A Revised Prospectus for a Third Restatement of Agency

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* Professor of Law, Duke University, School of Law. This Prospectus is a revised version of a prospectus dated February 24, 1995 that I submitted to the Council of the American Law Institute. I became the Reporter for a third restatement of agency in October, 1995. This Prospectus, like the original prospectus, reflects my preliminary thinking about the subject of agency. The views expressed are my own, not those of the American Law Institute.

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INTRODUCTION

The purpose of this Prospectus is to assist the American Law Institute in evaluating the need for a third restatement of agency. This Prospectus identifies critical issues in the subject matter of agency, in particular issues not addressed by *Restatement (Second)* and issues for which the treatment in *Restatement (Second)* has been overtaken by subsequent developments in cases or statutes. It ventures some preliminary thoughts about directions that might usefully be taken in a third restatement. Additionally, this Prospectus briefly identifies portions of *Restatement (Second)* that could be deleted or truncated in a third restatement due to developments that occurred after 1958, the publication date of *Restatement (Second)*. This Prospectus focuses primarily upon issues for which the applicable doctrine is unsettled or is problematic in some way.

I. SIGNIFICANCE OF THE LAW OF AGENCY

Agency's intellectual distinctiveness is its focus on relationships in which one person, as a representative of another, has derivative authority and a duty as a fiduciary to account for the use made of the representative position. Agency doctrine is two-fold, governing rights and duties between the principal and the agent as well as legal consequences stemming from the agent's interactions with third parties. Agency relationships are numerous and varied and include employment, lawyer-client relationships, and the agency created by partnership. The legal definition of "agency" is much narrower than the usage of the term in other academic disciplines like economics.[1] As defined by section 1 of *Restatement (Second)*, any agent is a fiduciary subject to the principal's right of control. Thus, the legal definition excludes trustees and directors of corporations because, as the law structures the trust and the corporation, the beneficiaries of these

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[1] *See* Michael Jensen & William Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308-09 (1976). For example, Jensen and Meckling define "agency relationship" as "a contract under which one or more persons (the principal[s]) engage another person (the agent) to perform some service on their behalf which involves delegating some decision making authority to the agent." *Id.* "Decision-making authority" encompasses any decision relevant to the relationship that the agent might make, whether or not it results in legal liability for the principal. *See id.*

relationships do not have a right of control over the fiduciary actor.[2] Agency is often an intellectually powerful starting point for analyzing a relationship whose legal character is in dispute. Bodies of case law consider whether and when the principal-agent prototype applies to relationships between parties such as shareholders and corporations,[3] lenders and borrowers,[4] and franchisors and franchisees.[5]

Agency is an unusual body of law. As legal doctrine, agency ranges broadly and with visible practical significance. Embedded in agency doctrine, however, are a number of enduring normative questions and intellectual puzzles. It will, for example, always be a challenge to reconcile the consequences of agency doctrine with the normative presuppositions of contract and tort law. As a consequence of agency, when any agent acts with actual or apparent authority, the principal is bound to contracts and transactions made by the agent[6] and may be vicariously liable for some instances of the agent's misconduct.[7] Contract and tort law, however, focus on the immediate actors or their conduct. Contract formation turns on the parties' observed manifestations of intention; tort doctrine often examines the actor's intentions or whether the actor's conduct breached a duty owed to third parties injured by the conduct. It is facile as well as misleading to impose these legal consequences on the principal through the simple tactic of identifying an agent with the principal. The agent's behavior clearly is that of a separate and autonomous moral actor, with separate and autonomous interests.

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[2] *See* RESTATEMENT (SECOND) OF AGENCY § 14B cmt. f (1958). A trustee would additionally be an agent if the trust is structured to give the beneficiary the right to control the trustee. *See id.* A director who is, additionally, an officer or an employee is an agent within the scope of the office or employment relationship.

[3] *See* Deborah A. DeMott, *Agency Principles and Large Block Shareholders*, 19 CARDOZO L. REV. 321, 324-25 (1997) (describing relationship of corporation and large block shareholders under agency prototype).

[4] *See* Juliet P. Kostritsky, *Bargaining with Uncertainty, Moral Hazard, and Sunk Costs: A Default Rule for Precontractual Negotiations*, 44 HASTINGS L.J. 621, 657 n.137 (1993) (discussing agency principles as between lenders and borrowers in addition to relevant case law).

[5] *See* PHILLIP I. BLUMBERG & KURT A. STRASSER, THE LAW OF CORPORATE GROUPS: ENTERPRISE LIABILITY §§ 6.05.4, 10.02.1-.04 (1998) (analyzing cases involving use of agency theory in franchisor-franchisee relationships).

[6] *See* RESTATEMENT (SECOND) OF AGENCY § 140.

[7] *See, e.g., id.* § 216 (stating that principal may be vicariously liable for tort committed by servant or other agent).

In some industries, such as real estate and insurance, the legal characterization of behavior based on agency doctrine affects basic business practices. However, legal characterization is not uniform among jurisdictions. For example, in residential real estate transactions, jurisdictions vary in how they characterize the relationship between, on the one hand, a property owner and the real estate broker who lists the property for sale and, on the other hand, a prospective purchaser and the separate broker who aids the prospective purchaser.[8] Should the broker who aids the purchaser be treated as the purchaser's agent,[9] the seller's subagent,[10] a dual agent for both the seller and the prospective purchaser,[11] or a nonagent independent contractor?[12] Each characterization has significant consequences for the prospective buyer and the seller; each characterization either accelerates or delays formation of a bilateral contract between any prospective buyer and the seller.[13]

More generally, agency doctrine defines the legal consequences of choosing to act through another person in lieu of oneself. The relationship between a principal and the agent is interactive, and the principal's capacity to control the agent is heavily dependent on the principal's use of language and other signaling devices that the agent must interpret. For the principal, the legal consequences of the agent's conduct stem from the

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[8] *See* Katherine A. Pancak et al., *Real Estate Agency Reform: Meeting the Needs of Buyers, Sellers, and Brokers*, 25 REAL EST. L.J. 345, 353 (1997) (noting six categories of restructured brokerage relationships adopted by states).

[9] *See* Hiller v. Real Estate Comm'n, 627 P.2d 769, 772-73 (Colo. 1981) (holding that broker had not acted as agent for homeowner); Pancak, *supra* note 8, at 362-66 (describing different statutes that define broker's dual and designated agencies).

[10] *See* Stortroen v. Beneficial Fin. Co., 736 P.2d 391, 396 (Colo. 1987) (holding that in absence of written agreement providing otherwise, in multiple listing transaction selling broker is subagent of listing broker).

[11] *See* Ronald Benton Brown & Joseph M. Grohman, *Real Estate Brokers: Shouldering New Burdens*, 11 PROB. & PROP. 14, 16 (May/June 1997) (defining in-house transactions as deals where seller's and buyer's agents are associated with same broker or brokerage).

[12] *See* Wise v. Dawson, 353 A.2d 207, 209 (Del. Super. Ct. 1975) (holding that in absence of evidence clearly proving otherwise, multiple listing service does not create agent-subagent relationship).

[13] If the broker who aids a prospective purchaser is the purchaser's agent, communicating an offer (or accepting an offer) via the purchaser's agent requires an additional communication to achieve a legally effective communication to the seller. If the broker is the seller's agent, communications to the agent within the scope of the agency impute to the principal, which in this instance is the seller.

principal's decision to create or participate in an agency relationship in anticipation of certain benefits. The principal has the right to define the terms of the agency relationship, including the incentives created for the agent, and has the right of control over the agent and the ability to terminate the relationship. The principal establishes for the agent which of the agent's acts will be treated as the principal's own. The principal's ability to define the agency relationship and structure its meaning for the agent justifies the link between the agent's conduct and its legal consequences for the principal.

