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The Doctrine of Implied Ratification—Application and Limitations

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The basic import of the doctrine of implied ratification is that a principal may be held liable for the *unauthorized* acts of his agent, not because of his subsequent willingness to be bound but rather because his conduct and actions are inconsistent with a disavowal of the agent's acts. Inasmuch as most transactions involve agents, it is vital for lawyers and potential litigants to fully understand this doctrine, particularly the situations in which courts will impose or limit its application.[1]

Although the law of agency necessarily draws upon principles from other areas of law,[2] many of its concepts are unique. The doctrine of implied ratification presents perhaps the most original combination of nontraditional reasoning and rules in the law of agency.[3] This, com-

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1. *See* W. SEAVEY, AGENCY (1964). Professor Seavey, one of the foremost writers on the law of agency, commented in the preface of his treatise that "the time given [to the study of agency in law schools] is far less than its intrinsic importance warrants, since practically all of the world's business involves agents and in most important transactions, an agent on each side." *Id.* at ix.

2. Agency theory draws primarily on the law of torts, contracts (including conveyances), sales and negotiable instruments, trusts and restitution.

3. *See* Twerski, *The Independent Doctrine of Ratification v. The Restatement and Mr. Seavey*, 42 TEMP. L.Q. 1 (1968) Professor Twerski states:

> An examination of the ratification doctrine has led this writer to conclude that it merits independent recognition as a viable agency concept. The failure to recognize its independent significance has unfortunately led to its misapprehension and misapplication and has caused needless confusion to generations of students who have sought to reconcile ratification with traditional common law rules.

Id. at 4. *See also* RESTATEMENT (SECOND) OF AGENCY § 82 comment c (1957), which provides in pertinent part:

> [Ratification] does not conform to the rules of contracts, since it can be accomplished without consideration to or manifestation by the purported principal and without fresh consent by the other party. Further, it operates as if the transaction were complete at the time and place of the first event, rather than the last, as in the normal case of offer and acceptance. It does not conform to the rules of torts, since the ratifier may become responsible for a harm which was not caused by him, his property or his agent. It cannot be justified on a theory of restitution, since the ratifier may not have received a benefit, nor the third person a deprivation. Nor is ratification dependent upon a doctrine of estoppel, since there may be ratification although neither the agent nor the other party suffer a loss resulting from a statement of affirmance or a failure to disavow.

bined with the diversity of situations in which agency relationships arise, makes prediction of how a court will apply this doctrine difficult.

This article will investigate the doctrine of implied ratification, with an emphasis on determining which conduct by a principal may lead to imposition of liability. The goal is twofold: to achieve a clearer understanding of the current judicial application and limitations of the rules, and to provide guidelines for a principal who wishes to protect himself from liability for his agent's unauthorized acts.

Fundamentals

Ratification is based on the premise that when a party consents to another's actions on his behalf, he can acquire rights and liabilities based on such conduct. Further, the consent may be given after the act with the same efficacy as consent given prior to an act.[4] The *Restatement (Second) of Agency* defines ratification as: "the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him."[5]

The doctrine of ratification may be divided into two distinct categories, express and implied. Express ratification occurs when the principal voluntarily becomes a party to the prior act or transaction done or purported to be done on his account.[6] The principal's consent, in an express ratification, normally manifests itself orally or in writing.[7] This has also been described as voluntary ratification, "since the affirmance of the transaction results from the willingness of the ratifier to become a party to the transaction and is not imposed upon him because of what he does or fails to do."[8] In the event that formalities are required for the authorization of a particular transaction, the same formalities are required for its ratification.[9]

Before considering implied ratification, some basic tenets of ratification should be kept in mind. The principal must have possessed the

4. Rakestraw v. Rodrigues, 8 Cal. 3d 67, 500 P.2d 1401, 104 Cal. Rptr. 57 (1972). *See* SEAVEY, *supra* note 1, at 57. *See also* Seavey, *The Rationale of Agency*, 29 YALE L.J. 859 (1920).

5. RESTATEMENT (SECOND) OF AGENCY § 82 (1957).

6. Rakestraw v. Rodrigues, 8 Cal. 3d 67, 500 P.2d 1401, 104 Cal. Rptr. 57 (1972); Rayonier, Inc. v. Polson, 400 F.2d 909 (9th Cir. 1968).

7. The affirmance resulting in ratification is basically a mental act. SEAVEY, *supra* note 1, at § 37 (It is "a determination to abide by, or to adopt as one's own, the act of another.").

