Franchising has many benefits for the right business model. It enables the franchisor to rapidly expand despite limited capital and gain immediate insight for a local market. For the franchisee, franchising mitigates the risk of starting a new business by offering an established business or product. But when will the franchisor be responsible for the negligence of the franchisee?

WHAT IS A FRANCHISE SYSTEM?

Franchises are everywhere. 7-Eleven, Arby’s, Wendy’s, Whataburger, Red Robin, Steak’N’Sshake, TGI Friday’s, Motel 6 and many other businesses are direct examples of domestic franchises. Some companies like California Pizza Kitchen and the Darden brands even franchise internationally. Typically in franchise relationships, the franchisee operates an independent business but uses the franchisor’s trademark or trade name under license. In exchange for using the franchisor’s trademark, the franchisee typically must comply with a detailed franchise or license agreement designed to protect the integrity of the trademark by setting uniform quality, marketing, and operational standards.
For Wendy’s, this helps to ensure that a Frosty is a Frosty no matter what restaurant a customer visits.

**WHEN IS A FRANCHISOR LIABLE FOR THE FRANCHISOR’S NEGLIGENCE?**

If a franchisee’s employee is negligent, courts have used two alternative tests to decide whether the franchisor can also be held liable. One creates expansive liability to the franchisor, the other is more focused upon the actual relationship between the franchisor and franchisee.

The first, older test is the traditional “control or right to control” model. This is the same model used to determine whether an employee is within the course and scope of employment when the negligent act occurred. This test tends to create expansive liability to the franchisor. “If the operational standards included in the typical franchise agreement for the protection of the franchisor’s trademark were broadly construed as capable of meeting the ‘control or right to control’ test that is generally used to determine respondent superior liability, then franchisees would almost always be exposed to vicarious liability for the torts of their franchisees.” *Kerl v. Rasmussen*, 682 N.W.2d 328, 331-32 (Wis. 2004).

Yet the right-to-control test has lost favor. “A few older cases were willing to treat general quality and operational requirements in franchise agreements as indicia of control sufficient to get the plaintiff past summary judgment on that issue.” *Kerl*, 682 N.W.2d at 338 n.5. The right to control test does not represent the modern cases concerning franchisor and franchisee relationships. “The more recent cases reject the general proposition that the contractual quality and operational standards in a franchise agreement give rise to a basis for franchisor vicarious liability, opting instead for a more precisely focused test...” *Id.*

*Rainey v. Langen*, 998 A.2d 342 (Me. 2010) applied the right to control test to a collision involving a delivery driver for a Domino’s Pizza franchise. The injured plaintiff sued and also named the franchisor, Domino’s Pizza, LLC. *Rainey* applied the right to control test but, perhaps acknowledging its problems, re-stated the test as focusing “on a franchisor’s control over a franchisee’s performance of its day-to-day operations.” *Id.* at 349. This “test allows a franchisor to regulate the uniformity and the standardization of products and services without risking the imposition of vicarious liability.” *Id.*

Domino’s franchise agreement imposed typical requirements upon the franchisee. But “although the quality control require-ments and minimum operational standards are numerous, these controls fall short of reserving control over the performance of [franchisee]’s day-to-day operations.” *Id.* at 350. “In the end, the quality, marketing, and operational standards present in the Agreement and Guide do not establish the supervisory control or right of control necessary to impose vicarious liability.” *Id.*

*Rainey’s* evidence seems to stand somewhere between the traditional right to control test and the modern standard, known as the “instrumentality test.” This test looks beyond the franchise agreement and imposes liability on the franchisor only when it has control or a right of control over the daily operation of the specific aspect of the franchisee’s business that was negligent. This test focuses on the reality of a franchise relationship and acknowledges the mere presence of detailed contractual obligations does not mean the franchisor is managing the franchisee’s day-to-day operations. “To the contrary, the imposition of quality and operational requirements by contract suggests that the franchisor does not intervene in the daily operation and management of the independent business of the franchisee.” *Id.* at 338. The modern test also acknowledges that these contractual requirements are required to protect the integrity of the trademark that is vital to the franchisee’s viability.

If common franchise agreement provisions concerning marketing, operational requirements, uniform quality, and a right of inspection do not automatically impose liability on a franchisor, what will? In *Kerl* an employee of an Arby’s franchise left work without permission during his shift and murdered his former girlfriend, before then committing suicide. The victim’s estate attempted to hold Arby’s Inc., the franchisor, responsible for the franchisee’s alleged negligent supervision of the employee. No liability was imposed because Arby’s lacked control over the instrumentality that supposedly caused the harm: day-to-day supervision of employees.

*Patterson v. Domino’s Pizza*, 333 P.3d 725 (2014) presented this question to the Supreme Court of California in the context of a sexual harassment claim. It concluded a “franchisor will be liable if it has retained or assumed the right of general control over the relevant day-to-day operations at its franchised locations.” *Id.* at 743. Although using different terminology, this test is substantially similar to the instrumentality test. *Patterson* reviewed the franchise agreement and the facts of how the franchisee operated, but concluded Domino’s did not have control over the “day-to-day aspects of the employment and workplace behavior of [the franchisee’s] employees,” so Domino’s could not be held liable for the sexual harassment at issue.

*Viado v. Domino’s Pizza*, LLC, 217 P.3d 199 (Or. App. 2009) applied the instrumentality test to another delivery driver. It acknowledged the franchise agreements standards for delivery drivers but concluded “none of them gives Domino’s the right to control the physical details of the manner of driving.” *Id.* at 211 (emphasis in original). “[P]laintiff’s evidence must establish more than the fact that Domino’s set hiring and training standards for delivery drivers or standards for delivery vehicles. ... Setting those standards for a franchisee’s employees and having the right to actually control how the franchisee’s employees perform the physical details of driving are two different things.” *Id.* Consequently Domino’s was not liable.

**HOW CAN A FRANCHISOR PROTECT ITSELF?**

Just like in tax and other areas, the franchise agreement must be sufficiently specific to enforce trademark standards, but not too specific to effectively give the franchisor day to day control over the franchisee’s specific operations. This is a fine line to walk, but modern courts seem willing to accept that establishing operational standards alone is not sufficient to impose liability against a franchisor.

Finally, franchisors are frequently defended under tenders of defense. It is vital that the attorney defending the franchisor understand when liability might be imposed and push to develop facts to support the franchisor’s eventual motion for summary judgment. Too often it seems the defense counsel assigned to defend the employee, franchisee and franchisor together simply assumes the franchisor is liable without fully pressing the issue.

Deciding whether a franchisor is liable for a franchisee’s negligence is often fact specific to the incident involved. Using a well-planned discovery strategy, however, facts can usually be developed to terminate the franchisor’s liability.

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