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# Company Liability for a Life Insurance Agent's Financial Abuse of an Elderly Client

Johnny Parker

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# COMPANY LIABILITY FOR A LIFE INSURANCE AGENT'S FINANCIAL ABUSE OF AN ELDERLY CLIENT

*Johnny Parker\**

2007 MICH. ST. L. REV. 683

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*The character of a society is measured by how it treats those of its members who are at the dawn of life, its children, how it treats those of its members who are in the shadows of life, its poor, its sick, its handicapped, and how it treats those of its members who are in the twilight of life, its elderly.*

—Tom Lantos<sup>1</sup>

## INTRODUCTION

The elderly represent a rapidly increasing percentage of the American population. In July 2003, 35.9 million people—12 percent of the country's total population—were age 65 and older.<sup>2</sup> Among those age 65 and older, 18.3 million people were age 65 to 74; 12.9 million were age 75 to 84; and 4.7 million were 85 and older in 2003.<sup>3</sup> The fastest growing age group between 1980-1990 was 85 to 90 years.<sup>4</sup> For the period between 1990-2000, the fastest growing age group was 90 to 95 years.<sup>5</sup> According to actuarial predictions, by the year 2010, 39 million Americans will be over age 65; and, by 2050, 10 percent of the United States population will be over 85.<sup>6</sup>

Consider also that in the United States alone, a citizen turns 50 once every seven seconds.<sup>7</sup> On January 1, 2006, the first of an estimated 77 million baby boomers, Americans born between 1946 and 1964 celebrated their 60th birthday.<sup>8</sup> By 2030, the number of elderly is expected to nearly double to 72 million people—a whopping 20 percent of the total U.S. population.<sup>9</sup> Currently, people over 50 control 70 percent of the nation's wealth and with

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1. *Physical and Financial Abuse of the Elderly: Hearing Before the Subcomm. on Retirement Income & Employment of the Select Comm. on Aging*, 97th Cong. 8 (1981) [hereinafter *Physical and Financial Abuse of the Elderly*] (testimony of Tom Lantos, Rep.).

2. WAN HE ET AL., U.S. CENSUS BUREAU CURRENT POPULATION REPORTS, 65+ IN THE UNITED STATES: 2005, at 1 (2005), <http://www.census.gov/prod/2006pubs/p23-209.pdf>.

3. *Id.*

4. RONALD J. SCHWARTZ, LAW AND AGING: ESSENTIALS OF ELDERLY LAW 2 (2005).

5. *Id.*

6. *Id.* at 1-2.

7. Longevity Archives, Boomers' Power: A Baby Boomer Manifesto, <http://www.nextfiftyyears.com/longevity/> (Aug. 7, 2006).

8. *Protecting Senior Citizens Against Investment Fraud: Hearing Before the Special Comm. on Aging*, 109th Cong. (2006) [hereinafter *Protecting Senior Citizens Against Investment Fraud*] (testimony of Patricia D. Struck, Wisconsin Securities Division Administrator, President, North American Securities Administrators Association, Inc.), available at [http://www.nasaa.org/Issues\\_\\_Answers/Legislative\\_Activity/Testimony/4503.cfm](http://www.nasaa.org/Issues__Answers/Legislative_Activity/Testimony/4503.cfm).

9. WAN HE ET AL., *supra* note 2, at 12.

continued longevity are destined to become the targets of choice for scam artists and con men.<sup>10</sup>

Seniors<sup>11</sup> are not immune from the evils that plague society at large. Like their child counterparts, they too often find themselves the victims of abuse. Elder abuse and neglect can take many forms, including physical, psychological, and financial.<sup>12</sup> Financial abuse is the most common form of elder abuse.<sup>13</sup> The elderly have become the victims of choice for con men because (1) they are most likely to have a "nest egg," own their homes, and/or have excellent credit; (2) they are polite and trusting; (3) seniors are less likely to report fraud because they do not know to whom to report it, are too ashamed at having been defrauded, or do not know they have been defrauded; and (4) when they do report fraud, they often make poor witnesses, due to the effect of age on memory. In summary, the elderly are prime targets of scam artists because they are perceived as more trusting, less aware of their surroundings, and easier to handle.

The National Center on Elder Abuse estimates that there are five million cases of financial elder exploitation annually, with most going unreported by seniors who are either too embarrassed about being duped or are unaware that the theft is happening.<sup>14</sup> This dilemma is further accentuated by the fact that baby boomers possess more than \$8.5 trillion in investable assets and are expected, over the next forty years, to inherit at least \$7 trillion from their parents.<sup>15</sup> Thus, financial abuse of the elderly has become a dilemma of epic proportions.

Financial abuse of the elderly can take many forms and can be categorized on the basis of a number of distinct characteristics. In an attempt to draw attention to the problem, the range of potentially abusive activities has been classified into four main categories: (1) theft; (2) fraud; (3) intentional

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10. Susanna Schrobsdorff, *Financial Fraud of the Elderly on the Rise*, NEWSWEEK, July 19, 2005, [http://www.msnbc.msn.com/id/8631060/site/newsweek/print/1/displaymode/1098/\(1of4\)5/8/26](http://www.msnbc.msn.com/id/8631060/site/newsweek/print/1/displaymode/1098/(1of4)5/8/26).

11. I define senior citizens as those ages sixty-five and older. I use the term "seniors," "elder," "elderly," "older population," and "older Americans" interchangeably.

12. Margaret F. Hudson, *Elder Mistreatment: A Taxonomy with Definitions by Delphi*, 3 J. ELDER ABUSE & NEGLECT 1, 14 (1991). Physical violence, including negligence, is the most common form of abuse, followed by financial abuse, the abrogation of basic constitutional rights, and psychological abuse. *Physical and Financial Abuse of the Elderly*, *supra* note 1, at 3.

13. Duhaime Law, Elder Abuse, <http://www.duhaime.org/LegalResources/PoliceStation/tabid/334/articleType/ArticleView/articleId/55/Elder-Abuse.aspx> (last visited Dec. 27, 2007).

14. Schrobsdorff, *supra* note 10.

15. *Protecting Senior Citizens Against Investment Fraud*, *supra* note 8. See also Kathy Chu, *Financial Scams Expected to Boom as Boomers Age*, USA TODAY, May 17, 2006, available at [http://www.usatoday.com/money/perfi/retirement/2006-02-05-baby-boomers-usat\\_x.htm](http://www.usatoday.com/money/perfi/retirement/2006-02-05-baby-boomers-usat_x.htm).

breach of duty by a fiduciary or caregiver; and (4) negligence.<sup>16</sup> Though these categories constitute distinct forms of financial abuse, a certain amount of overlap exists.<sup>17</sup> For example, misuse of an elder's assets by a fiduciary can overlap with fraud, theft, or embezzlement. This type of financial abuse is amorphous because its parameters are defined by the relationship of the abuser and the victim, rather than by the type of conduct involved.

It is also possible to further refine financial elder abuse into two classifications. The first refinement is typically committed by someone with a personal relationship to the victim, such as a family member, friend, or caretaker who has gained the victim's trust in order to take advantage of that trust.<sup>18</sup> The second type is referred to as commercial elder abuse and is practiced by organized businesses.<sup>19</sup> Rather than resorting to outright theft, "[t]he commercial abuser acts under color of a business enterprise to obtain access to the elder's assets."<sup>20</sup> These classifications, however, are also amorphous because an abuser, such as a life insurance agent, can rely on both the personal relationship with the victim and the guise of his apparent business enterprise, in order to take advantage of the victim.

Financial abuse of the elderly is not exclusive to the blue collar scam artist.<sup>21</sup> The considerations that make the elderly attractive to blue collar con men also serve as the impetus for financial elder abuse by reputable institutions and their professional employees. These institutions, uniquely aware of the nation's changing demographics and the desire of most seniors to maximize their retirement investments, all too frequently participate in the financial fleecing of the elderly.<sup>22</sup> They have launched all-out marketing campaigns in which cold callers, brokers, financial planners, and insurance agents pitch dubious investment products and strategies to seniors. In the white collar context, financial elder abuse often takes the form of investment fraud.<sup>23</sup>

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16. Carolyn L. Dessin, *Financial Abuse of the Elderly*, 36 IDAHO L. REV. 203, 206 (2000).

17. *Id.*

18. See Kurt Eggert, *Lashed to the Mast and Crying for Help: Self-Limitations of Autonomy Can Protect Elders from Predatory Lending*, 36 LOY. L.A. L. REV. 693, 697-98 (2003).

19. *Id.* at 698.

20. *Id.*

21. See ALBERT B. LEWIS, GOTCHA! SWINDLES, SCAMS, CONS AND RIP-OFFS (1998).

22. Nat'l Comm. for the Prevention of Elder Abuse, Financial Abuse, [http://www.preventelderabuse.org/elderabuse/Fin\\_abuse.html](http://www.preventelderabuse.org/elderabuse/Fin_abuse.html) (last visited Nov. 21, 2007); Prevent Elder Abuse, Predators and Politics, <http://preventelderabuse.blogspot.com/2007/07/predators-and-politics.html> (last visited Nov. 21, 2007).

23. Helpguide.org, Elder Abuse: Types, Signs, Symptoms, Causes, and Help, [http://www.helpguide.org/mental/elder\\_abuse\\_physical\\_emotional\\_sexual\\_neglect.htm](http://www.helpguide.org/mental/elder_abuse_physical_emotional_sexual_neglect.htm) (last visited Nov. 21, 2007); Prevent Elder Abuse, *supra* note 22. See also *infra* notes 49-63.

The purpose of this Article is to examine the life insurance industry's role in financial elder abuse. Part I explains why elders are perfect fraud victims for life insurance companies and agents. It examines the intrinsic and extrinsic considerations that make elderly people the perfect prey for predators, such as rogue life insurance agents. Part II explores the extent to which insurance agents engage in financial elder abuse. While financial elder abuse is frequently attributed to a minority of unscrupulous insurance agents, Part II demonstrates that the problem is more widespread than the life insurance industry is prepared to acknowledge. Part III describes the story of one life insurance agent's financial elder abuse case that occurred in Oklahoma and culminated in litigation in 2005. While the story is typical in many respects, it was chosen primarily because of the agent's response when the scam was finally detected. Part III demonstrates that elders who are financially victimized by their insurance agents rarely, if ever, received full financial compensation. Consequently, Part III serves as the launch pad for the primary thesis: making out a case of company liability for a life insurance agent's financial elder abuse. Part IV explores the traditional legal theories typically used to impute liability to employers for torts committed by employees. This Part explains each theory in detail with emphasis on its appropriateness in the context of financial elder abuse.

## I. THE PERFECT STORM

In a perfect storm, a number of significant conditions come together to create a devastating consequence. The significant conditions necessary for a perfect storm for life insurance fraud are in place, and the nation's elderly are most at risk. While not all inclusive, a laundry list of significant conditions must include: (1) the economy; (2) technology and information sharing; (3) an aging population; (4) the proliferation of titles used by investment professionals; and (5) general life insurance agents' advantages.

### A. The Economy

Due to advancements in science, technology, and medicine, American citizens are living longer. Consequently, individuals must carefully plan for their retirement needs if they are to continue to enjoy their pre-retirement living standards in retirement.

Financing a lengthy retirement necessitates greater savings through national retirement plans, company pension plans, or private savings. Since the bear market of 2000–2002, millions of investors, especially seniors, are seeking lucrative investments to recapture their market losses and further

grow their retirement assets.<sup>24</sup> Investor desperation is a motivation for unscrupulous institutions and individuals. Seniors are especially vulnerable to false claims that they can recover their market losses by investing in products that promise high returns with minimal or no risks. “‘The troubled economy has spawned a large spike in insurance scams’ . . . . The scams, often run by insurance agents, feed on the desire of many older Americans to make up for lost income during the recent economic downturn.”<sup>25</sup> As people age and as retirement planning and, eventually, incomes become more and more subject to fluctuations in the stock market, investors will increasingly turn to insurance products to diversify their portfolios.<sup>26</sup>

## B. Technology and Information Sharing

The enactment of the Financial Services Modernization Act of 1999, also known as the Gramm-Leach-Bliley Act, removed many of the barriers that distinguished insurance, commercial banking, and investment banking.<sup>27</sup> Consequently, the lines between these institutions, their services, and products have become blurred. Banks now sell mutual funds, securities firms offer checking accounts, and insurance companies offer products for investment. The integration of the three industries’ marketing and other functions is often referred to as financial modernization.<sup>28</sup>

Financial institutions collect and maintain enormous amounts of information about their clientele. Some of the information is provided when elders apply for and use banking institutions and insurance products. Information may also be purchased or acquired by financial institutions from

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24. *A Look at History May Help Investors Put the 2000s in Perspective*, UPDATE: EMPLOYEE BENEFIT NEWS FOR MEMBERS OF AAPG, May 2003, <http://www.aapg.org/member/geovest/2003/05May03.pdf>; E.S. Browning, *Dow Industrials End Above 11,000 as Stocks Extend New Year’s Rally*, WALL ST. J., Jan. 10, 2006, available at <http://webreprints.djreprints.com/sampleWSJHL2cr.pdf>; *Investment Loses, Trading Wins: The Greatest Stock Market Mania of All Time*, CROSSCURRENTS, available at <http://www.cross-current.net/archives/mar01.htm>.

25. Franny Van Nevel, *Frauds Against the Elderly: Hang Up the Phone, Lock the Door, Bury Your Checkbook!* (quoting Jim Quiggle, Director of Communications, Coalition Against Insurance Fraud), <http://hffo.cuna.org/10930/article/539/html> (last visited Nov. 21, 2007).

26. The primary types of assets used to balance a retirement portfolio are stocks, bonds, mutual funds, annuities, and cash. Retirement Investing Basics, <http://personalinsure.about.com/b/a/257761.htm> (last visited Nov. 21, 2007). Annuities are an insurance product and are unique in that they can provide income for the remainder of the investor’s life. *Id.*

27. SUMMARY OF FEDERAL FINANCIAL SERVICES MODERNIZATION ACT OF 1999 (GRAMM-LEACH-BLILEY ACT), <http://legis.nd.gov/assembly/57-2001/docs/pdf/39150.pdf>; Jolina C. Cuaresma, *Business Law: Privacy: Financial Services: The Gramm-Leach-Bliley Act*, 17 BERKELEY TECH. L.J. 497 (2002).

