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I. INTRODUCTION

The law of agency governs the relations between principals, agents, and third persons.[1] A portion of that body of law deals with the liabilities that arise when an agent causes harm to a third party.[2] Situations in which negligent employees cause harm to their employers' customers are ripe for the application of standard agency principles.[3] Those principles dictate that the employer will be liable for the tort of an employee if the tort is committed in the scope of employment.[4]

The *Restatement (Second) of Agency* and case law provide many illustrations. If an employer directs an employee to perform a certain task and the employee mistakenly completes a different one, and in doing so negligently harms another, the employer is liable.[5] Or if an employee

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1. *See* RESTATEMENT (SECOND) OF AGENCY § 1 (1958) [hereinafter RESTATEMENT]; J. S. COVINGTON, INTRODUCTION TO AGENCY AND PARTNERSHIP 1 (1988); ROSCO T. STEPHAN, AGENCY—PARTNERSHIP IN A NUTSHELL § 1 (1977).

2. *See generally,* RESTATEMENT, *supra* note 1, ch. 7; 2 FLOYD R. MECHEM, A TREATISE ON THE LAW OF AGENCY, §§ 1855-2018 (2d ed. 1982).

3. The *Restatement* provisions are cast in terms of "masters" and "servants," while other agency texts refer to "principals" and "agents." *See generally* MECHEM, *supra* note 2. According to Mechem, the principal-agent relationship refers to situations where an individual (the agent) is a business representative of another (the principal) and where the expectation is that the agent will make contact with third persons to make contracts for the principal's benefit. *See id.* § 36. Servants, on the other hand, are those employed to perform services for their employers or masters without any expectation that they will enter into contracts for the master. *See id.* Mechem explains that although this distinction is clear, it is not treated so by the courts; for the most part, however, the difference is not crucial, since the rules governing principals and agents and masters and servants are very much alike. *See id.* § 38. The *Restatement* states that full-time employees are servants, *see* RESTATEMENT, *supra* note 1, ch. 7, topic 2, tit. B., introductory note, and further explains that "[a] master is a species of principal, and a servant is a species of agent." *Id.* § 2 cmt. a. Notary employees will fit the definition of servant when they act to serve their employers. Because the use of "master" and "servant" has declined over the years, *see* MECHEM, *supra* note 2, § 38, this Article, except when specifically referring to *Restatement* provisions, will use the terms "employer" and "employee."

4. *See* RESTATEMENT, *supra* note 1, § 219.

5. *See id.* § 229 cmt. a, illus. 1. This example presupposes that the employee was acting within the scope of employment. An employer will not be liable, however, if the employee's act is done with the intent to disobey the employer. *See id.* § 235 cmt. a, illus. 2.

uses a personal car for employment purposes and the employer pays for the car's upkeep, then the employer is subject to liability if the employee, while on the job, causes harm to another while negligently driving the car.[6] An employer would also be liable if it employs a full-time nurse who negligently attends to an injured third party while at work.[7]

The employer's liability for a third party's harm arises even though the employer is not negligent. Instead, the law of agency provides that "liability is normally based upon the fact that the tort is brought about in the course of an undertaking for the benefit, and subject to the right, of the principal to control his servant."[8] It is this type of liability—also referred to as vicarious liability or respondeat superior—with which this Article is concerned.[9]

Consider a slightly different example: A bank secretary who is a notary public[10] takes the acknowledgment of a signature on a document that is generated as part of a bank transaction. The secretary negligently fails to require the acknowledging party to appear before her. Thereafter, the party whose acknowledgment purportedly appeared on the document claims that the signature was forged, and a third party who relied on the acknowledgment suffers harm. Should the bank be liable for the secretary-notary's negligence? Should it make a difference if the bank manager coerced the notary employee to take the invalid acknowledgment?

The addition of a notary employee to the factual scenario complicates the legal analysis to a significant extent. For a number of reasons, some courts and state statutes have restricted the application of vicarious liability when the offending tortfeasor is a notary employee.[11] Other courts and at least one state's statute, however, embrace traditional agency principles.[12] The law's inconsistency causes confusion and has undesirable consequences. Jurisdictions that reject the application of

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6. *See id.* § 239 cmt. b, illus. 3.

7. *See* Dickerson v. American Sugar Ref. Co., 211 F.2d 200, 202 (3d Cir. 1954). An employer will be liable for damage to contractual or business interests if the employer unintentionally authorizes conduct by an employee that results in a tort. *See* RESTATEMENT, *supra* note 1, § 215 and cmt. c.

8. RESTATEMENT, *supra* note 1, § 216 cmt. a.

9. *See* Trinity Lutheran Church, Inc. v. Miller, 451 N.E.2d 1099, 1102 (Ind. Ct. App. 1983) (referring to liability imposed on a master for the torts of a servant as respondeat superior); McVay v. Rich, 859 P.2d 399, 403 (Kan. Ct. App. 1993) (defining vicarious liability as the liability imposed on one individual for the acts of another, "based solely on a relationship between the two persons" (quoting BLACK'S LAW DICTIONARY 1566 (6th ed. 1990)).

10. For the balance of this Article the terms "notary" and "notaries" will be used to refer to a notary public and notaries public, respectively.

11. *See, e.g.*, Commercial Union Ins. Co. v. Bert Thomas-Aitken Constr. Co., 230 A.2d 498, 500 (N.J. 1967), *rev'g* 218 A.2d 892 (N.J. Super. Ct. App. Div. 1966); CONN. GEN. STAT. § 3-94*l* (1997). *See generally* J. Michael Gottschalk, *Comment, The Negligent Notary Public-Employee: Is His Employer Liable?*, 48 NEB. L. REV. 503 (1969) (representing an early analysis of notary-related employer liability).

12. *See, e.g.*, Transamerica Ins. Co. v. Valley Nat'l Bank, 462 P.2d 814, 817-18 (Ariz. Ct. App. 1969); FLA. STAT. ch. 117.05 (7) (1997).

agency law may leave injured third parties with an inadequate recovery,[13] and allow notary employers to escape liability while benefiting from having notary services available to customers. The ultimate result is a deterioration in the quality of notary services.

A better approach would rely on agency principles to address work-related notary misconduct. There is little question that employers not only have the power to control the scope of the notary services they offer but also derive some benefit from having notaries on staff. The existence of employer control and commercial advantage cannot be minimized or overlooked when resolving the vicarious liability issue. Unfortunately, cases that have been reluctant to impose vicarious liability not only tend to ignore, or at least minimize, employer control and benefit, but often reject vicarious liability with unclear and unpersuasive reasoning. Further, the significant amount of statutory protection afforded employers codifies the negative common-law trends to the ultimate detriment of the public. Although competing interests unquestionably exist, the balance should be tipped in favor of imposing vicarious liability on notary employers through the application of agency principles.[14] To deal with this liability, employers can rely on workplace education and can insure themselves against notary misconduct.

This Article will begin by providing an overview of the notary office and liability for notary misconduct. Pertinent provisions of the law of agency will then be summarized, followed by a discussion of case law and current statutory provisions dealing with employer liability for notary employee misconduct. After a critical analysis of existing law, this Article will suggest common-law and statutory alternatives to determine employer liability. Finally, suggestions will be made to alleviate the burden this liability may place on employers, including ideas for workplace procedures to ensure that instances of notary employee misconduct are eliminated or kept to a minimum.

II. BACKGROUND

A. Overview of Notary Law[15]

Notaries have been defined as public officers who administer oaths, take acknowledgments, and perform other official acts.[16] They have also

13. This is so because the defendant notary may not carry professional insurance, and because the amount of surety bonds, where required, is typically very low. *See infra* note 32.

14. *See* Gottschalk, *supra* note 11, at 516-17, 22-23 (stating that the ministerial nature of notary work opens the door for the application of tort and employer liability).

15. This Article does not seek to provide an exhaustive discussion of notary law, but rather to set forth a cursory overview of applicable principles. For a valuable reference article, see Michael L. Closen and G. Grant Dixon III, *Notaries Public from the Time of the Roman Empire to the United States Today, and Tomorrow*, 68 N.D. L. REV. 873 (1992). *See also* 66 C.J.S. *Notaries* (1950).

16. *See* 66 C.J.S. *Notaries* §§ 1, 6 (1950).

been described as quasi-judicial officers controlled by the legislative and executive branches of government.[17] The office of notary public is an ancient one, having arisen in early Roman times.[18] In the United States, however, it was the development of trade that created a need for notaries.[19] Specifically, persons involved in commerce needed a way to gauge the reliability and authenticity of commercial documents. A notary's seal on a document served to authenticate it so it could be relied upon in foreign jurisdictions and in commercial transactions.[20] The public's reliance on notarized documents remains an important underpinning of notary law today.

Notaries hold a public office,[21] and the extent of their powers is dictated by statutory provisions.[22] The common-law functions of notaries were traditionally limited to "law merchant," or commercial activities, such as noting and extending marine protests and presenting and protesting foreign bills of exchange.[23] Broader powers authorized by statute include the authority to administer oaths; take acknowledgments; and perform judicial functions, such as issuing arrest warrants, punishing contempt, and performing marriage ceremonies.[24] Regardless of the specific function, notary powers are usually described as ministerial.[25]

Perhaps the most common notary functions include the taking of acknowledgments and the administration of oaths. An example of the former occurs when a notary notarizes a document such as a will; an example of the latter occurs when a notary completes an affidavit.[26] The common law and statutes dictate that a notary performing these tasks must be presented with sufficient evidence that the person whose acknowledgment is to be taken or to whom an oath is to be administered is in fact the person whose name appears in the document.[27] Once the signature is executed, the notary witnesses the signature utilizing a stamp or seal as required by the jurisdiction in which the notary is commissioned.[28]

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17. *See* Closen & Dixon, *supra* note 15, at 882.

18. *See id.* at 874-75.

19. *See id.* at 876.

20. *See id.*

21. *See* George v. General Fin. Corp., 414 F. Supp. 33, 35 (E.D. La. 1976).

22. *See* Kump v. Gee, 187 S.W.2d 932, 934 (Tex. Civ. App. 1945). Notary eligibility requirements can arise under constitutional or statutory provisions. *See* 66 C.J.S. *Notaries* § 2 (1950).

23. *See* 66 C.J.S. *Notaries* §§ 2, 6 (1950).

24. *See generally* Closen & Dixon, *supra* note 15, at 882-85 (discussing authority of notaries in various states).

25. *See* Wright v. Bedford, 182 N.Y.S.2d 660, 662 (Sup. Ct. 1958); *see also* Gottschalk, *supra* note 11, at 517.

26. *See* Closen & Dixon, *supra* note 15, at 882-84.

27. *See, e.g.*, City Consumer Serv., Inc. v. Metcalf, 775 P.2d 1065, 1068 (Ariz. 1989). If, however, the person who requests the notarial act is personally known to the notary, no such evidence needs to be shown. *See id.; see also* FLA. STAT. ch. 117.05 (1996).

28. *See In re* Estate of Martinez, 664 P.2d 1007 (N.M. Ct. App. 1983).