8. Seavey, *Ratification By Silence*, 103 U. PA. L. REV. 30 (1954).

9. For example, a seal or writing may be required for a valid authorization to convey land or strict compliance with statutory provisions may be required before an agreement made by public officers will bind a municipal organization. *See* SEAVEY, *supra* note 1, at § 37H (citing cases).

power to have authorized the act when it occurred.[10] The *Restatement* goes further, allowing ratification if, at the time of affirmance, the intended principal could authorize such an act.[11] The principal must have full knowledge of all of the material facts at the time of ratification.[12] However, if a principal ratifies and is aware that he does not know all of the relevant facts, he may lose his right to avoid the ratification.[13] Moreover, he may be estopped from avoiding ratification by a change in position by the other party.[14] A principal may not ratify a transaction that, under law or public policy, is illegal.[15]

There are also various facts and events closely associated with an unauthorized transaction that are neither required for, nor prevent, an effective ratification.[16] For example, the agent's or the third party's knowledge that the agent was in fact unauthorized is irrelevant.[17] However, in a controversial case, *Hirzel Funeral Homes v. Equitable*

10. *See* SEAVEY, *supra* note 1, at § 33.

11. RESTATEMENT (SECOND) OF AGENCY § 84(1) (1957). Ordinarily, an agent may not ratify his own unauthorized act. However, under the *Restatement (Second)*:

> An agent can be authorized to ratify for his principal the previous unauthorized act of himself or of another agent. Prima facie, an agent authorized to delegate to another the performance of a transaction or to effect a result is authorized to ratify the unauthorized performance of the transaction or accomplishment of a result by such other . . . .

Id. § 93 comment c (1957).

12. Dufresne v. Elite Ins. Co., 26 Cal. App. 3d 916, 103 Cal. Rptr. 347 (1972); Griggs v. Dodson, 223 Ga. 164, 154 S.E.2d 252 (1967); Security Ins. Co. v. Mato, 13 Ill. App. 3d 11, 298 N.E.2d 725 (1973); Desilvo v. Restauire, 264 Pa. Super. 522, 400 A.2d 211 (1979).

13. *See* SEAVEY, *supra* note 1, at § 36. Ignorance of minor details will not prevent affirmance constituting ratification on the grounds of not knowing all of the relevant facts. *Id.* § 36D. *See also* RESTATEMENT (SECOND) OF AGENCY § 91 (1957).

14. *See* SEAVEY, *supra* note 1, at § 36E.

15. Lowe v. April Indus., Inc., 531 P.2d 1297 (Utah 1974). *See also* Note, *Agency—Ratification of an Unauthorized Act*, 19 S.C.L. REV. 788, 790 (1967) [hereinafter cited as Note], *citing* Dubuque Fire & Marine Ins. Co. v. Miller, 219 S.C. 17, 64 S.E.2d 8 (1951).

16. These are set forth in § 92 of the *Restatement (Second) of Agency* (1957), as follows:

> An affirmance by the principal of a transaction with a third person is not prevented from resulting in ratification by the fact:
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> (a) that the other does not give fresh consent to the transaction at or after the affirmance, or does not change his position because of it; or
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> (b) that the purported principal, before affirming, had repudiated the transaction, if the other party has not acted or has failed to act in reliance upon the repudiation; or
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> (c) that the other party had a cause of action against the agent because of a breach of warranty or a misrepresentation by the agent as to his authority to conduct the original transaction; or
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> (d) that the agent conducting the transaction has died or lost capacity; or
>
> (e) that the principal is subject to liability without receiving consideration; or
>
> (f) that the agent or the other party knew the agent to be unauthorized; or
>
> (g) that the principal does not communicate with anyone.

17. RESTATEMENT (SECOND) OF AGENCY § 92(f) (1957).

Trust Co.,[18] the court held that there could be no ratification if the third party to the contract knew that the purported agent was not authorized.[19]

Implied ratification is based on conduct of the principal inconsistent with any position other than an affirmation of the agent's act or transaction.[20] Professor Seavey commented: "Ratification is implied in order to deny the principal an advantageous position over the third person contractor. Absent implied ratification, the principal, after discovering the execution of the unauthorized act, could either ratify or reject depending on whether the transaction subsequently resulted in profit or loss."[21] In an implied ratification, the ratifier is in essence electing to do acts from which a court will impose liability upon him. Conduct, rather than consent, is the critical factor.[22] In addition, formalities required for the protection of the ratifier in voluntary transactions are unnecessary.[23] If, however, the formality is required for the protection of others, it remains a requirement for implied ratification.[24]

Retention of Benefits

One kind of conduct that leads to implied ratification is retention of benefits, that is, when a principal receives or retains property or benefits as a result of an unauthorized transaction conducted by his agent and thereafter fails to notify either the third person or the agent of his disapproval. In these situations, ratification results automatically without reference to the principal's desires.[25] The majority view is that failure to repudiate within a reasonable time coupled with a failure to return what was received is ratification and not merely evidence of ratification.[26]

18. 46 Del. 334, 83 A.2d 700 (1951).