28. See *infra* note 29.

third parties, public entities, and so called "data augmentation" companies. The information collected by financial institutions, including life insurance companies, often consists of detailed data about a customer's financial portfolio and financial plans.<sup>29</sup>

The interplay between information technology and finance makes commercial transactions possible in a matter of seconds. Because individual record-keeping is now done by computers, the financial status of a consumer can be verified within minutes. The phenomenon of blending confidential personal information and technology with the shift to an instantaneous payment system has many commercial advantages. However, this phenomenon also brings with it many perils for the unwary. The sheer instantaneity of obtaining financial information and culminating financial transactions can be and is being abused by many life insurance agents.<sup>30</sup> For example, armed with a laundry list of what is available for the taking, unscrupulous agents are less likely to take no for an answer. Thus, the most apprehensive elder is deprived of an opportunity to suggest financial inability as a reason for not lending or investing money.

### C. An Aging Population

The number of elderly citizens in the United States is rapidly growing. The elderly are vulnerable to life insurance fraud because many suffer from cognitive deficits, social isolation, and other problems related to the aging process, which make the elderly easier to deceive.<sup>31</sup>

Consider these statistics: An estimated 75 million Americans are due to turn 60 over the next 20 years. That's an average of more than 10,000 people retiring every day. Households led by people aged 40 or over already own 91% of America's net worth. The impending retirement of the baby boomers will mean that, very soon, the vast majority of our nation's net worth will be in the hands of the newly retired.<sup>32</sup>

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29. Grayson Barber, *Uneasy Access: Privacy Problems in the Financial Modernization Act*, <http://graysonbarber.com/pdf/financialservicesmodernization.pdf>; Beth Givens, *Financial Privacy: The Shortcoming of the Federal Financial Services Modernization Act*, Presentation at the Cal. Bar Ass'n Annual Meeting (Sept. 2000), available at [http://www.privacyrights.org/ar/fin\\_privacy.htm](http://www.privacyrights.org/ar/fin_privacy.htm) (last visited Nov. 21, 2007).

30. The proper role of an insurance agent or financial advisor in an effective information system is to advise and provide knowledge of the products, the determination of the consumer's profile as well as suitability of transactions. These representatives should assist the customer in her choices and recommend products that are not only adapted to her needs, but also that best respond to the client's profile. The best interest of the customer's should be the guiding force in the relationship.

31. Lawrence A. Frolik, *Insurance Fraud on the Elderly*, TRIAL, June 2001, at 48.

32. *Improving Financial Disclosure for Individual Investors, Hearing Before the Comm. on Banking, Housing, & Urban Affairs*, 109th Cong. (2006) (testimony of Christo-



These two factors—problems associated with the aging process and assets—indicate the continued growth in both the number and severity of financial abuse cases involving the elderly.

#### D. The Proliferation of Titles Used by Investment Professionals

Seniors are more trusting of professionals; consequently, “[t]he alphabet soup of letters after salesperson’s names can be confusing or even deliberately deceptive.”<sup>33</sup> Nevertheless, most consumers, especially the elderly, trust financial advisors who have credentials “because they assume that credentials indicate a minimum level of regulatory oversight, as well as knowledge, training and experience.”<sup>34</sup> People offering financial advice use many titles. However, obtaining credentials and titles is not required by federal or state law.<sup>35</sup> According to the American Association of Retired Persons, many professionals that use titles such as “financial planner” and “personal financial consultant” are unregulated and have met no minimum standard requirements.<sup>36</sup>

The number of the recently created senior-related designations is on the rise.<sup>37</sup> A senior-related designation may imply that the salesperson has special knowledge, training, or skills on issues important to the elderly. The training required to receive the designation, however, may be in nothing more than marketing and selling techniques targeting the elderly.

#### E. Life Insurance Agent’s Advantages

The elderly are common targets of unscrupulous life insurance companies and agents because they (1) are often home throughout the day; (2)

pher Cox, Chairman, Securities & Exchange Commission), *available at* <http://www.sec.gov/news/testimony/ts042506cc.htm>.

33. *State Warns Consumers About ‘Senior Specialists’*, ELDER ABUSE MDT MINUTES/NEWSL. (Wash. County Sheriff’s Office Elder Safe Program, Hillsboro, Or.), Sept./Oct. 2006, at 1, *available at* <http://www.co.washington.or.us/sheriff/service/abusemdt/oct06.pdf>.

34. CALIFORNIA SENATE INS. COMM., FINANCIAL PLANNING OR FLEEING OF SENIORS?: INSURANCE PRODUCTS AND INVESTMENTS 12 (2003), [http://www.quatloos.com/Cal\\_Ins\\_Committee\\_27\\_Feb\\_2003\\_Financial\\_Planning\\_Scams.pdf](http://www.quatloos.com/Cal_Ins_Committee_27_Feb_2003_Financial_Planning_Scams.pdf).

35. AARP, THE POLICY BOOK: AARP PUBLIC POLICIES 2007, FINANCIAL SERVICES AND CONSUMER PRODUCTS (2007), [http://assets.aarp.org/www.aarp.org/\\_articles/legpolicy/11\\_consu07.pdf](http://assets.aarp.org/www.aarp.org/_articles/legpolicy/11_consu07.pdf).

36. The only title or term currently subject to federal regulation is “investment advisor.” “In general, investment advisors who manage \$25 million or more in clients’ assets must be registered with the Securities and Exchange Commission (SEC), while advisors who manage less than \$25 million must register with the state securities agency in the state where they have their principal place of business.” *Id.* at 11-35.

37. *State Warns Consumers About ‘Senior Specialists’*, *supra* note 33.

have time to listen; (3) welcome visitors, especially insurance agents; and (4) tend to be more trusting or deferential to an “expert.”<sup>38</sup> While insurance agents do not have a monopoly on coaxing customers into lousy investments or fraud, a confluence of factors has made insurance agents a prime medium for engaging elderly clients in these transactions. First, life insurance agents have access to an audience of willing and sometimes desperate buyers. The elderly are uniquely interested in products that promise increased cognitive function, virility, improved physical condition,<sup>39</sup> and financial freedom. Second, life insurance agents have intimate knowledge of their clients’ financial conditions and abilities (i.e., the type of assets and their value). Third, they also have the trust of their clients and are often trusted members of their communities. Lastly, life insurance agents know where their clients’ money is (i.e., the physical location of the asset).<sup>40</sup> “That insurance agents would wittingly or unwittingly be able to draw seniors into fraudulent schemes is not surprising . . . ‘Con artists love an environment of trust . . . and insurance agents already have the trust of older people.’”<sup>41</sup>

## II. THE EXTENT OF THE PROBLEM

The exact number of elders who are victims of life insurance swindling is unknown. However, “while only a minority of agents have been involved in fraudulent schemes, they have been responsible for billions disappearing from people’s retirement plans and accounts . . . .”<sup>42</sup>

Since 2000, the North American Securities Administrators Association—a group of state investment regulators—has published a list of the Top Ten Scams, Schemes & Scandals.

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38. Frolik, *supra* note 31.

39. Federal Bureau of Investigation, *Fraud Target: Senior Citizens*, <http://www.fbi.gov/majcases/fraud/seniorsfam.htm> (last visited Nov. 21, 2007).

40. *CR Investigates: Insurance Agent Scams*, CONSUMER REPS., Aug. 2004, at 40, available at [http://www.accessmylibrary.com/coms2/summary\\_0286-22105443\\_ITM](http://www.accessmylibrary.com/coms2/summary_0286-22105443_ITM).

41. *Top Ten Investment Scams: Seniors are Favorite Targets as Fraud Moves from Wall St. to Main Street*; [http://money.cnn.com/2001/04/23/investing/securities\\_fraud/index.htm](http://money.cnn.com/2001/04/23/investing/securities_fraud/index.htm) [hereinafter *Top Ten Investment Scams*] (quoting Jane King, Manager of Consumer Protection, American Association of Retired Persons).

42. *CR Investigates: Insurance Agent Scams*, *supra* note 40.

The ranking of scams is listed in order of prevalence and seriousness.

2000	2001	2002	2003
internet fraud	unlicensed individuals, such as life insurance agents, selling securities	unlicensed individuals, such as insurance agents, selling securities	unlicensed individuals, such as insurance agents, selling securities
investment seminars	affinity group fraud	unscrupulous stock brokers	affinity group fraud
affinity group fraud	payphones and ATM sales	analyst research conflict	payphone and ATM sales
abusive sales practices	promissory notes	promissory notes	promissory notes
telemarketing fraud	internet fraud	prime bank schemes	internet fraud
promissory note fraud	ponzi schemes	viatical settlements	ponzi schemes
viatical investment scams	callable CDs	affinity fraud	callable CDs
entertainment fraud	viatical settlements	charitable gift annuities	viatical settlements
ponzi schemes	prime bank schemes	oil & gas schemes	prime bank schemes
illegal franchising offerings <sup>43</sup>	investment seminars <sup>44</sup>	equipment leasing <sup>45</sup>	investment seminars <sup>46</sup>

43. See Cadwalader, Wickersham & Taft, LLP, *NASAA Issues List of "Top 10 Investment Scams"* (1999), <http://library.findlaw.com/1999/Jul/1/127304.html> (last visited Nov. 21, 2007).

44. See *Top Ten Investment Scams*, *supra* note 41.

45. North American Securities Administrators Ass'n, *'Top 10' Investment Scams Listed by State Securities Regulators* (Sept. 16, 2002), <http://hawaiireporter.com/story.aspx?dfd7104b-257a-4d70-8ed0-4f0d40497a90> (last visited Nov. 21, 2007).

46. Top Ten Investment Scams, [http://www.kumc.edu/cao/Senior\\_Press\\_Article/GoldenAge/Top\\_10\\_InvestmentScams.htm](http://www.kumc.edu/cao/Senior_Press_Article/GoldenAge/Top_10_InvestmentScams.htm) (on file with author).

2004	2005	2006
ponzi schemes	ponzi schemes	ponzi schemes
senior investment fraud	unlicensed individuals selling securities	senior investment fraud
promissory notes	unregistered investment products	promissory notes
unscrupulous brokers	promissory notes	unscrupulous brokers
affinity fraud	senior investment fraud	affinity fraud
insurance agents and other unlicensed securities sellers	high-yield investments	insurance agents and other unlicensed securities sellers
prime bank schemes	internet fraud	prime bank schemes
Internet fraud	affinity fraud	internet fraud
mutual fund fraud	variable annuity sales practices	mutual fund business practices
variable annuities <sup>47</sup>	oil & gas scams <sup>48</sup>	variable annuities fraud <sup>49</sup>

At least two of the perennial scams on the list—promissory note fraud,<sup>50</sup> and unlicensed individuals, such as life insurance agents, selling securities—have been closely linked to life insurance agents. “While most independent insurance agents are honest professionals, too many are lured

47. *State Securities Regulators Release Top 10 Scams, Schemes & Scandals* (Jan. 14, 2004), available at [http://www.quatloos.com/top10\\_scams.htm](http://www.quatloos.com/top10_scams.htm).

48. *NASAA's 2005 Top 10 Threats to Investors* (Mar. 24, 2005), available at <http://www.webmoneyguide.com/toptenscams.htm>.

49. Everything Blog: Top Ten List of Investment Scams, Schemes and Scandals (Oct. 1, 2006), <http://everyravlik.blogspot.com/2006/10/top-ten-list-of-investment-scams.html> (last visited Nov. 21, 2007).

50. Promissory notes are “short-term debt instruments issued by little-known or sometimes non-existent companies that promise high returns—upwards of 15 percent monthly—with little or no risk.” “These notes are often sold to investors by independent life insurance agents.” Military.com, Law Scams, <http://www.military.com/benefits/legal-matters/law-scams> (last visited Nov. 21, 2007). When interest rates are low, investors—especially seniors—are often lured by the higher, fixed returns that promissory notes offer.

by high commissions into selling . . . promissory notes, ATM and payphone investment contracts and viatical settlements.”<sup>51</sup>

In the first quarter of 2001, eleven of sixteen cease-and-desist orders issued by the Securities Division of Indiana were directed to insurance agents who were selling securities without the proper license.<sup>52</sup> Most were independent life insurance agents,<sup>53</sup> which tend to represent more than one company. Many represent only one. In March 2001, “25 states and the District of Columbia announced actions against companies and individuals—many of them independent life insurance agents—that took roughly 4,500 people for \$76 million . . . .”<sup>54</sup> In 2002, in an alleged scam sold almost entirely by independent insurance agents, investors in at least fourteen states lost close to \$30 million.<sup>55</sup> That same year, in Arizona, three independent insurance agents scammed investors out of more than \$20 million.<sup>56</sup> One of the three scammed elderly investors out of nearly \$2 million by first soliciting them to purchase “living trusts,” and then switching them into annuities, and finally using bogus promissory notes.<sup>57</sup>

In June 2002, four Georgia-based scam artists were sentenced to seventeen years in prison for recruiting independent insurance agents to sell millions of dollars worth of bogus promissory notes.<sup>58</sup> Half of each investment went to pay commissions that were divided among company principals and sales agents.<sup>59</sup> Georgia securities regulators were able to seize nearly \$5 million of the \$8 million fraudulently taken from local investors.<sup>60</sup> “The average age of the victims was 68.”<sup>61</sup> That same year, a Maine court sentenced an insurance agent to seven years in prison for operating a promissory note scam that took twenty-five people for more than \$1 million.<sup>62</sup> In 2003, Arizona securities regulators obtained a \$4.3 million final judgment against a Scottsdale company and two insurance agents who fraudulently sold charitable gift annuities to mostly senior investors.<sup>63</sup>

The link between life insurance agents and financial elder abuse is beyond dispute. “Regulators estimate that promissory note fraud [alone] has

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51. *State Securities Regulators Release Top 10 Scams, Schemes & Scandals*, *supra* note 47.

52. *Law Scams*, *supra* note 50.

53. *Id.*

54. *Id.*

55. North American Securities Administrators Ass’n, *supra* note 45.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. North American Securities Administrators Ass’n, *supra* note 45.

