

LESE Day Two

**Good Faith
Agency
Professionals**

Spring 2002

GOOD FAITH

consumer

subjective: honesty in fact

merchant

subjective: honesty in fact

objective: commercial reasonableness

UTMOST GOOD FAITH

fiduciary duty

subjective: honesty in fact

objective: personalized

AGENCY

"PRINCIPAL"

principal
principal
employer (master)

"AGENT"

agent
independent contractor
employee (servant)

An agency is created by **express or implied acts of the parties**

the "principal" must act
agreement between the agent and principal
not necessarily a contract
capacity needed by "principal"
consideration not needed by either

Law attaches liability to knowing and voluntary acts.

who CONTROLS what & how?

P & A **P: what & how;** **A: what & how**

P & IC **P: what;** **IC: how**

ER & EE **ER: what & how;** **EE: none**

P & A share liability by degree of control.

In a P & IC relationship,
the P can shift liability for negligence to IC,
but the P can not shift liability for strict liability to IC.

ER has all liability for EE's acts within scope.

An "agent"

acts for and acts instead of the "principal"
when the agent acts
within the "agents" scope of authority.

The "agent" is not acting personally,
rather,
the "principal" is acting.

Both
the "principal" and the "agent"
owe each other **fiduciary duties**.

Recall fiduciary's **utmost good faith**.

"agent's" duties to the "principal"
obedience

care

loyalty

disclose conflict of interest and
obtain "principal's" approval for conflict
distinguish from directors

inform

law assumes duty fulfilled

accounting

"principal's" fiduciary duties to the "agent"

contract compliance
power versus right

indemnification

With respect to **tax laws and laws to protect employees**, the courts look to the **substance**, rather than the **form**, of an agency relationship to categorize the "agent" as either an employee or an independent contractor.

CRITERIA

skilled
own methods of the trade
hired by and paid by the task
supervision focuses on the deadline,
not the means of completing the task
separate business entities

"principal" is **vicariously liable** for "agent's" contracts, torts, and crimes if "agent" acting **within the scope of authority**.

reasonable expectations of the parties

Upon whom is the 3rd party justifiably relying ?
undisclosed principal

partially disclosed "principal"

fully disclosed "principal"

PROFESSIONALS

PROFESSIONAL'S AS AGENTS

State licensed
contract and tort
reasonable expectations and
justifiable reliance

COMMON LAW FRAUD

knowing
intentional
misrepresentation of a material fact
an expert's opinion can be a fact
justifiable reliance
AND
causing injury

Professional's Liability for TORT

To whom is the duty of care is owed?
Is privity required?

Ultramares Rule
party with primary benefit

Restatement Rule
foreseen third party

Minority Rule
reasonably foreseeable third party

Professional's Liability for CONTRACT

What conduct is a breach of the duty of care?

published standard
voluntary professional association
State regulatory body

negligence *per se*

Professional's Liability for Securities Law

due diligence for an issue
BarChris Rule
must ask and must verify

10b insider trading
do not need privity
do need scienter

Communications
between an "agent" and a "principal",
at a minimum,
are confidential. Only some are privileged.

confidential v. privileged communications
PRIVILEGED: attorney - client

If **past action**, then absolute.
Court can **not** compel testimony.
If **future and criminal**, then attorney
may have prior obligation to disclose.

CONFIDENTIAL: accountant - client
Court may compel testimony.
Otherwise, disclosure is a
breach of a fiduciary duty.
