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ARTICLES

ARTIFICIAL INTELLIGENCE (AI) AND THE PRACTICE OF LAW IN TEXAS

JUDGE XAVIER RODRIGUEZ†

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† Born in San Antonio, Texas, Xavier Rodriguez is a former Texas Supreme Court Justice and currently is a United States District Judge for the Western District of Texas. Special thanks are extended to Prof. Josh Blackman of South Texas College of Law Houston, Tara Emory of Redgrave Data, Prof. Maura Grossman of the University of Waterloo, Chris Davis of Gray Reed, Professor Marissa J. Moran of CUNY - New York City College of Technology, Judge Ron Hedges (U.S. M.J. ret.), Jeremy Pickens of Redgrave Data, and Jackie Schafer for their review and comments of earlier drafts of this article or providing resource materials to consider. Thanks are extended to Emily Formica, a student at the St. Mary's University School of Law for her research assistance, comments, and edits to this article.

From quill pens to mobile devices, how to practice law is constantly evolving. "Because of the vital role of lawyers in the legal process, each lawyer should strive to become and remain proficient and competent in the practice of law, including the benefits and risks associated with relevant technology."[1] The growth of artificial intelligence (AI) applications is just the latest incarnation of these developments. As lawyers have been required to adapt to these developments, the adaptable lawyer will need to determine when and if to incorporate AI into their practice. Such incorporation could help reduce the costs of legal services while increasing quality, expand the availability of legal services, and allow lawyers to get more done in less time. By automating repetitive and mundane processes, those lawyers particularly skilled in using AI to their advantage will be able to spend more time on case analysis and crafting legal arguments. AI is poised to reshape the legal profession. But AI will require courts, rules committees, and ethics bodies to consider some of the unique challenges that AI presents. It will require attorneys to evaluate whether to use such products, and the risks associated with any use. Attorneys using AI tools without checking on the accuracy of their output are responsible for the consequences of incorporating inaccurate information into their work product.[2] This article seeks to provide attorneys with a baseline understanding of AI technology and recommends areas where the State Bar, courts, rules committees, and attorneys may wish to undertake further study and potential rule changes.

Although AI tools are rapidly developing, no doubt there will be future governmental scrutiny and consumer input into this technology. In July 2023, the Federal Trade Commission began to investigate OpenAI, creator of ChatGPT,[3] to determine whether the tool has harmed consumers through its

1. TEX. DISCIPLINARY RULES PROF'L CONDUCT R.1.01 cmt. 8, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (TEX. STATE BAR R. art. X, § 9).

2. *See, e.g.*, Michael Loy, Comment, *Legal Liability for Artificially Intelligent "Robot Lawyers"*, 26 LEWIS & CLARK L. REV. 951, 957-58 (2022) (discussing how attorneys have a duty to accept ultimate responsibility for the use of robot lawyers as software tools).

3. This article makes several references to ChatGPT because it was one of the first developers to garner significant publicity. But there are several other text generators in this space (e.g., Claude 2, Google Bard AI, Bing AI Chat, Perplexity AI, and others), as well as many other AI tools now on the market. In addition to these commercial products, some law firms (e.g., Dentons) have now launched their own versions of an LLM. This article should not be interpreted as making any type of endorsement or non-endorsement of any product.

collection of data and how personal data is used.[4] The Securities and Exchange Commission has likewise begun to propose new regulatory requirements to address risks associated with the use of AI.[5] ChatGPT's co-founder recently testified before Congress requesting that Congress enact regulatory policy in these areas, partly to avoid navigating a patchwork of state laws.[6] On October 30, 2023, President Biden signed an Executive Order titled "Safe, Secure, and Trustworthy Artificial Intelligence." In part, this Executive Order (EO) requires that AI developers who develop a model that may pose a risk to the national security, national economic security, or public health or safety notify the federal government when training its model and share certain safety results. The EO also directs the U.S. Department of Commerce to develop standards and best practices for detecting AI-generated content and authenticating such content by watermarking the AI-generated content.[7]

Notwithstanding that AI tools have been in existence for some time now—albeit in a behind the scenes and low-key way, and that the governmental and private sectors are considering how best to move forward with AI, some commentators question whether generative AI tools will ever gravitate to the necessary level of accuracy to justify their use.[8] Further, as global entities and states in the United States consider whether to restrict the harvesting of certain data fed into AI tools for training purposes, it is uncertain how any such restrictions may affect the ability of AI tools to produce results with accuracy. If AI tools ingest generative AI results, some experts in the

4. Cat Zakrzewski, *FTC Investigates OpenAI Over Data Lead and ChatGPT's Inaccuracy*, WASH. POST (July 12, 2023, 7:26 PM), https://www.washingtonpost.com/technology/2023/07/13/ftc-openai-chatgpt-sam-altman-lina-khan [https://perma.cc/F6BS-BP4F] (discussing how analysts have called OpenAI's ChatGPT the fastest-growing consumer app in history).

5. Press Release, U.S. Sec. Exch. Comm'n, SEC Proposes New Requirements to Address Risks to Investors From Conflicts of Interest Associated With the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers (July 26, 2023) (on file with the U.S. Sec. Exch. Comm'n), https://www.sec.gov/news/press-release/2023-140 **[**https://perma.cc/B6TL-UBQ7].

6. Cecilia Kang & Cade Metz, *F.T.C. Opens Investigation into ChatGPT Maker Over Technology's Potential Harms*, N.Y. TIMES (July 13, 2023), https://www.nytimes.com/2023/07/13/technology/chatgpt-investigation-ftc-openai.html **[**https://perma.cc/2J77-NQ42].

7. *See* Press Release, White House, Fact Sheet: President Biden Issues Executive Order on Safe, Secure, and Trustworthy Artificial Intelligence (Oct. 30, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/30/fact-sheet-president-biden-issues-executive-order-on-safe-secure-and-trustworthy-artificial-intelligence/ [https://perma.cc/V8DT-4EK3].

8. *See* Ted Chiang, *ChatGPT is a Blurry Jpeg of the Web*, THE NEW YORKER (Feb. 9, 2023), https://www.newyorker.com/tech/annals-of-technology/chatgpt-is-a-blurry-jpeg-of-the-web [https://perma.cc/8GET-LZPY] (analogizing what generative AI does to compressing data as akin to what happens when a file is compressed to a jpeg and loses certain attributes – known as lossy compression).

field question whether "data inbreeding" may result that may produce inaccurate results.[9] Practitioners should monitor this rapidly changing landscape.

This article, however, does not undertake to make any recommendations on the larger policy issues surrounding artificial intelligence. For example, the American Bar Association in 2023 adopted Resolution 604 that sets forth guidelines requiring AI developers to ensure their products are subject to human oversight and are transparent. This article assumes that policymakers will at various times enact regulatory or statutory requirements in this area[10] and, accordingly, this article will focus on issues practicing attorneys are likely to encounter and steps the State Bar of Texas and related entities should consider.

Some AI issues are raised only briefly here. Some issues will require resolution from legislative bodies, courts, and governmental agencies.

AI implicates several intellectual property and other considerations that are important for lawyers to be aware of to advise clients. For example, to

9. *See* Maggie Harrison, *When AI is Trained on AI-Generated Data, Strange Things Start to Happen*, FUTURISM (Aug. 2, 2023), https://futurism.com/ai-trained-ai-generated-data-interview?ref=refind [https://perma.cc/4RYN-989T] (interview with Richard G. Baraniuk, Sina Alemohammad & Josue Casco-Rodriguez).

10. *See, e.g.*, WHITE HOUSE OFF. OF SCI. & TECH. POL'Y, BLUEPRINT FOR AN AI BILL OF RIGHTS: MAKING AUTOMATED SYSTEMS WORK FOR THE AMERICAN PEOPLE (2022), https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf [https://perma.cc/2SRE-VBWS] [hereinafter *Blueprint for an AI Bill of Rights*]; U.S. DEP'T OF COM., NAT'L INST. OF STANDARDS & TECH., NIST AI 100-1, ARTIFICIAL INTELLIGENCE RISK MANAGEMENT FRAMEWORK (AI RMF 1.0) (2023), https://nvlpubs.nist.gov/nistpubs/ai/NIST.AI.100-1.pdf [https://perma.cc/KJ4G-7QQQ] (a set of standards for the design, development, use, and evaluation of AI products); Consumer Fin. Prot. Bureau, *Consumer Financial Protection Circular 2022-03:Adverse Action Notification Requirements in Connection with Credit Decisions Based on Complex Algorithms*, (May 26, 2022), https://files.consumerfinance.gov/f/documents/cfpb_2022-03_circular_2022-05.pdf [https://perma.cc/2QYX-345Z] (the Consumer Financial Protection Bureau (CFPB) May 2022 guidance to financial institutions regarding algorithmic credit decisions and creditor reporting obligations); H. Mark Lyon et al., *Artificial Intelligence and Automated Systems 2022 Legal Review*, GIBSON DUNN (Jan. 25, 2023), https://www.gibsondunn.com/artificial-intelligence-and-automated-systems-2022-legal-review/ [https://perma.cc/5XCZ-23AD] (summarizing U.S. state and federal legislative, regulatory and policy developments).

"what extent should . . . AI be considered a legal person and for what purposes?"[11] Who (if anyone) owns a patent for a device designed by AI?[12] Who is liable in tort for damages caused by an AI system?[13] Will the ubiquitous use of AI facial recognition devices on public streets trigger a violation of the Fourth Amendment?[14] Does the "scraping" of data from the internet and other sources violate any copyright works?[15] Can an AI company be sued for defamation if its product manufactures a defamatory statement about a person or entity?[16] This article merely references the likelihood of these developments and defers on these issues for consideration at a later date by courts and governmental agencies.

I. AN INTRODUCTION TO AI

AI is ubiquitous and already in devices we use daily, including our smartphones and cars. "We routinely rely on AI-enriched applications, whether searching for a new restaurant, navigating traffic, selecting a movie, or getting customer service over the phone or online."[17] To remain proficient

11. Fredric I. Lederer, *Here There Be Dragons: The Likely Interaction of Judges with the Artificial Intelligence Ecosystem*, 59 THE JUDGES' J. 12, 13 (2020); *see also* Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, 88 Fed. Reg. 16190 (Mar. 16, 2023) (to be codified at 37 C.F.R. pt. 202), https://www.govinfo.gov/content/pkg/FR-2023-03-16/pdf/2023-05321.pdf [https://perma.cc/QAS4-9QU7] (the U.S. Copyright office has taken the position that AI-generated works cannot be copyrighted); Franklin Graves, *DC Court Says No Copyright Registration for Works Created by Generative AI*, IPWATCHDOG (Aug. 19, 2023, 3:34 PM), https://ipwatchdog.com/2023/08/19/copyright-registration-works-created-by-generative-ai/id=165444/# [https://perma.cc/N924-XT6K] (J. Beryl Howell agreed, stating in an August 2023 opinion that "[h]uman authorship is a bedrock requirement of copyright").

12. *See generally In re* Application of Application No. 16/524,350, No. 50-567-3-01-US, 2020 WL 1970052 (Dec. Comm'r Pat. Apr. 22, 2020); Thaler v. Vidal, 43 F.4th 1207 (Fed. Cir. 2022); Thaler v. Perlmutter, No. 1:22-cv-01564, 2023 WL 5333236 (D.D.C. Aug. 18, 2023) (mem. op.) (AI-generated works cannot be copyrighted); *Artificial Intelligence*, U.S. PAT. & TRADEMARK OFF., https://www.uspto.gov/initiatives/artificial-intelligence [https://perma.cc/2DUW-KUV4] (Mar. 22, 2023, 12:41 PM).

13. *See* Lederer, *supra* note 11, at 13.

14. *Id.* at 14.

15. Winston Cho, *Scraping or Stealing? A Legal Reckoning Over AI Looms*, THE HOLLYWOOD REP. (Aug. 22, 2023, 12:18 PM), https://www.hollywoodreporter.com/business/business-news/ai-scraping-stealing-copyright-law-1235571501/ [https://perma.cc/8WTB-LPGW] (AI companies contend that their practice of inputting data from the internet and other sources constitutes "fair use" under copyright law).

16. Ryan Tracy & Isaac Yu, *Some of the Thorniest Questions About AI Will be Answered in Court*, WALL ST. J. (Aug. 23, 2023, 9:00 AM), https://www.wsj.com/tech/ai/some-of-the-thorniest-questions-about-ai-will-be-answered-in-court-e7fd444b [https://perma.cc/D3TY-5EAR] (also mentioning issues such as can AI be used by healthcare insurance carriers to review claims and whether AI tools violate privacy laws).

17. NAT'L SEC. COMM'N ON A.I. 33 (2021), https://www.nscai.gov/wp-content/uploads/2021/03/Full-Report-Digital-1.pdf [https://perma.cc/63ZP-9DYN].

and competent in the practice of law, lawyers must have a basic understanding of the technology and terminology used in AI.

AI "refer[s] to computer systems and applications that are capable of performing functions normally associated with human intelligence, such as abstracting, reasoning, problem solving, learning, etc."[18] "AI applications employ algorithmic models that receive and process large amounts of data and are trained to recognize patterns, thus enabling the applications to automate repetitive functions as well as make judgments and predictions."[19] "Machine learning is a subset of AI. It refers to humans training machines to learn based on data input . . . . [M]achine learning looks for patterns in data to draw conclusions. Once the machine learns to draw one correct conclusion, it can apply those conclusions to new data."[20]

> Natural language processing (NLP) is another subfield of AI . . . . NLP enables computers to read text or hear speech and then understand, interpret, and manipulate that natural language . . . . Using NLP, computers are able to analyze large volumes of text data . . . to identify patterns and relationships . . . . This type of AI in law can be applied to help complete tasks like document analysis, e-discovery, contract review, and legal research.[21]

The models powering platforms used for generating text are called large language models, or LLMs.

Much attention has recently been focused on ChatGPT, an AI chatbot created by OpenAI, powered by a large language model (LLM) trained on a massive dataset to generate human-like responses. But ChatGPT and similar models are only one type of AI, commonly referred to as "generative AI."[22]

> Generative AI is a specific subset of AI used to create new content based on training on existing data taken from massive data sources . . . in response to a user's prompt, or to replicate a style used

18. CYNTHIA CWIK, PAUL W. GRIMM, MAURA R. GROSSMAN & TOBY WALSH, AM. ASS'N FOR THE ADVANCEMENT OF SCI., ARTIFICIAL INTELLIGENCE AND THE COURTS: MATERIALS FOR JUDGES 6 n.2 (2022), https://www.nvd.uscourts.gov/wp-content/uploads/2023/04/AI-and-Trustworthiness-NIST.pdf [https://perma.cc/T7CP-R7V8].

19. Leslie F. Spasser, Denver K. Ellison & Brennan Carmody, *Artificial Intelligence Law and Policy Roundup*, LAW.COM: LEGALTECH NEWS (Mar. 1, 2023, 9:02 AM), https://www.law.com/legaltechnews/2023/03/01/artificial-intelligence-law-and-policy-roundup/ [https://perma.cc/2KTC-4XW4].

20. *AI for Lawyers: What is AI and How Can Law Firms Use It*?, CLIO, https://www.clio.com/resources/ai-for-lawyers/lawyer-ai/ [https://perma.cc/8PA6-LT2T].

21. *Id.*

22. For those who benefit from a visual explanation of how ChatGPT and similar AI tools work, see Seán Clarke, Dan Milmo & Garry Blight, *How AI Chatbots like ChatGPT or Bard Work – Visual Explainer*, THE GUARDIAN (Nov. 1, 2023, 8:00 AM), https://www.theguardian.com/technology/ng-interactive/2023/nov/01/how-ai-chatbots-like-chatgpt-or-bard-work-visual-explainer?CMP=Share_iOSApp_Other [https://perma.cc/C37Y-8KRB].

> as input. The prompt and the new content may consist of text, images, audio, or video.[23]

Indeed, as one example, electronic research platforms such as Westlaw and LexisNexis are incorporating generative AI capabilities into their platforms.[24] Some eDiscovery vendors have likewise begun to incorporate generative AI into their platforms, aiming to improve efficiencies in the discovery process.[25] Still, the current state of developments has not been tested adequately, and there have been conspicuous examples of the technology failing to work properly.[26] AI platforms have also been developed for legal writing,[27] contract management, due diligence reviews, litigation forecasting, predictions of judicial rulings, juror screening,[28] and nonprofit legal organizations have been experimenting with how to implement bots to complete

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23. Maura R. Grossman, Paul Grimm, Daniel Brown & Molly Xu, *The GPT Judge: Justice in a Generative AI World*, 23 DUKE LAW & TECH. REV. (forthcoming 2023) (manuscript at 8) (footnote omitted), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4460184.

24. *See* Westlaw Precision; *see also* LexisNexis.

25. It may be possible within a short timeframe for eDiscovery platforms to use generative AI to help locate potential sources of relevant information, and assist with the preservation, collection, and review of relevant data. *See From Bleeding Edge to Leading Edge: GAI and Reciprocal Intelligence in eDiscovery*, COMPLEX DISCOVERY (Aug. 20, 2023), https://complexdiscovery.com/from-bleeding-edge-to-leading-edge-gai-and-reciprocal-intelligence-in-ediscovery [https://perma.cc/9W9T-V8W4]. Some eDiscovery platforms are suggesting their product can do so. *See e.g.*, *Introducing DiscoveryPartner: Generative AI Discovery and Investigation Software Purpose Built for the Cloud with Cost-Saving On/Off Cloud Utility Pricing*, MERLIN, https://www.merlin.tech/?utm_medium=email&_hsmi=280828406&_hsenc=p2ANqtz-8CFB2bMxRXlwZ2-6gv1-luFC31xs_ya5ObI8yl4BpS-HlJY-grZkHg2zlfrheueiM6HlJ8T2TA2PVy25CKwiraIFPWGqtAHl-0xpYJntP_KnyEwvE&utm_content=280828406&utm_source=hs_email [https://perma.cc/8NXD-SK8C]. But cost savings in these areas may need to be offset by the need for additional quality control and validation of results. *See Even FLOE? A Strategic Framework for Considering AI in eDiscovery*, COMPLEX DISCOVERY (Aug. 10, 2023) https://complexdiscovery.com/even-floe-a-strategic-framework-for-considering-ai-in-ediscovery [https://perma.cc/GSY9-8RGZ].

26. In perhaps the most notable example, a ChatGPT-generated legal brief included six fictitious cases. The lawyers who submitted the brief were sanctioned as a result. *See* Sara Merken, *New York Lawyers Sanctioned for Using Fake ChatGPT Cases in Legal Brief*, REUTERS (June 26, 2023, 3:28 AM), https://www.reuters.com/legal/new-york-lawyers-sanctioned-using-fake-chatgpt-cases-legal-brief-2023-06-22/# [https://perma.cc/4ML9-L4RV].

27. For example, Clearbrief claims to strengthen legal writing in Word by using AI to examine discovery, exhibits, pleadings, and other documents and displaying the citations to the source documents. It also claims to create a hyperlinked timeline. *See* Bob Ambrogi, *New AI Features in Clearbrief Create Hyperlinked Timelines and Allow Users To Query Their Documents*, LAWSITES (Aug. 15, 2023), https://www.lawnext.com/2023/08/exclusive-new-ai-features-in-clearbrief-create-hyperlinked-timelines-and-allow-users-to-query-their-documents.html [https://perma.cc/G3SL-LYPZ].

28. *See Voltaire Uses AI and Big Data to Help Pick Your Jury*, ARTIFICIAL LAW. (Apr. 26, 2017), https://www.artificiallawyer.com/2017/04/26/voltaire-uses-ai-and-big-data-to-help-pick-your-jury/ [https://perma.cc/3T92-DKB2]. Voltaire is an AI tool designed to provide insight into jurors by reviewing their social media activity, public records, and other online presence.

legal forms.[29] Sullivan & Cromwell has recently announced that it has been investing in LAER AI to develop an AI Discovery Assistant. The intent is to bring an AI product to market that will accompany an attorney to depositions and trials, having already "digested" the case, listened to the testimony, and then suggests questions. One of the products already put in use, AI Discovery Assistant (AIDA) conducts document review.[30]

AI developments have taken place at a rapid pace not anticipated by the legal community.[31] While these developments have been impressive there is a need for education in the legal community to understand errors or "hallucinations" that may occur in the output of the LLMs powering these platforms. Attorneys and courts need to be aware of both the benefits and limitations that these AI platforms present.

II. POTENTIAL LIMITATIONS OF CURRENT GENERATIVE AI PLATFORMS

Depending on the AI platform, several potential limitations should be considered. Issues to be considered include, but are not limited to, the following:

> Was the data used to train the system skewed or complete? Is it representative of the target population on which the system will be used? If the AI system was trained with historical data that reflects systemic discrimination, how was this addressed? Were variables incorporated that are proxies for impermissible characteristics (e.g., zip code or arrest records, which may correlate with and therefore incorporate race)? What assumptions, norms, rules, or values were used to develop the system? Were the people who did the programming themselves sufficiently qualified, experienced and/or diverse to ensure that there was not inadvertent bias that could impact the output of the system? Did the programmers give due consideration to the population that will be affected by the performance of the system?[32]

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29. *See* Paul W. Grimm, Maura R. Grossman & Gordon V. Cormack, *Artificial Intelligence as Evidence*, 19 NW. J. TECH. & INTELL. PROP. 9, 34-35 (2021). This article is also very useful for a more detailed discussion of what is AI and its historical development.

30. *See* Patrick Smith, *Sullivan & Cromwell's Investments in AI Lead to Discovery, Deposition 'Assistants'*, THE AM. LAW. (Aug. 21, 2023, 5:00 AM), https://www.law.com/americanlawyer/2023/08/21/sullivan-cromwell-investments-in-ai-lead-to-discovery-deposition-assistants [https://perma.cc/8GQ3-JFX6].

31. It has been widely reported that ChatGPT 3.5, which was introduced in March 2022, scored at about the bottom 10th percentile on a simulated bar exam, but GPT4, introduced in March 2023, scored at the 90th percentile on the same exam. *See* Barry Dynkin & Benjamin Dynkin, *AI Hallucinations in the Courtroom: A Wake-Up Call for the Legal Profession*, N.Y. L. J. (June 14, 2023, 10:00 AM), https://www.law.com/newyorklawjournal/2023/06/14/ai-hallucinations-in-the-courtroom-a-wake-up-call-for-the-legal-profession/ [https://perma.cc/NEE3-CRK5].

32. CWIK ET AL., *supra* note 18, at 20.

Most importantly, was the AI system specifically designed to be used by lawyers and the legal profession?

As noted by John Naughton, certain LLMs "crawled" or "harvested" an enormous amount of data on which the model could be trained.[33] The LLM then "learned" from the dataset through neural networks.[34] This allows the LLM to compose text "by making statistical predictions of what is the most likely word to occur next in the sentence that they are constructing."[35] But "[o]ne of the oldest principles in computing is GIGO – garbage in, garbage out. It applies in spades to LLMs, in that they are only as good as the data on which they have been trained."[36]

The above questions require exploration because of the potential for bias in AI systems. "[M]achine-learning algorithms are trained using historical data, [thus,] they can serve to perpetuate the very biases they are often intended to prevent. Bias in [training] data can occur because the training data is not representative of a target population to which the AI system will later be applied."[37] This may or may not be as great a concern in the context of generative AI platforms like ChatGPT, but in the context of lawyers or clients using AI for hiring decisions or judges using AI platforms for bail decisions, bias in the underlying data set is an issue that requires scrutiny. Some researchers are focusing on ways to mitigate such biased models.[38] The American Bar Association, among other groups,[39] have suggested that lawyers might violate ABA Model Rule of Professional Conduct 8.4's prohibition against engaging in discriminatory conduct by the use of biased AI platforms. It is uncertain whether mere use of AI tools that subsequently are shown to be flawed would violate Texas Disciplinary Rules of Professional Conduct

33. John Naughton, *The World Has a Big Appetite for AI – But We Really Need to Know the Ingredients*, OBSERVER (Aug. 21, 2023, 11:00 AM), https://www.theguardian.com/commentisfree/2023/aug/19/the-world-has-a-big-appetite-for-ai-but-we-really-need-to-know-the-ingredients [https://perma.cc/LT8Z-VS2G].

34. *See also* Timothy B. Lee & Sean Trott, *A Jargon-Free Explanation of How AI Large Language Models Work*, ARS TECHNICA (July 31, 2023, 6:00 AM), https://arstechnica.com/science/2023/07/a-jargon-free-explanation-of-how-ai-large-language-models-work/ [https://perma.cc/Q8XH-5M38].

35. Naughton, *supra* note 33.

36. *Id.*

37. *See* Grimm et al., *supra* note 29, at 42-47.

38. *See* Hammaad Adam, Aparna Balagopalan, Emily Alsentzer, Fontini Christia & Marzyeh Ghassemi, *Mitigating the Impact of Biased Artificial Intelligence in Emergency Decision-Making*, COMMC'NS MED. (Nov. 21, 2022), https://www.nature.com/articles/s43856-022-00214-4 [https://perma.cc/8229-Y8T7].

39. *See* Julia Brickell , Jeanna Matthews, Denia Psarrou & Shelley Podolny, *AI, Pursuit of Justice & Questions Lawyers Should Ask*, BLOOMBERG L. (Apr. 2022), https://www.bloomberglaw.com/external/document/X3T91GR8000000/tech-telecom-professional-perspective-ai-pursuit-of-justice-ques [https://perma.cc/XZZ5-WQ3A].

5.08 since the "conduct must be shown to have been 'willful' before the lawyer may be subjected to discipline."[40]

Another concern with certain AI algorithms and their outputs may be the lack of proper testing for reliability for use in the legal profession.[41] Attorneys should also be cautious about using an AI platform that was originally intended for a certain use and applying it for another use without adequate testing for validity (this is sometimes known as "function creep": the widening of a technology or system beyond its original intended use.)[42]

Finally, current pricing may pose a temporary obstacle to widespread adoption. As of August 2023, pricing for the largest GPT-4 model is $.06 for every 1,000 tokens (about 750 words) input. And $.12 for every thousand tokens output.[43] If entire case files were inputted, costs could be significant. As with all technology, as the technology improves and competition grows, these costs are likely to decline.

It should be noted, however, that many concerns over AI have been based on earlier versions. "When OpenAI launched its first large language model, known as GPT-1, in 2018, it had 117 million parameters—a measure of the system's scale and complexity. Five years later, the company's fourth-generation model, GPT-4, is thought to have over a trillion."[44] As these tools mature, their accuracy will likely greatly improve.

III. POTENTIAL OPPORTUNITIES THAT AI MAY OFFER THE LEGAL INDUSTRY

Many law firms share the same challenges —rising overhead costs (particularly wages), increasingly complex cases, and the historical reliance on manual processes that are inefficient, reduce productivity, and result in in-

40. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 5.08, cmt. 2.

41. *See* Grimm et al., *supra* note 29, at 48-51.

42. *See id*. at 51.

43. Dan Diette, *What Will Generative AI and LLMs Mean for eDiscovery?*, COMPLETE DISCOVERY SOURCE (CDS) (Aug. 10, 2023), https://cdslegal.com/insights/ai/what-will-generative-ai-and-llms-mean-for-ediscovery/ [https://perma.cc/HA6B-VYYX].

44. Ian Bremmer & Mustafa Suleyman, *The AI Paradox, Can States Learn to Govern Artificial Intelligence—Before It's Too Late?*, FOREIGN AFFAIRS (Aug. 16, 2023), https://www.foreignaffairs.com/world/artificial-intelligence-power-paradox [https://perma.cc/Q5MD-AE8K] (also noting that "AI could be used to generate and spread toxic misinformation, eroding social trust and democracy; to surveil, manipulate, and subdue citizens, undermining individual and collective freedom; or to create powerful digital or physical weapons that threaten human lives. AI could also destroy millions of jobs, worsening existing inequalities and creating new ones; entrench discriminatory patterns and distort decision-making by amplifying information feedback loops; or spark unintended and uncontrollable military escalations that lead to war . . . . AGI could become self-directed, self-replicating, and self-improving beyond human control.").

creased costs largely absorbed by clients. AI tools offer the prospect to automate and possibly improve several operations, including legal research, document review, and client communication. The use of AI could also free lawyers to work on issues of strategic importance—both improving the experience of practicing law while at the same time providing more value to the client. In addition, AI's ability to analyze large amounts of data can reduce the risk of human error and increase confidence in the accuracy of the results produced.

But large language models, such as ChatGPT, have recently exposed a weakness—hallucinations or errors. Although why errors occur is not fully understood, generally the LLMs hallucinate because the underlying language model compresses the language it is trained on, and reduces/conflates concepts that often should be kept separate. Ultimately, the LLM is a probabilistic model and generates text, as opposed to true or false answers.[45] New models, however, are being developed that are being built on archives of legal documents to improve the accuracy of an answer. These new generative AI programs designed for the legal industry may improve accuracy to queries posed, quickly review thousands of pages of documents expediting due diligence tasks and early case assessment of litigation, and draft summaries or contract language. In sum, the potential exists to reduce legal costs. That said, lawyers will still have to verify output and provide "human judgment" to the issue at hand.

It is expected that AI tools will be able to: (1) facilitate ADR by providing early insights into disputes, (2) predict case outcomes, (3) engage in scenario planning and predict negative outcomes, (4) assist with case management and calendaring/deadlines, (5) conduct contract review and due diligence tasks, (6) automate the creation of forms and other legal documents, (7) assist with discovery review and production, (8) assist with the ability to detect personal identifying information, confidential health information, or proprietary or trade secret information, (9) enhance marketing and social media presence, (10) translate data into another language, (11) automate billing, and (12) expedite and lower the cost of legal research and regulatory compliance. In addition, counsel may be able to use AI tools to engage in strategic planning with their clients by running analyses of the client's financial statements and other data.[46] That said, many other non-AI tools can assist with

45. Code.org, *How Chatbots and Large Language Models Work*, YOUTUBE (Aug. 15, 2023), https://www.youtube.com/watch?v=X-AWdfSFCHQ [https://perma.cc/ND25-8T6F] (a video on how LLMs work and further explaining hallucinations).

46. THOMSON REUTERS, CLIENT COLLABORATION: THE EVOLUTION IN LAW FIRMS 6 (2023), https://legal.thomsonreuters.com/content/dam/ewp-m/documents/legal/en/pdf/white-papers/client-collaboration-white-paper-the-evolution-in-law-firms-us-tr3462238.pdf [https://perma.cc/5RMT-BEKJ].

these tasks. Ultimately, attorneys and clients will need to evaluate whether the benefits of this new technology outweigh any costs or concerns.

As lawyers contemplate how they may incorporate AI tools into their practice, the following concerns should be addressed:

A. Duty to Protect Client Confidential Information and Use of AI Tools

Texas Disciplinary Rule of Professional Conduct 1.05 provides that an attorney generally may not reveal confidential information. Protective orders issued by individual courts impose even more stringent requirements—including, for instance, that attorneys verify the permanent destruction of discovery materials at the end of a case. Attorneys considering using AI platforms should take care not to disclose confidential information inadvertently by inputting such information into a prompt or uploading confidential information into the AI platform for processing, particularly when the AI system is open source, such as the free version of ChatGPT, and the terms of service do not guarantee confidentiality.

Many AI platforms may save data, such as query history, to train and improve their models. Employees working from "free" AI platforms could potentially be exposing client sensitive data or attorney work product. Some of these free AI tools may use information inputted to further train their models, thus exposing client confidential information. Other AI platforms may not use prompts or inputted data to train. If using paid subscription services, an argument exists that such confidentiality concerns are mitigated due to the terms of service agreements entered into with those paid commercial providers.[47] Another matter, however, is the concern that exists with any third-party provider—that is, the potential that the AI provider is itself hacked in a cybersecurity incident and client data is taken. As always, due diligence must be exercised to satisfy that reasonable security measures are in place with any third-party provider. Further, sometimes additional requirements are imposed on the parties, such as an obligation to destroy information upon the conclusion of a matter. Sometimes that obligation is mandated contractually or sometimes included in a protective order or other discovery stipulation or protocol. A lawyer uploading documents into an AI tool may be unable to certify that the information was destroyed unless it confirms that this is covered by the platform's terms of service.

47. *See* John Tredennick & William Webber, *Attorneys Using AI Shouldn't Worry About Waiving Privilege*, LAW360 (Aug. 22, 2023, 4:29 PM), https://www.law360.com/articles/1706972/attorneys-using-ai-shouldn-t-worry-about-waiving-privilege [perma.cc/T3S7-97GE] (arguing that paid commercial licensed products generally contain nondisclosure and nonuse provisions in their terms of use and the expectation of privacy in those products is as strong as those contained in Microsoft 365 licenses).

On the other hand, AI can be used to secure information sharing and address privacy concerns. AI-powered redaction can automatically identify personally identifiable information (PII) and efficiently redact a large volume of documents.[48] AI-powered redaction reduces the risk of accidentally disclosing sensitive data because of human error. An attorney using AI platforms and redaction software must weigh the benefits and risks associated with both.

B. Law Firm (and Corporate) Policies

Law firms (and corporations) should consider implementing an AI policy to provide guidance to their employees on the usage of AI. At the end of the spectrum, some firms may completely ban the use of AI platforms. As discussed in this article, this approach may be largely unworkable, and fail to prepare the law firm for the realities of the modern practice of law. A better approach may be to instruct employees that they are responsible for checking any AI's output for accuracy; they should consider whether the output of any AI platform is biased, that all appropriate laws be complied with, and they evaluate the security of any AI platforms used before inputting any confidential information.[49]

C. Use of AI-Generated Motions or Briefs for Court Use

Although AI tools are vastly improving, attorneys should never file any AI-generated document without reviewing it for accuracy. This includes not only checking to ensure that the facts stated are correct and that legal authorities cited are accurate, but that the quality of analysis reflects good advocacy. Texas Rule of Civil Procedure 13 provides that by filing the document, the attorney certifies "that they have read the pleading, motion, or other paper; that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or

48. Sriharsha M S, *Detecting and Redacting PII Using Amazon Comprehend*, AWS: AWS MACH. LEARNING BLOG (Sept. 17, 2020), https://aws.amazon.com/blogs/machine-learning/detecting-and-redacting-pii-using-amazon-comprehend [perma.cc/Q3WH-3QBM] (this early customer use case breaks down a real-time analysis of how Amazon Comprehend automatically identifies and redacts PII).

