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Notes and Comments

THEORIES OF LIABILITY FOR RETAIL FRANCHISORS: A THEME AND FOUR VARIATIONS

INTRODUCTION

Over the past decade, franchising has assumed an increasingly important role in the American economy. A consumer may now deal with franchises in many daily activities, beginning just beyond the cradle and extending to the grave.¹ In addition to the familiar gasoline station and the ubiquitous fast food restaurant, a consumer may be patronizing a franchise when he has his car repaired (*e.g.*, Midas Muffler Shops, AAMCO Transmission Centers) and rents a replacement vehicle (*e.g.*, Budget, Hertz); when he looks for a job (*e.g.*, Olsten, Manpower) or takes a vacation (*e.g.*, Kampgrounds of America, Holiday Inns).² He may be dealing with a franchise when he buys anything from a refrigerator (*e.g.*, Montgomery Ward) to a pet (Docktor Pet Centers) to a home (*e.g.*, Century 21, Gallery of Homes real estate brokers).³

This extension of the franchising concept to businesses as diverse as tax preparation and day care has accompanied a significant increase in the economic impact of franchising. The sales volume of franchise operations has more than doubled over the past decade, with sales by retail franchises now accounting for nearly ninety percent of all franchise sales and for approximately one-third of all retail sales in the American economy.⁴ With the growth in sales volume has come an increase in the total number of franchise outlets.⁵ As the growth in

1. There are franchised day care centers and a franchised cremation service. 1978 FRANCHISE ANNUAL 95, 110 (R. Dixon ed.). For an overview of the many types of franchises, see *id.*; INDUSTRY & TRADE ADMIN., OFFICE OF MINORITY BUS. ENTERPRISE, U.S. DEP'T OF COMMERCE, FRANCHISE OPPORTUNITIES HANDBOOK (1978) [hereinafter cited as FRANCHISE OPPORTUNITIES HANDBOOK]. For a brief history of the development of American franchises, see D. THOMPSON, FRANCHISE OPERATIONS AND ANTITRUST 19-27 (1971).

2. See FRANCHISE OPPORTUNITIES HANDBOOK, *supra* note 1, *passim*.

3. See *id.* The Department of Commerce has identified real estate as the fastest growing franchise area, with an estimated 22,000 outlets in 1979. INDUSTRY AND TRADE ADMIN., U.S. DEP'T OF COMMERCE, FRANCHISING IN THE ECONOMY: 1977-1979, at 17 (1979) [hereinafter cited as FRANCHISING IN THE ECONOMY].

4. The latest government survey estimated 1979 franchise operation sales at \$299 billion with retail sales accounting for nearly \$267 billion. FRANCHISING IN THE ECONOMY, *supra* note 3, at 2, 11. Sales were estimated by franchises responding to the survey and by the government for automobile and truck dealerships, gasoline stations, and soft drink bottlers. In 1977, the last year for which actual sales are known, they amounted to only \$253 billion. *Id.* at 32. Sales in 1969, the year in which the Department of Commerce began collecting statistics, totaled \$115.9 billion. *Id.* at 35. In 1978 estimated franchise retail sales of \$247 billion were almost 32% of all retail sales in the economy. *Id.* at 11.

5. There were nearly 384,000 franchise outlets in 1969, *id.* at 38, and an estimated 492,000 in 1979, *id.* at 11. Franchise businesses seem to be recovering from a recent decline in the number of outlets. Following a period of yearly increases to a high of 453,632 in 1973, the number dropped to 400,701 in 1974, then began to rise to 434,538 in 1975, 443,263 in 1976, and 450,800 in 1977. *Id.* at 38-40.

sales, number, and variety of franchises has increased the importance of franchising in the economy and in the life of the average consumer, courts increasingly have had to deal with its impact, particularly with the problem of franchisor liability for injuries to consumers.⁶ Because of the variety of relationships encompassed under the rubric "franchise,"⁷ the courts' chief difficulty has been defining that term⁸ and developing rules of liability applicable to the many concerns that may be classified as franchises. As will be seen, the courts have progressed in this effort from examining incidents of control in individual franchise relationships, applying principles of actual agency, to relying on one major characteristic — the franchisor's holding out franchisee products and outlets as its own — common to all franchise relationships, applying a variety of legal theories in doing so. That is, in determining franchisor liability, the courts have moved from *ignoring* the franchise as franchise and examining only the specific control characteristics that result from it to *recognizing* the franchise as franchise and looking to the impression created by all franchisors that all units in the chain are part of a single business.

In its simplest terms, a franchise may be defined as a "license from the owner of a trade mark or trade name permitting another to sell a product or service under that name or mark."⁹ More sophisticated definitions take into account certain common features of franchises, including the marketing and advertising of a uniform product or service, that is, the concept of franchise outlets as part of a chain,¹⁰ and the franchisor's control over the franchisee's method of operation or at least the methods of operation common to various

6. A court recently faced with the question of the applicability of strict liability in tort to a franchisor noted that the claim was "without precedent or parallel." *City of Hartford v. Associated Constr. Co.*, 34 Conn. Supp. 204, 208, 384 A.2d 390, 393 (1978), and continued:

The issue is, however, of great importance to the commercial marketplace in the light of the contemporary popularity of franchise agreements for the manufacture and sale by licensees of trademarked products in designated territories in substitution for the traditional direct marketing of goods by the trademark owners. It was inevitable that the continuous growth of franchised businesses should present this question for judicial determination.

Id.; see *Kosters v. Seven-Up Co.*, 595 F.2d 347, 349, 351-52 (6th Cir. 1979).

7. See text accompanying notes 12 to 15 *infra*.

8. The difficulty of defining the franchise relationship is also seen in the area of litigation by franchisees against franchisors, when, for example, a franchisee asserts he was misled by the franchisor when he purchased the franchise. Franchisees have attempted to categorize the franchise agreement as an investment contract, subject to securities regulation. See, e.g., *Beefy Trail, Inc. v. Beefy King Int'l*, 348 F. Supp. 799, 804-05 (M.D. Fla. 1972). One author has suggested that courts and legislatures should view the relationship between franchisor and franchisee as a fiduciary one. Brown, *Franchising — A Fiduciary Relationship*, 49 TEX. L. REV. 650 (1971).

9. G. GLICKMAN, 15 BUSINESS ORGANIZATIONS — FRANCHISING § 2.01 (1978).

10. Although franchising is sometimes referred to as an industry, it is a method of distribution and marketing used in a wide variety of industries. FRANCHISING IN THE ECONOMY, *supra* note 3, at 1.

outlets.¹¹ Businesses falling within any definition of franchise may be retail, wholesale, or manufacturing operations. Retail businesses may sell goods or provide services, or both; those selling goods may be further divided into those in which the franchisee only sells the products of the franchisor or a third party and those in which he produces the goods sold under the franchisor's name. The latter type, for example, fast food restaurants, is generally considered a combination product-service franchise.

Franchises can be divided into three main categories: distributorships, other retail chain operations, and manufacturing and processing plants.¹² The first group, in which local outlets, under their own names, sell the products of one or more manufacturers, includes automobile dealerships and gasoline stations.¹³ Familiar examples of the second class, in which local outlets operate solely under the name of the franchisor and appear to be branches of a single business, are fast food restaurants and retail stores such as 7-Eleven.¹⁴ All service franchises fall into this category, although one could conceive of a service franchise akin to a distributorship, for example, one involving the sale of a franchisor's service package such as a tour or benefit plan where the franchisee provides only an outlet for the sales. Such franchises would, however, necessarily involve the franchisee's providing some services to the customer. The third category includes concerns such as mattress manufacturers and soft drink bottlers.¹⁵

11. A franchise has been defined as "an elaborate agreement under which the franchisee undertakes to conduct business or sell a product or service in accordance with the methods and procedures prescribed by the franchisor and the franchisor undertakes to assist the franchisee through advertising, promotion, and other advisory services." G. GLICKMAN, *supra* note 9, § 2.01; see D. THOMPSON, *supra* note 1, at 7-8.

12. G. GLICKMAN, *supra* note 9, § 2.02; Fels, *The Franchising Phenomenon: An Overview*, in *THE FRANCHISING PHENOMENON* 5 (J. Rice ed. 1969).

Thompson divides all franchises into two broad categories, those involving sale of the franchisor's product or service by the franchisee and those involving production by the franchisee of the product or service under a trade or service mark license. D. THOMPSON, *supra* note 1, at 9-10. Franchises included under his system of classification would be the same, but his method of classification suggests that the determination of liability rests with proper comparison among the subcategories of the same group, not necessarily from group to group. See *id.* at 16.

13. These two examples are often exclusive distributorships, although they need not be. The classification of gasoline stations as distributorships is not without problems. Courts have viewed the station operator as an independent dealer selling one company's gasoline products, e.g., *Coe v. Esau*, 377 P.2d 815, 818 (Okla. 1963), but some recent cases suggest that stations should be categorized, at least functionally, as service franchises, e.g., *Gizzi v. Texaco, Inc.*, 437 F.2d 308 (5th Cir. 1971).

This Comment will concentrate on the second category of franchises, the retail chain, although it will also necessarily deal with the other two by way of comparison and contrast.

14. Sometimes these retail stores sell a line of products bearing the franchisor's trademark, for example, Montgomery Ward stores. They are distinguished from the non-exclusive distributorship in that the franchisor is not the manufacturer and the store is operated in the franchisor name.

15. If franchise is defined broadly, the category also includes any plant making a product under license from a trademark owner.

Current Law — Actual Agency

Until recently, courts applied only established agency principles in deciding franchisor liability, making determinations on the basis of vicarious liability for the acts of franchisees. Because a franchise is something of a hybrid business form, resembling both an association of independent businessmen and a company-owned chain,¹⁶ the primary problem in ascertaining franchisor liability for the acts of its franchisee has been fitting the franchisor-franchisee relationship into one of the two traditional categories of agency law, principal-independent contractor or master-servant.¹⁷ Since even franchises of the same general type have different attributes, and since courts differ in according various factors different weights, courts have not agreed on the characterization of the franchise relationship. Different results have been reached regarding franchises of the same type,¹⁸ and even regarding the same franchise.¹⁹ The central question in the courts' analysis has been the extent of control exercised by the franchisor over franchisee operations,²⁰ *i.e.*, whether the franchisor

16. D. THOMPSON, *supra* note 1, at 6; Fels, *Problems of Principal and Agent: Franchisor Exposure to Uninsurable Risks for Acts and Omissions of Others*, in THE FRANCHISING PHENOMENON 99-100 (J. Rice ed. 1969). See G. GLICKMAN, *supra* note 9, § 2.03, comparing the franchise relationship to employment, licenses, distributorships, leased departments, concessions, cooperatives, and joint ventures.

17. A master is liable in tort or contract for the acts of a servant but not for the acts of an independent contractor. RESTATEMENT (SECOND) OF AGENCY § 2 (1958). There are a few exceptions, for example, a principal cannot delegate a duty to perform certain hazardous activities and thus may be liable for an independent contractor's activities in such areas. *Id.* § 214, Comment c.

The distinction between the two relationships turns on the nature and amount of control the principal exercises over the subordinate. The principal has the right to control the way a servant performs his job and to specify how operations are to be conducted; on the other hand, he may prescribe the job to be done to the independent contractor but not the way in which it is to be performed. *Id.* § 2.

18. For example, courts have differed on the status of gasoline station franchisors. Compare, *e.g.*, B.P. Oil Corp. v. Mabe, 279 Md. 632, 370 A.2d 554 (1977) (no agency) with Chevron Oil Co. v. Sutton, 85 N.M. 679, 515 P.2d 1283 (1973) (agency).

19. Compare Wood v. Holiday Inns, Inc., 508 F.2d 167 (5th Cir. 1975) with Murphy v. Holiday Inns, Inc., 216 Va. 490, 219 S.E.2d 874 (1975). The court of appeals, although it based its decision on apparent agency, stated that the evidence showed a high degree of control by the franchisor. 508 F.2d at 175. The Virginia Supreme Court, affirming summary judgment for the franchisor, found no evidence of control over day-to-day operations. 216 Va. at 495, 219 S.E.2d at 878.

20. *E.g.*, Dorsic v. Kurtin, 19 Cal. App. 3d 226, 96 Cal. Rptr. 528 (1971) (agency); B.P. Oil Corp. v. Mabe, 279 Md. 632, 370 A.2d 554 (1977) (no agency); Levine v. Standard Oil Co., 249 Miss. 651, 163 So. 2d 750 (1964) (no agency); Chevron Oil Co. v. Sutton, 85 N.M. 679, 515 P.2d 1283 (1973) (agency); Coe v. Esau, 377 P.2d 815 (Okla. 1963) (no agency); see Borcharid & Ehrlich, *Franchisor Tort Liability: Minimizing the Potential Liability of a Franchisor for a Franchisee's Torts*, 69 TRADEMARK REP. 109, 110-13 (1979); Comment, *Service Station Torts: Time for the Oil Companies to Assume Their Share of the Responsibility*, 10 CAL. W.L. REV. 382, 383-84 (1974) [hereinafter cited as *Service Station Torts*]; Note, *Liability of a Franchisor for Acts of the Franchisee*, 41 SO. CAL. L. REV. 143,

exercises control of the kind and degree necessary for a finding of agency; usually, the issue of agency has been a fact question for jury determination.²¹

No single factor has been determinative of the issue of control.²² Courts have looked to various provisions of the franchise agreement,²³ including those relating to payment arrangements,²⁴ termination,²⁵ required hours of operation,²⁶

147-52 (1968). *But see* Comment, *Liability of Oil Companies for the Torts of Service Station Operators*, 7 LAND & WATER L. REV. 263, 269 (1972) [hereinafter cited as *Oil Companies*] (since courts have reached different results in cases factually similar, control not really the test).

21. E.g., *Dorsic v. Kurtin*, 19 Cal. App. 3d 226, 96 Cal. Rptr. 528 (1971); *Blake v. Dickinson*, 30 Ill. App. 3d 724, 332 N.E.2d 575 (1975); *cf. Drexel v. Union Prescription Centers, Inc.*, 582 F.2d 781 (3d Cir. 1978); *Aweida v. Kientz*, 536 P.2d 1138 (Colo. App. 1975); *Billops v. Magness Constr. Co.*, 391 A.2d 196 (Del. 1978); *Buchanan v. Canada Dry Corp.*, 138 Ga. App. 588, 226 S.E.2d 613 (1976) (sufficient evidence of control to preclude summary judgment for franchisor). *But cf. Murphy v. Holiday Inns, Inc.*, 216 Va. 490, 219 S.E.2d 874 (1975) (summary judgment for franchisor affirmed, insufficient day-to-day control shown; question of construction of written documents for court to determine).

22. Isolation has heretofore been unnecessary; until recently most of the cases dealt with service stations, in which the patterns of control are similar. Based on the lack of requisite control over day-to-day operations, service station operators have usually been held to be independent contractors. E.g., *Elkins v. Husky Oil Co.*, 153 Mont. 159, 455 P.2d 329 (1969); *see B.P. Oil Corp. v. Mabe*, 279 Md. 632, 639-43, 370 A.2d 554, 558-60 (1977) (reviewing cases from other jurisdictions); *Service Station Torts, supra* note 20. *Contra, Aweida v. Kientz*, 536 P.2d 1138 (Colo. App. 1975); *Chevron Oil Co. v. Sutton*, 85 N.M. 679, 515 P.2d 1283 (1973).

23. The weight given an agreement may vary with a court's formulation of the control test. Some courts state that the question is whether the franchisor has retained the *right* to control operation of the franchisee business, e.g., *Billops v. Magness Constr. Co.*, 391 A.2d 196, 197-98 (Del. 1978); *Buchanan v. Canada Dry Corp.*, 138 Ga. App. 588, 591, 226 S.E.2d 613, 615 (1976); *B.P. Oil Corp. v. Mabe*, 279 Md. 632, 638, 370 A.2d 554, 557-58 (1977); some that the inquiry is "actual control" of the operation of the business, e.g., *Smith v. Cities Serv. Oil Co.*, 346 F.2d 349, 352 (7th Cir. 1965); and some, apparently, that the test is either, *Drexel v. Union Prescription Centers, Inc.*, 582 F.2d 781, 786 (3d Cir. 1978) (applying Pennsylvania law); *Coe v. Esau*, 377 P.2d 815, 818 (Okla. 1963) ("has the right to control, or exercises the right to control"); *Green v. Independent Oil Co.*, 414 Pa. 477, 483, 201 A.2d 207, 210 (1964) (whether agent subject to control or the right to control). The differences in formulation are probably largely a matter of semantics, but there may be some tendency for courts framing the test as right to control to look only to the contract for evidence of control.

24. Several courts have noted, as evidence of independent contractor status, that a service station operator pays for his oil and gasoline on a cash basis. E.g., *B.P. Oil Corp. v. Mabe*, 279 Md. 632, 635, 370 A.2d 554, 557 (1977); *Coe v. Esau*, 377 P.2d 815, 818 (Okla. 1963); *cf. Aweida v. Kientz*, 536 P.2d 1138, 1140 (Colo. App. 1975) (title to gasoline passed from oil company to customer).

25. *Compare Aweida v. Kientz*, 536 P.2d 1138, 1141 (Colo. App. 1975) (possible to reason that since termination could be had for any reason, franchisor controlled all activities) with *Green v. Independent Oil Co.*, 414 Pa. 477, 484-85, 201 A.2d 207, 210 (1964) (termination not a significant factor, has to be for cause).

26. *Compare Dorsic v. Kurtin*, 19 Cal. App. 3d 226, 96 Cal. Rptr. 528 (1971) (franchisor's prescription of gasoline stations' operating hours evidence of agency) with *Coe v. Esau*, 377 P.2d 815 (Okla. 1963) (operator's determination of own hours evidence of independent contractor status).

exclusive sale of company products,²⁷ actual ownership of the outlet and equipment,²⁸ and franchisors' rights to perform inspections of the outlet and make suggestions regarding its operation²⁹ for evidence of control.³⁰ In addition to looking to the specific and comprehensive provisions of a franchise contract, one court has noted that the very generality or broadness of other provisions may also provide the basis for a finding of actual agency, because such provisions suggest the reservation of broad powers of control in the franchisor.³¹ It is generally agreed, however, that contractual provisions describing the franchisee as an independent contractor are not determinative of the relationship.³²

Apart from cases dealing with gasoline station franchises, there may be too few reported cases to predict confidently any trends concerning the issue of franchisor control. Nonetheless, a few observations may be made. The very

27. Courts have noted the requirement that a service station operator sell only company petroleum products as one factor evidencing agency, *e.g.*, *Aweida v. Kientz*, 536 P.2d 1138, 1140 (Colo. App. 1975), and have cited his freedom to buy certain products from other sources as evidence of independence, *e.g.*, *B.P. Oil Corp. v. Mabe*, 279 Md. 632, 370 A.2d 554 (1977); *Coe v. Esau*, 377 P.2d 815 (Okla. 1963); *Foster v. Steed*, 19 Utah 2d 435, 432 P.2d 60 (1967).

In one of the few cases involving fast food franchises, the court found evidence of control in the franchisor's right to name suppliers and dictate what other products could be sold. *Singleton v. International Dairy Queen, Inc.*, 332 A.2d 160, 163 (Del. Super. 1975).

28. The common pattern of ownership for service stations is ownership by the company, the operator, or a third party, with a lease to the company, and a lease back to the operator. Ownership by the operator of his equipment is cited as evidence of his independence, *e.g.*, *Westre v. DeBuhr*, 82 S.D. 276, 144 N.W.2d 734 (1966), but ownership by the company does not preclude a finding that the operator is an independent contractor, *e.g.*, *Hoover v. Sun Oil Co.*, 212 A.2d 214 (Del. Super. 1965).

29. *E.g.*, *Miller v. Sinclair Ref. Co.*, 268 F.2d 114 (5th Cir. 1959); *Dorsic v. Kurtin*, 19 Cal. App. 3d 226, 96 Cal. Rptr. 528 (1971); *Billops v. Magness Constr. Co.*, 391 A.2d 196, 198 (Del. 1978) (sufficient evidence of control to go to jury); *Hoover v. Sun Oil Co.*, 212 A.2d 214 (Del. Super. 1965); *Coe v. Esau*, 377 P.2d 815 (Okla. 1963); *see McLaughlin v. Chicken Delight, Inc.*, 164 Conn. 317, 321 A.2d 456 (1973); *and Singleton v. International Dairy Queen, Inc.*, 332 A.2d 160 (Del. Super. 1975) (reaching contrary results but both noting contractual provisions giving the right of inspection as one of many factors showing control).

30. Another factor sometimes mentioned is that the station honors the oil company's credit cards, but it seems to be given little or no weight. *E.g.*, *Coe v. Esau*, 377 P.2d 815, 818 (Okla. 1963). *Contra*, *Aweida v. Kientz*, 536 P.2d 1138, 1141 (Colo. App. 1975).

For a similar listing of factors identified as important in recent cases, see *Borchard & Ehrlich, supra* note 20, at 112-13. The authors suggest ways for franchisors to avoid liability by reducing controls. They identify controls over product quality and uniformity as least likely to be regarded as excessive, *id.* at 123, and warn against controls over details and methods of operation "not strongly related to quality, uniformity and uniformity of business identity," *id.* at 124.

31. *Drexel v. Union Prescription Centers, Inc.*, 582 F.2d 781, 788-89 (3d Cir. 1978).

