The Oxford Handbook of Fiduciary Law

Fiduciary Principles in Agency Law

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I. The Elements and Significance of Agency Relationships

This Chapter identifies the fiduciary principles that are integral to agency relationships as defined by the common law and explores their implications. In contrast with relationships in which a fact-specific assessment of a relationship and its circumstances triggers the application of fiduciary duties, agency relationships are categorically treated as fiduciary.[1] For the most part, the Chapter focuses on common law, albeit referring at points to statutes and regulations applicable to specific agency relationships. Beyond the scope of this chapter, comprehensive codifications define and govern some specific relationships;[2] in some contexts regulators articulate fiduciary duties otherwise owed by agents within the scope of the regulation.[3] Likewise, although the common-law definition of agency encompasses employees,[4] employment relationships as such are not the focus of this Chapter.

The Chapter's geographical focus is confined to the United States. Within the broader common-law tradition, agency-law doctrine may differ less across national jurisdictions than is true for other subjects. In the United States, state-by-state variations are muted, especially so for

1. For this distinction, see Andrew S. Gold & Paul B. Miller, Introduction, in Philosophical Foundations of Fiduciary Law 1, 2-3 (Andrew S. Gold & Paul B. Miller eds., 2014). See also Daniel B. Kelly, Fiduciary Principles in Fact-Based Fiduciary Relationships, in this volume.

2. See, e.g., Nina Kohn, Fiduciary Principles in Surrogate Decisionmaking, in this volume.

3. See Arthur B. Laby, Fiduciary Principles in Investment Advice, in this volume.

the fiduciary principles canvassed by this Chapter. In the seven states in which legislation codifies many general doctrines of agency law, outcomes in cases often do not differ from outcomes reached by courts applying the common law.[5] The three successive Restatements of Agency issued by the American Law Institute have been significant forces operating toward doctrinal convergence across states.[6] Relatedly, the Restatements have, for agency law, served as authoritative scholarly resources comparable to authored treatises that dominate in other fields.[7]

When a relationship of common-law agency links two persons, one person's actions can directly carry legal significance for the other. As this Chapter illustrates, agency doctrine is salient in many settings. A "principal" is charged with the legal consequences of the conduct of an "agent" when the agent acts within the scope of authority conferred by the principal or reasonably appears so to act from the perspective of third parties with whom the agent interacts. Agency doctrine defines and imposes formal structure on consensual relationships in which one actor has legally-consequential power to represent the other, encompassing externally-oriented consequences for the principal, the agent, and third parties, as well as internally-oriented rights and duties between principal and agent. An agent functions, not as a substitute for the principal,

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4. Restatement (Third) of Agency § 1.01, cmt c (2006). On employees as fiduciaries, see Aditi Bagchi, Fiduciary Principles in Employment Law, in this volume.

5. The seven states are Alabama, California, Georgia, Louisiana, Montana, North Dakota, and South Dakota. See Ala. Code § 8-2-1 to -9; Cal. Civ. Code §§ 2019 to -22; 2026 to -30; 2295 to 2300; 2304 to –39; 2342 to –45; 2349 to -51; 2355-57; Ga. Code §§ 10-6-1 to –6; 10-6-20 to -39; 10-6-50 to -64; 10-6-80 to -89; 10-6-100 to -102;10-6-120 to -122; La Civ. Code Art. 2985-3032; Mont. Code Ann. §§ 28-10-101 to –105; 28-10-201 to –215; 28-10-301 to – 303; 28-10-401 to -423; 28-10-501 to -503; 28-10-601 to -609; 28-10-701 to -704; 28-10-801 to –802; N.D. Cent. Code §§3-01-01 to –11; 3-02-01 to -16; 3-03-01 to -09; 3-04-01 to -03; 3-05-01 to -02; 3-06-01 to -06; S.D. Codif. Laws ch 59-1 to -9; 59-2-1 to -7; 59-3-1 to -18; 59-4-1 to -2; 59-5-1 to -3; 59-6-1 to -10; 59-7-1 to -8; 59-8-1 to -2; 59-9-1 to -8.

6. Restatement of Agency (1933); Restatement (Second) of Agency (1958); Restatement (Third) of Agency (2006).
7. Apart from the Restatements, the last comprehensive treatment of agency law specific to the United States was a two-volume work published in 1914. See Floyd R. Mechem, A Treatise on the Law of Agency (West Pub. Co., 2d ed. 1914).

but as an extension of the principal's legal personality in dealings with third parties and other externally-oriented conduct within the scope of the agency relationship, including knowledge of facts acquired by the agent when material to the agent's duties to the principal.[8] The potentially grave impact for the principal underlies the requisites that define an agency relationship, including its fiduciary character. The requisites for agency relationships also reflect the implications for personal autonomy when one person represents another.

Perhaps moreso than for other canonical fields within fiduciary law, the law's terminology for agency relationships differs from usage elsewhere. In social-science and humanities scholarship, "agency," "agent-principal relationship," and "representation" often diverge from the meaning ascribed by the law.[9] One explanation is that theoretical accounts of agency law should reflect the fact that agency doctrine itself has multiple focal points that incorporate externally-oriented legal consequences stemming from an agent's conduct. Within the law, agency occupies a specific doctrinal category in which agents represent other persons; in economics scholarship, agent-principal relationships capture a wide range of relationships in which one actor's conduct actions may affect another actor's interests in many ways, not necessarily through legally-consequential representation.

1. Requisites for common-law agency

8. Deborah A. DeMott, The Fiduciary Character of Agency and the Interpretation of Instructions in Philosophical Foundations 321, 322 (hereinafter DeMott, Fiduciary Character).