62. *Id.*

63. *State Securities Regulators Release Top 10 Scams, Schemes & Scandals*, *supra* note 47.

cost Americans over \$300 million.”<sup>64</sup> Between July 1999 and June 2000, California regulators took enforcement action against 185 individuals and 45 entities for unlicensed broker-dealer activity and filed two major civil actions against five entities and nine individuals.<sup>65</sup> They also announced the issuance of a total of 433 orders for the illegal and fraudulent offer and sale of securities in connection with a national crackdown on sellers of promissory notes pledging high returns and low risks to investors.<sup>66</sup> California’s investigation revealed that these promissory notes were often sold by independent life insurance agents.<sup>67</sup> In 2000, the Attorney General of New York charged two insurance adjusters in a promissory note fraud scam that cost their victims \$3.8 million.<sup>68</sup> Similar investigations throughout the country also substantiated the link between life insurance agents and financial elder abuse.<sup>69</sup> Consequently, by 2006, the twenty-eight state task force formed in 1999 to respond to the growing problem of promissory note fraud<sup>70</sup> had expanded to thirty-eight states.<sup>71</sup>

### III. A LIFE INSURANCE AGENT’S FINANCIAL ELDER ABUSE STORY

At the time of the hearing before the Insurance Commissioner of Oklahoma, Virginia Marks was a seventy-four-year-old retired school-teacher with an eighty-one-year-old husband who was also a retired school-teacher.<sup>72</sup> Michael Hentges was a life insurance agent for Columbus Life Insurance Company and had advised the Marks on their investments, insurance, and financial planning for approximately twenty years.<sup>73</sup> On October 1, 1999, Hentges sold the Marks’ Trust a \$410,000 whole life, life insurance policy through Columbus Life Insurance Company.<sup>74</sup> On or about

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64. *Protecting Yourself Against Note Fraud*, available at <http://www.savewealth.com/specialreports/notefraud/> (last visited Nov. 21, 2008).

65. *California Leads Security Regulators Crackdown on Promissory Note Fraud* (June 1, 2000), <http://www.michiganannuity.com/news.cfm/Article/5861/California-Leads-Securities-Regulators.html>.

66. *Id.*

67. *Id.*

68. Press Release, N.Y. State Att’y Gen. Dep’t of Law, Spitzer Charges Pair in \$3.8 Million Promissory Note Fraud: Ins. Agents Preyed on Clients (June 1, 2000), [http://www.oag.state.ny.us/press/2000/jun/jun01a\\_00.html](http://www.oag.state.ny.us/press/2000/jun/jun01a_00.html) [hereinafter Press Release].

69. See *California Leads Security Regulators Crackdown on Promissory Note Fraud*, *supra* note 65; Press Release, *supra* note 68.

70. See *California Leads Security Regulators Crackdown on Promissory Note Fraud*, *supra* note 65; Press Release, *supra* note 68.

71. See *Protecting Senior Citizens Against Investment Fraud*, *supra* note 8.

72. Order Revoking License of Michael Edmund Hentges ¶ 2, *State ex rel. Holland v. Hentges* (Ins. Comm’r of Okla. Oct. 27, 2005) (Nos. 05-0688-DIS, 05-1164-DIS).

73. Verified Pet. ¶ 13, *Marks v. Hentges* (Okla. Dist. Ct. July 1, 2005) (No. CJ-2005-03882).

74. *Id.* ¶ 16.

September 9, 2003, Hentges contacted Mrs. Marks seeking to borrow \$25,000. When asked why he thought she would have the money to make such a loan, Hentges referred Mrs. Marks to the \$200,000 she had in the Columbus Life Insurance policy. He also counseled her on the possibility of cashing in certificates of deposits that the Marks owned. Mrs. Marks ultimately borrowed the requested funds from the Columbus Life policy and transferred the funds to Hentges in a check made payable to 76PW, LLC, whose asset was an airplane. To induce Mrs. Marks to make the loan, Hentges promised to repay the money in three months at five percent interest per month.<sup>75</sup> This promise was memorialized in a promissory note given to Mrs. Marks. According to Hentges, the purpose of the loan was to repair the airplane owned by 76PW, LLC. Although the loan was for three months, no payment was made to Mrs. Marks until January 2005.<sup>76</sup>

Approximately one week later, Hentges returned to Mrs. Marks seeking to borrow an additional \$50,000 at an interest rate of two percent per month on behalf of his real estate company. This loan was also facilitated with funds borrowed by Mrs. Marks from the Columbus Life Insurance policy sold to her by Hentges. In return for the loan, Hentges provided Mrs. Marks with a promissory note from Real Estate Marketing Services, LLC (REM). The promissory note promised “to pay Virginia Marks the principal sum of Fifty Thousand and No/100 Dollars (\$50,000.00), together with interest thereon at the rate Five Percent (5%) per month. . . . [d]ue and payable on December 15, 3003 [sic].”<sup>77</sup>

In November 2003, Hentges again approached Mrs. Marks for a loan in the amount of \$25,000 for investment in a real estate company. He advised the Marks that it would be prudent to borrow the money from the Columbus Life Insurance policy that he had sold them. When Mrs. Marks received the money from Columbus Life and delivered it to Hentges, he presented a third promissory note stating “[t]he entire unpaid principal and accrued interest thereon shall be due and payable on February 18, 2004.”<sup>78</sup> In January 2004, Hentges approached Mrs. Marks and requested a \$100,000 loan for investment in his real estate company. As with the prior three loans, Hentges prepared the Columbus Life Insurance “Request for Surrender/Withdrawal Transfer/Loan” paperwork and presented it to the Marks for their signature. He also provided the Marks with an updated copy of the letter requesting that Columbus Life “use this as my authorization to take a loan from my above listed policy in the amount of \$100,000.00. . . .

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75. *Id.* Ex. A, ¶¶ 19-20 (“with the entire unpaid principal and accrued interest thereon shall be due and payable on December 8, 3003[sic].”) Promissory notes are short-term debt instruments that promise high returns with little or no risks.

76. Order Revoking License of Michael Edmund Hentges, *supra* note 72, ¶¶ 2-3.

77. Verified Pet., *supra* note 73, Ex. B, ¶¶ 9-14.

78. *Id.* Ex. C, ¶¶ 19-20.

If you have any questions, please contact my agent, Michael E. Hentges.”<sup>79</sup> A similar letter listing the respective amount had been prepared by Hentges and presented to Columbus Life, along with each loan request. In conjunction with the \$100,000 loan, Hentges provided Mrs. Marks with a promissory note promising to:

pay to Leslie D. Marks and Virginia D. Marks, husband and wife, as joint tenants with rights of survivorship, or order the principal sum of One Hundred Thousand and No/100 Dollars (\$100,000.00), together with interest thereon at the rate of Eight Percent (8%) per annum until all principal and interest due and owing are paid.<sup>80</sup>

Hentges, at the time of the filing of the civil suit, had repaid a combined sum of \$54,000 on the principal and interest on all of the notes.<sup>81</sup> A combined principal and accrued interest in the aggregate sum of \$204,166.70 remained due and owing.<sup>82</sup>

According to the hearing examiner, Mr. Hentges “used his relationship as the insurance agent and financial advisor to induce Mrs. Marks to make the above loans.”<sup>83</sup>

In his dealing with Mrs. Marks, Respondent [Hentges] was dishonest in his promises of repayments of loans and in the transfer of those funds from one business to another which he either owned or had a financial interest. As her insurance agent and financial advisor, he breached his fiduciary relationship to the detriment of Mrs. Marks and to his benefit and that of his business ventures.<sup>84</sup>

In a companion case before the Oklahoma Insurance Commission, Michael Hentges was also found guilty of inducing Janice Marie Kelly, a sixty-five-year-old retired schoolteacher, into making a \$200,000 investment to purchase a twenty-five percent interest in 76PW, LLC.<sup>85</sup> According to the terms of the investment, Ms. Kelly was to recover the amount of the investment in two years at ten percent interest.<sup>86</sup> Default occurred in June 2003 on the date of the first payment. Ms. Kelly received no return on her money until early 2005 when she received \$6,700. In conclusion, the hearing examiner found that

6. The evidence clearly showed Respondent's [Hentges] untrustworthiness and incompetence in using information he had about the financial affairs of Mrs. Marks and Ms. Kelly to borrow money for ventures in which he had a substantial interest and for his benefit and his failure to repay and by defaulting on the first payment dates.

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79. *Id.* ¶¶ 21-23.

80. *Id.* Ex. D, ¶¶ 28-30.

81. *Id.* ¶ 32.

82. *Id.*

83. Order Revoking License of Michael Edmund Hentges, *supra* note 72, ¶ 5.

84. *Id.* ¶ 8.

85. *Id.* ¶ 9.

86. *Id.*



7. All evidence taken together in this case shows a person who used his connections and persuasive powers to take the savings of two ladies in their retirement years for his personal benefit or that of his entities . . . .<sup>87</sup>

The preceding financial elder abuse story is all too common in many respects. However, Hentges's response to the demand letter prepared by Mrs. Marks's attorney sheds additional light on another recurrent problem—restoring the victim to her pre-fraud status—associated with financial elder abuse by insurance agents. As written by Mr. Hentges's attorney:

After reviewing the Leslie & Virginia Marks promissory notes and your letter of June 22, 2005, I told my client that I would not use my skills as an attorney to defend him in this matter . . . that I would represent him only in an effort to get these debts paid. With that in mind, I would like to think that we are on the same side in this case.

Before we can make any progress, however, there are several absolute "truths" that you and your clients must accept. They are as follows:

1. Mr. Hentges is financially unable to make payment at this time;
2. If he loses [sic] his license to sell insurance, his future ability to pay will be severely hampered;
3. He will not pay the usurious and other high interest rates called for in the notes;
4. He will not make a partial payment on a past due note; and
5. He will not pay if he gets sued.

I realize that these absolute "truths" are objectionable, but you must accept them as a predicate to any further negotiations. If you do not, the Marks [sic] will never get paid. Most certainly, I do not intend this as a threat. I know my client. These "truths" are simply the way it is and nothing I can say or do will change them.

Assuming that you will accept the foregoing, in settlement and compromise of these promissory note obligations, I propose the following:

1. The loans be recalculated with interest at the rate of 8% per annum and we arrive upon an agreed "sum certain" due and owing;
2. The Marks [sic] acknowledge the four notes as paid in full and surrender the originals; and
3. Mr. Hentges execute and deliver a new installment note for the "sum certain" with 6% interest thereon, payable in twelve quarterly payments (preferably by electronic transfer).

I anticipate your initial reaction to be negative, but please . . . do not summarily reject this proposal. I have given it a great deal of thought and I believe that it is the only viable solution. At the very least, please call me and give me an opportunity to explain my reasoning in more detail.

Very truly yours,

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87. *Id.* ¶¶ 6-7.

This response letter is significant for a number of reasons. Most significant, however, is the fact that the abuser asserts his precarious financial position—inability to pay—as a shield. In keeping with the art of fraud, the abuser uses the fact that he could possibly lose his sole source of income—selling insurance—as leverage for not being sued and a new deal, the terms of which he negotiates. The totality of the circumstances raises the question of corporate accountability for financial elder abuse perpetuated by insurance agents.

#### IV. THE LEGAL BASIS FOR HOLDING A COMPANY LIABLE FOR AN AGENT'S TORT

The legal basis supporting imposition of tort liability on an employer for the acts committed by others has been classified into four distinct categories. Accordingly, section 219 of the Restatement (Second) of Agency provides:

- (1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.
- (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
  - (a) the master intended the conduct or the consequences, or
  - (b) the master was negligent or reckless, or
  - (c) the conduct violated a non-delegable duty of the master, or
  - (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.<sup>89</sup>

The theories of liability recognized in section 219 are commonly referred to as (1) respondeat superior;<sup>90</sup> (2) direct liability of the employer;<sup>91</sup> (3) liability for a non-delegable duty;<sup>92</sup> and (4) apparent agency.<sup>93</sup>

##### A. Respondeat Superior

Respondeat superior is the most common example of vicarious liability. Pursuant to this doctrine, the culpability of a servant or employee is imputed to the nonculpable master or employer if the former was acting within the scope of his or her employment with the latter at the time of the

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88. Verified Pet., *supra* note 73, Ex. F, ¶ 35.

89. RESTATEMENT (SECOND) OF AGENCY § 219 (1958).

90. *Id.* § 219(1).

91. *Id.* § 219(2)(a)-(b).

92. *Id.* § 219(2)(c).

93. *Id.* § 219(2)(d).

tortious act.<sup>94</sup> A variety of rationales have been advanced in explanation of respondeat superior.<sup>95</sup> However, two theories—"control" and "enterprise liability"—have been accorded the greatest weight in contemporary legal thought.<sup>96</sup> Pursuant to the control theory, liability may be imposed on the employer whenever the act of the employee was committed with the implied authority, acquiescence, or subsequent ratification of the employer.<sup>97</sup> According to the enterprise theory, respondeat superior is limited to requiring an enterprise to bear the loss incurred as a result of an employee's negligence. The act of the employee, however, must be so connected to his employment as to justify the imposition of liability on the employer.<sup>98</sup> The enterprise theory presupposes that an employer's enterprise creates inevitable risks as a part of doing business and that the employer is liable for risks that are inherent in or created by the enterprise.<sup>99</sup>

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94. W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* 501-02 (W. Page Keeton ed., 5th ed. 1984). While respondeat superior is universally expressed in terms of the employer being held liable for an employee's negligence committed within the scope of employment, the doctrine has broader application and imputes liability on an employer for any torts committed by an employee within the scope of employment. *See, e.g.*, Ala. Power Co. v. Bodine, 105 So. 869 (Ala. 1925) (doctrine applicable to intentional tort); Taranto v. N. Slope Borough, 909 P.2d 354 (Alaska 1996) (applicable to intentional tort); Perez v. Van Groningen & Sons, Inc., 719 P.2d 676 (Cal. 1986) (doctrine applicable to intentional tort); Colo. Comp. Ins. Auth. v. Jones, 131 P.3d 1074 (Colo. Ct. App. 2005) (doctrine applicable to intentional torts); Mullen v. Horton, 700 A.2d 1377 (Conn. App. Ct. 1997) (doctrine applicable to willful tort); Howard v. J.H. Harvey Co., 521 S.E.2d 691 (Ga. Ct. App. 1999) (doctrine applicable to intentional tort); Stropes v. Heritage House Childrens Ctr. of Shelbyville, Inc., 547 N.E.2d 244 (Ind. 1989) (doctrine applicable to criminal conduct); Williams v. Cmty. Drive-In Theater, Inc., 520 P.2d 1296 (Kan. 1974) (doctrine applicable to intentional tort); Patterson v. Blair, 172 S.W.3d 361 (Ky. 2005) (doctrine applicable to intentional and criminal acts); Kornec v. Mike Horse Mining & Milling Co., 180 P.2d 252 (Mont. 1947) (doctrine applicable to intentional and malicious conduct); Medlin v. Bass, 398 S.E.2d 460 (N.C. 1990) (doctrine applies to intentional tort); Los Ranchitos v. Tierra Grande, Inc., 861 P.2d 263 (N.M. Ct. App. 1993) (doctrine applicable to intentional and criminal conduct); Drake v. Star Mkt. Co., 526 A.2d 517 (R.I. 1987) (doctrine applies to intentional tort).

