LO 20-6 What are the different types of authority of the agent?

LO 20-7 Do the principal and the agent have any contractual liability? How so?

LO 20-8 How can an agency relationship be terminated?

In the Case Opener, it is important to determine whether single-route drivers are employees or independent contractors of FedEx because different legal obligations arise, depending on the nature of the relationship. One of the most important relationships in the business world is the *agency relationship,* in which the employee may be an agent of the employer, having the ability, among others, to bind that employer legally.

Agency relationships are crucial to running large businesses because the use of agents allows corporations to enter into contracts and therefore conduct business in multiple locations simultaneously. This chapter explores the nature and creation of the agency relationship as well as the legal obligations that the parties take on when they form such a relationship.

Introduction to Agency Law

Agency is generally defined as a relationship between a principal and an agent. In an **agency relationship,** the **agent** is authorized to act for and on behalf of the **principal,** who hires the agent to represent him or her. The Restatement of Agency defines **agency** as "the fiduciary relation that results from the manifestation of consent by one person to another that the other shall act in his behalf and subject to his control, and consent by the other so to act."[1] (A **fiduciary** is a person who has a duty to act primarily for another person's benefit. A lawyer, for example, is a fiduciary for his or her client. We discuss fiduciaries in depth later in this chapter.)

Agency law is primarily state law. Thus, it can vary somewhat from state to state. As of July 2010, 40 states had enacted statutes governing the behavior of sports agents. The specific legislation that regulates the conduct of athlete agents in these 40 states is the Uniform Athlete Agents Act (UAAA). Non-UAAA laws also regulate athlete agents in California, Michigan, and Ohio. The UAAA provides for criminal, civil, and/or administrative penalties based on the particular state's statute. Twenty-three of those states impose civil penalties or damages on the agent for violations of the athlete agent statutes. Twenty-four states (including California and Florida) have established criminal penalties for sports agents who violate the state statute. In contrast, only five states have criminalized violations of the statute by the athletes themselves. In addition to state laws protecting athletes and agents, players associations' model contracts describe the nature of the services agents can perform on behalf of their principals and the duties the parties owe to one another. For example, the Major League Baseball Players Association's (MLBPA's) "Regulations Governing Player Agents" expressly states that agents act in a fiduciary capacity vis-à-vis their athlete clients.

Agency law is especially important for modern firms doing business in foreign countries. Although foreign countries offer fresh markets and eager consumers, American companies often run into legal difficulties due to language barriers or lack of knowledge about local laws. To avoid such problems, many companies hire agents familiar with local laws, customs, and customers to help them function smoothly in foreign markets.

agency relationship
The association between one party and an agent who acts on behalf of that party.

agent
A party who has the authority to act on behalf of and bind another party.

principal
The party that an agent's authority can bind or act on behalf of.

agency
The fiduciary relationship that arises when one person consents to have another act on his behalf and subject to his control and the other consents to do so.

fiduciary
A person who has a duty to act primarily for another person's benefit.

Creation of the Agency Relationship

LO 20-1

Agency relationships are consensual relationships formed by informal oral agreements or formal written contracts. However, an agency relationship exists only when the principal takes action to ask another individual to act on behalf of the principal.

[1] Restatement (Second) of Agency, sec. 1(1). The Restatement is a valuable reference that is well respected in the legal profession. It is frequently cited by judges as well as attorneys and scholars in making legal arguments. The Restatement provides a summary of agency law.

Exhibit 20-1

Creation of Agency Relationships

Expressed agency	Formed by making a written or oral agreement
Implied authority	Formed by implication through the conduct of the parties
Agency by estoppel	Formed when a principal leads a third party to believe that another individual serves as his or her agent but the principal had made no agreement with the so-called agent
Agency by ratification	Exists when an individual misrepresents himself or herself as an agent for another party and the principal accepts or ratifies the unauthorized act

Under what circumstances can an agency relationship be created? First, an agency relationship can be created only for a lawful purpose in the same way that a contract cannot have an illegal purpose. Thus, a principal could not hire an agent to kill someone on behalf of the principal.[2] Second, almost anyone can act as an agent. A contract made by an agent is viewed as a contract between the principal and a third party. Therefore, a person can serve as an agent regardless of age or competency.[3] However, if an individual does not have contractual capacity, he or she could not hire an agent to make contracts on his or her behalf. For example, because a contract entered into by a minor is voidable, most states do not allow minors to hire agents.

LO 20-2

As long as these two criteria are met, agency relationships can be created on the basis of any of the following four forms of authority:

1. By expressed agency, or agency by agreement.
2. By implied authority.
3. By apparent agency, or agency by estoppel.
4. By ratification.

The following sections discuss the types of agency formation, and Exhibit 20-1 presents a summary.

EXPRESSED AGENCY (AGENCY BY AGREEMENT)

expressed agency An agency created in a written or oral agreement. Also called *agency by agreement.*

When parties form an agency relationship by making a written or oral agreement, the agency is known as **expressed agency**, or **agency by agreement.** Expressed agency is the most common type of agency. As specified in the expressed agreement, the agent has the authority to contract on behalf of the principal. Although a contract is not necessary, if an agency agreement is formed through a contract, the contract must meet all the elements of a contract discussed in Chapter 6. If a principal agrees to hire no other agent for a period of time or until a particular job is done, the principal and agent have entered into an exclusive agency contract.

power of attorney A specific form of express authority that grants an agent specific powers.

One legal document that establishes agency relationships is a **power of attorney**, a document that gives an agent authority to sign legal documents on behalf of the principal. Power of attorney can be classified in several ways. First, a power of attorney can be general or specific. For example, with a general power of attorney, a principal gives an agent broad authority to sign legal documents on behalf of the principal. In contrast, with a specific power of attorney, a principal gives authority to an agent for only the specific areas or purposes listed in the agreement.

Powers of attorney are often given for business and health care purposes. In the health care instance, a principal gives power of attorney to an agent so that the agent can make decisions about the principal's medical care in case the principal cannot make those decisions. Given that a principal must have the ability to enter into contracts to enter into an agency relationship, a principal may not enact a power of attorney after becoming incompetent. Therefore, before incapacitation, a principal may create a durable power of attorney.

durable power of attorney A document that specifies that an agent's authority is intended to continue beyond the principal's incapacitation.

A **durable power of attorney** is a written document, created by a principal, expressing his or her wishes for an agent's authority to be unaffected by the principal's subsequent incapacity. Alternatively, a durable power of attorney might become active only after a principal becomes

[2] Restatement (Second) of Agency, sec. 19.
[3] Restatement (Second) of Agency, sec. 21.

CASE Nugget

Durable Power of Attorney

Penny Garrison et al. v. The Superior Court of Los Angeles et al.

132 Cal. App. 4th 253 (2005)

On Ella Needham's request, her daughter, Penny Garrison, was designated Needham's agent through a durable power of attorney. Needham was later admitted to a residential care facility. As part of the admissions process, Garrison, acting under the durable power of attorney, executed two arbitration agreements. After Needham's death, Garrison and Needham's other daughters sought to sue the facility for a number of concerns the family had regarding the care their mother had received. The facility sought to enforce the two arbitration agreements. However, the family contended that the agreements were unenforceable because Garrison could not legally enter into them.

The durable power of attorney had given Garrison power to (1) make all health care decisions for Needham according to what she believed was in Needham's best interest and (2) make decisions relating to Needham's personal care, including but not limited to determining where she lived. Therefore, Garrison was legally in charge of picking the residential care facility, and she had the power to enter into agreements regarding Needham's care.

Nowhere in the enumerated legal powers did the durable power of attorney state that Garrison could not enter into arbitration clauses. Moreover, the arbitration clauses were optional to the original contract, and they allowed a 30-day period during which Garrison could cancel them. Because the durable power of attorney was legal and enforceable, Garrison could not cancel the agreements into which she entered.

incapacitated in any manner. Because the agreement is entered into before incapacitation, a power of attorney is legally binding after the principal becomes incapacitated.

It is important to note a few additional points. First, the Restatement states, "[A]n 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."[4] Therefore, in addition to the preceding criteria, there needs to be agreement by the principal to have the person act as an agent and by the agent to act for the principal. As noted shortly, this agreement can be reached in several ways.

Second, agency agreements usually do not need to be in writing. However, there are two important exceptions. First, agency agreements need to be in writing whenever an agreement is reached for an agent to enter into a contract that under the statute of frauds must be in writing. For example, Janet wants Phil to act as her agent. She grants him the power to enter into contracts. The statute of frauds, or, more specifically, the equal dignities rule, mandates that the type of contracts Phil is allowed to enter into must be in writing. Therefore, Phil's agreement with Janet must also be in writing. Also, whenever an agent is given power of attorney (discussed later), the agreement must be in writing.

Third, agents may perform their services gratuitously. A **gratuitous agent** is one who acts without consideration; that is, the agent is not paid for his or her services. Gratuitous agents function much like regular agents, with a few specific exceptions noted later in this chapter.

gratuitous agent
An agent who acts without being paid for his or her services.

AGENCY BY IMPLIED AUTHORITY

In some cases, an agency relationship is not created by an expressed agreement but, rather, is implied by the conduct of the parties. The circumstances of a situation determine the extent of an agent's ability to conduct business on behalf of the principal. However, the implied authority cannot conflict with any express authority.

[4] Restatement (Second) of Agency, sec. 15.

Formation of Power of Attorney in Luxembourg

In the United States and other common-law jurisdictions, a power of attorney authorizes the agent only to "conduct a series of transactions" under instruction from the principal. This limitation makes the power of attorney in common law distinctly different from that provided by civil law, which authorizes the agent to do "everything and anything which the principal himself could do."

Under the law of the Grand Duchy of Luxembourg, the person for whom the power of attorney is acting on behalf is called a donor, instead of a principal. Under this Luxembourg law, there are two types of power of attorney from which a donor must choose. The first type is a power of attorney that is valid until death, and the second type is a power of attorney that has unlimited validity even after death. The actions that are permitted to be performed by a power of attorney are completely determined by the law in Luxembourg.