9. For the classic definition in economics, see Michael Jensen & William Meckling, Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure, 3 J. Fin. Econ. 305, 308-309 (1976)("[w]e define an agency relationship as one in which one or more persons (the principals) engage another person (the agent) to perform some service on their behalf which involves delegating some decisionmaking authority to the agent"). In philosophy and humanities scholarship more generally, "agency" is a property ascribed to subject to whom purposes and desires can

As defined by the common law, "[a]gency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act."[10] Both the fiduciary character of the relationship and the principal's control over the agent are essential requisites for an agency relationship. The Supreme Court recognized their constitutive nature in *Hollingsworth v. Perry*, holding that the proponents of a successful ballot initiative to amend the California constitution were not agents of the state or its citizens and thus under the federal Constitution lacked standing to defend the amendment in federal court when state officials declined to do so.[11] Observed a majority of the Court, "the most basic features of an agency relationship are missing here:" the proponents owed no fiduciary duties to California and, in conducting the litigation, were not subject to the state's control or that of its citizens.[12] More generally, the requisite that the principal possess a right or power to control an agent differentiates agency from other fiduciary relationships. Although the nature of the principal's control varies across agency relationships, a principal has power to furnish interim instructions to an agent—and indeed to terminate the agent's authority—albeit in breach of contract.[13] The agent's fiduciary duty to the principal furnishes a benchmark for the

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be attributed. See Charles Taylor, Human Agency and Language: Philosophical Papers I 99 (1985). In philosophical inquiry into the arts, 'representation' implies denotation. Nelson Goodman, Languages of Art 25 (1968).

10. Restatement (Third) of Agency § 1.01.

11. Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

12. Hollingsworth, 133 S Ct at 2666-67. The Court's holding is controversial as a statement of federal standing doctrine. See Fred O. Smith, Jr, Undemocratic Restraint, 70 Vand. L. Rev. 845, 899-900 (2017) (characterizing Hollingsworth as "a remarkable opinion" that constitutionalizes "the question of who can represent the state's interests," disregarding a prior determination by the California Supreme Court that the initiative's proponents had standing to defend its constitutionality).

13. Restatement (Third) of Agency § 1.01, cmt c.

agent's interpretation of instructions received from the principal, linking the fiduciary character of the relationship to the principal's power of control.[14]

Although agency is a consensual relationship, the label that parties assign to their relationship is not determinative. Nonetheless, how the parties refer to a relationship's functional characteristics may be relevant to the legal determination of whether a relationship of agency exists. This determination generally is a mixed question of law and fact.[15] When the parties' agreement explicitly disclaims any fiduciary duties, if the agreement also constructs the essential structure of an agency relationship, the disclaimer cannot oust fiduciary duties.[16] A court considers the overall purpose of the agreement; if it is to enable one party to take legally salient action on behalf of the other and subject to the other's control, disclaimers of agency are ineffectual and do not oust fiduciary duties.[17] Creating a relationship of common-law agency generally does not require compliance with legally-specified formalities, such as the execution of a written instrument or a contract.[18] However, when a principal confers authority on an agent to enter into types of agreements or transactions for which the law requires a writing signed by the party to be charged, a principle of "equal dignity" requires that a writing signed by the principal

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14. DeMott, Fiduciary Character, supra n. 8, at 321.

15. Restatement (Third) of Agency § 1.02.

16. Patriarch Partners Agency Services, LLC v. Zohar CDO 2003-I, Ltd., __ F. Supp. 3d ___ (S.D.N.Y. Apr. 20, 2017) [2017 WL 1535385 at * __]; EBC I v. Goldman, Sachs & Co., 5 N.Y. 3d 11, 20 (2005)(fiduciary duty results from relation between parties and is "not dependent solely upon an agreement or contractual relation between them").

17. Samba Enters., LLC v. iMesh, Inc., 2009 WL 705537 at *7-8 (S.D.N.Y., Mar 19 2009).

18. Restatement (Third) of Agency § 1.01 cmt. d.

evidence the agent's authority.[19]

2. Defining the scope of agency relationships

When an agent deals with a third party, the robust doctrine of apparent authority disallows operative effect to restrictions privately imposed by the principal on the agent's actual authority that contravene manifestations made by the principal to the third party or restrict the agent's authority when the agent has acted consistently with customary industry practice. However, as between themselves, the parties to an agency relationship may define its scope through exclusion, as by specifying domains in which the agent may act free of fiduciary duties to the principal. Separately, the law recognizes the possibility that another type of legal relationship may exist contemporaneously with an agency relationship. For example, as a standard matter, an agent may have a right to assert a lien over the principal's property to secure the principal's payment of agreed-to compensation for the agent's services.[20] Likewise, a securities broker who lends funds to a client via a margin account becomes the client's creditor. If a broker liquidates an under-margined account as permitted by the account agreement, the result may be deleterious to the client and the client may object, but the broker has exercised its rights as the client's creditor, beyond the reach of any agency-law duty owed to the client as the broker's principal.[21]

Sometimes contractual exclusions from the scope of agency relationships minimize the

19. Restatement (Third) of Agency § 3.02.

20. Restatement (Third) of Agency § 8.01, cmt c.

21. For a full discussion, see Deborah A. DeMott, Defining Agency and Its Scope II, in Comparative Contract Law: British and American Perspectives 396, 403 (Larry A. DiMatteo & Martin Hogg, eds. 2016)(hereinafter DeMott, Scope).

scope in which an agent's fiduciary duty has operative effect. In auctions of art objects, the consignor of a work to an auction house becomes a principal in a relationship of agency in which the house acts as the consignor's agent. Commonly delineated in a written consignment agreement, the terms of the parties' relationship are subject to the terms of the house's standard contract with purchasers (the house's conditions of sale, limited warranty, and guarantee). Consignment agreements give the house discretion to consult experts, which the house may exercise over a consignor's explicit objections.[22] Consignment agreements also give the house discretion to rescind contracts when the house determines in good faith it may be subject to liability to a purchaser for breach of its warranty because a catalog description—such as an attribution to a named artist—is inaccurate.[23] In both examples, the auction house as consignee acts pursuant to rights defined by contract that lie outside the scope of its fiduciary duties to the consignor, its principal. These contractually-defined rights may be exercised contrary to the principal's instructions and to its detriment.[24]

The scope of a common-law agency relationship may also be salient in a context governed by statute. The statute's structure and purpose are relevant to whether an agent as defined by the common law should also be treated an "agent" when the statute uses that term. In *Segal v. Genitrix*, an LLC's former president sued two investors who were formerly members of the LLC's board of directors on the premise that they were subject to personal liability for his

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22. Reale v. Sotheby's, 718 NYS 2d 37 (App. Div. 2000).

