. Corp.* court's rationale regarding whether an apparent-agency relationship had been established. The court noted that the existence of an agency relationship is determined not by the alleged agent's actions, but rather whether or not the alleged principal has indirectly granted the agent the apparent authority. *Id.* ¶ 41. Consequently, the principal will not be held liable when the agent's own actions have created the appearance of apparent authority in the eyes of the third party. *Id.* Only when the principal has "clothed" the agent with apparent authority, which causes a third party reasonably to believe that the agent has the authority to act on behalf of the principal, will the principal be liable for his agent's torts. *Id.*

29. Emerson, *supra* note 6, at 624.

to establish a prima facie case of apparent agency, the plaintiff must establish:

> (1) that the franchisor acted in a manner that would lead a reasonable person to conclude that the operator and/or employees of the franchise[ ] were employees or agents of the defendant; (2) that the plaintiff actually believed the operator and/or employees of the franchise[ ] were agents or servants of the franchisor; and (3) that the plaintiff thereby relied to his or her detriment upon the care and skill of the allegedly negligent operator and/or employees of the franchise[ ].[30]

If an injured party can establish the existence of an apparent agency between a franchisor and its franchisee under these factors, a court can hold the franchisor liable for its franchisee's acts.[31] Instances of a franchisor's acts that could lead a reasonable person to assume that a franchisee is an agent of the franchisor include "all means and methods that would maintain an image of uniformity among all of the franchises, including national advertising, common signs and uniforms, common menus, common appearance, and common standards."[32] For example, customer Bob, in our introductory hy-

---

30. Butler v. McDonald's Corp., 110 F. Supp. 2d 62, 69 (D.R.I. 2000) (discussing a McDonald's franchise "restaurant"). *See also* Billops v. Magness Constr. Co., 391 A. 2d 196, 198 (Del. 1978) (noting that the concept of apparent authority is based upon manifestations, which may be made directly to the third party or made publicly to the community via signs or advertising by the alleged principal, to third persons, and the reasonable belief by those persons that the alleged agent is authorized to bind the principal.); Gizzi v. Texaco, Inc., 437 F.2d 308 (3d Cir. 1971). In *Gizzi*, a service station selling the franchisor's products had negligently repaired the brakes of a vehicle and sold it to plaintiff who was subsequently injured when the brakes failed to properly work. *Id.* at 309. The plaintiff filed an action against the franchisor alleging it was vicariously liable under the apparent authority doctrine, since the franchisee service station sold the franchisor's gasoline and automotive products, the franchisor owned pieces of equipment in the franchised service station, and in its advertising, the franchisor urged reliance on men wearing such oil company insignia. *Id.* at 309–10.

31. *See also Gizzi*, 437 F.2d at 309. The *Gizzi* court enumerated numerous elements a plaintiff must satisfy in order to establish a prima facie case of apparent authority, and noted that so long as this initial burden can be met the issue is generally viewed as a question of fact for the jury to decide. *Id.*

32. *See* 62B AM. JUR. 2D *Private Franchise Contracts* § 296, Westlaw (database updated Aug. 2018); *see also* D.L.S. v. Maybin, 121 P.3d 1210

pothetical involving Joe's Burrito Place, seems to be the very model of the third party (e.g., a customer or supplier) that courts look for when finding that a franchisor has created apparent authority in, and potential vicarious liability from, the actions of its franchisees.

II.
Franchisor Liability Under the Restatement of Agency

Courts have often relied on the Restatement of Agency ("Restatement") to answer the question of how much control a franchisor must exert for it to be held vicariously liable for the wrongful acts of its franchisees.[33] While the test may appear to be straightforward, interpretations of the Restatement have led different jurisdictions to reach different conclusions for the same or very similar fact patterns.[34] Thus, because many franchises span multiple jurisdictions, a franchisor may find it difficult to maintain a different level of control over a franchisee in one jurisdiction than it does over a franchisee in another jurisdiction.[35]

Restatement (Third) of Agency ("Restatement Third") defines "agency" as a "fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests

---

(Wash. Ct. App. 2005) (holding the franchisor made no representations or acted in any manner to allow a third party to believe the establishment of an apparent agency relationship between himself and the franchisee; thus, the franchisor was a third party for franchisees' torts); *but see* Boy 1 v. Boy Scouts of Am., 993 F. Supp. 2d 1367, 1375–76 (W.D. Wash. 2014) (holding that Boy Scouts of America could not be held liable for the actions of troop leaders simply because they supplied uniforms and insignias to the leaders); VanDeMark v. McDonald's Corp., 904 A.2d 627, 636 (N.H. 2006) (affirming lower court's finding that even though the franchisor had authority to insure uniformity and standardization of a franchisee's products, it did not have authority over security policies at the franchisee's restaurant that led to plaintiff's injury).

33. Sean Obermeyer, *Resolving the Catch 22: Franchisor Vicarious Liability for Employee Sexual Harassment Claims Against Franchisees,* 40 Ind. L. Rev. 611, 612 (2007). *See* Miller v. McDonald's Corp., 945 P.2d 1107, 1110–12 (Or. Ct. App. 1997) (utilizing a right of control test to evaluate franchisor liability).

34. Obermeyer, *supra* note 33, at 623–29.

35. *Id.* at 612.

assent or otherwise consents so to act."[36] The establishment of an agency relationship is largely based on whether the parties act as if there is an agency relationship; accordingly, an agency relationship may be found regardless of whether the parties disclaim the establishment of such a relationship.[37] On the other hand, the franchisor–franchisee relationship alone does not establish an agency relationship.[38] To establish it, the franchisor must assent[39] to the franchisee acting on his behalf and the franchisee must assent, or consent, to acting on behalf of the franchisor.[40] Additionally, the franchisor must maintain control over the franchisee, and the franchisee must remain subject to the franchisor's control.[41]

When reviewing the establishment of an agency relationship, a court measures both the franchisor's assent and the franchisee's consent to the relationship "through written or spoken words or conduct."[42] Thus, the franchisor may give the franchisee actual authority,[43] or the franchisee may exhibit apparent authority.[44] In the former, the franchisor must give the

---

36. RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. LAW. INST. 2006).

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

38. Thus, under the Restatement Third, a fiduciary relationship is not automatically established between franchisor and franchisee. *See id.*

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

40. *See id.*

41. *Id.*; *see also id.* cmt. c ("The requirement that an agent be subject to the principal's control assumes that the principal is capable of providing instructions to the agent and of terminating the agent's authority.").

42. *Id.* § 1.03.

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

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

franchisee express or implied authority to act on its behalf.[45] The latter is a form of authority intended to protect innocent third parties who reasonably concluded that the agent was acting on behalf of the principal, when the principal allowed the agent to so act. If either of these forms of authority is found, assuming such acts are committed within the scope of their employment,[46] the principal will be found vicariously liable for the tortious acts of its agent in accordance with the Restatement Third.[47]

III.
Additional Justification for Franchisor Liability: Third-Party Reliance

While courts have been reluctant to hold franchisors liable for the tortious conduct of their franchisees, overall policy justifications that at times can hold franchisors liable even when there is no established agency relationship.[48] Horror stories of franchisor liability findings appear largely based on the

45. While express actual authority is quite obvious, implied actual authority can be difficult to determine. According to Restatement Third, implied actual authority is defined as acts incidental or closely related to a central authority and also as "an agent's reasonable interpretation of the agent's authority." *Id.* § 2.01 cmt. b. For illustrations of these respective definitions, see Bodell Constr. Co. v. Stewart Title Guar. Co., 945 P.2d 119 (Utah Ct. App. 1997), discussing whether issuing title insurance gave agent implied authority to engage in transactions involving escrows, closings, and settlements that were necessary to issue said insurance, and Kanavos v. Hancock Bank & Trust Co., 439 N.E.2d 311 (Mass. App. Ct. 1982), discussing whether agent could reasonably believe it was within his authority to authorize right of last refusal or cash payment modifications. The latter definition seems to be similar to the belief requirement of apparent authority, but centered on the agent's rather than the third party's perspective.

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

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

48. *See* Michael R. Flynn, *The Law of Franchisor Vicarious Liability: A Critique,* 1993 Colum. Bus. L. Rev. 89, 97 (1993). The ultimate rationale behind

franchisor's "deep pockets" relative to smaller, less wealthy franchisees. Rather than basing liability on any real or apparent agency theories, findings are focused on franchisors' ability to more adequately indemnify injured parties.[49] Moreover, some courts have established franchisors' liability not in accordance with any agency theory, but rather under a "piercing the corporate veil" theory. Under corporate law, when the corporation is nothing more than an alter ego or façade for the personal dealings of the dominant shareholders, then the corporate liability shield does not apply, and shareholders can be held personally liable for corporate dealings.[50] Additionally, other justifications for holding the franchisor vicariously liable for the torts of its franchisee without the establishment of any agency relationship include third-party reliance, risk spreading, and prevention of harm.[51]

---

holding franchisors vicariously liable for the torts of their franchisees is to adequately compensate injured third parties.

49. *See* Randall K. Hanson, *The Franchising Dilemma: Franchisor Liability for Actions of a Local Franchisee*, 19 N.C. CENT. L.J. 190, 192 (1991) (discussing "deep pocket" theory of profitability as an argument for why franchisors should face liability); Emerson, *supra* note 6, at 628 n.59 ("[T]he typical franchisor is better able than most franchisees to bear the cost of consumer injuries."); *but see* David Brittain, Note, *Franchisor's Liability for Acts of Franchisees: A Risk Administration Perspective*, 32 U. FLA. REV. 603, 627 (1980) (arguing that it may be more difficult for franchisors to recoup costs than it is for franchisees).

50. *See* Buchanan v. Canada Dry Corp., 226 S.E.2d 613 (Ga. Ct. App. 1976). The court noted that the franchisee could be, in essence, the "alter ego" of the franchisor. *Id.* at 616. The court did not draw any conclusions about whether an agency relationship existed between that particular franchisee and franchisor. However, the court did find that to be a question of material fact, and that such a relationship would lead to franchisor liability. Therefore, the franchisor, Canada Dry, may nevertheless be held liable for the injuries plaintiff sustained when the franchisee, Southeast-Atlantic, negligently drove a truck into the plaintiff's car. *Id.* The court reversed and remanded the case in order for the jury to decide whether the franchisee was in fact the franchisor's alter ego and thus liable. *Id.* Whether Canada Dry could be held liable depended upon whether the franchisee, Southeast-Atlantic, was the franchisor's alter ego in accordance with an apparent author/agency relationship. *Id.*; *see also* Cornelis v. B & J Smith Assocs. LLC, No. CV-13-00645-PHX-BSB, 2013 WL 6795969, at *3–6 (D. Ariz. Dec. 20, 2013) (addressing a number of claims based on alter ego liability in a franchise relationship).

51. *See, e.g.*, Note, *Liability of a Franchisor for Acts of the Franchisee*, 41 S. CAL. L. REV. 143, 153 (1967) [hereinafter *Liability of a Franchisor*]. Of course, courts have sometimes invoked broad policy considerations that seem to

A. *Customer Beliefs and Reliance*

Many franchisors exercise tremendous control over the franchisee to ensure that the latter does not damage the franchisor's business reputation. This includes maintaining a fair degree of power to make certain that the business is conducted in accordance with explicit standards and regulations. For example, the franchisors may require the franchisee to follow comprehensive operation and training manuals to guarantee a consistent product or service across a vast demographic region. As a result, customers often believe that the franchised businesses consist of wholly integrated outlets, when in reality the franchisee is a separate, independent business.[52] Such a customer off the street would likely walk into the corner Subway or a Holiday Inn believing that it was merely a "chain" outlet belonging to the larger corporation. However, unbeknownst to the customer, that particular Subway or Holiday Inn is very likely a franchisee, which could ultimately alter whom the customer could seek indemnification from if the customer were subsequently injured.

While it is ultimately the franchisor's objective to blur any distinction between franchised and company-owned units,[53] doing so may ultimately harm the franchisor's interests. Customers injured by a franchisee may contend that the franchisor should not enjoy the benefits he reaps with the

---

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 needed to spread 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); Touchstone v. G.B.Q. Corp., 596 F. Supp. 805 (E.D. La. 1984) (stating that a principal who exercises operational control over a contractor may be liable for contractor's injuries).

52. Lynn M. LoPucki, *Toward a Trademark-Based Liability System*, 49 UCLA L. REV. 1099, 1104 (2002). The results of the survey discussed in this article support the notion that the public is often mistaken as to the characteristics of franchises. *See infra* Part V.

53. *See* Jonathan E. Schulz, Note, *You Can't Have Your Cake and Eat It Too: The Standards for Establishing Apparent Agency*, 60 S.C. L. REV. 999, 1005 (2009) ("[F]ranchisors usually contractually obligate franchisees to 'join in the franchisor's efforts to "fool the customer" . . . [and] maintain the illusion that the business consists of uniform, wholly integrated outlets when . . . the 'chain' actually consists of separate, independent businesses.'").

chain-store without also assuming concomitant social responsibilities.[54] Consequently, a third party may be able to hold a franchisor liable for injuries sustained at or from a franchise if he can demonstrate that: (1) the franchisor has directly communicated, or has communicated via signs or other advertisements; (2) the third party has relied upon these manifestations; and (3) the third party's interpretation and reliance upon these manifestations was reasonable.[55] Some courts, in fact, specifically conclude that "mass advertising, company signs, and other indications of possible agency suffice" to hold a franchisor liable.[56] It is not enough to show any reliance, but

---

54. Agosto v. Leisure World Travel, Inc., 304 N.E.2d 910, 913 (Ohio Ct. App. 1973) (discussing third-party beneficiaries, apparent authority, and agency by estoppel). *But see* Premier Bus. Grp., LLC v. Red Bull of N. Am. Inc., No. 08-CV-01453, 2009 WL 3242050, at *5–7 (N.D. Ohio Sept. 30, 2009) (focusing on the level of control exercised by the franchisor to determine whether the franchisor should be liable for the franchisee and thus assume social responsibility).

55. Ordinarily, if the plaintiff cannot establish reliance on the manifestation, then the franchisor will not be held liable. Caranna v. Eades, 466 So. 2d 259 (Fla. Ct. App. 2d Dist. 1985); Hart v. Marriot Int'l, Inc., 304 A.D.2d. 1057 (N.Y. App. Div. 3d Dept. 2003). *See* 62B AM. JUR. 2D *Private Franchise Contracts*, *supra* note 32, §§ 292, 296 (2009). *See also* Gizzi v. Texaco, Inc., 437 F.2d 308 (3d Cir. 1971). The court held that in order for the franchisor to be held liable under an apparent agency theory, there needed to be both "manifestations by the alleged principal to the third party" and a "reasonable belief by the third person that the alleged agent [wa]s authorized to bind the principal." *Id.* at 309. The court went on to explain further that these manifestations by the principal could "be made directly to the third person, or may be made to the community, by signs, or advertising." *Id.* The court noted that "[i]n order for the third person to recover against the principal, he must have relied on the indicia of authority originated by the principal," and "such reliance must have been reasonable under the circumstances." *Id.*

56. *See* Crinkley v. Holiday Inns, Inc., 844 F.2d 156 (4th Cir. 1988) (holding the franchisor liable based on national advertising, etc.). That finding was the opposite of *Papa John's Int'l Inc., v. McCoy*, 244 S.W.3d 44 (Ky. 2008); however, this was the dissent's argument as to why the franchisor should be vicariously liable. *See also* Emerson, *supra* note 6, at 641 (noting Beck v. Arthur Murray, Inc., 54 Cal. Rptr. 328, 330 (Dist. Ct. App. 1966), where plaintiff failed to prove that she believed the franchisor to be the franchisee's principal, i.e., no reasonable reliance on the manifestations; but, the franchisor was nevertheless held liable under an apparent agency theory because "no one directed her attention to a disclaimer nor told her that the business was independently owned."; thus, in this case, the franchisor was held liable because the franchisor failed to actively disclose to the customer that she was patronizing a franchise, wholly independent from the principle business organization); Bright v. Sandstone Hosp., LLC, 755 S.E.2d 899, 903

must be reasonable reliance stemming directly from the franchisor's "mouth" (its ads, its actions) to the franchisee customer's "ear." For example, in *Hofherr v. Dart Industries, Inc.*,[57] a franchisor successfully defended itself from a plaintiff who failed to prove reasonable reliance inasmuch as the plaintiff testified that she patronized a franchised pharmacy, by whom she was injured, because someone told her it was reliable, not because it was associated with a national franchisor.[58]

By way of example, these instances of reliance were found sufficient to establish the appearance of an agency relationship:

1. *Billops v. Magness Construction Co.*[59]

In a decision overturning a trial court's summary judgment for the franchisor and remanding the case for jury consideration of the apparent agency question, a franchised Hilton hotel's banquet manager wrongfully interfered with an organization holding a fully prepaid reception, demanding an additional payment and then sabotaging the reception. The franchisor had required its franchisee to display the Hilton logo and sign onto the exclusion of all other logos or signs; and the franchise agreement prohibited the franchisee from mentioning any name other than Hilton to the hotel's customers, with the franchisee required to identify itself completely with the Hilton "system," including the franchisor's color schemes and design. In fact, the defendants admitted that—based on the method of operation or the physical environment of the franchised hotel—there was no reasonable basis for an ordinary person to know that he or she was dealing with any entity other than the Hilton Corporation; and the plaintiff expressly relied on the franchisor's name and the quality it represented.[60]

(Ga. Ct. App. 2014) (ruling that a franchise agreement requiring quality assurance inspections of franchisee's properties did not make hotel guests third-party beneficiaries).

