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Vicarious Liability — The Franchisor's Quandary

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One of the three definitional elements of a franchise under the Federal Trade Commission rule and many state statutes is that the franchisor exerts (or has authority to exert) a significant degree of control over the franchisee's method of operation or provides significant assistance with respect to the franchisee's method of operation. The touchstone of vicarious liability is likewise control, leaving franchisors struggling with how to minimize the risk of being held liable for the conduct of their franchisees, while still protecting their brands and attendant goodwill.

Two recent cases make clear that franchisors are not alone in this quandary and illustrate distinct approaches that courts take in applying principles of vicarious liability to a relationship inherently steeped in control.

Ketterling v. Burger King

In *Ketterling v. Burger King Corp.*, 272 P.3d 527 (Idaho March 2, 2012), a customer alleged that she slipped on snow in the parking lot of a franchised Burger King restaurant. The customer filed a negligence suit against Burger King and later added the company that managed the restaurant on the franchisee's behalf. The Minidoka County District Court granted Burger King's motion for summary judgment, concluding that Burger King, as a franchisor, did not control the premises where the customer fell and that the management company did not have apparent authority to bind Burger King.

In a case of first impression, the Idaho Supreme Court affirmed. The court commenced its analysis by noting that it was undisputed that Burger King did not own the premises where the customer fell. Relying exclusively on Burger King's franchise operations manual, which required franchisees to clear snow and ice from their locations as soon as possible, the customer contended that Burger King nonetheless exercised sufficient control over the day-to-day operations of the restaurant to hold the franchisor liable for the management company's negligence.

Rejecting that assertion, the court stated that "[g]eneral franchise operating requirements are usually not enough to establish control or a right of control giving rise to liability," rather, "'[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.'"

While acknowledging that the manual also required franchisees to shovel snow from walks, apply ice melt, display caution signs and reapply ice melt as needed, the court appeared to place greater emphasis on language in the manual that the franchisee was an independent owner and operator of the restaurant and was responsible for the day-to-day operation of the restaurant in determining that Burger King did not have a right of control over the restaurant’s daily activities.

Patterson v. Domino’s Pizza

The Second District Court of Appeal of California came out differently on the vicarious liability issue in *Patterson v. Domino’s Pizza LLC*, 207 Cal. App. 4th 385 (June 27, 2012). In that case, a teenage employee of a Domino’s franchisee, alleging that she was sexually harassed and assaulted by the restaurant’s assistant manager, sued Domino’s, the franchisee and the manager. The trial court granted Domino’s motion for summary judgment, concluding that the franchisee was an independent contractor and that the assistant manager was not Domino’s agent or employee for purposes of imposing vicarious liability.

Unlike the Idaho Supreme Court, the *Patterson* court was not writing on a blank slate on the issue of vicarious liability in the franchise context and reversed. The court noted that a franchisee may be deemed the franchisor’s agent, even when the agreement provides that the franchisee is an independent contractor, if the franchisor "assumes substantial control over the franchisee’s local operation, its management-employee relations or employee discipline."

Domino’s argued that a provision in the franchise agreement that the franchisee was "solely responsible for recruiting, hiring, training, scheduling for work, supervising and paying the persons who work in the [s]tore, and those persons shall be [the franchisee’s] employees and not [Domino’s] agents or employees” neutralized the franchisor’s control over franchisee-employee matters as a matter of law.

The employee pointed to countervailing provisions in the agreement vesting substantial control in Domino’s, including Domino’s right to set the qualifications and standards for the franchisee’s employees and a requirement that the franchisee uses a computer system designated by Domino’s to train employees, as well as Domino’s Manager’s Reference Guide (MRG), which detailed specific hiring requirements, the documents required to be included in the franchisee’s personnel files and employee appearance standards.

Turning to provisions of the agreement and the MRG governing subjects other than the franchisee’s employees, the court found that Domino’s rights to, inter alia, control the franchisee’s computer system; audit the franchisee’s tax records; and determine the franchisee’s location, store hours, advertising, the handling of customer complaints, signage, email capabilities, equipment, decor, method and manner of customer

payment, pricing of items, book and record-keeping methods and insurance standards substantially circumscribed the franchisee’s independence "in areas that go beyond food preparation standards."

The employee also presented evidence of control outside of the provisions of the franchise agreement. Specifically, the employee introduced evidence that Domino’s exercised extensive local management control over the franchisee and controlled employee conduct and discipline and that a Domino’s area leader determined which of the franchisee’s employees should be fired and, in fact, instructed the franchisee to fire the accused assistant manager.

The franchisee, during his deposition, testified that he felt compelled to comply with this mandate or he would risk losing his franchise. While Domino’s offered contrary evidence, the court concluded that the employee met her burden to show triable issues of fact regarding the scope of Domino’s control over the franchisee.

Conclusion

The *Ketterling* court suggested that the inclusion of the independent owner/operator provision in the franchisor’s manual was dispositive on the issue of control and that, consequently, the franchisor could not be held liable for the alleged negligence of the franchisee’s management company.

In contrast, the *Patterson* court stated that while provisions of the franchise agreement were relevant, they were not necessarily controlling. By adopting a totality of the circumstances approach, the *Patterson* court concluded that the franchisor could have exercised sufficient control to render it vicariously liable for the acts of its franchisee’s employee.

While the *Patterson* case makes clear that even the most careful drafting cannot wholly neutralize the threat of vicarious liability faced by franchisors, in evaluating its impact, it is important to recognize that the court in that case merely determined that there were sufficient facts in dispute such that it was reluctant to decide the issue on a paper record. It did not actually hold that the franchisor was vicariously liable for the conduct of its franchisee’s employee.

Accordingly, franchisors should remain vigilant in drafting their franchise agreements and manuals to ensure that they do not overstep the ostensibly ever-moving boundary between control over the day-to-day operations of the franchise and protection of the franchise system, the proprietary marks and the brand.