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Agency -- Apparent Authority and Agency by Estoppel: Emerging Theories of Oil Company Liability for Torts of Service Station Operators

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NOTES

Agency—Apparent Authority and Agency by Estoppel: Emerging Theories of Oil Company Liability for Torts of Service Station Operators

The average American motorist has no way of knowing what business arrangement exists between the operator of the local service station he patronizes and the "brand name" oil company whose products the station sells. Yet, in the past the nature of this business relationship has been determinative on the issue of the liability of the oil company for the torts of its operators because courts have consistently refused to hold the oil company liable unless a master-servant or principal-agent relationship invoking respondeat superior could be established.[1] Recently, however, in *Gizzi v. Texaco, Inc.*[2] the court of Appeals for the Third Circuit looked to the apparent relationship between the oil company and dealer and upheld apparent authority and agency by estoppel[3] as grounds for jury consideration of oil company liability.

In *Gizzi* plaintiffs Gizzi and Giaccio (a passenger) were injured in an expressway collision when the brakes failed on a van bought by Gizzi from a Texaco operator on the day of the accident. As an incident to the sale of the van, the Texaco dealer had repaired the brakes. Both plaintiffs sued Texaco[4] for personal injury under theories of apparent agency and agency by estoppel[5] citing Texaco's national advertising portraying its dealers as being skilled in automotive servicing, evidence of acquiescence by Texaco in the sale of used cars by this and other dealers, and evidence of a sign on the premises that indicated the pres-

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[1]Annot., 83 A.L.R.2d 1282 (1962); *see* Annot., 116 A.L.R. 470 (1938).

[2]437 F.2d 308 (3d Cir.) (2-1 decision), *cert. denied*, 92 S.Ct. 65 (1971).

[3]For purposes of this note, no attempt is made to distinguish between theories of apparent authority and agency by estoppel. Some writers contend that apparent authority is based on estoppel and that the two theories are substantially coextensive. P. MECHEM, OUTLINES OF THE LAW OF AGENCY §§ 85-90 (4th ed. 1952). Others argue that apparent authority is founded upon the objective theory of contracts and that apparent authority and agency by estoppel are distinguishable on grounds such as the estoppel requirement of change of position (for example, executory contracts are said to be enforceable under apparent authority but not estoppel); the origins of estoppel being in tort, apparent authority in contract; and enforceability by the principal. RESTATEMENT (SECOND) OF AGENCY § 8, comment *d* at 32-33 (1957) [hereinafter cited as RESTATEMENT]; W. SEAVEY, HANDBOOK OF THE LAW OF AGENCY § 8E (1964). However, all seem to agree that in most cases the elements of both theories are present and any differences are immaterial. RESTATEMENT § 8, comment *d* at 32-33.

[4]The station operator was not a defendant in the action. 437 F.2d at 309.

[5]The plaintiffs also alleged actual agency, but no actual authority for the sale of the van was found by the trial court or the appellate court. *Id.*

ence there of an "Expert foreign car mechanic."[6] Especially singled out was Texaco's slogan "Trust your car to the man who wears the star."[7] The district court ruled that plaintiffs had not introduced sufficient evidence to warrant submission of the issues of apparent authority (or actual authority) to the jury and directed a verdict in favor of Texaco. On appeal the Third Circuit, in viewing the evidence in a light most favorable to plaintiffs, found that reasonable men could differ as to whether Texaco had clothed its dealer with apparent authority to repair and sell vehicles and remanded the case to allow the jury to consider this question of fact.[8]

Prior to the *Gizzi* decision, in cases involving the asserted liability of oil companies for acts of their service station operators, the courts had relied exclusively upon the doctrine of respondeat superior.[9] Under this doctrine the courts examine the degree of "control"[10] or "right to control"[11] between the company, as master or principal, and the dealer, as servant or agent. The focal points in the respondeat superior analysis are the written contract and, with varying emphasis, the working relationship. Relevant factors include who owns title to the business, how the dealer is compensated, who controls the retail price, and whether the oil company has the power to terminate the sales agreement, to withdraw essential equipment, or to control the station employees (especially in their day-to-day conduct).[12] Findings vary widely[13] because of differences of opinion as to how much control is necessary to invoke respon-

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[6]*Id.* at 310.