49. *See Task Force on Responsible Use of Generative AI for Law*, MIT (June 2, 2023), https://law.mit.edu/ai [https://perma.cc/TWJ5-ZVUF] (lawyers should adhere to the following principles in all usage of AI applications: Duty of Confidentiality to the client, Duty of Fiduciary Care, Duty of Client Notice and Consent, Duty of Competence in the usage and understanding of AI applications, Duty of Fiduciary Loyalty to the client, Duty of Regulatory Compliance and respect for the rights of third parties, and Duty of Accountability and Supervision to maintain human oversight over all usage and outputs of AI applications); Shana Simmons, *A Chief Legal Officer's Guide to Building a Corporate AI Policy*, LEXOLOGY (Aug. 11, 2023), https://www.lexology.com/library/detail.aspx?g=c5f2bb0c-c09c-4908-aff0-46efedc69755 [https://perma.cc/MYX8-UG6T].

groundless and brought for the purpose of harassment." Texas Disciplinary Rule of Professional Conduct 3.03 states that a "[l]egal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal." As a result, if lawyers are already required to make a reasonable inquiry, it is likely unnecessary for judges to issue additional standing orders requiring lawyers to declare whether they have used AI tools in preparing documents and certifying that they have checked the filing for accuracy.

What remains unclear is whether AI platforms are nonlawyers requiring supervision as contemplated by Texas Disciplinary Rule of Professional Conduct 5.03. It is also uncertain whether negligent reliance on AI tools can establish a violation of these rules, and whether lawyers must exercise "supervisory authority" over the AI platform, such that the lawyer must make "reasonable efforts" to ensure that the AI platform's output is compatible with the attorney's professional obligations. The Rules Committees and the Committee on Professional Ethics may wish to consider strengthening the language of these rules to clarify their scope.[50]

While there has already been substantial publicity about inaccurate ChatGPT outputs and why attorneys must always verify any draft generated by any AI platform,[51] the bar must also consider the impact of the technology on pro se litigants who use the technology to draft and file motions and briefs.[52] No doubt pro se litigants have turned to forms and unreliable internet material for their past filings, but ChatGPT and other such platforms may give pro se litigants unmerited confidence in the strength of their filings and cases, create an increased drain on system resources related to false information and nonexistent citations, and result in an increased volume of litigation filings that courts may be unprepared to handle. As nonlawyers, pro se litigants are not subject to the Rules of Professional Conduct, but they remain subject to Texas Rule of Civil Procedure 13. The current version of Rule 13, however, requires that the pro se litigant arguably know, in advance of the

50. Any filing in federal court that contains inaccuracies may be subject to sanctions under Federal Rule of Civil Procedure 11. FED. R. CIV. P. 11 ("By presenting to the court a pleading, written motion, or other paper . . . an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable . . . (1) it is not being presented for any improper purpose, . . . (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument . . . (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery . . . .").

51. *See, e.g.*, Mata v. Avianca, Inc., No. 22-cv-1461, 2023 WL 3698914 (S.D.N.Y. May 26, 2023) (lawyers sanctioned for citing to nonexistent cases that were "hallucinated" by ChatGPT and the brief was not verified by the attorney before filing).

52. *See* Berman v. Matteucci, No. 6:23-cv-00660 (D. Or. July 10, 2023) (PACER) (a pro se prisoner filed a belated habeas petition arguing that his use of ChatGPT helped him discover new arguments to advance. The Court denied the application for habeas, not because of any error in the ChatGPT results, but because the petitioner did not understand how his claim was still untimely).

filing of a motion, that the pleading is groundless and false. The Texas Supreme Court Rules Advisory Committee may wish to consider whether Rule 13 should be modified.

D. Evidentiary Issues in Litigation

Generally, "[r]elevant evidence is admissible."[53] Lawyers who intend to offer AI evidence, however, may encounter a challenge to admissibility with an argument that the AI evidence fails the requisite authenticity threshold,[54] or should be precluded by Rule 403 ("[evidence] may [be] exclude[d] . . . if its probative value is substantially outweighed by [the] danger of . . . unfair prejudice, confusion of the issues, [or] misleading the jury . . . .").[55]

Although the current version of the Rules of Evidence may be flexible enough and sufficient to address challenges to the introduction of AI-created evidence, the rules of procedure or scheduling orders should ensure that adequate deadlines are set for any *Daubert* hearing. "[J]udges should use Fed. R Evid. 702 and the *Daubert* factors to evaluate the validity and reliability of the challenged evidence and then make a careful assessment of the unfair prejudice that can accompany the introduction of inaccurate or unreliable technical evidence."[56]

AI evidence may require that the offering party disclose any training data used by the AI platform to generate the exhibit. If a proprietary AI platform is used, the company may refuse to disclose its training methodology or a protective order may be required. Courts are split on how to treat platforms using proprietary algorithms. In a case out of Wisconsin, a sentencing judge used a software tool called Correctional Offender Management Profiling for Alternative Sanctions (COMPAS), which uses a proprietary algorithm, to sentence a criminal defendant to the maximum sentence.[57] In that case, the Supreme Court of Wisconsin held that the circuit court's consideration of a COMPAS risk assessment at sentencing did not violate a defendant's right to due process because the circuit court explained that "its consideration of the COMPAS risk scores was supported by other *independent factors*" and "its use was *not determinative* in deciding whether [the defendant] could be supervised safely and effectively in the community."[58] Coming to the opposite conclusion, a district court in Texas held that Houston Independent School

53. TEX. R. EVID. 402; *see also* FED. R. EVID. 402.

54. *See* TEX. R. EVID. 901(a); *see also* FED. R. EVID. 901(a).

55. TEX. R. EVID. 403; *see also* FED. R. EVID. 403.

56. Grossman et al., *supra* note 23, at 14-15 (offering "practical, step-by-step recommendations for courts and attorneys to follow in meeting the evidentiary challenges posed by GenAI").

57. State v. Loomis, 881 N.W.2d 749 (Wis. 2016).

58. *Id.* at 753.

District's (HISD) value-added appraisal system for teachers posed a realistic threat to protected property interests because teachers were denied access to the computer algorithms and data necessary to verify the accuracy of their scores which was enough to withstand summary judgment on their claim for injunctive relief under the Fourteenth Amendment.[59] AI evidence requires a balancing between protecting the secrecy of proprietary algorithms developed by private commercial enterprises and due process protections against substantively unfair or mistaken deprivations of life, liberty, or property.

Further, a pretrial hearing will likely be required for the trial court to assess "the degree of accuracy with which the AI system [correctly] measures what it purports to measure" or "otherwise demonstrates its validity and reliability."[60] One obstacle that may be encountered is "explainability." That is how one commentator explains how the AI model generated its output.

> [M]ore sophisticated AI methods called deep neural networks [are] composed of computational nodes. The nodes are arranged in layers, with one or more layers sandwiched between the input and the output. Training these networks—a process called deep learning—involves iteratively adjusting the weights, or the strength of the connections between the nodes, until the network produces an acceptably accurate output for a given input.
>
> This also makes deep networks opaque. For example, whatever ChatGPT has learned is encoded in hundreds of billions of internal weights, and it's impossible to make sense of the AI's decision-making by simply examining those weights.[61]

Simply put, this is the so-called "black box" phenomenon.

> The selection of training data, as well as other training decisions, is [initially] human controlled. However, as AI becomes more sophisticated, the computer itself becomes capable of processing and evaluating data beyond programmed algorithms through contextualized inference, creating a "black box" effect where programmers may not have visibility into the rationale of AI output or the data components that contributed to that output.[62]

The above statement is not without controversy. Some argue that AI platforms cannot go beyond its programmed algorithms. Even AI tools that have been programmed to modify themselves can only do so within the original parameters programmers develop. "Deep Learning" tools may differ

59. Hous. Fed'n of Tchrs., Loc. 2415 v. Hous. Indep. Sch. Dist., 251 F. Supp. 3d 1168 (S.D. Tex. 2017).

60. CWIK ET AL., *supra* note 18, at 12.

61. Stephen Ornes, *Peering Inside the Black Box of AI*, 120 PROC. NAT'L ACAD. SCIS. (ELECTRONIC ISSUE) 1, 2 (2023), https://www.pnas.org/doi/epdf/10.1073/pnas.2307432120 [https://perma.cc/K2K9-L9YD].

62. Spasser et al., *supra* note 19.

from AI tools that are considered "Machine Learning." Nevertheless, "Federal Rule of Evidence 702 requires that the introduction of evidence dealing with scientific, technical, or specialized knowledge that is beyond the understanding of lay jurors be based on sufficient facts or data and reliable methodology that has been applied reliably to the facts of the particular case."[63] "Neural networks develop their behavior in extremely complicated ways—even their creators struggle to understand their actions. Lack of interpretability makes it extremely difficult to troubleshoot errors and fix mistakes in deep-learning algorithms."[64]

The AI developers may be unable to explain fully what the platform did after the algorithm was first created, but they may be able to explain how they verified the final output for accuracy. AI models may also be dynamic if they are updated with new training data, so even if a specific model can be tested and validated at one point in time, later versions of the model and its results may be significantly different.

An immediate evidentiary concern emerges from "deepfakes." Using certain AI platforms, one can alter existing audio or video. Generally, the media is altered to give the appearance that an individual said or did something they did not.[65] The technology has been improving rapidly.

> What is more, even in cases that do not involve fake videos, the very existence of deepfakes will complicate the task of authenticating *real* evidence. The opponent of an authentic video may allege that it is a deepfake in order to try to exclude it from evidence or at least sow doubt in the jury's minds. Eventually, courts may see a "reverse *CSI* effect" among jurors. In the age of deepfakes, jurors may start expecting the proponent of a video to use sophisticated technology to prove to their satisfaction that the video is *not* fake. More broadly, if juries—entrusted with the crucial role of finders of fact—start to doubt that it is possible to know what is real, their skepticism could undermine the justice system as a whole.[66]

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63. Grimm et al., *supra* note 29, at 95-97. *See also* FED. R. EVID. 702 (b)-(d).

64. Ben Dickson, *What is Deep Learning?*, PCMAG (May 18, 2023), https://www.pcmag.com/news/what-is-deep-learning [https://perma.cc/MWW4-D57B].

65. *See* John M. McNichols, *How Real are Deepfakes?*, A.B.A.: TECH. (Aug. 23, 2023), https://www.americanbar.org/groups/litigation/resources/litigation-news/2023/how-real-are-deepfakes/ [https://perma.cc/T9EQ-LECL] (noting that the Congressional Research Service warned of deepfake's potential to access classified information, falsely depict public figure's as making inappropriate statements, or influencing elections and the failure of Congress to pass legislation criminalizing their use).

66. Riana Pfefferkorn, "*Deepfakes" in the Courtroom*, 29 B.U. PUB. INT. L. J. 245, 255 (2020) (emphases in original).

Although technology is now being created to detect deepfakes (with varying degrees of accuracy),[67] and government regulation and consumer warnings may help,[68] no doubt if evidence is challenged as a deepfake, significant costs will be expended in proving or disproving the authenticity of the exhibit through expert testimony.[69]

> The proposed changes to Fed. R. Evid. 702, which become effective on December 1, 2023, make clear that highly technical evidence, such as that involving GenAI and deepfakes, create an enhanced need for trial judges to fulfill their obligation to serve as gatekeepers under Fed. R. Evid. 104(a), to ensure that only sufficiently authentic, valid, reliable—and not unfairly or excessively prejudicial—technical evidence is admitted.[70]

Concerned that AI tools may produce accurate results, but not necessarily reliable results, two very distinguished scholars have called for Federal Rule of Evidence 901(b)(9) to be amended to require a proponent of AI-generated evidence to describe any software or program that was used and show that it produced reliable results "in this instance."[71] It remains uncertain whether that proposal will be adopted. It is also uncertain how reliability may be satisfied given the proprietary information concerns discussed above, and how much additional costs will be added to the already overly costly litigation system attempting to establish or refute the proposed reliability standard.

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67. *Id.* at 268 ("So-called 'verified media capture technology' can help 'to ensure that the evidence [users] are recording . . . is trusted and admissible to courts of law.' For example, an app called eyeWitness to Atrocities, 'allows photos and videos to be captured with information that can firstly verify when and where the footage was taken, and secondly can confirm that the footage was not altered,' all while the company's 'transmission protocols and secure server system . . . create[] a chain of custody that allows this information to be presented in court.'" (alterations in original) (quoting *Ticks or It Didn't Happen: Confronting Key Dilemmas in Authenticity Infrastructure for Multimedia*, WITNESS (Dec. 2019), https://lab.witness.org/ticks-or-it-didnt-happen/ [https://perma.cc/C43S-JEKJ])).

68. Top technology firms including Google, Amazon, Microsoft, Meta, and ChatGPT-maker OpenAI recently signed a White House pledge to develop "tools to alert the public when an image, video or text is created by artificial intelligence, a method know as 'watermarking.'" Cat Zakrzewski, *Top Tech Firms Sign White House Pledge to Identify AI-Generated Images*, WASH. POST (July 21, 2023, 4:04 PM), https://www.washingtonpost.com/technology/2023/07/21/ai-white-house-pledge-openai-google-meta/ [https://perma.cc/2ZZD-437Z].

69. Pfefferkorn, *supra* note 66, at 267 ("We can foresee that evidentiary challenges to suspected deepfakes will add significantly to case timelines, and also 'will likely increase the cost of litigation because new forensic techniques and expert witnesses aren't cheap.' Litigators will have to manage their clients' expectations accordingly.").

70. Grossman et al., *supra* note 23, at 18.

71. Advisory Comm. on Evidence Rules, Paul W. Grimm & Maura R. Grossman, Proposed Modification of Current Rule 901(b)(9) to Address Authentication Issues Regarding Artificial Intelligence Evidence, at 97 (Oct. 27, 2023), https://www.uscourts.gov/sites/default/files/2023-10_evidence_rules_agenda_book_final_10-5.pdf [https://perma.cc/FUF4-NM7F].

E. AI in Law Enforcement

If not already implemented by law enforcement agencies, the probability that AI platforms will be used to track, assess, and predict criminal behavior is probable.[72] By collecting data on movements, occurrences, time of incidents, and locations, AI tools can flag aberrations to law enforcement officials. Such analyses can allow law enforcement agencies to predict crimes, predict offenders, and predict victims of crimes.[73] Criminal defense attorneys encountering situations where their clients have been arrested because of AI tools will need to evaluate whether any due process or Fourth Amendment violations can be asserted in this context.

F. AI and the Criminal Justice System

Some benefits and risks associated with AI-adoption in the criminal justice system are apparent. Early adopters, for instance, are using AI-powered document processing systems to improve case management. A new system in Los Angeles recently helped a public defender help a client avoid arrest after the attorney was alerted by the system to a probation violation and warrant.[74] Lawyers involved in the California Innocence Project are using Casetext's CoCounsel, an AI tool, to identify inconsistencies in witness testimony.[75]

Already tools have been produced that assist courts with bail evaluation and sentencing decisions. However, past platforms of these types have been the subject of some immense scrutiny as being unreliable and biased.[76] Racial bias has seeped into some earlier programs because of inputs such as home

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72. *See* Grimm et al., *supra* note 29, at 36-41.

73. *See generally* HIMANSHU ARORA, ARTIFICIAL INTELLIGENCE IN LAW ENFORCEMENT: USE-CASES, IMPACT ON FUNDAMENTAL RIGHTS AND ETHICAL REFLECTIONS (Eliva Press, 2023).

74. Keely Quinlan, *L.A. County's Public Defender Uses AI to Improve Client Management*, STATESCOOP (July 12, 2023), https://statescoop.com/la-county-public-defender-ai-aws [https://perma.cc/LD6Q-JFT7].

75. Matt Reynolds, *California Innocence Project Harnesses Generative AI for Work to Free Wrongfully Convicted*, A.B.A. J. (Aug. 14, 2023, 8:45AM), https://www.abajournal.com/web/article/california-innocence-project-harnesses-generative-ai-for-work-to-free-wrongfully-convicted [https://perma.cc/KJ7Z-M88F].

76. *See* Jeff Larson, Surya Mattu, Lauren Kirchner & Julia Angwin, *How We Analyzed the COMPAS Recidivism Algorithm*, PROPUBLICA (May 23, 2016), https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm [https://perma.cc/78K2-M8J7]; Julia Dressel & Hany Farid, *The Accuracy, Fairness, and Limits of Predicting Recidivism*, 4 SCIENCE ADVANCES (ELECTRONIC ISSUE) 1, 1 (2018), https://www.science.org/doi/epdf/10.1126/sciadv.aao5580 [https://perma.cc/2VGS-J45S]. *But see* State v. Loomis, 881 N.W.2d 749, 775 (Wis. 2016).

residence being used in the algorithms.[77] Given the presence of racially segregated neighborhoods, these algorithms produced bail recommendations that were unintentionally biased. The effect of implementing AI in place of human decision-making was recently studied by a credited group of researchers. The surprising results showed that bail decision models trained using common data-collection techniques "judge" rule violations more harshly than humans would. "[I]f a descriptive model is used to make decisions about whether an individual is likely to reoffend, the researchers' findings suggest it may cast stricter judgements than a human would, which could lead to higher bail amounts or longer criminal sentences."[78] Another study found that participants who were *not* inherently biased, were still strongly influenced by advice from biased models when that advice was given prescriptively (i.e., "you should do X") versus when the advice was framed in a descriptive manner (i.e., without recommending a specific action).[79]

Courts and probation offices that are considering adopting these platforms should inquire into how the platform was built, what factors are being considered in producing the result, and how bias has been mitigated.[80] Further, if such platforms are used in the bail consideration or sentencing process, they should be used only as a non-binding recommendation given the complexity and impact of such decisions.

G. AI and Employment Law

Some AI platforms contend that the use of their products could accelerate the hiring process and reduce the potential for discrimination allegations.[81] Law firms or clients seeking to use these AI platforms should understand that such platforms should be vetted for bias and accuracy. Attorneys counseling employers also need to be aware of the limitations of any such platforms. Efforts should be made to ensure that "explainability" of the platform's results can be produced. As with all tools that are used to monitor or

77. *See, e.g.*, *Loomis*, 881 N.W.2d at 775.

78. Adam Zewe, *Study: AI Models Fail to Reproduce Human Judgements About Rule Violations*, MIT NEWS (May 10, 2023), https://news.mit.edu/2023/study-ai-models-harsher-judgements-0510 [https://perma.cc/8FQS-98XV]; *see also* Aparna Balagopalan et al., *Judging Facts, Judging Norms: Training Machine Learning Models to Judge Humans Requires a Modified Approach to Labeling Data*, 9 SCIENCE ADVANCES (ELECTRONIC ISSUE) 1, 8-11 (May 10, 2023), https://www.science.org/doi/epdf/10.1126/sciadv.abq0701 [https://perma.cc/R39U-VK4Y].

79. Adam et al., *supra* note 38 ("Crucially, using descriptive flags rather than prescriptive recommendations allows respondents to retain their original, unbiased decision-making.").

80. *Id.*

81. *See, e.g.*, Keith E. Sonderling, Bradford J. Kelley & Lance Casimir, *The Promise and The Peril: Artificial Intelligence and Employment Discrimination*, 77 U. MIA. L. REV. 1, 4 (2022). This paper also provides an excellent summary on how Title VII, Americans with Disabilities Act, and Age Discrimination in Employment Act claims may arise in the AI context.

measure employee actions and performance, privacy, and discrimination concerns should be considered.[82] If law firms or clients use third parties to handle their human resource needs, a review of what, if any, AI platforms are used and how should be made. In addition, lawyers working in this area should monitor developments in this field, such as guidance being developed by the Equal Employment Opportunity Commission[83] and the National Labor Relations Board.[84] A recent example is a New York City law requiring transparency and algorithmic audits for bias. New York City Local Law 144 of 2021 regarding automated employment decision tools (AEDT) prohibits employers and employment agencies from using an AEDT tool unless the tool has undergone a bias audit within one year of the use of the tool, information about the bias audit is publicly available, and certain notices have been provided to employees or job candidates.[85]

H. AI and eDiscovery

How generative AI and LLMs will be incorporated into eDiscovery remains uncertain. Discovery is generally conducted by implementing a legal hold when the duty to preserve evidence has been triggered. Later, key players and other data custodians are interviewed to determine what, if any, relevant evidence the custodian or source (e.g., email server) may possess. Then relevant data is gathered and usually sent to a vendor for processing and uploading onto a platform where the documents can be reviewed and tagged for relevance, privilege, or both. Usually, parties agree to search terms to ensure that relevant documents are procured and produced. In larger cases, parties may opt to use technology-assisted review (TAR) platforms where a "seed set" is reviewed by a person knowledgeable on the file and then the TAR

82. *See* Annelise Gilbert, *EEOC Settles First-of-its-Kind AI Bias in Hiring Lawsuit*, BLOOMBERG L. (Aug. 10, 2023, 10:46 PM), https://news.bloomberglaw.com/daily-labor-report/eeoc-settles-first-of-its-kind-ai-bias-lawsuit-for-365-000 [https://perma.cc/NGU2-TVDT] (allegations that employer's AI tools rejected older applicants in violation of the Age Discrimination in Employment Act).

83. *See Artificial Intelligence and Algorithmic Fairness Initiative*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/ai [https://www.eeoc.gov/ai [https://perma.cc/DW79-DFCE].

84. *See* Memorandum from Jennifer A. Abruzzo, Gen. Couns., Nat'l Lab. Rels. Bd., to Reg'l Dirs., Officers-in-Charge & Resident Officers, Nat'l Lab. Rels. Bd. (Oct. 31, 2022) (on file with author) (warning that AI tools that conduct workplace surveillance might interfere with worker rights protected under the National Labor Relations Act); *see also* N.Y.C. ADMIN. CODE § 20-871 (2023) (requiring candidate notice before AI tool use for employment purposes and annual bias audit); H.B. 2557, 101st Gen. Assemb., Reg. Sess. (Ill. 2019) (providing interviewee rights for AI use in video interviews); H.B. 1202, 443rd Gen. Assemb., Reg. Sess. (Md. 2020) (requiring notice and consent for facial recognition services in pre-employment interviews).

85. N.Y.C. ADMIN. CODE § 20-871 (2023).

platform "learns" from the "seed set" and automatically reviews the remaining documents for relevance and privilege without human input.

The natural language search capabilities of LLMs are now being incorporated into eDiscovery platforms.[86] This allows AI to recognize patterns and identify relevant documents. Unstructured data (e.g., social media and collaborative platforms like Slack or Teams) can be reviewed by the AI tool. Theoretically, collection and review costs could be dramatically lessened, and attorney fees reduced. Another possibility is that AI will be used to augment the document gathering and review process, as well as assist with privilege review. For example, the Clearbrief platform, amongst others, is already being used for this purpose, with the underlying source documents visible in Word so the user can verify the relevance of the results of the AI suggestions of relevant documents. The user can then share a hyperlinked version of their analysis with the cited sources visible so the recipient can also verify the relevance of the source document.

A potential downside to the adoption of AI tools that must be considered is whether any prompts entered in the AI tool, or data or images generated by the AI tool may be subject to production in the event of a government investigation or litigation request. Just as collaboration tools such as Slack and Teams have added new burdens and costs to production compliance, so too may AI tools.

I. AI and Health Care Law

It is widely expected that AI tools will be more routinely deployed in the diagnosis of diseases and treatment. Lawyers practicing in the healthcare industry will need to consider issues of bias in the AI tool's seed set that may lead to accuracy problems.[87] They will also need to understand how these tools can be employed in a way that complies with healthcare-specific regulatory requirements—in particular, privacy requirements imposed by the Health Insurance Portability and Accountability Act of 1996 (HIPAA). As with other issues raised above, liability for any misdiagnosis or treatment resulting from the use of an AI tool will require future judicial resolution.

86. *See e.g.*, RELATIVITY.AI LABS, https://www.relativity.ai/ [https://perma.cc/9CCB-26MT]; *The Legal AI You've Been Waiting For*, CASETEXT: MEET COCOUNSEL, https://casetext.com/cocounsel/ [https://perma.cc/A6FW-C3GX]; REVEAL: AI-POWERED EDISCOVERY & INVESTIGATIONS, https://www.revealdata.com/ [https://perma.cc/3HJC-WG4X].

87. *See, e.g.*, Starre Vartan, *Racial Bias Found in a Major Health Care Risk Algorithm*, SCI. AM. (Oct. 24, 2019), https://www.scientificamerican.com/article/racial-bias-found-in-a-major-health-care-risk-algorithm/ [https://perma.cc/7EZU-URWV].

J. AI and Immigration Law

AI tools have already been implemented by immigration law practitioners in completing U.S. citizenship forms and tracking their status.[88] AI tools have been helpful in this area, where often the same data must be filled in multiple forms. Again, as with all forms that are generated, it is still the responsibility of the attorney to review for accuracy any forms completed by an AI tool.

K. The Need for Attorneys to Monitor Regulatory and Statutory AI Developments

To adequately counsel clients, attorneys will need to keep abreast of regulatory and statutory developments in this area. Although as of this writing Texas has not passed any significant legislation related to implementing AI, other states have.[89] In addition, the Equal Employment Opportunity Commission,[90] the Federal Trade Commission, and the White House Office of Science and Technology Policy[91] have all issued guidelines on the use of AI.[92] The Consumer Financial Protection Bureau issued interpretative guidelines that require lending companies to provide notices to credit applicants of the specific reasons they were denied credit, to include arguably whether AI was used in that decision-making process.[93] In April 2021, the European

88. *See Immigration Law Enhanced With AI*, FILEVINE, https://www.filevine.com/platform/immigrationai/ [https://perma.cc/HHT7-ZNS8]; *see also* VISALAW.AI, https://www.visalaw.ai/ [https://perma.cc/9A6V-HDCU].

89. A limited attempt was tried in Texas with the introduction of House Bill 4695, which would have prohibited the use of AI to provide mental health counseling. Tex. H.B. 4695, 88th Leg., R.S. (Tex. 2023). The bill was filed on March. 10, 2023 by Jacey Jetton and has not been enacted into law. In June 2023, Governor Abbott established the Artificial Intelligence Advisory Council. It will "study and monitor AI systems developed, employed, and procured by state agencies, . . . assess the need for a state code of ethics for AI in state government, review automated decision systems, evaluate potential benefits and risks as a result of implementing automated decision items, and recommend administrative actions state agencies may take to ensure AI systems are thoughtfully and ethically developed." Press Release, Off. Tex. Governor, Governor Abbott Establishes New Artificial Advisory Council (June 13, 2023), https://gov.texas.gov/news/post/governor-abbott-establishes-new-artificial-intelligence-advisory-council [https://perma.cc/G83L-WA45]. The Electronic Privacy Information Center summarizes state AI laws and legislation. *See AI Policy*, ELEC. PRIV. INFO. CTR., https://epic.org/issues/ai/ai-policy/ [https://perma.cc/4X5R-QXL3].

90. U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 83.

91. *Blueprint for an AI Bill of Rights*, *supra* note 10.

92. *See, e.g.*, Spasser et al., *supra* note 19; *see also Blueprint for an AI Bill of Rights*, *supra* note 10.

93. Consumer Fin. Prot. Bureau, *supra* note 10.

Commission proposed the first EU regulatory framework for AI. The EU Artificial Intelligence Act is "the world's first rules on AI" and is anticipated to go into effect by the end of 2023.[94]

L. AI and the Impact on Individual Privacy

As more states enact privacy statutes, attorneys should know about how such statutes may affect the ability of their clients to sell data they collect and how such statutes may impact what data they are even allowed to store or process. This is especially relevant considering the just-passed Texas Data Privacy and Security Act, which becomes effective on July 1, 2024.[95] AI algorithms require large sets of data to confidently produce their results. This data is scraped from many sources, and questions are being raised as to whether consumers have provided informed consent to the storage, use, and resale of any data collected[96] regarding their purchases, internet viewing, medical data, etc.[97] Companies may also need to be able to quickly respond to consumer requests about data collected, as well as requests to delete the data. For attorneys with clients gathering data from overseas, the European Union, General Data Protection Regulation,[98] and the EU Artificial Intelligence Act[99] should be considered given that any data privacy violations could result in large fines.[100]

94. *EU AI Act: First Regulation on Artificial Intelligence*, EUR. PARLIAMENT (June 8, 2023), https://www.europarl.europa.eu/news/en/headlines/society/20230601STO93804/eu-ai-act-first-regulation-on-artificial-intelligence [https://perma.cc/96H9-RA9H].

95. Daryl W. Bailey, Chris Davis & London England, *Deep in the Heart of Privacy: Understanding the Texas Data Privacy and Security Act's Impact on Businesses*, GRAY REED: THOUGHT LEADERSHIP (July 13, 2023), https://www.grayreed.com/NewsResources/Thought-Leadership/233610/Deep-in-the-Heart-of-Privacy-Understanding-the-Texas-Data-Privacy-and-Security-Acts-Impact-on-Businesses [https://perma.cc/MSH8-FL4G].

96. At least one lawsuit has been filed in federal court arguing that Google's BARD AI product is "secretly stealing everything ever created and shared on the internet by hundreds of millions of Americans" and "putting the world at peril with untested and volatile AI." *See* Complaint at 13, J.L. v. Alphabet Inc., No. 23-cv-0344078 (N.D. Cal. July 11, 2023) (putative class action on behalf of all persons whose personal information was used as training data).

97. *See* Grimm et al., *supra* note 29, at 53-57.

98. Council Regulation 2016/679, 2016 O.J. (L 119) 1, 83 (EU).

99. Amendments Adopted by the European Parliament on 14 June 2023 on the Proposal for a Regulation of the European Parliament and of the Council on Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) And Amending Certain Union Legislative Acts, EUR. PARL. DOC. (P9_TA 236) (2023), https://www.europarl.europa.eu/doceo/document/TA-9-2023-0236_EN.pdf [https://perma.cc/SFZ4-AU8U].

100. *See id.* at amend. 647 (administrative fines of up to €30 million or 6% of the total worldwide annual turnover depending on the severity of the infringement are set as sanctions for non-compliance with the AI act.). *See also* 2016 O.J. (L 119), *supra* note 98, at 83 (administrative fines up to €20 million or up to 4% of the total worldwide annual turnover of the preceding financial year, whichever is higher).

M. AI and Use by Pro Bono and Non-Attorney Providers

AI platforms offer the possibility of expanding the ability of pro bono providers to provide legal resources to those otherwise unable to afford an attorney. Relativity, an eDiscovery provider, has been providing an AI product, Translate, to legal aid organizations. The advantages provided by AI in helping to close the access to justice gap, however, need to be weighed by pro bono providers. AI tools cannot replace human interaction, evoke empathy, or adequately address nuances that may not be adequately expressed by a non-lawyer using the AI tool. Pro bono providers will need to exercise care that any advice or work product generated by the AI tool is vetted for accuracy prior to being delivered to the client. Attorneys using AI tools without checking on the accuracy of their output may ultimately bear sole or joint liability with the AI provider.[101] This article expresses no comment on whether AI tools used without attorney oversight could be engaging in the unauthorized practice of law.[102] Further, any liability for advice or filings generated by a "robot lawyer" will need to be adjudicated by the courts. An example of a so-called "robot lawyer" could be DoNotPay, a platform that uses a chatbot to help contest parking tickets.[103]

N. AI and ADR

Largely because of the COVID pandemic, many mediators and arbitrators shifted to an online platform to conduct mediations and arbitrations (so-called ODR or online dispute resolution). AI tools might help improve accessibility to the ADR process in both the physical (live) and ODR sessions. Arbitrators could benefit from AI tools to help summarize large data sets and generate insights. Without the parties' consent, an issue exists as to whether this would constitute some ethically impermissible ex parte communication, or an inappropriate review of material not submitted in the arbitration proceeding itself. Mediators, however, in some cases could use such AI tools to help guide the parties to an understanding of any weakness in their

101. *See* Loy, *supra* note 2, at 957-58.

102. *See* Unauthorized Prac. of L. Comm. v. Parsons Tech., Inc., 179 F.3d 956 (5th Cir. 1999) (sale and distribution of Quicken Family Lawyer product was found by the trial court to constitute UPL because of the amendment to Texas Gov't Code § 81.101 "the 'practice of law' does not include the design, creation, publication, distribution, display, or sale . . . [of] computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney" (quoting H.B. 1507, 76th Leg., Reg. Sess. (Tex. 1999))).

103. *See* Sara Merken, *Lawsuit Pits Class Action Firm Against 'Robot Lawyer' DoNotPay*, REUTERS (Mar. 9, 2023, 2:10 PM), https://www.reuters.com/legal/lawsuit-pits-class-action-firm-against-robot-lawyer-donotpay-2023-03-09/ [https://perma.cc/EU84-3MYR]; *see also* Faridian v. DoNotPay, Inc., No. CGC-23-604987 (Cal. Super. Ct. filed Mar. 3, 2023).

case. Some mediation platforms have been developed already that offer asynchronous, virtual mediation. Maintaining confidentiality and security of any documents posted to such sites will be essential. At present the efficacy of an entirely online ODR session driven by an AI tool without a human neutral does not seem to be a viable option that would effectively resolve most disputes. In any event, its value in small claims court and other cases with a small monetary amount in controversy should be explored.

In 2016, British Columbia launched the Civil Resolution Tribunal (CRT), the first online tribunal to implement ODR mechanisms in Canada. CRT is part of the British Columbia public justice system and aims to provide an accessible and affordable way of resolving civil disputes. In July 2023, CRT closed 51 Strata property claims, 287 small claims, 56 motor vehicle injury/accident benefits/accident responsibility claims, and 4 miscellaneous cases.[104] There is little independent research on the effectiveness of the CRT, but the aggregate participant satisfaction survey results for 2022/23 show 78% of the participants who responded would recommend the CRT to others.[105] For low-value matters in particular, the benefits of a speedy resolution may outweigh the risks.

O. AI and Use in Law Firm Marketing

AI platforms can offer instructions on how to create or improve websites, and build content on the site, as well as generate ideas for advertisements, marketing materials, and social media postings. Smaller law firms who do not have the resources of a marketing person might benefit from this assistance, so long as any content is proofed and verified to comply with existing attorney advertising regulations.[106] Chatbots could assist with client communications, onboarding, and responding to routine questions. That said, care should be exercised to ensure that an improper attorney-client relationship has not been established and that confidentiality is maintained. Answering substantive queries from clients using a chatbot is not advised. But since failure to keep clients informed about the status of their matter is often an item of grievance, chatbots could assist in this regard.

104. *CRT Key Statistics – July 2023*, CIV. RESOL. TRIBUNAL (Aug. 3, 2023), https://civilresolutionbc.ca/blog/crt-key-statistics-july-2023/ [https://perma.cc/62GT-Z32B].

105. CIV. RESOL. TRIBUNAL, https://civilresolutionbc.ca/ [https://perma.cc/L75G-ZMDP].

106. MODEL RULES OF PRO. CONDUCT r. 7.1 cmt. 3 (AM. BAR ASS'N. 2023); *see also* TEX. DISCIPLINARY RULES PROF'L. CONDUCT R. 7.02.

