

**American Bar Association
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Vicarious Liability in Developing Areas:

Damned If You Do and Damned If You Don't!

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I. INTRODUCTION

The concept of vicarious liability in the franchise context has most frequently arisen in connection with injuries on the franchisee's premises when the customer harmed sues both the franchisee and the franchisor. However, the vicarious liability concept can also be found in other areas directly affecting franchisors. The purpose of this paper is to discuss certain of those non-traditional areas – namely, joint employer, the sharing economy, cybersecurity and various statutory claims.¹

II. PRINCIPLES OF VICARIOUS LIABILITY LAW WITHIN FRANCHISING

The franchise business model was built upon tenets that provide for a mutually beneficial and advantageous relationship between a franchisor and franchisee. These tenets have made franchising one of the most prolific, profitable, and successful business models on a global scale. A foundational pillar of franchising is the shift of control away from the franchisor to the independent owner-operator of the franchised business. This essentially enables the franchisee to run the day-to-day operations of the business as it sees fit and without interjection by the franchisor, so long as it complies with the terms of the franchise agreement and system standards, and appropriately utilizes the licensed trademarks.

Distilled to its essence, the franchisor-franchisee relationship “involves the licensing of intellectual property, usually in the form of the franchisor’s trademark.”² Pursuant to the Lanham Act³, “a franchisor is required to maintain control and supervision over a franchisee’s use of its mark, or else the franchisor will be deemed to have abandoned its mark under the [Act’s] abandonment provisions.”⁴

It is well-established that the doctrine of vicarious liability holds one party liable for the acts or omissions of another. The doctrine departs from the fundamental premise that a party is liable for its own actions, and not the acts of others, by imposing liability upon a party “who did not commit the tortious conduct but nevertheless is deemed responsible by virtue of the close relationship between that person and the tortfeasor.”⁵

In the franchise industry, vicarious liability claims typically arise when a consumer is unaware that the business, and often the land on which it is situated, are independently owned and operated. In these scenarios, the consumer’s understanding of the franchised product or service rests upon national brand recognition and the goodwill associated with franchisor’s trade names and service marks. In other instances, vicarious liability claims arise when a plaintiff simply attempts to seek deeper

¹ The views expressed in this paper do not necessarily represent the views of any clients or employers of the authors or the views of each of the authors.

² *Rainey v. Langen*, 998 A.2d 342, 348 (Me. 2010).

³ 15 U.S.C. § 1064(5)(A) (2006).

⁴ *Depianti v. Jan-Pro Franchising Int'l, Inc.*, 990 N.E.2d 1054, 1063 (Mass. 2013).

⁵ *Kerl v. Dennis Rasmussen, Inc.*, 682 N.W.2d 328, 333 (Wisc. 2004).

pockets. In both scenarios, a plaintiff attempts to hold a franchisor liable for acts or omissions committed by its franchisees, or its franchisees' employees, for an incident arising out of or occurring at the franchised business. At its crux, a plaintiff's ability to impose vicarious liability hinges upon the extent of control exerted by the franchisor over the franchisee and its operation of the business.

Inherent and unique to the franchisor-franchisee relationship is the fine line the franchisor must invariably walk between ensuring quality, uniformity, adherence to system standards, and protection of its intellectual property and goodwill, while concurrently minimizing its level of control in the relationship to abate the potential for, and the risks associated with, vicarious liability. "Franchisors are in a unique position regarding potential vicarious liability, because the Lanham Act 'places an affirmative duty upon a licensor of a registered trademark to take reasonable measures to detect and prevent misleading uses of his mark by his licensees or suffer cancellation of his federal registration.'"⁶

In recent times, vicarious liability claims advanced against franchisors have expanded to a myriad of areas of law. Aside from the personal injury and tort scenario, franchisors are now faced with vicarious liability claims sounding in, *inter alia*, deceptive trade practices, consumer protection, violation of the Americans With Disabilities Act, and claims within the purview of employment law such as negligent hiring, supervision, and retention.

Although most franchise agreements plainly indicate that there is no agency relationship between the parties, and the franchisee is an independent contractor, the court will often in analyzing the merits of a vicarious liability claim, also look to the relationship of the parties outside of the four corners of the contract. The imposition of vicarious liability has historically rested upon whether the franchisor has pervasive control, or the power to control, the day-to-day operations of the franchised business. Under recent case law, courts have more narrowly tailored their focus on whether or not the franchisor had the control, or the ability to control, the specific operational activity or instrumentality of the franchised business which caused the harm.⁷

In order to impute vicarious liability on franchisors under agency law, the two theories most commonly advanced are based upon actual or apparent authority. In evaluating such a claim, the court must "keep in mind that not every close relationship will create [vicarious] liability. One may be an agent of another, owing to his principal the

⁶ *Estate of Anderson v. Denny's Inc.*, 987 F. Supp. 2d 1113, 1141 (D.N.M. 2013) (citing *Rainey v. Langen*, 998 A.2d 342, 348 (Me. 2010) (quoting *Dawn Donut Co. v. Hart's Food Stores, Inc.*, 267 F.2d 358, 366 (2d Cir. 1959)).

⁷ *Hong Wu v. Dunkin' Donuts, Inc.*, 105 F. Supp. 2d 83, 87-89 (E.D.N.Y. 2000) (citing *Schoenwandt v. Jamfro Corp.*, 261 A.D.2d 117, 689 N.Y.S. 2d 461 (N.Y. App. Div. 1999) (summary judgment appropriate where relationship is "merely franchisor-franchisee" and there is no showing that franchisor "exercised complete domination and control of [franchisee's] daily operations or [that] such control resulted in plaintiff's injury"); see also *Helmchen v. White Hen Pantry, Inc.*, 685 N.E.2d 180, 182 (Ind. Ct. App. 1997) (reviewing case law from several jurisdictions raising similar issues and concluding the relevant inquiry is "whether there is a genuine issue of material fact as to the extent the [franchisor] controlled security measures at its convenience stores").

fiduciary obligations of loyalty and general obedience, but at the same time not be sufficiently under the control of the principal to be considered a servant.”⁸

A. Actual Agency

In advancing an actual agency argument, “[a] franchisor may be held liable for acts of his franchisee when the actual relationship between them is that of principal and agent or master and servant.”⁹ Thus, the degree of control needed for an actual agency relationship is the right to control the means used in operating the business, rather than the results.

Most courts have used the “right of control” test in determining whether to impute vicarious liability upon franchisors for acts or omissions committed by franchisees.¹⁰ In such a scenario, “[t]he critical factor is the control or the right to control by [the franchisor] of the manner in which the [franchise] was operated.”¹¹ Courts have held that “[t]he kind of actual agency relationship that would make [the franchisor] vicariously liable for [the franchisee’s] negligence requires that [the franchisor] have the right to control the *method* by which [the franchisee] performed its obligations under the Agreement.”¹² Further, “[a] number of other courts have applied the right to control test to a franchise relationship. The Delaware Supreme Court stated the test as it applies to that context: ‘If, in practical effect, the franchise agreement goes beyond the stage of setting standards, and allocates to the franchisor the right to exercise control over the daily operations of the franchise, an agency relationship exists.’”¹³ Thus, if there is sufficient evidence that a franchisor controls the day-to-day operations of the franchised business, rather than simply mandating performance or uniformity standards, plaintiffs can likely establish that an actual agency relationship exists between a franchisor and franchisee.¹⁴

In *Stenlund v. Marriott Int’l, Inc.*, plaintiff filed a slip and fall negligence action, seeking to recover damages sustained at the Panama City Marriott Hotel. Marriott International moved for summary judgment, which the court ultimately granted. In *Stenlund*, the court found that Marriott International’s “control” over the operations of the hotel was limited to: (1) providing “routine corporate and regional services” including

⁸ *Stenlund v. Marriott Int’l, Inc.*, Civ. No. GJH-14-1544, 2016 U.S. Dist. LEXIS 39718, at *20 (D. Md. Mar. 22, 2016) (citing *Chevron, U.S.A., Inc. v. Lesch*, 319 Md. 25, 570 A.2d 840, 844 (Md. 1990)).

⁹ *Jones v. Filer, Inc.*, 43 F. Supp. 2d 1052, 1055 (W.D. Ark. 1999).

¹⁰ *Kerl*, 682 N.W.2d at 337 (“Most courts that have addressed the issue of franchisor vicarious liability...have adapted the traditional master/servant ‘control or right of control’ test to determine whether the relationship between the franchisor and franchisee should give rise to vicarious liability.”).

¹¹ *Ahl v. Martin*, 82 A.D.2d 938, 938, 440 N.Y.S. 2d 748 (N.Y. App. Div. 1981).

¹² *Miller v. McDonald’s Corp.*, 945 P.2d 1107, 1110 (Or. Ct. App. 1997) (emphasis added by court).

¹³ *Viado v. Domino’s Pizza, LLC*, 230 Or. App. 531, 541, 217 P.3d 199, 205 (Or. Ct. App. 2009) (citing *Billops v. Magness Constr. Co.*, 391 A.2d 196, 197-98 (Del. 1978)).

¹⁴ See *Rainey*, 998 A.2d at 347 (noting that “[t]his distinction is consistent with our emphasis on the ‘power to control and direct the details of the work,’ rather than the ‘result to be obtained.’”).