Just as notary powers vary, so do the qualifications of office, but typically notaries must have the ability to read and write English and must be at least eighteen years of age.[29] Notary candidates normally apply to the executive branch of the state for a commission,[30] and if the application is accepted the candidate will be commissioned to serve as a notary for a fixed term subject to renewal.[31] Notaries also are required to take an oath of office and may be required to provide a bond to assure the proper discharge of their notarial duties.[32]

The importance of the notary function stems from the reliance placed on notarial acts by others. The appearance of a notary's seal[33] on a document leads others to rely on the authenticity of the item that is notarized.[34] As such, if a notary commits malfeasance in the course of performing a notary service, tort liability may result.[35] In this regard, a notary is held to an objective standard of care, requiring the notary to act as a reasonably prudent notary would act in the same community.[36] If this standard of care is violated, the notary will be personally liable for all harm that is proximately caused by the negligence.[37] A notary's surety also will be liable if the notary breaches the conditions of the bond.[38]

This selective summary of notary law principles leads to a number of observations. Notaries are public officers whose primary duty is to help facilitate commerce by authenticating documents upon which others are likely to rely. As such, notaries hold a position of public trust. Notaries are bonded subject to the condition that they faithfully execute their functions;[39] if they breach this duty, the sureties on the bonds are liable to the individuals who suffer harm as a result of the notaries'

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29. *See* Closen & Dixon, *supra* note 15, at 878-79.

30. This is normally done through the office of the Secretary of State. *See id.* at 878.

31. *See id.* at 887-88.

32. *See* 66 C.J.S. *Notaries* § 3 (1950). Bonding amounts among the states are very low. California is the only state with a bond as high as $15,000, the result of legislation that became effective in 1997. *See* CAL. GOV'T CODE § 8212 (West Supp. 1997); *see generally* CHARLES N. FAERBER, NOTARY SEAL & CERTIFICATE VERIFICATION MANUAL (1996-97 ed.). For example, Idaho requires a $10,000 bond; South Dakota requires a $500 bond; and South Carolina and Rhode Island are among those states which require no bond at all. *See id.* at 104, 296, 300, 306. Faerber's text is an extremely useful compilation of requirements for notaries throughout the United States.

33. A seal may or may not be required by statute. For example, a seal is optional in Connecticut and mandatory in Maryland. *See* FAERBER, *supra* note 32, at 47, 155. If required, a "seal is prima facie evidence of authority of the notary public to administer the oath and of the regularity of the certification." Brooks v. State, 11 S.E.2d 688, 691 (Ga. Ct. App. 1940).

34. *See, e.g.*, Barber v. International Co. of Mexico, 48 A. 758, 764 (Conn. 1901).

35. *See* Closen & Dixon, *supra* note 15, at 888.

36. *See* Naquin v. Robert, 559 So. 2d 18, 20 (La. Ct. App. 1990).

37. *See* Jordan v. O'Connor, 222 P.2d 322, 328 (Cal. Ct. App. 1950).

38. *See* Hemet Home Builders Ass'n v. Wells, 39 P.2d 233, 240 (Cal. Ct. App. 1934); 66 C.J.S. *Notaries* § 12 (1950).

39. *See* Stemmons v. Akins, 283 P.2d 797, 798-99 (Okla. 1955).

misconduct.[40] For example, if a private notary[41] fails to verify the identification of an individual when taking an acknowledgment, and if a third party who has relied on that acknowledgment suffers harm that is proximately caused by the notary's misconduct, the notary and the notary's surety are liable to the third party. This liability is imposed under the common law as well as under many state statutes.[42] The Model Notary Act similarly provides that "[a] notary is liable to any person for all damages proximately caused that person by the notary's official misconduct in performing a notarization."[43]

The foregoing analysis of private notary liability turns on traditional tort principles that are quite straightforward. The principles suggest that a notary and surety would be liable if a third party suffers harm as a result of a notary employee's misconduct committed while at work.[44] Because the resources of an individual notary may be limited, however, and because the bonding amounts in many jurisdictions fail to provide adequate recovery for most injured parties, the notary's employer would likely be joined in such a suit under the theory of vicarious liability.

B. Overview of Vicarious Liability

The law of agency, as compiled in the *Restatement (Second) of Agency*, imposes liability on "masters" for the job-related torts of their "servants." The master-servant terminology of the *Restatement* encompasses employers and employees; thus, the *Restatement* provisions arguably apply to employers and their notary staff.[45]

A number of the *Restatement*'s sections are pertinent to this discussion. Section 219 sets forth the fundamental principle of vicarious liability: "A master is subject to liability for the torts of his servants committed while acting in the scope of their employment."[46] Under the *Restatement*, an individual is a servant if subject to the control of the master; if not subject to the master's control, the individual will be deemed an independent contractor, and the employer will not be liable

40. *See* Hemet Home Builders Ass'n v. Wells, 39 P.2d at 240.

41. For the purposes of this Article, "private notary" refers to a notary who performs notary services independent of any other employment situation. This is to be contrasted with the term "notary employee," which refers to a notary who performs notary services as part of, or incidental to, another job function.

42. *See, e.g.*, CAL. GOV'T CODE § 8214 (Deering 1996).

43. MODEL NOTARY ACT § 6-101(a) (1994). Subsection (b) provides that a notary's surety is likewise liable in an amount not to exceed the penalty of the bond. *See id.* § 6-101(b). The Model Notary Act, published by the National Notary Association in 1984, revises the 1973 Uniform Notary Act and seeks to provide model legislation for those state legislatures considering the enactment of notary laws. *See id.* § 1-102.

44. Neither the statutes cited above nor the Model Notary Act exempt notary employees from personal liability for misconduct.

45. *See supra* note 3.

46. RESTATEMENT, *supra* note 1, § 219.

for the contractor's torts.[47] Consideration is not necessary to create a master-servant relationship; even if a person serves another gratuitously, that person can be a servant if the other accepts the services.[48]

The *Restatement* lists ten factors for a fact finder to consider in determining whether the physical conduct of a person is subject to another's control. The factors focus on the type of activity a person undertakes for an employer, the type of work-related tools and supplies the employer provides to the employee, and the intent of the parties.[49] A master-servant relationship cannot be defined with precision, and can arise where the right to control is attenuated.[50]

The *Restatement* makes clear that it is possible for a person to serve two masters at once. Section 226 provides that "[a] person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service of the other."[51] Both masters may thus be responsible for an act by the servant as long as the act is in the scope of employment for both masters.[52] Nevertheless, if the servant's intent to serve one master "necessarily

47. *See id.* §§ 2, 220(1). Section 2 makes clear that a servant is to be contrasted with an independent contractor, who contracts with a person to do the work for that person, but whose physical conduct is not subject to that person's control. *See id.* § 2(3). The general rule states that the employer of an independent contractor is not liable for third-party harm resulting from the independent contractor's negligence. *See* Hammond v. Bechtel, Inc., 606 P.2d 1269, 1273-74 (Alaska 1980); *see also* RESTATEMENT, *supra* note 1, § 220 cmt. e.

48. *See* RESTATEMENT, *supra* note 1, § 225 & cmt. a.

49. Subsection (2) of Restatement § 220 (Definition of Servant) provides:

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

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

50. *See id.* cmts. c, d.

51. *Id.* § 226. The test under this principle is whether one person or another "had the right to control, not only the work to be done, but also the manner of doing it." Dickerson v. American Sugar Refining Co., 211 F.2d 200, 202 (3d Cir. 1953) (applying Pennsylvania law). There is no surrender of control merely because an employer permits control to be divided. *See id.* at 203.

52. *See* RESTATEMENT, *supra* note 1, § 226 cmt. a.

excludes an intent to serve the other," the servant will not be deemed to be serving two masters simultaneously.[53]

Not only must a master-servant relationship exist, but an employee must also act within the scope of employment for an employer to be liable for the employee's torts.[54] The *Restatement* sets forth a three-part test which must be met for a tortfeasor to be considered to be acting within the scope of employment.[55] First, the conduct must be the type the person is employed to perform.[56] Second, the conduct must occur substantially within authorized time and space limits.[57] Third, the conduct must be actuated, at least in part, by a purpose to serve the master.[58] Conduct is not considered to be within the scope of employment if it fails to meet any part of the test.[59]

Comments to section 228 emphasize that the master determines what lies within the scope of employment, but that in any event there must be some purpose to serve the master for the scope of employment test to be met.[60] The mere fact that an individual is employed is not enough; rather, the employee's conduct must work toward accomplishing an authorized purpose and must be done at an authorized place and time. If this is so, an inference arises that the conduct occurs within the scope of employment.[61] The comments further reiterate that the employer must be able to control the servant in order for the employer to be liable.[62]

Conduct by an employee that leads to employer liability must be "of the same general nature as that authorized, or incidental to the conduct authorized."[63] This language makes clear that some incidental acts will lead to employer liability. If the act is subordinate to or pertinent to an act that is part of the job description, it could lead to liability.[64] Comments to section 229 additionally state that the "ultimate question is whether or not it is just that the loss resulting from the servant's acts should be considered as one of the normal risks to be borne by the business in which the servant is employed."[65]

Faced with the prospect of liability, employers might simply forbid employees from performing tasks in a negligent manner. But *Restatement* section 230 provides that an act may be committed within the scope of employment even if an employer forbids the servant to

53. *Id.*
54. *See id.* § 228(1).
55. *See id.*
56. *See id.*
57. *See id.*
58. *See id.*
59. *See id.* § 228(2).
60. *See id.* § 228 cmt. a.
61. *See id.* cmt. b.
62. *See id.* cmt. c.
63. *Id.* § 229(1).
64. *See id.* cmt. b.
65. *Id.* cmt. a.

commit the act.[66] Comments to this section state that an employer cannot expect an employee to perform only in the manner in which he or she has been instructed.[67] Nevertheless, if an employer bans an employee from performing a certain type of act, it may indicate that such acts, if committed, would not be committed within the scope of employment.[68]

These black-letter principles, while certainly subject to interpretation by case law as well as modification by statute, provide valuable guidance when considering whether the employer of a notary employee should be liable for work-related notary misconduct. If an employer purposely hires an individual to serve in a capacity in which notary services will be performed periodically, standard agency principles arguably apply.

Although the notary position might be considered a "distinct occupation,"[69] the details of which an employer does not control, the work is often performed at the employer's direction, at the employer's place of business, and as part of the notary's salaried job. Further, the employer is likely to pay for the notary's commission and supplies. As such, a reasonable argument can be made that the employee's notary activities are sufficiently controlled by the employer for the employee to be deemed a servant.[70] Additionally, there would seem to be little question that an employer's decision to hire a notary is based, in part, on a belief that its business will benefit by having the notary on staff. Under this scenario the employee's performance of notary work would be the type of conduct the employee was hired to perform, would occur within authorized time and space limits, and would at least partially be actuated by a purpose to serve the employer. The employee, then, would fit the definition of servant and would, as notary, act within the scope of employment.[71]

If such an employee committed notary misconduct, employer liability would result even if the notary services were seen as only incidental to the employee's main job function.[72] Additionally, it would make no difference if the employer instructed the notary to perform all notary services in strict accordance with the law.[73] Nor would the result change if the employer did not pay for notary fees and supplies, since the gratuitous rendering of notary services for the employer's benefit will not defeat vicarious liability.[74] Finally, the fact that the notary employee was acting at least in part on behalf of the state at the time of the

66. *See id.* § 230 ("An act, although forbidden, or done in a forbidden manner, may be within the scope of employment.").