95. *See, e.g.*, John H. Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 315, 383, 441 (1894); T. BATY, *VICARIOUS LIABILITY* 146-54 (1916); Fleming James, Jr., *Vicarious Liability*, 28 TUL. L. REV. 161 (1954).

96. KEETON ET AL., *supra* note 94, at 500-01.

97. Fruit v. Schreiner, 502 P.2d 133, 140 (Alaska 1972).

98. *See* Beard v. Brown, 616 P.2d 726, 737 (Wyo. 1980).

99. *See* Fruit, 502 P.2d 133; Inter Mountain Mortgage, Inc. v. Sulimen, 93 Cal. Rptr. 2d 790 (Cal. Ct. App. 2000); Sheftic v. Marecki, No. 56764, 1999 Conn. Super. LEXIS 2953 (Conn. Super. Ct. Oct. 21, 1999); Carroll Air Sys. v. Greenbaum, 629 So. 2d 914 (Fla. Dist. Ct. App. 1993); Henderson v. Prof'l Coatings Corp., 819 P.2d 84 (Haw. 1991); Shelby v. Truck & Bus Group Div. of Gen. Motors Corp., 533 N.E.2d 1296 (Ind. Ct. App. 1989); Riniker v. Wilson, 623 N.W.2d 220 (Iowa Ct. App. 2000); Brillhart v. Scheier, 758 P.2d 219 (Kan. 1988); Richardson v. APAC-Miss., 631 So. 2d 143 (Miss. 1994); Carter v. Reynolds, 815 A.2d 460 (N.J. 2003).

The general rule of vicarious liability is beyond dispute. However, vicarious liability has been applied to so many exceptional circumstances that "the rule is now primarily important as a preamble to the catalog of its exceptions."<sup>100</sup> Therefore, "[w]hat has emerged as the modern justification for vicarious liability is a rule of policy, a deliberate allocation of risk."<sup>101</sup> Thus, respondeat superior is an expression of the sentiment that it would be unjust to permit an employer to gain from the efforts of others without being responsible for the mistakes, errors of judgment, and frailties of those working for his benefit. As such, respondeat superior provides an incentive to monitor employees and deter wrongful conduct.<sup>102</sup>

Two distinct requirements must be met to establish the liability of an employer for the tortious act of an employee. First, it must be demonstrated that the requisite master/servant, employer/employee, or principal/agent relationship existed at the time of the tortious act.<sup>103</sup> This requirement is concerned exclusively with the nature of the relationship between the actor and the person being charged with responsibility for the consequences of the act. If the requisite relationship does not exist, no further inquiry is necessary and respondeat superior may not be invoked. Where the requisite relationship is proven to exist, however, the second requirement—that the tortious act took place within the scope of employment—must be satisfied.<sup>104</sup>

The test used in the vast majority of jurisdictions for determining whether the relational requirement, i.e., employer/employee, for application of respondeat superior has been satisfied is that articulated in Restatement (Second) of Agency section 220. According to section 220:

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

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100. *Pac. Fire Ins. Co. v. Kenny Boiler & Mfg. Co.*, 277 N.W. 226, 228 (Minn. 1937).

101. KEETON ET AL., *supra* note 94, at 500 (citation omitted).

102. *Brady v. Dairy Fresh Prods. Co.*, 974 F.2d 1149, 1151 (9th Cir. 1992).

103. *Chamlee v. Johnson-Rast & Hays*, 579 So. 2d 580 (Ala. 1990); *Estate of Himsel v. State*, 36 P.3d 35 (Alaska 2001); *State v. Superior Court*, 524 P.2d 951 (Ariz. 1974) (en banc); *Lefebvre v. Delmar Appliance of Del., Inc.*, No. 98C-01-026(WLW), 2001 Del. Super. LEXIS 122 (Del. Super. Ct. Mar. 23, 2001); *Murphy v. Army Distaff Found., Inc.*, 458 A.2d 61 (D.C. 1983); *Torres v. Tandy Corp.*, 592 S.E.2d 111 (Ga. Ct. App. 2003); *Godar v. Edwards*, 588 N.W.2d 701 (Iowa 1999); *Doe v. Roman Catholic Church*, 615 So. 2d 410 (La. Ct. App. 1993); *Rockwell v. Sun Harbor Budget Suites*, 925 P.2d 1175 (Nev. 1996); *Jordan v. Cates*, 935 P.2d 289 (Okla. 1997).

104. *Chamlee*, 579 So. 2d 580; *Estate of Himsel*, 36 P.3d 35; *Superior Court*, 524 P.2d 951; *Lefebvre*, 2001 Del. Super. LEXIS 122; *Murphy*, 458 A.2d 61; *Torres*, 592 S.E.2d 111; *Godar*, 588 N.W.2d 701; *Doe*, 615 So. 2d 410; *Rockwell*, 925 P.2d 1175; *Jordan*, 935 P.2d 289.

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment; whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant; and
- (j) whether the principal is or is not in business.<sup>105</sup>

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105. Section 220 of the Restatement (Second) of Agency is used in forty-two states and in the District of Columbia to determine whether the requisite relationship exists. *See Powell v. Tanner*, 59 P.3d 246 (Alaska 2002); *Ringling Bros. & Barnum Bailey Combined Shows, Inc. v. Superior Court*, 680 P.2d 174 (Ariz. Ct. App. 1983); *Blankenship v. Overholt*, 786 S.W.2d 814 (Ark. 1990); *Grant v. Woods*, 139 Cal. Rptr. 533 (Cal. Ct. App. 1977); *Norton v. Gilman*, 949 P.2d 565 (Colo. 1997); *Hanson v. Transp. Gen., Inc.*, 716 A.2d 857 (Conn. 1998); *Falconi v. Coombs & Coombs, Inc.*, 902 A.2d 1094 (Del. 2006); *Sturdivant v. Seaboard Serv. Sys., Ltd.*, 459 A.2d 1058 (D.C. 1983); *Harper v. Toler*, 884 So. 2d 1124 (Fla. Dist. Ct. App. 2004); *Atlanta Commercial Builders, Inc. v. Polinsky*, 250 S.E.2d 781 (Ga. Ct. App. 1978); *Bailey's Bakery, Ltd. v. Borthwick*, No. 2639, 1948 Haw. LEXIS 34 (Haw. Feb. 14, 1948); *Van Vranken v. Fence-Craft*, 430 P.2d 488 (Idaho 1967); *Buccieri v. Ill. Cent. Gulf R.R.*, 601 N.E.2d 840 (Ill. App. Ct. 1992); *Carter v. Prop. Owners Ins. Co.*, 846 N.E.2d 712 (Ind. Ct. App. 2006); *Burr v. Apex Concrete Co.*, 242 N.W.2d 272 (Iowa 1976); *Brillhart v. Scheier*, 758 P.2d 219 (Kan. 1988); *Knorp v. Albert*, 28 P.3d 1024 (Kan. Ct. App. 2001); *Ky. Unemployment Ins. Comm'n v. Landmark Cmty. Newspapers of Ky., Inc.*, 91 S.W.3d 575 (Ky. 2002); *Kennedy v. Pine Tree Council & Boy Scouts of Am.*, No. CV-91-752, 1995 Me. Super. LEXIS 216 (Me. Super. Ct. June 14, 1995); *Balt. Harbor Characters, Ltd. v. Ayd*, 780 A.2d 303 (Md. 2001); *Salmon v. Anthony Mfg. Co.*, No. 97-05182E, 1998 Mass. Super. LEXIS 582 (Mass. Super. Ct. Nov. 5, 1998); *Bergman v. Cleveland Cliffs Iron Co.*, 425 N.W.2d 97 (Mich. 1988); *Lindberry v. J.A. Danens & Son, Inc.*, 123 N.W.2d 695 (Minn. 1963); *Richardson v. APAC-Miss., Inc.*, 631 So. 2d 143 (Miss. 1994); *Griffin v. Sinks Ford Sales*, 413 S.W.2d 856 (Mo. Ct. App. 1967); *Watts v. Mont. Rail Link, Inc.*, 975 P.2d 283 (Mont. 1997); *Sandrock v. Taylor*, 174 N.W.2d 186 (Neb. 1970); *Boissonnault v. Bristol Federated Church*, 642 A.2d 328 (N.H. 1994); *Carter v. Reynolds*, 815 A.2d 460 (N.J. 2003); *Benavidez v. Sierra Blanca Motors*, 959 P.2d 569 (N.M. Ct. App. 1998); *Cook v. Morrison*, 413 S.E.2d 922 (N.C. Ct. App. 1992); *Blackstone v. Daugherty*, No. OT-78-22, 1979 Ohio App. LEXIS 9400 (Ohio Ct. App. Feb. 23, 1979); *Kowaleski v. Kowaleski*, 385 P.2d 611 (Or. 1963); *Commonwealth v. Roberts*, 141 A.2d 393 (Pa. 1958); *Estate of Perry v. Green Card, Inc.*, No. PC/03-4671, 2006 R.I. Super. LEXIS 170 (R.I. Super. Ct. Nov. 30, 2006); *Jeitz v. Fleming*, 217 N.W.2d 868 (S.D. 1974); *Ascolese v. Misco, Inc.*, No. 88-283-

Whether the requisite relationship exists ultimately depends on the facts of the specific case. The presence of any one of the relevant considerations alone is not dispositive.<sup>106</sup> Neither is the presence of all of the factors required in order to make the determination. The relevant considerations are merely considered along with all of the other circumstances relevant to the issue of whether, in fact, the employer retained a degree of control sufficient to support a finding that a master/servant relationship existed at the time of the tortious act.<sup>107</sup> Approximately eight jurisdictions continue to rely on the common law concept of control as dispositive of whether the requisite relationship existed at the time of the tortious act.<sup>108</sup>

Scope of employment operates as a limitation on the relational aspect of respondeat superior. In other words, the employer's liability exposure extends no further than the torts committed by the employee while acting in the scope of his or her employment.<sup>109</sup> Despite its simplicity, scope of employment is a very vague and nebulous concept. As a term of art:

[t]his highly indefinite phrase . . . is so devoid of meaning in itself that its very vagueness has been of value in permitting a desirable degree of flexibility in decisions. It is obviously no more than a bare formula to cover the unordered and unauthorized acts of the servant for which it is found to be expedient to charge the master with liability, as well as to exclude other acts for which it is not.<sup>110</sup>

Accordingly, the Restatement (Second) of Agency section 228 recognizes a number of factors that should be considered in resolving the question. According to section 228:

(1) Conduct of a servant is within the scope of employment if, but only if:

II, 1989 Tenn. App. LEXIS 236 (Tenn. Ct. App. Mar. 22, 1989); *Atchison, Topeka & Santa Fe Ry. Co. v. Port of Beaumont Navigation Dist. of Jefferson County, Tex.*, 438 S.W.2d 843 (Tex. App. 1969); *Glover v. Boy Scouts of Am.*, 923 P.2d 1383 (Utah 1996); *Clements v. MCV Associated Physicians*, 61 Va. Cir. 673 (Va. Cir. Ct. 2002); *RLI Ins. Co. v. Vt. Agency of Transp.*, 762 A.2d 475 (Vt. 2000); *Hollingbery v. Dunn*, 411 P.2d 431 (Wash. 1966); *Meka v. Falk Corp.*, 306 N.W.2d 65 (Wis. 1981).

106. *Anderson v. PPCT Mgmt. Sys., Inc.*, 145 P.3d 503, 507-08 (Alaska 2006); *Carter v. Wright*, 949 S.W.2d 157, 160 (Mo. Ct. App. 1997).

107. *Brock v. Difani*, No. CA98-351, 1999 Ark. App. LEXIS 37, at \*8 (Ark. Ct. App. Jan. 20, 1999).

108. Literal control is not required. Rather, the inquiry centers around whether the employer had the right to control the method, manner, or operative details of work. *Terry v. Phillips 66 Co.*, 591 So. 2d 33 (Ala. 1991); *Cupit v. Grant*, 488 So. 2d 358 (La. Ct. App. 1986); *Nat'l Convenience Stores v. Fantauzzi*, 584 P.2d 689 (Nev. 1978); *Berger v. Dykstra*, 610 N.Y.S.2d 401 (N.Y. App. Div. 1999); *Doan v. City of Bismarck*, 632 N.W.2d 815 (N.D. 2001); *Anderson v. West*, 241 S.E.2d 551 (S.C. 1978); *Zirkle v. Winkler*, 585 S.E.2d 19 (W. Va. 2003); *Combined Ins. Co. v. Sinclair*, 584 P.2d 1034 (Wyo. 1978).

109. *Patterson v. Blair*, 172 S.W.3d 361 (Ky. 2005); *Fruit v. Schreiner*, 502 P.2d 133 (Alaska 1972); *Robarge v. Bechtel Power Corp.*, 640 P.2d 211 (Ariz. Ct. App. 1982); *Jones v. Blair*, 387 N.W.2d 349 (Iowa 1986).

110. *KEETON ET AL.*, *supra* note 94, at 502.

- (a) it is of the kind he is employed to perform;
- (b) it occurs substantially within the authorized time and space limits;
- (c) it is actuated, at least in part, by a purpose to serve the master, and
- (d) if force is intentionally used by the servant against another, the use of force is not unexpected by the master.