19. *Id.* For two cogent opposing views on the reasoning of *Hirzel*, *see* Seavey, *Ratification—Purporting to Act as Agent*, 21 U. CHI. L. REV. 248 (1954) and Twerski, *supra* note 3, at 8-13.

20. Carolina-Georgia Carpet & Textiles, Inc. v. Pelloni, 370 So. 2d 450 (Fla. App. 1979). *See* Note, *supra* note 15, at 788 ("The inconsistent conduct is viewed by the courts as manifesting an affirmation of the transaction.").

21. Note, *supra* note 15, at 788.

22. Seavey points out that since the liability results from conduct, any declarations by the principal of his unwillingness to be bound by the transaction would have no effect on the result. SEAVEY, *supra* note 1, at § 38. *See also* George F. Mueller & Sons, Inc. v. Northern Ill. Gas Co., 12 Ill. App. 362, 299 N.E.2d 601 (1973).

23. SEAVEY, *supra* note 1, at § 38B ("One who brings suit upon a contract to sell land made by an agent not authorized in writing, or who receives and retains the proceeds, cannot well set up the lack of a written authorization.").

24. *Id.* at § 37H and cases cited in notes 91, 92 and 93 therein.

25. Seavey, *Ratification By Silence*, 103 U. PA. L. REV. 30, 40 (1954).

26. *Id.* at 40, 41 n.46 (citing cases). Seavey comments that these cases are based in restitution. He explains:

> [A] purported principal who has seized property through the unauthorized act of

Retention of the benefits of an unauthorized transaction by an agent will not be held to constitute ratification unless the principal has the privilege of repudiating the unauthorized act.[27] In *Wing v. Lederer*[28] a licensed tree surgeon performed certain work for a homeowner. The work was authorized by the homeowner's part-time caretaker and yardman, but the caretaker clearly had no authority, actual or apparent, to authorize it.[29] The tree surgeon contended that the homeowner ratified the acts of the defendant's agent in hiring the plaintiff by accepting the work and retaining the benefits thereof.[30] On appeal the court held that no ratification took place because the homeowner had no choice regarding the retention of the benefits and did not have the privilege of repudiating the act.[31]

Independent Claim Defense

Sometimes a principal may retain the benefits of his agent's unauthorized transaction after denying ratification of the transaction by asserting an independent claim to those benefits. The recent case of *Carpenter v. Payette Valley Cooperative, Inc.* addressed this issue.[32] A lender loaned $20,000 to a dairy farmer belonging to the defendant cooperative. The lender alleged that he was induced to make the loan by the guaranty of the cooperative through its manager. When the cooperative learned of the guaranty, it immediately disavowed the transaction by letter, denying any previous knowledge of and responsibility for the unauthorized guaranty.

The Idaho Supreme Court held that the agent had neither express nor apparent authority to act as agent for the defendant in guaranteeing the farmer's personal note.[33] The court stated: "[N]o liability could attach to the [cooperative] by reason of the endorsement of the

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> another who purported to act for him is responsible to the owner of the property if nothing more happens, and the third person at that moment is entitled to a rescission of the transaction with the purported agent and the restitution to him of the subject matter. The principal, therefore, has a duty to return the property to the owner and if upon demand he refuses to return it, assuming it to be a chattel, he would be guilty of conversion and the third person would be entitled to an action for the restitution of the property or its value.

Id. Although the principle of unjust enrichment may primarily motivate the decisions, the language most often is that of ratification and sometimes the relief granted is not restitutionary.

27. Wing v. Lederer, 77 Ill. App. 2d 413, 418, 222 N.E.2d 535, 538 (1966) ("Absent such choice, the principal's conduct in accepting such benefits does not indicate that he assents to what has been done or intends to confirm it.").

28. *Id.*

29. *Id.* at 417, 222 N.E.2d at 537.

30. *Id.* at 418, 222 N.E.2d at 538.

31. *Id.* Plaintiff's alternate theories of an implied contract and/or quasi-contract also failed. *Id.* at 419-20, 222 N.E.2d at 539.

32. 99 Idaho 143, 578 P.2d 1074 (1978).

33. *Id.* at 147, 578 P.2d at 1078.

note by [its agent] because he was at all times acting beyond the scope of his employment and without the knowledge, consent or authority of the cooperative's directors."[34] The court reiterated the basic agency principle that a person dealing with an agent must ascertain the extent of his authority from the principal.[35]

The lender also argued that the cooperative had impliedly ratified the transaction by retaining the benefits thereof. The plaintiff argued that the cooperative was enriched because some of the loan proceeds discharged part of the farmer's indebtedness to it and the balance went to pay for the farmer's purchase of cattle, which the cooperative subsequently sold on foreclosure. The court followed the *Restatement (Second) of Agency* and held that application of the loan proceeds did not constitute an implied ratification:

> The receipt by a purported principal, with knowledge of the facts, of something to which he would not be entitled unless an act purported to be done for him were affirmed, and to which he makes no claim except through such act, constitutes an affirmance unless at the time of such receipt he repudiates the act. If he repudiates the act, his receipt of benefits constitutes an affirmance at the election of the other party to the transaction.[36]

The court believed that the crucial consideration was whether the cooperative had a claim to the benefits received independent of its agent's unauthorized transaction.[37] Its conclusion was that the cooperative had the independent right to receive money owed to it and therefore did not act inconsistently by retaining the funds and

34. *Id.* at 145, 578 P.2d at 1076. The court relied on the following factual findings: (1) The Board of Directors exercised strict control over its agent in financial matters. The agent was authorized by resolution or minutes to conduct financial business only with certain designated financial institutions of which plaintiff was not included. (2) The agent was never authorized by the defendant to endorse the note held by the plaintiff. And, (3) the defendant had not apparently or ostensibly or otherwise held out its agent as having authority and was not estopped from showing his lack of authority to endorse the note. *Id.* at 145-46, 578 P.2d at 1076-77.

35. The court stated:

> [A third party] cannot rely upon the agent's statement or assumption of authority, or upon the mere presumption of authority. [Citation omitted.] If such person makes no inquiry but chooses to rely upon the agent's statement he is chargeable with knowledge of the agent's authority, and his ignorance of its extent will be no excuse to him, and the fault cannot be thrown upon the principal who never authorized the act or contract.

Id. at 146, 578 P.2d at 1077 (*quoting* Chamberlin v. Amalgamated Sugar Co., 42 Idaho 604, 612, 247 P. 12, 14 (1926)).

36. Carpenter v. Payette Valley Coop., Inc., 99 Idaho 143, 148, 578 P.2d 1074, 1079 (1978) (*quoting* RESTATEMENT (SECOND) OF AGENCY § 98 (1957)).

37. Carpenter v. Payette Valley Coop., Inc., 99 Idaho 143, 148, 578 P.2d 1074, 1079 (1978).

repudiating the unauthorized act of its agent.[38] The court said that "a party who claims to have benefited a principal by reason of the unauthorized action of an agent has the burden of proving that the benefits accrue directly to the principal as the proximate result of the unauthorized transaction in order to constitute ratification by the principal."[39]

The court also held that there was no implied ratification by retention of the proceeds of the foreclosure sale. Since the lender failed to perfect a security interest in the cattle and should have known that the cooperative held a chattel mortgage with an after-acquired property provision, the lender had only his promissory note to look to for the return of his loan.[40]

In *De Silvo v. Restauire*,[41] a conversion of goods gave rise to an independent claim to defeat what otherwise would be an implied ratification by retention of the benefits. An automobile buyer brought an action to compel the transfer of title of the car. The title was held by a credit corporation. The buyer acquired the automobile as a result of several transactions originating with the lessee of the automobile who,

38. *Id.* at 149, 578 P.2d at 1080. *See also* RESTATEMENT (SECOND) OF AGENCY § 98, comment c (1957) which states in pertinent part:

> If the purported principal is otherwise entitled to possession of the things received as the result of the agent's act, his receipt of them does not constitute affirmance, although in connection with other facts it may be evidence of it. Likewise, if the principal believes himself to be entitled to the things independently of the act of the purported agent, the fact that he knows of the material facts connected with the transaction as conducted by the agent does not necessarily cause his receipt of the things to constitute an affirmance.

See also T.W. & L.O. Naylor Co. v. Bowman, 39 Idaho 764, 230 P. 347 (1924); *cited in* Carpenter v. Payette Valley Coop., Inc., 99 Idaho 143, 578 P.2d 1074, 1080 (1978).

39. Carpenter v. Payette Valley Coop., Inc., 99 Idaho 143, 149, 578 P.2d 1074, 1080 (1978). *See also* Killinger v. Iest, 91 Idaho 571, 576, 428 P.2d 490, 495 (1967). *But see Carpenter*, 99 Idaho at 151, 578 P.2d at 1082, (Shepard, C.J., dissenting). Chief Justice Shepard, while acknowledging the "independent claim" principle, applies a different and cogent interpretation to the facts at hand:

> The money was given to the [defendant] as a convenient way of getting the money to Browne. The fact that the [defendant] set-off the debt owed to it by Browne when it received the money from [the plaintiff] on Browne's account does not mean, vis-a-vis [the plaintiff], that the [defendant] had *an independent right* to the money it obtained from [the plaintiff]. Having acquired control of the money from [the plaintiff] *solely by reason of the unauthorized acts of its agent* Collinsworth, an effective repudiation of those unauthorized acts required not merely a notice of repudiation but a return of the *benefits acquired by those acts*. Failure to return that money constitutes an affirmance of the agent's acts, notwithstanding notice of repudiation. (Emphasis added.)

