

BUYERS, BEWARE: THE FLORIDA SUPREME
COURT'S ABROGATION OF THE APPARENT
AUTHORITY DOCTRINE LEAVES PLAINTIFFS
HOLDING THE TAB FOR TORTS OF FRANCHISEES—
MOBIL OIL CORP. V. BRANSFORD

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I. INTRODUCTION

In 1990, Jeremy Bransford entered a Mobil Mini Mart filling station to purchase some food items.¹ Shortly thereafter, an argument arose between Mr. Bransford and the filling station cashier.² Suddenly, the cashier attacked Mr. Bransford and beat him severely, causing permanent injury.³

Mr. Bransford filed suit against Mobil, alleging that Mobil had established an apparent authority relationship with the operator of the filling station, who was a Mobil franchisee.⁴ The evidence of apparent authority included facts indicating that Mobil owned the property on which the franchise was located, sold Mobil products at the filling station, used Mobil trademarks and logos throughout the premises, and sent Mobil representatives to the station to provide various routine support services.⁵ Further, the franchise agreement required the use of Mobil symbols and

1. *Mobil Oil Corp. v. Bransford*, 648 So. 2d 119, 120 (Fla. 1995).

2. *Id.* at 122 (Shaw, J., dissenting).

3. *Id.*

4. *Id.* at 120.

5. *Id.*

the selling of Mobil products,⁶ and the filling station employee was wearing the Mobil logo on his clothing when he attacked Mr. Bransford.⁷

On January 25, 1995, the Supreme Court of Florida entered summary judgment in favor of Mobil Oil Corporation; the court found that there was no material issue of fact on the question of whether Mobil had incurred liability under the doctrine of apparent authority.⁸ Mr. Bransford's allegations, stated the court, "clearly fail[ed] to allege even the minimum level of a 'representation' necessary to create an apparent agency relationship."⁹

By effectively ruling that a franchisor cannot be held liable for the torts of a franchisee, despite a level of representation clearly adequate to warrant a jury trial on the issue of whether a reasonable person would believe that the franchisee was the apparent agent of the franchisor, the Florida Supreme Court has virtually eliminated the doctrine of apparent authority as a means of imposing vicarious liability in the franchising industry.¹⁰ This Note argues that the Florida Supreme Court's grant of summary judgment in *Mobil Oil* despite ample evidence of apparent authority will likely set precedent leading to inefficient economic results and inequitable decisions in future cases involving customers injured by the negligence of a business operator. Part II of this Note provides a brief history of legal developments in oil company franchise cases and illustrates the challenges courts have faced in applying traditional vicarious liability principles in the context of modern franchise arrangements. Part III discusses the court's holding in *Mobil Oil* and assesses the current status of vicarious liability law in Florida. In part IV, the rationale supporting the concept of vicarious liability is explored in order to analyze the impact the court's decision will have on Florida's agency law jurisprudence. Finally, alternative approaches are suggested for developing a theory that will better implement the policy goals behind vicarious liability in light of the commercial realities of the developing franchise industry.

II. HISTORY OF VICARIOUS LIABILITY IN OIL COMPANY FRANCHISING

Try to recall how many times you have patronized a filling station. How many times have you stopped to fill up your tank, ask directions, or purchase a drink from a filling station with a food mart? Over a thousand?

6. *Id.*

7. *Id.* at 122 (Shaw, J., dissenting).

8. *Id.* at 121.

9. *Id.*

10. *Compare* Mobil Oil Corp. v. Bransford, 648 So. 2d 119 (Fla. 1995) with Holiday Inns, Inc. v. Shelburne, 576 So. 2d 322 (Fla. 4th DCA 1991) (finding that a jury could reasonably determine that Holiday Inns, Inc. established an apparent agency relationship with its franchisee because the franchisee displayed the Holiday Inns sign and logo on its premises).

Maybe five thousand? Did you ever wonder who really operated the filling station, or whether you could recover from the station in the event of injury?

Use of franchising as a form of business arrangement has steadily increased over the past several decades, with franchising arrangements becoming a particularly popular method for oil companies to distribute their products.¹¹ Vicarious liability suits against franchisors have likewise continued to rise.¹² Cases involving torts of filling station franchisees have presented a constant challenge for Florida courts, which have sought to develop a theory of vicarious liability that will produce equitable results for injured plaintiffs without placing an unreasonable burden on the franchising industry.¹³ The theories of liability developed by courts in oil company franchise cases often have implications beyond the oil industry; the precedent set in these cases frequently dictates who will bear the ultimate cost when customers are injured as the result of negligent business operations.¹⁴

The earliest cases involving the liability of oil companies for the acts of their service station operators relied exclusively upon the doctrine of respondeat superior as the basis for holding the oil company liable.¹⁵ The concept of respondeat superior, or "imputed negligence," rests on the premise that by reason of some relation existing between A and B, A may incur liability for B's negligence, even though A has not been negligent.¹⁶ In order to determine whether the necessary agency relationship exists to hold A liable under the doctrine of respondeat superior, courts will examine, among other matters, the extent to which A controlled or had the right to exercise control over the time, manner, and method of B's work.¹⁷ Therefore, the principal aspects courts examine include the

11. Thomas M. Pitegoff, *Franchise Relationship Laws: A Minefield for Franchisors*, 45 BUS. LAW. 289, 291 (1989) (stating that U.S. Department of Commerce estimated, by 1986, that retail sales by franchise establishments had grown to represent 34% of all retail sales by). While state law dictates the precise definition of the term "franchise," most definitions have a combination of the following: (a) either a marketing plan or a community of interest element, (b) a trademark element, and (c) a fee element. *Id.* at 292-93.

12. David A. Beyer, *Franchise Vicarious Liability in Florida: A Survey and Recent Developments*, FLA. B.J., Feb. 1995, at 18. Beyer states that from 1960 through 1993, there appears to have been 11 reported opinions dealing with vicarious liability in the franchise industry in Florida. *Id.* As of the date of Mr. Beyer's survey, there were already four opinions reported in Florida in 1994. *Id.*

13. See, e.g., *Gizzi v. Texaco, Inc.*, 437 F.2d 308 (3d Cir.) (two-one decision), *cert. denied*, 404 U.S. 829 (1971); *Mobil Oil*, 648 So. 2d at 119.

14. See, e.g., *Mobil Oil*, 648 So. 2d 119.

15. Charles R. Britt, Note, *Agency—Apparent Authority and Agency by Estoppel: Emerging Theories of Oil Company Liability for Torts of Service Station Operators*, 50 N.C. L. REV. 647, 648 (1972).

16. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 69, at 499 (5th ed. 1984). This Note addresses the rationale behind vicarious liability *infra* part IV.

17. E.g., *Leach v. Brilad Oil Co.*, 753 F. Supp. 366, 368 (S.D. Ga. 1991). Additional factors courts may take into account in determining whether the requisite degree of control or

working relationship between the parties and the written contract or franchise agreement.¹⁸ Unless the circumstances indicate that A maintained the ability to exercise the requisite degree of control over B's work,¹⁹ A cannot be held liable for B's negligent acts under the doctrine of respondeat superior.²⁰

Unlike the doctrine of respondeat superior, which normally requires the presence of an actual agency relationship (and therefore control), apparent authority is a form of implied agency; implied agency is entirely distinct from actual authority (and therefore from the control requirement).²¹ The Second Restatement of Agency defines apparent authority as "the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons."²²

In Florida, three elements must exist for a finding of apparent authority: a) a representation by the purported principal that the alleged agent is acting on its behalf; b) a reliance on that representation by a third party; and c) a change in position by the third party.²³ The representations of the principal may be made directly to a third person or may be made to the

the right to it exists include: the kind of occupation and the customs of the community as to whether the employer usually supervises the type of work involved; whether the one employed is engaged in a distinct business or occupation and the skill required of the employee; who supplies the place and instrumentalities of the work; the length of time the employment is to last; and the method of payment. KEETON ET AL., *supra* note 16, at 501.

