Caught Between Scylla and Charybdis: Are Franchisors Still Stuck Between the Rock of Non-Uniformity and the Hard Place of Vicarious Liability?[1]

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Uniformity is key to franchising. Indeed, franchising is successful only when the franchisor "find[s] a business model that works and then insists that each franchise adhere religiously to the model."[2] To accomplish that goal, franchisors must, of course, exercise significant control over the manner in which franchisees conduct their businesses. For decades, however, courts frequently relied on these controls to impose vicarious liability on franchisors for the torts and other bad acts of their franchisees. These cases were based on the mistaken premise that a franchisor's brand controls represent actual, or "day-to-day," control over a franchisee's business operations. Because vicarious liability analyses have historically focused on the amount of the principal's perceived control over its agent, and because courts have mistakenly attempted to wedge the square peg of franchising into the round hole of the principal-agent model, a franchisor's insistence on uniformity could very well lead to a finding of vicarious liability. After all, if a franchisor can control the color of the walls or the positioning of signs at its franchisees' stores, then surely it can be held liable for the torts of its franchisees—or so the reasoning went.

1. Being "between Scylla and Charybdis" is an idiom derived from Greek mythology. HOMER'S ODYSSEY, BOOK XII. Like the more common phrase "between a rock and a hard place," it refers to a situation where one is forced to choose between two evils. *See* http://www.britannica.com/EBchecked/topic/530331/Scylla-and-Charybdis. In pop culture, the phrase was featured rather famously in the 1983 hit song by The Police, "Wrapped Around Your Finger" ("You consider me the young apprentice/Caught between the Scylla and Charybdis").

2. William L. Killion, *Franchisor Vicarious Liability—The Proverbial Assault on the Citadel*, 24 FRANCHISE L.J. 162, 164 (Winter 2005).

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The tide began to turn, at least in many jurisdictions, during the late 1990s and early 2000s. Courts began to understand that franchising was not the classic agency relationship it was often made out to be. Applying the traditional "control" test—which usually meant myopically focusing on the ways in which a franchisor ensures uniformity in its franchised locations—simply did not make sense. More importantly, many courts realized that placing too much emphasis on these controls vastly overstates the franchisor's actual control over its franchisees' injury-causing conduct. And that, in turn, leads to the wrong result: holding franchisors vicariously liable for acts that they did not cause, could not control, and never had the power to prevent in the first place.

Even now—decades after these vicarious liability cases first began filtering through the legal system—some courts are still getting it wrong. Some continue to use brand control as a proxy for actual control and impose vicarious liability on franchisors in situations where it simply is not warranted.

This article begins by tracing the history of franchisor vicarious liability from the early days of the "brand control equals agency" approach through the mid-2000s, when courts began applying the more modern "instrumentality" test. Next, it analyzes several recent franchisor vicarious liability decisions, some of which the authors believe were correctly decided while others were not. As to this latter category, this article focuses on two cases decided in California in 2012 and 2013 involving Domino's Pizza and Liberty Tax Service. These cases represent a potentially dangerous legal trend: a renewed willingness by courts to impose vicarious liability on franchisors based primarily on brand control rather than actual control. If anything, these cases demonstrate that some courts are moving in the wrong direction entirely by reverting to the days of the simplistic principal-agent model and a faulty application of the "control" test that went with it.[3]

I. Early Franchisor Vicarious Liability Cases and Application of the "Control" Test

Vicarious liability has existed for centuries.[4] Although its basic principles are well known, a few key concepts are worth repeating. To begin with, vi-

3. This article deals only with those cases (or portions of cases) in which the plaintiff alleged that the franchisee was the *actual* agent of the franchisor. There is another, smaller body of vicarious-liability case law in which plaintiffs have alleged that the franchisee is the "apparent" or "ostensible" agent of the franchisor. *See, e.g.*, Ross v. Choice Hotels Int'l, Inc., 882 F. Supp. 2d 951 (S.D. Ohio 2012); Braucher Braucher v. Swagat Group, L.L.C., 702 F. Supp. 2d 1032 (C.D. Ill. 2011); Jackson Hewitt, Inc. v. Kaman, 100 So. 3d 19 (Fla. Dist. Ct. App. 2011); Kaplan v. Coldwell Banker Residential Affiliates, Inc., 69 Cal. Rptr. 2d 640 (Ct. App. 1997). These cases likewise pose a number of challenges for franchisors. Because actual agency is the most common agency theory asserted by plaintiffs and much of the recent case law tends to center around actual agency, this article does not discuss the law of apparent agency.

4. 1 Modern Tort Law: Liability & Litig. § 7.2 (2d ed. 2013) ("Development of the 'respondeat superior' doctrine to its present form began in the 17th century, when England's growth in industry and commerce required a responsive common law.") (citing Mary M. v. City of Los Angeles, 814 P.2d 1341 (Cal. 1991)).

carious liability is a form of strict liability, or "liability without fault." Under certain instances, the law will impose liability on a person who did not commit the tortious conduct but is held responsible because of the close relationship between that person and the tortfeasor.[5]

Perhaps the most well-known form of vicarious liability is the *respondeat superior* (or master-servant) doctrine under which employers are held liable for the acts of their employees while acting within the scope of their employment. Under the early common law, courts permitted third parties to hold the master legally responsible for the acts of his servant because it was believed that the master could exercise actual control over the servant's physical activities. Based on the master's ability to control the servant, the law deemed it fair to hold the master liable when the servant's negligence caused harm to another even if the master did nothing wrong. The servant's acts were deemed to be those of the master himself.[6] The same principles hold true of the principal-agent relationship. A principal is generally liable for the acts of an agent acting within the scope of his or her agency, again based on the theory that the agent is acting on the principal's behalf and under his or her direction and control.

Two policy reasons for imposing vicarious liability on the master or principal have often been cited: (1) imposing liability creates a financial incentive for the master to ensure that his or her servants exercise care when carrying out the master's business; and (2) if an accident does occur, the master is typically in a much better position to compensate the injured party or, at the very least, to insure against the loss. However the rationale is expressed, one thing is clear: it is the ability to exert actual control over the activities of another that gives rise to vicarious liability.

In the 1950s and 1960s, when franchising was still in its infancy and not well understood by most judges (or lawyers, for that matter), courts quickly seized on the fact that franchisors exerted significant control over the manner in which their franchisees conducted their businesses. Even a half-century ago, franchisors began to understand that "success comes only when one franchise location is indistinguishable from another and also knew that the key to this uniformity was control."[7] Not surprisingly, the judiciary almost immediately tried to squeeze franchising into the familiar principal-agent model. An early case involving Arthur Murray, Inc.,[8] decided in 1967, illustrates this approach.