The successive restatements have visibly influenced the development of agency doctrine in the United States. Many facets of agency doctrine stated in *Restatement (Second)* in 1958 continue to correspond to rationales in current case law. Overall, however, the body of formulations contained in *Restatement (Second)* is showing its age, as much through its relative emphases and its pattern of inclusion and exclusion as through its specific content. For example, in contrast to 1958, much of today's business activity implicates large organizations, including for-profit business corporations and not-for-profit organizations like universities. *Restatement (Second)* does not devote specific attention to the agency problems created by the corporate form or by organizations in general. *Restatement (Second)* reflects a simpler business world dominated by smaller business enterprises that effected transactions through nonemployee-representatives and brokers, a world additionally in which large-scale franchising did not play a significant role in structuring business activity. Further, *Restatement (Second)* pays only glancing attention to the agency dimensions of partnership as a form of business organization, one in which perennial disputes arise over the scope of partners' agency authority and fiduciary duty.[14] Even if the popularity of limited liability companies eclipses that of limited and general partnerships, the underlying agency problems will remain.

Moreover, with the very passage of time since 1958, parts of *Restatement (Second)* have become outdated. It is telling that *Restatement (Second)* terms the employer the "master" and the em-

[14] *Restatement (Second)* addresses agency dimensions of partnership briefly. *See* RESTATEMENT (SECOND) OF AGENCY § 14A cmt. a (1958) (stating that partners' rights and liabilities to each other are "determined by agency principles").

ployee the "servant";[15] although these words may function as terms of art[16] in this context, they connote a view of the employer's prerogatives and capacity for pervasive control atypical in the contemporary workplace. Not all judicial opinions containing terminology familiar to readers of *Restatement (Second)* reflect a steady state of doctrine. On some issues courts may give operative definitions to agency terms of art that diverge from the understanding reflected in *Restatement (Second)*. *Restatement (Second)* also treats in extensive detail matters that are now substantially regulated by statute and administrative agencies, such as the employer's duty to provide a safe workplace for employees.[17]

More generally, the intellectual style evident throughout much of *Restatement (Second)* emphasizes detailed treatment at the occasional expense of a general articulation of principles. This propensity may at times sacrifice the opportunity that generalization presents to explore underlying rationales more fully. The length

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[15] *See id.* § 2(1), (2). To be sure, these terms are used somewhat apologetically. Comment c to section 2, headed "*Servants not necessarily menials*," notes that "[m]any servants perform exacting work requiring intelligence rather than muscle." *Id.* § 2 cmt. c. The comment evidences faith in the normative irrelevance of formal terminology, as well as in its egalitarian potential, concluding as it does that "the officers of a corporation or a ship, the interne [sic] in a hospital, all of whom give their time to their employers, are servants equally with the janitor and others performing manual labor." *Id.*

[16] *See* Fisher v. Townsends, Inc., 695 A.2d 53, 58-59 (Del. 1997) (stating employer-employee terminology connotes implication of direct relationship pursuant to workers' compensation statutes). Some courts use master-servant terminology as the broader and more inclusive category, preferring to restrict employer-employee terminology to the narrower set of situations that implicate rights or obligations under workers' compensation statutes. *See id.* The most basic distinction is between agents over whom the principal's right to control does not extend to the specifics of how the agent does the work (like nonemployee lawyers and real estate agents) and agents over whom the principal's right to control encompasses such specifics. *See* RESTATEMENT (SECOND) OF AGENCY § 2 cmt. b. In the terminology of *Restatement (Second)*, those in the latter category are "servants" and those in the first category are "independent contractors." *See id.* § 2(1), (3). Two further possibilities complicate the terminology, though. *Restatement (Second)* also uses the "independent contractor" label to refer to actors who are not agents. *See id.* § 2(3) (defining relationship when person contracts to do something for one by whom person is not controlled). Such independent contractors are not fiduciaries; the contract-provided performance defines their relationship with the principal, and the principal has no interim rights of control. *See id.* Separately, not all servants within the *Restatement (Second)* definition are employees because the definition would include an actor who provides services gratuitously to a person who has the right to control the actor's physical conduct in providing the service. Gratuitous service within the household is an obvious example.

[17] *See* RESTATEMENT (SECOND) OF AGENCY § 492.

of *Restatement (Second)*, coupled with its 528 separately enumerated points of black letter law,[18] may reduce its usefulness. At the same time, *Restatement (Second)* also reflects the view that agency is cogent as a body of legal principles connected at some level by generalized rationales.[19] It is neither a hodgepodge nor a jurisprudential marriage of convenience between transaction-oriented rules relevant to contractual liability and compensation-oriented rules relevant to vicarious tort liability. In contrast, it is noteworthy that the leading contemporary authority on agency in English law is pessimistic regarding the prospect of generalization.[20]

Assessing agency in the 1990s, I believe the intellectual optimism reflected in *Restatement (Second)* is still warranted. The first two restatements successfully sought "the rhyme and reason of the law beneath the tangle of words which has grown upon the fertile soil of a three party relationship."[21] Their success was an effective rejoinder to Justice Holmes's position that the rules of agency were the simple-minded result of combining the fiction of identity between the principal and the agent with common sense.[22] Holmes's account of agency was thin and intellectually pessimistic; in contrast, the restatements drew a robust body of principle from opinions reflecting "judicial sense (rather than common sense) and the needs of commerce."[23]

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[18] *See id.* §§ 1-528. In fact, there are more than 528 points due to the use of numbers followed by capital letters. *See, e.g., id.* §§ 14A-14O.

[19] *See* Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 910 (1988) (describing general theory that fiduciary obligation of agency relationship can be applied to diverse situation of facts as intelligible and cogent).

[20] *See* F.M.B. REYNOLDS, BOWSTEAD & REYNOLDS ON AGENCY 20 (16th ed. 1996) (stating that seeking to link "agency reasoning in contract and property with vicarious liability in tort with a view to the development of more general principles" seems to be "no longer in fashion, and if this is so it is with good reason").

[21] Warren A. Seavey, *The Rationale of Agency*, 29 YALE L. REV. 859, 859 (1920). Professor Seavey, the Reporter for the first two restatements, succeeded Professor Floyd R. Mechem, who died in 1928.

[22] *See* OLIVER WENDELL HOLMES, THE COMMON LAW 180-83 (1881) (discussing evolution of agency law of master and servant and how common sense has limited agency doctrine); Oliver Wendell Holmes, *Agency, I*, 4 HARV. L. REV. 345, 350-51 (1891) (explaining fiction in identifying relationship between agent and principal); Oliver Wendell Holmes, *Agency, II*, 5 HARV. L. REV. 1, 14 (1891) (stating that law results from "a conflict between logic and common sense"). On the narrowness of Holmes's jurisprudence generally, see Louise Weinberg, *Holmes' Failure*, 96 MICH. L. REV. 691 (1997).

[23] *See* Seavey, *supra* note 21, at 859 (stating that judges decide cases in accordance with

If anything, today's resources provide even stronger bases for optimism. Developments in other intellectual disciplines, in particular economics, organization theory, sociology, and others suggest powerful insights into agency relationships that aid in generalization. It is not necessary to rely on fictions of identity or fictions that deny the moral autonomy of an agent to develop a satisfactory treatment of relationships in which the actor has agreed to act for the benefit of another who will have the right to some degree of control over the agent's actions.[24] The contemporary habit of reflecting upon language and its interpretation is helpful in understanding the operation and consequences of agency relationships; likewise, inquiry into the creation of meaning within privately constructed systems of interaction is instructive.[25] Moreover, the prospect of successful generalization is enhanced by moving beyond the earlier restatements' near-exclusive focus on individual principals to a broader focus on corporate and organizational principals. By paying explicit attention to the applications of agency doctrine when the principal is an organization, one enhances the prospect of successful generalization. In varying degrees of tightness, one can discover links between agency's internal concern with the principal-agent relationship and its external concern with the consequences of an agent's interactions with third parties.

