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#1

RESTATEMENT (SECOND) OF AGENCY

(Selected Sections)

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Chapter 1

INTRODUCTORY MATTERS

TOPIC 1. DEFINITIONS

§ 1. Agency; Principal; Agent

(1) Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.

(2) The one for whom action is to be taken is the principal.

(3) The one who is to act is the agent.

§ 2. Master; Servant; Independent Contractor

(1) A master is a principal who employs an agent to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service.

(2) A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.

(3) An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor

subject to the other's right to control with respect to his physical conduct in the performance of the undertaking. He may or may not be an agent.

Comment:

a. Servants and non-servant agents. A master is a species of principal, and a servant is a species of agent. . . .

b. Servant contrasted with independent contractor. The word "servant" is used in contrast with "independent contractor". The latter term includes all persons who contract to do something for another but who are not servants in doing the work undertaken. An agent who is not a servant is, therefore, an independent contractor when he contracts to act on account of the principal. Thus, a broker who contracts to sell goods for his principal is an independent contractor as distinguished from a servant. Although, under some circumstances, the principal is bound by the broker's unauthorized contracts and representations, the principal is not liable to third persons for tangible harm resulting from his unauthorized physical conduct within the scope of the employment, as the principal would be for similar conduct by a servant; nor does the principal have the duties or immunities of a master towards the broker. Although an agent who contracts to act and who is not a servant is therefore an independent contractor, not all independent contractors are agents. Thus, one who contracts for a stipulated price to build a house for another and who reserves no direction over the conduct of the work is an independent contractor; but he is not an agent, since he is not a fiduciary, has no power to make the one employing him a party to a transaction, and is subject to no control over his conduct. . . .

c. Servants not necessarily menials. As stated more fully in Section 220, the term servant does not denote menial or manual service. Many servants perform exacting work requiring intelligence rather than muscle. Thus the officers of a corporation or a ship, the interne in a hospital, all of whom give their time to their employers, are servants equally with the janitor and others performing manual labor. . . .

§ 3. General Agent; Special Agent

(1) A general agent is an agent authorized to conduct a series of transactions involving a continuity of service.

(2) A special agent is an agent authorized to conduct a single transaction or a series of transactions not involving continuity of service.


§ 4. Disclosed Principal; Partially Disclosed Principal; Undisclosed Principal

(1) If, at the time of a transaction conducted by an agent, the other party thereto has notice that the agent is acting for a principal and of the principal's identity, the principal is a disclosed principal.

(2) If the other party has notice that the agent is or may be acting for a principal but has no notice of the principal's identity, the principal for whom the agent is acting is a partially disclosed principal.

(3) If the other party has no notice that the agent is acting for a principal, the one for whom he acts is an undisclosed principal.

§ 7. Authority

 Authority is the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to him.

§ 8. Apparent Authority

Apparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons.

§ 8A. Inherent Agency Power

Inherent agency power is a term used in the restatement of this subject to indicate the power of an agent which is derived not from authority, apparent authority or estoppel, but solely from the agency relation and exists for the protection of persons harmed by or dealing with a servant or other agent.

§ 8B. Estoppel; Change of Position

(1) A person who is not otherwise liable as a party to a transaction purported to be done on his account, is nevertheless subject to liability to persons who have changed their positions because of their belief that the transaction was entered into by or for him, if

(a) he intentionally or carelessly caused such belief, or

(b) knowing of such belief and that others might change their positions because of it, he did not take reasonable steps to notify them of the facts.

(2) An owner of property who represents to third persons that another is the owner of the property or who permits the other so to represent, or who realizes that third persons believe that another is the owner of the property, and that he could easily inform the third persons of the facts, is subject to the loss of the property if the other disposes of it to third persons who, in ignorance of the facts, purchase the property or otherwise change their position with reference to it.

(3) Change of position, as the phrase is used in the restatement of this subject, indicates payment of money, expenditure of labor, suffering a loss or subjection to legal liability.

TOPIC 3. ESSENTIAL CHARACTERISTICS OF RELATION

§ 13. Agent as a Fiduciary

* An agent is a fiduciary with respect to matters within the scope of his agency.

§ 14. Control by Principal

A principal has the right to control the conduct of the agent with respect to matters entrusted to him.

TOPIC 4. AGENCY DISTINGUISHED FROM OTHER RELATIONS

§ 14H. Agents or Holders of a Power Given for Their Benefit

One who holds a power created in the form of an agency authority, but given for the benefit of the power holder or of a third person, is not an agent of the one creating the power.

§ 14O. Security Holder Becoming a Principal

A creditor who assumes control of his debtor's business for the mutual benefit of himself and his debtor, may become a principal, with liability for the acts and transactions of the debtor in connection with the business.

Chapter 2

CREATION OF RELATION

TOPIC 1. MUTUAL CONSENT AND CONSIDERATION

§ 15. Manifestations of Consent

* An agency relation exists only if there has been a manifestation by the principal to the agent that the agent may act on his account, and consent by the agent so to act.

TOPIC 3. CAPACITY OF PARTIES TO RELATION

§ 23. Agent Having Interests Adverse to Principal

* One whose interests are adverse to those of another can be authorized to act on behalf of the other; it is a breach of duty for him so to act without revealing the existence and extent of such adverse interests.

Chapter 3**CREATION AND INTERPRETATION OF
AUTHORITY AND APPARENT
AUTHORITY****TOPIC 1. METHODS OF MANIFESTING CONSENT****§ 26. Creation of Authority: General Rule**

Except for the execution of instruments under seal or for the performance of transactions required by statute to be authorized in a particular way, authority to do an act can be created by written or spoken words or other conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal's account.

§ 27. Creation of Apparent Authority: General Rule

Except for the execution of instruments under seal or for the conduct of transactions required by statute to be authorized in a particular way, apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.

**TOPIC 2. INTERPRETATION OF AUTHORITY
AND APPARENT AUTHORITY****TITLE A. AUTHORITY****§ 32. Applicability of Rules for Interpretation of Agreements**

Except to the extent that the fiduciary relation between principal and agent requires special rules, the rules for the interpretation of contracts apply to the interpretation of authority.

§ 33. General Principle of Interpretation

An agent is authorized to do, and to do only, what it is reasonable for him to infer that the principal desires him to do in the light of the principal's manifestations and the facts as he knows or should know them at the time he acts.