The law in Luxembourg also requires the power of attorney to be authenticated by a public authority or a public notary by providing a certified identification card or passport as well as proof of residency.

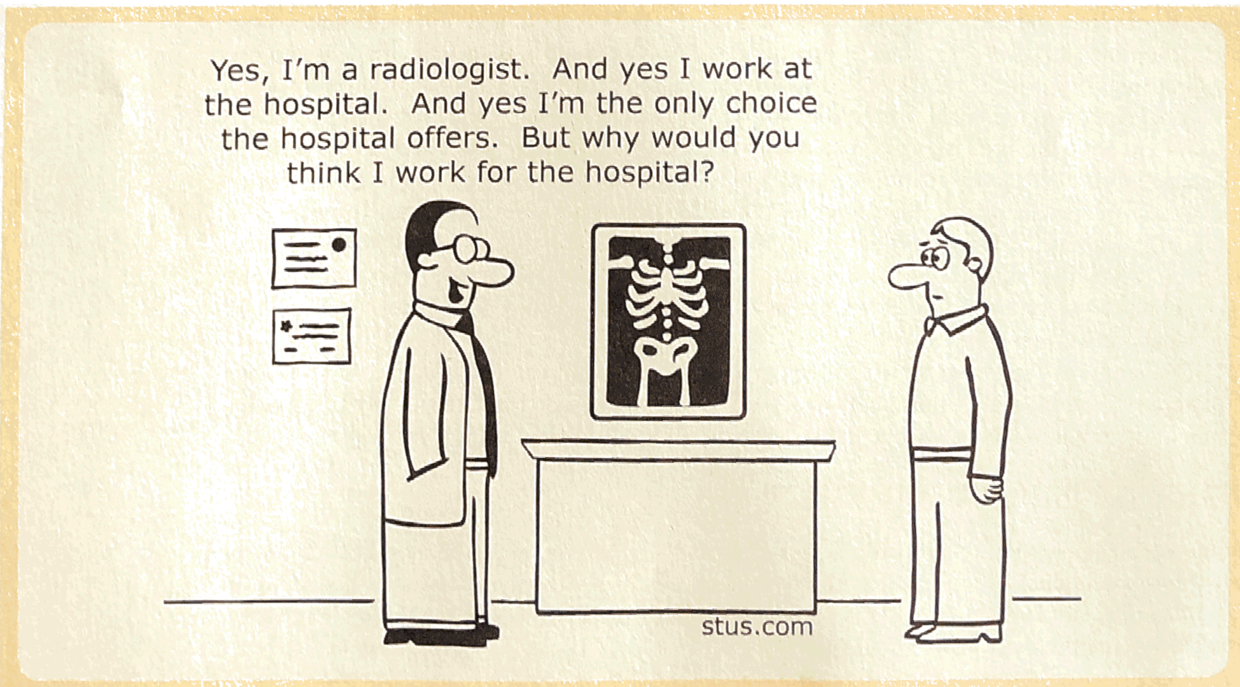
APPARENT AGENCY (AGENCY BY ESTOPPEL)

apparent agency
An agency relationship created by operation of law when one party, by his actions, causes a third party to believe someone is his agent when that person actually has no authority. Also called *agency by estoppel*.

Suppose a principal leads a third party to believe that another individual serves as his or her agent but the principal has made no agreement with the so-called agent. Does an agency relationship exist? Yes, because by his or her conduct, the principal has created **apparent agency**, or **agency by estoppel**. According to the principal's conduct, the agent has apparent authority to act; thus, the principal is estopped, or prevented, from denying that the individual is an agent.[5] When a third party relies on the principal's conduct and makes an agreement with an apparent agent, the principal must uphold any agreements made by the agent. If the principal attempts to deny an agency relationship existed, the third party must demonstrate that he or she reasonably believed, on the basis of the principal's conduct, that an agency relationship existed. The court will consider the principal's conduct in determining whether an agency relationship existed.

Suppose an executive of Emporium Carpet is interviewing a potential salesperson named Jose. In the course of the interview, the employer introduces Jose to some clients who are in the

[5] Restatement (Second) of Agency, sec. 8B.



building. During the conversation, he says, "I cannot wait to have Jose in our firm. The sooner he works for us, the happier I will be." For some reason, Jose is not hired. But Jose happens to meet these clients later, and in the course of their conversations, the clients place an order with Jose, believing him to be an employee of Emporium Carpet. Emporium now has an obligation to fulfill the order because the third party reasonably believed Jose was an agent of Emporium.

The Case Nugget given below discusses the importance of apparent authority.

AGENCY BY RATIFICATION

Suppose Fred is driving home and sees a car with a For Sale sign in the window. He stops to look at the car because his friend wants to buy a used car. He's amazed at the price and quality of the car, so he tells the owner his friend wants to buy the car. The owner claims that another individual is coming who probably will buy the car in an hour. So, to ensure that his friend gets this car, Fred signs a contract to purchase the car, but he notes on the contract that he is an agent of his friend. Because he is not an agent for his friend, the friend is not required to uphold the contract.

However, if Fred's friend agrees to purchase the car, the friend has accepted him as the agent for the contract. Fred's friend is now bound by the contract, and Fred cannot be held liable for

CASE Nugget

Apparent Authority and Agency

Steven A. B. Hannington, Appellant, v. Trustees of the University of Pennsylvania and Dr. Mark Bernstein, Appellees
Superior Court of Pennsylvania

2002 Pa. Super. 314; 809 A.2d 406; 2002 Pa. Super. LEXIS 2873

Steven Hannington, a doctoral candidate at the University of Pennsylvania, was expelled for outstanding tuition fees, which he claimed had been waived in exchange for organizing a two-day conference on behalf of the university's Energy Management and Policy Program. Hannington filed suit against the university for breach of contract, and the university countersued for the outstanding tuition, fees, and interest. Before the case went to trial, Hannington and the university negotiated a settlement through their attorneys. Hannington's attorney notified the court that an agreement had been reached, and he filed an Order to Settle, End, and Discontinue. One month later, Hannington obtained new counsel and filed a motion to restore the case to the trial list, claiming that his previous attorney had exceeded the scope of his authority by settling the case without his express authority. Hannington's motion was denied by the trial court, and he appealed.

The appellate court affirmed the trial court's decision, citing the doctrine of apparent authority for three reasons. First, the university was innocent and free from fault. Second, Hannington's attorney notified the university in a letter that Hannington had approved of the attached settlement release. Third, the negotiations took place over a six-month period, during which Hannington "had clothed his lawyer with the authority to communicate with the University on his behalf. Therefore, it was reasonable for the University and its lawyer to believe that Appellant had expressly authorized the settlement agreement." The court ruled that, regardless of Hannington's claims regarding the conduct of his attorney, the settlement was enforceable. If Hannington's attorney had not exceeded the scope of his authority, the settlement would be enforceable on its own. If Hannington's attorney had exceeded the scope of his authority, the doctrine of apparent authority would be applicable, giving the university the right to rely on the representation of Hannington's attorney to enter into a binding contract.

agency by ratification An agency relationship that arises when an individual misrepresents himself or herself as an agent for another party and that party accepts the unauthorized act.

misrepresenting himself as the agent. This type of agency relationship is **agency by ratification.** As suggested in the preceding example, there are two requirements for agency by ratification:

1. An individual must misrepresent himself or herself as an agent for another party.
2. The principal accepts or ratifies the unauthorized act.

For ratification to be effective, two additional requirements must be met:

1. The principal must have complete knowledge of all material facts regarding the contract.
2. The principal must ratify the entirety of the agent's act. (The principal cannot accept certain parts and reject other parts of the agent's act.)

LO 20-3

Agency Relationships

There are generally three types of business relationships to which agency laws are relevant: the principal–agent relationship, the employer–employee relationship, and the employer–independent contractor relationship. We discuss all three in the following sections and summarize them in Exhibit 20-2.

PRINCIPAL–AGENT RELATIONSHIP

The principal–agent relationship typically exists when an employer hires an employee to enter into contracts on behalf of the employer. This relationship is the most basic type of agency relationship. For example, suppose a salesclerk at Abercrombie & Fitch sells Amanda a shirt. The clerk is acting on behalf of the owner; consequently, any sales the salesclerk makes are binding on the owner of Abercrombie & Fitch. Similarly, think of all the advertisements seen on television in which a professional athlete speaks on behalf of a product. The athlete usually hires an agent to find and make agreements on behalf of the athlete to promote products.

EMPLOYER–EMPLOYEE RELATIONSHIP

Whenever an employer hires an employee to perform some sort of physical service, the parties have created an employer–employee relationship. The employee is subject to the control of the employer.[6] Generally, all employees are considered agents of the employer. Even employees not legally authorized to enter into contracts binding their employer or to interact with third parties are considered agents. Although all employees are agents, the reverse is not true. That is, not all agents are employees.

EMPLOYER–INDEPENDENT CONTRACTOR RELATIONSHIP

independent contractor A person who is hired to perform a task for another but who is not the other's employee.

Employers often hire **independent contractors,** persons who are not employees, to conduct certain tasks. The Restatement of Agency defines an independent contractor as "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

[6] Restatement (Second) of Agency, sec. 2.

Exhibit 20-2

Types of Business Relationships and Their Significance for Agency

RELATIONSHIP	HOW TO IDENTIFY	SIGNIFICANT FOR WHAT ISSUES?
Principal–agent	Parties have *agreed* that agent will have power to bind principal in contract.	Contract law
Employer–employee	Employer has right to *control* conduct of employees.	Tort law, tax law, wage law, discrimination law, copyright law
Employer–contractor	Employer has *no control* over details of conduct of independent contractor.	Tort law, tax law, wage law, discrimination law, copyright law

undertaking."[7] For example, building contractors, doctors, stockbrokers, and lawyers are independent contractors. Furthermore, building contractors, doctors, stockbrokers, and lawyers are agents but not employees. However, not all independent contractors are agents. Independent contractors cannot enter into contracts on behalf of the principal unless authorized to do so by the principal.

