An Introduction to Agency Law

Agency
- Two party relationship
  - Agent is authorized to act for principal
  - Social function: Stimulate commercial activity
- 2 Branches of Agency
  - Agent-Principal Relationship
  - Agent-Third Party Relationship

Formation
- Agent agrees to act for benefit of principal, under principal’s direction
- Exists even if
  - Parties do not intend to create it
  - Parties intend to create another rel
- Objective Standard
Restatement (Second) of Agency

- To exist, Agency relationship requires 3 characteristics:
  1. Agent possesses power to alter legal relationships between principal and himself.
  2. Agent acts as a fiduciary regarding matters within the scope of the agency.
  3. Principal has right to control agent's conduct concerning matters entrusted to the agent.

Capacity

- Both Principal & Agent must possess legal capacity.

Typical Agency Situations

- Agent is appointed
  - Insurance Agents
  - Realtors
- Partners of agents of each other
- Business organizations act as agents
Non-Delegable Duties

- Making statements under oath
- Voting in public elections
- Signing a will
- Entering into personal service contracts

General Rule for Agency

- Agent can bind principal only if the agent has authority to do so.

Authority

- Actual – Communicated to agent
  - *Express* – created by principal’s words
  - *Implied* – authority to do what is reasonable
- Apparent
  - Agent appears to have authority upon which 3rd parties rely
  - Arises when principal’s behavior causes 3rd party to believe agent had authority
Apparent Authority

- Based on:
  1. Communications by the principal to a third party
  2. That create a reasonable appearance of authority in the agent

- Purpose – protect 3rd parties who reasonably rely on principal’s manifestations that agent has authority

Examples of Implied Authority

- Agent hired to manage business
  - Has implied authority to make contracts customary in the business
  - Does not have power to borrow money, issue negotiable instruments

- Agent given control over Real Prop
  - Implied authority to contract for repairs, insurance, with tenants
  - Does not have power to sell or allow 3rd party liens or other interests to be taken on it.

Examples of Implied Authority

- Agent appointed to sell goods
  - Implied authority to make customary warranties on those goods.
Examples of Apparent Authority

- Principal tells 3rd party that the agent has authority, or directs agent in presence of 3rd party.
- Appointing agent to position that customarily involves authority to make certain contracts.
  - Problems arise when Principals limit this agent’s actual or express authority.

Types of Agents

- **General**
  - Continuously employed to conduct a series of transactions
- **Special**
  - Employed to conduct single transaction
- **Gratuitous**
  - Agent who receives no compensation
- **Subagent**
  - An agent of an agent
  - Typically appointed by the agent

Types of Agents

- **Electronic Agents**
  - Computer program or automated means to initiate action
    - Such as ordering over the internet
  - Principals who employ or deal with electronic agents are bound by the results of their operations.
    - Uniform Computer Information Transactions Act
Employee vs. Indep’t Contractor

- Employee (Servant)
  - Subject to control of principal
  - Focus on process

- Independent Contractor
  - Agree to achieve specified result
  - Principal cannot control how the result is achieved

Worker Classification under Fair Labor Standards Act (FSLA)

- Focus: whether employee is economically dependent
- 5 Factors
  - Degree of control by employer
  - Relative investments of worker & employer
  - Degree to which worker opportunity for profit is controlled by employer
  - Skill & initiative required to perform job
  - Permanency of the relationship

  *Reich v. Circle C. Investments, Inc.*

General Duties of Agent to Principal

- Must comply with written contract
- Fiduciary duties
  - Arise because relationship is one of Trust & Confidence
  - Gratuitous agents have fiduciary duties, but need not perform unless principal relies on her representations
Specific Duties of Agent to Principal

- **Duty of Loyalty**
  - Agent subordinates personal interest

- **Avoid Conflicts of Interest**
  - Forbidden to deal with self
  - Forbidden to compete with principal
  - Cannot act on behalf of another party

- **Maintain Confidentiality**
  - May not disclose confidential information obtained through the agency
  - Continues after agency relationship ends

Specific Duties of Agent to Principal

- **Duty to Obey Instructions**
  - Gratuitous agent need not obey to continue agency relationship

- **Duty to Act with Care & Skill**
  - Paid agent - must possess & exercise degree of care & skill that is standard
  - Gratuitous agent – care & skill required of non-agents

Specific Duties of Agent to Principal

- **Duty to Notify Principal**
  - Must communicate promptly matters that are relevant or material
  - No duty if agent receives privileged or confidential information

- **Duty to Account**
  - Must give principal money/property received in course of business, including incidental benefits (bribes/kickbacks)
  - Must disclose records & refrain from commingling property
Duties of Principal to Agent

- Must follow written contract
- Implied by Law
  - Compensate the Agent
  - Reimburse the Agent
    - If expressly or impliedly authorized
  - Indemnify the Agent
    - For losses resulting from agent’s authorized activities

Limitations on Indemnification

- Principal not required to indemnify agent for losses resulting from
  - Unauthorized acts
  - From agent’s negligence or other fault
- Direction to commit Tort
  - If agent knew it was a Tort, no duty to indemnify
  - If agent did not know, must indemnify

Termination of Agency by the Parties

- Triggering events
  - Time/event stated in agreement
  - Specified result has been accomplished
  - Mutual agreement of the parties
  - Option of either party
    - Revocation – by the Principal
    - Renunciation – by the Agent
- Parties have right to terminate, but liability may result
Agency Termination by Operation of Law