Comment:

a. Authority an ambulatory power. The agency relation is normally the result of a contract and is always the result of an

agreement between the parties. For the purpose of interpreting the words used, the effect of customs and all similar matters, the normal rules for the interpretation of contracts are applicable, as stated in Section 32. Nevertheless, an agreement creating an agency relation has elements different from those of other contracts. The implicit, basic understanding of the parties to the agency relation is that the agent is to act only in accordance with the principal's desires as manifested to him. . . . Whatever the original agreement or authority may have been, he is authorized at any given moment to do, and to do only, what he reasonably believes the principal desires him to do, in the light of what he knows or should know of the principal's purpose and the existing circumstances. . . .

Illustrations:

1. P, a mill owner, directs A, his purchasing agent, to purchase a large quantity of raw material, to be used in executing an order for goods. The following day the order for goods is rescinded, as A learns. Without inquiry as to whether or not P still wishes the material, A has no authority to purchase the raw material.

2. P, the owner of a factory running on half time for lack of orders, before leaving for his vacation, directs his purchasing agent to "put in our usual monthly coal supply of 1000 tons." The following day a large order comes in which will immediately put the factory on full running time. It may be found that A is authorized to purchase sufficient coal to keep the factory running, this depending upon whether or not P can easily be reached, the amount of discretion usually given to A, the condition of P's bank balance, and other factors.

3. Same facts as in Illustration 2, except that P is present when the large order is received. A has no authority to order more than 1000 tons.

b. Authority distinct from contract of agency. An agent is a fiduciary under a duty to obey the will of the principal as he knows it or should know it. This will may change, either with or without a change in events. Whatever it is at any given time, if the agent has reason to know it, his duty is not to act contrary to it. The fact that in changing his mind the principal is violating his contract with the agent does not diminish the agent's duty of obedience to it. Hence the rule applicable to the interpretation of authority must be as flexible as the will of the principal may be. Thus, whether or not the agent is authorized to do a particular act at a particular time depends, not only on what the principal told the agent, but upon a great variety of other factors, including changes in the situation after the instructions were given. The interpretation of authority,

therefore, differs in this respect from the interpretation of a contract, even the contract of agency.

The agent's authority may therefore be increased, diminished, become dormant or be destroyed, not only by further manifestations by the principal but also by the happening of events, dependent, in many situations, upon what the agent knows or should know as to the principal's purposes. This does not mean that the agent can do anything merely because he believes it to be of advantage to the principal. Nor does it mean that the agent is authorized to act if he believes the principal would authorize him to act if he knew the facts. The agent's scope of authority is limited to the authorized subject matter and the kind of transaction contemplated. An agent of a dealer in property, whose function is limited to selling, is not authorized to buy property even if he reasonably believes the principal would authorize its purchase if he knew of the opportunity. The ordinary store manager, in the absence of an emergency, is not authorized to borrow, even though he knows the principal would welcome the opportunity.

It is in accordance with this continuous comparison between the communication to the agent and the circumstances under which he acts, that his authority may broaden . . . or may be diminished, suspended or terminated . . . , however irrevocable the terms in which the authority is expressed. Whether or not the principal is liable for a breach of contract for revoking the authority, nevertheless he can do so Further, because the agent is under a duty to protect the principal's interests within the authorized field, if the circumstances are or become ambiguous, either intrinsically or because of extrinsic facts, and he cannot communicate with the principal, the agent is authorized to act reasonably in accordance with the facts as he knows or should know them

§ 35. When Incidental Authority Is Inferred

Unless otherwise agreed, authority to conduct a transaction includes authority to do acts which are incidental to it, usually accompany it, or are reasonably necessary to accomplish it.

§ 39. Inference That Agent Is to Act Only for Principal's Benefit

Unless otherwise agreed, authority to act as agent includes only authority to act for the benefit of the principal.

§ 43. Acquiescence by Principal in Agent's Conduct

(1) Acquiescence by the principal in conduct of an agent whose previously conferred authorization reasonably might include it, indicates

that the conduct was authorized; if clearly not included in the authorization, acquiescence in it indicates affirmance.

(2) Acquiescence by the principal in a series of acts by the agent indicates authorization to perform similar acts in the future.

TITLE B. APPARENT AUTHORITY

§ 49. Interpretation of Apparent Authority Compared with Interpretation of Authority

The rules applicable to the interpretation of authority are applicable to the interpretation of apparent authority except that:

(a) manifestations of the principal to the other party to the transaction are interpreted in light of what the other party knows or should know instead of what the agent knows or should know....

Chapter 4

RATIFICATION

TOPIC 1. DEFINITIONS

§ 82. Ratification

Ratification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him.

Comment ...

c. *A unique concept.* The concept of ratification ... is unique. It does not conform to the rules of contracts, since it can be accomplished without consideration to or manifestation by the purported principal and without fresh consent by the other party. Further, it operates as if the transaction were complete at the time and place of the first event, rather than the last, as in the normal case of offer and acceptance. It does not conform to the rules of torts, since the ratifier may become responsible for a harm which was not caused by him, his property or his agent. It can not be justified on a theory of restitution, since the ratifier may not have received a benefit, nor the third person a deprivation. Nor is ratification dependent upon a doctrine of estoppel, since there may be ratification although neither the agent nor the other party suffer a loss resulting from a statement of affirmance or a failure to disavow. However, in some cases in which ratification is claimed, the principal's liability can be based upon unjust enrichment or estoppel, either in addition to or as alternative to his liability based on ratification....

d. *Justification.* That the doctrine of ratification may at times operate unfairly must be admitted, since it gives to the purported principal an election to blow hot or cold upon a transaction to which, in contract cases, the other party normally believes himself to be bound. But this hardship is minimized by denying a power to ratify when it would obviously be unfair. See §§ 88-90. Further, if the transaction is not ratified normally the pseudo-agent is responsible; if not, it is because the third party knew, or agreed to take the risk, of lack of authority by the agent. In many cases, the third person is a distinct gainer as where the purported principal ratifies a tort or a loan for which he was not liable and for which he receives nothing. This result is not, however, unjust, since although the creation of liability against the ratifier may run counter to established tort or contract principles, the liability is self-imposed. Even one who ratifies to protect his business reputation or who retains unwanted goods rather than defend a law suit, chooses ratification as preferable to the alternative. Further, the sometimes-derided doctrine of relation back not only is one used in other parts of the law, but it tends to give the parties what they wanted or said they wanted. If it sometimes happens that a mistaken or over-zealous agent is relieved from liability to the third person, the net result causes no harm to anyone. However, perhaps the best defense of ratification is pragmatic; that it is needed in the prosecution of business. It operates normally to cure minor defects in an agent's authority, minimizing technical defenses and preventing unnecessary law suits. In this aspect, it is a beneficial doctrine, which has been adopted in most systems of law.