“executive supervision and support” and “general expertise and general operational assistance” with respect to areas such as executive supervision, employee relations, research and development, insurance, life safety, accounting controls, and internal auditing; and (2) providing “core training programs” for management-level hotel employees and other unspecified training programs for other hotel employees.¹⁵ Pursuant to the International Agreement, Marriott International also required that the hotel use Marriott International’s Reservations System, Property Management System, and other Marriott Chain hotel systems “which systems are intended to benefit the Marriott Chain.”¹⁶ As for the control over the casino where plaintiff fell, the only role Marriott International had in supervising the casino operations was that the Oversight Committee had the power to conduct “annual quality assurance reviews” for issues such as “guest experience, service delivery, integrity of games, maintenance and cleanliness and other quality measures.” The court found that the minimal oversight Marriott International had over the hotel and casino was far from that which was necessary to deem Marriott International or even its subsidiary, Marriott Services, the “master” of hotel properties, with respect to their management and operation of the Hotel and Casino.¹⁷ The court further held that Marriott International’s right to conduct annual quality assurance reviews of the casino did not establish that it controlled the instrumentality that caused plaintiff’s injury, or that it had “the right to control and direct [Hotel Properties] in the performance of [its] work.”¹⁸ Nor did Marriott International’s obligation to provide certain executive oversight for the hotel mean that it was responsible for any alleged failure of hotel employees to provide medical care after plaintiff’s injury.¹⁹

Courts are generally mindful that “a franchisor does have a legitimate interest in retaining some degree of control in order to protect the integrity of the marks” and “courts have found that retaining certain rights such as the right to enforce standards, the right to terminate the agreement for failure to meet standards, the right to inspect the premises, the right to require that franchisees undergo certain training, or the mere making of suggestions and recommendations does not amount to sufficient control.”²⁰

As the court in *Hong Wu v. Dunkin’ Donuts, Inc.* instructed, “[i]n deciding whether the franchisor’s actions give rise to a legal duty, courts typically draw distinctions between *recommendations* and *requirements*.”²¹ Other courts have concluded similarly that despite a company’s efforts to offer suggestions, regarding security issues to its franchisees for example, the company would not be found vicariously liable for the alleged negligence of its franchisees where the franchisor did not specifically mandate a

¹⁵ *Stenlund*, 2016 U.S. Dist. LEXIS 39718, at *23.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* (citing *Chevron*, 570 A.2d at 844 (citations omitted)).

¹⁹ *Id.* at *24-25.

²⁰ *Hunter v. Ramada Worldwide Inc.*, No. 04-062-ERW, 2005 WL 1490053, at *6 (E.D. Mo. June 23, 2005).

²¹ *Hong Wu v. Dunkin’ Donuts, Inc.*, 105 F. Supp. 2d 83, 89-90 (E.D.N.Y. 2000).

security measure, and instead made a mere suggestion or recommendation to heighten franchisee awareness.²²

B. Apparent Agency

If no actual agency exists, a plaintiff can assert an apparent agency theory if it shows “both that [the franchisor] acted in a manner that would lead a reasonable person to conclude that [the franchisee] was an agent of the [franchisor] and that [p]laintiffs acted in reliance of that representation.”²³ Thus, regardless of the non-existence of an actual principal-agent relationship, apparent agency may exist if a franchisor’s actions or omissions lead a third party to believe that the franchisee is the franchisor’s agent – or that the third party is dealing with the franchisor directly – and the third party relies thereon to her detriment.²⁴ The elements which must be proven to establish apparent agency are: “(1) purported principal consciously or impliedly represented another to be his agent; (2) third party reasonably relied on the representation; and (3) third party detrimentally changed his or her position in reliance on the representation.”²⁵

In *Crinkley v. Holiday Inns, Inc.*,²⁶ the Fourth Circuit, applying North Carolina law, concluded that a hotel franchisor could be held vicariously liable in negligence on an apparent agency theory where the franchisee used the franchisor’s trade name and trademarks, the franchisor engaged in national advertising that promoted its system, and the franchisor published a directory listing of its properties within the system – all without distinguishing between company owned and franchised properties.²⁷ The court reasoned that a jury could reasonably conclude that the franchisee “was operated in such a way as to create the appearance that it was owned by” the franchisor.²⁸

In *Bright v. Sandstone Hospitality, LLC*,²⁹ plaintiff contended that the trial court erred in finding that no genuine issue of material fact existed as to whether Wingate Inns International, Inc. could be found responsible for any actions or inactions by Sandstone, the franchisee, under an apparent agency theory. In rejecting plaintiff’s argument, the Georgia Court of Appeals ruled that it had previously held that “merely displaying signs or a trademark may be insufficient to establish an apparent agency relationship (citing *Texaco, Inc. v. Youngbey*),³⁰ and that a failure to post a sign stating that someone other

²² *Id.*

²³ *Sims v. Marriott Int’l, Inc.*, 184 F. Supp. 2d 616, 617 (W.D. Ky. 2001).

²⁴ *Allen v. Greenville Hotel Partners, Inc.*, 409 F. Supp. 2d 672, 681 (D.S.C. 2006) (citing *See R & G Constr., Inc. v. Lowcountry Reg’l Transp. Auth.*, 343 S.C. 424, 540 S.E.2d 113, 118 (S.C. Ct. App. 2000)).

²⁵ *Id.*

²⁶ 844 F.2d 156 (4th Cir. 1988).

²⁷ *Id.* at 166-67.

²⁸ *Id.*

²⁹ 327 Ga. App. 157, 158, 755 S.E.2d 899, 902 (Ga. Ct. App. 2014).

³⁰ 211 Ga. App. 789, 790, 440 S.E.2d 533 (1994).

than the franchisor owns and operates a business is insufficient, standing alone, to show apparent agency.”³¹ Further, the court held, “[t]o establish the required elements [of apparent agency]...it is not enough that the plaintiff *believe* that an agency relationship exists.”³² Plaintiff argued that through the presence of Wingate signage at the premises, Wingate essentially held the franchisee out as its agent. However, testimony additionally revealed that at the time of plaintiff’s fall, there was a sign at the front desk stating the hotel was owned and operated by Sandstone.³³ Accordingly, the court found that no apparent agency relationship existed.³⁴

C. The Instrumentality Rule

In *Estate of Anderson v. Denny’s Inc.*,³⁵ Denny’s argued that the current trend in franchisor vicarious liability suits was a move toward the instrumentality rule, which would expose a franchisor to vicarious liability only if “the franchisor had control or right of control over the daily operation of the specific aspect of the franchisee’s business that is alleged to have caused the harm.”³⁶ This modified rule effectively responds to the position franchisors find themselves in, of having to protect their trademarks under the Lanham Act’s mandates, and concurrently risk exposure to vicarious liability for a franchisee’s acts.³⁷ “As one commenter noted, broadly extending vicarious liability could improperly penalize a franchisor for exercising the degree of control necessary to protect the integrity of its trademark.”³⁸ In denying Denny’s motion for summary judgment, the court applied New Mexico choice of law rules and - while recognizing that other modern cases applied the instrumentality rule - held that it could not deviate from the then-most recent Supreme Court of New Mexico opinion which applied a traditional vicarious liability test.³⁹

III. NEW AREAS WHERE VICARIOUS LIABILITY MAY APPLY

A. Joint Employer

Perhaps the most significant area in which the vicarious liability-type concept has recently arisen is in the joint employer context. For decades, franchisors were viewed by

³¹ *Bright*, 755 S.E.2d at 902 (citing *Anderson v. Turton Dev. Inc.*, 225 Ga. App. 270, 275 (2)(b), 483 S.E.2d 597 (1997)).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ 987 F. Supp. 2d 1113, 1160-1161 (D.N.M. 2013).

³⁶ *Id.* (citing *Rainey v. Langen*, 998 A.2d 342 (Me. 2010)).

³⁷ *Id.*

³⁸ *Rainey*, 998 A.2d at 348 (citing Michael R. Flynn, Note, *The Law of Franchisor Liability: A Critique*, 1993 Colum. Bus. L. Rev. 89, 99 (1993)).

³⁹ *Anderson* at 1161.

the governmental labor agencies as of such a nature that absent direct involvement in the employment decisions regarding their franchisees' employees, franchisors were not considered as joint employers of those employees. But several recent developments at the National Labor Relations Board ("NLRB") and the U.S. Wage and Hour Administration may be changing that.

1. The NLRB and the *Browning-Ferris* Decision

Often a non-franchise case may have a significant impact on franchising. The *Browning-Ferris* case may just be one such case.

In June of 2014, the General Counsel of the NLRB, Richard F. Griffin, Jr., submitted an *amicus* brief in *Browning-Ferris*.⁴⁰ In the brief, he argued that the NLRB should "abandon its existing joint-employer standard" and adopt a new joint-employer standard under which "an entity could be a joint employer if it exercised direct or indirect control over working conditions, had the unexercised potential to control working conditions, or where 'industrial realities' otherwise made it essential to meaningful collective bargaining." He urged the Board to "adopt a new standard that takes account of the totality of the circumstances, including how the putative joint employers structured their commercial dealings with each other."

In accordance with his view of the joint employer theory, the General Counsel issued numerous complaints involving over seventy-eight unfair labor practice charges against McDonald's, USA, LLC, as an alleged joint employer. The complaints raise, among other issues, the theory that McDonald's is a joint-employer of its franchisees' employees because it retained control, even if not exercised, over its franchisees' employment practices. (Those complaints are being heard before an NLRB Administrative Law Judge.)

The NLRB issued its decision in the *Browning-Ferris* case in August 2015. In the 3-2 decision, the Board essentially adopted the broader and looser standard for joint employer status that the NLRB General Counsel had urged in his *amicus* brief. The Board concluded that an entity may be a joint employer even without itself exercising control over the employees. As the Board held:

We will no longer require that a joint employer not only possess the authority to control employee's terms and conditions of employment, but also *exercise* that authority. Reserved authority to control terms and conditions of employment, even if not exercised, is clearly relevant to the joint-employment inquiry. As the Supreme Court has observed, the question is whether one statutory employer "possess(s) sufficient control over the work of the employees to qualify as a joint employer with" another employer. Nor will we require that, to be relevant to the joint-employer inquiry, a statutory employer's control must be exercised directly and immediately. If otherwise

⁴⁰ *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery, and FPR-II, LLC, d/b/a Leadpoint Business Services, et al.*, Case 32-RC-109684 (hereinafter, "*Browning-Ferris*").

sufficient, control exercised indirectly – such as through an intermediary – may establish joint-employer status.⁴¹

(Emphasis in original.)