Employee or Independent Contractor? The question of whether a worker is an employee or an independent contractor has important implications in terms of workers' compensation, workplace safety, and unemployment statutes. The employer–employee relationship is subject to the workers' compensation, workplace safety, employment discrimination, and unemployment statutes, whereas the employer–independent contractor relationship is not. Furthermore, as discussed later in this chapter, employers are generally liable in tort for the actions of their employees, whereas they are generally not liable for the actions of independent contractors.

BUT WHAT IF . . .

WHAT IF THE FACTS OF THE CASE OPENER WERE DIFFERENT?

Let's say in the Case Opener that a single-route driver named Rick was an independent contractor for FedEx. He delivered a package to a woman named Sarah, but Sarah's package had been damaged at a FedEx center. Rick formed a contract for Sarah, telling her that FedEx would award her the cost of the item that was shipped. Is Rick legally correct in this scenario? Why or why not?

When courts are deciding whether a worker is an employee or an independent contractor, perhaps the most important issue they consider is how much control the employer exerts over the agent.[8] If the employer has substantial control over day-to-day operations of the worker, the worker is generally considered an employee.

Although the degree of control an employer maintains is the central factor courts look at in determining whether a person is an employee or an independent contractor, it is by no means the only factor examined. Exhibit 20-3 lists the additional criteria the court considers in deciding

[7] Restatement (Second) of Agency, sec. 2.
[8] Restatement (Second) of Agency, sec. 2(3).

Exhibit 20-3

Independent Contractor or Employee?

CRITERIA	EMPLOYEE	INDEPENDENT CONTRACTOR
Does the worker engage in a distinct occupation or an independently established business?	No	Yes
Is the work done under the employer's supervision, or does a specialist without supervision complete the work?	Employer supervision	Specialist without supervision
Does the employer supply the tools?	Yes	No
What skill is required for the occupation?	No specialized skill	Great degree of skill
What is the length of time for which the worker is employed?	Long time	Varies
Is the worker a regular part of the business of the employer?	Yes	No
How is the worker paid?	Regular payments according to time	When the job is completed

Exhibit 20-4

Summary of Duties in an Agency Relationship

PRINCIPAL TO AGENT	AGENT TO PRINCIPAL
Duty of compensation	Duty of loyalty
Duty of reimbursement and indemnification	Duty of performance
Duty of cooperation	Duty of notification
Duty to provide safe working conditions	Duty of obedience
	Duty of accounting

whether a worker is an employee or an independent contractor. These criteria were established in the Restatement of Agency.[9]

LO 20-4

Duties of the Agent and the Principal

An agency relationship is a fiduciary relationship of trust, confidence, and good faith. Thus, the formation of an agency relationship results in the creation of certain duties that the principal and agent owe each other. These duties are established in the agency agreement and are implied by the law. We discuss them in the following sections and present a summary in Exhibit 20-4.

LO 20-5

PRINCIPAL'S DUTIES TO THE AGENT

When a principal contractually agrees that another person can make agreements on his or her behalf, the principal owes certain duties to the agent. If these duties are not fulfilled, the principal has violated the agent's rights. Consequently, the agent can bring a suit against the principal. If the agent is successful in bringing a suit against the principal, the agent is entitled to contract or tort remedies. Furthermore, if the principal has failed to meet duties owed to the agent, the agent can refuse to act on behalf of the principal until the failure is remedied.

duty to compensate
A principal's obligation to pay an agent for his or her services.

Duty of Compensation The principal has a duty to compensate the agent for services provided unless the parties have agreed that the agent will act gratuitously. The agency contract usually specifies the type and amount of compensation as well as the time at which the compensation will be given to the agent. Thus, if a person hires an attorney to represent her, she has a duty to pay that attorney, her agent. If there is no agreement on the amount the principal will compensate the agent, the courts suggest that compensation should be calculated according to the customary fee in the situation.[10]

duty of reimbursement and indemnification
A principal's obligation to reimburse an agent for any expenses or losses incurred by the agent on the principal's behalf.

Duty of Reimbursement and Indemnification The principal has a duty of reimbursement and indemnification to the agent. If an agent makes authorized expenditures in the course of working on behalf of the principal, the principal has a duty to reimburse the agent for the amount of money spent.[11] Thus, if an agent takes a trip on behalf of the principal, the principal must have authorized this trip if the agent is to be reimbursed by the principal.

Similarly, the principal has the duty to indemnify or reimburse the agent for any losses the agent incurs while working within the scope of authority on the principal's behalf.[12] For example, suppose an agent makes an agreement with a third party on behalf of the principal and the principal fails to uphold the agreement. The third party could sue the agent for damages because of the failure to uphold the agreement. The principal has a duty to indemnify the agent for the losses the third party regained.

[9] Restatement (Second) of Agency, sec. 220.
[10] Restatement (Second) of Agency, sec. 443.
[11] Restatement (Second) of Agency, sec. 438.
[12] Restatement (Second) of Agency secs. 438 and 439.

CASE Nugget

Duty to Compensate

Ralph T. Leonard et al. v. Jerry D. McMorris et al.

320 F.3d 1116 (2003)

NationsWay was one of the largest privately held trucking companies in the United States, with 3,200 employees operating in 43 states. In 1999, NationsWay filed for Chapter 11 bankruptcy and terminated most of its employees. Ralph Leonard, and a number of the other employees who were terminated, sued Jerry McMorris and other NationsWay executives, arguing they were personally liable for unpaid wages under their duty to compensate arising from the employer–employee relationship.

The defendants argued they could not be held personally liable for agreements made between the employees and the corporation. As the case began, NationsWay was continuing its bankruptcy filings, under which the former employees were to receive approximately \$3 million in unpaid wages. However, the plaintiffs wanted additional amounts covering accrued vacation pay, sick-leave pay, holiday pay, and other nonwage compensation as well as a 50 percent penalty and attorney fees.

In deciding the case, the court addressed "[w]hether officers of a corporation are individually liable for the wages of the corporation's former employees under the Colorado Wage Claim Act." The court concluded, "[U]nder Colorado's Wage Claim Act, the officers and agents of a corporation are *not* jointly and severally liable for payment of employee wages and other compensation the corporation owes to its employees under the employment contract and the Colorado Wage Claim Act." Although the corporation has a duty to compensate, the executives who were the defendants were not individually liable to the former employees for the unpaid wages.

Duty of Cooperation The principal also owes a duty of cooperation to the agent. Therefore, the principal must assist the agent in the performance of his or her duties. Furthermore, the principal can do nothing to interfere with the reasonable conduct of an agent. For example, suppose Suzy hired someone to sell her car for her. Suzy must be willing to let the agent show her car to interested buyers.

duty of cooperation
A principal's obligation to assist an agent in the performance of the agent's duties and not to interfere with reasonable conduct of the agent.

Duty to Provide Safe Working Conditions The principal has a duty to provide safe working conditions for the agent. This includes equipment, premises, and other working conditions. If the principal is aware of unsafe working conditions, the principal has a duty to warn the agent of the potential danger and make the necessary repairs. Federal and state statutes, such as the Occupational Safety and Health Act (OSHA), set specific standards for the working environment. If an employer violates these standards, the employer may be subject to fines.

duty to provide safe working conditions
A principal's obligation to provide proper equipment, suitable premises, and a safe working environment in accordance with federal and state statutes.

AGENT'S DUTIES TO THE PRINCIPAL

When an agent agrees to act on behalf of a principal, the agent is a *fiduciary*, a person in a position of trust and confidence, and as such owes certain duties to the principal. However, because the agent makes agreements on behalf of the principal, the agent is in a position to harm the principal. If, for example, an agent makes numerous contracts the principal could not possibly carry out all at once, it is likely the third parties would sue the principal for not carrying out the agreements. If the agent breaches his or her fiduciary duties, the principal can sue the agent, and the principal may be entitled to a variety of contract and tort remedies beyond those stated in the contract.

duty of loyalty
An agent's obligation to act in the interest of the principal.

Duty of Loyalty Courts suggest that the **duty of loyalty** is perhaps the most important duty an agent owes to a principal. Because the agency relationship is a fiduciary relationship (i.e., a relationship of trust), the agent has a responsibility to act in the interest of the principal.[13] The agent carries out her duty of loyalty to the principal in a number of ways, including avoiding conflicts of interest and protecting the principal's confidentiality.

An agent can in most situations represent and act on behalf of only one principal in an agreement. An agent usually cannot represent both the principal and a third party (who would then become another principal if represented by the same agent) in an agreement because there could be a conflict of interest. In addition, the agent has a duty to notify the principal of any offers from third parties.

For example, suppose Tony has hired a real estate agent to make land purchases for him. A third party notifies the real estate agent that some of her property will soon be going up for sale, and the third party wants to know whether Tony, the principal, would be interested in buying the property. The real estate agent cannot decide to buy that property for himself until (1) the agent has communicated the offer to Tony and (2) Tony has considered and rejected the offer.

The duty of loyalty also requires the agent to keep confidential any information about the principal during the course of agency and after the agency relationship is terminated. The agent cannot disclose or misuse any information received during or after the agency relationship with the principal.

duty of notification
An agent's obligation to inform the principal of the agent's actions on the principal's behalf and of all relevant information.

Duty of Notification Not only does the agent have to communicate offers from third parties, but the agent must also communicate any information the agent thinks could be important to the principal. This duty is known as the **duty of notification.**[14] For example, if a third party has made an agreement through an agent with a principal and the third party has failed to meet the agreement, the agent must notify the principal of this information in a timely manner. It is critical for an agent to inform the principal of all relevant information because the law typically assumes the principal is aware of all information revealed to the agent, regardless of whether the agent shares all this information with the principal. Case 20-1 pays special attention to the duties of the agent to the principal and explains what happens when an agent violates the specific duty of loyalty.