See also Hammitt v. Virginia Mining Co., 32 Idaho 245, 181 P. 336 (1919).

40. Carpenter v. Payette Valley Coop., Inc., 99 Idaho 143, 150, 578 P.2d 1074, 1081 (1978).

41. 264 Pa. Super. 528, 400 A.2d 211 (1979).

by the terms of his lease, had no right to purchase or sell the car. Later, the buyer was told by the agent that the original lessee had no authority to sell the vehicle. Shortly thereafter, when the buyer remitted payment to the credit corporation's agent, the agent refused to transfer title but accepted the check and applied it to the original lessee's account, which at the time was paid in full. According to the buyer, the lessor had no independent claim because the account was up to date. However, the court held that there was no ratification inasmuch as the lessee's admitted conversion of the automobile was a default of the lease entitling the credit corporation to accelerate the lease obligations. Since the accelerated balance due exceeded the amount of payment, the acceptance of the check partially satisfied the independent claim and "could not work a legal ratification . . . ."[42]

On occasion, even the existence of an independent claim or other legitimate reason for a course of conduct may not prevent that conduct from constituting a ratification of another's unauthorized and even gratuitous act. In *Adams v. KVWO, Inc.*,[43] on the termination of a personal property lease agreement, the lessee, radio station KVWO, had the property moved and placed in storage at its expense. The rightful owner had been asked to remove the property many times. Adams, who held a secured claim on the property, took possession of one item of the property (an office filing cabinet) from storage and paid all of the storage charges on it, signing a receipt as "owner or authorized agent." The court held that by this act, Adams ratified not only the accruing unpaid storage charges but the initial moving and storage charges, which had been paid by KVWO.[44] It is important to note that at the time the property was moved into storage by KVWO, Adams did not have legal title, but only a valid security interest.[45] The court, in holding Adams liable to KVWO for the initial moving and storage charges, reasoned that Adams's security interest in the property "was the only real interest of any value then embodied by the [property] and was unquestionably protected by KVWO's action."[46] The court further said: "Even though this protection by storage may well have been initiated by a legally unfavored 'volunteer', . . . Adams, through his actions, . . . ratified this 'voluntary' protection."[47]

42. *Id.* at 534, 400 A.2d at 214. The court relied primarily on the RESTATEMENT (SECOND) OF AGENCY § 98 (1957), appearing in the text at note 37, and also on Yarnall v. Yorkshire Worsted Mills, 370 Pa. 93, 87 A.2d 192 (1952); Gum, Inc. v. Felten, 341 Pa. 96, 17 A.2d 386 (1941).

43. 570 P.2d 458 (Wyo. 1977).

44. *Id.* at 461-62 (emphasis added).

45. *Id.* at 460 (the lease had been terminated by a bankruptcy trustee and legal title passed by the bankruptcy court's order long after the property was stored).

46. *Id.* at 462.

47. *Id.*

Delay in Disavowal

The consequences of how and when a principal chooses to disavow an unauthorized act of his agent on learning of the act must be carefully considered to avoid an implied though unintended ratification. In *Minniti v. Cascade Employers Ass'n, Inc.*,[48] a corporate defendant, when informed of an unauthorized employment contract entered into by its agent with the plaintiff, chose to disavow the contract by a letter to the plaintiff which read, in pertinent part, that the contract "'shall be terminated in accordance with the terms set forth in the agreement in connection with the cancellation of the agreement'. . . .'"[49] The plaintiff contended that the letter constituted a ratification of the agreement because the employer had relied on its terms for cancellation. Although the court held that there was no ratification, it implied that had the defendant not acted promptly in its conduct to disavow and terminate the contract, an implied ratification could be based on such conduct.[50]

In a recent Illinois case,[51] an employee had been promised a salary increase by the employer's agent at the time he was hired.[52] After a two-month delay, this promise was disavowed by the defendant as being an unauthorized act. The court held that "mere delay" in telling the plaintiff that the promise was unauthorized and consequently would not be honored did not establish a ratification of the unauthorized act.[53] Regrettably, the court did not provide any quantitative limits on the extent of such a "delay." Clearly a delay beyond a reasonable time could constitute an implied ratification by silence.[54] Additionally, the court did not accept the employee's contention that

48. 280 Or. 319, 570 P.2d 1171 (1977).

49. *Id.* at 324, 570 P.2d at 1174.

50. *Id.* at 332, 570 P.2d at 1178.

51. Schoenberger v. Chicago Transit Auth., 84 Ill. App. 3d 1132, 405 N.E.2d 1076 (1980).

52. *Id.* at 1137, 405 N.E.2d at 1080-81. (The court held that the agent had no actual authority for this act and that the employee could not have reasonably believed the agent (an interviewer in charge of recruiting) had authority. The court reached this result because the employee's initial contact with the employer was with its placement department where he had his first interview; the interviewer was not at a management level and his job title did not suggest otherwise; and the interviewer told the employee that the formal offer of employment would be made by the placement department).

