Restatement (Second) of Agency § 5 (1958)

§ 5 Subagents and Subservants

(1) A subagent is a person appointed by an agent empowered to do so, to perform functions undertaken by the agent for the principal, but for whose conduct the agent agrees with the principal to be primarily responsible.
(2) A subservant is a person appointed by a servant empowered to do so, to perform functions undertaken by the servant for the master and subject to the control as to his physical conduct both by the master and by the servant, but for whose conduct the servant agrees with the principal to be primarily responsible.

See Reporter's Notes.

Comment on Subsection (1):

a. An agent may be authorized to appoint another person to perform for the principal an act which the agent is authorized to perform or to have performed. The agreement may be that upon the appointment of such a person the agent's function as agent is performed, and that thereafter the person so appointed is not to be the representative of the agent but is to act solely on account of the principal, in which case the one so appointed is an agent and not a subagent. On the other hand, the agreement may be that the appointing agent is to undertake the performance of the authorized act either by himself or by someone else and that the person so appointed while doing the act on account of the principal is also, in so doing, to be the agent of the appointing agent, who consequently will have the responsibility of a principal with respect to such person. If this is the agreement, the person so appointed is a subagent. What the agreement is depends, as do other agreements, upon the manifestations of the parties as interpreted by the usages between them, the customs of business, and all other circumstances. See §§ 77- 81.

A person may be a subagent although the appointing agent has no authority to appoint him. This is so if the agent has apparent authority to make the appointment, or if he otherwise has power to bind the principal, as where he is a general agent and the appointment of a subagent is an ordinary incident of his position, although forbidden in the particular instance. See §§ 161, 194.

Illustrations:

1. P, a fire insurance company, appoints A as its general agent for a certain state, it being agreed that A shall open offices in cities selected by him and shall receive a specified commission upon business done. A is thereby authorized to appoint subagents.

2. P, having a claim against T in a distant state, directs his attorney, A, to take steps for its collection. A is thereby authorized to employ an attorney in the debtor's state to initiate proceedings for collection. Whether the second attorney is P's agent or a subagent employed by A depends upon the understanding of the parties.

3. P, in Boston, who is familiar with customs prevailing in the cotton market at New Orleans, employs A, a commission merchant in New Orleans, to buy cotton for him in the New Orleans market and ship it to Boston. It is the custom in New Orleans for commission merchants to entrust the details of such a purchase to a cotton broker. In accordance with this custom, A employs B, a cotton broker, experienced and in good standing, to make the purchase. The employment of B by A is authorized and it may be found that B is a subagent.

4. Same facts as in Illustration 1, except that P tells A that A must not employ specified persons, among whom is B. A advertises for solicitors, as P knows. B applies for a position and is accepted, without notice of P's prohibition. A had apparent authority to employ B, and B is P's subagent.

Comment:

b. Reasons for distinguishing "agent" from "subagent". A subagent, as defined herein, is a person for whose conduct the appointing agent is responsible to the principal (see § 406), and in some cases is responsible to the person with whom the subagent deals. See § 362. These legal consequences do not follow when the appointing agent's function is merely to appoint a person to act for the principal, in which case the appointing agent is liable only if negligent in making the appointment. See § 405. In such a case, the person so appointed is not different from any other agent of the principal, and the fact that he was appointed by a superior agent rather than by the principal becomes immaterial. It is useful, therefore, to have a term which applies solely to the special type of relation where the appointed person is both an agent of the principal and an agent of the superior, appointing agent.

The courts have sometimes used the term subagent to describe both subagents as defined herein and also persons who, although appointed by superior agents, are not agents of such superior agents. This difference in usage has not resulted in improper decisions, but it has made the problem of citation difficult, since in noting cases in digests and encyclopedias the cases have to be read carefully to be sure that the court was referring to the kind of person described in this Section as a subagent.

Where an agent has no power to bind P by an appointment of a subagent, the one so appointed is the agent of the agent only, and the latter is responsible both to the principal for any improper delegation or/and to third persons for his agent's conduct. As to the authority to appoint an agent or subagent see Sections 77- 81.

c. Types of subagents. The subagent may be an employee of the agent or he may be a person not in the general employment of the agent but appointed for a specific undertaking. Thus, the receiving teller of a bank which acts as agent in the collection of a note is a subagent with respect to clients of the bank; another bank to which the depositary bank sends a note for collection may also be a subagent. The inference is that the regular employees of an agent are subagents; there is no inference in the case of other persons selected by an agent to act for the principal, except that if the person so employed is a public officer, as in the case of a notary not employed continuously, it is inferred that he is not a subagent. See §§ 79- 81. The subagent may be the servant of the agent, as in the case of a bank teller who collects a note for a depositor, or a non-servant agent, as in the case of a second bank to which the note is sent for collection. In no case would a subagent be the servant of the principal, except where the agent was himself a servant, in which case the rule stated in clause (2) would apply. It is to be noted that when a corporation or partnership is an agent, its officers, employees, and individual partners necessarily act as subagents in the performance of the principal's affairs, since such organizations can act only through others.

Illustration:

5. P employs A, a real estate broker, to sell Blackacre. A employs salesmen to show the premises to prospective customers and to indicate the terms of sale. The salesmen are servants of A but not of P, although they are subagents of P.

d. Liabilities resulting from subagency. A subagent performing acts which the appointing agent has authorized him to perform in accordance with an authorization from the principal is an agent of the principal and affects the relations of the principal to third persons as fully as if the appointing agent had done such acts. See § 142. Furthermore, the subagent stands in a fiduciary relation to the principal, and is subject to all the liabilities of an agent to the principal, except liability dependent upon the existence of a contractual relation between them. See § 428(1). Likewise, the principal may have correlative duties to the subagent. See § 458.

The subagent is also the agent of the appointing agent, with power to subject the appointing agent to liability to the principal for his defaults in the performance of the principal's business (see § 406), and to third persons for his acts within the scope of his authority or employment. See § 362. Likewise, the appointing agent has the same rights and liabilities with respect to the subagent as any other principal has to his agent. See §§ 428(2) and 459.

e. Subagents in series. There may be a series of subagents, as where an attorney, authorized to collect a debt and appoint a subagent, sends it to a correspondent with a request for him to appoint another for whose conduct the correspondent is to be responsible.

Comment on Subsection (2):

e. Situations creating subservants. The situations in which there may be a subservant relation are relatively rare but may exist where a person is paid by the piece or job and is allowed by the master to select assistants at his own expense, it being understood that the servant is to direct the conduct of the subservant who is to be subject also to the superior power of control which the master may exercise. If this superior control is not exercised, both the master and the servant are liable to third persons for torts of the subservant within the scope of employment for which the servant is an indemnitor to the master. For this purpose, both are masters of the subservant. The servant is also liable to the master for the conduct of the subservant in the scope of

employment and is under a duty to indemnify the master if he becomes liable to third persons for such conduct. If the master exercises his prerogative of overriding his servant in giving directions, the subservant is only his servant in doing the directed act. Illustrations of the subservant relation include that between the mine owner and the assistant of a miner who furnishes his own tools and assistants, the latter, however, being subject to the general mine discipline; the relation between the owner of a building and an employee of a janitor; the relation between the employees of a branch manager of a corporation where the branch manager is free to control and pay his assistants, but where all are subject to control by the corporation as to their conduct. In no case are the servants of a non-servant agent the servants of the principal.

f. Liabilities resulting from the relation. A subservant committing a tort in the scope of employment subjects both his employer and the latter's master to liability, his employer having a right of indemnity against him and a duty of indemnity in favor of the master of both of them. See § 362. On the other hand, for losses suffered in the rightful performance of his duties, the subservant may be entitled to indemnity either from his immediate master or from the employer of his master, the latter bearing the ultimate burden. See §§ 438, 458 and 459.

Illustrations:

6. P employs miners with the agreement that they are to employ, pay and control the activities of assistants who, nevertheless, are within the general discipline of the mine and can be discharged at any time for misconduct. B, employed by A as an assistant, negligently dumps coal on T, a licensee on the premises. P, A and B are liable to T, and A is under a duty to indemnify P for any resulting loss.

7. P operates a series of markets, putting each in charge of a manager who in practice is given full control over selling. Each manager is paid a net commission on the net profits and is allowed to hire whom he will, the store being subject, however, to general supervision by P. One of the managers, A, hires a delivery man to drive a truck owned by A. On one of his trips he negligently runs over T. Both A and P are liable to T. P has a right of indemnity against A.

REPORTER'S NOTES

(This note deals with the problems which arise from the appointment and activities of subagents, including subservants. The rules as to these are stated in sections 5, 80, 81, 137, 222, 255, 264, 283, 291, 318, 361, 362, 406, 428, 431, 458, 459, 518.)

Words are the tools of lawyers. They should be clean and polished. Ambiguity makes them ineffective to convey the intended thought. As far as possible, they should have a single meaning. Unfortunately, the literature of agency is filled with terms which are used in a variety of senses. Thus, “undisclosed principal” may indicate a situation in which an agent does not reveal the existence of a principal, or one in which he reveals his existence but not his identity, or sometimes even one in which the principal's name is not written in the document constituting the memorandum of a transaction. Again, “apparent authority” may indicate a situation in which the principal has manifested to a third person that the agent is authorized, or it may describe merely the power to bind his principal of an agent who unauthorizedly does an act for the principal, even where the principal's existence is unknown to the other party to the contract. Likewise “notice” has been used both as a legal conclusion and as a factual word importing knowledge, with a variety of meanings.

Among other words thus abused is the word "subagent." In Section 5 a subagent is described as "a person appointed by an agent empowered to do so, to perform functions undertaken by the agent for the principal, but for whose conduct the agent agrees with the principal to be primarily responsible."[1] The term has been used so ambiguously both by text writers and by the courts that it seems worth while to point out its ambiguous use and to state the rules that apply to the conduct of one who is herein so described. The term "subservant" was not used in the original Restatement but it is useful to describe the term and indicate the situations to which it applies.

I. SUBAGENTS

An agent may be authorized to appoint another agent who will have the same relation to the principal as if appointed directly by the latter. This appointment may be by way of delegation, that is, in substitution for the appointing person, or it may be to do acts which the appointing person himself would not normally do or be authorized to do. It may be understood that the one so appointed is to perform acts under the direction of the one appointing him, as where a manager is employed to engage other agents and servants who are to work under his direction, or that the appointing agent performs his whole function in making the appointment, as where an employment agency is directed to hire persons for the principal. In both cases it is clear that the persons thus employed are employees or agents, not of the employing agent, but of the person for whom the employing agent works. This is true even though the one employing them also supervises them. Thus the employees of a corporation, from the vice-president down to the office boys, are not the servants of the directors or of the president, but of the corporation. The secretary of a manager is not the manager's employee but the corporation's. There is no practical value in giving a special name to such persons, who are no more and no less agents or servants than are those who control them. If we wish to describe them it would perhaps be proper to say that they are subordinate agents or servants—or perhaps nonexecutives, since for some purposes we may wish to create a category of executives. However we describe them, there are no rules which apply to them other than those resulting from the principle that their duties and powers depend upon the kinds of positions that they occupy. It should be quite clear that for such persons the prefix "sub" has no bearing upon their relations with principals or with superior agents.

In such cases the agent who does the appointing, whether a servant of the employer or an independent organization such as an employment agency, may be responsible to the principal or even to a third person if he is careless in making the appointment. If he is a supervising employee, he may be responsible to the employer or to a third person for his improper supervision or direction. But he has no fiduciary relation to the one whom he has appointed. He is not liable to him for compensation or indemnity. He cannot, in his own right, claim from him the performance of any of the duties of obedience, loyalty, or accounting. Unless he has made an improper appointment or failed in supervision, he is not responsible to a third person or even to the principal for the conduct of his appointee. His death or the termination of his agency does not affect the relation between the principal and the one whom he has appointed. Having performed his function, he drops out of the picture.

On the other hand, we have the situation that is created when an agent agrees with his principal that he will accomplish a result for the principal, but for this purpose will use agents of his own selection to whom he pays compensation and for whose conduct he is responsible to the principal. A typical illustration of this arises where a person employs a real estate broker to sell a tract of land, with the understanding that the real estate broker is to use his own instrumentalities, including subordinates who are to be responsible to the real estate broker for what they do and who are to receive their compensation from him. This is an entire change from the first situation. Although the salesman for the broker may be employed to execute a contract for the principal, he is in fact an employee of the broker and is liable to the broker for any failure of performance. His position therefore with reference both to the broker and to the owner of the land is quite different from the position of a subordinate working under the direction of a manager who has appointed him. For such a person, therefore, it is desirable to create a name which will indicate this distinction. The term "subagent" would seem to be appropriate for such a person and it is at least consistent with judicial uses. The prefix "sub" in such a case is appropriate, not to indicate that the agent is not the agent of the principal, since he is, and not to indicate that he was appointed by an agent, since today most agents are appointed in that way, but to indicate that he is the kind of agent who is also an agent of the one appointing him, where the purpose of the entire arrangement is to carry out the purposes of the first principal. In such a case he is the agent of two principals, one of whom is subordinate to the other.

The idea that one is no less the principal's agent because he is also the agent of the one from whom he derived his authority and to whom he owes fiduciary duties has been, and appears still to be, a difficult conception to understand. This is illustrated by Hoover v. Wise, where it was held that knowledge of the subagent was not knowledge of the principal because the subagent was the "agent of the collecting agent, and not of the creditor who employed that agent."[2] If, however, it is understood that such a person is performing his duty to the agent, and at the same time representing the principal in the transaction, all logical difficulties would seem to disappear. If, for instance, an agent thus employed has authority to sell Blackacre for its owner, the salesman in making representations or entering into the contract of sale obviously does so on behalf of the owner. If this were not true, he could not bind the seller. With reference to the owner he is as much an agent in the transaction as if he had been employed directly, but because he has been employed and paid by another and because the other is responsible to the owner for the way in which he conducts the transaction, there arises a four-party[3] instead of the ordinary three-party relation.

