

# Vicarious Liability of Franchisors

By: Arthur L. Pressman  
Partner, Nixon Peabody LLP

and

Robert F. Salkowski  
Partner, Zarco Einhorn Salkowski & Brito, P.A.

# Presenters



- **Robert Salkowski, Partner, Zarco Einhorn Salkowski & Brito, P.A.**
- Has represented franchisees, licensees and dealers in over 300 different systems
- Has authored several articles regarding franchising and distribution that have appeared in various industry and legal publications
- Robert has also been named as one of the top franchise attorneys in such publications as *The Best Lawyers in America*, *South Florida's Best Lawyers*, and *Florida Trend's Legal Eagles*



- **Arthur Pressman, Partner, Nixon Peabody, LLP**
- Leading franchise lawyer with a nationwide practice, specializing in the representation of franchisors
- Leads an international franchising practice that represents world leaders in franchising and retail distribution, and numerous hotel, real estate, and consumer services systems.
- Concentrates in the resolution of franchise and commercial disputes through litigation or other dispute resolution approaches

# Vicarious Liability

## Introduction

# Vicarious Liability

## What is it?

- Based on Theory of Principal/Agent
- Imposes liability on Principal for the wrongful acts of its Agent
- Actual Authority vs. Apparent Authority

# Vicarious Liability – What Is It?

- Actual Authority Evidenced By:
  - Control over employees
  - Uniform Accounting/Reporting Requisites
  - Proscribed Hours
  - Required Sources of Supplies & Products
  - Detailed Operating Manuals
  - Right of Inspection
  - Uniform Marketing/Advertising Activities
  - Payment by Franchisor of Franchisee's Taxes

# Vicarious Liability – What Is It?

- Apparent Authority
  - Representation to a Third Party that an agency relationship exists
  - Third Party's reliance on that representation to its detriment
    - Uniform Appearance & Design
    - Advertising/Marketing in Franchisor's Name
    - Telephone Listing Franchisor Only
    - Signs, Letterheads bearing Franchisor's Name Only
    - Answering Machine with Franchisor's Name Only

# Vicarious Liability Context in Which Claims Arise

- Wrongful Death Cases
  - *Braucher v. Swagat Group, LLC*  
702 F. Supp. 2d 1032 (C.D. Ill 2010)
  - *Allen v. Greenville Hotel Partners, Inc.*  
409 F. Supp. 2d 672 (D. S.C. 2006)

# Vicarious Liability

## Context In Which Claims Arise

- Slip and Fall Cases
  - *Toppel v. Marriott International, Inc.*  
*2008 WL 2854302 (D. S.C. 2009)*
    - *Franchisor Motion for Summary Judgment Denied*
    - *Court found evidence sufficient to establish control by Marriot over Franchisee's operations*
  - *Hunter v. Ramada Worldwide*  
*2005 WL 1490053 (E.D. Missouri 2005)*



# Vicarious Liability

## Context in Which Claims Arise

### Wage and Hour Violations

- *Awuah v. Coverall North America*  
952 N.E. 2d 890 (Mass. 2011)
- “Modified Ponzi Scheme”  
707 F. Supp. 2d 80 (D. Mass. 2010)

### Workers’ Compensation Claims

- *Doctor’s Associates, Inc. v. Uninsured Employee’s Fund*  
2011 WL 5878145 (KY 2011)

# Vicarious Liability

## Context in Which Claims Arise

- Robbery and Assault
  - *Matson v. Noble Investment Group*  
288 Ga App. 650 (2007)
- Hotel Guest Shot by Intruder
  - *Bass v. Gobal, Inc. and Super 8 Motels*  
384 S.C. 238 (2009)

# Vicarious Liability

## Context in Which Claims Arise

- American with Disability Act (ADA) Claims
  - *U.S. v. Days Inn of America*  
*151 F.3d 822 (8<sup>th</sup> Cir. 1998)*
  - *U.S. v. Days Inn of America*  
*22 F. Supp. 2d 612 (E.D. Ky. 1998)*

# Vicarious Liability

## Context in Which Claims Arise

- Fraud/Misrepresentations
  - *Kaplan v. Coldwell Banker*  
59 Cal. App. 4<sup>th</sup> 741 (CA 2<sup>nd</sup> Dist. 1997)
    - Franchisor's advertising campaign and logos used by Franchisee raised triable issue of fact of apparent agency between Franchisor and Franchisee

# Vicarious Liability

## Context in Which Claims Arise

- Injuries to Hotel Guests
  - *Hilton v. Holiday Inns, Inc.*  
1990 WL 113133 (S.D. NY. 1990)
    - Franchisor's duty to supervise franchisees to ensure compliance with standards may be sufficient to find actual control

# Vicarious Liability

## Lessons Learned

- Vicarious liability presents a quandary for Franchisors
- Protecting the Marks/System vs. Avoiding Liability
  - No clean answers
  - Fact specific
  - Quality of Counsel

# Risk Management Techniques To Avoid Vicarious Liability

- Include Appropriate Provisions In Franchise Agreement
  - Franchisee solely responsible for business
  - Independent parties, no partnership, joint ventures, agency or employment relationship
  - Display appropriate notification on premises, signs, letter head establishing that the business is independently owned
- Monitor Franchisee's compliance with Franchise Agreement
- Examine degree of control exerted over Franchisees
- Remove any unnecessary controls
- Insurance and indemnity requirements