[7]*Id.*

[8]In remanding for jury consideration the issues of apparent authority and agency by estoppel, the court made clear that it found no "overwhelming case of liability." *Id.*

[9]Annot., 83 A.L.R.2d 1282 (1962); *see* Annot., 116 A.L.R. 470 (1938).

[10]A distinction is typically drawn between control over details of the work and mere control over the result to be achieved. *See, e.g.,* Miller v. Sinclair Ref. Co., 268 F.2d 114, 118 (5th Cir. 1959).

[11]"One of the main criterions, if not the chief one, as to whether the relationship of respondeat superior exists, is the right to control, and it is not a question as to whether that control is actually assumed but whether it exists." Greene v. Spinning, ___ Mo. App. ___, ___, 48 S.W.2d 51, 57 (1931).

[12]Comment, *Master and Servant—The Filling Station Operator as an Independent Contractor,* 38 MICH. L. REV. 1063, 1070 (1940); Annot., 83 A.L.R.2d 1282, 1284-85 (1962).

[13]For the purpose of tort liability the courts seem to differ over the extent to which they will be influenced by the factors surrounding the relationship de hors the written contract between the [filling station operator and the oil company] . . . . The myriad factual combinations possible with varying degress of economic control complicate the problem of forecasting the result in any particular situation.

Comment, 38 MICH. L. REV., *supra* note 12, at 1072.

deat superior and because of the profusion of types of arrangements between oil companies and dealers.[14]

The courts were consistent prior to the *Gizzi* decision in not accepting apparent authority or agency by estoppel as grounds for oil company liability. Before 1952, according to one authority,[15] no oil company had ever been held liable under an estoppel theory arising from its apparent ownership of its service stations.[16] Nor has the pattern changed: no plaintiff has been successful in recovering from the oil company purely under theories of apparent authority or agency by estoppel since then. The courts rejected these theories on various grounds such as the fact that no evidence existed as to why plaintiff patronized the station and hence there was no evidence of reliance;[17] that it was common knowledge that trademark signs were displayed by independent contractors;[18] that signs were not a "holding out" by the oil company but only an indication that its products were sold;[19] and that newspaper advertisements referred only to the sale of specific products depicted and created no apparent authority or agency by estoppel with respect to brake repairs.[20] *Cawthon v. Phillips Petroleum Co.*[21] is perhaps a representative case and was based on facts not unlike those in *Gizzi.* In *Cawthon* plaintiff sued under theories of apparent authority and agency by estoppel (in addition to the usual actual agency theory) for injuries resulting from a faulty repair of his brakes. Plaintiff stressed the display of oil company signs, signs indicating "Brake Service" and "Mechanic on Duty," general advertising, and especially the slogan "Come to your Phillips 66 Dealer for *all* the things you need to help your car perform

[14]For example, Texaco owns and operates stations, leases land owned by Texaco to "independent dealers," and leases land from third parties for operation of service stations by "independent dealers." In other situations, the dealer leases land directly from the third party. Brief for Appellants at 16-17, Gizzi v. Texaco, Inc., 437 F.2d 308 (3d Cir. 1971). All of these basic arrangements are subject to further variation in the individual contracts.

[15]P. MECHEM, *supra* note 3, § 442.

[16]Actually in Standard Oil Co. v. Gentry, 241 Ala. 62, 1 So. 2d 29 (1941), an isolated case, the court in affirming a judgment against the oil company held that it was for the jury to determine whether or not the oil company was estopped from denying liability. However, special facts existed in that case in that plaintiff had patronized the station previously when it was operated by the oil company, and his testimony tended to show that his reason for transferring his business back to this station was "an unsatisfactory experience with an independent operator and a desire to do business with a more responsible party." *Id.* at 64, 1 So. 2d at 31.

[17]Miller v. Sinclair Ref. Co., 278 F.2d 114, 118 (5th Cir. 1959).

[18]Reynolds v. Skelly Oil Co., 227 Iowa 163, 171, 287 N.W. 823, 827 (1939).

[19]Sherman v. Texas Co., 340 Mass. 606, 608, 165 N.E.2d 916, 917 (1960).

[20]Cawthon v. Phillips Petroleum Co., 124 So. 2d 517, 521 (Fla. Ct. App. 1960).