In addition, the development of image-generating AI (e.g., Dall-E 2) may offer law firms the ability to generate unique graphics[107] that otherwise would have been too expensive for inclusion in their marketing.

P. Additional Training or Skillsets Required

If AI tools are used, AI should be used to complement human judgment. Lawyers and legal professionals should contemplate how to leverage this collaboration effectively and efficiently.[108] Prior to using any AI tool, lawyers should consider what processes currently used could be improved through AI technology. If AI tools are adopted, personnel will likely require training on how to properly construct prompts/queries and how to evaluate any results. Akin to Boolean searches that required some knowledge of how to construct a "good" search, AI tools require "good" prompts.[109] One advantage of generative AI prompts and responses is that the tool has "thread" conversations. A person can ask clarifying questions. Users can ask the AI tool to clarify previous responses or ask the AI tool to customize the tone or persona of the response. Personnel will also need training on compliance with confidentiality concerns, as well as considerations involving bias. Some commentators envision a new category of employee being employed—a "prompt engineer." Other commentators speculate that the technology will become much easier to use and prompt writing specialization will be unnecessary.

Q. AI and Cybersecurity Concerns

AI will likely be used by bad actors to penetrate law firm and client IT systems. As noted by Bloomberg Law News, even before the advent of AI,

107. This article does not opine as to whether any AI-generated graphic may be entitled to trademark or copyright protection, as that issue will need to be resolved through the intellectual property regulatory and litigation process. *See* Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, 88 Fed. Reg. 16190 (Mar. 16, 2023) (to be codified at 37 C.F.R. pt. 202), https://www.govinfo.gov/content/pkg/FR-2023-03-16/pdf/2023-05321.pdf [https://perma.cc/QAS4-9QU7] (the U.S. Copyright office has taken the position that AI-generated works cannot be copyrighted); *see also* Graves, *supra* note 11 (J. Beryl Howell agreed, stating in an August 2023 opinion that "[h]uman authorship is a bedrock requirement of copyright").

108. *See* Barclay T. Blair et al., *Law Firms of the Future Will Be Different in Three Critical Ways*, BLOOMBERG L. (Aug. 21, 2023, 3:00 AM), https://news.bloomberglaw.com/environment-and-energy/law-firms-of-the-future-will-be-different-in-three-critical-ways [https://perma.cc/WUJ5-Y9JE] (arguing that AI will augment the work attorneys perform and be woven into daily tasks such as word processing, timekeeping, and communication platforms. Secondly, AI will assist in the review of evidence and drafting of briefs. Because these transformative processes will displace routine tasks and the billings associated with these tasks, lawyers will need to focus on complex problem solving and strategic thinking).

109. *See, e.g.*, MAXWELL TIMOTHY, UNLOCKING THE POTENTIAL OF CHATGPT, ADVANCED PROMPTING TECHNIQUES TO GET MORE OUT OF CHATGPT 4 (2023).

financial fraud scams have proliferated. Concerns now have arisen that AI voice-synthesizing tools could allow scammers to download short voice samples of individuals from social media, voicemail messages, or videos and create new content that would enable a false transaction to occur.[110] To counter these threats, some banks have deployed suspicious transaction detection systems using NLP models.[111] Though adoption of AI by threat actors is still limited to social engineering, AI has the potential to affect the threat landscape "in two key aspects: the efficient scaling of activity beyond the actors' inherent means; and their ability to produce realistic fabricated content toward deceptive ends."[112] On August 9, 2023, the Biden Administration together with DARPA launched a two-year $20 million "AI Cyber Challenge" to identify and fix software vulnerabilities using AI.[113] Law firms should adopt a "proactive approach to breach preparedness by understanding the full scope of costs, conducting simulations, involving key stakeholders, and implementing the right technology solutions."[114] To this end, the National Institute of Standards and Technology ("NIST") released the AI Risk Management Framework (AI RMF 1.0) to better manage risks to individuals, organizations, and society. The Framework was published on January 26, 2023, along with a companion NIST AI RMF Playbook, AI RMF Explainer Video, an AI RMF Roadmap, AI RMF Crosswalk, and various Perspectives.[115] Attorneys and law firms can use the Framework to develop their own best practices and standards for using AI systems and managing the many risks of AI technologies.

110. Nabila Ahmed et al., *Deepfakes Are Driving a New Era of Financial Crime*, BLOOMBERG L. (Aug. 22, 2023, 6:17 PM), https://news.bloomberglaw.com/privacy-and-data-security/deepfakes-are-driving-a-whole-new-era-of-financial-crime [https://perma.cc/3ZJW-2VR3].

111. *Id.*

112. Michelle Cantos, Sam Riddell & Alice Revelli, *Threat Actors are Interested in Generative AI, but Use Remains Limited*, MANDIANT (Oct. 19, 2023), https://www.mandiant.com/resources/blog/threat-actors-generative-ai-limited [https://perma.cc/7LHR-CS46] (Google's Mandiant has tracked treat actors' use of AI since 2019).

113. *See* Press Release, White House, Biden-Harris Administration Launches Artificial Intelligence Cyber Challenge to Protect America's Critical Software (Aug. 9, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/08/09/biden-harris-administration-launches-artificial-intelligence-cyber-challenge-to-protect-americas-critical-software [https://perma.cc/67XN-8WTJ].

114. CyberScoop, *Understanding the Economic Impact of a Breach*, YOUTUBE (July 31, 2023), https://youtu.be/Bb-Uhn2dtwQ [https://perma.cc/MH3C-SJWR].

115. U.S. DEP'T OF COM., NAT'L INST. OF STANDARDS & TECH., NIST AI 100-1, ARTIFICIAL INTELLIGENCE RISK MANAGEMENT FRAMEWORK (AI RMF 1.0) (2023), https://nvlpubs.nist.gov/nistpubs/ai/NIST.AI.100-1.pdf [https://perma.cc/KJ4G-7QQQ].

R. Ethical Implications of Billing Practices and AI

How should attorneys bill for the use of AI? It is anticipated that law firms will need to hire staff with a greater understanding of technology and data. How does that overhead get absorbed? How does a court determine what is a "reasonable fee" if AI is employed? If a firm makes an investment in AI and then employs that tool to provide value for the client, should the law firm be able to charge for that?

S. Minimum Continuing Legal Education – Technology Hour Component

Florida, California, and North Carolina have amended their MCLE requirements to add a requirement that attorneys complete some hours of continuing education dedicated to technology concerns. Cybersecurity, privacy concerns, and AI concerns should also lead Texas to consider amending its MCLE requirements. The state of New York now requires continuing legal education credits to be obtained regarding cybersecurity, privacy issues and data protection.[116] Texas may wish to consider amending its MCLE requirements.

T. Law Schools

In many respects, the learning needs for the provision of technologically enhanced legal services mirror the "21st century skills" seen in other professions, such as data-oriented and agile thinking, but law students are traditionally not educated in these skills or the field of digital technology in general.[117]

Given that technology will play a more prominent role in the practice of law, law schools should consider adding to the course offerings additional classes centered on technological and data literacy.[118] Law schools should prioritize allowing law students access to AI tools and the ability to practice using them in a guided classroom setting. Additionally, law schools should create clear guidelines and update their university policies to include permitted and prohibited uses of generative AI for both staff and students. It is likely that many high school and college students will become dependent on gener-

116. *See* New York State CLE Program Rules 22 NYCRR § 1500.2(h) (2023).

117. Václav Janeček, Rebecca Williams & Ewart Keep, *Education for the Provision of Technologically Enhanced Legal Services*, 40 COMPUT. L. & SEC. REV. (ELECTRONIC ISSUE) 1, 5 (2021).

118. *See, e.g.*, Tammy Pettinato Oltz, *Educating Robot-Proof Attorneys*, 97 N.D. L. REV. 185, 186-87 (2022) (discussing the introductory technology course introduced at UND Law). *See generally* JOSEPH E. AOUN, ROBOT-PROOF: HIGHER EDUCATION IN THE AGE OF ARTIFICIAL INTELLIGENCE (2017) (discussing the need for universities to broaden their technology offerings and the need for students to better understand technology).

ative AI and so practical and legal reasoning skill sets may require reinforcement in law school. Law schools will need to reflect on how to react to this challenge.

U. AI Impact on the Judiciary and Judicial Training

As discussed above, AI issues will inevitably appear before judges and judicial officers should be cognizant of the fundamentals.

Some judges (primarily federal) have entered orders requiring attorneys to disclose whether they have used AI tools. This development first occurred because an attorney in New York submitted a ChatGPT-generated brief to the court without first ensuring its correctness. The ChatGPT brief contained several hallucinations and generated citations to non-existing cases. In response, some judges have required the disclosure of any AI that the attorney has used. As noted above, that is very problematic considering how ubiquitous AI tools have become. Likely these judges meant to address whether any generative AI tool had been used in preparing the motion or brief. That said, if any order or directive is given by a court, it should merely state that attorneys are responsible for the accuracy of their filings.[119] Otherwise, judges may inadvertently be requiring lawyers to disclose that they used a Westlaw or Lexis platform, Grammarly for editing, or an AI translation tool.[120]

In addition, for the reasons discussed above, judges and law clerks should be cautious in using generative AI tools in rendering decisions and drafting opinions. At least two foreign judges have acknowledged using ChatGPT to verify their work.[121] The Texas Code of Judicial Conduct is written using broad language. Arguably, a judge relying solely on an AI tool with

119. The federal court in the Eastern District of Texas recently amended its General Order Amending Local Rule CV-11 to caution pro se litigants that AI tools may produce faulty or legally inaccurate content, and that they must verify any computer-generated content to ensure its accuracy. General Order Amending Local Rules, General Order 23-11 (E.D. Tex. Oct. 30, 2023), https://txed.uscourts.gov/sites/default/files/goFiles/GO%2023-11%20Amending%20Local%20Rules%20Effective%20December%201%2C%202023.pdf [https://perma.cc/9FQA-QT77].

120. *See* Maura R. Grossman, Paul W. Grimm & Daniel G. Brown, *Is Disclosure and Certification of the Use of Generative AI Really Necessary*, 107 JUDICATURE 68, 71 (2023) (arguing that Fed, R. Civ. P. 11 and 26(g) are sufficient and that individualized standing orders are unnecessary and deter the legitimate use of GenAI applications); Isha Marathe, *4 Generative AI Issues That Are Likely Keeping Judges up at Night*, LAW.COM: LEGALTECH NEWS (Aug. 10, 2023, 6:40 PM), https://www.law.com/legaltechnews/2023/08/10/4-generative-ai-issues-that-are-likely-keeping-judges-up-at-night/ [https://perma.cc/7FKR-LLGE].

121. *See Colombian Judge Uses ChatGPT in Ruling on Child's Medical Rights Case*, CBS NEWS (Feb. 2, 2023, 4:37 PM), https://www.cbsnews.com/news/colombian-judge-uses-chatgpt-in-ruling-on-childs-medical-rights-case/ [https://perma.cc/3LXK-MP8Z] ("In this case, [Judge] Padilla said he asked the bot: 'Is autistic minor exonerated from paying fees for their therapies?' among other questions. It answered: 'Yes, this is correct. According to the regulations in Colombia, minors

no subsequent verification would violate Canon 1 (upholding the integrity and independence of the Judiciary), but the Code is remarkably silent about principles of impartiality, integrity, transparency, avoiding advocacy, and considering diverse perspectives and interpretations of the law. The State Commission on Judicial Conduct may wish to consider whether to amend the Code considering generative AI developments.[122]

Another concern raised about using AI in adjudicative systems is the possibility that AI adjudication will make the "legal system more incomprehensible, data-based, alienating, and disillusioning."[123] Historically, the law has valued explicit reasoning stated in a judicial opinion. But AI may adjudicate based on the analysis of a vast amount of data without constructing any explanation.[124] Non-quantifiable values like mercy presumably would not be considered by the AI tool.[125] No doubt "human judging" has its flaws and biases. Unlike humans, computers never get tired or sick or have a bad day. Data-driven decision-making is consistent and predictable. But as thought is given as to how far AI adjudicative models should be deployed, there will be a tension and tradeoff between the AI's capacity for efficiency and mass deployment and the desire for procedural due process and transparency.[126] Texas courts probably will not wish to pursue a "smart court" model of justice now being implemented in some Chinese cities. In the latter model, AI tools generate pleadings for litigants, analyze the litigation risk and issue a

diagnosed with autism are exempt from paying fees for their therapies.'"). *See also* Aman Gupta, *This Indian Court Has Used ChatGPT on a Criminal* Case, MINT (Mar. 29, 2023, 9:03 AM), https://www.livemint.com/news/india/this-indian-court-has-used-chatgpt-on-a-criminal-case-11679977632552.html [https://perma.cc/BH6Q-7JDE] (prompting ChatGPT: "What is the jurisprudence on bail when the assailants assaulted with cruelty?" and then denying the defendant's application for bail).

122. The State Bar of Michigan recently promulgated Ethics Opinion JI-155 that states: "Judicial officers must maintain competence with advancing technology, including but not limited to artificial intelligence." State Bar of Mich., Ethics Op. JI-155 (2023), https://www.michbar.org/opinions/ethics/numbered_opinions?OpinionID=1271&Type=5 [https://perma.cc/F7HG-Q24D]. The opinion cautions judges that using AI platforms that are impartial or unfair because of the algorithm's flaws may cause the judicial officer to render an incorrect decision. *See id.* Notably, the ethics opinion does not bar a judicial officer from using an AI tool. *See id.*

123. Richard M. Re & Alicia Solow-Niederman, *Developing Artificially Intelligent Justice*, 22 STAN. TECH. L. REV. 242 (2019).

124. *Id.* at 246.

125. *Id.* at 246-47; *see also* Charles Lew, *The AI Judge: Should Code Decide Your Fate*, FORBES: SMALL BUS. (Aug. 22, 2023, 9:30 AM) https://www.forbes.com/sites/forbesbusinesscouncil/2023/08/22/the-ai-judge-should-code-decide-your-fate/?sh=6c6f4cd24597 [https://perma.cc/42Y6-NA37] (arguing that AI may be fair but would lack the "intangible human qualities of empathy, sensory perception and comprehension of contexts such as cultural, historical and social factors that influence and impact critical decision making." At the same time, the author promotes the use of prudent AI tools to counter the public perception that our current court system no longer delivers impartial or non-biased rulings).

126. *See* Re & Solow-Niederman, *supra* note 123, at 255-69.

judgment—all done virtually.[127] But some have made the argument that "we should be considering the efficiencies of AI on the bench, applied as a dispute resolution tool for cases not economical to litigate or simpl[y] require an impartial, 'quick-and-dirty' resolution for those who simply need to move on, and move on quickly."[128]

The Texas Center for the Judiciary may wish to consider providing training and resources regarding AI.[129]

IV. CONCLUDING REMARKS

AI platforms will probably not replace lawyers soon. Through gains in efficiencies there may, however, be fewer attorneys and paralegals needed in the long term.[130] It is likely that lawyers and paralegals will be able to identify

127. *See, e.g.,* Ummey Sharaban Tahura & Niloufer Selvadurai*, The Use of Artificial Intelligence in Judicial Decision-Making: The Example of China,* INT'L J. L., ETHICS & TECH., Winter 2022, at 1 (discussing the pros and cons of "smart courts" – "human judges are more inconsistent than AI systems . . . [because of] personal values . . . and irrelevant extraneous factors." AI tools, however, reflect the mindset of the code writer and how the tool was trained, leading to bias concerns); *See also* Press Release, Council of Bars & L. Soc'ys of Eur., CCBE Statement on the Use of AI in the Justice System and Law Enforcement (May 25, 2023) https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/Statements/2023/EN_ITL_20230525_CCBE-Statement-on-the-use-of-AI-in-the-justice-system-and-law-enforcement.pdf [https://perma.cc/U8XM-7XXS] ("The CCBE is convinced that effective human oversight of the use of AI tools in the field of justice is a precondition of a justice system governed by the rule of law and stresses that the decision-making process must remain a human driven activity. In particular, human judges must be required to take full responsibility for all decisions and a right to a human judge should be guaranteed at all stages of the proceedings."). *But see* Frederick Pinto, *Can AI Improve the Justice System?*, THE ATLANTIC (Feb. 13, 2023) https://www.theatlantic.com/ideas/archive/2023/02/ai-in-criminal-justice-system-courtroom-asylum/673002/ [https://perma.cc/YQ6H-MKW5] ("Judges who are free from external meddling are nevertheless subject to a series of internal threats in the form of political prejudice, inaccurate prediction, and cognitive error . . . . In such cases—and many more—less humanity could lead to more fairness . . . . Justice may be blind, but human beings are fallible. Our thinking is clouded by more prejudices than we can count, not to mention an excessive confidence in our judgment. A fairer legal system may need to be a little less human.").

128. *See* Christopher Michael Malikschmitt, *The Real Future of AI in Law: AI Judges*, A.B.A.: L. TECH. TODAY (Oct. 18, 2023) https://www.americanbar.org/groups/law_practice/resources/law-technology-today/2023/the-real-future-of-ai-in-law-ai-judges/?utm_medium=email&utm_campaign=YOURABA&promo=YOURABA&utm_source=sfmc&utm_medium=email&utm_campaign=&promo=&utm_id=756324&sfmc_id=45058746 [https://perma.cc/TT8L-G2ZZ].

129. The United Nations Educational, Scientific and Cultural Organization (UNESCO) has recently established a massive online open course (MOOC) that explores admissibility of AI-generated evidence and virtual and augmented reality in courts. *See AI and the Rule of Law: Capacity Building for Judicial Systems*, UNESCO (Aug. 2, 2023), https://www.unesco.org/en/artificial-intelligence/rule-law/mooc-judges [https://perma.cc/VTG7-KUT3].

130. *But see* David Runciman, *The End of Work: Which Jobs Will Survive the AI Revolution*, THE GUARDIAN (Aug. 19, 2023) (stating "[w]orries about automation displacing human workers are as old as the idea of the job itself," yet also acknowledging that the "experience of work is far more likely to involve a portfolio of different occupations").

and retrieve relevant information from large data volumes more readily. Initial drafts of contracts and pleadings produced by AI platforms may result in time efficiencies but will still require attorney review and validation.[131] Still, the overall result may lessen costs to the client and make justice more accessible to unrepresented parties. It is likely that because of this increase in automation, lawyers will need to focus on "strategic and other higher-value work."[132]

On November 16, 2023, The State Bar of California, Committee on Professional Responsibility and Conduct released a memorandum and Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law.[133] The State Bars of Texas, Florida,[134] New York, and New Jersey are currently undertaking similar studies. California's work included a survey of lawyers regarding their current and planned use of generative AI. A similar survey of Texas lawyers would be useful to provide guidance to attorneys on what legal-specific tools may be helpful to their practice. The likelihood that there will be a consolidation of AI service providers is likely and in the short to mid-term, lawyers will need continued guidance on the legal issues that

131. The Florida Bar Board of Governors' Review Committee on Professional Ethics has issued Proposed Advisory Opinion 24-1. In summary, the proposed advisory opinion states that a "lawyer may ethically utilize generative AI technologies but only to the extent that the lawyer can reasonably guarantee compliance with the lawyer's ethical obligations. These obligations include the duties of confidentiality, avoidance of frivolous claims and contentions, candor to the tribunal, truthfulness in statements to others, avoidance of clearly excessive fees and costs, and compliance with restrictions on advertising for legal services." Fla. Bar, Official Notice for Proposed Advisory Opinion 24-1 Regarding Lawyers' Use of Generative Artificial Intelligence (Nov. 13, 2023), https://www.floridabar.org/the-florida-bar-news/proposed-advisory-opinion-24-1-regarding-lawyers-use-of-generative-artificial-intelligence-official-notice/ [https://perma.cc/5GM2-FLYK].

132. Natalie A. Pierce & Stephanie L. Goutos, *Why Law Firms Must Responsibly Embrace Generative AI*, at 22 (June 14, 2023), ssrn.com/abstract=4491772 [https://perma.cc/8MUQ-EW8B].

133. Among the practical guidance recommendations are that lawyers should anonymize client information and avoid entering details that could be used to identify a client, conduct due diligence to ensure that an AI provider adheres to security and data retention protocols, that a lawyer critically review and validate any output from a generative AI tool, that a lawyer consider disclosing to their client the use of any generative AI tools, and that a lawyer may not charge hourly fees for any time saved by using generative AI tools. *See* Memorandum from the Cal. Comm. on Pro. Resp. & Conduct to Members and Board of Trustees of the State Bar of Cal. (Nov. 16, 2023), https://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000031754.pdf [https://perma.cc/8ZDV-6DP6].

134. The Florida Bar, Board Review Committee on Professional Ethics is considering adopting an advisory opinion based on the Florida Bar's Special Committee on Artificial Intelligence Tools and Resources. The advisory opinion is expected to address whether lawyers must obtain a client's consent to use an AI tool, whether fees must be revised to reflect an increase in efficiency due to the use of an AI tool, and whether AI tools can solely be used to create due diligence reports. *See e.g.*, Fla. Bar, Announcement for Proposed Advisory Opinion on Lawyers' and Law Firms' Use of Generative Artificial Intelligence (Oct. 13, 2023), https://www.floridabar.org/the-florida-bar-news/proposed-advisory-opinion-on-lawyers-and-law-firms-use-of-generative-artificial-intelligence/ [https://perma.cc/39XP-QPTJ].

will arise as AI becomes ubiquitous, and what practical tools the vendor community offers that may help to meet these challenges.

APPARENT AUTHORITY AND VICARIOUS LIABILITY FOR TORT IN TEXAS: FROM DANCE TO EMBRACE

VAL RICKS†

I. INTRODUCTION: THE DANCE

Texas agency law lacks clarity and conviction with regard to one particular doctrine—the law governing when a principal is liable vicariously for tort because of the tortfeasor's apparent authority. Texas should clarify the doctrine. I offer the Restatement (Third) of Agency Section 7.08 as a proposal, though language from the Restatement (Second) might also do the job.

Agency law in Texas is for the most common cases straightforward and consistent with law in the other states. "To establish the existence of an

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agency relationship, the evidence must demonstrate the purported agent's consent to act on the principal's behalf and subject to the principal's control, together with the purported principal's authorization for the agent to act on his behalf."[1] This language is consistent with the Restatement (Third) of Agency's test for an agency relation.[2]

But an agency relation is merely the basis or the beginning of other agency rules: duties of agents to principals, duties of principals to agents, and so on. For an agent to bind a principal to some liability (in contract, tort, or otherwise) or to something that the agent knows, more than an agency relation is necessary. For example, to bind its principal to a contract, an agent must have actual authority or apparent authority power with regard to the specific contract at issue.[3]

Liability in tort is more complicated. Actual authority to commit a tort is possible but rare;[4] most principals do not command the commission of torts. Most commonly, tort liability is vicarious—the principal is liable for an agent's tort.[5] Vicarious liability of a principal arises (1) when an agent commits the tort "within the scope of employment or agency."[6] The employee is

1. Cmty. Health Sys. Prof. Servs. Corp. v. Hansen, 525 S.W.3d 671, 691 (Tex. 2017) (citing Grissom v. Watson, 704 S.W.2d 325, 326 (Tex. 1986)); Exxon Mobil Corp. v. Rincones, 520 S.W.3d 572, 589 (Tex. 2017) ("Authority to act on the principal's behalf and control are the two essential elements of agency." (citing Suzlon Energy Ltd. v. Trinity Structural Towers, Inc., 436 S.W.3d 835, 841 (Tex. App.— Dallas 2014, no pet.); Reliant Energy Servs. v. Cotton Valley Compression, L.L.C., 336 S.W.3d 764, 783 (Tex. App.— Houston [1st Dist.] 2011, no pet.))).

2. *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006) ("Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.").

3. *See, e.g.*, Gaines v. Kelly, 235 S.W.3d 179, 182 (Tex. 2007); Sanders Oil & Gas GP, LLC v. Ridgeway Elec., 479 S.W.3d 293, 301–03 (Tex. App.—El Paso 2015, no pet.); RESTATEMENT (THIRD) OF AGENCY § 6.01–.03 (AM. L. INST. 2006). Estoppel and unjust enrichment would also work. *See* RESTATEMENT (THIRD) OF AGENCY §§ 2.05, 2.07 (AM. L. INST. 2006).

4. *E.g.*, RESTATEMENT (THIRD) OF AGENCY § 7.08 cmt. b (AM. L. INST. 2006) ("When an agent's conduct constitutes a tort such as assault or arson, only in unusual circumstances would a third party harmed by the tort believe that the agent acted with actual authority in committing it."). Of course, "if an agent acts with actual authority in committing a tort, the principal is subject to direct liability." *Id.*

5. *Id.* § 7.07 ("An employer is subject to vicarious liability for a tort committed by its employee acting within the scope of employment."); *id.* § 7.08 ("A principal is subject to vicarious liability for a tort committed by an agent in dealing or communicating with a third party on or purportedly on behalf of the principal when actions taken by the agent with apparent authority constitute the tort or enable the agent to conceal its commission.").

6. Los Compadres Pescadores, L.L.C. v. Valdez, 622 S.W.3d 771, 779 (Tex. 2021); Painter v. Amerimex Drilling I, Ltd., 561 S.W.3d 125, 130–39 (Tex. 2018); Baptist Mem'l Hosp. Sys. v. Sampson, 969 S.W.2d 945, 947 (Tex. 1998); Bank of Tex., N.A. v. Glenny, 405 S.W.3d 310, 316–17 (Tex. App.—Dallas 2013, no pet.) (reversing summary judgment for an employer because a fact issue existed as to whether an employee made tortious misrepresentations within the scope of employment); Hedley Feedlot, Inc. v. Weatherly Tr., 855 S.W.2d 826, 837 (Tex. App.—Amarillo 1993, writ denied); Campbell v. Hamilton, 632 S.W.2d 633, 634–35 (Tex. App.—Dallas 1982, writ

only acting within the scope of employment if the employee was "[i] performing tasks generally assigned to him [ii] in furtherance of the employer's business."[7] Vicarious liability also arises (2) when tortious acts are committed by an employee high enough in a business's power structure to be a "vice principal."[8]

But these are not the only ways that vicarious liability in tort can arise. It can also arise through (3) apparent authority,[9] as the Supreme Court of Texas recognized over two decades ago in *Baptist Memorial Hospital System v. Sampson*.[10] Apparent authority "is the power held by an agent or other actor to affect a principal's legal relations with third parties *when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations*."[11] Apparent authority power arises

> either from a principal knowingly permitting an agent to hold [the agent itself] out as having authority or by a principal's actions which lack such ordinary care as to clothe an agent with the indicia of authority, thus leading a reasonably prudent person to believe that the agent has the authority [that the agent] purports to exercise.[12]

As described in Part II, the restatements of agency law have all provided, more or less, as stated in Section 7.08 of the Restatement (Third) of Agency:

> A principal is subject to vicarious liability for a tort committed by an agent in dealing or communicating with a third party on or purportedly

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ref'd n.r.e.); *see* Celtic Life Ins. Co. v. Coats, 885 S.W.2d 96, 98–99 (Tex. 1994) ("An insurance company is generally liable for any misconduct by an agent that is within the actual or apparent scope of the agent's authority."); RESTATEMENT (THIRD) OF AGENCY § 7.03 (AM. L. INST. 2006).

7. *Painter*, 561 S.W.3d at 138; *see* Laverie v. Wetherbe, 517 S.W.3d 748, 752–54 (Tex. 2017) (discussing the "furtherance" requirement in the context of waiver of sovereign immunity).

8. *E.g.*, Bennett v. Reynolds, 315 S.W.3d 867, 883–85 (Tex. 2010) (holding that the corporation "[can] be assessed exemplary damages for Bennett's conduct"); GTE Sw., Inc. v. Bruce, 998 S.W.2d 605, 618 (Tex. 1999) ("[S]tatus as a vice-principal of the corporation is sufficient to impute liability to [the corporation] with regard to his actions taken in the workplace."); Hammerly Oaks, Inc. v. Edwards, 958 S.W.2d 387 (Tex. 1997); *see also* Thomas C. Riney, *Participatory and Vicarious Liability in Business Litigation*, 37 CORP. COUNS. REV. 31, 49–57 (2018) (reviewing legal methods for finding vicarious liability).

9. RESTATEMENT (THIRD) OF AGENCY § 7.08 (AM. L. INST. 2006).

10. 969 S.W.2d 945, 947–48 (Tex. 1998) (stating a principal through apparent authority "may act in a manner that makes it liable for the conduct of one . . . who, *although an agent, has acted outside the scope of his or her authority*" (emphasis added)).

11. RESTATEMENT (THIRD) OF AGENCY § 2.03 (AM. L. INST. 2006) (emphasis added).

12. Gaines v. Kelly, 235 S.W.3d 179, 182 (Tex. 2007) (quoting *Sampson*, 969 S.W.2d at 948); *see* NationsBank, N.A. v. Dilling, 922 S.W.2d 950, 952–53 (Tex. 1996); Ames v. Great S. Bank, 672 S.W.2d 447, 450 (Tex. 1984) ("Apparent authority is the power of an agent to 'affect the legal relations of another person by transactions with third persons.'" (quoting RESTATEMENT (SECOND) OF AGENCY § 8 (AM. L. INST. 1958))).

> on behalf of the principal when actions taken by the agent with apparent authority constitute the tort or enable the agent to conceal its commission.[13]

The Restatement (Second) of Agency also contains helpful formulations.[14] Essentially, these sections describe a class of tortious conduct in which the agent's apparent authority makes the tortious conduct possible and/or harmful. For example, fraudulent statements and defamatory statements made by a person with apparent authority to speak for the principal are trusted and therefore harmful because of the agent's apparent authority—because the purported principal has done something that caused the tort victim reasonably to believe that the purported agent was authorized to speak thus.[15] I refer to this doctrine as the Section 7.08 doctrine or principle. It is well-established as a general doctrine of agency law.[16]

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13. RESTATEMENT (THIRD) OF AGENCY § 7.08 (AM. L. INST. 2006); *see* RESTATEMENT (SECOND) OF AGENCY §§ 219(d), 261, 262 (AM. L. INST. 1958); RESTATEMENT OF AGENCY §§ 219(d), 261, 262 (AM. L. INST. 1933). For differences in the Second and Third restatement formulations, see the last paragraph of comment b to Section 7.08 of the Restatement (Third) of Agency.

14. *E.g.*, RESTATEMENT (SECOND) OF AGENCY §§ 219(d), 261 (AM. L. INST. 1958).

15. *E.g.*, RESTATEMENT (THIRD) OF AGENCY § 7.08 cmt. c–d (AM. L. INST. 2006).

16. *See, e.g.*, *id.* § 7.08 reporter's notes and case citations; RESTATEMENT (SECOND) OF AGENCY § 261 case citations (AM. L. INST. 1958).

The Section 7.08 doctrine also appears in general statutes in various states. For example, the Alabama Code provides, "A principal is bound by acts of his agent under a merely ostensible authority to those persons only who have in good faith and without want of ordinary care incurred a liability or parted with value upon the faith thereof." ALA. CODE § 8-2-6 (2019). "[U]pon the faith thereof" appears to refer to the agent's "merely ostensible authority." *Id.* The statute's language overlaps with Section 7.08 and perhaps extends beyond it. The section is not limited to torts committed in communicative dealings, though "upon the faith thereof" probably restricts similarly. Like Section 7.08, the statute does not require that the activity be within the scope of employment or that the employer know of or benefit from the agent's wrongful conduct. The statute would apply equally to fraud enabled by apparent authority that benefitted only the agent.

Similar provisions appear in the statutes of California, Montana, North Dakota, and South Dakota. CAL. CIV. CODE § 2334 (2019); MONT. CODE ANN. § 28-10-606 (2009); N.D. CENT. CODE § 3-03-03 (2021); S.D. CODIFIED LAWS § 59-6-3 (2022). The verbiage was part of the "Field Code" proposed for adoption in New York in the early 1860s. *See* DRAFT OF A CIVIL CODE FOR THE STATE OF NEW YORK § 1000 (Albany: Weed, Parsons & Co. 1862).

The proposed code's authority for the language used it as both an authorization of vicarious liability and a limiting principle, essentially establishing the Section 7.08 doctrine. *See id.* cmt.; Mechanics' Bank v. New-York & New Haven R.R. Co., 13 N.Y. 599, 611 (1856) ("Assuming that the corporation had stock at its own disposal, and that Robert Schuyler, as agent, had full power to sell it in market and issue the proper certificates therefor, it is clear that any person dealing with him in good faith, and paying value, would become entitled to all the rights and privileges of a stockholder, although the agent, by a secret fraud, intended the transaction to be for his own benefit, and used the funds which he received for his own private purposes."); Farmers & Mechanics' Bank v. Butchers & Drovers' Bank, 16 N.Y. 125, 132–36 (1857) (holding similarly to Section 7.08, "Principals have been repeatedly held responsible for the false representations of their agents, not on the ground that the agents had any authority, either real or apparent, to make such representations, but for reasons entirely different," and quoting a much older English case in support for the proposition, "[s]eeing somebody must be a loser by this deceit, it is more reasonable that he that employs and

To some extent, Texas's scope of employment doctrine has been interpreted expansively (and perhaps beyond restatement norms) to cover some tort fact patterns to which this doctrine would apply. And scope of employment and apparent authority naturally overlap somewhat in application.[17] But scope of employment doctrine can only be stretched so far. Part III describes these limitations and how Section 7.08 doctrine differs. Like scope of employment, Section 7.08 doctrine is also necessary. Without it, the law would allow principals to externalize the cost of their use of agents on random members of the general public who are victims of agent's torts—torts empowered or otherwise contributed to in some way by the principal's conduct. Parts II and III include discussion of the policies served by the Section 7.08 doctrine.

Policies supporting the Section 7.08 doctrine have always been part of Texas law, so one would expect our courts to adopt the Section 7.08 doctrine or something close to it. But Part IV shows how Texas courts have "hat danced," as in the jarabe tapatío, with this doctrine for a century without embracing it.[18] Part IV.A describes early and late Texas decisions from the Supreme Court of Texas and the intermediate appellate courts that implicitly reject the doctrine. Part IV.B shows where Texas courts have adopted the doctrine at least in dicta and applied it defensively to allocate loss to the principal (which in logic is the same move as using it to impose vicarious liability for tort). Part IV.B also describes how the doctrine appears in Texas partnership law—in the Texas Business Organizations Code, which is not surprising given partnership's genesis in agency law.

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puts a confidence in the deceiver should be a loser, than a stranger" (emphasis in original)). The proposed code's neighboring provisions also offer consistent support. *See* DRAFT OF A CIVIL CODE FOR THE STATE OF NEW YORK, *supra*, §§ 980, 986 (defining *authority* to include ostensible authority), 987, 1005.