67. *See id.* cmt. b.

68. *See id.* cmt. c.

69. *See id.* § 220(2)(6).

70. *See supra* note 49.

71. *See* RESTATEMENT, *supra* note 1, § 228.

72. *See id.* § 229(1).

73. *See id.* § 230.

74. *See id.* § 225.

misconduct will not free the employer from liability, since agency principles admit to the possibility that an individual can serve two masters at the same time.[75] Only if a court is convinced that the performance of notary services "necessarily" requires the abandonment of an intent to serve the employer would this last argument fail.[76]

Courts and legislatures could benefit by carefully considering and applying *Restatement* principles when determining whether vicarious liability should be imposed on notary employers. As the discussion below demonstrates, however, this is not often done.

III. CASE LAW

Numerous cases explore the issue of employer liability for notary employee misconduct, a number of which date from the nineteenth century. Many cases resolve the issue by asking whether notaries can act in their professional capacity while at the same time acting as their employers' agents. More recent cases wrestle with the same question and also focus on reliance and proximate cause.

A. Early Cases

Many early cases deal with damages resulting from negligent notary practices in conjunction with note protests.[77] The cases are split on the issue of vicarious liability, revealing an early struggle with the status of notaries as public officers.[78]

In the 1880 case of *Davey v. Jones*,[79] the New Jersey Supreme Court determined that a bank could be liable for the negligence of its notary agent where the notary misread the name of a note's endorser and failed to send notice of insufficient funds to the note holder.[80] The court held that the collecting bank had a duty to do all that was needed to protect the note holder's rights.[81] The bank knew the holder and had a duty to inform the notary, "who was its agent," of the correct name.[82] Because the notary was the bank's agent, he was charged with the bank's

75. *See id.* § 226.

76. *See id.*

77. A "protest" involves a demand for payment of a note "in proper form, and at a proper time; and in case of non-payment, due and reasonable notice to the indorsers by the bank, or any of its clerks or servants, or other suitable person." Ayrault v. Pacific Bank, 47 N.Y. 570, 575 (1872).

78. The split in authority has been documented in secondary authority. *See generally* MECHEM, *supra* note 2, § 1313 (describing the split of authority in bank collection cases, and mentioning New York as one of those states that would impose liability on a bank which acts as an independent contractor in the collection of a note where its notary is negligent in presenting the paper and giving notice).

79. 42 N.J.L. 28 (1880).

80. *See id.* at 31.

81. *See id.* at 30.

82. *Id.*

knowledge as to the identity of the holder, and the notary's failure to properly notify the holder "must be treated as the negligence of the bank."[83] The court held that "[a] bank which assumes the duty of a collecting agent, is absolutely liable for any negligence or default of a notary . . . in relation to it."[84]

Although *Davey v. Jones* held the bank liable for its notary's negligence, certain facts of that case should be emphasized. The bank itself was negligent in failing to share its knowledge regarding the holder's identity with the notary.[85] When the notary was later negligent in following through with the protest, the court determined the bank should be liable.[86] *Davey* is thus not a true vicarious liability case, where liability would be imposed on the bank for its notary's negligence even if the bank was not at fault. Rather, it is a case where the bank and its notary were negligent. Nevertheless, *Davey* is notable because of its unambiguous language describing the notary as the bank's agent.

Many years after *Davey v. Jones*, the New Jersey Supreme Court again held a notary employer liable in *Simon v. Peoples Bank & Trust Co.*[87] In *Simon*, a notary who was also a teller at a bank negligently protested a note.[88] The court held the bank liable, stating that a bank receiving a note for collection undertakes "to do everything that may be necessary to make the collection, and . . . assume[s] a full liability for any negligence of which its correspondent may be guilty."[89] Although the scope of the collecting bank's duty was limited on appeal,[90] *Simon* demonstrates the court's willingness to impose liability on a bank for its notary's negligence. Thus, *Simon* is more of a vicarious liability case than *Davey*, since under *Simon* the bank would be liable even if the negligence of the bank's notary-cashier was the sole cause of the plaintiff's harm.

Other courts similarly determined that notaries employed by banks to protest notes fulfill duties the banks otherwise would have to carry out themselves, and as such the banks could be liable for the negligence of their notaries under agency theory. In *Ayrault v. Pacific Bank*,[91] a bank routinely delivered notes to a notary public for protest. The notary negligently completed a protest and a lawsuit ensued.[92] Relying on various authorities, the bank argued that it was not liable because the

83. *Id.*

84. *Id.* at 31.

85. *See id.* at 30.

86. *See id.* at 31.

87. 180 A. 682 (N.J. Sup. Ct. 1935), *rev'd on other grounds*, 184 A. 793 (N.J. 1936).

88. *See id.* at 684-85.

89. *Id.* at 683 (quoting Annotation, *General Discussion of the Nature of the Relationship of Employer and Independent Contractor*, 19 A.L.R. 226, 264 (1922)).

90. *See* Simon v. Peoples Bank & Trust Co., 184 A. 793, 794 (N.J. 1936). There the court held that a collecting bank has a duty only to give notice of the note's dishonor to the note holder or the parties involved.

91. 47 N.Y. 570 (1872).

92. *See id.* at 571.

notary was not its agent.[93] The plaintiff responded that the bank did "not fulfill its duty [merely] by putting the paper into the hands of a notary, but the bank is answerable for the conduct of its agents in the premises."[94] The court agreed, holding that if a bank employs a notary to present notes for payment, and if there is no contract limiting the bank's liability or stating that the bank's sole function is to hand over the notes to a competent notary, the notary will be deemed to be the agent of the bank and the bank will be liable for the notary's negligence.[95] Evidence to the effect that it was the custom of the banking industry to hand over notes to notaries did not change the nature of the contract between banks and their customers.[96]

In other jurisdictions courts responded differently. In 1891, the Supreme Court of Georgia held that a bank was not liable for negligence committed by a notary in the course of protesting a note.[97] In *May v. Jones,* suit was brought against a notary and his bank employer when the notary neglected to present a note to the proper bank.[98] Although the court held that there was clearly an action against the notary,[99] it rejected the notion that the bank should be liable as well:

> [T]he notary is not a mere agent or servant of the bank, but is a public officer, sworn to discharge his duties properly. He is under a higher control than that of a private principal. He owes duties to the public which must be the supreme law of his conduct. Consequently when he acts in his official capacity, the bank no longer has control over him and cannot direct how his duties shall be done.[100]

The court saw a "sharp dividing line" between the functions of the bank and those of the notary as a public officer, and further noted that the bank could not control the notary in the performance of his public function.[101]

The public officer rationale of *May v. Jones* contrasts sharply with the analysis in cases such as *Ayrault.* In *May,* the court refused to hold the bank vicariously liable for the notary's negligence despite the bank's employment of the notary and the notary's negligent performance of the duty for which he was employed. The court's rationale can easily be tied into the *Restatement*'s definition of servant: In the court's view only the state, not the bank, controlled the actions of the notary in performing the protest; as such, the notary was not a servant of the bank when performing that function and therefore there was no agency

93. *See id.* at 572.
94. *Id.*
95. *See id.* at 574.
96. *See id.*
97. *See* May v. Jones, 14 S.E. 552, 553 (Ga. 1891).
98. *See id.*
99. *See id.*
100. *Id.*
101. *Id.* at 554.

relationship.[102] This would appear so even though the notary was performing a function that he was authorized to do, performed it within authorized time and space limits, and in doing so furthered a purpose of the bank. Put another way, it appears that even though the notary might have met the test for acting within the scope of employment,[103] he failed to meet the threshold test of being the bank's servant at the time the negligence occurred.

Other early cases, however, questioned the notion that notaries act exclusively for the state when performing notary services. In *Aetna Casualty & Surety Co. v. Commonwealth ex rel. Andres*,[104] a notary who also worked as a real estate agent defrauded an individual of a piece of property.[105] Suit was brought against the notary's surety, who claimed the fraud occurred while the notary was working as a real estate agent and not while acting as notary.[106] The court held that the notary's fraudulent acts were within the terms of the notary's official bond despite the fact that the notary was acting as a real estate agent at the same time:

> The fact that the fraud of the notary in his capacity as real estate agent operated concurrently with his official act did not defeat the liability on the official bond. The very act of the notary public in his official capacity was an essential factor in divesting the title to the land, and it enabled the real estate agents to consummate the fraud.[107]

A similar argument was made in *Lacour v. National Surety Co.*,[108] where a notary employee forged a series of notes and checks and then absconded with the funds.[109] When suit was brought against the notary's surety, the surety company argued that the notary forged the documents and embezzled the proceeds while an agent of the employer and not as a notary.[110] The court held that the notary's regular employment did not divest the notary of his official character.[111] Important to the court was the fact that the fraud could not have been committed unless the employee had been a notary.[112]

Aetna and *Lacour* are cases that were brought against surety companies to recover on notary bonds, rather than cases brought against notary employers. The holdings of these cases on the question of the

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102. *See supra* text accompanying notes 47-50.

103. *See supra* text accompanying notes 58-59.

104. 25 S.W.2d 51 (Ky. 1930).

105. *See id.* at 52.

106. *See id.*

107. *Id.* at 53.

108. 85 So. 600 (La. 1920).

109. *See id.* at 600-01.

110. *See id.* at 601.

111. *See id.* at 602. The court was mindful of the fact that, had it ruled otherwise, sureties would escape liability in nearly all cases. *See id.* Further, a Louisiana statute provided that notary employers were protected by notary sureties. *See id.*

112. *See id.* at 601.

nature of the notary's actions at the time of the misconduct is, however, relevant to this discussion. Both courts held that the notaries could act as notaries and employees simultaneously, seemingly rejecting the idea presented in *May v. Jones* that notary employees, when performing notarial acts, act solely for the state. *Restatement* section 226 similarly recognizes that an employee can simultaneously serve two employers.[113]

B. Recent Cases

More recent cases continue to reveal divergent views on the issue of employer liability for notary employee misconduct. In the absence of statutory guidance, one judicial approach eschews reliance on agency theory while another embraces vicarious liability.

In *Commercial Union Insurance Co. v. Burt Thomas-Aitken Construction Co.*,[114] the Supreme Court of New Jersey rejected the application of agency principles in a case where a notary, who was an assistant cashier at a bank, negligently notarized signatures on an indemnity agreement.[115] The agreement was purportedly signed by the principals of a construction company, and although the agreement was not part of a bank transaction, the construction company was a bank customer.[116] One of the principals' signatures was allegedly forged, and the bonding company, on whose behalf the indemnity agreement was prepared, sustained a loss after the construction company defaulted on a job.[117] The bonding company sued the bank, claiming the notary was the bank's agent.[118]

The trial court held that the bank was not liable as a matter of law.[119] Even though a bank might be liable if a notary employee performs a duty for the bank and in the bank's interest, here the act was that of a public official.[120] Since the notarial act was a mere accommodation for bank customers, it was only incidentally performed in the bank's interest.[121] Key to the trial court's decision was the fact that the notary misconduct occurred in relation to a non-bank transaction. The ready availability of the notary to bank customers did not overshadow the fact that the notary was acting in his public capacity: "The bank has no control in such event of the method of taking the acknowledgment."[122] The trial court, however, left the door open for employer liability in cases where a

113. *See* RESTATEMENT, *supra* note 1, § 226; *supra* text accompanying notes 51-53.