53. *Id.* at 1138-39, 405 N.E.2d at 1082. *See also* Wing v. Lederer, 77 Ill. App. 2d 413, 222 N.E.2d 535 (1966), discused *supra* in the text accompanying notes 28-31.

54. Professor Seavey, in discussing the probative value of silence, states:

> [A] person's failure to repudiate a prior transaction in which his . . . name is involved has probative value to indicate his assent is consistent with, and limited by, the generalization that a failure to take action is evidence of a state of mind wherever the situation is such that action would have been taken by the ordinary person who did not have such a state of mind.

Seavey, *Ratification by Silence*, 103 U. PA. L. REV. 30, 32 (1954).

his employment constituted a "retained benefit" to the employer resulting in an implied ratification. The court noted that the agent did have express authority to interview and recommend the employee for employment and, therefore, "any benefit sought or retained by the [employer] in relation to [the employee's] employment is irrelevant to the possibility of ratification of the promise for the . . . salary increase."[55]

Basing a Lawsuit or Defense

Another major category of conduct leading to an implied ratification is the basing of a lawsuit or a defense on an unauthorized transaction, with knowledge of its terms and conditions.[56] The *Restatement (Second) of Agency* provides:

> There is affirmance if the purported principal, with knowledge of the facts, in an action in which the third person or the purported agent is an adverse party:
>
> (a) brings suit to enforce promises which were part of the unauthorized transaction or to secure interests which were the fruit of such transaction and to which he would be entitled only if the act had been authorized; or
>
> (b) bases a defense upon the unauthorized transaction as though it were authorized; or
>
> (c) continues to maintain such suit or base of such defense.[57]

Wren Mobile Homes, Inc. v. Midland-Guardian Co.[58] presents an interesting example of this category of conduct, as well as its relation to matters of pleading. The case arose from a transaction in which Wren Mobile Homes was acting as the alleged agent of Midland-Guardian Company. Midland was the holder of a title retention contract providing for payment in installments of the unpaid balance of the purchase price of a house trailer. Upon the buyer's default, Midland instructed Wren to repossess the house trailer. The buyer sued Midland and Wren as codefendants for damages arising during the repossession. At the trial, judgment was rendered in favor of the buyer and was paid entirely by Midland.[59] Midland subsequently

55. Schoenberger v. Chicago Transit Auth., 84 Ill. App. 3d 1132, 1139, 405 N.E.2d 1076, 1082 (1980).

56. *See* SEAVEY, *supra* note 1, at § 38D and cases cited therein. ("One cannot at one time blow both hot and cold; claim validity for a transaction and at the same time deny it.").

57. RESTATEMENT (SECOND) OF AGENCY § 97 (1957).

58. 117 Ga. App. 22, 159 S.E.2d 734 (1967).

59. *Id.* at 24, 159 S.E.2d at 736-37. After defensive pleadings were filed, the buyer settled with Wren, who was dismissed from the suit. The court held that the covenant not to sue given

brought suit against its agent Wren for reimbursement of its loss as the result of the previous litigation. Wren contended that Midland had ratified Wren's alleged wrongful acts and therefore, as a matter of law, could not withdraw the ratification and obtain reimbursement.[60] In Midland's answer in the previous case, it had denied the buyer's allegations that acts of its agent, Wren, were wrongful. The court held in favor of Midland, reasoning that basing a defense "requires the adoption of an agent's action in an *affirmative fashion* such as basing an *affirmative defense* thereon."[61] The court said that "denying allegations that a plaintiff is compelled to sustain with proof is not basing an affirmative defense on the alleged wrongful acts, but is rather to require proof thereof by the plaintiff. There is a distinction between 'denial' and an affirmative 'defense'."[62] The court further commented that "the denial of an allegation is not an affirmative declaration that the allegation is not true, but simply puts the plaintiff on notice that the burden is upon him to prove the allegation."[63]

In *Joseph L. Wilmotte & Co. v. Rosenman Bros.*,[64] a buyer brought suit to enforce an arbitration clause in the sales contract. The seller alleged that its agent had no authority to bind it to arbitration. The court held that the seller's participation in arbitration initiated by the buyer constituted a ratification of the clause despite the seller's prompt withdrawal from arbitration.[65] It should be noted, however, that the bringing of a lawsuit or the setting up of a defense based on a transaction as the agent was authorized to conduct it, probably would not ratify the unauthorized transaction.[66]

Pattern of Conduct

Delay in seeking reformation, even for reasons of financial exigency, may defeat a principal's right to base a defense on an

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to Wren did not bar proceedings against Midland (the principal) by the buyer, even though the principal's liability was derivative (based on respondeat superior). The covenant merely extinguished the right to pursue the remedy against the covenantee but did not extinguish the covenantor's cause of action. Otis v. Wren Mobile Homes, Inc., 111 Ga. App. 649, 143 So. 2d 8 (1966).