The Georgia code includes a similar provision: "The principal shall be bound for the care, diligence, and fidelity of his agent in his business, and hence he shall be bound for the neglect and fraud of his agent in the transaction of such business." GA. CODE ANN. §10-6-60. The notes to this section include *Braselton Bros., Inc. v. Better Maid Dairy Prods., Inc.*, 148 S.E.2d 71 (Ga. Ct. App. 1966), *rev'd*, 150 S.E.2d 620 (Ga. 1966), *conformed* 152 S.E.2d 15 (Ga. App. 1966), a near-textbook example of Section 7.08 liability in which a delivery agent for a dairy regularly over-charged a customer for products delivered and pocketed the overcharge himself. *See* 150 S.E.2d at 621–22; 148 S.E.2d at 71–74.

17. *See infra* Section III.

18. I discovered only one case that explicitly referred to the restatement version of the doctrine, from Restatement (Second) of Agency § 261: *City of Fort Worth v. Pippen*, 430 S.W.2d 239, 241 (Tex. App.—Fort Worth 1968), *rev'd*, 439 S.W.2d 660 (Tex. 1969) (resting legal statements in part on RESTATEMENT (SECOND) OF AGENCY § 261 (AM. L. INST. 1958)). On appeal, however, the Supreme Court of Texas affirmed the principal's liability not on the basis of the Section 7.08 doctrine but on the more present and morally demanding relation of the tortfeasing sub-agent's (Pippen's) immediate principal Rattikin Title Company to the City of Fort Worth, which city was the ultimate principal of the agent Rattikin Title. *See* 439 S.W.2d at 665 ("The emphasis here should be laid on the fiduciary obligation which Rattikin owed to the City. Pippen's failure to disclose the misapplication of these funds resulted in a violation of Rattikin's duty to the City.").

In the end, the Texas authorities (i) establish that vicarious liability through apparent authority is part of Texas law but (ii) describe it with so uncertain a trumpet call that neither side can prepare for battle.[19] A clear statement adopting and outlining the principle and policies that support it would give business and litigants clear guidance and reflect sound economic policy. Having danced around Section 7.08 doctrine for many years, Texas lawyers should comfortably embrace it.

II. APPARENT AUTHORITY AND TORT: THE PRINCIPLE AND POLICY OF SECTION 7.08

Apparent authority alone is enough to bind in contract—but not in tort. Something more is necessary. According to Restatement (Third) of Agency Section 7.08, apparent authority suffices "when actions taken by the agent with apparent authority constitute the tort or enable the agent to conceal its commission."[20] The rule as stated applies to agents whether employees or not and also to agents "whose tortious conduct is not within the scope of employment."[21]

The Restatement (Third) lists fact patterns where this doctrine can apply: "fraudulent and negligent misrepresentations, defamation, tortious institution of legal proceedings, and conversion of property obtained by the agent purportedly at the principal's direction."[22] Why these, in particular? Apparent authority power plays no role in many torts. For example, negligent truck drivers injure others tortiously whether apparently authorized or not. Policy supporting vicarious liability for negligent driving does not depend on appearance: accident victims do not rely on trucking company representations of authority before allowing themselves to be struck.

But authority aids the commission of some torts—or, as the Restatement (Second) puts it, "enables the agent, while apparently acting within his authority, to commit" the tort.[23] The Restatement (Third) has a slightly longer explanation: "[T]o charge a principal is fair because it is the principal's manifestation that clothes the agent with the appearance of authority to act on the principal's behalf and that induces the third party reasonably to believe that the agent acts with actual authority."[24] When that justification—that connec-

19. *Cf. 1 Corinthians* 14:8 (New King James) ("[I]f the trumpet makes an uncertain sound, who will prepare for battle?").

20. RESTATEMENT (THIRD) OF AGENCY § 7.08 (AM. L. INST. 2006).

21. *Id.* § 7.08 cmt. a.

22. *Id.*

23. RESTATEMENT (SECOND) OF AGENCY § 261 (AM. L. INST. 1958).

24. RESTATEMENT (THIRD) OF AGENCY § 7.08 cmt. b (AM. L. INST. 2006).

tion with the principal—exists, then liability is justified because the appearance of authority created by the principal or purported principal plays a role in the tort. Because of apparent authority which originates in the principal's manifestations, (i) the third party reasonably believes that the agent acts for the principal and (ii) the tort involves some abuse of that authority. The abuse of authority creates the conditions necessary for the tort to occur or for its commission to be harmful. It is unfair to allow principals to enable their agents to commit torts that harm innocent people and then disclaim all liability.

Here are two Restatement illustrations of the doctrine:

> 1. P Numismatics Company urges its customers to seek investment advice from its retail salespeople, including A. T, who wishes to invest in gold coins, seeks A's advice at an office of P Numismatics Company. A encourages T to purchase a particular set of gold coins, falsely representing material facts relevant to their value. T, reasonably relying on A's representations, purchases the set of coins. P is subject to liability to T. A is also subject to liability to T. See § 7.01.[25]
>
> 2. Same facts as Illustration 1, except that A persuades T to pay cash for the coins and to leave the coins with A so that they may be safely stored by P Numismatics Company. A then absconds with both the coins and the cash paid by T. Same results.[26]

In Illustration 1, A might well have been acting within the scope of employment under Texas law.[27] After all, A is a retail salesperson for a dealer in gold coins, and A's representations sold gold coins for the company. But Illustration 2 involves conduct by A for A, not in furtherance of the employer's business. Under scope of employment doctrine and the Texas caselaw in Part IV.A, the third party may be stuck with suing A alone. I imagine that some lawyers might complain that—well—the third party left the cash and coins with the agent, and that is the problem. But a numismatics company only acts through its agents. If the company takes cash (as numismatics companies do), its agent will handle cash. Yes, proper accounting practices would involve more than one agent, but must a customer control this? And if the company

25. *Id.* § 7.08 cmt. b, illus. 1.

26. *Id.* § 7.08 cmt. b, illus. 2.

27. *See* Morrow v. Daniel, 367 S.W.2d 715, 718 (Tex. App.—Dallas 1963, no writ) (concluding that a promoter of corporate stock was within the scope of employment when making false statements to induce the plaintiff to buy stock) (discussed *infra* Part IV.A.2); *cf.* Celtic Life Ins. Co. v. Coats, 885 S.W.2d 96, 99 (Tex. 1994) (affirming that an insurance sales representative acted within the scope of employment when misrepresenting the terms of an insurance policy in the process of selling it).

serves as (or works with) a custodian of the coins (a very common arrangement[28]), the buyer must leave them in the control of some agent, and the conversion could be accomplished by any agent.

Some lawyers might object that the manifestation of the principal did not justify the reliance in this case (after all, what does "urges its customers . . . to seek advice" mean?). But this is not an objection to the rule or principle, only its application. Adjusting the manifestation to justify the trust solves that problem: "urges its customers (i) to seek advice from its account representatives who handle all client services and (ii) to store the coins with the company." In such a case, the reason the buyer trusted A with the coins is that the company vouched for A, and the same vouching enabled the agent to conceal its tortious intent and conduct until it was too late. Having enabled trust in A's statements and trust in A's custody and thus enabled A's commission of fraud and conversion, the company should be liable for the coin's value as represented even though the company now has neither the coins nor the money.[29]

Liability under this doctrine extends to trust in statements that themselves are not tortious if the third party's trust in the statement enables an apparent agent to generate what would be liability within the scope of the agency as manifest by the principal. Here is another example from the third Restatement:

> 3. O, who owns an office building, retains P, a construction firm, to renovate the building. T, a prospective tenant, visits the building. T asks P's site manager, A, whether it will be safe for T to inspect a particular group of offices. A tells T to ask G, a security guard in the building, saying "G's our point person for safety." G tells T that the offices in question are safe to visit although G does not know whether this is

28. Federal law allows tax-advantaged, self-directed individual retirement accounts to include precious metals if the metals are held by a qualified custodian, and many numismatics companies qualify (or claim to). *See, e.g.*, *Investor Alert: Self-Directed IRAs and the Risk of Fraud*, SEC (Feb. 7, 2023), https://www.sec.gov/investor/alerts/sdira [https://perma.cc/9K55-8UJ9].

29. Illustration 4 to Section 7.08 is similar:

> 4. P Insurance Company appoints A as an agent with authority to sell policies and collect premiums on its behalf. A approaches T, a prospective customer and, after T agrees to buy insurance policies through A, furnishes T with policy applications provided by P Insurance Company. Complying with a direction in the policy applications, T gives A checks in the amount of premiums due on policies that A sells to T. A does not forward the premiums to P Insurance Company, instead using the funds for A's own purposes. As a consequence, P Insurance Company does not issue the policies to T. T sustains a loss covered by policy language. P Insurance Company is subject to liability to T. A acted with apparent authority in making statements about insurance policies to be issued by P Insurance Company and in collecting premiums. Separately, A's conduct in accepting T's premium payments is attributed to P Insurance Co.

RESTATEMENT (THIRD) OF AGENCY § 7.08 cmt. b, illus. 4 (AM. L. INST. 2006).

> so. Unbeknownst to T, G is an employee of Guards, Inc., not P. P and Guards, Inc., have instructed A and G never to direct prospective tenants within the building, but T neither knows nor has reason to know this. T reasonably believes that G, to whom A directs T, has authority to answer questions from prospective tenants. T is injured when T falls through the weakened flooring in one of the offices. P is subject to liability to T. G is also subject to liability.[30]

In this illustration, the manifestations of P cause T to believe reasonably both that G is P's agent and that G has authority to give directions for P regarding safety. Having vouched for G in this manner, P is liable for the tort of G under Section 7.08 even though G is neither P's agent nor P's employee and therefore has no "scope of employment." However, if G were P's agent as represented to T, then G's scope of employment would include giving T directions as illustrated.

The Restatement (Third) itself does not say this, but some caselaw explains these results by reasoning "that, when one of two innocent persons must suffer from the acts of a third, he must suffer who put it in the power of the wrongdoer to inflict the injury."[31] My favorite expression of this principle comes from an old Texas case: "It is a well-established doctrine that where one of two innocent parties must suffer, he who trusts most must suffer most."[32] The principle is ancient in Texas law.[33] Without question, neither the numismatics company in Illustrations 1 and 2 nor the manager of the construction firm in Illustration 3 may have been at fault; both the salesperson and the security guard may have been objectively trustworthy both to the principal or apparent principal, on the one hand, and the tort victim, on the other. But someone must bear this loss, and because the apparent authority that the principal created enabled the fraud or the exposure to danger, then, as between the innocent third party and the innocent principal, the principal should bear the loss. This is true whether or not the agent's conduct

(i) benefits the principal,

(ii) is the kind of task generally assigned to the agent, or

(iii) is actually in furtherance of the employer's business.[34]

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30. *Id.* § 7.08 cmt. b, illus. 3.

31. Richards v. Att'ys' Title Guar. Fund, Inc., 866 F.2d 1570, 1572–73 (10th Cir. 1989) (applying Colorado law); *see* Grease Monkey Int'l v. Montoya, 904 P.2d 468, 476 (Colo. 1995) (en banc); RESTATEMENT (SECOND) OF AGENCY § 261 cmt. a (AM. L. INST. 1958) ("The principal is subject to liability under the rule stated in this Section although he is entirely innocent . . . .").

32. Keystone Pipe & Supply Co. v. Milner, 6 S.W.2d 771, 775 (Tex. App.—Amarillo 1928, no writ).

33. *See* Neale v. Sears, 31 Tex. 105, 116 (1868) ("[W]here one of two innocent persons must suffer; and it is a well-established rule that he who trusts most must suffer most.").

34. *See* RESTATEMENT (THIRD) OF AGENCY § 7.08 cmt. b (AM. L. INST. 2006).

A similar policy argument supporting liability is that, if a principal or apparent principal intends the benefit of a manifestation of agency or authority, it must also bear the burdens that reasonably follow from it.[35] Economically, this makes perfect sense. Employing agents is costly. Employee fraud is a cost. Sometimes employees steal from and defraud their own employers. This loss results directly from employers' placing trust in their employees. The trust is necessary to do business, and employees' abuse of that trust to steal from and defraud their employer is a cost of that trust. Employers understand this and insure against it. The exact same trust that employers place in their employees—when that trust is expressed by word or conduct to customers and clients—allows the employees to steal from, defraud, or defame customers and clients. This trust is also necessary to do business because otherwise customers and clients could not deal safely with agents. Employees' abuse of that trust is likewise a cost of doing business, because some abuse will arise whenever employers act to enable their agents to deal with customers and clients. For an employer to disclaim liability for it is for an employer to externalize the cost of employer-created trust onto the customers and clients who are harmed by it.

To attempt to externalize this cost after the loss has occurred is particularly harmful. "A principal may not choose to act through agents whom it has clothed with the trappings of authority," receive the benefit of the business they generate, "and then determine at a later time whether the consequences of their acts offer an advantage."[36] Having attempted to obtain profit by vouching for its agents, the employer cannot be allowed to pick and choose whether it wants the results of that vouching. (Of course, the tortfeasor A is liable to the third party in all three illustrations, as a tortfeasor.[37] "[A] principal's vicarious liability turns on whether the agent is liable."[38])

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35. *See* RESTATEMENT (SECOND) OF AGENCY § 8A cmt. a (AM. L. INST. 1958) ("It would be unfair for an enterprise to have the benefit of the work of its agents without making it responsible to some extent for their excesses and failures to act carefully.").

36. RESTATEMENT (THIRD) OF AGENCY § 2.03 cmt. c (AM. L. INST. 2006).

37. *E.g.*, Transcor Astra Grp. S.A. v. Petrobras Am. Inc., 650 S.W.3d 462, 478–79 (Tex. 2022) ("[T]he fact that an individual was acting in a corporate capacity does not prevent the individual from being held personally—or 'individually'—liable for the harm caused by those acts."); Miller v. Keyser, 90 S.W.3d 712, 717 (Tex. 2002) ("[A] corporate agent is personally liable for his own fraudulent . . . acts."); Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors Inc., 960 S.W.2d 41, 47 (Tex. 1998) ("[A]n independent legal duty, separate from the existence of the contract itself, precludes the use of fraud to induce a binding agreement."); Leyendecker & Assocs. v. Wechter, 683 S.W.2d 369, 375 (Tex. 1984) ("A corporation's employee is personally liable for tortious acts which he directs or participates in during his employment."); Weller v. Keyes, No. 03-21-00302-CV, 2022 WL 3638204, at *3 (Tex. App.—Austin Aug. 24, 2022, pet. granted) (mem. op.); Texienne Oncology Ctrs., PLLC v. Chon, No. 09-19-00356-CV, 2021 WL 4994622, at *6–7 (Tex. App.—Beaumont Oct. 28, 2021, pet. denied) (mem. op.); Spicer v. Maxus Healthcare Partners, LLC, 616 S.W.3d 59, 116–20 (Tex. App.—Fort Worth 2020, no pet.).

38. RESTATEMENT (THIRD) OF AGENCY § 7.03 cmt. b (AM. L. INST. 2006).

Courts relying on the Section 7.08 doctrine often stress that it stretches no further than the third party's reasonable reliance, and the Restatement also emphasizes this: "A principal is not subject to liability under the rule stated in this section unless there is a close link between an agent's tortious conduct and the agent's apparent authority."[39] As one would expect, the theory does not work if, absent specific guidance from the principal, "the third party knows or has reason to know [that the proposed transaction] is irregular or otherwise not within the ordinary course of business that the agent conducts for the principal."[40]

The South Dakota Supreme Court in *Leafgreen v. American Family Mutual Insurance Co.*[41] put the limitation this way:

> [A] principal is liable for tortious harm caused by an agent where a nexus sufficient to make the harm foreseeable exists between the agent's employment and the activity which actually caused the injury; foreseeable is used in the sense that the employee's conduct must not be so unusual or startling that it would be unfair to include the loss caused by the injury among the costs of the employer's business.[42]

Employing this rule, the *Leafgreen* court held that an insurance company was not liable for the loss of personal property shown to the company's agent by the insured when the agent visited the insured's home to ask about some unrelated insurance matters and the agent several weeks later hired burglars to go back to the insured's home to steal the personal property.[43]

Vicarious liability was rejected in *Lou-Con, Inc. v. Gulf Building Services*[44] for similar reasons. There, a janitorial services company hired Harris as a janitor and assigned him to clean Lou-Con's building.[45] The company entrusted Harris with the building keys so that he could get inside to work.[46] Four months later, Harris stole cash from a Lou-Con building desk and started a fire to hide the theft.[47] Harris was convicted of arson,[48] and Lou-Con sued the janitorial services company for the arson damages, arguing that handing Harris the keys had enabled him to start the fire.[49] Said the court in

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39. *Id.* § 7.08 cmt. b.

40. *Id.* Illustration 7 to Section 7.08 shows this principle in action but also turns on other legal requirements.

41. 393 N.W.2d 275 (S.D. 1986).

42. *Id.* at 280–81.

43. *Id.* at 276, 281. Illustration 6 in comment b of Restatement (Third) of Agency Section 7.08 is a variation of *Leafgreen*. *See* RESTATEMENT (THIRD) OF AGENCY § 7.08 reporter's notes, at 238 (AM. L. INST. 2006).

44. 287 So.2d 192 (La. Ct. App. 1974).

45. *Id.* at 194–95.

46. *Id.* at 195.

47. *Id.*

48. *Id.*

49. *Id.* at 199–200.

rejecting that argument, "[I]t was not foreseeable that Harris would commit the crime of arson simply because he had the keys in his possession and could gain access to the building."[50] Not only that, but Harris committed his crime at night when he was alone in the building. Harris had apparent authority only to do janitorial work; his apparent authority was unrelated to his arson.[51] Nothing about his access to the building to do janitorial work was related to that tort in any but a but-for causation way. (And anyway, one can burn down a building from the outside.)

This limiting principle is sometimes applied (or rationalized) as an attempt to identify the more efficient bearer of the risk of the agent's malfeasance.[52] If the tort is something an agent in the position of the person with apparent authority might foreseeably do and the third party could not have seen the tort coming or was less likely to see it, then the apparent principal can avoid the tort's commission and harm at lesser cost than could the victim. Imposing liability on the apparent principal is economically efficient as well as fair. If, however, the third party should have reasonably suspected that the act was not authorized, then the third party might be the better bearer of the risk. This rationale does not apply in all cases; it probably has no application to *Lou-Con, Inc.* But it explains a variation of Illustration 8 of Section 7.08:

> 8. A is an account executive with P Securities, Inc. A tells T, who is not a customer of P Securities, Inc., that if T sends money to A personally, A will place it in A's personal employee account at P Securities, Inc., and will then invest it in a special municipal-bond fund. A tells T that this investment strategy will yield a significantly increased return for T because the bonds in the fund will be purchased at P Securities, Inc.'s cost and because P Securities applies a lower commission charge to its employees' own transactions.[53]

We all know how this ends: A takes T's money and invests it in cryptocurrency futures; the money is lost.[54] P Securities is not subject to liability. P's only manifestation in this case is that A is its agent. None of this activity was actually authorized by P, of course. T was not even P's customer. But even if T was P's customer, none of this activity was apparently authorized because T could not reasonably believe that P Securities authorized A to take T's funds by personal check to A (a personal check is a large, flapping, red

50. *Id.* at 200.

51. One could argue that his apparent authority as janitor caused the third party to allow him to be alone in the building at night and steal from the desks.

52. *See* J. DENNIS HYNES & MARK J. LOEWENSTEIN, AGENCY, PARTNERSHIP, AND THE LLC: THE LAW OF UNINCORPORATED BUSINESS ENTERPRISES 317 (10th ed. 2019); *cf.* Eric Rasmusen, *Agency Law and Contract Formation*, 6 AM. L. & ECON. REV. 369, 380–90 (2004) (describing the relevance of the least-cost-avoider principle to various agency doctrines).

53. RESTATEMENT (THIRD) OF AGENCY § 7.08 cmt. b, illus. 8 (AM. L. INST. 2006).

54. *Id.* ("risky options").

flag) or put them in A's personal or employee account or invest them at an employee commission rate. Any one of these three should have raised T's suspicions. T was thus probably an equal or better risk bearer than P with regard to these activities of A.

Sometimes, apparent authority might be one of two independent grounds for vicarious liability, and the line between the two may be different in Texas than elsewhere. Consider Illustration 9 to Section 7.08:

> 9. A, the chief executive officer of P Corporation, has actual authority to raise capital for P Corporation from banks and other lenders without specific approval from P Corporation's board of directors for amounts up to $500,000. Over several years, A persuades T to give A $200,000 for investment in P Corporation. A provides T with promissory notes of P Corporation in exchange for each payment that T makes to A. T meets with A on P Corporation's premises, and communications concerning T's investment are made on stationery bearing P Corporation's letterhead. A, however, uses T's money for A's own purposes. P Corporation is subject to liability to T.[55]

Raising and taking investment money is the very thing A, as CEO, is authorized to do. One could argue that A's conduct was within the scope of employment. It was entirely self-serving and thus under Restatement (Third) doctrine not within the scope of employment.[56] But Texas's scope of employment doctrine may require less intent to serve the principal than does the Restatement: *Laverie v. Wetherbe*[57] held that scope of employment analysis is "fundamentally objective: Is there a connection between the employee's job duties and the alleged tortious conduct? The answer may be yes even if the employee . . . is motivated by ulterior motives or personal animus so long as the conduct itself was pursuant to her job responsibilities."[58] Whether A, who clearly had ulterior motives and a personal profit goal, was acting "pursuant to" A's job responsibilities is debatable. Whether A was or not, however, A's conduct was clearly enabled by the apparent authority A owned as a result of the position to which P had appointed A. Even if A was not within the scope of employment, A acted within the scope of A's apparent authority.

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55. *Id.* § 7.08 cmt. c, illus. 9.

56. *Id.* § 7.07(2) ("An employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer."); *see* Grease Monkey Int'l, Inc. v. Montoya, 904 P.2d 468, 472 (Colo. 1995) (en banc) (distinguishing vicarious liability for tort under scope of employment doctrine from vicarious liability for tort under apparent authority on the grounds that scope of employment requires that acts be done with an intent to serve the principal). Illustration 9 is based in part on the facts of *Grease Monkey*. *See* RESTATEMENT (THIRD) OF AGENCY § 7.08 reporter's notes (AM. L. INST. 2006).

57. 517 S.W.3d 748 (Tex. 2017).

58. *Id.* at 753. *Laverie* involved the Tort Claims Act, not the common law doctrine, but Texas courts cite both lines of authority for each doctrine, even though the two doctrines involve very different policy considerations.

One good reason or valid legal ground to hold a person liable does not and should not preclude the law from acknowledging another good reason or other legal ground to hold the person liable. Both scope of employment and apparent authority as described by Section 7.08 are grounds in justice. Apparent authority is grounds in law in the United States to hold P liable; it should be so in Texas, too.[59] But the reach of *Laverie* leaves us wondering how far scope of employment may be stretched. Does it include all of the conduct covered by Section 7.08, or does this matter? To this question, the paper now turns.

III. SCOPE OF EMPLOYMENT'S INSUFFICIENCY

Scope of employment cases are a bit of a jumble in Texas. The phrase "scope of employment" appears in the common law of agency,[60] the Tort Claims Act's limited waiver of sovereign immunity,[61] and the Labor Code to describe conditions under which workers' compensation is owed.[62] Despite that these three laws are justified by different policies and serve very (wildly?) different purposes, Texas courts cite decisional law from one in support of interpretations of others.[63] At the same time, when the perceived need arises, the courts disclaim: "Texas law has long recognized the distinction between workers' compensation claims under their statutory framework and the imposition of vicarious liability under the common law."[64]

Regardless of the confusion, apparent authority as a ground for liability obviously proceeds on different principles and on a different policy basis than scope of employment or scope of authority. Consider and contrast apparent authority with the Supreme Court of Texas's relatively recent discourse in *Painter v. Amerimex Drilling I, Ltd*.[65] on scope of employment law, which

59. Other illustrations to Section 7.08 present similar potential overlaps. Consider, for example, illustrations 10, 11, 12, 13, and 16, all of which illustrate not only apparent authority enablement but probably also scope of employment. *See* RESTATEMENT (THIRD) OF AGENCY § 7.08 cmt. c, illus. 10, 11, 12, 13 (AM. L. INST. 2006); *see id.* § 7.08 cmt. d, illus. 16.

60. *See* Painter v. Amerimex Drilling I, Ltd., 561 S.W.3d 125, 130–39 (Tex. 2018).

61. *See* TEX. CIV. PRAC. & REM. CODE § 101.106(f) (describing details of an election of remedies); *id.* § 101.001(5) (defining "scope of employment"); *Laverie*, 517 S.W.3d at 752–56.

62. TEX. LAB. CODE § 406.031 (subjecting a workers' compensation insurance carrier to liability for an injury to an employee that "arises out of and in the course and scope of employment"); *id.* § 401.011(12) (defining "[c]ourse and scope of employment"); Orozco v. Cnty. of El Paso, 602 S.W.3d 389, 392–98 (Tex. 2020); Leordeanu v. Am. Prot. Ins. Co., 330 S.W.3d 239, 240–49 (Tex. 2010).

63. *See, e.g.*, *Painter*, 561 S.W.3d at 136 (citing Workers' Compensation Act precedents to support a respondeat superior argument); *Laverie*, 517 S.W.3d at 753–55 (citing and discussing precedent relating to the common law of respondeat superior, in a sovereign immunity case).

64. Cameron Int'l Corp. v. Martinez, 662 S.W.3d 373, 378 (Tex. 2022).

65. 561 S.W.3d, 125, 130–39 (Tex. 2018).

follows. Apologies for the length, but the excerpt makes the distinctions between the doctrines obvious. For ease of reading, I have omitted internal quotations and citations.

> Under the common-law doctrine of respondeat superior, or vicarious liability, liability for one person's fault may be imputed to another who is himself entirely without fault solely because of the relationship between them. The doctrine has been explained as a deliberate allocation of risk in line with the general common law notion that one who is in a position to exercise some general control over the situation must exercise it or bear the loss. Respondeat superior thus constitutes an exception to the general rule that a person has no duty to control another's conduct.
>
> We have long recognized the employer-employee relationship as one implicating the doctrine's risk-shifting policies. In this context, an employer is vicariously liable for its employee's negligent acts if those acts are within the course and scope of his employment. In other words, to prove an employer's vicarious liability for a worker's negligence, the plaintiff must show that, at the time of the negligent conduct, the worker (1) was an employee and (2) was acting in the course and scope of his employment.
>
> As to the first element, disputes often arise over whether the worker was an independent contractor rather than an employee. The distinction is significant because, as a general rule, an employer is insulated from liability for the tortious acts of its independent contractors. To resolve such disputes, we examine whether the employer has the right to control the progress, details, and methods of operations of the work.
>
> We have also elaborated on the course-and-scope element, explaining that vicarious liability arises only if the tortious act falls within the scope of the employee's general authority in furtherance of the employer's business and for the accomplishment of the object for which the employee was hired. Further, the act must be of the same general nature as the conduct authorized or incidental to the conduct authorized. Accordingly, if an employee deviates from the performance of his duties for his own purposes, the employer is not responsible for what occurs during that deviation.
>
> . . . .
>
> As explained, the potential for vicarious liability is premised on the relationship between the wrongdoer (agent) and the third party (principal) to whom liability is imputed. The defining characteristic of that relationship is the principal's right to control the agent's actions undertaken to further the principal's objectives. This characteristic is present in the employer-employee relationship, which is why the employer's overall right to control the details of the work is what principally distinguishes an employee from an independent contractor.

> Thus, a plaintiff must demonstrate such a right to control in order to satisfy the first element of a vicarious-liability claim against an employer for its employee's negligence: that the wrongdoer was an employee at the time of the negligent conduct. But when that relationship is undisputed, the employer essentially concedes the existence of the right to control that is necessary to give rise to the relationship. As a general matter, this right to control extends to all the employee's acts within the course and scope of his employment, i.e., actions within the scope of the employee's general authority in furtherance of the employer's business and for the accomplishment of the object for which the employee was hired.
>
> Accordingly, we disagree with those courts of appeals that have tied the right-to-control analysis to the course-and-scope element of a vicarious-liability claim. That element hinges on an objective assessment of whether the employee was doing his job when he committed a tortious act. The employer's right to control the work, having already been determined in establishing the employer-employee relationship, is not part of this analysis.[66]

This passage makes obvious the distinctions between (i) liability based on scope of employment, on the one hand, and (ii) the Section 7.08 doctrine, on the other.

Whereas scope of employment is based on the "relationship between" the employer and employee or agent (and the *Painter* court thought the point important enough to repeat), the Section 7.08 doctrine is based on the relationship between the principal and the tort victim and the ways that relationship makes the tort successful or harmful.

Whereas scope of employment is based on "the general common law notion that one who is in a position to exercise some general control over the situation must exercise it or bear the loss" (another point the *Painter* court repeated), the Section 7.08 doctrine is based on

(i) the responsibility of the principal for words or conduct that induce trust in a purported agent;

(ii) the unfairness of allowing the principal to externalize on tort victims (random potential customers or clients) the costs of its employing agents or vouching for them;

(iii) that as between two innocent parties, the one who enabled the harm should suffer for it; and

(iv) that the least cost avoider of the harm should pay for it, because this will allocate the risk of that harm most efficiently.

66. *Id.* at 130–33 (citations omitted).

Whereas scope of employment doctrine requires that "the worker (1) was an employee and (2) was acting in the course and scope of his employment," the Section 7.08 doctrine requires neither that the worker was an actual employee nor that the employee was within the scope of employment; indeed, the purported agent (i) may not be an agent at all and thus have no scope of agency or (ii) may be an agent and be acting outside the scope of the agent's employment or authority[67] (and by way of illustration, the doctrine could very well apply to an independent contractor[68]).

Whereas with scope of employment "[t]he defining characteristic of [the relevant] relationship is the principal's right to control the agent's actions undertaken to further the principal's objectives," the defining characteristic of the Section 7.08 doctrine is that the principal's conferral of apparent authority on an agent or purported agent made the tortious conduct successful and/or harmful. Thus, Section 7.08 is based on neither control nor whether "the agent's actions [were] undertaken to further the principal's objectives." Neither is required. The employee "may [not] have been doing his job when he committed the tortious act;" that would not matter.

The two doctrines are thus very different.

The scope of the two doctrines may overlap in practice or may not, but that makes little difference. Scope of employment is sometimes broad enough to include fraud.[69] Even though the employee's conduct must be "in furtherance of the employer's business,"[70] that does not require the acts to be authorized, and the conduct can be contrary to the principal's instructions.[71]

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67. RESTATEMENT (THIRD) OF AGENCY § 7.08 cmt. b (AM. L. INST. 2006) ("An actor may continue to possess apparent authority although the principal has terminated the actor's actual authority or the agency relationship between them."); Baptist Mem'l Hosp. Sys. v Sampson, 969 S.W.2d 945, 947–48 (Tex. 1998) ("[A]n individual or entity may act in a manner that makes it liable for the conduct of one who is not its agent at all or who, although an agent, has acted outside the scope of his or her authority.").

68. *See Sampson*, 969 S.W.2d at 948 ("[A] hospital may be vicariously liable for the medical malpractice of independent contractor physicians when plaintiffs can establish the elements of ostensible agency.").

69. Bank of Tex., N.A. v. Glenny, 405 S.W.3d 310, 317 (Tex. App.—Dallas 2013, no pet.); Bright v. Addison, 171 S.W.3d 588, 606–07 (Tex. App.—Dallas 2005, pet. denied); Hedley Feedlot, Inc. v. Weatherly Tr., 855 S.W.2d 826, 837 (Tex. App.—Amarillo 1993, writ denied); Campbell v. Hamilton, 632 S.W.2d 633, 634–35 (Tex. App.—Dallas 1982, writ ref'd n.r.e.); *see* Celtic Life Ins. Co. v. Coats, 885 S.W.2d 96, 98–99 (Tex. 1994).

70. *Painter*, 561 S.W.3d at 131 (quoting Goodyear Tire & Rubber Co. v. Mayes, 236 S.W.3d 754, 757 (Tex. 2007)).

71. Int'l & G.N.R. Co. v. Anderson, 17 S.W. 1039, 1040 (Tex. 1891) ("The act of the servant may be contrary of his express orders, and yet the master may be liable. But the act must be done within the scope of the general authority of the servant. It most be done in furtherance of the master's business, and for the accomplishment of the object for which the servant is employed. For the mode in which the servant performs the duty he is engaged to perform, if wrongful, and to the injury of another, the master is liable, although he may have expressly forbidden the particular act.").

Otherwise, a principal could cut off vicarious liability by instructing all agents not to commit torts. So, even intentionally tortious conduct such as fraud can subject the employer to vicarious liability because it is within the scope.[72]

A summary judgment in favor of an employer on scope of employment grounds in a fraud case was reversed in *Bank of Texas, N.A. v. Glenny*.[73] The facts of the case show some evidence in support of Section 7.08 doctrine liability. For example, the letters printed on (purported principal) Glenny's letterhead sent to the plaintiff bank in support of the loan were the subject of two conference calls with someone in Glenny's office.[74] The letters were faxed "directly from Glenny's office" shortly after the bank requested additional information about the letter's subjects.[75]

But there is much more evidence in *Glenny* of right to control and that the employees in Glenny's office normally did this sort of thing—that it was within the scope of their employment. Glenny testified in his deposition that the "[l]etters were prepared by his office pursuant to the instructions of his client . . . as part of Glenny's representation of the client as an attorney."[76] Indeed, Glenny asserted attorney-client privilege regarding them.[77] "[I]t was not unusual for Kim Wiley[, who signed the letters,] to sign letters on Glenny's behalf."[78] And Wiley testified she was not trying to help her brother, the builder beneficiary of the resulting construction loan, but merely write a note for a client's "own internal file."[79] Scope of employment liability was justified in this case.

Scope of employment might also include defamation. In *Laverie v. Wetherbe*,[80] involving the Tort Claims Act's waiver of sovereign immunity, the court addressed whether the course and scope requirement involved an assessment of subjective intent or motivation: does it matter whether the employee subjectively intended to serve the employer?[81] The court said no: "[O]ur traditional scope-of-employment analysis in *respondeat superior* cases . . . concerns only whether the employee is discharging the duties generally assigned to her."[82]

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72. *See, e.g.*, GTE Sw., Inc. v. Bruce, 998 S.W.2d 605, 617–18 (Tex. 1999) (holding employer vicariously liable for extreme and outrageous conduct that was in no way authorized).
73. 405 S.W.3d 310, 317 (Tex. App.—Dallas 2013, no pet.)
74. *Id.* at 314–15.
75. *Id.* at 315.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. 517 S.W.3d 748 (Tex. 2017).
81. *Id.* at 751, 753.
82. *Id.* at 753 (internal quotation marks omitted).