The Board further stated:

Having fully considered the issue and all of the arguments presented, we have decided to restate the Board’s legal standard for joint-employer determinations and make clear how that standard is to be applied going forward.

* * *

[W]e will no longer require that a joint employer not only possess the authority to control employees’ terms and conditions of employment, but must also exercise that authority, and do so directly, immediately, and not in a “limited and routine” manner. . . . The right to control, in the common-law sense, is probative of joint-employer status, as is the actual exercise of control, whether direct or indirect.⁴²

As noted above, the *Browning-Ferris* decision did not involve a franchise and, in fact, the Board, in a footnote in its opinion, discussing *Patterson v. Domino’s Pizza, LLC*⁴³ (discussed below), noted that “the particularized features of franchisor/franchisee relationships” are “no[t]. . . present here.”⁴⁴ But the dissent expressed real concerns as to the impact of the decision on franchisors:

The majority does not mention, much less discuss, the potential impact of its new standard on franchising relations, but it will almost certainly be momentous and hugely disruptive. Indeed, absent any discussion, we are left to ponder whether the majority even agrees with the statement of the General Counsel in his amicus brief that “[t]he Board should continue to exempt franchisors from joint employer status to the extent that their indirect control over employee working conditions is related to their legitimate interest in protecting the quality of their product or brand” Given the breadth of the majority’s test and rationale, we are concerned that the majority effectively finds that a franchisor even with this type of indirect control would be deemed a joint employer.⁴⁵

⁴¹ *Id.* at 2 (emphasis in original/footnotes omitted).

⁴² *Id.* at 15-16.

⁴³ 60 Cal. 4th 474, 177 Cal. Rptr. 3d 539, 333 P.3d 723, 740 (2014).

⁴⁴ *Browning-Ferris* at n.94.

⁴⁵ *Id.* at 45 (dissent).

After the NLRB's decision, an NLRB election was conducted to determine whether the employees would be represented by the Teamsters. The Teamsters prevailed and Browning-Ferris refused to recognize and bargain with the union. After the Teamsters filed an unfair labor practice charge against Browning-Ferris, the NLRB issued a unanimous decision on January 12, 2016 against Browning-Ferris.⁴⁶ That decision is currently being appealed.⁴⁷ In the meantime, the new test of joint employer will be the NLRB policy until either Congress or a court instructs it otherwise.

Not only is franchising potentially affected by the new NLRB policy, it has also been the target of the current Wage and Hour Administrator for the Department of Labor, Dr. David Weil. According to Dr. Weil, "fissuring" in the franchise industry began when companies began to recognize the competitive advantage arising from creating a distinctive brand (for example, creating a loyal customer base that is more willing to pay a premium for the brand's products). According to him, the companies also realized the savings that could occur through a franchise relationship, because the franchise arrangement allowed the company to reduce labor costs by shifting those costs onto the franchisee. Based on this, according to Dr. Weil, there becomes a fissure, or split, in the employment relationship that puts workers in a position of being vulnerable to abuses. In order to protect workers from abuses, Dr. Weil contends that the law should hold franchisors liable, jointly liable, or vicariously liable for labor and employment violations of their franchisees.

2. The Freshii Decision

In the midst of the pendency of the *Browning-Ferris* case, the Associate General Counsel of the NLRB issued an Advice Memorandum (*Nutritionality, Inc. d/b/a Freshii*)⁴⁸ addressing the issue of joint employer in a franchise situation. He found that Freshii Development, LLC, a franchisor of a fast-casual restaurant chain, was not a joint employer of the employees of its franchisee, Nutritionality, Inc., under either the older NLRB joint employer test or the newer one proposed by the NLRB's General Counsel. His cited, among other things, the following facts:

- Freshii was not responsible for setting the wages, raises or benefits of the franchisee's employees;
- Freshii played no role in the decisions of its franchisee with respect to hiring, firing, disciplining or supervising employees;
- Freshii was not involved in the franchisee's scheduling and setting work hours of its employees;
- Sections of the operations manual, other than the recipes and décor elements, were offered as "recommendations" rather than "mandatory" requirements;

⁴⁶ Case No. 32-CA-160759.

⁴⁷ *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recycling v. National Labor Relations Board*, Case No. 16-1028 (D.C. Cir., filed January 20, 2016).

⁴⁸ 13-CA-134294, 13-CA-138293, and 13-CA-142297.

- Inspections were limited to ensuring compliance with Freshii’s mandatory brand standards and not any employment-related policies;
- The franchise agreement specified that the system standards of the franchise did not include “any personnel policies or procedures” but that Freshii may make available such policies and procedures for franchisees’ optional use and the franchisee alone would “determine to what extent, if any, those policies and procedures might apply” in its restaurant operations;
- The franchise agreement also stated that Freshii “neither dictates nor controls labor or employment matters for franchisees and their employees;”
- Freshii provides franchisees with a sample employee handbook that contained personnel policies but did not require franchisees to use the handbook or policies;
- Freshii was not actively involved in the point-of-sale systems or any scheduling software, and there was no evidence that Freshii had any input into scheduling algorithms or methods used in the software; and
- Although Freshii had the contractual right to terminate the franchise agreement, it did not use that right to affect the terms and conditions of the franchisee’s employees.⁴⁹

Based on these facts, the Associate General Counsel found that Freshii was not a joint employer of Nutritionality’s employees, regardless of whether the older or more recent NLRB standard was applied. He further pointed out that because Freshii did not directly or indirectly control or otherwise restrict the employees’ core terms and conditions of employment, meaningful collective bargaining between Nutritionality and the union could proceed in Freshii’s absence.⁵⁰

The *Freshii* ruling – as an Advice Memorandum issued by the Associate General Counsel of the NLRB – does not have the same precedential value as the *Browning-Ferris* decision of the Board. However, it may be an example of a situation envisioned by the General Counsel’s recognized exception in his *amicus* brief in *Browning-Ferris* – that a franchisor is not a joint employer when its controls are limited to those designed to protect the brand and quality of the system.

⁴⁹ *Id.* at 2-3.

⁵⁰ *Id.* at 10.

3. The Patterson Decision

The California Supreme Court in *Patterson v. Domino's Pizza, LLC*⁵¹ considered the issue of whether a franchisor should be vicariously liable as a "joint employer" for sexual harassment engaged in by an employee of its franchisee.

As the court framed the issue:

We granted review to consider the novel question dividing the lower courts in this case: Does a franchisor stand in an employment or agency relationship with the franchisee and its employees for purposes of holding it vicariously liable for workplace injuries allegedly inflicted by one employee of a franchisee while supervising another employee of the franchisee? The answer lies in the inherent nature of the franchise relationship itself.⁵²

The court devotes several pages of the opinion to the special features of the franchise relationship and describes the history of franchising as a method of distribution in which the franchisor provides the franchisee with a system and the franchisee, often an entrepreneurial individual, invests his time and money in order to own and profit from his own business.⁵³ "In the typical arrangement, the franchisee decides who will work as his employees, and controls day-to-day operations in the store."⁵⁴

Against this backdrop, and after discussing the relevant case law, the court found, among other things, that:

- Domino's was not in control with respect to training employees on how to treat each other at work and how to avoid sexual harassment;
- the training programs on the computer system did not cover these employment issues;
- the franchisee implemented his own harassment policy and training program for his employees;
- the franchisee's training program included the authority to impose discipline for any violations and control over that was with the franchisee;
- the franchisee encouraged the reporting of sexual harassment complaints directly to him;

⁵¹ 60 Cal. 4th 474, 177 Cal. Rptr. 3d 539, 333 P.3d 723 (2014)

⁵² 333 P.3d at 725.

⁵³ *Id.* at 734.

⁵⁴ *Id.*

- Domino's had no procedure for monitoring or reporting sexual harassment complaints between the employees of franchisees; and
- it was the franchisee – not Domino's – that took unilateral disciplinary action against the alleged harasser as a result of the plaintiff's complaint.⁵⁵

As a result, the court concluded that “no reasonable inference can be drawn that Domino's, through [its employee], retained or assumed the traditional right of general control an ‘employer’ or ‘principal’ has over factors such as hiring, direction, supervision, discipline, discharge, and relevant day-to-day aspects of the workplace behavior of the franchisee's employees.”⁵⁶ Accordingly, the court held that there is no basis to find that an employment or agency relationship existed between Domino's and the franchisee and its employees to support the plaintiff's claims against Domino's on vicarious liability grounds.

4. *Ochoa v. McDonald's Corp.*

In a case decided last year, a California federal court assessed whether McDonald's Corp. (“McDonald's”) was a joint employer of its franchisees' employees in a wage and hour class action. In *Ochoa v. McDonald's*,⁵⁷ several current and former employees of McDonald's franchises sued the franchisee and McDonald's for, among other things, alleged wage and hour violations of the California Labor Code. The Labor Code claims were premised on the theory that McDonald's was a joint employer. McDonald's moved for a summary judgment that it was not a joint employer of the plaintiffs-employees.

Based on prior California precedent, the court noted that an “employer” for minimum wage purposes is “a person who ‘directly or indirectly, or through an agent or other person, *employs* or exercises control over the wages, hours, or working conditions of any person.’” (Emphasis added.) “Employ,” according to the court, means “‘to exercise control over . . . wages, hours or working conditions,’ (2) ‘to suffer or permit to work,’ or (3) ‘to engage, thereby creating a common law employment relationship.’”⁵⁸

The court then proceeded to assess whether McDonald's was a joint employer under any of these three tests. As to the first test, the court observed that California courts deny employer liability for entities that may be able to influence the treatment of employees but lack the authority to control their wages, hours or conditions directly.⁵⁹ As to the second test, the court noted that the California Supreme Court has held that an entity can be liable as an employer for “suffering or permitting to work” only if it “fail[s] to perform the duty of seeing to it that the prohibited condition does not exist. . . [More

⁵⁵ *Id.* at 741-742.