32. *E.g., id.* at 786; *Chevron Oil Co. v. Sutton*, 85 N.M. 679, 515 P.2d 1283 (1973). *But cf. Foster v. Steed*, 19 Utah 2d 435, 432 P.2d 60 (1967) (relationship controlled by agreements).

nature of retail franchises that produce goods under the name of the franchisor seems to demand findings of actual agency more frequently than in the gasoline station cases because the controls exercised over such operations, which relate largely to the method of product manufacture, are often much more extensive than those exercised by oil companies over gasoline stations.³³ Retail franchises that merely sell goods produced by others resemble service stations in some respects: both involve retail distribution of another's product, and, in some instances, the franchisee may be selling a line of products under the franchisor brand. Because they do not necessarily sell a franchisor's products, however, the degree of franchisor control over franchisee operations may be less than the oil companies' control over their outlets. Franchises offering only services may prove more difficult to classify.³⁴ Although franchisors may exercise a good deal of control to ensure that outlets present a common appearance and use the same methods, it is inherent in the nature of the provision of services that local outlets operate somewhat autonomously.³⁵ The degree of standardization of which a service is susceptible may be a key factor in determining control.

One problem common to all applications of agency principles is definition of the scope of the agency relationship.³⁶ For example, in gasoline station cases involving claims for injuries occurring on the premises or for damages caused by faulty repair services performed by station operators and employees,³⁷ a critical question is whether the stations are agents of the oil companies as to *all* activities or only for the sale of products. This issue has only rarely been acknowledged,³⁸ but the findings that station operators are independent

33. See *Singleton v. International Dairy Queen, Inc.*, 332 A.2d 160, 162-63 (Del. Super. 1975) (summary judgment against franchisor denied); cf. *Buchanan v. Canada Dry Corp.*, 138 Ga. App. 588, 588-89, 226 S.E.2d 613, 614 (1976) (bottling plant; same). *But see* *McLaughlin v. Chicken Delight, Inc.*, 164 Conn. 317, 320-21, 321 A.2d 456, 458 (1973) (affirming jury verdict for defendant).

34. Compare *Murphy v. Holiday Inns, Inc.*, 216 Va. 490, 219 S.E.2d 874 (1975) with *Wood v. Holiday Inns, Inc.*, 508 F.2d 167 (5th Cir. 1975).

35. *But see* *Drexel v. Union Prescription Centers, Inc.*, 582 F.2d 781 (3d Cir. 1978).

36. The same problem is presented in the apparent agency context. See notes 92 & 93 and accompanying text *infra*.

37. Nearly all gasoline station cases have involved such claims. See Annot., 83 A.L.R.2d 1284 (1962).

38. The only case that seems to have addressed the problem in an actual agency context is *Aweida v. Kientz*, 536 P.2d 1138, 1141 (Colo. App. 1975), in which the court said that it could be reasoned that because the sale of gasoline was essential to the success of a service station, control over gasoline sale manifested control over the entire business, *id.*

See *Smith v. Cities Serv. Oil Co.*, 346 F.2d 349, 352 (7th Cir. 1965) (station operator "had complete control of the specific incident of the repair of the Smith automobile in which it is not shown that defendant derived any profit or benefit whatsoever"); *Hoover v. Sun Oil Co.*, 212 A.2d 214, 215 (Del. Super. 1965) (station represents to public that it sells "not only Sun's quality products but Sun's quality service"); *Chevron Oil Co. v. Sutton*, 85 N.M. 679, 682, 515 P.2d 1283, 1286 (1973) (noting as factors that operator used business cards billing station as "Lee Sharp Chevron and Four Wheel Drive Equipment," apparently with Chevron's consent, and that customers could charge costs of repairs as well as products on Chevron credit cards).

contractors in the context of premises and repair claims would appear to imply adoption of a limited agency theory.³⁹ The question is sometimes raised in the consideration of whether company signs, decor, and uniforms indicate agency.⁴⁰ The resolution of these issues is not so simple as might be imagined: with respect to gasoline stations, courts have often stated that such signs indicate only that the company's products are sold at the outlet.⁴¹

One would expect similar results in cases involving other distributorships and perhaps retail chains such as convenience stores, although the convenience store outlet may present problems similar to those encountered with service outlets. A 7-Eleven sign, for example, does not mean that 7-Eleven products are sold at the store. The service franchise should not present this problem, however, since the provision of the service is inseparable from the operation of the business. If the franchisor exercises sufficient control over the daily running of the business for the relationship to be classified as master-servant, he necessarily controls the way in which the service is provided.

The greatest difficulty of application arises out of the product-service franchise. A fast food outlet, for example, produces a product but also is in a service business, the operation of a restaurant. The strongest controls exercised by the franchisor over such operations relate to the way in which the food is prepared and its quality;⁴² therefore, where the injury complained of results from the product, the franchisee might be considered the franchisor's agent. It is possible, however, that the controls exercised over the general operation of the business may not be sufficient in themselves to warrant a finding of agency. Thus far, the few cases involving franchises of this type have indicated that such a distinction will not be drawn for actual agency purposes.⁴³

39. *E.g.*, *Smith v. Cities Serv. Oil Co.*, 346 F.2d 349 (7th Cir. 1965) (Michigan law) (fire started when station operator dropped burning gasoline can); *Miller v. Sinclair Ref. Co.*, 268 F.2d 114 (5th Cir. 1959) (Florida law) (fire); *Coe v. Esau*, 377 P.2d 815 (Okla. 1963) (damage to car, inadequate installation of oil filter gasket); *Green v. Independent Oil Co.*, 414 Pa. 477, 201 A.2d 207 (1964) (explosion).

40. *E.g.*, *Aweida v. Kientz*, 536 P.2d 1138 (Colo. App. 1975) (agency); *Hoover v. Sun Oil Co.*, 212 A.2d 214 (Del. Super. 1965) (no agency); *Levine v. Standard Oil Co.*, 249 Miss. 651, 163 So. 2d 750 (1964) (no agency); *Coe v. Esau*, 377 P.2d 815 (Okla. 1963) (no agency).

41. *Coe v. Esau*, 377 P.2d 815 (Okla. 1963), contains a frequently quoted statement: It is indeed a matter of common knowledge and practice that distinctive colors and trademark signs are displayed at gasoline stations by independent dealers of petroleum product suppliers. These signs and emblems represent no more than notice to the motorist that a given company's products are being marketed at the station. *Id.* at 818. *Accord*, *Reynolds v. Skelly Oil Co.*, 227 Iowa 663, 287 N.W.2d 823 (1939).

42. For examples of such controls, see *McLaughlin v. Chicken Delight, Inc.*, 164 Conn. 317, 321, 321 A.2d 456, 458 (1973) (judgment for franchisor affirmed), and *Singleton v. International Dairy Queen, Inc.*, 332 A.2d 160, 162-63 (Del. Super. 1975) (indicia of control summarized, concluding little else needed to establish agency; holding based on apparent agency).

43. *McLaughlin v. Chicken Delight, Inc.*, 164 Conn. 317, 321 A.2d 456 (1973), involved a traffic accident in which the franchisee's delivery truck was involved. In *Singleton v. International Dairy Queen, Inc.*, 332 A.2d 160 (Del. Super. 1975), a child ran into a glass door on the premises and was injured when it shattered.

Developing Trends — Scope of the Comment

Because a franchise cannot be classified readily as either a principal-independent contractor relationship or a master-servant relationship, and because franchising is a method of distribution with many variations, few generalizations can be made about franchisor liability under the principles of actual agency.⁴⁴ In seeking a more satisfactory theory for imposing liability, courts and commentators have turned away from examination of multiple characteristics of particular franchises and have begun to attempt to isolate factors common to all franchises upon which liability might be predicated. In particular, this new approach has focused on the franchisor's licensing of its trade or service mark. Liability has been imposed on franchisors on the bases of apparent agency⁴⁵ and strict products liability.⁴⁶ The application of various tort and contract theories has been suggested, based on the franchisor's status as a mark licensor.⁴⁷

A number of theories exist by which retail franchisors might be held liable for injuries to consumers caused by defective products or services provided by franchisees, or by the conditions on franchisees' premises.⁴⁸ This Comment

44. Each case before any court requires an individualized determination, but in many instances once a court determines that the relationship at issue is a particular kind, it can apply to the case an established line of decisions dealing with that relationship. Although a court abusing this process will be accused rightly of adjudication by label-pasting, it serves important interests of continuity and efficiency. In the context of this process, "franchise" is an improper label for a court to use. Although it perhaps can be stated as a general proposition that service station operators are independent contractors, it cannot be stated that fast food outlet owners and mattress manufacturers, also franchisors, are also independent contractors.

45. See pp. 278-84 *infra*.

46. See pp. 284-302 *infra*.

47. The trademark may be the source of a duty to control the mark licensee, and licensor liability may be imposed under a variety of tort and contract theories, see notes 205 to 210 and accompanying text *infra*, or may constitute a holding out of the licensee's product as the licensor's and products liability imposed on a negligence or strict liability basis, see notes 123 to 167 and accompanying text *infra*. It should be noted that these theories do not impose additional liability in the distributorship situation, although the distributor uses the franchisor's trademark, since the franchisor is himself the manufacturer or distributor.

Liability has also been proposed on two bases other than those discussed in this Comment, negligent failure to supervise, see *Coty v. U.S. Slicing Machine Co.*, 58 Ill. App. 3d 237, 373 N.E.2d 1371 (1978); Sandrock, *Tort Liability of a Non-Manufacturing Franchisor for Acts of Its Franchisee*, 48 U. CINN. 699, 709-11 (1979); and negligence as a member of a common enterprise with the franchisee, *id.* at 714-15.

48. Such topics as franchisor liability for a franchisee's contractual obligations or for violations of wage and hour laws and consumer protection statutes are beyond the scope of this Comment. Excluded from detailed consideration here, although obviously critical to recovery under any theory of franchisor liability, is the question whether franchisee operation — not necessarily the one that produced the product that injured the plaintiff — in a state, or a franchisor's relationship with it, constitutes sufficient franchisor contact with the forum for assertion of personal jurisdiction over the franchisor. The related, but not necessarily coextensive, inquiry concerning whether in such a situation a franchisor is

demonstrates that the various theories can, in reality, be viewed as variations on the single theme of a reliance or holding out theory. In each theory, the keys to liability are the franchisor's representations that all units in the franchise are part of the single enterprise and the consumer's reliance on those representations. That is, liability determinations begin with the examination of the content of the franchisor's mass advertising, coupled with the licensing of the use of its name and often trade or service marks, and its requirements of standardized uniforms, labels, signs, building design and the like. To complete the liability analysis, it is shown that members of the public who deal with the franchisees rely upon these representations and on the franchisor's name and reputation.

This does not mean, however, that all the liability theories can be telescoped into one, nor that, even given identical proof in every case, the elements of each theory are the same. Significant differences remain among the theories; for example, under apparent agency, franchisor liability is vicarious, under other theories it is direct. Also, because of the different theories upon which liability is predicated, a major difference lies in the application of the various theories to the two main types of retail franchises,⁴⁹ the product or service franchise in

"doing business" in a state for the purposes of a long-arm statute is also without the scope of the topic.

Where the franchise is a manufacturer's distributorship, with franchisees the local distributors of its products, it seems clear that there is personal jurisdiction in any forum in which the products are sold. *See World-Wide Volkswagen Corp. v. Woodson*, 100 S. Ct. 559 (1980).

A more difficult question is whether there is personal jurisdiction, constitutional or statutory, in cases in which the franchisee is not a distributor. Looking to the franchisor's deliberate contacts with the forum, the approach that *World Wide Volkswagen* requires, 100 S. Ct. at 567, it seems clear that a franchisee's business operation and the franchisor's relationship to it could be held to satisfy the constitutional test for jurisdiction over the franchisor. This would certainly seem to be so where the franchise product or service is supplied in the forum state, since, by definition, the franchisor has sought to do some business in the state. The analysis could be made in at least two different ways. A court may look to the franchisee's operation and the franchisor's control over it, finding in appropriate cases that the franchisor so directs franchisee operations that, for jurisdictional purposes at least, he is doing business in or has contacts with the forum. This need not mean that in determining liability the franchisee is the franchisor's agent. *See Dittman v. Nelson Tester Co.*, 7 Wis. 2d 6, 11, 95 N.W.2d 804, 807 (1959). A slightly different variation looks to the financial benefits the franchisor derives indirectly, in the form of license royalty payments, from the franchisee operations. *See Atwood Hatcheries v. Heisdorf & Nelson Farms*, 357 F.2d 847, 853-54 (5th Cir. 1966). An alternate approach would look to the franchisor's business relationship with the franchisee — the contract, visits of its representatives to the state, sales of products to the franchisee, as well as royalties — as sufficient contacts to warrant the exercise of jurisdiction over the franchisor and perhaps even to meet a statutory "doing business" test.

49. The manufacturer-distributor franchise fits into current notions of products liability; no new theory is needed to hold the franchisor-manufacturer liable for defects in his product. Questions of liability arise when it is not clear that the operation is simply a product distributorship, e.g., automobile manufacturer's liability for repair services performed by its dealers.

which the franchisee produces the good or supplies the service offered and the chain store operation, in which the franchisee sells the goods of others. To date, some of the theories discussed herein have been applied only in connection with manufacturing franchises. Thus, two critical questions are whether liability can be imposed on non-manufacturing franchisors on the same bases that it has been imposed on manufacturing franchisors, and, if so, whether it can be imposed on both types of retail franchisors.

A further question arises as to the application of the various liability theories to franchises that have characteristics of both main types of retail franchises. For example, a drugstore may sell a variety of goods and also offer a prescription service;⁵⁰ and beauty salons may sell cosmetics and other beauty aids in addition to providing services. To the extent that classification as a particular type of retail franchise determines liability under a particular theory, it should be made on the basis of the facet of the operation involved in the suit. If a customer sues the drugstore franchisor because a product purchased at an outlet has caused injury, then the entity should be viewed as a chain store. If, on the other hand, injury was caused by a mistake in filling a prescription, the enterprise should be classified as one providing services.⁵¹ This method of functional classification may present problems in cases in which the injury can be viewed as falling within either function of the franchise, for example, when a customer has been injured by a cosmetic selected at the recommendation of a beauty salon employee. The franchisor's liability in such cases would seem to derive from the fact that the franchisee has provided poor services to the customer. One could contrast this example with one in which a customer merely selects a cosmetic from a display without the advice or recommendation of an employee.

This Comment discusses each franchisor liability theory generally, and the application of each to the two principal types of retail franchises is compared and contrasted. The ways in which each theory demonstrates the common theme of retail franchisor advertising inducing consumer reliance are noted, and the ways in which the various theories differ in manifestation of the common theme and in application to different types of retail franchisors are discussed.

Why Any Liability for Franchisors?

A necessary preliminary to any discussion of various theories of franchisor liability is the question why any liability should be imposed.⁵² The answer lies in

50. See, e.g., *Drexel v. Union Prescription Centers, Inc.*, 582 F.2d 781, 786 (3d Cir. 1978).

51. See *id.* The husband of a customer brought a wrongful death action against the franchisor because the local outlet gave the wrong medicine when filling his wife's prescription.

52. In discussing whether to impose liability on franchisors, commentators have defined franchises by pointing to the common characteristic of all franchises, a trademark license, with the control over the licensed product necessarily involved, Comment, *Tort Liability of Trademark Licensors*, 55 IOWA L. REV. 693 (1970); see Note, *Liability of a*

the consideration of compensation for injuries in relation to economic factors such as cost bearing and risk spreading.⁵³

In general, the franchisor is better able than the franchisee to bear the cost of injuries to consumers: it is more solvent and can spread the costs among a greater number of people. In some cases, however, the franchisee, particularly the owner of several units,⁵⁴ may be equally capable of bearing the costs; moreover, all franchisees may be able to obtain insurance. Nonetheless, the franchisor remains in the position to select financially responsible franchisees and to require that they obtain insurance.⁵⁵

The franchisor often is also better able to reduce the risks of injuries caused by the product or service.⁵⁶ As a trademark licensor, the franchisor has a duty to

Franchisor for Acts of the Franchisee, *supra* note 20 (discussing whether compliance with the quality control provisions of the Lanham Act will create an agency relationship between the trademark licensor and licensee), or by pointing to the common characteristics of all retail franchises, a pattern consisting of a trademark or trade name license, advertising of which creates the impression of a chain operation and significant control over the way the product is made or the business conducted, *e.g.*, *Oil Companies*, *supra* note 20; Comment, *A Franchisor's Liability for the Torts of the Franchisee*, 5 U.S.F. L. REV. 118 (1970) [hereinafter cited as *Franchisor's Liability*]. Although this discussion is applicable to franchisees defined in either manner, it is more compelling in the latter case.

53. The discussion that follows assumes that cost and risk distribution factors are relevant in deciding whether a franchisor or a franchisee should be liable for injuries to consumers. By eliminating the injured customer from this calculation, a value judgment has, of course, been made. As Professor Guido Calabresi points out, "risk distribution" need not exclude the injured, and, as used in this discussion, it incorporates a deterrence function. See G. CALABRESI, *THE COST OF ACCIDENTS* 20-21 (1970). In addition, cost allocation need not even be restricted to the injured and the injurers. See *id.* at 22-24. The discussion of economic factors in this Comment is based generally on the theories of Professor Calabresi. G. CALABRESI, *THE COST OF ACCIDENTS* (1970). For a discussion specifically applying these theories to oil company franchisors, see *Oil Companies*, *supra* note 20, at 272-81.

54. See *FRANCHISING IN THE ECONOMY*, *supra* note 3, at 4. Another phenomenon is the two-tier system, illustrated in this region by Gino's, Inc. Gino's, a hamburger chain, is also a franchisee of KFC Corporation (Kentucky Fried Chicken). *Business Week*, November 6, 1978, at 185. Although its individual outlets are surely less able to bear the costs of injuries than KFC, there may be no compelling reason why Gino's as franchisee is not as able financially as KFC to bear costs of injuries.

55. One student commentator has noted that franchisors other than oil companies have done this. *Oil Companies*, *supra* note 20, at 283. The author of a recent article suggests — for the protection of the franchisor — that franchisors should require that their franchisees obtain insurance and name franchisors as co-insureds on the policies. Germain, *Tort Liability of Trademark Licensors in an Era of "Accountability": A Tale of Three Cases*, 69 TRADEMARK REP. 128, 140 (1979).

56. This may not be true of a retail chain store franchisor. If the franchisor distributes its own products or selects or controls those sold, it has the ability to reduce risks from defective products. If the individual outlets retain freedom in purchasing, their acts in selecting products to be sold likewise reduce (to the extent a seller may do so) the risk of injuries from products sold as a class, though not from a particular product.

control the quality of the product made by his licensees,⁵⁷ and in so doing may be able to specify production methods to ensure uniform quality.⁵⁸

Franchises generally begin as franchisor outlets,⁵⁹ and often franchisees have no prior experience in a particular business. The franchisor has usually originated the product or service and is often engaged in research and product improvement activities, the benefits of which he passes along to his franchisees.⁶⁰ The franchisor in a retail operation of the convenience store type has somewhat different obligations and opportunities to control quality of products sold by his franchisees. Although he must assure the quality of goods sold under his mark, he will be unable to require his franchisees to sell particular brands.⁶¹ Like other types of franchisors, he may be able to require certain standards — cleanliness, for example — of the stores.⁶² In either case, a franchisor may have a great deal of control over franchisee operations simply because inexperienced franchisees look to him for advice and guidance.

In other areas, however, the franchisee may be better able to prevent injuries. Defective products or on-premises injuries may be caused by employee incompetence, failure to observe proper health and safety precautions, or failure to properly train employees. Although the franchisor's prescription of proper safety measures, for example, may be of benefit, only the franchisee can ensure that they are actually followed.

Where a service business is involved, the prevention of risks may depend upon the extent to which the service can be standardized. Fast food restaurants have achieved a high degree of standardization through the provision of recipes or formulas for the product and detailed operating procedures in which they often provide training for franchisees.⁶³ Other service franchises, for example,

57. The amount of control actually exercised by trademark licensors varies widely, and fulfillment of the duty as licensor requires only minimal control. See notes 228 to 235 and accompanying text *infra*.

58. Ostensibly, the degree of control exercised by a trademark licensor is limited to only the amount necessary to assure uniformity of product quality. See note 236 *infra*. This is the basis upon which operations such as fast food restaurants impose strict, extensive controls on franchisee operations.

59. Some franchises, usually trading on celebrity names, have been formed specifically for the purpose of franchising. Examples include Minnie Pearl Fried Chicken, Arnold Palmer Dry Cleaning Centers, and the Muhammed Ali Champburger chain.

60. See FRANCHISE OPPORTUNITIES HANDBOOK, *supra* note 1, *passim*. The listings of franchise opportunities, taken solely from information given by the franchisors, show entries for assistance provided by the franchisor to franchisees, some of which indicate that improvements or developments in the product or service are passed on to the franchisees. *Id.*

61. Doing so would probably be classified as an illegal tying arrangement. See note 236 *infra*.

62. This may be done as an incident of the license of a service mark, where the franchisor's mark designates services as well as goods, or by provision for loss of the franchise if the franchisee fails to meet certain standards.