23. Greenwood v. Koven, 880 F. Supp. 186 (SDNY, 1995). Greenwood holds that the house's exercise of discretion must be motivated by at least a subjectively-held belief that the sale could subject the house to liability.

24. For further discussion of art-auction cases, see DeMott, Scope, supra n. 21, at 404-407.

unpaid wages under the Massachusetts Wage Act.[25] The act imposes liability on "officers or agents having the management" of a company. Neither defendant served the company as an executive officer. One defendant, designated a third party beneficiary in the president's employment agreement, held power to act as the company's agent to enforce the agreement, including its termination; and the evidentiary record supported an inference that he spoke for the other defendant and thus acted as his agent. The court held that the limited scope of these agency relationships did not make defendants "agents having the management of the company" as the Wage Act requires. Although as investors the defendants had leverage over the company's business—in particular over the investment of new funds—such control is not equivalent to the position of an agent charged with managing the company. Establishing that an individual director (or investor) held such a position requires showing that the company's board of directors conferred authority on the individual of the scope required by Wage Act.[26]

3. A state of agency-in-waiting?

An agent's duties to the principal are generally coterminous with the agency relationship, which places pre-agency dealings between an eventual agent and principal on an arms-length footing.[27] But the absence of an agency relationship does not mean that the parties owe each other no duties of any sort. For example, an employee of a brokerage firm may defraud investors who are not formally clients of the firm, acting without either actual or apparent authority to bind the firm and through transactions that are explicitly not conducted through the firm. In the

25. Segal v. Genitrix, 87 N.E.3d 560 (Mass. 2017). The Wage Act is Mass. Gen. L c. 149, § 148.

26. 87 N.E.3d at 576.

27. Restatement (Third) of Agency § 8.01, cmt. c.

brokerage context, venerable authority holds that an agency relationship begins when a client places an order and the broker agrees to execute it.[28] If the firm acted negligently in hiring and supervising the employee—perhaps one whose prior history made foreseeable the exploitation of investors through the vehicle of employment—the firm would be subject to liability via a tort theory.[29]

Pre-agency duties can be conceptualized in three possible ways. First, any pre-agency duties arise from another body of law, as in the bad-broker example. Second, pre-agency duties could require a fact-specific determination that the relationship between the prospective agent and principal involved trust and confidence to a degree that justifies assessing the prospective agent's conduct against fiduciary standards.[30] Third, prospective agency itself (the state of "agency-in-waiting") itself could trigger fiduciary duties, which calls into question whether the trigger operates only when an agency relationship eventually links the parties. The second and third theories would require determining the extent of the agent's duties. In assessing these three possibilities, one might metaphorically recall the choice that confronts a purchaser of a switch to control an electric light: an on-off toggle function, or a dimmer control that enables changes in brightness.

In *Martin v. Heinold Commodities, Inc.*, a class action brought by commodity investors,

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28. Le Marchant v. Moore, 150 N.Y. 209 (1896). For a more recent statement, see In re Enron Corp. Sec., Derivative & "ERISA' Litig., 238 F. Supp. 3d 799, 843 (S.D. Tex. 2017)(broker's fiduciary duties in nondiscretionary account begin when client places order and ends when broker executes it, in contrast to relationship in which broker manages account on a discretionary basis or serves as a financial advisor to client).

29. For a recent example, see Owens v. Stifel Nicholaus & Co., 650 Fed. App'x 764 (11th Cir. 2016). The same theory underlies the liability of a burglar alarm company that hires a known violent felon as a door-to-door salesman when the salesman kidnaps a prospective customer. Underberg v. Southern Alarm, Inc., 643 S.E. 2d 374, 375 (Ga. App. Ct. 2007).

30. See Daniel B. Kelly, Fiduciary Principles in Fact-Based Fiduciary Relationships, in this volume.

the court held that a commodities broker had a fiduciary duty to explain the nature of its commission and fee structures to prospective clients in light of their complexity and the inaccessibility of relevant information from other sources.[31] The court's reasoning spans the second and third theories outlined above, stressing that "where the very creation of the agency relationship involves a special trust and confidence on the part of the principal in the subsequent fair dealing of an agent, the prospective agent may be under a fiduciary duty to disclose the terms of his employment as an agent."[32] Thus, whether a prospective agent owes fiduciary duties—in *Martin* a duty of disclosure concerning commission and fee terms—to a prospective principal turns on a specific reason for informational asymmetry, present when the prospective principal uniquely depends on the prospective agent.

The opaque commission and fee structures in *Martin* do not exhaust the range of potentially problematic conduct that may precede or anticipate an agency relationship. Still within the commodities realm, regulation requires that firms adopt internal prohibitions against "front running" by commodities brokers, that is, practices that prioritize trades in proprietary accounts or accounts in which the broker has an interest ahead of executable customer orders in the same commodity.[33] As discussed more formally below, by front-running a customer order an agent competes with its principal, which contravenes the agent's duty of loyalty unless the principal consents. Front-running can also injure the principal when the agent's prior transaction is sizable enough to move the market price. If the agent profits through the strategy, the agent

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31. 643 N.E.2d 734, 741 (Ill. 1994).

32. Id. at 740.

33. 17 C.F.R. §§ 155.2-.4.

nets more than the commission to which the principal agreed from its association with the agent.