114. 230 A.2d 498 (N.J. 1967), *rev'g* Commercial Union Ins. Co. v. Burt Thomas-Aitken Constr. Co., 218 A.2d 892 (N.J. Super. Ct. App. Div. 1966).

115. *See id.* at 500-01.

116. *See* Commercial Union Ins. Co. v. Bert Thomas-Aitken Constr. Co., 209 A.2d 155, 156 (N.J. Super. Ct. Law Div. 1965).

117. *See id.* at 156.

118. *See id.*

119. *See id.* at 158.

120. *See id.*

121. *See id.* at 157.

122. *Id.* at 157-58.

notary's act involves bank business. Cast in *Restatement* terms, the court seemed to say that, due to the lack of employer control, the notary's act was not that of a servant and that, in any event, the act was not committed in the scope of employment because it was too incidental to the bank's interest.

The intermediate appellate court reversed, holding that the mere fact that the indemnity agreement was not a bank transaction was not dispositive of the matter.[123] The court reasoned that the scope of employment test was the crucial focus and, based on the notary's deposition, the trier of fact could find that the notary acted "with the authority and approval of the bank and thus within the scope of his employment."[124] The court determined that accommodating customers with notary services was likely a part of bank business, and that if the services were actuated in part by a purpose to improve customer relations the scope of employment test was satisfied.[125] Summary judgment for the defendant was therefore improper.[126]

The New Jersey Supreme Court reversed,[127] taking issue with the appellate court's easy resort to standard agency principles. The court held the notary was a public officer and "as such exercises an authority the bank itself could not receive and does an act the bank itself could not do."[128] Further, the court reasoned that the plaintiff did not rely on a link between the notary and the bank and that an acknowledgment by any notary would have met the plaintiff's requirements.[129]

In the court's view, a notary's powers come from the state, not from an employer, and earlier bank protest cases holding banks liable for notary negligence involved situations where banks hired notaries to perform the banks' own work.[130] In this case, however, the bank could not perform the notary service and was not a party to the transaction. The mere fact that the bank offered notary services to customers was not enough to alter the result.[131] The court reasoned that someone who seeks out a notary looks only to the notary and not the notary's employer.[132] In short, "*any* notary will do."[133]

The court ultimately resolved the issue by making a policy decision. Mindful of the fact that lawyers make extensive use of notary services

123. *See* Commercial Union Ins. Co. v. Burt Thomas-Aitken Constr. Co., 218 A.2d 892, 893 (N.J. Super. Ct. App. Div. 1966).

124. *Id.* at 893-94.

125. *See id.* at 894.

126. *See id.*

127. *See* Commercial Union Ins. Co. v. Burt Thomas-Aitken Constr. Co., 230 A.2d 498 (N.J. 1967).

128. *Id.* at 499.

129. *See id.* The plaintiff had, in fact, claimed that it did not know the notary was employed by a bank. *See id.* at 500.

130. *See id.*

131. *See id.*

132. *See id.*

133. *Id.*

and that the imposition of vicarious liability would greatly impact the legal profession, the court reasoned that it would be unjust to hold the bank liable.[134] The court's emphasis on the equities of the case reflects the *Restatement*'s view that the imposition of vicarious liability ultimately hinges on whether it is just for an employer to bear the loss.[135] To some extent the court also engaged in a balancing analysis, remarking that public convenience, which is served by notaries who are employed by others, overshadows the goodwill an employer receives by making notary services available to its customers.[136]

The court did not close the door on employer liability altogether. The opinion concludes with an exception to the rule disallowing employer liability: An employer might be liable if it somehow participates in the notary misconduct by asking or encouraging the notary to act negligently, or if the employer leads another to believe that the notary acted on its behalf and under its authority.[137]

Justice Francis's dissent points out that the notary acted "primarily to serve the bank's interest, not his own," and that he had performed notarial acts for years with the bank's understanding that it was a service to its customers.[138] Further, there was little question that the bank knew the notary certificates completed by its employee would be relied upon in commerce by persons such as the plaintiff.[139] As such, a jury could find that the notary's act was in the bank's interest.[140]

Under the majority's view, the bank's liability would require the bank to be a party to the transaction in which the notary misconduct occurred. The court suggests that a notary is only subject to an employer's control for vicarious liability purposes if the notary services are provided to customers for employer-related transactions. Unless these facts are present, there is no master-servant relationship. The court's analysis also suggests the related view that a notary does not act within the scope of employment if notary services are performed as part of a non-bank transaction.

Although the *Commercial Union* court would impose liability on an employer if it coerced a notary employee to commit notary misconduct, those facts would raise an issue of the employer's own culpability. In such a case the employer's liability would be premised on its own fault, rather than on its vicarious liability for the fault of an employee.[141]

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134. *See id.* at 501.

135. *See* RESTATEMENT, *supra* note 1, § 228 cmt. a; *see also supra* text accompanying note 65.

136. *See* Commercial Union Ins. Co. v. Burt Thomas-Aitken Constr. Co., 230 A.2d at 501.

137. *See id.*

138. *Id.* at 502 (Francis, J., dissenting).

139. *See id.* at 502-03.

140. *See id.* at 503.

141. *See supra* text accompanying notes 8-9. On remand, the bank notary was vindicated. The jury found that he did not know the acknowledgment was false and therefore was not negligent. *See* Commercial Union Ins. Co. v. Burt Thomas-Aitken Constr. Co., 253 A.2d 469, 471 (N.J. 1969). Once again Justice Francis, in dissent, took the opportunity to state that whenever a notary

In 1969, the Arizona Court of Appeals addressed the issue of vicarious liability in a notary employment context. In *Transamerica Insurance Co. v. Valley National Bank*,[142] a title insurance company brought suit against a notary and the notary's bank employer. The bank had insisted that its manager's secretary get a notary commission and agreed to pay all of her notary fees. There was evidence that the notary's superiors often asked her to notarize signatures outside the presence of the signing parties.[143] In the facts giving rise to the case, the secretary took the acknowledgment of a bank customer who did not appear before her. The notary was acquainted with the person who purportedly signed the document, but was told by the person who brought her the document that the signer could not be present because he was too busy.[144] The document was a warranty deed under which the signer was the grantor. The signature was forged and the title company, relying on the notarized signature, disbursed funds.[145] Based on the public official status of notaries, the trial court granted the bank's motion for summary judgment; in its view the notary's act did not further bank business and the bank had not participated in the misconduct.[146]

On appeal, the court ruled that notaries are not public officials "in the ordinary sense" even though the state constitution and statutes make clear that they are public officers.[147] Accordingly, the court concluded that notaries are "quasi-public" officers only, and that this status should not be used to shield employers from liability.[148]

The court cited with approval those cases imposing liability on banks where notaries were negligent in performing bank obligations.[149] In its opinion agency principles should apply, making the crucial inquiry whether the employee was acting in the scope of employment when the negligence occurred.[150] The court believed the first part of the *Restatement* test was adequately demonstrated because the bank had asked the secretary to become a notary, supplied her with all she needed to perform the notary work, and paid for the commission. As such, reasonable jurors could differ as to whether the notary services were

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accommodates a customer he acts in the course of employment, since his act benefits the bank. *See id.* at 472 (Francis, J., dissenting). Further, in his view the bank was aware that the notary's certificate would be relied upon in the business world. *See id.* at 473.

142. 462 P.2d 814 (Ariz. Ct. App. 1969).

143. *See id.* at 815.

144. *See id.*

145. *See id.* at 815.

146. *See id.* at 816.

147. The court cited to the earlier case of *Harris v. Watson*, 161 S.E. 215, 220 (N.C. 1931) (Brogden, J., dissenting), in which it was noted that if notaries are judicial officers, the state has an enormous judicial branch. *See* Transamerica Ins. Co. v. Valley Nat'l Bank, 462 P.2d at 816-17.

148. *See* Transamerica Ins. Co. v. Valley Nat'l Bank, 462 P.2d at 817-18.

149. *See id.* at 817.

150. *See id.* at 818. Interestingly, the court never analyzed the work arrangement between the bank and its notary to determine whether a master-servant relationship existed.

included in her job-related duties.[151] There was also sufficient evidence regarding the second part of the scope of employment test since the misconduct took place within authorized time and space limits.[152] As to the third part of the test, requiring that the notary's act be done at least in part to serve a purpose of the bank, the court found the facts were at least debatable.[153] Accordingly, the bank's motion for summary judgment should have been denied.[154]

Although the court could have concluded with this analysis, it further stated that the case fell within the *Commercial Union* exception, under which a notary employer might be liable if it coerces a notary employee to commit misconduct.[155] Because there was evidence suggesting that the bank encouraged the notary to take acknowledgments outside of the presence of the acknowledging parties, liability under the *Commercial Union* exception was also likely.

The *Transamerica* court was more accepting of the notion that today's notaries are often employed to perform professional services for the benefit of their employers. Certainly this appears true from the court's description of notaries as "quasi-public" officers and its willing application of agency principles. It is interesting that the court nowhere questioned whether the plaintiff relied on the bank in any way, indicating that reliance on the employer was a non-issue. Although the court mentioned the employer's encouragement of illegal notary practice, it did so only to place the case within the *Commercial Union* exception, suggesting that even in the absence of those facts the court would have determined that a vicarious liability case could proceed.

California courts have also applied agency principles to notary employee cases, albeit with little discussion. In *Iselin-Jefferson Financial Co. v. United California Bank*,[156] a notary negligently took the acknowledgment of a forged signature on a loan guarantee agreement.[157] The plaintiff purchased accounts receivable from a company on condition that the company furnish written guarantees from one of the company's debtors.[158] The guarantees were to be completed by two of the debtor company's principals and their wives.[159] In the wives' absence, the principals presented the guarantee document to an officer of the defendant bank and asked for the signatures to be notarized.[160] A bank notary did so after the officer told him that one of the wives had signed the guarantee and that the officer had compared signatures from

151. *See id.*
152. *See id.*
153. *See id.*
154. *See id.*
155. *See id.* at 818-19.
156. 549 P.2d 142 (Cal. 1976).
157. *See id.* at 143.
158. *See id.*
159. *See id.*
160. *See id.* at 143.

bank files.[161] The wife had actually refused to sign the guarantee and her signature had been forged.[162] When the debtor company later defaulted, the plaintiff sued on the guarantees and also sued the notary, the notary's surety, and the bank.[163] After the guarantors defaulted, the remaining parties stipulated to the notary's misconduct and to the fact that the notary had acted for the bank in the scope of employment.[164] The trial court ruled that the plaintiff relied on the guarantee and notary certificate and would not have agreed to the transaction without them.[165] Accordingly, the trial court imposed judgment against the notary, the surety, and the bank.[166]

A later California case cites *Iselin-Jefferson* and accepts the principle of employer liability for notary employee negligence without much explanation. In *Garton v. Title Insurance and Trust Co.*,[167] a notary employed by a title insurer took a false acknowledgment on a deed of trust.[168] The deed omitted mineral and gas rights that were to have been reserved by the grantors.[169] The plaintiff-buyers did not appear before the notary when the deed of trust was notarized, and the notary later attached an exception to the deed setting forth the mineral and gas reservation.[170] The reservation prevented the plaintiffs from using the property as they had planned, and they sued the notary and the title insurer for fraud, deceit, and misrepresentation.[171] As to liability based on the improper notarization, the court stated that it was well-settled that a notary's breach of duty leads to liability if the damages are proximately caused by the breach.[172] The court also held that, "TI&T, as [the notary's] employer, may . . . be held liable for the improper taking of the acknowledgment."[173]

The California cases, due to their lack of discussion, are not very instructive on the issue of vicarious liability. They nevertheless demonstrate that California accepts the application of agency principles to job-related notary misconduct.[174]

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161. *See id.*

162. *See id.*

163. *See id.*

164. *See id.*

165. *See id.*

166. *See id.* In *Iselin-Jefferson* the bank stipulated that the notary misconduct occurred within the scope of employment, so the court did not address the issue. *See id.* It is interesting that the parties did not dispute the existence of an agency relationship based on the rationale of *Commercial Union*, which had been decided nine years earlier.