Although the liabilities arising from the relation of principal, agent, and subagent have now become clear to most courts, the statements of both courts and text writers have created confusion, largely by a failure to use language that indicates the distinction between a subagent and a subordinate agent appointed by another agent. The confusing ambiguity began early. I hazard a guess that at least part of the difficulty was caused by confusing the power to delegate, that is, the power to appoint another person to perform one's own work, with the power of employment, either by way of substitution or otherwise. But, however the confusion arose, it arose at an early time. Thus Paley, the first writer of a text on agency, in speaking of one who was superintending a workman paid by another, said, "In cases of this description, the agent who employs a sub-agent in the service of the principal, is not liable,"[4] a statement which would be true for one who was authorized to appoint another agent of the principal, but not for one authorized to appoint a subagent. The great Story, usually accurate both in statements of law and the use of words, said "the agent will not ordinarily be responsible for the negligence or misconduct of the sub-agent, if he has used reasonable diligence in his choice. * * *"[5] Nowhere did he make clear the distinction between one who is authorized to appoint a person who is to work under him for the principal, but for whom he is not responsible, and one who appoints a subagent as the term is used here. From that time until this there have been difficulties in handling the subject. Floyd Mechem, in his great classic,[6] indicated the distinction but unfortunately did not define the term. Philip Mechem, in the fourth edition of his father's Outlines of Agency,[7] gives an excellent discussion but cannot bring himself to state that the subagent (and by that he means what is meant here by a subagent) is an agent of the principal. Other works currently in use make the distinction with indifferent success.[8]

It is not surprising, therefore, that the courts have used the term sometimes with one meaning and sometimes with another. This has not led to many errors in result because most of the misuse is by way of dicta. In many cases it is stated that an agent is not liable to the principal or to third persons for the act of a subagent unless he was guilty of negligence in the appointment or unless he improperly cooperated in the act.[9] But in each of these cases, on a proper interpretation of the facts, the result is correct, because the person called a subagent was not a subagent, but an agent appointed by another agent of the same principal. In a number of cases it is stated that the principal is liable for the compensation of a subagent, if the agent was authorized to employ him.[10] Again the statement has reference to a person who, as I interpret the facts, was not a subagent. In one of the cases it is said that an agent employing a subagent is not liable to third persons for the tort of the subagent, where in fact the defendant was merely a superior agent.[11] In another instance the court spoke of an assistant cashier as being a subagent of the cashier of a bank,[12] and similar loose handling of the term "subagent" appears in other cases.[13]

It is often difficult to tell whether the court had in mind an agent or a subagent as defined in this Comment. Thus in Christensen v. Pryor[14] the court said, in holding the agent liable to the principal for fraud of the subagent, that there is no privity of contract between the principal and subagent unless the employment was authorized. In Gulf Refining Co. v. Shirley[15] the court said a subagent may or may not be the agent of the principal, and made the test of liability whether the agent was authorized to make his appointee the principal's agent. In Baker-Riedt Motor Co. v. Moore[16] the court said, in holding a manufacturer not liable to a truck salesman for commissions, that the subagent was not the agent of the principal. Similar difficulties in language or

misconceptions of law appear in other cases.[17] It is not surprising that even a careful note writer should throw into one note under the heading, "Liability of Agent for Acts or Omissions of Subagent,"[18] cases involving liability of corporate officers, mine bosses, and the like for acts of inferior employees together with cases concerned with the liability of brokers who employ their own staffs, using the term "subagency" indiscriminately to cover both types of situation.

Aside from the difficulty in the language there is now little disagreement in the courts as to the rules which are important in distinguishing the agent from the subagent. There is no reason here to describe the consequences of the normal agency relation. It is enough to say that an appointing or supervising agent who has acted carefully is not responsible to the principal, to a third person, or to the agent whom he has appointed or supervised, for any acts done by the latter, nor does the latter agent have any fiduciary duties to the one who appointed or supervised him. On the other hand, although the subagent and the principal ordinarily have no contractual relations, the subagent is, as is demonstrable, an agent (although not ordinarily a servant) of the principal, with the duties of a fiduciary to, and the right of indemnity against, the principal. It is in this area that the early cases found the greatest difficulty, one which no longer exists.

Position of Agent Employing a Subagent. As against the agent, the subagent has the normal rights and duties of any agent to a principal. The agent has been held liable to the subagent for the latter's compensation, as where a real estate broker was held liable to a person he had employed to find a customer for the purchase of land;[19] where an agent was required to pay workmen's compensation to an employee who was his servant;[20] where a collecting agency was made liable to the constable whom it employed;[21] and where an executor was required to pay a broker whom he had employed for the estate.[22]

The agent is liable to the principal for any improper conduct by, or loss resulting from the insolvency of, the subagent whom he has appointed. Banks have been held liable in innumerable cases for the conduct of subagents they have appointed.[23] The same rule has found expression in cases in which a real estate broker was held responsible to the vendor for loss caused by the fraud of the broker's salesman;[24] where an agent to record a mortgage was said to be liable for negligence of his agent in recording;[25] where a broker was held liable to a contractor for the misdeeds of a subagent;[26] where a collecting agent was found responsible for misappropriation by an employee;[27] where a mercantile agency was held liable for the fault of a correspondent;[28] and where an insurer was held liable to the insured for the negligence of insurer's attorney.[29]

The agent is liable to third persons for the conduct of a subagent, as is any principal or master for the conduct of his agents or servants.[30] As an agent does not enjoy any immunity of his principal, so the agent is not protected by the principal's immunity from liability for acts of a subagent[31] and is liable for an assault or negligence of his servant or for the misstatements of a subagent.[32] He is of course in no way responsible for the conduct of subordinate agents of the principal, provided he has not been guilty of substandard conduct in appointing or supervising them, even though the courts have sometimes improperly used the term "subagents" to describe such agents.

Rights and Liabilities of Principal With Reference to Subagent. A principal as such is not, without special agreement, liable to a subagent for compensation.[33] That the subagent is nevertheless his agent now seems clear beyond doubt. The failure to recognize this caused the difficulty in Hoover v. Wise.[34] But for many years the courts have been practically unanimous, whatever may be said in dicta, in making the principal responsible for the subagent's conduct in all the ways in which the conduct of a nonservant agent may make a principal liable. Thus the courts now consistently hold that the principal is bound by the knowledge of the subagent as if he had been directly appointed,[35] with only an occasional dictum to the contrary.[36] In Newco Land Co. v. Martin[37] the "single agent" rule was held applicable to a subagent, and in Bonacorso v. Camden Fire Ins. Ass'n[38] a notification given to the subagent was held to bind the principal. In a number of cases the principal has been held liable for the fraud of the subagent.[39]

Unless the subagent is also the servant of the principal, the latter is not liable for his physical conduct causing harm to others. Except in the case of subservants, it is difficult to see how the subagent can be the principal's servant, since his employer is a nonservant agent not subject to the principal's direction. However, if at any time the subagent is in fact under the control of the principal as to his physical conduct, his conduct in obedience to the principal's directions would make him a servant for whose conduct the principal, now a master, would be responsible.

A subagent is liable to the principal for negligence in performing or failing to perform duties undertaken for the principal. He is also under a duty to account for anything received for the principal and is liable as a fiduciary for any breach of a fiduciary duty. It is in this area that the courts have had the greatest difficulty in understanding that a subagent is in fact an agent of the principal, even though it is obvious that he must be the agent of the principal when he binds the principal while acting in connection with the principal's affairs. It was formerly said that there was no "privity" between principal and subagent, since there was no contract between them, and the older English cases thus held that a subagent had no duty to account to the principal.[40] There are also a few American cases so holding,[41] apparently based on the same idea of lack of privity. These cases, however, are out of line with the great mass of modern decisions.

Privity as a requirement is disappearing both in the tort and contract fields, and modern cases recognize that the subagent is responsible to the principal as a fiduciary. True, the principal does not pay his salary and he is not liable to the principal for a breach of contract if, as is normal, his only contract is with the agent. He should, however, be responsible to the principal for failing to pay over anything received for the principal, for careless handling of the principal's affairs, for negligent failure after undertaking to act, and for any violation of fiduciary duty. If he improperly acquires property, he is a constructive trustee. These results are all consistent with the ordinary rules of agency, torts, and restitution.

It is now commonplace that the principal can recover from the subagent money received by the latter for him.[42] A subagent has been held liable to the principal for disobeying orders[43] and for committing a breach of fiduciary duty.[44] In Florida Citrus Exchange v. Union Trust Co.[45] it was held that the subagent would be liable to the principal for negligence. These results are reinforced by the decisions dealing with setoffs by subagents in actions by principals. In cases where the subagent knew of the existence of the principal, it is held that the subagent cannot set off a claim which he has against the agent.[46] It is only where the subagent was unaware of the existence of the principal that he is entitled to set off such a claim.[47] Finally, corresponding to the fiduciary duties of a subagent, there is the duty of the principal to indemnify the subagent for losses incurred in performing the principal's business, resting on exactly the same basis as the principal's duty to indemnify other agents directly appointed.[48]

Since the subagent is the agent of the principal and also of the agent, his authority can be terminated by either of his two principals. Thus his relation with the ultimate principal is terminated by the death or other legal incapacity of the agent, as it is also when he realizes, or should realize, that the principal no longer wishes him to act.[49] He would violate his duty to the principal if at the orders of the agent he were to act in the principal's affairs contrary to the principal's directions. On the other hand, he would not be liable to the agent for failure to obey in such a case, since the agent has no right to direct him to act against the orders of the principal. The agent, however, can also terminate the authority of the subagent to act for the principal. If after the agent has told him not to act, he acts at the request of the principal, he does so exclusively as the principal's agent and not as a subagent.

II. SUBSERVANTS

Consistently with the description of a subagent, a subservant may be defined as "a person appointed by a servant empowered to do so to perform functions undertaken by the servant for the master and subject to control as to his physical conduct both by the master and by the servant, but for whose conduct the servant agrees with the master to be primarily responsible."[50]

The situations in which a subservice relation can be found are few, since normally a servant subject to the master's control as to his physical conduct does not employ one subject to his orders other than a subordinate employed by him for the master. However, there are a few situations in which a servant, although subject to control as to his conduct by his master, is authorized to employ his own assistants, paying them and being responsible to the master for their conduct. In such cases, the basis for the finding of subservice appears to be that the subservants are subject to control, in their physical movements, both by their immediate employer and by the latter's master. The employing servant in this situation is in the position of a master to those whom he employs but these are also in the position of servants to the master in charge of the entire enterprise. An illustration is an organization operating a railroad or a mine, paying its servants for results and authorizing them to employ assistants, but maintaining discipline over the entire operation.[51] However, subservice has been found in a variety of other situations. Thus in Waggaman v. General Finance Co.[52] it was found that a finance company was the master of one employed by its employee to assist him in repossessing an automobile. In State ex rel. Cooper v. Baumann[53] it was held that assistants employed by a head janitor were in the relation of servants to the school board, and they would seem to fit the description of subservants as defined in the Restatement. Another interesting example is Bileu v. Paisley,[54] involving the relations among the owner, manager, and herders of sheep.

The most important recent cases in this area are those in which it has been held that an employee of the lessee of a gasoline service station is the servant of the corporate lessor, thus making the lessor liable for his negligence.[55] It would seem necessary in such a case to find that the individual station operator was the servant of the lessor. To support this finding, if the ordinary rules of master and servant are followed, it should appear that the station operator was controlled in his physical activities while operating the station. This has not appeared; the oil companies have in fact required only that the lessees should supply proper facilities and employees. The decisions holding the oil companies responsible for the acts of station operators and their employees are, I believe, actually based upon the assumed economic desirability of finding such responsibility, since the operators are frequently in no better economic position than the usual minor employee. Of course it can be argued that the lessors have such economic control that the lessees are coerced even as to their physical conduct, but this seems contrary to reality.

Even under the courts' reasoning in these cases, the lessees would not seem to escape liability altogether for the negligence of their employees. Although actions against them directly are unlikely, they stand in the relation of indemnitor to the oil companies for harm done by them and their servants. In a leading case in this field this implication was recognized, the court saying: “It may be true that Duncan's employees remained his servants, but, as hereinbefore stated, when he placed them in the service of the appellant, they became also its servants and thereby became entitled to all the rights of a servant against the appellant. * *”[56]

Many cases have agreed with this result,[57] though some have disagreed.[58] But whether or not the decisions are correct, they clearly recognize the existence of a class of persons who, under the analysis here presented, can properly be called subservants. This same recognition can be found in other areas,[59] in which there is a similar diversity of judicial opinion. For example, in Burlingham v. Gray,[60] in which a newspaper company employed a dealer who in turn employed newsboys, it was held that a jury might find the latter to be servants of the company, which would then be responsible for their negligence, while in World Publishing Co. v. Smith[61] the company was held not liable, on the ground that the newsboys were servants only of the “dealer.”

The conception of two masters to whom the servant must be obedient is perhaps even more difficult than that of an agent with two principals, one of whom at least is not his master. But if we agree with the result reached in the line of cases mentioned above, it would appear necessary to recognize the existence of subservants.

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Case Citations - by Jurisdiction

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E.D.Va.
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Cal.App.
Colo.
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Mass.App.
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N.J.Super.
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N.M.App.
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Wis.
Wis.App.

U.S.

U.S.1974. Subsec. (2) cit. in op. in disc. and cit. in conc. op. in disc. This was an action brought under the Federal Employers' Liability Act (FELA) against a railroad to recover for injuries sustained by plaintiff workman while unloading automobiles from a railroad car. Plaintiff, an employee of a trucking company (PMT) which unloaded the cars under a contract with the railroad company, alleged that he was sufficiently under the railroad's control to bring him under coverage of the FELA, even though PMT supervisors controlled the day-to-day unloading process. The District Court held that PMT was serving generally as the railroad's agent, that PMT's employees were the railroad's agents for purposes of the unloading operation, that the work performed by plaintiff fulfilled the nondelegable duty of the railroad, and, therefore, that the relationship between plaintiff and the railroad sufficed to make the FELA apply. The Court of Appeals reversed on the ground that the District Court's test for FELA liability was too broad. Held: Case remanded with instructions. For the purposes of the FELA the question of employment, or master-servant status, is to be determined by reference to common-law principles. Under common-law principles, there are three methods by which a plaintiff can establish his employment with a rail carrier for FELA purposes even while he is nominally employed by another, i.e., (1) the employee could be serving as the borrowed servant of the railroad at the time of his injury, (2) he could be deemed to be acting for two masters simultaneously, (3) he could be a subservant of a company that was, in turn, a servant of the railroad. Nothing in the District Court's findings suggest that plaintiff was sufficiently under the railroad's control to be either a borrowed servant of the railroad or a dual servant of PMT and the railroad. Even the theory of a subservant relationship between plaintiff and the railroad fails, since the District Court's findings did not establish the master-servant relationship between the railroad and PMT necessary to render plaintiff a subservant of the railroad. Although the District Court was correct in concluding that PMT was an agent of the railroad, a finding of agency is not tantamount to a finding of a master-servant relationship. The District Court's conclusion that the railroad was “responsible” for the unloading operation is not tantamount to a finding that the railroad controlled or had the right to control the physical conduct of PMT employees, like the plaintiff, in the unloading operation. The District Court's findings clearly fail to establish that plaintiff was “employed” by the railroad. The concurring Justice felt that the Majority's detailed discussion of the evidence was unnecessary, that the case should be remanded to the District Court with instructions to apply the correct principles of Master-servant law in determining plaintiff's status under the FELA and that whether the railroad controlled, or had the right to control, plaintiff's work was “for the original factfinder to determine.” The Dissent felt that the District Court had found that the requisite relationship was present to permit a recovery under the FELA, that the findings of fact made by the District Court were not clearly erroneous and supported its conclusion that FELA was applicable. The Dissent held that the District Court “made findings of fact easily sufficient to support the existence of an employment relationship under the correct substantive test, and he in fact found that the requisite relationship existed.” Kelley v. Southern Pacific Co., 419 U.S. 318, 95 S.Ct. 472, 476, 580, 42 L.Ed.2d 498.