[13] Restatement (Second) of Agency, sec. 401.
[14] Restatement (Second) of Agency, sec. 381.

CASE 20-1

INTERNATIONAL AIRPORT CENTERS v. JACOB CITRIN
COURT OF APPEALS FOR THE SEVENTH DISTRICT
440 F.3D 418 (2006)

FACTS: *The defendant, Mr. Citrin, was employed by the plaintiffs' real estate business, International Airport Centers (IAC). In the course of their business relationship, IAC lent Citrin a laptop to use to record work data. Eventually, Mr. Citrin quit his job at IAC and started his own business, which was in breach of his employment contract. Before returning the laptop to IAC, he deleted all of the business data in the computer. Ordinarily, pressing the Delete key on a computer merely removes the index entry, and such deleted files are easily recoverable. But Mr. Citrin loaded into the laptop a secure-erasure program to prevent the recovery of the files. Subsequently, IAC sued him for violating the Computer Fraud and Abuse Act and his duty of loyalty that agency law imposes on an employee. The district court dismissed the suit and IAC appealed.*

REASONING: Citrin's authorization to access the laptop terminated when he resolved to destroy his employer's files, in violation of the duty of loyalty agency law imposes on an employee. Judge Posner cited an important precedent stating that the authority of the agent terminates if he acquires adverse interests or if he is otherwise guilty of a serious breach of loyalty to the principal.

DECISION AND REMEDY: Reversed and remanded. IAC has a claim against Citrin for breaching his common law duty of loyalty.

SIGNIFICANCE OF THE CASE: When entering into agency relationships, all parties to the relationship need to understand their rights and duties. This case helps clarify an agent's duty of loyalty to his employer.

CRITICAL THINKING

Why do you think the original trial court ruled in the opposite manner? Why might you conclude that the agent in the case (Citrin) did not violate his duties to the principal (IAC)?

ETHICAL DECISION MAKING

Recall the WH framework for ethics. A classmate argues that Citrin made the correct decision in deleting the data because he himself was a stakeholder and deleting the data bettered his own position. Do you agree? Who are the relevant stakeholders negatively affected by Citrin's decision to destroy the business data on the computer?

Duty of Performance The agent owes a **duty of performance** to the principal. This duty is twofold. First, the agent must perform the duties as specified in the agency agreement. For example, suppose an insurance agent contacts Bethany about purchasing a car insurance policy. Bethany agrees to purchase the policy, but for some reason the agent never obtains the policy for her. Bethany discovers the insurance agent's mistake when she gets into a car accident. The insurance agent did not meet the duty of performance. Consequently, Bethany could bring a claim against the insurance agent.

duty of performance
An agent's obligation to perform the duties specified in the agency agreement and to do so with reasonable skill and care.

Second, the agent must perform the specified duties with reasonable skill and care. The agent is expected to provide the same standards of skill, care, and professionalism that a reasonable person in the same situation would provide. For example, when an attorney advertises that he is a specialist in a certain type of law, this lawyer will be held to the reasonable standard of care in that specialty of law.[15] A gratuitous agent cannot be found liable for a breach of contract for failure to perform because no contract exists between the principal and the agent. However, if a gratuitous agent begins to act as a regular agent, and the principal affirms the relationship, a duty to perform arises insofar as the agent has begun a specific task for the principal.

Duty of Obedience Under the **duty of obedience,** the agent must follow the lawful instruction and direction of the principal.[16] Thus, if the agent makes an unauthorized agreement, the agent has failed to meet the duty of obedience. However, if the principal gives unlawful or unethical instructions, the agent is not required to behave in accordance with those instructions. For example, let's say a principal tells an agent to sell a basketball autographed by Michael Jordan; however, the agent knows that the principal forged the signature on the basketball. The agent is not required to obey the instructions of the principal.

duty of obedience
An agent's obligation to follow the lawful instruction and direction of the principal.

Duty of Accounting Under the **duty of accounting,** the agent must keep an accurate account of the transactions of money and property made on behalf of the principal.[17] If the principal requests to see this accounting, the agent has a duty to provide the principal with the accounting. Part of the duty of accounting is the duty of the agent to keep separate accounts for the principal's funds and the agent's funds. The agent cannot allow the funds to mix.

duty of accounting
An agent's obligation to keep an accurate account of the transactions of money and property made on behalf of the principal.

[15] Restatement (Second) of Agency, sec. 379.

[16] Restatement (Second) of Agency, secs. 383 and 385.

[17] Restatement (Second) of Agency, sec. 382.

Rights and Remedies

PRINCIPAL'S RIGHTS AND REMEDIES AGAINST THE AGENT

Because the agency relationship generally *is* a contractual relationship, a principal has contract remedies available for breach of fiduciary duties. In addition, a principal may use tort remedies for an agent's misrepresentations, negligence, or other business failings that cause damage to the principal. Furthermore, when an agent breaches his or her fiduciary duties, the principal has the right to terminate the agency relationship. Although numerous possible remedies are available to the principal, the three main remedies are constructive trust, avoidance, and indemnification.

Constructive Trust Agency relationships exist primarily for the benefit of the principal. Therefore, principals are the legal owners of anything an agent may come to possess through the employment or agency relationship. Accordingly, when an agent through deceit or other means retains profits or goods obtained through the employment or agency relationship, which by law belong to the principal, the agent has breached his or her fiduciary duties. For example, Joy is an agent of Sarah's, selling real estate. Joy sells a piece of property for $2,000 more than Sarah anticipated. Joy then keeps the extra $2,000 and reports the sale at the price Sarah expected. By law, the profits belong to Sarah, and Joy has breached her fiduciary duties by keeping the money.

Also, an agent may not use the agency relationship to obtain goods or property for himself when the principal desired to obtain the same goods or property. In an agency relationship, the principal always has right of first refusal. That is, before an agent may use the relationship for a personal acquisition, the principal has the opportunity to buy whatever goods or properties are in question. Returning to Sarah and Joy, if Joy were to buy a piece of land she knew Sarah wanted to purchase, she again would have breached her fiduciary duties to Sarah.

When an agent illegally benefits from the agency relationship, the principal may enact a constructive trust on the profits, goods, or property in question. A **constructive trust** is an equitable trust imposed on a person who wrongfully obtains or holds legal right to property he or she should not possess. When a principal enacts a constructive trust, the court rules that the agent is merely holding the property or goods in trust for the principal, granting the principal legal right or possession.

constructive trust
An equitable trust imposed on a person who wrongfully obtains or holds legal right to property he or she should not possess.

Avoidance When an agency relationship exists through a contract and the agent breaches the agreement or his fiduciary duties, the principal may use her right of avoidance. *Avoidance* allows a principal to nullify any contract the agent negotiated. Which, if any, contracts are voided is at the discretion of the principal.

Indemnification Agents enter into contracts with third parties on behalf of the principal. If a third party believes that the agent is acting with actual or apparent authority, she may sue the principal for any breach of contract. However, when the breach was caused by the agent's negligence, the principal has a right to *indemnification*. That is, when sued by a third party, a principal may sue his agent to recover the amount assessed to the third party if the breach of contract is the agent's fault.

In addition to recovering for negligence, a principal can recover if an agent fails to follow the principal's instructions. Courts have had difficulty in determining when a principal gives limiting instructions and when he merely gives advice. Going against advice does not impose liability on an agent, but violating limiting instructions does. For a principal to avoid a potential lawsuit from a third party, he should notify the third party whenever a relationship with an agent ceases or limiting instructions are given.

AGENT'S RIGHTS AND REMEDIES AGAINST THE PRINCIPAL

Although agency relationships are intended to benefit the principal, the agent is not without rights and remedies. Whenever a duty is imposed on the principal, a corresponding right exists for the agent. Agents have available tort and contract remedies in addition to the right to demand an accounting.

Tort and Contract Remedies Agents, much like principals, have certain tort and contract remedies available for situations in which a principal violates an agency agreement. These remedies are the same as standard tort and contract remedies.

Demand for an Accounting When an agent feels she is not being properly compensated, especially when working on commission, the agent may *demand an accounting.* When an agent demands an accounting, she may withhold further performance of her duties until the principal supplies appropriate accounting data. For example, Hal is a used-car salesman working for Not a Lemon Car Dealers. When Hal receives his pay, he believes he has been shorted the appropriate amount he made on commission. Hal can request Not a Lemon to obtain an auditor to perform an audit and determine whether he was in fact paid the proper amount for his sales.

BUT WHAT IF . . .

WHAT IF THE FACTS OF THE CASE OPENER WERE DIFFERENT?

Let's say in the Case Opener that Janelle, a truck driver, was an independent contractor for FedEx. She looked at her income over the course of the prior year and was quite certain that she was not being paid her promised compensation. She demanded that FedEx hire an auditor to go over the company's records and make sure she and other independent contractors in her area had been paid fairly. Does FedEx have a duty to Janelle to do this?

Specific Performance When a contract exists and a principal agrees to certain conditions but fails to perform, under contract remedies the agent may seek court assistance in forcing the principal to perform the contract as stipulated. However, when the agency relationship is not contractual or the contract is for personal services, an agent does not have the right to seek specific performance. In noncontractual relationships, an agent may recover for services rendered and/or future damages, but the agent may not force the principal to fulfill the specific contractual agreements or even to continue to employ the agent.

Authority of the Agent: The Link to the Principal's Liability

LO 20-6

Earlier in the chapter, we discussed how an agency relationship and its resulting authority could be created. That section introduced the important concepts of (1) expressed agency, or agency by agreement; (2) implied agency; and (3) apparent agency, or agency by estoppel. Each of these avenues for creating agency includes a form of authority that attaches to that type of agency.

