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"Do You Deliver?" – Is Your Equity on the Delivery Menu?

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Delivery of food, goods or services to customer locations is an integral part of the service concept underpinning many hospitality and franchised businesses. Some purveyors have abandoned on-premise service formats in favor of carry-out and delivery-base store fronts. But how far should the system owner go to set standards for delivery operations?

An Oregon appeals court recently considered the personal injury claims of a person struck by a Domino's® pizza delivery driver in *Viado v. Domino's Pizza, LLC*. While such accidents are not unusual, the injured party's appeal of the lower court's ruling that Domino's was not liable and the comprehensive analysis of the law by the Oregon appellate court merit some attention. Contrary to recent rulings by state appellate courts in South Carolina and Florida, this Oregon appellate court held that the franchisee was indeed the agent of Domino's (the franchisor). The ruling exposed Domino's to further analysis of potential vicarious liability for the negligence of the franchisee's driver. Ultimately, the court held that because Domino's did not direct the actual, physical driving details of the delivery driver, Domino's was not liable to the injured party for the damages suffered in the accident with the franchisee's delivery driver.

Most franchisors strike a balance between uniformity of retail outlet operation set out in the franchise agreement and operations or standards manual, so that consumer expectations are met consistently by every outlet, and the flexibility needed for franchisees to operate their own businesses independently. In practice, the balance is hard to define for business-to-consumer business format franchises in competitive genres where consistency of delivery is paramount for system growth and survival. When faced with a personal injury claim, courts use agency principles to avoid forcing the injured party into an expensive-to-prove case about whether the franchisor or the franchisee is singularly responsible for the injuries.

The Oregon court followed a 1978 Delaware case and a 1986 Alabama case in which the principles used by many state courts in the U.S. were established: "*If, in practical effect, the franchise agreement goes beyond the stage of setting standards, and allocates to the franchisor the right to exercise control over the daily operations of the franchise, an agency relationship exists.*" A franchisor who controls or has the right to control the acts of the franchisee makes the franchisee an agent in the eyes of the court, so the franchisee is merely acting on behalf of the franchisor, who is the principal in the transaction, and not for the franchisee's own benefit.

The Oregon trial court decided the franchisee was not an agent of Domino's, allowing Domino's to exit the case on summary judgment. The appeals court agreed with the result, but not the reasoning, and that appellate ruling is where the mischief lies. The appeals court examined the franchise agreement and the "manager's reference guide," which provides highly detailed specifications for operating the pizza franchise delivery program. These standards included requirements for driving age and experience, proof of insurance, safety record research and qualifications, use of seat belts, use of hands-free mobile phones, periodic vehicle safety inspections, fueling safety procedures, use of truck beds, use of Domino's driving safety training materials and more. The court reproduced language from the franchise agreement and operating manual that reserved for the franchisor the right to establish certain rules and procedures for operating the retail business:

"(a) the safety, maintenance, cleanliness, sanitation, function and appearance of the Store premises and its equipment, image, fixtures, furniture, decor and signs; "(b) qualifications, dress, grooming, general appearance and demeanor of [franchisee employees]; "(c) quality, taste, portion control and uniformity, and manner of preparation and sale, of all pizza and other authorized food and beverage products sold by the Store and of all ingredients, supplies and materials used in the preparation, packaging and sale of these items; "(d) methods and procedures relating to receiving, preparing and delivering customer orders; "(e) the hours during which the Store will be open for business; "(f) use and illumination of exterior and interior signs, posters, displays, menu boards and similar items; "(g) the handling of customer complaints; "(h) advertising on the Internet or other electronic media, including websites, home pages and the use of domain names; "(i) e-mail capabilities of the Store and other electronic communication devices to facilitate communication with us or our offices; and, "(j) the method and manner of payment which will be accepted from customers."