While courts must balance all possible factors to determine whether a master-servant relationship exists, Prosser and Keeton state that a relatively accurate rule-of-thumb considers whether the community would regard the person employed as part of the employer's working staff. *Id.* at 501, 502. If the community would view the employee in this manner, it may be said that the employee is a "servant" of the employer and that the employer may be held vicariously liable for the employees' torts within the scope of employment. *Id.*

The idea that the master is capable of maintaining sufficient control over the servant's duties to eliminate the possibility that the servant will act negligently will not prove valid in many circumstances. *Cf. id.* at 500 (stating that the "control" a master has over a servant is more or less fictional). Further, the rule-of-thumb stated by Prosser and Keeton and many of the indicia that courts purport to examine suggest that the doctrine of respondeat superior stems from concepts of reliance or estoppel. Since the rationale behind the theories of reliance and estoppel, discussed *infra* part IV, remains valid despite the absence of the control element, the control requirement of the doctrine of respondeat superior seems to amount to a limitation imposed by courts to limit the scope of vicarious liability and not a rationally indispensable element. *Cf. id.* (explaining that English courts receded from the control requirement as a requisite to vicarious liability soon after 1700 in order to deal with the complications of commerce and industry).

18. Britt, *supra* note 15, at 648.

19. The courts, of course, maintain much latitude in determining the requisite degree of control necessary in each case.

20. See, e.g., Leach, 753 F. Supp. at 368.

21. RESTATEMENT (SECOND) OF AGENCY § 8 cmt. a (1957).

22. *Id.* § 8.

23. Mobil Oil Corp. v. Bransford, 648 So. 2d 119 (Fla. 1995). Note that, although the franchisor need not actually exercise control over the franchisee to be held liable under apparent authority, the plaintiff must reasonably believe that the franchisor does exercise such control, or maintains the authority to do so, in order to establish the reliance requirement.

community by signs, advertising, authorizing the agent to state that he is permitted to act on behalf of the principal, or continuously employing the agent.²⁴

In 1971, the Third Circuit Court of Appeals decided for the first time, in *Gizzi v. Texaco, Inc.*,²⁵ that an oil company could be held liable for the acts of a filling station franchisee under the doctrines of apparent authority and agency by estoppel, despite the absence of control by the franchisor over the franchisee.²⁶ In *Gizzi*, the plaintiff was injured when the brakes failed on a car that he had bought from an employee of a Texaco station.²⁷ The trial court noted that no actual agency existed between Texaco and the employee who sold the car because the employee sold the car on his own behalf, not on behalf of Texaco.²⁸ However, the plaintiff asserted that Texaco had clothed the employee with apparent authority to make the repairs and sell the car of behalf of Texaco.²⁹ In support of his theory of liability, the plaintiff introduced evidence that Texaco's insignia and slogan "[t]rust your car to the man who wears the star" were prominently displayed.³⁰ The United States District Court for the Eastern District of Pennsylvania granted Texaco's motion for summary judgment, but the Third Circuit reversed, stating that "[w]hile the evidence on behalf of appellants by no means amounted to an overwhelming case of liability . . . reasonable men could differ regarding [the sufficiency of the evidence to establish apparent agency] and . . . the issue should have been determined by the jury"³¹

24. RESTATEMENT (SECOND) OF AGENCY, *supra* note 21, § 8 cmt. b.

25. 437 F.2d 308 (3d Cir. 1971).

26. *Id.*

27. *Id.* at 309.

28. *Id.* at 310.

29. *Id.* at 309.

30. *Id.* at 310. Other evidence mentioned by the court included proof that Texaco leased the property on which the filling station was located to its employee, that Texaco owned certain pieces of equipment used at the station and sold its products at the station, and that Texaco engaged in substantial national advertising not only to promote Texaco products, but also to convey the impression that Texaco dealers were skilled in automotive servicing. *Id.* at 309-10.

Here, as in many other cases involving apparent authority, the court failed to distinguish those factors relevant to the apparent authority analysis from those not relevant under this theory. Because apparent authority is based solely on concepts of reliance and estoppel, those facts of which third parties have no knowledge (such as who owns the land and equipment, the content of the franchise contract, etc.) should not be relevant in the apparent agency determination. See RESTATEMENT (SECOND) OF AGENCY, *supra* note 21, § 8 cmt. a (stating that apparent authority is entirely distinct from authority, either express or implied). The failure of courts to distinguish factual elements relied upon to establish apparent authority from those relevant only to actual authority leads to much of the confusion surrounding the basis for these two theories.

31. *Gizzi*, 437 F.2d at 310.

Since most franchise relationships fall short of creating an actual agency,³² the Third Circuit's holding in *Gizzi* broadened the scope of potential liability for oil companies in franchise arrangements by recognizing that the theory of apparent authority, as well as that of actual agency, could provide the basis for holding an oil company liable for the acts of a franchisee.³³ Although other federal and state courts since *Gizzi* have used the doctrine of apparent authority to hold franchisors responsible for the acts of their franchisees,³⁴ the use of the apparent authority doctrine in the franchise context has received substantial criticism since franchisors are left open to extremely broad liability.³⁵ Broad liability results because plaintiffs can usually point out ample indicia of representation in a modern franchise arrangement to allege vicarious liability under apparent authority.³⁶ These elements of representation are particularly prevalent in most oil company franchise arrangements.³⁷ Besides representation, the other two elements necessary to hold a franchisor vicariously liable for a franchisee's actions—reasonable reliance on the representation and change in position—do not require a high degree of proof to support the allegation.

To protect franchisors from the potentially broad liability imposed by the apparent authority doctrine, some courts have adopted a theory referred to as the common knowledge doctrine.³⁸ The common knowledge doctrine assumes that the public understands that oil companies and certain other businesses commonly enter into franchise agreements whereby the franchisee displays the logos, markings, slogans, and other indicia of the franchisor, although the franchisee maintains control over daily business operations.³⁹ Courts adopting this theory reason that since the public

32. Robert W. Emerson, *Franchisors' Liability when Franchisees Are Apparent Agents: An Empirical and Policy Analysis of "Common Knowledge" About Franchising*, 20 HOFSTRA L. REV. 609, 621-22 (1992).

33. *Gizzi*, 437 F.2d at 310.

34. See, e.g., *Sutton v. Chevron Oil Co.*, 514 P.2d 1301 (N.M. Ct. App.), *rev'd*, 515 P.2d 1283 (N.M. 1973).

35. Emerson, *supra* note 32, at 628.

36. Comment, "You Can Trust the Man Who Wears the Star"—Or Can You?: *The Use of Apparent Authority To Establish a Principle's Tort Liability*, 33 U. PITT. L. REV. 257, 267 (1971) (commenting that from the fact pattern in *Gizzi*, it is difficult to conceive of any situation where an inference of apparent authority would not be warranted). See Robert N. Davis, Jr., Comment, *Service Station Torts: Time for the Oil Companies To Assume Their Share of the Responsibility*, 10 CAL. W. L. REV. 382, 390-91, 396 (1974).

37. See *Smith v. Cities Serv. Oil Co.*, 346 F.2d 349, 352 (7th Cir. 1965) (stating that it is generally recognized that provisions in service station leasing agreements almost universally provide that the lessee may display the lessor's brand signs and honor the lessor's credit cards and that the lessor may make suggestions as to the operation of the station and may terminate the lease); Emerson, *supra* note 32, at 620-21 (stating that numerous examples exist of courts' finding or permitting a jury to find an agency relationship based on vicarious liability in the gasoline industry).