> The scope-of-employment analysis, therefore, remains fundamentally objective: Is there a connection between the employee's job duties and the alleged tortious conduct? The answer may be yes even if the employee performs negligently or is motivated by ulterior motives or personal animus so long as the conduct itself was pursuant to her job responsibilities.[83]

And for this sentence, the court cited a century-old respondeat superior case, *Galveston H. & S.A. Ry. & Co.*[84] Thus, the court ruled that a professor making an allegedly defamatory statement about another professor and associate dean "need not have offered evidence of her motives."[85] The allegedly defamatory statement was within the scope of employment because the professor made it "while fulfilling her job duties."[86]

That a case was not within the scope also does not mean that it was within the Section 7.08 doctrine. In *Minyard Food Stores, Inc. v. Goodman*,[87] employee H accused employee G of having an affair with the store manager.[88] The company, Minyard Food Stores, conducted an investigation in which the store manager, in response to and during this investigation, admitted to kissing employee G on several occasions.[89] Employee G was transferred after an investigation, and subsequent events suggested that various other company employees and some customers believed the accusation.[90] Employee G sued employee H and the store manager for defamation and also sued the company. A jury found that the store manager had—as part of Minyard's investigation—defamed employee G and that the "defamatory statements were made in the course and scope of his employment."[91] The Texas Supreme Court concluded that there was "no evidence to support the jury's finding" that the statements were within the scope of employment.[92] According to the court, company "policies require employees to participate in workplace misconduct investigations," but the defamation was not "in furtherance of Minyard's benefit, and for the accomplishment of the object for which the

83. *Id.*

84. *Id.* (citing Galveston, H. & S.A. Ry. Co. v. Currie, 96 S.W. 1073, 1074 (Tex. 1906) ("It is now settled, in this state at least, that the presence of such a motive or purpose in the servant's mind does not affect the master's liability, where that which the servant does is in the line of his duty, and in the prosecution of the master's work.")).

85. *Id.* at 750.

86. *See id.* at 755–56.

87. 80 S.W.3d 573 (Tex. 2002).

88. *Id.* at 574.

89. *Id.* at 575–76.

90. *Id.* at 574–75.

91. *Id.* at 575.

92. *Id.* at 578.

employee was hired."[93] The store manager "lied *to* Minyard," but did not lie "*for* Minyard,"[94] so the store was not liable for what the store manager said.[95] Section 7.08 would add nothing to *Minyard Food Stores*. Nothing about H's statements was taken seriously or was harmful because Minyard Food Stores employed H as a manager. Their defamatory status had force because they were stated by H as a human being who was not in a relationship with G that G wanted.

But scope of employment has limits. The Section 7.08 doctrine is a different basis for liability, as the Supreme Court of Texas implied in *Sampson*: "an individual or entity may act in a manner that makes it liable for the conduct of one . . . *who, although an agent, has acted outside the scope of his or her authority*."[96] So Illustrations 1–3 above in Part II warrant application of the doctrine. In these illustrations, scope of employment as construed in Texas might create liability for the employer in Illustration 1 when the false statement of coin value creates a sale for the numismatics company.[97]

But in Illustration 2, the employee is acting on their own, and the employer may never have seen either cash or coins; the employee stealing the coins was acting "for" the employer even less plausibly than H was in defaming G. Nonetheless, the employee in Illustration 2 is only enabled to commit the fraud and theft because the numismatics company has certified the employee to the customer as a trustworthy salesperson. The Section 7.08 doctrine should apply even though scope of employment does not. A Texas case, *Morrow v. Daniel*,[98] might create vicarious liability on similar grounds (as discussed *infra* Part IV.A.3).

The same is true in Illustration 3, where the employer has vouched for G's authority. G in fact has no scope of employment because G is not an agent of O or P; but by creating apparent authority in G, P has both made G its apparent agent and given G apparent authority, and this is why T follows G through the building and believes G's conduct and representations regarding the safety of the building.

Thus, scope of employment and the Section 7.08 doctrine are different in elements and policies. The doctrines are separate but complementary laws for the efficient and just governance of principals' use of agents.

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93. *Id.* at 579 (citing Lyon v. Allsup's Convenience Stores, Inc., 997 S.W.2d 345, 348 (Tex. App.—Fort Worth 1999, no pet.) ("This obviously was not done to accomplish any object for which either [employee] was hired.")).

94. *Id.*

95. *Id.*

96. Baptist Mem'l. Hosp. Sys. v Sampson, 969 S.W.2d 945, 947 (Tex. 1998) (emphasis added).

97. *See* RESTATEMENT (THIRD) OF AGENCY § 7.08 cmt. b, illus. 1 (AM. L. INST. 2006).

98. 367 S.W.2d 715 (Tex. App.—Dallas 1963, no writ).

There is no need to confuse the two. The most famous confusion of the two I know of occurred in the case of *American Society of Mechanical Engineers v. Hydrolevel*,[99] cited in the Reporter's Notes to Section 7.08 as an example of apparent authority liability in tort for defamation.[100] There, a committee of the American Society of Mechanical Engineers (ASME) wrote a letter interpreting a safety rule for the design of boilers. The letter impliedly and falsely disparaged the mechanism produced by Hydrolevel, an up-and-coming producer of low-water cutoff mechanisms (implying that boilers should continue to use the tried and true products of McDonnell & Miller (M&M), the long-dominant cutoff maker).[101] The ASME letter made its way into M&M marketing materials.[102] The long-term effect of the letter was to drive Hydrolevel from the market.[103] It turned out the drafters of the letter and ASME's actions regarding it had economic relationships with M&M[104] and had used their positions at ASME to put ASME's imprimatur on the product disparagement.[105] The disparagement was litigated as an antitrust claim, and the Supreme Court held that the ASME could be liable for the letter because it was drafted and sent out with the ASME's agents' apparent authority.[106] The Court reviewed the Section 7.08 doctrine at some length[107] and found it consistent with antitrust law. The Court noted it was applying "the general rules of agency law."[108] The case is a relatively straightforward application of the Section 7.08 doctrine.

Justice Powell dissented.[109] Nearly all of Justice Powell's dissent argues against the application of antitrust law (and treble damages) to a non-profit (and non-competitor).[110] But regarding the agency doctrine itself, Justice Powell complains, "In this case, the Court specifically holds that standard-setting organizations may be held liable for the acts of their agents even though the organization never ratified, authorized, or derived any benefit

99. 456 U.S. 556 (1982); *see also* United States v. Kellogg Brown & Root, Inc., 161 F. Supp. 3d 423, 432–33 (E.D. Tex. 2015) (applying *ASME* and the Section 7.08 doctrine under the Anti-Kickback Act, 41 U.S.C. §§ 51–58).

100. *See* RESTATEMENT (THIRD) OF AGENCY § 7.08 reporter's notes to cmt. d (AM. L. INST. 2006). The case is quoted and discussed in HYNES & LOEWENSTEIN, *supra* note 52, at 298–301.

101. *Hydrolevel Corp.*, 456 U.S. at 560–62.

102. *Id.* at 562–64.

103. *Id.* at 563–64.

104. *Id.* at 561–64 (discussing the relationships of both James and Hardin with M&M and the role of both in crafting (i) the letter and (ii) ASME's response to Hydrolevel objections regarding the letter).

105. *Id.* (relating how James and Hardin had planned and carried out this action without their names being attached to the correspondence itself).

106. *Id.* at 565–78.

107. *Id.* at 565–70.

108. *Id.* at 565–66.

109. *See id.* at 578 (Powell, J., dissenting).

110. *See id.* at 579–94.

whatsoever from the fraudulent activity of the agent and even though the agent acted solely for his private employer's gain."[111] My students easily see that these arguments miss the mark. They are arguments against actual authority or scope of employment, not apparent authority. The ASME employs agents to interpret its rules, and it derives a benefit from this activity. Though it did not authorize the disparagement, it certainly clothed the disparagement with authority by apparently authorizing the disparager. As between innocent parties, the ASME should bear the loss. All of the rationales in favor of Section 7.08 doctrine liability apply.

Justice Powell later argued, "It would be enlightening if the Court would explain how such an association can protect itself even from 'mere tort' liability . . . in light of the Court's adoption of the apparent authority theory of liability. . . . [N]o set of rules and regulations, and no procedures however elaborate, can protect adequately against fraud and disloyalty."[112] Factually, this is true, of course. But this also appears to be an argument that the agents acted outside the scope of employment. My students point out that, as between the principal and the entirely innocent Hydrolevel, the least cost avoider is the ASME. Hydrolevel has no ability at all to police the ASME's committee assignments. And even if no amount of policing could catch all fraud, the principal is the one who decided to employ agents and has the benefit of their work, and having created their power to harm, it should be responsible for that harm as between itself and an innocent party. As the Supreme Court of Texas observed, "one of two innocent persons must suffer; and it is a well-established rule that he who trusts most must suffer most."[113]

Most (i) fact patterns covered by and (ii) policy distinctions between scope of employment and apparent authority are fairly clear. However, some cases present more difficult and sympathetic fact patterns. A number of cases, beginning with the U.S. Supreme Court's decisions in *Burlington Industries, Inc. v. Ellerth*[114] and *Faragher v. City of Boca Raton*[115] purport to apply something like apparent authority to impose vicarious liability on an employer for sexual harassment and other (worse) misconduct.[116] *Ellerth* purported to rest vicarious liability on Restatement (Second) of Agency Section 219(d), the second restatement's language for the Section 7.08 doctrine.[117]

111. *Id.* at 579.

112. *Id.* at 591 n.17. Thanks to HYNES & LOWENSTEIN, *supra* note 52, for pointing out this language.

113. Neale v. Sears, 31 Tex. 105, 116 (1868).

114. 524 U.S. 742 (1998).

115. 524 U.S. 775 (1998).

116. *E.g.*, Borg-Warner Protective Servs. Corp. v. Flores, 955 S.W.2d 861 (Tex. App.—Corpus Christi 1997, no pet.) (rape).

117. *See Ellerth*, 524 U.S. at 755–65.

Most particularly, the Court said that "tangible employment action" by a supervisor satisfies this standard.[118] (Texas courts have held that similar law applies under related Texas statutes.[119]) Even the Court was not entirely comfortable with this rationale, however. With regard to hostile environment liability, the Court offered defenses that undercut it.[120] The power to accomplish the abuse requires some explanation, and the victim has to explain the power in some way. The Reporter's Notes to Section 7.08 comment on the possibility of vicarious liability for intentional physical tort under this standard and note that the issue is developing.[121] Texas courts applying Texas law have considered such cases under both scope of employment and "ostensible agency" notions, treating each as plausible enough to discuss.[122]

The tendency to gravitate toward some kind of "apparent authority" is understandable because employers rarely (almost never?) actually authorize such conduct. The tortious conduct is also an abuse of the employee's position in some unauthorized way. Often the abuser's access to the victim is a result of (i) the employer's hiring the abuser to do some job and (ii) the victim's receipt of the employer's service through the abuser's efforts (supervise the victim's work, guard the victim who is a prisoner, install the victim's cable TV, etc.). The tortfeasor's opportunity to commit the tort is thus related to the employment; some abuse of position is foreseeable (as *Ellerth* recognizes) and is probably a cost of doing business. I am sympathetic to many of these cases, and I think the employer should be liable in many of them. But I also see a distinction between two fact patterns: (i) a worker's abuse of a

118. *Id.* at 760.

119. *E.g.*, Bartkowiak v. Quantum Chem. Corp., 35 S.W.3d 103, 108–11 (Tex. App.—Amarillo 2000, no pet.) (noting RESTATEMENT (SECOND) OF AGENCY § 219(d) and holding the *Ellerth* defense applied, an unnecessary result unless the law made vicarious liability for sexual harassment possible). *But cf.* River Oaks L-M. Inc. v. Vinton-Duarte, 469 S.W.3d 213, 225–32 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (holding that no such defense applied and affirming the employer's liability).

120. *Ellerth*, 524 U.S. at 761–65.

121. RESTATEMENT (THIRD) OF AGENCY § 7.08 reporter's notes (AM. L. INST. 2006).

122. *See, e.g.*, Doe v. Kanakuk Ministries, No. 3:13–CV–3030–G, 2014 WL 3673029, at *7–9 (N.D. Tex. Jul. 24, 2014) (noting that plaintiffs alleged scope of employment and apparent agency, but dealing with a motion to dismiss only the scope of employment claim); Doe v. YUM! Brands, Inc., 639 S.W.3d 214, 232–38 (Tex. App.—Houston [1st Dist.] 2021, no pet.) (declining to find scope of employment or ostensible agency of pizza delivery driver for sexual assault); Harris v. Mastec N. Am., Inc., No. 05-19-00955-CV, 2020 WL 6305028, at *3–6 (Tex. App.—Dallas Oct. 28, 2020, no pet.) (mem. op.) (reviewing vicarious liability for sexual assault by cable TV installer employee, under scope of employment alone, and expressing its inability as a court to stretch the law further based on public policy arguments); Buck v. Blum, 130 S.W.3d 285, 288–90 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (dealing with a doctor's sexual assault of a patient as an issue of scope of employment); Borg-Warner Protective Servs. Corp. v. Flores, 955 S.W.2d 861, 866–67 (Tex. App.—Corpus Christi 1997, no pet.) (rape) (resting on apparent authority ideas but also on something like vice principal doctrine).

situation that comes up at or grows out of work and which the victim is relatively powerless to stop, on the one hand, and (ii) the employer's apparently authorizing the agent's conduct that constituted the tort or allowed it to conceal the tort, on the other.

These issues undoubtedly require further thought and development.[123] For purposes of the Section 7.08 doctrine, courts should proceed in accordance with the policies that support the doctrine. As with other cases, the court should ask whether "actions taken by the agent with apparent authority constitute the tort or enable the agent to conceal its commission."[124] The decisions should consider policies supporting the doctrine: responsibility for the principal's manifestations to the third party that the agent is doing the business of the principal (to some extent, this will depend on the manifestations); whether the principal is externalizing onto random customers and clients a cost of its doing business; whether, as between two innocent persons, the employer has enabled the harm; and who is the least cost avoider. These are difficult issues, but fair and efficient legal systems have to deal with them.

IV. THE DANCE OF APPARENT AUTHORITY AND TORT IN TEXAS

Authorities in Texas have both rejected and adopted the Section 7.08 doctrine, but they have never joined hands and moved as one. Like the dancers in the jarabe tapatío, the courts and the doctrine dance around each other doing different steps. More recently, the case law has tentatively adopted the doctrine, just as when the dancers in the jarabe bring their smiling faces together. It is time to bring the dance to an end and let the dancers embrace.

A. Rejection?

A few older cases seem to reject outright the substance of Section 7.08. These cases are older than the Restatement (Third) of Agency, but the courts

123. The law is still developing. *See, e.g.*, Pena v. Greffet, 110 F. Supp. 3d 1103 (D.N.M. 2015) (discussing at length whether under New Mexico law something like the *Ellerth* doctrine would apply to the rape by a prison guard of a prisoner in the guard's custody (and answering yes to a variation on that doctrine)); Sherman v. Dep't of Pub. Safety, 190 A.3d 148, 173–84 (Del. 2018) (holding the state liable as an employer for a police officer's tortiously forcing an arrestee to perform a sexual act on him, not under scope of employment (because the officer was in no way motivated to serve the state) and not because of apparent authority but because the officer abused his authority under Restatement (Second) of Agency § 219(d) and also because the state had a non-delegable duty "to make sure that an arrestee is not harmed by the tortious conduct of its arresting officers"); Martin v. Tovar, 991 N.W.2d 760, 763–68 (Iowa 2023) (rejecting every theory of employer liability allowed by *Sherman* and holding the state not liable as an employer for a police officer's sexual assault perpetrated on a drunken non-arrestee who was transported to a hotel as a courtesy after her driver was arrested).

124. RESTATEMENT (THIRD) OF AGENCY § 7.08 (AM. L. INST. 2006).

that decided them had available the wisdom of the first or second restatement or both. I have found three such cases, none of which reject Section 7.08's rule outright but only exclude it in dicta or by implication without direct argument.

1. Western Weighing & Inspection Bureau v. Armstrong[125]

Armstrong, which is almost 100 years old,[126] involved the sale of an enormous amount of hay. Steger & Co. contracted to buy from Liverpool Hay & Grain 5,000 tons of hay, then owned by Wilbur Webb, for "$9.50 per ton f.o.b. Galveston."[127] Under the contract, Steger & Co. was to pay for the hay "in cash" based on "railroad weights" for the hay as delivered in Galveston, "immediately after acceptance of the hay" by a representative of the French government, which planned to buy the hay from Steger & Co.[128]

In operation, the contract became more specific. The parties agreed that Steger & Co. would also pay freight on the hay to Galveston based on the weight of the hay there as measured by Western Weighing & Inspection Bureau (WWIB), "an organization formed and maintained by . . . railroads of the United States for the purpose of weighing shipments."[129] WWIB was a non-profit, but the persons who actually did its work and kept its records were railroad employees.[130] Steger & Co. appears to have trusted WWIB's weights, perhaps because WWIB was a non-profit and the railroad was neither buyer nor seller of the hay and thus independent.

Liverpool Hay & Grain, the seller, appointed Webb—the owner of the hay—its agent to collect.[131] While the hay was being delivered, the parties seem to have thought the trade a success. Steger & Co.'s later complaint said the company actually bought about 10,000 tons pursuant to the contract's terms—twice the amount originally promised.[132] At Galveston, Steger & Co. received 436 carloads of hay via the Harrisburg & San Antonio Railway Co.[133] As per the contract, Steger & Co. accepted the weight of the hay and

125. 288 S.W. 119 (Tex. Comm'n App. 1926, holding approved).

126. The case moved through the Texas courts in 1917–1926. *Id.*; *see* W. Weighing & Inspection Bureau v. Armstrong, 281 S.W. 244, 245 (Tex. App.—Galveston 1925), *rev'd*, 288 S.W. 119 (Tex. Comm'n App. 1926, holding approved) (reporting the complaint was filed in 1917).

127. *Armstrong*, 281 S.W. at 245.

128. *Id.* Specifically, the parties agreed that the "basis of settlement as to weight" would be set by the railroad's weighing association. *Id.*

129. *Id.* at 246.

130. *Id.*

131. *Id.* The court of appeals suggested that later, as the sale exceeded the contracted amount, hay from other sellers was included. *See id.* at 251 ("and out of any other cars bought of anybody else").

132. *Id.* at 245–46, 252.

133. *Id.* at 246.

paid the shipping and purchase price based on WWIB measurements made when the hay arrived in the port city.[134]

Steger & Co. later realized it had been defrauded. Webb conspired with the railroad employees working for WWIB to inflate the weight of every carload.[135] The testimony of one WWIB worker was that Webb told them to bill for an extra 4,000 pounds for normal-size train cars and an extra 2,000 pounds for smaller cars; in some cases, the workers billed 6,000 pounds over.[136] Once, they billed 15,000 pounds over![137] When Webb was told of this last overage, he "laughed about it, and said the weighers at Galveston were treating him pretty nicely."[138] In all, Steger & Co. alleged it was billed and paid for over 12 million pounds of hay when only 9,850,000 were delivered.[139] Steger & Co. overpaid $10,370 for the hay,[140] all in reliance on WWIB's weighing activities.[141] It likewise overpaid for the freight charges.

The plaintiff, Armstrong, was agent for and liquidating partner of Steger & Co.[142] Armstrong sued Liverpool Hay & Grain, Webb, the railroad, and WWIB. At trial in Galveston, Armstrong won a jury verdict and judgment for $20,526.81 against Webb, the railroad, and WWIB.[143] The railroad and WWIB appealed, and the intermediate court of appeals in Galveston affirmed.[144]

The Texas Commission of Appeals reversed, a holding the Supreme Court of Texas adopted.[145] The Commission of Appeals leaned heavily on the intermediate court, however. The Commission approved the Galveston appellate court's recitation of the facts.[146] For its opinion, the Commission adopted the opinion of Justice Pleasants, who dissented in the Galveston appellate court.[147]

The contrasting opinions of the Galveston court thus show best how the Supreme Court of Texas mostly rejected the Section 7.08 principle. The Galveston Court of Appeals affirmed that Steger & Co. could reasonably rely on

134. *Id.* at 245–46.
135. *Id.* at 246–49 (reporting the complaint and the jury's findings).
136. *Id.* at 252–53.
137. *Id.* at 253.
138. *Id.*
139. *Id.* at 246.
140. *Id.* at 247. There were other items of damages claimed which are not relevant here. *Id.*
141. *Id.*
142. *Id.* at 245.
143. *Id.* at 249. Webb did not appeal. *Id.* at 248.
144. *Id.* at 255.
145. W. Weighing & Inspection Bureau v. Armstrong, 288 S.W. 119, 121 (Tex. Comm'n App. 1926, holding approved).
146. *Id.*
147. *Id.*

the railroad weights.[148] It reasoned that the WWIB's (and its agents') conduct was within the scope of its employment.[149] Of course, it was: Steger & Co.'s freight costs paid to the railroad were based on the inflated weights, and the inflated weights led directly to higher freight payments to the railroad (and higher payments to Webb). This explains why the railroad should be liable for the freight overages, but should it be liable for the excess payments to Webb? Here is the court's answer:

> It is well settled, we think, that all such statements . . . or acts of an agent as are within the scope of such agent's employment *or impliedly possessed by him by virtue of his representative character* are binding on the principal; that a duty rests upon every one, in the management of his own affairs, whether by himself or by his agent or servant, so to conduct them as not to injure another, and that if he does not do so, and another is thereby injured, he can be made to answer the damage. *Inasmuch as he has made it possible for his employé to inflict the injury, it is but just that he should be held accountable*. *The principal holds out his agent as competent and fit to be trusted, and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of his agency*.[150]

This is not a bad statement of Section 7.08's principle: The principal holds out his agent as "fit to be trusted," and this makes it possible for or enables the agent to inflict injury, and when he does (and here it was by conduct actually within the scope of employment), it is just to hold the principal accountable.

But the dissenting Chief Justice Pleasants (in the opinion adopted by the Texas Commission of Appeals, the holding of which was approved by the Supreme Court of Texas) said scope of employment could not "be applied . . . and the railroad company held liable for" the overpayment to Webb.[151] Weighing the hay for the contracting parties was outside the course and scope of employment, the judge said.[152] Thus, the court of appeals' position in support of the principle of Section 7.08 was abandoned. But that is as far as Justice Pleasants goes: the opinion does not repudiate Section 7.08's position. Justice Pleasants twice asserted what he thought the majority meant—that the railroad "knew or was charged with knowledge of the fact that [Steger & Co.] were purchasing the hay upon the weights given by this unfaithful agent. As

148. *Armstrong*, 281 S.W at 251–52.

149. *Id.* at 253–54 (reasoning that "the undisputed evidence showing that the weigher of the bureau was, for the purpose of weighing the hay in question, the agent of the railroad company, and that in weighing the hay, he was performing the very services imposed upon him by the railroad company").

150. *Id.* at 254 (emphasis added).

151. *Armstrong*, 288 S.W. at 119.

152. *Id.* at 119–20.

I have . . . stated, there is no evidence" of that knowledge.[153] Section 7.08 requires no such knowledge. The Commission of Appeals adopted Justice Pleasants' opinion, so while the Commission of Appeals refused to adopt the Section 7.08 principle, it did not reject it outright.

2. Morrow v. Daniel[154]

In September 1960, Stim-O-Stam Enterprises, Inc. (Enterprises) was organized with a board of directors and with Bobby Morrow as president.[155] Enterprises was organized—and headquartered in Abilene—to sell "Stim-O-Stam," a product for "reducing muscle soreness and muscle fatigue" and adding endurance.[156]

M.W. Nunn was acting secretary of Enterprises but "not officially Secretary of the Corporation."[157] The directors and Morrow apparently permitted Nunn to sell Enterprises stock and accept payment. Nunn was allowed to sign checks on Enterprises' "bank account alone without the signature of anyone."[158] Nunn abused these privileges. At some point, Nunn formed a separate corporation named Stim-O-Stam, Inc.[159] Morrow and the directors of Enterprises knew nothing about this separate corporation.[160]

Nunn concocted a scheme to defraud B.F. Daniel, a potential Enterprises investor.[161] Nunn met several times with Daniel in Dallas in March 1961 to encourage Daniel to invest in Enterprises. At one meeting, Nunn brought Morrow along.[162] Daniel's lawyer (i) checked to determine that Enterprises existed and that Morrow was its president and (ii) had Nunn swear before a notary that an Enterprises financial statement showing a net worth of more than $60,000 was true.[163] Some time after Daniel met Morrow, "Daniel agreed to buy thirty-six shares . . . for $18,000."[164] Nunn then left for Abilene, claiming he needed Morrow's signature on the stock certificates.[165]

When Nunn arrived in Abilene, he told Morrow that Daniel had changed his mind and decided not to buy the stock. Morrow took the certificates

153. *Id.* at 120–21; *see id.* at 119–20.
154. 367 S.W.2d 715 (Tex. App.—Dallas 1963, no writ).
155. *Id.* at 716.
156. *Id.*
157. *Id.*
158. *Id.*
159. *See id.* at 717.
160. *Id.*
161. *Id.* at 716–17.
162. *Id.* at 716.
163. *Id.* at 716–17.
164. *Id.* at 717.
165. *Id.*

back.[166] But then Nunn forged Morrow's name on stock certificates of Stim-O-Stam, Inc., the other company. Nunn returned these certificates to Daniel, falsely claiming that Daniel's attorney had already approved them.[167] Daniel did not notice the different corporate name.

Daniel paid for the stock with two transfers. One was $8,000 cash. He had no more cash, and Nunn claimed (of course) that Enterprises would take only cash, so Daniel paid the other $10,000 in a convoluted way. He transferred to Nunn personally a farm worth $32,800, and then Nunn signed a personal note to Daniel for $22,800 and promised to pay the other $10,000 himself.[168] Daniel appears to have suspected nothing. Daniel opened a bank account in Dallas and deposited the $8,000 cash.[169] Nunn transferred $6,000 from this account and deposited it in Enterprises accounts but then withdrew all $6,000 and used the money for his own purposes.[170] Of course, Nunn never paid the other $10,000; the whole transaction was a sham.

Daniel sued Enterprises, Morrow, and the Enterprises directors, in Dallas County. The defendants sought to have the case transferred to Taylor County, to Abilene. The issue in the case was whether venue lay in Dallas County, and that depended on whether some evidence showed "that any fraud attributable to Enterprises was committed in Dallas County."[171] Whether it did depended on whether Enterprises was responsible for the acts of Nunn.

For the record, the court concluded that the Enterprises financial statement was false.[172] Moreover, in providing it, "Nunn was acting within the scope of his authority as agent for Enterprises" when he persuaded Daniel to buy stock, so "a fraud was perpetrated by Nunn in Dallas . . . while acting in the course of his employment as agent for Enterprises."[173] Of course, Nunn was tasked with raising money for Enterprises, and for part of this story, he was ostensibly doing just that. The court concluded that this fraud could be litigated in Dallas.[174]

But the court sustained the objection with regard to the fraudulent stock certificates. In the court's words,

> Nunn was acting solely for himself when he substituted the certificates. He misrepresented the facts to his principal. Notice and knowledge of the fraudulent switch in the certificates was not brought home to ap-

166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.* at 718.
173. *Id.*
174. *Id.*

> pellants until after the exchange had taken place. Under the circumstances appellees failed to prove agency with reference to the exchange of the certificates.[175]

The court said that Enterprises' bank account's holding the $6,000 for a time made no difference: "Enterprises received no benefit from the deposits, for Nunn immediately checked out the money and used it for his own purposes."[176] The court thought it relevant that Morrow and the directors did not participate in or even know of Nunn's fraud until after it occurred.[177] Because Enterprises could not be held to these fraudulent acts, it could not be forced to litigate this claim in Dallas County.[178]

Under Section 7.08, Enterprises may well have been held liable for Nunn's fraud. Nunn was Enterprises' agent throughout. Nunn dealt with Daniel "on or purportedly on behalf of" Enterprises. Nunn appeared to be raising money for Enterprises, with Morrow's blessing. Nunn's position as acting secretary, his access to Enterprises' information, and Morrow's participation in Nunn's dealings with Daniel gave the impression that Nunn had authority. Though the apparent authority did not constitute the tort, it did "enable the agent to conceal its commission," in Section 7.08's words, because Daniel did not suspect, given Enterprises' affirmation of Nunn's authority, that Nunn was committing fraud.

Were I litigating the cases, I would have argued that Daniel accepted the Stim-O-Stam, Inc. certificates unreasonably because he had bargained for stock in Enterprises; this would show that apparent authority was lacking.[179] That Nunn asked for cash and a deed to himself personally as grantee also raised red flags. But unreasonable reliance is not the court's objection. The court's objection is that Nunn was acting for himself, which is not even an argument against apparent authority—but as an objection to apparent authority would also foreclose its use.[180]

3. National Life & Accident Ins. Co. v. Ringo[181]

Around 7:30 p.m. on April 5, 1938, P.L. Brown visited Ringo's home to collect weekly premiums on policies of insurance carried by National

175. *Id.*
176. *Id.* at 719.
177. *Id.*
178. *Id.*
179. *See* RESTATEMENT (THIRD) OF AGENCY § 7.08 cmt. b (AM. L. INST. 2006).
180. *See id.* § 7.08; *see also id.* § 7.08 cmt. b ("[T]he fact that an agent's conduct is not in fact beneficial to the principal does not shield the principal from legal consequences . . . because apparent authority . . . is traceable to a manifestation made by the principal.").
181. 137 S.W.2d 828 (Tex. App.—Dallas 1940, writ ref'd).

Life.[182] Brown had visited in the past.[183] Ringo had four policies with National Life: one for himself, one for his wife, and one each for his two daughters.[184] Brown was admitted to the dining room where Ringo gave him $1.80, the premiums for two weeks for the policies.[185] This amount was "credited in duplicate receipt books in the possession of each party."[186] Brown had previously visited on March 22 and collected four weeks' payments for the month of March,[187] so this $1.80 payment should have covered the week beginning April 4 and the one beginning April 11.

Then Ringo insisted that the $1.80 "paid his policies two or three weeks in advance, instead of one week as both books indicated."[188] Brown and Ringo argued over whether the books were correct. Ringo told Brown to leave and not return. Their dispute became more heated. Brown invited Ringo outside "to settle it. Come on outside and we will just fight it out."[189] Ringo went outside, and Brown assaulted Ringo with a knife.[190] In testimony later, each insisted the other was the aggressor.[191] Brown testified that he had no interest in the premiums except that, if the policies lapsed, National Life would charge Brown a "certain amount" in new business.[192] Ringo was welcome to pay at the office if he wanted.[193]

Ringo sued Brown and National Life for his injuries. The jury was asked,

> Do you find from a preponderance of the evidence that at the time and on the occasion of plaintiff's injury P. L. Brown was acting within the apparent scope of his authority as an employee of the defendant, The National Life & Accident Insurance Company? Answer either "yes" or "no". By the term "apparent authority", as used in this charge, is meant that authority which an agent appears to have by some act on the part of the principal.[194]

The jury answered yes.[195]

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182. *Id.* at 829.
183. *Id.* at 830.
184. *Id.* at 829.
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.* (testimony of Brown).
194. *Id.*
195. *Id.*

Was "yes" the right answer? The trial court imposed judgment for $500 against National Life, which appealed.[196] The Dallas Court of Appeals reversed.[197]

The court dealt quickly with apparent authority: "[N]either the pleading nor the evidence raises an issue of 'apparent authority' on the part of the agent Brown."[198] Why? National Life "invested its agent with no appearance of authority . . . other than to collect an amount of premium and credit same in the duplicate receipt books, as on previous and regular trips."[199]

But the quarrel arose from Brown's weekly premium collection? No, this quarrel was beyond

> the outer limits of the servant's authority and duties . . . clearly shown. . . . When the servant turns aside, for however short a time, from the prosecution of the master's work, and engages in the doing of an act not in furtherance of the master's business, but to accomplish some purpose of his own, whether in doing so he is actuated by malice or ill will * * *, there is no principle which charges the master with responsibility for such action.[200]

No principle? Then what of Section 7.08? The "no principle" dicta read quickly appears to restrict all vicarious liability of a master to acts done within the scope of employment, "in furtherance of the master's business."[201] As noted,[202] the principle of Section 7.08 does not require this but instead imposes liability on the employer because of apparent authority,[203] not because the employee's acts are "in furtherance," and apparent authority creates vicarious liability even though the agent is seeking "some purpose of his own."[204] However, the *Ringo* court's dicta should not be taken at face value: the court only gets to the "no principle" statement after it has dispensed with apparent authority—not because that doctrine is unavailable, but for lack of

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196. *Id.*

197. *Id.* at 832.

198. *Id.* at 830.

199. *Id.*

200. *Id.* The rest of *Ringo* reasons that Brown was not acting within the scope of his employment. Brown's duties as agent were "[t]o solicit business, write applications, deliver policies, and collect premiums." *Id.*. The court explained that Brown had "no power to arbitrate" a difference of opinion about how far premiums had been paid, and

> Brown's proposal to plaintiff that the matter be concluded outside the house, indicated no more than the settlement of animosities arising from a personal quarrel. . . . An adjustment of the pending controversy, either by wager of battle, or otherwise, was not within the province of said agent, whose employment . . . merely furnished the opportunity for the wrongful act.

Id. at 831. I have no quarrel with this analysis.

201. *Id.* at 830.

202. *See supra* Part II.

203. *See* RESTATEMENT (THIRD) OF AGENCY § 7.08 (AM. L. INST. 2006).

204. *See id.*; *see also id.* § 7.08 cmt. b ("[T]he agent's motivation is immaterial.").

evidence that it applies. The court's analysis of apparent authority undercuts its own dicta. The *Ringo* dicta is at best light criticism of Section 7.08's principle.