C.A.2

C.A.2, 1984. Subsec. (1) quot. in sup., com. (c) quot. in part in sup. Defendant freight claims agent filed some 13,000 lawsuits against plaintiff railroad on behalf of additional defendants, receivers, for the late arrival of shipped goods. In this action for abuse of process, fraud, and unfair trade practices, plaintiff charged, inter alia, that principles of agency law made the additional defendants liable along with the claims agent for their share of unfounded claims. The trial court found mostly in defendants' favor, ruling that the agent's employee, who filed the claims, was not an employee of the additional defendants. This court affirmed in part, and reversed and remanded as to the issue of the additional defendants' share of liability. Accepting the trial court's finding that the freight claims agent unfairly filed 1,900 unfounded claims, the court concluded that the receivers shared the agent's liability on that count. The court noted that regular employees of agents were subagents, that a principal was liable

for the acts of its agent's employees, and that a principal was accountable in tort for unauthorized acts of an agent. Blanchette v. Cataldo, 734 F.2d 869, 875.

C.A.2, 1982. Cit. in disc. An American purchaser of leather and suede garments brought a breach of contract action against defendant who had agreed to locate foreign manufacturers and make arrangements for the importation of the garments into the United States. Plaintiff alleged that third party whom defendant had hired to assist him failed to properly inspect the goods before certifying them to be "merchantable." He also alleged that third party was an agent of defendant, thus making defendant liable for the third party's failure to inspect. The lower court dismissed plaintiff's complaint and denied defendant's counterclaims for a percentage of his commissions after finding that there can be no vicarious liability when a subagent, with the permission of the principal, is appointed by the agent to work for the principal. The lower court also found no joint venture between the defendant and the third party to hold defendant liable for the third party's acts. This court held, inter alia, that an essential issue is whether the third party is a subagent of defendant or an independent agent of the plaintiff. If he is a subagent, then the agent is responsible to the principal for the subagent's conduct with reference to the principal's affairs unless otherwise agreed. If he is an independent agent, then the agent is not liable for his acts unless he had a duty to appoint and supervise the other agents and he violated this duty, or he directed, permitted, or took part in the improper conduct of the other agents. The agent is also liable for another agent's acts if he jointly contracted with another agent to perform for the principal. The court stressed that the plaintiff's claim was based on a breach of an express agreement with the defendant to it that the requisite inspections were done and that defendant could be held for this breach regardless of any subagency or joint venture issues. Because the lower court did not deal with this express agreement, the court remanded for further findings of fact and affirmed the dismissal of defendant's counterclaims. Demian, Ltd. v. Charles A. Frank Associates, 671 F.2d 720, 723.

C.A.4

C.A.4, 1998. Cit. in headnotes, subsec. (1) cit. in disc. Insurer sought declaration of noncoverage on grounds of property owners' misrepresentations, omissions, and concealments about two insured buildings that were vandalized. Property owners counterclaimed for breach of contract and joined insurance agent and wholesale broker as parties, alleging negligence. The district court entered summary judgment for insurer, agent, and broker. Affirming in part, reversing in part, and remanding, this court held, inter alia, that, with respect to one of the buildings, a question remained as to the applicability of the policy's vacancy provision, which precluded coverage for unoccupied structures, and that material factual issues existed as to whether wholesale broker knew of property owners and acted on their behalf when placing their application for coverage with an appropriate insurer, in which case broker could be found liable as owners' agent or subagent. United Capitol Ins. Co. v. Kapiloff, 155 F.3d 488, 489, 498.

C.A.4, 1995. Subsec. (1) cit. in disc. After a worker was asphyxiated by the release of carbon dioxide during a test of a United States vessel's fire suppression system, the administratrix of the worker's estate brought suit in state court against several contractors and subcontractors engaged to perform maintenance and repair tasks aboard the vessel. The action was removed to federal district court, which denied plaintiff's motion to remand to state court. Reversing and remanding, this court held that, pursuant to basic principles of agency law, defendants were not "agents" of the United States for purposes of the exclusivity provision of the federal Suits in Admiralty Act, but were merely nonagent independent contractors of the United States; thus, plaintiff's action could go forward in state court. Servis v. Hiller Systems Inc., 54 F.3d 203, 208.

C.A.5

C.A.5, 1991. Illus. 5 quot. in disc. After unsuccessfully attempting to buy a house that was later sold to a white couple, a black couple sued the developer's corporation, its exclusive sales broker, and employees of both companies. The district court granted directed verdicts for two of the individual defendants and the jury found in favor of the remaining defendants. Reversing and remanding, this court held in part that the jury was improperly instructed as to the agency relationship between an employee of the sales broker and the developer's corporation. The court stated that, by answering questions about and showing the house to prospective buyers, the employee benefited the developer and became the agent of the developer's corporation. Thus, the

employee's racially derogatory remarks could be evidence of a pattern or practice of discrimination by the developer. Moss v. Ole South Real Estate, Inc., 933 F.2d 1300, 1312.

C.A.5, 1975. Rptr's Notes cit. in sup. Following certain incidents surrounding the revocation of credit by defendants, plaintiff suffered a heart attack and subsequently brought suit. From the granting of judgment n.o.v. for two defendants and new trials for two others, plaintiff appealed. The court affirmed in part and reversed in part. Defendant oil company was initially determined not to be a consumer reporting agency within the provisions of the Fair Credit Reporting Act. The company's directive to terminate plaintiff's credit was made for the purpose of protecting the oil company, rather than influencing the defendant motel who received the directive. The cause of action based upon the "user" provision of the Act was properly dismissed. The credit report in defendant's possession was not used in making the determination to terminate plaintiff's credit. As to the liability of the oil company for the actions of the clerk at the motel, the correct test is whether the alleged principal (oil company) had the right to control the physical details of the manner of the alleged agent's (motel clerk) performance. If an agent's act were incidental to carrying out the duties assigned to him by his master, the master may be held liable, even though he did not authorize the agent's means, and also though the agent may have sought to accomplish the master's business in a manner contrary to the master's expressed instructions. By virtue of an extension of credit arrangement between defendant oil company and defendant motel, the court concluded that the oil company controlled the clerk's activity to some degree. Whether there was sufficient control of the clerk's physical activities to render the oil company liable was a jury question. The court went on to conclude that the existence of contradictory yet reasonable inferences in the case rendered the district court's judgment n.o.v. as to the oil company improper. Thus, the case was remanded for a new trial on the question of the clerk's status as a servant of the oil company. As to the granting of a new trial to the clerk and motel, the trial court's decision was affirmed, the court noting that where verdicts in the same case are inconsistent on their faces indicating that the jury was confused, a new trial is appropriate. Finally, the court concluded that there was sufficient evidence from which a jury could reasonably conclude that defendant motel-franchisor should be liable for defendant clerk's actions. The issue was a question of apparent authority and proper for the jury to determine. In the interests of justice, the action against the franchisor was remanded due to the jury's confusion as to the proper application of law to the facts. Indemnification of the motel and clerk by defendant oil company was not proper since the oil company was not shown to be negligent. Wood v. Holiday Inns, Inc., 508 F.2d 167, 174.

C.A.7

C.A.7, 1990. Subsec. (2) cit. in case quot. in disc. A steel works facility employee who was injured while working in a steelyard sued a railroad that was a subsidiary of the steel company and that performed transportation functions at the facility, claiming that he was an employee of the railroad for the purpose of establishing liability under the Federal Employers' Liability Act (FELA). The district court granted the defendant's motion for a directed verdict on the ground that the plaintiff was not the defendant's employee under the FELA. Affirming, this court rejected the plaintiff's argument that the plaintiff was a subservant of the steel company, which was in turn a servant of the defendant, holding that the evidence showed that the defendant exercised no control over the steel company at the time of the accident. Warrington v. Elgin, Joliet & Eastern Ry. Co., 901 F.2d 88, 90.

C.A.8,

C.A.8, 2019. Subsec. (1) cit. in sup. After the administrator of a company owned by insured stole funds from insured's subsidiary using the subsidiary's property management software, insured brought a lawsuit against insurer, alleging that insurer violated the parties' insurance policy by refusing to cover damages resulting from the theft. The district court granted insurer motion for summary judgment. This court affirmed, holding, inter alia, that the policy did not cover conduct by the administrator, because she qualified for the "authorized representative" exception under the policy as a subagent of insured's subsidiary. The court explained that, under Restatement Second of Agency § 5(1), the administrator was subsidiary's subagent, because she acted on her employer's behalf, her employer was subsidiary's agent, and she acted in accordance with industry custom when she stole the funds. C.S. McCrossan Inc. v. Federal Insurance Company, 932 F.3d 1142, 1147.

C.A.8

C.A.8, 1992. Com. (c) and Rptr's Note cit. in disc. Hospital that was part of pooled liability fund settled malpractice claim against nurse and then sued nurse's insurer for indemnification. The trial court granted hospital's motion for summary judgment. Affirming, this court held that pooled liability fund was not "other insurance" within meaning of nurse's policy, since hospital's corporate owner had not shifted risk to third party in exchange for premiums, but had merely pooled funds to manage risks among several of its hospitals. The court held that even if fund were considered insurance, its coverage did not extend to hospital's employees for amounts under $500,000. St. John's Reg. Health Ctr. v. American Cas. Co., 980 F.2d 1222, 1225.

C.A.10

C.A.10, 1989. Subsec. (1) cit. in case quot. in disc. The owners of thoroughbred horses that were killed or injured while being transported by a carrier sued the carrier for damages. The district court granted the carrier's motion for a partial summary judgment, finding that the plaintiffs' subagent was authorized to sign the bill of lading, which limited the carrier's liability to $200 per horse. This court affirmed, holding that a groom, as the employee of the plaintiffs' trainer, had the authority to handle the shipping of the horses and to sign the bill of lading. The court said that the groom was acting as the plaintiffs' subagent when he signed the bill of lading, thereby binding the plaintiffs to its terms. Norton v. Jim Phillips Horse Transportation, Inc., 901 F.2d 821, 828.

C.A.10, 1980. Appx. cit. in disc. This action was brought by a husband and wife, for injuries sustained by the husband when a crane cable snapped on board a drilling rig in Singapore. The plaintiffs sued the American parent company and its Singapore subsidiary, alleging negligence in their failure to provide a dependable crane operator, in the operation of the crane by the defendants' employee and in using a stretched and weakened cable. The lower court sustained the Singapore corporation's motion to dismiss for lack of in personam jurisdiction and granted summary judgment in favor of the American corporation, refusing to impose liability for acts of its subsidiary. On appeal, this court affirmed the ruling in favor of the Singapore corporation but reversed the judgment in favor of the American corporation and remanded the case for further proceedings. Under Oklahoma law, if the general employer has not given full control of a servant for the time during which the work is being performed, then the servant does not become the servant of the person for whom the work is performed merely because such person points out the work to the servant or gives him certain directions. Because the American corporation had executed a management agreement with the Singapore corporation, whereby the American corporation agreed to provide management personnel for the purpose of assisting the Singapore corporation in its operations and undertakings, this court found that the factual issue of control, by the American corporation over the management team in the Singapore operations, would not permit an affirmance of the summary judgment. Luckett v. Bethlehem Steel Corp., 618 F.2d 1373, 1381.

C.A.D.C.

C.A.D.C.2018. Com. (e) quot. in diss. op.; illus. 6 and 7 quot. in sup.; Rptrs' Note quot. in diss. op. After the National Labor Relations Board ruled that recycling-plant operator and staffing agency were joint employers for union-representation purposes, operator filed a petition for review. This court granted in part operator's petition, holding, inter alia, that, although the Board correctly stated the common law that the mere presence of an intermediary did not prevent an employer from being the master of its servants, it failed to correctly apply the facts of the case to the stated law. The court quoted Restatement Second of Agency § 5 in explaining that the mere fact that an intermediary existed between a servant and a master did not destroy the master–servant relationship. The dissent argued that the majority's reliance on § 5 was incorrect because operator did not seem to have the power to directly fire workers hired through staffing agency, and therefore there was no master–servant relationship between operator and hired workers. Browning-Ferris Industries of California, Inc. v. National Labor Relations Board, 911 F.3d 1195, 1217, 1229, 1230, 1233.

C.A.D.C.1996. Com. (a) quot. in disc. Private corporation that sought to become the administrator of an electronic benefits transfer (EBT) program established by the Department of Treasury challenged Treasury's decision to solicit interested parties by invitation for expressions of interest (IEI), rather than by bid. Corporation alleged that, because IEI required Treasury to appoint a federal financial agent, it was foreclosed from consideration, while Treasury maintained that only a federal financial agent could legally administer the EBT system. The district court granted Treasury's motion for summary judgment. Reversing and remanding, this court held that it was not necessary to appoint a federal financial agent, because Treasury was authorized to designate an agent to do the acts it could do, and because, contrary to Treasury's belief, the selected EBT administrator became the agent of the recipient of the transferred funds, not an agent of Treasury. Transactive Corp. v. U.S., 91 F.3d 232, 240.

C.A.D.C.1974. Cit. in sup. This was a motion filed in a criminal appeal by two night school law students, who were federal employees, for leave to enter their appearance on behalf of the indigent appellant. The question before the court was whether a federal statute prohibiting a federal employee from appearing as an "agent or attorney" on behalf of anyone in a proceeding to which the United States is a party barred the students from entering their appearances. The court denied the motion and answered the above question affirmatively. In rejecting the argument that the role of a law student was neither that of an attorney nor that of an agent for appellant, and that an appearance by a law student would not frustrate the legislative intent of the statute, the court said, "… this interpretation of the function of eligible law students ignores the scope of the authority delegated under our student advocacy program. Substantial responsibility for investigation, drafting and argument may be given to students by the attorney. Such duties and continuous evaluation and supervision by the supervising attorney bring students within the definition of 'subagents' appointed by agents with the consent of the principal. As such, they are clearly within the scope of the ban contained in 18 U.S.C. 205." United States v. Bailey, 162 App.D.C. 135, 498 F.2d 677, 679.

U.S.Ct.Cl.

U.S.Ct.Cl.1972. Com. a cit. in sup. Plaintiff agreed with the U.S. to manage certain vessels of the Government, including making payment of certain expenses such as salaries, port expenses, repairs, etc. In one city where plaintiff had no office, it appointed a subagent to handle payroll and servicing. The court held that where an employee of the subagent absconded with funds originally deposited by the United States in a special account according to its agreement with plaintiff, plaintiff was responsible to the United States for the loss of those funds, and the fact that plaintiff exercised ordinary care in selecting its subagent did not exempt it from liability to the United States. Victory Carriers, Inc. v. United States, 467 F.2d 1334, 1342.