38. Emerson, *supra* note 32, at 645.

39. *Id.*

is deemed to understand that the franchisor actually has no significant control over a franchisee, a plaintiff cannot show that he or she relied upon the franchisor's reputation in choosing to do business with the franchisee.⁴⁰ Thus, the common knowledge doctrine prevents a plaintiff from proving the element of reliance, despite the franchisee's display of signs, logos, or other indicia of the franchisor, unless additional facts exist to warrant the plaintiff's reliance upon the franchisor's business reputation.⁴¹

III. *MOBIL OIL CORP. v. BRANSFORD*

Courts normally use the common knowledge doctrine to support a summary judgment ruling, thereby removing the case from the jury and the fact-finding stage.⁴² However, some courts have employed alternative methods to circumvent the jury's fact-finding function in apparent authority cases. One such method is to grant summary judgment on the basis that the indicia of franchisor control displayed by the franchisee falls short of the minimum level required for the plaintiff to go to the jury.⁴³ This is what the Supreme Court of Florida did in *Mobil Oil Corp. v. Bransford*.⁴⁴

A. *Facts and Procedural History*

In 1990, eighteen-year-old Jeremy Bransford entered a Mobil Mini Mart gas station in Fort Lauderdale to purchase a sandwich.⁴⁵ Mr. Bransford exchanged sharp words with the cashier, Hyman Stetham.⁴⁶ The confrontation escalated and, without warning, Stetham punched Bransford three times in the face.⁴⁷ Bransford's facial bones were crushed in three places; the injuries required permanent implantation of metal plates and screws in Bransford's face.⁴⁸ After the incident, Bransford continued to experience pain when chewing and had blurred vision.⁴⁹

40. *Id.*

41. *Id.* Such indicia could include circumstances similar to those in *Gizzi v. Texaco, Inc.*, 437 F.2d 308 (3d Cir. 1971), where an advertising campaign was designed by the franchisor to encourage customers to utilize service facilities of franchise stations, in addition to purchasing the franchisor's products. See *Chevron U.S.A., Inc. v. Lesch*, 570 A.2d 840 (Md. 1990). In *Chevron*, the court distinguished the circumstances surrounding the advertising campaign in *Gizzi* from a pattern of facts involving a similar advertising campaign previously conducted, but nearly terminated, prior to the alleged tortious incident. The court found that the latter situation did not provide the additional basis for the reasonable reliance necessary to overcome the common knowledge doctrine. *Id.* at 843.

42. Emerson, *supra* note 32, at 648.

43. See *Mobil Oil Corp. v. Bransford*, 648 So. 2d 119, 121 (Fla. 1995) (finding that despite the filling station's display of Mobil's logo, colors, and trademark symbols, the plaintiff clearly failed to allege the minimum level of representation necessary to create an apparent agency relationship).

44. *Id.*

45. *Id.* at 122 (Shaw, J., dissenting).

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

The Mobil station where the incident occurred was owned by Mobil and leased to Alan Berman.⁵⁰ Stetham, who allegedly had a history of assaulting customers, was Berman's employee.⁵¹ Bransford sued Mobil on the theory that Mobil had established an apparent agency with Berman and, therefore, had assumed vicarious liability for torts arising out of Berman's operation of the filling station.⁵²

To show apparent authority, Bransford indicated that Mobil owned the property on which the station was located; Mobil trademarks and symbols were used throughout the premises; the franchise agreement required the use of Mobil symbols and the sale of Mobil products; and Mobil allegedly sent representatives to the station to provide routine support services.⁵³ Further, Bransford presented evidence that employees of the station were required to wear Mobil uniforms and that Stetham was wearing a Mobil hat when he attacked Bransford.⁵⁴

After hearing oral argument, the trial court granted Mobil's motion for summary judgment without opinion.⁵⁵ Bransford sought review of the trial court's ruling on apparent authority in the Fourth District Court of Appeal, which reversed the summary judgment, after finding that "Mobil might be liable under the theory of apparent agency"⁵⁶ Mobil petitioned the Florida Supreme Court for review.⁵⁷ The court granted review since the Fourth District Court of Appeal's decision was in apparent conflict with the Florida Supreme Court's opinion in *Orlando Executive Park, Inc. v. Robbins*,⁵⁸ in which the court indicated that an oil company could not confer apparent authority on a service station franchisee by allowing the franchisee to use the franchisor's name and sell its products.⁵⁹

B. Analysis of the Supreme Court's Decision

The Florida Supreme Court reversed the Fourth District Court of Appeal and entered summary judgment in favor of Mobil on the grounds that the factual allegations in Bransford's complaint "clearly fail[ed] to allege even the minimum level of a 'representation' necessary to create an apparent agency relationship."⁶⁰ The court noted that in cases of alleged apparent agency, something must have happened to communicate to the plaintiff that the franchisor was exercising substantial control over the

50. *Id.* at 120.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 122 (Shaw, J., dissenting).

55. Petitioner's Brief at 3.

56. *Id.* at 4.

57. *Id.*

58. 433 So. 2d 491 (Fla. 1983).

59. *Mobil Oil*, 648 So. 2d at 121.

60. *Id.*

franchisee.⁶¹ The majority found that Bransford's evidence of representation failed to state a cause of action against Mobil because "[i]n today's world, it is well understood that the mere use of franchise logos and related advertisements does not necessarily indicate that the franchisor has actual or apparent control over any substantial aspect of the franchisee's business or employment decisions."⁶² Further, the provision of routine contractual support services does not change the result,⁶³ and actual ownership of the premises is relevant only to the extent that such ownership may indicate some degree of actual or apparent control over the business, which the facts in *Mobil Oil* did not indicate.⁶⁴

The court distinguished *Mobil Oil* from a seemingly conflicting case, *Orlando Executive Park*, on the basis that the franchisor's direct participation in *Orlando Executive Park* was sufficient to represent to the public that the franchisor exercised substantial control over the franchisee's business.⁶⁵ In *Orlando Executive Park*, the plaintiff sued the Howard Johnson Company after she was attacked at a Howard Johnson Motor Lodge operated by an independent company, Orlando Executive Park, Inc.⁶⁶ The Florida Supreme Court affirmed the Fifth District Court of Appeal's decision that the plaintiff had presented sufficient evidence at trial to support the trial court's finding of apparent authority.⁶⁷

In *Orlando Executive Park*, the Florida Supreme Court cited with approval the Fifth District Court of Appeal decision, which stated: "[W]hile [Orlando Executive Park, Inc.] might not be [Howard Johnson's] agent for all purposes, the signs, national advertising, uniformity of building design and color schemes allow the public to assume that this and other similar motor lodges are under the same ownership."⁶⁸ The court believed that Howard Johnson's operation of the restaurant, lounge, and adult theater at the motel constituted additional evidence that Howard Johnson had established an apparent agency relationship with the franchisee.⁶⁹ The opinion stated that "[t]he complex was an integrated commercial enterprise, and [Howard Johnson's] direct participation was significant."⁷⁰ The *Mobil Oil* court focused on the latter factor in distinguishing *Mobil Oil* from *Orlando Executive Park* and concluded that "[t]he fact [that the franchisor actually operated several components within the complex in question] alone obviously and directly 'represented' to the public that the

61. *Id.*

62. *Id.* at 120.

63. *Id.*

64. *Id.* at 121.

65. *Id.*; *Orlando Executive Park, Inc. v. Robbins*, 433 So. 2d 491, 492 (Fla. 1983).

66. *Orlando Executive Park*, 433 So. 2d at 492.

67. *Id.* at 494.