⁵⁶ *Id.* at 742.

⁵⁷ 133 F. Supp. 3d 1228 (N.D. Cal. 2015)

⁵⁸ *Id.* at 1233.

⁵⁹ *Id.*

clearly,] the ‘basis of liability is the defendant’s knowledge of and *failure to prevent* the work from occurring’”⁶⁰ (Emphasis added.) And as to the third test, citing the *Patterson v. Domino’s Pizza* decision, the court pointed out that “to engage” means to create a common law employment relationship and that “[a] franchisor . . . becomes potentially liable for actions of the franchisee’s employees, only if it has retained or assumed a general right of control over factors such as hiring, direction, supervision, discipline, discharge, and relevant day-to-day aspects of the workplace behavior of the franchisee’s employees.”⁶¹

Applying these principles to McDonald’s, the court found that no joint employer liability could be established. The court noted that the franchisee had sole authority to make hiring, firing, wage and staffing decisions. It found that McDonald’s monitoring programs were not sufficient to give it power to cause the franchisees’ employees to work or prevent them from working, and that McDonald’s limited control over the wage payment and record-keeping aspects of the franchisee’s business was not sufficient under *Patterson* to establish common law employment.⁶²

The court referenced several factors in the franchise relationship and held that they did not amount to sufficient control to render McDonald’s a joint employer:

- the power to terminate/non-renew/deny expansion for systems standards violations;
- suggestions for crew scheduling and staffing;
- monitoring of customer service metrics, even if enforced by sanctions against the franchisee;
- McDonald’s-provided software (POS and timekeeping, crew scheduling/inventory control), even if McDonald’s had programmed the software incorrectly;
- business consultant advice/monitoring; and
- McDonald’s ownership or leasehold interest in the restaurant property.⁶³

After the court granted McDonald’s summary judgment on the joint employer theory under the California Labor Law, it denied summary judgment to McDonald’s on the “ostensible agency” theory. According to the court, ostensible agency exists where “(1) the person dealing with the agent does so with reasonable belief in the agent’s authority; (2) that belief is ‘generated by some act or neglect of the principal sought to be

⁶⁰ *Id.* at 1234.

⁶¹ *Id.* at 1235, quoting *Patterson v. Domino’s Pizza*, 60 Cal. 4th at 497-98, 177 Cal. Rptr. 3d 539, 333 P.3d 723.

⁶² *Id.* at 1236-38.

⁶³ *Id.*

charged,' and (3) the relying party is not negligent."⁶⁴ It reasoned that there existed a triable issue of fact because the employees had a reasonable belief that McDonald's was their employer based on uniforms, pay stubs, and job applications submitted through McDonald's website.⁶⁵

This year, the court certified a class of more than 800 current and former employees of the McDonald's franchisee to pursue the "ostensible agency" claim.⁶⁶ In doing so, the court stated:

Whether plaintiffs will ultimately prevail or fail in their proof of agency is for the trier of fact to decide and not for the Court to resolve in determining certification. It may well be that the proposed class has the "fatal similarity" of a failure of proof on ostensible agency.⁶⁷

B. Cybersecurity

As far as we have been able to determine, there are as yet no final court decisions applying vicarious liability theories in the cybersecurity (*i.e.*, data breaches) area in the franchise context. The most significant case in the area of franchisor liability for cybersecurity breaches is *Federal Trade Commission v. Wyndham Worldwide Corporation*.⁶⁸ But the appellate decision in that case did not reach the ultimate issue of whether the franchisor was liable for the security breaches that occurred at franchised locations.

Although there have been no reported decisions involving vicarious liability cybersecurity claims in the franchise context, perhaps analogies from physical security cases may present the approach courts will take in this area when faced with an information security breach. At the risk of over-generalizing, most of the cases where the franchisor has been found liable (or where courts have described the factual elements that would be indicative of franchisor liability) rely upon unique facts which persuaded the court that elements of control out-weighed elements demonstrating a lack of control. For example, cases consistently refer to the distinction between security policies, manuals and the like that only set forth "recommendations" as opposed to documents that set forth "mandatory requirements", typically finding (or commenting) that security "requirements" cross the line into control and security "recommendations" do not. Heightening awareness and offering suggestions have not constituted control leading to vicarious liability, while material involvement in training or auditing by the franchisor have been deemed sufficient control. Taking the analysis down a level, courts have also distinguished between franchisors that merely recommended the use of

⁶⁴ *Id.* at 1239, citing *Kaplan v. Coldwell Banker Residential Affiliates, Inc.*, 59 Cal. App. 4th 741, 747, 69 Cal. Rptr. 2d 640 (1997).

⁶⁵ *Id.* at 1239-40.

⁶⁶ Case No. 3:14-cv-02098-JD, 2016 WL 3648550 (N.D. Cal. July 7, 2016).

⁶⁷ *Id.* at *4.

⁶⁸ 799 F.3d 236 (3d Cir. 2015).

security equipment, as opposed to requiring the use of certain security equipment or making definitive decisions for the franchisee on the necessity or sufficiency of the equipment.⁶⁹ Finally, courts are more willing to side with the plaintiff when the franchisor is proven to have had a working knowledge of the operational flaw that led to the harm (e.g., through auditing) or provided (or required) the actual instrumentality that led to the harm. A review of the scope of control exercised by a franchisor is a case-by-case analysis, with plaintiffs seeking to seize upon any measures of direct control available in the evidentiary record and defendant franchisors trying to refute the same. We suspect that plaintiffs and defendant franchisors will take the same approach in asserting vicarious liability claims in the cybersecurity context.

Although there has been an absence of decisions on the merits of vicarious liability and cybersecurity, there has been one significant appellate decision as noted above. In *F.T.C. v. Wyndham Worldwide Corp.*,⁷⁰ the Federal Trade Commission (“FTC”) filed an action alleging that Wyndham Hotels and Resorts (“Wyndham”) had “failed to provide reasonable and appropriate security for the personal information” collected and maintained by independently owned Wyndham-branded hotels.⁷¹ The FTC further alleged that Wyndham’s practices “unreasonably and unnecessarily exposed consumers’ personal data to unauthorized access and theft.”⁷² In particular, the FTC alleged that as a result of Wyndham’s practices, intruders gained access on three occasions to consumer data on the Wyndham-branded hotels’ computer networks.⁷³ The FTC filed the lawsuit under Section 5(a) of the FTC Act⁷⁴ which prohibits “unfair” or “deceptive” acts or practices in or affecting commerce.

The FTC asserted various alleged actions by Wyndham that the FTC claimed violated Section 5(a), including failure to employ commonly-used methods to require user ID’s and passwords that are difficult for hackers to guess and inadequate use of firewalls to limit access between and among the hotels’ management systems.⁷⁵ Wyndham denied the allegations and moved to dismiss, arguing that the FTC lacks authority to assert an “unfairness” claim in the data-security context, and that the FTC failed to provide fair notice of what the law requires before bringing its “unfairness” claim.

⁶⁹ See, e.g., *Hong Wu v. Dunkin Donuts, Inc.*, 105 F. Supp. 2d 83, 94 (E.D.N.Y. 2000) (holding franchisor was not vicariously liable for the alleged lapse in security at issue because there was no evidence that franchisor actually mandated specific security equipment or otherwise controlled the steps taken by its franchisees in general, and franchisee at issue in particular, to protect employees). See also *VanDeMark v. McDonald’s Corp.*, 153 N.H. 753, 904 A.2d 627 (2006) (holding franchisor did not retain sufficient control over security policies so as to subject it to vicarious liability for negligence associated with assault on overnight custodian by intruders at franchisee restaurant; although franchisor maintained authority to insure the uniformity and standardization of products and services offered by the restaurant, such authority did not extend to the control of security operations).

⁷⁰ 799 F.3d 236 (3d Cir. 2015).

⁷¹ 10 F. Supp. 3d 602, 608 (D.N.J. 2014).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ 15 U.S.C § 45(a).

⁷⁵ 10 F. Supp. 3d at 626.

A New Jersey federal court rejected the motion to dismiss arguments but granted Wyndham's post-decision motion to certify its ruling for an interlocutory appeal.

On appeal, the Third Circuit upheld the district court ruling, holding that the FTC has the authority under the FTC Act to bring lawsuits against private companies for data security practices.⁷⁶ The Third Circuit addressed two issues: (i) whether the FTC possesses the authority to regulate cybersecurity under Section 5, proscribing unfairness; and (ii) whether Wyndham possessed fair notice that cybersecurity practices could fall within the statutory standard. The court answered both questions in the affirmative.

First, the court found that the FTC possessed the jurisdiction to prohibit unfair cybersecurity practices. Second, the court held that "fair notice is satisfied . . . as long as the company can reasonably foresee that a court could construe its conduct as falling within the meaning of the statute."⁷⁷

In December 2015, the FTC publicly announced a settlement with Wyndham, pursuant to which:

- Wyndham is required to implement and maintain for twenty years a comprehensive information security program reasonably designed to protect the security, confidentiality and integrity of customers' cardholder data collected or received by Wyndham in the U.S.;
- franchised hotels and resorts are excluded from the coverage;
- but Wyndham is required to have safeguards to control risks emanating from certain Wyndham-branded franchised hotels to the cardholder data Wyndham itself collects or receives;
- so long as Wyndham collects or receives cardholder data (but for no more than twenty years), it is required to obtain annual independent assessments and certifications of the extent of its compliance with specified data security standards, which at Wyndham's election may include the Payment Card Industry Data Security Standard ("PCI DSS");
- as part of the annual assessment process, the assessor also must certify whether Wyndham places certain restrictions on traffic from certain franchisee computer networks;
- if Wyndham obtains the assessments and those assessments certify compliance with PCI DSS (or another approved standard) each year, it will be deemed to be in compliance with its comprehensive information security obligations and will not be required to establish the comprehensive information security program;

⁷⁶ 799 F.3d 236 (3d Cir. 2015).