[21]124 So. 2d 517 (Fla. Ct. App. 1960).

at its best." The photograph that accompanied Phillips' advertisement in which the slogan was used depicted only products sold outright by Phillips to the dealers, and the court found any representation to be limited to "things" for sale. The court found neither a solicitation of mechanical or repair services nor an assertion of agency in Phillips' advertising and affirmed a summary judgment in favor of the oil company.

While *Gizzi* breaks this pattern of rejection of apparent authority and agency by estoppel, its handling of the traditional elements of the two theories poses some problems. *Gizzi* is somewhat at odds with apparent authority cases in other business settings in its handling of the reliance factor (in this case plaintiffs' belief and reliance on Texaco's "standing behind" the sale and repair of the vehicle by its dealer). Traditionally, the plaintiff must have relied upon the principal's indicia of authority[22] (in *Gizzi* upon Texaco's advertising, signs, and the "foreign mechanic" sign). Proof that his reliance is justifiable and reasonable is an essential element of the plaintiff's case[23] and he has the burden of proof.[24] The court did make a cursory reference to reliance by plaintiff Gizzi[25] but there was no mention of reliance by plaintiff Giaccio (the passenger) at all in the opinion.[26] Allowing Giaccio to take his case to the jury on remand, riding the coattails of Gizzi's reliance, would seem to broaden the scope of potential oil company liability beyond that encompassed by traditional concepts of apparent authority.[27]

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[22]Bowman v. Home Life Ins. Co. of America, 260 F.2d 521, 523 (3d Cir. 1958).

[23]RESTATEMENT §§ 27, 267. The court in *Gizzi* cites § 267 with respect to reliance:

> One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.

RESTATEMENT § 267.

[24]"However, it is part of plaintiff's case to prove some element of reasonable reliance." W. SEAVEY, *supra* note 3, § 90.

[25]"Appellant Gizzi testified that he was aware of the advertising engaged in by Texaco and that it had instilled in him a certain sense of confidence in the corporation and its products." 437 F.2d at 310.

[26]The only references to Giaccio in appellants' brief aside from general references of reliance by "plaintiffs" are that Giaccio also patronized the service station in question, was present when there were discussions in regard to the vehicle purchased, and was at the station when the vehicle was actually picked up. Brief for Appellants at 27, 32.

[27]RESTATEMENT § 8, comment *e* at 35, illustration 11, gives this example:

> The Ace Taxi Company employs no drivers but merely receives orders from prospective passengers and puts "Ace Taxi Company" on cabs owned and operated by independent drivers. One of those drivers collides negligently with another automobile, damaging one of its passengers who reasonably believes the Taxi Company to be the

Closely related to the reliance issue is a problem raised by *Gizzi* with regard to scope of apparent authority. That is, based upon the representations of the oil company to the public, what range of activities by the dealer might a motorist reasonably surmise to be authorized by the company? This aspect of *Gizzi* seemed most to bother the trial judge[28] and the dissenting judge[29] who felt that no reasonable man could believe that Texaco would authorize and stand behind the repair and sale of a used vehicle and, therefore, that the case should not go to the jury. What constitutes a sufficient factual issue to take the case to the jury is perhaps the critical question in all apparent authority cases reaching for a "deep pocket." In a recent case, *Wallach v. Williams*,[30] the New Jersey Supreme Court affirmed a decision that no factual issue of apparent authority was posed for the jury when a motorist fueling his car at a service station was struck by an automobile negligently driven by a station attendant. The court, however, specifically reserved for determination in an "appropriate" case the question whether the negligence of an independent contractor or his employees[31] might be

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employer. The Taxi Company is liable to the passenger but not to the owner of the other automobile.

[28]The Third Circuit opinion quoted the district court judge:

"In short, nobody could reasonably interpret any of these slogans or representations or indicia of control as dealing with anything more than the servicing of automobiles, and to the extent of putting gas in them and the ordinary things that are done at service stations.

"That 'Trust your car to the man who wears the star' could not possibly be construed to apply to installing new brake systems or selling used cars."

437 F.2d at 310 (district court opinion unreported).

[29]The majority relied in part on RESTATEMENT § 267. The dissenting judge stressed the last part of comment *a* to § 267:

"This rule normally applies where the plaintiff has submitted himself to the care or protection of an apparent servant in response to an apparent invitation from the defendant to enter into such relations with such servant. A manifestation of authority constitutes an invitation to deal with such servant and to enter into relations with him *which are consistent with the apparent authority.*"

437 F.2d at 311, *quoting* RESTATEMENT § 267, comment *a* at 578 (emphasis by the judge).

[30]52 N.J. 504, 246 A.2d 713 (1968).

