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The Voice of the Defense Bar

Customer Connection

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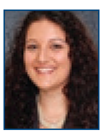

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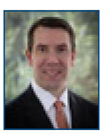

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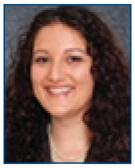
In This Issue

Leadership Note

Letter from Editors and Committee News

Greetings from your editors, Ryan Blazure and Shawn Libman! We are excited to share with you the Fall 2019 Retail and Hospitality Committee newsletter, *Customer Connection*!

We hope many of you had a wonderful experience at the Annual Meeting last month. It was a great time to reconnect with DRI friends from all different practices and locations. New Orleans is always one of the greatest cities in the world in which to network, explore, and party (a little too much)! Highlights included the Fulton Alley Street Party on Thursday and the Mardi Gras Masquerade Ball on Friday, in addition to all the other amazing things The Big Easy had to offer!

We are already starting to plan the spring 2020 DRI Retail and Hospitality Seminar. Be on the lookout for more news in the coming months. If you are interested in participating, speaking, or just want to help plan the seminar, please reach out to either of us. We can help put you in touch with the steering committee.

The steering committee is highlighting the substantive law groups (SLGs) at the next seminar. SLGs are smaller groups within the Retail and Hospitality Committee, which focus on specific legal topics such as premises liability, negligent security, franchising, technology, amusement, food safety, employment, insurance coverage and many others. SLGs are a great way to find people who have similar legal experience. If you are interested in being active in an SLG please contact the SLG Chair Shawn Libman. We are working on coordinating special networking events, speaking arrangements and writing opportunities for SLG members.

If you want to keep up with all the committee news check out our online community. You can sign up to receive live email updates or get daily/weekly digest emails from the online forum. This is an excellent resource and I hope you take the opportunity to join the conversation.

The *Customer Connection* newsletter's mission is to cover the latest topics benefiting your daily practice. Is there something brewing that you want to know more about? Any recent experiences that your colleagues could benefit from? Do you have a great win that should be celebrated? Let us know! We would love to cover it in our next issue. Contact us to make it happen.

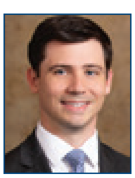
Thank you to the article authors and the newsletter committee for their hard work. If you enjoyed an article please do not hesitate to reach out and tell the author! I am sure they would enjoy hearing from you.

And don't forget…please share this newsletter with your clients! Now go read those articles!

Feature Articles

Food Trucks: A Road to Prosperity with a Detour Through Court

By R. Delacy Peters and Sky Brown

Fast. Fascinating. Affordable. Food. These are the tenets of the food truck industry. Gone are the days of the simple taco truck or lunch wagon. From Burger Buses and Waffle Trucks to Korean Fusion and Lobster Rolls, it's a wild west of entrepreneurs, budding restaurateurs, and established businesses all looking to capitalize on a growing market that promotes creativity, efficiency, and flexibility. In the United States today, there are food trucks operating in over 300 cities, which in 2017 generated an estimated $2.7 billion dollars in revenue.[1] However, just as law and order made its way across the prairie to the Pacific and tamed the west, so goes the fate of the humble food truck. As this industry grows, so do the barriers of entry and the regulatory restraints on a once free and fluid market.

[1] U.S Chamber of Commerce, Food Truck Nation.

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When advising current and potential clients in this growing minefield of regulations, there are a few areas of particular importance to consider: Entity Formation; Business Aptitude; and Local Permitting and Food Safety.

Entity Formation

Clients must carefully consider how they wish to structure their new endeavor. This includes considerations of how taxes are to be paid and how liability is to be distributed. While many of these issues are state specific, clients should be discouraged from pursuing a food truck venture as a sole proprietorship which could open the door to direct financial and legal liability. Rather, the recommended route often includes creating a limited liability company ("LLC") early in the process. This allows for the separation of personal liability while retaining the benefit of a tax passthrough. Another approach can include the creation of a subsidiary under an existing business entity for clients with established brick-and-mortar restaurants.

Business Aptitude

The landscape and allure of the food truck industry has drawn in many first-time business owners, either looking to break the yoke of their current employers or to find a part-time business that they feel is self-sustaining. This, in itself, forces a unique issue of understanding client expectations versus client abilities and expertise. Therefore, it is important to advise clients not only of possible future conflicts but also to help clients affirmatively address potential pitfalls.

For this reason, operating agreements between partners, financiers, and other invested parties are essential. A well-crafted agreement can help clients distinguish operational guidelines and responsibilities between partners, provide mechanisms for resolving disputes, and set clear financial benchmarks. For example, in the case of two partners, one financial and other operational, the operating agreement should identify which partner is responsible for handling tax issues, which partner is responsible for inventory management, and a mechanism for approving vendor and client contracts. While, these issues may seem mundane, these agreements create a system of checks and balances that will aide clients in navigating the turbulent and stressful start-up period.

Local Permitting and Food Safety

Permitting and understanding the increasing web of regulations governing food truck operation is—and will continue to be—a never ending and persistent issue for any individual entering the industry. Depending on the jurisdiction, obtaining the necessary permits and licenses to begin operations can vary from as few as 10 to more than 30 separate procedures.[2] Related costs may range anywhere from $800 to $17,000, and this cost variation can be instrumental to the client's successfully implement his or her vision. As such, start-up costs and related matters should be considered long before the process of purchasing the physical means needed to launch.