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

6. Modern Tort Law, *supra* note 4 ("The basis for the common-law liability of the master or principal for the conduct of the servant or agent is stated in the Latin maxim, 'qui facit alium, facit per se'—'he who acts through another, acts through himself.' " (quoting Blackstone's Commentaries, Vol. 1, p. 417)).

7. Killion, *supra* note 2, at 164 (discussing the manner in which Ray "Kroc and his lieutenants at McDonald's would eventually perfect the science of franchise control and establish the model that guides all successful franchise systems today").

8. The Arthur Murray franchise system still exists, boasting 260 dance studios worldwide, according to its website. *See* http://arthurmurray.com (last accessed on July 9, 2013).

In *Nichols v. Arthur Murray, Inc.*,[9] the court held that the franchisee was Arthur Murray's agent, and therefore the franchisor was liable for the franchisee's breaches of its contracts with the plaintiff. In the context of a business relationship, the court stated, when determining whether parties are principal and agent, "the right to control is an important factor."[10] The court then went on to observe that, "[i]f, in practical effect, one of the parties has the right to exercise complete control over the operation by the other an agency relationship exists; the former is the principal and the latter the agent."[11] The court found an agency relationship between Arthur Murray and its franchisee based on the extensive and detailed operational controls contained in the parties' franchise agreement. The court cited with approval the trial court's finding that, "[a] reading of the contract here involved leads me to conclude that *rigid effective controls over almost every aspect of the operation were retained by the licensor* to the extent that for all intents and purposes it should be regarded as the operator of the business."[12]

Interestingly, the *Nichols* court acknowledged that a franchisor has a right under the Lanham Act to impose controls on franchisees in order to protect its trademarks. But the court held that Arthur Murray's controls went too far:

> Many of the controls conferred were not related . . . to the protection of defendant's trade name, including its dancing and teaching methods, goodwill and business image. Other controls, although related to the protection of the trade name, because the exercise thereof was not limited to effecting such purpose, enabled defendant to impose its will upon the franchise holder in areas wholly unrelated to that purpose.[13]

The court hinted that if Arthur Murray wished to avoid creating an agency relationship, it should limit its controls to only those necessary to protect its "trade name, including its dancing and teaching methods, goodwill and business image."[14] Unfortunately, the court did not specify which of the many controls it found objectionable, raising more questions than it answered. Which of the two dozen operational controls cited by the court crossed the (as-yet-undefined) line between something that is necessary to protect a franchisor's marks and something that is not? Which of these controls were supposedly unrelated to the purpose of protecting the franchisor's goodwill? Because these questions were left unanswered, *Nichols* provided lit-

9. 56 Cal. Rptr. 728 (Ct. App. 1967).
10. *Id.* at 731 (citations omitted).
11. *Id.* (citations omitted).
12. *Id.* at 732 (emphasis added).
13. *Id.*
14. Indeed, California courts apparently recognize this to be the primary holding of *Nichols*. *E.g.*, Cislaw v. Southland Corp., 6 Cal. Rptr. 2d 386, 389 (Ct. App. 1992) (summarizing *Nichols* and other cases by concluding that, "taken as a whole, [these cases] impliedly recognize that the franchisor's interest in the reputation of its entire system allows it to exercise certain controls over the enterprise without running the risk of transforming its independent contractor franchisee into an agent").

tle guidance to future courts faced with similar facts. In large part, the legacy of *Nichols* is a black-letter rule that is at best murky and difficult to apply.[15]

Because of these shortcomings, *Nichols* effectively proclaimed that all franchise relationships were principal-agent relationships that exposed the franchisor to vicarious liability for the franchisee's acts, at least if the franchisor attempted to impose even the most basic brand or operational controls. While it is easy to criticize a nearly fifty-year-old opinion for its misunderstanding of franchising, even today, judges, lawyers, and jurors who are not schooled in modern franchising sometimes have difficulty distinguishing between the significant operational and brand protection controls that are common to all franchise relationships (which, in the authors' opinion, should not give rise to an agency relationship), and those things that constitute actual control over day-to-day operations (which arguably could give rise to an agency relationship).[16]

Even so, early cases like *Nichols* set the stage for two-plus decades of poorly reasoned case law relating to franchisor vicarious liability. Well into the 1980s and beyond, courts throughout the country embraced the concept that a franchisor's decision to prescribe detailed, mandatory operational and quality control standards governing the franchisee's business was, in and of itself, sufficient to conclude that the franchisee was the agent of the franchisor, thus exposing the franchisor to vicarious liability for the franchisee's acts.[17]

15. Another case decided the same year, *Porter v. Arthur Murray, Inc.*, 57 Cal. Rptr. 554 (Ct. App. 1967), also held that the franchisee was Arthur Murray's agent, and likewise held the franchisor vicariously liable for the franchisee's breaches of its agreements with the customer/plaintiff.

16. Killion, *supra* note 2, at 165 & n.20.

17. *See, e.g.*, Crinkley v. Holiday Inns, Inc., 844 F.2d 156, 166 (4th Cir. 1988) (holding that under North Carolina law whether the franchisee was the franchisor's agent was a jury question because, among other things, "[b]y virtue of the franchise agreement, Holiday Inns [the franchisor] retained a significant degree of control over the operation of the Holiday Inn-Concord [i.e., the franchised location]"); Drexel v. Union Prescription Centers, 582 F.2d 781, 788 (3d Cir.1978) (applying Pennsylvania law and reversing summary judgment because general provisions in the franchise agreement were "so broadly drawn as to render uncertain the precise nature and scope of [franchisor's] rights vis-á-vis its franchisee"); Taylor v. Checkrite, Ltd., 627 F. Supp. 415, 417 (S.D. Ohio 1986) (applying Ohio law and concluding that, based on the operational controls outlined in the franchise agreement, the franchisor "ha[d] such a right of control over the franchisee as to make that franchisee its agent in regard to the activities complained of in this lawsuit"); Hayward v. Holiday Inns, Inc., 459 F. Supp. 634, 635–36 (D. Va. 1978) (applying Virginia law and denying summary judgment to the franchisor because it was a jury question whether the "detailed rules and standards" imposed by the franchisor gave it "the necessary 'control or right to control the methods or details of doing the work' of the franchisee"); Raasch v. Dulany, 273 F. Supp. 1015, 1018–19 (E.D. Wis. 1967) (denying summary judgment because provisions in an automobile-rental franchise agreement imposing quality control requirements on a franchisee created an issue of fact as to whether the franchisor had a right of control); Billops v. Magness Const. Co., 391 A.2d 196, 198 (Del. 1978) (holding that provisions in a hotel franchise agreement "reveal a triable issue on the question of actual agency," precluding summary judgment on a claim that the franchisor should be held vicariously liable for the franchisee's harassment of a hotel customer); Singleton v. Int'l Dairy Queen, Inc., 332 A.2d 160, 161–62 (Del. Super. Ct. 1975) (concluding that provisions of a restaurant franchise agreement suggested "excessive" control by the franchisor over the franchisee, precluding summary judgment on a claim that the franchisor was vicariously liable