§ 83. Affirmance

Affirmance is either

- (a) a manifestation of an election by one on whose account an unauthorized act has been done to treat the act as authorized, or
- (b) conduct by him justifiable only if there were such an election.

TOPIC 2. WHEN AFFIRMANCE RESULTS IN RATIFICATION

§ 84. What Acts Can Be Ratified

(1) An act which, when done, could have been authorized by a purported principal, or if an act of service by an intended principal, can be ratified if, at the time of affirmance, he could authorize such an act.

(2) An act which, when done, the purported or intended principal could not have authorized, he cannot ratify, except an act affirmed by a legal representative whose appointment relates back to or before the time of such act.

§ 85. Purporting to Act as Agent as a Requisite for Ratification

(1) Ratification does not result from the affirmance of a transaction with a third person unless the one acting purported to be acting for the ratifier.

(2) An act of service not involving a transaction with a third person is subject to ratification if, but only if, the one doing the act intends or purports to perform it as the servant of another.

§ 87. Who Can Affirm

To become effective as ratification, the affirmance must be by the person identified as the principal at the time of the original act or, if no person was then identified, by the one for whom the agent intended to act.

§ 88. Affirmance After Withdrawal of Other Party or Other Termination of Original Transaction

To constitute ratification, the affirmance of a transaction must occur before the other party has manifested his withdrawal from it either to the purported principal or to the agent, and before the offer or agreement has otherwise terminated or been discharged.

§ 89. Affirmance After Change of Circumstances

If the affirmance of a transaction occurs at a time when the situation has so materially changed that it would be inequitable to subject the other party to liability thereon, the other party has an election to avoid liability.

§ 90. Affirmance After Rights Have Crystallized

If an act to be effective in creating a right against another or to deprive him of a right must be performed before a specific time, an affirmance is not effective against the other unless made before such time.

TOPIC 3. WHAT CONSTITUTES AFFIRMANCE

§ 93. Methods and Formalities of Affirmance

(1) Except as stated in Subsection (2), affirmance can be established by any conduct of the purported principal manifesting that he consents to be a party to the transaction, or by conduct justifiable only if there is ratification.

(2) Where formalities are requisite for the authorization of an act, its affirmance must be by the same formalities in order to constitute a ratification.

(3) The affirmance can be made by an agent authorized so to do.

§ 94. Failure to Act as Affirmance

An affirmance of an unauthorized transaction can be inferred from a failure to repudiate it.

§ 97. Bringing Suit or Basing Defense as Affirmance

There is affirmance if the purported principal, with knowledge of the facts, in an action in which the third person or the purported agent is an adverse party:

(a) brings suit to enforce promises which were part of the unauthorized transaction or to secure interests which were the fruit of such transaction and to which he would be entitled only if the act had been authorized; or

(b) bases a defense upon the unauthorized transaction as though it were authorized; or

(c) continues to maintain such suit or base such defense.

§ 98. Receipt of Benefits as Affirmance

The receipt by a purported principal, with knowledge of the facts, of something to which he would not be entitled unless an act purported to be done for him were affirmed, and to which he makes no claim except through such act, constitutes an affirmance unless at the time of such receipt he repudiates the act. If he repudiates the act, his receipt of benefits constitutes an affirmance at the election of the other party to the transaction.

§ 99. Retention of Benefits as Affirmance

The retention by a purported principal, with knowledge of the facts and before he has changed his position, of something which he is not entitled to retain unless an act purported to be done on his account is affirmed, and to which he makes no claim except through such act, constitutes an affirmance unless at the time of such retention he repudiates the act. Even if he repudiates the act, his retention constitutes an affirmance at the election of the other party to the transaction.

TOPIC 4. LIABILITIES**§ 100. Effect of Ratification; In General**

[T]he liabilities resulting from ratification are the same as those resulting from authorization if, between the time when the original act was performed and when it was affirmed, there has been no change in the capacity of the principal or third person or in the legality of authorizing or performing the original act.

§ 100A. Relation Back in Time and Place

The liabilities of the parties to a ratified act or contract are determined in accordance with the law governing the act or contract at the

time and place it was done or made. Whether the conduct of the purported principal is an affirmance depends upon the law at the time and place when and where the principal consents or acts.

Chapter 5

TERMINATION OF AGENCY POWERS

TOPIC 1. TERMINATION OF AUTHORITY

TITLE B. TERMINATION BY MUTUAL CONSENT, REVOCATION, OR RENUNCIATION

§ 118. Revocation or Renunciation

Authority terminates if the principal or the agent manifests to the other dissent to its continuance.

Comment:

a. Such termination by act of the principal is revocation; by act of the agent, it is renunciation.

b. Power to revoke or renounce. The principal has power to revoke and the agent has power to renounce, although doing so is in violation of a contract between the parties and although the authority is expressed to be irrevocable. A statement in a contract that the authority cannot be terminated by either party is effective only to create liability for its wrongful termination.

Illustrations:

1. In consideration of A's agreement to advertise and give his best energies to the sale of Blackacre, its owner, P, grants to A "a power of attorney, irrevocable for one year" to sell it. A advertises and spends time trying to sell Blackacre. At the end of three months P informs A that he revokes. A's authority is terminated.

2. In consideration of \$1000 and A's promise to endeavor to sell, P grants to A for a period of one year a power of attorney to sell property, with compensation at 25 per cent. of the selling price, the power of attorney ending with this phrase: "Hereby intending and agreeing that this power shall be irrevocable during one year, and that during this period A shall have a power coupled with an interest which shall not be affected by my death or other circumstances." At the end of three months P informs A that he revokes. A's authority is terminated.

Comment:

c. Liabilities. If there is a contract between principal and agent that the authority shall not be revoked or renounced, a party who revokes or renounces, unless privileged by the conduct of the other or by supervening circumstances, is subject to liability to the other. . . .

d. Non-agency powers. A power in the form of an agency authority given for the protection of a person described as an agent, but who is not one, is not an agency authority and cannot be revoked by the power giver; if such a power is held for the benefit of a third person, it can be terminated neither by revocation nor renunciation. See § 139. . . .

TOPIC 5. TERMINATION OF POWERS GIVEN AS SECURITY

§ 138. Definition

A power given as security is a power to affect the legal relations of another, created in the form of an agency authority, but held for the benefit of the power holder or a third person and given to secure the performance of a duty or to protect a title, either legal or equitable, such power being given when the duty or title is created or given for consideration.