In contrast, suppose a prospective client who has not established a commodity futures trading account requests a quote from a broker in anticipation, for example, of making a large block purchase. As a commodities intermediary, the broker has access to information the prospective client lacks, including real-time market information as well as impending client order flows for cheese futures contracts. Commodities regulation contains no explicit prohibition on "trading ahead" of a prospective client on the basis of a request for a quote, given its reliance on a customer's "executable order" to trigger regulation. However, commodities regulation now includes a prohibition on insider trading (narrower than that applicable to insider trading in securities) that proscribes the use of misappropriated information in breach of a pre-existing duty, which does not require that the information be that of a client or customer.[34] Thus, the reasoning in *Martin* could ground liability when the nature of the request for a quote necessitated that the prospective client repose trust and confidence in the broker, and arguably whether or not the prospective client places an order.

Unlike the broker in *Martin* and brokers who front-run client orders (or employee brokers who front-run their employer's trading plans), a broker who indulges in anticipatory front-running on the basis of requests for quotes assumes the risk of undertaking an illiquid position in a commodity if no orders follow requests for quotes. This fact—inherent in the economics of

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34. Commodities Exchange Act §§ 4b(a) and (C); 7 USC §§ 6b and (c). The Dodd-Frank Act amended the language of section 6 (c) in 2010 to grant the Commodities Futures Trading Commission (CFTC) authority to prohibit the use of manipulative or deceptive devices or contrivances in contravention of CFTC regulations. The amendment imposes no affirmative disclosure obligations except when necessary to prevent or correct a misleading statement. The CFTC brought and settled its first insider trading proceedings in 2015 and 2016, both against traders who front-ran their employers' proprietary trading plans. In re Motazedi, CFTC No. 16-02 (Dec 2, 2015) and In re Ruggles, CFTC No. 16-34 (Sept. 29, 2016).

front-running—may undercut the likelihood of showing that a prospective client, in requesting a quote, reposed a sufficient degree of trust and confidence in the broker. More generally, duties in the context of pre-agency dealings likely do not arise in bright-line fashion and are triggered by circumstances that function more like dimmer switches than toggles.

II. An Agent's Duties to the Principal

Contemporary accounts of agency doctrine differentiate among an agent's duties to the principal, distinguishing duties of loyalty from duties of performance.[35] Some of an agent's duties of performance are distinctive to agency; older accounts termed this category "duties of service and obedience."[36] Several discrete duties within this category facilitate and support an agent's loyalty to the principal. A further dimension of agency doctrine defines the category of subagency, which applies to relationships in which an agent appoints a person to perform functions that the agent has consented to perform on behalf of the agent's principal and for whose conduct the appointing agent is responsible to the principal.[37] A subagent is bound by the duties the appointing agent owes to the principal; the subagent also owes fiduciary duties to the appointing agent.[38] Thus, in the brokerage examples above, individual actors who execute trades and perform other agency functions on behalf of firm clients are subagents of the brokerage firm, and the firm itself is the client's agent.[39] Within organizations that furnish agency services—like

35. Restatement (Third) of Agency §§ 8.02-8.05 (duties of loyalty); §§ 8.07-8.12.

36. Restatement (Second) of Agency ch. 13, tit. B (§§ 377-386).

37. Restatement (Third) of Agency § 3.15(1).

38. Restatement (Third) of Agency § 3.15 cmt. d.

39. Restatement (Third) of Agency § 3.15 cmt b. Coagents, in contrast, share one common principal. *Id.*

brokerage firms—the principal has opportunities, often coupled with duties imposed by regulation, to institute mechanisms that further compliance with duties owed by its personnel to clients as principals.

1. Duties of loyalty

An agent owes the principal four distinct duties of loyalty. Uniting all is an overarching fiduciary principle: the agent's "duty to act loyally for the principal's benefit in all matters connected with the agency relationship."[40] These duties apply regardless of whether an agent has access to property of the principal and whether an agent's functions require the exercise of discretion. As discussed below, a principal may consent to conduct that would otherwise breach a duty of loyalty, but the principal's consent does not relieve the agent of all duties, in particular duties to deal with the principal fairly and in good faith.

First among these well-established duties, an agent has a duty not to acquire a "material benefit" from a third party through the agent's use of the agent's position, including in connection with transactions effected on the principal's behalf or other actions taken on the principal's behalf.[41] Thus, an agent who takes a bribe from a third party in connection with a transaction conducted on the principal's behalf breaches the agent's duty of loyalty. The agent is subject to liability although the principal cannot demonstrate harm and although the agent did not believe the principal would be harmed.[42] Although most "material benefits" are, like monetary

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40. Restatement (Third) of Agency § 8.01.

41. Restatement (Third) of Agency § 8.02.

42. For a recent example, see Samba Enters., LLC v. iMesh, Inc., 2009 WL 705537 (S.D.N.Y. Mar. 19, 2009), aff'd, 390 Fed. App'x 55 (2d Cir. 2010)(firm, characterized by court as serving as an agent, engaged to find suitable

bribes, direct and pecuniary in nature, the duty also encompasses subtler benefits, such as a corporate officer's receipt of the opportunity to purchase IPO shares from the IPO's underwriter as a token of gratitude and in anticipation of business relationships with the corporation in the future.[43]

Second, an agent has a duty not to self-deal with the principal, that is, "not to deal with the principal as or on behalf of an adverse party in a transaction connected with the agency relationship."[44] So to deal places the agent's (or the third party's) interests in irreconcilable tension with the principal's interests and undercuts the consensual quality of the agent's representation of the principal. If self-dealing is customary for agents in a particular industry, but the principal is unaware of the custom, by retaining an agent in the industry the principal has not consented to the self-dealing custom.[45] Dual agency—representing an additional principal in conducting a transaction between them—breaches this duty. Some cases exclude "ministerial acts" from the prohibition on dual agency, defining such acts as those involving no exercise of judgment, discretion, or skill on behalf of the additional principal.[46]

Third, an agent has a duty throughout the duration of an agency relationship to refrain from competing with the principal and from taking action on behalf of or otherwise assisting the

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business partner for client; firm entered into undisclosed side agreement with company to which it referred client, receiving a fee from the identified partner for referring it to the client).