⁷⁷ *Id.* at 256.

- if there is a data breach of Wyndham’s own systems involving more than 10,000 credit card numbers, Wyndham must obtain an assessment of the breach and provide such assessment to the FTC;
- there was no admission of liability on the part of Wyndham; and
- there was no payment of any monetary penalty by Wyndham.⁷⁸

What is perhaps most significant about the terms of the settlement is that it creates a “safe harbor” for Wyndham (and perhaps franchisors in general) if it obtains assessments each year certifying compliance with the Payment Card Industry Data Security Standards or another approved standard.

C. Statutory Obligations

Franchisors should also be wary of statutory violations, which may be committed by their franchisees. As detailed in Section II above, a franchisor may be held liable for acts of its franchisee when the actual relationship between them is that of principal and agent or master and servant.⁷⁹ As discussed more fully in the examples below, franchisees are sometimes determined to be the agents of the franchisor when courts have assessed violations of certain statutory obligations—such as the Telephone Consumer Protection Act (“TCPA”), the Americans With Disabilities Act (“ADA”), and the Fair and Accurate Credit Transaction Act (“FACTA”).

1. Examples of Recent Cases Analyzing Vicarious Liability Under the TCPA

a. Background of the TCPA

The TCPA was enacted in 1991 for the purpose of protecting consumers from unsolicited telemarketing calls and faxes—and most recently text messages.⁸⁰ The TCPA regulates and restricts the manner in which businesses may advertise their products and services to consumers by phone as well as by text message and fax.⁸¹ Specifically, the TCPA prohibits the use of an “automated telephone dialing system” or an “artificial or pre-recorded voice” to make calls to cellphones without obtaining the recipient’s prior consent.⁸² This rule applies to both telemarketing and non-telemarketing calls, including debt collection and informational calls.⁸³ Following a change in FCC

⁷⁸ Stipulated Order for Injunction, dated December 11, 2015 (in *Federal Trade Commission v. Wyndham Worldwide Corporation, et al.*, Civil Action No. 2:13-CV-01887-ES-JAD).

⁷⁹ See, e.g., *Jones v. Filler, Inc.*, 43 F. Supp. 2d 1052, 1055 (W.D. Ark. 1999).

⁸⁰ See generally 47 U.S.C. § 227.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

regulations in October 2013,⁸⁴ the TCPA now also requires prior written consent for most automated telemarketing communications, particularly those made to cellphones.

b. Dish Network Order

On May 9, 2013, the Federal Communications Commission (“FCC”) issued a declaratory ruling which found that Dish Network, LLC may be held vicariously liable for a third-party marketer’s violations of the TCPA.⁸⁵ Dish Network then appealed this declaratory ruling to the District of Columbia Circuit.⁸⁶ The court noted that its jurisdiction is limited to review only “final orders” of the FCC.⁸⁷ The court determined that the FCC’s declaratory ruling on vicarious liability under the TCPA is not “final” because the decision has no binding effect on the courts and is not entitled to deference under federal law.⁸⁸ During the appeal, the FCC itself argued that the declaratory ruling is persuasive only, and not binding on any courts.⁸⁹ Accordingly, Dish Network’s appeal was dismissed.⁹⁰ Although language in the court’s decision suggests that the FCC’s ruling is not entitled to deference by the courts, the FCC’s decision may nonetheless still be used by courts.⁹¹ Accordingly, the FCC’s decision on TCPA vicarious liability remains intact and, as such, marketers must be especially cautious moving forward.

In two prior federal actions, the plaintiffs alleged that the underlying sellers were liable for TCPA violations engaged in by their third-party telemarketers.⁹² The sellers countered that they did not “initiate” the subject calls as defined under the TCPA because the third-party telemarketing contractors were the actual initiators of the calls, and thus the sellers should not be held liable.⁹³ Before ruling on the TCPA claims, the courts in each case asked the FCC for a declaratory ruling on the potential liability of the seller.⁹⁴ The FCC subsequently held that, although the sellers did not “initiate” the calls

⁸⁴ See *Dish Network Order*, infra.

⁸⁵ See *Dish Network Order*, 28 F.C.C.R. 6574 (2013).

⁸⁶ *Dish Network, L.L.C. v. FCC*, 552 F. App’x 1 (D.C. Cir. 2014).

⁸⁷ *Id.* at 1.

⁸⁸ *Id.* at 1-2.

⁸⁹ *Id.* at 2.

⁹⁰ *Id.*

⁹¹ See, e.g., *Palm Beach Golf Ctr.-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245, 1253 (11th Cir. 2015).

⁹² See *Charvat v. EchoStar Satellite, LLC*, 676 F. Supp. 2d 668 (S.D. Ohio 2009); *United States v. Dish Network, LLC*, 667 F. Supp. 2d 952 (C.D. Ill. 2009).

⁹³ *Chavrat*, 676 F. Supp. 2d at 674; *Dish Network*, 667 F. Supp. 2d at 958.

⁹⁴ *Dish Network Order*, 28 F.C.C.R. at 6578.

as contemplated under the TCPA, they could be held liable where there is an “agency relationship.”⁹⁵

c. Thomas v. Taco Bell Corp.

About a year after the *Dish Network Order*, on July 2, 2014, the Ninth Circuit issued a ruling outlining the vicarious liability pleading standard under the TCPA.⁹⁶ Since the FCC’s declaratory ruling in the *Dish Network*, litigants have argued in court over how far this liability standard can extend, and in what scenarios it applies.⁹⁷ Most district courts throughout the country have held that in order for a seller to be vicariously liable under the TCPA, a plaintiff must plead (and ultimately prove) that the seller exercised, or had the right to exercise, control over its third-party telemarketers.⁹⁸ In its ruling, the Ninth Circuit expanded and discussed the application of TCPA liability under the scope of “apparent authority” and classical principles of agency.⁹⁹

The *Taco Bell* case involved an allegation that the plaintiff had received a text message ad from an ad agency on behalf of Taco Bell Corp. (“Taco Bell”) in violation of the TCPA.¹⁰⁰ Specifically, this case involved a marketing campaign conducted by Taco Bell franchisees.¹⁰¹ A California federal court ruled that although sellers can be held vicariously liable for any TCPA violations made by their telemarketers, the facts at issue did not support such a finding against Taco Bell because it had not controlled the manner and means by which the text message campaign was conducted.¹⁰² The manner and means by which the text message campaign occurred were based on decisions by the franchisees and the ad agency—the franchisor did not have any actual control over the campaign.¹⁰³ Therefore, the court ruled that Taco Bell cannot be held vicariously liable for the TCPA violations alleged in the plaintiff’s complaint.¹⁰⁴

⁹⁵ *Id.* at 6584.

⁹⁶ *Thomas v. Taco Bell Corp.*, 582 F. App’x 678 (9th Cir. 2014).

⁹⁷ *See, e.g., id.*

⁹⁸ *See, e.g., Makaron v. GE Sec. Mfg., Inc.*, No. CV–14–1274–GW, 2015 WL 3526253 (C.D. Cal. May 18, 2015); *Bridgeview Health Care Center v. Clark*, No. 09 C 5601, 2015 WL 1598115, at *7 (N.D. Ill. Apr. 8, 2015) (citing *Palm Beach Golf Center-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245 (11th Cir. 2015)).

⁹⁹ *Thomas*, 582 F. App’x at 689.

¹⁰⁰ *Id.* at 678.

¹⁰¹ *Id.*

¹⁰² *Id.* at 679 (quoting *Thomas v. Taco Bell Corp.*, 879 F. Supp. 2d 1079, 1084 (C.D. Cal. 2012)).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

The Ninth Circuit affirmed this ruling.¹⁰⁵ In doing so, the Ninth Circuit determined that a seller may be vicariously liable under the TCPA if a plaintiff can demonstrate that the telemarketer had “apparent authority” from the seller when the subject call or text was sent.¹⁰⁶ Additionally, the plaintiff must allege and prove that the seller has ratified any conduct by the telemarketer that violated the TCPA.¹⁰⁷

d. Siding & Insulation Co. v. Alco Vending, Inc.

Most recently, the Sixth Circuit reversed a decision of an Ohio federal court granting summary judgment to the defendant in a TCPA fax case.¹⁰⁸ In the district court, the defendant argued that, although it did retain an ad agency to send faxes to businesses, it could not be liable under the TCPA for sending the allegedly offending faxes because it only retained the ad agency to transmit the faxes to *consenting* businesses and had never authorized transmission of faxes to *non-consenting* businesses, including the plaintiff’s.¹⁰⁹ The district court held that the defendant was not vicariously liable under federal common-law agency principles because it neither authorized the transmission of the offending faxes, nor ratified the ad agency’s conduct.¹¹⁰

On appeal, however, the Sixth Circuit reversed, holding that the proper standard for evaluating the defendant’s conduct was based on the FCC’s regulations that impose liability on the entity “on whose behalf” a fax is sent.¹¹¹ In choosing that standard, the court analyzed and declined to apply two other standards that were presented by the parties: (i) a strict liability standard, and (ii) a vicarious liability standard.¹¹²

As for the vicarious liability standard, the court reasoned that the district court incorrectly relied on the FCC’s *Dish Network Order*,¹¹³ which, as the FCC had explained in a letter submission relied upon by the Eleventh Circuit in *Palm Beach Golf Center-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*,¹¹⁴ did not extend to fax cases.¹¹⁵ Instead, following the approach articulated in *Sarris*, the Sixth Circuit adopted a “on-whose-

¹⁰⁵ *Id.* at 680.

¹⁰⁶ *Id.* at 679.

¹⁰⁷ *Id.* at 680.