II. *Kerl* and the Modern "Instrumentality" Test

The simplistic "brand control equals agency" approach that courts applied throughout the '60s, '70s, and '80s eventually began to break down in the 1990s. Armed perhaps with a better understanding of franchising, courts began to take a more nuanced approach. Rather than asking whether the franchisor "controlled" the franchisee in a general sense (by, for example, imposing standards concerning the look and feel of the franchised business and the quality of products or services), courts began asking the much narrower question of whether the franchisor controlled the precise "instrumentality," or aspect of the franchisee's business, that caused the alleged harm.[18] The court should find the existence of a potential agency relationship between the franchisor and the franchisee only if the answer to that question is yes. After all, it makes sense to impose liability *only in those situations where the franchisor has the legal right and practical ability to prevent the alleged harm.* As noted earlier, the principal's ability to prevent harm was one of the primary historical reasons for imposing vicarious liability.

It would be difficult to track the trajectory of cases from the early "brand control equals agency" approach to the "instrumentality" test, which is now considered the majority rule.[19] One commentator has suggested that the first challenge to the old regime can be found in a 1993 Texas case, *Exxon Corp. v. Tidwell*.[20] However, although *Tidwell* was likely the first state supreme court to expressly reject the notion that general operational controls alone were sufficient to create an agency relationship, it was not the first court to question it, at least impliedly.[21] Albeit few and far between, there were a handful of published decisions in the 1970s and 1980s in which courts both acknowl-

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for an injury suffered by a restaurant customer caused by defective glass door); Ahl v. Martin, 440 N.Y.S.2d 748, 749 (N.Y. App. Div. 1981) (affirming denial of summary judgment because there were "disputed facts and conflicting inferences regarding the degree of control and right to control by the [regional and national franchisors] over the operation of the store at which . . . [a drunken] driver allegedly purchased alcoholic beverage[s]").

18. *See Kerl*, 682 N.W.2d at 338–41 (examining ten cases and concluding that "[t]hese courts have adapted the traditional master/servant 'control or right to control' test to the franchise context by narrowing its focus: the franchisor must control or have the right to control the daily conduct or operation of the particular 'instrumentality' or aspect of the franchisee's business that is alleged to have caused the harm before vicarious liability may be imposed on the franchisor for the franchisee's tortious conduct. The quality and operational standards typically found in franchise agreements do not establish the sort of close supervisory control or right to control necessary to support imposing vicarious liability on a franchisor for the torts of the franchisee for all or general purposes.").

19. *See, e.g.*, Dipianti v. Jan-Pro Franchising Int'l, Inc., 990 N.E.2d 1054, 1064 (Mass. 2013) ("The 'instrumentality' test . . . accords with the approach of the majority of courts that have considered vicarious liability in the context of the franchise relationship."); *see also Kerl*, 682 N.W.2d at 341 (calling the instrumentality test the "majority approach in other jurisdictions").

20. *See* Killion, *supra* note 2, at 166 (discussing Exxon Corp. v. Tidwell, 867 S.W.2d 19 (Tex. 1993)).

21. In the most technical sense, *Tidwell* was not a franchise case. There, an employee was shot and injured during a robbery at a service station that Exxon leased to its licensee. Accordingly, the Texas Supreme Court analyzed the case in light of the "hybrid body of law [that] has developed governing oil companies and their service station lessees." *Tidwell*, 867 S.W.2d at 21.

edged the extensive controls that franchisors exert over their franchisees, but at the same time rejected the notion that such controls, standing alone, were sufficient to create an agency relationship.[22] However, none of these cases adequately explained why franchising is different from other business relationships that have often been analyzed under the traditional principal-agent model. Nor did they explain why a mechanical application of that model in franchising usually leads to an incorrect result.

That gap was filled in 2004 when the Wisconsin Supreme Court handed down its opinion in *Kerl v. Dennis Rasmussen, Inc.*[23] The *Kerl* decision is perhaps the best and most complete explanation of why brand controls alone are not the same as the actual, day-to-day control of a franchisee's business, and, as a result, why it makes little sense to focus solely on those controls when trying to determine whether an agency relationship exists.

The facts of *Kerl* were tragic. Harvey Pierce worked at an Arby's restaurant in Madison, Wisconsin, as part of a jail work-release program.[24] On June 11, 1999, he left the restaurant without permission and walked to a nearby Wal-Mart; in the parking lot of the store, he shot his ex-girlfriend, Robin Kerl, and her fiancé, David Jones, and then turned the gun on himself.[25] Kerl survived but was gravely injured.[26] Jones and Pierce both died.[27] Kerl and Jones's estate later sued the franchisee, Dennis Rasmussen, Inc. (DRI), and the franchisor, Arby's, Inc., among others.[28] Plaintiffs alleged that Arby's should be held vicariously liable for negligently hiring, retaining, and supervising Pierce under theories of actual or constructive agency and *respondeat superior*; they also contended that Arby's was also directly liable for its own alleged negligence.[29] The trial court granted summary judgment to Arby's on all claims.[30] Plaintiffs appealed only the dismissal of their vicarious liability claims against

22. *See, e.g.*, McLaughlin v. Chicken Delight, Inc., 321 A.2d 456, 459–60 (Conn. 1973) (upholding the trial court's finding that the franchisee's delivery driver was not an agent of the franchisor; accordingly, the franchisor could not be held liable for the death of plaintiff's decedent resulting from a car accident allegedly caused by the franchisee's employee); Murphy v. Holiday Inns, Inc., 219 S.E.2d 874, 878–79 (Va. 1975) ("As appears from the face of the document, the purpose of those provisions [in the parties' franchise agreement] was to achieve systemwide standardization of business identity, uniformity of commercial service, and optimum public good will, all for the benefit of both contracting parties. The regulatory provisions did not give defendant control over the day-to-day operation of [the franchisee's] motel."); Holiday Inns, Inc. v. Newton, 278 S.E.2d 85, 86 (Ga. Ct. App. 1981) (citing *Murphy* and concluding that there was no agency relationship between the franchisor and franchisee because "[t]he franchise [agreement] gave [the franchisor, Holiday Inns, Inc.] no control over the premises or the employees" that allegedly caused the injury to the plaintiff).

23. 682 N.W.2d 328 (Wis. 2004).

24. *Id.* at 332.

25. *Id.*

26. *Id.* Ms. Kerl's story apparently had a happy ending, however. A web page created in 2010 indicates that she has recovered physically and is doing well. *See* http://www.capitalcityhues.com/102110RobinKerl.html (last accessed July 15, 2013).

27. *Kerl*, 682 N.W.2d at 332.