EXPRESS AUTHORITY

In an expressed agency relationship, the agent has **express authority**, which is often referred to as *actual authority*. The principal has explicitly instructed the agent to do something. Therefore, if the principal requests her agent to sell her house for $100,000, the agent has explicit authority to sell the house for that amount. Express authority is binding in the sense that it gives the agent the power to make transactions and agreements with third parties. Because an agent with express authority has specific goals he or she is to achieve, the agent is also granted the use of other means, beyond the expressed agreement, reasonably necessary to achieve the desired goal.[18]

express authority
The authority of an agent that arises when the principal explicitly instructs the agent to do something. Also called *actual authority*.

[18] Restatement (Second) of Agency, sec. 35.

equal dignity rule
A rule requiring that contracts that would normally fall under the statute of frauds and need a writing if negotiated by the principal must be in writing even if negotiated by an agent.

When express authority is granted for an agent to enter into a contract legally required to be in writing, most states require the grant of authority also to be in writing. This requirement is known as the **equal dignity rule.** When an agency agreement fails to adhere to the equal dignity rule, the subsequent contracts are typically considered voidable by the principal. This rule is based on the statute of frauds.

There are two key exceptions to the equal dignity rule. The first pertains to executive officers. When an executive officer is conducting business in the usual course of her job, she need not obtain written approval from the corporation for every decision she makes. The second exception is rooted in common sense. The equal dignity rule does not apply to an agent when the agent is working in the direct presence of the principal.

IMPLIED AUTHORITY

implied authority
The authority of an agent that arises by inference from the words and actions of the principal.

In an implied agency relationship, the agent has **implied authority;** that is, the relationship is inferred from the conduct of the parties. Consequently, the authority of the agent is implied on the basis of words and actions of the principal to the agent.[19] An agent's implied authority is derived from an agent's express authority and consists of what is reasonably necessary for carrying out the agent's grant of express authority.

One way an agent may have implied authority is through custom. Therefore, it is important for third parties to familiarize themselves with the trade. Furthermore, if an agent must make an agreement or transaction to carry out the transaction he or she has agreed to perform for the principal, we can generally infer the presence of the authority.

For example, suppose one agrees to serve as a manager for a store. The contract probably does not expressly give authority for every decision the manager might need to make. However, the manager has implied authority to make agreements and transactions that customarily go along with the manager's position.

Another example of implied authority revolves around anyone, such as a purchasing agent, who ordinarily is the person who everyone in the industry expects will make contracts for particular inputs. For someone to act as if the purchasing agent lacks authority to make such commitments on behalf of the firm would be to act contrary to the expected lines of authority.

APPARENT AUTHORITY AND ESTOPPEL

As you learned earlier in this chapter, apparent agency exists when a third party reasonably believes, on the basis of a *principal's* actions, that an agency relationship exists between the principal and another individual. Thus, if the third party reasonably believes that the agent has authority to represent the principal, the principal must uphold any agreements made with the agent, who has apparent authority.[20] The principal is prevented (estopped) from acting as if the agent had no such authority.

LO 20-7

Contractual Liability of the Principal and Agent

In addition to identifying the type of authority an agent has, courts must identify a few other factors when making decisions about an agency relationship's liability to third parties. First, the court must determine the classification of the principal. Second, the court must decide whether the principal authorized the actions of the agent.

CLASSIFICATION OF THE PRINCIPAL

Classifications are made from the perspective of the third party. In other words, the extent of the third party's knowledge about the principal determines the classification of the principal.

[19] Restatement (Second) of Agency, sec. 33.
[20] Restatement (Second) of Agency, secs. 27 and 159.

What are potential ethical issues arising from questions about the authority of a particular agent? The law of agency places special weight on the viewpoint of the agency relationship from the perspective of the third party (neither the agent nor the principal). But who are the other stakeholders in a managerial decision who might be affected by the assignment of a particular form of authority?

When a principal is classified as a **disclosed principal,** the third party is aware that the agent is making an agreement on behalf of a principal; the third party also knows the identity of the principal. In contrast, if a third party is aware that an agent is making an agreement on behalf of a principal but the third party is unaware of the identity of the principal, the principal is classified as a **partially disclosed principal** or an **unidentified principal.** Finally, if a third party does not know an agent is acting on behalf of a principal, the principal is classified as an **undisclosed principal.** Remember, the classification of the principal is important because it is a significant factor in determining the liability of the principal.[21]

disclosed principal
A principal whose identity is known to a third party. The third party is aware that the agent is making an agreement on behalf of the principal.

partially disclosed principal
A principal whose identity is not known by a third party, although the third party is aware that the agent is making an agreement on behalf of a principal. Also called *unidentified principal.*

undisclosed principal
A principal whose existence is not known by a third party. That is, the third party does not know an agent is acting on behalf of a principal.

AUTHORIZED ACTS

When an agent acts within the scope of her authority on behalf of a disclosed or partially disclosed principal, the agent is not liable for the acts of the principal.[22] The principal is liable only if the agent has some kind of authority to act on the principal's behalf. With a disclosed principal, the agent is not liable because he or she is not a party to the transaction.

Yet, if the principal is partially disclosed, the agent can be held liable herself because the courts generally treat the agent as a party to the contract. As a party to the contract, the agent may be found liable to the third party for contractual nonperformance.[23] Whether disclosed or partially disclosed, apart from any liability the agent might have, the principal is liable for the agreements made with the third party.

When the agent acts within her authority on behalf of an undisclosed principal, the law will likely hold the agent liable for the agreement. Remember, with an undisclosed principal, the third party is not aware of the existence of the principal. Thus, in the eyes of the third party, the agent is the only possible person who could be liable. Yet, if the agent is liable to the third party, then the undisclosed principal is liable to the agent. However, there are certain situations in which the agent is the only party liable for the contract. These situations are:

1. The contract expressly excludes the principal from the contract. In that the principal was not a party to the contract, he or she has no liability to the agent.
2. The agent enters into a contract that is a negotiable instrument. The Uniform Commercial Code (UCC) governs negotiable instruments and states that another party, that is, a principal, cannot be liable for a negotiable instrument if his name is not on the instrument or if the agent's signature does not indicate that the agreement was made in a representative capacity.[24]
3. The third party enters into a contract with the agent that requires the performance of the agent. In this case, the third party may reject the performance of the principal. For example, if the agent is a photographer and she enters into a contract for her principal without disclosing this fact, the third party may reject the principal's attempt to fulfill the contract by taking the third party's picture.
4. If the principal or agent knows a third party would not enter into a contract with the principal if the principal's identity were disclosed but the agent enters into a contract with the third party anyway, the agent will be the only party liable if the third party rescinds the contract.

In situations in which a principal was undisclosed, a judgment for a third party against an agent, when the third party comes to know of the undisclosed principal's identity, releases the

[21] Restatement (Second) of Agency, sec. 4.
[22] Restatement (Second) of Agency, sec. 320.
[23] Restatement (Second) of Agency, sec. 321.
[24] UCC § 3-402(b)(2).

Exhibit 20-5

Contractual Liability to Third Parties for Authorized Agent Acts

CLASSIFICATION OF PRINCIPAL	AGENT LIABILITY?	PRINCIPAL LIABILITY?
Disclosed	No	Yes
Partially disclosed	Possibly	Yes
Undisclosed	Yes	Yes

Exhibit 20-6

Contractual Liability to Third Parties for Unauthorized Acts of the Agent

THIRD-PARTY BELIEF	AGENT LIABILITY?	PRINCIPAL LIABILITY?
Believes that the agent has authority	Yes	No
Believes that the agent is mistaken about her authority	No	No

principal from liability.[25] Also, a judgment against a previously undisclosed principal frees the agent from liability.[26]

Exhibit 20-5 summarizes contractual liability to third parties for authorized acts of the agent.

UNAUTHORIZED ACTS

If an agent has no authority to act on behalf of a principal but the agent still enters into a contract with a third party, the principal, regardless of the classification, is not bound to the contract unless the principal ratifies the agreement.

When the agent exceeds his authority to act on behalf of the principal, the agent will likely be personally liable to the third party. Yet, when the third party is aware that the agent does not represent the principal, the law does not hold the agent liable for the agreement. In almost all other cases in which the agent claims to have authority to contract on behalf of the principal, the law holds the agent liable to the third party. If an agent enters into a contract knowingly misrepresenting his alleged authority, the agent is liable to the third party in a tort action.

Agents who go beyond their authority when the principal is disclosed or partially disclosed are liable for a breach of implied warranty, not for a breach of contract. The agent cannot be found liable for breach of contract because the agent is never an intended party to the contract, even when exceeding his or her authority. The agent can breach the implied warranty intentionally, through a knowing misrepresentation, or unintentionally, through a good-faith mistake such as simply misjudging his or her authority. In either case, the agent is liable if the third party acted relying on the agent's alleged status.

Exhibit 20-6 summarizes the contractual liability of principals and agents to third parties for unauthorized acts of the agent.

Tort Liability and the Agency Relationship

If an agent commits a tort that injures a third party, the agent is personally liable for his or her actions, regardless of both the classification of the principal and the liability of the principal.[27] The principal may also be held liable for the agent's actions. This liability can arise from authorized or unauthorized acts. Furthermore, tortious liability of the principal can be established directly or indirectly. Finally, if an agent is an employee and the principal/employer controls the employee's behavior, the principal can be found liable. The next section explains these methods of establishing tortious liability.

[25] Restatement (Second) of Agency, sec. 210.
[26] Restatement (Second) of Agency, sec. 337.
[27] Restatement (Second) of Agency, sec. 343.

