

Agency Law in Cyberspace

By

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Recent cases from the United States illustrate the broad-ranging applicability of common-law agency doctrines to legal relationships that stem from interactions occurring in cyberspace. Despite the internet's novelty, it is not surprising that it furnishes the context for questions to which common-law agency proves responsive. Agency law provides a general vocabulary of concepts and doctrines applicable to the wide range of situations in which one person's conduct carries consequences for the legal position of another person when the actor acted as the other person's representative.

Agency doctrine accomplishes three basic tasks. First, it defines the circumstances under which a relationship is characterized as one of agency as opposed to some other legal characterization, such as a debtor-creditor relationship. As will soon be evident, applying this definition requires specifying whether someone or something has legal capacity to be a principal or an agent in an agency relationship. Second, agency identifies the bases under which legal consequences stemming from one person's conduct are attributed to another person. The relevant consequences may include the creation of rights and obligations stemming from a transaction, the imputation of the agent's knowledge to the principal, and the imposition of vicarious liability on the principal as a consequence of tortious conduct by the agent. Third, agency determines rights and duties as between principal and agent themselves, complementing and supplementing any contract between them. Although the specifics of agency doctrine vary somewhat among common-law jurisdictions, in each the basic doctrines are similar, arguably more so than for other subjects within the general law.

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Consider first how common-law agency defines the relationships from which these consequences follow and how this definition may apply to interactions via the internet. As defined in the American Law Institute's new Restatement (Third) of Agency, agency is "the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests consent or otherwise consents so to act."¹ The issues in *Batzel v. Smith* – ranging well beyond agency questions – stemmed from an e-mail message posted to a listserv asserting that the plaintiff possessed paintings looted during World War II, that she had inherited the paintings, and that she claimed to be descended from Heinrich Himmler.² The plaintiff, who denied that the assertions were true, sued the individual who sent the e-mail message; the operator of the website, who chose to post it following some editing; and the website's commercial sponsor. A majority of the court held that the website operator's liability was governed by the federal statute setting limits on liability under state law for defamatory postings on the Internet and other computer networks.³ If the website operator reasonably understood the message to have been sent for internet publication, the statute shielded the operator from liability because the website operator, by selecting and editing the message, did not engage in "creation or development of information" contained in the message. On the other hand, if the operator should reasonably have concluded that the message was not intended for publication (it arrived via a different e-mail address) the statute would not shield the operator from liability.

The agency issue in *Batzel* was less controversial. All members of the court agreed that the website's commercial sponsor was not subject to vicarious liability for the website operator's actions. Although the sponsor furnished \$8,000 in financial support to the website operator, the relationship between them did not satisfy the requisites of a principal-agent relationship. To

¹ Restatement (Third) of Agency § 1.01 (forthcoming 2006).

² 333 F.3d 1018 (9th Cir. 2003).

³ See Communications Act of 1934, as amended, 47 U.S.C. §230 (c).

establish an agency relationship would require showing that the sponsor had the right or ability to control the website operator's activities, but the sponsorship agreement gave the sponsor no right to control what the website operator published and disclaimed any right of control on the part of the sponsor.

Thus, in cyberspace as elsewhere, an agency relationship requires that an actor assent to act subject to the control of another party. Moreover, the fact that the website's sponsor may have anticipated benefit through the sponsorship relationship did not transform its relationship with the website operator into an agency relationship. After all, few parties—including commercial sponsors of all sorts of communications activity—enter into a contract without anticipating some prospective benefit. But that anticipation does not transform the relationship into an agency relationship, a characterization that follows only when the parties assent that one shall act on behalf of the other and subject to the other's control.

To apply the definition of an agency relationship may require determining whether a given someone or something has capacity to function as either an agent or a principal for purposes of common-law agency. A person, whether or not an individual, has capacity to act as a principal if, at the time the agent takes action, the person would have had capacity if acting in person.⁴ In contrast, any person may ordinarily be empowered to act as an agent.⁵ Thus, a minor may not be bound by a contract entered into on the minor's behalf by an adult principal; agency law looks through the agent to the principal to assess the principal's capacity. However, assuming a minimum of physical and mental ability, a minor may act as an agent, even to bind a principal when the minor would lack capacity to bind him or herself to the same transaction.

But acting as either an agent or a principal requires that the actor be a "person," terminology that clearly embraces—in addition to individuals—corporations and other legally-recognized associations as well as governments and their subdivisions if able to possess legal rights and incur obligations. To be sure, in some areas of law, legal personality is not defined so

⁴ Restatement (Third) of Agency § 3.04(a).

⁵ *Id.* § 3.05.

stingily; maritime usage, which ascribes gender to ships, also speaks of “ships’ agents” and subjects ships themselves to liability in some instances. Nonetheless, for purposes of common-law agency, a ship is a fictitious legal instrumentality. It does not control “its” lawyer who defends it in litigation nor does it otherwise appoint “its” own agents.