[31]If apparent authority is relied on, it follows that oil companies would be liable for torts of employees of the service station operator (and not just the operator), since it is the motorist's reliance on the oil company's indicia of authority or invitation that establishes liability. Under the respondeat superior approach, if a principal-agent or master-servant relationship is found between the oil company and the service station operator, the oil company is likewise liable for subemployees:

Where the immediate question is the status of some subemployee or subagent of the [service station operator], it is generally true that his status, in relation to the producing company, follows that of the . . . service station operator, the same general

imputed to an oil company when it appears to the ordinary motorist that the oil company is operating the station or is sufficiently in control to extend an invitation to the public to buy the products or services there.[32]

Policy grounds underlying apparent authority and estoppel as opposed to respondeat superior seem distinguishable in certain areas. One writer cites what he calls the "lip service" paid by the courts to the control test as the basis for respondeat superior as "an attempt to correlate the doctrine with the general rule of tort liability, that of fault."[33] Apparent authority and estoppel have no such connection with fault: "Like apparent authority, [estoppel] is based on the idea that one should be bound by what he manifests irrespective of fault ...."[34] The "enterpriser's risk"[35] theory of respondeat superior contrasts with both the apparent-authority idea of a party's being bound by the reasonable expectations he creates[36] and the similar (some say identical) estoppel notion that as beteween two innocent parties the burden is placed on the one whose misleading manifestations have created reliance and change of position. However, the "deep pocket" rationale, which is often characterized as the true explanation behind the doctrine of respondeat superior, might be said to apply equally to apparent authority and agency by estoppel, at least in the oil company setting. Thus apparent authority could be a second avenue to achieve a social policy of risk distribution with respect to injury caused by service station operators. The oil company is clearly in the best position to assess the business risks of social harm involved in its operation and to distribute the risk to the public through its prices. Indeed, the dealer ordinarily has no capacity to allocate the risk to the public through what he charges. Prices are usually governed by the oil company with the dealer receiving a commission based on sales. The advantage of apparent authority as a

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factors being determinative.

Annot., 83 A.L.R. 2d 1282, 1285 (1962).

[32]The court cited RESTATEMENT § 8, comment *e* at 35, illustration 11. 52 N.J. at 506, 246 A.2d at 714. Illustration 11 is set out in note 27 *supra.*

[33]Comment, 38 MICH. L. REV., *supra* note 12, at 1064-65.

[34]RESTATEMENT § 8, comment *d* at 33.

[35]"Society imposes vicarious liability on the employer because his selection and direction has put the employee in a situation where the wrong occurs and because he is the enterpriser who has assumed the risks of gain or loss from the employee's work activities." Conant, *Liability of Principals for Torts of Agents: A Comparative View,* 47 NEB. L. REV. 42 (1968).

[36]Apparent authority "is that authority which, through [sic] not actually delegated to the agent, the principal intentionally or inadvertently causes third persons to believe the agent to possess." Conant, *The Objective Theory of Agency: Apparent Authority and the Estoppel of Apparent Ownership,* 47 NEB. L. REV. 678, 681 (1968).

means of reaching the "deep pocket" is that problems occasioned by the "control" test of untangling complex oil company-dealer relationships are avoided.

On the other hand, as Texaco argued, allowing an issue of apparent authority to go to the jury on the quantum of evidence presented in *Gizzi* may require oil companies not only to revamp their national advertising but also to refuse to allow their dealers to repair or sell autos unless those activities are stringently controlled by the oil companies. "For if Texaco and other companies must become the guarantors of the non-negligent performance of such services, then they must exercise control over the conduct of their dealers in performing them."[37] Such control would seem to violate a federal policy of preserving the independence of the retail service station dealer,[38] and the oil companies might run the risk of antitrust prosecution if the dealer had no voice in determining what products or services he would offer.[39] These arguments notwithstanding, the oil company should not enjoy the benefits of chain-store marketing methods and national identification with its station operators without assuming concomitant social responsibilities. Moreover, it is debatable whether the dealer is truly independent today. In addition, liability has long been imposed on grounds of apparent authority and estoppel in other business contexts.[40]