II. PRINCIPAL POINTS OF DIFFICULTY

This Part identifies points in agency doctrine that are especially important or difficult. This Part first discusses topics addressed by *Restatement (Second)* that either have attracted major subsequent case law development beyond the formulation in *Restatement (Second)* or topics that the restatement formulation has not optimally served. This Part next turns to topics or questions not

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commercial necessities and general principles of jurisprudence).

[24] *See, e.g.*, JAMES S. COLEMAN, FOUNDATIONS OF SOCIAL THEORY 151 (1990) (discussing misperceptions of relationships between principal and agent, principal and third party, and principal-agent and third party).

[25] *See* JOHN SEARLE, THE CONSTRUCTION OF SOCIAL REALITY 59-78 (1995) (arguing that language is constitutive of institutional reality).

included or resolved by *Restatement (Second)* and then to topics addressed in detail in *Restatement (Second)* that might be deleted or truncated in a third restatement.

A. *Topics Encompassed by* Restatement (Second)

1. Bases for Agency Characterization of Relationship

Since 1958, much case law has considered circumstances, apart from formal and explicit appointment, that justify treating one person as another's agent. The most troubling cases apply concepts termed "apparent agency" and "estoppel" to hold liable a party who benefits from a relationship in which the parties did not intend the legal consequences of agency.[26] Frequently, the party who ultimately benefits economically through another's activity fails to notify the public that the relationship is other than agency.[27] It is likely that parties to such relationships value their ability to structure the way they do business in order to minimize legal risks.

Some cases strain to apply this estoppel doctrine to protect third parties who are injured in their dealings with, for example, a nonemployee physician in a hospital emergency room[28] or an independent franchisee in a seemingly unified national chain of business establishments.[29] Jurisdictions differ on the plaintiff's burden of establishing detrimental reliance on an appearance of agency and in the probative significance assigned to a party's failure to correct misimpressions that others may draw about the nature of a relationship.[30]

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[26] *See, e.g.*, BLUMBERG & STRASSER, *supra* note 5, § 13.05.

[27] *See id.* § 10.03.

[28] *See* Hardy v. Brantley, 471 So. 2d 358, 371 (Miss. 1985) (holding that hospital that holds itself out to public as providing service is vicariously liable for negligence of nonemployee physician who furnishes service to patient when patient engages hospital's service without regard to identity of physician).

[29] *See* Crinkley v. Holiday Inns, Inc., 844 F.2d 156, 167 (4th Cir. 1988) (holding motel franchisor vicariously liable for negligence of motel operator when franchiser retained significant degree of control over franchisee, motel was operated to suggest ownership by franchisee, and motel guest at least marginally relied on appearance in selecting particular lodging facility).

[30] *Compare* Gilbert v. Sycamore Mun. Hosp., 622 N.E.2d 788, 792-94 (Ill. 1993) (holding that hospital is vicariously liable under theory of apparent authority for negligence of nonemployee physician when hospital acted in manner that would lead reasonable person

A related but larger set of questions about the basic definition of agency stems from the centrality of control in *Restatement (Second).* Section 220 delineates in considerable detail the nature of a right to control the agent's physical acts; if this right of control is present, the agent is an employee.[31] In contrast, the more general concept of control applicable to nonemployee agents is not developed affirmatively. *Restatement (Second)* principally defines control through illustrations of situations that would not, by themselves, create a right of control.[32] Even if control ultimately eludes a dispositive (and positive) definition, the treatment of control in *Restatement (Second)* does not reflect the current mix of significant commercial disputes; a more fully articulated doctrine of control would facilitate judicial resolution of these disputes.

Control may have different meanings depending on the context and the possible consequences. Whether one corporation is under the control of another is a common question in otherwise completely dissimilar corporate disputes. At issue in some disputes is whether one corporation, as a substantial shareholder in another corporation, is responsible for the wrongdoing or the obligations of that second corporation.[33] Other disputes focus on the duties a substantial shareholder owes to minority shareholders and on the standard of judicial review applicable to transactions between a substantial shareholder and a corporation.[34] It is noteworthy that this body of case law does not im-

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to believe physician was employee or when hospital knew of or acquiesced in acts of another that would create such impression and patient acts in reliance on conduct of hospital or its agent), *with Hardy,* 471 So. 2d at 371 (holding that hospital that holds itself out to public as providing service is vicariously liable for negligence of nonemployee physician who furnishes service to patient when patient engages hospital's service without regard to identity of physician).

[31] *See* RESTATEMENT (SECOND) OF AGENCY § 220 (1958).

[32] *See id.* § 14 cmt. c (explaining that acting on behalf of another does not in itself trigger agency relationship).

[33] *See generally* Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study,* 76 CORNELL L. REV. 1036 (1991) (presenting comprehensive empirical study).

[34] *See, e.g.,* Thorpe v. CERBCO, Inc., 676 A.2d 436, 442-43 (Del. 1996) (holding that controlling shareholder breached duty of loyalty by competing with corporation); Kahn v. Lynch Communications Sys., Inc., 638 A.2d 1110, 1115 (Del. 1994) (holding that controlling shareholder owes duty of fairness to other shareholders).

pose a duty to exercise control, instead specifying the consequences for a shareholder that does exercise its potential control.[35]

Some cases consider whether financially distressed borrowers are the agents of aggressive lenders who exercise rights created by a loan agreement.[36] If a borrower is a lender's agent, the lender is liable to the borrower's other creditors for transactions within the scope of the agency relationship. The principle of lender control in section 140 of *Restatement (Second)* warrants review in light of major developments regarding lender liability in various doctrinal guises.[37] One possibility would be to delineate the distinction between agents and nonagent independent contractors, specifying which circumstances courts should consider in commercial relationships. More generally, one function of the law of agency is to create disincentives — the liabilities just summarized — for parties who step outside narrowly defined roles to exercise control over other parties.

Restatement (Second) characterizes "inherent agency power" as a separate basis for imposing the consequences of an agency relationship.[38] The power is derived solely from the relationship between an agent and a principal rather than from the principal's manifestations to third parties.[39] What *Restatement (Second)* articulates is not, however, a definition of the power but rather a statement of its basis. The term appears to have generated considerable and perhaps unnecessary confusion, yet its

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[35] *See In re* American Honda Motor Co. Dealerships Relations Litig., 958 F. Supp. 1045, 1051-52 (D. Md. 1997) (stating circumstances under which parent is liable for acts of subsidiary).

[36] *See* A. Gay Jenson Farms Co. v. Cargill, Inc., 309 N.W.2d 285, 290 (Minn. 1981) (holding that creditors became liable as principals for acts of debtors when creditors assumed control of debtor's business).

[37] *See, e.g.*, Sander Alvarez, *Taming the Environmental Protection Agency: Lender Liability in the Aftermath of* Kelly v. EPA, 3 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 465, 469-70 (1996) (discussing inconsistent application of secured creditor exemption found in Comprehensive Environmental Response, Compensation, and Liability Act); Kenneth M. Lodge et al., *A Lender's Liability for Agent Misdeeds*, 33 SANTA CLARA L. REV. 811, 813 (1993) (discussing agency law in context of interference with corporate governance and excessive control); Edward F. Mannino, *New Developments in Lender Liability Litigation*, SB74 A.L.I.-A.B.A. 699, 708-16 (1997) (discussing various misrepresentation theories used to bring both contract and tort cases against financial institutions).