¹⁰⁸ *Siding & Insulation Co. v. Alco Vending, Inc.*, No. 15–3551, 2016 WL 2620507 (6th Cir. May 9, 2016).

¹⁰⁹ *Id.* at *2.

¹¹⁰ *Id.* at *3.

¹¹¹ *Id.* at *11.

¹¹² *Id.* at *9, *11.

¹¹³ 28 F.C.C.R. 6574 (2013).

¹¹⁴ 781 F.3d 1245 (11th Cir. 2015).

¹¹⁵ *Alco* at *10.

behalf” standard which it reasoned does not rely on traditional agency rules of ratification or authorization, but rather factors such as, “the degree of control that the latter entity exercised over the preparation of the faxes, whether the latter entity approved the final content of the faxes as broadcast, and the nature and terms of the contractual relationship between the fax broadcaster and the latter entity.”¹¹⁶ The court found that this was a “middle ground between strict liability and vicarious liability.”¹¹⁷

Applying this standard to the case before it, the Sixth Circuit found that some factors tended to show that the ad agency did not act on behalf of the defendant and others showed that it did.¹¹⁸ The case was remanded to the district court to rule in accordance with the “on whose behalf” standard.¹¹⁹

e. Potential Impact on Franchisors

The FCC’s ruling in the *Dish Network* matter expanded, to some degree, the scope of liability under the TCPA. Although the express language of the statute places liability on the caller, the FCC has implemented rules or, as it has referred to them, “appropriate incentives,” for sellers “to monitor and police TCPA compliance by third-party telemarketers.”¹²⁰

The Ninth Circuit’s ruling in the *Taco Bell* case has put this into perspective. A direct agency relationship, where the franchisor exercises control over, or has the right to control, a particular marketing campaign, may render the franchisor vicariously liable for any resulting TCPA violations of the franchisee. However, if there is no such control, a plaintiff must overcome the high hurdles of demonstrating a manifestation of authority in the franchisee by the franchisor to the plaintiff, reasonable reliance on such manifestation, an underlying agency relationship between the franchisor and franchisee, and the franchisor’s profit from the telemarketer’s conduct.

2. Examples of Recent Cases Analyzing Vicarious Liability Under the ADA

a. Background of the ADA

The Americans With Disabilities Act of 1990 was designed “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”¹²¹ The ADA is divided into three areas: (1) employment (Title I); (2) public services (Title II); and (3) places of public accommodation (Title III).¹²²

¹¹⁶ *Id.* at *12.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at *13-15.

¹¹⁹ *Id.* at *16.

¹²⁰ *Dish Network Order*, 28 F.C.C.R. at 6588.

¹²¹ 42 U.S.C. § 12101(b)(1).

¹²² 42 U.S.C. §§ 12101-12213.

Title III of the ADA specifically provides, “No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases, or operates a place of public accommodation.”¹²³ Claims against franchisors under the ADA generally involve suits under Title III by customers who visit a franchise location and find that the particular location is not accessible or discriminates against the disabled.

b. Stites v. Hilton Hotels Corp.

In late 2009, the California Court of Appeals affirmed a decision in favor of a franchisor, Hilton Hotels Corp., for alleged violations of the ADA when a guest with a service dog was unable to obtain a room in a hotel that was owned and operated a franchisee.¹²⁴ Although the facts were disputed as to why the individual was denied a room in the hotel,¹²⁵ the issue before the court was whether or not the franchisor could be liable for ADA violations of the hotel staff.¹²⁶

The court ruled in favor of the franchisor, finding that “[t]here is no evidence that the Inn’s desk clerk was hired, trained, or supervised by [the franchisor]. Rather the employee was hired, trained and supervised by QSSC, a franchisee that is not a party to this appeal. There is no evidence that [the franchisor] exercised any control over QSSC, let alone complete control.”¹²⁷ Because an element of control over the franchisee was lacking, the franchisor could not be vicariously liable for the franchisee’s (or its employees’) actions.¹²⁸

c. Bracken v. McDonald’s Corp.

Most recently, in 2013, an Oregon federal court reached a similar conclusion in granting McDonald’s Corp.’s Motion to Dismiss a complaint filed against it for violations of the ADA that allegedly occurred at one of its franchised restaurants.¹²⁹ In this case, the plaintiff claimed that while eating at a McDonald’s restaurant with his dog, he was approached by a franchise employee who requested certification indicating that the dog was a service animal.¹³⁰ Plaintiff did not provide the requested documentation and was asked to keep the dog outside for health code reasons.¹³¹ Although ultimately the

¹²³ 42 U.S.C. § 12182(a).

¹²⁴ *Stites v. Hilton Hotels Corp.*, No. B209485, 2009 WL 4548351 (Cal. Ct. App. Dec. 7, 2009).

¹²⁵ *Id.* at *1-2.

¹²⁶ *Id.* at *2.

¹²⁷ *Id.* at *5.

¹²⁸ *Id.*

¹²⁹ *Bracken v. McDonald’s Corp.*, No. 3:13-cv-00697-AA, 2013 WL 3432086 (D. Or. July 2, 2013).

¹³⁰ *Id.* at *1.

¹³¹ *Id.*

franchise employee apologized and offered to refund the plaintiff's money or prepare a new meal for him, the plaintiff refused and filed suit against the franchisor, McDonald's Corp.¹³² The franchisor moved to dismiss the complaint alleging, *inter alia*, that the complaint failed to state a claim against the franchisor as liable for the actions of the franchise employee.¹³³

In reaching its decision, the court found that "while plaintiff's complaint makes clear that all of the allegedly wrongful actions transpired at a McDonald's franchise, there are no allegations linking defendant to the franchisees' employees' conduct."¹³⁴ Accordingly, because the plaintiff did not allege that McDonald's Corp. had a right to control the franchise location, plaintiff was unable to assert adequately that an agency relationship existed between the franchisor and the franchise employee that would give rise to vicarious liability.¹³⁵

d. Potential Impact on Franchisors

Courts are ultimately divided on a franchisor's liability for ADA compliance.¹³⁶ Regardless, it is clear that franchisees are liable. A franchisor must be cautious not to exert too much control over its franchisees if it wishes to reduce the risk of being found vicariously liable for the actions of its franchisees. By the same token, however, franchisors must be wary of the fact that exerting too little control may harm the uniformity of its brand. Certain recent cases — such as the *Burger King* cases¹³⁷ — have especially demonstrated this issue, because the plaintiffs sued only the franchisor, and not the franchisee, for the ADA violations.

In light of this, it may be useful for a franchisor to place specific ADA compliance provisions into its franchise agreement to help ensure that the franchisee is in compliance. A franchisor can also choose to insert provisions into the franchise agreement that expressly limits its control — and, consequently, liability — over issues such as building design. Mark A. Kirsch, *Franchising Compliance with the Americans with Disabilities Act*, GENERAL PRACTICE, SOLO & SMALL FIRM DIVISION MAGAZINE, Vol.

¹³² *Id.*

¹³³ *Id.* at *2.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Although the more recent cases discussed above are dealing with the actions of franchise employees, some prior cases analyzing the design of the premises have been split on the issue of franchisor liability. Compare, e.g., *Equal Rights Ctr. v. Hilton Hotels Corp.*, Civil Action No. 07-1528 (JR), 2009 WL 6067336, at *8 (D.D.C. 2009) (denying motion to dismiss against hotel franchisor because it "monitors conditions at its franchise hotels and that it can compel them to make changes when needed"), with *Neff v. American Dairy Queen Corp.*, 58 F.3d 1063, 1068-69 (5th Cir. 1995) (holding franchisor not liable where franchisor exercised no control over barrier removal).

¹³⁷ *Vallabhapurapu v. Burger King Corp.*, No. C 11-00667 WHA, 2012 WL 2568183 (N.D. Cal. July 2, 2012); *Castaneda v. Burger King Corp.*, 264 F.R.D. 577 (N.D. Cal. 2009). In each of these cases, a California federal court approved settlements that required Burger King Corporation (the franchisor) to, *inter alia*, survey its restaurants every ten years and requiring franchisees to hire registered architects to survey each restaurant every time the lease agreement is renewed to ensure ADA compliance.

17, No. 6 (September 2000). Finally, the franchisor must be careful not to approve anything that may not be ADA compliant either through its words, writings, or actions.

3. **Examples of Recent Cases Analyzing Vicarious Liability Under FACTA**

a. **Background of FACTA**

In 2003, Congress updated FACTA to respond to growing consumer concerns about credit card identity theft.¹³⁸ Among other things, FACTA requires that merchants ensure their receipts contain no more than the last five digits of a credit or debit card number and exclude the card's expiration date.¹³⁹ There is a private right of action for violations of FACTA, permitting the recovery of actual damages for a negligent violation, and actual or statutory damages, as well as punitive damages, for “willful” violations.¹⁴⁰

b. **Patterson v. Denny's Corp.**

In early 2008, a Pennsylvania federal court denied a franchisor's motion to dismiss a FACTA claim premised on the franchisor's vicarious liability for a franchisee's violation of the Act.¹⁴¹ Although FACTA provides no statutory basis for vicarious liability, the court noted that entities have been held vicariously liable for FACTA violations committed by their agents under common law agency principles.¹⁴² Finding no reason to treat the franchisor-franchisee relationship differently, the court held that the “decisive issue” is whether the franchisor exercises sufficient control over the franchisee's business operations.¹⁴³

In opposing the franchisor's motion to dismiss, the plaintiff submitted evidence from the franchisor's 10-K Report that stated “The Denny's system is approximately one-third company-operated and two-thirds franchised A network of regional franchise operations managers oversee our franchised restaurants to ensure compliance with brand standards, promote operational excellence, and provide general support to our franchisees. These managers visit each franchised unit an average of two to four times per quarter.”¹⁴⁴ Because the court found that this evidence was sufficient to state a claim against the franchisor as vicariously liable for its franchisee's violations of FACTA, the motion to dismiss was denied and plaintiff was permitted to proceed with its claims against the franchisor.¹⁴⁵

¹³⁸ 15 U.S.C. § 1681 et seq.

