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In General

The subject matter of this Restatement, the common law of agency, encompasses the legal consequences of consensual relationships in which one person (the "principal") manifests assent that another person (the "agent") shall, subject to the principal's right of control, have power to affect the principal's legal relations through the agent's acts and on the principal's behalf. Relationships of agency usually contemplate three parties—the agent, the principal, and third parties with whom the agent interacts in some manner. Agents of the same principal may also interact, with legal consequences for their mutual principal. This Restatement also embraces the situation in which the legal consequences of agency apply to a relationship in which an actor appears to third parties to be acting as a person's agent but the relationship between the putative principal and the actor lacks elements of the common-law definition of agency.

Many questions governed by common-law agency doctrines involve the legal consequences of an agent's interactions with third persons. Such interactions may create legal rights and duties as between the principal and the third party, the agent and the third party, and the principal and the agent. The common law of agency also governs the legal consequences of the relationship of the agent and the principal with each other, which is in many respects defined and governed by any agreement between them. Agency doctrine also imputes the agent's knowledge to the principal in many circumstances.

Inclusions and Exclusions

The common-law definition of a relationship of agency, stated in § 1.01 of this Restatement, results in inclusions and exclusions that run counter to some ordinary understandings of the term "agency" and of the scope of this body of law. The term "agency" has several distinct meanings. The common-law definition of a relationship of agency uses concepts, such as "manifestation" and "control," that embrace a wide spectrum of meanings and that in this application are highly fact-specific. As a result, agency law covers a broader set of relationships than might be expected. Manifestations may be made indirectly and in generalized ways, and legal implications do not necessarily depend on precise statements made to specifically identified individuals. Likewise, a principal's right of control, which entitles the principal to give interim instructions or directions to the agent, is a broadly drawn concept.
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Moreover, as many people understand the law of agency, it applies to situations in which one person has, or appears to have, the right to enter into contracts with third parties that bind a principal or in which a person has the right to make dispositions of another person's property. These situations are indeed governed by the common law of agency, but the reach of the concept is broader. An employment relationship is encompassed by the common-law definition, as are nonemployment relationships in which one person has the right to direct the physical actions of another who has consented to act on the person's behalf. Historically, both such relationships often were termed "master-servant" relationships.

The common law of agency includes some doctrines that are not applicable to each situation encompassed by the definition of a relationship of agency. For example, many employment relationships do not implicate agency doctrines involving contracts with third parties because many employees lack any capacity to create contractual rights or liabilities on behalf of their employers. Interacting in transactional settings with third parties falls outside their job descriptions. However, agency doctrine is relevant to all employment relationships for two distinct reasons. It defines duties the employer and employee owe to each other, and it defines circumstances under which the employer is vicariously liable for wrongs committed by an employee.

The common law of agency in the United States encompasses the principle of respondeat superior, which makes an employer, or a nonemployer principal who has the right to direct another's actions, vicariously liable for torts committed by an employee or agent while acting within the scope of employment or other engagement. Doctrines of authority and apparent authority, which principally but not exclusively apply when the focus is transactionally oriented activity by an agent, do not govern or explain the application of respondeat superior. Rather, respondeat superior is based on the status created by particular types of agency relationships, chiefly employment. The doctrine of scope of employment, although related in some basic respects to the notion of scope of authority, is distinct from the agency-law doctrines that define actual and apparent authority. Although this Restatement includes the respondeat superior doctrine, it does not deal extensively with the duties that an employer owes its employees. Such duties are now extensively prescribed by statute and administrative regulation and enforced to a considerable degree through processes external to the civil-justice system.

Within the scope of a relationship of agency, the agent owes fiduciary duties to the principal. The fiduciary character of the relationship does not explain all of the doctrine included within agency law. For example, the bases for the respondeat superior doctrine are
not necessarily linked to the bases for treating agents as fiduciaries. In this respect, as in others, the doctrine comprising the whole of agency law is eclectic and reflects the subject's breadth.