[38] *See* RESTATEMENT (SECOND) OF AGENCY § 8A (1958).

[39] *See id.* (discussing inherent agency power between principal and agent).

contributions to agency doctrine are worth noting. Inherent agency power explains why courts might hold an undisclosed principal liable when the agent exceeds the scope of actual authority; in such a relationship, because third parties are unaware that their liaison is anyone's agent,[40] the definition of apparent authority in *Restatement (Second)* is inapplicable.

The treatment of inherent agency power in *Restatement (Second)* is problematic in two respects. First, to the extent some contemporary cases broadly define the circumstances that warrant a finding of apparent authority, this development may have overtaken the doctrine of inherent agency power. Apparent authority holds the principal to the consequences of the agent's conduct when a third party reasonably believes that the agent has authority to do particular acts and that belief is traceable to conduct of the principal.[41] Thus, inherent agency power may no longer be a distinctive basis for imposing agency's consequences when the principal is disclosed. Second, section 8A of *Restatement (Second)* states that inherent agency power "exists for the protection of persons harmed by or dealing with a servant or other agent."[42] This rationale is misleading because a contract between an undisclosed principal acting through an agent and a third party would be enforceable by the undisclosed principal against the third party as well as by the third party against the principal.[43] A more accurate rationale for inherent agency power is that, in aggregate, the doctrine works to reduce transaction costs for all parties, not just third parties. Cases applying the doctrine protect third parties when a disclosed agent's assertion of authority is plausible in light of the agent's evident position or prior relationship with the third party.[44] In addition,

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[40] *See* Dupuis v. Federal Home Loan Mortgage Corp., 879 F. Supp. 139, 144 (D. Me. 1995) (applying agency law principles to analyze liability of undisclosed principal for acts of general agent).

[41] *See* American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 565-66 (1982) (stating that principal is liable to third party in various situations if agent acts with apparent authority).

[42] RESTATEMENT (SECOND) OF AGENCY § 8A.

[43] *See id.* § 147 cmt. c (describing liability of undisclosed principal to third party); *id.* § 302 (discussing ability of principal to enforce contract against third party).

[44] *See, e.g.*, Nogales Serv. Ctr. v. Atlantic Richfield Co., 613 P.2d 293, 295-97 (Ariz. Ct. App. 1980) (holding that truck stop operator could reasonably believe that representative of gasoline company had authority to grant across-the-board discount); Croisant v. Watrud,

the agent for an undisclosed principal must reasonably appear to have the right to do a particular act that carries typical consequences[45] under circumstances in which the third party's failure to inquire further was reasonable and the principal was fairly responsible for the appearance of authority or right.

2. Scope of Authority

Whether an agent did a particular act while acting within the scope of the agent's authority determines the legal consequences of those acts for the principal. As mentioned earlier, the principal is bound by any transaction that an agent enters into on behalf of the principal, and the principal is vicariously liable for certain of the agent's torts.[46] If an employment relationship exists, the principal is vicariously liable for the agent's torts committed while acting within the scope of employment.[47] A principal is not vicariously liable for physical harms caused by the negligence of nonemployee agents (subject to some exceptions);[48] however, a principal is vicariously liable for a nonemployee agent's misrepresentation,[49] defamation,[50] and tortious institution or conduct of legal proceedings[51] if the agent is acting

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432 P.2d 799, 801-02 (Or. 1967) (holding that client of accountant reasonably believed firm authorized him to collect and disburse her funds although such services were atypical for accountants).

[45] *See, e.g.*, Watteau v. Fenwick, [1892] 1 Q.B. 346, 348-49 (stating that undisclosed principal is bound to contract made by pub manager). In *Watteau*, a trade supplier to a pub sold conventional items of inventory to a pub manager whom the trade supplier had no reason to know was no longer the pub's owner, having dealt with the pub through the same individual prior to the undisclosed sale to a brewing company. *See id.*

[46] *See* RESTATEMENT (SECOND) OF AGENCY § 219; *see also* WARREN A. SEAVEY, STUDIES IN AGENCY 228-30 (1949) (discussing master's liability for servant's torts).

[47] *See* RESTATEMENT (SECOND) OF AGENCY § 219.

[48] *See id.* § 250.

[49] *See id.* § 257.

[50] *See id.* § 254. If the object of the allegedly defamatory statement is a public official, a defendant is not liable unless the defendant's conduct meets the "actual malice" standard adopted in *New York Times v. Sullivan*, 376 U.S. 254 (1964). In this context, an agent's actual malice does not impute to the principal absent intervening and independent action by the principal. *See, e.g.*, McFarlane v. Esquire Magazine, 74 F.3d 1296, 1302 (D.C. Cir. 1996), *cert. denied*, 117 S. Ct. 53 (1996).

[51] *See* RESTATEMENT (SECOND) OF AGENCY § 253. Unlike defamatory statements and misrepresentation, vicarious liability for tortious institution or conduct of legal proceedings extends only to the speech of agents who are actually authorized. *See id.*

within the scope of actual authority or with apparent authority.[52] Thus, the concepts of scope of authority and scope of employment are fundamental. The formulations in *Restatement (Second)* may have been partially overtaken, however, by case law developments; a vivid example is the controversial expansion in some jurisdictions of an employer's vicarious liability for intentional physical torts committed by employees.[53] *Restatement (Second)* also acknowledges that an agent's apparent authority may serve as a basis for imposing vicarious liability.[54] Courts vary in their receptiveness to this idea, which figures prominently in current sexual harassment litigation.[55]

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[52] *See supra* notes 41-43 and accompanying text.

[53] *See, e.g.*, Mary M. v. City of Los Angeles, 54 Cal. 3d 202, 209, 814 P.2d 1341, 1344 (1991) (stating that employee may be found to have acted within scope of employment for respondeat superior purposes when employee's misconduct represented risk typical of or broadly incident to employer's enterprise, even though act was malicious in nature and did not benefit employer). Other jurisdictions limit vicarious liability for intentional physical torts to circumstances in which the employee's motivation was, at least in part, to serve the employer's interests. *See, e.g.*, Andrews v. United States, 732 F.2d 366, 370 (4th Cir. 1984) (applying South Carolina law). *Restatement (Second) of Agency* could be cited to support either position. Subsection 228(1)(c) defines conduct to be within the scope of employment if "it is actuated, at least in part, by a purpose to serve the master." RESTATEMENT (SECOND) OF AGENCY § 228(1)(c). Under subsection 219(2), an employer is not liable for employee torts committed outside the scope of employment unless the employer intended the act or its consequences, the employer was reckless or negligent, the conduct violated a nondelegable duty, or the employee "purported to act or 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." *See id.* § 219(2). What does it mean for a servant to "purport" to act or speak on the master's behalf, especially when the victim knows the actor to be a servant? Moreover, the reference to reliance in subsection 219(2) is susceptible to more than one reading. "Reliance upon apparent authority" may mean that the appearance of authority is traceable to conduct of the principal. *See* Ford v. Unity Hosp., 299 N.E.2d 659, 664 (N.Y. 1973) (holding that principal is not liable unless appearance of authority is traceable to principal); Herbert Constr. Co. v. Continental Ins. Co., 931 F.2d 989, 993 (2d Cir. 1991). Or "reliance upon apparent authority" may refer to a plaintiff's conduct that would not have occurred but for the appearance of authority. *See* Gilbert v. Sycamore Hosp., 622 N.E.2d 788, 792-94 (Ill. 1993) (holding that hospital can be held liable for negligence of physician who is independent contractor if there is apparent agency). Separately, given the structure of subsection 219(2)(d), if the agency relationship "aided" the agent "in accomplishing the tort," a basis for liability exists that is distinct from apparent authority. RESTATEMENT (SECOND) OF AGENCY § 219(2)(d).