28. *Id.*

29. *Id.* at 332–33.

30. *Id.* at 333.

Arby's.[31] The Wisconsin Court of Appeals affirmed the trial court's judgment as to Arby's.[32]

The Wisconsin Supreme Court accepted review. Justice Diane S. Sykes, writing for the court, framed the issue as "whether and under what circumstances a franchisor may be held vicariously liable for the negligence of its franchisee."[33] In a lengthy introduction, the court outlined its belief that franchising is qualitatively different from other types of business relationships and must be treated differently when analyzing whether a franchisor should be held vicariously liable. The court began by noting that virtually all franchises are "operated in accordance with a detailed franchise or license agreement," the purpose of which is to "protect the integrity" of the franchisor's marks.[34] The franchisor protects its marks by "setting uniform quality, marketing, and operational standards applicable to the franchise."[35]

Although these standards may at first give the appearance that the franchisor has a "right to control" the franchisee for vicarious liability purposes, the very nature of franchising compels a different conclusion:

> The rationale for vicarious liability becomes somewhat attenuated when applied to the franchise relationship, and vicarious liability premised upon the existence of a master/servant relationship is conceptually difficult to adapt to the franchising context. 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 respondeat superior liability, then franchisors would almost always be exposed to vicarious liability for the torts of their franchisees. We see no justification for such a broad rule of franchisor vicarious liability. If vicarious liability is to be imposed against franchisors, a more precisely focused test is required.
>
> We conclude that the marketing, quality, and operational standards commonly found in franchise agreements are insufficient to establish the close supervisory control or right of control necessary to demonstrate the existence of a master/servant relationship for all purposes or as a general matter. We hold, therefore, that a franchisor may be held vicariously liable for the tortious conduct of its franchisee *only if the franchisor has control or a right of control over the daily operation of the specific aspect of the franchisee's business that is alleged to have caused the harm*.[36]

The *Kerl* court held that, although the franchise agreement imposed a great number of quality and operational standards on the franchisee, DRI, "Arby's did not have control or the right to control DRI's supervision of its employees."[37] Because personnel supervision (or more specifically, DRI's alleged failure to properly supervise Pierce) was the "specific aspect" of DRI's business that caused harm to plaintiffs Kerl and Jones, and Arby's did not supervise Pierce or control his activities on a day-to-day basis or have the right

31. *Id.*
32. *Id.*
33. *Id.* at 330.
34. *Id.* at 331.
35. *Id.*
36. *Id.* at 331–32 (emphasis added).
37. *Id.* at 332.

to do so, Arby's could not be held vicariously liable for DRI's alleged negligence.[38]

Although this holding may seem somewhat unremarkable at first glance, *Kerl* represents an important moment in the history of American franchise law. For one thing, it may have been the first time a court recognized that imposing the quality controls inherent in any franchise relationship is not the same as exercising day-to-day control. If anything, the court in *Kerl* reached exactly the opposite conclusion. It reasoned that the franchisor sets standards for franchisees to follow precisely because it does not and cannot control the day-to-day operations of the franchisee's business. Imposing these controls is the only way to ensure uniformity of the products or services without interfering with the franchisee's right to operate as an independent businessperson, which is the arrangement that all franchise relationships contemplate.

As the *Kerl* court put it, "[t]he typical franchisee is an independent business or entrepreneur, often distant from the franchisor and not subject to day-to-day managerial supervision by the franchisor."[39] The existence of brand controls does not indicate, as many courts had previously held, that a franchisor manages or controls the franchisee's business. "To the contrary," the court wrote, "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."[40] To paraphrase the court, the only way the franchisor can ever hope to ensure the necessary uniformity in its franchised units without actually operating or managing them itself is to impose these quality standards.[41] The *Kerl* court's observations on these issues therefore reflect the important distinction between imposing quality control standards from a distance, and actually managing or controlling a franchisee's operations. The former is not a sufficient basis on which to impose vicarious liability, while the latter may, in appropriate circumstances.

Aside from its significance to the substantive law of franchising, the timing of the *Kerl* decision was also important. By the early 2000s, franchising had become, in the words of one commentator, "a giant engine of the American economy."[42] Reducing the instances in which franchisors can be held vicariously liable for the acts of their franchisees is a necessary step in continuing the explosive growth that franchising has experienced during the last

38. *Id.*
39. *Id.* at 338.
40. *Id.* (emphasis added).
41. In fact, one of the primary goals of franchising is to allow the franchisor to *avoid* managing a large network of outlets on a day-to-day basis, while at the same time increasing the presence and value of its brand in the marketplace. As the court in *Kerl* remarked, "[a] franchise relationship is a marriage of convenience. It enables franchisors to spread the capital cost of enlarging the market for their goods and services by transferring those costs to local franchisees." *Id.* at 337.
42. Edward Wood Dunham, *Federal Franchise Legislation and Congress's Own Duty of Competence and Due Care*, 21 FRANCHISE L.J. 67, 68 (Fall 2001).

two decades. After all, "if the law . . . holds franchisors routinely liable for the wrongful acts of its franchisees, franchisors will either quit franchising or at least charge higher fees" to franchisees for the privilege of using their marks and business format.[43] Neither of these options is attractive or economically sound, given the slow economic recovery after the Great Recession. As of 2007, the most recent year for which numbers are available, franchised businesses helped to create more than 17 million jobs in the United States and pumped more than $2 trillion into the national economy.[44] Thus, dealing appropriately with unnecessary legal obstacles, like the arbitrary imposition of vicarious liability on franchisors, is and remains an important legal and economic issue.

III. Franchisor Vicarious Liability in 2013—Is the Instrumentality Test Here to Stay?

The instrumentality test has been adopted in a significant number of jurisdictions that have considered vicarious liability in the franchise context. For the most part, it seems, gone are the days when a franchisor that imposes ordinary brand controls on its franchisees is automatically deemed vicariously liable for its franchisee's bad acts based solely on those controls. That was a far too simplistic approach that tended to overstate (often vastly) the franchisor's real, day-to-day control. Actual control is and should be the focus of any sound vicarious liability analysis. Likewise, for the reasons that the *Kerl* court pointed out, trying to squeeze the franchise relationship into the old principal-agent model is often problematic.[45]

A sampling of recent decisions from various federal district courts indicates that the federal bench understands franchising and the issues surrounding vicarious liability better than ever before.