For example, in the City of Houston, two sets of plans must be sent to the Health Department for approval prior to constructing or remodeling any mobile food unit.[3] Additionally, all employees must either obtain a food service manager certification or complete a food handler training course within 60 days of employment.[4]

Moreover, different cities may have different approval processes based on certain characteristics of the truck's operation. For example, in Houston, there is a single process used for all types of vendors while, conversely, San Francisco has two processes depending on whether the food truck will operate on private property or public right-of-way.[5] Luckily, many jurisdictions provide checklists to help navigate the red tape.

An often-overlooked necessity by many first-time entrepreneurs is an understanding of regulations on food safety, preparation, and waste management. Just like a brick-and-mortar restaurant, the food truck industry is subject to regular health inspections, grey water waste management, and strict regulations regarding the offsite preparation and storage of food. Clients are often surprised to learn that food cannot simply be prepped at home or that discarded food waste cannot be disposed of in a conventional manner.

However, as the industry has grown, solutions for these issues have been addressed through the use of city approved commissary kitchens and contracts with established restaurants to share their facilities. The City of Houston currently offers 13 approved commissaries which mobile food vendors may use for waste disposal, potable

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2 U.S Chamber of Commerce, Food Truck Nation.

3 Houston, Texas – Code of Ordinances, Section 20-25.

4 Houston, Texas – Code of Ordinances, Section 20-53.

5 City and County of San Francisco, Department of Public Health Environmental Health Branch, https://www.sfdph.org/dph/files/EHSdocs/ehsFood/Mobile/MFF_Flowchart.pdf

water, unit maintenance, and food preparation.[6] Chicago's ordinance, by contrast, simply states that a mobile food preparer must be serviced by a commissary approved by the Chicago Department of Health.[7]

In addition to servicing requirements, any, if not all, jurisdictions have implemented strict regulations limiting the areas where food trucks are allowed to offer service. Often, these restrictions include times of operations and minimal distances from brick-and-mortar restaurants, residential areas, and government buildings. Understanding these restrictions and being able to communicate them is essential for protecting client interests and avoiding unnecessary citations and unrealistic expectations. Some examples of restricted-use regulations include Houston's prohibition on street parking[8], Chicago's limitation on food truck sales within 200 feet of a restaurant's entrance[9], and New York City's locational restrictions by street.[10]

These restrictions on business operations in the food truck industry have already spawned court battles as food truck operators and other special interest groups work to protect their industries.

The Road to Court

In many instances, food truck owners have challenged license requirements and restrictive regulations. Some interesting cases are discussed below.

Lopez, et al. v. City of San Antonio involved a challenge to Section 13-639(a)(10) of the San Antonio City Code that prohibited food trucks from operating within 300 feet of any restaurant, grocer, or convenience store. The 300-foot ban applied to mobile food vendors whether they were parked on private property with the owner's consent or validly parked on public property. The *Lopez* Plaintiffs argued that their right to economic liberty under Article 1 Section 19 of the Texas Constitution was violated by unreasonable and protectionist governmental interference. In response to the suit the City of San Antonio repealed the law.

6 City of Houston, Houston Health Department, Approved Commissaries List 2019, https://www.houstontx.gov/health/Food/documents/Commissary_List.pdf.

7 Municipal Code of Chicago, 7-38-138.

8 Houston, Texas – Code of Ordinances, Section 40-8.

9 Municipal Code of Chicago, 7-38-115(f)

10 New York City, Dept. of Health and Mental Hygiene, Mobile Food Vending Restricted Streets Guide, https://www1.nyc.gov/assets/doh/downloads/pdf/permit/mvf_restricted_streets.pdf

In *King, et al. v. Louisville/Jefferson County Metro Government*, 17-CV-390-DJH-CHL, the Louisville/Jefferson County Metro Government ("Louisville Metro") likened food trucks to street dealers, peddlers and mobile itinerant vendors. The gist was that food trucks constituted a nuisance and should not exist within a certain distance of food establishments. King sued in the United States District Court for the Western District of Kentucky, and the matter was promptly resolved with the entry of a Consent Decree stipulating that food trucks are considered mobile food vendors and not itinerant. Further, Louisville Metro was ordered to suspend enforcement of any regulation that prohibited food trucks from operating simply because the food truck was within a certain distance of a food establishment.

In *Rock, et al. v Town of Carolina Beach, et al.* the Town of Carolina Beach admitted promulgating Carolina Beach Code of Ordinance Section 14-21(d)(1) to prevent "outsider" food trucks from competing with Carolina Beach restaurant owners. The ordinance provided that, prior to obtaining approval for a food truck license, the food truck operator had to maintain an eating or drinking establishment for a least one year in the town of Carolina Beach. One week after Plaintiffs filed suit, the ordinance was repealed.

The City of Fort Pierce, Florida regulates food trucks under Chapter 9, Article IV of the Fort Pierce Code. The Code provides that food trucks cannot operate within 500 feet of a similar type business (Section 9-111(b)(1)) which is defined as any business that serves or sells any food. Essentially, everywhere in Fort Pierce is within 500 feet of a place that serves or sells any food. In *Diaz, et al. v City of Fort Pierce, Florida* the court agreed with Plaintiffs that the 500-foot ban is not rationally related to any interest other than protectionism and enjoined the City from enforcing the law.