With regard to *Ringo*, as with *Morrow*, I would have argued that apparent authority did not enable the tort. Brown as a collection agent for National Life could not reasonably be thought to have authority to stab insureds as a method of dispute resolution; and anyway, Ringo resisted, so he did not think Brown had the authority either, most likely. Apparent authority is an ill fit for this tort, which is why Section 7.08 is limited to torts committed "by an agent *in dealing or communicating with* a third party" and none of its illustrations involve assault.[205]

4. Millan v. Dean Witter Reynolds, Inc.[206]

Millan v. Dean Witter Reynolds, Inc. is a much more recent decision, actually mentioned in the Reporter's Notes to Section 7.08.[207] Maria Millan opened two brokerage accounts at Dean Witter and named her son Miguel, a Dean Witter broker, as her broker.[208] Miguel opened an additional Dean Witter account in his mother's name and forged her signature on the application.[209] Miguel gave this extra account check-writing privileges and a credit card, which he used.[210] He deposited his mother's periodic deposits into this account and wrote himself checks from it.[211] He covered his tracks with a P.O. Box, a false change of address form, and false account statements purporting to be from Dean Witter.[212]

Millan sued her son and Dean Witter for fraud and other things.[213] The trial court directed a verdict for Dean Witter on scope of employment theory,[214] and the court of appeals affirmed (over a dissent).[215] The court of appeals asked "whether the employee's actions fall within the scope of the employee's general authority, are in furtherance of the employer's business, and

205. *See id.* § 7.08; *id.* § 7.08 cmt. b, illus. 1–8; *id.* § 7.08 cmt. c, illus. 9–15; *id.* cmt. d, illus. 16–17.

206. 90 S.W.3d 760 (Tex. App.—San Antonio 2002, pet. denied).

207. RESTATEMENT (THIRD) OF AGENCY § 7.08 reporter's notes to cmt. c (AM. L. INST. 2006). I discussed *Millan* in a recent article. *See* Val Ricks, *Fraud Is Now Legal in Texas (for Some People)*, 8 TEX. A&M L. REV. 1, 41–43 (2020).

208. *Millan*, 90 S.W.3d at 763.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* at 767.

215. *Id.* at 763.

are for the accomplishment of the object for which the employee was hired"—standard tests for scope.[216]

A majority of the San Antonio Court of Appeals sitting en banc concluded "there was no evidence that Miguel acted within the scope."[217] His activities went "far beyond . . . general brokerage duties."[218] He "greatly exceeded the scope of his authority when, through a litany of deceitful acts, he stole money from his mother."[219] And so the court found "no evidence . . . to support the submission of Dean Witter's vicarious liability for fraud [to the jury]."[220]

Admittedly, some of Miguel's acts were things only a family member could have done. He "[stole] checks from his mother's bathroom drawer,"[221] "rent[ed] a post office box, rifl[ed] his mother's mailbox."[222] But much of what Miguel did a broker could do in part because he appeared to have apparent authority: "writing checks on his mother's account, depositing his mother's checks into his own account, forging his mother's signature on numerous occasions, stealing statements from his mother's mailbox, creating and sending bogus statements to his mother, and opening a post office box so he could receive his mother's actual statements."[223] The majority concluded that "[t]hese acts were not related to Miguel's duties" and thus not within the scope.[224] Justice Stone dissented, but even the dissent felt bound to argue only in terms of "scope of employment."[225] Under that paradigm, the best factual conclusion the dissent felt it could muster was that Miguel's acts "were not 'utterly unrelated' to his duties."[226]

It is unfortunate the court did not consider Miguel's apparent authority. Millan's counsel tried, as the court reported: "Millan contends the trial court should have submitted a question on whether Miguel was acting with apparent authority."[227] But the court responded illogically. The court conceded that "[a]pparent authority . . . can be used to establish the principal's liability when there is no actual authority" and cited *Sampson*,[228] discussed *infra* Part IV.B.3, which does indeed say this. But the court's riposte is a non sequitur:

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216. *Id.* at 767–68.
217. *Id.* at 768.
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.* at 770 (Stone, J., dissenting).
223. *Id.* at 768 (majority opinion).
224. *Id.*
225. *See id.* at 769–70 (Stone, J., dissenting).
226. *See id.* at 770.
227. *Id.* at 767 (majority opinion).
228. *Id.* (citing Baptist Mem'l Hosp. Sys. v. Sampson, 969 S.W.2d 945 (Tex. 1998)).

"Because Miguel was a registered agent for Dean Witter, there was no need to show apparent authority because Miguel had actual authority."[229] Combined with the court's holding on scope of employment, the court's conclusion is in conflict: Scope of employment is rejected because Miguel's acts were so far outside his actual (or scope of) authority, and apparent authority is rejected because Miguel had actual authority. Logic will not let the court have it both ways. Moreover, had the court actually read *Sampson*, the court would have seen that *Sampson* affirmed that a principal "may act in a manner that makes it liable for the conduct of one . . . who, *although an agent, has acted outside the scope of his or her authority*."[230] Being an agent (and thus having some authority) is no bar to apparent authority's creating vicarious liability.

And in fact, Miguel's fraud probably would have been impossible without Dean Witter's conferring on Miguel the status and power of broker, even though much of what Miguel did was unauthorized by either Dean Witter or Millan. Millan sent money to Miguel only because he was her Dean Witter broker. Miguel as a broker could bypass Dean Witter's normal procedures because he was a broker. As a broker, he could open an account in his mother's name with a forged signature, give the account check-writing privileges and a credit card, turn in a false change of address form, and create false statements. Even things the majority indicates were outside the scope appear to be possible only because they were done by a Dean Witter broker who could act at the brokerage without oversight: deposit his mother's checks in the wrong account, send bogus statements, assign a Dean Witter account to a P.O. Box Miguel owned. Miguel's apparent authority fooled both Millan the customer and the internal fraud auditors at Dean Witter.[231] Much of what Miguel did fits well within Section 7.08's doctrine.

Despite this, the doctrine might not have applied. Apparent authority exists only if the third party's belief that the agent acts with authority is reasonable.[232] The jury found that Maria Millan's harm was caused 85% by her own negligence.[233] The court of appeals affirmed this finding based on evidence that "Millan should have known by July 1994 that something was

229. *Id.*

230. *Sampson*, 969 S.W.2d at 947 (emphasis added).

231. *Millan*, 90 S.W.3d at 763 (the jury's finding Dean Witter 15% negligent); *id.* at 765 ("Over the next three years, Dean Witter violated its own policy of reviewing employee-related accounts on a monthly basis.") ("Dean Witter failed to verify the change-of-address information, violating its own policy.").

232. RESTATEMENT (THIRD) OF AGENCY § 7.08 cmt. b (AM. L. INST. 2006) ("[T]he rule stated in this section is inapplicable when a third party does not reasonably believe that an agent's action has been authorized by the principal.").

233. *Millan*, 90 S.W.3d at 763.

amiss with her accounts."[234] Thus, her trust in Miguel may well not have been reasonable. If not, then the Section 7.08 doctrine would not apply—but the court should have said so rather than rejecting for false reasons a legal theory that is and should be part of Texas law.

This is not the opinion's only problem. The majority noted that "an employer is not liable for intentional and malicious acts that are unforeseeable considering the employer's duties."[235] Applied to a case of broker fraud, this sentence is absurd and frightening. Dean Witter hires brokers to handle other people's money. Dean Witter should certainly foresee that their brokers will sometimes steal it—and in clever ways involving abuse of their broker status, as the dissent noted.[236] In fact, aside from the truly personal things Miguel did at his mother's home, Miguel as a broker could have defrauded any customer in a similar manner. Brokerage firms make this kind of fraud possible by encouraging their customers to entrust brokers with their money.

Both the majority's and dissent's substantive arguments, however, are limited to scope of employment. The result is that *Millan* has come to stand for the proposition that "in *Millan*, the employee stole from a client, for which Dean Witter could not be vicariously responsible."[237] Limited to scope of employment, that may be true. As a blanket statement, it should be false. A principal should be vicariously liable for an employee's fraudulent theft of client funds when the fraud is enabled by apparent authority only a principal can create. That is a cost of using agents to make a profit.

5. Sola Scope of Employment

These four representative cases are akin to another errant but short line of Texas cases that claim scope of employment is the sole avenue for vicarious liability. Here is the claim: "A principal is liable for misrepresentations of his agent only when such misrepresentations are authorized or within the scope of the agent's authority."[238] When this statement was made in 1970, it

234. *Id.* at 766.

235. *Id.* at 768.

236. *See id.* at 769 (Stone, J., dissenting) ("Were this not so, a firm could actually rely upon its agents to embezzle from accounts, then claim ignorance.").

237. Prime Tex. Surveys, LLC v. Ellis, No. 01-19-00372-CV, 2020 WL 6065441, at *5 (Tex. App.—Houston [1st Dist.] Oct. 15, 2020, no pet.) (mem. op.); *see* Nat'l W. Life Ins. Co. v. Newman, No. 02-10-00133-CV, 2011 WL 4916434, at *7 (Tex. App.—Fort Worth Oct. 13, 2011, pet. denied) (mem. op.); *see also* H.D.N. Corp. v. Autozone Tex., L.P., No. 4:12-CV-3723, 2014 WL 4471537, at *2 (S.D. Tex. Sept. 9, 2014).

238. Pasadena Assocs. v. Connor, 460 S.W.2d 473, 479 (Tex. App.—Houston [14th Dist.] 1970, writ ref'd n.r.e.).

went beyond the precedent it cited.[239] Occasionally, even the Supreme Court of Texas talks this way.[240] If nothing else, the statement ignores vice principal liability, which is clearly established.[241] It also ignores any possibility of vicarious tort liability generated by an apparent authority, which was considered as if established in *NationsBank v. Dilling*[242] and subject to a full analysis in *Baptist Memorial Hospital System v. Sampson*[243]—a contradictory move if scope of employment is legally the only road to vicarious liability. Later cases take these kinds of statements at face value, however.[244] Such absolute statements are simply incorrect.

B. Adoption?

1. NationsBank v. Dilling[245]

The Supreme Court of Texas gave mild support to the Section 7.08 doctrine in *NationsBank v. Dilling*.

NationsBank reported a scheme in which Carolyn Price, Fritz McMillon, and others conspired to defraud Dilling.[246] McMillon had served time in

239. *Pasadena Assocs.* cites *Reed v. Hester*, 44 S.W.2d 1107, 1109 (Tex. Comm'n App. 1932, holding approved), for this, but *Reed* omits "only." The other cases *Pasadena Assocs.* cites in support are similarly limitless, suggesting *Pasadena Assocs.* overstates. See the following, also cited by *Pasadena Assocs*.: *Chandler v. Butler*, 284 S.W.2d 388, 394–98 (Tex. App.—Texarkana 1955, no writ) (affirming the principal's liability because the principal committed fraud "either in person or through his agents acting within the scope of their *apparent* authority" (emphasis added)); *Powell v. Andrews*, 220 S.W.2d 718 (Tex. App.—Texarkana 1949, writ ref'd n.r.e.) (holding fraud made "while acting within the scope . . . may render the principal liable" but not claiming this rule is exclusive); *Wink v. Wink*, 169 S.W.2d 721, 723 (Tex. App.—Galveston 1943, no writ) (noting scope of authority without claiming that rule is exclusive).

240. *E.g.*, Minyard Food Stores, Inc. v. Goodman, 80 S.W.3d 573, 577 (Tex. 2002) ("The general rule is that an employer is liable for its employee's tort only when the tortious act falls within the scope of the employee's general authority in furtherance of the employer's business and for the accomplishment of the object for which the employee was hired."); Gaines v. Kelly, 235 S.W.3d 179, 185 n.3 (Tex. 2007) (confusingly providing this citation in an apparent authority case: "*Texas Midland R.R. v. Monroe*, 110 Tex. 97, 216 S.W. 388, 388 (Tex. 1919) (noting general rule that principal will not be charged with liability to a third person for the acts of the agent outside the scope of his delegated authority)").

241. *See supra* note 8. Even acts by a vice principal that generate liability are not authorized acts. An authorized act would not require imputation but create direct liability for a principal. *See supra* notes 4 & 8.

242. 922 S.W.2d 950 (Tex. 1996).

243. 969 S.W.2d 945 (Tex. 1998).

244. *See* FDIC/Manager Fund v. Larsen, No. 05-88-00137-CV, 1993 WL 37380, at *6 (Tex. App.—Dallas Feb. 11, 1993, writ denied) (not designated for publication) (citing *Pasadena Assocs.* for the identical rule); Great Am. Life Ins. Co. v. Lonze, 803 S.W.2d 750, 754 (Tex. App.—Dallas 1990, writ denied) (same); The Christian Broad. Network, Inc. v. Busch, No. 2:05cv558, 2006 WL 2850624, at *7 (E.D. Va. Oct. 3, 2006) (same).

245. 922 S.W.2d 950 (Tex. 1996).

246. *Id.* at 952.

prison for fraud, and Dilling knew this.[247] Even so, McMillon persuaded Dilling to invest in McMillon Enterprises, Ltd. (MEL). He told Dilling that MEL bought and sold rental cars; in fact, MEL had no real business.[248] Dilling made an initial investment.

Price, a NationsBank teller, accepted the Dilling check from McMillon and "issued several cashier's checks in amounts exceeding the value of the MEL check."[249] "Price also fabricated deposit slips reflecting amounts deposited in MEL's account."[250] "McMillon showed Dilling the deposit slips" to prove MEL was a real business.[251] McMillon also "repaid Dilling's initial investment plus a return," using "the cashier's checks issued by NationsBank."[252] Satisfied that MEL was legitimate, Dilling invested much more, eventually $595,000, none of which was repaid. "Dilling was not a NationsBank customer and never met with Price or any other NationsBank representative."[253]

Of course, Dilling sued McMillon, MEL, Price, and NationsBank. The trial court granted to Dilling judgment against McMillon, MEL, and Price—but not NationsBank. On appeal, Dilling argued that NationsBank was vicariously liable because of Price's apparent authority.[254] The intermediate court of appeals agreed with Dilling, citing a Fifth Circuit case, *Bankers Life Ins. Co. of Nebraska v. Scurlock Oil Co.*,[255] which claimed to see something like the Section 7.08 doctrine in a line of Texas caselaw.[256] The *Bankers Life* line of cases is persuasive precedent, yet these cases employed the Section 7.08 doctrine to prohibit a principal from suing, not to hold a principal liable.[257] In logic, the two positions are the same, but their procedural context differs. I discuss this line of precedent in the next section, Part IV.B.2.

When *NationsBank* was appealed from Waco to Austin, the Supreme Court of Texas reversed. Why is this case in the positive column, then?[258] The Supreme Court at least considered the Section 7.08 doctrine.[259] It did not use a legally spurious or illogical reason to exclude the doctrine. The court

247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.*
255. 447 F.2d 997 (5th Cir. 1971).
256. Dilling v. NationsBank, N.A., 897 S.W.2d 451, 453–56 (Tex. App.—Waco 1995), *rev'd*, 922 S.W.2d 950 (Tex. 1996).
257. *See Scurlock Oil*, 447 F.2d at 1005–07. These cases are discussed *infra* Part IV.B.2.
258. It is cited as such in the Reporter's Note to Section 7.08. RESTATEMENT (THIRD) OF AGENCY § 7.08 reporter's notes to cmt. c (AM. L. INST. 2006).
259. *See NationsBank*, 922 S.W.2d at 952–53.

seemed to treat apparent authority as a viable possibility for holding a principal vicariously liable because of an agent's acts done with apparent authority.

The court reversed because it believed NationsBank had created no apparent authority. In the court's view, NationsBank "never took any action that would lead a reasonably prudent person to conclude that it had authorized Price to make representations regarding an investment in MEL."[260] Cashier's checks alone could not show that MEL was a sound investment; cashier's checks only represent that the bank will honor the checks.[261] Bank deposits likewise did not show that MEL merited Dilling's money.[262] The court did not express disagreement with *Bankers Life*—it only distinguished it.[263]

But *NationsBank* is at best light support for Section 7.08 doctrine. Though the case did not preclude the doctrine, it also neither explained nor justified it.[264] A lawyer reading the opinion is left with no idea what role, if any, the court thinks the doctrine plays in the law, what policy positions do or could justify it, or whether the court thinks any set of facts would call for it. The court does not explicitly disagree with *Bankers Life*, but the court does not need to, because it distinguished the opinion. The *NationsBank* opinion's rhetorical strategy was to say as little as possible about the Section 7.08 doctrine but ensure that it did not apply. Did the court realize this doctrine has always been part of the restatements of agency and is applied across the United States? Maybe that created in the court a certain tolerance for the doctrine. But *NationsBank* goes no further than this.

A lower court might well see what appears to be this rhetorical strategy: Do not rule out apparent authority—but find it does not exist. This worked for the court in *NationsBank*, and the court did it again and more forcefully in *Baptist Memorial Hospital System v. Sampson*[265] (discussed *infra* Part IV.B.3) and again in *Gaines v. Kelley*.[266] All of these cases are lessons in how to reverse factual findings of apparent authority when vicarious tort liability is at issue. The intermediate appellate courts have taken the hint and do this when tort liability is at issue.[267] I found only two cases to the contrary, both

260. *Id.* at 953.
261. *Id.*
262. *Id.*
263. *Id.*
264. *See id.* at 952–53.
265. 969 S.W.2d 945 (Tex. 1998).
266. 235 S.W.3d 179, 182–85 (Tex. 2007); *see also* Ins. Co. of N. Am. v. Morris, 981 S.W.2d 667, 672–75 (Tex. 1998) (finding apparent authority not established on the facts so that the purported principal was not responsible for fraud).
267. *E.g.*, Granger v. Travelers Home & Marine Ins. Co., No. 04-17-00814-CV, 2018 WL 6517406, at *1 (Tex. App.—San Antonio Dec. 12, 2018, no pet.) (mem. op.); Westview Drive Invs., LLC v. Landmark Am. Ins. Co., 522 S.W.3d 583, 606 (Tex. App.—Houston [14th Dist.] 2017, pet.

unpublished. One buries the apparent authority holding, and its facts are so unique that the case would have little precedential value even if it were published.[268] The other is a review of a default judgment based on the pleadings

denied) (conceding potential liability for an agent's actions "within the scope of its apparent authority in committing some wrongdoing" but finding no wrongdoing); Hubbard v. Jackson Nat'l Life Ins. Co., No. 13–15–00138–CV, 2017 WL 711601, at *3–5 (Tex. App.—Corpus Christi Feb. 23, 2017, no pet.) (mem. op.); United Residential Props., L.P. v. Theis, 378 S.W.3d 552, 564–65 (Tex. App.—Houston [14th Dist.] 2012, no pet.); Lozada v. Farrall & Blackwell Agency, Inc., 323 S.W.3d 278, 291–93 (Tex. App.—El Paso 2010, no pet.); Neubaum v. Buck Glove Co., 302 S.W.3d 912 (Tex. App.—Beaumont 2009, pet. denied); Broussard v. San Juan Prods., Inc., 273 S.W.3d 400, 402–06 (Tex. App.—Beaumont 2008, no pet.); Sanders v. Total Heat & Air, Inc., 248 S.W.3d 907, 915–17 (Tex. App.—Dallas 2008, no pet.) (handling the tort claims in a later part of the opinion, at 917–18); Acree v. Guar. Fed. Bank, F.S.B., No. 01-99-01108-CV, 2001 WL 225688, at *5–6 (Tex. App.—Houston [1st Dist.] Mar. 8, 2001, pet. denied); Lexington Ins. Co. v. Buckingham Gate, Ltd., 993 S.W.2d 185, 200 (Tex. App.—Corpus Christi 1999, pet. denied); Atwood v. Kansas City Life Ins. Co., No. 14-96-00048-CV, 1997 WL 567941, at *6–8 (Tex. App.—Houston [14th Dist.] Sept. 11, 1997, no pet.) (not designated for publication), *modified on reh'g*, 1991 WL 688998 (Tex. App.—Houston [14th Dist.] Nov. 6 1997, no pet.) (per curiam) (admittedly, in this case the appellant (i) argued it should win whether or not it relied and (ii) did not bother to gather evidence from the record); Humble Nat'l Bank v. DCV, Inc., 933 S.W.2d 224, 236–38 (Tex. App.—Houston [14th Dist.] 1996, writ denied); *cf.* ITT Cons. Fin. Corp. v. Tovar, 932 S.W.2d 147, 156–59 (Tex. App.—El Paso 1996, writ denied) (discussing apparent authority but reasoning similarly regarding scope of employment, following *NationsBank*); Corral-Lerma v. Border Demolition & Env't. Inc., 467 S.W.3d 109 (Tex. App.—El Paso 2015), *modified & supplemented*, 474 S.W.3d 481 (Tex. App.—El Paso 2015, no pet.) (reversing summary judgment that an apparent owner had apparent authority, leaving the issue for trial).

It is not that Texas courts never find apparent authority. They do. *See, e.g.*, Fitzgerald Truck Parts & Sales, LLC v. Advanced Freight Dynamics, LLC, No. 14-19-00397-CV, 2021 WL 1685353, at *1 (Tex. App.—Houston [14th Dist.] Apr. 29, 2021, pet. filed) (mem. op.) (finding apparent authority when jurisdiction in Texas was at issue); Cent. Petroleum Ltd. v. Geoscience Res. Recovery, LLC, 543 S.W.3d 901 (Tex. App.—Houston [14th Dist.] 2018, pet. denied) (finding apparent authority when jurisdiction in Texas was at issue); Expro Am., LLC v. Sanguine Gas Expl., LLC, 351 S.W.3d 915, 924–27 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) (affirming denial of summary judgment and finding a fact issue existed regarding apparent authority in a case of contract breach). Sometimes they deny apparent authority in the non-tort context, too. *See* IRA Res., Inc. v. Griego, 221 S.W.3d 592, 596 (Tex. 2007) (a jurisdiction case); 2616 S. Loop L.L.C. v. Health Source Home Care, Inc., 201 S.W.3d 349, 356–58 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (a lease case). *See if you can figure out* Behzadpour v. Bonton, No. 14-09-01014-CV, 2011 WL 304079, at *3–4 (Tex. App.—Houston [14th Dist.] Jan. 27, 2011, no pet.) (mem. op.) (somewhat confusingly finding no evidence in the record of either actual or apparent authority but reversing summary judgment and stating that a factual issue exists regarding both).

268. Residencial Santa Rita, Inc. v. Colonia Santa Rita, Inc., No. 04-06-00778-CV, 2007 WL 2608564, at *1 (Tex. App.—San Antonio Sept. 12, 2007, no pet.) (mem. op.). Colonia sued Residencial for breach of restrictive covenants in a condominium development because Cristina Prada used one of the condos as an office. In defense, to show estoppel, Residencial showed that Eduardo as agent for Colonia "represented to Cristina that she could use one of the units that would be owned by Residencial as an office." *Id.* at *2. The court upheld both Residencial's defense of estoppel and Residencial's fraud claims against Colonia based on Eduardo's statement. *Id.* at *2–4. Eduardo may or may not have been Colonia's actual agent, though the court says he "routinely made the decisions involving [the condo development] by himself." *Id.* at *1. But the court said, "Cristina testified in her deposition that Begonia told her that Eduardo was going to take her place and that 'whatever he says is like if I had said it.' This is sufficient to raise a fact issue as to whether Eduardo had apparent

alone, which independently established that the principals also committed fraud.[269]

As a consequence of *NationsBank*'s light support, the Supreme Court's treatment of apparent authority claims in that and subsequent cases, and the court of appeals' following the Supreme Court's lead, the doctrine remains unclear and not well established.

2. Adoption by Defense

Bankers Life thought it saw the Section 7.08 doctrine in several older Texas cases.[270] The fit is not exact, however. In these cases, the courts employed the doctrine essentially as a defense to an action by the principal—holding the principal unable to sue for the principal's loss from the fraud at issue. This is how *Bankers Life* itself used the doctrine. Is this enough of a difference that the *Bankers Life* line is distinguishable?

Here are the *Bankers Life* facts:

> Bankers owned a mortgage on certain oil leases in East Texas and was entitled to receive the oil runs from these leases. Bankers' mortgagor was a man named Jordan, who previously had owned and operated the leases, and whom Bankers contracted with to continue operating the leases in Bankers' behalf. As a pipeline purchaser, Scurlock purchased oil from Jordan at Jordan's storage tanks. Scurlock was under contract to pay Jordan for some of the oil, for which Jordan would then account to Bankers, and to pay Bankers directly for the rest. When Jordan delivered the oil in question in this case to Scurlock, however, he represented that it was oil for which Scurlock should pay him rather than Bankers, when in actuality it was oil for which Bankers should have been paid directly. Relying on Jordan's misrepresentations, Scurlock paid Jordan rather than Bankers. Jordan never accounted to Bankers for the oil payments it received. Bankers sued Scurlock for breach of contract and conversion.[271]

On these facts, the court said Bankers Life could not sue Scurlock for conversion. Bankers Life was bound by the acts of its agent Jordan and Texas cases which "forbid a principal to benefit from the fraudulent acts of its agent to the detriment of third parties."[272] This is in logic a similar move as Section 7.08. Thus, the court noted, "[t]his rule applies even though the principal had no knowledge of the fraud, did not consent to it, and indeed is a victim of the

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authority to act on behalf of Begonia and Colonia. *See NationsBank, N.A. v. Dilling*, 922 S.W.2d 950, 952-53 (Tex.1996) . . . ." *Id.* at *2 n.1.

269. Glazener v. Jansing, No. 03-02-00796-CV, 2003 WL 22207226, at *1–6 (Tex. App.—Austin Sept. 25, 2003, no pet.).

270. *See* Bankers Life Ins. Co. v. Scurlock Oil Co., 447 F.2d 997, 1003–06 (5th Cir. 1971).

271. *Id.* at 998–99.

272. *Id.* at 1005.

fraud himself."[273] But the doctrine's use is different; in *Bankers Life*, the doctrine precludes the principal's suit for tort rather than grounding vicarious liability.

The Texas cases cited there do the same. In *W.C. Biggers & Co. v. First National Bank*,[274] Biggers managers held out agent Nash as "agent to buy cotton for W.C. Biggers & Company in Kaufman County."[275] Third parties were under the impression that Nash was authorized to "accept drafts drawn on" his principal Biggers.[276] Two drafts drawn on Biggers came to First National Bank purporting to be (i) drawn by C.R. Pannil and Jack Haynie and (ii) "attached to" bills of lading for bales of cotton.[277] The bank allowed Nash to accept both drafts because "it appeared the drafts on their faces were substantially such as Nash had express authority to accept."[278] Both were fraudulent (both were for unavailable cotton, and the railroad signed neither bill of lading; the cotton was never received).[279] The court's brief report does not state who benefitted from the fraud. W.C. Biggers sued the bank for honoring the drafts.[280] The court declined—refused to hold the bank liable—because "in accepting the drafts as he did Nash acted within the apparent scope of authority he possessed as appellants' agent."[281] "The rule is, when the innocent principal or an innocent third party must suffer loss from misconduct of an agent acting within the apparent scope of his authority as such, that the loss must be borne by the principal."[282] Here the Section 7.08 doctrine imposes responsibility for fraud enabled by apparent authority on the principal to take away liability for tort, not to impose it. More, similar examples from *Bankers Life* appear in the margin.[283]

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273. *Id.*
274. 29 S.W.2d 841 (Tex. App.—Texarkana 1930, writ dism'd).
275. *Id.* at 842.
276. *Id.* at 841–42.
277. *Id.* at 842.
278. *Id.*
279. *Id.*
280. *Id.* (reporting W.C. Biggers' claim that the bank owed it a duty to inspect the bills of lading and cotton tickets, to see whether they had value, before paying the drafts).
281. *Id.*
282. *Id.*
283. The court made a similar move in *Harrison v. MacGregor*, 112 S.W.2d 1095 (Tex. App.—Amarillo 1938, no writ). The court held that if tenants asked to farm land by the principal's apparently-authorized agent acted in good faith, they could not be charged with the agent's fraud. *Id.* at 1100. *See also, e.g.*, Davis Motors, Inc. v. Peel, 354 S.W.2d 408 (Tex. App.—Fort Worth 1962, no writ) (stopping the principal from suing the third party for reimbursement for a fraudulent but apparently authorized sale by the principal's own sales manager); Rose v. Zeigler Cattle Co., 450 S.W.2d 365 (Tex. App.— El Paso 1970, writ ref'd n.r.e.) (true owner of cattle unable to recover cattle from purchaser who bought from the owner's apparently authorized agent in an actually fraudulent sale).

In principle, these defensive uses of the Section 7.08 doctrine are precedent for the offensive use of the same doctrine. If responsibility for the fraudulent misrepresentations of the agent can take away a principal's right to recover in tort, the same responsibility ought to confer on third parties who are victims of the representations the right to recover against the principal in tort. Had (i) a correspondent bank negotiated the drafts Nash accepted and (ii) W.C. Biggers had insufficient funds, First National should have been entitled to pay the correspondent bank and sue W.C. Biggers for the debt.[284] By the same token, had First National been bankrupt, Biggers itself should be liable for the debt or for fraud. The law cannot justly (i) disable principals from suing in tort because they are bound to their agent's fraudulent statements and (ii) at the same time turn away innocent third parties who want to bind principals in tort for those same fraudulent statements. The difference in procedural stance should not translate into a difference in right. In other words, *Dilling* was right to distinguish rather than reject *Bankers Life*; it and the cases it cites may establish the Section 7.08 doctrine.

3. Baptist Memorial Hospital System v. Sampson

After *NationsBank*, perhaps the most prominent Texas case involving apparent authority and vicarious tort liability is *Baptist Memorial Hospital System v. Sampson*.[285] In this case, the Supreme Court of Texas went out of its way to hammer home the apparent authority avoidance strategy honed in *NationsBank*.[286]

In *Sampson*, patient Sampson accused Baptist Memorial doctors of misdiagnosing a brown recluse spider bite, causing Sampson (i) injuries both temporary and permanent and (ii) a risk of death.[287] Sampson sued the doctors and also the hospital, alleging the hospital was liable "under an ostensible agency theory."[288] Because the doctors were independent contractors, not agents or employees, scope of employment liability was not possible.[289]

284. Constructing a similar hypothetical is difficult for *Bankers Life* because the kind of statement Jordan made cannot defraud a third party, only the principal.

285. 969 S.W.2d 945 (Tex. 1998).

286. To give credit where it may be due, the *Sampson* court cited intermediate appellate opinions that did the same thing. *See id.* at 948 (citing Lopez v. Central Plains Reg'l Hosp., 859 S.W.2d 600, 605 (Tex. App.—Amarillo 1993, no writ), *overruled by* St. Luke's Episcopal Hosp. v. Agbor, 952 S.W.2d 503, 509 n. 1 (Tex. 1997); Nicholson v. Mem'l Hosp. Sys., 722 S.W.2d 746, 749–50 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.)). Note also Justice Hardberger's criticisms of *Sampson*. *See* Phil Hardberger, *Juries Under Siege*, 30 ST. MARY'S L.J. 1, 51–63 (1998).

287. *Sampson*, 969 S.W.2d at 946–47.

288. *Id.* at 947.

289. *See id.* at 947–48.

The court declared that the ostensible agency theory was an alternative method of creating vicarious liability.[290] Moreover, the court called these doctrines "basic agency concepts."[291] The court's initial description thus touches on our issue, though little else about the opinion is helpful. The court stated, "[A]n individual or entity may act in a manner that makes it liable for the conduct of *one who is not its agent at all or who, although an agent, has acted outside the scope of his or her authority*."[292] Simplified, and in the context of this case involving an allegation of tort liability, this is two statements: (1) A party can become vicariously liable for the tort of someone who is not even its agent (apparent *agency*). (2) A party can become liable in tort for the conduct of an agent that is "outside the scope of [the agent's] authority" (apparent *authority*).[293] Both of these are true and reflected in the language in Section 7.08; sometimes both will be applicable on the same facts. In fact, apparent authority had been employed in some Texas intermediate appellate courts prior to *Sampson* to hold a hospital liable for a tort committed by an independent contractor physician,[294] but *Sampson*'s analysis and rhetoric more or less superseded those precedents, as the reader will see.

But then the *Sampson* court leaves basic agency concepts behind, and the rest of the opinion is troublesome. The court's very next sentence pretends to be about what the court just said but only addresses the first situation, apparent agency: "Liability may be imposed in this manner under the doctrine of ostensible agency in circumstances when the principal's conduct should equitably prevent it from denying the existence of an agency."[295] This statement only addresses vicarious liability for a non-agent—the court's statement (1). That was the fact pattern in *Sampson* itself—a hospital's liability for the actions of a doctor who was an independent contractor rather than a servant-agent.[296] Statement (2) is different; in a statement (2) fact pattern, no one disputes that the agent is an agent.

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290. *Id.* at 947–48 ("[A] hospital may be vicariously liable for the medical malpractice of independent contractor physicians when plaintiffs can establish the elements of ostensible agency.").

291. *Id.* at 948.

292. *Id.* at 947 (emphasis added).

293. *Id.*

294. *See, e.g.*, Thompson v. Baylor Univ. Med. Ctr., No. 05-92-01831-CV, 1995 WL 81321, at *5–6 (Tex. App.—Dallas Feb. 28, 1995, writ denied) (not designated for publication); Baptist Mem'l Hosp. Sys. v. Smith, 822 S.W.2d 67, 74–78 (Tex. App.—San Antonio 1991, writ denied), *abrogated by* Sampson v. Baptist Mem'l Hosp. Sys., 940 S.W.2d 128, 134–38 (Tex. App.—San Antonio 1996), *rev'd*, 969 S.W.2d 945 (Tex. 1998); Smith v. Baptist Mem'l Hosp. Sys., 720 S.W.2d 618, (Tex. App.—San Antonio 1986, writ ref'd n.r.e.), *overruled by* St. Luke's Episcopal Hosp. v Agbor, 952 S.W.2d 503, 509 n.1 (Tex. 1997); Brownsville Med. Ctr. v. Gracia, 704 S.W.2d 68, 74–75 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).

295. *Sampson*, 969 S.W.2d at 947.

296. *Id.* at 948 ("[A] hospital may be vicariously liable for the medical malpractice of independent contractor physicians when plaintiffs can establish the elements of ostensible agency.").

Sampson never described statement (2) further, and *Sampson* had a difficult time keeping straight what it did describe. For example, in a footnote immediately following this recognition of the Section 7.08 principle, the court says, "Many courts use the terms ostensible agency, apparent agency, apparent authority, and agency by estoppel interchangeably. As a practical matter, there is no distinction among them."[297] And just after this footnote, the court said, "Ostensible agency in Texas is based on the notion of estoppel, that is, a representation by the principal causing justifiable reliance and resulting harm."[298] Why say the doctrine of ostensible agency is based on the notion of estoppel if "as a practical matter[] there is no distinction among them"?[299] The relationship between the two doctrines either matters or it does not matter, but suggesting it does and does not in the same paragraph is not very helpful.