63. See FRANCHISE OPPORTUNITIES HANDBOOK, *supra* note 1. All of the listings of franchise opportunities, which are taken solely from information supplied by franchisors, show the amount of training provided. Many franchisors gave no specific training period

beauty salons, day care centers, and income tax preparation firms, are less susceptible of standardization. These services require individual skill and judgment of employees, and although the franchisor's provision of operating procedures or guidelines may reduce some injuries, the franchisee can best prevent poor service by selecting skilled employees.⁶⁴

There are certainly some injuries, perhaps only a small percentage, that neither franchisor nor franchisee can prevent. Risk prevention considerations do not dictate allocation of the costs of such injuries to either, and the distribution will be made on the basis of cost administration factors.⁶⁵

In addition to primarily economic considerations, there are policy reasons to impose franchisor liability for injuries caused by defective products or services, particularly because the growing prevalence of franchise operations makes frequent consumer contact a virtual certainty. Courts have recognized that entities causing injuries to consumers by manufacturing or selling products and inducing customers to buy must bear some responsibility for their actions.⁶⁶ The retail franchisor induces consumers to deal with his franchisees, who may sell a defective product or provide poor services or whose premises may be unsafe. Absent the franchisor's inducement, consumers either would not deal with the outlet or would make a decision to do so based on their own knowledge of the outlet or other criteria. The franchisor is also likely to be involved significantly in furnishing the product or service; he may supply it to franchisees or control

but of those that did, two to four weeks was common. *Id.* Training periods varied from none (apparently only for franchises tied to already existing businesses, such as Telecake International, franchisees of which are retail bakeries) to three months (*e.g.*, Goodyear Tire & Rubber; Sizzler; Carpeteria). *Id.* Some franchisors provide training only for the franchisee, others train the outlet employees as well. *Id.*

64. A franchisor may prescribe qualifications for certain employees, particularly those who must be certified or licensed, but any more extensive involvement with employment practices is likely to result in a finding of a master-servant relationship between the franchisor and franchisee.

65. Allocating the costs of accidents to the party that can best prevent losses serves a deterrence function; it assumes that if made to bear the costs, the persons able to do so will try to prevent accidents. In a situation in which there can be no deterrence, the cost of accidents can be distributed to the party who has the most money. This approach, known as the "deep pocket" method, *see* G. CALABRESI, *supra* note 53, at 40-41, is likely to result in franchisor liability. Another approach, known as "loss spreading," would put the loss on the party best able to distribute the cost among the greatest number of people. *See id.* at 39-40. *See also id.* at 46-67. This may also be the franchisor, who can raise license and royalty fees for all franchisees, who will in turn raise prices, so that all the customers of the franchise ultimately bear the costs of all injuries within the chain. Insurance by franchisees may also be a way to spread the accident costs to a great many people. *But see id.* at 55-64.

66. *See* INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, PRODUCT LIABILITY: FINAL REPORT OF THE LEGAL STUDY, vol. I, at 36 (1977) [hereinafter cited as LEGAL STUDY I], notes 107 to 109 and accompanying text *infra*. One author has recognized a general trend toward "accountability" in the consumer area and in recent efforts to impose liability on trademark licensors. Germain, *supra* note 55. *Cf.* Gilmore, *Products Liability: A Commentary*, 38 U. CHI. L. REV. 103, 111-16 (1970) (expansion of products liability part of broader expansion in contract and tort liability generally).

its production or procurement by franchisees. Indeed, one of the inducements to consumers may be franchisor involvement or standardization of the business.

APPARENT AGENCY

The theory of apparent agency or agency by estoppel imposes liability expressly on the bases of a franchisor's representation of the franchisee as a part of one overall operation and consumer reliance on that representation.⁶⁷ The elements of liability are manifestations of agency, in the form of words or conduct, by the alleged principal to third parties, upon which manifestations the third parties reasonably rely.⁶⁸ If the requisite showing is made, vicarious liability for the acts of the franchisee is imposed on the franchisor.

The leading case applying the apparent agency doctrine to franchises is *Gizzi v. Texaco, Inc.*⁶⁹ The United States Court of Appeals for the Third Circuit, in reversing a directed verdict for Texaco, held that the prominent display of the company insignia and slogan, which had been the subject of an extensive advertising campaign, could constitute a holding out to the public of the station manager as the company's agent.⁷⁰ The court pointed to Texaco's "Trust your car to the man who wears the star" campaign, one of the purposes of which was to convince the public that Texaco dealers were skilled in servicing automobiles.⁷¹

The shift in emphasis to the consumer's perception of the franchise relationship, particularly as influenced by mass advertising,⁷² was the *Gizzi*

67. RESTATEMENT (SECOND) OF AGENCY §§ 8, 8B, 267 (1958). Apparent agency and agency by estoppel have been treated as identical. *E.g.*, *Gizzi v. Texaco, Inc.*, 437 F.2d 308 (3d Cir. 1971). See RESTATEMENT (SECOND) OF AGENCY § 8, Comment d, for an explanation of the differences and similarities.

68. RESTATEMENT (SECOND) OF AGENCY § 267 (1958).

69. 437 F.2d 308 (3d Cir. 1971). *Gizzi* and a passenger in his van were injured in an accident that occurred as the result of a brake failure. *Gizzi* had purchased his used van from a New Jersey Texaco dealer, who was to have repaired the vehicle, including the brakes, before delivery. *Gizzi* asserted that Texaco had held the operator out as its agent, that he had reasonably relied on various indications of agency, and that Texaco was therefore estopped from denying liability. *Id.* at 309.

70. *Id.* at 310. The case was not the first in which oil company signs were recognized as a manifestation of authority, see *Standard Oil Co. v. Gentry*, 241 Ala. 62, 1 So. 2d 29 (1941) (company itself had previously operated the station); *Cawthon v. Phillips Petroleum Co.*, 124 So. 2d 517 (Fla. App. 1960) (advertisement relied on by plaintiff did not relate to repair services); although several earlier cases had held that signs, uniforms, and the like did not constitute a representation of agency, *e.g.*, *Apple v. Standard Oil, Div. American Oil Co.*, 307 F. Supp. 107 (N.D. Cal. 1969); *Crittendon v. State Oil Co.*, 78 Ill. App. 2d 112, 222 N.E.2d 561 (1966); *Sherman v. Texas Co.*, 340 Mass. 606, 165 N.E.2d 916 (1960); *Westre v. DeBuhr*, 82 S.D. 276, 144 N.W.2d 734 (1966).

71. 437 F.2d at 310. The court noted that Texaco knew of and condoned the sale of used vehicles by 30% of its dealers and that it knew of the particular station's practice because the station was located across from a Texaco regional office. *Id.* The circuit court held there was sufficient evidence of apparent authority for the case to have gone to the jury. *Id.*

72. See Comment, "You Can Trust Your Car to the Man Who Wears the Star" — Or Can You?: The Use of Apparent Authority to Establish a Principal's Tort Liability, 33 U. PITT. L. REV. 257, 264 (1971) [hereinafter cited as *Trust Your Car*].

decision's most significant contribution to franchisor liability law. Subsequent cases and commentary have acknowledged that advertising is one of the more important, if not the most important, factors in the application of the apparent agency doctrine.⁷³ Although prior cases had held that oil company signs and the like merely indicated that a company's products were sold by the station, not that the station was the company's agent in performing repairs and other customary services,⁷⁴ *Gizzi* has established that customer recovery may be based on an advertising campaign that creates the impression that the company vouches for repairs and other normal station activities.

Courts have applied the apparent agency principles enunciated in *Gizzi* in a few cases involving franchises other than gasoline stations.⁷⁵ In *Billops v. Magness Construction Co.*,⁷⁶ the Delaware Supreme Court reversed the trial court's summary judgment in favor of the franchisors in a tort action arising out of the plaintiffs' treatment by employees of a local Hilton Inn.⁷⁷ The court found that the question of apparent authority should be submitted to a jury because sufficient indicia that the local inn was Hilton's agent had been offered, and evidence of reliance upon the franchisor's reputation had been presented.⁷⁸ In

73. *E.g.*, *B.P. Oil Corp. v. Mabe*, 279 Md. 632, 649, 370 A.2d 554, 564 (1977) (denying liability and noting there was no proof of advertising by BP); *Johnston v. American Oil Co.*, 51 Mich. App. 646, 649, 215 N.W.2d 719, 721 (1974); *Service Station Torts*, *supra* note 20, at 395 n.83; *Trust Your Car*, *supra* note 72, at 264.

74. *E.g.*, *Sherman v. Texas Co.*, 340 Mass. 606, 165 N.E.2d 916 (1960); *Westre v. DeBuhr*, 82 S.D. 276, 144 N.W.2d 734 (1966).

75. *Drexel v. Union Prescription Centers, Inc.*, 582 F.2d 781 (3d Cir. 1978); *Wood v. Holiday Inns, Inc.*, 508 F.2d 167 (5th Cir. 1975); *Billops v. Magness Constr. Co.*, 391 A.2d 196 (Del. 1978); *Singleton v. International Dairy Queen, Inc.*, 332 A.2d 160 (Del. Super. 1975); *see Sapp v. City of Tallahassee*, 348 So. 2d 363 (Fla. App.), *cert. denied*, 354 So. 2d 985 (Fla. 1977).

Apparent agency was also the basis of decision in four pre-*Gizzi* cases involving such franchises, but they differed from it in one important respect. In all of the cases, brought in contract, at least some of the manifestations of agency were made specifically to the plaintiff. *Kuchta v. Allied Builders Corp.*, 21 Cal. App. 3d 541, 98 Cal. Rptr. 588 (1971); *Beck v. Arthur Murray, Inc.*, 245 Cal. App. 2d 976, 54 Cal. Rptr. 328 (1966); *Vowels v. Arthur Murray Studios*, 12 Mich. App. 359, 163 N.W.2d 35 (1968); *Duluth Herald & News Tribune v. Plymouth Optical Co.*, 286 Minn. 495, 176 N.W.2d 552 (1970). In none of the cases were national advertising and company signs the only indications of authority. Actual reliance was clearly present, and determining the scope of the company's manifestations of authority was not a problem.

76. 391 A.2d 196 (Del. 1978).

77. *Id.* The plaintiffs sued for false imprisonment, invasion of privacy, intentional and negligent infliction of emotional distress, battery, assault, and defamation, all arising out of the incidents that occurred when they refused to pay an additional rental charge for a ballroom at the Brandywine Hilton Inn.

Three corporate defendants, Hilton Inns, Inc., Hilton Hotels Corporation, and Hilton International Co., were sued; it was unclear whether all three were franchisors of the local inn. *See id.* at 199.

78. *Id.* at 198-99. The court looked to requirements of the franchise agreement that only the Hilton logo and sign be displayed, that no other name be mentioned to customers as the management of the Inn, and that the Inn's appearance be consistent with the Hilton system. *Id.* at 199. Plaintiffs testified to their reliance on the Hilton name, and the quality of its hotels, in selecting a place to hold their function. *Id.*

Wood v. Holiday Inns, Inc.,⁷⁹ the court, after examining various provisions of the franchise agreement that were designed to promote uniformity, held that a jury might reasonably find that the agreement required the local inn to be of such an appearance that travelers would conclude that it was owned by the franchisor.⁸⁰

A similar result was reached by the United States Court of Appeals for the Third Circuit in *Drexel v. Union Prescription Centers, Inc.*,⁸¹ where the court found sufficient representations of agency by the principal to preclude summary judgment.⁸² The court looked to items such as bags given to store customers, advertising, and the store's telephone listing, all of which identified it only as "Union Prescription Center." These representations were attributable to the franchisor because of its contractual control over the franchisee's advertising, use of signs and insignia, and other symbols.⁸³ Although no evidence of plaintiff's reliance on the franchisor name had been introduced, the court of appeals held that this failure should not bar plaintiff's cause of action because, at the summary judgment stage, the burden was on the defendant to establish the absence of issues of material fact.⁸⁴

Under apparent agency theory, manifestations of agency to a third person must be made by the principal, not its agent.⁸⁵ Mass advertising by a franchisor usually would meet this test by constituting a holding out of the franchisee as its agent. Although the extent of franchisor control over its franchisees is

79. 508 F.2d 167 (5th Cir. 1975)

80. *Id.* at 176; *accord*, *Sapp v. City of Tallahassee*, 348 So. 2d 363, 367 (Fla. App.), *cert. denied*, 354 So. 2d 985 (Fla. 1977) (relying on *Wood* in action involving temporary employee at local Holiday Inn).

The *Wood* case represents a significant, though subtle, difference in the application of *Gizzi*. *Gizzi* and other cases impose liability on the basis that signs and other indicia, coupled with advertising, lead the consumer to believe the outlet operator is an agent of the franchisor. *Wood* similarly imposed liability, but on the basis that the franchise outlets are indistinguishable from the company-owned outlets. The difference lies in the fact that *Wood* would seem to require that there be company units, while *Gizzi* does not. Whether this distinction was intended to be significant is unclear; the *Wood* court may have drawn it only because there were franchisor-owned Holiday Inns and the franchise agreement provided for uniformity.

81. 582 F.2d 781 (3d Cir. 1978).

82. The court, applying Pennsylvania law, also noted that because of ambiguities in the franchise agreement as to whether the franchisee was an actual agent of the franchisor, sufficient questions existed for the question to be submitted to a jury. *Id.* at 785-90. In reaching its conclusion, the court predicted that the apparent agency doctrine would be adopted in Pennsylvania. *Id.* at 791-93.

83. *Id.* at 795. The lower court had relied partly on the fact that the franchisee had registered with local and state regulatory boards as owner of the business. 428 F. Supp. 663, 667 (E.D. Pa. 1977). The court of appeals discounted this fact because it would have been unknown to the plaintiff, 582 F.2d at 796, and also noted that a sign naming the franchisee as "Registered Pharmacist" might as easily have been interpreted as a statement of professional qualifications as one of ownership, *id.*

84. 582 F.2d at 797.

85. See text accompanying note 68 *supra*.

immaterial,⁸⁶ as recognized by the courts in *Wood*, *Billops*, and *Drexel*, a franchisor's dictation of the content of franchisee advertising, telephone listings, and store signs⁸⁷ and its requirement of a uniform appearance of outlets⁸⁸ may lead to the conclusion that it has held out the local franchisees as its agents.

Once manifestations of authority have been made, a plaintiff must prove that he has relied upon them in dealing with the franchisee, although, as in *Gizzi*, the plaintiff's testimony may be sufficient.⁸⁹ Some courts have denied liability in service station cases because evidence failed to establish that plaintiffs had relied upon the companies' manifestations of agency in dealing with the stations.⁹⁰ In several cases involving other types of retail franchises, however, courts have not required so strict a proof of plaintiffs' reliance.⁹¹

86. It may, however, receive some consideration, probably because virtually all reported cases involve claims of both actual and apparent agency. The tendency may be to consider the controls in weighing actual agency, then, if not sufficient, lump them in with other factors supporting apparent agency. See, e.g., *B.P. Oil Corp. v. Mabe*, 279 Md. 632, 370 A.2d 554 (1977); cf. *Wood v. Holiday Inns, Inc.*, 508 F.2d 167 (5th Cir. 1975) (reviewing factors such as controls in the franchise agreement for the purpose of determining whether franchisor required manifestations that would lead a consumer to believe the local inn was owned by Holiday Inns).

87. *Drexel v. Union Prescription Centers, Inc.*, 582 F.2d 781, 795 (3d Cir. 1978); *Billops v. Magness Constr. Co.*, 391 A.2d 196, 199 (Del. 1978).

88. *Drexel v. Union Prescription Centers, Inc.*, 582 F.2d 781, 795 (3d Cir. 1978); *Wood v. Holiday Inns, Inc.*, 508 F.2d 167, 176 (5th Cir. 1975); *Billops v. Magness Constr. Co.*, 391 A.2d 196, 199 (Del. 1978).

89. The court stated, "Appellant *Gizzi* testified that he was aware of the advertising engaged in by Texaco and that it had instilled in him a certain sense of confidence in the corporation and its products." 437 F.2d at 310. As one student commentator has noted, the decision made no reference to reliance on the part of *Gizzi's* passenger. Note, *Agency — Apparent Agency and Agency by Estoppel: Emerging Theories of Oil Company Liability for Torts of Service Station Operators*, 50 N.C.L. Rev. 647, 650 (1972) [hereinafter cited as *Emerging Theories*].

90. E.g., *Union Oil Co. v. Crane*, 288 Ala. 174, 258 So. 2d 882 (1972) (plaintiff dealt with station because of personal relationship with local operator); *Aweida v. Kientz*, 536 P.2d 1138 (Colo. App. 1975) (plaintiff had never heard of oil company before accident); *B.P. Oil Corp. v. Mabe*, 279 Md. 632, 370 A.2d 554 (1977) (plaintiff's testimony that he always bought BP gas and always dealt with BP held insufficient to show reliance); *Saunders v. Clark Oil Ref. Corp.*, 57 Mich. App. 687, 226 N.W.2d 695 (1975) (plaintiff came to station only to give a friend a ride home).

It appears that the *Mabe* court viewed reliance much more strictly than would most other courts. See 279 Md. at 650, 370 A.2d at 564 (Levine, J., dissenting) (expressing view that the evidence supported a finding of apparent agency).

91. The *Wood* court noted that on retrial plaintiff was to be permitted to explain why he always stayed at Holiday Inns. 437 F.2d at 176 n.5. Presumably, such testimony would tend to establish reliance. As to reasonableness, the court seemed to favor the plaintiff. There was no way he could have known in dealing with an employee of the local inn that he was not dealing with an employee of Holiday Inns. *Id.* at 176. The *Sapp* court noted that the same was true of a temporary employee at the local inn restaurant. 348 So. 2d at 367. The *Singleton* court did not discuss reliance. The fact that no evidence of reliance was introduced did not preclude reversal of summary judgment entered for the franchisor in *Drexel*. See text accompanying note 84 *supra*.

As an additional element of a reliance claim, a plaintiff must show that his reliance on the franchisor's manifestations was reasonable. The reasonableness issue arises in connection with the definition of the scope of manifestations of agency. In the *Gizzi* case, the trial and dissenting judges acknowledged that Texaco's advertising might have led a reasonable person to believe that the station operator was its agent for supplying gasoline products and routine services, but not for the sale of used vehicles.⁹² In a later case, the Maryland Court of Appeals seems to have drawn an even narrower distinction, apparently finding that it may have been reasonable for a plaintiff to believe that the operator was the company's agent in the sale of products, but not as to services provided.⁹³ It is significant, though, that the Maryland court also found that no evidence of an advertising campaign had been introduced. Without the added factor of a campaign that leads the public to believe that the company vouches for the operator's repair services,⁹⁴ courts may resolve cases on the basis of "common knowledge" that service stations are independent sellers of the company's products.⁹⁵ Some courts may find that this common knowledge makes it unreasonable for consumers to rely on oil company representations;⁹⁶ others may take the position that they cannot find such reliance unreasonable as a matter of law.⁹⁷

The same problems of the reasonableness of the plaintiff's reliance and the scope of franchisor manifestations arise in connection with retail franchises

92. 437 F.2d at 310 (majority quoting from lower court opinion); *id.* at 311 (Seitz, J., dissenting); see *Emerging Theories*, *supra* note 89, at 653-54.

93. *B.P. Oil Corp. v. Mabe*, 279 Md. 632, 649, 370 A.2d 554, 563-64 (1977); see *id.* at 652, 370 A.2d at 565 (Levine, J., dissenting) (rejecting the distinction). Mabe was injured by the explosion of liquid, supposed to be water, that had been poured into his radiator. Putting water in a radiator would fall within the range of normal services performed by gasoline stations.

Other courts have denied recovery at least partly on the basis that the injury involved was outside the scope of representation. See *Apple v. Standard Oil, Div. American Oil Co.*, 307 F. Supp. 107 (N.D. Cal. 1969) (child bitten by dog at station, no evidence defendant knew it was there); *Huffman v. Gulf Oil Corp.*, 26 N.C. App. 376, 216 S.E.2d 383 (1975) (same). *But see Clark v. Texaco, Inc.*, 55 Mich. App. 100, 222 N.W.2d 52 (1974) (summary judgment for defendant proper in case in which plaintiff bitten by dog); *Borchard & Ehrlich*, *supra* note 20, at 116 n.47.

94. The Maryland court seems to have required a specific campaign along the lines of the one in *Gizzi*. Other courts have talked of advertising in a general way. *E.g.*, *Johnston v. American Oil Co.*, 51 Mich. App. 646, 215 N.W.2d 719 (1974).

95. As to whether this is common knowledge, see *B.P. Oil Corp. v. Mabe*, 279 Md. 632, 650, 370 A.2d 554, 564 (1977) (Levine, J., dissenting), pointing out that many stations are company owned. The government estimates that 20% of stations are owned by oil companies. *FRANCHISING IN THE ECONOMY supra* note 3, at 32, from which the percentage was derived. *Cf. Borchard & Ehrlich*, *supra* note 20, at 125 (noting that if franchisors seeking to avoid liability advertise franchisee status, courts might again apply the "common knowledge" formulation).

96. See, *e.g.*, *Manis v. Gulf Oil Corp.*, 124 Ga. App. 638, 639-40, 185 S.E.2d 589, 591 (1971); *Westre v. DeBuhr*, 82 S.D. 276, 279-80, 144 N.W.2d 734, 735-36 (1966).