167. 165 Cal. Rptr. 449 (Cal. Ct. App. 1980).

168. *See id.* at 453.

169. *See id.*

170. *See id.*

171. *See id.*

172. *See id.* at 455.

173. *Id.* at 456.

174. Courts have stated that the question of whether an employee-employer relationship exists is a question of fact to be determined under state law. *See* Werner v. Werner, 526 P.2d 370, 376 (Wash. 1974) (en banc). In *Werner*, the issue was whether out-of-state notary employers were

At least one New York court has similarly imposed vicarious liability in a notary employer case. In *Independence Leasing Corp. v. Aquino*,[175] a young man opened an account at a bank with the assistance of a branch manager and then asked the manager, who was also a notary, to notarize a car lease document.[176] The document was signed in front of the notary by someone who was believed to be the young man's father. The signer was not the father, and when payments were not made on the lease the plaintiff leasing company sued the notary, the bank, and the father.[177] The cause of action brought against the notary and bank was based on a state statute imposing liability on a notary for misconduct in the performance of his powers.[178] The lower court held that if the father did not in fact sign the lease document the branch manager and the employer bank would be liable for the manager's notarization as long as the act constituted notary misconduct under state law.[179] On appeal, the court held that misconduct includes negligence in the performance of notarial duties.[180] Further, the court stated that the negligence of the notary and that of the bank was "amply supported by the record."[181] The court held, however, that proof was needed as to the plaintiff's reliance on the notary's actions and accordingly ordered a new trial.[182] Much like the California cases, *Independence Leasing* does not fully discuss the issue of vicarious liability but instead accepts its application without elaboration. Notably, the court was willing to impose employer liability where the misconduct occurred in a transaction that was not directly related to the employer's business.

C. Proximate Cause

Employer liability for notary employee misconduct requires the misconduct to be the proximate cause of the plaintiff's harm. The issue of proximate cause has been examined in cases brought against notary employers as well as sureties.

One point that is repeatedly made in these cases is that the notary misconduct need not be the sole cause of the harm for surety or

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subject to the state's jurisdiction where the notary employees' misconduct resulted in the plaintiff's harm. *See id.* The court stated, "[w]hile the notaries are public officers, it may be assumed that there is a sufficient agency relationship with their employers to render the employers also subject to this forum's jurisdiction." *Id.*

175. 506 N.Y.S.2d 1003 (Erie County Ct. 1986).

176. *See id.* at 1004.

177. *See id.* n.1.

178. *See id.* at 1004.

179. *See* Independence Leasing Corp. v. Aquino, 480 N.Y.S.2d 274, 275 (Buffalo City Ct. 1984), *aff'd in part, rev'd in part*, 506 N.Y.S.2d 1003 (Erie County Ct. 1986). The court, however, concluded that under the state statute negligence was insufficient to show notary misconduct. *See id.* at 276.

180. *See* Independence Leasing Corp. v. Aquino, 506 N.Y.S.2d at 1007.

181. *Id.*

182. *See id.*

employer liability to attach. In *Aetna Casualty & Surety Co. v. Commonwealth ex rel. Andres,*[183] suit was brought against a surety for the misconduct of a notary who also acted as a real estate agent. The surety claimed that the false notary certificate was not the proximate cause of the harm.[184] The court stated that the notary's act need not be the sole cause of the harm: "If it is a concurring cause and plays a part in bringing about the injury, the liability for the loss is fixed."[185] Because the notary's completion of a false notary certificate, when coupled with his acts as a real estate agent, led to the loss, proximate cause was shown.[186] It was irrelevant that the notary's professional misconduct occurred simultaneously with his fraudulent acts as a real estate agent.[187]

Similarly, in *Commonwealth ex rel. Smolovitz v. American Surety Co.,*[188] the court had to deal with a suit brought against the surety on a notary's bond.[189] A notary completed a certificate for the release of a mechanic's lien without one of the signing parties appearing before her.[190] The absent signer, who was the president of the construction company that built the plaintiff's home, had signed the lien releases but never signed the affidavit.[191] Nevertheless, the notary certified that he was present when she notarized the document.[192] A number of liens were later filed against the plaintiffs' property and the plaintiffs sued the notary's surety.[193] Despite the fact that there was no law requiring the lien releases to be notarized, the plaintiffs argued that they relied on "the affidavit as to the authenticity of the release of liens."[194] The court found that the transaction would never have been completed unless there was a sworn lien release. It further reiterated that a notary's misconduct must be a proximate cause of the harm, although it need not be the sole cause.[195]

Although *Smolovitz* does not furnish a test for proximate cause, other surety cases do. In *State ex rel. Nelson v. Hammett,*[196] the court held that in order for proximate cause to be met "the acts causing the loss must have followed each other in natural, continuous, and unbroken

183. 25 S.W.2d 51 (Ky. 1930).
184. *See id.* at 52.
185. *Id.*
186. *See id.*
187. *See id.* at 53.
188. 149 A.2d 515 (Pa. Super. Ct. 1959).
189. *See id.* at 516.
190. *See id.*
191. *See id.*
192. *See id.*
193. *See id.*
194. *See id.*
195. *See id.* at 517. Finding the jury's decision against the plaintiffs to be unwarranted in the face of the evidence on proximate cause, the court set aside the verdict and ordered a new trial. *See id.*
196. 203 S.W.2d 115 (Mo. Ct. App. 1947).

sequence."[197] Other cases emphasize that the plaintiff need not be a party to the document in order to recover against a surety. As long as damages are proximately caused by the notary's misconduct, there may be recovery.[198]

A recent Florida case, *Ameriseal, Inc. v. Leiffer*,[199] also deals with proximate cause. There, a notary employee of a law firm was approached by a co-worker's husband, who asked her to notarize two signatures.[200] The documents reflected that the two individuals whose signatures appeared were agents of an insurance company.[201] The employee notarized the signatures even though neither individual was personally known to her and neither appeared before her to swear to the truth of the information in the papers.[202] Ameriseal paid premiums totaling $70,000 to secure bonds that were represented by the falsely notarized papers.[203] The insurance company denied having issued the bonds and Ameriseal lost a state road painting contract as a result.[204] Ameriseal sued the husband, the notary, and the law firm employer.[205]

The trial court entered summary judgment for the law firm and the notary, accepting their argument that the notary's act was not the proximate cause of the harm.[206] This ruling was reversed on appeal, the court finding that there was an issue of fact as to whether Ameriseal's harm stemmed from its reliance on the invalid notarization.[207] The court

197. *Id.* at 120.

198. *See, e.g.*, Brittain v. Monsur, 195 S.W. 911, 917 (Tex. Ct. App. 1917). *Brittain* similarly emphasizes facts demonstrating the plaintiff's reliance on a fraudulent certificate of acknowledgment. *See id.* at 912-13.

199. 673 So. 2d 68 (Fla. Dist. Ct. App. 1996).

200. *See id.* at 71.

201. *See id.* at 69.

202. *See id.*

203. *See id.*

204. *See id.*

205. *See id.* Ameriseal also filed a claim against the notary's surety. *See id.* at 71 (Sharp, J., dissenting). Florida requires a bond in the amount of $5,000.00 to be paid to any person harmed as a result of the notary's misconduct. *See id.* n.1.

The case arose under section 117.05(7) of the Florida Statutes, which provides: "The employer of a notary public shall be liable to the persons involved for all damages proximately caused by the notary's official misconduct, if the notary public was acting within the scope of his or her employment at the time the notary engaged in the official misconduct." FLA. STAT. ch. 117.05(7) (1995). The statute imposes liability on an employer as long as the employee acted in the scope of employment at the time of the misconduct. As such, the statute approaches the issue of liability by relying on agency doctrine.

Despite the statute's requirement that the notary must be acting in the scope of employment, the defendants never raised this issue, instead relying on proximate cause. *See* Ameriseal, Inc. v. Leiffer, 673 So. 2d at 69-70. Because the notary employee assisted the husband of a friend and thus performed the notarization on a document that was apparently not related to law firm business, an argument might have been raised that the notary service was not actuated by any purpose to serve the employer. If this were so, a crucial part of the scope of employment test would not have been met, and the law firm might have had another defense.

206. *See* Ameriseal, Inc. v. Leiffer, 673 So. 2d at 69.

207. *See id.* at 70.

was persuaded by Ameriseal's affidavit, which stated that the plaintiff would not have paid the premiums without having relied on the notarized signatures.[208]

The court found irrelevant the defendants' argument that even if the two individuals personally appeared before the notary the bonds would have been invalid because those individuals did not have actual authority.[209] The court reasoned that the two "might have been unwilling to swear falsely, . . . and . . . had they signed, they, and not the notary, would be civilly liable for any loss."[210] Defendants also claimed that Ameriseal had purchased other invalid bonds not involving the notary's misconduct.[211] But the court reasoned that "[t]he misconduct of others does not immunize [the notary] and her employer from damages resulting from her misconduct."[212]

The dissent argued that the facts were insufficient to show proximate cause. It cited to *Gardner v. Weiler,*[213] in which a notary certified a seller's fraudulently obtained acknowledgment on a warranty deed. The *Gardner* court ruled that the notarization was too far removed from the seller's damage to constitute proximate cause.[214] The court stated:

> We do not think that a notary's acknowledgment of the seller's execution on a warranty deed, which had been fraudulently constructed by the buyer to effect a transaction different from the one actually agreed between seller and buyer, is a substantial cause of the seller's loss. It may have played a role. It may have been the predicate for recordation. It may be traced in the web of circumstances from the one to the other. But it is not the proximate cause of her loss.[215]

The proximate cause case law illustrates two points. First, in suits brought against notary sureties or employers based on notary misconduct, the notary error need not be the sole cause of the plaintiff's harm. Second, the plaintiff's reliance on the invalid notarization is often a factor in determining proximate cause. As to the latter point, it makes no difference if the notarization upon which the plaintiff relied was required by law; rather, as long as the misconduct plays a part in causing the injury, liability can result. How substantial a role the notary misconduct plays in the ultimate harm is likewise important, and this

208. *See id.*
209. *See id.*
210. *Id.*
211. *See id.*
212. *Id.*
213. 630 So. 2d 670 (Fla. Dist. Ct. App. 1994).
214. *See id.* at 670.
215. *Id.* at 670-71. A very recent case emphasizes that a notary's act will be the proximate cause of a plaintiff's harm only when the harm results from a breach of the notary's duty. *See* Dickey v. Royal Banks, 111 F.3d 580, 584 (8th Cir. 1997) (suggesting that notary's duty is limited to assuring the authenticity of the plaintiff's signature).

normally will be a question for the trier of fact.[216]

The case law dealing with notary employer liability is not easily summarized. The opinions are divergent and often are accompanied by little in the way of rationale. Numerous issues are touched upon, among them agency, reliance, and proximate cause. As the next section of this Article demonstrates, statutory approaches exhibit slightly more consistency.