Comment:

a. A power given as security arises when a person manifests consent that the one to whom it is given can properly act to create liability against him, or to dispose of some of his interests, or to perfect or otherwise protect a title already in the power holder or in the person for whom he is to act. If the power is given as security for the performance of a duty, it must be supported by consideration, but consideration is not necessary if the power is in aid of and accompanies a transfer of a title to the power holder.

b. Distinguished from authority. A power given as security is one held for the benefit of a person other than the power giver. . . .

§ 139. Termination of Powers Given as Security

(1) Unless otherwise agreed, a power given as security is not terminated by:

- (a) revocation by the creator of the power;
- (b) surrender by the holder of the power, if he holds for the benefit of another;
- (c) the loss of capacity during the lifetime of either the creator of the power or the holder of the power; or

(d) the death of the holder of the power, or, if the power is given as security for a duty which does not terminate at the death of the creator of the power, by his death.

(2) A power given as security is terminated by its surrender by the beneficiary, if of full capacity; or by the happening of events which, by its terms, discharges the obligations secured by it, or which makes its execution illegal or impossible.

Chapter 6

LIABILITY OF PRINCIPAL TO THIRD PERSONS; CONTRACTS AND CONVEYANCES

TOPIC 1. GENERAL PRINCIPLES

§ 140. Liability Based Upon Agency Principles

The liability of the principal to a third person upon a transaction conducted by an agent, or the transfer of his interests by an agent, may be based upon the fact that:

- (a) the agent was authorized;
- (b) the agent was apparently authorized; or
- (c) the agent had a power arising from the agency relation and not dependent upon authority or apparent authority.

§ 143. Effect of Ratification

Upon ratification with knowledge of the material facts, the principal becomes responsible for contracts and conveyances made for him by one purporting to act on his account as if the transaction had been authorized, if there has been no supervening loss of capacity by the principal or change in the law which would render illegal the authorization or performance of such a transaction.

TOPIC 2. DISCLOSED OR PARTIALLY DISCLOSED PRINCIPAL

TITLE A. CREATION OF LIABILITY BY AUTHORIZED ACTS

§ 144. General Rule

A disclosed or partially disclosed principal is subject to liability upon contracts made by an agent acting within his authority if made in proper form and with the understanding that the principal is a party.

TITLE C. CREATION OF LIABILITY BY UNAUTHORIZED ACTS

§ 159. Apparent Authority

A disclosed or partially disclosed principal is subject to liability upon contracts made by an agent acting within his apparent authority if made in proper form and with the understanding that the apparent principal is a party. The rules as to the liability of a principal for authorized acts, are applicable to unauthorized acts which are apparently authorized.

§ 160. Violation of Secret Instructions

A disclosed or partially disclosed principal authorizing an agent to make a contract, but imposing upon him limitations as to incidental terms intended not to be revealed, is subject to liability upon a contract made in violation of such limitations with a third person who has no notice of them.

§ 161. Unauthorized Acts of General Agent

A general agent for a disclosed or partially disclosed principal subjects his principal to liability for acts done on his account which usually accompany or are incidental to transactions which the agent is authorized to conduct if, although they are forbidden by the principal, the other party reasonably believes that the agent is authorized to do them and has no notice that he is not so authorized.

§ 161A. Unauthorized Acts of Special Agents

A special agent for a disclosed or partly disclosed principal has no power to bind his principal by contracts or conveyances which he is not authorized or apparently authorized to make, unless the principal is estopped, or unless:

(a) the agent's only departure from his authority or apparent authority is

- i. in naming or disclosing the principal, or
- ii. in having an improper motive, or
- iii. in being negligent in determining the facts upon which his authority is based, or
- iv. in making misrepresentations; or

(b) the agent is given possession of goods or commercial documents with authority to deal with them.

**TITLE D. DEFENSES AND LIABILITY AFFECTED
BY SUBSEQUENT EVENTS**

§ 179. Rights Between Third Person and Agent

Unless otherwise agreed, the liability of a disclosed or partially disclosed principal is not affected by any rights or liabilities existing between the other party and the agent at the time the contract is made.

§ 180. Defenses of Principal—In General

A disclosed or partially disclosed principal is entitled to all defenses arising out of a transaction between his agent and a third person. He is not entitled to defenses which are personal to the agent.

TOPIC 3. UNDISCLOSED PRINCIPAL

TITLE A. CREATION OF LIABILITY BY AUTHORIZED ACTS

§ 186. General Rule

An undisclosed principal is bound by contracts and conveyances made on his account by an agent acting within his authority, except that the principal is not bound by a contract which is under seal or which is negotiable, or upon a contract which excludes him.

TITLE B. CREATION OF LIABILITY BY UNAUTHORIZED ACTS

§ 194. Acts of General Agents

A general agent for an undisclosed principal authorized to conduct transactions subjects his principal to liability for acts done on his account, if usual or necessary in such transactions, although forbidden by the principal to do them.

§ 195. Acts of Manager Appearing to Be Owner

An undisclosed principal who entrusts an agent with the management of his business is subject to liability to third persons with whom the agent enters into transactions usual in such businesses and on the principal's account, although contrary to the directions of the principal.

§ 195A. Unauthorized Acts of Special Agents

A special agent for an undisclosed principal has no power to bind his principal by contracts or conveyances which he is not authorized to make unless:

- (a) the agent's only departure from his authority is
 - (i) in not disclosing his principal, or
 - (ii) in having an improper motive, or

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RESTATEMENT (SECOND) OF AGENCY

(iii) in being negligent in determining the facts upon which his authority is based, or

(iv) in making misrepresentations; or

(b) the agent is given possession of goods or commercial documents with authority to deal with them.

**TITLE C. DEFENSES AND LIABILITY AFFECTED
BY SUBSEQUENT EVENTS**

§ 203. Defenses of Undisclosed Principal—In General

An undisclosed principal is entitled to all defenses arising out of a transaction with an agent, but not defenses which are personal to the agent.

§ 205. Power of Agent to Modify Contract Before Disclosure of Principal

Until the existence of the principal is disclosed, an agent who has made a contract for an undisclosed principal has power to cancel the contract and to modify it with binding effect upon the principal if the contract or conveyance, as modified, is authorized or is within the inherent power of the agent to make.

Chapter 7

**LIABILITY OF PRINCIPAL TO
THIRD PERSON; TORTS**

**TOPIC 2. LIABILITY FOR AUTHORIZED CONDUCT
OR CONDUCT INCIDENTAL THERETO**

TITLE B. TORTS OF SERVANTS

§ 219. When Master is Liable for Torts of His Servants

(1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.