The common-law definition also has the effect of excluding situations that many think of and refer to as agency. In general, agency does not encompass situations in which an “agent” is not subject to a right of control in the person who benefits from or whose interests are affected by the agent’s acts, who lacks the power to terminate the “agent’s” representation, or who has not consented to the representation. This fact leads to awkwardness both in terminology and in the need to draw distinctions between relationships of “true agency,” on the one hand, and other relationships in which one person’s acts affect the legal interests of another person. For example, the defining characteristics of “true agency” are not present in the relationship between a corporation’s shareholders and its directors, between a guardian and the guardian’s ward, and between a public official designated by statute to receive service of legal process and the person for whom process is received. The law applicable to those relationships is not covered by this Restatement.

Restatement Third, Agency, deals nonetheless with some relationships that fall outside the common-law definition but that are closely linked to agency. These inclusions are of two types. First, it is often the case that a relationship that appears to be one of agency to strangers to the relationship is claimed by the parties to be something other than agency or that a person acknowledged to be an agent is claimed to have acted without authority and thus without the principal’s consent. The legal consequences, if any, of such appearances of agency and authority are governed principally by the doctrine of apparent authority and to a lesser degree by ratification, estoppel, and restitution. This Restatement deals fully with apparent authority, ratification, and estoppel and more briefly with this dimension of restitution. Second, some consensual relationships that fall outside the common-law definition of agency are useful precisely because they carry the consequence that one person’s acts are ascribed to another; tradition, origin, and function ally them closely to agency at least as a starting point for legal analysis of the relationship. This Restatement covers three exemplars of cognate relationships, those resulting from durable powers of attorney, powers given as security, and irrevocable proxies.

This Restatement articulates a body of core principles. It does not deal comprehensively with all bodies of legal doctrine that embody or reflect the common law of agency or that overlap with it. In particular, this Restatement does not address the specifics of topics addressed by
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Restatement Third, The Law Governing Lawyers, or the Principles of Corporate Governance: Analysis and Recommendations.

Organizations

Doctrines within the common law of agency are formulated without regard to whether a person is an individual or a legal or commercial entity or other legally recognized nonindividual person, including an organization. This Restatement follows this convention, but it also discusses at length the application of agency doctrine to organizations. Many agents hold positions in organizations. This Restatement thus covers applications of agency doctrine to persons who act as representatives of corporations, partnerships, other business organizations, and private not-for-profit entities. In that context, the focal point for the application of agency doctrine is determining either the duties owed the organization by those holding positions within it or the consequences of interactions between actors in positions defined by one organization with individuals external to the organization or with actors who hold positions in another organization. This Restatement also deals at points, but not comprehensively, with the application of common-law doctrine to agents of governmental subdivisions and entities created by government.

Common Law and Statutes

Although the subject of this Restatement is the common law of agency, many references are made to statutory material. Modern common-law doctrines operate in the context of statutes. Increasingly, statutes influence common-law development, as explained more fully below. However, despite the significance of all sorts of statutes, the common law of agency retains coherence in two respects. Its basic concepts and doctrines apply in diverse contexts, including those affected by statutes. Agency has also retained structural coherence, despite statutory developments, in large measure because many statutes make implicit or explicit reference to common law or presuppose a background that includes basic common-law doctrines. Statutory developments thus have not transformed the law of agency into a law of agencies.

Given the significance of statutes, it is helpful to begin with a general description of the relationships between common-law doctrine and statutory or administrative material that shape the contemporary law of agency. There are at least five distinct types of relationships. First, in seven jurisdictions in the United States, legislation codifies many of the general doctrines of agency. In these states—Alabama, California, Georgia, Louisiana, Montana, North Dakota, and South Dakota—the basic framework or starting point for analysis is a
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statutory codification. Excepting Louisiana, these statutes codify the common law of agency as understood at the time of the codifications, which spanned the mid-19th century through the early 20th century. Like many of the formulations in this Restatement, the codifications usually employ concepts that depend on factual context, that are stated in relatively general language, and that cover a wide and variable spectrum of situations. Cases applying the “common law” codifications reach outcomes that, for the most part, substantially correspond to outcomes reached by courts applying the common law.