43. In re eBay, Inc. S'holders Litig., 2004 WL 253521 (Del. Ch. Feb. 11, 2004).

44. Restatement (Third) of Agency § 8.03.

45. Restatement (Third) of Agency § 8.03, cmt. b.

46. Bernstein v. Centaur Ins. Co., 644 F. Supp. 1361, 1370 (S.D.N.Y. 1986); Olsen v. Vail Assocs Real Estate, Inc., 935 P2d 975, 980-981 (Colo. 1997).

principal's competitors.[47] An agent-competitor acts adversely to the principal, albeit without self-dealing, breaching a duty of loyalty even when the principal cannot demonstrate harm. Competition by agents is often facilitated—and competitive injury worsened—by the agent's access to and use of the principal's confidential information.[48] Unless the agent has agreed otherwise, this duty terminates with the agency relationship.

Fourth, an agent has a duty not to use the principal's property for the agent's own purposes or those of a third party, nor may the agent use or communicate confidential information of the principal for the agent's own purposes or those of a third party.[49] Unlike the duty to refrain from competition with the principal, duties concerning the principal's property and confidential information endure after the agency relationship terminates.[50] A subagent, like the appointing agent, owes the principal a duty of confidentiality, even when the subagent has not executed a confidentiality agreement. In *Veleron Holding, B.V. v. Morgan Stanley*, the defendant investment bank served as a lender's disposal agent for stock that the plaintiff had pledged as collateral for a loan to buy the stock.[51] The plaintiff alleged that the defendant breached its fiduciary duty by selling the stock short when in possession of nonpublic information that the lender was likely to issue a margin call that the shareholder would be unable to meet. The court held that under the circumstances the investment bank as "disposal agent"

47. Restatement (Third) of Agency § 8.04.

48. For a recent non-US example, see Lifeplan Australia Friendly Soc. Ltd. v. Ancient Order of Foresters [2017] FCAFC 74. In Lifeplan, two senior employees of the plaintiff acted on behalf of the defendant, while still employed by the plaintiff, to tie down business for the defendant and then, armed with the plaintiff's customer lists, resigned and became employees of the defendant.

49. Restatement (Third) of Agency § 8.05.

50. Restatement (Third) of Agency § 8.05, cmts b and c.

51. 117 F. Supp. 3d 404 (S.D.N.Y. 2015).

could owe a fiduciary duty to the lender as its principal. Alternatively, the lender owed the shareholder a duty of confidentiality that could bind the disposal agent as the lender's subagent notwithstanding the absence of any confidentiality agreement between the lender and the disposal agent.[52]

The general overarching principle of loyalty itself can impose fiduciary constraints on an agent, as illustrated by issues that arise when an agent abandons its functions on behalf of a principal. The consensual nature of an agency relationship means that either agent or principal may terminate the relationship at any time through a manifestation made to the other, a manifestation of renunciation if from the agent or of revocation if from the principal.[53] The agent's power to renounce can enable a now-former agent to engage in conduct that would otherwise breach the agent's fiduciary duties to the principal. As the discussion of "agents-in-waiting" demonstrates, determining just when an actor becomes subject to an agent's fiduciary duties may sometimes require closer scrutiny. Likewise, the end of an agency relationship may not terminate all of agency's consequences.[54] Consider the implications when an agent makes no manifestation of renunciation to the principal but simply ceases to perform. A fundamental consequence of agency—examined more fully below—charges the principal with knowledge of facts learned by the agent that are material to the agent's duties. In some contexts, inaction itself carries legal consequences, including the waiver of rights that must be exercised in a timely

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52. 117 F. Supp. 3d at 455 (a "woeful omission," according to the court but one "of no moment").

53. Restatement (Third) of Agency § 3.10(1).

54. Among these consequences is the prospect that the agent may continue to deal with third parties purportedly on behalf of the principal. An agent's apparent (as opposed to actual) authority terminates only when it is no longer reasonable for the third party with whom the agent deals to believe that the agent continues to act with actual authority. Restatement (Third) of Agency § 3.11(2).

fashion. Abandoning a principal without notice is inconsistent with the overarching duty of loyalty to which an agent is subject. Inaction—the failure to notify the principal—if a voluntary act on the agent's part breaches the agent's duty of loyalty. Abandonment severs the representative relationship between agent and principal.[55]

2. Duties of performance

Although fiduciaries' duties are conventionally categorized into compartments of "loyalty" and "care," the taxonomy of agency duties is complex and reticulated. In particular, an agent owes a suite of duties of care, competence, and diligence. Additionally, an agent is subject to a distinctive duty to comply with lawful instructions received from the principal, to be sure a duty of performance but one inseparably linked to the agent's overarching duty to act loyally on behalf of the principal as the principal's representative. Further facilitating the principal's exercise of control, an agent owes another distinctive duty, which is to use reasonable effort to provide the principal with facts known to the agent that are material to the agent's duties.

Less distinctively, an agent has a duty to act consistently with the express and implied terms of any contract with the principal.[56] These terms may incorporate customs and usages of a particular trade. Contracts between brokers and the investors in commodities discussed above may impliedly incorporate the rules and customs of exchanges on which the brokers execute trades on behalf of customers. Likewise, and not distinctive to agency doctrine, an agent owes

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55. For this point in the attorney-client context, see Maples v. Thomas, 565 US 266, 283 (2012)(lawyers who abandoned their client, a death-row inmate, ceased to represent him with consequence that now-former client not charged with consequences of lawyers' failure to file timely appeal).