(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:

(a) the master intended the conduct or the consequences, or

(b) the master was negligent or reckless, or

(c) the conduct violated a non-delegable duty of the master, or

(d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

WHO IS A SERVANT

§ 220. Definition of Servant

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

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

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

SCOPE OF EMPLOYMENT

§ 228. General Statement

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

(a) it is of the kind he is employed to perform;

(b) it occurs substantially within the authorized time and space limits;

(c) it is actuated, at least in part, by a purpose to serve the master, and

(d) if force is intentionally used by the servant against another, the use of force is not unexpected by the master.

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

§ 229. Kind of Conduct Within Scope of Employment

(1) To be within the scope of the employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized.

(2) In determining whether or not the conduct, although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment, the following matters of fact are to be considered:

(a) whether or not the act is one commonly done by such servants;

(b) the time, place and purpose of the act;

(c) the previous relations between the master and the servant;

(d) the extent to which the business of the master is apportioned between different servants;

(e) whether or not the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant;

(f) whether or not the master has reason to expect that such an act will be done;

(g) the similarity in quality of the act done to the act authorized;

(h) whether or not the instrumentality by which the harm is done has been furnished by the master to the servant;

(i) the extent of departure from the normal method of accomplishing an authorized result; and

(j) whether or not the act is seriously criminal.

§ 230. Forbidden Acts

An act, although forbidden, or done in a forbidden manner, may be within the scope of employment.

§ 231. Criminal or Tortious Acts

An act may be within the scope of employment although consciously criminal or tortious.

TITLE C. AGENTS' TORTS—LIABILITY NOT DEPENDENT
UPON RELATION OF MASTER AND SERVANT
IN GENERAL

§ 250. Non-liability for Physical Harm by Non-servant Agents

A principal is not liable for physical harm caused by the negligent physical conduct of a non-servant agent during the performance of the principal's business, if he neither intended nor authorized the result nor the manner of performance, unless he was under a duty to have the act performed with due care.

Chapter 10

LIABILITY OF THIRD PERSON TO PRINCIPAL

TOPIC 1. CONTRACTS; DISCLOSED AGENCY

§ 292. General Rule

The other party to a contract made by an agent for a disclosed or partially disclosed principal, acting within his authority, apparent authority or other agency power, is liable to the principal as if he had contracted directly with the principal, unless the principal is excluded as a party by the form or terms of the contract.

§ 298. Defenses of Other Party

The other party to a contract made by an agent on behalf of a disclosed or partially disclosed principal has all the defenses which he would have had against the principal if the principal had made the contract under the same circumstances.

§ 299. Rights Between Other Party and Agent

Unless otherwise agreed, the liability of the other party to a disclosed or partially disclosed principal upon a contract made by an agent is not affected by any rights or liabilities then existing between the other party and the agent.

TOPIC 2. CONTRACTS; UNDISCLOSED AGENCY

§ 302. General Rule

A person who makes a contract with an agent of an undisclosed principal, intended by the agent to be on account of his principal and within the power of such agent to bind his principal, is liable to the principal as if the principal himself had made the contract with him, unless he is excluded by the form or terms of the contract, unless his existence is fraudulently concealed or unless there is set-off or a similar defense against the agent.

§ 303*RESTATEMENT (SECOND) OF AGENCY***§ 303. Principal Excluded From Transaction**

A person with whom an agent makes a contract on account of an undisclosed principal is not liable in an action at law brought upon the contract by such principal:

(a) if the contract is in the form of a sealed or negotiable instrument; or

(b) if the terms of the contract exclude liability to any undisclosed principal or to the particular principal.

§ 306. Rights Between Other Party and Agent

(1) If the agent has been authorized to conceal the existence of the principal, the liability to an undisclosed principal of a person dealing with the agent within his power to bind the principal is diminished by any claim which such person may have against the agent at the time of making the contract and until the existence of the principal becomes known to him, if he could set off such claim in an action against the agent.

(2) If the agent is authorized only to contract in the principal's name, the other party does not have set-off for a claim due him from the agent unless the agent has been entrusted with the possession of chattels which he disposes of as directed or unless the principal has otherwise misled the third person into extending credit to the agent.

§ 308. Defenses of Other Party

In an action by an undisclosed principal against the other party to a contract, the other party has all the defenses, except those of a purely procedural nature:

(a) which he would have had against the principal if the principal had made the contract under the same circumstances,

(b) which he had against the agent until the discovery of the principal, unless the agent was authorized to contract only in the principal's name.

TOPIC 5. EFFECT OF RATIFICATION**§ 319. General Rule**

Where a purported servant or other agent has entered into a transaction with a third person, its ratification by the purported master or other principal has the same effect upon the liabilities of the third person to the principal as an original authorization.

Chapter 11

LIABILITY OF AGENT TO THIRD PERSONS

TOPIC 1. CONTRACTS AND CONVEYANCES

TITLE A. AGENT A PARTY TO A TRANSACTION CONDUCTED BY HIMSELF

§ 320. Principal Disclosed

Unless otherwise agreed, a person making or purporting to make a contract with another as agent for a disclosed principal does not become a party to the contract.

§ 321. Principal Partially Disclosed

Unless otherwise agreed, a person purporting to make a contract with another for a partially disclosed principal is a party to the contract.

§ 322. Principal Undisclosed

An agent purporting to act upon his own account, but in fact making a contract on account of an undisclosed principal, is a party to the contract.

§ 326. Principal Known to Be Nonexistent or Incompetent

Unless otherwise agreed, a person who, in dealing with another, purports to act as agent for a principal whom both know to be nonexistent or wholly incompetent, becomes a party to such a contract.

Comment . . .

b. Promoters. The classic illustration of the rule stated in this Section is the promoter. When a promoter makes an agreement with another on behalf of a corporation to be formed, the following alternatives may represent the intent of the parties:

(1) They may understand that the other party is making a revocable offer to the nonexistent corporation which will result in a contract if the corporation is formed and accepts the offer prior to withdrawal. This is the normal understanding.

(2) They may understand that the other party is making an irrevocable offer for a limited time. Consideration to support the promise to keep the offer open can be found in an express or limited promise by the promoter to organize the corporation and use his best efforts to cause it to accept the offer.

(3) They may agree to a present contract by which the promoter is bound, but with an agreement that his liability

terminates if the corporation is formed and manifests its willingness to become a party. There can be no ratification by the newly formed corporation, since it was not in existence when the agreement was made. . . .

(4) They may agree to a present contract on which, even though the corporation becomes a party, the promoter remains liable either primarily or as surety for the performance of the corporation's obligation.

Which one of these possible alternatives, or variants thereof, is intended is a matter of interpretation on the facts of the individual case.