Under Baltimore City Code Article 15, Subtitle 17-1, food trucks cannot operate within 300 feet of any retail business establishment that is primarily engaged in selling the same type of food product; A violation of the 300-foot rule is a criminal offense resulting in a conviction and $500 fine; three violations mandate license revocation. In *Pizza Di'Joey, LLC, et al. v Mayor and the City Council of Baltimore*, the Circuit Court ruled that the ordinance was so vague that fair notice was not provided, and enforcement was likely to be subjective and arbitrary. The City appealed and the Appellate Court reversed. On September 11, 2019, Maryland's highest court granted the Plaintiffs' Petition for Certiorari.

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Finally, in 2012, the City of Chicago passed an ordinance that contained (1) a 200-foot proximity rule with a $1,000 - $2,000 fine per offense and (2) a requirement to permanently install a GPS device to send real time data allowing the food truck to be tracked. The Chicago ordinance is unique in that the City designated areas in each community where food trucks are permitted without being subject to the 200-foot rule. In *LMP Services, Inc., v. The City of Chicago*, food truck owners challenged the 200-foot rule as violative of due process and equal protection and argued the GPS requirement was an unconstitutional warrantless search. The trial court granted summary judgment in favor of the City which was affirmed by both the intermediate appellate court as well as the Illinois Supreme Court. According to the Illinois courts, the 200-foot ban was rational because the ordinance contained numerous accommodations and exceptions and balanced the interests of brick-and-mortar restaurants with those of food trucks in managing sidewalk congestion and encouraging food trucks to locate in underserved areas.

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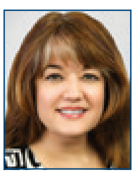
Introduction to Franchising Law

By Farheen Ibrahim and Laura Canada Lewis



The business and legal structure that creates the franchise business model has taken many forms since its inception in the early 1850s.[11] What started as a way for Isaac Merritt Singer, the founder of Singer Sewing Machines, to offer convenient repair services for his sewing machines through a license to repair engineers for use of his parts and trademarks,[12] has developed into a defined business structure and legal framework that governs a regulated industry that spans restaurants and grocery stores, personal and commercial services, entertainment, and product production. This introduction to franchising covers the basics of modern franchise law and its intersection with other bodies of law.

The Franchise Agreement

A "franchise" is a license from the franchisor to a third-party, a "franchisee," for use of its trademarks, business format, operating system, and other protected and proprietary information for the operation of a franchised business by the franchisee. A franchise agreement is the contractual agreement between a franchisor and franchisee that provides certain rights and obligations to develop and operate a franchised business at specified location or territory. This franchise agreement contains components of a license to use intellectual property, nondisclosure and restrictive covenants, dispute resolution requirements, and other contractual provisions that govern the relationship between the franchisor and franchisee.

Mr. Singer arguably first recognized the core component of a franchise – the trademark license agreement.[13] A key component in franchising is for a franchisor to have an effective, registrable trademark. There is immense value in a trademark and it can be a franchisor's most valuable asset. For example, McDonalds' trademarks are valued at $43 billion USD[14] and it has brand recognition all around the world. The value of a trademark is "goodwill" in the marketplace,[15] which a franchisee can immediately

11 Robert Webber, An Introduction to Franchising 6-8 (2012).

12 Id. at 7.

13 Id.

14 Interbrand Rankings, https://www.interbrand.com/best-brands/best-global-brands/2018/ranking/mcdonalds/ (last visited September 10, 2019).

15 Susser v. Carvel Corp., 332 F.2d 505, 516-17 (2nd Cir. 1964) (noting that "the cornerstone of a franchise system must be the trademark or trade name of a product").

exploit when operating its own franchised location. The franchisor, through this trademark license, increases its presence in certain territories without having to invest as many resources as would be required for corporate-owned locations. In this way, the franchise relationship is symbiotic to the franchisor and franchisee.

Federal Franchise Regulations

Franchising is regulated at the federal and state level. The Federal Trade Commission ("FTC") regulates franchising through the Trade Regulation Rule on Disclosure Requirements and Prohibitions Concerning Franchising as amended in 2017 (the "Franchise Rule").[16] The Franchise Rule governs the offer and sale of a "franchise" everywhere in the United States and its territories. Further, the FTC periodically publishes compliance guides and other explanatory directives regarding applicability of the Franchise Rule, disclosure requirements, and other guidance.[17]

A "franchise" under the Franchise Rule is defined as "any continuing commercial relationship or arrangement, whatever it may be called, in which the terms of the offer or contract specify, or the franchise seller promises or represents, orally or in writing, that: (1) the franchisee will obtain the right to operate a business that is identified or associated with the franchisor's trademark, or to offer, sell, or distribute goods, services, or commodities that are identified or associated with the franchisor's trademark; (2) the franchisor will exert or has authority to exert a significant degree of control over the franchisee's methods of operation, or provide significant assistance in the franchisee's method of operation; and (3) as a condition of obtaining or commencing operation of the franchise, the franchisee makes a required payment or commits to make a required payment[18] [currently $570] or more to the franchisor or its affiliate" during the first six months of operations.[19]

Federal law requires franchisors to prepare a franchise disclosure document (the "FDD") that contains prescribed disclosures for the offer and sale of their franchises in all 50 states.[20] The FDD is required to describe the franchise system, its principals, financial health, trademarks and other intellectual property, list of franchisees, and other pertinent information that may be helpful for potential franchisees to evaluate the franchise opportunity and the business risk associated with the investment.[21] This FDD must be delivered to potential franchisees at least 14 calendar days before prospective franchisees sign any binding agreement or pay any fee for the franchise.[22] Further, the Franchise Rule also requires that potential franchisees receive execution copies of the franchise and other agreements at least seven calendar days before execution.[23]

Franchisors have an on-going duty to update their FDD. An FDD expires 120 days after the end of the franchisor's fiscal year, meaning the franchisor may no longer use that version of the FDD for disclosure purposes. To continue selling franchises, the franchisor is required to update certain disclosures in the FDD, as well as include updated audited financial statements from the previous fiscal year.