56. Restatement (Third) of Agency § 8.07.

duties to the principal concerning the principal's property, including a duty not to intermingle it with anyone else's property, and a duty to keep and render accounts to the principal of money or other property received or paid out of the principal's account.[57]

An agent's duty is "to act with the care, competence, and diligence normally exercised by agents in similar circumstances."[58] That an agent's duty encompasses competence or skill links the agent's breach of duty to the jurisprudence of professional malpractice. An agent's possession of special skills or knowledge, above the norm for similarly-situated agents, is relevant to whether the agent acted with due care and diligence under the circumstances.[59] Thus, the diligence component of the duty, like care and competence, has operative consequences. Agents who claim to possess special skills or to be especially knowledgeable are held to the professed standard in determining whether the agent's conduct breached the duty.[60] These duties may overlap with an agent's duties of performance articulated in or created by a contract with the principal. When an agent owes duties of performance arising out of the principal-agent relationship that are independent of or distinct from the agent's contract with the principal, the doctrine known as the economic loss rule does not bar recovery in tort for economic losses suffered by the principal as a consequence of the agent's breach of duty.[61]

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57. Restatement (Third) of Agency § 8.12. This duty also proscribes dealing with the principal's property in a fashion so that it appears to be the agent's property. *Id* § 8.12 (1).

58. Restatement (Third) of Agency § 8.08.

59. Restatement (Third) of Agency § 8.08; Restatement (Third) of Torts: Liability for Physical and Emotional Harm §12.

60. Restatement (Third) of Agency § 8.08.

61. For recent applications of the independent-duty exception to the economic loss rule, see Lawyers Title Ins. Co. v. Rex Title Co., 282 F.3d 292, 294 (4th Cir. 2002)(applying Maryland law)(by issuing title insurance policy without obtaining release of lien on title, agent breached independent duty of care, apart from terms of written agency agreement); U.S. Bank Nat'l Assoc. v. San Antonio Cash Network, 252 F. Supp. 3d 714 (D. Minn. 2017)(as bank's

An agent's distinctive duties of performance include a duty to act only within the scope of the agent's actual authority. If an agent exceeds the bounds of authority, the agent is subject to liability to indemnify the principal for any loss,[62] often because the agent acted with apparent authority to bind the principal to a transaction with a third party or the principal incurred litigation costs in a successful defense against a third-party claim. Relatedly, an agent has a duty, mentioned above, to comply with lawful instructions received from the principal. This duty is a distinguishing feature of agency law.[63] It is integral to the principal's power of control as well as to the agent's overarching duty of loyalty to the principal, which furnishes the benchmark against which the agent should interpret and act upon instructions received from the principal.

The duty to comply with instructions has bite as applied to corporate officers who, unlike directors, are agents of the corporation.[64] In *Amalgamated Bank v. Yahoo! Inc.*, the court held that a corporation's CEO may have breached her fiduciary duty to the corporation by failing to comply with directives received from the board of directors in connection with hiring a second-

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agent hired to transport bank's cash to ATMs, carrier as bank's agent owed fiduciary duties, including duty to disclose all facts relevant to principal's rights, distinct from duties created by contract); Cook v. John Hancock Life Ins. Co. (U.S.A.), 2015 WL 178108 *15 (W.D. Va. Jan. 14, 2015)(fiduciary duty independent of contract can arise when financial advisor, acting as agent for client, holds property for client). See also St. Malachy Roman Catholic Congregation of Geneseo v. Ingram, 841 N.W.2d 338, (Iowa 2013)(securities registered representative breached duty of care owed to client as representative's principal in connection with estate-planning work; economic loss rule does not bar putative beneficiary's claim against representative).

62. Restatement (Third) of Agency § 8.09 cmt. b.

63. See Megan Wischmeier Shaner, Restoring the Balance of Power in Corporate Management: Enforcing Officers' Duty of Obedience, 66 Bus. Law. 27, 44-45 (2010)(characterizing duty as "peculiar to agency law").

64. As agents, officers owe duties of care, competence, and diligence, differentiating them from corporate directors, who have a robust statutory right to rely on officers. An officer's liability for conduct falling short of that normally exercised by agents in similar circumstances should fall outside the protective ambit of the business judgment rule, which insulates directors from liability for conduct taken in good faith that does not breach a duty of loyalty. For the argument, see Deborah A. DeMott, Corporate Officers as Agents, (2017) 74 Wash.& Lee L. Rev. 847 (2017).

in-command.[65] Additionally, by withholding from the board material information about changes in the second-in-command's compensation package, the CEO may have breached another duty owed by agents, which is providing the principal (here the board of directors, to whom the CEO reported) with facts known to the agent and material to the agent's duties to the principal. Facts for this purpose, as in *Amalgamated Bank*, include those relevant to the agent's own actions or inaction when material to the agent's duties. The agent's duty to provide information to the principal has limits: the duty applies only to facts that the agent could furnish to the principal without violating a superior duty owed to another person.[66] Additionally, the duty is subject to manifestations made by the principal, such as the wish not to receive information of a particular type. However, in the corporate context illustrated by *Amalgamated Bank*, the fiduciary duties that directors themselves owe to the corporation impose limits on directors' ability to insulate themselves from receiving facts known to senior officers.[67]

III. Mutable or Immutable Duties

Agency doctrine melds flexibility in defining an agent's duties with immutable elements. As discussed above, the fiduciary character of the agent's relationship to the principal is constitutive of agency, as the Supreme Court held in *Hollingsworth v. Perry.* To be sure, the parties to a relationship are free to structure it so that neither owes a fiduciary duty to the other, but the result would not constitute common-law agency. Additionally, either agent or principal has the power to terminate the relationship at any time even if doing so constitutes a breach of

65.132 A3d 752, 780 (Del Ch, 2016).

66. Restatement (Third) of Agency § 8.11(2).

67. On the corporate context, see Julian Velasco, Fiduciary Principles in Corporate Law, in this volume.

contract. Agency presupposes a condition of ongoing consent from both parties to be linked as agent and principal. Like a principal's ongoing power to give interim binding instructions to an agent albeit in breach of an earlier contract with the agent, the parties each have the power on an ongoing basis to terminate their relationship.[68] Thus, agency law respects and enforces the expression of parties' time-inconsistent preferences to a degree that other bodies of legal doctrine may not. Overall, the definitional requisites of agency impose constraints on the legal efficacy of advance agreements between principal and agent despite the range of matters that an agreement may address.