In *Gray v. McDonald's USA, LLC*,[46] an employee of a McDonald's franchisee was physically assaulted by his manager, who was also an employee of the franchisee.[47] The plaintiff argued, among other things, that McDonald's was vicariously liable for the franchisee's negligent supervision of the manager as well as failure to provide a safe workplace.[48] Expressly relying on *Kerl*, the court said that "the relevant inquiry" is not whether McDonald's requires a franchisee's managers to attend training or whether it imposes brand controls.[49] Rather, the key is "whether [McDonald's] had the right to hire, fire,

43. Killion, *supra* note 2, at 165.
44. *See* International Franchise Association, The Economic Impact of Franchised Businesses: Volume III, Results for 2007, at 1–15 (*available at* http://www.buildingopportunity.com/download/National%20Views.pdf) (last accessed July 12, 2013).
45. *Kerl*, 682 N.W.2d at 337–38.
46. 874 F. Supp. 2d 743 (W.D. Tenn. 2013).
47. *Id.* at 745–46.
48. *Id.* at 749, 752.
49. *Id.* at 752.

and discipline [the manager who assaulted the employee]."[50] There was "[n]o evidence" of this, the court held, and therefore McDonald's could not be held vicariously liable for the franchisee's alleged failure to properly supervise the manager.[51] The court granted summary judgment to McDonald's on that claim.[52]

In re Motor Fuel Temperature Sales Practices Litigation[53] involved a group of consumers who purchased gasoline at Circle K convenience stores in Kansas. They sued a number of defendants, including Circle K Stores, Inc., the franchisor of the outlets at which the fuel was purchased, alleging that the fuel sales practices violated the Kansas Consumer Protection Act. Circle K moved for summary judgment on plaintiffs' claims "because it does not own or operate any retail motor fuel stores in Kansas—it only franchises Circle K-branded stores in the state."[54] Plaintiffs argued that Circle K was nevertheless vicariously liable for the franchisees' allegedly deceptive sales practices.[55] The court disagreed and granted Circle K's motion. Citing Kansas law, the court stated that "[t]o hold Circle K vicariously liable for the acts of its franchisees on a theory of actual authority, plaintiff must show that Circle K controlled or had the right to control franchisees in the particular instrumentality that harmed plaintiff, *i.e.*, in the details of selling motor fuel."[56] The court further held that the evidence of Circle K's alleged control upon which the plaintiffs were relying were "precisely the types of controls that a franchisor may legitimately exercise over its franchisees without incurring vicarious liability."[57] Indeed, the court noted, the plaintiffs had failed to produce any evidence whatsoever that Circle K had any control over the manner in which franchisees sold motor fuel, which was the "instrumentality" that caused the alleged harm to the plaintiffs.[58] Accordingly, Circle K was entitled to summary judgment.[59]

In *Karnauskas v. Columbia Sussex Corp.*,[60] the plaintiff sued, among others, Marriott International, Inc., after he allegedly cut his hand while using a coffee maker at a Marriott-branded hotel in Phoenix.[61] The plaintiff alleged that Marriott was vicariously liable for the alleged negligence of its franchisee, defendant Columbia Properties Phoenix LP, in failing to properly inspect and dispose of the faulty glass coffee pot.[62] The court purported to

50. *Id.*
51. *Id.*
52. *Id.* at 753. The court also rejected the argument that McDonald's was directly liable for Gray's injuries. *See id.*
53. MDL No. 1840, 2012 WL 1536161 (D. Kan. Apr. 30, 2012).
54. *Id.* at *2.
55. *Id.* at *5.
56. *Id.*
57. *Id.* at *6.
58. *Id.*
59. *Id.* at *8.
60. No. 09-cv-7104, 2012 WL 234377 (S.D.N.Y. Jan. 24, 2012).
61. *Id.* at *1.
62. *Id.* at *3.

apply Arizona law.[63] However, it began its analysis by surveying cases from a number of jurisdictions, including the Wisconsin Supreme Court's decision in *Kerl*, and concluded that in the "majority of cases involving franchisor liability," the franchisor may be held liable only when it has "considerable day-to-day control over the specific instrumentality that is alleged to have caused the harm."[64] Although Arizona courts had not specifically addressed the issue, the court predicted that Arizona law would likewise hold that in order to be held vicariously liable for the negligence of a franchisee, a franchisor "must exercise more than a right to control uniformity of appearance" at its franchised locations.[65] The court therefore concluded that because Marriott "did not have control over the day-to-day operations of the hotel or the instrumentality at issue in this case [i.e., the coffee maker that allegedly injured the plaintiff], it owed no duty of care to plaintiff. . . ."[66] Accordingly, the court granted summary judgment for Marriott.[67]

In *Courtland v. GCEP-Surprise, LLC*,[68] the plaintiff, who worked as a bartender and server at a franchised Buffalo Wild Wings restaurant, alleged that she was subjected to sexual discrimination, harassment, and retaliation by the restaurant's general manager and an assistant manager.[69] She filed a complaint alleging Title VII claims against the franchisee, GCEP-Surprise, LLC, and two franchisor entities, Buffalo Wild Wings, Inc. and Buffalo Wild Wings International Inc. (collectively, Buffalo Wild Wings).[70] She alleged, among other things, that Buffalo Wild Wings was vicariously liable for the managers' alleged harassment.[71] However, finding the instrumentality test to be the " 'predominant test' for holding a franchisor vicariously liable,"[72] the court concluded that, although Buffalo Wild Wings, "maintained strict guidelines as to the presentation and operation of the Restaurant," that fact did "not establish, without more, that [it] had control over the [r]estaurant's managerial staff."[73] Since Buffalo Wild Wings did not hire, fire, or supervise the managers, i.e., the "instrumentality" that caused harm to the plaintiff, it could not be held vicariously liable for their alleged harassment.[74] Accordingly, the court granted summary judgment in favor of Buffalo Wild Wings.[75]

63. *Id.* at *2.
64. *Id.* at *3.
65. *Id.*
66. *Id.*
67. *Id.*
68. No. CV-12-00349-PHX-GMS, 2013 WL 3894981 (D. Ariz. July 29, 2013).
69. *Id.* at *1.
70. *Id.* at *2.
71. *Id.*
72. *Id.* at *5 (quoting *Gray*, 874 F. Supp. 2d at 752).
73. *Id.* at *6.
74. *Id.* at *7.
75. *Id.* at *8. The plaintiff also alleged that Buffalo Wild Wings and the franchisee were her "joint employers," and that the franchisee was the franchisor's apparent, as opposed to actual, agent. The court granted summary judgment to the franchisor on these claims as well.

Likewise, the highest courts of at least two states have recently adopted the instrumentality test.