Some franchisors may be exempt from complying with the Franchise Rule. Franchises that defer fees for a certain amount of time, require a franchise fee lower than the current minimum required payment, or require a franchisee initial investment of $1 million dollars or greater may be exempt from federal franchise disclosure requirements.[24] However, federally exempt franchisors should examine whether they may be required to comply with state registration requirements under other applicable laws, such as states' business opportunity laws discussed below.

State Franchise Laws

Certain states have enacted their own franchise regulations with requirements beyond the Franchise Rule. The "Registration States" include California, Hawaii, Illinois, Indiana, Maryland, Michigan, Minnesota, New York, North Dakota, Oregon, Rhode Island, South Dakota, Virginia, Washington, and Wisconsin.

Registration States require additional registration or filing of the FDD with the appropriate state agency, with the exception of Oregon, which requires maintenance of certain accounting records,[25] before a franchise is offered or sold in that state. These state regulators may impose additional requirements on the franchisor, such

16 16 C.F.R. Part 436 (2007).

17 See Guidance, Federal Trade Commission, https://www.ftc.gov/tips-advice/business-center/guidance (last visited September 10, 2019).

18 The Franchise Rule requires the FTC to adjust this threshold dollar amount every fourth year based upon the Consumer Price Index for all urban consumers published by the U.S. Department of Labor. Franchise Disclosure Rule, 77 Fed. Reg. 3614 (Jun. 18, 2012). The $570 threshold took effect on July 1, 2016.

19 16 C.F.R. 436.1(h).

20 15 U.S.C. § 45.

21 See id.

22 16 C.F.R. 436.2(a).

23 16 C.F.R. 436.2(b).

24 16 C.F.R. 436.8(a)(5)(i).

25 Or. Rev. Stat. § 650.010.

as state-specific amendments to the franchise agreement and addendums to the FDD, and fee deferrals until the franchisor can meet certain financial requirements. Registration States may also have varying pre-sale disclosure requirements, annual renewal registration requirements, and limitations on termination rights.

Business Opportunity Laws

Certain states' business opportunity laws may also apply to franchises. These laws may impose additional registration and disclosure requirements. Twenty-five states ("Business Opportunity States") have some form of business opportunity statutes: Alabama, Alaska, California, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Michigan, Nebraska, New Hampshire, North Carolina, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, and Washington.

Some of the Business Opportunity States have business opportunities laws, which do not apply to the offer and sale of franchises if the franchisor has a federally registered trademark.[26] Other Business Opportunity States require one-time[27] or annual filings, and may impose bonding or escrow requirements on the franchisor. Certain Registration States also have business opportunity laws, but these do not apply to franchises registered according to that state's franchise laws.

Some offers or sales of a franchise may fall within an exemption under the Franchise Rule, but may still require registration with the respective state's business opportunity regulations if the franchisor makes certain representations or promises to its franchisees.

Intersectionality

Franchise law overlaps significantly with business and trademark law. It also elicits franchise-specific guidance under other areas of law such as anti-trust and employment, among others. Anti-trust concerns, pursuant to the Sherman Act of 1890, the Clayton Antitrust Act of 1914, and the Robinson-Patman Act of 1936 and various state anti-trust equivalents (collectively, "Antitrust Laws"), may arise within the franchisor-franchisee relationship. Specifically, franchisors may reserve the right to dictate franchisee's retail pricing and require franchisees to purchase certain products or services from franchisor-affiliated parties. Depending on the type of arrangement, it could constitute a prohibited tying arrangement.[28] Other concerns under Antitrust Laws include prohibited price-fixing and resale price maintenance concerns.[29]

The employment issues surrounding franchisors and franchisees are numerous and can be quite complex. Franchisors must balance their own employment matters with the ones experienced by their franchisees. Although franchisors aim to be helpful and promote franchisee success, they must balance franchise system compliance and brand protection with exerting too much control over the franchised business, which may trigger joint employer issues between the franchisor and franchisee's employees.[30] In September 2018, the National Labor Relations Board proposed a rule to change its joint-employer standard.[31] In April 2019, the Department of Labor also published a notice of rulemaking to amend its regulations to address a new joint employer standard.[32] Confounding matters further, the rulemaking on joint employer standards within the various federal agencies appear to change according to political inclinations, making it increasingly difficult for franchisors to determine the appropriate level of control to impose on their franchisees.

Conclusion

The franchising framework can be quite complex, but incredibly flexible to accommodate a variety of business concepts. The same basic framework applies equally to quick service restaurants as escape-room franchises. Franchising is no longer relegated to large corporations; in fact, the most common franchises are medium to small sized systems. Hundreds of thousands of different franchises are offered in the United States every year, and these U.S. based concepts are rapidly expanding internationally,

26 See e.g., Business Opportunity Registration Guidelines: What is a Business Opportunity?, Connecticut Department of Banking, available at https://portal.ct.gov/DOB/Business-Opportunities/Bus-Opps/Guidelines-for-Business-Opportunity-Registration-in-Connecticut.

27 See e.g., Frequently Asked Questions for Form Series 2700 – Business Opportunities, Texas Secretary of State, available at https://www.sos.state.tx.us/statdoc/faqs2700.shtml.