97. *E.g.*, *Gizzi v. Texaco, Inc.*, 437 F.2d 308, 310 (3d Cir. 1971); see *Oil Companies*, *supra* note 20, at 270.

other than gasoline stations. There may be some tendency for courts to find that consumer reliance on franchisor representations may be more reasonable in other retail situations than in gasoline station cases. As one court has indicated, the same "common knowledge" that exists as to gasoline station ownership may not exist as to ownership of other types of retail outlets.⁹⁸ Other courts have looked only to the situations before them, finding that plaintiffs could not reasonably have known that local outlets were not the agents of the franchisors.⁹⁹ As to the scope of the franchisor's manifestations of authority, there could be different results in the cases of retail chain store franchises and retail franchises selling products and services, and liability will depend on the content of franchisor advertising. In regard to retail chain stores, the franchisor's name and advertising may indicate that certain of its products are sold by the outlet, or may indicate only that the franchisee outlets or the products sold there have certain qualities or characteristics. In this situation, although it seems likely that even apparent agency would result only in liability for a defective product, franchisor advertising that represents the stores as having certain characteristics — for example, cleanliness and safety — might result in the imposition of liability in other circumstances, such as for a fall on a dirty floor. The retail operation that sells and manufactures products and offers services as well presents a greater problem in definition of the scope of agency, that is, whether agency extends only to the products, to the entire operation, or only to the products and some services.¹⁰⁰ Again, franchisor advertisement of the outlets and its connection with them will be a critical element.

98. *Drexel v. Union Prescription Centers, Inc.*, 582 F.2d 781, 796 n.23 (3d Cir. 1978).

99. *Wood v. Holiday Inns, Inc.*, 508 F.2d 167, 176 (5th Cir. 1975); *Billops v. Magness Constr. Co.*, 391 A.2d 196, 198-99 (Del. 1978); *Sapp v. City of Tallahassee*, 348 So. 2d 363, 367 (Fla. App.), cert. denied, 354 So. 2d 985 (Fla. 1977). The court in *Billops* noted that the defendants had even admitted in answers to interrogatories that there were no distinguishing features in the operation or physical appearance of a local inn by which an ordinary person could have realized he was not dealing with the franchisors. 391 A.2d at 198-99.

Borchard and Ehrlich suggest that because some of the cases, such as *Billops*, seem to turn on the fact that the customer had no way of knowing that the outlet was not run by the franchisor, a franchisor may be able to avoid liability if he affirmatively discloses the franchisee's status. Such disclaimers would need to be "unambiguous and prominent." Borchard & Ehrlich, *supra* note 20, at 125.

100. A somewhat similar problem may exist in retail distributorships where a single owner is the distributor of different companies' products, for example, an automobile dealer selling Mercedes-Benz and Ford cars. Assuming Mercedes knows of the dual distributorship, is it liable when a customer, relying on the high standard of competence of Mercedes-trained mechanics, brings his Ford in for repairs? The initial question is whether the Mercedes sign is a representation of agency as to all repairs of Mercedes automobiles, and the answer would seem to be yes, at least if dealers are advertised as expert repair outlets. The service station analogy is apt. Whether liability would extend further is problematic, even with knowledge that the public relies on a general reputation for excellence of Mercedes mechanics. That reputation would seem to be tied to the reputation of Mercedes automobiles.

Service franchises present a slightly different variation of the problem, that of how to define the services offered by the franchisee. The fact that services, not products, are offered may be a factor in imposing liability. Dry cleaning, for example, is an easy service to define. Describing what is provided by a motel other than a place to sleep may be more difficult.¹⁰¹ Franchisor advertising may represent facilities as clean or safe, so that the scope of agency might extend to conditions or activities involving those qualities.

STRICT LIABILITY

Background

The doctrine of strict liability in tort, now adopted in forty-three jurisdictions by statute or judicial decision,¹⁰² evolved in products liability as the progeny of traditional negligence and warranty theories. Warranty theories furnished the strict liability portion of the doctrine, and negligence extended the affected class beyond those parties with whom a manufacturer was in privity.¹⁰³ Although liability without fault is imposed on manufacturers, it is not absolute: it is necessary to prove that a product was defective when it left the manufacturer,¹⁰⁴ that it reached the consumer in substantially the same

101. *Wood* suggests the problem. A motel guest sued Gulf and Holiday Inns for injuries (a later heart attack while recalling and relating the incident) resulting from the desk clerk's rousing him and taking away his Gulf credit card. In discussing Holiday Inn's liability, the court noted that part of plaintiff's contract for lodging was a contract for "proper treatment" by employees. 508 F.2d at 176. See *Billops v. Magness Constr. Co.*, 391 A.2d 196 (Del. 1978). Defining "proper treatment" in a case less egregious than *Wood* or *Billops* might present more difficulty.

102. 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 3[2] (1978). Not all jurisdictions recognize strict liability in tort, although nearly all achieve the same result under sales warranty theories with the privity requirement relaxed to varying degrees. *Id.* The interchangeability of warranty without privity with strict liability in tort depends on which version of the Uniform Commercial Code section on third party beneficiaries of sellers' warranties is adopted. See U.C.C. § 2-318.

Although the two versions of strict liability may be substantially identical, defenses such as disclaimer are available in warranty actions, 2 L. FRUMER & M. FRIEDMAN, *supra*, § 3[1][c], and economic losses are not recoverable under strict liability in tort, *id.* § 16A[4][k].

103. 2 L. FRUMER & M. FRIEDMAN, *supra* note 102, § 16A[1]; W. PROSSER, HANDBOOK OF THE LAW OF TORTS 641-58 (1971); see *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 63, 377 P.2d 897, 901 (1962).

Strict liability in tort bears other vestiges of its negligence heritage. Conduct that would be contributory negligence may fall within assumption of risk, which still has vitality, RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965), and some courts have applied comparative fault concepts in strict liability cases, e.g., *Hagenbuch v. Snap-On Tools Corp.*, 339 F. Supp. 676 (D.N.H. 1972); see LEGAL STUDY I, *supra* note 66, at 9.

104. The *Restatement* provides for liability for sale of a defective product that is unreasonably dangerous to the user. RESTATEMENT (SECOND) OF TORTS § 402A & Comment i (1965). *Greenman v. Yuba Power Products* prescribed liability when a product "proves to have a defect that causes injury to a human being." 59 Cal. 2d at 62, 377 P.2d at 900. The "unreasonably dangerous" formulation has been rejected as injecting negligence-like

condition as it left the manufacturer,¹⁰⁵ and that the defect caused the plaintiff's injury.¹⁰⁶

Strict products liability is often spoken as of enterprise liability, *i.e.*, the business enterprise that places the defective product in the hands of the consumer bears responsibility for the injuries it causes.¹⁰⁷ Although responsibility is often discussed in economic terms — the manufacturer being the entity best able to bear and distribute the costs of injuries¹⁰⁸ — a notion of fault on the part of the members of the enterprise is present in the doctrine.¹⁰⁹

The responsible enterprise, the members of which are strictly liable, has been extended beyond manufacturers.¹¹⁰ Entities in the product's vertical

considerations into strict liability. *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 2d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972); see LEGAL STUDY I, *supra* note 66, at 3-4. See generally 2 L. FRUMER & M. FRIEDMAN, *supra* note 102, § 16A[4][f]. Frumer and Friedman define a manufacturing defect as "an unintended condition because of a miscarriage in the manufacturing process." 2 L. FRUMER & M. FRIEDMAN, *supra* note 102, § 16A[4][f][1], noting that products may also be defective in design and that manufacturers may be liable for failure to warn, *id.* Dean Prosser states that the prevailing view is that the product is defective when it does not meet the ordinary consumer's reasonable expectations as to safety. W. PROSSER, *supra* note 103, at 659.

105. RESTATEMENT (SECOND) OF TORTS § 402A(1)(b) (1965). The American Law Institute reserved judgment on whether makers of component parts and products undergoing further change would be liable, *id.*, Comments p and q, but liability has been extended to both, see W. PROSSER, *supra* note 103, at 663-64.

106. RESTATEMENT (SECOND) OF TORTS § 402A (1965). Misuse may, for example, defeat a strict liability claim, since the injury is not caused by the defect. *Id.*, Comment h; LEGAL STUDY I, *supra* note 66, at 8.

107. "The purpose of such liability is to insure that the cost of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 63, 377 P.2d 897, 901 (1962) (Traynor, J.). In an earlier opinion, Judge Traynor discussed considerations of loss prevention and risk spreading. *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 462, 150 P.2d 436, 440-41 (1944) (Traynor, J., concurring).

108. *But see* LEGAL STUDY I, *supra* note 66, at 36. Referring to the confusion over standards of responsibility in products liability cases, the authors note that "concepts of risk spreading, enterprise liability and absolute liability are sometimes given lip service, but are consistently rejected by most courts." *Id.*

109. See, *e.g.*, Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L. Rev. 5, 14-17 (1965), suggesting that a manufacturer who puts a defective product on the market is simply negligent. The authors of the legal study for the Interagency Task Force on Product Liability suggest recognition of the fact that negligence and fault concepts have not been ignored in strict products liability, LEGAL STUDY I, *supra* note 66, at 36, and propose a hybrid cause of action based on Professor Wade's concept. "The cause of action would essentially be one of negligence except that (1) the proof process in manufacturing defect cases would be shifted to focus on the product, and (2) intermediate sellers would be held liable even if they themselves were not directly negligent." *Id.* at 37.

110. Although the statements made in the discussion following are still generally true, the last two years have shown something of a countervailing trend. Eleven state legislatures have responded to commonly voiced criticisms of strict liability in tort and other products liability theories.

Most of the statutes provide an alternate statute of limitations for products liability actions which either key to the date the product was first sold or allow the

distribution chain were the first to which liability was applied; now retailers and intermediate sellers are often strictly liable.¹¹¹ In a few cases, liability has

passage of a specified time as a defense. ARIZ. REV. STAT. ANN. § 12-551 (Supp. 1979) (12 years after first sale, except for negligence and breach of express warranty actions); COLO. REV. STAT. § 13-21-403(3) (Supp. 1978) (10 years after first sale); CONN. GEN. STAT. ANN. § 52-577a (West Supp. 1979) (8 years); ILL. ANN. STAT., ch. 83, § 22.2(b) (Smith-Hurd Supp. 1979) (earlier of 12 years from first sale or 10 years from first delivery to initial user); Act of March 10, 1978, Pub. L. No. 141, § 28, 1978 Ind. Acts 1310 (to be codified at IND. CODE 33-1-1.5(5)) (10 years after delivery to first user); KY. REV. STAT. ANN. 411.310(1) (1978) (5 years after sale to first consumer or 8 years after manufacture); MINN. STAT. § 604.03 (useful life); NEV. REV. STAT. § 25-224 (Supp. 1978) (10 years from first sale); OR. REV. STAT. § 30.905(1) (Supp. 1978) (8 years from first purchase for use); TENN. CODE ANN. § 23-3703 (Supp. 1978) (earlier of 10 years from first purchase for use or one year after expiration of useful life of product).

Other common modifications provide that subsequent alteration or modification can be asserted as a defense or bars an action, ARIZ. REV. STAT. ANN. 12-683(2) (Supp. 1979); ILL. ANN. STAT., ch. 83, § 22.2(c) (Smith-Hurd Supp. 1979); Act of March 10, 1978, Pub. L. No. 141, § 28, 1978 Ind. Acts 1309 (to be codified at IND. CODE 33-1-1.5(4)(b)(3)); KY. REV. STAT. ANN. § 411.320 (1978); OR. REV. STAT. § 30.915 (Supp. 1978); R.I. GEN. LAWS 9-1-32(b) (Supp. 1978); TENN. CODE ANN. § 23-3708 (Supp. 1978); and that the state of the art at the time of manufacture and sale provides a defense or standard for liability, ARIZ. REV. STAT. ANN. § 12-683(1) (Supp. 1979); COLO. REV. STAT. § 13-21-403(1) (Supp. 1978); Act of March 10, 1978, Pub. L. No. 141, § 28, 1978 Ind. Acts 1309 (to be codified at IND. CODE § 33-1-1.5(4)(b)(4)); KY. REV. STAT. ANN. § 411.310(2) (1978); NEB. REV. STAT. 25-21, 182 (Supp. 1978); TENN. CODE ANN. § 23-3705(a) (Supp. 1978).

At the federal level attempts have also been made to respond to the products liability crisis. The promulgation by the Department of Commerce of a Model Uniform Products Liability Act, 44 Fed. Reg. 62, 714 (1979), is likely to lend impetus to the trend toward statutory reform of products liability law. A detailed analysis of the model act is beyond the scope of this Comment, but it can be noted that the proposal incorporates many of the features of the state legislation noted above. Primary responsibility is placed on manufacturers, although sellers and others can be liable when they are at fault or when the manufacturer cannot be sued. *See id.* at 62, 726-27. Other provisions include a limited "state of the art" defense, *id.* at 62, 728-30; a defense of compliance with applicable government standards, *id.* at 62, 730-31; and limitation of liability to a product's useful safe life, *id.* at 62, 732, 62, 733-34 with a ten-year statute of repose, *id.* at 62, 732, 62, 734. Comparative "responsibility" is to be applied, and damages apportioned. *Id.* at 62, 734-39. Twenty-four bills, none of which has yet passed and some of which are duplicative, were introduced in 1979 in the first session of the 96th Congress. Eleven of these proposals would ease the economic burden on manufacturers and others by providing income tax deductions for amounts paid into reserve funds or trusts established for products liability losses, H.R. 394, 1677, 1678, 1947, 2693, 2694, 2926, 2935, 3252; S. 542, 634; and three would do so by enabling product sellers to pool their resources in risk retention groups to purchase liability insurance on a group basis, H.R. 5258, 5571; S. 1789. Many of the same kinds of substantive provisions that the state statutes and the Department of Commerce proposal contain are also contained in the federal bills.

111. *E.g.*, *Bailey v. Montgomery Ward & Co.*, 6 Ariz. App. 213, 431 P.2d 108 (1967) (retailer); *Barth v. B.F. Goodrich Tire Co.*, 265 Cal. App. 2d 228, 71 Cal. Rptr. 308 (1968) (retailer and wholesaler); *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964) (retailer); *Dunham v. Vaughan & Bushnell Mfg. Co.*, 42 Ill. 2d 339, 247 N.E.2d 401 (1969) (wholesaler). *Contra*, *Sam Shainberg Co. v. Barlow*, 258 So. 2d 242 (Miss. 1972) (retailer and wholesaler); *Walker v. Decora, Inc.*, 225 Tenn. 504, 471 S.W.2d 778 (1971) (same) (strict liability limited to manufacturers).

been extended to a non-seller on the ground that it was part of the marketing enterprise that produced the good and induced the consumer to buy it.¹¹² Product suppliers other than sellers have also been held strictly liable in tort.¹¹³

The courts have also broadened the scope of products liability by expanding the class of items defined as consumer products. Now included in the definition are homes built by developers¹¹⁴ and the product in a hybrid sales-service transaction.¹¹⁵ A few courts have found express and implied warranties in commercial service transactions,¹¹⁶ and commercial services may be the next "products" to which strict liability is applied.¹¹⁷

112. *Kosters v. Seven-Up Co.*, 595 F.2d 347 (6th Cir. 1979); *Kasel v. Remington Arms Co.*, 24 Cal. App. 3d 711, 101 Cal. Rptr. 314 (1972); see *Hempstead v. General Fire Extinguisher Corp.*, 269 F. Supp. 109 (D. Del. 1967); *Hanberry v. Hearst Corp.*, 276 Cal. App. 2d 680, 81 Cal. Rptr. 519 (1969); *Webber & Trombetta, Product Liability: The Potential Liability of the Advertising Agency*, 24 CLEV. ST. L. REV. 413 (1975).

113. The principal application has been to commercial lessors, *Cintrone v. Hertz Truck Leasing & Rental Serv.*, 45 N.J. 434, 212 A.2d 769 (1965); accord, *Price v. Shell Oil Co.*, 2 Cal. 3d 245, 466 P.2d 722 (1970); *Stewart v. Budget Rent-A-Car Corp.*, 52 Haw. 71, 470 P.2d 240 (1970); but has been extended beyond enterprises in the business of leasing products, see *Sipari v. Villa Olivia Country Club*, 63 Ill. App. 3d 985, 380 N.E.2d 819 (1978); *Streatch v. Associated Container Transp. Ltd.*, 388 F. Supp. 935 (S.D. Cal. 1975); but see *Speyer, Inc. v. Humble Oil & Ref. Co.*, 275 F. Supp. 861 (W.D. Pa. 1967), *aff'd*, 403 F.2d 766 (3d Cir.), *cert. denied*, 349 U.S. 1015 (1968). In one case a licensor, the owner of a launderette, was held liable. *Garcia v. Halsett*, 3 Cal. App. 3d 319, 82 Cal. Rptr. 420 (1970).

114. The leading case is *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965), in which liability was imposed on a developer on an implied warranty theory. Liability has been imposed upon the builder of mass-produced homes, e.g., *Kriegler v. Eichler Homes, Inc.*, 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969); *Patitucci v. Drelich*, 153 N.J. Super. 177, 379 A.2d 297 (1977); see *State Stove Mfg. v. Hodges*, 189 So. 2d 113 (Miss.), *cert. denied*, 386 U.S. 912 (1966). *Contra*, *Chapman v. Lily Cache Builders, Inc.*, 48 Ill. App. 3d 919, 362 N.E.2d 811 (1977). It has also been extended to a developer in the sale of a lot. *Avner v. Longridge Estates*, 272 Cal. App. 2d 695, 77 Cal. Rptr. 633 (1969).

115. E.g., *Newmark v. Gimbel's, Inc.*, 54 N.J. 585, 258 A.2d 697 (1969); cf. *Magrine v. Krasnica*, 94 N.J. Super. 228, 227 A.2d 539 (Hudson County Ct. 1967), *aff'd per curiam sub nom. Magrine v. Spector*, 100 N.J. Super. 223, 241 A.2d 637 (Super. Ct. App. Div. 1968) (needle used by dentist not "supplied" by him to patient). But see *Texas State Optical, Inc. v. Barbee*, 417 S.W.2d 750 (Tex. Civ. App. 1967), *aff'd sub nom. Barbee v. Rogers*, 425 S.W.2d 342 (Tex. 1968). See generally *Reynolds, Strict Liability for Commercial Services — Will Another Citadel Crumble?*, 30 OKLA. L. REV. 298 (1977).

116. E.g., *Texas Metal Fabricating Co. v. Northern Gas Prods. Corp.*, 404 F.2d 921 (10th Cir. 1968) (Kansas law); *Vitromar Piece Dye Works v. Lawrence of London, Ltd.*, 119 Ill. App. 2d 301, 256 N.E.2d 135 (1969); *Newmark v. Gimbel's, Inc.*, 54 N.J. 585, 258 A.2d 697 (1969); *McCool v. Hoover Equip. Co.*, 415 P.2d 954 (Okla. 1966). But see *LaRossa v. Scientific Design Co.*, 402 F.2d 937 (3d Cir. 1968).

117. See *Johnson v. Sears, Roebuck & Co.*, 355 F. Supp. 1065 (E.D. Wis. 1973); *Newmark v. Gimbel's, Inc.*, 54 N.J. 585, 258 A.2d 697 (1969); *Reynolds, supra* note 115, at 311-12. Strict liability is unlikely to extend to professional services. Even courts that have applied it to commercial services have distinguished for policy reasons any extension to professional services. *Johnson v. Sears, Roebuck & Co.*, 355 F. Supp. at 1067; *Newmark v. Gimbel's, Inc.*, 54 N.J. at 596-97, 258 A.2d at 702-03; see *Reynolds, supra* note 115, at 313, 317. But see *id.* at 314.

It was inevitable, as a Connecticut court recently noted, that strict liability in tort be suggested for product franchisors: "The marketplace is the common denominator of franchising as a fact and strict tort liability as a law, and the two were bound to join in issue for resolution by the court."¹¹⁸ The close supervision over production and distribution of a franchise product that is exercised by the retail franchisor makes it a likely candidate for strict liability; the franchisor is an integral part of the enterprise producing and selling the good.¹¹⁹ The expansion of strict liability to sales-service transactions, with possible extension to all commercial services, makes it foreseeable that liability will also be proposed for service franchisors.¹²⁰

Two principal theories¹²¹ have emerged under which retail franchisors could be held strictly liable for defective products and services produced by their franchisees.¹²² The stated basis of one theory combines section 400 of the

118. *City of Hartford v. Associated Constr. Co.*, 34 Conn. Supp. 204, 208, 384 A.2d 390, 393 (1978).

119. It is possible, however, that strict liability in tort will not be extended further. That 11 states have within the past three years enacted statutes limiting the effect of judicial application of the doctrine may be evidence of a general trend to at least constrain the doctrine's extension.

120. Given the trend toward restriction of the scope of strict liability, *see* note 110 *supra*, imposition of liability on service franchisors may be slow. It may well develop through the finding of an implied warranty for service transactions akin to the implied warranty of merchantability. *See* note 117 *supra*.

121. A third variation is strict liability predicated on the duty of a trademark licensor to control product quality, which is discussed with the trademark theories. *See* notes 209 to 211 and accompanying text *infra*.