While these rules are typical of any business format franchise, in this case the Oregon court found the rules to confer on the franchisor sufficient control to find the franchise to be an agency relationship. Business people will think such a finding does not square with reality. While some franchises more closely resemble commission sales agency arrangements, pizza delivery has little of the control or economic elements that ordinarily characterize an agency relationship. The capital for the business is supplied by the franchisee, not the franchisor, the operating business risks and benefits lie with the franchisee, and the only avenue of control for the franchisor is termination of the franchise or suspension of franchisor-controlled services.

Once the court made the agency finding, the analysis then looked at whether the relationship was an employment or non-employment agency. Despite the absence of evidence of an employment context and the franchise agreement's recital of independent contractor status for the franchisee, the court took a careful route to reach the conclusion that the franchisee was not an employee. Domino's exposure was thus reduced significantly.

Under Oregon law and the laws of many other states, the principal of a nonemployee agent is vicariously liable for that agent's negligence only if the principal directs the agent in the performance of the task that caused the injury. The question of direction was next examined by this court. The Domino's franchise documentation established stringent controls over the delivery driver and his or her connection to and job performance for the pizza franchisee:

"(1) Drivers must be 18 years old and carry a state issued driver's license; (2) Drivers must have proof of insurance; (3) Drivers' Motor Vehicle Records need to be verified at the start of employment and at a minimum of every six months; (4) Drivers cannot have more than two violations in the past two years; (5) An employee who does not meet the standards may only work in a non-driving capacity and then only after signing a 'Non-Driving Agreement'; (6) Drivers cannot drive with 'suspended,' 'provisional,' 'court restricted,' 'revoked,' 'learners permit,' or 'Junior' license; (7) Drivers and riders must wear seat belts; (8) Drivers cannot leave keys in unoccupied vehicles; (9) Tobacco use is not permitted by any driver while on the clock; (10) Drivers cannot use cell phone unless it is a 'hands free' device; (11) Driver Reference Book is required at the driver station; (12) Only team members in full uniform are permitted to deliver orders to customers; (13) Delivery drivers must wear a properly working watch when delivering product; (14) Drivers cannot look for an address when delivering a pizza; (15) Drivers must leave the store within sixty (60) seconds of being given a pizza and deliver it within nine (9) minutes; (16) Drivers can only drive certain types of vehicles, but not motorcycles; (17) Franchises can be terminated for failure to follow driving standards; and (18) Domino's conducts periodic and surprise inspections of franchise vehicles and delivery drivers."

The appeals court found these controls, along with the generalized standards to comply with applicable laws in the operation of the delivery vehicle, obey the rules of the road, use seat belts and not use cell phones, did not meet the standard of controlling the physical details or performance of the driving. Such control would take the

form of specifying routes. In another Oregon case, a quick service restaurant franchisor was liable for directing the franchisee as a nonemployee agent because the specification of food handling and safety procedures was detailed enough to meet the control definition. However, the court found that the driving controls did not reach the level needed to send the case to the jury. One wonders if the question would have a different answer if the franchisor supplied a routing system or specified a GPS device for the franchisee's drivers.

If your franchise agreement and operations manuals demonstrate high levels of detail for delivery operations of franchisees, a court may take a less benign and well reasoned view of the issue of control over franchisee operations, or let the case go to the jury to decide. There is a risk/reward tradeoff inherent in the decision to use non-owned delivery vehicles to create advertising impressions on the cheap. Franchisors may want to revisit the calculus periodically. At the very least, the practice demands a robust insurance monitoring function to assure that franchisees maintain required automobile liability insurance coverage. Otherwise, the franchisor's balance sheet (or at least the self-insured retention) is at risk on every delivery run, and dependent on the franchisee's successful selection and supervision of competent, safe delivery drivers. In a delivery-centric business model, that risk may be part of the ingredient list for success, and the benefits of the detailed standards and specification for delivery operations outweigh the insurable risks of decentralized, franchised delivery. Pizza anyone?