Ct.Fed.Cl.

Ct.Fed.Cl.2006. Subsec. (1) and com. (a) quot. in ftn. Thrift holding company sued United States, alleging that its passage of the Federal Institutions Reform, Recovery and Enforcement Act breached the supervisory merger contract between the parties. Upon defendant's claim that plaintiff committed a prior material breach of the contract, this court granted plaintiff's motion to strike, as hearsay, statements made by one of its original investors to other potential investors. The court held that investor was not an agent or subagent of plaintiff for purposes of raising capital for conversion to a stock savings bank and communicating with potential investors, and thus his statements were not admissible as admissions by a party opponent. First Annapolis Bancorp, Inc. v. U.S., 72 Fed.Cl. 369, 378.

M.D.Ala.

M.D.Ala.1999. Cit. in headnote, quot. in sup., com. (b) quot. in sup., Rptr's Note quot. in sup. Mother sued two hospitals, alleging that her infant daughter was denied a medical screening examination in violation of the Emergency Medical Treatment and Active Labor Act. This court granted second hospital summary judgment, holding, inter alia, that the first hospital's employees were not subagents of the second hospital. By agreeing to take on the responsibility of hiring, firing, and otherwise managing the first hospital's employees, the second hospital did not agree to assume primary responsibility for them. Zeigler v. Elmore County Health Care Authority, 56 F.Supp.2d 1334, 1337.

D.Colo.Bkrtcy.Ct.

D.Colo.Bkrtcy.Ct.2020. Cit. in case cit. in sup. Aircraft purchaser who obtained a judgment in state court against Chapter 11 debtor brought an adversary action against debtor who provided brokerage services to purchaser for the purchase of an aircraft, alleging, inter alia, that the judgment was nondischargeable under federal bankruptcy law as a debt incurred through a willful and malicious injury, because it arose from debtor's fraudulent concealment of pertinent information from purchaser. This court entered judgment for purchaser, holding that the judgment against debtor was nondischargeable, because he breached his duties as an agent to purchaser. The court observed that it was appropriate to look to the Restatement Second of Agency to clarify agency principles and the scope of debtor's duties owed to purchaser, because Colorado frequently relied on §§ 3, 5, 261, and 262 in formulating law that was applicable to agency-law issues. In re Bloom, 622 B.R. 366, 419.

D.Conn.

D.Conn.1990. Cit. in case quot. in disc. A chicken farm owner whose farm was destroyed by fire received insurance against fire loss for an amount less than he had requested from an insurance brokerage firm. The disparity stemmed from an alteration of the coverage in an endorsement prepared by a wholesale insurance broker acting as an intermediary broker between the firm and the insurance company that ultimately provided the coverage. The farmer sued, among others, the firm and the wholesale broker for failure to exercise reasonable care in causing the company to issue a policy other than in the amount requested by the plaintiff. On the wholesale broker's motion for summary judgment, this court held that a genuine issue of fact existed as to whether the broker complied with its duty of care owed to the plaintiff. The court explained that since the plaintiff knew the firm was not a primary insurer, the plaintiff could be found to have impliedly authorized the firm to employ the broker as a subagent to secure the insurance package. Passarello v. Lexington Ins. Co., 740 F.Supp. 933, 936.

D.D.C.

D.D.C.2007. Subsec. (1) quot. in sup. Former officer of corporation brought qui tam action on behalf of United States under the False Claims Act against corporation's subsidiary, subsidiary's alleged joint venturer, and others, alleging that defendants conspired to rig the bidding for government construction contracts; joint venturer counterclaimed for breach of fiduciary duty, alleging that plaintiff concealed and delayed reporting the fraud. Granting plaintiff judgment on the pleadings as to the counterclaim, this court held, inter alia, that venturer failed to identify a cognizable fiduciary duty owed to it by plaintiff. The court rejected venturer's argument that plaintiff automatically became its, or joint venture's, agent or subagent by virtue of the parties entering the venture, noting that there were no allegations that any of the joint venturers agreed to such an arrangement. U.S. ex rel. Miller v. Bill Harbert Intern. Const., Inc., 505 F.Supp.2d 20, 32.

M.D.Fla.

M.D.Fla.1994. Cit. in headnote, cit. in disc., com. (a) and Rptr's Notes cit. in disc. (cit. as com. on subsec. (1)). Defendant mortgage solicitor who was found guilty of corruptly demanding payment in connection with the business of a financial institution moved for a judgment of acquittal. Granting defendant's motion, the court held that defendant was not an "agent" of a "financial institution," as required by statute to support his conviction, since the government did not present any evidence from which it could be inferred that the bank/"financial institution" that owned the mortgage company for which defendant worked had agreed that defendant would act on its behalf or under its control. U.S. v. Tianello, 860 F.Supp. 1521, 1522, 1524.

M.D.Fla.1991. Com. (a) cit. in disc. A female welder brought a civil rights action against her employer and various supervisors and co-workers on the ground that they created and encouraged a sexually hostile, intimidating work environment. The court entered judgment for the plaintiff. The court found, however, that the defendant company president was not liable for the hostile work environment, since his delegation of the responsibilities for handling sexual harassment complaints to supervisory

personnel was done on behalf of the company and therefore created an agent-principal relationship between the delegatees and the company, not the delegatees and the president; accordingly, the company, not the president, incurred liability when the actions, or inaction, of the delegatees created the circumstances for the application of respondeat superior. Robinson v. Jacksonville Shipyards, Inc., 760 F.Supp. 1486, 1528.

N.D.Ill.

N.D.Ill.2015. Subsec. (1) quot. in sup.; com. (d) cit. in case quot. in sup. After recipient of unsolicited, pre-recorded telemarketing calls that promoted company's products and services filed a class action against company under the Telephone Consumer Protection Act, company sought contractual indemnification from telemarketer whose affiliate hired the lead provider that purportedly made the calls to recipient on company's behalf. This court granted in part company's motion for summary judgment, holding that affiliate and lead provider were telemarketing agents for telemarketer, and that company was contractually entitled to indemnification from telemarketer for their actions. The court reasoned, in part, that affiliate appointed lead provider as a subagent for telemarketer; thus, affiliate and telemarketer were responsible for lead provider's actions under Restatement Second of Agency § 5. Desai v. ADT Security Systems, Inc., 78 F.Supp.3d 896, 903.

N.D.Ill.1998. Com. (d) quot. in disc. A corporation and a partnership headed by a sports celebrity sued the CEO of a restaurant bearing the celebrity's name, alleging trademark infringement and unfair competition, among other claims. This court denied in part defendant's motion to dismiss, holding, inter alia, that a fact issue existed as to whether defendant was plaintiffs' agent, despite the parties' contractual arrangement. The court rejected defendant's assertion that he was merely a subagent whose duties to plaintiffs were limited by the terms of the restaurant management agreement with the company that ran the competing restaurant, and that he was limited only by that company's promise not to open a sports-themed restaurant within one mile of plaintiffs' restaurant. MJ & Partners Restaurant Ltd. v. Zadikoff, 10 F.Supp.2d 922, 932.

N.D.Ill.1997. Subsec. (2) cit. in case quot. in disc. Railroad employee who allegedly slipped, fell, and sustained serious injuries while walking across an icy railcar exchange yard sued yard and railroad for negligence under the Federal Employers Liability Act (FELA). Plaintiff maintained that, at the time of the accident, he was employed by both defendants. Defendants moved for summary judgment. Denying the motions, the court held that material factual issues existed as to whether there was any theory under which plaintiff could be considered a dual employee for purposes of FELA. Wallenberg v. Burlington Northern R.R. Co., 974 F.Supp. 660, 665.

N.D.Ill.1995. Com. (c) cit. in case cit. in disc. Metal-stamping company sued its metal supplier for tortious inducement of breach of fiduciary duty in connection with defendant's payments of cash and gifts to one of plaintiff's officers. Because defendant claimed to be plaintiff's agent, plaintiff argued that defendant itself was liable for breach of fiduciary duty and that the two employees who made the actual payments were liable as plaintiff's subagents. Granting plaintiff's motion for summary judgment on the issue of defendant's liability for tortious inducement but denying as to the agency and subagency theories, the court held that if it were determined that an agency relationship existed, undisclosed payments to plaintiff's officer, made in violation of plaintiff's corporate policy, would constitute a breach of defendant's duty of loyalty, as would the actions of the individual employees personally responsible for the transactions. In re Salem Mills, Inc., 881 F.Supp. 1109, 1117.

W.D.La.

W.D.La.2008. Subsec. (2) cit. in ftn. Contractor's equipment operator, who was injured after he fell from a truck while working on railroad's track maintenance project, brought personal-injury action under the Federal Employer's Liability Act (FELA) against railroad, alleging that he was employed by both contractor and railroad at the time of the accident. Denying summary judgment for railroad, this court held that, while employee was working with a senior employee of contractor and using contractor's equipment on a contracted task when the incident occurred, genuine issues of material fact remained as to whether employee was a “borrowed employee” of railroad pursuant to FELA, in light of plaintiff's testimony that at the specific time

of his injury, he was acting on a direct order from railroad's supervisor to get water for railroad's track crew out of the back of the truck. Haymon v. Union Pacific R. Co., 547 F.Supp.2d 594, 596.

D.Md.

D.Md.1974. Quot. in ftn. in sup. Plaintiff sued defendant county for injuries reecived when a police officer employed by defendant unleashed his police dog against plaintiff's minor son. The defendant claimed that it was protected by the doctrine of sovereign immunity, and that an agent of the state, the officer, is not liable for tortious claims, that only the principal, the state, is liable. The court made a finding that the county is a citizen except when acting in carrying out certain governmental functions, such as employing and supervising police officers. The court dismissed the defendant's contention that it was protected since only its principal, the state, is liable. There is a well settled principal that an agent is equally liable along with its principal for tortious actions of the agent or subagent. A waiver of sovereign immunity is found to exist by explicit county ordinance and also by the extent of "home rule" power which places the police activities of the defendant within its corporate limits, thus not within protection of the state's sovereign immunity. Taylor v. Prince George's County, 377 F.Supp. 1004, 1009.

D.Md.1971. Com. (a) illus. 3 cit. in sup. The subrogated insurers of the owner of tobacco brought this action against the company which arranged for the purchase and storage of tobacco and against the owners and operators of the warehouse where the tobacco was stored when it burned. A Maryland statute required a warehouseman to furnish insurance on tobacco in storage. The court found the defendant to be the agent of the plaintiff, where the defendant was at all times subject to the control of the plaintiff and acted on behalf of the plaintiff as its commission agent, and held that even an independent contractor can be an agent for purposes of binding the principal on a contract. The court found the owners of the warehouses to be subagents of the plaintiff, because the defendant agent had the implied authority to appoint a subagent, lacking warehouses and packing facilities of its own. The plaintiff's substantial control over the defendant agent and subagent showed that they were not acting as mere suppliers. As a result of an agreement between the parties, insurance was provided by the plaintiff. The court found that the agent had thereby complied with the statute requiring the insurance be "furnished;" and hence the defendants were not liable for failing to provide insurance. General Cigar Co. v. Lancaster Leaf Tobacco Co., 323 F.Supp. 931, 938.

D.Mass.

D.Mass.1986. Subsec. (1) cit. in disc. A lender sued debtors to recover full payment on an installment loan. The lender, a California corporation, was awarded a default judgment against the defendants, Massachusetts residents, who claimed that the judgment was void because it was entered by default in a court that had no personal jurisdiction over them. This court held that the defendants had sufficient minimum contacts with California to warrant the exercise of personal jurisdiction over them in the California district court. The court reasoned that the defendants had purposefully injected themselves into an out-of-state transaction through the solicitation of the loan by their agent and subagent. Ganis Corp. of California v. Jackson, 635 F.Supp. 311, 316, decision affirmed 822 F.2d 194 (1st Cir. 1987).

D.Minn.

D.Minn.2010. Cit. in sup., subsec. (1) cit. in case cit. in sup. Insurer, as subrogee of insured restaurant chain under an employee-theft insurance policy, sued insured's shipping manager, local shipper's employee, and shipper's affiliate, seeking to recover losses allegedly caused by defendants' fraudulent scheme under which insured's shipping manager approved payment of inflated shipping bills from local shipper's employee in return for kickbacks. On remand, this court denied the parties' motions for summary judgment, holding, inter alia, that it was unnecessary that shipper's affiliate held out local shipper's employee himself —and not just local shipper—as affiliate's agent in order for shipper's employee to be found to be affiliate's subagent on a theory of apparent agency. The court reasoned that a principal was liable for the actions of its agent's agent—that is, the principal's subagent; in this case, that meant that affiliate could be held liable for the actions of local shipper's employee if local shipper was either an actual or an apparent agent of affiliate. Hartford Fire Ins. Co. v. Clark, 727 F.Supp.2d 765, 773, 774.

D.Nev.Bkrtcy.Ct.

D.Nev.Bkrtcy.Ct.2005. Subsec. (1) quot. in disc. Bankruptcy trustee brought adversary proceeding against credit-card-processing company and its corporate parent, seeking damages for breach of credit-card-processing agreement, and an equitable accounting for, and turnover of, payments made by debtor's customers. Dismissing the claim for an accounting as to corporate parent, this court held that there was no fiduciary duty on which to base a claim for an accounting, because corporate parent, hired without debtor's express or implicit authority, was not an agent of debtor or trustee, but an agent of company, who was responsible for its conduct. In re National Audit Defense Network, 332 B.R. 896, 920.

D.N.J.

D.N.J.2005. Quot. in sup. Title-insurance company, as the assignee and subrogee of a mortgage company, sued title agent, its subagent title agency, and subagent's owner and employee, inter alia, to recoup losses from a mortgage loan that assignor was fraudulently induced to make. This court granted plaintiff partial summary judgment, holding, inter alia, that title agent could be held liable for the fraudulent acts of owner and employee, as its subagents. Title agent had authority to delegate the handling of the closings to the subagents, but it could not avoid liability simply by having a nonemployee conduct closings. Lawyers Title Ins. Corp. v. Phillips Title Agency, 361 F.Supp.2d 443, 448.

N.D.N.Y.

N.D.N.Y.1989. Subsec. (2) cit. in case quot. in disc. An employee of a general contractor involved in a railroad rehabilitation project was injured when he jumped from a ballast regulator, which he operated just before it collided with a stone train. The employee sued the railroad under the Federal Employer's Liability Act (FELA) to recover for his personal injuries. Denying the defendant's motion for summary judgment, the district court held that there was substantial evidence of the railroad's supervision and control of the plaintiff's work and that the ballast regulator belonged to the railroad and was being used for railroad purposes at the time of the accident, which could establish the railroad as the plaintiff's employer. The court stated that a plaintiff can establish his employment with a rail carrier, subject to FELA, if he was a subservant of a company that was, in turn, a servant of the railroad. Smoot v. New York Susquehanna and Western Ry. Corp., 707 F.Supp. 629, 631.

