"Limiting the Vicarious Liability of Franchisors for the Torts of their Franchisees"

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Vicarious liability plays a crucial role in the torts system. It is this doctrine, after all, that will often determine whether tort law operates not only in principle, but practically to shift losses of accidents from victims to defendants with the financial wherewithal to satisfy the judgments. Notwithstanding this centrality, vicarious liability has received relatively sparse attention from torts scholars. One area particularly in need of thoughtful dialogue is the matter of the appropriate role of vicarious liability in the context of franchising. Given the central role of franchising in the United States and the world economies, this omission is especially unfortunate. This article recommends the following approach to the crucial matter of whether or when the franchisor-franchisee relationship should be deemed sufficient to support vicarious liability. It proposes that if the franchisor satisfies both of the following preconditions, then its vicarious liability (under either an actual or apparent agency rationale) based on the torts of its franchisees or its franchisees’ employees would be precluded. Those preconditions are: First, the franchisor must have taken reasonable steps to require that notice be prominently displayed by its franchisees clearly indicating that the franchised units are owned and operated by independent franchise entities. Second, and in addition, the franchisor must also require that its franchisees carry reasonable levels of liability insurance. If either of these preconditions is not satisfied, the franchisor would then remain subject to the potential application of the rules governing vicarious liability, the outcome of which would depend on whether the plaintiff could satisfy the elements required for vicarious liability to the same extent as would otherwise be the case. Moreover, if the franchisor remains subject to the rules governing vicarious liability, I further suggest that the courts restrictively define those rules.