TITLE B. AGENT NOT PARTY TO TRANSACTION
CONDUCTED BY HIMSELF

§ 328. **Liability of Authorized Agent for Performance of Contract**

An agent, by making a contract only on behalf of a competent disclosed or partially disclosed principal whom he has power so to bind, does not thereby become liable for its nonperformance.

§ 329. **Agent Who Warrants Authority**

A person who purports to make a contract, conveyance or representation on behalf of another who has full capacity but whom he has no power to bind, thereby becomes subject to liability to the other party thereto upon an implied warranty of authority, unless he has manifested that he does not make such warranty or the other party knows that the agent is not so authorized.

§ 330. **Liability for Misrepresentation of Authority**

A person who tortiously misrepresents to another that he has authority to make a contract, conveyance, or representation on behalf of a principal whom he has no power to bind, is subject to liability to the other in an action of tort for loss caused by reliance upon such misrepresentation.

TITLE C. DEFENSES AND EFFECTS OF SUBSEQUENT EVENTS

§ 333. **Rights Between Other Party and Principal**

Unless otherwise agreed, the liability of an agent upon a contract between a third person and the principal to which the agent is a party is not affected by any rights or liabilities existing between the third person and the principal not arising from the transaction, except that, with the consent of the principal, the agent can set off a claim which the principal would have in an action brought against him.

§ 334. Defenses of Agent—In General

In an action against an agent upon a contract between a third person and the principal to which the agent is a party, the agent has all the defenses which arise out of the transaction itself and also those which he has personally against the third person; defenses which are personal to the principal are not available to the agent.

§ 335. Agent Surety for Principal

In an action brought against an agent upon a contract to which the agent is a party but under which the primary duty of performance rests upon the principal, the agent has the defenses available to a surety.

§ 336. Election by Other Party to Hold Principal; Agency Disclosed

Unless otherwise agreed, the agent of a disclosed or partially disclosed principal who is a party to a contract made by another with such principal is not relieved from liability upon the contract by the determination of the other party to look to the principal alone, nor, unless the agent and the principal are joint contractors, by the fact that the other gets a judgment against the principal. He is relieved from liability to the extent that he is prejudiced thereby if he changes his position in justifiable reliance upon a manifestation of the other that he will look solely to the principal for performance.

§ 337. Election by Other Party to Hold Principal; Agency Undisclosed

An agent who has made a contract on behalf of an undisclosed principal is not relieved from liability by the determination of the other party thereto to look to the principal alone for the performance of the contract. He is discharged from liability if the other obtains a judgment against the principal, or, to the extent that he is prejudiced thereby, if he changes his position in justifiable reliance upon the other's manifestation that he will look solely to the principal for payment.

Chapter 13

**DUTIES AND LIABILITIES OF
AGENT TO PRINCIPAL**

TOPIC 1. DUTIES

TITLE B. DUTIES OF SERVICE AND OBEDIENCE

§ 377. Contractual Duties

A person who makes a contract with another to perform services as an agent for him is subject to a duty to act in accordance with his promise.

§ 379. Duty of Care and Skill

(1) Unless otherwise agreed, a paid agent is subject to a duty to the principal to act with standard care and with the skill which is standard in the locality for the kind of work which he is employed to perform and, in addition, to exercise any special skill that he has.

(2) Unless otherwise agreed, a gratuitous agent is under a duty to the principal to act with the care and skill which is required of persons not agents performing similar gratuitous undertakings for others.

TITLE C. DUTIES OF LOYALTY

§ 387. General Principle

Unless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency.

§ 388. Duty to Account for Profits Arising Out of Employment

Unless otherwise agreed, an agent who makes a profit in connection with transactions conducted by him on behalf of the principal is under a duty to give such profit to the principal.

Comment:

a. Ordinarily, the agent's primary function is to make profits for the principal, and his duty to account includes accounting for any unexpected and incidental accretions whether or not received in violation of duty. Thus, an agent who, without the knowledge of the principal, receives something in connection with, or because of, a transaction conducted for the principal, has a duty to pay this to the principal even though otherwise he has acted with perfect fairness to the principal and violates no duty of loyalty in receiving the amount. . . .

Illustrations:

1. A, a real estate broker acting for P, the seller, in order to assure himself of his commission, makes a contract with T, a purchaser, by which, if T cancels the contract with P, as he is given the right to do, T is to pay A the amount of A's commission. T repudiates the contract with P but pays A. A holds his commission as a constructive trustee for P.

2. P authorizes A to sell land held in A's name for a fixed sum. A makes a contract to sell the land to T, who makes a deposit which is to be forfeited if the transaction is not carried out. T forfeits the amount. A sells the land to another person at the price fixed by P. A is under a duty to account to P for the amount received from T. . . .

Comment:

b. Gratuities to agent. An agent can properly retain gratuities received on account of the principal's business if, because of custom or otherwise, an agreement to this effect is found. Except in such a case, the receipt and retention of a gratuity by an agent from a party with interests adverse to those of the principal is evidence that the agent is committing a breach of duty to the principal by not acting in his interests.

Illustrations:

4. A, the purchasing agent for the P railroad, purchases honestly and for a fair price fifty trucks from T, who is going out of business. In gratitude for A's favorable action and without ulterior motive or agreement, T makes A a gift of a car. A holds the automobile as a constructive trustee for P, although A is not otherwise liable to P. . . .

Comment:

c. Use of confidential information. An agent who acquires confidential information in the course of his employment or in violation of his duties has a duty not to use it to the disadvantage of the principal. . . . He also has a duty to account for any profits made by the use of such information, although this does not harm the principal. Thus, where a corporation has decided to operate an enterprise at a place where land values will be increased because of such operation, a corporate officer who takes advantage of his special knowledge to buy land in the vicinity is accountable for the profits he makes, even though such purchases have no adverse effect upon the enterprise. So, if he has "inside" information that the corporation is about to purchase or sell securities, or to declare or to pass a dividend, profits made by him in stock transactions undertaken because of his knowledge are held in constructive trust for the principal. He is also liable for profits made by selling confidential information to third persons, even though the principal is not adversely affected.

§ 389. Acting as Adverse Party Without Principal's Consent

Unless otherwise agreed, an agent is subject to a duty not to deal with his principal as an adverse party in a transaction connected with his agency without the principal's knowledge.