A rather expansive theory of strict liability has been suggested in connection with oil company franchisors, strict liability for franchisees' torts. *Sutton v. Chevron Oil Co.*, 85 N.M. 604, 514 P.2d 1301, *rev'd as to strict liability*, 85 N.M. 679, 681, 515 P.2d 1283, 1285 (1973); Comment, *Liability of an Oil Company for its Lessee's Torts*, 1965 U. ILL. L.F. 915. Since the sole basis of liability is risk bearing and distribution, the theory could apply to all franchisors or at least to those using controls similar to those of oil companies. It is submitted that this theory is too broad. Risk bearing and distribution considerations may compel the imposition of some liability on franchisors, *see* text accompanying notes 54 to 65 *supra*, but do not mandate strict liability for all franchisee torts. Moreover, both the concept of fault inherent in strict liability, *see* note 109 and accompanying text *supra*, and the growing concern that courts have gone too far in applying it, *see* note 110 *supra*, compel careful analysis of the characteristics of franchises and tailoring of liability to those characteristics.

122. The liability discussed in the two theories is primarily the franchisor's liability for what has been characterized by one major work as "defects in product assembly," *i.e.*, defects caused because the product is improperly made by the franchisee. 2 L. FRUMER & M. FRIEDMAN, *supra* note 102, § 16A[4][f][1]. Although it is not always possible to identify the causes of product defects, these defects should be distinguished from those that can be identified in the design, formula, or specifications of a product. In the latter case the defective condition of the product is caused solely by the franchisor's errors; even if the franchisee follows instructions perfectly, the product will be defective. Franchisor liability in such a case seems easier, and one recent case relied partly on the franchisor's approval of the design of a defective product, *Kosters v. Seven-Up Co.*, 595 F.2d 347 (6th Cir. 1979); *see* notes 186 to 190 and accompanying text *infra*.

Restatement (Second) of Torts, which imposes a manufacturer's liability on a person holding out another's product as his own, with section 402A, which imposes strict liability on manufacturers. The second theory, known as the "stream of commerce" theory, imposes liability on the basis of the franchisor's control over production of the franchisee product and influence on the consumer's decision to purchase it.

Restatement Section 400 Theory

By reading section 400 of the *Restatement (Second) of Torts* with section 402A, a few courts have suggested that trademark¹²³ licensors be held strictly liable in tort for injuries caused by defective products made by their licensees.¹²⁴ Section 400, adopted in 1934, provides that one who puts out another's product as his own, as by affixing a trademark, is subject to the same liability as the manufacturer.¹²⁵ The rationale for adoption was that a seller who represents himself as manufacturer, thereby causing consumers to rely upon his name in buying the product, should not be allowed to escape liability by pleading that he was merely selling a product made by someone else.¹²⁶

Cases in which liability had previously been imposed under section 400 typically involved a retailer or wholesaler who marketed under his own private brand a product made by another.¹²⁷ In some cases the retailer or distributor appeared to be the manufacturer;¹²⁸ in others he was identified, more or less

123. "Trademark" is used here in its strict sense, *i.e.*, a mark affixed to goods.

124. *Carter v. Joseph Bancroft & Sons Co.*, 360 F. Supp. 1103, 1105-07 (E.D. Pa. 1973); *Sipari v. Villa Olivia Country Club*, 63 Ill. App. 3d 985, 992, 380 N.E.2d 819, 825 (1978); *see Lovelace v. Astra Trading Corp.*, 439 F. Supp. 753, 757 (S.D. Miss. 1977); *City of Hartford v. Associated Constr. Co.*, 34 Conn. Supp. 204, 211-12, 384 A.2d 390, 396-97 (1978); *Connolly v. Uniroyal, Inc.*, 75 Ill. 2d 393, 389 N.E.2d 155 (1979).

125. RESTATEMENT (SECOND) OF TORTS § 400 (1965). Comment d discusses the situations to which the rule applies, including affixing a trade name or mark.

126. *See id.*, Comment d.

127. *E.g.*, *Smith v. Regina Mfg. Corp.*, 396 F.2d 826 (4th Cir. 1968) (floor polisher sold under Sears Kenmore label); *Swift & Co. v. Blackwell*, 84 F.2d 130 (4th Cir. 1936) (evaporated milk, Swift label); *Sears, Roebuck & Co. v. Morris*, 273 Ala. 218, 136 So. 2d 883 (1961) (boat trailer, Sears Elgin label); *Lill v. Murphy Door Bed Co.*, 290 Ill. App. 328, 8 N.E.2d 714 (1937) (bed, Murphy label); *Dudley Sports Co. v. Schmitt*, 279 N.E.2d 266 (Ind. App. 1972) (pitching machine, Dudley tag); *Swift & Co. v. Hawkins*, 174 Miss. 253, 164 So. 231 (1935) (cheese, Swift label); *Dow Drug Co. v. Nieman*, 57 Ohio App. 190, 13 N.E.2d 130 (1936) (cigar, distributor's label). *See Auld v. Sears, Roebuck & Co.*, 261 App. Div. 918, 25 N.Y.S.2d 491 (1941), *aff'd per curiam*, 288 N.Y. 515, 41 N.E.2d 927 (1942) (washer, Sears label; sufficient evidence of holding out but insufficient evidence of liability). *But see Purkey v. Sears, Roebuck & Co.*, 220 F.2d 700 (5th Cir. 1955) (lawn mower, Sears Craftsman label).

128. *E.g.*, *Lill v. Murphy Door Bed Co.*, 290 Ill. App. 328, 8 N.E.2d 714 (1937) (literature stated Murphy made the bed; Murphy name on bed); *Thornhill v. Carpenter-Morton Co.*, 220 Mass. 573, 108 N.E. 474 (1915) (label stated defendant made the product); *Willson v. Faxon, Williams & Faxon*, 208 N.Y. 108, 101 N.E. 799 (1913) (defendants identified on label as manufacturers). Other cases have held that where defendant is a manufacturer and labels the product with his name, with nothing to indicate it is made by

clearly, as the distributor.¹²⁹ Liability has been imposed where there is a representation of the product as the defendant's, usually by use of his trade name and often a trademark as well. The representations are most often found on the product label or container,¹³⁰ but also may be in advertising material.¹³¹

Although at the time the section was adopted a manufacturer was not strictly liable in tort,¹³² there would seem to be no reason why strict liability could not apply now that most jurisdictions have extended the doctrine to manufacturers.¹³³ A few courts have indicated that this extension of section 400 is reasonable in situations in which it has traditionally applied, for example, where defendant is a retailer or distributor of the product¹³⁴ or a related company of the manufacturer.¹³⁵ A distributor or retailer may be strictly liable because of his role as marketer of the product;¹³⁶ the fact that the public also believes he is the manufacturer only serves to make the imposition of liability more compelling.

another, he has held it out as his own. *E.g.*, *Wagner v. Larson*, 257 Iowa 1202, 136 N.W.2d 312 (1965). Where the defendant's name or mark appears on the product with no indication that defendant is not the manufacturer, he may also be liable. *E.g.*, *Smith v. Regina Mfg. Corp.*, 396 F.2d 826 (4th Cir. 1968); *Sears, Roebuck & Co. v. Morris*, 273 Ala. 218, 136 So. 2d 883 (1961); *Dow Drug Co. v. Nieman*, 57 Ohio App. 190, 13 N.E.2d 130 (1936) (distributor sold cigars under its tradename).

129. In such cases courts have looked to the overall impression created by the product label and packaging, finding it reasonable for the consumer to believe the product was manufactured or prepared by the defendant. *E.g.*, *Swift & Co. v. Blackwell*, 84 F.2d 130 (4th Cir. 1936); *Burkhardt v. Armour & Co.*, 115 Conn. 249, 161 A. 385 (1932); *Swift & Co. v. Hawkins*, 174 Miss. 253, 163 So. 231 (1935). *But see* *Degouveia v. H.D. Lee Merc. Co.*, 100 S.W.2d 336 (Kans. City Ct. App. 1936); *Hamson v. Standard Grocery Co.*, 328 Mass. 263, 103 N.E.2d 233 (1952).

Some of the cases can be explained as efforts to pierce the corporate veil, as where the distributor is a subsidiary of the manufacturer. *E.g.*, *Bathory v. Proctor & Gamble Distrib. Co.*, 306 F.2d 22 (6th Cir. 1962); *see* *Burkhardt v. Armour & Co.*, 115 Conn. 249, 161 A. 385 (1932).

130. *E.g.*, *Swift & Co. v. Blackwell*, 84 F.2d 130 (4th Cir. 1936); *Burkhardt v. Armour & Co.*, 115 Conn. 249, 161 A. 385 (1932); *Thornhill v. Carpenter-Morton Co.*, 220 Mass. 593, 108 N.E. 474 (1915); *Willson v. Faxon, Williams & Faxon*, 208 N.Y. 108, 101 N.E. 799 (1913); *Dow Drug Co. v. Nieman*, 57 Ohio App. 190, 13 N.E.2d 130 (1936).

131. *E.g.*, *Carney v. Sears, Roebuck & Co.*, 309 F.2d 300 (4th Cir. 1962); *Lill v. Murphy Door Bed Co.*, 290 Ill. App. 328, 8 N.E.2d 714 (1937); *Dudley Sports Co. v. Schmitt*, 279 N.E.2d 266 (Ind. App. 1972); *Wagner v. Larson*, 257 Iowa 1202, 136 N.W.2d 312 (1965).

132. RESTATEMENT (SECOND) OF TORTS § 400 (1965), Comment b; *see id.* §§ 394-398.

133. *See* 2 L. FRUMER & M. FRIEDMAN, *supra* note 102, § 3[2]. Comment b to § 400 lists the liability sections to which the rule applies, not including § 402A. RESTATEMENT (SECOND) OF TORTS § 400, Comment b (1965). *See* text accompanying notes 161 to 163 *infra*.

134. *Lovelace v. Astra Trading Corp.*, 439 F. Supp. 753 (S.D. Miss. 1977); *see* *Forry v. Gulf Oil Corp.*, 428 Pa. 334, 344, 237 A.2d 593, 599 (1968) (dictum).

135. *See* *Sipari v. Villa Olivia Country Club*, 63 Ill. App. 3d 985, 380 N.E.2d 819 (1978) (common ownership of two defendant companies).

136. *See* authorities cited in note 111 *supra*. Use of § 400 would impose greater liability on a retailer or distributor in jurisdictions in which only manufacturers are held strictly liable.

Two recent cases have considered the application of section 400 in situations in which the defendant was not also a retailer or distributor of the product.¹³⁷ The plaintiff in *Carter v. Joseph Bancroft & Sons Co.*¹³⁸ was injured when her Banlon dress caught fire. Banlon is a trademark for fabrics and garments made by licensees according to Bancroft's specifications; neither the fabric nor the dress was manufactured by it.¹³⁹ A federal district court, in denying Bancroft's motion for judgment *non obstante veredicto*, held that it was sufficiently "involved in the manufacturing process" to come within the definition of a seller under state law.¹⁴⁰

Another decision to rely at least partly on section 400 was *Connelly v. Uniroyal, Inc.*,¹⁴¹ which concerned a claim arising out of an accident that occurred when a tire on plaintiff's Opel burst. The tire bore the Uniroyal name and was manufactured by its subsidiary, pursuant to a license agreement.¹⁴² Uniroyal had also entered into an agreement under which it authorized the subsidiary's use of its manufacturing methods and processes and agreed to supply technical services and instruction.¹⁴³ The subsidiary was a Belgian company that had developed and made tires for Opel for some time before being acquired by Uniroyal.¹⁴⁴ The Illinois Supreme Court, affirming the trial court's denial of summary judgment in favor of Uniroyal, held that Uniroyal as trademark licensor could be liable for the defective tire produced by its licensee.¹⁴⁵

137. *Carter v. Joseph Bancroft & Sons Co.*, 360 F. Supp. 1103 (E.D. Pa. 1973); *Connelly v. Uniroyal, Inc.*, 75 Ill. 2d 393, 389 N.E.2d 155 (1979).

138. 360 F. Supp. 1103 (E.D. Pa. 1973).

139. *Id.* at 1106. The dress tag named the manufacturer, though neither prominently nor clearly. *Id.* at 1107. Defendant contended it fell within the exception noted in comment d to § 400, *i.e.*, where the manufacturer is clearly identified on the label and it is also clear that another named on the label is only a distributor or seller, the latter does not put out the goods as his own. The court rejected this contention because it was unclear from the tag that the defendant was only a distributor. *Id.*

140. *Id.* The involvement was based on Bancroft's provision of specifications and quality control for manufacture of the fabric. *Id.* n.2. The court relied on *Forry v. Gulf Oil Corp.*, 428 Pa. 334, 237 A.2d 593 (1968). The *Forry* case involved a defective tire manufactured by B.F. Goodrich and sold to Gulf Tire & Supply Company, which put its own name on it and sold it to a Gulf Oil service station. The *Bancroft* court rejected defendant's attempt to distinguish *Forry* on the basis that there the real manufacturer was unknown, 350 F. Supp. at 1107, but drew no distinction based on Gulf's role as seller of the tire to the station. The *Forry* case did not do so either, although the dissent pointed out that, in any case, Gulf was a seller under Pennsylvania law and the imposition of liability via § 400 was unnecessary. 428 Pa. at 349 n.2, 237 A.2d at 601 n.2 (Roberts, J., dissenting). In *Forry* the court adopted § 400 as Pennsylvania law. *Id.* at 344, 237 A.2d at 599. Section 402A had been adopted previously.

141. 75 Ill. 2d 393, 389 N.E.2d 155 (1979), *affg in part and rev'g in part* 55 Ill. App. 3d 530, 370 N.E.2d 1189 (1977). This decision also discussed the imposition of strict liability on a trademark license theory. See notes 239 to 244 and accompanying text *infra*.

142. 75 Ill. 2d at 398, 407, 389 N.E.2d at 157, 161.

143. *Id.* at 407-08, 389 N.E.2d at 161.

144. 55 Ill. App. 3d at 539, 370 N.E.2d at 1197.

145. 75 Ill. 2d at 411-12, 389 N.E.2d at 163.

An intermediate appellate court had rejected plaintiff's section 400 theory on the grounds that the section was not intended to impose strict liability and that it applied only to those who in some way supplied goods to others.¹⁴⁶ Since Uniroyal had in fact played no role in supplying the tires,¹⁴⁷ that court found, it had not put them out as its own within the meaning of section 400.¹⁴⁸ The Illinois Supreme Court rejected this reasoning. It noted that in cases in which section 400 had been applied to impose strict liability on a trademark owner, the owner had participated in the distribution of the product. However, the court held that such participation was not an essential element of the application of strict liability.¹⁴⁹ The same public policy reasons supporting imposition of strict liability on wholesalers, retailers, and lessors supported its application to a trademark licensor, "an integral part of the marketing enterprise,"¹⁵⁰ which participated "in the profits reaped by placing a defective product in the stream of commerce."¹⁵¹ The fact that Uniroyal was not a link in the distribution chain was "wholly irrelevant."¹⁵²

The first case in which liability was proposed for a retailer holding out another's product as his own was the 1913 case of *Willson v. Faxon, Williams & Faxon*.¹⁵³ There, in an action by a customer who became ill after taking laxative tablets, the court reversed a directed verdict for a retail druggist who had labeled the tablets as his own although they were made by a wholesale druggist. The cause of action seems to resemble negligent misrepresentation: defendant, who had represented himself to be the manufacturer and thus acquainted with the product's ingredients, in fact knew nothing of its composition. The court found sufficient evidence of negligence for the case to go to the jury, since

146. 55 Ill. App. 3d at 541, 370 N.E.2d at 1197.

147. *Id.* The court viewed Uniroyal's role in terms of its actions. Although it owned 95% of the subsidiary's stock and two of its directors were also directors of the subsidiary, it left management in the hands of the subsidiary's officers, and the Belgian company dealt directly with Opel. *Id.* at 539, 370 N.E.2d at 1195-96.

148. *Id.* at 541, 370 N.E.2d at 1197.

149. 75 Ill. 2d at 410-11, 389 N.E.2d at 162-63. The court also noted that in two of the prior cases, *Forry v. Gulf Oil Corp.*, 428 Pa. 334, 237 A.2d 593 (1968), and *Carter v. Joseph Bancroft & Sons Co.*, 360 F. Supp. 1103 (E.D. Pa. 1973), participation was not essential to the imposition of liability. 75 Ill. 2d at 411, 389 N.E.2d at 163.

150. 75 Ill. 2d at 411, 389 N.E.2d at 163.

151. *Id.* It is clear from the court's language that the determinant of liability was Uniroyal's status as licensor, not as parent. *See id.* at 409, 389 N.E.2d at 161.

152. *Id.* The Illinois court relied on its prior statement in *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 617, 210 N.E.2d 182, 185 (1965): "Lack of privity of contract not being a defense in a tort action against the manufacturer, it is not a defense in an action against any of [the various named sellers and suppliers]." *Id.* The parties listed by the *Suvada* court, including an assembler of parts and a manufacturer of component parts, although not in privity with a consumer were, however, entities in the product manufacturing and distribution chain.

153. 208 N.Y. 108, 101 N.E. 799 (1913).

negligence could be predicated on the druggist's act of selling the product as his own without taking steps to ascertain its nature.¹⁵⁴

Another basis sometimes stated for section 400 liability is estoppel. By holding himself out as the manufacturer of a good, a defendant causes members of the public to rely on his reputation and skill.¹⁵⁵ When a plaintiff is injured by reason of his reasonable reliance, the party holding out the good is estopped from denying he is the manufacturer.¹⁵⁶ Actual reliance generally need not be shown,¹⁵⁷ though it is often present; rather, the emphasis is on consumer "reliance" in general. Somewhat related is the third basis sometimes stated for section 400 liability, that is, that the holding out is akin to a warranty. Courts speak of the defendant as "vouching for," or guaranteeing, the product.¹⁵⁸

Although section 400 has almost always been applied to suppliers of products, extension to franchisors is fully consonant with the underlying reliance and estoppel rationale.¹⁵⁹ It has come to be recognized in the area of products liability that entities other than retailers and distributors may play as great a role in influencing consumer decisions to purchase products as sellers. It is as likely that consumers would rely on the trademark and advertising of a franchisor in selecting a product as on a retailer's name.¹⁶⁰

154. *Id.* at 114, 101 N.E. at 801. The *Willson* case is probably best known, however, for its statement that defendant's representation that it was the manufacturer rendered it just as liable as the manufacturer would have been. *Id.*

155. The first case to state estoppel as the theory of liability was probably *Burkhardt v. Armour & Co.*, 115 Conn. 249, 161 A. 385 (1932).

156. *E.g.*, *Carney v. Sears, Roebuck & Co.*, 309 F.2d 300, 304 (4th Cir. 1962); *Dudley Sports Co. v. Schmitt*, 279 N.E.2d 266, 273 (Ind. App. 1972).

157. This is illustrated by the number of cases in which, even apart from questions of actual reliance by a purchasing plaintiff, recovery has been allowed where plaintiff could not possibly have relied on defendant's representations because the products were purchased by others. *E.g.*, *Moody v. Sears, Roebuck & Co.*, 324 F. Supp. 844 (S.D. Ga. 1971); *Sears, Roebuck & Co. v. Morris*, 273 Ala. 218, 136 So. 2d 883 (1961); *Dudley Sports Co. v. Schmitt*, 279 N.E.2d 266 (Ind. App. 1972); *Wagner v. Larson*, 257 Iowa 1202, 136 N.W.2d 312 (1965).

158. *E.g.*, *Swift & Co. v. Blackwell*, 84 F.2d 130, 132 (4th Cir. 1936); *Dudley Sports Co. v. Schmitt*, 279 N.E.2d 266, 273 (Ind. App. 1972).

159. Extension has some support in prior case law. In *Timmins v. F.N. Joslin Co.*, 303 Mass. 540, 22 N.E.2d 76 (1939), a department store was held liable for injuries caused by splinters in a loaf of bread sold by its grocery concessionaire. The grocery department was not identified as separate from the store, and advertisements were placed in the name of the store. Liability was imposed on the basis that the store held itself out as the proprietor of the grocery department, and plaintiff reasonably believed she was buying from the store. *Id.* at 542, 22 N.E.2d at 77. The department store was not, except by reason of such action, a member of the product distribution chain.

160. See *FRANCHISING IN THE ECONOMY*, *supra* note 3, at 13-14 (considerable advertising by fast food franchisors tending to create brand loyalty among patrons); *cf.* Goldstein, *Products Liability and the Trademark Owner: When a Trademark is a Warranty*, 32 BUS. LAW. 957, 966-68, 970-73 (1977) (consumer reliance on trademark or brand name). Goldstein suggests that a well-known trademark used on a line of goods should be perceived as warranting that all of the goods in the line, including those not advertised, have the same quality as the advertised goods bearing the mark.

The chief objections to use of sections 400 and 402A to impose strict liability on entities holding out others' products as their own, and to trademark licensors in particular, are that section 400 was not intended to apply to section 402A liability because it antedates the latter¹⁶¹ and that it was intended to apply only to product suppliers such as wholesalers.¹⁶² A response to these objections involves the nature of the *Restatement* as authority and its permissible use by courts. The *Restatement* is one source upon which a court may rely in deriving a rule of law. It is not a statute to be parsed closely, although examination of the American Law Institute's comments and the context of various sections serves to clarify the ambit of the rule expressed. A court should use a *Restatement* position only as an expression of a general or better rule of law, not as applicable of its own force; that is, it should use *Restatement* language as one expression of what it has determined to be a proper rule.¹⁶³ There is then no reason why, upon proper analysis of the wisdom of the rule, a court should not be able to "extend," as a matter of its own law, the application of the *Restatement* rule.