The court then turns to the elements of the doctrine it plans to apply. The San Antonio Court of Appeals had discussed two different theories that seemed like apparent authority, one from the Restatement (Second) of Agency and one from the Restatement (Second) of Torts.[300] The court of appeals also held that hospitals providing emergency room care had a "nondelegable duty" to provide care without malpractice.[301] The Texas Supreme Court rejected the nondelegable duty rule on this appeal[302] but claimed to adhere to one of the Restatement theories, Section 267 of the Restatement (Second) of Agency, which has "three elements."[303] The court stated these elements as follows, even though Section 267 mentions neither doctors nor hospitals:

> Thus, to establish a hospital's liability for an independent contractor's medical malpractice based on ostensible agency, a plaintiff must show that (1) he or she had a reasonable belief that the physician was the agent or employee of the hospital, (2) such belief was generated by the hospital affirmatively holding out the physician as its agent or employee or knowingly permitting the physician to hold herself out as the hospital's agent or employee, and (3) he or she justifiably relied on the representation of authority.[304]

The court thus phrased its rule as if it were the law of hospitals rather than a basic agency rule. It was trying to harmonize Section 267 in this context with

297. *Id.* at 947 n.2.
298. *Id.* at 948.
299. *Id.* at 947 n.2.
300. *Id.* at 948–49 (citing Sampson v. Baptist Mem'l Hosp. Sys., 940 S.W.2d 128, 131–32 (Tex. App.—San Antonio 1996, *rev'd*, 969 S.W.2d 945 (Tex. 1998)).
301. *Id.* (citing *Sampson*, 940 S.W.2d at 135–36).
302. *Id.*
303. *Id.* at 949. The Restatement section itself does not have elements. *See* RESTATEMENT (SECOND) OF AGENCY § 267 (AM. L. INST. 1957). This is gloss from the *Sampson* court.
304. *Sampson*, 969 S.W.2d at 949.

the following more general language that it also quoted from *Ames v. Great Southern Bank*[305]:

> Apparent authority in Texas is based on estoppel. It may arise either from a principal knowingly permitting an agent to hold herself out as having authority or by a principal's actions which lack such ordinary care as to clothe an agent with the indicia of authority, thus leading a reasonably prudent person to believe that the agent has the authority she purports to exercise . . . .
>
> A prerequisite to a proper finding of apparent authority is evidence of conduct by the principal relied upon by the party asserting the estoppel defense which would lead a reasonably prudent person to believe an agent had authority to so act.[306]

Ames itself was a contract case[307] and so not directly relevant, but *Ames*'s language can be phrased as three elements without lapsing into hospital-focused language.[308] Note that when the Supreme Court of Texas translated *Ames* and Section 267 into a rule for *Sampson*, it phrased the result as a test for whether a person gained agency status (statement (1)), not whether a person who was already an agent had authority to do some act (statement (2)). *Sampson*'s rule does not exhaust the possibilities latent in the *Ames* language, however. If *Ames*'s language applies in the tort context, as *Sampson* claimed, then it should have an effect like apparent authority does in Section 7.08.

The Texas Supreme Court's application of its rule in *Sampson* then left much to be desired. The court held there was no evidence of elements (2) or (3):

> [T]he Hospital took no affirmative act to make actual or prospective patients think the emergency room physicians were its agents or employees, and did not fail to take reasonable efforts to disabuse them of such a notion. As a matter of law, . . . no conduct by the Hospital would lead a reasonable patient to believe that the emergency room physicians were hospital employees.[309]

These conclusions seem counter to what the emergency room patient experiences. In *Sampson* itself, the evidence showed that Sampson arrived in

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305. 672 S.W.2d 447 (Tex. 1984).

306. *Sampson*, 969 S.W.2d at 949 (quoting *Ames*, 672 S.W.2d at 450).

307. *See Ames*, 672 S.W.2d at 450 ("Suzanne Dealy was not clothed with apparent authority to modify or waive the contractual relation between Great Southern and Ames.").

308. This exercise might yield such a broad rule as follows:
(1) A third party's reasonable belief that a person is authorized,
(2) that such belief was generated by the other's affirmatively holding out the person as authorized or knowingly permitting the person to hold herself out as authorized, and
(3) that the third person justifiably relied on the representation of authority.

309. *Sampson*, 969 S.W.2d at 950.

pain.[310] On the second visit, she came by ambulance.[311] That seems about right for a patient seeking emergency medical care. Sampson "did not recall signing [any] documents," did not see any signs, "did not choose which doctor would treat her," and "believed that a physician employed by the hospital was treating her."[312] Sampson only saw doctors pre-approved and scheduled by the hospital. The first hospital-selected doctor examined Sampson, ordered hospital employees to bring medicine, and administered a shot with a hospital-supplied needle.[313] A second hospital-selected doctor acted similarly the next day.[314] Sampson chose the hospital, not the doctors. The hospital offered emergency care, so the patient reasonably expected the hospital to provide it, and that's what happened. What was she supposed to think?

The *Sampson* court did not discuss any of those things in its application of the rule, however.

Instead, the *Sampson* opinion's analysis of its rule[315] began with an irrelevant fact. The court recited that a doctor witness from the hospital testified that all the emergency room doctors were independent contractors not under the supervision of the hospital.[316] But evidence of that is found in private contracts and is irrelevant to (i) what the hospital held out to patients or (ii) patients' reasonable beliefs.[317] The court also noted that the hospital did not collect fees for the doctors,[318] but that is not relevant either, because it does not happen until long after the care occurs.

Not everything the court said was irrelevant. The court noted that "signs were posted in the emergency room notifying patients that the emergency room physicians were independent contractors."[319] And Sampson signed a consent form saying as much.[320] The court must have thought a reasonable emergency room patient would understand the significance of the wall sign

310. *Id.* at 946.
311. *Id.*
312. *Id.* at 950.
313. *Id.* at 946.
314. *Id.*
315. This begins *id.* at 950.
316. *Id.*
317. For what it is worth, emergency room physicians might well be employees. *See* Jeanne Lenzer, *EP Contracts: Handshakes and Other Red Flags*, AM. COLL. OF EMERGENCY PHYSICIANS (June 2005), https://www.acep.org/life-as-a-physician/careers/contracts/ep-contracts-handshakes-and-other-red-flags [https://perma.cc/AB8S-2PDB] ("As an employee, the emergency physician may be hired directly by the hospital or by a group contracted with the hospital."); *see also Are Emergency Room Doctors Employees of the Hospital?*, BELLAIRE ER, https://bellaireer.com/emergency-room-doctors-employees-hospital [https://perma.cc/F9LM-BFUJ] ("At Bellaire ER, we have qualified emergency room doctors employed by the institution.") (Bellaire ER is a Houston-area emergency care provider.).
318. *Sampson*, 969 S.W.2d at 950.
319. *Id.*
320. *Id.*

and the consent form's statement that the hospital "is not responsible for the judgment or conduct of any physician who treats or provides a professional service."[321] I do not have such confidence that emergency room patients will have the capacity—especially when they enter the emergency room. I am not the only one. I once asked a class of Agency & Partnership students whether they thought the court correctly applied its own test, and every student said "no."[322] We strongly suspected that *Sampson*'s animating policy was care for hospitals, not agency law. After all, the hospital is necessarily in control of conditions in the hospital; if a doctor there appears to be a hospital employee (and many outside Texas are actually employees[323]), then the appearance is attributable entirely (or almost so) to the hospital. Subsequent cases following *Sampson*'s rule but holding hospitals liable felt that liability was possible even after distinguishing *Sampson*'s factual analysis in very flimsy ways.[324]

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321. *Id.*

322. I was very surprised. I taught the case for many years, and this only happened once (80% agreement was more common). Why would it happen at all?

323. *E.g.*, *Employed Physicians Outnumber Self-employed,* AM. MED. ASS'N (May 6, 2019), https://www.ama-assn.org/press-center/press-releases/employed-physicians-outnumber-self-employed [https://perma.cc/2QM7-ZGDJ] ("Physicians working directly for a hospital were 8.0% of all patient care physicians, an increase from 5.6% in 2012. Physicians in hospital-owned practices were 26.7% of all patient care physicians, an increase from 23.4% in 2012."). Sometimes the law deems them such, too. *See* McDonald v. Hampton Training Sch. for Nurses, 486 S.E.2d 299, 300–04 (Va. 1997) (holding to be a jury question whether an independent contractor doctor was in the law an employee for purposes of the hospital's vicarious liability). They are only not employed by hospitals in Texas because Texas law prohibits anyone but a doctor from functioning even nominally in control of another doctor. *See* Hannah Hawk, Texas Tort Reform Reform 5–10 (Dec. 8, 2022) (unpublished manuscript) (on file with author).

324. *See, e.g.*, Moreno v. Columbia Med. Ctr.-East, No. 08-00-00040-CV, 2001 WL 522432, at *4 (Tex. App.—El Paso May 17, 2001, pet. denied) (not designated for publication) ("In contrast to *Sampson*, there is contested evidence . . . that Dr. Mena was wearing a smock or lab-coat with Columbia's insignia on the front, which might have given rise to a patient's reasonable belief that Dr. Mena was associated with Columbia as its agent or employee."); Garrett v. L.P. McCuistion Cmty. Hosp., 30 S.W.3d 653, 655–57 (Tex. App.—Texarkana 2000, no pet.); Barragan v. Providence Mem'l Hosp., No. 08-99-00028-CV, 2000 WL 1731286, at *1, 6 (Tex. App.—El Paso Nov. 22, 2000, pet. denied) (not designated for publication) (distinguishing *Sampson* on grounds that no signs were displayed; the hospital billed patients for the doctors' fees; the consent form did not "make clear the relationship between the doctor and a hospital emergency room to most persons, and certainly not to a woman who does not speak, read, or understand English very well;" the patient was in acute pain and vomiting and taken back for care immediately; and a nurse referred to the ER doctors as "our" doctors). Much more in line with *Sampson*'s application is *Kimbrell v. Mem'l Hermann Hosp. Sys.*, 407 S.W.3d 871, 875–77 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (concluding "the Hospital took no affirmative act"). See also *Farlow v. Harris Methodist Ft. Worth Hosp.*, 284 S.W.3d 903, 919–26 (Tex. App.—Fort Worth 2009, pet. denied), which methodically discounts everything the patient and her family thought about the hospital. That the doctor was wearing a hospital badge does not matter because the patient "did not recall seeing it," but "[t]he inclusion of [independent contractor] language in admission paperwork negates any prior holding out by a hospital, even if the patient did not read the paperwork." *Id.* at 925–26. *See also* Valdez v. Pasadena Healthcare Mgmt., Inc., 975 S.W.2d 43, 46–47 (Tex. App.—Houston [14th Dist.] 1998, pet. denied) (predating *Sampson* but employing the same argument).

At any rate, *Sampson* provides a test for determining whether a person committing a tort who is not an agent or employee can subject an apparent principal to tort liability. Presumably, the agent or employee must also act within the scope of that apparent employment to render the hospital liable. Section 267 more or less assumes this.[325] In *Sampson*, it was not an issue: the doctors were clearly practicing emergency room care and so were clearly within what would be their (apparent) scope. *Sampson* does not address the apparent scope or the range of apparent authority (concepts clearly covered in Section 7.08's "constitute the tort or enable the agent to conceal its commission" language)—only whether a person apparently is or is not an agent. So, while *Sampson* provides a threshold test for cases in which the tortfeasor is not even an agent, it does not explain how a plaintiff renders a party liable for the agent's conduct "outside the scope of [the agent's] authority."[326] It just says such liability is possible. Many other cases do merely the same, not always in the context of hospitals and doctors.[327]

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325. The language says,

> One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.

RESTATEMENT (SECOND) OF AGENCY § 267 (AM. L. INST. 1957).

326. Baptist Mem'l Hosp. Sys. v. Sampson, 969 S.W.2d 945, 947 (Tex. 1998).

327. *See* Christie v. Hahn, No. 05-20-01045-CV, 2022 WL 3572690, at *5 (Tex. App.—Dallas Aug. 19, 2022, no pet.) (noting that "a principal is liable for the fraudulent acts and misrepresentations of his authorized agent" "when the agent has . . . apparent authority to do those acts" but holding only that the principal was liable under the Texas Securities Act because the agent acted with actual authority in committing fraud) (this case oddly holds a principal liable for fraud committed with actual authority, but I would be surprised if the principal actually authorized the commission of fraud); Doe v. YUM! Brands, Inc., 639 S.W.3d 214, 237–38 (Tex. App.—Houston [1st Dist.] 2021, no pet.) (declining to find ostensible agency of pizza delivery driver for sexual assault); *see* Zarzana v. Ashley, 218 S.W.3d 152, 159–61 (Tex. App.—Houston [14th Dist.] 2007, pet. struck) (rejecting both scope of employment and apparent authority as inadequate, citing *Sampson*); Russell v. Indus. Transp. Co., 251 S.W. 1034, 1036–38 (Tex. Comm'n App. 1923, holding approved), *aff'd*, 258 S.W. 462 (Tex. 1924). ("While it is true that such agents sometimes depart from their instructions and exceed their authority in making representations, yet when they are acting within the apparent scope of their employment, when they do depart from their instructions and when they do falsify the facts, it is proper that their employer, who has put them before the world as his agent for the transaction of his business, should suffer from their dereliction, rather than the public who are preyed on.") (*Russell* rules in such a broad way, however ("Our discussion . . . largely determines the disposition of defendant's assignments . . . ."), that it is not possible to tell whether the court thought the fraud was within the scope of employment).

4. The Payments Cases: More Dicta

Sampson is not the only Texas case to flirt with apparent authority and vicarious liability for tort. Another line of cases holds a lender-principal responsible for receipt of a payment when the payment is received by an authorized (loan-servicer) agent and pocketed by the agent and thus never passed on to the lender.[328] That sounds uncontroversial. If receipt of funds is the legally operative act and the agent is authorized to receive funds for the principal, then the principal is of course bound by the agent's receipt of funds. But the courts felt angst about the result perhaps because the principal's coffers never received the money—the agent absconded with the payment.[329] A loss had occurred! These courts state the issue in a way that reflects the third party's concern: "[A] final payment to an authorized agent is deemed payment to the principal. This is true even if the agent misappropriates the money."[330] Neither the principal nor the third party was at fault, but someone had to feel the sting.

So where does apparent authority fit in? These cases begin their "law talk" by noting that the absconding agent's authority to receive funds for the principal can be actual or apparent.[331] The legal recitation is important because the rationale given in support of the result applies regardless of whether actual authority or apparent authority power is the mechanism that binds the principal. The courts reason that as between principal and third party, "the party who placed trust in the wrongdoer was in the best position to avoid the loss and, therefore, should suffer the loss."[332] This is a rationale commonly given for the Section 7.08 principle.[333] Whether the binding doctrine is actual authority or apparent authority power, the principal—not the third party—is the one who has placed the wrongdoing agent in the position of trust: The agent has actual authority only if the principal has manifest to the agent that

328. *See, e.g.*, Benbrook Econ. Dev. Corp. v. Nat'l Bank of Tex., 644 S.W.3d 871, 886 (Tex. App.—Fort Worth 2022, no pet.); Gusma Props., L.P. v. Travelers Lloyds Ins. Co., 514 S.W.3d 319, 323, 323–28 (Tex. App.—Houston [14th Dist.] 2016, no pet.); Aquaduct, L.L.C. v. McElhenie, 116 S.W.3d 438, 443 (Tex. App.—Houston [14th Dist.] 2003, no pet.); Jarvis v. K & E Re One, LLC, 390 S.W.3d 631, 642 (Tex. App.—Dallas 2012, no pet.).

329. *See Benbrook*, 644 S.W.3d at 881; *Aquaduct*, 116 S.W.3d at 441; *Jarvis*, 390 S.W.3d at 636.

330. *Benbrook*, 644 S.W.3d at 886.

331. *Id.*; *Jarvis*, 390 S.W.3d at 639–40; *Aquaduct*, 116 S.W.3d at 442. Typically for these cases, *Jarvis* declined to address the trial court's finding of apparent authority only because it approved the finding of actual authority. *Jarvis*, 390 S.W.3d at 641.

332. *Gusma Props.*, 514 S.W.2d at 323 (binding a principal to an agent's receipt of a check made payable jointly to the principal and agent when the actual agent was "acting within the scope of his authority"); Strickland Transp. Co. v. First State Bank of Memphis, 214 S.W.2d 934, 939 (Tex. 1948) (reasoning similarly when the agent was authorized to receive checks but not cash them but had cashed them and absconded with the funds); *Benbrook*, 644 S.W.3d at 886.

333. *See supra* notes 31–33 and accompanying text.

the agent is authorized. The agent has apparent authority power only if the principal has vouched for the agent to the third party. Either way, the principal who placed trust in the wrongdoer is in the best position to avoid the loss. The principal is also the party who wanted the benefits of—and created—an agency relation, so that party should bear its burdens.

But these cases describe apparent authority only in dicta. Moreover, they involve receipt of payment and the resulting termination of payment obligations,[334] not the tort of conversion. They are contractual and involve the legal consequences to the principal of an agent's authorized conduct, not the commission of a tort by an agent outside the scope of employment. The case we are worried about would require the loan servicer—acting without actual authority but with apparent authority power—to end up with the money, then the borrower suing the lender for fraud. We do not see that in these cases, but the courts' recitations in this line include all the parts necessary to resolve that case, too.

5. The Texas Partnership Code

Section 7.08 reports a common law agency rule. Not surprisingly, the rule appears in the Texas General Partnership Law[335] (and by reference in the Texas Limited Partnership Law[336]). Partners were historically mutual agents of each other[337] and still function as such.[338] In the part of the Texas General Partnership Law describing the agency relationship of partners, the code says this: "A partnership is liable for the loss or injury to a person, including a partner, . . . as a result of a wrongful act or omission or other actionable conduct of a partner acting: (1) in the ordinary course of business of the partnership; or (2) with the authority of the partnership."[339] "Authority" may well include both actual and apparent.[340] Either way, subsections (1) and (2) are

334. *See Jarvis*, 390 S.W.3d at 636.

335. The Texas General Partnership Law includes provisions of the Texas Business Organizations Code applicable to general partnerships. *See* TEX. BUS. ORGS. CODE § 1.008(f).

336. *See id.* §§ 1.008(g), 153.153.

337. *See* Wagner Supply Co. v. Bateman, 18 S.W.2d 1052, 1055 (Tex. 1929); Gibson v. Ne. Nat'l Bank, 602 S.W.2d 337, 341 (Tex. App.—Fort Worth 1980, writ ref'd n.r.e.) ("mutual agency"); Crawford v. Austin, 293 S.W. 275, 278 (Tex. App.—Texarkana 1927, writ dism'd w.o.j.) ("mutual agency").

338. *See* TEX. BUS. ORGS. CODE §§ 152.301, –.303, –.304, –.306 (holding that "[e]ach partner is an agent of the partnership," that partner's acts bind the partnership in contract and tort, and that partners are liable for "the obligations of the partnership"). Because general partners of limited partnerships are governed by the general partnership code, *see id.* § 153.153, the rules discussed here apply in the limited partnership context as well when a general partner's conduct is at issue.

339. *Id.* § 152.303(a).

340. *See* 19 ELIZABETH S. MILLER & ROBERT A. RAGAZZO, TEXAS PRACTICE SERIES: BUSINESS ORGANIZATIONS § 8:4 n.8 (3d ed. 2022) ("The 'authority' of the partnership referred to in Tex. Bus. Orgs. Code Ann. § 152.303 should be interpreted to include apparent, as well as actual,

in the alternative, signaling that the code understands that some wrongful acts or omissions "or other actionable conduct" of a partner may be committed and subject the partnership to liability without "the authority of the partnership."[341] When (a)(2) is not satisfied but (a)(1) is satisfied, the conduct was not authorized but occurred in the ordinary course. Unauthorized conduct that binds in this way does so because of apparent authority.[342]

This section overlaps with the principle of Section 7.08. A simple riff on Section 7.08's Illustrations 1 and 2 proves the point:

> 1. P Numismatics Company, a partnership with two general partners, A and B, urges its customers to seek investment advice from its retail salespeople. Both A and B engage in retail sales activity and are known by T to be partners and owners of P. T, who wishes to invest in gold coins, seeks A's advice at an office of P Numismatics Company. A encourages T to purchase a particular set of gold coins, falsely representing material facts relevant to their value. T, reasonably relying on A's representations, purchases the set of coins. P is subject to liability to T. A is also subject to liability to T. See § 7.01. Because P is a partnership, B is also liable.
>
> 2. Same facts as Illustration 1, except that A persuades T to pay cash for the coins and to leave the coins with A so that they may be safely stored by P Numismatics Company. A then absconds with both the coins and the cash paid by T. Same results.[343]

Section 152.303(a) directly applies to both of these cases. A commits a wrongful act while acting in the ordinary course of business of the partnership even though A lacks actual authority to commit the torts; the partnership is therefore liable.

Lest courts be put off by A's theft of the coins from both T and the partnership, Section 152.303(b) covers that situation: "A partnership is liable

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authority."); UNIF. P'SHIP ACT § 3-305 cmt. (2013); ALLAN DONN, ROBERT W. HILLMAN AND DONALD J. WEIDNER, THE REVISED UNIFORM PARTNERSHIP ACT § 305 Official cmt. & n.0.50 (Oct. 2022 Update) ("The partnership is liable for the actionable conduct or omission of a partner acting in the ordinary course of its business or 'with the authority of the partnership.' This is intended to include a partner's apparent, as well as actual, authority . . . .") ("H.R.U.P.A. adds the words "actual or apparent" before the word "authority" here and in Section 305(b). This does not appear to change substance."); *cf.* Cook v. Brundidge, Fountain, Elliott & Churchill, 533 S.W.2d 751, 757–59 (Tex. 1976) (holding under the predecessor statute that an unauthorized partner could act within the statute by acting "within the scope of his apparent authority").

341. *See* TEX. BUS. ORGS. CODE § 152.303; DONN ET. AL., *supra* note 340, at n.11 ("The lack of actual or apparent authority is 'irrelevant' if a partner receives the money or property in the course of partnership business.") (citing Cent. Livestock Ass'n, Inc. v. R & J Dairy, No. 08–155 (JNE/JJG), 2009 WL 2516120, at *4 (D. Minn. Aug. 14, 2009)).

342. *Cf.* TEX. BUS. ORGS. CODE § 152.302 (seemingly distinguishing between acts taken with authority and those taken "apparently for carrying on in the ordinary course").

343. Derived from RESTATEMENT (THIRD) OF AGENCY § 7.08 cmt. b, illus. 1–2 (AM. L. INST. 2006).

for the loss of money or property of a person who is not a partner that is: (1) received in the course of the partnership's business; and (2) misapplied by a partner while in the custody of the partnership."[344] Note that subsection (b) does not require that the course be "ordinary," only "in the course of." Note also that the section does not require that the partner as agent be acting for the benefit of the partnership in any way. In fact, Section 152.303(b) more or less requires that the partner convert property in partnership possession, which would be tortious against both the partnership and the third party who placed the property in the custody of the partnership. The section does not require that the partnership knows any of this is happening.[345] In fact and in law, the knowledge of the partner committing such fraud would not be imputed to the partnership;[346] the statute presumes liability will exist without the partnership's knowledge of any wrongdoing.

Though Texas lacks extensive caselaw on the subject under the current statute,[347] the predecessor Texas statute supported liability in *Cook v. Brundidge, Fountain, Elliott and Churchill*.[348] In *Cook,* the Supreme Court of Texas applied Section 7.08 doctrine to partners as principals and agent. The case involved a partner lawyer, Lyon, who stepped outside the scope of his partnership role to direct a client's investment funds to the lawyer's own preferred investment project, Texas Yummers.[349] The client's funds were lost, and the client sued the firm. Just to be clear, the Supreme Court disclaimed reliance on all the usual agency avenues to firm liability:

> Vicarious liability of the law firm for the alleged damages suffered by Betty L. Cook, et al, is not claimed on the basis of any negligence or breach of duty on the part of the other members of the law firm; nor is it claimed that the other members of the law firm became cognizant of the acts of Lyon, or in anywise consented to or ratified his course of dealings with Betty L. Cook.[350]

"The extent of authority of a partner is determined essentially by *the same principles as those measuring the scope of the authority of an agent*," said

344. TEX. BUS. ORGS. CODE § 152.303(b).

345. Indeed, the adverse interest of the partner stealing from the partnership and the third party would prevent imputation to the partnership of the stealing partner's knowledge.

346. TEX. BUS. ORGS. CODE § 151.003(d).

347. Most of the cases decided under the current statute and potentially raising the issue involve hospitals and medical practices sued for the faults of doctors. *See* MILLER & RAGAZZO, *supra* note 340. Cases under the predecessor statute support the result, however.

348. *See* 533 S.W.2d 751, 757–59 (Tex. 1976) (denying summary judgment to a law partnership for the misuse of client funds entrusted to a partner lawyer because factual dispute existed as to whether the lawyer partner was "acting within the scope of his apparent authority").

349. *Id.* at 751–55.

350. *Id.* at 755.

the court,[351] but there was no claim that Lyon acted with authority (or by implication, in the scope):

> As stated before, it is not claimed either that Lyon was authorized by the partnership to act as he did in the Yummers matter or that Betty L. Cook, et al, had notice or knowledge that Lyon had no authority to act for the partnership in what he did. Assuming misapplication of the funds, the crucial consideration in determining whether the law firm is bound by the acts of Lyon by force of the statutory provisions is whether in receiving the funds of Betty L. Cook, et al, in the sum of $60,343.25, Lyon was 'apparently carrying on in the usual way the business of the partnership' (Sec. 9); or, as also expressed, whether he was 'acting in the ordinary course of the business of the partnership' (Sec. 13). If so, it would follow that Lyon was 'acting within the scope of his apparent authority' when he received the money and property of Betty L. Cook, et al; and that the law firm is 'bound to make good the loss' from his misapplication of the funds (Sec. 14).[352]

The court sent the case back to trial on that issue.[353] The case rests clearly on Section 7.08 doctrine, which the Supreme Court called "the same principles as those measuring the scope of the authority of an agent."[354] If a partner acting as agent can bind its principal under Section 7.08 doctrine, so can an agent acting as agent.

The current Uniform Partnership Act likewise affirms that it includes Section 7.08 liability,[355] and broader caselaw supports that understanding of the Uniform Partnership Act.[356] Because the provisions governing general partners apply also to general partners of limited partnerships,[357] this provision also governs the liability of limited partnerships for acts of general partners.

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351. *Id.* at 758 (emphasis added).

352. *Id.* at 758–59.

353. *Id.* at 759.

354. *Id.* at 758.

355. *See* UNIF. P'SHIP ACT § 3-305 cmt. (2013) ("Extrapolating from agency law, apparent authority is relevant only when the appearance of authority augments the impact of the wrongful act."). The Uniform Partnership Act provision has been incorporated into the Uniform Business Organizations Code, intended as a successor model act. *See* UNIF. BUS. ORGS. CODE § 3-305 (2022); *id.* § 3-305 cmt. a (the comment explicitly cites RESTATEMENT (THIRD) OF AGENCY § 7.08 (2006) for interpretive support and retains the same comment: "[A]pparent authority is relevant only when the appearance of authority augments the impact of the wrongful act.").

356. *See, e.g.*, Chenaille v. Palilla (*in re* Palilla), 493 Bankr. Rep. 248, 254–55 (Bankr. D. Colo. 2013); Infant Swimming Res., Inc. v. Faegre & Benson, LLP, No. 07–cv–00839–LTB–BNB, 2007 WL 3326685, at *4–5 (D. Colo. Nov. 6, 2007), *aff'd*, 335 Fed. Appx. 707 (10th Cir. 2009).

357. *See* TEX. BUS. ORGS. CODE § 153.153.

V. CONCLUSION: THE EMBRACE

So, where do we stand?

Texas courts have clearly invited the Section 7.08 doctrine to the party and taken its hand as the litigation music played. In *Dilling*, in *Sampson*, in cases supporting the defense in *Bankers Life*, and in *Cook* and the Texas General Partnership Law, the doctrine is talked of as part of the Texas law of agency.[358] It might be.

But none of these cases explain how the doctrine fits into Texas agency law generally, why that must be so, or what the doctrine does—the Supreme Court of Texas has never applied the doctrine. Rather than apply the doctrine, the Supreme Court has accepted cases in which the Court could stop the dance after just a handhold and turn its partner aside. Moreover, the courts in *Armstrong*, *Morrow*, and *Millan* treat the doctrine so poorly that no one would expect it to stay on the floor.[359] *Millan* dismissed it irrationally, *Sampson* applied its apparent agency component irrationally, and *Armstrong*, *Morrow*, and *Ringo* gave rationales against the doctrine that would maim it.[360]

Texas should make up its mind. Will Texas

(i) hold the principal responsible for the principal's words and conduct that induce trust in a purported agent, especially as between the innocent principal and the innocent third party?

(ii) as between two innocent parties, let the one who trusted most suffer most, according to Texas's ancient principles?

(iii) allow principals to externalize on tort victims (random potential customers or clients) the costs of principals' employing agents, or vouching for them?

(iv) impose the costs of agent's misuse of apparent authority efficiently on the least cost avoider?

Time and a bit of judicial activity and wisdom will tell.

Section 7.08 doctrine in its various strands is still—dance card open—waiting. It is time to end the dance and embrace.

358. *See supra* Part IV.B.
359. *See supra* Part IV.A.
360. *Id.*

COME HELL OR HIGH WATER: FORCE MAJEURE IN TEXAS

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I. INTRODUCTION

Essayist and former practitioner of mathematical finance, Nicholas Taleb, said "Mild success can be explainable by skills and labor. Wild success is attributable to variance."[1] Great fortunes can be created when the unexpected happens. Great losses may also be incurred applying similar logic—there are unexpected and unforeseeable events that occur, and their effect on commercial transitions can be significant. A force majeure clause allows a party to excuse themselves from performance under the right circumstances. The "breadth of application of the doctrine makes difficult an attempt to formulate a statement of the requisites governing its application. But the difficulty may be largely avoided if the expressions of the courts are used as a

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1. *See* NASSIM NICHOLAS TALIB, FOOLED BY RANDOMNESS: THE HIDDEN ROLE OF CHANCE IN LIFE AND IN THE MARKETS 12 (2d ed. 2004).

basis of departure."[2] A force majeure clause integrated into a contract serves to specifically exclude articulated force majeure events, mentioned and integrated by the parties into the contract.[3] Common law protection is provided by another doctrine: the doctrine of impossibility.[4]

Impossibility is also an excuse for performance but exists when the contract between the parties does not feature a force majeure clause.[5] In the absence of such a clause, impossibility applies where an unforeseen event renders performance impossible.[6] Thus, in Texas, either a party premeditates the notion of some force majeure event and negotiates its mention into a force majeure clause, or allows for the courts to make their own determination as to whether an event qualifies under the doctrine of impossibility.

This article aspires to discuss the rules and application of force majeure and impossibility in Texas, reconcile their origins and underpinnings with modern application, and explore their practical effect today. Also, this article takes normative positions on the application of force majeure and impossibility in Texas and suggests that Texas courts overturn precedent in the following ways. One, the interests of justice would be better served by applying reverse ejusdem generis to the interpretation of force majeure clauses. Two, the interests of justice would be better served if the courts used a higher standard, such as the preponderance of the evidence, in deciding whether a material fact was a basic assumption of both parties. Although still discretionary, such a burden would require some proof instead of allowing the absence of proof to suffice.

II. ORIGINS AND UNDERPINNINGS OF FORCE MAJEURE

Force majeure began as two Roman concepts: *pacta sunt servanda* and *clausula rebus sic stantibus*.[7] *Pacta sunt servanda* translates from Latin to mean that contractual "agreements must be kept" and that neglect of party obligations is a violation of the contract.[8] *Rebus sic stantibus* is the legal doctrine allowing for a contract or a treaty to become inapplicable because of a fundamental change of circumstances and translates from Latin to mean

2. J. Denson Smith, *Impossibility of Performance as an Excuse in French Law: The Doctrine of Force Majeure*, 45 YALE L.J. 452, 454 (1936).

3. *See* TEC Olmos, LLC v. ConocoPhillips Co., 555 S.W.3d 176, 183 (Tex. App.—Houston [1st Dist.] 2018, pet. denied)

4. *See* Tractebel Energy Mktg., Inc. v. E.I. Du Pont de Nemours & Co., 118 S.W.3d 60 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

5. *Id.* at 72.

6. *Id*.

7. Jocelyn L. Knoll & Shannon L. Bjorklund, *Force Majeure and Climate Change: What is the New Normal?*, 8 J. AM. COLL. CONSTR. LAWS. 2 (2014) (citing Marel Katsivela, *Contracts: Force Majeure Concept or Force Majeure Clauses?*, 12 UNIF. L. REV. 101, 102 (2007)).

8. *Id.*; *see also* Hans Wehberg, *Pacta Sunt Servanda*, 53 AM. J. INT'L L. 775 (1959).

"things thus standing."[9] Thus, *rebus sic stantibus* is essentially an escape to the general rule of *pacta sunt servada*.[10] They are two sides to a coin—the coin being the integrity of contract law. Over time, these concepts manifested themselves in the civil code of France during Napoleon's reign (the Napoleonic Code), which dates back to 1804.[11] Unlike English courts at that time, which enunciated contractual rigidity, French courts were more amenable to revoking contracts for reasons authorized by law.[12] Still today, Article 1148 of the modern French Civil Code states that there would not be a claim for damages where force majeure prevents the fulfilment by the obligor of an obligation.[13] "Considered to be his greatest legacy, Napoleon's Civil Code assured the spread of the ideals of the French Revolution long after the end of his rule."[14] The compilers of the Code provided that "no damages could be recovered when non-performance was the result of force majeure."[15]

> But nowhere in the Code did they undertake to define this term. Just how broad it might be, how much it might cover, what the limits of its applicability were, had to be worked out by the French courts very much as Anglo-American courts have worked out, more or less definitely, the proper scope of the doctrine covering the discharge of liability on the grounds of impossibility.[16]

After Napoleon was exiled *again* to Saint Helena Island, the civil code which bore his name carried on, and its ideals eventually made their way into English and then subsequently American common law.[17]

Under the Modern French Code, as derived from the Napoleonic Code, "three elements need to be present for an event to qualify as force majeure: the harm causing event needs to be external, unforeseeable, and irresistible."[18] External events are outside an obligee's "sphere of . . . control," sometimes referred to as "'acts of God' [or] 'acts of war.'"[19] In the nineteenth century, like now, courts encountered merchants who have lost cargo and

9. Knoll & Bjorklund, *supra* note 7, at 6; *see* Medina & Medina v. Country Pride Foods Ltd., 631 F. Supp. 293 (D.P.R 1986); *Clausula rebus sic stantibus*, WIKIPEDIA (Mar. 20, 2023, 3:28 PM), https://en.wikipedia.org/wiki/Clausula_rebus_sic_stantibus [https://perma.cc/M4X5-ZY35].