68. *Id.*

69. *Id.*

70. *Id.*

franchisor was in substantial control of the business [in *Orlando Executive Park*]”⁷¹

In *Orlando Executive Park*, the Florida Supreme Court resolved an apparent conflict with the Fourth District Court of Appeal’s decision in *Sydenham v. Santiago*,⁷² where no apparent agency was found between an oil company and a franchisee filling station despite signs and other indicia of representation similar to those of Howard Johnson in *Orlando Executive Park*.⁷³ The court explained that the apparently anomalous rulings did not conflict because “the district court [in *Orlando Executive Park*] has set out the proper standard, limiting *Sydenham* and other oil company cases to their facts, and [the court] disapprove[s] extending the language of *Sydenham* [indicating that oil companies do not confer apparent authority on their franchisees by allowing the franchisee to use the franchisor’s trade name and sell its products] into cases such as the instant one”⁷⁴

In *Mobil Oil*, the court clearly abrogated the portion of the holding in *Orlando Executive Park* that purported to distinguish the degree of representation required to find an apparent agency relationship in oil company cases from the degree of representation required in other franchise cases.⁷⁵ The opinion stated:

[The court] recognize[s] that *Orlando Executive Park* suggested that oil company cases somehow are different from other franchising cases and that logos or other trademark symbols alone can create an apparent agency [in franchise cases not involving oil companies]. Because [the court] believe[s] these to be erroneous impressions, [it] recede[s] from *Orlando Executive Park* to the extent it is inconsistent with this opinion.⁷⁶

From the language in *Mobil Oil*, one can surmise that no apparent agency relationship can exist between any type of franchisor and franchisee on the basis of representation by signs, logos, employee clothing, provision of routine support services, ownership of the premises on which the business is located, or any of the other indicia of representation alleged by Bransford in his complaint. To avoid summary judgment and get to the jury on the issue of apparent authority in franchise arrangements, plaintiffs will have to present additional evidence that the franchisor “participated in some substantial way in directing or managing acts of the

71. *Mobil Oil Corp. v. Bransford*, 648 So. 2d 119, 121 (Fla. 1995).

72. 392 So. 2d 357 (Fla. 4th DCA 1981).

73. Compare *Orlando Executive Park*, 433 So. 2d at 494 with *Sydenham*, 392 So. 2d at 357.

74. *Sydenham*, 392 So. 2d at 357.

75. *Mobil Oil*, 648 So. 2d at 121.

76. *Id.*

franchisee”⁷⁷ The only example we have of evidence the Florida Supreme Court believes adequate to avoid summary judgment under this standard is that involved in the *Orlando Executive Park* scenario, where the franchisor actually operates several components within a single complex, leaving only some components under the control of the franchisee.⁷⁸ This scenario is particularly unlikely to occur in oil company franchises, in which the entire filling station is often operated by the franchisee.

Future plaintiffs will find it particularly difficult to allege apparent authority because the *Mobil Oil* opinion mixed apparent agency concepts, such as indicia of representation, with actual agency concepts, such as control of certain business operations.⁷⁹ By requiring plaintiffs to demonstrate franchisor control to prove the element of representation, the court has basically limited franchisor liability to instances of actual authority.⁸⁰ As discussed previously, since most franchisors do not maintain actual control over their franchisees’ operations, most franchisors cannot be held liable for the acts of their franchisees on the basis of actual authority.⁸¹

While the court could have limited the *Mobil Oil* ruling to oil company cases, the court opted to make the holding applicable to all types of franchises.⁸² At least one commentator has noted that limiting the liability of oil company franchises, while leaving other types of franchisors open to broader liability, may be justified on the basis that oil companies use their franchisees merely to distribute their products, while other types of franchises, such as hotels and food service companies, involve the franchising of a specific business format.⁸³ Because oil company franchisors are normally not concerned with how their service station franchisees operate, these franchisors can distribute their products through service station franchisees without exercising control over the franchisees’ business format.⁸⁴ Arguably, the less control a franchisor exercises over the franchisees’ business methods, the less liability exposure the franchisor should be expected to bear for the franchisees’ negligence.⁸⁵

However, by receding from its earlier opinion in *Orlando Executive Park*, which indicated that oil company franchises would be treated under a different standard from other types of franchises, the court declined to

77. *Id.* at 120.

78. *Id.* at 121.

79. See Beyer, *supra* note 12, at 66. Beyer comments that because of *Mobil Oil*, plaintiffs will have to try to establish the representation element by noting instances of actual control by the franchisor. However, if a plaintiff can show actual control, the claim should be based on actual, not apparent, agency. *Id.*

80. *Id.*

81. See *supra* part II.

82. See *supra* part III.B.

83. See Beyer, *supra* note 12, at 20.

84. See *id.*

85. However, this reasoning again confuses control by the franchisor with the apparent authority determination.

accept the common knowledge doctrine as a means of limiting the liability of specified franchises, such as those involving oil companies.⁸⁶ The court's decision to extend its holding to all types of franchises, rather than to limit the holding to oil companies, makes *Mobil Oil* an exceptionally drastic and broad-reaching decision. For the first time in over thirty years, the apparent authority doctrine will be virtually unavailable as a means of recovery to plaintiffs who are injured when the company that owns all of the assets of a particular business contracts with an insolvent third party to operate the business, even if the company in ownership continues to represent to the public that the owner maintains control over the business operations. The result is that, under *Mobil Oil*, all a company has to do to avoid liability for a dangerous or a negligently operated business is to contract the operation of the business to a third party.⁸⁷ The franchisor can then continue to market its products or services, while representing to the public that the franchisor still operates the business, without incurring any potential tort liability.

Businesses such as the oil, hotel, and fast food industries, which utilize an extensive franchise system of marketing and distribution, will likely view the *Mobil Oil* decision as long overdue relief from an onerous cause of action that places an unfair burden on industry and stifles economic growth. Many franchisors believe that apparent authority unfairly allows a plaintiff to hold a business liable for the negligence of its franchisees despite the fact that the business did not, and possibly could not, control the actions of its franchisees.⁸⁸ These businesses argue further that imposing broad liability on franchisors makes the use of an efficient business arrangement impractical, if not impossible, and that communities ultimately will suffer from the resultant lack of economic growth.⁸⁹

Further, many franchisors (and also some courts) feel that the apparent authority doctrine is unfair because courts and juries will often overlook the requirements of the rule to allow a sympathetic plaintiff to recover from a large corporation.⁹⁰ Prior to *Mobil Oil*, most apparent authority cases in the franchise context were contested over the reliance element.⁹¹ Since reliance is a jury question with no clearly defined standards, some courts have received heavy criticism for finding reliance where none could reasonably have been found in order to allow an injured plaintiff to recover.⁹²

86. See *Mobil Oil Corp. v. Bransford*, 648 So. 2d 119, 121 (Fla. 1995).

87. *Id.* at 120-21.

88. See Randall K. Hanson, *The Franchising Dilemma: Franchisor Liability for Actions of a Local Franchisee*, 19 N.C. CENT. L.J. 190, 193 (1991).

89. See *id.*

90. See Emerson, *supra* note 32, at 628.

91. Beyer, *supra* note 12, at 66.

92. Emerson, *supra* note 32, at 628-29. Emerson cites *Buchanon v. Canada Dry Corp.*, 226 S.E.2d 613 (Ga. Ct. App. 1976) (reversing the lower court's grant of summary judgment in favor of the defendant franchisor despite the fact that no third-party reliance could have ex-

After *Mobil Oil*, apparent authority cases will no longer hinge on the reliance requirement alone; plaintiffs will now have to overcome a nearly impossible hurdle to avoid summary judgment on the representation element and reach a jury trial on the issue of reliance.⁹³

Despite some legitimate arguments in favor of limiting the liability of franchisors under the apparent authority doctrine, the court's controversial decision virtually to eliminate vicarious liability in the franchising industry holds some potentially serious consequences for tort victims and for society. By holding that no apparent authority can exist despite the presence of the signs, logos, and other indicia of franchisor control present in *Mobil Oil*, the Florida Supreme Court has perverted the apparent authority doctrine and, in so doing, has undercut the rationale behind the doctrine in a way that will likely lead to unjust and uneconomical results in future cases involving the torts of franchisees. This Note now explores the social and economic theories upon which the doctrine of vicarious liability is based in order to analyze the impact the *Mobil Oil* decision will have on Florida's agency law jurisprudence.