[54] *See* RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (stating that vicarious liability for acts outside scope of servant's employment can be imposed if servant relied upon apparent authority or existence of agency relation aided servant in accomplishing tort).

[55] *Compare* Torres v. Pisano, 116 F.3d 625, 635 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 563 (1997) (stating that employer may be liable for supervisor's participation in creation of

Restatement (Second) also differentiates with great precision among the different types of authority an agent might possess, with the great divide falling between authority that the principal actually intends the agent to have and authority that third parties might mistakenly yet reasonably believe the principal conferred upon the agent.[56] This latter type of authority in turn derives either from the position in which the principal places the agent and the customary powers of that position (inherent agency power) or from the principal's manifestations to third parties when the third parties reasonably believe the agent has authority to act (apparent authority).[57] It is open to question whether this distinction is sustainable in light of the definition of apparent authority applied in many recent cases.

Many cases apply the concept of apparent authority to specific facts. Recent illustrations include whether a college's vice president of business had apparent authority to guarantee the indebtedness of a contractor removing asbestos from the college's buildings;[58] whether a bank branch manager had apparent authority to tell a loan applicant that the loan had been approved even though he lacked unilateral authority to make the loan;[59]

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hostile environment when supervisor used actual or apparent authority to further harassment), *with* Faragher v. City of Boca Raton, 111 F.3d 1530, 1535 (11th Cir. 1997) *cert. granted*, 118 S. Ct. 438 (1997) (holding that vicarious liability standard inapplicable when supervisor harasses plaintiff by participating in creation of hostile work environment, but does not threaten adverse employment consequences if plaintiff does not accommodate sexual overtures).

[56] *See* RESTATEMENT (SECOND) OF AGENCY § 27 (defining apparent authority when principal's conduct reasonably causes third person to interpret agent's authority).

[57] *See id.* § 8A (discussing that inherent agency is derived solely from agency relation as opposed to principles based upon contract or tort); *id.* § 27 (stating that reasonable conduct from principal to third person creates apparent agency).

[58] *See* FDIC v. Providence College, 115 F.3d 136, 142 (2d Cir. 1997) (holding that college vice president lacked apparent authority to execute guaranty for college).

[59] *See* Miller v. Mason-McDuffie Co., 739 P.2d 806, 811 (Ariz. 1987) (holding that bank manager had apparent authority to communicate approval to applicant although bank manager lacked unilateral authority to make loan); Pipkin v. Thomas & Hill, Inc., 236 S.E.2d 725 (N.C. Ct. App. 1977), *aff'd in part and rev'd in part on other grounds*, 258 S.E.2d 778, 781-82 (N.C. 1979) (holding that vice president of mortgage loan bank had apparent authority to bind bank to contract); First Energy (U.K.) Ltd. v. Hungarian Int'l Bank Ltd., 2 Lloyd's Rep. 194, 195-96 (C.A. 1993) (holding that senior manager had ostensible authority to bind bank in loan contract).

and whether a lawyer, sent into a court-ordered mediation by a client, had apparent authority to bind the client to a settlement agreement.[60]

Two disjunctions are apparent between the *Restatement (Second)* formulation and the cases. First, to what extent does the principal have an affirmative duty to disabuse third parties of erroneous impressions created by an agent? Although the comment to section 8 of *Restatement (Second)* suggests that imposing such a duty would be "extraordinary" (at least in the absence of detrimental reliance by third parties), some current case law presupposes that the principal may have a duty to prevent the agent's unauthorized conduct that intimates an expansion of the agent's authority to third parties.[61] A closely related question is the extent to which the principal has an affirmative obligation, once an agency terminates, to squelch the agent's lingering appearance of authority.[62] Second, many cases define apparent authority itself more broadly than does the black letter formulation in *Restatement (Second)*, requiring less specificity and focus in the principal's representations to third parties.[63] It is unsurprising

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[60] *See* Carr v. Runyan, 89 F.3d 327, 331-32 (7th Cir. 1996) (holding that apparent authority exists when client's actions cause contracting third party reasonably to believe lawyer has contracting authority).

[61] *See* Corman v. Musselman, 439 N.W.2d 781, 787 (Neb. 1989) (stating that apparent or ostensible authority "may be conferred if the alleged principal affirmatively, intentionally, or by lack of ordinary care causes third persons to act upon the alleged authority").

[62] *Compare* Herbert Constr. Co. v. Continental Ins. Co., 931 F.2d 989, 996 (2d Cir. 1991) (holding that principal's failure to give notice to third parties of termination of agency and principal's failure to retrieve blank performance bond forms from agent do not automatically entitle third party to rely on agent's appearance of authority), *with* Johnson v. Nationwide Gen. Ins. Co., 937 F. Supp. 186, 192 (N.D.N.Y. 1996) (stating that when agent is terminated due to criminal activity during course of agency, principal must take "all reasonable and practical actions and communications . . . to assure that third parties are aware of the termination, and that the former agent has no authority to act for the principal in any shape, form or manner").

[63] *See* American Soc'y of Mechanical Eng'rs v. Hydrolevel Corp., 456 U.S. 556, 556-57 (1982) (holding that in private antitrust action, nonprofit professional organization that set industry standards is bound by communication of officer to customer that led customer not to purchase product manufactured by plaintiff). As defined in *Restatement (Second) of Agency*, apparent authority arises from and in accordance with the principal's "manifestations to . . . third persons." RESTATEMENT (SECOND) OF AGENCY § 8 (1958). The definition limits the consequences of apparent authority to the agent's "transactions" with third persons. *See id.* Compared with *Restatement (Second)*, contemporary cases apply a looser-fitting definition of apparent authority. *See Carr*, 89 F.3d at 331 (holding that court must examine whether principal's actions gave third party "the reasonable impression that the agent has authority"

that, in many such cases, an agent will interact with third parties on behalf of organizations in which the agent has a defined role.

3. Agency and Nonagency Fiduciary Relationships

The common law of agency defines the agent to be a fiduciary, as does section 1 of *Restatement (Second).* Elsewhere this Prospectus identifies several situations that do not involve agency relationships as defined by section 1.[64] In these situations, courts impose legal consequences comparable in some respects to those of agency law and fiduciary obligation. Some of the case law, moreover, uses agency terminology when elements of the section 1 definition are not present in the relevant relationship. As an initial framework toward further analysis, it is helpful to specify and then distinguish among traits of relationships that attract legal consequences beyond or in addition to those of a contract stemming from arms-length bargaining.

a. Representational Capacity

Representational capacity assumes that the role of acting on behalf of another is a basis for imposing fiduciary obligation on the person who assumes the representational role and, in varying degrees, for binding the represented person to the consequences of the representative's acts. This category includes agency relationships as defined in section 1. Another example, not encompassed by the *Restatement (Second)* definition, is a named plaintiff in representative litigation.[65] Such a plaintiff in a class or derivative action has undertaken to act on behalf of the class or the corporation and is treated as a fiduciary, but is not subject to the control of the class or corporation. Similarly, a hold-

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to enter into agreement); Linkage Corp. v. Trustees of Boston Univ., 679 N.E.2d 191, 199, 203-04 (Mass. 1997) (holding that principal's actions might consist of placing agent in position titled or defined such that third party reasonably believed agent had authority).