S.D.N.Y.

S.D.N.Y.2012. Com. (d) quot. in sup. Insured entities sued insurer, after insurer canceled the renewal of their insurance policy for nonpayment, alleging that their payment of the anticipated renewal premium to their retail insurance broker was sufficient to constitute payment to insurer, even though the retail insurance broker never remitted the payment to the wholesale broker that negotiated and obtained the renewal from insurer, or to insurer directly. Granting summary judgment for insureds, this court held that, under New York law, insurer was charged with receipt of the premium. The court explained that wholesale broker was an agent of insurer for the limited purpose of receiving on insurer's behalf any premium that was due on the policy issued at wholesale broker's request, and the moment that wholesale broker delivered the policy to retail insurance broker, retail insurance broker was a subagent of insurer and could receive the premium on insurer's behalf. MacLaren Europe Ltd. v. ACE American Ins. Co., 908 F.Supp.2d 417, 421.

S.D.N.Y.2000. Subsec. (1) quot. in sup., com. (d) quot. in sup. Former president of a corporation sued corporation for breach of an indemnification agreement that arose from a settlement of a bankruptcy of a law firm, of which plaintiff was a putative member. Jury entered verdict for plaintiff. Granting corporation's motion for a new trial, the court held, inter alia, that although plaintiff failed to prove that he was serving as a partner at the law firm at corporation's request, he could have argued at trial that he served as the agent of the law firm under an agency/subagency theory, since the law firm was in a partnership with a separate company owned by plaintiff. Pursuant to this argument, plaintiff's company was an agent of the law firm, and its authority to

appoint plaintiff as its subagent could have been inferred from the fact that that it was a corporation that could only act through its agents. Manley v. AmBase Corp., 121 F.Supp.2d 758, 772.

S.D.N.Y.1980. Com. (d) quot. in part in sup., and com. (b) cit. in disc. Plaintiffs and defendants entered into an agreement whereby, for a certain fee, the defendants investigated and recommended securities for acquisition by the plaintiffs' fund. The defendants were investigated by the Securities and Exchange Commission for activities conducted under the agreement with the plaintiffs and, subsequently, the defendants were indemnified by the plaintiffs' fund for legal fees incurred as a result of the S.E.C. proceedings. The plaintiffs brought an action to recover these monies paid to the defendants, alleging, inter alia, that the independent directors of the the fund lacked authority to indemnify the defendants, that the indemnity was improper because the defendants were operating in a fiduciary capacity, and that, as fiduciaries, defendants could not profit at the expense of the fund that was their charge. The court held, inter alia, that although the defendants were vested with substantial authority in making recommendations for acquisition of securities, because the fund was structured so that the defendants had the duty of investigating and recommending securities, a duty normally entrusted to a corporate officer, and because the Delaware indemnification statute was primarily enacted to permit corporate officers to be indemnified in situations where their actions as officers are brought under attack, the defendants were agents within Delaware law, and that the directors could award them legal fees from the securities fund. Cambridge Fund, Inc. v. Abella, 501 F.Supp. 598, 615.

E.D.Pa.

E.D.Pa.2003. Cit. in disc. Mooring master brought state-court action for common-law negligence and maritime negligence against foreign supertanker-management company after suffering injuries when crane transferring him from supertanker to tender vessel collapsed while he was assisting in unloading of supertanker. After removal, this court granted company's motion to dismiss for lack of personal jurisdiction, holding, inter alia, that business entity that was allegedly involved in joint venture with company, and that employed a Pennsylvania resident, was not company's agent so as to confer personal jurisdiction over company. Saudi v. Acomarit Maritimes Services, S.A., 245 F.Supp.2d 662, 676.

E.D.Pa.1998. Cit. in headnotes, cit. in disc., subsec. (2) quot. in disc., cit. in case quot. in disc., cit. in cases cit. in ftn., com. (e) quot. in disc., quot. in ftn., com. (f) cit. in ftn., illus. 5 quot. in ftn. High school basketball referee sued state athletic association for violations of Title VII and Title IX, alleging that assignors, whose role was to select referees to officiate at interscholastic basketball games, discriminated against her on the basis of gender. Association moved for summary judgment, arguing, among other things, that assignors were chosen by local chapters of basketball officials, which were merely groups of individuals who were not association members. Granting the motion in part and denying it in part, the court analyzed master-servant and principal-agent relationships before holding, inter alia, that material factual issues existed as to whether local chapters were servants or agents of association, whether assignors were servants or agents of local chapters, and whether assignors were subservants or subagents of association. Kemether v. Pennsylvania Interscholastic Athletic Ass'n, 15 F.Supp.2d 740, 741, 747, 751.

E.D.Pa.1993. Cit. in disc., com. (d) cit. in disc. Insurance consultant sued hospital for breach of contract. Denying the parties' cross-motions for summary judgment, the court held that genuine issues of material fact existed as to whether the assistant to the individual serving as hospital's president and executive director acted as his subagent in signing the written memorandum agreement with plaintiff on behalf of hospital and whether the president/executive director led plaintiff to believe that his assistant had authority to sign contracts on his behalf with respect to hospital. The court also stated that a fact issue existed as to whether the president/executive director himself had the authority to bind hospital to the contract, noting that, in light of the fact that hospital's bylaws vested its president and executive director with the joint authority to enter into contracts for hospital, he may have had the actual authority to do so. Richardson v. John F. Kennedy Memorial Hospital, 838 F.Supp. 979, 985.

E.D.Pa.1975. Subsec. (2) cit. in disc. Plaintiff brought an action against the trustees of a railroad to recover for injuries sustained while moving a gondola railroad car loaded with steel plates. Plaintiff was employed by a stevedore company which was under contract with the railroad to load and unload railroad cars on piers. The court granted defendants' motion for summary judgment

on the ground that plaintiff was not an employee of the railroad under the "borrowed servant" doctrine, since the railroad did not control and direct plaintiff in the act of moving the gondola, and thus the railroad was not liable for plaintiff's injuries under the Federal Employers' Liability Act. Taras v. Baker, 411 F.Supp. 426, 428.

E.D.Va.

E.D.Va.1994. Subsec. (1) quot. in ftn. in sup. Administratrix of the estate of an electrical technician killed when a test of a Navy ship's fire suppression equipment resulted in the technician's asphyxiation brought suit in state court against the subcontractors that were responsible for conducting the test, asserting a wrongful death claim. After removal to federal court, this court denied plaintiff's motion to remand the case to state court and granted subcontractors' motions for summary judgment, holding, inter alia, that subcontractors were agents or employees of the United States for purposes of the Suits in Admiralty Act, for which the sole and exclusive remedy was against the United States in federal court. Servis v. Hiller Systems, Inc., 858 F.Supp. 590, 600, reversed 54 F.3d 203 (4th Cir. 1995), cert. denied 516 U.S. 1084, 116 S.Ct. 799, 133 L.Ed.2d 747 (1996).

E.D.Wis.

E.D.Wis.1995. Subsec. (1) cit. in headnotes and quot. in sup., coms. (c) and (d) cit. in headnotes and quot. in disc. Toy distributor sued a sales representative company and its president for breach of fiduciary duty and for tortious interference with the distributor's contractual and prospective economic relationship with a toy retailer. Defendants counterclaimed for unpaid commissions. This court granted in part and denied in part plaintiff's motion for summary judgment, holding, inter alia, that defendants owed fiduciary duties to plaintiff, because there was no factual dispute that defendants were plaintiff's subagents and were aware that they were acting on behalf of plaintiff with respect to the sale of a certain game. Select Creations, Inc. v. Paliafito America, Inc., 911 F.Supp. 1130, 1131, 1132, 1151, 1152.

Cal.App.

Cal.App.2006. Cit. in sup. Pomegranate grower, who contracted with commission merchant to market his fruit, sued various businesses that obtained his fruit in transactions with merchant and allegedly used false invoices to reduce and conceal the sums owing to him. The trial court found that plaintiff lacked privity of contract with defendants, and granted defendants judgment on the pleadings. This court reversed and remanded, holding, inter alia, that plaintiff stated claims for conversion and breach of fiduciary duty against defendants. The court concluded that plaintiff sufficiently alleged that defendants, as entities that obtained control over plaintiff's crop on a reconsignment basis, became subagents of commission merchant, and thus owed the same duties to plaintiff, as principal, as did merchant, as agent. Mendoza v. Rast Produce Co., Inc., 140 Cal.App.4th 1395, 1404, 45 Cal.Rptr.3d 525, 532.

Cal.App.1968. Appendix cit. in sup. The defendant, a national corporation providing business and management consultant services, hired a certain party as an area director who subsequently began a toy business in the physical facilities of his area office. The plaintiffs, responding to an advertisement of the area director soliciting distributorships for the toy business, were told by the area director's assistant that the toy business was a part of the defendant, upon which the plaintiffs allegedly relied in making investments in the distributorships and, upon sustaining losses, the plaintiffs sought to hold the defendant responsible for the fraud of its agents. The court, holding that the defendant had put the area director and his assistant into a position permitting them to commit the alleged fraud, which rendered it liable irrespective of the fact that these two parties were acting for their own purposes in making the misrepresentations, affirmed judgments for the plaintiffs. Hartong v. Partake, Inc., 266 Cal.App.2d 942, 72 Cal.Rptr. 722.

Colo.

Colo.1998. Subsec. (1) quot. in diss. op. Concert promoter appealed a city revenue department's administrative decision that it was liable for a seat tax on tickets for a series of concerts that it had promoted under a joint venture with the city's zoological foundation, an agent of the city. The trial court affirmed the administrative decision, and the court of appeals reversed. Reversing and remanding, this court held that the concert series was not eligible for the seat-tax exemption for sales by the city or a department of the city because an agency relationship did not exist between the zoo and the joint venture, which sold the tickets, and thus the tickets were not sold by an agent or a subagent of the city. The dissent argued that the exemption was available because promoter, viewed either alone or as part of a joint venture, acted as an agent of the zoo in promoting the concert series; in carrying out its duties, it at all times acted on behalf of the zoo, for the zoo's benefit, and subject to the zoo's ultimate control. City & County of Denver v. Fey Concert Co., 960 P.2d 657, 670.

Colo.1993. Subsec. (1) quot. in conc. and diss. op., com. (d) quot. in ftn. Parishioner sued Episcopal diocese and its bishop for injuries she allegedly sustained as a result of her sexual relations with priest to whom she had gone for counseling. The trial court entered judgment on a jury verdict awarding plaintiff damages. Affirming in part, this court held, inter alia, that diocese was liable for negligent hiring and supervision of priest, since an agency or employment relationship existed between diocese and priest and there was sufficient evidence that diocese's placement of priest in the role of counselor and its lack of supervision of priest breached diocese's duty of care to plaintiff. A concurring and dissenting opinion argued that diocese could not be liable for negligent hiring or supervision since it was neither principal nor employer of priest. Moses v. Diocese of Colorado, 863 P.2d 310, 325, 334, cert. denied 511 U.S. 1137, 114 S.Ct. 2153, 128 L.Ed.2d 880 (1994).

Colo.1987. Subsec. (1) quot. in disc., com. (d) cit. in disc. A prospective purchaser accepted a seller's counterproposal on the price of a house through a nonlisting broker. However, before the seller was notified, he accepted another offer. When the purchaser sued the seller for specific performance, the trial court granted summary judgment to the defendant on the ground that notice to the nonlisting broker did not constitute notice to the seller. Reversing and remanding, this court held that, since the nonlisting broker was an agent of the listing broker and a subagent of the seller, the notice must be imputed to the seller. The court reasoned that the authority given by a listing agreement generally included the implied authority to appoint others as subagents to perform the tasks assigned to the broker for the term of the contract. The court noted that, if it was determined that there was an agency relationship between the plaintiff and the nonlisting broker, the plaintiff would have no cause of action against the seller. Stortroen v. Beneficial Finance Co., 736 P.2d 391, 395.

D.C.App.

D.C.App.1984. Subsec. (1) quot. in part in ftn. Homeowners sued two real estate brokers to recover damages arising from the brokers' submittal to them of a prospective purchaser's checks that were later dishonored by the bank. This court affirmed the trial court's denial of the brokers' motion to dismiss and its finding that the brokers breached their fiduciary duty owed to the homeowners, and reduced the amount of damages awarded to the homeowners. It held that a real estate broker, like any other agent, owes a fiduciary duty to his principal and that a subagent who knows of the ultimate principal's existence owes him the same duties owed by the agent. It also held supported by the evidence the trial court's finding that the cooperating agent, whose efforts were to result in a commission split with the listing agent, owed a fiduciary duty to the homeowners, whether or not he was a subagent. Vicki Bagley Realty, Inc. v. Laufer, 482 A.2d 359, 364.

Ill.

Ill.1966. Cit. in sup. The plaintiff sought damages from the defendant county sheriff and others for personal injuries sustained while the plaintiff was a prisoner in the county jail. This court upheld a dismissal, finding that the plaintiff's cause of action under the doctrine of respondeat superior insufficient as was the attempt by the plaintiff to make the sheriff and/or wardens insurers of the prisoners' safety when a trustee prisoner allowed another prisoner to attack the plaintiff. Kelly v. Ogilvie, 35 Ill.2d 297, 220 N.E.2d 174, 176.

Ill.App.

Ill.App.2005. Subsec. (1) cit. in case quot. in sup. Insured owner of marina damaged in hurricane sued surplus-lines and exchange brokers for, in part, breach of fiduciary duty for failing to monitor and discover unsound financial condition of insurer, which had failed to pay insured's claims. Trial court granted summary judgment for exchange broker. This court reversed and remanded, holding that a genuine issue of material fact existed as to whether exchange broker was acting as insured's subagent when it procured renewal insurance on insured's behalf. The court said that the fact that there were no direct communications between exchange broker and insured was not fatal to a finding of an agency relationship, since exchange broker was aware of insured and acted on its behalf. AYH Holdings, Inc. v. Avreco, Inc., 357 Ill.App.3d 17, 292 Ill.Dec. 675, 826 N.E.2d 1111, 1127.

Ill.App.1994. Subsec. (1) cit. in headnote and quot. in disc. After sniper shot and killed a driver as driver drove his truck away from a picket line he had crossed at a manufacturing plant, driver's wife sued manufacturer for wrongful death. Trial court entered judgment on jury verdict finding defendant guilty of negligence in failing to warn driver that it had received threats to shoot replacement drivers it had hired. Reversing, this court held that defendant owed driver no common law duty to warn driver of a mere threat to shoot replacement drivers or of the uncorroborated report that gunshots had been fired at the plant during the strike. The court determined that driver was an independent contractor and that an agency relationship did not exist between defendant and the two companies that provided replacement trucks and drivers. Neither company had authority to enter contracts or negotiations on defendant's behalf. Petersen v. U.S. Reduction Co., 267 Ill.App.3d 775, 204 Ill.Dec. 415, 417, 641 N.E.2d 845, 846, 851.