Against this background, consider the import of the commonly-used term “electronic agent,” in particular as applied to a computer program that, once launched, enters into transactions within constraints identified in its program. From the standpoint of common-law agency, a computer program is not capable of acting as a principal or an agent because it is not a person that may itself hold legal rights and be subject to obligations. Common-law agency views an “electronic agent” as the instrumentality of the person who uses it, comparable to any other physical object used in connection with interactions with third parties, such as a typewriter, a calculator, or a fax machine. As a consequence, if a computer program malfunctions, even in ways its designer or user did not anticipate, the agency-law consequences for the user are no different from those stemming from malfunctions by other instrumentalities. A malfunctioning “electronic agent” is not analogous to an employee who, while indulging in a “frolic” of the employee’s own, commits a tort for which the employer is not subject to vicarious liability because the employee acted outside the scope of employment.

Happily, legislation concerning electronic agents is consistent with common-law agency on this point. The Uniform Electronic Transactions Act (UETA) defines an “electronic agent” as a “computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part, without review or action by an individual.”⁶ To the same effect is the federal Electronic Signature in Global and National Commerce Act.⁷ Under both statutes, “person” is a defined term that does not encompass an “electronic agent.” The official commentary to UETA explicitly characterizes an “electronic agent” as a “machine” that is the tool of the person that uses it, despite its ability to

⁶ UETA § 2(6).

⁷ 15 U.S.C. § 7001 et seq.

initiate or respond—within the limits of its programming— without further intervention by that person.

Moreover, conducting a transaction in cyberspace does not appear to vary the bases on which a principal may be bound by actions taken by an agent. This is so even when the agent proves to be highly unreliable. In *CSX Transportation, Inc. v. Recovery Express, Inc.*, the plaintiff’s business included selling out-of-service railcars and parts.⁸ The plaintiff received an e-mail stating an interest in buying rail cars as scrap from an individual who identified himself in the e-mail as “albert arillotta from interstate demolition and recovery express....” Following subsequent phone calls, the plaintiff forwarded sales order forms confirming terms of the sale to Interstate. The railcars were delivered to Mr. Arillotta at the plaintiff’s own railyard, where Mr. Arillotta disassembled and transported them away. Mr. Arillotta’s check in payment of \$115,757.36 in invoices sent to Interstate Demolition bounced. Interstate Demolition itself, allegedly as a consequence of fraudulent conduct by Mr. Arillotta, no longer existed by the time of the suit. Thus the plaintiff’s suit against Recovery Express, with which Mr. Arillotta (and Interstate) shared office space.

The plaintiff’s sole hope of recovery against Recovery Express turned on agency doctrines. This is because the plaintiff was unable to show that Recovery benefitted either from the disassembled railcars themselves or from money generated by their sale. As a consequence, the plaintiff’s claim against Recovery Express turned on attributing Mr. Arillotta’s conduct to Recovery Express. The court, granting Recovery Express’s motion for summary judgment, analyzed the facts of its dealings with Mr. Arillotta through the framework provided by common-law agency. Although the specific application of this framework presented a question of first impression, two familiar agency doctrines did the work.

First, did Mr. Arillotta act with actual authority to bind Recovery? As defined in the Restatement, an agent acts with actual authority “when, at the time of taking action, the agent

⁸ __ F. Supp. 2d __, 2006 WL 235068 (D. Mass. Feb. 1, 2006).

reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act."⁹ The plaintiff, however, came forward with no evidence to raise a genuine issue about whether Mr. Arillotta reasonably believed he acted with actual authority from Recovery Express. This is unsurprising as Mr. Arillotta held no formal position with Recovery Express. Second, did Mr. Arillotta act with apparent authority? As defined in the Restatement, "apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations."¹⁰ Apparent authority thus turns on the reasonableness of a third party's belief that the agent acts with actual authority and on whether that belief is traceable to a manifestation of the principal.

What's interesting and novel about the fact pattern in *CSX Transportation* is the basis for the plaintiff's apparent authority claim. Although Mr. Arillotta held no formal position with Recovery Express, it assigned him an e-mail address (albert@recoveryexpress.com) with its domain name. Mr. Arillotta's other connections to Recovery Express – shared office space, phone and fax numbers, mailing address – may not have been evident to the plaintiff prior to making the sales contract and, in any event, emerged solely from representations made by Mr. Arillotta himself, not Recovery. In contrast, by assigning Mr. Arillotta an e-mail address with its domain name, Recovery Express itself engaged in conduct conveying some meaning about its association with Mr. Arillotta. As it happens, the e-mail assignment occurred because officers of Recovery had an interest in Interstate Demolition, leading Recovery Express to allow Mr. Arillotta's use of its premises and facilities, including e-mail services. Neither Recovery Express nor its officers shared other property of Recovery Express with Interstate Demolition or Mr. Arillotta.