IV. RATIONALES BEHIND VICARIOUS LIABILITY

Why should the owner of a business be held liable for the actions of a franchisee, particularly when the owner does not exert any control over the franchisee's business operations?

Two schools of thought describe the chief reasons courts and scholars have asserted for holding a party who may not have been at fault liable for the negligent acts of another party. The first school holds that liability is imposed in order to produce economically efficient results, which ultimately provide the most favorable situation for individuals in our society.⁹⁴ Alternatively, the second school asserts that vicarious liability arises out of ideas about social justice and moral responsibility.⁹⁵ While these two rationales differ in their philosophical approach, both provide con-

isted to support a finding of apparent agency in a case involving the franchisee's negligent operation of a truck), to illustrate how some courts have perverted the apparent authority doctrine to allow a plaintiff to recover from a franchisor where no actual agency existed.

93. See Beyer, *supra* note 12, at 66.

94. This school of thought is based on the law and economics theory. For an example of a law and economics analysis of tort liability, see Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987); S. SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* (1987).

95. This school of thought is embodied in the RESTATEMENT (SECOND) OF AGENCY, *supra* note 21. For further analysis of the relationship between tort law and moral theory, see JEFFERY G. MURPHY & JULES L. COLEMAN, *PHILOSOPHY OF LAW* 54-84 (1987) and George P. Fletcher, *Law and Morality: A Kantian Perspective*, 87 COLUM. L. REV. 533 (1987).

elling reasons for enforcing a system of vicarious liability.⁹⁶ This Note now examines these two schools of thought in order to provide the reader with an understanding of the foundations of the apparent authority doctrine.

A. *Efficient Allocation of Resources Theory*

Enterprise liability describes the idea that an enterprise should bear the costs the enterprise engenders, rather than distributing risk on the basis of fault.⁹⁷ The enterprise liability school of thought is based on an allocation of resources justification.⁹⁸ The ethical postulate at the heart of this concept is that people generally know what is best for themselves and will respond logically according to market incentives and disincentives.⁹⁹ A pure system of enterprise liability requires two elements: first, the cost of injuries must be borne by the activities that cause them, whether or not fault is involved, because the injury is a real cost of those activities; second, among the several parties engaged in an enterprise, the loss should be placed on the party most likely to cause the burden to be reflected in the price of whatever the enterprise sells.¹⁰⁰

Proponents of the enterprise liability theory argue that, in many, but not all,¹⁰¹ circumstances, enterprise liability will lead to more efficient resource allocation and less cost to society.¹⁰² For example, if the government suddenly were to pay the cost of all auto accidents, people would no longer need to buy insurance, and the result would be that some people would buy more cars.¹⁰³ The effect would be the same if the government suddenly chose to pay the cost of steel used by auto manufacturers and to raise the money out of taxes.¹⁰⁴ In each case, an economist would say resources are misallocated because goods are produced that the purchaser would not buy if he really had to pay the full extent of their cost to society.¹⁰⁵ Enterprise liability corrects this misallocation by placing all of the costs associated with producing a product on the manufacturer. This will cause the true cost of the product to be reflected in the price of the product,

96. For a theory based on the proposition that tort law is a mixture of economic efficiency and moral justice, see Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 *IND. L.J.* 349 (1992).

97. Calabresi, *supra* note 94, at 500. For further commentary on the concept of strict liability in tort law, see LANDES & POSNER, *supra* note 94, at 54-84, and W. PAGE KEETON ET AL., *supra* note 16, § 98, at 692-94.

98. Calabresi, *supra* note 94, at 502.

99. *Id.*

100. *Id.* at 500-01.

101. The complications with applying this theory under certain industry conditions are discussed *supra* part IV.A.i.

102. Calabresi, *supra* note 94, at 513.

103. *Id.* at 503.

104. *Id.*

105. *Id.*

so that market forces will produce a more efficient allocation of resources. According to the enterprise liability school, "the most desirable system of loss distribution under a strict resource-allocation theory is one in which the prices of goods accurately reflect their full cost to society."¹⁰⁶

With respect to the oil company franchising industry, one commentator illustrated the advantages that a nonfault system of liability based on efficient allocation of resources may provide over a fault-based system by examining *Smith v. Cities Service Oil Co.*¹⁰⁷ In *Cities Service*, a negligent repair case, the district court granted the oil company's motion for judgment notwithstanding the verdict, and the Seventh Circuit Court of Appeals affirmed.¹⁰⁸ Applying the control test, the circuit court held that the operator was an independent contractor, rather than an agent of the owner, because the operator had control over the day-to-day operations of the station, including the repair business.¹⁰⁹

The operator, who was the eleventh operator of the station in less than seven years, had filed for bankruptcy about eight months after the accident.¹¹⁰ The operator had little, if any, insurance and no personal assets with which to pay damages.¹¹¹ The station itself could not even be sold to pay the judgment because Cities Service owned the land, the station, and the major pieces of equipment.¹¹² The operator merely leased the station from Cities Service and agreed to sell Cities Service's products.¹¹³

The commentator explained that under the fault-based system of liability, the insolvency of the operator worked to the mutual benefit of the parties.¹¹⁴ The operator, who had no significant assets to invest, was able to lease the station from Cities Service for very little cost.¹¹⁵ This opportunity encouraged the operator to undertake the business and attracted additional

106. *Id.* at 505.

107. Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231, 1266 (1984) (citing *Smith v. Cities Serv. Oil Co.*, 346 F.2d 349 (7th Cir. 1965)).

108. *Smith*, 346 F.2d at 349. In *Smith*, the service station operator poured gasoline into a hot carburetor and the gasoline ignited. *Id.* The operator then threw the gasoline onto the plaintiff, who sustained severe burns. *Id.*

109. *Id.* at 352.

110. *Id.* at 351-52.

111. Sykes, *supra* note 107, at 1267.

112. *Id.*

113. *Id.* Knowing that it might make the operator a servant, Cities Service did not pay him a straight salary.

114. *See id.*

115. *Id.* The details of the contracts between Cities Service and the station operator also indicated that Cities Service had renegotiated the operator's rent on numerous occasions. One agreement called for the operator to pay only \$1 per month in rent, and another guaranteed the operator net earnings of \$335 a month. *Id.* The Seventh Circuit attributed these modifications to the "impecunious nature of the operation, coupled with the defendant's desire that the station be operated as an outlet for its products." *Id.* (citing *Smith*, 346 F.2d at 349).

customers for Cities Service's products.¹¹⁶ The operator did not assume great risk for potential tort claims because Cities Service owned the station.¹¹⁷ After the accident, the insolvent operator obtained a discharge in bankruptcy and moved on to other employment, while Cities Service found a new operator for the station.¹¹⁸

This scenario illustrates how a rule of personal liability can produce extremely inefficient and inequitable results. Such a rule makes possible the continued operation of a business that probably cannot recover its marginal social costs, while encouraging the principal to use agents who have little, if anything, at risk and who consequently have diminished incentives to avoid losses. In this type of situation, vicarious liability will almost certainly provide more efficient resource allocation by creating additional incentives for the principal to provide adequate loss-avoidance incentives and to improve resource allocation by closing down unprofitable operations.¹¹⁹

There are three separate premises offering justification for the allocation of resources theory: 1) the risk-spreading rationale, 2) the loss prevention rationale, and 3) the deep pocket rationale.¹²⁰ These three theories will now be addressed in order to analyze further the basis for the allocation of resources theory. Particular attention will be paid to the effect these theories have in the context of the oil franchising industry.