[64] *See infra* note 65 and accompanying text (discussing plaintiff in representative litigation); *infra* notes 74-75 and accompanying text (discussing real estate transactions and agents involved).

[65] *See* Heckmann v. Ahmanson, 168 Cal. App. 3d 119, 128-29, 214 Cal. Rptr. 177, 183-84 (Ct. App. 1985) (holding that plaintiff in representative litigation owed fiduciary duty to other members of class).

er of a durable power of attorney acts on behalf of the grantor who loses the legal capacity to be a principal if the grantor becomes mentally incapacitated.

b. Control

Having the right to direct another's actions is central to the definition of a relationship of agency. Control is a defining element in other fiduciary relationships, but in agency the obligation runs in the opposite direction; agency imposes a fiduciary obligation on the controlled person (the agent) on behalf of the controlling person (the principal). As a basis for the imposition of fiduciary obligation, control over another's property for that other's benefit is presumed by the trust. Likewise, directors of a corporation control the corporation's assets for its benefit and that of its stockholders. Corporate law in the United States subjects majority (or otherwise controlling) shareholders to a less-well-defined set of fiduciary duties.[66] In commercial contexts, some case law treats a lender's[67] or franchisor's[68] control over borrowers or franchisees as a basis for limiting the lender's or franchisor's use of contractually defined prerogatives, for regulating the lender's or franchisor's conflicting interests, or for enhancing the lender's or franchisor's duties of disclosure.[69] In one form or another, control is also a basis on which courts justify the imposition of liability on the party exercising control for the controlled party's wrongful acts and occasionally for the controlled party's contractual undertakings.

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[66] *See* Southern Pac. Co. v. Bogert, 250 U.S. 483, 487 (1919) (holding that majority has right to rule, but stands in fiduciary relationship with minority); Zahn v. Transamerica Corp., 162 F.2d 36, 42 (1947) (holding that majority is charged with duty of exercising good faith, care, and diligence in protecting minority interest).

[67] *See* A. Gay Jenson Farms v. Cargill, Inc., 309 N.W.2d 285, 290 (Minn. 1981) (holding that lender exercised sufficient control over borrower's operations to establish agency relationship).

[68] *See* Arnott v. American Oil Co., 609 F.2d 873, 882 (8th Cir. 1979) (discussing duty imposed upon franchisor not to act capriciously in terminating franchise).

[69] *Cf.* Williams v. Dresser Indus., 795 F. Supp. 1144, 1146 (N.D. Ga. 1992) (stating that under Georgia law, parties negotiating to enter franchise relationship may owe fiduciary duties of disclosure depending on factual circumstances). *But see* Bain v. Champlin Petroleum Co., 692 F.2d 43, 47-48 (8th Cir. 1982) (noting absence of "special circumstances" where franchised oil company sold gasoline to service station at higher price than it sold gasoline to jobber wholesalers).

c. Trust and Confidence

Acting to engender the trust and confidence of people to whom one provides advice is a basis for the relationship-specific imposition of fiduciary obligation.[70] The context is frequently defined by the advisor's membership in a profession or by a close relationship between the advisor and advisee grounded in family, friendship, or religion. Claims that the advisor "controlled" the advisee's decisions seem most often to be assertions that the relationship was one of special trust and confidence. Recent case law recognizes,[71] as does comment e in section 390 of *Restatement (Second)*,[72] that a relationship of trust and confidence may precede one of agency, with the effect that fiduciary obligation applies to the agent-to-be prior to the onset of the agency relationship. Additionally, and usually unsuccessfully, claims of special trust and confidence arise in settings otherwise defined by contract and commercial relationships. Examples include: debtor-creditor, manufacturer-retailer, manufacturer-distributor, and franchisor-franchisee relationships in which one party has become economically dependent upon the other party and vulnerable to its opportunism.[73] These are situations that may also attract robust applications of the contractual duty of good faith and fair dealing.

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[70] *See* Burdett v. Miller, 957 F.2d 1375, 1381 (7th Cir. 1992) (holding that fiduciary relationship may be imposed on advisor on ad hoc basis); *see also* Don King Prod., Inc. v. Douglas, 742 F. Supp. 741, 769-70 (S.D.N.Y. 1990) (discussing boxer's claim he reposed trust in fight promoter as inconsistent with boxer's testimony that he was one of few people in sport who had anything "halfway decent" to say about promoter).

[71] *See* Martin v. Heinold Commodities, Inc. 643 N.E.2d 734, 741 (Ill. 1994) (holding agent had duty to disclose terms of compensation, prior to formation of relationship, due to prior relationship with principal).

[72] *See* RESTATEMENT (SECOND) OF AGENCY § 390 cmt. e (stating that agreements for compensation do not ordinarily give rise to fiduciary duty, but relation of trust may create fiduciary relationship).

[73] *See, e.g.*, Rajala v. Allied Corp., 919 F.2d 610, 614 (10th Cir. 1990) (stating that overriding factor in finding fiduciary relationship is mutual responsibility); Kutz v. Cargill, Inc., 793 S.W.2d 622, 625 (Mo. App. 1990) (denying farmer's constructive fraud claim against feed company and salesman due to absence of confidential relationship).

4. Thin or Selective Agency Relationships

Restatement (Second) has little to say directly about relationships in which the agency relationship is slight (or "thin"). Where the agency serves a very narrowly defined or highly selective purpose, the agency relationship applies to one aspect of the party's relationship but not others. For example, treating a purchaser's "agent" in the typical residential property transaction as the seller's subagent means that the seller's listing agent has an agent (the subagent) who is usually someone else's employee and agent (the real estate firm employing the individual broker who assists the purchaser).[74] The challenge is to fit this relationship into the universe of *Restatement (Second)* concepts so that the subagent is "under the control" of the seller's listing agent and the seller.[75] This is a vivid example of a highly selective agency relationship. Another is an agreement designating someone as an agent solely for tax purposes.[76] The general question is how best to fit agency characterization into the expectations of the parties to the relationship and the legitimate interests of third parties; the *Restatement (Second)* universe reflects a less complicated world of business relationships. In the real estate context, the business world presupposed by *Restatement (Second)* predates the widespread use of multiple listing services. Contemporary businesses operate in a context in which law and regulation play a large role; some agency relationships become salient

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[74] *See, e.g.*, Stortroen v. Beneficial Fin. Co., 736 P.2d 391, 396 (Colo. 1987) (describing subagency that may be created with real estate broker and members of multiple listing service).

[75] A separate and smaller challenge arises if listing property in a multiple listing service is treated as an offer of a unilateral contract of subagency, which would, under contemporary contract doctrine, become irrevocable as to each offeree when the offeree commences the requested performance. *See* RESTATEMENT (SECOND) OF CONTRACTS § 45(1) (1981) (discussing option contracts). The challenge arises because section 118 of *Restatement (Second) of Agency* provides that authority terminates "if the principal or agent manifests to the other dissent to its continuance." RESTATEMENT (SECOND) OF AGENCY § 118; *see also id.* cmt. b (stating that subagent's authority terminates upon notification to subagent). If "if" means "when," the treatment of revocation in *Restatement (Second) of Agency* does not address the constraints on revocation imposed by contemporary contract doctrine.

