

# THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

## Cloak & BRIEFCASE

# Secret agency and the apparent authority doctrine

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James Bond is a secret agent for the British government (although he's not an especially well-kept secret).

Bond reports to "M," a senior government official. Bond's relationship with his government is that of agent (Bond) and principal (M, or the government).

An agent is one empowered to act for a principal. See generally *Marine Midland Bank v. John E. Russo Produce Co. Inc.*, 50 N.Y.2d 31 (1980). The acts of an agent are treated as if they were acts of the principal. Perhaps the most common agent is the employee.

Bond's precise authority is known to him and M, but not to third parties. For example, Felix Leiter, a CIA agent, knows Bond is an ally and a British agent, but does not know the precise scope of Bond's authority.

Accordingly, when Bond called Felix to request military assistance on behalf of England, Felix obliged. The target was to be the secret love bunker of one Sir Gregory Lightfellow.

Unbeknownst to Felix (but knownst to Bond), Sir Gregory was not a British government-approved target; he was just an intellectual playboy attempting to seduce Bond's beautiful niece, Olivia. Nevertheless, on Bond's command, a CIA missile strike destroyed Sir Gregory's bunker, blowing Sir Gregory to smithereens. Olivia later was slain by a beautiful assassin who thought she was "the chick who always hogs the Nordic Track at the YMCA."

The rocket attack prompted questions by the American authorities. The CIA then called M, who summoned Bond. Bond admitted he had exceeded his authority and the conditions of his license to kill. He was given a probationary license and sent to a killer's safety course (which reduced his assassin's insurance premiums by 10 percent).

England disavowed responsibility because Bond acted without authority. The United States disavowed responsibility because it was acting at the request of the British government's agent. The matter was submitted to the International Court at The Hague, which ruled that New York Law would apply at the trial. Despite suspected ties to MI-6, I was engaged to represent the United States. The case hinges on the "apparent authority doctrine."

Under New York State law, the apparent authority doctrine will hold a principal responsible for its agent's actions as long as the principal clothed the agent with apparent authority, *Hallock v. State*, 64 N.Y.2d 224, 231 (1984).

"Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction," *Id.* An

agent can never "by his own acts imbue himself with apparent authority," *Id.*

"[T]he existence of 'apparent authority' depends upon a factual showing that the third party relied upon the misrepresentation of the agent because of some misleading conduct on the part of the principal — not the agent," *Id.* (Internal quotations omitted; citations omitted).

"Moreover, a third party with whom the agent deals may rely on an appearance of authority only to the extent that such reliance is reasonable," *Id.*



The appellate court in *Merrell-Benco Agency LLC v. HSBC Bank USA*, 20 A.D.3d 605 (Third Dept. 2005), which favorably cited *Hallock*, supra, held that apparent authority may only be granted by the principal and never by the agent. In finding that apparent authority existed, the *Merrell-Benco* court noted that the principal specifically permitted its agent "to hold himself out to both the world and the agency's employees as president/member/managing member and/or owner," *Id.* at 608. The principal in *Merrell-Benco* further clothed its agent with apparent authority by authorizing the agent to file official documents on the principal's behalf, and sign company checks, ultimately becoming the sole signatory on its corporate accounts, *Id.* at 609.

The burden is on the party asserting the apparent authority doctrine (the relying party) to establish that it reasonably relied on the alleged agent's claim of authority. When one "deals with agents or officers of [a limited liability entity], he is bound to know their powers and the extent of their authority," *Alexander v. Cauldwell*, 83 N.Y.480 (1881); see also *Traitel Marble Co. v. Brown Bros. Inc.*, 159 A.D.485, 487 (First Dept. 1913); *Goldenberg v. Bartell Broadcasting Corp.*, 47 Misc.2d 105, 112 (NY Sup. Ct. NY Cty. 1965).

As long as Felix and the CIA were justified in relying on Bond, a secret agent of the British government, Bond's actions will be imputed to his principal — the British Government. The Hague will have to examine whether the CIA's reliance on Bond's apparent authority was reasonable. The issue will be decided based on the authority with which the British government publicly cloaked Bond.

### The moral

Know that the law favors transparency and does not like secrets. The law places the burden on the party who has information to conceal, at its own peril.

It may be wise for principals to consider listing agents, along with the scope of their authority, on their company Web site, perhaps along with language directing potential vendors to a specified individual who can verify an

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agent's authority.

Practitioners forming new entities also may wish to consider listing those with exclusive power to act for a new entity in such entity's publicly-filed formation documents so the public is placed on notice. Concomitantly, a third party who intends to rely on an alleged agent will want to verify authority with the principal, ask probing questions, diligently examine relevant public records and demand relevant private records.

In this era of ubiquitous and vague titles, businesses should be careful not to inadvertently cloak employees with unintended powers of agency. Written and detailed job descriptions also may be advisable to sketch out the limits of agents' authority.

While it is impossible to prevent a dishonest employee from lying, an

"employee is to be loyal to his employer and is 'prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties,'" *Western Elec. Co. v. Brenner*, 41 N.Y.2d 291, 295 (1977); a written understanding will help avoid honest errors and miscommunications by those acting in good faith. A written document also may establish the errant agent's personal liability for his unauthorized acts, *Baltzen v. Nicolay*, 53 N.Y. 467 (1873).

Despite my "annoying" requests, the editor informs me this essay will not self-destruct in five seconds.

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