In summary, one might conclude that apparent authority and agency by estoppel do represent appropriate theories of oil company liability. *Gizzi* breaks with the traditional pattern in recognizing that the jury should have the opportunity to consider apparent authority in addition to the "control" arguments of respondeat superior. The problem is that *Gizzi* may represent an outer limit with respect to what reasonable men could agree on as being within the apparent authority created by the oil company's manifestations to the public. It cannot reasonably be assumed that the oil company "holds out" its dealer with respect to

[37]Petitioner's Brief for Certiorari at 6-7, Gizzi v. Texaco, Inc., 437 F.2d 308 (3d Cir.), *cert. denied*, 92 S.Ct. 65 (1971).

[38]The importance of the small retailer in our economy is difficult to overstate. In the gasoline industry, he is the competitive entity that bears the greatest proportionate risk and earns the lowest return on investment. As a small businessman, an individual entrepreneur, his welfare is of particular concern to this Commission. Interference with his right to compete as he chooses and unlawful practices that blunt the effect of his efforts and tend to cause his elimination are matters calling for public intervention. FTC, REPORT ON ANTICOMPETITIVE PRACTICES IN THE MARKETING OF GASOLINE 40 (1967).

[39]Petitioner's Brief for Certiorari at 9.

[40]P. MECHEM, *supra* note 3, §§ 424-25, 442.

each and every activity the dealer undertakes, and the sale and repair of a used vehicle would seem to be on the borderline. Likewise, sending the passenger's (Giaccio's) case to the jury without any showing of reliance on his part seems unjustified under traditional approaches to apparent authority. Whatever the jury outcome on remand (assuming *Gizzi* is not later overturned), the Third Circuit has now cracked the door that had barred from the jury plaintiffs suing oil companies under theories of apparent authority and agency by estoppel. In so doing, it has removed the greatest obstacle to recovery from the oil companies under those long dormant theories.

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Bankruptcy—Filing Fee Subjected to Constitutional Test

In 1892 Congress faced "the question whether this Government, having established courts to do justice to litigants, will admit the wealthy and deny the poor entrance to them."[1] Congress responded by enacting an in forma pauperis statute granting indigents access to federal courts without prepayment of fees or costs.[2] When Congress later adopted the present Bankruptcy Act in 1898,[3] it made specific provision for an in forma pauperis proceeding.[4] This allowed an indigent debtor[5] to file a voluntary petition in bankruptcy and receive a discharge from his debts without payment of the filing fee. In 1946, however, Congress

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[1]H.R. REP. NO. 1079, 52d Cong., 1st Sess. 1 (1892).

[2]Act of July 20, 1892, ch. 209, 27 Stat. 252 (now 28 U.S.C. § 1915(a) (1970)). For a general discussion of this statute, see Duniway, *The Poor Man in the Federal Courts*, 18 STAN. L. REV. 1270 (1966).

[3]Bankruptcy Act of 1898, ch. 541, 30 Stat. 544.

[4]Bankruptcy Act of 1898, ch. 541, §§ 40a, 51(2), 30 Stat. 556, 558; General Order 35(4), 172 U.S. 665 (1898). The General Orders in Bankruptcy, adopted by the Supreme Court in 1898 pursuant to § 30 of the Bankruptcy Act of 1898, ch. 541, 30 Stat. 554, are designed to explain, amplify, and apply the provisions of the Bankruptcy Act and have the full force of law except as they conflict with the Act. The General Orders may be found as amended to December 31, 1970, in the appendix to 11 U.S.C. (1970).

[5]The in forma pauperis provision in the Bankruptcy Act from the beginning seems to have been generally interpreted as meaning that a pauper is one totally without assets and available credit. *See, e.g., In re* Medearis, 291 F. 709 (W.D. Tex. 1923); *In re* Collier, 93 F. 191 (W.D. Tenn. 1899). However, somewhat different standards of indigency were applied in Sellers v. Bell, 94 F. 801 (5th Cir. 1899), and *In re* Plimpton, 103 F. 775 (D. Vt. 1900). *See* 2 COLLIER ON BANKRUPTCY ¶ 51.04, at 1876-77 (14th ed. 1971). For a general discussion on in forma pauperis petitions in bankruptcy, see Shaeffer, *Proceedings in Bankruptcy in Forma Pauperis*, 69 COLUM. L. REV. 1203 (1969).