(2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.<sup>111</sup>

While the essential considerations for drawing the ultimate conclusion are stated in section 228, additional factors are stated in section 229.<sup>112</sup> A few jurisdictions, however, treat the section 229 factors as dispositive of

111. Section 228 of the Restatement (Second) of Agency is used in thirty-one states and in the District of Columbia to determine whether the requisite relationship exists. See *Luth v. Rogers & Babler Constr. Co.*, 507 P.2d 761 (Alaska 1973); *Olson v. Staggs-Bilt Homes, Inc.*, 534 P.2d 1073 (Ariz. 1975); *Duperry v. Rodrigues*, No. CV010278771S, 2004 Conn. Super. LEXIS 1202 (Conn. Super. Ct. May 5, 2004); *Coates v. Murphy*, 270 A.2d 527 (Del. 1970); *District of Columbia v. Coron*, 515 A.2d 435 (D.C. 1986); *Powers v. E.R. Precision Optical Corp.*, 886 So. 2d 281 (Fla. Dist. Ct. App. 2004); *Wong-Leong v. Haw. Indep. Refinery, Inc.* 879 P.2d 538 (Haw. 1994); *Wooley v. Debest Plumbing, Inc.*, 983 P.2d 864 (Idaho 1999); *Bagent v. Blessing Care Corp.*, 862 N.E.2d 985 (Ill. 2007); *Celebration Fireworks, Inc. v. Smith*, 727 N.E.2d 450 (Ind. 2000); *LeBrane v. Lewis*, 292 So. 2d 216 (La. 1974); *Spencer v. V.I.P., Inc.*, 910 A.2d 366 (Me. 2006); *Tall v. Bd. of School Comm'rs*, 706 A.2d 659 (Md. Ct. Spec. App. 1998); *Kansallis v. Fern*, 659 N.E.2d 731 (Mass. 1996); *Kasner v. Gage*, 161 N.W.2d 40 (Minn. 1968); *Jones v. B.L. Dev. Corp.*, 940 So. 2d 961 (Miss. Ct. App. 2006); *Noah v. Ziehl*, 759 S.W.2d 905 (Mo. Ct. App. 1988); *Maguire v. State*, 835 P.2d 755 (Mont. 1992); *Johnson v. Evers*, 238 N.W.2d 474 (Neb. 1976); *Pierson v. Hubbard*, 802 A.2d 1162 (N.H. 2002); *Carter v. Reynolds*, 815 A.2d 460, 464 (N.J. 2003); *Los Ranchitos v. Tierra Grande, Inc.*, 861 P.2d 263 (N.M. Ct. App. 1993); *Dinkins v. Farley*, 434 N.Y.S.2d 325 (1980). *But see* *Ramos v. Jake Realty Co.*, 801 N.Y.S.2d 566 (N.Y. App. Div. 2006); *Nelson v. Gillette*, 571 N.W.2d 332 (N.D. 1997); *Hale v. Spitzer Dodge Inc.*, No. 04AP-1379, 2006 Ohio App. LEXIS 3246 (Ohio Ct. App. June 29, 2006); *Ferrell v. Martin*, 419 A.2d 152 (Pa. Super. Ct. 1980); *Alberts v. Mutual Serv. Cas. Ins. Co.*, 123 N.W.2d 96 (S.D. 1963); *Morris v. Collis Foods, Inc.*, No. W2001-00918-COA-R3-CV, 2002 Tenn. App. LEXIS 441 (Tenn. Ct. App. June 19, 2002); *Brueckner v. Norwich Univ.*, 730 A.2d 1086 (Vt. 1999); *Tremel v. Reid*, 45 Va. Cir. 364 (Va. Cir. Ct. 1998); *Robel v. Roundup Corp.*, 59 P.3d 611 (Wash. 2002); *Finsland v. Phillips Petroleum Co.*, 204 N.W.2d 1 (Wis. 1973).

112. See *Luth*, 507 P.2d at 764; *Ortiz v. Clinton*, 928 P.2d 718 (Ariz. 1996); *State v. Hoshijo*, 76 P.3d 550 (Haw. 2003); *Celebration Fireworks*, 727 N.E.2d at 453; *LeBrane*, 292 So. 2d at 218-19; *Erving v. Inhabitants of Wellington*, No. CV-92-040, 1994 Me. Super. LEXIS 66 (Me. Super. Ct. Feb. 25, 1994); *Tall*, 706 A.2d at 668; *Kasner*, 161 N.W.2d at 42; *Noah*, 759 S.W.2d at 910-11; *House v. Kalispell Reg'l Med. Ctr.*, No. DV-01-426(B), 2002 Mont. Dist. LEXIS 3387 (Mont. Dist. Ct. Oct. 21, 2002); *Daigle v. City of Portsmouth*, 534 A.2d 689 (N.H. 1987); *Carter*, 815 A.2d at 464; *Ramos*, 801 N.Y.S.2d at 567 (test for scope of employment); *Keck v. Masters*, No. C-950037, 1995 Ohio App. LEXIS 5188 (Ohio Ct. App. Nov. 29, 1995); *Alberts*, 123 N.W.2d at 98; *Morris*, 2002 Tenn. App. LEXIS 441 at \*9; *Brueckner*, 730 A.2d at 1091; *Sanders v. Day*, 468 P.2d 452 (Wash. Ct. App. 1970); *Goode v. Combined Ins. Co.*, 308 N.W.2d 777 (Wis. Ct. App. 1981).

whether the employee was acting within the scope of employment.<sup>113</sup> Nevertheless, the section 229 factors "have primary reference to the physical activities of servants."<sup>114</sup> Consequently, they are not designed to deal with the special problems of determining whether an intentional tort, such as fraud, is so similar or incidental to the conduct authorized as to be within the scope of employment.<sup>115</sup>

It is universally recognized that the doctrine of respondeat superior is applicable to situations involving intentional or criminal activities, if they are committed within the scope of employment.<sup>116</sup> The flexibility of the phrase "scope of employment" is especially noteworthy in the context of fraud cases involving agents of corporations. For example, the Alabama Supreme Court has consistently observed:

that a corporation is liable for the torts of its employees, both agent and servant, based upon the principle of respondeat superior, not the doctrine of agency. "The factual question to be determined is whether the act complained of was done either by agent or servant while acting within the course and scope of his employment; the corporation or principle may be liable in tort for acts of its servants or agents done within the scope of employment, real or apparent, even though it did not authorize or ratify such acts or even expressly forbade them." The courts have further held the principle liable for his agent's fraud committed within the actual or apparent scope of his employment, even where the fraud was committed strictly for the agent's own benefit and to the principal's detriment.<sup>117</sup>

Even in the absence of a specific rule of law, determining scope of employment from a more traditional legal perspective entails a degree of flexibility sufficient to encompass financial elder abuse. For example, in *Baker v. Stewart Title & Trust of Phoenix, Inc.*,<sup>118</sup> an attorney, Friedman, solicited about eighty investors to invest in a number of limited partnerships. With the participation of a real estate broker, accountants, and title companies,

113. See, e.g., *Riniker v. Wilson*, 623 N.W.2d 220 (Iowa Ct. App. 2000); *Bryant v. Brannen*, 446 N.W.2d 847 (Mich. Ct. App. 1989); *Dart v. Yellow Cab, Inc.*, 401 S.W.2d 874 (Tex. App. 1966).

114. RESTATEMENT (SECOND) OF AGENCY § 229 cmt. a (1958).

115. See Charles Davant IV, *Employer Liability for Employee Fraud: Apparent Authority or Respondeat Superior?*, 47 S.D. L. REV. 554 (2002).

116. See *Condict v. Condict*, 664 P.2d 131 (Wyo. 1981); *Stevenson v. Precision Standard Inc.*, 762 So. 2d 820 (Ala. 1999); *Taranto v. N. Slope Borough*, 909 P.2d 354 (Alaska 1996); *Patterson v. Blair*, 172 S.W.3d 361 (Ky. 2005); *Brown v. King*, 767 N.E.2d 357 (Ill. App. Ct. 2001); *Cazenave v. Pierce*, 568 So. 2d 1360 (La. Ct. App. 1990); *Los Ranchitos*, 861 P.2d at 267; *Thompson v. Everett Clinic*, 860 P.2d 1054 (Wash. Ct. App. 1993). See also the RESTATEMENT (SECOND) OF AGENCY § 231, which provides: "An act may be within the scope of employment although consciously criminal or tortious."

117. *Pac. Mut. Life Ins. Co. v. Haslip*, 553 So. 2d 537, 541 (Ala. 1990) (citation omitted). See also *Land & Assocs., Inc. v. Simmons*, 562 So. 2d 140 (Ala. 1989) (limiting the rule of vicarious liability to soliciting insurance agents; an insurance company is directly liable for the fraud committed by a general agent).

118. 5 P.3d 249 (Ariz. Ct. App. 2000).



Friedman defrauded the investors by purchasing the land under a fake name and then reselling it to the limited partnership at an inflated price. DeAngio, an employee of defendant Stewart Title Company, processed at least eight escrows that Friedman established in the name of the fictitious buyers or shell companies. According to the evidence, DeAngio knowingly participated in at least two transactions that facilitated Friedman's scheme and shared in the undisclosed profits and fees. In determining whether DeAngio was acting within the scope of her employment, the court recognized that conduct falls within said scope if it is the kind the employee is employed to perform, it occurs within the authorized time and space limits, and it furthers the employer's business, even if the employer has expressly forbidden it.<sup>119</sup>

According to the *Baker* Court, DeAngio's action fell within the scope of her employment because she typically notarized documents and opened and closed escrows. Her tortious actions involved notarizing documents for Friedman that she knew he had signed under fictitious names and then concealing his fraudulent signature. In the context of analyzing whether the employee's conduct furthered the employer's business, Stewart Title Company contended that the escrow fees, collection accounts fees, and title insurance fees it was paid would have been received even if DeAngio had acted legitimately, and that the increase in purchase prices of properties that resulted from her malfeasance did not affect the fees to which Stewart Title Company was entitled.<sup>120</sup> The court, however, concluded that:

DeAngio's activity benefitted and furthered the business of Stewart Title because of the repeat business that she generated with Friedman. In fact, DeAngio stated that Stewart Title encouraged its escrow officers to procure new clients and develop business with existing clients. These clients would usually follow the escrow officers when they changed employment. Generating such benefits may suffice for liability.<sup>121</sup>

According to the court, providing incidental and gratuitous services to customers could improve customer relations and further the company's purpose.<sup>122</sup>

Another analytical perspective for assessing the merits of the scope of employment requirement in the area of financial elder abuse can be gleaned from the California Court of Appeal's decision in *Inter Mountain Mortgage, Inc. v. Sulimen*.<sup>123</sup> In *Inter Mountain Mortgage*, the trial court granted a motion for summary judgment in favor of the defendant/employer on the issue of the applicability of respondeat superior. The action arose out of an

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119. *Id.* at 254.

120. *Id.* at 255.

121. *Id.*

122. *Id.*

123. 93 Cal. Rptr. 2d 790 (Cal. Ct. App. 2000).

alleged fraudulent loan transaction scheme perpetrated by one of defendant's loan representatives against Inter Mountain Mortgage, the mortgage loan brokerage that processed the loan.

According to the Court of Appeals in *Inter Mountain Mortgage*:

"an employee's willful, malicious and even criminal torts may fall within the scope of his or her employment for purposes of respondeat superior, even though the employer has not authorized the employee to commit crimes or intentional torts." "The employer is liable not because the employer has control over the employee or is in some way at fault, but because the employer's enterprise creates inevitable risks as a part of doing business. Under this theory, an employer is liable for 'the risks inherent in or created by the enterprise.'"<sup>124</sup>

Pursuant to this perspective, in order for conduct to be within the scope of employment, a nexus between the employee's tort and the employment must exist.<sup>125</sup> This nexus—that the tort be engendered by or arise from the work—is different from "but for" causation.<sup>126</sup> The fact that the employment brought the tortfeasor and victim together in time and space is insufficient evidence for the required nexus. Rather, the proof must demonstrate that the incident leading to the injury was an outgrowth of the employment. Thus, "the risk of tortious injury must be 'inherent in the working environment' or 'typical of or broadly incidental to the enterprise [the employer] has undertaken.'"<sup>127</sup> Accordingly, courts should examine the employee's conduct as a whole, rather than merely focusing on the wrongful act itself. The pertinent inquiry is whether the injury-causing act was one in a series of acts authorized by the employer so that the job-created authority facilitated the commission of the tort.

"The employee's tortious conduct must also be 'a generally foreseeable consequence of the activity.'"<sup>128</sup> Foreseeability means that the employee's conduct, in the context of the particular enterprise, is not so unusual or startling that it would be unjust to include the loss resulting from it among other costs of doing business.<sup>129</sup>

According to the evidence in *Inter Mountain Mortgage*, the alleged fraudulent transaction occurred during the employee's employment with the defendant as a loan representative. The employee also represented that he was submitting the loan to Inter Mountain as a part of his job responsibilities. As noted by the appellate court in reversing the grant of summary judgment in favor of the employer:

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124. *Id.* at 794 (citations omitted).

125. *Id.* at 795.

126. *Id.*

127. *Id.* at 795 (citations omitted).

128. *Inter Mountain Mortgage*, 93 Cal. Rptr. 2d at 795.

129. *Id.*

Under such circumstances, a nexus existed between Baskaron's [employee] alleged tort, the fraudulent loan transaction, and his employment as a loan representative. The risk of one of defendants' loan representatives submitting a fraudulent loan application, such as the Brown loan application, was a generally foreseeable risk inherent and incidental to defendants' mortgage loan brokerage business. Baskaron's employment as a loan representative placed him in the position of being able to submit fraudulent loan applications. Such an occurrence was "not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business."<sup>130</sup>

The practical effect of each perspective is its recognition of the important role of the jury in determining the scope of employment in fraud cases.<sup>131</sup> Each perspective also demonstrates the significance of public policy in respondeat superior analysis. The relevant public policy considerations include: (1) whether application of the doctrine of respondeat superior will have a preventive or deterrent effect; (2) whether application of the doctrine will provide greater assurance of compensation to victims; and (3) whether application will ensure that the victim's losses are equitably borne by those benefiting from the enterprise responsible for the injury.<sup>132</sup> These considerations support application of the doctrine of respondeat superior to financial elder abuse cases. Exposing insurance companies that employ agents who commit financial elder abuse furthers the policy objectives of the doctrine by encouraging companies to better train, monitor, and supervise their employees.