57. Hofherr v. Dart Indus., Inc., 853 F.2d 259 (4th Cir. 1988).

58. *Id.*

59. Billops v. Magness Constr. Co., 391 A.2d 196 (Del. 1978).

60. *Id.* at 199.

2. *Fogel v. Hertz International, Ltd.*[61]

The plaintiff used an "800" telephone number to make reservations, and this nationwide communications support led the plaintiff to the reasonable inference of an agency relationship between the franchise rental company and the company's franchisor.

3. *Orlando Executive Park, Inc. v. P.D.R.*[62]

A plaintiff specifically called a trade name establishment, not just any establishment, and lacked awareness that any of the establishments were individually owned.

4. *Licari v. Best Western International, Inc.*[63]

A guest at a Utah franchised hotel contracted Legionnaire's disease. While the franchisee had a large sign saying it was independently owned and operated, the plaintiffs stated that they relied only on "Best Western" signs generally visible from the road. That could be deemed reasonable and thus justify a finding of apparent authority.[64]

5. *Crinkley v. Holiday Inns, Inc.*[65]

The victims of a hotel robbery were familiar with a franchised hotel chain's national advertising, which had led to their decision to patronize the franchised hotel in question.

---

61. Fogel v. Hertz Int'l, Ltd., 529 N.Y.S.2d 484 (App. Div. 1988).

62. Orlando Exec. Park, Inc. v. P.D.R., 402 So. 2d 442, 444 (Fla. Dist. Ct. App. 1981), *approved sub nom.* Orlando Exec. Park, Inc. v. Robbins, 433 So. 2d 491 (Fla. 1983).

63. Licari v. Best Western Int'l, Inc., No. 2:11-cv-603, 2013 U.S. Dist. LEXIS 97725 (D. Utah July 12, 2013).

64. Likewise, in a case where a customer sued both a Burger King franchisee and the franchisor for injuries arising from eating a sandwich containing metal objects, the court allowed the customer's apparent authority claim to go to trial; it noted, "a single sign indicating that a franchisee owns the particular restaurant at issue may not necessarily overcome the public perception of agency." Bartholomew v. Burger King Corp., 15 F. Supp. 3d 1043, 1050 (D. Haw. 2014).

65. Crinkley v. Holiday Inns, Inc., 844 F.2d 156 (4th Cir. 1988).

6. *Ago v. Begg, Inc.*[66]

A plaintiff's real-estate agents relied on the reputation of a franchisor's real estate company that licensed a smaller real estate company to use the franchisor's trademark.

7. *Ford v. Palmden Restaurants, LLC*[67]

Late on a Saturday evening, the patron of a Denny's franchised restaurant was brutally assaulted by a gang that had been, for over a year, regularly taking over the restaurant and terrorizing customers at that same time every week. Before this assault, several meetings with the police and with security services had produced numerous recommendations, but the franchisee implemented none of them. The court concluded that the franchisee was Denny's ostensible agent because the customer reasonably relied on the locally displayed Denny's name and trademarks, the nationwide Denny's advertisements, and the absence of store-specific signage indicating a franchised operation.

8. *Kaplan v. Coldwell Banker Residential Affiliates, Inc.*[68]

Leon S. Kaplan was a superior court judge with much experience investing in real estate, and had hired various real estate brokers in other transactions and had bought or sold an apartment building, an office building, a number of storefront commercial properties, five single-family residences, and other commercial properties. Kaplan sued, among others, the franchisor Coldwell Banker and his real estate broker, Eric L. Marsh, a Coldwell Banker franchisee. The claim against Coldwell Banker was based on Marsh's apparent authority, but the disclaimer language on Marsh's advertising, required by its franchise agreement, indicated that his brokerage was "an independently owned and operated member of Coldwell Banker Residential Affiliates, Inc." The court noted that this disclaimer language was much smaller than that "touting" Coldwell Banker.[69] On appeal, it found that Kaplan could reasona-

66. Ago v. Begg, Inc., 705 F. Supp. 613 (D.D.C. 1988).

67. Ford v. Palmden Rests., LLC, No. E053195, 2012 WL 3089406 (Cal. Ct. App. July 31, 2012).

68. Kaplan v. Coldwell Banker Residential Affiliates, Inc., 69 Cal. Rptr. 2d 640 (1997).

69. *Id.* at 641.

bly rely on his belief that Coldwell Banker "stood behind" its franchisee.[70] While Coldwell Banker made no representations specifically to Kaplan, it advertised to the public, and induced reliance, as "[t]he venerable name, Coldwell Banker, the advertising campaign, the logo, and the use of the word 'member' were and are designed to bring customers into Coldwell Banker franchises.[71]

9. *Bartholomew v. Burger King Corp.*[72]

In an injured customer's product liability case against both the franchisor and the franchisee, the court held that franchisor Burger King's "branding efforts" could have created an apparent agency, especially when there is a Burger King sign outside the franchised restaurant, when "the architectural and color scheme of the restaurant matches that of other Burger King restaurants, and [when] numerous materials inside the restaurant bear the 'Burger King' logo,"[73] all factors that "could lead a fact-finder to conclude that the Plaintiffs justifiably relied upon an apparent agency relationship between [the franchisee] and Burger King."[74]

10. *Federal Insurance Co. v. Firemen's Insurance Co. of Washington, D.C.*[75]

Customer William Hammerash and his wife sued home remodeling services franchisor Case Design and a Case Design franchisee, Professional Home Repair ("PHR"), for the damages stemming from PHR's allegedly defective work on the Hammerashes' home.[76] The arbitrator concluded there were a

---

70. *Id.* at 643.

71. *Id.*

72. Bartholomew v. Burger King Corp., 15 F. Supp. 3d 1043 (D. Haw. 2014).

73. *Id.* at 1051.

74. *Id.*

75. Federal Ins. Co. v. Firemen's Ins. Co. of Wash., D.C., No. DKC 09-2361, 2014 WL 1607603 (D. Md. Apr. 21, 2014).

76. In arbitration, Federal Insurance Company asserted that another insurer, Netherlands Insurance Company ("Netherlands"), should have paid half of Federal's defense costs on the Hammerashes' suit against Case Design, while Netherlands countered that its costs should be much less; it stated that it only had to provide coverage for vicarious liability based on actual authority. The court disagreed with Netherlands because its insurance coverage extended to liability based on apparent authority. *Id.* at *4–6.

number of reasons for the presence of apparent authority under Maryland law, all based on the Hammerashes' reliance on the following: (1) they entered a contract for remodeling and repair work signed by Case Handyman Services (the franchisor's service mark) on the franchisor's letterhead; (2) they talked to persons, although PHR representatives, who gave them business cards emblazoned with the Case Design logo and legend; (3) these PHR employees told the Hammerashes about the franchisor's long history and ensured them their project "would be taken care of no matter what happened"; (4) the Hammerashes testified that, while they had seen the Case Design website, they *failed to understand* that the website notation, "independently owned and operated," meant (a) PHR was separate from Case Design and (b) the Hammerashes' dealings were just with PHR.[77]

In response to the claims of injured franchisee customers or other third parties, a franchisor may defend against liability by arguing that it should not be liable for the franchisee's torts where there was no agreement as to an agency relationship between the franchisor and franchisee.[78] However, courts are unlikely to accept such arguments, as the modern trend has established that an agency relationship "may exist even if the principal did not actually subjectively intend to create an agency relationship, as long as the third party's reliance upon the principal's statement and conduct was reasonable."[79]

So, in the end, the existence or nonexistence of an apparent agency often comes down to beliefs and the reasonableness thereof. Even where there is no agreement between the franchisor and franchisee that an agency relationship has been

77. *Id.* at *4.

78. *See* John L. Hanks, *Franchisor Liability for the Torts of Its Franchisees: The Case for Substituting Liability as a Guarantor for the Current Vicarious Liability*, 24 OKLA. CITY U. L. REV. 1, 18 (1999) (discussing how franchise agreements allow for tort liability and potential indemnification by the franchisee); *see, e.g.*, Wheat v. Kinslow, 316 F. Supp. 2d 924, 930 (D. Kan. 2003) (supporting the proposition that there would need to be an "agreement" between the franchisor and franchisee).

79. Standard Builders Supplies v. Gush, 614 N.Y.S.2d 632, 634 (App. Div. 1994). *See also* Toppel v. Marriott Int'l, Inc., 2006 WL 2466247, at *8 (S.D.N.Y. Aug. 24, 2006) (suggesting that presence of franchisor's trademark on various documents of franchisee could provide reasonable basis for a third party to rely on the agency relationship).

established, a court may nevertheless infer a relationship based upon the parties' manifestations and the third party's interpretations of the relationship. If an apparent agency relationship is found, the franchisor will likely be found liable for the franchisee's torts, with risk-spreading as another rationale for liability, even in the absence of an agency relationship.[80]

B. *The Franchisor's Quandary, and* Gizzi v. Texaco *to the Present*

This emphasis on third-party reliance yet again places the franchisor in a difficult situation. While the franchisor may face liability if the third party reasonably relies on manifestations made by the franchisor, the franchisor may nevertheless prefer to risk liability than to post disclaimer signs. Such signs may potentially thwart the franchisor's attempt to induce the customer into believing that every store is wholly integrated and uniform. This disclaimer threatens customer goodwill, as it conveys a diminished impression of uniformity across the business.[81] Therefore, although signs may save a franchisor from vicarious liability by expressly disclosing to customers that they are patronizing an individual franchise rather than

---

80. Many commentators and courts have cited the franchisor's "superior bargaining position" and have concluded that franchisors are in a better position to distribute potential losses and face variable risks. *See, e.g.*, Luso Fuel Inc. v. BP Prod. N. Am., Inc., No. 08-CV-3947, 2009 WL 1873583, at *3 (D.N.J. June 29, 2009) (citing Westfield Ctr. Serv., Inc. v. Cities Serv. Oil Co., 432 A.2d 48, 54 (N.J. 1981)); Goldwell of N.J., Inc. v. KPSS, Inc., 622 F. Supp. 2d 168 (D.N.J. 2009); Mustang Mktg., Inc. v. Chevron Prod., Co., 406 F.3d 600, 607 (9th Cir. 2005) (all noting the franchisor's superior bargaining position in comparison to the franchisee's). *See also* Robert W. Emerson, *Fortune Favors the Franchisor: Survey and Analysis of the Franchisee's Decision Whether to Hire Counsel*, 51 SAN DIEGO L. REV. 709, 716 (2014) (discussing the "David" and "Goliath" type relationship of franchisees and franchisors in the franchise bargaining process).

81. *See* Emerson, *supra* note 6, at 633. Further, disclaimers can be risky because they do not necessarily work in all jurisdictions or circumstances. *See, e.g.*, Bartholomew v. Burger King Corp., 15 F. Supp. 3d 1043, 1049 (D. Haw. 2014) (noting that under Hawaii law, disclaimers of agency—even in a franchise agreement—may not by themselves defeat vicarious liability). *But see* Braucher v. Swagat Grp., LLC, 702 F. Supp. 2d 1032, 1045 (C.D. Ill. 2010) (holding that disclaimers of any agency relationship between franchisor and franchisee absolved the franchisor from liability because they were the only evidence to customers of any franchise relationship whatsoever).

an integrated business,[82] such signs may also cause a franchisee to lose clientele and capital.

Since franchises are so unique in structure and do not tailor perfectly to the traditional employer–employee or principal–agent relationships, courts have struggled to define how much control in the franchising context would give rise to an agency relationship and to apply any definition to a particular circumstance.[83] Indeed, the notion of franchisors as joint employers of their franchisees' employees rose to prominence in the last several years, culminating in an August 2015 National Labor Relations Board (NLRB) decision, *Browning-Ferris Industries of California, Inc.*[84] There, the NLRB changed the joint employment test under the National Labor Relations Act ("NLRA"),[85] making two entities (e.g., both the franchisor and its franchisees) joint employers if one entity "reserved" control over the terms and conditions of the other entity's employees; the second entity's failure to exercise the control would not matter in determining joint-employer status, as the *right* to control would suffice.[86] Furthermore, as so many franchisors

---

82. *See* Duluth Herald & News Tribune v. Plymouth Optical Co., 176 N.W.2d 552, 557–58 (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."); Schmidt v. Bassett Furniture Indus., No. 08-C-1035, 2009 WL 3380354, at *15–19 (E.D. Wis. 2009) (noting that franchisor liability arises if a franchisee conveys an image that the third party is dealing with a branch and not a franchise; by identifying dealers as Bassett Furniture Direct, Bassett could only give customers the impression that they were dealing with a franchise rather than a branch and thus Bassett could not avoid liability from an agency relationship).

83. Susan A. Grueneberg, Joshua Schneiderman & Lulu Y. Chiu, *Drafting Franchise Agreements After* Patterson v. Domino's: *Avoiding the Minefield of Vicarious Liability and Joint Employment*, 36 FRANCHISE L.J. 189, 190–91 (2016).

84. Browning-Ferring Indus. of Cal., Inc., 362 N.L.R.B. No. 186, 2014–15 NLRB Dec. (CCH) ¶ 16,006 (Aug. 27, 2015).

85. 29 U.S.C. §§ 151–169 (2015).

86. A joint-employer could be created through a number of business arrangements besides franchising, such as insurance companies requiring employers to take certain actions with their employees, lenders mandating performance requirements, business-negotiated quality or product requirements, mandatory standards for contractors given access to a home or other property, and contractual dictates about the time, manner and methods of performance; the user–supplier, lessor–lessee, parent–subsidiary, contrac-

do have the right, per the franchise agreement, to oversee a franchisee's hiring of workers, implementation of the *Browning-Ferris* standard would leave most franchisors vulnerable to liability as joint employers.[87] However, a December 2017 NLRB decision revisited the matter and appears to have effectively laid the matter to rest by returning the joint-employer test to the pre- *Browning-Ferris* test—a standard followed for the thirty years prior to *Browning-Ferris*.[88] Criticizing the "vague

---

tor–subcontractor, predecessor–successor, creditor–debtor, and contractor–consumer business relationships. *Browning-Ferris Indus.*, 362 N.L.R.B. No. 186, at *106. Nonetheless, "of the thousands of business entities with various contracting arrangements that suddenly found themselves to be joint employers under the *Browning-Ferris* standard, franchisors stand out." *Id.* at *209.