Taken together, despite the bases that might be found to distinguish them, the cases applying sections 400 and 402A to trademark licensors suggest a theory under which strict liability could be imposed on retail product franchisors. In fact, one court has approved the application of section 400 in a situation very similar to that of a retail franchise. *City of Hartford v. Associated*

161. Germain, *supra* note 55, at 136. *Bancroft* is distinguishable on this ground because § 400 was adopted by the Pennsylvania Supreme Court after it had adopted § 402A. See *Carter v. Joseph Bancroft & Sons Co.*, 360 F. Supp. at 1106 n.1, 1107. Section 400 was adopted in 1968 in *Forry v. Gulf Oil Corp.*, 428 Pa. 334, 237 A.2d 593 (1968); § 402A had been adopted in *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966). This was not true in Mississippi, the law of which the district court applied in *Lovelace v. Astra Trading Corp.*, 439 F. Supp. 753 (S.D. Miss. 1977). Mississippi courts had applied § 400 as early as 1935. *Swift & Co. v. Hawkins*, 174 Miss. 253, 164 So. 231 (1935).

162. See *Borchard & Ehrlich*, *supra* note 20, at 122-23; Germain, *supra* note 55, at 136. Both objections were noted by the intermediate appellate court in *Connelly*, 55 Ill. App. 3d 530, 541, 370 N.E.2d 1189, 1197 (1977), but the Illinois Supreme Court found both unpersuasive, see 75 Ill. 2d 393, 410-11, 389 N.E.2d 155, 162-63 (1979).

Lovelace v. Astra Trading Corp., 439 F. Supp. 753 (S.D. Miss. 1977), may be distinguishable because the defendant sought to be held liable was a distributor. The court did note that the distributor was considerably more involved in production than the usual wholesaler; Astra Trading had selected a design for the hair dryer alleged to have started a fire in plaintiff's home and had approved a prototype made to its specifications. *Id.* at 757.

163. See Reynolds, *The Court of Appeals of Maryland: Roles, Work and Performance — Part II: Craftsmanship and Decision-Making*, 38 MD. L. REV. 148, 154-55 (1978).

The *Lovelace* court followed such a course. Distinguishing the leading Mississippi case that imposed strict liability generally only on manufacturers, it noted dictum by the Mississippi court to the effect that a retailer representing himself to be the manufacturer was held to the same standard as a manufacturer. 439 F. Supp. at 757 (citing *Shainberg v. Barlow*, 258 So. 2d 242 (Miss. 1972)). It pointed to § 400 as providing legal support for the proposition, adding that the section had been followed in Mississippi. *Id.* Finally, the court said that the rule was "soundly based in logic" and served "to meet the reasonable expectations of the consuming public." *Id.*

*Construction Company*¹⁶⁴ involved a suit for damages caused by a defective roofing compound applied to a school building. Defendant Silbrico Corporation had licensed to Associated Construction use of the formula or process for making its trademarked compound, a roofing insulation base, and had also supplied one of the raw materials needed for the compound. The trial court denied defendant's demurrer to plaintiff's cause of action grounded in strict liability on two grounds, one of which was based on reading sections 400 and 402A together.¹⁶⁵ The court, noting the sequence of adoption of the two sections, regarded section 402A as imposing additional manufacturer's liability on those subject to section 400 liability.¹⁶⁶ A franchisor was subject to such liability because it was a link in the marketing chain that placed the defective product in the hands of the consumer.¹⁶⁷

The section 400 theory is unlikely to be applied to service franchisors but may be applicable to those retail franchises that sell products, the chain store selling the products of others and the outlets which produce and sell a product. Application to the first type, if a product is sold under the franchisor's name, where the franchisor is a distributor but not otherwise liable, would fall within the traditional scope of section 400 liability, although not because of any peculiarities of the franchise relationship. Where a franchisor is not also a distributor, the theory would not apply to a chain store franchisor. The

164. 34 Conn. Supp. 204, 384 A.2d 390 (1978) (alternate holding).

165. *Id.* at 211-12, 384 A.2d at 396-97. Defendant's primary contention was that no cause of action under § 402A had been stated because the necessary element that the product was expected to and did reach the plaintiff without substantial change in the condition in which it was sold was lacking. *Id.* at 207, 384 A.2d at 392. Plaintiff alleged that the compound was defendant's trademarked product, which had been developed and promoted by it and licensed to its co-defendant with specifications for composition, and that the licensing agreement constituted an extensive involvement with the product, which the defendant had placed in the stream of commerce. The court found that these claims were sufficient to state a cause of action, *id.* at 211, 384 A.2d at 396, and held that defendant's legal responsibility derived from the trademark licensing agreement, which guaranteed that the product as produced by its licensees was the same quality as the product made by it, and thus met the "same condition" requirement. *Id.*

Clearly, this is not what is meant by the "same condition" requirement in strict liability, which is intended to remedy the problem of products altered or assembled after they leave the manufacturer, which is not responsible for defects caused by the later acts. The requirement would apply to a franchise situation in which the product is altered after it leaves the franchisee, who is the manufacturer. Conceptual difficulties arise because of the appearance of the franchise operation, which looks like, and in many respects is, a vertical distribution chain. If liability is imposed on the franchisor under § 400, it is not because it, like a manufacturer of a component part, supplies the formula and one of the ingredients to the franchisee. Rather, the franchisor, like a retailer, is responsible because it puts out the franchisee-made product as its own. See text accompanying note 168 *infra* for a discussion of this problem.

166. 34 Conn. Supp. at 212, 384 A.2d at 397.

167. *Id.*; see *Kasel v. Remington Arms Co.*, 24 Cal. App. 3d 711, 101 Cal. Rptr. 314 (1972); *Connelly v. Uniroyal, Inc.*, 75 Ill. 2d 393, 389 N.E. 2d 155 (1979).

franchisor of a 7-Eleven Store, for example, does not hold out Maxwell House coffee as its own product.

The section 400 theory could apply, however, to a franchise in which the retail outlets produce goods, although there are difficulties in its application. The traditional application of section 400 liability was to impose on a defendant the liability of the unknown manufacturer behind him in the distribution chain.¹⁶⁸ Liability flowed downward, from the manufacturer to the distributor or retailer. On the other hand, imposing liability on the franchisor for a defective product made by the franchisee creates what appears to be an upward flow. The problem is created by the peculiar status of the franchisee, which is both manufacturer and retailer in this situation. Because of this dual status, the section 400 theory affords a valid means of imposing liability on these franchisors. The typical application was to a retailer or distributor, but the rationale for imposition of liability was not the defendant's position in the distributive chain but his actions that led the public to believe he was the manufacturer of the product and to rely on the fact. The rationale is fully applicable to the modern franchisor of a chain in which products are made by the franchisees. Because consumers believe that the franchisor is a manufacturer, or at least that it has created a formula for a product and ensures that its franchisees follow the formula, they buy the franchisee-made product. Viewed from the eyes of the relying consumer, the franchisor's position is the same as that of the traditional section 400 defendant.

In the case of the retail franchise in which products are made by individual outlets, the section 400 theory of liability is virtually identical with the apparent agency theory. The franchisor's advertising, reinforced by signs, identical building design, and uniforms which lead the public to identify outlets with the franchisor, is the key to liability. Under the apparent agency theory, liability is imposed because the franchisor holds out the franchisee as its agent; under section 400, franchisor liability is imposed because it holds out the franchisee's product as its own. One difference between the two theories may be that reliance of a particular plaintiff is required under the former theory while under the latter theory it appears that reliance by the general public, or an impression upon which an average consumer is assumed to rely, will suffice.¹⁶⁹

168. Section 400 theory may present an additional problem. A consideration sometimes mentioned in imposing liability on one who appears to be the manufacturer of the product is that purchasers have no way of knowing the identity of the actual manufacturer. Buyers *do* know the actual manufacturer of the franchise product; they buy it from him. The situation is not the same as the older § 400 cases, however, for the public thinks the franchisee is the same as the franchisor. Section 400 has been used to impose liability in what seems to be an analogous situation, where the defendant is a distributor subsidiary of the manufacturer. *E.g.*, *Bathory v. Proctor & Gamble Distrib. Co.*, 306 F.2d 22 (6th Cir. 1972). It is fairly obvious in such cases that plaintiff was not relying on the distributor's holding out of the unknown manufacturer's product as his own; he thought he was suing the manufacturer.

169. Compare notes 89 to 91 and accompanying text *supra* with notes 156 to 157 and accompanying text *supra*.

In the ordinary case, section 400 presents, in a sense, the converse of the apparent agency theory. It is not the principal who is being held responsible for the injurious conduct of the agent below it because it has held out the agent as synonymous with itself; rather, it is the "agent" who is being held liable because he has, with respect to a particular product, held himself out as synonymous with the "principal" behind him. Whether the agent's liability is vicarious or direct is not entirely clear; statements in the section 400 cases bear both interpretations.¹⁷⁰ The liability is imposed for the section 400 defendant's deception of the public, and although imputation of the manufacturer's fault is used to remedy the deception, it can be classified as direct.

The retail franchise relationship in which franchisees produce goods and sell them under the franchisor's name affords, somewhat perversely, the opportunity to apply either theory to a single relationship. Doing so, even doing both, is not illegitimate. As has been previously discussed, all franchises resemble ordinary unitary enterprises, and the franchisor has taken pains to appear to the public as the principal in the relationship. If the franchise is one in which products are made by franchisees, the franchisor has also necessarily represented itself to be the manufacturer of goods made by others. Only the nature of a franchise allows the franchisor thus to be viewed alternately as the "principal" and the "agent" in the context of the converse apparent agency and section 400 theories.

For this type of franchise, then, it would seem that the apparent agency theory ought to serve in all cases that section 400 covers. It clearly would if the franchisee's liability were based on negligence. However viewed, the franchisor would be liable — albeit vicariously in one case and directly in the other — for its franchisee's negligence in making a harmful product. The difficulty arises when strict products liability is sought to be imposed. Under agency theories a principal is vicariously liable for the acts of his agent. If the agent's conduct would render him directly liable in tort or contract, his liability is imputed to his principal. Logically, a principal ought to be vicariously liable if the agent is held liable on a contractual implied warranty theory, if that is the jurisdiction's version of strict products liability, or on a tort theory, if strict liability in tort is the jurisdiction's version.

Because strict products liability is viewed in fact as based not so much on conduct as on an entity's status as a seller or manufacturer — its membership in the good-producing enterprise — courts' analyses are often framed in terms of whether a defendant fits a particular category. It may be that where an injury is caused by a defective product, this type of analysis will generally be used; indeed, statutes or case law may mandate classification of a defendant as a

170. At least one court has actually termed the liability involved "vicarious," *Forry v. Gulf Oil Corp.*, 428 Pa. 334, 343, 237 A.2d 593, 599 (1968), but most simply refer, in a somewhat self-contradictory way, to the defendant's having vouched for the product and "assumed" the manufacturer's liability, e.g., *Smith v. Regina Mfg. Corp.*, 396 F.2d 826, 828 (4th Cir. 1968); *Dudley Sports Co. v. Schmitt*, 279 N.E.2d 266, 273 (Ind. App. 1972).

"manufacturer" or "seller" in order to impose liability. Although a court ought be able to use an apparent agency analysis to find that a franchisor's status is that of a seller, section 400, cast in terms of the holding out defendant's assuming the status of the manufacturer, may be used more readily. The cases that suggest section 400 liability for the retail franchisor are not instructive. Except for the distributor in *Lovelace v. Astra Trading Corp.*,¹⁷¹ they did not involve entities that would fit either category; because distributors were not strictly liable under the law of Mississippi, it was necessary in that case to use section 400 to confer manufacturer's status on the distributor.

Stream of Commerce Theory

A version of strict products liability known as the "stream of commerce" theory imposes liability on all persons in the "overall producing and marketing enterprise" responsible for placing defective products in the marketplace.¹⁷² This theory expands products liability from the entities directly responsible for making and selling a defective product to those responsible for the consumer's purchasing decision and consumption.

The theory has been used by a California intermediate appellate court to impose liability on a trademark licensor. The plaintiff in *Kasel v. Remington Arms Company*¹⁷³ was injured when a defective shotgun shell exploded in his gun. The shell was manufactured by a Mexican company under license from Remington and sold under the Remington name.¹⁷⁴ The company was a Remington affiliate, which Remington had caused to be created and for which it had supplied the technology and personnel for making the ammunition under technical information sales and services contracts. In addition, Remington had financed the plant through purchase of its common stock and bonds.¹⁷⁵ A former Remington employee who maintained close ties with the company was the new affiliate's director of operations for the first three and a half years of its existence, and members of Remington's board of directors sat on the affiliate's board.¹⁷⁶ Remington engaged in extensive advertising of its products, including the shells made in Mexico, in the United States and other countries.¹⁷⁷

171. 439 F. Supp. 753 (S.D. Miss. 1977).

172. *E.g.*, *Delaney v. Towmotor Corp.*, 339 F.2d 4 (2d Cir. 1964).

173. 24 Cal. App. 3d 711, 101 Cal. Rptr. 314 (1972).

174. There were apparently a few differences in the Mexican product. The court thought they were not significant to disposition of the case. *Id.* at 720, 101 Cal. Rptr. at 319. Boxes of shells made by the Mexican company were required under the license agreement to be labeled "Manufactured in Mexico under contract with Remington Arms Company, Inc." These words were on the label in Spanish. *Id.* at 718, 101 Cal. Rptr. at 318.

175. *Id.* at 717-20, 101 Cal. Rptr. at 318-19.

176. *Id.* at 717-19, 101 Cal. Rptr. at 318-19. Other links with the Mexican enterprise included Remington's training of Mexican nationals and its procurement and delivery of plant machinery. *Id.* at 719, 101 Cal. Rptr. at 319.

177. *Id.* at 720-21, 101 Cal. Rptr. at 319-20.

The California court of appeal held erroneous the trial judge's instruction that the jury could find Remington strictly liable only if it found that Remington manufactured the defective shell or that the Mexican company was its agent. The court said that the uncontradicted evidence of Remington's involvement was sufficient for the trial court to have found as a matter of law that Remington was an integral part of the business enterprise that put the defective shell in the stream of commerce.¹⁷⁸ The court, comparing Remington's status as trademark licensor to that of a franchisor, noted the problem of applying liability from the licensee upward to the licensor¹⁷⁹ but said that as long as the franchisor or licensor was a "link in the marketing enterprise" that put the defective product in the stream of commerce, there was no reason to refrain from extending strict liability in tort to it.¹⁸⁰ No particular relationship to the consumer was required; what was sought was a "participatory connection, for his personal profit or other benefit, with the injury-producing product and with the enterprise that created consumer demand for and reliance upon the product."¹⁸¹ Control over the cause of the defect in the product was not critical,¹⁸² but because of its role in creating the company, its many ties with it, its reservation of the right of control over the quality of the product, as well as its advertising and the profit it derived from the sale of the products, Remington was significantly involved in the enterprise that produced the product.¹⁸³

The *Kasel* court apparently considered Remington's role in creating demand for the Mexican-made product the determinative factor in imposing liability. It indicated that strict liability could be imposed on others involved with "the enterprise that created consumer demand for and reliance upon the product."¹⁸⁴ At the same time, in summing up the factors warranting application of strict liability, it noted that Remington was much more involved in the enterprise

178. *Id.* at 723, 101 Cal. Rptr. at 321-22.

179. *Id.* at 724, 101 Cal. Rptr. at 322-23. See note 181 and accompanying text *infra*.

180. 24 Cal. App. 3d at 725, 101 Cal. Rptr. at 323.

181. *Id.*

182. *Id.* at 725-26, 101 Cal. Rptr. at 324.

183. *Id.* at 727, 101 Cal. Rptr. at 324-25.

184. *Id.* at 725, 101 Cal. Rptr. at 323. Another member of the demand-creating enterprise is the independent certifier of a product. The court noted parenthetically that the rationale of a prior case, *Hanberry v. Hearst Corp.*, 276 Cal. App. 2d 680, 81 Cal. Rptr. 519 (1969), which involved the Good Housekeeping Seal of Approval, might be open to reexamination. 24 Cal. App. 3d at 726-27, 101 Cal. Rptr. at 324.

See *Connelly v. Uniroyal, Inc.*, 75 Ill. 2d 393, 389 N.E.2d 155 (1979). In *City of Hartford v. Associated Constr. Co.*, 34 Conn. Supp. 204, 384 A.2d 390 (1978), a Connecticut trial court discussed the *Kasel* case, and adopted its basic theory. *Id.* at 208-09, 384 A.2d at 393-94. Apparently, however, the only ground of demurrer that the defendant pressed was that no cause of action was stated in strict liability because no allegations had been made that the product was intended to and did reach the consumer in its original condition. See note 165 *supra*.

responsible for putting the defective product on the market than were retailers or distributors, on whom strict liability had been imposed.¹⁸⁵

Another court seems to have used a combination of the stream of commerce notion and franchisor control over the defective product to impose liability in a similar situation. In *Kosters v. Seven-Up Company*, plaintiff sued the franchisor Seven-Up, as well as its local franchised bottling plant, for injuries sustained when a bottle slipped from a Seven-Up carton she was carrying, fell and exploded.¹⁸⁶ The Sixth Circuit held that the case was properly submitted to the jury as to Seven-Up's liability under an implied warranty theory¹⁸⁷ on the basis that the franchisor's "sponsorship, management and control" of the product distribution system, as well as its specific approval of the design of the defective carton, put it in the position of a supplier for liability purposes.¹⁸⁸ Listing several factors from which the franchisor's obligation to the consumer arose,¹⁸⁹ the court summarized the basis of liability as "the franchisor's control and the public's assumption, induced by the franchisor's conduct, that it does in fact control and vouch for the product."¹⁹⁰

185. 24 Cal. App. 3d at 727, 101 Cal. Rptr. at 324-25. See Borchard & Ehrlich, *supra* note 20, at 120. In addition, the Mexican corporation might be viewed as a sham or thin corporation.

186. 595 F.2d 347 (6th Cir. 1979). The court of appeals found that the trial court's submission to the jury on the theories of negligence and implied warranty was proper but that its instructions on absolute liability for an inherently dangerous activity, liability for failure to eliminate the harm by changing the carton design, and plaintiff's status as a third party beneficiary to the franchise contract were erroneous. *Id.* at 353-55. Since it was impossible to tell on which theory the jury had found for the plaintiff, the case was reversed and remanded for a new trial. *Id.* at 355. Plaintiff had sued the grocer, bottler, and carton manufacturer as well as the Seven-Up Company, but those claims were settled.

187. Implied warranty, with privity abolished, is the strict liability theory used in Michigan, the law of which applied to the case. This is the equivalent of strict liability in tort, as indicated by the court's references to "tort liability," *id.* at 353, and its citation of § 402A of the *Restatement Second of Torts*, *id.* at 353 nn.18, 20.

188. *Id.* at 353.

189. The court stated that when a franchisor consents to distribution of a defective product bearing its name, its liability to the consumer arises from the combination of:

- (1) the risk created by approving for distribution an unsafe product likely to cause injury,
- (2) the franchisor's ability and opportunity to eliminate the unsafe character of the product and prevent the loss,
- (3) the consumer's lack of knowledge of the danger, and
- (4) the consumer's reliance on the trade name which gives the intended impression that the franchisor is responsible for and stands behind the product.

Id. (footnote omitted).

190. *Id.* The court drew on a variety of rationales including risk prevention, *id.*, see note 189; the stream of commerce idea, 595 F.2d at 352 (the Seven-Up Company "not only floated its franchisee and the bottles of its carbonated soft drink into the so-called 'stream of commerce' . . ." (footnote omitted)); and the notion of vouching for the product, *id.* at 353.

Based on what was likely a stream of commerce rationale, the court in *Connelly v. Uniroyal, Inc.*¹⁹¹ found that strict liability could be imposed on a trademark licensor for injuries resulting from a defective tire manufactured by its licensee. The Illinois Supreme Court noted that a licensor was "an integral part of the marketing enterprise" and that its "participation in the profits reaped" from placing a defective product in the stream of commerce presented policy reasons for the imposition of strict liability that were identical to those justifying its imposition on wholesalers, retailers, and lessors.¹⁹²

Like the section 400 theory, the stream of commerce theory imposes strict liability on a manufacturing franchisor, with the key to liability being the franchisor's advertisement which creates demand for and reliance on the product. The three cases thus far decided under the theory have involved enterprises with actual control over the producer¹⁹³ or the product itself.¹⁹⁴ The *Kasel* court, in noting that the rationale of a previously decided case involving only an independent certifier of a product, *Hanberry v. Hearst Corporation*,¹⁹⁵ might be affected, considered it critical that the defendant was responsible for creating consumer reliance on the defective product.¹⁹⁶ The courts in *Kosters* and *Connelly* seemed to rely as well on the defendant's connection with the enterprise making the product.¹⁹⁷ Even if courts are not willing to follow the *Kasel* court to impose liability on entities responsible only for creating demand for a product, the stream of commerce theory is clearly applicable to a retail franchise in which products are made by local outlets. The franchisor has induced consumers to buy the product in reliance on its name, and maintains a substantial connection with the businesses making the product by its specification of the process by which the product is made and its exercise of controls over the franchisee outlets. Because of the problems discussed above concerning the application of section 400 theory to entities not in the vertical distribution chain, the stream of commerce theory may best accommodate franchisor liability.