¹³⁹ 15 U.S.C. § 1681(g)(1).

¹⁴⁰ 15 U.S.C. § 1681(n), (o).

¹⁴¹ *Patterson v. Denny's Corp.*, Civil Action No. 07-1161, 2008 WL 250552 (W.D. Pa. Jan. 30, 2008).

¹⁴² *Id.* at *2.

¹⁴³ *Id.* (citing *Drexel v. Union Prescription Centers, Inc.*, 582 F.2d 781, 785-86 (3d Cir. 1978)).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

c. Keith v. Back Yard Burgers of Nebraska, Inc.

In 2012, a Nebraska federal court analyzed the same issue and reached a similar conclusion in regards to a motion for judgment on the pleadings filed by a franchisor.¹⁴⁶ In *Keith*, a franchise restaurant printed credit and debit card expiration dates on its receipts in violation of FACTA, which prohibits this practice.¹⁴⁷ The plaintiff alleged that the franchisor was vicariously liable because it “exercised significant and actual control over the [franchisee’s] business activities, including point of sale policies and procedures.”¹⁴⁸ The franchisor answered and moved for judgment on the pleadings, arguing, in essence, that it had no liability because it was neither the entity that accepted plaintiff’s debit card and handed him a receipt, nor was it vicariously liable for the acts of its franchisee.¹⁴⁹

The court denied the franchisor’s motion and concluded that vicarious liability is a viable basis to state a claim for a FACTA violation.¹⁵⁰ In so doing, the court relied on *Patterson v. Denny’s Corp.*, which applied common law agency principles to conclude that vicarious liability may exist under FACTA if a franchisor exercises control sufficient to establish a master-servant relationship.¹⁵¹ Because the *Keith* order only resolved a motion for judgment on the pleadings, the court was required to read the pleadings in the light most favorable to the plaintiff, and the court therefore denied the franchisor’s motion.¹⁵²

d. Potential Impact on Franchisors

Given that vicarious liability is possible under FACTA based on the decisions in *Patterson* and *Keith*, franchisors have many factors to consider when trying to find the proper amount of control to exercise over their franchisees to both avoid any unnecessary liabilities while, at the same time, maintaining brand uniformity and quality. Because the law has prohibited retailers from printing expiration dates on receipts since 2003 when FACTA was enacted,¹⁵³ franchisors should be careful to provide sufficient guidance to their franchisees regarding proper point of sale procedures, but not provide so much oversight that they establish a master-servant relationship with their franchisees. If the proper guidance is followed, it may help prevent lawsuits in the first instance. In this case, even if the franchisee does not follow the franchisor’s guidance, the franchisor may have a defense against vicarious liability.

¹⁴⁶ *Keith v. Back Yard Burgers of Nebraska, Inc.*, No. 8:11CV135, 2012 WL 1252965 (D. Neb. Apr. 13, 2012).

¹⁴⁷ *Id.* at *1; see also 15 U.S.C. § 1681(c)(g)(1).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at *2.

¹⁵¹ *Id.* (citing *Patterson*, 2008 WL 250552, at *2).

¹⁵² *Id.*

¹⁵³ See generally 15 U.S.C. § 1681, et seq.

Franchisors should also consider including indemnity provisions in their franchise agreements that plainly apply to privacy-related claims, such as those arising from FACTA. Even though indemnification cannot prevent lawsuits from being filed against the franchisor, it could provide the franchisor with a strong counterclaim against its franchisee if the plaintiff were to prevail.

D. Sharing Economy Business Model – Uber, Airbnb and Others

With the recent advent and development of the so-called “sharing economy” business model, the industry has found itself on the defensive, with even more risk of exposure for the imputation of vicarious liability. Companies like Airbnb, Uber, and Lyft have had a significant presence in the market of late. Uber and Lyft, for example, provide a fee-for-service ridesharing platform whereby individuals needing transportation can access the Uber or Lyft smartphone application, be assigned a driver, and be driven to their destination. Uber is paid at the end of the ride, and a portion is remitted to the driver. Uber, however, holds itself out as a technology company rather than a transportation company. The company has faced multiple recent lawsuits in which drivers have filed agency actions claiming to be employees rather than independent contractors.

In this new sharing economy context, claims grounded in employment law are additionally becoming prevalent. Personal injury and wrongful death lawsuits are being filed against the sharing companies as well, wherein plaintiffs are attempting to hold the companies vicariously liable for actions or omissions taken by, for example, Lyft or Uber drivers. The companies attempt to disclaim liability based upon the fact that drivers, in the Uber setting for example, are independent contractors and not employees.

In the recent case of *Doe v. Uber Techs., Inc.*¹⁵⁴, plaintiffs brought a tort suit against Uber for sexual assaults which plaintiffs allege they suffered at the hands of Uber drivers. Uber filed a motion to dismiss, disputing that the drivers were employees of Uber, and instead arguing, among other things, that the drivers were independent contractors. The court noted that whether an individual is classified as an employee or as an independent contractor depends upon “whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired.”¹⁵⁵ The court found that plaintiffs alleged facts sufficient to claim plausibly that an employment relationship existed. In support of this assertion, plaintiffs alleged that Uber sets fare prices without driver input and drivers may not negotiate fares. Uber additionally retained control over customer contact information, retained the right to terminate drivers at will, and controlled various aspects of the manner and means by which drivers could offer rides through the Uber app. The court found that, for the purpose of surviving a motion to dismiss, plaintiffs plausibly alleged that the two drivers at issue were acting within the scope of employment when they committed the assault.

¹⁵⁴ No. 1-CV-04670-SI, 2016 U.S. Dist. LEXIS 60051, at *5 (N.D. Cal. May 4, 2016).

¹⁵⁵ *Id.* at *10 (citing *S.G. Borello & Sons, Inc. v. Dep’t of Indus. Relations*, 48 Cal. 3d 341, 350 (1989), 769 P.2d 399; see also *Bradley v. Dep’t. of Corr. & Rehab.*, 158 Cal. App. 4th 1612, 1626, 71 Cal. Rptr. 3d 222 (2008) (“The prevailing view is to consider the totality of the circumstances, reflecting upon the nature of the work relationship between the parties, and placing emphasis on the control exercised by the employer over the employee’s performance of employment duties.”) (citing *Vernon v. State*, 116 Cal. App. 4th 114, 124-25, 10 Cal. Rptr. 3d 121 (2004)).

Similarly, in *Cotter v. Lyft, Inc.*, the court denied a summary judgment motion brought by software app operator, Lyft. The court refused to find as a matter of law that drivers who used the Lyft app were independent contractors, where the evidence showed that “Lyft retains a good deal of control over how [the drivers] proceed.”¹⁵⁶ This included rules such as not talking on the phone with passengers present, not requesting tips, and not asking for a passenger’s contact information, with Lyft reserving the right to penalize or terminate drivers who did not comply with the rules.¹⁵⁷

In *Search v. Uber Techs, Inc.*¹⁵⁸ plaintiff filed suit claiming that Uber was liable for an alleged knife attack by one of its drivers. Plaintiff asserted, among other things, claims sounding in negligent hiring, training, and supervision, and negligence under *respondeat superior* and apparent-agency theories. As the court noted, whether Uber was liable for many of these theories, depended upon whether Uber was, or presented itself as, the driver’s employer. Plaintiff asserted that the driver was “an employee, agent, and/or servant” of Uber at the time of the incident, and alleged facts to establish an employer-employee relationship. Plaintiff further asserted that “[u]pon threat of termination, Uber subjects its drivers to a host of specific requirements,” including, use of the Uber app, standards for the cleanliness and mechanical functioning of their cars, rules regarding tipping, minimum timeframes and acceptance rates for ride requests, and display of the Uber logo. In ruling on Uber’s motion to dismiss, the court found that, given the conditions of Uber’s arrangement with its drivers, as presented by plaintiff, the court could not determine as a matter of law that the driver was an independent contractor.

Plaintiff alternatively argued that Uber represented to customers that its drivers were its agents, and that it screened and managed them accordingly. The court noted that apparent authority “depends upon the third-party’s perception of the agent’s authority,” which “may be based upon written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on her behalf” by the apparent agent. Plaintiff alleged that Uber, “[t]hrough several forms of media” such as its mobile app and its website, represented to customers that it is “your private driver,” “that it subjects its drivers to rigorous screening procedures” before hiring them, and that it “continues to monitor” those drivers after they are hired. In that case, plaintiff’s apparent-agency theory of liability also survived defendant’s motion to dismiss.

Finally, in *O’Connor v. Uber Techs*¹⁵⁹ and *Yucesoy v. Uber Techs, Inc.*,¹⁶⁰ Uber drivers brought a class action and a putative class action, respectively, against Uber Technologies, Inc., claiming that, although Uber classified them as independent contractors, they were actually employees and were therefore owed certain benefits,

¹⁵⁶ 60 F. Supp. 3d 1067, 1078 (N.D. Cal. 2015).

¹⁵⁷ *Id.* at 1078-79.

¹⁵⁸ 128 F. Supp. 3d 222, 226 (D.D.C. 2015).

¹⁵⁹ Case No. 13-03826-KAW, 2013 U.S. Dist. LEXIS 120406, at *1 (N.D. Cal. Aug. 23, 2013).

¹⁶⁰ Case No. 15-CV-0262-EMC, 109 F. Supp. 3d 1259, 1261, 2015 U.S. Dist. LEXIS 76617, at *1 (N.D. Cal. June 12, 2015).

reimbursements, and protections. Such benefits would include unemployment benefits, workers' compensation, the right to unionize, and reimbursement for mileage and tips.