[76] *See, e.g.*, Commissioner of Internal Revenue v. Bollinger, 485 U.S. 340, 342 (1988) (permitting corporation to be designated as agent of partnerships solely to hold title to property and secure financing); National Carbide Corp. v. Commissioner of Internal Revenue, 336 U.S. 422, 428-30 (1949) (disallowing characterization of three subsidiary corporations as agents of parent).

because they blunt the effect of regulation premised upon a transaction or interaction between two independent parties.[77]

5. Rationales for Vicarious Liability

Why any principal should be accountable for an agent's wrongful act is a pervasive jurisprudential inquiry. *Restatement (Second)* does not articulate a general rationale for the principal's vicarious liability, focusing instead in section 219 on a rationale for employer vicarious liability: "it would be unjust to permit an employer to gain from the intelligent cooperation of others without being responsible for the mistakes, the errors of judgment and the frailties of those working under his direction and for his benefit."[78] Articulating the underlying conception of justice more fully would strengthen this justification. Drawing on the contemporary economic analysis of legal rules, one could examine the costs of monitoring agents imposed on employers or other principals to reduce the likelihood of misconduct and contrast those costs with the cost of gathering information and insuring against risk that an absence of vicarious liability imposes on third parties. To the extent agents know that principals monitor them, they may be deterred from committing intentional wrongful acts and may exercise additional care, thereby reducing the likelihood of negligent misconduct. Moreover, the principal defines incentives for the agent, which shapes the framework in which the agent interprets and reacts to the principal's instructions and makes decisions that implicate the interests of third parties. Other justifications for vicarious liability, each with distinctive strengths and weaknesses, are readily identifiable as well.[79]

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[77] An illustration that is especially well developed in cases is the impact of characterizing a relationship as one of agency on claims that conduct violates the antitrust laws. *See, e.g.*, Ryko Mfg. Co. v. Eden Servs., 823 F.2d 1215, 1240-41 (8th Cir. 1987) (reversing jury verdict awarding damages on antitrust claim due to lack of sufficient evidence of market power); Illinois Corp. Travel, Inc. v. American Airlines, 806 F.2d 722, 729-30 (7th Cir. 1986) (affirming denial of preliminary injunction for price maintenance claim under quick look rule of reason analysis); Acquaire v. Canada Dry Bottling Co., 906 F. Supp. 819, 840 (E.D.N.Y. 1995) (granting motion to compel arbitration and vacating temporary restraining order).

[78] RESTATEMENT (SECOND) OF AGENCY § 219 cmt. a.

[79] *See* Seavey, *supra* note 21, at 874 (justifying imposition of contractual liability on undisclosed principal). *See generally* W. PAGE, KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 69, at 499-501 (discussing justifications of vicarious liability). A basic in-

6. Conflicted Agents

Many recent cases grapple with the consequences for corporate principals of officers or directors who were disloyal or otherwise conflicted as agents.[80] Section 282 of *Restatement (Second)* states a basic rule that does not impute to the principal knowledge obtained secretly by an agent acting adversely to the principal.[81] It would be helpful to explain how this principle applies to corporate principals when officers and directors engage in acts that create liability for the corporation or its shareholders. *Restatement (Second)* appears not to address whether domination of a board of directors by those engaged in such disloyal acts should toll an otherwise-applicable statute of limitations. Jurisdictions differ in the relevant case-law definition of circumstances that act to toll the running of a limitations period.[82]

7. Contractual Variations of Agency Relationship

Many of the rules in *Restatement (Second)* that set forth the agent's fiduciary duty to the principal are default rules, applicable "unless otherwise agreed."[83] For example, with the principal's consent, the agent may be a party to a transaction with the principal. In contrast, other fiduciary-related rules in *Restatement (Second)* are clearly intended to be mandatory. The agent's duty to deal fairly with the principal, in a transaction in which the agent acts adversely to the principal but with the principal's knowledge, is not a duty expressly subject to agree-

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sight underlying much agency doctrine that warrants thoughtful elaboration in this context as well is that "[l]iability follows control." *See* Seavey, *supra* note 21, at 874.

[80] For a statement of generally-applicable rules, see PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS §§ 5.01-.02, 5.04-.06 (1994).

[81] *See* RESTATEMENT (SECOND) OF AGENCY § 282(1) (stating that agent's secretly obtained knowledge that is adverse to principal generally does not affect principal when agent is acting within agent's own interest or for another).

[82] *Compare* Resolution Trust Co. v. Hecht, 833 F. Supp. 529, 533 (D. Md. 1993) (applying Maryland law and stating limitations period will not begin to run when there is no reasonable prospect that corporation could have been induced to sue), *with* FDIC v. Dawson, 4 F.3d 1303, 1312 (5th Cir. 1993) (stating that statute of limitations tolled only when majority of directors were more than negligent).

[83] *See* RESTATEMENT (SECOND) OF AGENCY §§ 379-382, 388, 391, 395 (stating these rules apply unless otherwise agreed).

ment otherwise.[84] The associated comment to section 390 states, however, that a contract of purchase and sale between an agent and a principal not in a dependent position is not voidable "merely" because the principal pays too much or receives too little, provided further that the agent "fully performs his duties of disclosure . . . ."[85] The comment suggests that principles beyond those stated in section 390 may apply and make the transaction voidable.[86] Another example that the comment does not identify is the principal's privilege to terminate the agent upon a serious breach of fiduciary duty. Under subsection 409(1) of *Restatement (Second)*, the principal's exercise of this privilege would not constitute a breach of any contract between the principal and the agent. To what extent, though, is the rule creating the privilege mandatory or subject to the parties' contrary agreement? A closely related question is whether the principal would be able, through contract, to waive the power to revoke authority as opposed to creating contractual liability that follows upon revocation.[87]

More generally, and arguably more importantly, the rules governing interpretation of authority in *Restatement (Second)* presuppose the underlying relationship to be fiduciary, either implicitly or explicitly.[88] By characterizing the relationship between an agent and a principal as fiduciary, agency doctrine underlies and supplements whatever preexisting agreement the agent and the principal may have reached that specifies the parties' duties. As a consequence, the principal's tasks in exercising control are greatly simplified because the principal need not draft instructions that anticipate any and all contingencies. The fiduciary relationship in agency law obliges the agent to interpret the principal's instructions reasonably to further purposes of the

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[84] *See id.* § 390 (stating agent has duty to deal fairly with principal).

[85] *See id.* cmt. c.

[86] *See id.* (stating agent with close confidential relationship with principal has burden of proving substantial gift was not result of undue influence).

[87] *See, e.g., id.* § 118 cmts. a & b (stating that if principal or agent manifests dissent to continuance of relationship, dissent is effective as revocation or renunciation, despite prohibition in contract).

[88] *See, e.g., id.* § 33 (stating that agent authorized to do only what agent may reasonably infer principal intends agent to do); *id.* § 32 (stating that rules for interpretation of contracts apply to interpretation of authority).

principal that the agent knows or should know in light of facts that the agent knows or should know at the time the agent acts. The fiduciary character of the relationship means that the principal does not bear the risk that the instructions contain gaps that the agent can exploit in either a self-interested fashion or a fashion oriented to serving interests other than those of the principal. The fiduciary character of the agent's relationship to the principal should also affect the reactions of reasonable third parties who interact with the agent, casting doubt on the agent's assertions of authority to bind the principal to transactions promising no possible benefit to the principal. This interpretive framework is entirely compatible with the principal's ability to consent to acts by the agent that would, in the absence of consent, constitute a breach of the agent's fiduciary duty.[89]

B. Topics Not Substantially Addressed by Restatement (Second)

1. Preparation to Compete

The propriety of pre-termination preparation for competition is a commercially significant and oft-litigated topic that warrants examination. *Restatement (Second)* focuses on competition concurrent with, and subsequent to, the agency relationship. Section 393 of *Restatement (Second)* prohibits the agent from competing with the principal in the area of the agency without the principal's consent.[90] Sections 395 and 396 address limits on the use of confidential information in post-associational competition.[91] Many competition-driven disputes involving former agents, however, additionally challenge preparations for competition undertaken during the agency relationship.

