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Broken Glass, Cut Tendon, No Franchisor Liability: Standards Versus Control Over Day-to-Day Operations

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A frequent question in franchise agreement negotiations is: who is liable when a customer is injured by an article required under franchise system standards and specified by the franchisor? In the recent case of *Karnauskas v. Columbia Sussex Corp.*,[1] a New York court found that in a broad variety of circumstances where the franchisor does not exercise day-to-day control over the franchisee, and there is no evidence of product selection, the franchisor is not liable for negligence in product selection or maintenance.

A hotel guest was injured when the glass coffee carafe from her Arizona Marriott hotel room shattered around her hand, severing a tendon. The guest sued Marriott International, Inc. as well as the franchisee and operator of the hotel, Columbia Sussex Corporation. The guest alleged that Marriott should be held vicariously liable based on its license agreement with Columbia Sussex. Accordingly, the central question of the case was whether Marriott could be liable for the alleged negligence of the franchisee based on that license agreement alone.

Initially, the New York federal court, (applying Arizona law) noted that a majority of courts apply a "degree-of-control analysis to determine whether a licensor is liable for the negligent operation of a licensee." The court surveyed a number of jurisdictions, including the Georgia case of *Pizza K., Inc. v. Santagata*[2] and the New York case of *Hart v. Marriott Intern., Inc.*[3]

Ultimately, the court held that "Marriott did not have a duty of care to plaintiff because it did not have any day-to-day control over the hotel and did not select, recommend, or inspect the coffee carafe at issue." The court found a clause in the license agreement establishing that distinction particularly helpful: "Licensee shall retain and exercise full operating control of the Hotel... [and] shall have the exclusive authority for the day-to-day management of the Hotel." That clause, combined with the fact that Marriott did not own the hotel, or play any part in the day-to-day operation of the hotel, was ultimately persuasive for the court in resolving any negligence maintenance issue. The court cited *Capriglione v. Radisson Hotels Intern., Inc.*,[4] in which the court found the defendant franchisor not liable because the franchisor of a hotel did not own or control the hotel on day-to-day basis. Although the court thoroughly analyzed day-to-day operations, the true nature of this defective design case suggests that the court actually decided in favor of Marriott because the plaintiff "produced no evidence showing that Marriott selected, recommended, or inspected the coffee maker at issue."

While most franchisors anticipate that courts apply a "degree-of-control analysis" to determine whether a franchisor is liable for its franchisee's negligence, and have included a clause in the license agreement similar to Marriott's clause in this case, a franchisor should be wary about liability if it goes ahead and exercises control in fact. If a franchisor seeks to avoid liability, not only should the franchise agreement reflect the intention to stay out of day-to-day operations, but the actual business relationship should as well. In an Arizona case, the court reasoned that because a franchisor selected, recommended and inspected the article at issue, it functioned as a gratuitous supplier within the meaning of Section 324(a) of the Restatement 2d of Torts and could therefore be held liable for injury involving the equipment.[5]

Karnauskas is a positive case for franchisor liability, particularly in circumstances where Arizona law applies. The decision establishes great persuasive authority for summary judgment in Arizona with respect to

circumstances where a plaintiff produces no evidence that a franchisor selected, recommended or inspected a product that caused or contributed to injury. Additionally, the decision provides a useful guide for franchisors to avoid certain forms of vicarious premises liability by: (1) avoiding specific selection, recommendation and inspection of potentially dangerous products for use at franchisee locations when possible; (2) carving out day-to-day operations in the licensing agreement as the sole domain of the franchisee; and (3) abstaining from any day-to-day management in fact of the franchised hotel. Day-to-day operations will be important to a court's analysis in a case of negligent maintenance; and selection, recommendation and inspection of products will be important for the analysis of defective product design on a franchisee's premises.

For franchisees who place coffee makers in hotel rooms, the *Karnauskas* court found enough evidence for the plaintiff to go to trial against the franchisee based on evidence that one-cup coffee makers are safer than glass coffee carafes.[6] The same path to trial would have likely occurred for the franchisor if the plaintiff had introduced evidence that Marriott had selected, recommended or inspected the coffee carafes. Hotel franchisors and franchisees alike should consider the costs and benefits of a switch to one-cup models from glass carafe models.

More importantly, as franchisors seek alternative remedies to termination of a weak performing franchise, and those remedies include periods of active supervision and management, the analysis in this case serves as a reminder that any such undertaking of active management will strip away this liability shield, and open the door to joint and several liability to parties injured or damaged at the franchised premises.

[1] 2012 U.S. Dist. LEXIS 8988, (S.D.N.Y. 2012)
[2] 547 S.E.2d 405, 406-07 (Ga. App. 2001) (pizza franchisor not liable for auto accident caused by franchisee delivery driver because franchisor was "not authorized under the agreement to exercise supervisory control over the daily activities of [franchisee's] employees")
[3] 304 A.D.2d 1057, (N.Y. 3d Dep't 2003) (hotel franchisor not liable for alleged negligence of franchisee because franchise agreement did not give franchisor day-to-day control).
[4] 2011 U.S. Dist. LEXIS 115145, at *2 (D. N.J. 2011)
[5] *Papastathis v. Beall*, 723 P.2d 97, 99-100 (Ariz. App. 1986) (franchisor recommended and inspected soda machine involved in harm at franchise location)
[6] *See* "One-Cup Coffeemakers Gaining Wider Acceptance in Lodging Industry: Upscale, Full-Service And Gaming Hotels Lead Latest In-Room Beverage Trend," Hotel Business, August 2006.