Despite almost universal precedence to the contrary, there is legal authority for the proposition that apparent authority is the exclusive basis for holding an employer vicariously liable for an employee's fraud.<sup>133</sup> In *Grease Monkey International, Inc. v. Montoya*,<sup>134</sup> Arthur Sensenig was President, Chief Operating Officer, and Chairman of the Board of Grease Monkey from 1983 through 1991. Sensenig had broad authority to act as general officer and agent, and raise capital for the company from banks and other lenders, including private citizens like the Montoyas.<sup>135</sup>

From 1983 through 1991, Sensenig secured payments from Mr. Montoya, representing that the payments were investments in Grease Mon-

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130. *Id.* at 795-96 (citation omitted).

131. *Pac. Mut. Life Ins. Co. v. Haslip*, 553 So. 2d 537, 541 (Ala. 1990); *Inter Mountain Mortgage*, 43 Cal. Rptr. 2d 790; *Baker v. Stewart Title & Trust Properties of Phoenix, Inc.*, 5 P.3d 249 (Ariz. Ct. App. 2000).

132. *Farmers Ins. Group v. County of Santa Clara*, 906 P.2d 440, 454-55 (Cal. 1995).

133. *See Grease Monkey Int'l, Inc. v. Montoya*, 904 P.2d 468 (Colo. 1995). For a detailed discussion of this theory, see Charles Davant IV, *supra* note 115.

134. 904 P.2d 468 (Colo. 1995).

135. Mr. Montoya met Arthur Sensenig in the mid 1960s. At that time, Sensenig was a teller at a bank where Mr. Montoya was a customer. During the 1960s and 1970s, Sensenig gave Mr. Montoya investment advice. Montoya was impressed by Sensenig and his progress at the bank. Sensenig, before leaving the bank, ultimately achieved the position of bank vice-president. *Id.*

key. Sensenig secured the payments by representing to Mr. Montoya that, because Grease Monkey was a new company, it did not have its own bank accounts, and that as its President and Chairman of the Board, he used his personal account as the corporate account. Sensenig, in furtherance of his fraudulent scheme, took Mr. Montoya to Grease Monkey's offices and showed him a promotional slide show presentation used by Grease Monkey to solicit franchise business.

After writing out an investment check, the Montoyas received a promissory note as evidence of their investment. When Sensenig delivered interest payments to the Montoyas, he brought charts showing the growth and success of Grease Monkey. Mailings to the Montoyas regarding their investments were on Grease Monkey letterhead, and calls concerning the investments were made to Sensenig at Grease Monkey. Sensenig also showered the Montoyas with promotional items from Grease Monkey, such as pens, hats, and sweatshirts. Ultimately, none of the money paid by Mr. Montoya to Sensenig was invested in Grease Monkey. Rather, Sensenig used it for his personal benefit. Consequently, the Montoyas filed suit against Grease Monkey, as Sensenig's employer, for breach of contract, fraud, misrepresentation, breach of duty of good faith, promissory estoppel, extreme and outrageous conduct, and negligent hiring and supervision. At trial, the Montoyas prevailed on their fraud and misrepresentation claims.

According to the Colorado Supreme Court in *Grease Monkey*, the facts of the case required that the concepts of principal-agent, master-servant, and employer-independent contractor legal relationships be accurately defined and applied.<sup>136</sup> As observed by the Court:

Apparent authority liability is not based upon the rules of respondeat superior, and it is not "essential to find that the agent was motivated by an intent to act for his master's purposes." Actions for misrepresentations and fraud generally fit into the category of torts which do not lie within the scope and principles of respondeat superior. In many of these situations, the agent's position enables him to perpetrate the fraud, and the agent acted for his own purposes. However, "[t]he fact that the agent is acting from purely personal motives is immaterial unless this is known to the other party."<sup>137</sup>

The Court's rationale in *Grease Monkey* was that "respondeat superior and master-servant principles constitute an aspect of agency law distinct from fraud based on the apparent authority analysis of [the Restatement (Second) of Agency] section 261."<sup>138</sup> Pursuant to the apparent authority theory, the liability of the principal is based on the fact that the agent's position facilitates the commission of the fraud because from a third person's perspective, the transaction appears normal on its face, and the agent ap-

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136. *Grease Monkey*, 904 P.2d at 472.

137. *Id.* at 473 (citations omitted).

138. *Id.* at 473-74.

pears to be acting in the ordinary course of business. Consequently, “the apparent authority doctrine of section 261 sets forth the appropriate analytical framework for the present case.”<sup>139</sup>

The drafters of the Restatement (Second) of Agency expressly recognized that the factors used to determine scope of employment in the context of respondeat superior are concerned with the “physical activities of servants.”<sup>140</sup> Since fraud was not considered to be a physical act, “special rules which deal with situations in which the master may be liable for deceit . . . and similar matters . . . are stated in Sections 246-264.”<sup>141</sup> These special rules premise the liability of a master for the fraud of an employee on the doctrine of apparent authority exclusively and not on respondeat superior. Both the rule and its supporting rationale—i.e., that apparent authority and not respondeat superior is the proper basis for holding an employer liable for an employee’s fraud—were carried over into the tentative drafts of the Restatement (Third) of Agency.<sup>142</sup>

## B. Apparent Authority or Aided by Existence of the Agency Relationship

The Restatement (Second) of Agency section 219(2)d provides for two different theories of liability.<sup>143</sup> The first clause recognizes an employer’s vicarious liability for the torts of an employee based on the doctrine of apparent authority, while the second creates liability for an employer whose agent was aided in accomplishing the tort by the existence of the agency relationship.<sup>144</sup>

### 1. *Apparent Authority*

“Apparent authority is 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

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139. *Id.* at 475.

140. RESTATEMENT (SECOND) OF AGENCY § 229 cmt. A (1958).

141. *Id.*

142. RESTATEMENT (THIRD) OF AGENCY § 2.03 cmts. a-b (Tentative Draft 2000).

143. *See Doe v. Forrest*, 853 A.2d 48, 51 (Vt. 2004) (adopting § 219(2)(d)); *Montgomery v. Shelby & Belle, LLC*, No. 255278, 2005 Mich. App. LEXIS 2292 (Mich. Ct. App. Sept. 22, 2005) (unclear if Michigan recognizes § 219(2)(d)); *Mahar v. StoneWood Transp.*, 823 A.2d 540, 545 (Me. 2003) (recognizing § 219(2)(d)); *Payton v. N.J. Tpk. Auth.*, 678 A.2d 279, 283 (N.J. Super. 1996) (recognizing § 219(2)(d)); *Arizona v. Schallock*, 941 P.2d 1275, 1280 (Ariz. 1997) (en banc) (recognizing § 219(2)(d)); *Olson v. Connerly*, 457 N.W.2d 479, 482 (Wis. 1990) (recognizing § 219(2)(d)).

144. *See Forrest*, 853 A.2d at 51 (adopting § 219(2)(d)); *Montgomery*, 2005 Mich. App. LEXIS 2292 (unclear if Michigan recognizes § 219(2)(d)); *Mahar*, 823 A.2d at 545 (recognizing § 219(2)(d)); *Payton*, 678 A.2d at 283 (recognizing § 219(2)(d)); *Schallock*, 941 P.2d at 1280 (recognizing § 219(2)(d)); *Olson*, 457 N.W.2d at 482 (recognizing § 219(2)(d)).

such third persons.”<sup>145</sup> Apparent authority and respondeat superior are both interrelated doctrines of vicarious liability in that either would hold an employer liable for the harm caused by an employee committed with apparent authority and while acting in the scope of his or her employment.<sup>146</sup> Because the doctrines lead to the same legal consequence (employer liable or employer not liable) and are based on the rationale that, as between two innocent parties—the principal-master and the third party—the principal-master, who, for his own purposes, places another in a position to do harm to a third party, should bear the loss, the doctrines are viewed as alternative theories of liability.<sup>147</sup> However, while the same fact pattern can support application of both doctrines, there are instances where apparent authority would create employer liability while respondeat superior would not.<sup>148</sup>

There is an important practical distinction between determining vicarious liability for harm caused by a third party's voluntary interactions with a purported agent, as in the case of fraud or misrepresentation, and those that are inflicted on a third party who has made no choice to deal with the agent, as in the case of a car accident. It is only in the former instance—voluntary interaction with the agent—that apparent authority is particularly appropriate because the principal's conduct and the third party's ability to assess the agent's authority bear on the liability of the principal. Consequently, apparent authority and respondeat superior are not equivalent. A servant or agent may sometimes act within the scope of his employment and still lack apparent authority. The inverse is equally possible.

Apparent authority, unlike respondeat superior, is not limited by the requirements of control or scope of employment.<sup>149</sup> Likewise, while respondeat superior cannot apply absent the requisite relationship, apparent authority may apply even though no relationship exists between the principal and the apparent agent.<sup>150</sup> Apparent authority gives a purported agent the power to affect the principal's legal relationship with a third person.

145. RESTATEMENT (SECOND) OF AGENCY § 8 (1958).

146. See *Kansallis Finance Ltd. v. Fern*, 659 N.E.2d 731, 734-35 (Mass. 1996).

147. See, e.g., *Bozarth v. Harper Creek Bd. of Ed.*, 288 N.W.2d 424, 425 (Mich. Ct. App. 1979); *Forrest*, 853 A.2d at 51; *Lamoreux v. Oreck*, 717 N.W.2d 853, 853 (Wis. Ct. App. 2006); *J. L. Querner Truck Lines, Inc. v. Safeway Truck Lines, Inc.*, 168 A.2d 216, 224 (N.J. Super. Ct. App. Div. 1961); *Sports Car Ctr. of Syracuse, Ltd. v. Bombard*, 672 N.Y.S.2d 201, 203 (N.Y. App. Div. 1998); *Kansallis*, 659 N.E.2d at 735.

148. See, e.g., *Kansallis*, 659 N.E.2d at 735; *Parlato v. Equitable Life Assurance Soc'y of the U.S.*, 749 N.Y.S.2d 216, 221 (N.Y. App. Div. 2002).

149. See *Parlato*, 749 N.Y.S.2d at 221; *Forrest*, 853 A.2d at 70; *Kansallis*, 659 N.E.2d at 735.

150. RESTATEMENT (SECOND) OF AGENCY § 8 cmt. a (1958); see also *Brown v. Saint Vincent Hosp.*, 899 So. 2d 227, 238 (Ala. 2004); *State ex rel. Medlin v. Little*, 703 N.W.2d 593, 597 (Neb. 2005); *Walson v. Walson*, 556 S.E.2d 53, 56 (Va. Ct. App. 2001); *Roessler v. Novak*, 858 So. 2d 1158, 1161 (Fla. Dist. Ct. App. 2003); *Indep. Fire Ins. Co. v. Able Moving & Storage Co.*, 650 So. 2d 750, 753 (La. 1995).

The power arises from the principal's manifestations to third persons about the relationship. Apparent authority to perform an act exists when a principal's conduct causes a third person to reasonably believe that the agent has the authority upon which he or she purports to act.<sup>151</sup>

Most courts rely upon the doctrine of apparent authority as recognized in the Restatement (Second) of Agency section 261 as the basis for holding an employer liable for an employee's fraud committed outside the scope of employment.<sup>152</sup> Section 261 provides: "A principal who puts a servant or other agent in a position which enables the agent, while apparently acting within his authority, to commit a fraud upon third persons is subject to liability to such third persons for the fraud."<sup>153</sup>

The principle of law set forth in section 261 is applicable whenever the agent is acting within the scope of his agency.<sup>154</sup> The rationale underlying section 261 is that "the agent's position facilitates the consummation of the fraud, in that from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him."<sup>155</sup> Therefore, "the principal is subject to liability under the rule stated in this Section although he is entirely innocent, has received no benefit from the transaction, and, as stated in Section 262, although the agent acted solely for his own purposes."<sup>156</sup>

Generally, in order to establish apparent or ostensible authority, the plaintiff must prove that (1) the principal manifested his consent to the exercise of such authority or knowingly permitted the agent to assume the

151. See *Tex.-Tenn. Intl., Inc. v. Marshall C. Rardin & Sons, Inc.*, No. 12431, 1986 Ohio App. LEXIS 7994 (Ohio Ct. App. Aug. 20, 1986); *Roessler*, 858 So. 2d at 1161; *Link v. Kroenke*, 909 S.W.2d 740, 745 (Mo. Ct. App. 1995); *Milliken Group, Inc. v. Hays Nissan, Inc.*, 86 S.W.3d 564, 568 (Tenn. Ct. App. 2001); *Alexander v. Tri County Coop.*, 609 So. 2d 401, 403 (Miss. 1992).

152. See, e.g., *Leafgreen v. Am. Family Mut. Ins. Co.*, 393 N.W.2d 275, 277 (S.D. 1986); *Parlato*, 749 N.Y.S.2d at 221; *Lucas v. Liggett & Myers Tobacco Co.*, 442 P.2d 460, 463 (Haw. 1968); *Buckeye Union Ins. Co. v. SCOA Industries, Inc.*, 1975 Ohio App. LEXIS 7266 (Ohio Ct. App. Feb. 4, 1975); *Blackburn v. Dean Witter*, 201 Cal. App. 2d 518, 521 (1962); *Grease Monkey Int'l, Inc. v. Montoya*, 904 P.2d 468, 472 (Colo. 1995).

153. RESTATEMENT (SECOND) OF AGENCY § 261 (1958).

154. See, e.g., *Leafgreen*, 393 N.W.2d at 277; *Parlato v. Equitable Life Assurance Soc'y of the U.S.*, 749 N.Y.S.2d 216, 221 (N.Y. App. Div. 2002); *Lucas*, 442 P.2d at 463; *Buckeye*, 1975 Ohio App. LEXIS 7266; *Blackburn*, 201 Cal. App. 2d at 521; *Grease Monkey*, 904 P.2d at 472.

155. RESTATEMENT (SECOND) OF AGENCY § 261 cmt. A (1958). See also *Leafgreen*, 393 N.W.2d at 277; *Parlato*, 749 N.Y.S.2d at 221; *Lucas*, 442 P.2d at 463; *Buckeye*, 1975 Ohio App. LEXIS 7266; *Blackburn*, 201 Cal. App. 2d at 521; *Grease Monkey*, 904 P.2d at 472.