In June 2013, the Supreme Judicial Court of Massachusetts, answering a question certified to it by the federal district court, ruled that the instrumentality test was the proper one to apply when determining whether a franchisor is vicariously liable for the acts of a franchisee.[76] In *Depianti v. Jan-Pro Franchising International, Inc.*,[77] the plaintiffs were a group of "unit franchisees" who alleged that the "regional master franchisee" (BradleyMktg Enterprises, Inc.) misclassified them as independent contractors, rather than employees and therefore committed various wage-and-hour violations under Massachusetts law.[78] The plaintiffs sought to hold the franchisor, Jan-Pro, vicariously liable for Bradley's alleged violations of these labor laws.[79] Recognizing that the traditional master-servant or principal-agent test is "not easily transferrable to the franchise relationship," the court specifically adopted the instrumentality test, which it observed has now become the majority rule.[80] The court held that, "a franchisor is vicariously liable for the conduct of its franchisee only where the franchisor controls or has a right to control the specific policy or practice resulting in harm to the plaintiff."[81] This test, the court stated, best serves one of the primary purposes in imposing vicarious liability: namely, doing so only where the franchisor is in a reasonable position to prevent the harm in the first place.[82]

In *Ketterling v. Burger King Corp.*,[83] the plaintiff alleged that Burger King Corp., the franchisor, was vicariously liable for the slip-and-fall injury she suffered in the snowy parking lot of a franchisee's restaurant.[84] The Idaho Supreme Court, in a case of first impression, ruled that "[a] franchisor may be held vicariously liable for the tortious conduct of its franchisee only if the franchisor has control or a right to control over the daily operation of the specific aspect of the franchisee's business that is alleged to have caused the harm."[85] In this case, even though the franchise operations manual directed the franchisee to clear snow and ice from areas around the restaurant, it also specifically provided that the franchisee alone was responsible for the store's day-to-day operation.[86] Because Burger King Corp. did not

76. Depianti v. Jan-Pro Franchising Int'l, Inc., 990 N.E.2d 1054 (Mass. 2013).
77. *Id.*
78. *Id.* at 1058.
79. *Id.* at 1062.
80. *Id.* at 1062–63 (discussing *Kerl* and similar decisions).
81. *Id.* at 1064. Clearly, the court could have chosen its words more carefully here. The instrumentality test that the court adopted is not concerned with whether the franchisor controls a specific policy. The instrumentality test focuses on the franchisor's ability to control specific acts, not policies. Every franchisor controls the policies that govern its relationship with its franchisees. Operations manuals are full of these policies.
82. *Id.*
83. 272 P.3d 527 (Idaho 2012).
84. *Id.* at 528.
85. *Id.* at 533.
86. *Id.*

"control or [have] a right to control" the frequency with which the franchisee cleared snow, the franchisor could not be held vicariously liable for injuries the plaintiff allegedly suffered there.[87] The court therefore affirmed the trial court's summary judgment ruling in Burger King's favor.[88]

These six recent decisions were correctly decided under the modern, majority rule as expressed in *Kerl*. The instrumentality test is not concerned with whether the franchisor imposes brand controls. Every franchisor does. Franchising is all about rigorous uniformity, which can be achieved only through appropriate operational standards that must be enforced. But if courts focus only on a franchisor's quality control policies, we will return to the days of the "brand control equals agency" approach discussed earlier in this article. Such an approach reflected a profound misunderstanding of how franchising works. Likewise, the traditional "right-to-control" test, often expressed through a master-servant or principal-agent analysis, swept too broadly. It, too, ended up using brand controls as a proxy for the actual control that, historically at least, had always been necessary to impose vicarious liability.

The instrumentality test, as these cases show, is the appropriate one to apply in the franchising context because it asks the right question: namely, whether the franchisor has both the legal right and the practical ability to control on a day-to-day basis the specific act that caused harm to the plaintiff. Only then does it make sense to impose vicarious liability on the franchisor, because only in those situations can one reasonably fault the franchisor for its failure to prevent harm. When applied properly, this test should result in a finding of vicarious liability in relatively few cases. Quite simply, most franchisors have very little, if any, actual day-to-day control over the operations of their franchisees' businesses. As a result, franchisors are rarely in the best position to prevent harm to customers and other third parties who patronize or are employed at franchised businesses.[89]

IV. Two Recent California Decisions Raise Concern for Franchisors

Despite a growing number of jurisdictions adopting the instrumentality test, California has declined to do so, as demonstrated by two recent deci-

87. *Id.*
88. *Id.*
89. As one commentator has observed, the franchisor's actual contact with its franchisees' operations is often rather limited:

> In the typical franchise system, the franchisor's contact with the daily operation of the franchised location is a periodic quality-assurance (QA) evaluation, a visit that might occur from one to four times a year. The QA evaluation may last a day, at most, and is rarely conducted by an individual equipped to do a comprehensive security and safety evaluation.

Killion, *supra* note 2, at 165. "From a practical viewpoint, the franchisor is not in the best position to control wrongful acts of the franchisee." *Id.*

sions discussed below. These should give franchisors cause for concern, whether they currently do business in California.

A. *Patterson v. Domino's Pizza, LLC*

In *Patterson v. Domino's Pizza, LLC*,[90] the plaintiff, a teenage girl, went to work for a Domino's Pizza franchise in Thousand Oaks, California.[91] Almost immediately after she arrived, she was allegedly sexually harassed by her manager, Renee Miranda.[92] She soon left the job and later sued the franchisee, Sui Juris, LLC, and three entities related to the franchisor: Domino's Pizza, LLC, Domino's Pizza, Inc., and Domino's Pizza Franchising, LLC (collectively, Domino's).[93] She claimed that both Sui Juris and Domino's were her employers and were vicariously liable for Miranda's misconduct under the *respondeat-superior* doctrine.[94] The trial court granted summary judgment in Domino's favor, finding, among other things, that (1) the franchise agreement between Domino's and Sui Juris gave the franchisee sole control over hiring and personnel decisions at the franchised location, and (2) there was no evidence that Domino's played any role in any of Sui Juris' hiring or personnel decisions.[95] In short, the trial court found that Sui Juris was an independent contractor and that Miranda was "not an employee or agent of . . . Domino's . . . for purposes of imposing vicarious liability."[96]

The California Court of Appeal, however, took a very different view of the evidence and reversed the trial court's summary judgment ruling. Focusing extensively and nearly exclusively on the franchise agreement and a "Manager's Reference Guide," the court cited a laundry list of the ways in which Domino's controlled Sui Juris' operation of its business.[97] The court noted, for example, that Domino's (1) set standards for employees' grooming and appearance; (2) had access to the store's computer system (which contained personnel data); and (3) created rules regarding signage, store hours, advertising, equipment, décor, menu pricing, and the like.[98] These controls, the court said, "substantially limit franchisee independence in areas that go beyond food preparation standards."[99] The court also cited evidence that after the harassment came to light, a Domino's area

90. 143 Cal. Rptr. 3d 396 (Ct. App. 2012). On October 10, 2012, the California Supreme Court granted review of this case. *See* Patterson v. Dominos [sic] Pizza LLC, 287 P.3d 68 (Cal. 2012). Under the California Rules of Court, the opinion was automatically de-published once the court granted review. *See* California Rules of Court 8.1105(e)(1). As of the time this article went to press, the supreme court had not yet issued its opinion.