1. Duties of performance

An agent's duties of performance may be subject to agreement with the principal. Most importantly, the agent's duty to act with care, competence, and diligence may be defined through an agreement that specifies benchmarks or other measures of the effort to be expected from the agent. An agreement may also raise or lower the standard of performance applicable to the agent and may specify mechanisms for dispute resolution. Such an agreement may be phrased in terms that lack the specificity required for the principal's consent to conduct by the agent that would otherwise breach the agent's duties of loyalty, as explained below.[69] Executive employment agreements are examples of expertly negotiated contracts that establish expectations, measures for performance, rewards, and sanctions. Employment agreements for CEOs, at least in public

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68. This power is subject to contravention by statute. For an industry-specific (and unusual) example, see Md. Com. Law Code § 23-104 (2004), which ousts the application of the common-law rule for the hospitality industry (hotels and retirement communities) when an operating agreement does not permit early termination. Under Md. Com. Law Code § 23-104(b), specific performance is an available remedy.

69. Restatement (Third) of Agency § 8.08 cmt b.

companies, commonly opt out of the common-law (and agency-law) default rule of employment at will by defining the circumstances that will constitute "cause" for termination and giving a now-former CEO greater rights against the corporation if terminated without cause.[70] The corporation, as principal, retains its agency-law power to terminate its relationship with the CEO but through the agreement the parties have priced in advance the corporation's exercise of the power.

In contrast, individualized agreement plays a less evident role in connection with agents' duties to act within the scope of actual authority and to comply with lawful instructions received from the principal. When the agent acts beyond the scope of actual authority as defined at an earlier time, the principal may agree—on a going-forward basis—to expand the scope of authority. Indeed if the principal fails to object to the agent's excesses, the principal's acquiescence may be understood by the agent as an implied expansion of the agent's authority.[71] If the agent's understanding is reasonable under the circumstances, for example in light of prior interactions with the principal, the principal's acquiescence has redefined and expanded the scope of the agent's authority. Looking backward, however, an agent's prior unauthorized act binds the principal—and does not constitute a breach of duty to the principal—only when the principal ratifies it. Ratification requires that the principal know the material facts about the agent's action[72] and in some fashion either manifest assent to the action or otherwise engage in

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70. Stewart J. Schwab & Randall S. Thomas, An Empirical Analysis of CEO Employment Contracts: What Do Top Executives Bargain For?, 63 Wash. & Lee L. Rev. 231 (2006).

71. Restatement (Third) of Agency § 2.02 cmt f.

72. Restatement (Third) of Agency § 4.06.

conduct that justifies a reasonable assumption that the principal has consented.[73] Thus, by definition ratification requires historical knowledge, that is, knowledge of facts concerning actions already taken by the agent. These limits reflect the pervasive significance of the principal's power to control the agent as a constitutive element for an agency relationship. Empowering an agent unilaterally to redefine the scope of the agent's authority or unilaterally to determine to disregard lawful instructions received from the principal is antithetical to the principal's control.

Relatedly, the scope of an agent's authority controls whether the agent may delegate by appointing a subagent to perform functions the agent has consented to perform on behalf of the principal. An agent may appoint a subagent only when the agent has actual authority to do so, or acts with apparent authority, which requires a manifestation by the principal to third parties that the agent has such authority.[74] This limit on delegation stems from the consensual character of an agency relationship and is an additional implication of the principal's power of control, here over increasing the number of actors whose conduct may bind the principal.

2. Duties of loyalty

Agency law treats an agent's disloyal conduct differently from breaches of duties of performance. In particular, the law imposes substantial limits on the effectiveness of advance agreements between agent and principal that redefine duties of loyalty or excuse their breach. Only through consent to disloyal conduct does the principal "waive" the agent's breach or lose

73. Restatement (Third) of Agency § 4.01(2). Ratification is applicable only when the actor in question is an agent or has purported to act as one. See Kristensen v. Credit Payment Servs. Inc., 879 F.3d 1010, __ (9th Cir. 2018).

74. Restatement (Third) of Agency § 3.15(2).

the right to seek remedies against the agent for breach. In this context, consent resembles the formulation in tort law, which requires willingness in fact—or at least apparent willingness in fact—that an act shall occur.[75] Agency law requires specificity for legally operative consent to an agent's conduct that otherwise would breach a duty of loyalty, in particular that the principal know all material facts known to the agent unless the principal has manifested uninterest in knowing them.[76] The principal's consent, if not confined to a specific act or transaction, is legally effective only as applied to acts or transactions of some specified type that could reasonably be expected to occur in ordinary course in the principal's relationship with the agent.[77] In obtaining the principal's consent, the agent has a duty to act in good faith and otherwise deal fairly with the principal.

Apart from transactions of a specified type, agency doctrine defines consent in terms that are closely allied to the doctrine of ratification, discussed above. The requirement that a principal's consent be informed by knowledge of all material facts known to the agent lends consent a retrospective cast comparable to that associated with ratification.

IV. Remedies for Breach of Duty

Following an agent's breach of a fiduciary duty, several distinct routes toward remedies

75. Restatement (Second) of Torts § 10A (defining 'consent' as 'willingness in fact that an act or invasion of an interest shall take place').

76. Restatement (Third) of Agency § 8.06 (1)(a)(ii). For a recent application, see Sacramento EDM, Inc. v. Hynes, 2017 WL 1383289 at * 28 (E.D. Cal, Mar. 18, 2017)(misrepresentation by agent of interest rates and other terms associated with leases in which agent had personal interest vitiated effectiveness of principal's consent to lease transactions).