⁹ Restatement (Third) of Agency § 2.01.

¹⁰ *Id.* § 2.03.

The question for the court was whether, by assigning Mr. Arillotta an e-mail address containing its domain name, Recovery Express made a manifestation on which a third party like the plaintiff might reasonably rely in concluding that Mr. Arillotta acted with actual authority to bind Recovery Express to purchase a sizable quantity of railroad cars. The answer is no. Concluded the court, “Granting an e-mail domain name, by itself, does not cloak the recipient with carte blanche authority to act on behalf of the [grantor]. Were this so, every subordinate employee with a company e-mail address—down to the night watchman—could bind a company to the same contracts as the president.”¹¹

That is, although a company’s act of assigning an e-mail domain name constitutes a manifestation of some association between the company and the assignee of the address, it conveys insufficient information about the nature of the association to furnish a basis on which a third party might reasonably believe the assignee has actual authority to commit the company to a particular transaction. Moreover, the court identified useful analogies in “low-tech situations” in which a principal has made a nonspecific manifestation of some association with an agent. Employees or other agents given business cards or stationery with a company’s name or logo do not possess indicia of apparent authority to bind the company to a transaction. Unlike a title, such indicia do not indicate the type or nature of actions that the person who possesses them has authority to take on the company’s behalf.

Despite its cyberspace ingredient, *CSX Transportation* is a good illustration of a recurring pattern in cases involving apparent authority: a careless principal and a credulous third party, linked by a devious agent. As *CSX Transportation* illustrates, apparent authority protects only third parties who reasonably believe an agent to be authorized; the belief, moreover, must be somehow traceable to a manifestation of the principal, not the agent, however persuasive the agent may be.

¹¹ 2006 WL 235068 at *5.

Apparent authority doctrine also responds to another recurring pattern, not evident in *CSX Transportation*: an agent who acted with actual authority not provable by the third party, when the agent is allied with a principal who, regretting the outcome of the agent's actions, opportunistically denies that the agent acted with authority. That is, the large number of cases in which a principal's liability is based on apparent authority may well include some number of instances in which the agent acted consistently with a reasonable understanding of the principal's manifestations about what the principal wished the agent to do but, after the consequences become evident, the principal denies that the agent acted with actual authority and the third party cannot or does not surmount the hurdles of proving otherwise.

The same insight should be applicable to dealings conducted in cyberspace or otherwise through novel means. An older case from the United States subjects a principal to liability on the basis of inferences reasonably to be drawn by third parties from the position in which the principal evidently placed its agent, although the principal's particular business was novel. In *Kidd v. Thomas A. Edison, Inc.*, a company that produced musical recordings engaged singers to perform live "tone test" recitals to demonstrate the recordings' accuracy.¹² The company's agent, unbeknownst to the singers, was authorized only to engage them on payment terms that conditioned payment to the singers on revenues generated by each recital. The agent engaged the singers on unconditional terms, standard practice in the music industry when singers were engaged to perform recitals. The court held that the novel use of recitals made by the company—a real-time comparison of live with then-new recorded sound—furnished no basis on which a singer should believe the company's agent had authority only to commit to payment on conditional terms "unheard of" in connection with musical recitals otherwise.¹³ Just as *CSX Transportation* illustrates the limits of apparent authority when invoked by a credulous third party, *Kidd* illustrates how robustly the doctrine may operate when a third party's belief in an agent's authority is reasonable and is based on the position in which principal has placed its agent,

¹² 239 F. 405 (S.D.N.Y.), aff'd, 242 F.923 (2d Cir. 1917).

¹³ *Id.* at 406.

despite the novelty of the specific business proposition tying the principal and its agents to third parties.

One measure of the health of any body of legal doctrine is its capacity to generate outcomes that are acceptable—on grounds of moral intuition, economic efficiency, or otherwise—in the face of changes in underlying factual circumstances. Not all doctrines within common-law agency met this test. For example, the common law posited that a principal’s loss of capacity automatically revoked all prior grants of actual authority. Individuals were thereby denied the ability, prior to the onset of incapacity, to establish an agency relationship through which legally effective action may be taken on the principal’s behalf in accordance with the principal’s instructions. Unsurprisingly, statutes in all U.S. jurisdictions now permit the creation of “durable” actual authority through a written instrument that so provides when executed by a then-competent principal. In contrast, agency-law doctrines applicable to interactions in cyberspace have proven more robust. The definition of an agency relationship, the specification of legal personality for agency-law purposes, and the bases on which the legal consequences of an agent’s conduct may be attributed to the principal all translate well into the new medium.