Comment:

a. The rule stated in this Section applies to transactions which the agent conducts for his principal, dealing therein with himself, and also to transactions in which the agent deals with his principal, who acts in person or through another agent; it is applicable to

transactions in which the agent is acting entirely for himself and to those in which he has such a substantial interest that it reasonably might affect his judgment. Thus, an agent who is appointed to sell or to give advice concerning sales violates his duty if, without the principal's knowledge, he sells to himself or purchases from the principal through the medium of a "straw," or induces his principal to sell to a corporation in which he has a large concealed interest....

c. Where no harm to principal. The rule stated in this Section is not based upon the existence of harm to the principal in the particular case. It exists to prevent a conflict of opposing interests in the minds of agents whose duty it is to act solely for the benefit of their principals. The rule applies, therefore, even though the transaction between the principal and the agent is beneficial to the principal. Thus, in the absence of a known custom or an agreement, an agent employed to sell at the market price cannot, without disclosure to the principal, properly buy the goods on his own account, even though he pays a higher price for them than the principal could obtain elsewhere. The rule applies also although the transaction is a public sale and the price received is above that stated by the principal to be adequate. Likewise, ordinarily, an agent appointed to buy or to sell at a fixed price violates his duty to the principal if, without the principal's acquiescence, he buys from or sells the specified article to himself at the specified price, even though it is impossible to obtain more or as much. However, if a broker is employed to sell property with an agreement that he is to retain all above a specified price, it may be inferred that the transaction gives him an option to purchase at that price without notice to the principal that he is acting for himself....

§ 390. Acting as Adverse Party With Principal's Consent

An agent who, to the knowledge of the principal, acts on his own account in a transaction in which he is employed has a duty to deal fairly with the principal and to disclose to him all facts which the agent knows or should know would reasonably affect the principal's judgment, unless the principal has manifested that he knows such facts or that he does not care to know them.

Comment:

a. Facts to be disclosed. One employed as agent violates no duty to the principal by acting for his own benefit if he makes a full disclosure of the facts to an acquiescent principal and takes no unfair advantage of him. Before dealing with the principal on his own account, however, an agent has a duty, not only to make no misstatements of fact, but also to disclose to the principal all relevant facts fully and completely. A fact is relevant if it is one

which the agent should realize would be likely to affect the judgment of the principal in giving his consent to the agent to enter into the particular transaction on the specified terms. Hence, the disclosure must include not only the fact that the agent is acting on his own account (see § 389), but also all other facts which he should realize have or are likely to have a bearing upon the desirability of the transaction from the viewpoint of the principal. This includes, in the case of sales to him by the principal, not only the price which can be obtained, but also all facts affecting the desirability of sale, such as the likelihood of a higher price being obtained later, the possibilities of dealing with the property in another way, and all other matters which a disinterested and skillful agent advising the principal would think reasonably relevant.

If the principal has limited business experience, an agent cannot properly fail to give such information merely because the principal says he does not care for it; the agent's duty of fair dealing is satisfied only if he reasonably believes that the principal understands the implications of the transaction.

Illustrations:

1. P employs A to sell Blackacre for \$1,000. A, having sought a customer, is unable to find one and reports such fact to P. He then states that he is willing to pay \$1,000, telling P truthfully that he believes that a better sale might be made later in view of the chance that the locality will develop. A pays P \$1,000. A month later, A sells the land for \$1,500. In the absence of other facts, A has violated no duty to P.

2. P employs A to purchase a suitable manufacturing site for him. A owns one which is suitable and sells it to P at the fair price of \$25,000, telling P all relevant facts except that, a short time previously, he purchased the land for \$15,000. The transaction can be rescinded by P....

Comment:

c. *Fairness.* The agent must not take advantage of his position to persuade the principal into making a hard or improvident bargain. If the agent is one upon whom the principal naturally would rely for advice, the fact that the agent discloses that he is acting as an adverse party does not relieve him from the duty of giving the principal impartial advice based upon a carefully formed judgment as to the principal's interests. If he cannot or does not wish to do so, he has a duty to see that the principal secures the advice of a competent and disinterested third person. An agent who is in a close confidential relation to the principal, such as a family attorney, has the burden of proving that a substantial gift to him was not the result of undue influence. Even though an agent

employed to sell is not in such a position, payment of less than the reasonable market value for property he buys from the principal is evidence that the bargain was unfair. If the principal is not in a dependent position, however, and the agent fully performs his duties of disclosure, a transaction of purchase and sale between them is not voidable merely because the principal receives an inadequate price or pays too great a price.

Illustrations:

4. P, a young physician with some inherited wealth and no business experience, places his property in charge of A to manage. Desiring a particular piece of land which represents a large share of P's assets, A waits until there is a slump in the price of land and, believing correctly that the slump is only temporary, suggests to P that it be sold, offering as an incentive that P's income from his profession will increase and that, although the price to be obtained is low, P can well afford to get more enjoyment from the proceeds now than from a larger amount later. P thereupon agrees to sell to A at a price which is as much as could be obtained at that time for the property. It may be found that A violated his duty of dealing fairly with P.

5. Same facts as in Illustration 4, except that A provides P with an independent experienced adviser, who gives disinterested advice, setting out the possibilities of accretion in values. It may be found that A has satisfied his duty of loyalty. . . .

e. Agreements for compensation. A person is not ordinarily subject to a fiduciary duty in making terms as to compensation with a prospective principal. . . .

§ 391. Acting for Adverse Party Without Principal's Consent

Unless otherwise agreed, an agent is subject to a duty to his principal not to act on behalf of an adverse party in a transaction connected with his agency without the principal's knowledge.

§ 392. Acting for Adverse Party With Principal's Consent

An agent who, to the knowledge of two principals, acts for both of them in a transaction between them, has a duty to act with fairness to each and to disclose to each all facts which he knows or should know would reasonably affect the judgment of each in permitting such dual agency, except as to a principal who has manifested that he knows such facts or does not care to know them.

§ 393. Competition as to Subject Matter of Agency

Unless otherwise agreed, an agent is subject to a duty not to compete with the principal concerning the subject matter of his agency.

§ 394. Acting for One With Conflicting Interests

Unless otherwise agreed, an agent is subject to a duty not to act or to agree to act during the period of his agency for persons whose interests conflict with those of the principal in matters in which the agent is employed.

§ 395. Using or Disclosing Confidential Information

Unless otherwise agreed, an agent is subject to a duty to the principal not to use or to communicate information confidentially given him by the principal or acquired by him during the course of or on account of his agency or in violation of his duties as agent, in competition with or to the injury of the principal, on his own account or on behalf of another, although such information does not relate to the transaction in which he is then employed, unless the information is a matter of general knowledge.