PRINCIPAL'S TORTIOUS CONDUCT

The law holds a principal directly responsible for the tortious conduct of his agent under two conditions. First, if the principal directs the agent to commit a tort, the principal is liable for any damages caused by that tort. The principal is authorizing the agent's unlawful behavior; thus, the principal is held responsible.[28] Similarly, the principal is liable for an agent's tortious act if the principal, although not condoning the agent's conduct, ratifies the agent's actions knowing the agent acted improperly.[29]

Second, if the principal fails to provide proper instruments or tools or gives inadequate instructions to the agent concerning the necessity to employ competent agents, the law then holds the principal liable to a third party for negligence. Under this provision of liability, a principal is liable for his or her negligent hiring of an agent. Thus, a principal must use proper care in selecting an agent for a job. This doctrine of negligent hiring has been used when an agent commits a tort against a customer, who often argues that the principal is liable because he or she should have taken more care in hiring the agent.

respondeat superior Latin for "let the superior speak"; the principle by which liability for harm caused by an agent/employee is held by the principal/employer.

vicarious liability The liability or responsibility imposed on a person, a party, or an organization for damages caused by another; most commonly used in relation to employment, with the employer held vicariously liable for damages caused by its employees.

Respondeat Superior The doctrine of *respondeat superior* (a Latin phrase meaning "let the superior speak") is used in the context of the principal/employer–agent/employee relationship. The principal/employer holds **vicarious liability** (i.e., liability assigned without fault) for any harm caused by the agent/employee during the time the agent/employee is working for the principal. In other words, the principal/employer is liable, not because he or she was personally at fault but because he or she negligently hired an agent.

The rationale behind this doctrine is that employers should be held liable for employees who commit torts because the employer is furthering his or her business through the work of the employee. If the employer is benefiting by the work of the employee, the employer should also be responsible for the harms caused by the employee.

Therefore, when a third party is injured through the negligence of an employee during the course of the employee's work, the third party can sue either the employee or the employer.[30] To establish employer liability, the third party must establish that the wrongful act occurred within the scope of employment. The courts consider the following elements in determining whether an act has occurred within the course and scope of employment:[31]

1. Did the employer authorize the employee's act?
2. Did the act occur within the time and space limits of employment?
3. Was the act performed, at least in part, on behalf of the employer?
4. To what extent were the employer's interests advanced by the act?
5. To what extent were the private interests of the employee involved?
6. Did the employer provide the means (i.e., tools) by which the act occurred?
7. Did the employee use force the employer did not expect?
8. Did the employer know that the act would involve the commission of a serious crime?

For example, if an employee is a delivery driver and negligently injures a third party while making deliveries on behalf of the employer, both the employee and the employer will be held liable.

Now suppose that the delivery driver is using the company vehicle when he stops at a drive-through at a fast-food restaurant to get some coffee. Could the employer be liable to a third party for an accident involving the delivery driver? If an agent makes a substantial departure from the course of the employer's business, the employer is not liable.

Courts often refer to a substantial departure as a "frolic of his own." However, if the deviation from the employer's business is *not* substantial, the employer can still be held liable. In Case 20-2, the court considers the scope of the employment relationship.

[28] Restatement (Second) of Agency, sec. 212.
[29] Restatement (Second) of Agency, sec. 218.
[30] Restatement (Second) of Agency, secs. 216 and 219.
[31] Restatement (Second) of Agency, sec. 229.

CASE 20-2

IGLESIA CRISTIANA LA CASA DEL SENOR, INC., ETC. v. L.M.
COURT OF APPEAL OF FLORIDA, THIRD DISTRICT
783 So. 2d 353 (2001)

FACTS: *L.M. sued Ali Pacheco, the former pastor of Iglesia Cristiana la Casa del Senor, Inc. (the Church), as well as the Church, alleging that Pacheco had sexually assaulted her in July 1991 when she was a minor. The allegation of sexual assault formed the basis of L.M.'s claims against the Church based on* respondeat superior. *When the criminal act occurred, L.M. was 16 years old.*

Before the criminal act took place, Pacheco visited L.M.'s residence twice when L.M. had been left home alone. On another occasion, Pacheco visited L.M. at her school. L.M. told her mother about Pacheco's visit but did not advise anyone from the Church.

According to L.M., on July 8, 1991, Pacheco called her at work and invited her to lunch to discuss her parents' marital problems. L.M. accepted, and Pacheco picked her up from work. L.M. noticed a sandwich and soft drink in the car. Pacheco drove to a Marriott Hotel. L.M. testified that Pacheco led her to a room he had rented and told her not to worry because she would finally be cured. He then proceeded to sexually assault her. Pacheco testified that L.M. consented to having sex.

According to him, their meeting was prearranged. They had discussed the matter and had in fact been to the Marriot Hotel on the previous day intending to have sexual relations but had decided against it. Pacheco testified that he knew what he was doing was wrong, but he explained that it was a great temptation in his life.

The jury returned a verdict in L.M.'s favor, finding the Church liable for Pacheco's criminal act on the grounds of respondeat superior. *The Church appealed.*

ISSUE: Was Pacheco acting as an employee of the Church when he assaulted L.M.?

REASONING: The court stated that for the doctrine of *respondeat superior* to apply, Pacheco's employer could not be liable for the tortious or criminal acts of Pacheco "unless the acts were committed during the course of the employment and to further a purpose or interest, however excessive or misguided, of the employer. An employee's conduct is within the scope of his employment, when (1) the conduct is of the kind he was employed to perform, (2) the conduct occurs substantially within the time and space limits authorized or required by the work to be performed, and (3) the conduct is activated at least in part by a purpose to serve the master."

In the case of L.M., the sexual assault did not occur on Church property, and what Pacheco did was not the kind of behavior the Church hired Pacheco to perform. In addition, his act was not an expression of Pacheco's desire to serve the Church. Little counseling occurred on the day of the crime. The Church would have tried very hard to prevent his actions had it known of his plans.

DECISION AND REMEDY: The court reversed the trial court's judgment and entered judgment for the Church.

SIGNIFICANCE: *Respondeat superior* does not mean that the employer is responsible for whatever an employee might do while at work. This case spells out the requirements for such liability to be imposed on the principal.

CRITICAL THINKING

Assume that L.M.'s account of the crime is true. Examine the exception to the scope-of-employment criteria mentioned by the judge. How could the plaintiff make an argument, using that exception, that Pacheco's conduct was within the scope of his employment?

ETHICAL DECISION MAKING

The judge in this case outlines a doctrine for determining the liability of an employer for the actions of employees. What value preference is highlighted by that doctrine?

If the third party is able to establish employee negligence such that the employer is liable, the employer has the right to recover from the employee any damages the employer paid to the third party as a result of the employee's negligence. The right to recover damages is referred to as the *right of indemnification*. However, if the employee is innocent of negligence, the employer is also free of liability.

Intentional Torts and *Respondeat Superior* The agent is liable for any torts he or she commits. In the same way that the principal is responsible for the negligent acts of the employee under the doctrine of *respondeat superior*, the principal may be liable for any intentional torts of the employee. Furthermore, an employer may be responsible for any tortious acts of the employee if the employer knew or should have known that the employee had a tendency to commit a tortious act. Hence, a principal may be liable for negligent hiring if he or she fails to do a background check to learn about the tendencies of potential employees.

For example, the principal of an employee with a criminal background may be held liable for tortious acts committed by his or her hired agent, even though the employee may not recognize the wrongfulness of his act. Therefore, employers will most likely purchase liability insurance in case particular employees engage in tortious activities.

AGENT MISREPRESENTATION

If an agent misrepresents himself or herself to a third party, the principal may be tortiously liable for the agent's misrepresentation. Unlike tort liability, which is based on whether the agent/employee was acting in the scope of employment, *misrepresentation liability* depends on whether the principal authorized the agent's act. If the principal authorizes the agent to engage in an act and the agent misrepresents herself intentionally or unintentionally, the principal is always tortiously liable to someone who relied on the agent's misrepresentation.

If an agent has misrepresented herself, the third party has two options:

1. The third party can cancel the contract with the principal and be compensated for any money lost.
2. The third party can affirm the contract and sue the principal to recover damages.

PRINCIPAL'S LIABILITY AND THE INDEPENDENT CONTRACTOR

As we discussed earlier in this chapter, an independent contractor is not an employee of the individual who hires him or her to do work. The individual doing the hiring does not control the details of the independent contractor's performance. Consequently, an individual who hires an independent contractor cannot be held liable for the independent contractor's tortious actions under the doctrine of *respondeat superior.*

Suppose that while working on the outside of the building he is renovating, an independent contractor accidentally injures an innocent bystander when he drops a pile of bricks on the bystander. The owner of the building is not liable for the innocent bystander's injuries; the independent contractor is liable.[32]

If, however, the independent contractor engages in extremely hazardous activities, such as blasting operations, for the principal, the principal will be responsible for any damages by the independent contractor. Certain activities are held strictly liable because of their inherently dangerous nature. Thus, an employer cannot escape the strict liability associated with those hazardous activities simply by hiring an independent contractor to complete the activities. In addition, the employer cannot escape liability for an independent contractor's tort if the employer directs the contractor to commit the tort.

The following Case Nugget demonstrates the role of tort principles in establishing the liability of those who employ independent contractors to engage in inherently dangerous activities.

[32] Restatement (Second) of Agency, sec. 250.

CASE Nugget

Liability When Hiring Independent Contractors

Larry S. Lawrence v. Bainbridge Apartments et al.
Court of Appeals of Missouri, Western District

957 S.W.2d 400 (1997)

In 1989, Smart Way Janitorial offered a bid to Larry Lawrence to wash the windows of Bainbridge Apartments. In May 1989, when Larry went to look at the apartments, he was told that Bainbridge wanted the windows washed from outside the building so that the residents would not be disturbed. The Bainbridge property consisted of six buildings: two seven-story buildings and four four-story buildings. Even though Lawrence could not create a safety line for washing the outside of the windows of the four-story buildings, the building manager insisted that Lawrence wash the windows from the outside. When Lawrence started washing the windows from the outside, he fell from one of the shorter buildings and suffered injuries. He brought a suit against Bainbridge Apartments, arguing that Bainbridge was negligent based on the inherently dangerous–activity exception to the doctrine that landowners are not vicariously liable for injuries caused by the negligence of an independent contractor or his employees.