77. Restatement (Third) of Agency § 8.06 (1)(b).

may be open to the principal.[78] For starters, the self-help response of terminating the relationship with the agent may prove wise, regardless of its legal aftermath. If the principal has a contract with the agent requiring that the agent be given notice of any breaches and an opportunity to cure them prior to termination, the notice-and-cure provision would not encompass breaches that are not curable, which could encompass breaches of duties of loyalty.[79] And the agent's breach of fiduciary duty may furnish a basis on which the principal may avoid a contract with a third party or, for that matter, with the agent.[80]

When an agent's breach of duty causes loss to the principal, the breach subjects the agent to liability to the principal, a long-established principle within tort law that places breaches of fiduciary duty on comparable remedial footing with other wrongs—such as fraud—for loss caused to the principal.[81] Additionally, the long-standing taxonomic placement of breach of fiduciary duty within tort law makes relevant tort principles of contribution among joint tortfeasors.[82] Separately, when through a breach of fiduciary duty an agent realizes a material benefit, the law of restitution and unjust enrichment imposes a duty on the agent to account to the principal, often termed a duty to disgorge gain stemming from the breach of duty.[83]

Overarching these specific remedies is a general principle of agency doctrine, which

78. For remedies more generally, see Samuel L. Bray, Fiduciary Remedies, in this volume.

79. See Larken, Inc. v. Larken Iowa City P'ship, 589 N.W.2d 700, 704 (Iowa 1998).

80. Restatement (Second) of Contracts § 163.

81. Restatement (Second) of Torts § 874 (defining breach of fiduciary duty as a tort).

82. For a recent example, see In re Rural/Metro S'holders Litig., 102 A.3d 205 (Del. Ch. 2014), aff'd, 129 A.3d 816 (Del. 2015).

83. Restatement (Third) of Restitution and Unjust Enrichment § 43(a)(liability in restitution for benefit obtained in breach of fiduciary duty).

forecloses an escape route that may occur to agents and their counsel. As noted above, a principal is generally charged with knowledge of facts known to the agent that are material to the agent's duties to the principal. Indeed, in some settings beyond the scope of this Chapter, doctrines associated with imputed knowledge have complex and wide-reaching consequences.[84] An agent might be tempted to argue that the rule of imputed knowledge applies in the context of claims the principal may assert against the agent, perhaps treating the principal's imputed knowledge of the agent's wrongdoing as a bridge toward establishing the principal's acquiescence or complicity in the agent's breach of duty. In *Zendejas v. Redman*, the principal retained an agent to locate a suitable horse for his son, a championship rider. The agent withheld material information concerning the history of the horse ("Vorst") he sourced, as well as the fact that he was also acting as the sales agent of Vorst's owner.[85] After Vorst proved untrainable and flawed in other material respects, the principal's claims against the agent included negligent misrepresentation. The agent argued that the principal could not establish that he justifiably relied on the agent's statements about Vorst because he was, as principal, charged with knowing facts known to the agent. Unsurprisingly, the court rejected the agent's imputed-knowledge argument on the basis that imputation doctrine does not apply to claims between principal and agent and operates only to protect third parties who deal with the principal through the agent.[86]

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84. For a good introduction, see Harry S Bryans, Claims against Lawyers by Bankruptcy Trustees: A First Course on the In Pari Delicto Doctrine, 66 Bus. Law. 587 (2011).

85. 2016 WL 1242349 (S.D. Fla, Mar. 30, 2016).

86. 2016 WL 1242349 at *7; accord, Restatement (Third) of Agency § 5.03 cmt b. For some courts, this basic principle may operate less strongly in the context of claims asserted by bankruptcy trustees when an agent's uncontroverted breach of duty was not wholly adverse to the principal's interests. See In re Lehr Constr. Corp., 551 B.R. 732 (S.D.N.Y.), aff'd, 666 Fed. App'x 66 (2d Cir. 2016)(employee may assert in pari delicto defense against bankruptcy trustee for former employer; employee's participation in fraudulent overbilling scheme, although it generated personal benefits for employee, was not entirely adverse to employer).

More controversially, an agent's breach of a duty of loyalty is also a basis on which the principal may seek forfeiture of commissions or other compensation paid or payable to the agent during the period of disloyalty. Forfeiture is not limited to use as a defense or an offset when an agent asserts a claim for compensation. Forfeiture may confer something of a windfall on a principal when the principal has benefitted through the agent's work, albeit flawed by disloyalty. On the other hand, forfeiture may be the sole plausible remedy when the agent has realized no benefit through disloyalty and the principal cannot prove any loss. Measured as it is by amounts paid or due the agent, forfeiture is determinable at lower costs to litigants and adjudicatory forums than other remedies may be. And forfeiture's potential to deter disloyalty is evident, as is the possibility that the threat of a forfeiture claim may chill former employees' assertion of rights against their now-former employer. Recent authority treats the remedy as discretionary, not a mandatory consequence of an agent's breach of fiduciary duty.[87]

A more technical question in some cases is how to define the relevant period of disloyalty: over an interval of time, or on a task-specific basis. In *Phansalkar v. Anderson Weinroth & Co.*, an advisor and deal-facilitator employed by a small investment bank worked on four transactions for the bank during his last eighteen months with the bank, in three transactions accepting investment opportunities for his personal account without the bank's consent.[88] Relying on the fact that the bank did not compensate the advisor on a deal-by-deal basis, the court held that the appropriate measure of compensation was the time interval over which disloyalty occurred. Additionally, the advisor was subject to liability to the bank for the profits

87. Wall Sys., Inc. v. Pompa, 154 A.3d 989, 1001 (Conn. 2017), relying on Restatement (Third) of Agency § 8.01 cmt. (d)(2). Some cases treat forfeiture as mandatory, as did Restatement (Second) of Agency §§ 403, 469 (1958), discussed in Pompa at 1000-1001.

88. 344 F.3d 184 (2d Cir. 2003).

he made through the investment opportunities or property he obtained; both represented material benefits received in breach of fiduciary duty.

IV. Conclusion

The common law treats agency relationships as categorical instances for the application of fiduciary duties. Nonetheless, agents may not be the prototypes that motivate theoretical accounts of fiduciary law, at least in part because the common-law definition requires that an agent be subject to the principal's control. As this Chapter demonstrates, the fiduciary character of the relationship is well established as a constitutive or necessary element of the relationship. The complexity of agency doctrine, implicating as it does externally-oriented consequences of representation as well as internally-oriented relations between principal and agent, follows as a consequence.