Ill.App.1992. Subsec. (2) cit. in disc. A laborer supplied by a labor-leasing firm was seriously injured while working at a railroad yard. The laborer sued the railroad for his personal injuries, pursuant to the Federal Employers Liability Act, alleging that he was an employee of the railroad at the time of the injury, thus within the ambit of the statute. The trial court entered summary judgment for defendant. Reversing and remanding, this court held that plaintiff presented evidence raising a factual question as to whether defendant controlled or had the right to control plaintiff's activities to render him an employee of defendant for purposes of the statute. The court noted that there were three methods by which plaintiff could have established his employee status with defendant, although nominally employed by another: the borrowed, dual, and subservant theories. Buccieri v. Illinois Cent. Gulf R.R., 235 Ill.App.3d 191, 176 Ill.Dec. 142, 146, 601 N.E.2d 840, 844.

Ill.App.1979. Cit. in disc. Plaintiff company brought suit against defendant university for liquidated damages following termination of uniform supply contracts by alleged subagents of a corporation engaged by the university to operate its physical plant. The lower court entered orders granting summary judgment in favor of the plaintiff, striking the university's third party complaint against the corporation, and denying defendant's motion for leave to amend the third party complaint. This court affirmed in part, reversed in part, and remanded. The court found specifically that there was no genuine issue of material fact concerning the subagents' actual authority to execute the contracts on behalf of the university, and held that the summary judgment was properly granted; however, the court stated that the trial court should have permitted defendant to amend the third party complaint, and reversed and remanded this portion of the case. Roscoe Co. v. Lewis University, College of Law, 79 Ill.App.3d 1098, 35 Ill.Dec. 133, 398 N.E.2d 1083, 1085.

Ind.

Ind.1998. Cit. in ftn. An employee and his wife brought a products liability action against the manufacturer and distributor of a device that caused injuries to the employee in the course of his employment. The employer and the employer's insurer paid the employee's medical and disability benefits under Indiana workers' compensation law and thereby acquired liens on any recovery by plaintiffs. The parties reached a settlement agreement through mediation, but an attorney apparently representing the employer and the insurer agreed to a settlement that compromised the interests of the employer and the insurer. The employer had not authorized the insurer or the attorney and refused to agree to the settlement. Plaintiffs brought a motion to enforce the settlement agreement. Answering two certified questions, this court held that a client's retention of an attorney does not in itself confer implied or apparent authority on that attorney to settle or compromise the client's claim. However, retention

does confer the inherent power on the attorney to bind the client to an in court proceeding. Absent a communication of lack of authority by the attorney, an attorney has the inherent power to settle the claim when the attorney attends a settlement procedure governed by the alternative dispute resolution rules. The court also noted that the insurer could be liable to the employer under an intermediate agency theory. Koval v. Simon Telelect, Inc., 693 N.E.2d 1299, 1305.

Iowa

Iowa, 1999. Quot. in ftn. Driver whose automobile was rear-ended by rental vehicle operated by friend of lessee's live-in boyfriend brought personal-injury action against lessor, lessee, and boyfriend's friend. Reversing the trial court's entry of judgment against lessee, this court held, in part, that lessee was not liable under an agency theory to plaintiff for negligence of boyfriend's friend in operating the rental vehicle. Boyfriend was not acting as lessee's agent when he agreed to return the vehicle to lessor as a favor to lessee, since lessee exercised no control over boyfriend's conduct in returning the vehicle, and thus boyfriend's friend, who was driving the vehicle at boyfriend's request, could not be considered lessee's subagent. Benson v. Webster, 593 N.W.2d 126, 130.

Iowa, 1968. Cit. in diss. op. The nine-year-old son of a farm manager was injured when, while helping his father, he caught his leg in some power machinery driven by a tractor's take-off device. In an action against the farm owner for supplying unsafe machinery and against Ford, the manufacturer, for negligence and breach of implied warranty, the plaintiff received a judgment, reversed here as to the farm owner and affirmed as to Ford. The court held that Ford did not follow the recognized standard of care for such possibly dangerous equipment and as a proximate cause thereof the plaintiff was injured. However it also was ruled that the evidence did not support a conclusion that the boy was an employee of the farm. A dissent disagreed with last holding and said there was a question for the jury as to the boy's status. Bengford v. Carlem Corp., 156 N.W.2d 855, 869.

Ky.

Ky.2003. Com. (e) cit. in disc., com. (f) quot. in disc. After two intoxicated high school students left school together during school-sponsored activity in order to buy more alcohol, student passenger was killed in car accident. His parents and estate sued state Department of Education (DOE) for negligence and wrongful death. Trial court affirmed board of claims' dismissal of suit, and appeals court affirmed. This court affirmed dismissal for loss of consortium but reversed dismissal for wrongful death, holding that DOE could be held vicariously liable, because statutory relationship between DOE and local school board was more akin to that of principal-agent than to that of co-agents. Legislative intent was to vest management, operation, and control of schools in DOE, with local boards acting as agents to implement DOE's policies at local level. Williams v. Kentucky Dept. of Educ., 113 S.W.3d 145, 151, 152.

Mass.App.

Mass.App.2004. Subsec. (1) quot. in disc. Property insurer, whose managing general agent entered agreement with broker by which broker agreed to act for general agent because agent lacked license to transact business in state, sought to recover indemnity from broker after paying on binder for snow-removal coverage. Trial court entered judgment for broker. Affirming, this court held, inter alia, that broker was agent of general agent, not insurer, and thus insurer was not entitled to indemnification from broker, where broker dealt only with managing general agent, was not informed of restrictions on general agent's authority, and broker's license to act for insurer did not impose restrictions. Savers Property & Cas. Ins. Co. v. Admiral Ins. Agency, Inc., 61 Mass.App.Ct. 158, 164, 807 N.E.2d 842, 847.

Mass.App.1982. Com. (b) cit. in ftn. in disc. and Rptr's Notes cit. in ftn. in disc. The plaintiff, a Massachusetts resident, purchased insurance for his motorboat from a local insurance brokerage. Because of the boat's high horsepower, the brokerage had great difficulty placing the insurance with a carrier. Finally, a policy insuring the boat was obtained from a foreign insurance company not authorized to do business in Massachusetts. The brokerage had used a consulting broker to establish contact

with the foreign insurance company and to procure the policy. The boat was later stolen and never recovered. The foreign insurance company failed to pay the plaintiff's claim for the boat, and the plaintiff brought this action against the foreign insurance company, its Massachusetts agent, the brokerage, and an individual agent of the brokerage. The plaintiff prevailed against all defendants at trial on the theories of negligence, breach of contract, and violation of the state insurance statute. The brokerage and its individual agent appealed, and this court remanded one issue back to for further finding. This court affirmed the trial court's finding of negligence by the brokerage in placing the insurance with a company not authorized to do business in Massachusetts. However, this court could not discover any evidence that the negligence complained of proximately caused any damage to the plaintiff. That issue of proof was alone remanded for further finding; the rest of the judgment was permitted to stand. In its decision this court stated that by placing the insurance with an unauthorized company the brokerage had violated a state statute. This violation itself was proof of negligence. This court also stated that the brokerage had broken an implied covenant of good faith and fair dealing in so placing the insurance. Finally, this court confirmed the brokerage's responsibility for the actions of its agent, the consulting broker, in procuring the insurance policy. MacGillivary v. W. Dana Bartlett Ins. Agency, 436 N.E.2d 964, 967.

Minn.

Minn.1980. Subsec. (1) cit. in sup. A prospective purchaser of real estate sued the defendant for breach of his warranty of authority to sell the property. The defendant had a partial ownership interest in the real estate but had no power to sell on behalf of the other owners. The trial court entered judgment for the purchaser. This court held, inter alia, that a real estate agent who found a buyer for the property and contacted the defendant's real estate agent was a subagent of the defendant, in accord with industry custom, even though the defendant knew nothing of the subagent's involvement. Further, the purchaser's breach of warranty suit could stand despite the defendant's lack of authority to act for the owners because the defendant purported to make a contract binding on the principals. Judgment affirmed, award of damages vacated, and case remanded for a new determination of damages. Wolfson v. Beris, 295 N.W.2d 562, 565.

Mo.App.

Mo.App.1987. Subsec. (2) cit. in case quot. in disc. An injured worker sued a railroad company with which the plaintiff's employer had contracted to supply services. The plaintiff alleged, inter alia, that at the time of his injury he was working under the direction and control of the defendant and that the defendant had the right to supervise and control his work, thereby making the plaintiff the defendant's employee. The trial court granted the defendant's motion for summary judgment. Affirming, this court held that the defendant was not liable for the plaintiff's injury. The court reasoned that the plaintiff had not demonstrated that he was an employee of the defendant because there was no evidence that the defendant directly controlled or had the right to directly control the plaintiff in the daily performance of his work. Bailey v. Missouri-Kansas-Texas R.R., 732 S.W.2d 248, 250.

Mo.App.1964. Cit. in sup. in ftn. The plaintiff sued the defendant company for injuries sustained by her in an automobile accident between her and the wife of an employee of the company who was in a private car following her husband to pick him up after work. The court held that the wife was not an agent of the company since they had never ratified or acquiesced to her acting as an agent. Further they had absolutely no right of control over her and, therefore, the company could not be held liable for her negligence. Usrey v. Dr. Pepper Bottling Co., 385 S.W.2d 335, 338.

Mont.

Mont.1999. Subsec. (2) cit. in case quot. in disc. Employees of company that provided repair services to railroad carrier sustained on-the-job injuries; employees sued company and carrier for violations of the Federal Employers Liability Act (FELA). Defendants argued that, because company was not a railroad, plaintiffs could not recover FELA benefits against it, and because carrier was not their employer, plaintiffs were not entitled to damages from it. The trial court entered judgment for defendants. Reversing, this court held that the evidence supported the finding that a master-servant relationship existed

between defendants, that plaintiffs were subservants of a company that was a servant of a railroad, and that plaintiffs could invoke FELA's protections. Watts v. Montana Rail Link, Inc., 975 P.2d 283, 285.

Neb.

Neb.1997. Cit. in headnotes, cit. in sup., com. (d) cit. in disc. Insurer filed suit against officers of financial services company that was authorized to bind insurances and handle premiums on insurer's behalf, alleging that officers aided and abetted company's conversion of premiums due insurer. Insurer obtained ex parte orders of attachment and garnishment pursuant to that section of the Nebraska Code permitting such action in cases where a defendant fraudulently contracted the debt over which suit was brought, but the trial court vacated the orders, finding the evidence insufficient to support prejudgment orders against officers in their individual capacity. Reversing, this court held, in part, that the orders were proper because officers were subagents of company, which, in turn, was an agent of insurer; that officers therefore had a fiduciary duty toward insurer; and that the evidence supported a finding that officers fraudulently contracted the debt at issue in the underlying case. Andrews v. Schram, 252 Neb. 298, 562 N.W.2d 50, 50, 51, 54-55.

Nev.

Nev.1979. Subsec. (1) cit. in sup. A real estate broker brought suit against members of an investment group for payment of a real estate commission, allegedly earned during negotiations for a sale of real property. A real estate broker working on behalf of the defendants sent the plaintiff a 73 page document containing a detailed description of commercial property owned by the defendants. Plaintiff subsequently showed the property to an individual who was interested in investing in commercial property in the area. One of the defendants, to whom the other members of the investment group had executed a power of attorney, called the plaintiff with an offer giving the purchaser 10 days to accept a sales proposal. Three days later the plaintiff called the office of the defendant appointed as agent for the group, but talked with another defendant who advised the plaintiff that they had a deal. The trial court entered judgment in favor of the broker, finding that the defendant with whom the plaintiff had discussed completion of the proposed sale as a subagent of the defendant invested with power of attorney, and the defendants appealed. The court reversed, holding that the evidence did not support the trial court's finding that the member of the group who advised the plaintiff that they had a deal was a subagent with authority to act for the group. The court noted that the document appointing the one defendant agent and attorney for each member of the group did not authorize the appointment of a subagent. In addition the court stated that there was nothing in the record to indicate that the appointed agent agreed with his principals to be responsible for the conduct of another as subagent. The court reasoned that since agency is grounded on the trust and confidence the principal places in his agent, agency duties cannot ordinarily be delegated without the express authority of the principal where the duties involve personal skill or judgment. Estate of Greenberg v. Skurski, 95 Nev. 736, 602 P.2d 178, 179.

Nev.1978. Cit. in sup. Plaintiff, sub-contractor employee, brought an action for damages resulting from injuries suffered at a construction site on defendant's property. Plaintiff, prior to suit, had received compensation for those injuries from the Industrial Commission. The district court granted summary judgment for the defendant. The appellate court affirmed, holding that where the defendant performed the function of principal contractor, including the exercise of supervisory control over the work on the project, the subcontractor's employee, who received compensation for injuries from the Industrial Commission, was not entitled to recover damages against the defendants. Hosvepian v. Hilton Hotels Corp., 94 Nev. 768, 587 P.2d 1313, 1315.

N.H.

N.H.2002. Quot. in disc. Title insurance company brought suit for, in part, negligence against attorney who had agreed to become plaintiff's agent for the purpose of issuing title insurance policies, after independent title abstractor retained by defendant negligently failed to find and disclose a construction mortgage on property. The trial court entered judgment for plaintiff. Reversing, this court held, inter alia, that defendant was not liable for the negligence of title abstractor as his subagent, since

the parties' agency agreement provided that defendant was responsible only for his own acts and omissions, not for the acts and omissions of others. Lawyers Title Ins. Corp. v. Groff, 148 N.H. 333, 808 A.2d 44, 50.

N.J.Super.

N.J.Super.1976. Subsec. (2) quot. in sup. An employee of a trucking company, which was a wholly owned subsidiary of defendant Penn Central Transportation Company, brought suit against Penn Central for negligence under the Federal Employers' Liability Act. Trial court dismissed the action, and this court affirmed, but the United States Supreme Court vacated the judgment and remanded for consideration in light of a similar United States case. That case noted that the requirement for recovery under the Act of a showing of a master servant relationship between a plaintiff and a firm could be met by a showing that plaintiff was the servant of a company which was, in turn, a servant of defendant. The court here held that there was sufficient evidence in the record for the jury to conclude that the subsidiary was organized for and continued to serve only the interests of the Penn Central Railroad, so that plaintiff might be found to be a subservant of Penn Central, and remanded for a new trial. Pelliccioni v. Schuyler Packing Company, 140 N.J.Super. 190, 356 A.2d 4, 8, 9.