Where relevant, this Restatement notes differences between common-law codifications and noncodified common-law jurisdictions. Also noted are major divergences among common-law doctrine in the United States, England, and the Commonwealth jurisdictions. Louisiana is the only noncommon-law jurisdiction to which this Restatement makes any systematic reference, although some guidance is provided for European material. The codified treatment of agency in Louisiana began with legislation based on the French Civil Code. The current codification of agency law, enacted in 1997, is distinctive, departing in some respects from the current French Code as well as the Quebec Civil Code.

The second relationship between the common law of agency and statutes is a consequence of the fact that, in applying statutes and administrative regulations, courts incorporate definitions or doctrines that are drawn from the common law. This often occurs because a statute or administrative regulation uses common-law terminology but provides no independent definition in the statute or regulation itself. Some important legislation, moreover, expressly refers to common-law agency to define statutory terms. For example, Internal Revenue Code § 3121(d) defines “employee” as “any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee.” Other statutes refer to concepts that are defined by common-law doctrines. For example, Uniform Commercial Code (U.C.C.) § 1-201(b)(41) defines an “unauthorized” signature as one “made without actual, implied, or apparent authority,” including a forgery. The U.C.C. thereby refers to common-law doctrine to determine whether a particular signature should suffice to bind a person. Additionally, U.C.C. § 1-103(b) makes the common law of agency, as well as other supplementary general principles of law, applicable unless explicitly displaced by particular provisions in the Code. In contrast, the purpose or function of a statute may lead a court to conclude that, although the statute uses the terminology of common-law agency or involves a relationship that constitutes common-law agency, the legislature did not intend to
invoke its consequences. This Restatement notes some instances where relevant but does not do so comprehensively.

Apart from express statutory references, courts often treat statutes as implicitly incorporating common-law doctrine when nothing in the statute displaces it and the dispute before the court requires a basis for decision. Organizational statutes, in particular, may raise a variety of questions about the degree to which the statute displaces otherwise applicable common-law doctrines or statutes of general applicability. Implicit incorporation is frequently employed in determining whether an individual's act should be treated as the act of an organization. For example, to determine whether an act done by an individual is properly attributable to a corporation or other organization, it is often necessary for the court to apply common-law doctrines of actual and apparent authority.

Implicit incorporation also occurs when a statute prohibits or ascribes consequences to conduct but specifies the conduct in terms that require extra-statutory definition. A leading illustration is § 10(b) of the Securities Exchange Act of 1934, which prohibits the use of any "deceptive or manipulative device or contrivance" in connection with the purchase or sale of any security. The United States Supreme Court has defined "deceptive" conduct to encompass a breach of fiduciary obligation, including securities trading by an agent on the basis of nonpublic information when the trader's conduct breaches the duties an agent owes the principal regarding nonpublic information obtained from the principal, including remaining silent when the agent has a fiduciary duty to speak. These examples show that even complex statutes, such as the U.C.C., the Internal Revenue Code, and the federal securities laws, rarely create wholly self-contained sets of rules for decision.

The third type of relationship, related to the second, occurs when a court incorporates common-law doctrine in its construction of a statute but modifies or varies the doctrine in light of the court's understanding of the statute's purpose or broader policy context. An illustration of this process is the United States Supreme Court's construction of Title VII of the Civil Rights Act of 1964 as it applies to sexual harassment by supervisory employees. The Court's decisions begin with the general law of agency to determine when to hold an employer accountable for harassing acts committed by supervisors. Unlike the common-law doctrines, however, the Court has made affirmative defenses available to employers who take measures to prevent sexual harassment and to enable victims to report conduct so that it may be investigated and, where appropriate, remedied. These defenses, and the departure from the common law that they represent, stem from the Court's assessment that, as applied in the context of
sexual harassment, the statute's prophylactic objective dominates its objective of providing relief to individual victims.