1. Risk Spreading

The risk-spreading justification for nonfault liability rests on the idea that if losses are broadly spread among people and over time, they are the least harmful.¹²¹ In the purest form, risk spreading would probably be accomplished through some form of governmental accident relief program spread among the population through taxes.¹²² In the absence of a governmental program, enterprise liability would be essential to accomplish risk spreading in the oil company franchise industry because the franchisee in an oil company franchise contract generally has no capacity to allocate the risk to the public through what he or she charges.¹²³ This is because prices are usually governed by the oil company, with the dealer re-

116. *Id.* The service station was marginally profitable for Cities Service to operate; the main benefit to Cities Service came from a percentage earned from the sale of products. *Id.*

117. *Id.* This limited liability allowed the operator to run the station and distribute Cities Service products, while the operator earned income from performing automobile repairs on the premises. *Id.*

118. *Id.*

119. *See id.* at 1268.

120. *See Calabresi, supra note 94, at 517, 527; Emerson, supra note 32, at 634-36.*

121. Calabresi, *supra note 94, at 517.*

122. *Id.*

123. *See Britt, supra note 15, at 652.*

ceiving a commission based on sales.¹²⁴ Therefore, “[t]he oil company is clearly in the best position to assess the business risks of social harm involved in [the] operation and to distribute the risk to the public through its prices.”¹²⁵

Insofar as enterprise liability places the burden of risk on the party most likely to insure against such risks, the system accomplishes a large degree of risk spreading throughout time and among people.¹²⁶ However, the efficiency and the extent to which a system of enterprise liability accomplishes the goal of risk spreading will depend on the structure of the industry involved, the nature of the costs charged, and the general economic conditions.¹²⁷ In an essentially competitive industry, substantial loss spreading through wages and prices will occur so long as accident costs vary with output or through the use of some specific resource in production.¹²⁸ The added cost of accidents will result in two effects: “(a) decreased output and higher prices, and (b) lower payments to, and decreased use of, those resources giving rise to the extra cost, assuming that these [resources] can be identified.”¹²⁹

However, if the industry were one in which substantial control over price and output existed, such as in a monopoly, close-knit oligopoly, or price-leader industry, no immediate risk spreading would occur as the result of enterprise liability.¹³⁰ No risk spreading would result because this sort of industry usually sets prices at a high enough level that any further price rise results in a substantial loss of sales.¹³¹ A tight pricing structure prevents these industries from shifting their increased costs to the consumer.¹³² Exit from the industry is unlikely because the profits in such industries are probably sufficient to bear the extra costs.¹³³ In this situation, at least some of the burden will remain permanently on the industry in the form of decreased profits, which may create a sick industry.¹³⁴ Although the oil industry probably most closely resembles an oligopoly or a price-leader industry, substantial risk spreading would likely be possible be-

124. *Id.*

125. *Id.*

126. Calabresi, *supra* note 94, at 518. However, if loss spreading were the only goal of a system of liability, the most desirable system would consist of a government relief program that would spread the burden of mishaps among the population through taxes. *Id.*

127. *Id.* at 519.

128. *Id.*

129. *Id.*

130. *Id.* at 524. Since relatively few oil companies control most of our country's oil supply, the oil industry would probably fall into this category of business.

131. *Id.*

132. *Id.*

133. *Id.* at 525. The inability of businesses to exit an industry produces undesirable social and economic effects and may put pressure on firms to take their chances without adequately insuring against losses. *Id.* at 529.

134. *Id.* at 524.

cause consumer demand for oil-based products, such as gasoline, is unlikely to vary significantly from small or moderate price increases.

2. Loss Prevention

The loss prevention rationale rests on two public policy precepts.¹³⁵ “First, the franchisor is in a good position to select responsible franchisees and to ensure that they exercise a high degree of care when dealing with their customers.”¹³⁶ Second, imposing vicarious liability encourages the franchisor to maintain the highest possible standards during its selection and supervision processes.¹³⁷ Imposing vicarious liability on the basis of the loss prevention rationale encourages franchisors to maintain a higher degree of control over their franchisees’ contractual dealings with third parties.¹³⁸ Under this rationale, placing liability on the oil company would encourage franchisors to choose responsible franchisees, to supervise and inspect them routinely, and to ensure that their franchisees acquire and maintain sufficient insurance to cover any damage award that may result from the franchisee’s negligence.¹³⁹

However, an overly broad application of the loss prevention rationale could result in franchisor liability for franchisees’ actions that the franchisor could not have reasonably contemplated.¹⁴⁰ Further, complete supervision of franchisees’ activities is often impossible.¹⁴¹ Despite the limitations of this theory, its application would provide strong incentive for franchisors to assume greater care and responsibility in ensuring that their franchisees act in a responsible manner toward the public.

3. Deep Pocket

The deep pocket rationale is often represented as the real reason behind vicarious liability.¹⁴² Such a justification has been characterized as a

135. Emerson, *supra* note 32, at 636.

136. *Id.*

137. These two public policy precepts undergird the actual agency principle of respondeat superior. *Id.*

138. While usually focused on tort claims, the loss prevention argument may serve equally well in a contract context by providing incentive for the franchisor to maintain a high degree of control over its franchisees’ books in order to ensure that the franchisor receives the proper amount of royalties and other fees. *Id.* 636-37.

139. *Id.* Commentators have noted that if liability becomes too broad, the mere threat of litigation may deter parties from socially beneficial innovations. *Id.* at 637 n.100. For this reason, liability is normally imposed on a franchisor only for failure to exercise “reasonable care and control.” *Id.* The fact that holding the defendant liable under vicarious liability creates a strong incentive to prevent harm is often considered a factor in determining whether to hold a defendant liable. KEETON ET AL., *supra* note 16, at 23.

140. Emerson, *supra* note 32, at 637.

141. *See id.*

142. Britt, *supra* note 15, at 652.

philosophy to take from the rich and give to the poor.¹⁴³ Advocates of this theory would argue that many franchises are extremely profitable and the franchisors are better able to cover the costs of accidents than are innocent victims.¹⁴⁴ A franchisor typically receives profits from the actions of the franchisee over the life of the franchise through the use of exclusive dealing contracts.¹⁴⁵ If the franchisor continues to profit from the consumption of franchisor-supplied products, the franchise can reasonably be expected to shoulder at least a portion of the liability burden.¹⁴⁶

The goals of this type of system could be accomplished either through a government accident compensation program paid out of progressive taxes, or through a system of liability (such as vicarious liability) that tended to put the burden of accidents on more wealthy litigants.¹⁴⁷ Proponents of a pure deep pocket system would likely see enterprise liability as a halfway house to the ultimate goal of social insurance based on progressive taxes, which would probably be the ultimate means of distributing the burden of accident costs on those who could best afford them.¹⁴⁸ While the deep pocket rationale, like the loss prevention theory, fails to define appropriate limits to the scope of vicarious liability, many people find it a legitimate and attractive justification for imposing vicarious liability on franchisors.

B. *Reliance and Estoppel*

The school of thought that imposes vicarious liability based on reliance and estoppel, like the resource allocation school of thought, is not based on concepts of individual fault.¹⁴⁹ However, unlike the theory of resource allocation, which is based on efficient or desirable allocation of resources, the theories of reliance and estoppel focus on concepts of societal fairness.¹⁵⁰ Those who adhere to this school of thought would argue that the true reason for imposing vicarious liability on franchisors is that franchi-

143. See Calabresi, *supra* note 94, at 527. Calabresi compares the deep pocket theory of vicarious liability to the tax code; if one favors a highly graduated system of taxes, one will also likely find the deep pocket theory of liability compelling. *Id.*

144. Hanson, *supra* note 88, at 192.

145. *Id.*

146. *Id.*

147. Calabresi, *supra* note 94, at 527.

148. *Id.* at 530.