87. The most prominent example has been that of the franchising behemoth, McDonald's. From 2014 to 2016, the theory of the NLRB General Counsel was that McDonald's is a joint employer of its franchisees' employees under the joint-employer standard. McDonald's USA, LLC, 362 N.L.R.B. No. 168, 2014–15 NLRB Dec. (CCH) ¶ 16,000, at *1 (Aug. 14, 2015). That theory was left extremely susceptible to reversal upon the election of a Republican President in the 2016 election. New NLRB officials and board members gained power, and the *Browning-Ferris* standard did prove to be short-lived. Lydia DePillis, *Trump Appointee May Give McDonald's a Break in Landmark Labor Case*, CNNMONEY (Jan. 11, 2018, 8:46 AM), http://money.cnn.com/2018/01/11/news/economy/mcdonalds-nlrb-joint-employer/index.html (discussing how the new appointee as NLRB General Counsel, Peter Robb, would likely cease or at least reduce its prosecution of the three-year-old case against McDonald's). The case has been stayed as a settlement of the case is pursued. Janet Sparks, *Judge Allows NLRB Counsel Two-Month Stay in McDonald's Joint Employer Case*, BLUE MAUMAU (Jan. 24, 2018, 6:48 PM), http://www.bluemaumau.org/comment/reply/16301. Still, a number of labor attorneys and other commentators believe that the McDonald's case, brought in 2014 before the *Browning-Ferris* case was decided, could survive under the old standard. DePillis, *supra* (noting that there is now a record of 150 days of testimony, including that of 57 McDonald's executives and middle managers, and quoting former NLRB Chair Wilma Liebman for the "strong argument . . . that even under the pre-*Browning-Ferris* standard, there was sufficient evidence of direct and immediate control"); Vin Gurrieri, *NLRB Joint Employer Shift No Silver Bullet for McDonald's*, LAW 360 (Jan. 9, 2018, 8:39 PM), https://www.law360.com/articles/1000446/nlrb-joint-employer-shift-no-silver-bullet-for-mcdonald-s (noting that, even under the restored, restricted joint-employer standard from before *Browning-Ferris*, McDonald's may be found to be a joint employer of its franchisees' employees; the record may indicate sufficient franchisor involvement with and control of franchisees' hiring, work, and labor relations practices).

88. This pre- *Browning-Ferris* test required the exercise of actual control that was direct, immediate, and not "limited and routine." TLI, Inc., 271

and ill-defined standard" of *Browning-Ferris*, the Board in the December 2017 *Hy-Brand Industrial Contractors, Ltd.*[89] case wrote:

> [A] finding of joint-employer status shall once again require proof that putative joint employer entities have *exercised* joint control over essential employment terms (rather than merely having 'reserved' the right to exercise control), control must be 'direct and immediate' (rather than indirect), and joint-employer status will not result from control that is "limited and routine."[90]

Even under that standard, though, the Board found that the two employers at issue in *Hy-Brand* qualified as joint employers because of the significant and substantial overlap between their operations, including that an officer at one company made hiring and firing decisions at both companies, employees of both companies participated in the same benefit plans, and the same policies applied to employees at both companies.[91] Moreover, as a further complication, one of the Board members voting 3-to-2 in the majority in *Hy-Brand* has been found to have violated conflicts of interest rules by not recusing himself in the case. As a result, the *Hy-Brand* decision has been withdrawn, possibly along with the long-term prognosis against an expansive joint-employer interpretation.[92] As of

---

N.L.R.B. 798 (1984), *enforced*, 772 F.2d 894 (3d. Cir. 1985); Laerco Transp. & Warehouse, 269 N.L.R.B. 324 (1984).

89. Hy-Brand Indus. Contractors, Ltd., 365 N.L.R.B. No. 156 (Dec. 14, 2017).

90. *Id.* at *22–23.

91. *Id.* at *2 (examining two construction companies, Hy-Brandt and Brand, owned and managed in the same capacities by the same four persons—a father and his three sons—and concluding, "[w]e agree with the [administrative law] judge that Hy-Brandt and Brand are joint employers, but we disagree with the legal standard the judge applied to reach that finding.").

92. Due to the determination of the NLRB's designated Ethics Official that Board Member Emanuel should not have participated in the *Hy-Brand* proceeding, the Board, with Emanuel not participating, vacated the Board's decision in *Hy-Brand Indus. Contractors, Ltd.*, 362 N.L.R.B. No. 186, 2014–15 NLRB Dec. (CCH) ¶ 16,006 (Aug. 27, 2015). Therefore, this reinstates, for now, the Board's decision in *Browning-Ferris Indus.*, 362 N.L.R.B. No. 186 (Aug. 27, 2015). *Board Vacates* Hy-Brand *Decision*, NLRB (Feb. 26, 2018), https://www.nlrb.gov/news-outreach/news-story/board-vacates-hy-brand-decision; *see also* Erin Mulvaney, *Ethics Conflict at NLRB Pushes Agency into 'Un-*

February 2019, the broad notion of joint-employers remains law, as a recent U.S. Court of Appeals ruling can be seen as partially upholding the NLRB's *Browning-Ferris* standard while at the same time disputing the NLRB's power to set the ultimate standard rather than the courts doing so.[93]

Clearly, while the joint-employer controversy touches upon issues more akin to an actual agency than an apparent agency, it evinces how challenging it can be for some businesses to navigate past the difficult eddies and shoals of complex, unsettled employment and agency standards. If large, well-represented employers have trouble, one can only imagine how difficult dealing with *apparent* agency may be for smaller franchisors, their franchisees, and their business "partners" (e.g., suppliers) and customers. Regardless of whether the franchisor has exerted "control" over the franchisee in the establishment of an agency relationship, courts must consider what constitutes franchisor "manifestations" of control and determine whether a potential plaintiff's reliance was "reasona-

---

charted Territory', NAT'L L.J. (Feb. 22, 2018, 1:26 PM), https://www.law.com/nationallawjournal/2018/02/22/ethics-conflict-at-nlrb-pushes-agency-into-uncharted-territory/?slreturn=20180125162016 (discussing how new NLRB member Emanuel's longstanding practice as a lawyer representing management seems to require his recusal from some cases now before the Board, including *Hy-Brand*).

93. Browning-Ferris Indus. of Cal., Inc. v. NLRB, 911 F.3d 1195 (D.C. Cir. 2018). Still, the NLRB, with a Republican majority, appears ready to push through a more restricted approach to joint employment. A proposed rule states:

> An employer, as defined by Section 2(2) of the National Labor Relations Act (the Act), may be considered a joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction. A putative joint employer must possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited and routine.

The Standard for Determining Joint-Employer Status, 83 Fed. Reg. 46681, 46696–97 (proposed Sept. 14, 2018) (arguing for the language to be codified at 29 C.F.R. pt. 103 as §103.40; providing twelve examples—including two involving franchisors and franchisees—where the rule would determine whether two businesses, in a particular situation, are joint employers).

ble."[94] In making such a determination, many courts have turned to what has commonly been referred to as the "common knowledge" doctrine; that is, consumers' "common knowledge" regarding franchisors' manifestations largely sets the "standard of reasonableness that both guides and then serves to limit the potential customer's 'reliance' on agency."[95]

Many courts have defined what could potentially be interpreted as creating an apparent agency relationship. For example, the Third Circuit Court of Appeals in *Gizzi v. Texaco, Inc.*[96] held that in order for the franchisor to be held liable under an apparent agency theory, there needed to be both "manifestations by the alleged principal to a third person" and a "reasonable belief by the third person that the alleged agent [wa]s authorized to bind the principal."[97] The court went on to explain that these manifestations by the principal could "be made directly to the third person, or may be made to the community, by signs or advertising."[98] The court noted that "[i]n order for the third person to recover against the principal, he must have relied on the indicia of authority originated by the principal,"[99] and "such reliance must have been reasonable under the circumstances."[100] The *Gizzi* court enumerated nu-

---

94. That is a wholly separate issue from whether the franchisor has exerted "control" over the franchisee in the establishment of an agency relationship.

95. Emerson, *supra* note 6, at 645.

96. Gizzi v. Texaco, Inc., 437 F.2d 308 (3d Cir. 1971). In *Gizzi*, a service station, selling the franchisor's products, had negligently repaired the brakes of a vehicle and sold it to the plaintiff. After leaving the premises, the plaintiff was harmed when the brakes failed. The plaintiff filed an action against the franchisor, and alleged that the franchisor was vicariously liable under the apparent authority doctrine. The authority was evidenced by the franchisee service station selling the franchisor's gasoline and automotive products, the franchisor owning pieces of equipment in the franchised service station, and in its advertising, the franchisor urging reliance on men wearing such oil company insignia. *See id.* at 309–10.

97. *Id.* at 309.

98. *Id.* (quoting RESTATEMENT (SECOND) OF AGENCY §§ 8, 8B, 27 (AM. LAW INST. 1964)). In a way, *Gizzi* actually broadens the original apparent authority definition beyond just directly holding out the agent to a third party. There need not be direct contact at all. One can simply put up advertising with a logo, and that could be enough for liability.

99. *Id.* (citing Bowman v. Home Life Ins. Co. of Am., 260 F.2d 521 (3d Cir. 1958); RESTATEMENT (SECOND) OF AGENCY § 267).

100. *Id.* (citing N. Rothenberg & Son, Inc. v. Nako, 139 A.2d 783 (N.J. Super. Ct. App. Div. 1958)).

merous elements a plaintiff must satisfy in order to establish a prima facie case of apparent authority and noted that, so long as this initial burden can be met, the issue is generally viewed as a question of fact for the jury to decide.[101] Certainly, despite the sometimes expansive interpretation of potential franchisor liability under *Gizzi*, franchisors continue to have numerous ways to defend themselves from an apparent authority claim, such as disclaimer and, in effect, reliance upon common sense or common knowledge.[102]

After the *Gizzi* ruling, many franchisors attempted to limit their exposure to liability by posting disclaimers of their responsibility.[103] Moreover, many franchisors have argued that it is not "reasonable" for a third party to assume that an apparent agency relationship has been established in situations where a franchisor participates in mass advertising campaigns or where he imposes quality standards upon his franchisees.[104] While these defenses likely would have been victorious forty years ago, in today's increasingly franchised society, they are less likely to persuade the courts. In fact, some courts have found such liability despite the franchisor's attempt to disclose to third parties that those parties are contracting with a franchisee, who is wholly independent from the franchisor.[105] Yet, franchisors still have some defense. As observed by the *Gizzi* court, the plaintiff "must have relied on the indicia of authority originated by the principal [the franchisor] . . . and such reliance must have been reasonable under the circumstances."[106] The plaintiff must actually depend on the fran-

101. *Id.* at 310.

102. *See* Braucher v. Swagat Grp., LLC, 702 F. Supp. 2d 1032, 1044–45 (C.D. Ill. 2010) (ruling that a hotel franchisor was not vicariously liable for its franchisee because there was no evidence that would create an impression that Choice Hotels operated all of its franchisees' hotels).

103. Emerson, *supra* note 6, at 639.

104. *Id.* at 638.

105. *See, e.g.*, Crinkley v. Holiday Inns, Inc., 844 F.2d 156, 166–67 (4th Cir. 1988) (holding that a motel could be liable for its franchisee's torts regardless of a sign stating that the franchise (Holiday Inn-Concord) was not operated by Holiday Inns, but rather by the franchisee (TRAVCO)).

106. *Gizzi*, 437 F.2d at 309 (citing N. Rothenberg & Son, Inc. v. Nako, 139 A.2d 783 (N.J. Super. Ct. App. Div. 1958) (citations omitted)).

chisee's supposed agency and, of course, be justified in supposing the franchisor to be the principal.[107]

As franchising's share of the economy grows globally,[108] and as so many franchise law issues have been identified and continue to evolve,[109] the vicarious liability of franchisors remains a core topic with interesting new fact patterns (e.g., due to the implications of the Internet) and a continuous range of legal resolutions. Consider just a few of the apparent agency-through-franchising cases that have arisen in the past dozen years. A number of cases, as discussed above,[110] have threaded the needle between a very constricted view of apparent agency and a more expansive interpretation, based on advertising, signs, trade names, statements to customers, and other indications of ownership or control.[111] Two cases decided decades

---

107. *See* Emerson, *supra* note 6, at 640 n.114 (describing a number of cases in which no reliance was found).

108. *See supra* note 1.

109. *See* Robert W. Emerson, *Franchise Contract Interpretation: A Two-Standard Approach*, 2013 MICH. ST. L. REV. 641 (2013) (discussing a comprehensive set of issues related to the franchise relationship, the legal environment and standards for franchises, the typical franchise contract clauses) [hereinafter Emerson, *Franchise Contract Interpretation*]; Robert W. Emerson, *Franchising and the Parol Evidence Rule*, 50 AM. BUS. L.J. 659 (2013) (discussing, *inter alia*, fraud, disclosure, and contract interpretation); Susan A. Grueneberg & Jonathan C. Solish, *Franchising 101: Key Issues in the Law of Franchising*, 19 BUS. L. TODAY 11 (2010) (discussing franchise law topics generally). For opposing views about the power held by parties in the franchise relationship, and the resulting need, or not, for increased government regulation, see William L. Killion, *The Modern Myth of the Vulnerable Franchisee: The Case for a More Balanced View of the Franchisor–Franchisee Relationship*, 28 FRANCHISE L.J. 23 (2008) (opposing additional regulation); Peter C. Lagarias & Robert S. Boulter, *The Modern Reality of the Controlling Franchisor: The Case for More, Not Less, Franchisee Protections*, 29 FRANCHISE L.J. 139 (2010) (arguing for more regulation to protect franchisees).

110. *See supra* notes 21–24, 27–28, 32, 79, 82 and accompanying text.

111. Some more recent cases reference facts suitable for an apparent agency claim. *See* Schmidt v. Bassett Furniture Indus., No. 08-C-1035, 2009 WL 3380354, at *7–8 (E.D. Wis. Oct. 20, 2009) (calling a franchise a branch, not a franchise and identifying dealers as simply "Bassett Furniture Direct"); Toppel v. Marriott Int'l, Inc., No. 03 Civ. 3042(DAB), 2006 WL 2466247, at *8 (S.D.N.Y. Aug. 24, 2006) (placing the franchisor's trademark on various documents of the franchisee); *see also* Ohio State Bar Ass'n. v. Martin, 886 N.E.2d 827 (Ohio 2008) (holding that a non-lawyer franchisee's unauthorized practice of law could not be imputed to its former franchisor under an apparent authority theory); D.L.S. v. Maybin, 121 P.3d 1210 (Wash. Ct. App.

after *Gizzi v. Texaco, Inc.*[112] provide further examples of just how divided the courts can be on issues of franchisor liability.

In *Papa John's International, Inc. v. McCoy*,[113] the plaintiff customer filed an action against the franchisee[114] and the franchisor of the pizzeria for defamation and malicious prosecution.[115] Specifically, comments made to the police by the franchisee's employee allegedly resulted in the customer's unlawful imprisonment.[116] The plaintiff argued that the franchisor was vicariously liable for the torts of its franchisee. Ultimately, the *McCoy* court followed the rule for franchisor liability established in *Kerl v. Dennis Rasmussen, Inc.*,[117] which invoked actual agency principles to conclude "a franchisor may be held vicariously liable for the tortious conduct of its franchisee only if the franchisor has control or a right of control over the daily operation of the specific aspect of the franchisee's business that is alleged to have caused the harm."[118] Thus, the *McCoy* court found that the franchisor was not liable because it "had no control over the franchisee's employee's isolated and allegedly intentional, tortious conduct."[119] It was the dissent in *McCoy* that argued the franchisor should be held liable in accordance with precedent,[120] under an apparent agency theory arising from the customer's "reliance on [the franchise] name, advertising, and . . . external indicia of responsibility such as the signage and uniforms."[121] The *Gizzi*

2005) (holding that the franchisor neither said nor did anything to make third parties to believe there was an apparent agency relationship).

112. Gizzi v. Texaco, Inc., 437 F.2d 308 (3d Cir. 1971). *See supra* notes 96–108 and accompanying text.

113. Papa John's Int'l, Inc. v. McCoy, 244 S.W.3d 44 (Ky. 2008).

114. RWT, Inc., the defendant, was a Papa John's franchisee. *Id.* at 47.

115. *Id.*

116. *See id.* at 48 (describing the deliveryman Burke's account that the customer McCoy detained Burke for over an hour and half after delivering a pizza to McCoy; and describing that McCoy was arrested subsequently and charged with unlawful imprisonment and a story regarding the arrest ran in a local newspaper).

117. Kerl v. Dennis Rasmussen, Inc., 2004 WI 86, ¶ 7, 682 N.W.2d 328, 332 (Wis. 2004).

118. *Id.* ¶ 50, at 342 (holding that because Arby's had no control or right of control over daily operation of its franchisee's business, Arby's was not subject to vicarious liability for tortious conduct of the franchisee).