91. *Patterson*, 143 Cal. Rptr.3d at 397–98.

92. *Id.* at 398.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* (ellipses in original).

97. *Id.* at 399–400.

98. *Id.* at 400.

99. *Id.* at 400.

leader told Sui Juris' owner Daniel Poff, "[y]ou've got to get rid of this guy," referring to Miranda.[100] Poff testified that he felt that he had to terminate Miranda or risk losing his franchise.[101] The court concluded that the evidence, taken as a whole, "supports reasonable inferences that there was a lack of local franchise management independence."[102] This alleged "lack of independence," according to the court, meant that Sui Juris was Domino's "agent," which in turn made Domino's vicariously liable for Sui Juris' failure to prevent Miranda from sexually harassing Patterson.

The court's decision in *Patterson* is troubling for a number of reasons, the most obvious of which is its apparent lack of understanding of modern franchising. The court focused far too much on ordinary brand controls that virtually all franchise systems impose on their franchisees. Standards for what the franchisee's employees wear to work, what signs should be put in the windows, how to decorate the franchised location, and what prices to charge are all things that are legitimately within the franchisor's prerogative. These sorts of controls are key to maintaining uniformity among franchised locations within a particular system and have been commonplace for decades. The court was apparently under the mistaken impression that the only things Domino's could prescribe without incurring vicarious liability were "food preparation standards," as if that were the sole component of the company's brand identity. However, as most courts now understand franchising, the franchisor's ability to create and enforce brand controls without creating an agency relationship in the process is not nearly so limited. Although the court was able to list many of the ways in which Domino's set standards for its franchisees, it failed to explain how Domino's controlled—or had the right to control—the *specific conduct* that caused the alleged harm to Patterson, namely, sexual harassment by her manager. Put another way, the court reasoned that if Domino's could control the décor in the restaurant or set standards for the employees' appearance, it also had the right to supervise and directly control on a day-to-day basis the franchisee's employees.

This is exactly the kind of reasoning that courts employed decades ago, as discussed earlier in this article. But this reasoning is simply no longer valid, if indeed it ever was. If anything, the use of rigorous brand controls proves that the franchisor does not have day-to-day control over its franchisees' businesses. That is precisely why it needs to set standards—because it cannot possibly manage the daily affairs of tens, hundreds, or even thousands of

100. *Id.* at 402.

101. *Id.* Domino's presented evidence that Poff had already decided to terminate Miranda before the conversation with the area leader. *See* Domino's Opening Brief on the Merits, 2012 WL 7186731, at *11–12 ("When Patterson and her father told Poff about the purported harassment, Poff immediately said he would fire Miranda."). But since the California Court of Appeal was reviewing a summary judgment ruling, the court naturally declined to resolve these factual disputes. *See Patterson*, 143 Cal. Rptr. 3d at 402.

102. *Patterson*, 143 Cal. Rptr. 3d at 402.

franchised locations.[103] Further, the court's decision in *Patterson* undermines one of the primary reasons for imposing vicarious liability in the first place. Imposing vicarious liability is fair only when the principal has the ability to prevent the alleged harm to the plaintiff by exercising very real and tangible control over an agent.[104] In this case, there was simply no evidence that Domino's knew about or condoned Miranda's behavior, or that it could have done anything to stop it.[105]

B. *People v. JTH Tax, Inc.*

In a civil enforcement action, *People v. JTH Tax, Inc.*,[106] the California attorney general filed a complaint against JTH Tax, Inc. (d/b/a Liberty Tax Service) alleging that it had violated various California unfair competition and false advertising statutes.[107] The lawsuit claimed that Liberty and its franchisees made misleading or deceptive statements in print and television advertising regarding Liberty's refund anticipation loans and electronic refund checks, and that the applications for these products contained inadequate disclosures relating to their terms.[108] After a nine-day bench trial, the trial court awarded the state approximately $1.169 million in civil penalties. Liberty was ordered to pay approximately $135,000 in restitution for violating state and federal laws relating to lending, unfair competition, consumer protection, and false advertising.[109] The court also issued an order requiring Liberty to police the advertising practices of its franchisees. "Under the injunction, Liberty is required to monitor its employees and franchisees to ensure they refrain from engaging in false advertising, to warn, then fine, and

103. Nor do most franchisors have any desire to manage them. That is often why they choose franchising as a business model rather than opening a chain of company-owned stores. *See Kerl*, 682 N.W.2d at 337 ("A franchise relationship is a marriage of convenience. It enables franchisors to spread the capital cost of enlarging the market for their goods and services by transferring most of those costs to local franchisees.").

104. *Kerl*, 682 N.W.2d at 338 (noting that, because the franchisor exercises little or no control over its franchisees' daily operations, "the perceived fairness" of imposing vicarious liability is "diminished in th[e] [franchising] context").

105. The fact that the Domino's area leader allegedly recommended that Sui Juris fire Miranda after learning of the harassment is not, as the appellate court seemed to believe, persuasive evidence of day-to-day control over the franchisee's personnel decisions. The area leader was merely expressing the commonsense notion that if one employee is sexually harassing another, firing the harasser is a prudent thing to do. Indeed, the fact that the area leader knew of the harassment only because the franchisee told her about it and may have asked for advice strongly suggests that Domino's had no role whatsoever in supervising the franchisee's employees. If Domino's did have that kind of control, Patterson would have reported the harassment directly to Domino's, rather than to Sui Juris. Here, there appears to be no evidence that Patterson *ever* communicated with Domino's about Miranda's alleged behavior.

106. 151 Cal. Rptr. 3d 728 (Ct. App. 2013), *review denied* May 1, 2013.

107. *Id.* at 733. At the time of trial, Liberty Tax Service had had more than 2,000 franchised and company-owned stores throughout the United States, including 195 franchised stores in California. *Id.*

108. *Id.*

109. *Id.* at 732.

then terminate those who commit violations, and to promptly notify the Attorney General's office of violations."[110]

One of the main issues in the case was whether Liberty could be held vicariously liable for advertisements that its franchisees placed but that it did not expressly approve. The trial court concluded that it was liable. "It is generally understood," the trial court wrote in its forty-nine-page decision, "that franchisors are often caught between the Scylla of failing to exercise sufficient control to protect their marks, and the Charybdis of exercising so much control they are vicariously liable for the torts of the franchisees or other licensees."[111] While seeming to understand this dilemma, the trial court went on to find that Liberty was guilty of exercising too much control. In reaching this conclusion, "the trial court focused on Liberty's operations manual," which, as the state argued, "showed Liberty had a right of control far in excess of what it needed to police its mark."[112] Among other things, the operations manual:

> required franchisees to offer [refund anticipation loans] and [electronic refund checks] via banks mandated by Liberty; prohibited franchisees from offering products and services without Liberty's permission; mandated franchisees' minimum operating hours, computers to be used, and day-to-day tasks such as how to open the store and when to clean the bathrooms; reserved the right to intervene in disputes with customers, including the right to pay refunds directly to customers and bill the franchisees for them; required franchisees to commit to maintaining Liberty's prescribed filing system and the setup for the tax return processing center; and controlled franchisee pricing by controlling the discounts franchisees could offer at different times of the year.[113]

As it related to advertising specifically, the operations manual, according to the trial court, contained significant direction concerning how and when to place advertisements. As the trial court put it, the operations manual, "literally provid[ed] [to the franchisees] a detailed, step-by-step guide for every aspect of marketing and advertising."[114]

The California Court of Appeal affirmed the trial court's rulings on these issues, and agreed that Liberty should be held vicariously liable for its franchisees' advertising practices. Like the trial court, the appellate court seemed to recognize that a franchise relationship is qualitatively different than other types of relationships to which the principal-agent model has been applied. "A franchisee, by definition," the court wrote, "operates a business 'under a marketing plan or system prescribed in substantial part by a franchisor,' which operation 'is substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising or other commercial symbol designating the franchisor. . . .' "[115] Nevertheless, the court warned, a fran-

110. *Id.* at 735.
111. *Id.* at 744.
112. *Id.* at 745.
113. *Id.*
114. *Id.*
115. *Id.* at 748 (quoting CAL. CORP. CODE § 31005(a)(1) & (a)(2)).

chisor whose controls extend beyond those necessary to protect its mark risks creating an agency relationship with its franchisees and thus incurring vicarious liability.[116] The court concluded that Liberty had crossed that line: "Liberty's very extensive right of, and actual, control over such things as pricing, advertising strategies and tactics, timing and amounts of discounts [that franchisees could offer on tax-related services], and product offerings" demonstrated "that Liberty controlled more than was necessary to protect its trademarks and goodwill."[117]

However, virtually all of the controls the trial and appellate courts deemed to be unrelated to brand protection are quite commonplace in modern franchise systems. Nearly every franchise system has rules concerning common operational issues like hours of operations, product offerings, product pricing, opening and closing practices, and the use of approved equipment. Even Liberty's controls on advertising practices were hardly out of the ordinary. Indeed, as Liberty argued, they were simply "part of its efforts to protect the goodwill in its mark by implementing a uniform and consistent marketing plan."[118] In any event, the entire *JTH Tax* opinion conveys a strong suspicion toward and apparent disfavor of anything beyond the most basic operational controls. In particular, the court made clear that if a franchisor imposes controls that are greater than "necessary" to protect a franchisor's mark and goodwill, which would result in the creation of an agency relationship between the franchisor and its franchisee. Unfortunately, however, the court in *JTH Tax* failed to offer a usable, practical standard by which franchisors could gauge whether they have crossed that line.

V. Conclusion

The instrumentality test is alive and well in many jurisdictions. But nearly a decade after the *Kerl* decision, the law remains in flux. At the very least, the recent cases involving Domino's and Liberty Tax are signs that the debate is not over just yet. Although these cases could be dismissed as being specific to California law or as mere aberrations, they still provide cause for concern. First, each focused heavily on brand controls and used those brand controls to impose vicarious liability on franchisors, even though the case law seems be trending away from that approach. These cases prove that—even in 2013—some courts are content to stick with the old rules, which make vicarious liability for franchisors much more likely than under the instrumentality test.

116. *Id.*
117. *Id.* at 751.
118. Rather inexplicably, the court discounted Liberty's argument, in part because Liberty conceded that the ads also helped generate revenue for the system: "Liberty acknowledges that it controlled [advertising] matters at least in part because it was 'good for business.' " *Id.* at 751. This remark seemed to suggest that if Liberty prescribed advertising practices in part because it was "good for business," its "uniform marketing plan" justification was somehow less credible. Why the court drew that conclusion is unclear.

Second, in each instance, the courts refused, either expressly or by implication, to analyze the case under more narrow grounds: specifically, whether the franchisor had both the right and the ability to control and prevent the precise harm. Aside from being inconsistent with case law in a growing number of jurisdictions, it also raises important concerns for franchisees in California and elsewhere. These cases do not attempt to define how much control franchisors can exert without incurring vicarious liability, while at the same time refusing to apply a standard that does, such as the instrumentality test. This creates an unacceptable level of uncertainty in the law. Third, it is possible, and perhaps even probable, that the reasoning of these cases will be adopted in other jurisdictions where the issue has not yet been decided,[119] despite the fact that many states are moving away from this dated and hard-to-apply approach. The potential state of uncertainty these cases create will make it more difficult for franchisors to gauge the legal impact of their actions. It will also force some to question whether the strict uniformity they need to succeed is worth the significant legal costs they will incur to have it.

Additionally, these cases, while to some extent raising more questions than providing answers, do offer important teachings for practitioners wishing to be prudent in advising their franchisor clients. Given the recent trend toward the application of the instrumentality test, it would behoove transactional lawyers to operate from the premise that a court examining a vicarious liability claim will look to the specific injury-producing mode in evaluating potential vicarious liability. Thus, franchise documents, including operations manuals that franchise lawyers are often called upon to review, should be drafted with these concepts in mind.

As a threshold matter, franchisors should go to great lengths to avoid injecting themselves into, or having even peripheral involvement in, the human resource practices of their franchisees. Although this point may seem obvious, at least one California appellate court considered a franchisor's informal, yet seemingly appropriate, suggestion to terminate an employee who had allegedly engaged in misconduct sufficient to give rise to a triable issue of fact.[120] The safest course would be to steer entirely clear of every aspect of a franchisee's employment policies and practices, to the extent practicable, except as necessary to maintain appropriate brand controls and system standards.

In addition, and as perhaps should always be the case, care should be taken to include appropriate disclaimers in the franchise disclosure document and operations manual. For example, it may be useful—although not

119. As recently as 2010, for instance, in a case involving Domino's, the Supreme Judicial Court of Maine expressly declined to adopt *Kerl*'s instrumentality test in favor of a more traditional agency test. *See* Rainey v. Langen, 998 A.2d 342, 349 (Me. 2010) ("We conclude that the traditional approach strikes an appropriate balance and, for that reason, decline to adopt the instrumentality rule.").

120. *Patterson*, 143 Cal. Rptr. 3d 396.

legally binding—to include in the disclosure document and manual a statement such as “the following are suggestions, not requirements.” It may also make sense for franchisors to examine which aspects of the franchisee’s business they are controlling, even tangentially, to determine if such controls are needed to maintain brand control or quality assurance standards or if—from a risk-management standpoint—the controls might be reduced, reallocated, or even eliminated.