N.M.

N.M.1995. Subsec. (1) quot. in disc. A Texas-based borrower corporation, its New Mexico-based parent, and New Mexico-based shareholders of the parent sued a Texas bank, alleging breach of contract to assist the borrower in the restructuring of its financial obligations. Trial court granted bank partial summary judgment, dismissed the Texas corporation's claim on the basis of forum non conveniens, and sanctioned plaintiffs for intimidating witnesses from appearing at scheduled depositions. Plaintiffs alleged that the sanctions were unjust because the court found that they and their attorneys had acted ethically and that the intimidation was caused by the renegade acts of their attorney's agent. This court affirmed in part, holding, inter alia, that sanctions were justified, because a principal is liable for the wrongful acts of his subagent committed within the scope of the agency relationship. Marchman v. NCNB Texas Nat. Bank, 120 N.M. 74, 898 P.2d 709, 727.

N.M.App.

N.M.App.1973. Subsec. (1) quot. in spec. conc. op. The applicants, adoptive parents, filed an application for the termination of the natural mother's rights to her son. On the mother's appeal from a termination of her rights, the court reversed the judgment, and held that the statute pertaining to termination of paternal rights was unconstitutional, that the trial court lacked jurisdiction to terminate the mother's rights, and that the judgment terminating such rights was contrary to public policy. Huey v. Lente, 85 N.M. 585, 514 P.2d 1081, 1091, rev'd 85 N.M. 597, 514 P.2d 1093 (1973).

N.Y.Sup.Ct.App.Div.

N.Y.Sup.Ct.App.Div.2008. Cit. in sup. Client sued law firm she retained to recover her interest in a partnership, alleging that defendant was vicariously liable for the negligence of a Florida attorney and/or negligently failed to supervise attorney in filing a notice of claim against estate of plaintiff's former partner, who had died a resident of Florida before a judgment that defendant had secured for plaintiff against former partner was satisfied. The trial court denied the parties' cross-motions for summary judgment. Affirming as modified by reversing the denial of plaintiff's cross-motion, this court held that, because defendant retained Florida attorney without plaintiff's knowledge, and plaintiff completely relied on defendant to take the steps necessary to satisfy her judgment, defendant assumed responsibility to plaintiff for the filing of the Florida estate claim, and attorney became defendant's subagent; therefore, defendant had a duty to supervise attorney's actions. Whalen v. DeGraff, Foy, Conway, Holt-Harris & Mealey, 53 A.D.3d 912, 913, 914, 863 N.Y.S.2d 100, 102.

N.Y.Sup.Ct.App.Div.1985. Cit. in sup. After the trial court granted a summary judgment in favor of the plaintiff creditor in an action to recover damages for goods had and received, the defendant bank appealed. This court modified and affirmed the

decision, holding that the issue of whether the bank had engaged in such conduct as to create the impression of apparent authority sufficient to hold it liable as a principal for the costs of fuel oil delivered by the plaintiff to certain premises on which the bank held a mortgage was a question of fact and that summary judgment was inappropriate for both parties. Save Way Oil Co., Inc. v. Mehlman, 115 A.D.2d 721, 496 N.Y.S.2d 537, 538.

N.Y.Sup.Ct.

N.Y.Sup.Ct.1973. Cit. in sup. and Appendix quot. in sup. The executor of the estate of the sole stockholder of a corporation sued for damages and to recover from a broker and a purchaser the difference between the price the purchaser paid the corporation for real estate and the price at which the purchaser later resold the property, a larger sum. The plaintiff alleged that after the broker had procured the defendant purchaser, he failed to notify the plaintiff of a higher offer, which offer was later accepted by the defendant purchaser. The court held that the plaintiff stated a cause of action, finding that the defendant broker had a fiduciary relationship with the plaintiff, even though he was not the plaintiff's agent, but rather a broker with whom the plaintiff's agent had listed the property, i.e., a subagent. Marra v. Katz, 74 Misc.2d 1010, 347 N.Y.S.2d 143, 146, 147.

N.C.App.

N.C.App.1997. Subsec. (1) quot. in disc. Corporation that was established in order to receive trust property sued attorney, accountant, and accounting firm for, inter alia, professional negligence, alleging that defendants' failure to submit to the IRS forms necessary for subchapter S treatment cost corporation $273,000 in taxes, interest, and penalties. A jury found that attorney and accountant had been negligent and, after denying defendants' motion for judgment n.o.v. on the ground that corporation had been contributorily negligent, the trial court entered judgment accordingly. Affirming, this court held, in part, that accountant was not the subagent of attorney but, rather, an agent of corporation, and, as such, was required to show that attorney was negligent in order to impute such negligence to corporation. Estate of Smith v. Underwood, 127 N.C.App. 1, 487 S.E.2d 807, 816, review denied … N.C. …, 494 S.E.2d 410 (1997).

N.C.App.1983. Subsec. (1) quot. in disc. The plaintiffs brought an action to recover a deposit made on an unsuccessful loan commitment application. The trial court entered judgment n.o.v. for the defendant and the plaintiffs appealed. The court of appeals reversed and remanded. Evidence was sufficient to support a finding that an agency relationship existed between the plaintiffs and the defendant so that the defendant agent was liable to the plaintiffs for the acts of its subagent. Because the defendant was the plaintiffs' agent, it was liable either for the entire amount of the deposit on the loan application or not at all, and the trial court erred in instructing the jury that they could find in an amount other than the amount of the deposit. Colony Associates v. Fred L. Clapp & Co., 300 S.E.2d 37, 40.

Ohio

Ohio, 1984. Subsec. (2) cit. but. dist. and cit. in diss. op. Plaintiff was employed by a trucking company which was a wholly-owned subsidiary of the defendant railroad. Plaintiff was seriously injured while loading trailer vans into a car owned by the defendant and brought this action under the Federal Employers' Liability Act (FELA). The trial court granted summary judgment for the defendant, and the appellate court affirmed. This court affirmed as well, holding that the railroad was not liable under the FELA for injuries sustained by an employee of its wholly-owned subsidiary when the railroad did not possess the right to control the employee's actions, but did control other aspects of the subsidiary's business. Plaintiff did not come within the subservant category of liability under the FELA because, although the subsidiary was a servant of the railroad, plaintiff was not subject to the control of both the subsidiary and the railroad. Sullivan v. Consolidated Rail Corp., 9 Ohio St.3d 105, 459 N.E.2d 513, 515, 517, certiorari dismissed 467 U.S. 1222, 104 S.Ct. 2671, 81 L.Ed.2d 886 (1984).

Or.App.

Or.App.1982. Subsec. (1) and coms. (a) through (e) cit. in ftn. An insurance company brought an action against two former employees and the corporation they had formed for unfair competition. The first defendant, a former vice-president of the plaintiff's company, had been terminated by the plaintiff and subsequently set up his own insurance company as the plaintiff's competitor. The second defendant had originally acted as the plaintiff's agent, but later acted in the capacity of a "sub-agent." While working in that capacity, he had encouraged two of the plaintiff's customers, whom he had acquired for the plaintiff, to move their business to the first defendant's newly-formed company, allegedly because the customers had grown dissatisfied with the plaintiff's service. The trial court denied the plaintiff's motion for a directed verdict, and the jury returned a verdict for the defendants. The plaintiff appealed, and this court affirmed. The court held first that the action of the first defendant prior to his termination, in inquiring about the issuance of a license for his new company, was permissible and could not support a claim for unfair competition. The court then examined the nature of the second defendant's "sub-agent" relationship with the plaintiff, and held that the question of duties arising under such a relationship, as well as any breach thereof, was properly submitted to the jury. There was sufficient expert testimony that the defendant's actions in encouraging his customers to move to the new company were both common and accepted in the trade. The court held that the trial court's denial of the plaintiff's motion for a directed verdict was proper. Western Alliance Corp. v. Western Reliance, 57 Or.App. 263, 643 P.2d 1382, 1386.

Pa.

Pa.1989. Subsec. (2) cit. in ftn. A school district sought to require a corporation that managed a county parking lot to collect the school district's tax on fees paid by patrons of the parking lot. The trial court granted judgment for the defendant, and the intermediate appellate court reversed and remanded. Reversing and remanding, this court held that the defendant was a servant of the county, rather than an independent contractor, and, as a servant of the county, it was immune from any obligation to collect the school district's parking tax. Moon Area School Dist. v. Garzony, 522 Pa. 178, 560 A.2d 1361, 1367.

Tex.App.

Tex.App.2001. Coms. (b) and (d) cit. in sup. Texas mortgage company that bought debt instruments sued 17 defendants for negligence arising out of the transactions. Trial court dismissed eight Mississippi defendants, including company formed to take ownership of assets bought by Mississippi company that sold instruments to plaintiff, holding that jurisdiction over seller and alleged independent contractor could not be imputed to the eight defendants. This court reversed in part, holding, inter alia, that seller and alleged contractor acted as agent for the defendant company formed to take ownership of assets bought by seller. While alleged contractor exercised control over details of his work, he actually was a subagent employed to make bargains with defendant company's consent. Royal Mortg. Corp. v. Montague, 41 S.W.3d 721, 735.

Tex.App.1993. Subsec. (2) cit. in disc. The employee of a brush-clearing subcontractor that was hired by a cable-laying contractor to clear a railroad right-of-way leased to a telephone company for laying of cable sued the railroad under FELA for injuries suffered when he attempted to lift a railroad crosstie. Reversing an award of damages to the employee and rendering, this court held, inter alia, that the railroad could not be seen as the plaintiff's employer. Neither, said the court, was the plaintiff a borrowed servant, a dual servant, or a subservant of the railroad, as there was no evidence that the railroad exercised any control over the plaintiff other than that necessary to ensure the integrity of its own transportation functions. Missouri Pacific R. Co. v. Buenrostro, 853 S.W.2d 66, 71.

Tex.App.1987. Subsec. (1) quot. in diss. op. An agent of an attorney who represented a water company persuaded landowners to agree to give the company first refusal rights in case the owners elected to sell. When the owners executed an oil and gas lease with a third party, the water company claimed that it violated the terms of the agreement. The trial court determined that the written agreement should be reformed, because both parties had agreed that mineral rights were not included. Affirming, this court held that the water company was bound by the mistakes of its subagent and stated that, if the parties were mutually mistaken with respect to the legal effect of the language that they used, the writing should be reformed to reflect the intended effect. The dissent argued that a subagent was a person appointed by an agent empowered to perform functions undertaken by

the agent for the principal and there was no evidence that the attorney was empowered to appoint a subagent. Cherokee Water Co. v. Forderhause, 727 S.W.2d 605, 620, judgment reversed 741 S.W.2d 377 (1987).

Wash.App.

Wash.App.1974. Quot. in sup. Law students brought an action to enjoin the deal and faculty of a law school, which was part of a state university, from violating provisions of the Open Public Meetings Act and for the assessment of civil penalties against them for such violations. The Act required that all meetings of the governing body of a public agency shall be open and public and all persons shall be permitted to attend any meeting of such an agency. The trial court, in granting a summary judgment of dismissal held that the law school is not a governing body of a public agency or a subagency … and the "Law School was not created by or pursuant to statute, ordinance or other legislative act." Upon appeal, the court affirmed the judgment of the lower court denying civil penalties and an injunction, but remanded the case with directions that a judgment be entered declaring the Open Public Meetings Act applicable to official meetings of the dean and faculty of the law school. The court noted that the term "subagent" is not defined in the Act and quoted the definition set forth in s 5. It held that the "law school was created by the university and given certain powers by which to function. It is, therefore, an agent of the university, a subagent of the state and so a 'public agency' within the purview of the statute." Cathcart v. Andersen, 10 Wash.App. 429, 517 P.2d 980, 982, aff'd 85 Wash.2d 102, 530 P.2d 313 (1975).

Wis.

Wis.2020. Rptr's Notes quot. in ftn. Festival attendee brought a claim sounding in negligence against festival producer and limited-liability company that was a member of a band producer had hired, alleging that plaintiff suffered injuries when she tripped over an electrical cord placed by limited-liability company's sole member. The trial court granted defendants' motion for summary judgment. The court of appeals reversed in part. This court reversed, affirming the trial court's finding that limited-liability company enjoyed the same statutory immunity for recreational activities as producer, because it was an agent of producer and, through the actions of its sole member, laid down the electrical cords that allegedly caused plaintiff to trip. The court explained that the sole member was a subagent of producer as defined by Restatement Third of Agency § 3.15, and noted that the substance of § 3.15 was similar to Restatement Second of Agency § 5, under which principals were liable for the conduct of subagents if the principal controlled the subagent's conduct. Lang v. Lions Club of Cudahy Wisconsin, Inc., 939 N.W.2d 582, 594.

Wis.App.

Wis.App.1982. Cit. in sup. A vendor brought an action in the trial court against a brokerage firm and two of its agents for failing to disclose material information concerning the purchaser, who happened to be one of the agent parties to the action. On motion of the firm and the non-purchaser agent, that court granted summary judgment in their favor and the vendor appealed. The vendor had given an exclusive listing contract for his home to one of the agents, and on learning that his fellow agent was interested in the property, the first agent related this interest to the vendor. Some months after acquiring the property, the agent purchaser defaulted. The appeals court held that the failure of the purchaser to disclose his poor financial condition was chargeable to the brokerage firm, since the purchaser served as its agent, and since brokers, as agents themselves, are responsible to the principals for the acts of their subagents. The court further held that the broker's failure to disclose facts indicating the likelihood of default prevented application of the general rule that a broker's right to commission is not defeated by a subsequent default. On these bases, the court overturned the trial court ruling as applicable to the broker. Having found that knowledge of the purchaser's financial condition could not be imputed to the other agent, the court affirmed the judgment as to him. Hercules v. Robedeaux, Inc., 329 N.W.2d 240, 242.

Footnotes

1 The Restatement of Agency § 5, of 1933, defines a subagent as "a person to whom the agent delegates, as his agent, the performance of an act for the principal which the agent has been empowered to perform through his own representative."

2 91 U.S. 308, 315, 23 L.Ed. 392 (1876).

3 The real estate dealer normally does not become a party to the contract, but would be liable to the purchaser for misrepresentations of the salesman, and, if purporting to have power to make a contract of sale, upon a warranty of authority.

4 Paley, Principal and Agent 226 n. (k) (1) (2d Am.ed.1822).

5 Story, Agency § 201 (1839).

6 1 Mechem, Agency § 325 (2d ed.1914).

7 Mechem, Outlines of Agency § 79 (4th ed., 1952).

8 The second edition of Tiffany, Principal and Agent ss 81, 83 (1924), by Professor Richard R.B. Powell, is reasonably adequate upon this point. In England Bowstead, Digest of Agency arts. 42, 62, 138 (11th ed.1951) is better on this than on other matters. Raphael Powell assumes that one not a subagent is a substitute for the one making the appointment. Agency 251 (1952). This work is a great advance for American readers over other English works dealing with agency but contains a number of misinterpretations of the Restatement.