The trial court ruled that because Lawrence had recovered workers' compensation benefits, the injury was not covered by the inherently dangerous–activity exception. The trial court granted summary judgment to Bainbridge; however, when Lawrence appealed, the decision was reversed and remanded because the court of appeals ruled that Lawrence was not a covered employee entitled to workers' compensation benefits.

The court argued that in establishing the rule of liability in this case, it would look to which party can best avoid the harm and manage the risk of loss of the inherently dangerous activity in question. An independent contractor who knows he will not be compensated by the landowner for his injuries has a strong incentive to take additional care and avoid neglect in performing his duties. This encourages him to demand additional safety measures and compensation before he agrees to undertake an inherently dangerous activity. The independent contractor is free to bargain and negotiate without restraint with the landowner. An independent contractor holds himself out as an expert who is uniquely qualified and skilled to bid for and perform the acts in question. As an expert, he is in a better position to understand the risks and costs involved in a particular job, and he may demand sufficient remuneration and safety measures to cover what he believes the attendant risks to be. In return for his bargained-for price, he accepts the allocation of the risk. The court held that an injured independent contractor, although uninsured, cannot recover under the inherently dangerous–activity exception.

Termination of the Agency Relationship

There are multiple ways to end an agency relationship. The parties may act to terminate the relationship. Alternatively, some agencies terminate automatically by the lapse of time, fulfillment of purpose, or operation of law. If the agency relationship has ended, the agent no longer has authority to make agreements on behalf of the principal. However, the agent's apparent authority continues until the principal notifies third parties that the agency relationship has ended. What terminates the agency relationship?

Notice of the termination of an agency relationship can be given in two general forms: actual or constructive. **Actual notice** of termination is given when third parties are directly informed,

actual notice
Notice of agency termination that is given by directly informing third parties, either orally or in writing.

orally or in writing, that an agency agreement has terminated.[33] Actual notice must be given to third parties who have had business interactions with the agent. Also, when the agent's authority was granted in writing, actual notice must be given in writing. Parties not directly related to an agency agreement may receive **constructive notice**, which is how notice of the termination of an agency agreement is generally announced.[34] Constructive notice is most frequently delivered through publication in a generally circulating newspaper for the area where the agency agreement existed.

constructive notice
Notice of agency termination that is usually given by publishing an announcement in a newspaper.

The issue of termination of the agency is especially important for global commerce. When parties are forming a contract of agency in a foreign jurisdiction, it is extremely important for the parties to include the conditions of termination within the contract.

Termination of an agency relationship involving persons from separate jurisdictions often results in complicated legal battles over compensation and liability. For example, principals must be aware of local labor laws because these laws can create agents' compensation and pension rights that are unknown to the principal. Local legal counsel should be especially knowledgeable about the provisions surrounding termination of agency in the particular jurisdiction and be able to help managers avoid unnecessary legal battles.

For example, if a manager has business transactions in one of the European Union countries and wants to terminate an agency relationship, he or she would want to have access to knowledge about the intricacies of Chapter IV of the Agency Relationship Law, which focuses on termination. After the termination of an agency contract in the EU countries, the agent receives help from the law in collecting damages. A released agent receives compensation if the agent has brought the principal new customers from whom the principal continues to profit, if the agent is unable otherwise to recover costs incurred through the performance of the contract, or if the agent dies.

Under certain circumstances, however, the law in European Union countries prohibits the agent from receiving compensation. For instance, if the principal has terminated the contract due to the incapacity of the agent, the principal is not obligated to dispense compensation. Also, compensation is not payable if the agent terminates the contract or assigns rights and duties under the agency contract to another person.

TERMINATION BY ACTS OF PARTIES

The agency relationship can be terminated following certain acts. Several possibilities are discussed in the following sections.

Lapse of Time If an agency agreement specifies that the agency relationship will exist for a certain amount of time, the relationship will end when the amount of time expires.[35] For example, an agency agreement might state that the agency relationship will begin on September 1 and end on September 30. Although the agent and principal can agree to continue the agency relationship through October, they will have to make a new agreement. The agent's express authority ends when the relationship ends; thus, it is the responsibility of the principal to notify third parties that the former agent no longer has the ability to act on the principal's behalf.

Fulfillment of Purpose Suppose a homeowner enters into an agreement with a real estate agent to sell his house. In other words, the very basis for the relationship is a function or purpose—the sale of a piece of real estate. Once the house is sold, the agent no longer has the authority to act on the seller's behalf. The agent has fulfilled the purpose of the agency relationship.[36]

Occurrence of a Specific Event An additional means of ending an agency relationship is the occurrence of a specific event. For example, John chooses Claire as an agent to move his bed to another location. Once the move has been made, the agency relationship would terminate.

[33] Restatement (Second) of Agency, sec. 136(2).
[34] Restatement (Second) of Agency, sec. 136(3).
[35] Restatement (Second) of Agency, sec. 105.
[36] Restatement (Second) of Agency, sec. 106.

Mutual Agreement by the Parties Remember, agency is a consensual agreement between two parties. Consequently, if the two parties mutually decide they do not wish to continue in the agency relationship, they can cancel the agreement and therefore terminate the agency relationship.

Revocation of Authority At any time, a principal can revoke an agent's authority.[37] Again, the basis of agency law is consensual agreement. If the principal does not want the agent to act on his behalf, the principal can revoke the agent's authority. However, the principal's revocation might constitute a breach of contract with the agent. Therefore, the principal could be liable for damages due to the breach of contract.[38] If the agent has somehow breached her fiduciary duty to the principal, the principal can revoke the agent's authority without being liable for damages to the agent.

Renunciation by the Agent In the same way that a principal terminates an agency relationship by revoking authority, the agent can terminate the agency relationship by renouncing the authority given to the agent. The agent can be liable for breach of contract if the agency agreement has stated a specific amount of time the agency relationship is to exist.

agency coupled with an interest
An agency relationship that is created for the benefit of the agent, not the principal.

Agency Coupled with an Interest An agency coupled with an interest is a special kind of agency relationship. Unlike regular agency agreements, an agency coupled with an interest is created for the agent's benefit, not for the principal's. Given that the agent is the one who benefits, an agency coupled with an interest is also known as *power given as security.* Because the agency arrangement is created to benefit the agent, the principal may not terminate the relationship. Rather, the agency relationship is terminated when an event occurs that discharges the principal's obligation.

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TERMINATION BY OPERATION OF LAW

Certain events lead to automatic termination of the agency relationship. These events may involve a situation in which the agent is unable to fulfill his task or one in which the principal does not desire to continue with the performance. In addition, automatic termination may occur when further pursuit of the agency relationship's objectives would be illegal. These events are discussed in the following sections.

Death If either the principal or the agent dies, the agency relationship is automatically terminated. Even if one party is unaware of the other party's death, the agency relationship no longer exists. Suppose an agent has authority to buy antiques on behalf of a principal. However, without the agent knowing it, the principal dies, but the agent continues to purchase items on behalf of the principal. Those transactions are not binding on the principal's estate because as soon as the principal died, the agent's authority to act ended.

Insanity If a principal or agent becomes insane, the agency relationship is finished. Some states have modified this law so that unless the person has been adjudicated insane, the agency contract still exists.

Bankruptcy If the principal or agent files a bankruptcy petition, the agency relationship is generally no longer in existence. If the agent is filing for bankruptcy and the agent's credit is important to the agency relationship, the relationship will end. However, if the agent's financial history is not relevant to the agency relationship, the agency may continue. Insolvency, which is defined as the inability to pay debts or the condition of liabilities outweighing assets, does not necessarily result in the termination of the agency relationship.[39]

Changed Circumstances If an unusual change in circumstances leads the agent to believe that the principal's instructions do not apply, the agency relationship terminates.[40] For example, suppose Smith contracts someone to act as her agent to sell a painting she found in her great-aunt's

[37] Restatement (Second) of Agency, sec. 119.
[38] Restatement (Second) of Agency, sec. 118.
[39] Restatement (Second) of Agency, sec. 113.
[40] Restatement (Second) of Agency, sec. 109.

Agents and Electronic Contracts in Singapore

Many legislatures have found it necessary to add or create certain laws in response to technology. Singapore, for instance, addressed the growing use of electronic contracts with new legislation in 1997. Because of the possibility of e-mail and electronic fraud, certain risks are associated with forming electronic contracts. The new legislation attempts to combat those risks and specifies the consequences of such fraud.

The fourth section of this legislation pertains to the formation of agency contracts. Agency contracts made electronically will be valid and enforceable if the principal or a principal's designated agent sent the contract. As for contracts made between third parties, certain circumstances must exist for the third party to make the assumption that the electronic record is that of the principal.

Either the third party follows a procedure of clarification previously agreed on by the principal or he or she sees the message originated from an agent who has been endorsed by the principal. Under either of these circumstances, the third party is legally allowed to assume that the electronic message originated with the principal.

If an agent in Singapore sends an electronic record not approved by the principal, the third party has the right to act as a result of that message. If such actions result in injuries or damages to the third party, the principal is responsible under law. The principal cannot claim that he or she was unaware of the agent's actions. Although there may have been no actual awareness, Singapore does not recognize the lack of awareness as a defense.

Singapore's new legislation intends to protect third parties from the poor judgment of principals by creating this direct link between them. Making the principal answerable and liable to the third party increases the pressure to employ reliable agents.

attic. Smith authorizes the agent to sell the painting for $5,000. However, in the course of showing the painting to several buyers, the agent learns the painting is a Van Gogh original. Thus, because the painting is worth much more than $5,000, the agent should infer that the principal does not want the original agency to continue.

Change in Law When a new law is passed subsequent to the formation of an agency agreement that makes the commission of the agency agreement illegal, the agency agreement is terminated. For example, Tyler hires Ryan to paint her house green. Then, after Ryan was hired, the city council passes a law making it illegal to paint one's house green. The new law automatically terminates the agency agreement.

