# VICARIOUS LIABILITY
# WHEN A FRANCHISOR IS LIABLE FOR ITS FRANCHISEE'S ACTIONS

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Nearly everyone has heard of the famous lawsuit in which a New Mexico woman sued McDonald's and was awarded several hundred thousand dollars after she spilled "too-hot" coffee on her lap, causing third-degree burns. In contrast, probably very few people know why she could sue the McDonald's corporation, even though the coffee was prepared and served by a McDonald's franchisee employee. The answer is vicarious liability.

Generally, when deciding whether to impose vicarious liability against a franchisor for acts of its franchisee's employees, courts measure the franchisor's control of franchisee operations. For instance, in the "hot coffee" lawsuit, the franchisor (the McDonald's corporation) was liable because it was the corporation — not the specific franchise — that mandated that coffee was to be served at 180 to 190 degrees Fahrenheit. But franchisor control is not always so clear and straightforward. It is essential that franchisors know, or at least can predict to some extent, in what circumstances they may be held vicariously liable for the acts of their franchisees and their franchisees' employees. Certainly, if preventive measures can be used to avoid such liability, these precautions should be known and taken. It is also important for individuals injured by franchisee employees to know how to effectively join a franchisor in a lawsuit.

Franchisors usually have a much greater capacity to compensate an injured party for tort damages and logically should be joined in most circumstances. For instance, emphasizing certain aspects of a franchisor-franchisee relationship may successfully support an injured party's claim to hold the franchisor vicariously liable. This article provides some general information and advice on how franchisors can protect against vicarious liability.

**Introduction**

In this article, we discuss two types of authority (actual and apparent) that may render a franchisor liable for the tortious acts of its franchisee and the franchisee's employees. We then explain the dilemma that franchisors face when deciding how deeply to supervise their franchisees — and review *Patterson v. Domino's Pizza*, a recent ruling from the California court system on franchisor vicarious liability that will soon be reviewed by the Supreme Court of California. Finally, we advise relevant parties in these situations (franchisor and injured party) how best to promote their interests.

**Vicarious Liability: Generally**

Essentially, vicarious liability occurs when one person or entity is liable for the actions of another. That liability arises from a principal-agent relationship between the acting party (the "agent") and the party accountable for the acting party's missteps (the "principal"). It may seem unfair to hold one person or entity liable for another's acts, but vicarious liability is a way for courts to ensure that a responsible party cannot avoid liability simply by hiding one step away from the situation. In other words, if an agent is merely acting on its principal's behalf, then the principal should be accountable for any liability arising from such conduct.

Two types of principal-agent authority — "actual" and "apparent" — can create vicarious liability on the principal. "Actual" authority arises when an agent has acted with the express authority of the principal. Because the principal has authorized its agent to act on its behalf, courts hold that the principal should be liable for any tortious acts of its agent in the scope of its representation of the principal. "Apparent" authority exists when, even though the principal did not expressly authorize an agent to act on its behalf, a third party interacting with the agent actually believes that the agent has been authorized to act on behalf of the principal.

One context in which vicarious liability often arises is between employers and employees. The latter are agents of their employers, and therefore employers are usually held vicariously liable for the acts of their employees performed with "authority" (*i.e.*, in the scope of their employment).

**Court Rulings on the Vicarious Liability of Franchisors**

Most courts have held that franchisors may be liable for the acts of their franchisees and franchisee employees. Courts are reluctant to hold franchisors liable for acts of their franchisees, because franchisors are often removed from the situation. But that is not always the case. Before deciding whether to hold a franchisor vicariously liable, a court must determine what test it will use, what criteria it will consider and what standard to use. Not all courts have resolved this preliminary matter. However, the following is a generalized summary of how most courts have ruled.

First, courts usually hold that a principal-agent relationship is not defined by a franchise agreement, but rather by how the parties actually interact. Most courts do not allow a franchisor to contract around vicarious liability. Thus, determining franchisor vicarious liability is typically a fact-intensive analysis of the particular franchisor-franchisee relationship.

As previously noted, a franchisor’s vicarious liability can arise from actual or apparent authority vested in its franchisee and its employees. For vicarious liability based on actual authority, courts primarily use the "control" test, in which they decide whether a franchisor has the right to control its franchisee’s operations. Courts typically analyze a franchisor-franchisee relationship and decide whether the franchisor interjects in the franchisee’s business merely to maintain uniformity among its franchises (not vicariously liable), or if the franchisor has additional control over the franchise (vicariously liable). As for what specific factors courts will consider, their approaches vary — some focus on whether a franchisor controls the day-to-day operations of its franchisee, others on whether the franchisor manages the specific aspect of its franchisee’s business from which liability arose.

For injured parties who sue a franchisor based on apparent authority, courts face a dilemma with vast ramifications. If a court holds that a franchisor gives apparent authority to its franchisee when it marks the franchisee with its brand, as most franchisors do, then franchisors may always be vicariously liable. For instance, a court could hold that the McDonald’s corporation has held out that a franchise has authority to act on its behalf, since the "M" logo is placed on all signs, food wrappers, employee uniforms, and so on. Courts could further hold that every injured party reasonably believes that the local McDonald’s acts with the McDonald’s corporation’s authority. If this is the case, then franchisors may always be held liable for the acts of their franchisees, regardless of their actual control of the franchisee’s operations and administration. Case law is fairly divided on whether to allow vicarious liability suits against franchisors based on apparent authority.