9 Robertson v. Sichel, 127 U.S. 507, 8 S.Ct. 1286, 32 L.Ed. 203 (1888); Donn v. Kunz, 52 Ariz. 219, 79 P.2d 965 (1938); Hilton v. Oliver, 204 Cal. 535, 269 P. 425, 61 A.L.R. 297 (1928); Smith v. Rutledge, 332 Ill. 150, 163 N.E. 544, 61 A.L.R. 273 (1928); Weaver v. Foundation Co., 310 Pa. 310, 165 A. 381 (1933); White v. Macoubray, 309 Pa. 266, 163 A. 521 (1932).

10 Cotton States Life Ins. Co. v. Mallard, 57 Ga. 64 (1876); American Oil & Refining Co. v. Clements, 99 Okl. 204, 225 P. 349 (1923); James Bradford Co. v. Edward Hill's Son & Co., 31 Del. (1 W.W.Harr.) 546, 554, 116 A. 353, 357, (1922) (dictum); Lanowah Inv. Co. v. John Hancock Mut. Life Ins. Co., 236 Mo.App. 1062, 1068, 162 S.W.2d 307, 310 (1942) (dictum).

11 Kuhnert v. Angell, 10 N.D. 59, 84 N.W. 579, 88 Am.St.Rep. 675 (1900).

12 Hamilton Nat. Bank v. Lerman, 229 Ala. 363, 157 So. 75 (1934).

13 Texas Co. v. Brice, 26 F.2d 164 (6th Cir.1928), certiorari denied 278 U.S. 640, 49 S.Ct. 34, 73 L.Ed. 555; Hall v. Douglas Aircraft Co., 23 Cal.App.2d 498, 73 P.2d 668 (1937); Ring Furniture Co. v. Bussell, 171 N.C. 474, 88 S.E. 484 (1916).

14 75 Ariz. 260, 255 P.2d 195 (1953).

15 99 S.W.2d 613 (Tex.Civ.App., 1936), error dismissed.

16 93 Okl. 153, 220 P. 25 (1923).

17 Automobile Banking Corp. v. Willison, 181 Md. 118, 28 A.2d 864 (1942); Large v. Frick Co., 215 Mo.App. 232, 256 S.W. 90 (1923); Powell v. State, 82 Tex.Cr.R. 163, 198 S.W. 317 (1917); Sater v. Cities Service Oil Co., 235 Wis. 32, 291 N.W. 355 (1940).

18 Annot., 61 A.L.R. 277 (1929).

19 Miller v. Adams-Cates Co., 64 Ga.App. 858, 14 S.E.2d 220 (1941).

20 Lee v. Oreon E. & R.G. Scott Realty Co., 96 S.W.2d 652 (Mo.App.1936).

21 McCarthy v. Hughes, 36 R.I. 66, 88 A. 984, Ann.Cas.1915D, 26 (1913).

22 Mitchell v. Teague, 233 S.W. 1040 (Tex.Civ.App.1921).

23 E.g., Exchange Nat. Bank v. Third Nat. Bank, 112 U.S. 276, 5 S.Ct. 141, 28 L.Ed. 722 (1884); Streissguth v. National German-American Bank, 43 Minn. 50, 44 N.W. 797, 7 L.R.A. 363, 19 Am.St.Rep. 213 (1890).

24 Christensen v. Pryor, 75 Ariz. 260, 255 P.2d 195 (1953).

25 Security Nat. Bank v. Home Nat. Bank, 116 Kan. 530, 532, 227 P. 365, 366 (1924) (dictum).

26 Albans Holding Corp. v. Blum, 270 App.Div. 1035, 63 N.Y.S.2d 90, amended on rehearing 271 App.Div. 791, 65 N.Y.S.2d 13 (2d Dep't 1946), affirmed 297 N.Y. 555, 74 N.E.2d 479 (1947).

27 Klein v. May Stern & Co., 144 Pa.Super. 470, 19 A.2d 566 (1941).

28 Bradstreet v. Everson, 72 Pa. 124 (1872).

29 Highway Ins. Underwriters v. Lufkin-Beaumont Motor Coaches, Inc., 215 S.W.2d 904 (Tex.Civ.App.1948), writ of error refused n.r.e., 147 Tex. 661 (1949).

30 Quinn v. Southgate Nelson Corp., 36 F.Supp. 873 (S.D.N.Y.), affirmed 121 F.2d 190 (2d Cir.), certiorari denied 314 U.S. 682, 62 S.Ct. 185, 86 L.Ed. 546 (1941).

31 Ibid.

32 Hughes v. Weekley Elevator Co., 37 Ga.App. 130, 138 S.E. 633 (1927) (negligence); McCaffrey v. Minneapolis, St. P. & S.S.M.R. Co., 222 Wis. 311, 267 N.W. 326 (1936), modified 222 Wis. 329, 268 N.W. 872 (negligence); Cowan v. Eastern Racing Ass'n, Inc., 330 Mass. 135, 146-47, 111 N.E.2d 752, 758 (1953) (dictum) (assault); Estes v. Crosby, 171 Wis. 73, 175 N.W. 933, 8 A.L.R. 1377 (1920), amendment of mandate denied 171 Wis. 73, 177 N.W. 512, 8 A.L.R. 1377 (misstatement).

33 Rutledge v. United Services Life Ins. Co., 84 U.S.App.D.C. 61, 171 F.2d 27 (1948), certiorari denied 336 U.S. 953, 69 S.Ct. 883, 93 L.Ed. 1107 (1949); Automobile Banking Corp. v. Willison, 181 Md. 118, 28 A.2d 864 (1942); Baker-Riedt Motor Co. v. Moore, 93 Okl. 153, 220 P. 25 (1923); McKnight v. Peoples-Pittsburgh Trust Co., 360 Pa. 290, 61 A.2d 820 (1948); Miller v. Adams-Cates Co., 64 Ga.App. 858, 860, 14 S.E.2d 220, 222 (1941) (dictum); Clark v. Opp, 156 Or. 197, 204, 66 P.2d 1179, 1182 (1937) (dictum). In O.A. Skutt, Inc. v. J. & H. Goodwin, Ltd., 251 App.Div. 84, 295 N.Y.S. 772 (4th Dep't 1937), the court, in so holding, made the improper generalization that the relation of principal and agent did not exist between the parties.

34 91 U.S. 308, 23 L.Ed. 392 (1876). See note 2, supra.

35 Jones v. Protection Mut. Fire Ins. Co., 93 F.Supp. 505 (E.D.Pa.1950), affirmed 192 F.2d 1018 (3d Cir.1951); Merritt v. Huber, 137 Iowa 135, 114 N.W. 627 (1908); National Bank v. Thomas J. Barrett, Jr. & Co., 173 S.C. 1, 7, 174 S.E. 581, 583 (1934) (dictum); cf. Ring Furniture Co. v. Bussell, 171 N.C. 474, 88 S.E. 484 (1916). In Wilken v. Capital Fire Ins. Co., 99 Neb. 828, 157 N.W. 1021 (1916), an insurance company was held responsible for the subagent's delay in forwarding an application.

36 E.g., McGehee v. Brookins, 140 S.W.2d 963, 966 (Tex.Civ.App.1940), error dismissed, judgment correct, since, however, the subagent was employed without authority.

37 358 Mo. 99, 213 S.W.2d 504 (1948). Where the agent is the principal's sole representative in a transaction, the principal is deprived of the benefit of the rule relieving him from liability for acts of his agent acting adversely to him. In such a case the agent's knowledge is imputable to the principal. 358 Mo. at 110, 213 S.W.2d at 511.

38 130 Neb. 203, 264 N.W. 442 (1936).

39 Tams v. Abrams, Ramos & Co., 120 N.J.Eq. 253, 185 A. 521 (Ct.Err. & App.1936); Mechanics' Trust Co. v. Reid, 117 N.J.Eq. 472, 176 A. 325 (Ct.Err. & App.1935); Stowe v. Wooten, 37 S.W.2d 1055, 1057 (Tex.Civ.App.1931) (dictum), affirmed 62 S.W.2d 67 (Tex.Com.App.1933). Tollett v. Montgomery Real Estate & Ins. Co., 238 Ala. 617, 193 So. 127 (1940).

40 E.g., Stephens v. Badcock, 3 Barn. & Ad. 354, 110 Eng.Rep. 133 (K.B.1832); Sims v. Brittain, 4 Barn. & Ad. 375, 110 Eng.Rep. 496 (K.B., 1832).

41 State v. Cochran, 336 Mo. 649, 80 S.W.2d 182 (1935) (president of a bank who stole money belonging to bank's principal, which was a charity, not guilty of embezzlement under a statute); Arpe v. Brown, 227 Mo.App. 60, 51 S.W.2d 225 (1932) (subagent of undisclosed principal owed him no fiduciary duty).

42 See Wilson & Co. v. Smith, 44 U.S. (3 How.) 763, 11 L.Ed. 820 (1845); Union Trust Co. v. Berry, 186 Ark. 966, 57 S.W.2d 413 (1933); Petersen v. Lyders, 139 Cal.App. 303, 33 P.2d 1030, certiorari denied 294 U.S. 716, 55 S.Ct. 514, 79 L.Ed. 1249 (1934) rehearing denied 294 U.S. 734, 55 S.Ct. 635, 79 L.Ed. 1262; De Raad v. Nash-De Camp Co., 73 Cal.App.Dec. 1175, 23 P.2d 68 (1933); McKenzie v. Nevius, 22 Me. 138 (1842); Milton v. Johnson, 79 Minn. 170, 81 N.W. 842, 47 L.R.A. 529 (1900); Friedman v. Irving Trust Co., 164 Misc. 811, 300 N.Y.S. 51 (Mun.Ct.1937); Moldawer's Appeal, 121 Pa.Super. 163, 183 A. 349 (1936).

43 Ott v. Schneiter, 56 Ohio App. 359, 10 N.E.2d 947 (1936).

44 Dolvin Realty Co. v. Holley, 203 Ga. 618, 48 S.E.2d 109 (1948); Keller v. American Chain Co., 255 N.Y. 94, 174 N.E. 74 (1930); Dorr v. Camden, 55 W.Va. 226, 46 S.E. 1014, 65 L.R.A. 348 (1904); De Bussche v. Alt, 8 Ch.D. 286 (1878); Kruse v. Miller, 143 Cal.App.2d 656, 300 P.2d 855 (1956) (failure to give principal information); Powell & Thomas v. Jones [1905] 1 K.B. 11; cf. Gierth v. Fidelity Trust Co., 93 N.J.Eq. 163, 115 A. 397, 18 A.L.R. 976 (Ct.Err. & App.1921).

45 244 App.Div. 68, 278 N.Y.S. 313 (4th Dep't 1935); cf. Friedman v. Irving Trust Co., 164 Misc. 811, 300 N.Y.S. 51 (Mun.Ct.1937).

46 Wilson & Co. v. Smith, 44 U.S. (3 How.) 763, 11 L.Ed. 820 (1845); De Raad v. Nash-De Camp Co., 73 Cal.App.Dec. 1175, 23 P.2d 68 (1933); Milton v. Johnson, 79 Minn. 170, 81 N.W. 842, 47 L.R.A. 529 (1900).

47 Hammon v. Paine, 56 F.2d 19 (1st Cir.1932); W.E. Herron Motor Co. v. First Nat. Bank, 226 Ala. 434, 147 So. 198 (1933); Federal Reserve Bank v. State & City Bank & Trust Co., 150 Va. 423, 143 S.E. 697 (1928).

48 Cf. Admiral Oriental Line v. U.S., 86 F.2d 201 (2d Cir.1936) (principal called in by agent to pay the expense of a successful defense against an action based on the subagent's act performed in the principal's business).

49 Friedman v. Irving Trust Co., 164 Misc. 811, 300 N.Y.S. 51 (Mun.Ct.1937); Wolf v. Title Guarantee & Trust Co., 251 App.Div. 354, 296 N.Y.S. 800 (1st Dep't 1937), affirmed 277 N.Y. 626, 14 N.E.2d 193 (1938); McMullen v. Daniel, 229 Ala. 194, 198, 155 So. 687, 690 (1933) (dictum).

50 The Restatement of 1933 contained no definition of the term.

51 Lehigh Valley Coal Co. v. Yensavage, 218 F. 547 (2d Cir.), certiorari denied 235 U.S. 705, 35 S.Ct. 282, 59 L.Ed. 434 (1914); Pennsylvania Co. v. Gallagher, 40 Ohio St. 637 (1884); Chicago, R.I. & Pac. Ry. v. Bennett, 36 Okl. 358, 128 P. 705, 20 A.L.R. 678 (1912); Kniceley v. West Virginia Midland R.R., 64 W.Va. 278, 61 S.E. 811, 17 L.R.A., N.S., 370 (1908). But cf. New Albany Forge & Rolling-Mill Co. v. Cooper,

131 Ind. 363, 30 N.E. 294 (1892) (owner of rolling mill held not the employer of, and hence not liable for the acts of, his servant's helper).

52 116 F.2d 254 (3d Cir.1940).

53 231 Wis. 607, 286 N.W. 76 (1939).

54 18 Or. 47, 21 P. 934, 4 L.R.A. 840 (1889). See also Barlow v. Makeeff, 74 Wyo. 171, 284 P.2d 1093 (1955).

55 See note 57 infra.

56 Texas Co. v. Mills, 171 Miss. 231, 247, 156 So. 866, 870 (1934).

57 Dockens v. La Caze, 78 F.Supp. 515 (W.D.La.1948); Texas Co. v. Wheeless, 185 Miss. 799, 187 So. 880 (1939) (station operator held a master for purposes of unemployment insurance); Frank v. Sinclair Refining Co., 363 Mo. 1054, 256 S.W.2d 793 (1953); see Tate v. Claussen-Lawrence Constr. Co., 168 S.C. 481, 167 S.E. 826 (1932) (oil company held liable for negligence of truck driver).

58 Pure Oil Co. v. Lassing, 222 F.2d 886 (6th Cir.1955); Zancanaro v. Hopper, 79 Ariz. 207, 286 P.2d 205 (1955); Arkansas Fuel Oil Co. v. Scaletta, 200 Ark. 645, 140 S.W.2d 684 (1940); Gulf Refining Co. v. Shirley, 99 S.W.2d 613 (Tex.Civ.App.1936), writ dismissed 127 Tex. 662 (1937).

59 See, e.g., Smith v. Howard Crumley & Co., 171 So. 188 (La.App.1936).

60 22 Cal.2d 87, 137 P.2d 9 (1943); cf. Moeller v. De Rose, 222 P.2d 107 (Cal.App.1950), hearing dismissed.

61 195 Okl. 691, 161 P.2d 861 (1945).

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