28 See Jefferson Parish Hospital District v. Hyde, 466 U.S. 2 (1984).

29 See State Oil Co. v. Khan, 522 U.S. 3 (1997).

30 See Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery & FPR-II, LLC. d/b/a Leadpoint Business Services, N.L.R.B. Case 32-RC-109684 (August 27, 2015).

31 National Labor Relations Board, Board Proposes Rule to Change its Joint-Employer Standard (September 13, 2018), https://www.nlrb.gov/news-outreach/news-story/board-proposes-rule-change-its-joint-employer-standard

32 U.S. Department of Labor, Notice of Proposed Rulemaking: Joint Employer Status (April 1, 2019), https://www.dol.gov/whd/flsa/jointemployment2019/.

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because franchising is a flexible and cost-effective method of business expansion.

Laura Canada Lewis and Farheen Ibrahim are seasoned franchise and business lawyers who represents a wide variety of franchisor clients in all aspects of their business. They assist their franchisor clients in an outside general counsel capacity, preparing disclosure documents and registration, as well as, franchisee compliance issues, defending restrictive covenants, and prosecuting or defending breach-of-contract claims that arise in the franchise context. Laura and Farheen also advise franchisees on managing their relationship with the franchisor, including evaluation of new franchises and litigation, and advise private equity and other investment advisory firms on franchise system acquisitions. Further, Laura manages day-to-day transactional matters, larger acquisitions and divestments, simple and complex real estate and land use concerns, and a variety of litigation matters. And, Farheen advises her business clients on management-side employment matters (including in the franchising context), restrictive covenants, corporate governance, acquisitions, and other general transactional matters.

Views of Arizona and Arkansas on the "Mode of Operation" Theory

By Michael Kelley and Kristie Crawford

Traditional premises liability analysis has placed great importance on the amount of time a foreign substance existed in cases where the cause of the substance is unknown. With the movement towards self-service oriented operations, some courts have eliminated a time requirement due to a business' "mode of operation," finding that it is foreseeable that a customer will create a dangerous condition in a self-service establishment. In some states, the mode of operation theory has lessened the plaintiff's burden in premises liability cases.

While somewhat differing in their approaches, Arizona[1] and Arkansas both require that an incident involving a foreign substance be more than an isolated incident for a nontraditional premises liability analysis to apply. Even if a condition is shown to occur frequently, both states require that the plaintiff also show the owner failed to exercise due care to prevent the condition from occurring. The following further explores the approaches taken by Arizona and Arkansas in relation to the mode of operation theory.

Arizona

Arizona first adopted the mode of operation rule in 1966 in a case involving a grocery store customer who slipped on a piece of lettuce. In *Rhodes v. El Rancho Markets*, 4 Ariz. App. 183, 418 P.2d 613 (1966), the court took judicial notice of the fact that "in a self-service market operation . . . the customer is expected to handle and examine the produce displayed in the open bins." *Id.* at 185, 418 P.2d at 615. Since the risk of a customer slipping and falling was foreseeable by the grocer, the grocer had a duty to take "reasonable steps to obviate the danger." *Id.*

In the 53 years since *Rhodes*, Arizona has expanded the mode of operation rule to cases involving almost all items dropped or spilled on the ground by other customers. The rule has been applied to cases involving lettuce, pizza, milk, grapes, soft drinks, water, and even liquids spilled by customers opening sealed bottles on display in the store. The rule is not limited in its application to the type of product as "the only real issue is whether or not [the business owner] could reasonably anticipate that [the item] would be spilled on a regular basis." *Chiara v. Fry's Food Stores*, 152 Ariz. 398, 401, 733 P.2d 283, 286 (1987). However, the Arizona Supreme Court has recognized the rule "is of limited application" because "if the rule applied whenever customer interference was conceivable, the rule would engulf the remainder of negligence law." *Id.*

The standard jury instruction in mode of operation cases states the following:

> Even if you find that Defendant had no notice of the unreasonably dangerous condition that Plaintiff claims caused harm, Defendant was negligent if you find the following:
>
> 1. Defendant adopted a method of operation from which it could reasonably be anticipated that unreasonably dangerous conditions would regularly arise; and

[1] Editor's Note: Arizona's Method of Operation was addressed in the Spring 2018 Issue; however, given the interest in this area of the nation, it was considered to provide additional information.

2. Defendant failed to exercise reasonable care to prevent harm under those circumstances.

Revised Arizona Jury Instructions (Civil), 6th, Premises Liability 1A.

The first hurdle a Plaintiff faces is proving the condition was "unreasonably dangerous." "Defective conditions are not necessarily dangerous conditions." *Berne v. Greyhound Parks*, 104 Ariz. 38, 41, 448 P.2d 388, 391 (1968). A "defective condition" is only a "dangerous condition" if it involves "an unreasonable risk of harm." *Id.* As such, while a crack in the grandstands which allows spilled liquid to drip onto the floor below might be a defective condition, it is not an unreasonably dangerous condition unless there is evidence to prove spills regularly dripped to the floor below, creating an unreasonable risk of harm to other patrons. *Id.* (refusing to apply the rule when spilled liquids dripped through cracks at wide and irregular intervals, and there was no evidence to prove that other puddles had occurred, or other customers had slipped on dripping liquids).