119. *Papa John's Int'l Inc.*, 244 S.W.3d at 56.

120. *Id.* (Scott, J., dissenting).

121. *Id.* at 58 (Lambert, C.J., dissenting).

court had applied this same analysis almost forty years earlier, yet judicial determinations remain unpredictable—dependent on any slight variance in facts and on which agency lexicon to invoke—in whether to depend exclusively upon actual authority or instead to use, solely or in addition to the actual authority justification, the doctrine of *apparent* authority.[122]

IV.
The "Common Knowledge" Doctrine

The "common knowledge" doctrine states "absent unusual circumstances, a third party is deemed to know that the independent contractor actually operated the local outlet, and is solely responsible for his actions."[123] Many courts that apply this doctrine have found that franchisors are not liable for the torts connected to their franchisees' independently owned and operated businesses. This is because courts have discovered "that independent outlets often display signs indicating they sell certain well-known, trademarked goods . . . ."[124] A finding of "common knowledge" indicates "customers thus cannot reasonably rely upon these signs as 'manifestations' of agency, permitting them to obtain relief against the trademark

122. This is not to say that the parameters of a franchisee's *actual* authority are clearly delineated. Like its "sister" concept of apparent authority, actual authority also may take litigants down a rabbit hole of malleable, confusing legal tests. One exasperated federal court declared that, even for cases restricted to one jurisdiction, there is no consensus, "as one court may interpret a fact as giving the franchisor control over [a franchisee's] daily operations, while another court may interpret that same fact as simply protecting a trademark." Estate of Anderson v. Denny's Inc., 987 F. Supp. 2d 1113, 1155 (D.N.M. 2013). Judicial tests appear to be "result oriented, either pro-plaintiff or pro-industry, thus undermining the integrity of the court process[;] it would be best to just pick a rule for franchisors, and let indemnification clauses and/or insurance determine who will pay any judgment." *Id.* at 1159–60.

123. Howell v. Chick-Fil-A, Inc., 1993 WL 603296, at *2 (N.D. Fla. Nov. 1, 1993). The common knowledge doctrine is questionable in light of empirical studies discussed later in Part V, but also because franchisees themselves often do not even understand the relationship between themselves and their respective franchisors. *See* Emerson, *supra* note 80, at 720.

124. Emerson, *supra* note 6, at 645.

licensor (franchisor) for the acts of an apparent agent, the licensee (franchisee)."[125]

The "common knowledge" doctrine was judicially created in *Reynolds v. Skelly Oil Co.*[126] and its progeny.[127] In *Skelly,* the Supreme Court of Iowa held that the customer's argument that the defendant, Skelly Oil Company, "was estopped [to claim no vicarious liability based on apparent agency] because of the signs displayed and that, because of such signs, there was a presumption that the station was owned by the Skelly Oil Company ha[d] no support in reason or authority."[128] The court compared the appellee's argument to the following situation: "because the word 'Chevrolet' or 'Buick' is displayed in front of a place of business, General Motors would be estopped to claim that it was not the owner of the business." However, the court found this position illogical, noting "[i]t is a matter of common knowledge that these trademark signs are displayed throughout the country by independent dealers."[129]

The rule created in *Skelly*—that it is a matter of common knowledge that independent dealers display trademark signs in their business and, therefore, it is not reasonable for customers to rely on such manifestations as creating an agency relationship between franchisor and franchisee—largely shielded franchisors from vicarious liability. Many courts have continued to follow the precedent set in *Skelly*[130] and have

---

125. *Id.*; *see also* Emerson, *An International Model, supra* note 1, at 249 n.18 (noting that some courts do not consider mere licensing of a trademark as holding oneself out as a principal for the franchisee).

126. *See* Reynolds v. Skelly Oil Co., 287 N.W. 823, 827 (Iowa 1939). *See also* Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Mobil Oil Corp., 606 N.W.2d 359, 366 (Iowa 2000) (refusing to hold franchisor liable because of a trademark sign at a service station).

127. *See, e.g.*, Chevron, U.S.A., Inc. v. Lesch, 570 A.2d. 840 (Md. 1990).

128. *Skelly*, 287 N.W. at 827.

129. *Id.* The reasoning of the *Skelly* court seems strained. The whole idea of "common knowledge" presumes that people actually know there is a distinction between the local owner (the franchisee) and a franchisor.

130. *See Chevron,* 570 A.2d at 846. A gas station customer argued the oil company, Chevron, was liable under an apparent agency theory for the torts of its franchisee's employee, Malcolm Weeks, who allegedly caused an explosion initiated in plaintiff's garage severely burning plaintiff and his wife and destroying their home. *Id.* at 841. They claimed that Chevron, Inc. was liable under an apparent agency theory, since the franchisee "was a 'branded station'; that is, it displayed the signs and colors of a particular brand, Chevron, and sold only that brand of gasoline and oil." *Id.* Initially, the trial court

held that the presence of signs, emblems, logos, and the like displayed by independent dealers are a matter of common knowledge and do not create any agency relationship between the franchisor and franchisee.[131]

---

found that there was no agency relationship between Chevron, Inc. and its franchisee, Walker Chevron; and even if there were reliance by the Lesches on such manifestations of agency, it would not have been reasonable or justified under the circumstances. Emerson, *supra* note 6, at 646 ("The trial court stated that there were no representations by Chevron of an agency relationship, nor was there any evidence of reliance by the plaintiffs.") (citing Lesch v. Chevron, U.S.A., Inc., 542 A.2d 1292, 1294–95 (Md. Ct. Spec. App. 1988)). The Maryland Court of Special Appeals (Maryland's lower appeals court) found "Chevron's efforts to prevent the public from distinguishing between branded stations and its own outlets were of long standing and were diligently pursued." *Id.* (citing *Lesch*, 542 A.2d at 1299). This appeals court concluded that there were numerous indications of agency and that the plaintiffs' reliance upon such manifestations of agency was reasonable in light of the fact that Chevron's actions made it "impossible for the public to distinguish the franchised Chevron station from Chevron U.S.A., Inc." *Id.* at 646–47 (citing *Lesch*, 542 A.2d at 1305). Chevron U.S.A. appealed to the highest state court, the Maryland Court of Appeals, which found that there was no apparent authority and held that "[i]t was not reasonable for the [plaintiffs] to conclude that Chevron owned and operated the station, or that it so controlled the employees of the station so as to be considered their master, and therefore responsible for their negligence." *Chevron*, 570 A.2d at 849–50. While the plaintiffs' claims were undermined by their own knowledge about the gas station's private ownership and their use of the station for repairs when it was previously a Sinclair or BP station, *id.* at 849, the court went beyond specific, actual knowledge to the more general issue of what all persons *should know*; and it thus held it to be unreasonable for the plaintiffs to rely on signs and other manifestations displayed at Walker Chevron, Inc., as creating an agency relationship between franchisor and franchisee, because it was "a matter of common knowledge that these trademark signs are displayed throughout the country by independent dealers." *Id.* at 846 (quoting B.P. Oil Corp. v. Mabe, 370 A.2d 554, 562 (Md. 1977)).

131. *See Chevron,* 570 A.2d. at 846 (noting the following cases as demonstrating "common knowledge:" Watkins v. Mobil Oil Corp., 352 S.E.2d 284, 287 (S.C. 1986) (sale of Mobil products, presence of Mobil signs and emblems on uniforms, and station trading as 'North Main Mobil' was not sufficient evidence to establish apparent agency); Wood v. Shell Oil Co., 495 So.2d 1034, 1039 (Ala. 1986) (presence of oil company's distinctive logo displayed on signs, literature, products, and uniforms is not sufficient evidence, in itself, to establish apparent agency because it is "common knowledge among the general public that such a logo is often displayed by independent dealers and that the only representation made by such displays is that the oil company's gasoline is sold at the service station."); Stephens v. Yahama Motor Co., 627 P.2d 439, 442 (Okla. 1981) (display of two Conoco signs at service station was not sufficient to establish apparent agency because it is com-

The *Skelly* and *Lesch v. Chevron, U.S.A., Inc.* courts posited that there are certain elements of a franchise that are generally known to the public. Specifically, these courts held that it is "common knowledge" that franchisors' trademark signs are displayed throughout the country by independent franchised dealers. Other courts, however, have found that there is no common knowledge when some franchised stores are owned and managed by franchisees and others by a franchisor.[132] Courts that have adopted the "common knowledge" doctrine have not done so based on any empirical evidence that consumers have such common knowledge.[133] Rather, courts have taken judicial notice of the doctrine, determining "that such knowledge is a fact, something judges and jurors already know"—a matter admitted without proof because it is universally regarded as established.[134]

V.
Survey Results: Testing the Validity of a "Common Knowledge" Doctrine

The surveys undertaken for this Article and reported in the Appendix demonstrate that the general populace remains ignorant of the fundamental structure of franchising. Indeed, most people know little with respect to any field in which

---

mon knowledge that such signs are displayed by independent dealers); Apple v. Standard Oil, Div. of Am. Oil Co., 307 F. Supp. 107, 115 (N.D. Cal. 1969) (noting the mere fact that service station sold Amoco gasoline and displayed Amoco signs did not constitute a "holding out" sufficient to give rise to a finding of apparent agency).

132. Ford v. Palmden Rests., LLC, No. E053195, 2012 WL 3089406, at *11 (Cal. Ct. App. Jul. 31, 2012).

133. Emerson, *supra* note 6, at 648; *see also* Brett A. Brosseit, *Buyers, Beware: The Florida Supreme Court's Abrogation of the Apparent Authority Doctrine Leaves Plaintiffs Holding the Tab for Torts of Franchisees* — Mobil Oil Corp. v. Bransford, 23 Fla. St. U. L. Rev. 837, 842–43 (1996) (noting that courts employ the common knowledge doctrine "unless additional facts exist to warrant the plaintiff's reliance upon the franchisor's business reputation.").

134. Emerson, *supra* note 6, at 648 (citing Black's Law Dictionary 848 (6th ed. 1990)) (internal quotations removed); *see Common Knowledge*, Black's Law Dictionary (10th ed. 2014) (noting that usage of the phrase "common knowledge" dates back to the 17th century and that the term means "[a] fact . . . so widely known that a court may accept it as true without proof."). However, courts in at least one foreign jurisdiction—Japan—have rejected a franchisor's "common knowledge" argument, *see* Emerson, *An International Model, supra* note 1, at 254 n.47.

franchises are found. For example, younger Americans have been the primary patrons of the fast-food industry,[135] and the surveys' results indicate how little such customers tend to know about the ownership, operations, and liability of the quick-service restaurants they frequent.[136] More generally, the surveys show—again[137]—that the courts' assumption of consumer "common knowledge" is sorely misplaced.[138] In fact, "there is little, if any, common knowledge about franchising, dealerships, [and] other such arrangements."[139]

Initially, in 1992, the two surveyed groups of respondents consisted of college business law students[140] and older individuals occupying a managerial or professional occupation; all the individual respondents theoretically should have possessed more knowledge regarding franchises than does the general public. The survey respondents were tested on their knowl-

---

135. Denise Lee Yohn, *2 Target Markets for Restaurants*, QSR MAG. (Nov. 2011), http://www.qsrmagazine.com/denise-lee-yohn/2-target-markets-restaurants.

136. *See infra* Appendix, questions 6, 13–14.

137. Emerson, *supra* note 6, at 648.

138. For an example of the doctrine being applied without evaluating the assumption of common knowledge, *see* Chevron, U.S.A., Inc. v. Lesch, 570 A.2d 840, 846 (Md. 1990) (discussing use of the common knowledge doctrine in many jurisdictions around the country); *but see* Bradford v. Jai Med. Sys. Managed Care Orgs., Inc., 93 A.3d 697, 710 n.25 (Md. 2014) (noting the limits of a common knowledge defense).

139. Emerson, *supra* note 6, at 648 ("[P]ublic assumptions about the law fly in the face of judicial calculations based on so-called common knowledge."). Of course, the public's lack of understanding about supposedly basic concepts is not unique to law or business. In the world of science, for instance, studies show a remarkable disparity between what lay people believe about certain matters (*e.g.*, climate change, the disposal of nuclear wastes, concealed handgun permits) and expert consensus. Dan M. Kahan, Hank Jenkins-Smith & Donald Braman, *Cultural Cognition of Scientific Consensus*, 14 J. RISK RES. 147 (2011).

140. There is evidence supporting the generalizability of research findings obtained in contrived settings across many domains. Craig A. Anderson, James J. Lindsay & Brad J. Bushman, *Research in the Psychological Laboratory: Truth or Triviality?*, 8 CURRENT DIRECTIONS IN PSYCHOL. SCI. 3 (1999); EDWIN A. LOCKE, GENERALIZING FROM LABORATORY TO FIELD SETTINGS 3–9 (1986). These articles talk about generalizing from laboratory research and can be extended to research results. E-mail from Amir Erez, W.A. McGriff, III, Professor of Mgmt., Warrington Coll. of Bus., Univ. of Fla., to Robert Emerson, Professor of Bus. Law, Univ. of Fla. (Feb. 12, 2016, 10:31 EST) (on file with author).

edge of franchising.[141] The survey respondents in the succeeding surveys—in 2000, 2008, and 2016—were upper-level university students, who can provide excellent data in these circumstances.[142]

For all of the surveys, the respondents were asked a series of questions to determine their knowledge as to the displays of trademarks, understanding of the business characteristics of a franchise, the existence of franchises, and the significance of a franchisor–franchisee relationship, including the prospects of franchisor vicarious liability. A wide range of businesses were covered, in various industries, with an attempt to cover each field with examples of two or more businesses having quite different levels of franchised or vertically-integrated units (stores, restaurants, offices, etc.). Fortunately, almost every business remained active over the entire time frame of the surveys and thus permitted a meaningful analysis over decades. The results were, and remain, remarkable.[143]

A. *The Surveys' Results*

The first five questions pertained to the group's knowledge about franchising,[144] specifically about gas stations that displayed a well-known company logo or trademark, sold only that brand of gasoline, accepted the brand-name credit card,

---

141. *See infra* Appendix (noting undergraduate level business law students were surveyed in 1992, 2000, 2008, and 2016).

142. *See* Anderson, Lindsay & Bushman, *supra* note 140; Richard N. Landers & Tara S. Behrend, *An Inconvenient Truth: Arbitrary Distinctions Between Organizational, Mechanical Turk, and Other Convenience Samples*, 8 INDUS. & ORGANIZATIONAL PSYCHOL. 142, 151 (2015); LOCKE, *supra* note 140. Also, note that in studies of cognitive biases, almost all research has in fact been conducted on students. E-mail from Amir Erez, *supra* note 140.

143. *See generally* Emerson, *supra* note 6, at 648–58 (describing the "common knowledge" doctrine as disproved); *see infra* Appendix, questions 1–14, 16–18, 20–29, 32–33 & 35–48 (survey responses showing that there is, actually, quite common *ignorance* about franchising). At least one state high court has recently acknowledged these results. *See, e.g.*, *Bradford*, 93 A.3d at 710 n.25 (citing Emerson, *supra* note 6, at 646–51, for the proposition that is problematic for the judiciary "to decide cases on the basis of 'common knowledge' that is not supported by evidence or subject to adversary testing").

144. Including their "knowledge as to the display of trademarks, the existence of franchises, and the significance of a franchisor–franchisee relationship, including the prospects of franchisor vicarious liability." Emerson, *supra* note 6, at 651.

were listed in advertisements under the nationally-known trade name, and had employees wearing uniforms with the trade name insignia. The groups' understanding of the ownership of these gas stations was minimal.[145] While many courts have applied the "common knowledge" doctrine to find that consumers universally recognize that such stations are independently owned, the survey displayed that the three test groups believed that such stations were "probably" company owned.[146] The groups were even further mistaken regarding diet centers, believing "signs, products and services, uniforms, telephone listings, advertisements, or a list of centers indicate company—not local—ownership."[147] When all such characteristics are present, the numbers go to a level where seven out of ten student respondents find it likely that the center is owned and operated by the national company. Each of the survey outcomes signals that even those persons, who should be educated about whether businesses are independently owned and operated, are not as sophisticated or knowledgeable as the courts tend to assume.