**The Control Test: A Catch-22 for Franchisors**

As noted above, courts often study the depth of interaction between franchisors and franchisees to determine whether a franchisor "controls" its franchisee and should be vicariously liable for its acts. Franchisors cannot contract around this liability. This analysis creates a Catch-22 for franchisors.

Surely, franchisors seek to avoid liability for their franchisees’ tortious acts. But a franchisor that entwines itself with its franchisees to prevent the latter from committing unlawful acts is more prone to being ruled in "control" and therefore vicariously liable. Another franchisee that neglects to supervise its franchisees and prevent their mistakes is less likely to be held vicariously liable for such mistakes. Courts have incentivized franchisors to remain handsoff and neglect efforts to prevent franchisees from unlawful activity.

In short, a franchisor that wants to protect its best interests by supervising its franchisees subjects itself to a higher likelihood of vicarious liability for its franchisees. Franchisors thus face a difficult situation when determining how deeply to involve themselves in their franchisees’ operations.

## Recent Case Law

In *Patterson v. Domino's Pizza*, a case originating in the Superior Court of Ventura County, CA, a 16-year-old female sued her employer Sui Juris, LLC — a Domino's franchisee — and its franchisor (three Domino's entities). Ms. Patterson alleged that Renee Miranda, the assistant manager of the restaurant, had sexually harassed and assaulted her at work.

The Domino's entities filed a motion for summary judgment, asserting that its franchise agreement with Sui Juris unambiguously provides that the latter is an independent contractor and that it has no principal-agent relationship with Sui Juris such that Domino's might be liable for injuries to Patterson.

The trial court granted the Domino's entities' motion for summary judgment, holding that the franchise agreement explicitly reads that Sui Juris is an independent contractor and that Miranda was not an employee or agent of Domino's so as to impose vicarious liability on Domino's for Miranda's actions. The court also held that even if Domino's is considered the employer, Patterson failed to raise a fact issue showing Domino's had notice of, ratified, or condoned Miranda's acts.

On review, the Court of Appeal for the Second District, Division 6, reversed the trial court's ruling. The appellate court declared that "a franchisee may be found to be an agent of the franchisor even where the franchise agreement states it is an independent contractor," since it is "the right to control the means and manner" that determines whether a principal-agent relationship exists.

In evaluating the circumstances, the appellate court listed numerous Sui Juris decisions that were controlled exclusively by Domino's, including qualifications for employees, employee training systems, hours of operation, advertising, pricing, equipment, furniture, décor and signage. Additionally, the owner of Sui Juris testified at his deposition that Domino's oversight of his franchise was extensive, and provided additional examples of such control. Based on this control, the appellate court held that a trier of fact could reasonable conclude that Domino's controlled Sui Juris and that a principal-agent relationship existed.

The appellate court also rejected the trial court's alternative holding that Domino's was not liable for Miranda's acts even if it was considered his employer, noting that an employer is strictly liable for a supervisor's sexual harassment of a minor employee. Finally, the Court of Appeals cited case
law holding that a sexual assault by a supervisor, even on a single occasion, may well be sufficiently severe so as to alter the conditions of employment and give rise to a hostile work environment claim.

On Oct. 10, 2012, the Supreme Court of California granted Domino's petition for review. The Supreme Court will review the singular issue of whether Domino's is entitled to summary judgment on Patterson's claim that it is vicariously liable for the tortious conduct of Miranda. As of the time of print, the latest activity in the appeal was the Supreme Court's allowance of an extension of time for filing an opening brief. The new deadline for an opening brief on the merits was Dec. 10, 2012; as press time, no other information was available.

## Advice for Injured Parties and Franchisors

When representing an injured party, it is certainly best to pursue not only the franchisee and the employee responsible, but also the franchisor. The latter will almost always have the greatest ability to compensate the injured party for any wrongdoing. For the greatest chance of success, it is best to allege vicarious liability based on both actual and apparent authority. For actual authority, provide the court with all the ways in which the franchisor controls the daily operations of the franchisee, especially if they relate to the liable acts (*e.g.*, Domino's control of hiring practices in Patterson). For apparent authority, allege that the franchisor's branding represented the franchisee's apparent authority to act on behalf of the franchisor, and hope that the court is willing to potentially hold all franchisors vicariously liable for their franchisees.

Finally, as noted above, franchisors face the predicament of how involved to be in franchisee operations. Best practices are to proceed in one of two completely dissimilar directions — either be extremely involved with franchisees to prevent unlawful activity, or remain hands-off other than to ensure consistency among franchises. With the former, a franchisor will most likely be vicariously liable for its franchisees' acts, but ideally has proactively prevented such liable acts. As for the latter, unlawful activity is more likely but the franchisor probably will not be liable for those acts.