The plaintiff must also prove that the condition would "regularly arise" prior to their accident for the rule to apply. "Regular" is defined as "customary, usual, or normal." *Borota v. Univ. Med. Ctr.*, 176 Ariz. 394, 396, 861 P.2d 679, 681 (Ariz. App. 1993). If the evidence establishes that spills do not occur very often, that would be "the opposite of the mode-of-operation rule" and "insufficient to establish that third-party interference was reasonably foreseeable so as to invoke that rule." *Id.* at 396, 861 P.2d. at 681. For example, in *Borata*, the court held a hospital was entitled to summary judgment because the Plaintiff was unable to establish that spills regularly occurred in the hallway where she fell. However, the Arizona Supreme Court has upheld application of the rule where testimony was elicited from employees that there were "lots of things" to clean up and "it's not the cleanest place." *Chiara*, 152 Ariz. at 401, 733 P.2d at 286. More recently, though, the Court of Appeals affirmed summary judgment in favor of a drug store where the store manager only testified "things would end up on the floor" and would have to be cleaned up "from time to time." *Contreras v. Walgreens Drug Store #3837*, 214 Ariz. 137, 140, 149 P.3d 761, 764 (Ariz. App. 2006). While the store manager admitted it was "typical" for "a couple of spills a week" to require cleaning, he also testified that spills were not "repetitive in nature" or "something that [he] would expect." *Id.* Since there was no evidence the spilled liquid "reached the floor nor that those spills occurred in the area of the store accessible to customers," the plaintiff had not met his burden of proving that prior spills "regularly created a hazardous condition." *Id.*

Even if there is enough evidence to prove unreasonably dangerous conditions regularly occurred, the plaintiff still bears the burden of proving the store failed to exercise reasonable care to prevent harm under the circumstances. While this is the plaintiff's burden, "a defendant involved in a jury trial will want to introduce any and all evidence indicating that it exercised reasonable care under the circumstances." *Chiara*, 152 Ariz. at 402, 733 P.2d at 287. This may include testimony from a member of management establishing how employees are trained on the prevention of customer accidents, testimony from employees regarding their inspection and cleaning of the premises on the day of the accident, and copies of written policies and procedures.

In all mode of operation cases, consideration should be given to identifying the unknown individual who created the condition as a non-party at fault. Arizona is a pure comparative fault state, and defendants may identify non-parties at fault within 150 days of the filing of their answer. This procedure allows the jury to assess a percentage of fault upon the individual who negligently created the condition and failed to remedy the condition or notify the business of the condition in time to provide a remedy or warning. *See, e.g., McKillip v. Smitty's Super Valu*, 190 Ariz. 61, 65, 945 P.2d 372, 376 (Ariz. App. 1997) (holding it was proper for a jury to apportion 65 percent of the fault to the unknown customer who dropped wax paper on the floor even though "how the paper reached the floor, whether a person dropped the paper, and how long the paper rested on the floor [were] all unknown").

Arkansas

Arkansas has declined to adopt the mode of operation theory, but still has a view similar to Arizona in using the recurring condition theory. To prevail in a traditional slip and fall case in Arkansas, a plaintiff must show either (1) the presence of the substance resulted from the defendant's negligence, or (2) the substance was present for such a length of time the defendant knew or reasonably should have known of its presence and failed to use ordinary care to remove it. *Mankey v. Wal-Mart Stores, Inc.*, 314 Ark. 14 (1993). A key factor in finding negligence on behalf of the defendant in a traditional slip and fall case where the cause of the substance is unknown is the length of time a substance was on the floor. *Wal-Mart Stores, Inc. v. Regions Bank Trust Dept.*, 347 Ark. 826 (2002). When the slippery condition is not an isolated incident and has been a recurring condition, the issue becomes "whether the business owner used ordinary care to keep his premises free from dangerous conditions likely to cause injury to invitees." *Brookshires Grocery Co. v. Pierce*, 71 Ark. App. 203, 205 (2000).

The mode of operation theory was presented to the Arkansas Supreme Court in *Ledford v. Gas Mart Co., Inc.*, 259 Ark. 1 (1975), which involved a slip and fall on grease or oil at a self-service gas station. The plaintiff argued the traditional rules should not apply, which resulted in a directed verdict, because due to the nature of the business, "the jury could have inferred that to let customers pour oil and pump gas into their own cars was conducting a dangerous business operation." *Id.* at 3. The Arkansas Supreme Court did find any compelling reasons to support that argument, while also noting the plaintiff did not present any evidence as to whether any effort was made to keep the premises safe or to show the driveways of the gas station were frequently covered with oil and grease. *Id.*

In *Heigle v. Miller*, 332 Ark. 315 (1998), the Arkansas Supreme Court took a different approach in a case involving a slip and fall by a guest at a residence. In that case, the plaintiff knew that her husband frequently urinated on the floor of the bathroom and knew the floor was slick without a piece of carpet being in the bathroom, but failed to make sure the carpet was in the bathroom when her friend came to visit or warn her friend of the potential for urine to be on the floor. *Id.* at 324. Under those circumstances, it was held the issue was whether the defendant had a "duty to warn of hidden dangers." *Id.* Similarly, a non-traditional approach was taken in *Conagra, Inc. v. Strother*, 68 Ark. App. 120 (1999), where there was evidence that (1) oil, grease, and water were regularly tracked through the hallway outside an employee breakroom; (2) the defendant had a long-standing policy of keeping non-skid mats in the area outside the employee breakroom; and (3) non-skid mats were present when the plaintiff entered the breakroom, but were removed by the time she left the breakroom. That evidence was found to be sufficient to make a submissible case. *Id.* at 126.