156. RESTATEMENT (SECOND) OF AGENCY § 261 cmt. A (1958). See also *Leafgreen*, 393 N.W.2d at 277; *Parlato*, 749 N.Y.S.2d at 221; *Lucas*, 442 P.2d at 463; *Buckeye*, 1975 Ohio App. LEXIS 7266; *Blackburn*, 201 Cal. App. 2d at 521; *Grease Monkey*, 904 P.2d at 472.

exercise of such authority; (2) the third party knew of the facts, and acting in good faith, had reason to believe, and did believe, that the agent possessed such authority; and (3) the third party, relying on such appearance of authority, changed his position to his detriment.<sup>157</sup> The appearance of apparent authority is measured by the standard of reasonableness; it is only the manifestations of the principal that created the appearance that must be reasonable.<sup>158</sup> Under section 261, whether the agent's fraudulent conduct seems regular, and whether the agent appears to be acting in the ordinary course of the business confided to him, is evaluated through the eyes of the third party.<sup>159</sup>

"While the boundaries of a principal's liability under this rule are not easily drawn, as the Reporter's Notes to section 261 suggest, they do exist."<sup>160</sup>

It is difficult to state more definitely than is done in this section the limits of liability. It would seem to be clear that if the agent is purporting to act as an agent and doing the things which such agents normally do, and the third person has no reason to know that the agent is acting on his own account, the principal should be liable because he has invited third persons to deal with the agent within the limits of what, to such third persons, would seem to be the agent's authority. To go beyond this, however, and to permit the third persons to recover in every case where the agent takes advantage of the standing and position of his principal to perpetuate a fraud would seem to go too far . . . . In some cases the situation is ambiguous: the agent performs his primary function as an agent . . . acting within the scope of his powers as such agent without loss to the other from the transaction itself, but the transaction is used as a means by which the agent may defraud such other. If in such cases the principal benefits from the agent's act, his liability to the extent of the benefits received is clear. If, however, the principal is not benefited, and the transaction which actually causes the loss is not one in which the agent purports to represent the principal, liability should not follow.<sup>161</sup>

Considerations of fairness, practicality and public policy are relevant in ascertaining the limits of the employer's liability for an employee's fraud under section 261.<sup>162</sup> In cases dealing with extreme criminal or tortious con-

157. See *Tex.-Tenn. Intl., Inc. v. Marshall C. Rardin & Sons, Inc.*, No. 12431, 1986 Ohio App. LEXIS 7994, \*9-10 (Ohio Ct. App. Aug. 20, 1986); *Roessler v. Novak*, 858 So. 2d 1158, 1161 (Fla. Dist. Ct. App. 2003); *Link v. Kroenke*, 909 S.W.2d 740, 745 (Mo. Ct. App. 1995); *Milliken Group, Inc. v. Hays Nissan, Inc.*, 86 S.W.3d 564, 569 (Tenn. Ct. App. 2001); *Alexander v. Tri County Coop.*, 609 So. 2d 401, 403 (Miss. 1992). Cf. *Grease Monkey*, 904 P.2d at 475 (for purposes of section 261 liability, "[A] plaintiff must establish that the servant or agent was put in a position which enabled the agent to commit fraud, the agent acted within his apparent authority, and the agent committed fraud.").

158. *Kansallis*, 659 N.E.2d at 734.

159. RESTATEMENT (SECOND) OF AGENCY § 261 cmt. A (1958). See also *Leafgreen*, 393 N.W.2d at 280; *Grease Monkey*, 904 P.2d at 475; *Lucas*, 442 P.2d at 481; *Dudley v. Estate Life Ins. Co. of Am.*, 257 S.E.2d 871, 875 (Va. 1979).

160. *Leafgreen*, 393 N.W.2d at 278.

161. RESTATEMENT (SECOND) OF AGENCY, § 261 (1958) (Reporter's Notes).

162. See, e.g., *Parlato*, 749 N.Y.S.2d at 223.



duct, however, some courts rely upon the rationale of Restatement (Second) of Agency section 231 to ascertain the limits of liability under section 261.<sup>163</sup>

Section 231 focuses on the foreseeability of an agent's criminal or tortious conduct from the perspective of the principal. Despite the fact that section 261 evaluates the agent's conduct from the eyes of the third party, in ambiguous situations section 231's foreseeability standard is used to delineate the limits of liability for acts done within the scope of an agent's apparent authority.<sup>164</sup> The foreseeability standard requires that a nexus sufficient to make the injury foreseeable exists between the agent's employment and the conduct that actually caused the injury.<sup>165</sup> In this context, foreseeability means that the agent's conduct must not be so unusual or startling that it would be unfair to treat the harm caused by the injury as a cost of the employer's business.<sup>166</sup>

## 2. *Aided by the Existence of the Agency Relationship*

The second phrase of section 219(2)d—aided in accomplishing the tort by the existence of the agency relationship—has been subjected to both broad and narrow interpretations.<sup>167</sup> According to the broad interpretation, the phrase should not be read in a manner which would render it superfluous to apparent authority.<sup>168</sup> In other words, it is not merely a refinement of apparent authority.<sup>169</sup> With its genesis deeply rooted in cases involving sexual harassment,<sup>170</sup> the broad interpretation recognizes that imposing liability on an employer where the employee is aided in accomplishing the tort by the existence of the agency relationship is not restricted to a particular type of case.<sup>171</sup>

While no definitive standard for determining application of the “aided-by-agency-relations” doctrine has been articulated under the broad interpre-

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163. See, e.g., *Lou-Con, Inc. v. Gulf Bldg. Servs., Inc.*, 287 So. 2d 192, 200 (La. Ct. App. 1973); *Leafgreen*, 393 N.W.2d at 278.

164. See, e.g., *Lou-Con*, 287 So. 2d at 200; *Leafgreen*, 393 N.W.2d at 278.

165. *Leafgreen*, 393 N.W.2d at 278.

166. *Id.*

167. See, e.g., *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (rejecting the narrow interpretation and holding that the phrase covers not only cases involving abuse of apparent authority, but also cases in which tortious conduct is made possible or facilitated by the existence of the actual agency relationship); *Doe v. Forrest*, 853 A.2d 48 (Vt. 2004); cf. *Mahar v. StoneWood Transp.*, 823 A.2d 540 (Me. 2003) (adopting a narrow interpretation of the phrase).

168. *Faragher*, 524 U.S. 775.

169. See, e.g., *id.*

170. See, e.g., *Faragher*, 524 U.S. 775; *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Doe*, 853 A.2d 48.

171. See, e.g., *Faragher*, 524 U.S. 775; *Ellerth*, 524 U.S. 742; *Doe*, 853 A.2d 48.

tation, the rationale and logic of the sexual harassment cases suggest that the mere fact that an employer creates an employment relationship alone is insufficient as a test.<sup>172</sup> These cases also suggest that in order to avoid making employers liable for all intentional torts of an employee in all circumstances, policy considerations must be weighed in assessing whether the "aided-by-agency-relations" doctrine is applicable.<sup>173</sup> Relevant policy considerations include: (1) position, power, and authority of the employee; (2) whether it is fair to impose the cost of injury on an employer; (3) the role the employment relationship played in the commission of the tort; (4) the opportunity the employer had to guard against the misconduct; and (5) whether imposing liability would serve as an incentive for those in a position to prevent the injury to do so.<sup>174</sup>

In *Mahar v. StoneWood Transport*,<sup>175</sup> the Maine Supreme Judicial Court adopted an alternative interpretation, or narrower version. In *Mahar*, the plaintiffs were victims of road rage perpetrated by defendant's employee, an independent contractor. Following an entry of summary judgment in favor of the defendant StoneWood, the Mahars appealed.

According to the court in *Mahar*, "[c]omment e to section 219(2)(d) acknowledges that the section is limited in its application to cases within the apparent authority of the employee, or when the employee's conduct involves misrepresentation or deceit."<sup>176</sup> As provided:

Clause (d) includes primarily situations in which the principal's liability is based upon conduct which is within the apparent authority of a servant, as where one purports to speak for his employer in defaming another or interfering with another's business. See §§ 247-249. Apparent authority may also be the basis of an action of deceit (§§ 257-264), and even physical harm. See §§ 265-267. In other situations, the servant may be able to cause harm because of his position as agent, as where a telegraph operator sends false messages purporting to come from third persons. See § 261. Again, the manager of a store operated by him for an undisclosed principal is enabled to cheat the customers because of his position. See § 222. The enumeration of such situations is not exhaustive, and is intended only to indicate the area within which a master may be subjected to liability for acts of his servants not in scope of employment.<sup>177</sup>

Despite the plain language of comment e, which specifically states that the "enumeration of such situations is not exhaustive," the *Mahar* court concluded that the aided-by-agency-relations clause of section 219(2)(d) was inapplicable.<sup>178</sup> The court's refusal to apply section 219 to the facts of

172. See, e.g., *Faragher*, 524 U.S. 775; *Ellerth*, 524 U.S. 742; *Doe*, 853 A.2d 48.

173. See, e.g., *Faragher*, 524 U.S. 775; *Ellerth*, 524 U.S. 742; *Doe*, 853 A.2d 48.

174. See, e.g., *Faragher*, 524 U.S. 775; *Ellerth*, 524 U.S. 742; *Doe*, 853 A.2d 48.

175. 823 A.2d 540, 541-42 (Me. 2003).

176. *Id.* at 546.

177. RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) cmt. e (1958).

178. RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) cmt. e (1958); *Mahar*, 823 A.2d at 546.

*Mahar* does not negatively impact the applicability of said section in the context of financial elder abuse cases. The *Mahar* court acknowledged that section 219 is merely limited in its applicability to cases within the apparent authority of the employee or when the employee's conduct involved misrepresentation or deceit,<sup>179</sup> the latter of which typifies a financial elder abuse case.

### C. Direct Liability

Direct liability applies to instances where the employee is acting outside the scope of his or her employment. It is universally recognized that an employer is directly liable where he or she intended the conduct or the consequences of the tortious act. Because direct liability on the intent theory is fairly open and shut it will not be discussed. The direct liability of an employer for the acts of an employee can be asserted on the basis of a number of negligence theories. For example, claims for negligent hiring, retention, training, and supervision are common features of the common law landscape.<sup>180</sup>

Because the basis of these claims sounds in negligence, the complaining party must prove that (1) the employer had a duty to prevent an unreasonable risk of danger to third persons that the employer knew or should

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179. *Mahar*, 823 A.2d at 546; see also *Brock v. Difani*, No. CA98-351, 1999 Ark. App. LEXIS 37 (Ark. Ct. App. Jan. 20, 1999).

180. See, e.g., *Brezenski v. World Truck Transfer, Inc.*, 755 A.2d 36 (Pa. Super. Ct. 1999); *Keller v. Koca*, 111 P.3d 445 (Colo. 2005); *Miller v. Wal-Mart Stores, Inc.*, 580 N.W.2d 233 (Wis. 1998); *Haverly v. Kaytec, Inc.*, 738 A.2d 86 (Vt. 1999); *Kiesau v. Bantz*, 686 N.W.2d 164 (Iowa 2004); *Young v. Lemons*, 639 N.E.2d 610 (Ill. App. Ct. 1994); *Saine v. Comcast Cablevision of Ark., Inc.*, 126 S.W.3d 339 (Ark. 2003); *Turner v. Pendennis Club*, 19 S.W.3d 117 (Ky. Ct. App. 2000); *Mainella v. Staff Builders Indus. Servs., Inc.*, 608 A.2d 1141 (R.I. 1992); *Crist v. Hunan Palace, Inc.*, 89 P.3d 573 (Kan. 2004). See also RESTATEMENT (SECOND) OF AGENCY § 213 (1958):

§ 213. Principal Negligent or Reckless

A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless:

- (a) in giving improper or ambiguous orders [or] in failing to make proper regulations; or
- (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others;
- (c) in the supervision of the activity; or
- (d) in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control.

A small minority of jurisdictions do not recognize negligent hiring, supervision, or training as distinct and independent torts. See, e.g., *Mahar v. StoneWood Transp.* 823 A.2d 540 (Me. 2003); *Gray v. Rhoads*, No. 99-95, 2001 Va. Cir. LEXIS 300 (Va. Cir. Ct. July 2, 2001); *Harrison v. Broadband Servs.*, No. 01-05-00016-CV, 2006 Tex. App. LEXIS 4690 (Tex. Ct. App. June 1, 2006).

have known the employee would harm; (2) the employer breached that duty; (3) the breach caused in fact and was the proximate cause of the harm; and (4) damages occurred.<sup>181</sup> “Liability exists only if all the requirements of an action of tort for negligence exist.”<sup>182</sup> In the specific context of negligent hiring, supervision, and training, the plaintiff, in addition to the foregoing proof requirement, must demonstrate that the employee committed an underlying tort or compensable wrongful act that caused his or her injury.<sup>183</sup> In essence the plaintiff must prove a case within a case.<sup>184</sup>

The most difficult aspects of the negligence claim to satisfy are duty and legal cause. Consequently, these aspects—to the exclusion of the issues of breach of duty and damages—will be discussed next.

### 1. *Duty*

The primary element in every negligence claim is that the defendant owed a duty of care to the plaintiff. The concept of duty is merely “an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection” from the harm suffered.<sup>185</sup> Duty is not a strict or rigid concept that remains static over time, but rather is a malleable concept that “must of necessity adjust to the changing social relationships and exigencies and man’s relation to his fellow . . . .”<sup>186</sup> In the context of direct liability for negligence, the question of whether the employer owes the third party a duty to exercise reasonable care can be ascertained from the perspectives of (1) foreseeable risks, or (2a) limited duty/special relationship.<sup>187</sup>

#### a. Foreseeable Risks

The common law imposes a duty on all persons not to subject others to unreasonable risks of harm from their actions. In this context, whether a life insurance company owes a third party a duty depends on issues of knowledge and risk. The question is whether the company knew or should have known that its action or inaction would subject another to an unrea-

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181. See, e.g., *Zarzana v. Ashley*, 218 S.W.3d 152 (Tex. Ct. App. 2007).

182. RESTATEMENT (SECOND) OF AGENCY § 213 cmt. a (1958). *Haverly*, 738 A.2d at 91.

183. *Miller v. Wal-Mart Stores, Inc.*, 580 N.W.2d 233 (Wis. 1998); *Haverly*, 738 A.2d 86; *Kiesau*, 686 N.W.2d 164; *IMT Ins. Co. v. Crestmoor Golf Club*, 702 N.W.2d 492 (Iowa 2005); *Host Marriott Corp. v. Meadows*, No. 05-00-00959-CV, 2001 Tex. App. LEXIS 4409 (Tex. Ct. App. June 29, 2001).