149. Britt, *supra* note 15, at 652.

150. These concepts hold that, as between two innocent parties, the burden is placed on the one whose misleading manifestations have created reliance and change of position. *Id.* Over the last half century, courts have evidenced an increasing tendency to consider and entertain the contention that law is, or at least should be, primarily a question of which interest is to prevail even when no one is at "fault." KEETON ET AL., *supra* note 16, § 4 at 21-22. In fact, some critics of the law and economics approach to tort law have even argued that a system of law designed to promote efficiency is immoral. See Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1981).

sors should not be able to enjoy the benefit of chain-store marketing methods and national identification with their franchisees without assuming concomitant social responsibilities.¹⁵¹

The theories of reliance and estoppel hold that uniform stores, signs, and management methods give the consumer the impression that they are dealing with a standardized business operation.¹⁵² This impression gives greater market value to the franchisor's trademark and the franchised operation.¹⁵³ In fact, one commentator has noted that the franchise contract typically requires franchisees to assist the franchisor in "fooling the customer" into thinking that they are doing business with an established chain.¹⁵⁴

If, as a result of such manifestations by the principal, the customer is indeed fooled into thinking that he or she is conducting business with the principal, the theory demands that the principal assume liability for any accident that arises out of the transaction, so long as the plaintiff's reliance on the principal's representation was reasonable.¹⁵⁵ This is because basic societal tenets dictate that the party who serves to gain through inducing others to do business with its representatives should bear the costs of the representative's negligence, rather than the innocent customer's bearing such costs.¹⁵⁶ As we have seen in *Mobil Oil*¹⁵⁷ and *Cities Service*,¹⁵⁸ if liability cannot be imposed on the oil company franchisor, the filling station franchisee may well be judgment proof and the unfortunate plaintiff may be left to bear the burden of any resultant injury. Theories of vicarious liability based on concepts of reliance and estoppel hold that innocent individuals should not be subjected to such an injustice.¹⁵⁹

While the resource allocation rationale for vicarious liability differs from the reliance and estoppel rationale, both arguments are frequently made, often in conjunction with one another, in support of a system that allows liability to be imposed on a franchisor for the torts of its franchisee, notwithstanding the fact that the franchisor may not actually control the franchisee.¹⁶⁰ The theory of apparent agency was originally developed as a theory of vicarious liability in order to make it possible for one party

151. *Id.*

152. Emerson, *supra* note 32, at 630.

153. *Id.*

154. *Id.* Failure on the part of the franchisee to maintain the charade may well be a breach of contract in many cases. *See id.* at 630 n.71.

155. *Id.* at 631.

156. *Id.* at 630.

157. *Mobil Oil Corp. v. Bransford*, 648 So. 2d 119 (Fla. 1995).

158. *Smith v. Cities Serv. Oil Co.*, 346 F.2d 349 (7th Cir. 1965).

159. *See* John D. Lackey, *Liability of Oil Company for its Lessee's Torts*, 1965 LAW F. 915, 920 (stating that oil companies should not be able to distribute their products through franchises without assuming responsibility for injuries resulting from the conduct of business).

160. Commentators often discuss theories of law and economics along with reliance principles as justifications for franchisor liability. *See* Emerson, *supra* note 32, at 609.

to be held accountable for the acts of another party in the absence of control by the principal.¹⁶¹ Placing liability on the principal, under the theory of apparent agency, serves the policy goals behind the theories of efficient allocation of resources and estoppel.¹⁶² By dictating that a franchisor cannot be held liable for the torts of a franchisee, despite a level of representation clearly adequate to warrant a jury trial on the issue of representation, the *Mobil Oil* decision is abrogating the doctrine of apparent authority as a means of imposing vicarious liability in the franchising industry. The underlying reason for the court's departure from the traditional understanding of apparent authority is that the court is seeking to protect the franchising industry from potentially broad liability. However, by abrogating vicarious liability in the franchising industry, the court is compromising the social policies behind the doctrine of apparent authority at the expense of the individual plaintiff and, ultimately, at the expense of society.

V. ALTERNATIVE APPROACHES TO VICARIOUS LIABILITY IN OIL COMPANY FRANCHISING

As discussed previously, courts have encountered great difficulty in applying the doctrine of apparent authority in light of the rapidly developing system of franchising, such as that used extensively in the oil industry.¹⁶³ While most scholars would probably agree that a pure system of enterprise liability, which would impose liability on the franchisor in all cases, would prove unduly burdensome on industry and would not produce the optimum results for our society,¹⁶⁴ most would likely agree that society would benefit from a system of vicarious liability that advanced the policy goals behind the allocation of resources and estoppel theories. Several alternatives to the *Mobil Oil* approach allow the apparent authority doctrine to remain intact in the franchising industry (thereby maintaining the policy goals discussed in the preceding section of this Note), while better accommodating the needs of the oil company franchising industry.

A. Legislative Intervention

While scholars may harbor differing viewpoints on the extent to which a principal should be held vicariously liable for the acts of its agent, one element must exist for any of the objectives of a system of vicarious liability to be effectuated—predictability. If the parties involved in oil company franchising arrangements, namely the consumer, the service station

161. See *supra* part II.

162. See *supra* part IV.

163. See *supra* part II.

164. *But see* Calabresi, *supra* note 94, at 518 (stating that enterprise liability is the best system from the standpoint of resource allocation).

operator, and the oil company, are unable to determine who will ultimately bear the expense of a franchisee's negligence, neither the allocation of resources theory nor the reliance theory will effectively accomplish their respective goals.

The allocation of resources theory is based on the idea that the franchisor, when faced with the burden of liability for its franchisee, will act rationally to reduce or eliminate the risk of liability in the most efficient manner and thus will accomplish the loss prevention objective.¹⁶⁵ Any expense arising from the franchisor's liability that cannot be eliminated will then be passed on to the consumer and will thus accomplish the risk-spreading objective.¹⁶⁶ Since the franchisor is able efficiently to reduce losses and spread the remaining expense among consumers, it can operate at a substantial profit and thus can afford to bear much of the burden of mishaps.¹⁶⁷

However, this chain of events will not occur if the franchisor cannot predict with some degree of certainty when the franchisor will be held liable for expenses arising from the torts of its franchisees. The franchisor, acting in an economically rational manner, will not incur additional expense in the form of insurance or risk-prevention measures if the franchisor cannot be reasonably certain that it will be held liable consistently enough that the additional expense of such measures will ultimately be less than that which the franchisor would be required to pay in damages to those injured by its franchisees' negligence. Likewise, franchisees will not incur additional expense to eliminate or insure against unsafe conditions if a significant possibility exists that they will not be held accountable if accidents do occur. In the absence of a reliable system of liability, the parties cannot plan for their needs, and the societal objectives contemplated by the theory of efficient resource allocation will not be accomplished.

Predictability is also necessary for the reliance-based doctrines to accomplish their goal of producing an equitable outcome for injured parties. If the public is unable to determine which service stations are actually run by companies that are in a position to compensate customers for injuries incurred as a result of the negligence of the operator, customers will not be able to protect themselves from the dangers associated with doing business with stations that cannot satisfy a judgment. If customers cannot make an informed decision as to which stations they may safely frequent, many innocent victims of an operator's negligence, such as Jeremy Bransford, will be left with the potentially devastating expense of injuries suf-

165. See *id.* at 502.

166. Emerson, *supra* note 32, at 635.

167. *Id.* at 634.

ferred when the oil companies and their service station operators gamble on the unlikelihood of having to satisfy a judgment.¹⁶⁸

The best way to address the dilemma faced by courts and to provide consistency to the question of liability in oil company franchising is for the Florida Legislature to define the liability of the parties involved in oil company franchising arrangements.¹⁶⁹ The legislative process provides a forum for the consumer, the service station operator, and the oil companies to present their views on proposed reforms.¹⁷⁰ The Legislature could then take appropriate action in light of the policy to be implemented.¹⁷¹ There are several approaches the Legislature could take to give some direction to the parties.