The students were even further off the mark when asked to determine whether gas stations are independently or corporately operated. According to the results of three student surveys conducted in 2000, 2008, and 2016, "only 19.0%, 15.7%, and 20.3%, respectively, of the respondents correctly answered that most Chevron gas stations are locally owned and operated, while a plurality of the respondents erroneously believed that they were mostly nationally owned and operated, and 37.9%, 39.1%, and 38.0% incorrectly concluded that most were dually owned and operated nationally and locally."[148] While the results of these studies show that the polling public

145. *See infra* Appendix, question 5.

146. About two-thirds of the students mistakenly believed that the stations were company owned. *See infra* Appendix, questions 1–5.

147. *See infra* Appendix, questions 7–11. The 2000, 2008, and 2016 survey results each indicate that about 75% of respondents also held this belief.

148. *See infra* Appendix, question 13. The 1992 results were: 9.9% correctly answered locally owned/operated, while 57% wrongly believed they were nationally owned and operated and 28 erroneously concluded they were dually owned and operated. Emerson, *supra* note 6, at 680 (question 1(i)). Among the students surveyed in 2000, 2008, and 2016, the answers about Chevron were close to the same all three times, with the 2016 figures being 20.3% for locally owned/operated, 38.1% erroneously thinking they were mainly nationally owned and operated, and 38.0% mistakenly selecting

is more likely to be aware of the franchise relationship in food, hotel, or even retail industries,[149] courts are less likely to extend the "common knowledge" doctrine to encompass such industries. Courts are more likely to apply the doctrine in the traditional gas station situations, as was the position taken by the *Skelly* and *Lesch* courts, despite the fact that the public possesses more knowledge regarding these nontraditional franchise situations than they do regarding the traditional one.[150]

When addressing whether the ubiquitous commonly recognized chains, such as McDonald's, were independently or corporately operated, the results showed even more erroneous perceptions. In 2000, about one out of five students incorrectly assumed McDonald's Corporation definitely or probably owned all McDonald's restaurants, and about half believed that many were jointly owned and operated.[151] In both 2008 and 2016, less than one-fifth of respondents answered correctly.[152] The 2000, 2008, and 2016 results reveal that students' relative knowledge should not be overemphasized. Repeatedly, for almost all of the dozens of questions in the survey, the respondents, as a group, have been, over time and across industries, greatly mistaken about franchised businesses' ownership,

---

dual ownership and operations as descriptive. *See infra* Appendix, question 13.

149. Emerson, *supra* note 6, at 653 ("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."). *Compare infra* Appendix, question 1, *with infra* Appendix, question 12.

150. *See* Emerson, *supra* note 6, at 652 n.199 (noting numerous cases in which courts are unwilling to extend the "common knowledge" doctrine to other franchise settings); *but see* Estate of Miller v. Thrifty Rent-A-Car Sys., 637 F. Supp. 2d 1029, 1039–41 (M.D. Fla. 2009) (extending the "common knowledge" doctrine to car rental franchises and noting other cases where Florida courts have extended the doctrine).

151. *See infra* Appendix, question 13.

152. *See infra* Appendix, question 6. This demonstrates that an alarmingly low number of people are able to distinguish between locally and nationally owned-and-operated businesses. Not only were respondents surprisingly incorrect in believing that McDonald's, one of the most well-known franchises, were generally nationally owned, but they were also incorrect regarding whether another well recognized franchise, Burger King, was nationally or locally owned. *See infra* Appendix, question 14.

operations, and potential liability.[153] Recognition of these survey results and other evidence of consumer ignorance should be grounds for either modification or outright abrogation of the common knowledge doctrine.

It should not be assumed that the public has, over time, become more knowledgeable about franchise relationships. On the contrary, the survey respondents were, for example, severely mistaken regarding one of the most well-known hotel chains, Holiday Inn; less than 10% of respondents knew the majority of the hotels were locally owned and operated.[154] A majority of the student respondents thought the hotel chain was nationally owned and operated. In fact, out of the 24 businesses that the 2000 and 2008 respondents—presumably all franchise customers—were quizzed over, a majority of the respondents only correctly categorized five businesses in 2008: Avis Rent-a-Car, State Farm Insurance, Jenny Craig Weight Loss Centers, Olive Garden, and Gap.[155] By 2016, two of those five (Jenny Craig Weight Loss and Olive Garden) slipped below a majority correct-identification level—with the remaining three (Avis, State Farm, and Gap) being the only businesses that the 2016 respondents accurately categorized over 50% of the time.[156] Generally, the student respondents do not seem to know whether a gas station, hotel, fast-food outlet or other restaurant, diet center, car rental store, learning site, tuxedo rental location, or other business is locally or nationally owned and operated.[157] The student respondents were likewise un-

153. *See infra* Appendix, questions 1–14, 16–18, 20–29, 32–33 & 35–48. Other than a few questions about how respondents behave, their degree of certainty about an answer, or the respondents' recommendations as to what the law of liability should be, all of the other questions in the survey concern the respondents' knowledge or lack thereof. *See infra* Appendix, questions 15, 19, 30–31, 34.

154. *See infra* Appendix, question 13.

155. *See infra* Appendix, question 13. In the 1992 results, out of 11 businesses, only Avis Rent-a-Car was correctly categorized by a majority.

156. *See infra* Appendix, question 13. Due to the national ownership predisposition of many respondents, all five (or three) of these "winning" categorizations concern businesses that are exclusively or mainly owned at the national level. The respondents' lack of knowledge about franchising, and evident assumption that a recognized trademark signals vertical integration, seemingly held a presumption in favor of a correct answer when the business was in fact nationally owned. However, the respondents were highly unlikely to label accurately a predominantly franchised business.

157. *See infra* Appendix, question 13.

certain about two fried chicken chains. First, they erroneously thought, by a margin of almost four to one, that most Kentucky Fried Chicken outlets are nationally or jointly owned rather than locally owned and operated.[158] Second, they were much less likely to believe that most Church's Fried Chicken restaurants are nationally owned and operated, when in fact they are usually *not* franchised.[159]

In the lodging industry, the student respondents were quite wrong about perhaps the most prominent, predominantly franchised hotel chain: Holiday Inn. In 2000, 2008, and 2016, only 7.3%, 8.9%, and 12.0% of the respondents, respectively, opined correctly that most Holiday Inns are locally owned and operated.[160] These Holiday Inn figures can be compared with a completely integrated operation, that of Motel 6. Approximately two or three times as many of the student respondents incorrectly believed that most Motel 6 motels are locally owned and operated than correctly believed that to be the case for a genuinely franchised chain, Holiday Inns.[161]

When the student respondents were questioned about what a franchise is, the majority of the respondents were not able to choose or otherwise offer a valid description of a franchise.[162] For example, in 2008, only 38% of the group noted that a franchise is independently owned, a fundamental element of the franchise structure.[163] The respondents were even more likely to be wrong about the structure of a franchise;[164] and a majority of these respondents incorrectly believed that franchises are not independently owned and op-

158. *See infra* Appendix, question 13.

159. *See infra* Appendix, question 13.

160. *See infra* Appendix, question 13.

161. *See infra* Appendix, question 13.

162. *See infra* Appendix, question 16. In fact, about half of the student respondents failed to recognize the roles of the franchisor and franchisee. These students were unaware that the franchisor did not own the business and did not know that the franchisee managed it. *See infra* Appendix, question 16. These results are especially troubling because most of these mistaken respondents thought they did know what a franchise is. *See infra* Appendix, question 16.

163. *See infra* Appendix, questions 13, 16.

164. *See infra* Appendix, question 16. Half of the respondents offered incorrect definitions of a franchise, with only a little over a third not defining a franchise with incorrect or irrelevant elements.

erated.[165] Generally, only 32.1% of the student respondents provided answers that included *only* correct attributes of franchising, while 37.4% of the student respondents provided answers that included both correct *and* incorrect attributes of franchises.[166] However, more than one in six student respondents thought that the franchisee did not manage it. Altogether, nearly 40% of the student respondents were entirely wrong about the very basics of franchise ownership and management.

Once correctly told what a franchise is, as well as the roles of the franchisor and franchisee in the arrangement, the respondents were questioned about what they thought the law was in this area. Specifically, they were asked whether they believed that a franchisor is liable for a breach of contract or negligence by its franchisee. Interestingly, the respondents were misinformed about a franchisor's vicarious liability, believing a franchisor could be held liable for its franchisee's breach of contract or tort.[167] About 75% of the respondents

165. *See infra* Appendix, question 16.

166. *See infra* Appendix, question 16. The paucity of correct responses persists across the decades. The survey results from 1992 indicate that 49.1% of telephone respondents (the public) and 50.6% of responding customers surveyed at franchised businesses identified only *incorrect* attributes of franchising, whereas only 16.5% of the public respondents and 14.5% of the customer respondents identified only correct attributes of franchising. Emerson, *supra* note 6, at 684 (question 6(b)). As for more recent survey results, the student respondents were, on average, more likely to know an attribute of franchised enterprises—32.1% of respondents in 2008 and 37.5% in 2016 identified only correct attributes of franchising; still about two-thirds of the respondents, in both 2008 and 2016, offered incorrect or, in effect, irrelevant attributes when describing franchises. *See infra* Appendix, question 16. However, compared to student respondents in 1992, the student respondents in the years since have been, altogether, *less knowledgeable* about franchising (less capable of choosing or otherwise offering an accurate description of a franchise—e.g., that it is independently owned and managed). *See infra* Appendix, question 18; Emerson, *supra* note 6, at 675 (question 14).

167. *See infra* Appendix, questions 20, 22. An average of about 65% believed that the franchisor was liable for its franchisee's breach of contract and 62% believed that the franchisor was liable for its franchisee's negligence (a tort). *See infra* Appendix, questions 20, 22.

were unaware that generally a franchisor is not liable when a franchisee violates a contract or commits a tort.[168]

After learning that a franchisor is not commonly held vicariously liable for its franchisee's torts or breaches of contract, the respondents were asked what they felt the law *should* be in this area. A majority of the student respondents believed that the law in this area should hold franchisors liable for the harm caused by their franchisees.[169] When public and franchise customers were surveyed regarding whether they believed franchisors should be liable for their franchisee's contract breaches and torts, the majority of them thought that national businesses should be liable for the harm done by local stores.[170] Of the students surveyed in 2008 and 2016, 74.4% and 76.1%, respectively, did not know that the franchisor is often not liable for franchisees' negligence or breaches of contract, demonstrating widespread misinformation about holding franchisors vicariously liable.[171] The surveys indicate that the vast majority of student respondents believe that national entities should be legally accountable for negligence or breaches of contract by the local stores.[172] Specifically, the surveys revealed:

> [M]ost people simply do not approve of legal walls separating national franchisors from liability for the acts of their franchised outlets. Without articulating it, perhaps many lay people adopt a loss prevention rationale for imposing franchisor liability: the notion that franchisors should be held liable for any act whose probability of occurrence could be substantially reduced in the exercise of reasonable care and control by the franchisor.[173]

---

168. *See infra* Appendix, questions 20, 22 (more than 60% of respondents in 1992 were similarly unaware); *see also* Emerson, *supra* note 6, at 658–59 (discussing other misconceptions regarding franchisor liability).

169. *See infra* Appendix, question 31.

170. *See infra* Appendix, question 31.

171. *See infra* Appendix, question 29.

172. *See infra* Appendix, question 30.

173. Emerson, *supra* note 6, at 659–60 (quoting *Liability of a Franchisor for Acts of the Franchisee*, *supra* note 51, at 155 (internal quotations omitted)). *See also* Hanson, *supra* note 49, at 192 (noting the ability of franchisors to carefully choose and monitor their own franchisees as rationales for imposing franchisor liability).

The surveys indicate that most people do not see the franchisor as sufficiently removed from the franchisee to escape liability for what the franchisee does. The surveys evince a near-unanimous belief that national companies should be required to stand behind services and goods sold at their local stores.[174] In effect, it appears that most people would hold franchisors liable for their franchisees' actions, in opposition to the existing law.[175]

In light of the survey results, the notion of "common knowledge" appears contradictory. In fact, the surveys ultimately demonstrate that there is no "common knowledge" regarding franchises. The student respondents should have been better educated on the issue of franchises. A majority of those surveyed did not understand the basic elements of a franchise or the roles of the franchisor and the franchisee. Moreover, they were incorrect on the topic of whether a franchisor could be held vicariously liable for its franchisee's actions. Even further mistaken were the public and franchise customers who appeared oblivious to the fact that they were actually a part of the misinformed. They had no idea whether they were patronizing an independently owned and operated franchise or a nationally owned and operated business. What the courts have deemed "common knowledge" is, perhaps, not so commonly known.

B. *Summary of Findings: There Is No "Common Knowledge"*

The judicially created doctrine of "common knowledge" has always been, and remains, a theory contradicted by the facts. There was no "common knowledge" when the doctrine was created, and there is no "common knowledge" today regarding the attributes of a franchise.[176]

The surveys plainly show that, even though the "common knowledge" doctrine was judicially created decades ago,[177] time simply has not enlightened the public to the characteris-

---

174. Emerson, *supra* note 6, at 683 (question 4(c)).

175. *Id.* at 683 (questions 4(d) & 4(e)).

176. The surveys demonstrate that the theory that respondents' knowledge of franchise characteristics and law would increase over time, in light of the general rule of progression in society, holds no water here. *See infra* Appendix.

177. Reynolds v. Skelly Oil Co., 287 N.W. 823, 827 (Iowa 1939). *See supra* notes 126–134 and accompanying text.

tics of a franchise. The 1992 survey demonstrates the public did not possess "common knowledge" regarding franchising.[178] More recent surveys in 2000, 2008, and 2016 indicate the public still does not possess any "common knowledge" regarding the attributes of a franchise.[179] Indeed, the survey results demonstrate that respondents actually have become less familiar with franchises and laws that pertain to them.[180]

The absence of common knowledge presents significant implications for franchising's case law on apparent authority. The justifiability or reasonableness of a customer's reliance on an apparent agency must no longer be measured to an idealized, erroneous notion of a marketplace consisting of informed consumers. If judicial speculation gave way to actual information, case resolutions might become more understandable and predictable. Franchisors and franchisees could then better plan their behavior and determine their risks.

In fact, in some areas, the public is even more mistaken than ever regarding the characteristics of a franchise. For example, the surveys show there is an overall lack of knowledge regarding how to identify whether a particular store is locally or nationally owned. Few laypersons can discern the ownership of businesses that they frequently patronize. Increasingly, more people assume that a business that serves the public is legally bound to post the identity of the establishment's owner. Furthermore, it is apparent that the general public has difficulty understanding even the most basic principles of franchising, and this has remained constant for the past few decades.[181]

---

178. Emerson, *supra* note 6, at 684.

179. *See infra* Appendix; *see also* Robert W. Emerson, A Franchisor's Vicarious Liability: Trademarks, Control, Consumers' Perceptions, Websites, and the Internet app. (Jan. 29, 2019) (unpublished manuscript) (containing survey questions for 2000, 2008, and 2016, with responses tending to show the respondents' worsening understanding as to the nature of well-known franchise networks).

180. *See generally* Emerson, *supra* note 179; Robert W. Emerson, *Franchising and Consumers' Beliefs About "Tied" Products: The Death Knell for Krehl?*, 45 FLA. L. REV. 163, 198–200 (1993) (containing the results of a public survey, with twelve questions about products and sales for various franchise networks and franchised outlets).

181. In fact, when questioned whether the franchisor is "legally obligated to 'stand behind'" the goods or services provided by its franchisee, the respondents in 2016 incorrectly answered this question nearly as frequently as

Nonetheless, the courts continue to use the doctrine, regardless of any empirical evidence suggesting there is something in the realm of universally known norms of franchising. Ultimately, the courts utilize the doctrine *in spite of* the empirical evidence that supports the fact that there is no such thing as "common knowledge" regarding franchises. Thus, as it was in 1992, the "common knowledge" doctrine remains, to this day, commonly unknown to the public.