Unless the law of products liability is expanded to include commercial services as "products," the stream of commerce theory, like the section 400 theory, is not applicable to franchisors of outlets offering only services. It may be applicable, however, to the second type of retail product franchisor, franchisees

191. 75 Ill. 2d 393, 389 N.E.2d 155 (1979). See text accompanying notes 141 to 152 *supra*.

192. 75 Ill. 2d at 411, 389 N.E.2d at 163.

193. See *Kasel v. Remington Arms Co.*, 24 Cal. App. 3d 711, 717-20, 101 Cal. Rptr. 314, 318-19 (1972); *Connelly v. Uniroyal, Inc.*, 75 Ill. 2d 393, 407, 389 N.E.2d 155, 161-62 (1979).

194. See *Kosters v. Seven-Up Co.*, 595 F.2d 347 (6th Cir. 1979). The franchisor had approved the design of the defective carton.

195. 276 Cal. App. 2d 680, 81 Cal. Rptr. 519 (1969). See note 184 *supra*.

196. *Kasel v. Remington Arms Co.*, 24 Cal. App. 3d 711, 726-27, 101 Cal. Rptr. 314, 324 (1972).

197. See *Kosters v. Seven-Up Co.*, 595 F.2d 347, 353 (6th Cir. 1979), text accompanying notes 188 to 190 *supra*; *Connelly v. Uniroyal, Inc.*, 75 Ill. 2d 393, 411, 389 N.E.2d 155, 163 (1979), text accompanying note 192 *supra*.

of which sell the products of others. If the chain store franchise sells products bearing the franchisor name, as do, for example, Montgomery Ward stores, the franchisor has created demand for and reliance on a product. Where the franchise outlets sell only products identified as others', the franchisor is a member of the "marketing enterprise" in one sense, because it has induced the public to deal with its outlet, which has sold the defective product. It may also have advertised that its outlets sell particular products, in which case it is a member of "the enterprise that created consumer demand for and reliance upon the product,"¹⁹⁸ or it may, by the way in which it advertises its outlets, have created consumer reliance on *all* products purchased from its outlets.¹⁹⁹ In such cases, it would seem that the stream of commerce theory should apply.

The franchisor has no connection, however, with the concern that actually produced the product, nor does it appear to the public to be the manufacturer. On this basis, it is possible that the stream of commerce theory would not be applied to retail franchisors whose outlets sell only others' products.

The stream of commerce theory, like the apparent agency and section 400 theories, focuses on the role of the franchisor in inducing public demand for and reliance on products sold by its franchisees. Like those theories, it would apply to all retail franchises in which products sold by franchisees under the franchisor name are made by them. The only difference between such franchises and the manufacturing and bottling franchises to which the theory has been applied is that the franchisees are retailers as well as manufacturers of the product.²⁰⁰ The theory may be applicable as well to retail franchises in which outlets only sell others' products.

Like the section 400 theory, the stream of commerce theory looks only to general reliance — the inducement of the public to buy a product — not to reliance by a particular plaintiff. It may, however, unlike the section 400 and apparent agency theories, require that there be some control over, or participation in, the enterprise making the good. Such a requirement is easily met in cases involving retail franchises in which franchisees make the products sold under the franchisor's name. There may be problems, as there are under the section 400 theory, with application to a retail chain selling only the goods of others, because the franchisor's connection is with the entity selling the good, not with that making it.

TRADEMARK-BASED THEORIES

The key role of trade and service marks²⁰¹ in the modern franchise system, and the effect on liability of a trademark license, have already been seen. Marks

198. *Kasel v. Remington Arms Co.*, 24 Cal. App. 3d 711, 725, 101 Cal. Rptr. 314, 323 (1972).

199. *Cf.* notes 244 to 251 and accompanying text *infra* (independent certifier of quality held liable because of role in inducing consumer purchase of product).

200. The analogy to the bottling plant is even more apt because the local plants distribute as well as bottle the soft drinks.

201. "Trademark" refers herein to a mark used in connection with a good, the term "service mark" to a mark identifying a service. A definition common to both is a

may be among the indicia of apparent authority,²⁰² and a trademark is often the principal means by which a product supplier holds out the goods of an unknown manufacturer as his own.²⁰³ A trademark license is particularly significant to the stream of commerce products liability theory.²⁰⁴ This section deals, however, with those theories drawing on the functions of the mark as an independent source of liability, deriving from the function of the mark as mark.

The guarantee or quality assurance function²⁰⁵ has been suggested as the basis for liability under various tort and contract doctrines. The mark is an assurance to the public that all products bearing it are of uniform quality;²⁰⁶ that assurance may be viewed, coupled with advertising as to quality, as an express

distinctive word, name or symbol used to identify the user's goods or services and distinguish them from others. See Lanham Act § 45, 15 U.S.C. § 1127 (1976).

202. *E.g.*, *Gizzi v. Texaco, Inc.*, 437 F.2d 308 (3d Cir. 1971); see notes 67 to 84 and accompanying text *supra*.

203. *E.g.*, *Burkhardt v. Armour, Inc.*, 115 Conn. 249, 161 A. 385 (1932); see notes 125 to 131 and accompanying text *supra*.

Commentators have examined whether the mark licensor's duty to control the quality of its licensee's goods or services entails sufficient control to establish an agency relationship. See G. GLICKMAN, *supra* note 9, §§ 4.01, 4.05[1]; Rudnick, *The Franchisor's Dilemma: Can He Satisfy the Legal and Commercial Requirements of a Trademark Licensing System Without Exposing Himself to Other Risks*, 56 TRADEMARK REP. 621, 640-41 (1966).

204. *E.g.*, *Kasel v. Remington Arms Co.*, 24 Cal. App. 3d 711, 101 Cal. Rptr. 314 (1972); see notes 179 to 183 and accompanying text *supra*. One case may have imposed liability solely on the basis of the defendant's status as a trademark licensor. *Connelly v. Uniroyal, Inc.*, 75 Ill. 2d 393, 389 N.E.2d 155 (1979).

205. The quality control function of the mark comes into play as a basis for liability chiefly in the product-service franchise, where the franchisor is making representations via the mark about the quality of the franchisee product. This franchise operation is in this respect similar to a manufacturing franchise.

The quality control function of the mark adds nothing to the liability of a franchisor in a distributorship system, because the franchisor is the manufacturer or distributor. The retail chain store franchise more closely resembles the distributorship than the manufacturing franchise; it makes no product that is sold under the franchisor mark.

206. The representation made by virtue of a trademark is that "all goods bearing the mark will be of the same nature, quality and characteristics." 3 R. CALLMAN, *THE LAW OF UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES* § 65.2, at 9-10 (1969). Sometimes referred to as the guarantee function, it is in reality neither a guarantee nor a warranty. *Id.*; 1 J. MCCARTHY, *TRADEMARKS AND UNFAIR COMPETITION* § 3:4 (1973).

The quality assurance function is largely the product of mass production and distribution. Reflecting trademark use in the Middle Ages as merchants' ownership marks, see F. SCHECHTER, *HISTORICAL FOUNDATIONS OF TRADE-MARK LAW* 19-37 (1925), and as guild-imposed craftsmen's marks indicating source, see *id.* at 38-77, the earlier view of their function was that they indicated source or origin by identifying the manufacturer. See R. CALLMAN, *supra*, § 65; 1 J. GILSON, *TRADEMARK PROTECTION AND PRACTICE* § 1.03[1] (1979); 1 J. MCCARTHY, *supra*, § 3:3; F. SCHECHTER, *supra*, at 147; cf. Lanham Act § 45, 15 U.S.C. § 1127 (1976) (trademark includes words or symbols "adopted and used by a manufacturer or merchant to identify his goods and distinguish them from those manufactured or sold by others"). The mark was a principal means by which consumers

or implied warranty, which is breached when a licensee makes a substandard product.²⁰⁷ The quality assurance function may also be considered a representation that the mark owner controls quality, which becomes a misrepresentation when he fails to control. Under proper circumstances, the mark licensor may be liable for negligent misrepresentation.²⁰⁸

The duty to control quality of licensee products arising by reason of the quality assurance function may so tie the licensor to the licensee product as to make him liable for its defectiveness in negligence or strict products liability.²⁰⁹ The quality control function furnishes the nexus between the licensor and the product, on the basis of which a duty is found and products liability doctrines applied.²¹⁰ These theories are in part based on, or at least supported by, the advertising function of marks. The mark is a medium or instrument for advertisement and a means of inducing consumer demand for and reliance on a product or line of products.²¹¹

identified and purchased goods, and the maker was entitled to protection against confusion of the public by others' use of the same or similar mark. See 1 J. McCARTHY, *supra*, § 2:12.

The functions of the trademark changed with the advent of mass production in the nineteenth century. Consumers were no longer likely to know the name of the manufacturer associated with a particular mark. The mark identified products of a single, uniform quality, the source of which was unknown. F. SCHECHTER, *supra*, at 147-50. The trademark came to be recognized as a representation that all goods bearing it were of the same quality. F. SCHECHTER, *supra*, at 150; see Hanak, *The Quality Assurance Function of Trademarks*, 43 *FORDHAM L. REV.* 363 (1974).

At common law what is now called the service mark was protected under the general principles of unfair competition affording protection against similar use of trade names and symbols of a business. See 1 J. McCARTHY, *supra*, §§ 9:1, 9:5. Since protection was tied to protection of the goodwill of a business, a concept of quality assurance did not develop. A service mark is almost certain to be associated with a particular business enterprise and is likely to be a trade name identifying the company as well as a mark identifying the services provided. It is possible, however, for a service mark not to be associated with a particular retail business. See *Professional Golfers Ass'n v. Bankers Life & Cas. Co.*, 514 F.2d 665 (5th Cir. 1975).

The Lanham Act initiated the notion of a service mark as a symbol that might be separated from a business. Lanham Act § 45, 15 U.S.C. 1127 (1976). It defined the service mark as the equivalent of a trademark, *id.*, and afforded it the same protection, *id.* § 3, 15 U.S.C. 1053; see *Professional Golfers Ass'n v. Bankers Life & Cas. Co.*, 514 F.2d 665, 668 (5th Cir. 1975). The consequence is that the statutory quality assurance function of trademarks is a function of service marks. See *id.*

207. Note, *Tort Liability of Trademark Licensors*, 55 *IOWA L. REV.* 693, 704-05 (1970) [hereinafter cited as *Trademark Licensors*]; see Goldstein, *Products Liability and the Trademark Owner: When a Trademark is a Warranty*, 32 *BUS. LAW.* 957 (1977).

208. *Trademark Licensors*, *supra* note 207, at 701-03.

209. *Id.* at 703-04, 705-06.

210. This was, at least in part, the basis for the holdings in *Kasel v. Remington Arms Co.*, 24 Cal. App. 3d 711, 725 n.17, 101 Cal. Rptr. 314, 323 n.17 (1972), and *Connelly v. Uniroyal, Inc.*, 75 Ill. 2d 393, 389 N.E.2d 155 (1979).

211. See 3 R. CALLMAN, *supra* note 206, § 65.3; 1 J. McCARTHY, *supra* note 206, § 3:5. Margaret Goldstein, recognizing this factor, suggests that a strong trademark is a warranty of quality for all of the individual goods in a line of products. Goldstein, *supra* note 207, at 964-73.

The law of trade and service marks is both common and statutory law, although common law as directly applied has been largely supplanted by statute, the most significant of which is the federal Lanham Act.²¹² Statutes have broadened the scope of mark protection by extending application of common law concepts²¹³ and by the use of mark registration systems.²¹⁴

The Lanham Act permits mark licensing²¹⁵ and in doing so incorporates the

212. The Lanham Act, 15 U.S.C. §§ 1051-1127 (1976), affords protection to marks used in interstate commerce. The minimal relation between local and interstate commerce required in *Katzenbach v. McClung*, 379 U.S. 294 (1964), has been held to be the test for interstate commerce under the Lanham Act. *Franchised Stores of New York, Inc. v. Winter*, 394 F.2d 664 (2d Cir. 1968).

All states except Alaska, Indiana, and Wisconsin have similar statutes for state trademark protection. See G. GLICKMAN, *supra* note 9, § 4.03[3]. Even in those states, unregistered marks may be afforded limited protection by the common law. *Id.* Common law protection is thus not supplanted in the sense of being ousted by statutory law; statutes simply offer such better protection that, as a practical matter, a mark owner will seek registration. In addition, because state and federal statutes are strongly rooted in the common law, its concepts continue to have considerable vitality in this field.

213. Equation of service marks with trademarks is one example. See note 206 *supra*.

214. Registration does not create ownership. The registrant must have established his right to the mark through use. Lanham Act § 1, 15 U.S.C. § 1051 (1976).

It is unsettled, however, whether a person can register a trademark under the Lanham Act without first using it *himself*. The answer would seem to be no; ownership, which must be acquired by use, is a prerequisite to registration. The problem has arisen in the franchising field, where a franchisor who has not operated any outlets himself registers a trade or service mark and licenses its use. It would seem that the first licensee, as the first to use the mark, is the owner. See 1 J. GILSON, *supra* note 206, § 6.01[3]. It has been held, however, that a franchisor may register the mark after use is established through controlled licensees. *Turner v. HMH Publishing Co.*, 380 F.2d 244, 229 (5th Cir. 1967). A certificate of registration is *prima facie* evidence of ownership. Lanham Act § 7(b), 15 U.S.C. § 1057(b). The Lanham Act sets up two registration systems, the Principal Register and the Supplemental Register. For the differences between the two, see 1 J. McCARTHY, *supra* note 206, §§ 19:5-8. References here are to the effects of registration on the Principal Register.

215. Trademark licensing was not permitted at common law because of the traditional tie of the mark with a business. 1 J. GILSON, *supra* note 206, § 6.01[4]; 1 J. McCARTHY, *supra* note 206, § 3:3. A trademark was, and is, acquired by use in connection with a business. *Id.* § 16:1; E. VANDENBURG, *TRADEMARK LAW AND PROTECTION* § 2.10 (1968). Once the owner acquires a mark, he is entitled to protection against infringement so long as he continues to use it. See, e.g., *id.* Although the mark is in a sense property, a symbol of the goodwill associated with a business, see 1 J. GILSON, *supra* note 206, § 1.03[5]; F. SCHECHTER, *supra* note 206, at 150-61, the mark property rights can only be exercised in connection with the business it represents, see 3 R. CALLMAN, *supra* note 206, § 66.3; E. VANDENBURG, *supra*.

Commentators suggest that the traditional view of the mark is outmoded; its role in advertising gives it a value independent of the business with which it is associated. 3 R. CALLMAN, *supra* note 206, § 66.3; 1 J. GILSON, *supra* note 206, § 1.03[5]; 1 J. McCARTHY, *supra* note 206, § 3:4. At least one court has recognized such an independent value. *Boston Prof'l Hockey Ass'n v. Dallas Cap & Emblem Mfg.*, 510 F.2d 1004 (5th Cir. 1975).

Controlled licensing is permitted under the Lanham Act, see notes 217 to 219 and accompanying text *infra*; cf. note 216 *infra* (question whether licensing now permitted at

quality control function of trademarks.²¹⁶ Section 5 of the Act provides that the use of a mark by related companies of a registrant inures to his benefit and does not affect the validity of the mark.²¹⁷ "Related companies" include a company controlled by the registrant "in respect to the nature and quality of the goods or services in connection with which the mark is used."²¹⁸ A licensee over which control as to quality of products and services is exercised is a related company; thus, licensing is permitted, provided the licensor takes proper steps to control the quality of goods or services made by its licensees.²¹⁹

The quality assurance function of marks has been referred to as a "duty to the public" to control quality,²²⁰ but the only statutory sanction for its breach is loss of the mark and registration.²²¹ It is the traditional linkage of mark owner rights and public deception that vests the mark owner's self-interested "duty" to control quality to protect his mark with the character of a duty to the public. The consumer was at first merely an incidental beneficiary of the mark owner's property right,²²² but as courts gradually begin to emphasize the consumer's role in determining the mark owner's right to protection, the mark owner was seen

common law); but assignment of a mark without transfer of the associated business is still forbidden, Lanham Act § 10, 15 U.S.C. § 1060 (1976).

216. See 4 R. CALLMAN, *supra* note 206, § 98.3(c); 1 J. GILSON, *supra* note 206, § 6.01[4].

217. 15 U.S.C. § 1055 (1976). This is true so long as the mark is not used in a way that deceives the public. *Id.*

218. Lanham Act § 45, 15 U.S.C. § 1127 (1976). The section provides: "The term 'related company' means any person who legitimately controls or is controlled by the registrant or applicant for registration in respect to the nature and quality of the goods or services in connection with which the mark is used." *Id.* (1976 & Supp. 1979).

219. *E.g.*, Dawn Donut Co. v. Hart's Food Stores, Inc., 267 F.2d 358, 367 (2d Cir. 1959); *In re Carvel Corp.*, [1965-1967 Transfer Binder] TRADE REG. REP. (CCH) ¶ 17,298 (1965).

220. *E.g.*, Kentucky Fried Chicken Corp. v. Diversified Pkg. Corp., 549 F.2d 368, 387 (5th Cir. 1977); Dawn Donut Co. v. Hart's Food Stores, Inc., 267 F.2d 358, 367 (2d Cir. 1959); *cf.* Denison Mattress Factory v. Spring-Air Co., 308 F.2d 403, 409 (5th Cir. 1962) ("affirmative duty to itself and the public") (emphasis added).

221. Registration may be cancelled if the mark is abandoned, Lanham Act § 14(c), 15 U.S.C. § 1064(c) (1976); abandonment may occur by reason of the owner's acts or omissions causing the mark to lose significance as an indication of origin, *id.* § 45, 15 U.S.C. § 1127 (1976). One commentator has suggested the possibility of a statutory cause of action against a licensor for failure to control quality. 1 J. GILSON, *supra* note 206, § 6.01[6].

Similar suggestions have been advanced with regard to a private cause of action for false advertising by way of trademark misuse under § 43 of the Lanham Act. *E.g.*, 1 J. McCARTHY, *supra* note 206, § 27:4B. The section provides that anyone applying a "false designation of origin, or any false description or representation" is liable in a civil action by any person doing business in the area falsely represented to be the origin or "any person who believes that he is or is likely to be damaged by the use of any such false description or representation." 15 U.S.C. § 1125(a) (1976). Interpretation of the section to create a consumer cause of action has been rejected by two courts, *Colligan v. Activities Club of New York, Ltd.*, 442 F.2d 686 (2d Cir.), *cert. denied*, 404 U.S. 1004 (1971) (class action); *Florida v. Eli Lilly & Co.*, 329 F. Supp. 364 (S.D. Fla. 1971), but has been upheld by one court, *Arnesen v. The Raymond Lee Org'n*, 333 F. Supp. 116 (C.D. Cal. 1971).

222. The owner was damaged by interference with his goodwill, measured by the extent to which consumers were misled and diverted to the infringer's business. See F. SCHECHTER, *supra* note 206, at 142-45, 162-64.

as vindicating the rights of consumers not to be deceived.²²³ Efforts to impose liability on trademark licensors through the quality assurance function represent an attempt to transform the general public's right not to be deceived, enforced by the mark owner as to future deception, into a specific individual right when past deception has caused injury.²²⁴

The owner-licensor of a mark does not represent by reason of the quality assurance function that the product or service bearing the mark has any particular quality; he merely assures the public that quality has not changed. That assurance alone might give rise to liability if the consumer relies to his detriment on the fact that there has been no change. Such an action would require proof of a change and its nature; it would be difficult to separate damage arising by reason of reliance on the fact that there was no change, or even by reason of the change, from that arising by reason of the fact that the licensee product was defective.

The assurance of quality becomes a representation of a particular standard upon which to base an action for breach of warranty by reason of the second function of marks, the advertising function. The mark is a shorthand for advertising claims made concerning the quality of the product or service; read with those claims, it makes a statement to the consumer about the quality of the good or service with which it is associated.²²⁵ The mark may also represent a particular quality standard because it is a symbol for prior consumer experience with and expectations concerning both the particular good or service to which it is affixed and other goods and services with which it is associated.²²⁶

If specific claims have been made about a product or service and the licensee-made version does not conform, a warranty action may be possible. In many cases, however, advertising is so vague or subtle that it merely creates a favorable impression that cannot be translated into specific claims. In such cases it may be impossible to define the terms of the warranty, although it might be possible to do so by proof of the prior quality of the product or service. This problem might also be cured by use of the presumption that no manufacturer deliberately places a defective product on the market. Such a presumption is

223. See 1 J. GILSON, *supra* note 206, § 1.03[6]; 1 J. McCARTHY, *supra* note 206, §§ 2.12–13. *But see* F. SCHECHTER, *supra* note 206, at 162–63, 165–67 (deploring efforts of some courts to make deception of the public the basis for infringement actions).

224. That courts have not recognized a statutory cause of action for deceived consumers as a class does not necessarily vitiate the argument for an individual action for injuries sustained by reason of a deception. The statutory actions would give consumers an action on the basis of deceit alone, the violation of the "right" not to be deceived. The individual actions suggested herein only arise when consumer reliance on the deceit has resulted in personal injury.