IV. STATUTES

Faced with a body of common law that is in conflict on the issue of employer liability for notary employee misconduct, some state legislatures have enacted statutes governing the issue. The majority of these statutes impose employer liability if the scope of employment test is met, but additionally require that the employer either know of or consent to the notary misconduct. Other statutes focus on instances where the employer coerces or directs the misconduct. Only one state adopts a pure agency approach to employer liability.

Before an employer can incur liability for notary employee misconduct under the Idaho and Virginia statutes, there must be proof that the notary acted within the scope of employment at the time of the misconduct and that the employer had "actual knowledge of, or reasonably should have known of," the notary's misconduct.[217] There is little guidance in the statutes as to the meaning of knowledge, and no cases have arisen under them.[218]

In Illinois, Missouri, Nevada, and West Virginia, employer liability requires that the notary act within the scope of employment at the time of the misconduct and that the employer consent to the misconduct.[219] Just as "knowledge" is not defined in the Idaho and Virginia statutes, there is no guidance as to the meaning of "consent" in these three statutes, and no cases have interpreted them.

The Connecticut, Oregon, and Florida statutes take different approaches. Connecticut's law imposes employer liability but is silent on scope of employment.[220] Instead, it requires that the notary misconduct be related to the employer's business and that the employer direct, encourage, consent to, ratify or approve of the misconduct either in the particular transaction or, implicitly, by previous actions in at least

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216. *See, e.g.*, Cole v. Austin, 33 N.W.2d 78, 81 (Mich. 1948); Burnett v. Yurt, 247 S.W.2d 227, 228 (Ky. 1952). But see JOSEPH W. GLANNON, THE LAW OF TORTS, 156-57 (1995), where the author argues that despite the fact that proximate cause is often determined by juries, they probably do not fully comprehend the issue.

217. IDAHO CODE § 51-118 (1995); VA. CODE ANN. § 47.1-27 (Michie 1995).

218. Misconduct, however, is defined to include negligence as well as unauthorized, unlawful, and abusive acts. *See* IDAHO CODE § 51-112; VA. CODE ANN. § 47.1-2(3).

219. *See* ILL. COMP. STAT. ANN. § 312/7-102 (West 1995); MO. ANN. STAT. § 486.360 (West 1995); NEV. REV. STAT. ANN. § 240.150(2) (Michie 1997); W. VA. CODE § 29C-6-102 (1995).

220. *See* CONN. GEN. STAT. § 3-941 (1994).

one similar transaction.[221] This language mirrors the language in the Model Notary Act, and is reminiscent of the holding in *Commercial Union.*[222]

The Oregon statute provides that the notary's employer is liable to the notary for all damages recovered from the notary based on official misconduct if it was coerced by threat of the employer and if the threat was made in reference to the particular notarization.[223] This statute is narrower than Connecticut's since it requires coercion vis à vis a particular transaction, whereas the Connecticut statute imposes liability for mere encouragement of notary misconduct which can be implied from previous actions.

Florida's statute is unique among all others by relying on pure agency principles. It imposes liability on employers for harm that is proximately caused by notary employee misconduct as long as the notary acts within the scope of employment at the time the misconduct occurs.[224]

All of the state statutes, except Florida's, require an employer to consent to, know of, or coerce the notary misconduct before it will incur liability for notary employee misconduct. Such a provision in essence requires the employer to be a tortfeasor itself before being held accountable for a notary employee's negligence. An employer who knows of or consents to notary misconduct arguably breaches a duty of care owed to those who will later rely on the notarized document, even where the employer does not affirmatively act so as to cause the harm.[225] Those employers who coerce a notary employee to commit misconduct could be viewed as grossly negligent or, under the appropriate facts, could be found liable for fraud.[226] Thus, the current statutes, excepting

221. *See id.* Guam's provision is similar. *See* GUAM CODE ANN. § 33501(c) (1996). Legislation has been introduced in Illinois that would revise its current employer liability provision to include similar language. *See* H.B. 1452, 90th Gen. Assembly (Ill. 1997).

222. *See* MODEL NOTARY ACT § 6-101(c); *see also supra* text accompanying notes 136-37.

223. *See* OR. REV. STAT. § 194.200 (1993). Recently, legislation has been proposed in Oregon that would grant notary employees immunity from negligence actions based on acts or omissions occurring on the job. Employers would remain vicariously liable for the misconduct. *See* H.B. 2216, 68th Leg. Reg. Sess. (Or. 1995).

224. *See* FLA. STAT. ch. 117.05(7) (1995).

225. *See generally* GLANNON, *supra* note 216, at 62. "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." *Id.* at 62 (quoting Blyth v. Proprietors of the Birmingham Waterworks, 156 Eng. Rep. 1047, 1049 (Ex. 1856) (Alderson, B.)). The excerpt makes clear that nonfeasance can give rise to liability in negligence.

226. Gross negligence typically involves reckless disregard or indifference to a plaintiff, where the defendant's act represents "a substantial deviation below the standard of care expected to be maintained by a reasonably careful person under like circumstances." LA. REV. STAT. ANN. §§ 6:703(9); 1191(A)(2) (West Supp. 1997). Some courts use the terms willful and wanton to describe gross negligence. *See* State v. Wilcox, 337 P.2d 797, 801 (Or. 1959). Fraud is a "material misrepresentation of past or existing facts, made with knowledge (scienter) or reckless ignorance of this falsity, which cause (sic) a reliance upon these representations, to the detriment of the person so relying." Coffey v. Wininger, 296 N.E.2d 154, 158 (Ind. Ct. App. 1973).

Florida's, should not be termed vicarious liability statutes, since the type of employer involvement they call for could give rise to an independent tort action against the employer. In short, the knowledge, consent, and coercion requirements shield employers in a way that vicarious liability does not.[227] Only the Florida statute relies on standard agency principles to impose employer liability.

V. ANALYSIS

It is the thesis of this Article that employers should be held accountable for notary employee misconduct through the application of agency principles. The preceding discussion of existing case law and statutes is a necessary backdrop to this thesis, because it exposes flaws in analysis and poor policy choices made by those authorities that reject agency theory. This section of the Article will discuss those flaws and policy choices, will propose sensible common-law and statutory models to impose vicarious liability for workplace notary misconduct, and will suggest measures that can be taken by employers to lessen the impact of the proposed liability.

A. The Shortcomings of Existing Common Law

Cases holding in favor of notary employers can be challenged in two respects. First, some of those cases reason that notary employees are public officers who are beyond the control of their private employers. Only half of that statement is correct: Although notaries are public officers, it does not necessarily follow that they are not subject to the control of their employers. Second, the pro-employer case law tends to merge, and thus confuse, issues of agency and negligence. A proper approach to notary employee misconduct demands that the notary's negligence and the employer's vicarious liability be analyzed separately.

May v. Jones[228] illustrates the initially appealing argument that the public official status of notaries makes it impossible for them to be controlled by their employers. The idea seems to be that a notary employee wears one hat while performing routine employment duties but removes that hat and replaces it with another the moment a notary service is performed. The argument suggests that because the employer cannot control the employee whenever the notary hat is in place, the employee is not a servant when performing notary work. Common sense dictates otherwise.

The public officer rationale ignores significant differences between most public officials and notaries. In order to hold a public office a three-part test must generally be met: the person must have authority conferred by law, must serve for a set term, and must have the power to

227. *See supra* text accompanying notes 8-9.

228. 14 S.E. 552 (Ga. 1891); *see supra* text accompanying notes 97-101.

exercise a power of the sovereign government.[229] Public officers are often classified into four groups: executive, legislative, judicial, or ministerial.[230] Regardless of category, the term public officer generally brings to mind an individual who is engaged in full-time public employment.[231] A notary, although a public officer under the three-part test,[232] is distinguishable from other public officers in an important respect. Notaries are needed to authenticate commercial documents so these documents can be relied upon by others. Throughout American history, notaries have been immersed in the world of private enterprise, not the world of government. This peculiarly private and commercial aspect of the notary function is what undoubtedly led the *Transamerica* court to state that notaries are only "quasi-public" officers.[233]

The common law should not ignore the commercial function of notaries in such a way that employers are shielded from vicarious liability. This is so not simply because notaries perform their work in the world of business rather than the world of government. It is additionally significant that notary employers gain a private advantage from having notaries on staff. The advantage might be one of enhancing a company's goodwill or promoting office efficiency and customer convenience. It is inescapable that the notary's private employer, in addition to the public, is benefitted by having notaries on staff. If an employee performs a notary service at work which is authorized by the employer and which benefits the employer in some way, the law of agency should be applied if, through notary negligence, a third party is harmed. The advantage that accrues to an employer suggests that authorized notary work occurs in the scope of the notary's employment.[234]

For a master-servant relationship to exist, however, an employer must control its notary employee. When notaries are properly recognized as functioning in the world of commerce, and when the benefit they bestow on their employers is acknowledged, it becomes unrealistic to argue that notaries are not subject to the control of their employers when performing notary services. It is not unusual for an employer to determine the type of notary services a notary employee can render as well as when those services may be performed. And, in many cases, it is the employer who pays all the fees associated with a notary's commission. Directing the availability of notary services and subsidizing them are certainly aspects of control, despite the fact that the

229. *See* Spring v. Constantino, 362 A.2d 871, 875 (Conn. 1975) (holding that a public defender, when representing a client, is not a public officer protected by sovereign immunity).

230. *See* People v. Salsbury, 96 N.W. 936, 940 (Mich. 1903).

231. *See generally* 67 C.J.S. *Officers* § 7 (1978).

232. A notary serves a set term, exercises authority that is conferred by a state's constitution or statutes, and performs ministerial duties.

233. *See* Transamerica Ins. Co. v. Valley Nat'l Bank, 462 P.2d 814, 817 (Ariz. Ct. App. 1969); *see also supra* text accompanying notes 142-55.

234. *See supra* Part II.B.

notary function is also a public one. While it may be true that an employer cannot control a notary's official act, an employer has the opportunity to control, and often does control, many other work-related procedures directly touching on notary services.[235] Further, surety case law and the law of agency recognize that it is possible for a servant to serve two masters simultaneously.[236] Therefore, the argument that the public officer status of notaries prevents employers from being liable for job-related notary misconduct is based on an unrealistic view of notaries and how they are utilized in the workplace.