The recurring condition theory was applied to a retailer in *Brookshires Grocery Co. v. Pierce*, 71 Ark. App. 203, 205 (2000), which involved a slip and fall on grapes. The appellate court reversed a directed verdict in favor of the grocery store because in addition to evidence of a recurring condition, there was evidence the (1) store management was aware the produce section was a dangerous area for falls; (2) the management had a schedule for inspection of floors that was not adhered to; and (3) although the clerk assigned to the area was known to be "slouchy" and not diligent in cleaning spills, he continued to be assigned to the area. *Id.* at 744. The evidence used to support the application of the recurring condition theory has been strictly analyzed by appellate courts since *Brookshires*, limiting its application to a particular set of facts. See *Hendrix v. Stobaugh*, 2009 Ark. App. 657 (2009); *Cowan v. Ellison Enterprises, Inc.*, 93 Ark. App. 135 (2005).

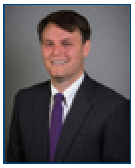
Conclusion

Neither the mode of operation theory nor the recurring condition theory is the death knell in a premises liability case. Many plaintiffs' attorneys fail to take the depositions of the defendants' employees or otherwise obtain evidence showing the condition was more than an isolated incident. Defense counsel may also be able to elicit testimony from the plaintiff that he or she regularly patronized the establishment and is unaware of prior spills or customer accidents on the premises. In addition, all steps taken by the defendant to prevent injuries resulting from foreign substances on the floor should be highlighted. With the right testimony, and hopefully good video surveillance footage, a motion for summary judgment can still prevail.

Michael Kelley is an experienced trial lawyer at Thomas Rubin & Kelley in Arizona. Mr. Kelley specializes in premises liability, product liability, automobile negligence, homeowner's liability, insurance coverage, insurance bad faith, and appeals.

Kristie Crawford is the Managing Principal of the Springfield, Missouri office of Brown & James, P.C. and practices throughout Arkansas and Missouri. She specializes in representing retailers, restaurants, bars and business owners in premises liability, negligence and employment claims through all stages of litigation.

Defense Verdict for Commercial Trucking Company in Louisiana



The Perrier & Lacoste trial team led by DRI member, Curt Rome, obtained a defense verdict in Houma, Louisiana in favor of a commercial trucking company, its driver, and its insurance company on March 21, 2019. Following a four-day jury trial, a defense verdict was returned in the 32nd Judicial District Court for the Parish of Terrebonne, State of Louisiana, finding that the alleged negligence of the defendant-driver was not the proximate cause of Plaintiff's injuries. Such verdicts in Louisiana are rare for commercial vehicles and came as a result of significant pre-trial investigation and posturing.

The case arose out of a series of events that began with the back, driver's-side tire of a box truck driven by the defendant-driver allegedly rubbing the front, driver's-side bumper of the vehicle in which Plaintiff was a passenger. The alleged tire rub occurred while the defendant-driver was allowed to cross through traffic by Plaintiff's driver in order to make a left turn. After the alleged tire rub, the defendant-driver travelled approximately three quarters of a mile while Plaintiff and his driver pursued. At a stop light, Plaintiff exited his vehicle and climbed atop Defendants' vehicle and began banging on the door. The parties' accounts differ as to whether Plaintiff then slipped off or jumped off of Defendants' vehicle after banging on the window. Upon landing on the ground in a split-like fashion, Plaintiff claimed injury to his groin and low back. Over time the low back pain allegedly increased, radiated down his leg, and caused lower leg weakness. Several months later, the lower leg weakness allegedly caused a fall, injuring Plaintiff's right shoulder. Plaintiff claimed that both the low back and shoulder injuries required surgery.

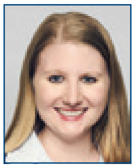
Plaintiff presented approximately $175,000 in past and future medical expenses to the jury. He also claimed $325,000 in past, present, and future pain and suffering, seeking a total award of $500,000.

Discovery efforts by the P&L trial team helped set the stage for a successful defense. Plaintiff's past medical history was significant and time was spent educating the jury about Plaintiff's long-standing back and shoulder issues. Through social media discovery, surveillance, and representations made by Plaintiff to the social security disability administration, the P&L trial team was able to establish that Plaintiff had not suffered any change in his physical ability or lifestyle. Further, a vigorous cross-examination of Plaintiff revealed several inconsistencies in Plaintiff's story related to the accident, his post-accident vacations and activities, his pre-existing back pain, and prior shoulder conditions.

With respect to liability, the P&L trial team was able to persuade the jury that the defendant-driver was not the cause of Plaintiff's injuries, but that Plaintiff's decision to approach and climb on Defendants' vehicle in traffic was the cause. Further, they were able to elicit testimony from several witnesses, including Plaintiff and his driver-girlfriend, that Plaintiff and his driver had cell phones they could have used to notify the police or take pictures of the vehicle instead of climbing onto the vehicle, which was the reason Plaintiff fell and injured himself. After twenty minutes of deliberations, the jury returned a verdict in favor of Defendants.

Curt Rome is a 2004 LSU Law Center graduate. Throughout his career Curt has represented industrial, retail, and insurance clients in complex litigation matters. His general litigation experience includes representing clients in transportation, products liability, premises liability, commercial litigation, first- and third-party insurance coverage, professional liability, and toxic tort matters. He has represented clients from many industries including commercial carriers, contractors, national retailers, domestic and foreign product manufacturers, and domestic and London market insurers. Curt has also handled numerous matters for local and national chemical manufacturers against claims involving workplace exposures to benzene and asbestos.