VI.
Changes in the Law: The Third Restatement of Agency

The law governing franchisor liability has been controversial and inconsistent since its inception. Many commentators and courts have held that a franchisor should not be held liable for the torts of its franchisee.[182] Yet, many other courts still strictly adhere to the apparent authority doctrine, finding a franchisor is subject to vicarious liability for a tort committed by its franchisee when the franchisee is "dealing with a third party on or purportedly on behalf of the principal when actions taken by the [franchisee] with apparent authority constitute the tort of enabling the agent to conceal its commis-

---

those respondents had in previous years. Only 15.8% of the 2016 respondents answered this question correctly, in comparison to the 13.2% and 14.6% who correctly answered in 2008 and 2000, respectively. *See infra* Appendix, question 24. Generally, the survey examples show tremendous ignorance about franchises and franchising law, with even a decline in knowledge from 2000 to 2016, which seems improbable given that the level of knowledge was usually low in the earlier years. *See infra* Appendix; Emerson, *supra* note 6, at 672–685.

182. *See, e.g.*, Kerl v. Dennis Ramussen, Inc., 682 N.W.2d 328 (Wis. 2004); Rainey v. Langen, 988 A.2d 342 (Me. 2010); Papa John's Int'l, Inc. v. McCoy, 2008 WL 199716 (Ky. 2008); Gress v. Lakhani Hosp., Inc., 110 N.E.3d 251 (Ill. App. Ct. 2018); Casey v. Ward., 211 F. Supp. 3d 107 (D.D.C. 2016). *But see* Crinkley v. Holiday Inns, Inc., 844 F.2d 156 (4th Cir. 1988) (holding a motel franchisor vicariously liable for injuries sustained by a customer who was injured in its franchisee's motel). Some courts have recently found a sort of middle ground on liability. *See* Depianti v. Jan-Pro Franchising Intern., Inc., 990 N.E.2d 1054, 1064 (Mass. 2013) (concluding "that a franchisor is vicariously liable for the conduct of its franchisee only where the franchisor controls or has a right to control the specific policy or practice resulting in harm to the plaintiff"); Leach v. Kaykov, 2013 WL 214383, at *4 (E.D.N.Y. 2013) (requiring more control than that of a "general supervisory nature" to allow vicarious liability for a franchisor).

sion."[183] This Part examines recent case law and Restatement changes and demonstrates how the question of franchisor liability continues to perplex policymakers.

Courts have regularly relied on Restatement (Second) of Agency ("Restatement Second") section 267 to impose liability on franchisors for injuries committed by franchisees.[184] However, Restatement Second has been superseded by Restatement Third, which was adopted in 2005 and published in 2006. While the new Restatement retains much of the same analysis and necessary elements from the prior Restatement, it expands the analysis on principal liability. Additionally, the Restatement Third has removed some of the Restatement Second's definitions of agency, as well as absorbed existing concepts into different sections. These changes could affect how a court determines a franchisor's liability for the torts committed by its franchisee.

A. *The Third Restatement's Section 2.05 Amendments*

The wording of the Restatement Second's section 8B[185] is captured by section 2.05 of the Restatement Third, which operates in a similar manner. Consequently, courts that now apply section 2.05 to the franchisor–franchisee relationship "should require evidence that the principal caused the [com-

---

183. RESTATEMENT (THIRD) OF AGENCY § 7.08 (AM. LAW INST. 2009).

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

185. The Restatement's "Estoppel — Change of Position" section, at paragraph one, provides:

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

RESTATEMENT (SECOND) OF AGENCY § 8B(1) (AM. LAW INST. 1958).

plainant] third party to believe the [franchisee] was his agent and that the third party justifiably and detrimentally" took a position based on this belief.[186] Such an application of agency by estoppel would require the establishment of new precedent in most jurisdictions.[187] Still, shifting one's grounds from apparent agency to agency by estoppel would likely deter some abusive litigation, particularly from plaintiffs seeking the deeper pockets of franchisors, as the estoppel standard requires a higher standard of proof.[188]

While apparent agency and agency by estoppel mandate different levels of reliance, cases that cite the Restatement Third as authority do not discuss whether the injured party "detrimentally changed his position."[189] For example, in *Miller v. McDonald's Corp.*,[190] while there was evidence that the plaintiff visited a McDonald's restaurant in reliance on an expectation of McDonald's quality of service, the plaintiff did not offer proof that she would have changed her position upon learning that the McDonald's Corporation did not actually own the

186. Wade, *supra* note 184, at 375. According to section 2.05, comment b, "detrimental change of position" is defined as the: "expenditure of money or labor, an incurrence of a loss, or subjection to legal liability, not the loss of the benefit of a bargain." RESTATEMENT (THIRD) OF AGENCY § 2.05 cmt. b (2009).

187. *See, e.g.*, Whetstone Candy Co., Inc. v. Kraft Foods, Inc., 351 F.3d 1067, 1078 n.15 (11th Cir. 2003) (declining to consider an argument of agency by estoppel because it is too similar to the doctrine of apparent authority); C.A.R. Transp. Brokerage Co., Inc. v. Darden Restaurants, Inc., 213 F.3d 474, 479 n.7 (9th Cir. 2000) (noting that as a practical matter there is no significant distinction between apparent authority and agency by estoppel).

188. *See* Hanson, *supra* note 49, at 192–94.

189. *See* Wade, *supra* note 184, at 376; *see also* Jones v. HealthSouth Treasure Valley Hosp., 206 P.3d 473, 480–81 (Idaho 2009) (finding no persuasive reason to adopt a stringent standard of reliance in cases regarding hospitals as a principal). Some cases require different levels of reliance depending on whether it is a contract or tort case. *See, e.g.*, Cefaratti v. Aranow, 141 A.3d 752, 769–71 (Conn. 2016) (in a medical malpractice case, discussing apparent agency cases, including franchising cases, and noting the contractual elements of a plaintiff's accepting the principal's offer of services, and then focusing on—and crafting—a purposely narrow apparent authority standard for *tort* liability; the latter requires proof that "the plaintiff would not have dealt with the tortfeasor if the plaintiff had known that the tortfeasor was not the principal's agent or employee").

190. Miller v. McDonald's Corp., 945 P.2d 1107, 1109–10 (Or. Ct. App. 1997).

franchise she had visited.[191] Similarly, the plaintiff in *Gizzi v. Texaco, Inc.*[192] relied on Texaco's manifestations that it owned the station where the plaintiff purchased a car.[193] However, he failed to demonstrate that he would not have purchased the car if he thought Texaco did not own the station.[194] Thus, under the theory of agency by estoppel, if the plaintiff fails to provide sufficient evidence that he would have changed his behavior, he would be precluded from recovering any damages from the defendant.[195]

In comparison, plaintiffs are more likely to recover from franchisors under the apparent agency theory than under the doctrine of agency by estoppel.[196] Many commentators reason that courts must strike an acceptable balance between ensuring that plaintiffs receive an acceptable remedy and allowing franchisors the ability to protect themselves from catastrophic damages awards.[197] However, if courts do not require plaintiffs to establish detrimental reliance or a change of position, as was required in *Miller* and *Gizzi*, then plaintiffs will be able to "recover for conduct that they would have undertaken regardless of the manifestations by the principal."[198] Such an outcome runs the risk of upsetting the desired balance between ensuring adequate remedies and maintaining franchisor protections.

---

191. *Id.* at 1113.

192. Gizzi v. Texaco, Inc., 437 F.2d 308 (3d Cir. 1971).

193. *Id.* at 310.

194. *See* Wade, *supra* note 184, at 376.

195. *Id.* For a discussion of the tort theory (agency by estoppel) and the contractual theory (apparent authority), see RESTATEMENT (THIRD) OF AGENCY §§ 2.03, 2.05 (AM. LAW INST. 2006).

196. Wade, *supra* note 184, at 376. *But see* Schulz, *supra* note 53, at 1004–05 (discussing how the apparent agency doctrine is difficult to prove because of courts finding "common knowledge" as to the separation of franchisor and franchisee).

197. For more general commentary, see Deborah DeMott, *A Revised Prospectus for a Third Restatement of Agency*, 31 U.C. DAVIS L. REV. 1035 (1998); Harvey Gelb, *A Rush to (Summary) Judgment in Franchisor Liability Cases?*, 13 WYO. L. REV. 215 (2013).

198. Wade, *supra* note 184, at 377.

B. *A Proposal to Remove Apparent Agency from the Third Restatement*

The concepts of agency by estoppel and apparent agency, although linked, are distinct.[199] Unfortunately, the courts' application of these doctrines has been confusing and inconsistent. Problems sometimes simply arise from the fact that "courts have not always been careful in using terminology in traditional Restatement ways," instead, for example, employing the term "agent" when the appropriate word to use would be "employee."[200] Therefore, a "less is more" weeding out of some notions (i.e., eliminating some definitional concepts or competing theories) could ensure more consistent decision-making. For example, one way to streamline the agency doctrine is to remove language about perceived agency, or apparent agency, from Restatement Third section 7.07 comment f (defining employees) as well as to expand section 2.05 so that agency by estoppel covers situations previously addressed in Restatement Second section 267.[201] The revision would remove the part of the comment stating that liability may extend to a potential defendant ("D") who causes a potential plaintiff ("P") to believe that someone else ("SE") who harmed P is D's employee, provided that P justifiably relied on SE's skill or case and SE's conduct is of the type that would lie within the scope of employment.[202] Instead, the focus would be on estoppel and *detrimental* reliance. The issue of apparent agency by

---

199. *See id.* at 377 n.240 (noting that apparent agency (or perceived agency as the author has entitled it) "is used to confer liability in the absence of an agency relationship where a third party has justifiably relied on the appearance of an agency relationship" and agency by estoppel "has been used to confer liability in the absence of an agency relationship where a third party has justifiably relied on the appearance of an agency relationship and detrimentally changed position based on that reliance").

200. Gelb, *supra* note 197, at 218.

201. Wade, *supra* note 184, at 377–78 (noting that such changes "will streamline the law and help guide courts in applying agency by estoppel").

202. The removed part would be the following:

> A person who causes a third party to believe that an actor is the person's employee may be subject to liability to the third party for harm caused by the actor when the third party justifiably relies on the actor's skill or care and the actor's conduct, if that of an employee, would be within the scope of employment.

RESTATEMENT (THIRD) OF AGENCY § 7.07 cmt. f (AM. LAW INST. 2006).

estoppel would be placed at the forefront of Restatement Third.[203]

Perhaps such changes are unnecessary, even for those who favor franchisor liability under apparent authority concepts. As one commentator noted, the Third Restatement's "Section 2.03 and its comments afford useful guidance in interpreting apparent authority or apparent agency."[204] However, elimination of perceived agency from the language in section 7.07 would force courts adopting Restatement Third to use agency by estoppel where no agency relationship exists.[205] Moreover, because Restatement Third section 2.05 has a clearly articulated reliance standard,[206] the modified Restatement would be less ambiguous and would provide more guidance for courts considering the imposition of liability upon a principal.[207] As Restatement Third is currently constituted, the issue of perceived agency and whether or not a person is acting within the scope of employment is hidden away in comment f.[208]

Restatement Third section 7.07 is an inconsistent doctrine as is.[209] The essential "purpose of section 7.07 is to define when an employer is liable for the tortious acts of an em-

---

203. Wade, *supra* note 184, at 380.

204. Gelb, *supra* note 197, at 236. Gelb gives numerous examples related to section 2.03 to support his view. *Id.* at 236–37.

205. Wade, *supra* note 184, at 379 ("Currently, the only ways to bind a principal when the requirements for an actual agency do not exist, as a matter of law, are to use perceived agency or agency by estoppel.").

206. Wade has also proposed amendments to section 2.05 of Restatement Third, i.e., *Estoppel to Deny Existence of Agency Relationship*. Wade, *supra* note 184, at 381. He has recommended that when a party's lack of due care causes a third person to believe erroneously that someone is acting on behalf of the would-be principal, the situation should be analyzed according to the same estoppel doctrine as in a claim of negligent misrepresentation. *Id.* at 381–82.

207. *Id.* at 379. Notably, even with a clearer standard it could still be difficult for plaintiffs to prove that they actually relied on agency in changing his or her position. *See* Miller v. McDonald's Corp., 945 P.2d 1107, 1109–10 (Or. Ct. App. 1997).

208. *See* Wade, *supra* note 184, at 380.

209. *See id.* at 377. *But see* David Potts, Engler v. Gulf *Interstate Engineering, Inc., and the Role of Control in Vicarious Liability*, 54 ARIZ. L. REV. 1157, 1169–70 (2012) (arguing that the adoption of the Restatement (Third) of Agency has actually helped clarified "previously opaque Arizona law").

ployee."[210] In making such a definition, section 7.07 presupposes an employer–employee relationship. The perceived agency doctrine attempts to answer when one party is liable for the torts of another without the creation of an actual agency relationship.[211] This clarity will assist courts in establishing a consistent doctrine for determining whether one can be held liable for the acts of non-agents.[212]

This revision proposes to expand the scope of agency by estoppel and eliminate the doctrine of perceived agency from the Restatement Third.[213] As written, section 2.05 focuses "on situations where the principal has negligently caused the belief [that the principal has ratified the agent's tortious behavior] or negligently failed to correct the [injured third party's] belief."[214] However, Wade proposes that once the doctrine of

---

210. Wade, *supra* note 184, at 380. However, there are certain exceptions to employer liability under section 7.07. For instance, Restatement Third states that section 7.07 is "inapplicable to an employer's liability for one employee's tortious conduct toward a fellow employee," and section 7.08 deals with the liability of a "principal for torts committed by agents in dealing or communicating with third parties on or purportedly on behalf of the principal when actions taken by the agent with apparent authority either constitute the tort or enable the agent to conceal its commission." Thus, it is unclear if Wade's proposed revisions would help in those areas. RESTATEMENT (THIRD) OF AGENCY § 7.07 cmt. a, § 7.08 (AM. LAW INST. 2006)

211. Wade, *supra* note 184 at 380.

212. *See id.* at 377, 380; Emerson, *supra* note 6; Wade, *supra* note 184, at 381–82; The illustrations following section 2.05 included *Gasbarra v. St. James Hosp.*, 406 N.E.2d 544 (Ill. App. Ct. 1980) (a medical malpractice case, involving a hospital's liability for an independently contracting staff physician's negligence), and *Miller v. McDonald's*, 945 P.2d at 1107 (Or. Ct. App. 1997) (discussed above); they represent when the perceived agency and/or agency by estoppel doctrines are most likely to be applied, i.e., in the employer–employee and franchisor–franchisee situation. Wade, *supra* note 184, at 381–82 (discussing amendments to the illustrations following section 2.05).

213. Wade, *supra* note 184, at 383 (commenting that agency by estoppel has been submissive to other agency theories, Wade proposes to place agency by estoppel as a principal doctrine to hold one liable for another's tortious acts).

214. *Id.* In an even more direct fashion, the Restatement Second addressed how negligence (failing to correct the customer's likely misunderstanding about an agency relationship) can create apparent authority: "a principal can create apparent authority when he intends 'to cause the third person to believe that the agent is authorized to act for him, or he *should realize* that his conduct is likely to create such a belief.'" RESTATEMENT (SECOND) OF AGENCY §27 cmt. a (AM. LAW INST. 2004) (emphasis added).

perceived agency is removed from the Restatement Third, it will be necessary to expand section 2.05 to include those situations which the doctrine traditionally covered.[215] Perhaps one expansion could come in the form of recognizing the contradictions of the "common knowledge" doctrine as well as the unequal bargaining power of the franchise bargaining process.[216] As a result, courts could find an equitable sort of perceived agency, or agency by estoppel, to hold franchisors accountable for their likely high control of the terms of the franchise agreement.

The amendments proposed above would have a substantial effect on franchise law when determining whether a franchisor is liable for its franchisee's tortious conduct. For example, by applying the facts of *Miller v. McDonald's* or similar cases to the proposed modification of section 2.05, one can much more easily imagine situations in which the franchisor is held liable and others where it evades liability.[217]

A franchisor likely would not be held liable for its franchisee's torts when: (1) a customer would have done business at the franchisee's location even when the customer knew the

---

215. Wade, *supra* note 184, at 383.

216. *See generally* Emerson, *supra* note 80 (noting the disparity of power favoring franchisors in negotiating franchise agreements because most franchisees choose not to hire attorneys to evaluate agreements).

217. *See Miller*, 945 P.2d at 1110 (holding that there was sufficient evidence for a jury to conclude that Miller was McDonald's agent and therefore, McDonald's could be vicariously liable for its "agent's" tortious conduct). Wade presents the following example of when McDonald's could be found liable for its franchisee's torts:

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

Wade, *supra* note 184, at 382.

franchisee, not the franchisor, controls (no detrimental reliance); and (2) the franchisor requires all franchisees to place the customer on notice and display signs that state, prominently, the franchisor, who is specifically named, does not own that business and further designates, with his real name, the real principal.[218] Most importantly, the proposed removal of perceived agency from the Restatement Third would help to clarify when a franchisor should be held liable for its franchisee's torts.