A second and perhaps more subtle flaw in some of the cases rejecting vicarious liability is seen in vague rationales that intermingle concepts of agency and negligence. Consider in particular the New Jersey Supreme Court's opinion in *Commercial Union.*[237] In ruling in the notary employer's favor, the court not only focused on the public officer status of the notary employee but also emphasized the plaintiff's lack of reliance on the bank employer.[238] The fact that the notary misconduct did not occur as part of a bank transaction disturbed the court, even though the act took place on bank premises during bank business hours.[239] The incidental aspect of the notary service led the court to find that the plaintiff did not rely on the notary's employer.[240] The court failed, however, to explain how a plaintiff's lack of reliance fit within the cause of action, leaving us to determine whether reliance on a notary's employer is crucial to the agency analysis or whether it is necessary to demonstrate the negligence of the notary. Although the former resolution represents the more persuasive reading of the case, the court is not clear. Despite this ambiguity, *Commercial Union's* reliance rationale suggests that a plaintiff must demonstrate some sort of reliance on the notary's employer rather than on the notarization before vicarious liability will be imposed.

This analysis should be contrasted with that of *Transamerica Insurance*, where the court engaged in a straightforward application of the scope of employment test in order to determine whether the bank employer could be liable for its notary employee's misconduct.[241] The plaintiff's reliance on the bank was not even mentioned, let alone determinative. Reliance is also not key under the *Restatement*, where the essence of vicarious liability is employer control and activity that occurs within the scope of employment. The absence of a reliance analysis from *Transamerica* and the *Restatement* is telling, suggesting that

235. *See* Gottschalk, *supra* note 11 at 522.

236. *See supra* text accompanying notes 51-53.

237. *See supra* text accompanying notes 127-37.

238. *See* Commercial Union Ins. Co. v. Burt Thomas-Aitken Constr., 230 A.2d 498, 500-01 (N.J. 1967).

239. *See id.* at 499-500.

240. *See id.*

241. *See* Transamerica Insurance Co. v. Valley Nat'l Bank, 462 P.2d 814, 815-19 (Ariz. Ct. App. 1969); *supra* text accompanying notes 142-55.

reliance should not be analyzed as part of an agency determination.

Reliance is, however, discussed in other cases, but in different ways. In *Iselin-Jefferson Financial Co.*, liability was imposed on the notary employer in part because the plaintiff relied on the notary's certificate.[242] And, in *Independence Leasing Corp.*, the court remanded the case to allow the plaintiff to prove that it relied on the notary's actions.[243] Both cases require a plaintiff to allege reliance on the notary's act rather than on the notary's employer. This approach stands in sharp contrast to the reliance-on-employer focus in *Commercial Union.*

Iselin-Jefferson and *Independence Leasing* share one similarity with *Commercial Union,* however: They fail to discuss exactly how the plaintiff's reliance on the notary misconduct fits within the overall cause of action. Is it required to establish the agency relationship between the employer and notary or something else? Unlike *Commercial Union, Iselin-Jefferson* and *Independence Leasing* suggest that reliance is tied to "something else," especially since the *Iselin-Jefferson* court accepted the parties' stipulation that the employer was vicariously liable for the notary's misconduct,[244] and the *Independence Leasing* court similarly felt that the negligence of the bank was demonstrated.[245]

The reliance issue is quickly resolved by looking to private notary and surety cases. In nearly all such cases, the plaintiff is required to allege that a notary made a negligent or false certificate and that the plaintiff relied upon the certificate.[246] In *American Surety Co. v. Boden,*[247] the court stated that notaries owe a duty to persons other than those to whom they directly render a service.[248] Because the public, in general, rightfully relies on notary certificates, recovery can be had if a person suffers injury that is proximately caused by the notary's misconduct.[249] The *Boden* court saw reliance on a notary certificate as a fundamental principle of notary law by stating that "[a] certificate of acknowledgment is an act which must, in the nature of things, be relied on with confidence" by business persons.[250]

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242. *See* Iselin-Jefferson Financial Co. v. United California Bank, 549 P.2d 142 (Cal. 1976); *supra* text accompanying notes 156-66.

243. *See* Independence Leasing Corp. v. Aquino, 506 N.Y.S.2d 1003, 1007 (Erie Co. Ct. 1986); *supra* text accompanying notes 175-82.

244. *See* Iselin-Jefferson Financial Co. v. United California Bank, 549 P.2d at 143.

245. *See* Independence Leasing Corp. v. Aquino, 506 N.Y.S.2d at 1007.

246. *See, e.g.*, State *ex rel.* Nelson v. Hammett, 203 S.W.2d 115, 120 (Mo. Ct. App. 1947). This is not always the rule, however. Where a statute allows suit to be brought against a notary and surety by anyone injured by the notary's misconduct, reliance need not be shown. The plaintiff must still prove proximate cause, however. *See id.* In *Hammett*, the executor of a grantor's estate was allowed to sue a notary and his surety where the notary allegedly induced the grantor to deed property to him. The court held that the lack of any reliance on the deed certificate by the grantor's executor did not bar the suit. *See id.*

247. 50 S.W.2d 10 (Ky. 1932).

248. *See id.* at 13.

249. *See id.*

250. *Id.* (quoting Annotation, *Liability of Notary Public or His Bond*, 18 A.L.R. 1302, 06 (1922)).

Cases such as *Boden* make clear that a plaintiff's reliance on an invalid notarization should be considered within the negligence case brought against the notary. In doing so, some courts discuss reliance in relation to proximate cause. In *Commonwealth ex rel. Smolovitz v. American Surety Co.*, for example, the court discussed the plaintiffs' reliance on a notarized affidavit in connection with its discussion of causation.[251] Similarly, in *Ameriseal v. Leiffer*, a case that was appealed on the sole issue of proximate cause, the court emphasized the plaintiff's affidavit, which stated that the plaintiff's harm resulted from its reliance on the notary's affidavit.[252] By pointing to the plaintiffs' reliance upon improper notarizations, these courts in effect tie reliance to foreseeability.[253]

Although reliance may be relevant to proximate cause, it can also be considered within a duty analysis. Courts are often less than clear in distinguishing between duty and proximate cause, but the concept of duty is often used to limit liability even where harm is foreseeable.[254] Couched in terms of duty, a notary's liability for negligence in performing a notary service should require, in part, that the notary owe a duty of care to the plaintiff. If a plaintiff has relied on a notary's actions, and if that reliance is reasonably foreseeable to the notary, a court should determine that the notary owed the plaintiff a duty of care. In holding that a notary's duty is not limited to those persons to whom the notary directly renders service, *Boden* expressly places reliance within a duty analysis.[255] Additionally, the *Boden* court's discussion of reliance is notably distinct from its analysis of proximate cause, indicating that reliance should be considered apart from causation.

Whether reliance on a notary certificate is a determinant for proximate cause or the defendant's duty, the result is ultimately the same: Harm resulting from notary misconduct that is foreseeable will be compensable only if a plaintiff can show reliance on the notarization. The reliance element, then, functions to limit recovery, and although it may be analyzed as part of duty or proximate cause in a notary negligence action, reliance has no place in determining whether an employer is liable for the notary's misconduct. That determination

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251. *See* Commonwealth *ex rel.* Smolovitz v. American Surety Co., 149 A.2d 515 (Pa. Super. Ct. 1959); *supra* text accompanying notes 188-95.

252. *See* Ameriseal, Inc. v. Leiffer, 673 So. 2d 68, 69-70 (Fla. Dist. Ct. App. 1996); *supra* text accompanying notes 199-212.

253. Courts may rely on foreseeability when considering proximate cause, limiting liability to those harms that are the foreseeable consequence of the defendant's negligence. *See, e.g.*, White v. Whiddon, 670 So. 2d 131, 133 (Fla. Dist. Ct. App. 1996) (discussing the foreseeability of intervening causes in relation to proximate cause); Murphy v. Wometco Cable T.V., 478 S.E.2d 398, 399 (Ga. Ct. App. 1996) (noting that issues of foreseeability are related to proximate cause); *see also* GLANNON, *supra* note 216, at 182-83.

254. *See* Dickey v. Royal Banks, 11 F.3d 580, 584 (8th Cir. 1997); *see also* GLANNON, *supra* note 216, at 182-83. Glannon states that a duty determination is often made on policy grounds, citing *Palsgraf v. Long Island Railroad*, 162 N.E. 99 (N.Y. 1928).

255. *See* American Surety Co. v. Boden, 50 S.W.2d 10, 13 (Ky. 1932).

should be resolved by resorting to the traditional agency concepts of employer control and scope of employment.

B. A Common-Law Model

To correct the shortcomings of existing case law, a realistic and clear common-law rule should be adopted. The rule would impose a two-step analysis to any vicarious liability case involving notary employee misconduct. A plaintiff would first have to demonstrate that the notary had, in fact, committed misconduct. In the absence of a statute, a court might well engage in a traditional tort analysis to determine if the notary should be liable for the harm. Both duty and proximate cause would be pivotal elements in this analysis; the focus, however, would be on whether the notary breached a duty of care owed to the plaintiff and, if so, whether the notary's negligence was the proximate cause of the plaintiff's harm. A plaintiff's reliance on the notary's certificate might be required to demonstrate that the notary owed the plaintiff a duty of care. The proximate cause analysis would then focus on the foreseeability of the plaintiff's harm. In the alternative, the plaintiff's reliance on the notarization might be considered within the proximate cause analysis. In any event, causation would be analyzed with the understanding that the notary misconduct need not be the sole cause of the plaintiff's harm.[256]

The second part of the analysis would require that, at the time of the misconduct, the notary was subject to the control of the employer and acted within the scope of employment. Courts should realistically look at notary employees and find that employer control exists and that the scope of employment test is met where appropriate. An expansive view of control should be applied, one that looks beyond the ability of the employer to control the performance of the notary act itself and instead inquires whether the employer controlled the availability of the notary services. Further, an employer's provision of notary services to customers should not hastily be dismissed as "incidental," leading to a failure under the scope of employment test.[257] Certainly the provision of notary services, which are often required to complete certain transactions, is not incidental. Additionally, only traditional agency principles should be applied at this juncture in the analysis, avoiding any consideration of the plaintiff's reliance on the employer.

The proposed model would arguably lead to increased employer liability, but would have the advantage of clarifying existing law by bifurcating the agency and underlying notary misconduct determinations. It would additionally provide plaintiffs, notaries, and employers with a predictable rule of law that reflects the realities of the workplace.

256. *See, e.g.*, Commonwealth *ex rel.* Smolovitz v. American Surety Co., 149 A.2d at 517.

257. *See, e.g.*, Commercial Union Ins. Co. v. Bert Thomas-Aitken Constr. Co., 209 A.2d 155, 157 (N.J. Super. Ct. Law Div. 1965).

Vicarious liability would not be automatic, however. An employer could escape liability if a notary employee did not commit misconduct or if proximate cause was not demonstrated; liability would also be avoided if an agency relationship did not exist, or if the misconduct did not occur in the scope of employment.