- Death or Bankruptcy of Principal
- Death or Bankruptcy of Agent
- Principal’s permanent loss of capacity
- Agent’s loss of capacity to perform
- Changes in value of agency property / subject matter
- Changes in business conditions
- Loss/destruction of agency property
- Object of agency becomes illegal
- Impossible to perform agency obligation
- Serious breach of agent’s duty of loyalty
- Outbreak of War

Agency coupled with an Interest

- Exists to benefit 3rd party
  - Example: Agent holds property securing loan. If loan repaid, property goes to owner. If owner defaults, agent sells property & gives proceeds to lender.
- Does not terminate by
  - Principal’s revocation
  - Principal’s/agents loss of capacity
  - Principal’s or Agent’s death

Effect of Termination on Agent’s Authority

- Once agency terminates, agent’s express and implied authority end.
- Apparent authority may be retained
  - 3rd parties unaware of the termination may rely on reasonable appearance of authority
- Apparent authority ends on
  - Principal’s death
  - Principal’s loss of capacity
  - Impossibility
Notice to 3rd Parties
- Used to terminate apparent authority
  - **Actual Notification**
    - For 3rd parties who have previously dealt with agent
    - Use direct personal statement or writing
  - **Constructive Notification**
    - Applies to all other 3rd parties
    - Advertise agency termination in newspaper of general circulation

Contract Liability of the Principal
- Principal liable if agent had express, implied, or apparent authority
- Principal may bind himself by ratifying the contract

Agent Notification
- If 3rd party gives notice to agent with actual or apparent authority to receive it, principal is bound
- Notice to 3rd party by agent with authority is considered notification by the principal
Agent Knowledge

- Agent’s knowledge is imputed to principal when relevant to activities authorized

Ratification

- Conduct
  - Express – principal communicates intent to ratify in words
  - Implied – principal’s behavior evidences intent to ratify
  - Silence, Acquiescence, failure to repudiate may constitute ratification

Requirements for Valid Ratification

- Act ratified must be valid at time of performance
- Principal must have been in existence at the time the agent acted
- When contract/act occurred, agent disclosed she was acting for principal
- Principal must be legally competent
- Principal must have knowledge of all material facts at time of ratification
- Entire contract/act is ratified
- Principal must use same formalities required to give the agent authority to execute the transaction.
Intervening Events

- Events that cut off Principal’s power to ratify:
  - 3rd party withdrawal from contract
  - 3rd party’s death or loss of capacity
  - Principal’s failure to timely ratify
  - Changed circumstances

Contract Liability of the Agent

- Depends on Nature of Principal
- Disclosed Principal
  - 3rd party has reason to know
    - Agent is acting for a principal
    - The principal’s identity
  - Agent is not liable on authorized contracts

Contract Liability of Agent

- Partially Disclosed Principal
  - 3rd party has reason to know
    - Agent is acting for a principal
    - Does not know principal’s identity
  - Agent is liable unless parties agree otherwise
    - Protects 3rd party, who cannot assess creditworthiness of principal
Contract Liability of Agent
- Undisclosed Principal
  - 3rd Party lacks knowledge of
    - Principal’s existence
    - Principal’s identity
    - Agent is liable on contracts
    - Undisclosed principal can enforce contract
- Nonexistent Principals
  - Agent who acts for legally nonexistent principal (unincorporated association) is personally liable

Liability of Agent by Agreement
- Agent may expressly bind herself by
  - Making contract in own name
  - Joining the principal as obligor on K
  - Acting as surety/guarantor for principal
- Signing without indication of status could create liability

Implied Warranty of Authority
- Agent liable if acts w/o authority
- Agent not liable if
  - 3rd party actually knows the agent lacks authority
  - Principal subsequently ratifies the contract
  - Agent adequately notifies 3rd party that he does not warrant his authority to contract
**Respondeat Superior**

- Employer liable for torts committed by
  - Agents who are employees
  - Who commit the tort in the scope of their employment
- Implied (Vicarious) Liability

**Respondeat Superior**

- Conduct in scope of employment
  - Of the kind the employee was employed to perform
  - Occurred substantially within the authorized time period
  - Occurred substantially within the location authorized by the employer
  - Motivated at least in part by the purpose of serving the employer

**Direct Liability of Principal**

- Principal is at fault
  - Examples
    - Principal directs conduct
    - Giving agent improper/unclear instr
    - Failure to regulate agent conduct
    - Hiring an unsuitable agent
    - Failing to discharge an unsuitable agent
    - Furnishing agent with improper tools/materials
    - Negligent supervision of agent
Liability for Torts of Independent Contractors

- Principal generally not liable
- Exceptions
  - Tortious behavior connected with retention of independent contractor
  - Harm resulting from IC’s failure to perform nondelegable duty
  - IC’s negligent failure to take special precautions needed to conduct highly dangerous or inherently dangerous activities

Liability for Agent’s Misrepresentations

- Generally, principal is liable
  - Directly liable if intended the agent to make the misrepresentations
  - Liable if agent had actual or apparent authority to make true statements on the subject
- Exculpatory Clauses
  - State agent has authority to make statements contained in the contract
  - Do not protect principal if he intends or expects agent will make false statements

Tort Liability of the Agent

- Agents usually liable for own torts
- Exceptions
  - Agent is exercising a privilege of the principal
  - Principal authorizes agent to exercise certain privileges in defense of person or property
  - Agent who made representations did not know or have reason to know of their falsity
  - Injuries to 3rd parties caused by defective tools/instrumentalities furnished by principal unless agent had actual knowledge
Tort Suits Against Principal & Agent

- General Rule: Joint & Severable Liability applies