§ 396. Using Confidential Information After Termination of Agency

Unless otherwise agreed, after the termination of the agency, the agent:

(a) has no duty not to compete with the principal;

(b) has a duty to the principal not to use or to disclose to third persons, on his own account or on account of others, in competition with the principal or to his injury, trade secrets, written lists of names, or other similar confidential matters given to him only for the principal's use or acquired by the agent in violation of duty. The agent is entitled to use general information concerning the method of business of the principal and the names of the customers retained in his memory, if not acquired in violation of his duty as agent;

(c) has a duty to account for profits made by the sale or use of trade secrets and other confidential information, whether or not in competition with the principal;

(d) has a duty to the principal not to take advantage of a still subsisting confidential relation created during the prior agency relation.

TOPIC 2. LIABILITIES

§ 401. Liability for Loss Caused

An agent is subject to liability for loss caused to the principal by any breach of duty.

§ 403. Liability for Things Received in Violation of Duty of Loyalty

If an agent receives anything as a result of his violation of a duty of loyalty to the principal, he is subject to a liability to deliver it, its value, or its proceeds, to the principal.

§ 404. Liability for Use of Principal's Assets

An agent who, in violation of duty to his principal, uses for his own purposes or those of a third person assets of the principal's business is subject to liability to the principal for the value of the use. If the use predominates in producing a profit he is subject to liability, at the principal's election, for such profit; he is not, however, liable for profits made by him merely by the use of time which he has contracted to devote to the principal unless he violates his duty not to act adversely or in competition with the principal.

Comment:

a. The rule stated in this Section applies whether or not the agent uses the principal's facilities or other assets in competition with him. It applies irrespective of any harm done to the things used and irrespective of the use which the principal would have made of them.

Illustration:

1. P employs A to take care of the horses which P uses for driving purposes. P does not use them for a month and, during this period, without P's consent, A rents the horses to various persons who benefit the horses by the exercise thereby given them. A is subject to liability to P for the amount which he has received as rental.

Comment:

b. *What are assets of the principal.* The agent is subject to liability not only for the use of tangible things but also for the use of trade secrets, good-will, credit, and other intangible assets of the principal. Thus, an agent is subject to liability if, in selling his own goods, he uses the principal's trade-mark in territory in which the trade-mark is known but in which the principal does not sell and does not intend to sell similar goods.

Although the right to the services of an agent is a business asset of the principal, the agent's liability for profits made by his use of the principal's assets does not include a liability for profits made by him during hours which he should have devoted to the principal's service, unless he has thereby violated a fiduciary duty owed by him to the principal.

Illustration:

2. P employs A to give his full time to P as a bookkeeper. A uses portions of the time which he should have devoted to P's service in keeping the books for another employer, deriving thereby a greater salary than he receives from P. P cannot recover from A the amount of salary which A receives from the other employer.

c. Whether use of principal's assets predominates. Whether or not the use of assets of the principal predominates in producing a profit is a question of fact. Where an agent conducts a business upon the principal's premises, the location and facilities of the principal or the services of the agent may predominate in the creation of profits. If a ship captain uses the ship to carry heavy packages of his own, by selling which he makes a substantial profit, the owner is entitled to it; if the captain carries a box of trinkets for personal sale at ports of call, the ivory he thereby obtains does not necessarily go to the shipowner.

Illustration:

3. A soldier uses his official uniform and position to smuggle forbidden goods into a friendly country and thereby makes large profits. The country by which he is employed is entitled to the profits.

Comment:

d. Other remedies of principal. In addition to the rights which the principal has under the rule stated in this Section, the principal may have a cause of action for breach of contract or for a tort by the agent, or he may be entitled to a decree declaring a constructive trust in the specific proceeds of the use of an asset. These rights may be in the alternative or they may be cumulative, in accordance with the rules stated in Section 407. Thus, if the agent improperly uses the principal's chattels, the principal is entitled to recover their value, plus any damages caused to the business by their use, if the use amounts to a conversion; or he can recover the chattels in specie together with any profit which the agent has made from them, plus any damage to them or to the business caused by their use.

§ 407. Principal's Choice of Remedies

(1) If an agent has received a benefit as a result of violating his duty of loyalty, the principal is entitled to recover from him what he has so received, its value, or its proceeds, and also the amount of damage thereby caused; except that, if the violation consists of the wrongful

disposal of the principal's property, the principal cannot recover its value and also what the agent received in exchange therefor.

(2) A principal who has recovered damages from a third person because of an agent's violation of his duty of loyalty is entitled nevertheless to obtain from the agent any profit which the agent improperly received as a result of the transaction.

Chapter 14

DUTIES AND LIABILITIES OF PRINCIPAL TO AGENT

TOPIC 1. CONTRACTUAL AND RESTITUTIONAL DUTIES AND LIABILITIES

TITLE A. INTERPRETATION OF CONTRACTS AND LIABILITIES THEREUNDER

§ 438. Duty of Indemnity; The Principle

(1) A principal is under a duty to indemnify the agent in accordance with the terms of the agreement with him.

(2) In the absence of terms to the contrary in the agreement of employment, the principal has a duty to indemnify the agent where the agent

(a) makes a payment authorized or made necessary in executing the principal's affairs or, unless he is officious, one beneficial to the principal, or

(b) suffers a loss which, because of their relation, it is fair that the principal should bear.

§ 439. When Duty of Indemnity Exists

Unless otherwise agreed, a principal is subject to a duty to exonerate an agent who is not barred by the illegality of his conduct to indemnify him for:

(a) authorized payments made by the agent on behalf of the principal;

(b) payments upon contracts upon which the agent is authorized to make himself liable, and upon obligations arising from the possession or ownership of things which he is authorized to hold on account of the principal;

(c) payments of damages to third persons which he is required to make on account of the authorized performance of an act which constitutes a tort or a breach of contract;

(d) expenses of defending actions by third persons brought because of the agent's authorized conduct, such actions being unfounded but not brought in bad faith; and

(e) payments resulting in benefit to the principal, made by the agent under such circumstances that it would be inequitable for indemnity not to be made.

§ 440. When No Duty of Indemnity

Unless otherwise agreed, the principal is not subject to a duty to indemnify an agent:

(a) for pecuniary loss or other harm, not of benefit to the principal, arising from the performance of unauthorized acts or resulting solely from the agent's negligence or other fault; or

(b) if the principal has otherwise performed his duties to the agent, for physical harm caused by the performance of authorized acts, for harm suffered as a result of torts, other than the tortious institution of suits, committed upon the agent by third persons because of his employment, or for harm suffered by the refusal of third persons to deal with him; or

(c) if the agent's loss resulted from an enterprise which he knew to be illegal.

§ 442. Period of Employment

Unless otherwise agreed, mutual promises by principal and agent to employ and to serve create obligations to employ and to serve which are terminable upon notice by either party; if neither party terminates the employment, it may terminate by lapse of time or by supervening events.