184. *Kiesau*, 686 N.W.2d 164.

185. KEETON ET AL., *supra* note 94, at 358.

186. *Gooden v. Tips*, 651 S.W.2d 364, 371 (Tex. App. 1983).

187. KEETON ET AL., *supra* note 94, at 169-73, 356-59.

sonable risk of harm. In determining whether the law is justified in imposing a duty of care, courts engage in a rather complex analysis that balances a number of factors, including: (1) the nature of the underlying risks of harm; (2) the foreseeability and severity of the harm; (3) the magnitude of the burden of guarding against injury or harm; (4) the relationship between the parties; (5) and ultimately, based on considerations of public policy and fairness, society's interest in the proposed solution.<sup>188</sup>

While no one factor is dispositive, foreseeability of risk is a pivotal issue<sup>189</sup> in assessing whether the court should impose a duty on insurance companies to exercise reasonable care to protect their customers from financial elder abuse. A particular risk or injury is foreseeable if its character can reasonably be anticipated from objective analysis. The ability to anticipate or foresee the risk may be based on an actual awareness of the risk, or the defendant may be charged with constructive knowledge, such as where the defendant is in a position to know of the risk. Typically, when the risk of harm is that posed by third persons, a plaintiff may be required to show that the defendant was in a position to know that there was a likelihood that such conduct would occur.

The empirical data discussed in Parts I and II supports the conclusion that financial elder abuse is a foreseeable risk. This data justifies a standard of foreseeability that is based on special knowledge or special reason to know that a particular plaintiff or identifiable class of plaintiffs will suffer a particular type of harm. It is not necessary that the defendant anticipate the precise injury, the extent of the harm, or the actual manner in which it occurs. Foreseeability merely requires that one anticipate or should have anticipated that an injury of an appreciable magnitude might result from his or her conduct.<sup>190</sup>

#### b. Limited Duty/Special Relationship

The common law has long recognized that there is no duty to control the conduct of a third party to protect another from harm, except where the defendant stands in some special relationship with either the person whose conduct needs to be controlled, or in a relationship with the intended victim of the conduct that gives the victim a right to protection.<sup>191</sup> The foregoing

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188. See *J.S. v. R.T.H.*, 714 A.2d 924 (N.J. 1998); *Keller v. Koca*, 111 P.3d 445 (Colo. 2005); *Althaus v. Cohen*, 756 A.2d 1166 (Pa. 2000).

189. *Keller*, 111 P.3d 445; *Hartsfield v. McRee Ford, Inc.*, 893 S.W.2d 148 (Tex. Ct. App. 1995); *Duncan v. Rzonca*, 478 N.E.2d 603 (Ill. Ct. App. 1985); *Gomez v. Ticor*, 193 Cal. Rptr. 600 (Cal. Ct. App. 1983).

190. See, e.g., *Endresen v. Allen*, 574 P.2d 1219 (Wy. 1978); *Gulf Refining Co. v. Williams*, 185 So. 234 (Miss. 1938).

191. See, e.g., *Brezenski v. World Truck Transfer, Inc.*, 755 A.2d 36 (Pa. Super. Ct. 2000); *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976).

rule of non-liability recognizes an exception where a special relationship exists between the employer and the actor or between the employer and a foreseeable victim of the actor's conduct.<sup>192</sup> In the context of financial elder abuse by life insurance agents, life insurance companies share a special relationship with both the victim and the perpetrator.

As a general rule, the triangular relationship between the insurance company, agent, and insured, in and of itself, will not justify imposing a fiduciary duty on insurance companies.<sup>193</sup> The rationale for this rule is that the relationship between the company and insured is an arms-length, buyer/seller one. This typically does not rise to the level of a fiduciary relationship in which a special confidence and trust are invested in the integrity of one in a superior position.<sup>194</sup>

## 2. *Proximate Cause*

Proximate cause is closely related to the issue of duty. The questions of duty and proximate cause are related because they both depend in part on foreseeability.<sup>195</sup> In every case, the issue of proximate cause initially involves an inquiry into the question of cause in fact. If this inquiry demonstrates that the defendant's conduct was not a factor in causing the plaintiff's injury, the matter ends. If, however, it is shown that the defendant's conduct was a factor in bringing about the plaintiff's harm, the legal inquiry continues to the question of whether the defendant's conduct played such a role as to make him or her liable for the damages. One widely accepted definition and test for proximate cause is that the defendant's conduct was the proximate cause if it was a substantial factor in bringing about the harm and there is no rule of law relieving the defendant from liability because of the manner in which his or her negligence resulted in injury.<sup>196</sup>

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192. See, e.g., *Brezenski*, 755 A.2d 36; *Tarasoff*, 551 P.2d 334.

193. See Douglas R. Richmond, *Trust Me: Insurers Are Not Fiduciaries to Their Insureds*, 88 KY. L.J. 1 (1999); Johnny C. Parker, *Does Lack of an Insurable Interest Preclude an Insurance Agent From Taking an Absolute Assignment of His Client's Life Policy?*, 31 U. RICH. L. REV. 71, 100-03 (1997).

194. See, e.g., *Mentis v. Del. Am. Life Ins. Co.*, No. 98C-12-023 WTQ, 1999 Del. Super. LEXIS 419 (Del. Super. Ct. July 28, 1999); *Synder v. Webb*, No. 97APE09-1248, 1998 Ohio App. LEXIS 2776 (Ohio Ct. App. June 18, 1998); *Rabouin v. Metro. Life Ins. Co.*, 699 N.Y.S.2d 655 (N.Y. App. Div. 1999).

195. See *Moning v. Alfonso*, 254 N.W.2d 759, 765 (Mich. 1977); *Powell v. Standard Brands Paint Co.*, 212 Cal. Rptr. 395, 396-97 (Cal. Ct. App. 1985); *Calkins v. Cox Estates*, 792 P.2d 36, 38 (N.M. 1990); *Stahlecker v. Ford Motor Co.*, 667 N.W.2d 244, 252-53 (Neb. 2003).

196. RESTATEMENT (SECOND) OF TORTS § 431 (1965). See also *Caldwell v. Ford Motor Co.*, 619 S.W.2d 535, 541 (Tenn. Ct. App. 1981); *Anaya v. Superior Court*, 93 Cal. Rptr. 2d 228, 229 (Cal. Ct. App. 2000); *McKenna v. Volkswagenwerk Aktiengesellschaft*, 558 P.2d 1018, 1022 (Haw. 1977); *Weaver v. McClintock-Trunkey Co.*, 111 P.2d 570, 573

As to the question of causation in the context of a claim for negligent hiring, supervision, retention, or training against the employer and employee, the issue is “whether the failure of the employer to exercise due care was a cause-in-fact of the wrongful act of the employee that in turn caused the plaintiff’s injury.”<sup>197</sup> The employee’s act—whether intentional or negligent—does not alter the underlying negligence claim against the employer.<sup>198</sup> Consequently, there must be a causal link between the employee’s wrongful act that harmed the plaintiff and the employer’s negligent hiring, supervision, or training of the employee.<sup>199</sup>

#### D. Non-Delegable Duty

The non-delegable duty doctrine provides that while a party may contract out of the performance of a non-delegable duty, he or she may not contract out of legal responsibility for any injury arising out of the performance.<sup>200</sup> The doctrine is an exception to the common law rule that an employer is not liable for the tortious conduct of an independent contractor.<sup>201</sup> The non-delegable duties exception refers to duties for which an employer must retain legal responsibility, despite proper delegation to another. While there are no general rules as to what constitutes a non-delegable duty,<sup>202</sup> it is universally recognized that a non-delegable duty can arise from contract,

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(Wash. 1941); *Canada v. Royce*, 257 P.2d 624, 627 (Or. 1953); *Deutsch v. Shein*, 597 S.W.2d 141, 144 (Ky. 1980); *Vincent ex rel. Stanton v. Fairbanks Mem’l Hosp.*, 862 P.2d 847, 851 (Alaska 1993); *Henry v. McCrudden*, 575 A.2d 666, 669 (Pa. Commw. Ct. 1990), *petition for appeal denied*, 585 A.2d 470 (1990); *Kiamas v. Mon-kota, Inc.*, 639 P.2d 1155, 1159 (Mont. 1982); *Weaver v. Arthur A. Schneider Realty Co.*, 381 S.W.2d 866, 868-69 (Mo. 1964); *Barnes v. Gulf Power Co.*, 517 So. 2d 717, 721 (Fla. Dist. Ct. App. 1987) (Ervin, J., concurring); *Lacy v. District of Columbia*, 424 A.2d 317, 320 (D.C. 1980); *Donnini v. Ouano*, 810 P.2d 1163, 1166 (Kan. Ct. App. 1991); *GKC Mich. Theaters v. Grand Mall*, 564 N.W.2d 117, 120 (Mich. Ct. App. 1997); *Boyden v. Tri-State Packing Supply*, No. CV-04-452, 2007 Me. Super. LEXIS 47 at \*6 (Me. Super. Feb. 28, 2007); *Hembree v. The Celotex Corp.*, No. 12641, 1992 Ohio Ct. App. LEXIS 3716 \*2 (Ohio Ct. App. July 14, 1992); *Huey v. Milligan*, 175 N.E.2d 698, 703 (Ind. 1961); *Barrett v. Harris*, 86 P.3d 954, 960-61 (Ariz. Ct. App. 2004).

197. *Miller v. Wal-Mart Stores, Inc.*, 580 N.W.2d 233, 238 (Wis. 1998).

198. *See Gomilla v. Libertas*, 621 N.W.2d 386 (Wis. Ct. App. 2000).

199. *Miller*, 580 N.W.2d at 238-39.

200. *Bouzenid v. Alfalfa Elec. Coop., Inc.*, 16 P.3d 450, 455 (Okla. 2000); *M.S. v. Nova Se. Univ.*, 881 So. 2d 614, 620 (Fla. App. 2004).

201. *Parker v. Neighborhood Theatres, Inc.*, 547 A.2d 1080, 1082-83 (Md. Ct. Spec. App. 1988); *Meyers v. City of Tempe*, 128 P.3d 751, 755 (Ariz. 2006); *Mutual Ins. Co. v. Hunt*, No. 5-2000-07, 2000 Ohio App. LEXIS 4038, at \*3 (Ohio Ct. App. Sept. 7, 2000); *Jackson v. Power*, 743 P.2d 1376, 1383 (Alaska 1987).

202. *See Rangolan v. County of Nassau*, 749 N.E.2d 178, 183 (N.Y. 2001); *Jackson*, 743 P.2d at 1384.

voluntary assumption, statute, or the common law.<sup>203</sup> Whether a duty is non-delegable, from a common law perspective, ultimately turns on public policy.<sup>204</sup> The exception is premised on the theory that certain duties of an employer are so vital or important to the community that the employer may not escape liability by delegating performance to another.<sup>205</sup>

The agency principle of non-delegable duties avoids the problems of fragmentation or leniency that accompany the employer liability standards of respondeat superior, direct liability, and agency.

The Restatement (Second) of Agency states:

The words "non-delegable duty" do not imply that there are duties which cannot be discharged by appointing others to perform them. They describe duties the performance of which can properly be delegated to another person, but subject to the condition that liability follows if the person to whom the performance is delegated acts improperly with respect to it.<sup>206</sup>

Non-delegable duties are a function of a special relationship between the person who owes the duty and the one to whom the duty is owed.<sup>207</sup>

Although the concept of non-delegable duty exists in theory in the context of corporate liability for employee fraud, in reality it has not been applied to impose liability on an insurance company for the conduct of its agents. This may, however, be a consequence of the availability of other more widely accepted legal doctrines, but the non-delegable duty doctrine still provides a sound and innovative approach to recovery for employee fraud against elderly clients.

## CONCLUSION

We have an epidemic in this country that is silent, deadly and devastating and its name is financial elder abuse. It does not discriminate on the basis of race, creed, color, religious preference, or sexual orientation. It crosses all socio-economic borders and will strike the wealthy and the poor alike. It is increasing at an unprecedented rate and, as of this writing, *there is no cure*.<sup>208</sup>

Elder abuse of any type flies in the face of all that is good. Elders are special targets and tend to suffer more severely when they are victimized.

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203. See *Jackson*, 743 P.2d at 1383; *Hayes v. Goldstein*, 697 N.E.2d 224, 225 (Ohio Ct. App. 1997).

204. See *Rangolan*, 749 N.E.2d at 183.

205. See *Jackson*, 743 P.2d at 1384; *Majorowicz v. Allied Mut. Ins. Co.*, 569 N.W.2d 472, 476 (Wis. Ct. App. 1997).

206. Justin Weddle, Note, *Title VII Sexual Harassment: Recognizing an Employer's Non-Delegable Duty to Prevent a Hostile Workplace*, 95 COLUM. L. REV. 724, 743 (1995) (quoting RESTATEMENT (SECOND) OF AGENCY).

207. Weddle, *supra* note 206, at 743.

208. Kim R. Hubbard, *Columns: President's Page: A National Disgrace—Financial Abuse of the Elderly*, 46 ORANGE COUNTY LAW. 5 (June 2004).



The problem of financial elder abuse by life insurance agents is not about to go away. The empirical data suggests that as Americans age and take possession of greater wealth, the problem will reach epic proportions. The problem of financial elder abuse is a normative one that easily figures into practical reasoning, that is, reasoning about what ought to be done. The answer to the question "what ought to be done?" is quite simple. The law must hold institutions such as life insurance companies accountable where their agents engage in financial elder abuse of an insured. If ultimate accountability were placed on the employing company to exercise care in the training, supervision, and monitoring of its agents, then major advances in curtailing the problem would certainly occur.

Practical reasoning leads to legal reasoning (i.e., how to achieve the desired result) that takes place at a more concrete level. The doctrines of respondeat superior, direct liability, non-delegable duty, and apparent agency, properly employed, afford greater protection by further insuring that victims of financial elder abuse will be compensated for their harms. Each incorporates the principles of equity and fair dealing. Each relies on public policy as a basic component of its mode of operation. Each strikes a balance between the problem and the ability of a life insurance company to prevent the problem.

We all hope to reach old age, and to enjoy the best quality of life possible when we get there. We trust in the law to brighten our prospects.