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[89] *See generally* Deborah A. DeMott, *Organizational Incentives to Care About the Law*, 60 LAW & CONTEMP. PROBS. (forthcoming 1998).

[90] *See* RESTATEMENT (SECOND) OF AGENCY § 393 (stating agent has duty not to compete with principal concerning subject matter of agency unless otherwise agreed).

[91] *See id.* §§ 395-396 (stating agent has duty not to use confidential information acquired during agency agreement to compete with or to injure principal even if information is unrelated to agent's employment).

2. Termination of Employees-at-Will

Since 1958, much case law and some state legislation have developed rules that constrain the ability of employers to terminate employees-at-will.[92] Rules vary substantially among jurisdictions on a basic question that implicates both the expectations of stability in any work relationship and the employer's desire for flexibility in managing employment-related matters.[93] One might, of course, treat this employment subtopic as a distinct body of law too specialized for inclusion in a general statement of agency doctrine. But much the same argument could be made for a number of the employment-related rules in *Restatement (Second)*.[94]

3. Agency Norms in Specific Settings

Restatement (Second) is very much a generalist document, essentially distinguishing only employment from other agency relationships. The volume of case law suggests, however, that the next restatement could usefully address other differentiated relationships. In particular, agency-related disputes arise commonly when one party to a transaction or event is an incorporated business or a general or limited partnership. Business organization statutes themselves tend not to address specific questions of an agent's authority.[95] Whether a partner acted within the course of partnership business[96] is often in dispute; the results of partnership litigation may support an overall broader reading of authority than do generic agency cases.

Another frequently litigated issue is whether corporate officers acted with authority requisite to bind the corporation.[97] Like

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[92] *See* MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW 25 (1994) (reporting that by 1989 nearly every state enacted exceptions to at-will-employment rule).

[93] *See id.* at 594-99 (explaining different state law obligations employers must heed during workforce reductions).

[94] *See, e.g.*, RESTATEMENT (SECOND) OF AGENCY § 471 (describing employer's tort liability for workplace safety risks within agency framework).

[95] *See* UNIFORM PARTNERSHIP ACT § 9, 6 U.L.A. 400-01 (1995) (stating authority of partner relating to partnership business).

[96] *See id.* (stating that partner must act within partnership-given authority).

[97] *See, e.g.*, Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass'n, 117 F.3d 1328, 1338-39 (11th Cir. 1997) (stating Florida law prohibits imputing corporate officers' acts to corporation when officer acts outside authority or adverse to cor-

the partnership disputes, the corporate officer cases significantly alter the risks borne by investors who do not have operational control over a business, as well as the risks borne by corporate officers who are not punctiliously careful about such formal matters as the style of their signatures. This body of doctrine also implicates the formal complexity of conducting business via transactions in which one or both parties are incorporated entities or partnerships. The Uniform Commercial Code ("UCC") drafters eliminated from revised article 3 any specific treatment of agency issues in connection with signatures on instruments, a development that enhances the practical value of directly addressing agency issues associated with corporate officers.

A distinctive set of specialized agency relationships might aptly be termed "personal" agencies, in which an individual principal appoints an agent to make decisions and handle matters related to the principal's property and, perhaps, the principal's physical circumstances and health care. Post-1958 statutory developments create relationships beyond the common-law purview of *Restatement (Second).* Statutes permit the creation of a durable power of attorney, such that the agent's authority survives the occurrence of mental incapacity on the part of the principal.[98] Statutes also permit the creation of health care power of attorney.[99] It is open to question whether the duties of agents who hold a durable power of attorney should be modeled on the law of trusts rather than agency.[100]

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porate interests); Lee v. Jenkins Bros., 268 F.2d 357, 363 (2d Cir. 1959) (stating limits on scope of officer's authority to bind corporation).

[98] *See, e.g.,* DEL. CODE ANN. tit. 12, § 4902 (1997) (providing that durable power of attorney has same effect during period where principal is disabled or incapacitated). Under the common law of agency, the principal's loss of legal capacity terminated the agency relationship. *See* RESTATEMENT (SECOND) OF AGENCY § 122(1) (stating principal's loss of capacity has same effect on authority during period of incapacity as principal's death). A durable power is not, however, a legally effective will substitute. The agent's power terminates with the principal's death, with a few exceptions. *See id.* § 120 (stating death of principal terminates authority of agent).

[99] *See* CAL. CIV. CODE § 2356(d) (West Supp. 1998) (providing exceptions to termination of agency); CAL. PROB. CODE § 4124(b) (West Supp. 1998) (defining durable power of attorney in cases where principal is incapacitated).

[100] *See* RESTATEMENT (THIRD) OF TRUSTS § 5 cmt. c (Tentative Draft No. 1, 1996) (stating that many rules applicable to trusts may apply to agent holding durable power during period of principal's legal incapacity).

4. Corporate "Alter Egos"

Many jurisdictions permit plaintiffs to pierce the corporate veil and impose liability on individual or incorporated shareholders if the corporation was but the alter ego or agent of its shareholders.[101] This doctrine goes well beyond the ambit of topics addressed by *Restatement (Second).* It is, however, a much litigated application of basic agency concepts for which the judicial rationale often seems vacuous; the resolution of such corporate disputes would be aided by an analytically delineated statement of agency's import.

5. Special Trust and Confidence in Commercial Relationships

In disputes arising out of long-term commercial relationships, plaintiffs frequently attempt to establish that the other and more powerful party in the relationship should be held to fiduciary standards. In particular, a plaintiff may claim that the defendant has a duty to disclose information to the plaintiff, or assert certain limits on the defendant's right to terminate the relationship or otherwise take action adverse to the plaintiff. Cases vary in the requirements for how a plaintiff may substantively establish that a relationship was one of special trust and confidence and for procedural matters like burdens of proof. The specter of special trust and confidence is a dimension of high-stakes commercial litigation that suffers doctrinally from a lack of analytic definition. The relationship to conventional agency doctrine is weak; if the plaintiff succeeds, however, the plaintiff benefits from judicial imposition of an agency-like set of fiduciary duties.

C. Topics to Delete or Truncate

Restatement (Second) concludes with ninety-seven sections that state the principal's duties to the agent, among them duties of general and enduring significance. In particular, the principal's duty to indemnify the agent retains fundamental significance within the common law.[102] In contrast, the content of other

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[101] *See* Thompson, *supra* note 33.

[102] *See, e.g.*, RESTATEMENT (SECOND) OF AGENCY §§ 438-440 (providing principal's duty of indemnity).

sections might fall more appropriately within the province of tort law.[103] For example, the operation of the fellow servant rule, which allocates the risk of loss from injuries inflicted by coworkers on each other, seems in its detail more allied to the policies of tort law. The content of other sections has been overtaken by statutory and administrative regulation of conditions in the workplace,[104] including the employer's duty to provide a safe working environment.

CONCLUSION

This Prospectus acknowledges the enduring significance of agency as a distinct body of legal rules, as well as the breadth of its application. A contemporary third restatement would reflect major changes in the business and institutional contexts for agency, clarify essential legal rules, and provide a general intellectual framework and set of principles within which courts and scholars could analyze future developments.

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[103] *See, e.g., id.* §§ 473-491 (stating dimensions of fellow-servant rule).

[104] *See, e.g., id.* §§ 492-516 (stating nondelegable duties of master).