Thus, as explained above, the perceived agency doctrine addresses employee–employer situations, and a franchisee is not generally considered the "employee" of its franchisor. Within the context of perceived agency, franchisor liability has been an inconsistent and confusing issue. However, if the perceived agency doctrine is deleted from the Restatement Third, then franchisor liability will be analyzed as consistently and fairly as is the employer–employee relationship.

CONCLUSION

The case law and facts are clear that the longstanding approach taken toward franchisor apparent authority fails to recognize consumer knowledge, franchise marketing and other franchisor conduct, and the resulting behavior of the customers for franchised businesses. Two simple reforms—basic improvements in legal interpretation and in business practices—could alleviate legal uncertainty and spur more efficient business practices.

A. *Problematic Controls, Franchisor and Consumer Confusion, and No Common Knowledge*

Franchisor liability for the acts of its franchisees, especially on grounds of apparent authority, remains a deeply contentious topic. While federal regulations, such as the Lanham Act, require the franchisor to exert some control over its trademark in accordance with franchise regulations, if the franchisor exerts too much control over the daily operations of its franchisee, then it may be held liable for that franchisee's torts or the torts of its employees.[219] To further con-

218. Wade, *supra* note 184, at 382–83.

219. *See* Garner, *supra* note 3, § 7:5 ("Courts generally take the position that actual control, not merely the right to control, must be demonstrated

fuse the issue, courts have gone in various directions regarding apparent authority or agency by estoppel. Some courts have found third-party reliance, based on apparent agency, to be justifiable, while other courts have utilized the "common knowledge" doctrine to find that such reliance is unreasonable.

Further clouding the discussion is the fact that there is no such thing as "common knowledge." The surveys discussed above indicate that society as a whole is quite ignorant of the basic structure of franchising—the ownership of units in large, chain enterprises—and of the potential legal consequences for franchisees, franchisors, and third parties.[220] Certainly, the ordinary layperson is not the only person that is relatively unaware of the characteristics of the franchising system. Even those who are associated with or employed by franchisees are unable to define the basic legal principles of a franchise correctly, such as who owns and operates franchises. Thus, those courts that have applied the "common knowledge" doctrine have been doing so erroneously.

B. *Three Simple Improvements in Law and Practice*

The present interpretative unrest over franchisor liability places franchisors and franchisees in a predicament. It is important for franchisors and franchisees to have accurate information regarding their rights and responsibilities to ensure they can comply as required by law. Proposed amendments and recent modifications to the Restatement of Agency would clarify the scope of franchisor liability for contract violations

---

for the license to be valid. Failure to exercise quality control may result in abandonment of the mark."). Garner continues, by opining that "[t]his statutory duty to enforce quality control underlies the existence and enforcement of quality and uniformity standards in a franchise system. A corollary of this duty is that the trademark owner has a legal obligation to prevent the sale of unauthorized products under the trademark." *Id. See* Mini Maid Servs. Co. v. Maid Brigade Sys., Inc., 967 F.2d 1516, 1519–20, 1522 (11th Cir. 1992) (discussing how a duty of supervision derives from the Lanham Act's abandonment provisions, commenting how "[t]he purpose of the Lanham Act . . . is to ensure the integrity of registered trademarks, not to create a federal law of agency," and noting that "contributory trademark infringement might be grounded upon a franchisor's bad faith refusal to exercise a clear contractual power to halt the infringing activities of its franchisees").

220. The vast majority of the survey questions deal with issues of business structure, ownership, and legal consequences. *See infra* Appendix.

and tortious conduct of franchisees. While the controversy is unlikely to be settled soon, the following reforms may help to settle the conflict.

First, courts should abandon the "common knowledge" doctrine. The justifiability or reasonableness of a customer's reliance on an apparent agency must no longer be measured according to an idealized, erroneous notion of a marketplace consisting of informed customers. With the abandonment of the "common knowledge" doctrine, however, more franchisors would likely be held liable, since it would often be found that the injured party did not know the business he was frequenting was a franchise. Thus, legislation should be implemented that would require franchisors to establish a form of "common knowledge." This will protect consumers while also holding liable those franchisors who do not comply with the statute.

Second, franchisors should be required to ensure franchisees post (1) prominent, understandable disclaimers of the franchisor's liability as well as (2) the fact that the business is franchised. To help meet both mandates, all franchised outlets should include the name of the owner and otherwise distinguish the franchisee from the franchisor. The absence of clear indications of the franchised business's owner and a prominent disclaimer of the franchisor's liability for the activities of the franchisee or the franchisee's employees should be greatly discouraged by a strong presumption that, absent such warning signs and other disclosures, the customer reasonably relied on a belief that the franchisor was a principal. In the terms of the franchise contract or the operations manual, franchisors already often require such signs or other posted announcements and disclaimers,[221] but a legal requirement could assure Customer C has access to valuable information about the particular business and acquires a better general understanding of the true nature of the franchised businesses all around Mr. or Ms. C. Obviously, even with such disclosures, the consumer still has the franchisee itself to hold accountable when torts,

221. Emerson, *Franchise Contract Interpretation*, *supra* note 109, at 696 (a 2013 survey of the agreements for 100 different franchise systems found that 79% of them required the franchisee to post notices informing the public of the franchisee's independent status, up from just 21% of the agreements for 100 different franchise systems surveyed in 1993).

contract breaches, or other claims can be proven, and the disclosures simply solidify as a practical matter what business practices and legal concepts have long aimed for: a wall separating the franchisee's role and responsibility from that of the franchisor.

Ideally, these declarations of independent ownership should explain to the consumers that the franchisor is not liable for the acts or omissions of the franchisee. These disclaimers may also include a statement about the franchisees' attainment of liability insurance as well as reiterate the point that the franchisor is not vicariously liable for the franchisee's breaches of contract or torts. Consumers should thus be more thoroughly, and effectively, informed about which parties may be free from liability for breaches of contract or torts. While explanations of liability *vel non* as well as disclosures about insurance may appear to be no more than sound business practices, in fact—over time and given the customers' level of understanding—these behaviors should also have the salutary effect, from the franchisors' point of view, of undermining a plaintiff's claim that he relied upon an apparent agency.

Third, a plaintiff using the acts or omissions of a franchisee as the basis for its suit against the franchisor simply cannot proceed with this claim sans proof of actual agency between the franchisor and franchisee, or, for cases without such proof, the plaintiff's change in position (acting or failing to act) due to the plaintiff's reliance upon a belief that the franchisor was, in fact, the owner and operator of the franchised business. In other words, the use of apparent authority as a method to assert franchisor liability without showing the detrimental reliance definitely required as a matter of equity (of agency by estoppel) would not be possible in the franchising context. Plaintiffs would have to plead and prove reliance.

These three clarifications in the law—elimination of a common knowledge defense, required posting of ownership information and liability disclaimers, and the necessity of proving detrimental reliance for all claims—should streamline adjudication of claims and encourage improved business practices. While the "common knowledge" doctrine clearly needs to be abandoned, admonitions and other precautions must also be implemented to ensure customers are properly protected. Implementation of these proposals will better establish,

as a set of fixed principles, the expectations for the franchisor and franchisee. An unsettled area of the law will be refined and simplified, with the legal and business environment of franchising better understood and, therefore, fairer.

Appendix: Surveys Examining "Common Knowledge"

The following questions were asked of 328, 890, 757, and 860 undergraduate business law students at the University of Florida, respectively, in 1992, 2000, 2008, and 2016. These students were almost exclusively juniors and seniors, with a median age of 21.

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

Part I — General Franchising Understanding and Recognition

For Questions 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 types of gasoline 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?

	1992 Poll	2000 Poll	2008 Poll	2016 Poll
Definitely Yes	7.6	13.0	14.1	13.4
Probably Yes	55.8	60.3	55.6	55.1
Probably No	23.5	17.3	18.5	20.7
Definitely No	7.6	3.8	5.3	4.5
Do Not Know	5.5	5.6	6.3	6.2

2. What if the gas station's attendants are supra 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?)

	1992 Poll	2000 Poll	2008 Poll	2016 Poll
Definitely Yes	11.9	11.9	14.1	18.1
Probably Yes	52.4	53.1	55.6	50.5
Probably No	22.6	23.0	18.5	20.6
Definitely No	7.6	5.2	5.3	3.9
Do Not Know	5.5	6.8	6.3	6.8

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?)

	1992 Poll	2000 Poll	2008 Poll	2016 Poll
Definitely Yes	10.7	10.8	14.9	18.5
Probably Yes	51.5	48.2	49.4	47.2
Probably No	25.3	23.7	20.0	21.3
Definitely No	5.8	7.0	6.5	4.3
Do Not Know	6.7	10.2	9.1	8.7

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?)

	1992 Poll	2000 Poll	2008 Poll	2016 Poll
Definitely Yes	20.4	16.0	17.6	19.0
Probably Yes	45.7	51.8	49.3	48.9
Probably No	23.5	18.8	18.0	19.5
Definitely No	4.9	4.3	4.0	3.7
Do Not Know	5.5	9.1	11.1	8.9

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?

	1992 Poll	2000 Poll	2008 Poll	2016 Poll
Definitely Yes	24.1	25.2	29.2	30.7
Probably Yes	45.7	50.6	46.1	44.8
Probably No	20.1	15.3	14.0	15.1
Definitely No	5.2	3.1	3.8	3.3
Do Not Know	4.9	5.8	6.7	6.1

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

	1992 Poll	2000 Poll	2008 Poll	2016 Poll
Definitely Yes	14.9	17.9	18.2	21.6
Probably Yes	30.2	26.6	31.4	33.9
Probably No	36.9	34.0	32.4	27.2
Definitely No	12.2	15.6	11.2	11.1
Do Not Know	5.8	5.9	6.6	6.2

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?

	1992 Poll	2000 Poll	2008 Poll	2016 Poll
Very Likely	31.4	21.9	23.0	22.4
Somewhat Likely	46.6	54.1	50.3	50.1
Somewhat Unlikely	14.6	15.6	15.7	15.1
Very Unlikely	4.3	2.4	5.3	6.1
Do Not Know	3.0	6.0	5.6	6.3

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?)

	1992 Poll	2000 Poll	2008 Poll	2016 Poll
Very Likely	25.9	18.1	21.3	24.7
Somewhat Likely	52.1	54.9	52.6	47.9
Somewhat Unlikely	13.1	16.8	14.7	15.1
Very Unlikely	4.3	4.0	4.8	5.2
Do Not Know	4.6	6.2	6.6	7.1

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?)

	1992 Poll	2000 Poll	2008 Poll	2016 Poll
Very Likely	26.5	18.6	23.5	26.3
Somewhat Likely	51.2	52.7	49.0	47.2
Somewhat Unlikely	13.1	18.2	15.3	15.3
Very Unlikely	4.6	3.3	4.6	4.3
Do Not Know	4.6	7.3	7.4	7.0

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?)

	1992 Poll	2000 Poll	2008 Poll	2016 Poll
Very Likely	33.5	23.0	28.3	31.1
Somewhat Likely	46.3	51.3	47.6	43.3
Somewhat Unlikely	12.5	15.1	12.8	15.1
Very Unlikely	4.3	3.3	3.8	3.9
Do Not Know	3.4	7.4	7.4	6.6

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?

	1992 Poll	2000 Poll	2008 Poll	2016 Poll
Very Likely	46.6	34.0	38.4	39.9
Somewhat Likely	38.1	43.7	40.2	39.1
Somewhat Unlikely	8.2	11.9	11.1	10.8
Very Unlikely	3.7	3.4	3.6	4.0
Do Not Know	3.4	7.0	6.6	6.3

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.?[222]

	1992 Poll	2000 Poll	2008 Poll	2016 Poll
Very Likely	43.9	32.8	33.7	34.1
Somewhat Likely	30.8	39.0	37.0	38.3
Somewhat Unlikely	13.4	16.1	16.4	16.3
Very Unlikely	8.5	7.5	7.8	6.9
Do Not Know	3.4	4.5	5.0	4.4

222. Actually, the Best Western name and logo is owned by the Best Western International Corporation, but all of the Best Western motels or hotels—nearly 2,200 in North America alone—have been independently owned and operated.) They are part of a hotel cooperative whose national organization and its members may be deemed the franchisor and franchisees, respectively. *See, e.g.*, Quist v. Best Western Int'l, Inc., 354 N.W.2d 656 (N.D. 1984) (interpreting the franchise definition in the North Dakota Franchise Investment Law, a definition similar to those found in other state statutes; upholding the State Securities Commissioner's decision that a "cooperative marketing association" such as Best Western International Corporation is indeed a franchisor covered under the North Dakota statute). *See also* Best Western Int'l Inc. v. Richland Hotel Corp., GP, LLC, No. CV-11-1246-PHX-LOA, 2012 WL 608016 (D. Ariz. 2012) (noting Best Western Hotels are individually owned and operated); *Member-Owner Benefits*, BEST WESTERN DEVELOPERS (Aug. 12, 2017), http://www.bestwesterndevelopers.com/owning-a-best-western/member-owner-benefits.php.

Questions 13–15 were only asked of the respondents in the years after 1992. These questions were added to the subsequent surveys for the purposes of further examining consumer common knowledge. In each column, the figures represent the 2000 Poll responses on the left side, the 2008 Poll responses are in the middle, and the 2016 responses are on the right or under the others.

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

	Locally Owned and Operated	Nationally Owned and Operated	Both (Jointly)	Don't Know
McDonald's Restaurants	24.6, 18.2*, 19.4	18.7, 21.3, 21.3	56.1, 59.5, 57.7	0.6, 1.1, 1.6
Lil' Champ Gas Stations	43.2, 51.5, 56.0	18.1, 8.2*, 10.1	28.5, 17.0, 10.3	10.3, 23.3, 23.6
Diet Center	46.3, 37.7*, 36.7	16.5, 9.6, 19.1	6.5, 7.5, 15.6	30.7, 45.2, 28.5
Holiday Inn	7.3, 8.9*, 12.0	66.5, 58.5, 45.9	24.7, 30.4, 38.7	1.6, 2.3, 3.4
Church's Fried Chicken	40.2, 33.8, 34.4	17.1, 18.9*, 17.9	33.8, 35.3, 34.5	8.9, 12.0, 13.3
Avis Rent-a-Car	5.2, 5.7, 12.6	78.5, 73.7*, 52.8	13.1, 13.7, 24.6	3.3, 6.9, 10.0
Computerland	49.9, 42.3*, 47.0	22.3, 11.0, 12.3	5.6, 4.0, 8.8	22.2, 42.7, 32.0
Motel 6	19.1, 17.4, 23.1	52.1, 45.1*, 36.0	24.3, 30.4, 33.9	4.5, 7.0, 7.0
Chevron Gas	19.0, 15.7*, 20.3	41.3, 41.7, 38.1	37.9, 39.1, 38.0	1.8, 3.3, 3.7
Kentucky Fried Chicken	24.2, 17.0*, 20.4	23.7, 26.3, 25.5	50.6, 53.8, 50.8	1.5, 2.9, 3.3
Budget Rent-a-Car	5.2, 6.7*, 14.3	77.0, 66.6, 50.8	14.2, 17.8, 23.0	3.6, 8.7, 11.9
Steak and Ale	28.1, 35.0, 40.5	32.4, 18.4*, 18.8	35.1, 28.4, 17.4	4.4, 18.0, 23.2
State Farm Insurance	17.0, 13.2, 15.4	56.2, 53.8*, 50.8	24.4, 29.9, 28.3	2.4, 3.0, 5.5
Sylvan Learning Centers	37.7, 19.4*, 20.5	29.8, 43.1, 38.8	9.6, 19.0, 27.2	22.9, 18.4, 13.5

	Locally Owned and Operated	Nationally Owned and Operated	Both (Jointly)	Don't Know
Boston Market	23.0, 16.5, 21.1	29.9, 27.9*, 28.9	44.2, 48.9, 43.4	3.0, 6.6, 6.7
Ponderosa Steakhouse	32.9, 34.2*, 43.4	29.5, 20.5, 15.6	26.1, 20.0, 18.8	11.4, 25.2, 22.3
Captain D's	40.1, 30.5, 39.2	17.3, 18.4*, 13.3	30.1, 29.8, 19.6	12.6, 21.1, 27.9
CompUSA	8.7, 6.1, 18.3	73.0, 70.0*, 40.8	10.7, 12.3, 15.6	7.6, 11.5, 25.2
Red Lobster	17.0, 11.1, 16.2	42.2, 44.9*, 39.1	38.3, 39.4, 41.1	2.5, 4.5, 3.6
Jenny Craig	12.2, 12.6, 16.8	61.3, 53.9*, 44.9	20.5, 23.5, 22.9	5.9, 9.9, 15.4
Bonanza Steakhouse	47.5, 41.2*, 41.0	12.3, 7.5, 16.3	14.1, 9.1, 15.0	26.1, 42.0, 27.7
Olive Garden	14.6, 8.9, 14.1	49.2, 50.6*, 40.0	34.2, 37.9, 41.9	2.0, 2.5, 4.0
Gap	2.9, 2.0, 5.8	83.3, 77.9*, 68.8	13.1, 17.9, 21.1	0.8, 2.5, 4.3
Gingiss Formalwear	39.3, 33.4*, 40.1	25.4, 11.8, 17.6	11.0, 4.8, 8.6	24.4, 49.9, 33.7

14. Are the following businesses in Gainesville, Florida:

	Locally Owned and Operated	Nationally Owned and Operated	Both (Jointly)	Don't Know
Burger King	35.4, 34.7, 22.5	12.3, 10.7, 22.7	48.1, 46.4, 46.6	4.3, 8.3, 8.2
Coldwell Banker Realtors	38.0, 40.2, 34.6	23.6, 16.1, 20.9	19.4, 26.3, 21.5	19.0, 17.3, 23.0

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

Strongly Agree	Agree	Disagree	Strongly Disagree	Do Not Know
4.0, 3.3, 1.9	31.3, 27.7, 24.1	42.2, 44.4, 46.6	15.0, 16.5, 18.2	7.5, 7.9, 9.3

16. Do you know what a franchise is? *The 2008 poll responses are on the left side, and the 2016 responses are on the right side.*

Yes	No	Uncertain
47.9, 76.4	27.7, 4.9	24.4, 18.8

[Those answering "Yes" were asked] What do you think it is?