When a statute uses language that has a specific meaning ascribed by common law, the question arises whether the legislature intended that the statute incorporate the relevant common law even when the statute itself makes no explicit reference to the common law. If the statute does not provide otherwise, it may be reasonable to assume the legislature intended that the common law be incorporated because the determination of what the statute means as applied to actual conduct is to be made by lawyers and ultimately by judges who come to their tasks associating specific consequences and concepts with patterns of language. On the other hand, when a court imports common-law doctrine into a statutory framework but modifies the doctrine, the court is making a judgment about efficacy in light of what the statute's overall objectives are understood to be, without a specific legislative mandate to make such adjustments. The adjustment, however, is not to the explicit provisions of the statute itself but to the consequences that would otherwise follow from incorporating common-law doctrine.

A fourth type of relationship occurs when a statute explicitly modifies an otherwise-controlling common-law doctrine to achieve a specific result. For example, at common law, a stockholder's appointment of a proxy—an agent with authority to vote shares of stock—remains effective until the proxy's authority is revoked, as it would be by an act of the shareholder manifesting intent to revoke. In contrast, under state corporation statutes, the appointment of a proxy expires of its own force after a specified period of time unless the instrument itself specifies a longer period of effectiveness. The statutory modification helps assure the freshness of a proxy designation and its conformity to the shareholder's current wishes. For similar reasons, the federal proxy rules sharply limit the degree to which a proxy instrument may confer discretionary voting authority on the holder. These modifications do not generally displace the common law of agency otherwise applicable to the relationship between the stockholder as principal and the proxy holder as agent. Likewise, it is not unusual for statutes to impose requirements or regulations on specific types of agents or to subject them to administrative regulation. Securities brokers and insurance agents and brokers, for example, are the subject of statutory and administrative regulation, but the common law of agency otherwise governs relationships between and among the agent, the principal, and third parties to transactions.

Most legislative modifications of the common law of agency are limited in effect to a particular doctrine or consequence that is displaced or modified by statute, as in the illustrations above. In
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contrast, some statutes have the effect of removing the assumptions on which a common-law doctrine rests. It may be necessary for a court to determine how best to classify a particular relationship and define the duties that the parties to the relationship owe to each other, or their rights and duties with respect to third parties, when the statute itself does not explicitly do so.

Under the common law of agency, authority is automatically revoked when the principal loses legal competence. See § 3.08. In contrast, statutes permit a principal to create a durable power of attorney, one that conveys authority to an agent that is not revoked by the principal’s loss of competence or that becomes irrevocable when the principal loses competence. Restatement Second, Agency, did not deal with durable powers. The common law of agency rests upon a definition of the relationship between principal and agent that presupposes the principal’s capacity to consent and right to control the agent, as well as the power to revoke authority unless it has been given as security to protect an interest that is distinct from the agency relationship. See §§ 3.12 and 3.13. The relationship created by a durable power resembles agency because it is a mechanism to enable the legal consequences of one person’s acts to be attributed to another person. In other respects, the relationship at this point resembles a trust in which the power holder is similar to a trustee because the person acting is not under the control of the person for whom the actor’s conduct has consequences and on whose behalf the actor has a duty to act.

Fifth, many statutes modify the incidents of some agency relationships, particularly incidents of “master-servant” relationships. The connotation that household service is the prototype for employment is dated, as is its suggestion that an employer has an all-pervasive right of control over most dimensions of the employee’s life. This Restatement thus does not use the “master-servant” terminology. Employment legislation has modified common-law doctrine concerning the fellow-servant rule, under which an employer is not liable for injuries inflicted on one employee by the negligent acts of another unless the act violates an employer’s nondelegable duties. See Restatement Second, Agency § 474. Employment legislation such as Title VII expands an employer’s nondelegable duties substantially, subjecting the employer under some circumstances to liability for employee conduct, such as sexually harassing behavior, that usually falls outside the scope of the common-law doctrine of respondeat superior. Workers’-compensation legislation likewise imposes liability on the employer in circumstances under which the common law did not.