Impossibility Suppose that while attempting to sell the painting in our earlier example, there is a fire in Smith's house and the painting is destroyed. Because it is impossible for the agent to sell the painting, it is impossible for the agency relationship to continue.[41]

In addition, if the agent loses qualifications needed to perform duties for the principal, the agency relationship ends because of impossibility. For example, Jackson hires a lawyer to serve as his agent. However, the lawyer has unfortunately engaged in a series of illegal actions and is disbarred. Because the lawyer can no longer fulfill the functions Jackson has authorized him to perform, the agency relationship is terminated.

Disloyalty of Agent An agency agreement is terminated whenever the agent, unknown to the principal, acquires an interest against the principal's interest. The agency agreement is also terminated if the agent breaches the duty of loyalty he or she has to the principal.[42] For example, Mary is an attorney representing Lola in her suit against a pharmaceutical company. If the pharmaceutical company offers Mary a job and she accepts, the agency agreement would terminate because Mary has acquired an interest opposed to Lola's interests.

War A principal has an agent in Iran authorized to conduct business dealings on the principal's behalf.[43] If the United States goes to war with Iran, this agency relationship will no longer exist because there is no way to enforce the rights of the parties.

[41] Restatement (Second) of Agency, sec. 124.
[42] Restatement (Second) of Agency, sec. 112.
[43] Restatement (Second) of Agency, sec. 115.

SUMMARY

Introduction to Agency Law

Agency: The relationship between a principal and an agent.

Agent: One authorized to act for and on behalf of a principal.

Principal: One who hires an agent to represent him or her.

Fiduciary: One with a duty to act primarily for another person's benefit.

Creation of the Agency Relationship

Expressed agency: Agency formed by making a written or oral agreement.

Power of attorney: Document giving an agent authority to sign legal documents on behalf of the principal.

Durable power of attorney: Power of attorney intended to continue to be effective, or to take effect, after the principal has become incapacitated.

Agency by implied authority: Agency formed by implication through the conduct of the parties.

Agency by estoppel: Agency formed when a principal leads a third party to believe that another individual serves as his or her agent but the principal has made no agreement with the so-called agent.

Agency by ratification: Agency that exists when an individual misrepresents himself or herself as an agent for another party, and the principal accepts or ratifies the unauthorized act.

Agency Relationships

An *agency relationship* is a fiduciary relationship (a relationship of trust) in which an agent acts on behalf of the principal.

A *principal–agent relationship* exists when an employer hires an employee to enter into contracts on behalf of the employer.

An *employer–employee relationship* exists when an employer hires an employee to perform some sort of physical service.

An *employer–independent contractor relationship* exists when an employer hires a person other than an employee to conduct certain tasks.

Duties of the Principal and the Agent

Principal:

- Duty of compensation
- Duty of reimbursement and indemnification
- Duty of cooperation
- Duty of safe working conditions

Agent:

- Duty of loyalty
- Duty of performance
- Duty of notification
- Duty of obedience
- Duty of accounting

Rights and Remedies

Principal:

- Constructive trust
- Avoidance
- Indemnification

Agent:

- Tort and contract remedies
- Demand for an accounting
- Specific performance

Authority of the Agent: The Link to the Principal's Liability	*Express authority:* The principal has explicitly instructed the agent to do something. *Implied authority:* The relationship is inferred from the conduct of the parties. *Apparent authority and estoppel:* Apparent agency exists when a third party reasonably believes on the basis of a principal's actions that an agency relationship exists between the principal and another individual.
Contractual Liability of the Principal and Agent	*Classification of the principal:* The principal must be classified as disclosed, partially disclosed, or undisclosed. *Authorized acts:* These are acts within the scope of the agent's authority. *Unauthorized acts:* These are acts that go beyond the scope of the agent's authority.
Tort Liability and the Agency Relationship	*Principal's tortious conduct:* The law holds a principal directly responsible for his or her own tortious conduct under two conditions: (1) The principal directs the agent to commit a tortious act and (2) the principal fails to provide proper instruments and tools or adequate instructions. *Agent misrepresentation:* If an agent misrepresents himself or herself to a third party, the principal may be tortiously liable for the agent's misrepresentation. Respondeat superior: The principal/employer is liable not because he or she was personally at fault but because he or she negligently hired an agent. *Principal's liability and the independent contractor:* An individual who hires an independent contractor cannot be held liable for the independent contractor's tortious actions under the doctrine of *respondeat superior* unless the contractor engages in hazardous activities.
Termination of the Agency Relationship	*Termination by acts of parties:* This may occur by lapse of time, fulfillment of purpose, occurrence of a specific event, mutual agreement by the parties, revocation of authority, or renunciation by the agent. *Termination by operation of law:* The agency relationship may be terminated automatically due to death, insanity, bankruptcy, changed circumstances, change in law, impossibility, or disloyalty of the agent.

Point/Counterpoint

Should Sports Agents Be Held Personally Accountable for NCAA Violations Involving Signing College Athlete Clients?

YES

The Uniform Athlete Agents Act (2000) regulates the behavior of sports agents and their activities in representing athletes. Since the creation of the UAAA, 40 states have adopted the regulations listed in the act. Although agents who violate the act can be penalized, it is more common for athletes to suffer the consequences of fines and game suspension. Likewise, it is rare for an agent to be charged at all. One of the most common violations occurs in the relationship between college athletes and agents looking to sign their principals to professional sports franchises. Moreover, it is unjust for a college athlete to be penalized for a lack of diligence on the part of his agent. Three reasons suggest the prudence of holding the agent responsible for these violations.

First, in the event of a penalty, schools and students can be punished for the actions of agents. Current college sports rules forbid students from entering into contracts with professional agents; however, the NCAA

NO

A common, yet illegal, practice of sports agents influencing the career decisions of college athletes has been costing universities and players their presence at important games and resulting in hundreds of thousands of dollars in civil suits. The NCAA and 40 states have passed regulations banning this practice; however, it has continued. Although the outcomes may seem minor, a suspension of a player from an important game could cost him a desirable draft position, influencing his salary and his career prospects. Some wish to see the sports agents penalized for their involvement, but three important reasons suggest against this.

First, targeting sports agents will only hinder one part of the process. To conspire successfully to direct a college athlete's professional signing decision secretively, at least three parties must be involved: the player, the agent, and a representative from the professional franchise. However, cases in only polices schools and student athletes. As a result, agents are infrequently held accountable, and students and schools are penalized. For example, University of Southern California (USC) running back Reggie Bush was found in violation of NCAA policies that prohibit students from receiving gifts from agents. As a result, USC was prohibited from entering lucrative bowl games for two years and put on four years of probation; Bush was forced to vacate and return his Heisman trophy. Furthermore, no legal action has since been sought against the agent who presented Bush with the gifts or his agency. Because his agent played an integral role in the act, he too should be held accountable. Agents should be liable for violating NCAA laws that affect their college clients.

Second, it is the agent's responsibility to represent his clients scrupulously. The core of the agent–principal relationship is trust that the agent is acting on the principal's best interests. Violating regulations and incurring fines and suspensions are to the detriment of the principal. Furthermore, if there is likely no penalty for the unscrupulous agent, he has every incentive to use gifts and money to attract a potential athlete to the team with the highest offer. A higher standard of conduct should be expected from these adult professionals than from the college students they are wooing. Furthermore, an agent–principal relationship cannot be used to conduct illegal activities, such as buying placement on a team through favors or gifts.

Finally, agents represent the only common point in the illegal conspiracy involving agents, teams, and players. Although all three parties can be held responsible for their involvement in illegal recruiting, the agents are not only the common thread in most of the arrangements, but in many cases they are the sole facilitators of the deals. For example, one agent may be working with 50 players and 20 teams at any given time, yet he is the only common factor in each deal. Therefore, to reduce the problem of illicit athletic dealings, penalizing agents would be the most effective method. Moreover, one cannot expect a player or a team to come forward—their career futures are hanging in the balance. Thus, targeting agents and holding them personally liable is in the interest of achieving the greater goal of eliminating illegal college athletic dealings.

the past have revealed the involvement of coaches and family members. Although it is true that agents facilitate the relationship between the player and his future team, it is not inherently clear that the agent is most at fault. The conduct of agents, as regulated by the UAAA, only requires all agents to register and volunteer to be monitored by a state authority. Even if every state passed this regulation, athletes and team representatives could conspire to avoid the NCAA standards and practices. In addition, an agent only facilitates the needs of his clients. As a result, he is only acting on behalf of the will of the college athlete. Moreover, if the athlete doesn't want to be involved in any dirty dealings, he is not obligated to abide by his agent's suggestion. It is therefore reasonable to assume that both athletes and professional team representatives are in favor of this widespread practice, so targeting agents would not successfully end the practice of improper college athlete agreements.

Moreover, agents represent an important role in the negotiation process, and their actions both protect the interests of their clients and create very little negative outcome. College athletes work with sports agents because they can assist them in signing to a professional team and furthering their careers. With possibly millions of dollars on the line, agents protect inexperienced athletes with important career decisions. Targeting agents will affect the student athletes that they represent because agents set out to find the best course of action for their respective principals. Conversely, the harm created by these inside dealings is minimal. Although the practice is far from fair, aside from the rare prosecution, those involved get their desired outcomes without negative impact on others. Thus, targeting agents will both harm the interests of the students they represent and have a small effect on harm reduction.

Last, holding sports agents personally accountable results in targeting the party with the least to gain in a deal. Whereas initial contracts for professional athletes can be in the tens of millions of dollars, agents stand to gain only a percentage of this amount, commonly between 4 percent and 10 percent. Furthermore, fines levied against players who have already signed contracts pale in comparison to the potentially millions of dollars for their first-year contract. Likewise, colleges and professional sports teams profit considerably from successful teams and players. Of all of those involved, agents stand to gain the least amount of money. Targeting athletes, schools, or teams would be a more effective strategy for slowing the underhanded dealings among agents, players, and teams.