On March 11, 2015, the court ruled that whether an Uber driver is an employee or independent contractor is a question for the jury. Thereafter, on September 1, 2015, the court ruled that Uber drivers could sue as a class on the question of whether they are employees or independent contractors. In May 2016, shortly before the *O'Connor* trial was to begin, Uber reached a \$100 million dollar settlement, in which Uber would be allowed to continue using the independent contractor classification and Uber drivers in California and Massachusetts would receive payment of damages.¹⁶¹ On August 18, 2016, however, the court determined that the settlement was "not fair, adequate, and reasonable" as structured, and denied plaintiffs' motions for preliminary approval of the settlement.¹⁶²

IV. HOW SHOULD FRANCHISORS DEAL WITH LIMITING THE POTENTIAL FOR, AND RISKS ASSOCIATED WITH, CONTROL OF THE FRANCHISEE'S BUSINESS?

With respect to the nascent sharing economy, it remains to be seen what will develop as precedent in case law as a result of the deluge of lawsuits attempting to classify independent contractors as employees and seeking to hold the sharing companies vicariously liable as a result. For the franchising industry as a larger whole, especially as we begin to see an increase in the number of lawsuits seeking to hold franchisors and franchisees liable under a joint employer theory, franchisors must closely monitor the level of control exerted over their franchisees' businesses. The governing franchise agreement or system standards manual should explicitly mandate that the franchised premises identify itself as an independent contractor, in order to clearly signal to consumers that the franchisor does not own or operate the franchised premises. Further, franchisors should complete periodic inspections for enforcement purposes to ensure such measures are being effectuated at franchised locations. Case law dictates that displaying signage at the front desk of a hotel lobby, or at the entryway of a franchised restaurant, for example, can adequately and explicitly notify consumers that the location is independently owned and operated by a franchisee. Doing so may help curtail the potential for successful agency arguments as well as claims that consumer reliance was reasonable. Further, although some jurisdictions have yet to adopt the instrumentality test, case law reflects that courts do recognize the predicament in which franchisors find themselves when endeavoring to maintain brand and system standards, and the integrity of their intellectual property, while minimizing vicarious liability claims.

In order to further limit the risks of vicarious liability and the associated financial exposure, the franchise agreements should contain strong indemnification language, requiring the franchisee to indemnify, defend, and hold the franchisor harmless from any claims occurring or arising at the franchised premises. This shift of legal responsibility onto the franchisee must be supported by the governing franchise agreement and the

¹⁶¹ *O'Connor v. Uber Techs., Inc.*, 2016 U.S. Dist. LEXIS 64347, at *9 (N.D. Cal. May 13, 2016).

¹⁶² *O'Connor v. Uber Techs., Inc.*, 2016 U.S. Dist. LEXIS 110281, at *11 (N.D. Cal. Aug. 18, 2016).

plain language of its provisions therein. Thus, sensitivity to this in the contract drafting stage is of paramount importance.

Equally as important, and as a supplement to the indemnification requirement, is that the franchise agreement contain an insurance obligation requiring the franchisee to carry sufficient and valid insurance to cover the franchisor, its affiliates and related parties, and all potential claims. The insurance obligation should also require the franchisor to be named as an additional insured under the policy.

The inherent nature of the franchise business model effectively decrees that the risk of vicarious liability can never be completely eliminated. This is especially true when the franchise model is built upon the common usage of trademarks, uniformity, and adherence to system standards. However, the best way to limit such risks is in the careful drafting of the franchise agreement and operations manual and the limitation of direct involvement and insertion by the franchisor into the day-to-day operations of the franchisee's business.

V. CONCLUSION

Although there may be no clear answer to the question of how much control is enough, and how much is too much, when the issue is one of vicarious liability, what is clear is that the concept is not limited to customer injuries on the premises. The concept arises in ever-developing areas of the law, both statutory and common law. Unfortunately, the bottom line for franchisors seeking to avoid vicarious liability while also seeking to protect the brand and the system may be "damned if you do and damned if you don't!"

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Barry M. Heller is the senior most franchise litigation partner at DLA Piper US LLP. For over 30 years, Barry's practice has consisted almost exclusively of representing clients in franchise and distribution disputes throughout the country, both in litigation and arbitration. Much of his practice has focused on franchise termination matters as well as on more complex franchise cases involving issues affecting the entire franchise system. He has handled cases involving, among other issues, termination, transfers, rights of first refusal, implied covenant of good faith and fair dealing, alternative distribution channels, covenants against competition, trademark infringement, product sourcing and approval, franchisee associations, and unfair competition.

Barry is the former director of the Litigation and Dispute Resolution Division of the ABA Forum on Franchising. He has authored and lectured on franchise litigation issues, including conducting Legal Roundtable seminars in different cities for the International Franchise Association on franchise litigation matters. He was co-author of a manual entitled *Franchise Litigation Claims* of the Litigation Section of the District of Columbia Bar Association, for whom he conducted a seminar on the subject. His numerous articles on franchise issues have appeared in such publications as *The Franchise Lawyer*, *Franchise Legal Digest*, *Of Interest*, the *Franchise Law Journal* and *InsideCounsel*.

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In every year since 2002, Barry has been listed in *Who's Who Legal: The International Who's Who of Business Lawyers*. Since 2007, he has been listed in every edition of *The Best Lawyers in America*. Since 2006, he has been named a Virginia Super Lawyer in every year. Since 2007, he has been named a Washington, DC Super Lawyer in every year. Barry was selected as one of the top 100 Franchise Legal Eagles by *Franchise Times* in 2004 as well as in every year from 2006 to 2016. Barry was named to the 2015 Edition of *Washington DC's Best Lawyers*. Barry has also been ranked in *Chambers 2016* and referred to as an "excellent litigator" for his representation of franchisors.

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Alejandro Brito is a partner at Zarco Einhorn Salkowski & Brito, P.A., a Miami based franchise law firm. The firm represents franchise and distribution clients in litigation and other forms of dispute resolution throughout the United States. The firm has represented franchisees from almost every major franchise system in the hotel, restaurant, and service industries. The firm has also represented franchise clients from Mexico, France, Holland, Germany, Australia, New Zealand and throughout the Caribbean.

Alex obtained his J.D. degree from the George Washington University in 1996. Alex graduated from Florida International University with a Bachelor of Arts degree in 1993. Currently, Alex litigates franchise, distribution and general commercial disputes in state and federal courts. In addition, Alex has handled numerous franchise disputes in arbitration proceedings throughout the country. Alex has also served as an arbitrator in actions between franchisees and franchisors. He is a member of the Florida Bar and is admitted to practice in Unites States District Courts for the Southern District of Florida, Middle District of Florida, Northern District of Illinois, and the Eastern District of Wisconsin, as well as the United States Court of Appeals for the Fifth Circuit, Sixth Circuit, Ninth Circuit, and Eleventh Circuit.

Alex has been listed in "The Best Lawyers in America" publication since 2006 and has received a Peer Review rating of "AV" by Martindale-Hubbell, indicating the highest level of legal ability and ethics. Alex has been recognized in the South Florida Legal Guide's *Top Lawyers* and Florida Trend Magazine's *Legal Elite*. In addition in 2010, Alex was a Finalist for the Most Effective Lawyer in Miami, as awarded by the Daily Business Review and was also named one of the "Top 20 Professionals Under 40" by Brickell Magazine.

Since joining Zarco Einhorn Salkowski & Brito, P.A., Alex has authored several articles discussing legal issues at the forefront of the franchise industry. Alex has also been a co-presenter at the ABA Franchise Forum on several topics: "Rediscovering Subjectivity: Does the UCC's Open-Price Doctrine Offer New Theories for Reining in Discretion and Filling In Gaps In Franchise Contract Rights," (2007), "Litigating Incurable Defaults," (2010) and False Advertising In Franchise Systems (2013).

Alex has also had the privilege of serving as a Director and Lifetime Fellow of the Florida Bar Foundation, a 501(c)(3) public charity, and the only statewide organization that provides financial support for legal aid and promotes improvements in addressing the civil legal needs of the poor.

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Ms. Constantinou is admitted to practice in the State of New Jersey, the State of New York, the United States District Court for the District of New Jersey, the United States District Court for the Eastern District of New York, the United States District Court for the Southern District of New York, the United States Court of Appeals for the Third Circuit, and the Supreme Court of the United States.

Through Wyndham's relationship with Kids In Need of Defense (KIND), Ms. Constantinou has served as a pro bono attorney to unaccompanied immigrant children since 2011. In 2015, she was awarded the Pro Bono Award by Wyndham Worldwide Corporation for her efforts in securing asylum and lawful permanent residency for multiple child clients. She additionally serves as a volunteer attorney with the New Jersey Law & Education Empowerment Project (NJLEEP) and is a member of the Wyndham Legal Department Diversity and Pro Bono Committees. In past years, she served as Chair of the Governance Committee for Wyndham's New Jersey chapter of Women on Their Way.

In July 2016, Ms. Constantinou presented at the Asian American Hotel Owners Association (AAHOA) Town Hall, speaking on women's empowerment in the business and private sector setting. In June 2016, she authored a blog for the Association of Corporate Counsel, reflecting on her representation of clients with KIND. In November 2015, Ms. Constantinou was a panelist at the Georgetown University Law Center, Hotel & Lodging Legal Summit, speaking on "Ethical Issues of Corporate Latent Liability." In May 2015, she authored an article for the American Bar Association's Forum on Franchising entitled "Drafting a Dream Team – Working with Outside Counsel." In September 2013, she was interviewed for the ABA Section of Litigation's *Minority Trial Lawyer* on diversity and her experiences in the in-house setting. In March 2011, Ms. Constantinou co-authored an article for the Defense Research Institute, Commercial Litigation Committee's *The Business Suit* entitled, "Manifest Destiny: Helping Your Franchisor Clients Navigate the Risks Associated with Global Expansion."