

OREGON CASE UPDATE

When Can an Agent's Actions Bind the Principal?

From the desk of John Kreutzer: If an agent has apparent authority to act on behalf of a principal, the principal can be bound to the agent's actions, even if the agent's actions exceeded his or her actual authority. But what are the limits to such apparent authority?

Claims Pointer: In this case arising out of a fraudulent investment scheme, the Oregon Supreme Court held that there was sufficient evidence to support the allegation that a loan officer acted with apparent authority of a mortgage company and the question should have been submitted to the jury. The case provides a review of agency law and insight into the Oregon approach to apparent authority, an important consideration in some employment law cases.

case in point...

Harkness v. Platten, 359 Or 715 (June 16, 2016)

Joanne Kantor ("Kantor"), a loan officer with Sunset Mortgage ("Sunset"), proposed that John and Sherri Harkness ("the Harknesses") use the equity in their house as collateral to borrow money from Sunset, which Kantor would then invest in short-term, high-interest loans to developers and building contractors (so-called hard-money loans). Kantor told the Harknesses that the loans would be secured by liens on real property with "lots" of equity. Under this plan, Kantor and Sunset would get paid from commission on the Harknesses' conventional loan on their house and from conventional construction loans Sunset would issue the builders. The Harknesses agreed and turned over the proceeds of a conventional loan they received from Sunset to Kantor. Later, Kantor went to work as a loan officer for Directors Mortgage, Inc. ("Directors"), and the Harknesses continued their same investment relationship with her.

After about two years, an attorney for one of the borrowers contacted the Harknesses with some concerns. Kantor claimed that she forgot to record a lien on the loan in question, so Mrs. Harkness accompanied her to record the lien. The borrower then sued the Harknesses, and the Harknesses learned that Kantor had forged the documents for that loan, and for other loans Kantor either had not recorded a lien at all or recorded a lien behind Directors' lien. Kantor also ran all the loan money through her personal accounts. At the conclusion of the lawsuit, the

Harknesses held notes to outstanding loans totaling approximately \$980,000, and at least one borrower had already filed bankruptcy.

The Harknesses retained hired an attorney to represent them in a suit against Kantor, Sunset, and Directors. Their attorney contacted Platten as a securities law expert, and Platten ended up working the case as co-counsel. Despite believing their total damages were approximately \$1.15 million, the Harknesses agreed to settle for \$600,000, relying on Platten's assurance that they could get money from borrowers. After mediation, the Harknesses contacted Platten to pursue the big borrower, but Platten declined to take the case and told the Harknesses they were better off taking their money to Vegas and putting it in a slot machine. The Harknesses sued Platten for legal malpractice on the grounds that they would not have accepted settlement without Platten's assurances.

To prevail against Platten, the Harknesses had to prove a "case within a case"—they had to show that without Platten's misrepresentations, they would have gone to trial, prevailed, and been awarded more than they received in settlement. At trial, the Harknesses argued that Kantor had apparent authority to bind Sunset and Directors to Kantor's investment scheme. Platten moved for a directed verdict based in part on the grounds that the Harknesses could not have prevailed against Sunset or Directors. The trial court granted a directed verdict for Platten. The Harknesses appealed, and the Court of Appeals affirmed the trial court. The

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Harknesses appealed to the Supreme Court.

Under Oregon law, apparent authority to do any particular act can be created only by some conduct of the principal (here, Sunset and Directors) that causes a third party to reasonably believe that the principal consents to have the apparent agent act for him on that matter. An agent's actions (here, Kantor) cannot give rise to apparent authority without the principal taking some affirmative step to create the appearance of authority, one that the principal either intended to cause or "should realize" likely would cause a third party to believe that the agent has authority to act on the principal's behalf. However, the principal's words, conduct or other representation need not be directly to or witnessed directly by the third party for the principal to be liable under a theory of apparent authority. Rather, the representation of authority need only be traceable to the principal. Additionally, when a principal cloaks an agent with actual authority to perform certain tasks, that actual authority may create the appearance of authority to perform other, related tasks.

The Supreme Court evaluated the evidence in the record to determine whether a jury could reasonably have found that Kantor had apparent authority to bind Sunset and Directors to the loan transactions. The record included evidence that Kantor was employed by both Sunset and Directors as a "loan officer" and advised the Harknesses to obtain loans from both Sunset and Directors. Kantor used Sunset and Directors officers, letterhead, and staff in the presence of plaintiffs. Sunset's president testified that Sunset was a "mortgage finance provider" and "mortgage broker," that Kantor was employed on a commission basis as a loan officer to originate loans, that a good loan officer could tell clients to use their equity to make money, and that his loan officers were

encouraged to find business. Mrs. Harkness also testified that she would not have entered into the loan transactions if Kantor had not been working with Sunset and Directors, and that she believed that Kantor had been acting within the scope of her employment in all her dealings with the Harknesses.

The Supreme Court concluded that a jury could infer that by hiring Kantor as a "loan officer," giving her actual authority to perform the tasks of a loan officer, and placing her in their offices without any notice to customers of limitations on her authority or fiduciary duties as a loan officer, Sunset and Directors manifested their assent to be bound by Kantor's actions. Moreover, a jury could infer that it was reasonable for the Harknesses to believe that Kantor's actions were part of her usual or customary authority as a loan officer to make and arrange loans on behalf of the mortgage companies that hired her. Thus, the issue should have been submitted to the jury, and the Court of Appeals and the trial court were reversed.

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