Answers included only correct attributes of franchising	32.1%	37.5%
Answers included both correct and incorrect attributes	37.4%	19.5%
Answers included only incorrect attributes	6.5%	18.5%
Answered attributes not clearly right or wrong	24.0%	24.5%

Correct Attributes:	**Percentage of Total**	
1. Individual Ownership	**38.0%**	**28.4%**
2. Individual Operations	**28.0%**	**27.6%**
3. Trade Mark, Trade Name, Intellectual Property Licensing	**39.1%**	**41.2%**
4. Initial Payment of Fees to Franchisor	**18.2%**	**13.6%**
5. Guidelines Furnished by Franchisor	**23.3%**	**21.4%**
6. Continuous Payments to Franchisor, (Royalties)	**17.9%**	**12.8%**
7. System for Marketing Goods and Services	**7.0%**	**5.2%**
8. Contractual Relationship	**6.7%**	**2.3%**
9. Training Provided	**1.2%**	**1.6%**

[Note: The percentages on this page or the next page for the following three lists—Correct Attributes, Unclear Attributes, and Incorrect Attributes—do not add up to 100% because individual survey respondents may have provided any number of attributes, or none at all.]

Unclear Attributes:	**Percentage of Total**	
i. Chain	**12.0%**	**10.5%**
ii. Worldwide/National Business	**0.7%**	**0.5%**
iii. Retail Sales	**0.9%**	**0.2%**
iv. Burger King	**1.4%**	**0.2%**
v. McDonald's	**7.4%**	**6.8%**
vi. Advertising License	**0.4%**	**1.4%**
vii. Intellectual Property/Brand	**1.1%**	**1.8%**
viii. Business Model	**2.3%**	**4.8%**
ix. Examples (Other than Burger King and McDonald's)	**9.4%**	**2.0%**
x. Product(s)	**18.5%**	**35.8%**
xi. Sale/Purchase of a Right or Rights	**8.9%**	**8.8%**

Incorrect Attributes:	**Percentage of Total**	
A. National, Centralized Operations	**5.3%**	**15.7%**
B. National, Centralized Ownership	**7.8%**	**17.9%**
C. Purchase of Company or its stock	**3.0%**	**0.7%**
D. Subsidiary	**0.7%**	**0.9%**
E. Large Corporation	**4.0%**	**7.7%**
F. Partnership	**1.4%**	**0%**
G. Agency	**0.3%**	**1.6%**
H. Small Business	**0.3%**	**0.2%**
I. Branch Locations	**6.5%**	**3.8%**
J. Store/Restaurant	**17.5%**	**6.6%**
K. Sole Proprietorship	**0.1%**	**0.3%**
L. Lease or Real Estate	**0.3%**	**1.3%**
M. Joint Venture	**0%**	**0.3%**
N. Loans from Franchisor	**0%**	**0.3%**
O. Government	**0%**	**2.1%**

Part II — Understanding Franchising Law

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

	1992 Poll	2000 Poll	2008 Poll	2016 Poll
Definitely Yes	2.4	7.7	8.9	8.0
Probably Yes	14.6	24.7	27.2	26.2
Probably No	50.0	41.3	36.2	37.5
Definitely No	25.4	17.3	15.6	16.1
Do Not Know	7.6	9.0	12.0	12.3

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

	1992 Poll	2000 Poll	2008 Poll	2016 Poll
a. Independently owned and managed by the franchisee (the party that was granted the franchise)	63.4	50.8	49.7	47.9
b. Independently owned, but managed by the franchisor (the party that granted the franchise)	16.5	21.3	17.4	17
c. A subsidiary company owned by the franchisor	3.4	6.8	4.5	3.5
d. A 'branch' office/ operation—owned by the franchising system as a whole, but managed by the franchisee	12.2	16.4	20.9	25.8
e. (at the invitation of the survey, the respondent wrote an answer here, and that answer did not conform with any of the answers above)	4.3	2.5	3.7	0.4
f. Do not Know	0.3	2.4	3.4	5.4

19. Please indicate the degree of certainty you have about your response (how sure you are about your answer) to 18, above.

	1992 Poll	2000 Poll	2008 Poll	2016 Poll
Absolutely Certain	14.6	11.9	14.5	5.6
Reasonably Sure	64.6	67.4	64.1	56.4
Not Sure	19.5	19.5	18.4	33.2
Completely Uncertain	1.2	1.2	2.9	4.8

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

	1992 Poll	2000 Poll	2008 Poll	2016 Poll
Definitely Yes	8.5	11.8	13.2	13.8
Probably Yes	50.0	54.4	50.2	51.1
Probably No	31.4	22.9	22.5	21.9
Definitely No	3.4	3.5	3.3	2.9
Do Not Know	6.7	7.5	10.7	10.4

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

	1992 Poll	2000 Poll	2008 Poll	2016 Poll
Definitely Yes	1.5	3.3	4.2	4.1
Probably Yes	23.2	33.7	30.9	37.6
Probably No	46.6	36.7	33.3	31.3
Definitely No	5.2	2.5	5.9	4.4
Do Not Know	23.5	23.9	25.5	22.7

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

	1992 Poll	2000 Poll	2008 Poll	2016 Poll
Definitely Yes	6.1	14.9	12.0	8.7
Probably Yes	49.7	53.2	49.8	50.8
Probably No	33.4	21.2	25.4	25.9
Definitely No	5.2	3.9	4.2	3.8
Do Not Know	5.5	6.9	8.5	10.8

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

	1992 Poll	2000 Poll	2008 Poll	2016 Poll
Definitely Yes	2.1	3.5	4.1	4.3
Probably Yes	30.7	38.6	32.6	44.5
Probably No	42.9	34.5	36.7	28.2
Definitely No	6.7	4.5	5.0	4.0
Do Not Know	17.5	18.9	21.4	19.0

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

	1992 Poll	2000 Poll	2008 Poll	2016 Poll
Definitely Yes	26.7	24.5	26.2	12.3
Probably Yes	55.5	54.2	52.8	57.5
Probably No	12.6	14.6	13.2	15.8
Definitely No	1.8	3.0	2.6	2.3
Do Not Know	3.4	3.6	4.9	12.1

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

	1992 Poll	2000 Poll	2008 Poll	2016 Poll
Definitely Yes	27.6	25.5	20.9	13.9
Probably Yes	64.7	65.5	62.6	59.0
Probably No	4.6	4.4	9.8	13.9
Definitely No	0.6	2.0	1.7	1.6
Do Not Know	2.5	2.6	4.8	11.5

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

	1992 Poll	2000 Poll	2008 Poll	2016 Poll
Definitely Yes	4.0	6.4	4.4	5.5
Probably Yes	38.7	46.4	46.0	47.5
Probably No	34.7	25.2	23.5	23.0
Definitely No	3.1	4.2	3.7	3.1
Do Not Know	19.6	17.9	22.2	20.9

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

	1992 Poll	2000 Poll	2008 Poll	2016 Poll
Definitely Yes	19.3	17.5	22.2	19.0
Probably Yes	62.3	59.4	55.2	57.0
Probably No	6.4	9.6	11.2	11.6
Definitely No	0.3	2.5	1.9	1.8
Do Not Know	8.6	11.0	9.3	10.6

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

	1992 Poll	2000 Poll	2008 Poll	2016 Poll
Definitely Yes	10.4	15.6	15.9	14.7
Probably Yes	69.0	62.4	58.4	56.0
Probably No	13.2	11.8	12.6	16.4
Definitely No	0.0	1.4	1.9	1.8
Do Not Know	7.4	8.8	11.1	11.1

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

	1992 Poll	2000 Poll	2008 Poll	2016 Poll
Yes, I knew that	25.2	21.8	25.4	23.9
No, I did not know that	74.8	78.2	74.4	76.1

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

	1992 Poll	2000 Poll	2008 Poll	2016 Poll
Strongly Agree	7.4	6.9	8.9	6.0
Agree	42.6	50.3	43.1	48.3
Disagree	35.6	27.7	28.4	27.9
Strongly Disagree	8.3	6.0	7.0	6.0
No Opinion	6.1	9.0	12.4	11.8

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

	1992 Poll	2000 Poll	2008 Poll	2016 Poll
a. Only the franchisor	4.3	5.0	4.2	5.9
b. Only the franchisee	34.7	29.1	26.3	23.8
c. At first, only the franchisee; but, if the franchisee is unable to pay, then the franchisor should be required to pay	39.9	35.8	36.6	36.8
d. Both the franchisor and the franchisee equally	12.0	24.0	19.8	19.9
e. Neither the franchisor nor the franchisee	1.2	0.0	1.1	0.4
f. (state an answer if you do not agree with any of the answers above)	5.8	1.5	5.6	5.8
g. No Opinion	2.1	4.5	6.2	7.4

Questions 32–44 were only asked of the respondents after 1992. These questions were added to the subsequent surveys for the purposes of further examining consumer common knowledge.

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

	2000 Poll	2008 Poll	2016 Poll
Definitely Yes	6.1	6.3	3.7
Probably Yes	25.8	27.9	31.9
Probably No	45.2	40.3	37.7
Definitely No	15.5	16.6	16.1
Do Not Know	7.3	8.7	10.6

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

	2000 Poll	2008 Poll	2016 Poll
Definitely Yes	4.0	3.4	1.9
Probably Yes	18.9	20.1	24.7
Probably No	48.2	44.9	43.4
Definitely No	20.4	23.4	18.7
Do Not Know	8.6	8.1	11.3

34. For the harm stated in Question 32, above, who do you believe should be liable? (2000 results on top, 2008 results in middle, and 2016 results at bottom)

Only the Franchisor	Only the Franchisee	At first, only the franchisee; but, if the franchisee is unable to pay, then the franchisor should be required to pay	Both Equally	Neither	(state an answer if you do not agree with any of the answers above	No Opinion
5.3	14.8	11.9	10.4	49.3	1.3	7.3
3.2	11.8	12.6	11.8	41.6	8.7	10.3
5.5	13.6	13.3	11.4	42.5	5.2	8.4

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

	2000 Poll	2008 Poll	2016 Poll
Definitely Yes	1.9	1.9	1.4
Probably Yes	6.7	6.9	17.2
Probably No	40.7	43.6	45.2
Definitely No	46.2	43.5	27.0
Do Not Know	4.5	4.1	9.3

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

	2000 Poll	2008 Poll	2016 Poll
Definitely Yes	2.8	1.9	1.3
Probably Yes	10.4	9.5	17.9
Probably No	44.7	45.8	48.4
Definitely No	34.6	36.5	21.9
Do Not Know	7.5	6.2	10.5

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

	2000 Poll	2008 Poll	2016 Poll
Definitely Yes	1.8	1.9	1.4
Probably Yes	11.0	10.6	15.6
Probably No	45.7	46.1	51.1
Definitely No	35.8	36.1	22.0
Do Not Know	5.8	5.3	9.9

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

	2000 Poll	2008 Poll	2016 Poll
Definitely Yes	2.8	4.2	1.8
Probably Yes	24.5	20.5	26.6
Probably No	36.0	36.2	35.2
Definitely No	28.5	31.3	26.3
Do Not Know	8.3	7.7	10.1

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

	2000 Poll	2008 Poll	2016 Poll
Definitely Yes	1.6	2.6	0.8
Probably Yes	6.3	6.6	12.8
Probably No	34.3	31.2	35.9
Definitely No	52.1	55.5	42.6
Do Not Know	5.7	4.0	7.9

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

	2000 Poll	2008 Poll	2016 Poll
Definitely Yes	3.1	2.5	2.1
Probably Yes	25.7	14.8	21.6
Probably No	39.9	43.5	40.8
Definitely No	24.2	32.1	25.2
Do Not Know	7.1	7.0	10.3

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

	2000 Poll	2008 Poll	2016 Poll
Definitely Yes	2.6	1.7	1.4
Probably Yes	12.4	13.2	19.9
Probably No	45.4	42.5	42.5
Definitely No	30.1	31.8	21.3
Do Not Know	9.5	10.6	14.8

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

	2000 Poll	2008 Poll	2016 Poll
Definitely Yes	3.5	2.9	1.9
Probably Yes	16.7	11.5	20.1
Probably No	42.9	45.3	42.8
Definitely No	25.3	28.3	19.3
Do Not Know	11.5	11.8	15.9

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

	2000 Poll	2008 Poll	2016 Poll
Definitely Yes	2.6	2.5	1.9
Probably Yes	11.3	8.7	15.9
Probably No	41.4	36.6	33.8
Definitely No	35.6	44.7	36.7
Do Not Know	9.0	7.3	11.6

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

	2000 Poll	2008 Poll	2016 Poll
Definitely Yes	2.5	1.3	1.4
Probably Yes	11.9	9.4	14.9
Probably No	42.6	36.3	33.4
Definitely No	33.1	44.1	36.6
Do Not Know	9.9	8.7	13.7

Part III — Corporate Franchising Knowledge

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

	1992 Poll	2000 Poll	2008 Poll	2016 Poll
Definitely Yes	1.2	3.8	4.2	4.2
Probably Yes	11.0	18.0	18.6	24.9
Probably No	29.8	33.6	30.0	31.0
Definitely No	54.6	38.7	42.4	28.2
Do Not Know	3.4	5.9	4.7	11.8

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

	1992 Poll	2000 Poll	2008 Poll	2016 Poll
Definitely Yes	54.0	32.1	31.8	18.2
Probably Yes	42.0	52.5	52.7	58.5
Probably No	2.1	9.2	7.7	9.2
Definitely No	1.2	2.0	3.0	3.8
Do Not Know	0.6	4.2	4.8	10.2

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

	1992 Poll	2000 Poll	2008 Poll	2016 Poll
Definitely Yes	1.2	4.4	4.2	4.9
Probably Yes	13.5	18.5	16.8	30.1
Probably No	27.3	36.0	31.7	30.4
Definitely No	55.8	35.0	39.0	22.3
Do Not Know	2.1	6.2	8.1	12.3

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

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