One way to produce some degree of predictability in franchising relationships is for the Legislature to mandate that conspicuous notices be posted in all service stations—notice indicating which stations are actually controlled by oil companies and which stations, despite the display of logos and indicia of large oil companies, are independently operated franchises.¹⁷² This would give all parties involved the opportunity to conduct their business with the realization that the oil company would remain liable for torts occurring at a station controlled by the company, while the independently owned station would be solely liable for its negligence. Although the oil companies and their franchisees would certainly mount a strong lobby against any such notice requirement so that they could continue to profit from the public's misperception regarding the ownership and operation of the stations, the notice requirement would be fair and equitable for all parties involved.

Another possibility is for the Legislature to mandate that all oil companies adequately insure against injuries sustained at stations the company owns.¹⁷³ Oil companies could be required to obtain such insurance as a condition precedent to the licensing of their franchisees.¹⁷⁴ Although court decisions usually hold that oil companies do not maintain control over

168. Although oil companies would prefer for consumers to believe that franchises are owned and operated by the oil company, these companies should not be permitted to benefit by allowing consumers to be influenced by faulty impressions created by franchisor-marketing efforts.

169. Although scholars have suggested this sort of legislative intervention into the franchising industry for many years, see Davis, *supra* note 36, at 401 and Emerson, *supra* note 32, at 666, the Legislature has refused to take action. Presumably, the oil industry exerts a very powerful influence over the Legislature to prevent such measures.

170. Davis, *supra* note 36, at 402.

171. *Id.*

172. While informing consumers of their risks may not change the habits of many consumers, allowing consumers to make informed decisions would arguably eliminate many ethical problems that arise under the present system.

173. Davis, *supra* note 36, at 404.

174. *Id.* at 405.

their service station operators,¹⁷⁵ commentators have noted that such control would not be necessary for this system to be effective because the oil companies would be able to use the inherent power created by the structure and economics of the distribution system to ensure that operators maintain safe practices and avoid claims.¹⁷⁶ The efficiency of this system would be increased because oil companies are in a much better position to negotiate favorable insurance rates than are their service station operators.¹⁷⁷

B. *Judicial Neutrality*

In the absence of legislative action, courts could better facilitate the policy objectives behind the doctrine of apparent authority by applying the doctrine to the oil company franchising industry with the same degree of objectivity that the doctrine is applied outside of the franchising industry. Although the development of the franchise industry has produced concerns regarding the use of the apparent authority doctrine to impose liability, excessive judicial control over the outcome of tort litigation has led only to greater uncertainty in the industry.¹⁷⁸ If judges continue to usurp the function of the jury by devising theories to dictate the outcome of tort cases based on apparent agency, juries will no longer be able to address each case on its merits. Rather, the issue of franchisor liability will be decided through sweeping policy decisions made by judges.

The argument that overly sympathetic juries will impose unwarranted liability on large corporate franchisors is not sufficient justification for completely abrogating the vital social objectives achieved by a system of vicarious liability. The concern over biased jury decisions and excessive awards is present in many tort actions not involving vicarious liability, yet courts do not remove entire causes of action merely to eliminate this possibility.¹⁷⁹ Rather, courts can reduce the occurrences of unfounded jury verdicts by taking extra care to communicate to juries their responsibility

175. *Id.* at 404.

176. *Id.*

177. *Id.* at 405 (commenting that the oil companies, not the service station operators, should secure the necessary insurance because oil companies have the economic power to bargain effectively with insurance companies).

178. See *supra* notes 8-10 and accompanying text.

179. Such concerns exist anytime a tort defendant is perceived by the jury as wealthy or well-insured, such as in the case of physicians. See Neil Vidmar, *Empirical Evidence on the Deep Pockets Hypothesis: Jury Awards for Pain and Suffering in Medical Malpractice Cases*, 43 DUKE L.J. 217-18 (1993). However, courts do not seek to eliminate physician liability to guard against unjust awards. The reluctance of courts to take this approach in the area of medical malpractice is evidenced by the continuing public focus on the physicians' need for malpractice insurance and concern about tort liability. See, e.g., F. Patrick Hubbard, *The Physicians' Point of View Concerning Medical Malpractice: A Sociological Perspective on the Symbolic Importance of "Tort Reform,"* 23 GA. L. REV. 295, 297 (1989) (stating that the paramount problem in physician tort liability is the rapid increase in the cost of insurance).

to rule objectively when determining whether the plaintiff has proven the elements of the apparent authority doctrine. The small number of jury awards that are clearly unfounded can be reversed by a judgment notwithstanding the verdict or ameliorated by remittitur of the award.¹⁸⁰

If the jury is not permitted to address the merits of each apparent agency action according to established principles of application, the courts will cease to serve the function of applying the law according to the facts of each situation.¹⁸¹ The result will be that individual plaintiffs will suffer and no predictability will be possible because judges will continue to play hide-the-ball by manipulating the elements of the apparent agency doctrine to achieve their policy objectives, often without realizing the full impact their decisions will have on agency law jurisprudence.

C. Adherence to the Common Knowledge Theory

Lastly, if the courts insist on implementing policy in the oil company franchising industry by manipulating the apparent agency doctrine, they should adhere consistently to the common knowledge theory. Although statistical surveys have shown that the public actually has little understanding of which businesses are commonly operated by independent franchisees and which are owned by the principal corporation itself,¹⁸² the uniform application of this theory would eventually lead to an enhanced public perception of the franchising industry. As the public becomes educated through court decisions, the media, and other methods of communication, some degree of predictability will result. This will allow potential parties to plan accordingly—an effect that will ultimately achieve the policy goals behind the allocation of resources theory and the estoppel theory to some extent, while also protecting the franchise industry from broad liability.

Further, the common knowledge doctrine can be enforced to protect only those industries that arguably should not be subjected to broad vicarious liability.¹⁸³ Since only certain industries would be protected under the doctrine, other businesses would not be able to escape liability by entering into franchise arrangements merely to shield themselves from liability. This would significantly reduce the “slippery slope” dilemma created by the *Mobil Oil* decision, which provides incentive for business

180. FLA. STAT. § 768.74 (1995) (granting Florida courts the authority to hear motions for remittitur and additur “to determine if such amount is excessive or inadequate in light of the facts and circumstances which were presented to the trier of fact”).

181. Judicial activism of this type results in the judiciary’s performing legislative functions and formulating policy. See GEOFFERY R. STONE ET AL., CONSTITUTIONAL LAW 362-67 (2d ed. 1991) (explaining why separation of powers was to many framers the most fundamental element in the U.S. Constitution).

182. Emerson, *supra* note 32, at 648.

183. See *id.* at 641 (stating that in cases not involving gasoline stations, courts may be less likely to find that consumers have a common body of knowledge about franchising).

owners to relinquish control of their branch operations to insolvent third parties in order to protect themselves from potential tort claims.

VI. CONCLUSION

By dictating that franchisors cannot be held liable for the torts of their franchisees under the doctrine of apparent agency despite overwhelming indicia of franchisor control, the Florida Supreme Court's decision in *Mobil Oil Corp. v. Bransford* has virtually abrogated apparent agency as a theory of liability in the franchising industry.¹⁸⁴ In doing so, the court has sacrificed the social goals of economic efficiency and fundamental fairness that can only be achieved through a system of vicarious liability.¹⁸⁵ To achieve these goals without placing undue hardship on the franchising industry, the Legislature should take action to delineate which party will be held liable for tort claims in franchising arrangements, or the Legislature should mandate that franchisors insure their franchisees to some prescribed minimum.¹⁸⁶

If the Legislature refuses to act, courts should refrain from manipulating the elements of the apparent authority doctrine to keep decisions away from the jury.¹⁸⁷ Alternatively, courts should apply the common knowledge doctrine consistently until the public becomes informed as to which party maintains liability in certain franchising arrangements and can plan accordingly.¹⁸⁸ Only by producing a predictable system of liability without abrogating vicarious liability can the vital policy goals of economic efficiency and moral justice be implemented.

184. See *supra* part III.B.

185. See *supra* notes 80-90 and accompanying text.

186. See *supra* part V.A.

187. See *supra* part V.B.

188. See *supra* part V.C.