C. Statutory Protection and Proposed Revision

Existing statutes, with the exception of Florida's, fail to recognize the benefits bestowed upon employers by their notary staff. Instead, the statutes ignore those benefits and shield employers from liability unless the employers engage in tortious conduct themselves. A well-drafted statutory scheme would impose liability on employers for notary employee misconduct by resorting to standard agency principles, but only when the plaintiff can initially demonstrate that a misconduct action can be pursued against the notary.

Many statutes impose liability on notaries and their sureties for misconduct,[258] which is often defined to include intentional misconduct as well as negligence.[259] Further, the statutes recognize a broad-based reliance on notary certificates by allowing recovery by "any person" who can show harm that is proximately caused by the misconduct.[260] As such, current statutes reflect a commendable policy decision that the public's need for reliable notary services justifies the imposition of broad-based liability on negligent notaries and their sureties. In effect, the statutes recognize the public's reliance on notary certificates and establish a corresponding duty of care on notaries.

Many of the same state codes that liberally impose liability on notaries provide a significant amount of protection for employers by requiring them to know of, consent to, or coerce notary employee misconduct before they can be held vicariously liable. Such statutes are the likely result of lobbying by politically strong notary employers such as banks and law firms. For the reasons already discussed, it is unfair to bestow upon employers this type of statutory protection since it allows them to control the availability of on-site notary services and reap the benefits with virtually no strings attached. The statutes almost encourage employers to become oblivious to shoddy notary practices to the ultimate detriment of the public. From a policy standpoint, these statutes are unwise.

A sensible and fair statutory cause of action imposing vicarious liability would address these concerns. State legislatures should codify employer liability for notary employee misconduct where employer

258. *See, e.g.*, ALASKA STAT. § 44.50.160 (Michie 1996); CAL. GOV. CODE § 8214 (Deering 1996).

259. *See, e.g.*, CONN. GEN. STAT. § 3-94a(7) (1994); 5 ILL. COMP. STAT. 312/7-104 (West 1996).

260. *See, e.g.*, CONN. GEN. STAT. § 3-94*l*(a) (1994); IDAHO CODE § 51-118(1) (1996); UTAH CODE ANN. § 46-1-15 (1996).

control is shown and where the scope of employment test is met. An ideal statutory model would first provide a cause of action for any person who suffers harm that is proximately caused by notary misconduct. Misconduct should be defined to include intentional acts as well as professional negligence. Aggrieved parties should be able to bring an action against the notary and the notary's surety. Most important, a separate provision should impose vicarious liability on the notary's employer if, at the time of the misconduct, the notary's services were subject to the employer's control and occurred in the scope of employment.

The proposed legislative scheme would focus first on the notary's liability, requiring a showing of misconduct and proximate cause. Unlike the common-law proposal, there would be no need to consider the plaintiff's reliance on the notary certificate as part of a duty determination, since the availability of an action to any person harmed by the misconduct would reflect a legislative decision that notaries owe a duty to the public in general.[261] If reliance were to have any place within this statutory scheme, it would be solely within the proximate cause analysis. Assuming a misconduct action against the notary could go forward, the employer could then be sued under the separate vicarious liability provision, focusing solely on employer control and scope of employment.

From a policy standpoint, the suggested statutory model recognizes that notary services are both commercial and public. It also provides a clear framework for a court to follow when suit is brought against a notary, a surety, and an employer. The proposal differs from any of the current statutory provisions, although it most closely resembles Florida's statute. Nevertheless, the proposed scheme departs from Florida's law by removing proximate cause from the vicarious liability provision, instead placing all emphasis on proximate cause within the misconduct action brought against the notary. Removing proximate cause from the employer liability provision avoids possible confusion that could result from statutes such as Florida's, pursuant to which courts might incorrectly require a plaintiff to show that the employer's actions were the proximate cause of the harm.

The statutory proposal, like the common-law model, would enlarge the scope of employer liability, forcing employers to control the quality of the notary services that they make available to their customers. The ways in which employers might do so are considered below.

D. Suggestions for Notary Employers

Employers can take a number of steps to lessen the likelihood that they will be sued for the misconduct of their notary employees.

261. *See* State *ex rel.* Nelson v. Hammett, 203 S.W.2d 115, 120 (Mo. Ct. App. 1947); *see also supra* text accompanying note 246. Some courts may, however, choose to discuss reliance in relation to proximate cause. *See supra* text accompanying notes 251-53.

Generally, a greater involvement in the notary services they provide is the most efficient way for employers to protect themselves from liability.

Workplace education is the most obvious, and perhaps the most beneficial, form of protection. Employers first need to educate themselves about the notary profession. Not only can this be a valuable first step toward the avoidance of vicarious liability, but basic education may also help prevent suits brought against employers for their own negligence regarding notary work.[262] Education is of special benefit to lawyers, who may face disciplinary action if notary services related to the practice of law are mishandled.[263] Once sensitized to notary procedures, employers will likely have greater respect for their notary employees and the notary work performed on the premises, and will have an incentive to ensure that their employees are adequately educated.

Employers need to educate not only their notary staff, but also any other employees who are involved in transactions where notary services might be called for. Employee education should encompass the notary process and state law requirements, and should ideally result in the development of a standard office procedure for notary services. Any such procedure must strive for consistency and should be governed by clear guidelines regarding the type of notary services allowed at the workplace.

Education can be furnished in numerous ways and at little cost. Employers can contact the proper state officials to receive printed information about notary practice and procedure. Professional notary organizations also publish valuable publications. In addition, employee personnel materials, such as an office manual, can be revised to include information on notary procedures.[264] One employee might even be designated the notary liaison and made responsible for monitoring office notary services.

A uniform office notary procedure will help assure compliance with state law. A team approach to notary work might also prove helpful,[265] but at the very least all office notaries should be required to maintain journals to record information regarding each notary service performed. A notary's journal, which may be required by law,[266] could prove

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262. For example, notary employers may be liable for the negligent supervision of notary employees. *See* RESTATEMENT, *supra* note 1, § 213; *see also* Gottschalk, *supra* note 11, at 523.

263. *See, e.g., In re* West, 805 P.2d 351 (Alaska 1991) (approving a three-month suspension from the practice of law for an attorney who directed a staff notary to notarize a forged litigation document).

264. *See* DUKE NORDLINGER STERN & JO ANN FELIX-RETZKE, A PRACTICAL GUIDE TO PREVENTING LEGAL MALPRACTICE 105-06 (1983).

265. For example, a notary might be required to complete each certificate in the presence of a co-worker. *Cf.* Paul G. Ulrich & Suzanne P. Clarke, *Professional Responsibility*, *in* 2 WORKING WITH LEGAL ASSISTANTS: A TEAM APPROACH FOR LAWYERS AND LEGAL ASSISTANTS §§ 14.4, 14.5 (Paul G. Ulrich & Robert S. Mucklestone, eds. 1981).

266. *See, e.g.*, ARIZ. REV. STAT. § 41-319 (1996); CAL. GOV. CODE § 8206(a) (West 1992 & Supp. 1997); NEV. REV. STAT. ANN. § 240.120(1) (Michie 1995). *See generally* FAERBER, *supra* note 32.

invaluable in the event a lawsuit is brought against the employer at a later time. If an office notary liaison has been designated, that individual might also be responsible for overseeing office notary procedures, including journal maintenance.

Employers should also strive to hire notaries who are committed to their public office. When interviewing candidates for positions that will entail notary work, employers should question applicants about their knowledge of and dedication to notary work. Employers should also stress their own commitment to providing quality notary services to their customers. Hiring only those notaries who are committed to performing quality notary work is yet another way to lessen the prospect of liability.

The proposed scheme for vicarious liability and the foregoing workplace suggestions will impose new costs on employers, but having employers shoulder the burden for the work-related negligence of notary staff is both fair and efficient. The fundamental fairness of imposing employer liability has already been discussed at length, but at least one other legal principle supports liability. It is axiomatic that when harm must fall on one of two innocents, the law will choose the one who "set the wrong in motion."[267] Because a plaintiff may not be fully compensated by the notary and surety,[268] either the innocent plaintiff or the notary's employer could feasibly be responsible for the compensation shortfall. Because the employer set the cause in motion by allowing notary services to be performed by notary employee' the employer should be liable for the damage.

Further, of the plaintiff and the employer, the employer is the cheapest cost avoider.[269] As already indicated, employers can monitor notary services at little cost and can insure themselves against notary employee misconduct.[270] On the other hand, potential plaintiffs can internalize damage from invalid notarizations only by engaging in a costly verification of every notary certificate upon which they rely. Basic economic theory dictates that the employer should shoulder the burden.

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267. Concordia Lutheran Evangelical Church v. United States Cas. Co., 115 A.2d 307, 309 (D.C. 1955) (holding that a party who signed blank checks that were later stolen must bear the loss when the thief later brought the checks to a bank that cashed them); *see also* Books v. Ready Mix Concrete Co., 96 S.E.2d 213, 215 (Ga. Ct. App. 1956) (holding that damage from blasting falls on the party who set the force in motion, despite the lack of fault).

268. *See supra* note 13 and accompanying text.

269. The cheapest cost avoider is defined as the person "for whom the safety cost would be the least." Robert F. Cochran, Jr., *Dangerous Products and Injured Bystanders,* 81 KY. L.J. 687, 708 (1992-93) (citing Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 84-85 (1975)).

270. Although there may be some dispute as to whether an employer's general liability insurance policy will cover notary-employee misconduct, an employer can easily protect itself by purchasing notary errors and omissions insurance for very little cost. Interview with Milton G. Valera, President, National Notary Association, and Deborah M. Thaw, Executive Director, National Notary Association, in Pittsburgh, Pa. (Nov. 26, 1997). In California, a notary-employee can be insured for $10,000 for an annual premium of under $20. Comprehensive policies that cover employers and all the notaries on staff are also available. *See id.*

An easy answer is to say that notary employees are the cheapest cost avoiders since they are in the best position to avoid their own misconduct. The law already recognizes this by providing for a primary cause of action against notaries. Because plaintiffs might not be fully compensated by suing the notaries and sureties, however, employers should also be accountable for a plaintiff's harm.

VI. CONCLUSION

A review of the common law and statutes governing employer liability for notary employee misconduct reveals a split of authority. Often the law provides unwarranted protection for employers. Those employers who utilize notary employees for the benefit of their business should face liability for notary misconduct based on agency law rather than be shielded by existing precedent and statutes.

Ideal models for common-law and statutory approaches to vicarious liability would require a plaintiff to demonstrate, first, that notary misconduct occurred and that it was the proximate cause of the plaintiff's harm. The plaintiff should then be able to proceed against an employer if the employer controlled the notary employee in relation to the notary services and if the misconduct occurred in the scope of employment.

The broadened scope of employer liability can best be addressed by workplace education, the implementation of uniform notary procedures at the office, and insurance. If followed, these suggestions would pay worthwhile dividends. Employers would be more knowledgeable about notary law and would be able to prevent notary misconduct at the workplace for relatively little cost. The quality of workplace notary services would also be enhanced, leading to perhaps the greatest benefit of all—a greater confidence in notary work by those engaged in commerce and by the public at large.