60. Wren Mobile Homes, Inc. v. Midland-Guardian Co., 117 Ga. App. 22, 25, 159 S.E.2d 734, 737 (1967) ("[A]s between the principal and the agent, where the principal ratifies the unauthorized actions of his agent he thereby absolves the agent from all responsibility for loss or injury growing out of the unauthorized acts . . . .").

61. *Id.* at 27, 159 S.E.2d at 738 (emphasis added).

62. *Id.*

63. *Id.* at 27-28, 159 S.E.2d at 738.

64. 258 N.W.2d 317 (Iowa 1977).

65. The court based its decision on the silence of the defendant as conduct indicating ratification. *Id.* at 324-25.

66. *See* RESTATEMENT (SECOND) OF AGENCY § 97, comment c (1957).

unauthorized act. In *Doxey-Layton Co. v. Holbrook*,[67] a contractor appealed from a decree of foreclosure on a real estate mortgage securing an indebtedness due and owing to the lender. The contractor had signed a blank note and mortgage, which was delivered to the lender's agent with the understanding that a twenty-year loan commitment would be forthcoming. Instead, the lender's agent filled in the note to reflect a one-year loan commitment. In order to continue the construction project, the contractor subsequently executed four short-term renewal notes, each granting an extension of time for payment. Upon foreclosure for nonpayment, the contractor contended that the lender's agent had no authority to fill in the note as he did. The court affirmed the decree of foreclosure, holding that the contractor's execution of four extensions of the original note after learning of the actual term of payment constituted a ratification of the original note.[68]

In a recent Louisiana case,[69] the defendant leased an air compressor from the plaintiff for use in defendant's construction business. The defendant ordered the equipment by telephone through its general manager who specified the date and job site for delivery. Upon delivery of the equipment, the plaintiff required the signing of a "rental dray receipt" by the defendant's construction foreman. Immediately above the signature line the receipt contained a printed provision that read in pertinent part, "you are to be responsible for any loss, damage or breakage . . . while the equipment is in your possession, and to save us harmless from all claims arising therefrom."[70] The equipment was subsequently stolen from the defendant's construction site. The trial court held that the defendant was not liable for the loss of the equipment inasmuch as its foreman, though authorized to sign the dray receipt acknowledging delivery of the rented equipment, had no authority to bind the defendant for loss of the equipment.[71] The appellate court, in reversing, held that the defendant's prior "pattern of conduct"[72] in its series of rental transactions with the plaintiff constituted an implied ratification of the action of its foreman. The evidence established that on many earlier occasions the defendant had honored invoices submitted by the plaintiff containing an identical provision and signed by the defendant's foreman and that the defendant was

67. 25 Utah 2d 194, 479 P.2d 348 (1971).

68. *Id.* at 198, 479 P.2d at 351.

69. Southern States Equip. Co. v. Jack Legett Co., 379 So. 2d 881 (La. App. 1980).

70. *Id.* at 883.

71. *Id.* at 884. Additionally, the trial court held that the defendant, having used reasonable care in securing the equipment, was not liable based on negligence. *Id.*

72. *Id.*

aware of the liability statement. The court said, "Once defendant learned of [the liability statement] by his continued silence and failure to protest or object to its inclusion in the dray receipt, it tacitly consented thereto and cannot now be heard to repudiate its legal effect."[73]

Allegations of implied ratification, either as the basis for a lawsuit or a defense, continue to be made in a wide variety of cases.[74] Two cases illustrate further limitations imposed by courts upon the application of this doctrine. In a 1981 Illinois case,[75] a dispute arose between a buyer and a seller of real estate. The buyer claimed that the sale included a warranty from the seller that there were no building code violations on the property. The written sales contract was never signed by the seller and the property was conveyed by a warranty deed. The buyer claimed that the warranty was agreed to by the parties' attorneys and was therefore part of the transaction. The court rejected the buyer's argument that the conveyance of the property by deed, coupled with the seller's failure to inform the buyer that the seller had not signed the contract of sale, was an implied ratification of oral terms agreed to by the parties' attorneys.[76]

In the other case,[77] the manager for a seller of office computers rendered to a buyer the unauthorized service of preparing computer programs. When the seller learned of his agent's acts, he nevertheless told the agent to "finish up" solving the buyer's remaining complaints about the computer. This conduct by the seller was claimed by the buyer to be an implied ratification of the agent's program preparation service, making the seller liable therefore and precluding the seller from asserting defective programs as a defense to the buyer's breach of warranty claim. In rejecting this reasoning, the court held that the seller's conduct was simply the most expedient means of resolving the buyer's general problems with the computer and was not conduct that would imply a ratification of the agent's unauthorized acts.[78]