Two Summary Judgment Wins in New York on the Issue of "Special Use"



In two separate cases, Anne Marie Esposito of Conway, Farrell, Curtin & Kelly, P.C., secured the dismissal of all claims against a national grocer on summary judgment grounds. In each of the cases, the Plaintiffs claimed that they fell due to a defect in a parking lot, which was adjacent to the store entrance and located in front of a small shopping center with three tenants in Hewlett, New York. Plaintiffs alleged negligence in the ownership, control, maintenance and repair of the parking lot.

In New York, a defendant can be liable for a defect on property which it owns, occupies or controls. *See, e.g., Zylberberg v. Wagner*, 119 A.D.3d 675, 676 (2d Dep't 2014). Additionally, a defendant can be liable if it: (1) had control over the property sufficient to authorize maintenance and repair of the property; and (2) used the property exclusively for its own use. *See Kaufman v. Silver*, 90 N.Y.2d 204, 207–08 (1997); *Breland v. Bayridge Air Rights, Inc.*, 65 A.D.3d 559, 560 (2d Dep't 2009). This is known as the "special use" doctrine. *Kaufman*, 90 N.Y.2d at 207–08.

In the first case, the court held that Plaintiff failed to raise a material issue of fact that the grocer had "special use" of the parking lot. In support of her argument, Plaintiff submitted the affidavit of an engineer who concluded that the parking lot defect was caused by garbage trucks and delivery trucks traveling in front of the store. Plaintiff argued that the dumpsters were used exclusively by the grocer and that the deliveries were made for its exclusive benefit. The court, however, found that the affidavit was speculative and insufficient to raise a material issue of fact because it failed to identify any data in support of its conclusion that the trucks caused the alleged defect.

In the next case, the court also held that the grocer did not have special use of the parking lot. While Plaintiff argued that the grocer put up a fence and housed its dumpsters in the Town of Hempstead's parking lot, the testimony established that the Town of Hempstead was responsible for repairs there and that other stores' customers used the parking lot. As a result, the court found that the grocer did not have exclusive use or control of the parking lot and was, therefore, not responsible for any defects.

Anne Marie Esposito is an Associate in Conway Farrell's Litigation group, where she counsels clients in connection with a variety of matters in both state and federal court. She has extensive experience handling personal injury claims involving premises liability and construction cases. Anne Marie graduated cum laude from St. John's University School of Law, where she was an Articles Editor for the St. John's University Law Review.

Fraternal Organization Obtains Defense Verdict in Dram Shop Liquor Liability Case with Jury Returning a Verdict of No Negligence in New Hanover County, Wilmington, North Carolina

Melody Jolly and Deedee Gasch obtained a jury verdict in favor of the defense after the jury deliberated for only 22 minutes. Plaintiffs alleged that a local Fraternal Organization overserved alcohol to a member who was allegedly a "regular" at the on-site bar to the point of intoxication. The member allegedly left the premises and was involved in a motor vehicle accident. The Plaintiffs, the family in the vehicle struck by the drunk driver, claimed the Fraternal Organization was responsible for significant, permanent neck and back injuries they sustained in the automobile accident caused by over service of alcohol. They also sought an award of punitive damages. The drunk driver resolved his claim before trial as did another establishment that allegedly served alcohol to the drunk driver. Gasch and Jolly argued that there was no evidence that the member was at the establishment on the day in question, nor any evidence that he was served any alcohol by the organization, much less that he was overserved. They also successfully excluded evidence of the breathalyzer results and significantly limited the testimony of Plaintiffs' toxicologist. After evaluating the evidence, the testimony from several witnesses including Plaintiff's expert toxicologist and treating physicians, and closing arguments in which Plaintiff's counsel asked for a verdict in excess of $170,000.00 in compensatory damages alone, the jury found no negligence and returned a verdict in favor of Defendants.

Deedee Gasch has over a decade of experience litigating catastrophic claims involving serious injury or death. While Deedee's practice is primarily focused on the defense of premises liability, trucking and commercial vehicle accidents, and medical malpractice, she also has a wide range of civil litigation experience. She spent approximately half of her career representing injured plaintiffs before returning to her first love of civil litigation defense work. This experience on both sides of a case uniquely situates her in negotiations and at trial if settlement is not possible. Deedee is a third-generation Tar Heel and attorney, following in the footsteps of her grandfather, a North Carolina Resident Superior Court Judge (deceased), and her father, a career trial lawyer. She has dual degrees in Journalism and Political Science and earned her law degree cum laude from Florida Coastal School of Law in Jacksonville, Florida, where she attended on a prestigious merit-based scholarship. She is licensed to practice law in both North Carolina and Florida.

Melody Jolly practices professional liability defense, including the defense of attorneys, architects & engineers, real estate professionals, accountants, home inspectors & appraisers, land surveyors, and other non-medical professionals. Melody is Section Leader for the Cranfill Sumner & Hartzog LLP's Professional Liability practice group and she has maintained an active leadership role in the DRI Professional Liability Committee since 2009, currently serving as Committee Chair. A frequent speaker and author on professional liability topics, Melody was recently recognized by Benchmark Litigation on its 40 & Under Hot List for her work in professional liability defense, and has also been recognized by Super Lawyers and Best Lawyers. Her dedication to professional liability defense includes counseling her professional clients on their ethical obligations and – if a mistake is made – assisting her clients in determining if the error can be corrected or the damage lessened and a claim or lawsuit avoided. Melody's legal experience also includes general construction litigation, community associations litigation, representation of corporations in business disputes and general liability matters.