10. WIKIPEDIA, *supra* note 9.

11. Knoll & Bjorklund, *supra* note 7, at 8.

12. Smith, *supra* note 2, at 452.

13. Marel Katsivela, *Contracts: Force Majeure Concept or Force Majeure Clauses?*, 12 UNIF. L. REV. 101, 102 (2007) (discussing origins of American force majeure).

14. *Napoleon's Legacy*, PBS, https://www.pbs.org/empires/napoleon/n_politic/legacy/page_1.html [https://perma.cc/YWY7-WMTY].

15. Smith, *supra* note 2, at 452.

16. *Id.* at 452-53.

17. *See* Katsivela, *supra* note 13, at 102.

18. *Id.* at 103.

19. *Id.*

missed deadlines due to force majeure events at sea and on land. In the absence of modern globalization and air freight transportation and with the prevalence of unexpected disaster in an era of imperial wars and maritime dependence, such laws provided some incentive for trade to continue despite the risk of loss. However, "an inherent defect of the goods under the control of the [obligee did] not generally qualify as force majeure since it [was] not deemed to be external to the debtor's sphere of activities or control."[20]

In addition to the event being external, French force majeure required that the event be "absolutely unforeseeable" at the time of contract formation.[21] Thus, if the obligee could have foreseen the event, they should have provided for it in the contract. But who decides whether the parties could or could not have foreseen an event? After all, some believe in the idiom that nothing is impossible, and there are undoubtedly contracting merchants who believed this as well.[22] Whether or not an event was unforeseen is a fact question, decided by the court when evaluating the surrounding circumstances.[23] Therefore, it seems the same event in some cases may be deemed an unforeseeable event and other cases not.[24]

Finally, the third element of French force majeure required that the event be irresistible.[25] This did not mean that the French code was speaking of events consisting of beautiful sirens enticing sailors to their destruction (although that might qualify),[26] but the code was instead referring to an event that renders performance not "merely onerous or burdensome" but impossible.[27] Courts still take this definition of impossibility into account since today, both Texas and French law require the obligee to take measures that a reasonable person would have taken against the event before an event is considered impossible.[28]

In both the traditional application of force majeure and in modern applications, courts engage in a "highly factual determination" and consider cases one at a time.[29] This means that courts will inevitably have a high amount of

20. *Id.* at 104 (discussing goods that are not qualified under force majeure).

21. *Id.* at 105.

22. *See* Meredith Wadman, *'Nothing Is Impossible,' Says Lab Ace Nita Patel*, 370 SCI. MAG. 652 (2020), https://www.science.org/doi/pdf/10.1126/science.370.6517.652 [https://perma.cc/86V3-GG2J].

23. *See* Katsivela, *supra* note 13, at 105.

24. *See id.*

25. *See id.* at 102.

26. *See* HOMER, THE ODYSSEY (Robert Fagles trans., 1996).

27. Katsivela, *supra* note 13, at 106.

28. *Id.*; *see also* Tractebel Energy Mktg., Inc. v. E.I. Du Pont de Nemours & Co., 118 S.W.3d 60, 69 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) ("[A] party is expected to use reasonable efforts to surmount obstacles to performance . . . and a performance is impracticable only if it is so in spite of such efforts." (alteration in original)).

29. *See* Katsivela, *supra* note 13, at 107.

discretion in assessing the presence of force majeure. How courts tend to utilize said discretion is in *pari passu* with how parties prepare their contractual agreements. Running from this logic, it is reasonable to see how jurisdictions such as Texas have tended towards deferring to and narrowly construing the language of the contract under scrutiny.

III. FORCE MAJEURE IN TEXAS

In Texas, force majeure's "historical basis has mostly eroded in favor o[f] contract interpretation."[30] "[T]he scope and effect of a force majeure clause depend ultimately on the specific language used in the contract and not on any traditional definition of the term."[31] The application of force majeure requires that a force majeure clause was written into the contract under scrutiny.[32] Without such a clause there is no application of force majeure.[33] Instead, there is a separately named excuse which is referred to as an impossibility defense (sometimes referred to as impracticability), which functions much like the original civil code force majeure doctrine does—requiring objective impossibility, reasonable efforts to surmount the obstacle, and the absence of something known as the basic assumption of both parties.[34] This basic assumption requirement, which will be discussed in depth in a later section, functions like the unforeseeability requirement in the French civil code in that the court steps in and decides for the parties whether or not the force majeure event was something assumed by both parties.

If the contract contains a force majeure provision, the parties should review it carefully and be guided by it.[35] The gaps not covered by impossibility, so to speak, are filled by the presence and contents of the force majeure provision. An act of God or an act of war usually will not relieve a party of its obligations, "unless the parties expressly provide otherwise" by including an applicable force majeure provision.[36] If the clause specifically mentions the event which hindered performance, even if it is foreseeable, the risk is con-

30. Jason Bernhardt, *Your Contract and Coronavirus: Now What?*, WINSTEAD: NEWS ALERTS (Mar. 27, 2020), https://www.winstead.com/Knowledge-Events/News-Alerts/346404/Your-Contract-and-Coronavirus-Now-What [https://perma.cc/Z2G8-NBLL].

31. TEC Olmos, L.L.C. v. ConocoPhillips Co., 555 S.W.3d 176, 197 n.68 (Tex. App.—Houston [1st Dist.] 2018, pet. denied) (quoting Roland Oil Co. v. R.R. Comm'n of Tex., No. 03-12-00247-CV, 2015 WL 870232, at *5 (Tex. App.—Austin Feb. 27, 2015, pet. denied) (mem. op.)).

32. *See id.* at 198 n.68.

33. *See id.*

34. *See* Tractebel Energy Mktg., Inc. v. E.I. Du Pont de Nemours & Co., 118 S.W.3d 60 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

35. Bernhardt, *supra* note 30.

36. GT & MC, Inc. v. Tex. City Refin., Inc., 822 S.W.2d 252, 259 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

sidered to be consciously mitigated by the parties and performance is excused.[37] Force majeure provisions will include a list of events negotiated over and integrated into the contract.[38] This process requires a risk and reward evaluation by the parties as they go back and forth over which events are to be listed and the price demanded.[39] Courts will then apply contract interpretation principles to the specific enumerations when determining whether a related event is encompassed.[40]

Because the presence of a writing controls, in regards to events that are catastrophic to performance, parties also must be sure to include some sort of catch-all provision for the types of events which are not more specifically enumerated.[41] This catch-all is where the truly unforeseen events are *caught*, and it is primarily the catch-all where the courts apply their discretion to determine what was the intent of the parties when they drafted the catch-all. Thus, when the alleged force majeure event is not specifically listed and falls within the general terms of the catch-all provision, the court will require that the defendant prove that the event was unforeseeable.[42] Regardless of the language in the contract, the court will only accept a force majeure or impossibility defense argument if there is a causal link between the event and the nonperformance.[43]

A. Issues with Application of Force Majeure in Texas

Under Texas law, whether a party has a valid force majeure argument is a fact-specific analysis of contract interpretation principles.[44] Courts will begin their analysis by looking at the language of the contract, with their primary purpose being to ascertain the intent of the parties.[45] "If the written instrument is worded so that it can be given a certain definite meaning or interpretation, then it is not ambiguous and the court will construe the contract as a matter of law."[46] Then, if the contract contains a force majeure provision, Texas courts will look to the specific language in a contract to determine the scope and effect of a force majeure provision.[47]

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37. *TEC Olmos*, 555 S.W.3d at 183 ("[W]hen parties specify certain force majeure events, there is no need to show that the occurrence of such an event was unforeseeable.").
38. *See id.* at 185.
39. *See id.* at 182.
40. *See id.*
41. *See id.* at 183-84.
42. *Id.* at 184.
43. *See* 30 RICHARD A. LORD, WILLISTON ON CONTRACTS § 77:31, at 360-61 (4th ed. 2021).
44. *See* Coker v. Coker, 650 S.W.2d 391, 393 (Tex. 1983).
45. *See id.*
46. *Id.*
47. *Id.*

1. Interpretation by Ejusdem Generis

A Texas court's primary concern "in interpreting a contract is ascertaining the true intent of the parties."[48] Texas courts will examine the writing as a whole, assigning effect to contractual provisions based on the nature of other provisions enumerated in more specific words.[49] This legal analysis, where contract interpretation is done cumulatively by looking within the four corners of the contract for provisions of "the same kind," is known by its Latin translation as *ejusdem generis*.[50]

Although seemingly originating in application towards the interpretation of statutes, this practice is used in Texas to interpret ambiguous language in force majeure contractual provisions.[51] This canon provides that when "general words follow an enumeration of two or more things, they apply only to . . . things of the same general kind or class specifically mentioned."[52] For example, in *R & B Falcon Corp. v. American Exploration Co.*,[53] a federal court applying state law distinguished between events listed in the contract's force majeure provision which were "essentially governmental instability and supply-chain-related events external to actual performance of the contract" and the "mechanical problem of unknown origins" which was the alleged reason for non-performance.[54] Applying *ejusdem generis* interpretation principles to the interpretation of the contract, the court held that one of the reasons why the plaintiff's claim for force majeure failed was that the events alleged to have caused nonperformance "bear little resemblance to the listed excuses for performance."[55] In conducting such an application, the court was not looking for the subjective intent of the parties; instead, it is "the objective intent, the intent expressed or apparent in the writing, that is sought."[56] It is important to remember that the *ejusdem generis* analysis is inapplicable under Texas law where the language at issue is deemed to be unambiguous.[57]

48. Zurich Am. Ins. Co. v. Hunt Petroleum (AEC), Inc., 157 S.W.3d 462, 465 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

49. *See id.*

50. Stanford v. Butler, 181 S.W.2d 269, 272 (Tex. 1944).

51. *See* R & B Falcon Corp. v. Am. Expl. Co., 154 F. Supp. 2d 969, 974 (S.D. Tex. 2001) (applying *ejusdem generis* principles to force majeure clauses).

52. TEC Olmos, L.L.C. v. ConocoPhillips Co., 555 S.W.3d 176, 185 (Tex. App.—Houston [1st Dist.] 2018, pet. denied) (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 199 (2012)).

53. *R & B Falcon Corp.*, 154 F. Supp. 2d at 974-75.

54. *Id.* at 974.

55. *Id*. at 975.

56. Corley v. Entergy Corp., 246 F. Supp. 2d 565, 574 (E.D. Tex. 2003) (quoting Bennett v. Tarrant Cty. Water Control & Improvement Dist. No. One, 894 S.W.2d 441, 446 (Tex. App—Fort Worth 1995, writ denied).

57. P. Bordages-Account B, L.P. v. Air Prods., L.P., 369 F. Supp. 2d 860, 870 (E.D. Tex. 2004).

But when the events enumerated in the force majeure clause are considered ambiguous, *ejusdem generis* applies.[58]

It is the judge who is making the decision of what is objectively apparent from the writing.[59] Thus, the plaintiff in *R & B Falcon Corp*. hit a dead end to his argument when the court made its decision. Because the court does not take the parties' subjective intent into consideration, without specificity, the court may interpret the contract in a way that is possibly not the way it was meant. This places pressure on the parties to make sure that they use specificity when drafting. However, by its very nature, the types of events listed in the force majeure clauses are not specific—otherwise, the drafters may be compelled to list every possible scenario in an impractically long and tedious process of consideration which inevitably would result in a needlessly long contract. Instead, parties usually place a catch-all in their force majeure clauses.[60] "Although there is authority for the view that if the event should have been foreseen as possible then the plea will not be allowed, the better view would seem to be that no more is required than that it should not have been foreseen as probable."[61]

2. Force Majeure Catch-All Clauses

To encompass force majeure events not specifically enumerated in the clause, parties are usually advised to accompany any listing of force majeure events with a catch-all provision. But drafting the catch-all presents its own challenges. Issues arise involving the canon of interpretation *ejusdem generis*, which limits the meaning of the catch-all to the same type of events as those listed specifically.[62] Thus, broad language meant to encompass "any other cause not enumerated herein but which is beyond the reasonable control of the Party whose performance is affected," will not in fact encompass "any other cause."[63] In *TEC Olmos, LLC v. ConocoPhillips Co.*,[64] the defendant entered into an agreement with the plaintiff to drill in search of oil and gas.[65] The contract executed contained the following force majeure clause, including both specific event enumerations and a catch-all provision:

> Should either Party be prevented or hindered from complying with any obligation created under this Agreement, other than the obligation to

58. *Id.* at 870-71.

59. *See id.*

60. *See* TEC Olmos, L.L.C. v. ConocoPhillips Co. 555 S.W.3d 176, 183-84 (Tex. App.—Houston [1st Dist.] 2018, pet. denied).

61. Smith, *supra* note 2, at 455-56.

62. *See* R & B Falcon Corp. v. Am. Expl. Co., 154 F. Supp. 2d 969 (S.D. Tex. 2001) (applying *ejusdem generis* principles to force majeure clauses).

63. *TEC Olmos*, 555 S.W.3d at 182.

64. 555 S.W.3d 176 (Tex. App.—Houston [1st Dist.] 2018, pet. denied).

65. *Id.* at 179.

> pay money, by reason of fire, flood, storm, act of God, governmental authority, labor disputes, war or any other cause not enumerated herein but which is beyond the reasonable control of the Party whose performance is affected, then the performance of any such obligation is suspended . . . .[66]

Subsequently, the global oil market entered a downturn effectively eliminating the defendant's financing and caused it to invoke the foregoing force majeure clause.[67] The defendant argued that economic change was enumerated in the force majeure clause's catch-all provision.[68] The court held that a market downturn was not a force majeure event.[69] In its reasoning, the court opined that "[w]hen more specific items in a list are followed by a catch-all 'other,' the doctrine of ejusdem generis teaches that the latter must be limited to things like the former."[70] In other words, "'only events or things of the same general nature or class as those specifically enumerated' excused a party's non-performance."[71] The court continued to explain that "[t]he specified events involve natural or man-made disasters (fires, floods, storms, act of God), governmental actions (governmental authority and war), and labor disputes" were of a type of risk that "would be difficult [to mitigate] absent a force majeure clause."[72] Market downturns, however, were of a different type of risk, and could be mitigated by conditioning performance on securing financing.[73]

Although agreeable, the result in *TEC* is problematic for two reasons. First, the defendant may have believed that it had negotiated an effective catch-all provision and thus was caught off guard when a court ruled that it had not. Such a holding would come after the contract had been executed; thus, even if a defendant could show that the integration of the provision was intended to cover "any event," the court would use its own discretion to decide what the clause meant—potentially holding in the alternative to the will of the parties.

Secondly, the methodology of Texas courts tips in favor of more sophisticated parties who can afford legal counsel privy to *ejusdem generis*' effect on the interpretation of an otherwise clear catch-all provision. Small businesses and individuals may be caught in a situation where they are not aware they are allowed an excuse until it is too late. It is the position of this article

66. *Id.*
67. *Id.* at 180.
68. *Id.* at 182.
69. *Id.*
70. *Id.* at 185.
71. *Id.* at 186 (quoting Seitz v. Mark-O-Lite Sign Contractors, Inc., 510 A.2d 319, 321 (N.J. Super. Ct. Law Div. 1986)).
72. *Id.*
73. *Id.*

that the interests of justice would be better served by applying reverse *ejusdem generis* to the interpretation of force majeure clauses.

For example, in *Roland Oil Co. v. Railroad Commission of Texas*, the force majeure provision at issue incorporated a catch-all clause that encompassed "any other cause or causes beyond reasonable control of the party."[74] Interpreting the clause, the court explained that "'other' means 'additional' or 'remaining' of a group or type not already mentioned" and that "similar things that are beyond a person's ability to control consists of the traditional force majeure events specifically described in the clause."[75] Roland argued that "each of the specific list of events in this clause stand alone and is not modified or described by the phrase 'by any other cause or causes beyond the reasonable control of the party.'"[76] The court explained that "Roland's interpretation would require ignoring the existence of "other" in this provision."[77] But does it?

The court is claiming that the word "other" in the force majeure provision must be a single-word modifier. A single-word modifier is one word that modifies the meaning of another word, phrase, or clause.[78] In the disputed clause, the word "other' is being used as an adjective. Adjectives modify nouns.[79] "Other," then, is modifying "cause or causes beyond reasonable control of the party." Although the court's analysis in this respect is correct, what if the modifier is actually the phrase "other cause or causes" and the modification is to "beyond reasonable control of the party"? This latter possibility of interpretation would be more in line with the interpretation argued by Roland. Regardless, the question remains whether this really was the intent of the parties, or is strict interpretation an imposition of the court's intent on the parties.

Similarly, other courts applying Texas law have also ruled in strange and mysterious ways that could not be predicted. In the bankruptcy case, *In re CEC Entertainment, Inc.*, the force majeure provision at issue stated: "This Section shall not apply to the inability to pay any sum of money due hereunder or the failure to perform any other obligation due to the lack of money or

74. Roland Oil Co. v. R.R. Comm'n of Tex., No. 03-12-00247-CV, 2015 WL 870232, at *5 (Tex. App.—Austin Feb. 27, 2015, pet. denied) (mem. op).

75. *Id.*

76. *Id.* at *6.

77. *Id.*

78. *Single-Word Modifier*, WIKIPEDIA (Aug. 15, 2013, 8:14 PM), https://en.wikipedia.org/wiki/Single-word_modifier#:~:text=A%20single%2Dword%20modifier%20is,word%20modifier%20may%20refer%20to%3A&text=Adjective%2C%20a%20word%20which%20modifies,or%20other%20word%20or%20phrase [https://perma.cc/ET3P-XZCP].

79. *See* Iliff v. Iliff, 339 S.W.3d 74, 80 (Tex. 2011).

inability to raise capital or borrow for any purpose."[80] The court held that the force majeure clause "does not apply to an 'inability to pay any sum of money' or a failure to perform caused by a lack of money."[81] Thus, since "[r]ent is a 'sum of money due' . . . the force majeure clause does not apply to an inability to pay rent."[82] The court here should be searching for the true intent of the parties when interpreting the contract. But the words in the last sentence—"due to the lack of money"—are ambiguous. The drafters could have intended the force majeure clause not to apply if default is "due to the lack of money" as a result of the events enumerated. Or, the drafters could have intended the force majeure clause not to apply due to a "lack of money," *in itself*, as a result of undercapitalization or some other internal factor. This latter intention is distinguishable from an "act of God" or "unusual government restriction" (specific events enumerated in the force majeure provision). So, depending on how the court chooses to read the language, which could be read either way, the force majeure clause is or is not effective.

3. Reverse Ejusdem Generis

Unlike *ejusdem generis*, the canon of reverse *ejusdem generis* states that "when a statute includes a list of terms and a catch-all phrase, the terms in the list are limited to those that are consistent with the catch-all phrase."[83] Although less known, such a canon's application in the context of Texas court interpretation of force majeure clauses allows for a more equitable result. The court is still using its own discretion to decide what the parties intended by using the language in the contract; however, the emphasis is placed on the language in the catch-all clause, allowing less sophisticated contract parties to have more confidence in all-encompassing language, fine-tuned by the specific events listed outside the catch-all. In this way, "when the catch-all [provision] is precise, the inference that the [drafters] intended the enumerated terms to be subject to the catch-all's limits will be rather strong."[84] "When the catch-all [provision] is more general, however, such an implication will rest on more tenuous grounds because the [drafter] may have used the general catch-all [provision] simply as a way of describing the list of terms rather than as a way of limiting it."[85]

As an example, we can revisit the contractual language employed in *TEC.* In that case, the defendant was to be excused when "prevented or hindered from complying with any obligation" by an "obligation to pay money,

80. *In re* CEC Entm't, Inc., 625 B.R. 344, 354 (Bankr. S.D. Tex. 2020).
81. *Id.*
82. *Id.* at 354.
83. *See* Jay Wexler, *Fun with Reverse Ejusdem Generis*, 105 MINN. L. REV 1, 2 (2020).
84. *Id*. at 3.
85. *Id*.

by reason of fire, flood, storm, act of God, governmental authority, labor disputes, war or any other cause not enumerated herein but which is beyond the reasonable control of the Party whose performance is affected."[86] The court held that performance was not excused by an economic downturn because when interpreting the contract via the doctrine of *ejusdem generis*, the "any other cause not enumerated" provision was colored by the unforeseeable nature of the enumerated items.[87] Applying reverse *ejusdem generis*, the court would simply read the clause to be covering unforeseeable events, *such as but not limited to* "natural or man-made disasters (fires, floods, storms, act of God), governmental actions (governmental authority and war), and labor disputes." Conversely, if the catch-all provision had instead said "or any other *natural or man-made disasters, governmental actions, or labor disputes"* the court would read the clause as *limited to* the more precisely mentioned categories of events. Although such an interpretation would not have saved the defendant from performance because market downturns are not unforeseeable, at least the force majeure clause was read in a broader way, more in line with force majeure's origins in protecting parties from the uncontrollable.[88]

See for example the application of the Ninth Circuit's reasoning in *Rio Properties v. Armstrong Hirsch Jackoway Tyerman & Wertheimer*.[89] In this case, Rio Properties, a hotel and casino operation, filed suit against singer Rod Stewart and his company for refusing to perform due to his diagnosis and treatment for thyroid cancer.[90] The force majeure provision in their agreement broadly stated: "if any party's performance became impossible by 'any [ ] cause beyond such party's reasonable control . . . then there shall be no claim for damages by either party to this Agreement, and the performance shall be rescheduled to a mutually agreeable time.'"[91]

The court found that Rod Stewart's performance could be considered impossible due to his illness, even though the contract did not explicitly identify that as a force majeure event.[92] The court reasoned that it could "admit Stewart's proffered extrinsic evidence regarding the nature and purpose of the integrated contract, its negotiation and execution, and the parties' intent in including the artist illness and force majeure provisions."[93] Thus, concluding the applicability of the force majeure clause.[94]

86. TEC Olmos, L.L.C. v. ConocoPhillips Co., 555 S.W.3d 176, 179 (Tex. App.—Houston [1st Dist.] 2018, pet. denied) (emphasis omitted).
87. *Id.* at 186.
88. *See* Katsivela, *supra* note 13, at 101-02.
89. 94 F. App'x 519 (9th Cir. 2004).
90. *Id.* at 520.
91. *Id.* at 521.
92. *Id.*
93. *Id.*
94. *Id.*

IV. IMPOSSIBILITY, THE TEXAS WAY

There is no force majeure doctrine outside of the contract.[95] That realm is dictated by another doctrine, one known as the doctrine of impossibility.[96] Impossibility is also an excuse for non-performance but exists when the contract between the parties does not feature a force majeure clause. The impossibility defense has also been referred to as impracticability.[97] However, these names are simply synonyms for the same law. Whatever the court chooses to call it, the Texas impossibility defense is based on Section 261 of the Restatement (Second) of Contracts, which provides:

> Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary. [98]

"Texas has recognized three contexts in which the [impossibility] excuse may be available: (1) the death or incapacity of a person necessary for performance, (2) the destruction or deterioration of a thing necessary for performance, and (3) a change in the law that prevents a person from performing."[99] Being very careful not to "simply rewrite the parties' contract," Texas courts limit the application of the impossibility defense to situations where "both parties held a basic (though unstated) assumption about the contract that proves untrue."[100] This basic assumption requirement is this article's second qualm with the application of Texas law to excuse parties from the unexpected.

A. Issues with Application of Impossibility in Texas

Certain inferences can be made by courts as to the basic assumptions of both parties. Based on these inferences the court will decide whether an excuse from performance is merited or not. For example, "in a contract for personal services, the death or incapacity of the person involved makes the contract impracticable . . . . Similarly, a contract to lease or insure a building is rendered impracticable if the building is destroyed. A change in the law that

95. *See id.*
96. *See id.*
97. Tractebel Energy Mktg., Inc. v. E.I. Du Pont de Nemours & Co., 118 S.W.3d 60, 64 n.6 (Tex. App.—Houston [14th Dist.] 2003, pet. denied)); *see also* Al Asher & Sons, Inc. v. Foreman Elec. Serv. Co., MO:19-CV-173-DC, 2021 WL 2772808, at *8 (W.D. Tex. Apr. 28, 2021) ("Under Texas law, impossibility and impracticability refer to the same affirmative defense.").
98. *Tractebel Energy Mktg*., 118 S.W.3d at 64.
99. Philips v. McNease, 467 S.W.3d 688, 696 (Tex. App.—Houston [14th Dist.] 2015, no pet.).
100. *Tractebel Energy Mktg*., 118 S.W.3d at 66.

makes performance illegal also renders it impracticable."[101] In these examples, a court may well have reasons based on the bargain of the parties to declare the parties' basic assumption; after all, a personal services contract is one requiring the performance of a certain individual (e.g., Beyonce's performance at a wedding, which no one else can perform). But declaring basic assumptions further away from the parties' bargain is fraught with danger. Over a certain threshold, the court is reaching to determine basic assumptions. Red flags arise when courts dictate the subjective assumptions of contractual parties. Professor Val Ricks, the supervising professor to this article, has opined that when the court does this "rather than exercise its moral, economic, and legal faculties, the court asks us to indulge in a fantasy about party mind-reading so that it can say it is not imposing its own will on the situation. This is never helpful and actually hides the real rationale."[102] Well said!

1. Attenuated String of Inferences

In addition, by inferring basic assumptions of the parties, courts may make a string of inferences that becomes increasingly attenuated as it's analysis grows. In *Tractebel v. E.I. Du Pont De Nemours and Co.*, the Texas Court of Appeals made a string of inferences in its decision whether or not a particular material fact was a basic assumption of both parties.[103] The fact pattern of the case involved the entrance of the parties into the contract, where one party was to provide government credits to the other in exchange for consideration.[104] There was no force majeure provision in the agreement between the parties.[105] Excusal of non-performance turned on whether the parties shared the *basic assumption* that the credits to be provided were to be particularly those earned by the defendant, as opposed to credits purchased by the defendant on the market and sold to the plaintiff.[106] The court first assumed that because a third party brokered the deal, and it was in his own interest to keep the parties anonymous, neither party knew who they were contracting with.[107] Then the court assumed that since this was the case, both parties could not have shared the basic assumption that it was the defendant's credits specifically that were being transacted.[108] And underlying these two assumptions, is the assumption that the plaintiff, in contracting for the credits,

101. *Id.*
102. Interview with Val D Ricks, Professor of L, S. Tex. Coll. of L. Hous., in Hous., Tex. (2022).
103. *Tractebel Energy Mktg.*, 118 S.W.3d at 66–67.
104. *Id.* at 64.
105. *See id.* at 67.
106. *Id.*
107. *Id.*
108. *Id.*

was not in fact contracting for the *other party's* credits but *any credits.* The court is making three separate assumptions to arrive at a conclusion.

Seeming to realize the attenuated logic at play, the court proffers an alternative scenario: that "even assuming [the plaintiff] knew [the defendant] was selling its own credits, this does not mean [the plaintiff] understood that to be a basic assumption of the contract."[109] Referring to several illustrations in the restatement itself, the court pointed out that "one party's assumption about the source of supply—and the other party's knowledge of that assumption—is not enough to excuse performance if alternative sources of supply are still available to fulfill the contract."[110] In reaching this end point in their logic, the court is saying to the parties that neither party both knew of the source of the credits and assumed that the credits from that source were the ones contracted for. Even in this alternative scenario, at least two assumptions are being made based on "no evidence" to the contrary.[111]

Similarly, in *Al Asher & Sons, Inc. v. Foreman Electric Service Co.*, the court concluded that an impracticability defense fails as a matter of law.[112] In *Al Asher*, Foreman, the defendant, failed to fulfill its obligations under rental agreements it entered into with the plaintiff.[113] Foreman argued that it was impossible to perform under the rental agreements because it had "entered into the Rental Agreements with the intention to use the capital gained from the PREPA [(Puerto Rico Electric Power Authority)] and FEMA [(Federal Emergency Management Agency)] contracts to cover the rental payments" and it "could not have predicted this kind of corrupt and fraudulent conduct from these parties engaged in disaster relief work."[114] The court reasoned that the "PREPA contract was not in existence at the time the rental agreements were made" and "the emails exchanged" between the parties did not establish that both parties "held a basic assumption regarding the non-occurrence of problems with the PREPA contract when the rental agreements were made."[115] Thus, the court concluded that "there is no evidence . . . as to the existence of a basic assumption regarding the PREPA contract held by both parties to the rental agreements."[116]

Like in *Tractabel*, the court is making assumptions based on a lack of evidence to reach their final inference in regards to the basic assumptions of

109. *Id.*
110. *Id.* at 68.
111. *Id.*
112. Al Asher & Sons, Inc. v. Foreman Elec. Serv. Co., MO:19-CV-173-DC, 2021 WL 2772808, at *8 (W.D. Tex. Apr. 28, 2021).
113. *Id.* at *7.
114. *Id.* at *8.
115. *Id.*
116. *Id.*

the parties. The court is inferring that since the contract related to reimbursement was not in existence yet, neither Foreman nor the plaintiff had assumed that fraud would not occur.[117] However, Foreman had "entered into the rental agreements to use the leased equipment to engage in storm restoration in Puerto Rico in the aftermath of Hurricane Maria and, specifically, to use the units to fulfill contracts" with FEMA and PREPA.[118] Regardless of whether or not the court may have reached the correct conclusion, its rationale is not persuasive. The court is saying that its holding is justified by a lack of evidence, but whether or not the parties shared the basic assumption is not adequately explored. Instead, it seems like the court really ruled based on its discretion because "the fact that performance is economically burdensome is insufficient to establish [impossibility]."[119] There is no exploration or use of the court's moral, economic, and legal facilities to further pursue Foreman's meritorious argument.

The assumption of a conclusion or fact based primarily on a lack of evidence to the contrary is known in the English literary world as an "argument from ignorance" or "negative proof fallacy."[120] The term was likely coined by philosopher John Locke.[121] Although convincing, arguments from ignorance are hasty and arrived at incorrectly since rules of logic place the burden of proof on the person making the claim; yet here, the court's claim is being proven by the lack of proof provided by the parties.[122] Alternatively, it is this article's position that the interests of justice would be better served if the court uses a higher standard, such as the preponderance of the evidence, in deciding whether a material fact was a basic assumption of both parties. Although still discretionary, such a burden would require some proof instead of allowing the absence of proof to suffice.

In addition, with a supervening event, the court may be able to consider outside evidence since the event happened outside the contract. In *Al Asher*, the court sustained the plaintiff's objection that certain declarations by Foreman be inadmissible due to their status as parol evidence.[123] Paragraph 7 of Foreman's declaration provided that "[b]y executing the Rental Agreements,

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117. *See id.*

118. *Id.* at *2.

119. *Id.* at *8 (citing Philips v. McNease, 467 S.W.3d 688, 696 (Tex. App.—Houston [14th Dist.] 2015, no pet.)).

120. *Argument from Ignorance*, WIKIPEDIA (May 28, 2021, 2:14 PM), https://simple.wikipedia.org/wiki/Argument_from_ignorance#:~:text=An%20argument%20from%20ignorance%20(Latin,not%20yet%20been%20proved%20true [https://perma.cc/R47V-VLNV].

121. *Argument from Ignorance*, WIKIPEDIA (Jan. 10, 2023, 4:30 AM), https://en.wikipedia.org/wiki/Argument_from_ignorance [https://perma.cc/AWM9-UFJ6].

122. WIKIPEDIA, *supra* note 120.

123. Al Asher & Sons, Inc. v. Foreman Elec. Serv. Co., MO:19-CV-173-DC, 2021 WL 2772808, at *5 (W.D. Tex. Apr. 28, 2021).

[Foreman] did not intend to be held liable for unreasonable repairs to the Equipment, inflated shipment fees, and other fees incurred when abiding to Asher's demands."[124] Similarly, Paragraph 8 provided that "[b]y executing the Rental Agreements, [Foreman] did not acknowledge the enforceability or validity of the agreements to the extent same are unenforceable."[125] By excluding these declarations, the court deprived itself of the opportunity to ascertain the parties' true intentions and assumptions without coming to its own conclusions in the absence of evidence to the contrary. Does this application of the parol evidence rule jive with the rationale for the rule? This article argues that it does not.

In the context of ruling on impossibility, the court should not allow the parol evidence rule to keep out applicable evidence. The parol evidence rule is a rule of substantive law, not a rule of evidence.[126] "When parties reduce an agreement to writing, the law of parol evidence presumes, in the absence of fraud, accident, or mistake, that any prior or contemporaneous oral or written agreements merged into the final written agreement . . . ."[127] "[A]ny provisions not set out in the writing [are presumed to have been] abandoned before execution of the agreement or, alternatively," they are presumed to have never been made.[128] Generally, this means the court will look to the contract language, applying the "'customary, ordinary and accepted meaning' of the language."[129] If there is an ambiguity in the contract language, the court will consider extrinsic evidence, which is evidence that relates to the contract but is not in the document itself.[130] The rationale is that one purpose of creating a written agreement is to memorialize the applicable terms and to exclude all other understandings to the contrary.[131] But when analyzing a supervening event, in the context of impossibility, the inquiry is birthed by the fact that the supervening event was not anticipated by the parties at all. The parol evidence rule determines the content of the contract. The doctrine of impossibility gives legal effect to events that happened after the contract formed. Evidence offered to show impossibility is not offered to show the content of the contract and is therefore not limited by the parol evidence rule, generally speaking. The content of the contract is not at issue. But that is just generally so. If the argument is that X or Y is or is not a basic assumption because we

124. *Id.* at *4.
125. *Id.*
126. Hubacek v. Ennis State Bank, 317 S.W.2d 30, 32 (Tex. 1958).
127. DeClaire v. G & B McIntosh Family Ltd. P'ship, 260 S.W.3d 34, 45 (Tex. App.—Houston [1st Dist.] 2008, no pet.).
128. Id.
129. Atl. Contracting & Material Co. v. Ulico Cas. Co., 844 A.2d 460, 469 (Md. 2004) (quoting Lloyd E. Mitchell, Inc. v. Md. Cas. Co., 595 A.2d 469, 475 (Md. 1991).
130. See Heat & Power Corp. v. Air Prods. & Chems., Inc., 578 A.2d 1202, 1208 (Md. 1990).
131. See Hobbs Trailers v. J. T. Arnett Grain Co., 560 S.W.2d 85, 87 (Tex. 1977).

agreed it was or was not in the contract, the parol evidence rule would limit that in *Al Asher*. If the court had considered Foreman's declarations, it may have come to a different conclusion as to the basic assumption of the parties in regards to the applicability of impossibility doctrine.

V. CONCLUSION

For the aforementioned reasons, it is apparent that the doctrine of force majeure and impossibility and their application in Texas is poised for revision by the courts. By looking to the methods used by other states with more developed jurisprudence, Texas courts can reconcile the origins and underpinnings of the doctrine with modern application and create a more practical effect as a remedy for the unforeseen consequences of today.