73. *Id.*

74. *See* Bruffey Contracting Co. v. Burroughs Corp., 522 F. Supp. 769 (D. Md. 1981), *aff'd mem.*, 681 F.2d 812 (4th Cir. 1982); Phoenix Western Holding Corp. v. Gleeson, 18 Ariz. App. 60, 500 P.2d 320 (1972); Carolina-Georgia Carpet & Textiles, Inc. v. Pelloni, 370 So. 2d 450 (Fla. App. 1979); Theis v. DuPont, Glore Forgan, Inc., 212 Kan. 301, 510 P.2d 1212 (1973); Monti v. Tangora, 99 Ill. App. 3d 575, 425 N.E.2d 597 (1981).

75. Monti v. Tangora, 99 Ill. App. 3d 575, 425 N.E.2d 597 (1981).

76. *Id.* at 580, 425 N.E.2d at 601.

77. Bruffey Contracting Co. v. Burroughs Corp., 522 F. Supp. 769 (D. Md. 1981), *aff'd mem.*, 681 F.2d 812 (4th Cir. 1982).

78. *Id.* at 775. It should be noted that the court's discussion of the ratification issue was somewhat hypothetical because the agent did not purport to act for the seller and the buyer did not believe he was acting on behalf of the seller. In fact, the buyer helped the agent to conceal it from the seller. *Id.* at 775. *But see* Doxey-Layton Co. v. Holbrook, 25 Utah 2d 194, 479 P.2d 348 (1971) (pragmatic conduct no rebuttal to a claim of implied ratification).

Conclusion

Implied ratification, which is based upon the conduct of the principal, does not require the principal's willingness to be bound and, indeed, in many instances will be imposed by courts notwithstanding a subsequent contrary intention of the principal.[79] It is vital, therefore, to comprehend current judicial attitudes toward the application and limitation of this doctrine.

An implied ratification will generally result when a principal retains the benefits of his agent's unauthorized transaction, knowing of the transaction.[80] It will not result if the principal has not had the opportunity to repudiate the unauthorized act,[81] or if the principal has an independent claim to the benefits.[82] Delay in repudiating an agent's unauthorized act may also result in an implied ratification.[83]

Basing a lawsuit or a defense on allegedly unauthorized acts is conduct of implied ratification, but the defense must be affirmative.[84] Also, the bringing of a lawsuit or the setting up of a defense based on a transaction as the agent was authorized to conduct it does not impliedly ratify that agent's unauthorized act.[85]

A principal must be aware of the legal import of his course of conduct. Financial or other exigencies will not excuse a course of conduct that otherwise indicates a legal implied ratification.[86] However, courts continue to exercise restraint in the application of this doctrine.[87]

A principal wishing to avoid liability for his agent's unauthorized acts should in all cases act swiftly and decisively in repudiation and, to the extent possible, avoid conduct that might be construed as a retention of the benefits of an unauthorized act. Further protection will result from a continuing scrutiny of future judicial application of the doctrine.

79. See *supra* notes 20-24. *See also* Southern States Equip. Co. v. Jack Legett Co., 379 So. 2d 881 (La. App. 1980); Doxey-Layton Co. v. Holbrook, 25 Utah 2d 194, 479 P.2d 348 (1971); Adams v. KVWO, Inc., 570 P.2d 458 (Wyo. 1977).

80. See *supra* text accompanying notes 24-48.

81. *See* Wing v. Lederer, 77 Ill. App. 2d 413, 222 N.E.2d 535 (1966) and discussion *supra* in the text accompanying notes 27-32.

82. *See* Carpenter v. Payette Valley Coop., Inc., 99 Idaho 143, 578 P.2d 1074 (1978) and discussion thereof *supra* in text accompanying notes 33-41; De Silvo v. Restauire, 264 Pa. Super. 528, 400 A.2d 211 (1979) and discussion thereof *supra* in text accompanying notes 42-43.

83. *See* Schoenberger v. Chicago Transit Auth., 84 Ill. App. 3d 1132, 405 N.E.2d 1076 (1980); Minniti v. Cascade Employers Assoc., Inc., 280 Or. 319, 570 P.2d 1171 (1977). *See supra* text accompanying notes 49-55.

84. Wren Mobile Homes, Inc. v. Midland-Guardian Co., 117 Ga. App. 22, 159 S.E.2d 734 (1967). See generally *supra* notes 56-63.

85. *See* RESTATEMENT (SECOND) OF AGENCY § 97, comment c (1957).

86. Southern States Equip. Co. v. Jack Legett Co., 379 So. 2d 881 (La. App. 1980). *See* Doxey-Layton Co. v. Holbrook, 25 Utah 2d 194, 479 P.2d 348 (1971).

87. See *supra* text accompanying notes 73-76.