225. See *Trademark Licensors*, *supra* note 207, at 704–05. A plaintiff would not necessarily need to have seen a particular advertisement for a warranty to be found. The mark in effect incorporates by reference the statements made about a good or service. The display of a mark is a general warranty of quality, the specifics of which are found in advertisements.

226. See Goldstein, *supra* note 207, at 964–73.

justified as a matter of fact as well as policy. Quality varies among producers of goods, but as a matter of economic self-interest, there is probably a minimum quality level below which no producer can afford to descend.²²⁷ Thus, although the consumer may have difficulty proving that a very high standard of quality has fallen to a lower level, he may be able to obtain relief when a product is defective.

Where the nature of the quality assurance function is said to entail an involvement in the licensee product which gives rise to a duty, the breach of which constitutes negligence or which justifies the imposition of strict liability on the licensor, a problem arises because the extent of the licensor's duty to control is unclear. Although under the Lanham Act the licensor is required to exercise actual control over the licensee,²²⁸ the extent of control required is unclear. The existence of a contractual control provision has been said to be immaterial so long as control is in fact exercised.²²⁹ A few courts have held that the duty to control is fulfilled by an unexercised contractual provision affording the licensor the right to control,²³⁰ but most hold that some actual supervision is necessary.²³¹ Some decisions indicate that very little in the way of control is required. An extreme example is *Land O'Lakes Creameries, Inc. v. Oconomowoc Canning Co.*,²³² in which a licensor who had only an oral license agreement, with no control provisions, and who had never issued any specifications or inspected the product, was held to have exercised sufficient supervision. Reliance on its

227. Jerome Gilson states that producers' self interest will result in some minimum standard, 1 J. GILSON, *supra* note 206, § 6.01[4], and it would seem that, in light of modern products liability law, courts could imply a minimal standard of quality to find that a product is not defective. In the case of certain products that cannot be made safe, the minimum standard might be that the product is either as safe as it can be or that proper warnings of its hazardous nature have been given.

Another way to derive a minimum standard might be through the use of industry customs. See H. HART & A. SACKS, *THE LEGAL PROCESS* 427-36 (tent. ed. 1958).

228. The Act does not define what kind of control is required, see Lanham Act § 45, 15 U.S.C. § 1127 (1976), but courts have interpreted it to require actual control, e.g., *Alligator Co. v. Robert Bruce, Inc.*, 176 F. Supp. 377, 379 (E.D. Pa. 1959).

229. E.g., *Land O'Lakes Creameries, Inc. v. Oconomowoc Canning Co.*, 330 F.2d 667 (7th Cir. 1964); *Dawn Donut Co. v. Hart's Food Stores, Inc.*, 267 F.2d 358 (2d Cir. 1959); *National Lampoon, Inc. v. American Broadcasting Cos.*, 376 F. Supp. 733, 737 (S.D.N.Y.), *aff'd per curiam*, 497 F.2d 1343 (2d Cir. 1974). But see *Robinson Co. v. Plastics Research & Dev. Corp.*, 267 F. Supp. 853, 864 (W.D. Ark. 1967); *Trademark Licensing*, *supra* note 207, at 898-99, suggesting that courts have not always looked at actual control although it is supposed to be the test.

230. E.g., *Robinson Co. v. Plastics Research & Dev. Corp.*, 267 F. Supp. 852, 864 (W.D. Ark. 1967); *Arthur Murray, Inc. v. Horst*, 110 F. Supp. 680 (D. Mass. 1953).

231. E.g., *National Lampoon, Inc. v. American Broadcasting Cos.*, 376 F. Supp. 733, 737 (S.D.N.Y.), *aff'd per curiam*, 497 F.2d 1343 (2d Cir. 1974); see 1 J. MCCARTHY, *supra* note 206, § 18:17.

232. 330 F.2d 667 (7th Cir. 1964).

licensee's quality controls, coupled with a forty-year history of no complaints about the goods, was sufficient.²³³

The question whether a licensor has exercised sufficient control over its licensees arises in trademark infringement suits, when the alleged infringer asserts as an affirmative defense that the licensor has lost the right to mark protection by failing to control licensee quality. In such a case, the burden is on the defendant to prove inadequate control, and the exercise of "minimal" controls is sufficient to protect the mark.²³⁴ The United States Court of Appeals for the Fifth Circuit recently aptly expressed the extent of a court's inquiry whether minimal control has been exercised: "We must determine whether [the licensor] has *abandoned* quality control; the consuming public must be the judge of whether the quality control efforts have been ineffectual."²³⁵

Because the extent of control required of a licensor is at least uncertain and at best extremely slight, it is difficult to contend that the quality assurance function of a mark alone supports a duty to the public upon which liability can practically be predicated. Only a complete failure to control can safely be said to be a breach of the duty. If liability derives solely from this function of the mark, it must be because the function at a minimum entails certain responsibilities for the product or certain relationships with licensees.²³⁶ The amount of control

233. *Id.* at 670. See also *Dawn Donut Co. v. Hart's Food Stores, Inc.*, 267 F.2d 358 (2d Cir. 1959) (no formal inspection system but licensees required to use licensor's batter mix); 3 R. CALLMAN, *supra* note 206, § 98.3(c); 1 J. McCARTHY, *supra* note 206, § 18:17.

234. *E.g.*, *Turner v. HMH Publishing Co.*, 380 F.2d 224 (5th Cir. 1967); *Land O'Lakes Creameries, Inc. v. Oconomowoc Canning Co.*, 330 F.2d 667 (7th Cir. 1964); *Dawn Donut Co. v. Hart's Food Stores, Inc.*, 267 F.2d 358 (2d Cir. 1959); *National Lampon, Inc. v. American Broadcasting Cos.*, 376 F. Supp. 733 (S.D.N.Y.), *aff'd per curiam*, 497 F.2d 1343 (2d Cir. 1974); *Alligator Co. v. Robert Bruce, Inc.*, 176 F. Supp. 377 (E.D. Pa. 1959).

235. *Kentucky Fried Chicken, Inc. v. Diversified Pkg. Corp.*, 549 F.2d 368, 387 (5th Cir. 1977) (emphasis added).

236. The minimal control *required* of a licensor in order to retain its mark should be distinguished from the amount of control, often also expressed as "minimal," *permitted* of a licensor. The question arises when licensors assert the need to control quality as a defense in antitrust cases in which an illegal tying arrangement is alleged. Such arrangements, which involve the sale of two products with an agreement to sell one only if another is purchased, *e.g.*, *Standard Oil Co. v. United States*, 337 U.S. 293 (1949), are illegal if the seller has sufficient economic power over the market for the first product to force the buyer to take the second, *e.g.*, *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969); *Standard Oil Co. v. United States*, 337 U.S. 293 (1949). The problem arises when a franchisor requires that its franchisees purchase products exclusively from it or from approved suppliers. Courts have now recognized that the franchise itself may be the primary tying product, and the supplies the secondary tied products, *e.g.*, *Kentucky Fried Chicken, Inc. v. Diversified Pkg. Corp.*, 549 F.2d 368 (5th Cir. 1977); *Capital Temporaries, Inc. v. Olsten Corp.*, 506 F.2d 658 (2d Cir. 1974); *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972); and that a franchisor may have sufficient economic power over its franchisees for the supplies provisions of the agreement to constitute an illegal tying arrangement, based on a presumption of power from the fact that the trademark is the dominant feature of the franchise, *e.g.*, *Falls Church Bratwursthaus, Inc. v. Bratwursthaus Mgmt. Corp.*, 354 F. Supp. 1237 (E.D. Va. 1973);

necessary to retain a mark is so slight that it does not seem to support the link between the franchisor and the franchisee product.

The quality control function of the mark is by itself, at least questionable as a basis for licensor liability. A second function of the mark, the advertising function, does, however, help to afford a basis for liability.²³⁷ The quality assurance function plays a part in that it contributes a notion — albeit one that cannot be quantified — of a duty to control quality so as not to deceive the public, but the key to liability is the role of the mark in creating consumer demand for and reliance on the product.²³⁸

One case has recognized that strict liability might be imposed on a trademark licensor, apparently on the sole basis of its status as a licensor.²³⁹ In *Connelly v. Uniroyal, Inc.*,²⁴⁰ a decision that, as previously discussed, also relied to some degree on a section 400 liability theory,²⁴¹ the Illinois Supreme Court held that strict liability could be imposed on Uniroyal for injuries resulting from a defective tire made by its licensee. The theory upon which liability was based is unclear; the court referred to both the licensor's membership in the marketing

see *Northern v. McGraw-Edison Co.*, 542 F.2d 1336 (8th Cir. 1976); or on a showing of actual power, e.g., *Carpa, Inc. v. Ward Foods, Inc.*, 536 F.2d 39 (5th Cir. 1976).

A tie-in is not illegal if it is necessary for the maintenance of quality, and franchisors often assert that contractual provisions restricting franchisees' sources of supply serve that purpose. A licensor may impose only the minimum amount of control necessary to assure uniform quality, e.g., *Carpa, Inc. v. Ward Foods, Inc.*, 536 F.2d 39 (5th Cir. 1976), and even if the tying provision does promote quality there must be no less restrictive means of doing so, *id.*; *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972).

The term "minimum" is used in both the mark abandonment and the antitrust cases in references to the degree, or amount, of control to be exercised by a mark licensor over the quality of its licensees' goods or services. In the former cases, the term refers to that degree of control that a licensor has a duty to exercise, in the latter to that degree of control a licensor cannot exceed. The determination in the former cases, because a licensor is alleged to have asserted too little control, must necessarily begin at a point near zero and decide at what point above zero sufficient, or "minimum," control is exercised. In the latter cases, in which licensors are said to have asserted too much control, the process begins near 100 (i.e., total) and determines at what point below it *only* sufficient, or "minimum," control is exercised. It is the contention of this author that the same "minimum" point so determined will not be reached in both instances. Rather, there will result a range of control that is barely sufficient at the lower end and barely permissible at the upper.

237. The two mark functions also serve as the basis for liability for breach of warranty. See notes 225 to 227 and accompanying text *supra*.

238. See note 211 and accompanying text *supra*.

239. Since the mark licensee was a subsidiary of the licensor, another basis for liability could be postulated, but this was apparently not the basis of the court's decision. See notes 149 to 152 and accompanying text *supra*.

240. 75 Ill. 2d 393, 389 N.E.2d 155 (1979). The trial court had denied summary judgment for the licensor, and an intermediate appellate court had reversed that determination. 55 Ill. App. 3d 530, 370 N.E.2d 1189 (1977). The Illinois Supreme Court reversed the intermediate court's decision on this ground.

241. See text accompanying notes 141 to 152 *supra*.

enterprise and its participation in profits from putting the defective product in the stream of commerce.²⁴² The basis of liability was not, however, consumer reliance on the mark and the licensor's role in inducing purchase. The plaintiff bought an automobile with the tire on it; it is difficult to imagine that the car was purchased because of reliance on the tire manufacturer's name.

No other court has suggested liability based solely on a defendant's role as mark licensor, although the role has been noted as a factor in imposing liability on other bases.²⁴³ Two cases not involving trademark licensors have, however, suggested liability for independent certifiers of quality, who are in fact in positions similar to trademark licensors, on the basis of their roles in inducing demand for and reliance on products.²⁴⁴ In *Hempstead v. General Fire Extinguisher Corporation*²⁴⁵ a United States district court found sufficient issues of fact to defeat a motion for summary judgment in an action against Underwriters Laboratories for negligent approval of the design of a fire extinguisher, despite the fact that Underwriters was neither the manufacturer nor the seller.²⁴⁶ The court described at length the Underwriters testing procedures, which it said constituted approval of the extinguisher design,²⁴⁷ and noted that the Underwi-

242. 75 Ill. 2d at 411-12, 389 N.E.2d at 163. See notes 191 to 192 and accompanying text *supra*. The court also noted that the manufacturer of the tire was not identified. 75 Ill. 2d at 411, 389 N.E.2d at 163.

243. In *Kasel v. Remington Arms Co.*, 24 Cal. App. 3d 711, 101 Cal. Rptr. 314 (1972); see notes 173 to 185 and accompanying text *supra*, a California court of appeal held a trademark licensor liable for injuries caused by a defective product made by its licensee, primarily because of the licensor's role in creating consumer demand for and reliance on the product. 24 Cal. App. 3d at 727, 101 Cal. Rptr. at 324-25. Imposition of liability was based on the role of the trademark as an inducement to buy, although substantial controls were also present. *Accord*, *City of Hartford v. Associated Constr. Co.*, 34 Conn. Supp. 204, 384 A.2d 390 (1978).

244. The analogy between independent certifiers and trademark licensors is by no means perfect, primarily because the licensor is not an entity perceived by the public as independent and impartial. This distinction was noted by the court in *Hanberry v. Hearst Corp.*, 276 Cal. App. 2d 680, 81 Cal. Rptr. 519 (1969), when the defendant sought to avoid liability on the basis that the Good Housekeeping seal was only an opinion, not a statement of a material fact. The court noted that the defendant was not the manufacturer or seller; it held itself out as a disinterested third person. *Id.* at 684, 81 Cal. Rptr. at 523.

245. 269 F. Supp. 109 (D. Del. 1967) (Virginia law). Another case seeking to impose liability on Underwriters Laboratories suggests a limitation of theories based on the advertising function of the mark. *Benco Plastics, Inc. v. Westinghouse Elec. Corp.*, 387 F. Supp. 772 (E.D. Tenn. 1974). The court, acknowledging that its decision was based primarily on practical policy considerations, rejected the attempt of a commercial sign manufacturer to impose liability on Underwriters, stating imposition of liability was not justified where plaintiff was not an ultimate consumer and no physical injury was involved. *Id.* at 786.

246. Plaintiff, who was employed at an apartment complex, was injured when a fire extinguisher operated by a co-worker exploded while they were putting out a fire.

247. 269 F. Supp. at 116-17. The Underwriters Laboratory seal is a certification mark under the Lanham Act. Lanham Act § 45, 15 U.S.C. § 1127 (1976). The court did not discuss it as a mark or advert to any statutory duties associated with it.

ters seal was of aid to the manufacturer in selling the product.²⁴⁸ Similarly, in *Hanberry v. Hearst Corporation*²⁴⁹ a California court found a cause of action in negligent misrepresentation asserted against the issuers of the Good Housekeeping Seal of Approval. The court emphasized the role of the seal in inducing customer purchases, stating that having "voluntarily involved itself in the marketing process, having in effect loaned its reputation to promote and induce the sale of a given product,"²⁵⁰ defendant should be liable when consumers reasonably relied upon its reputation, purchased a defective product, and were harmed.²⁵¹

The various suggested theories of liability resting on the functions of a trademark are most clearly applicable to retail franchisors, such as those operating fast food chains, selling products or products and services. Like a manufacturing franchisor, this retail franchisor licenses the manufacture or processing of goods bearing its mark.

Application to a retail franchise operation in which the outlets offer only services is somewhat problematic. The Lanham Act and similar state statutes equate the functions of service marks with those of trademarks, and the owner of a service mark has the same duty to control its licensees' services as does the trademark licensor. A service mark also serves the same advertising function as a trademark. Although the same theoretical underpinnings thus exist for mark-based liability, there may be practical difficulties in its application to service franchisors.

If licensor advertising makes explicit statements concerning services, a warranty action may be possible. Where such statements are not made, maintaining an action for breach of an implied warranty, for example, may not be possible. Proof of a prior standard of quality could afford a basis for such an action, but current law does not furnish a basis for presuming a minimum standard of service as products liability law at least arguably does for goods. If the noted trend toward imposition of "products" liability theory to commercial services continues, the gap may in time be filled. Liability predicated on the advertising function of the mark and the franchisor's creation of demand also presents the problem of defining the scope of the representation made by the mark and the standard of quality it represents. A service mark often applies to an entire business operation; in the restaurant business, for example, liability would presumably cover at least normal operations. Where the service is one that can be readily standardized, it may be possible to define in a fairly specific

248. 269 F. Supp. at 117.

249. 276 Cal. App. 2d 680, 81 Cal. Rptr. 519 (1969). Plaintiff, in reliance on the Good Housekeeping Seal of Approval, purchased some shoes bearing the seal. She was injured in a fall on her vinyl kitchen floor and asserted that the shoes were defective in that they had a low friction coefficient, making it likely that they would slip on vinyl floors.

250. *Id.* at 684, 81 Cal. Rptr. at 522.

251. *Id.*, 81 Cal. Rptr. at 523. The *Hanberry* court held the plaintiff had no cause of action in strict liability in tort, *id.* at 687, 81 Cal. Rptr. at 524, but the California court in the later *Kasel* decision has suggested that a different result might now be reached.

way what standards of quality are represented by a mark, at least in terms of minimal standards. Service franchises involving less standardized services present greater problems. Strict liability, with the mark guarantee and advertising functions furnishing the nexus between the licensor and the service which induces customers to purchase services of the franchisees, would not be imposed because strict liability has not been extended to services.

The theories predicating liability solely on the functions of a mark would not be applied at all to most retail franchisors of the chain store type. Such outlets, unless they also provide a service that is not merely incidental to their sale of goods, are unlikely to be trade or service mark owners.²⁵² If a service provided by the retail chain store is protected by a service mark, the franchisor's liability as to that part of the operation is no different from that of any other service franchisor. The same considerations and difficulties of application of mark liability discussed above would apply.

The sole basis of liability under the theories discussed in this section is the franchisor's trade or service mark, but, as noted in the discussion, the factor most important in their application is the nature and content of franchisor advertising. Advertising concerning the mark is important because it is in a sense an accoutrement of the mark. It both defines the quality goods and services bearing a mark are represented to have and gives the mark its value. Specific claims made in franchisor advertisements serve to define the quality representations made about the good or service, and the failure to achieve those standards may be the basis for liability.

Thus, it can be seen that the basis of liability under the various mark theories is, once again, the mark licensor's creation of consumer demand for and reliance on its product. In this instance, it is the trade or service mark that, by reason of the mark quality assurance function, fosters consumer reliance on goods or services bearing the mark and, by reason of the closely related advertising function of marks, creates and sustains consumer demand. The trademark theories all suggest direct liability of mark licensors based on the mark functions, but application will vary according to the particular legal theory employed. For example, strict liability is unlikely to be applied to service mark licensors because that doctrine has been associated primarily with products.

Because the theories derive from the function of a mark associated with particular goods and services, they apply only to those goods and services. Like the section 400 theory, the representation made for a product is that the good itself, not the producing franchisee's operation, has a particular quality. This limiting factor is more theoretical than real, however. Most retail franchises

252. A service mark registration is not granted unless what is owned truly identifies services which can be separated somewhat from the selling of goods. *See, e.g.*, Application of Orion Research Inc., 523 F.2d 1398 (C.C.P.A. 1975). *But see* American Int'l Reinsurance Co. v. Airco, Inc., 570 F.2d 941 (C.C.P.A. 1978).

producing goods are combination product-service franchises, such as fast food restaurants.

In application to service franchises, mark theories are, in many cases, likely to be coextensive with the apparent agency theory. Although the holding out of an agent need not be done by means of a service mark, the mark is likely to be at least one indication of authority where a service franchise is involved. Under the mark-based theories, however, what is being held out is the quality of the service provided, not the provider as agent. It will be difficult to separate the service proper from the entire operation of the business. It would seem, for example, that the "service" provided by a restaurant includes safe premises, so that liability based solely on the mark would entail liability for injuries sustained by a customer injured in a fall from a broken chair. Because of their different attributes, this may not be true of other types of service businesses, such as income tax preparation firms.

CONCLUSION

Several theories have been examined in this Comment that might serve as the basis for imposing liability on retail franchisors. The primary basis for the imposition of liability in each is the franchisor's holding out, chiefly by means of mass advertising, of the franchisee or the franchisee-produced good or service as the franchisor's; this holding out causes consumers to rely on the franchisor's name in dealing with local outlets, and liability is imposed when they are injured in doing so. The theories and the results reached under them are not identical, but all can be grouped under a general heading of "holding out — reliance."

Together, the theories seem to represent a complete repudiation of control, the basis for liability under an actual agency theory, in favor of advertising. It is important to note that none of the theories here discussed totally ignores control as a factor in liability determination. Actual control may still be a factor in the application of the stream of commerce theory,²⁵³ but what is of chief importance in that and all the other theories is the appearance of control. It is in part because the public believes that the franchisee outlets are part of a single enterprise headed by the franchisor, or that the franchisor has provided a method of producing goods and providing services, that they patronize franchisee outlets.

Although all the theories here discussed share the purpose of protecting consumers' reliance on franchisors' representations, they do so in differing ways. It has been seen that there are several variations on the common theme and that differences among the theories may produce different results for different types of retail franchisors. It is clear that the one retail franchise to which all the theories apply is that in which products sold under the name of the franchisor are made by the franchisee outlet. It has also been seen that the one

253. See text accompanying notes 185 to 190 *supra*.

theory that most clearly applies to all types of retail franchises is the apparent agency theory.

The application of the other liability theories may vary depending upon two factors, whether the outlet sells products or services and whether it produces the goods or services offered to the public or only sells the products of others. The product-service distinction is important in the application of strict liability theories because that liability has, with only a few exceptions, been imposed only on enterprises responsible for consumer use of goods. The distinction between outlet production and non-production of goods or services sold is important chiefly in the application of the mark-based theories because when outlets sell only products of others there is no representation of quality through a franchisor trademark. For a similar reason, this distinction may be significant in the imposition of liability under the section 400 strict liability theory.