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December 9, 2010

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BY HAND

Hon. Robert E. Gerber, U.S.B.J.
United States Bankruptcy Court
for the Southern District of New York
One Bowling Green
New York, NY 10004

Re: Official Committee of Unsecured Creditors of Motors Liquidation Company v. JPMorgan Chase Bank, N.A., *et al.* Adv. Pro. No. 09-00504

Dear Judge Gerber:

On behalf of Defendant JPMorgan Chase Bank, N.A., I write in response to Your Honor's request to provide citations for the additional authority I referenced during the oral argument on the motions for summary judgment in the above referenced adversary proceeding held before this Court on December 3, 2010. Attached please find courtesy copies of the following authorities that further support the proposition that testimony of the alleged agent is admissible to prove or disprove the existence and scope of actual authority:

- *Big Bear Import Brokers, Inc. v. LAI Games Sales, Inc.*, No. CV-08-2256-PHX-DGC, 2010 WL 729208, at *4 (D. Arizona March 2, 2010);
- *OPP v. Wheaton Van Lines, Inc.*, 231 F.3d 1060, 1064-65 (7th Cir. 2000); and
- *Sinclair v. Town of Bow*, 480 A.2d 173, 176-77 (Supreme Court of New Hampshire 1984).

Respectfully submitted,

John M. Callagy

Attachments

cc: Eric B. Fisher, Esq. (via e-mail and First Class U.S. Mail w/attachments)

Not Reported in F.Supp.2d, 2010 WL 729208 (D.Ariz.)
(Cite as: 2010 WL 729208 (D.Ariz.))

Only the Westlaw citation is currently available.

United States District Court,
D. Arizona.
BIG BEAR IMPORT BROKERS, INC. d/b/a Glow Machine, an Arizona corporation, Plaintiff,
v.
LAI GAME SALES, INC., et al., Defendants.
No. CV-08-2256-PHX-DGC.

March 2, 2010.

Andrew James Russell, Paul Sullivan Gerding, Jr., Kutak Rock LLP, Scottsdale, AZ, for Plaintiff.

James A. Ryan, Nicole Maroulakos Goodwin, Quarles & Brady LLP, Phoenix, AZ, for Defendants.

ORDER

DAVID G. CAMPBELL, District Judge.

*1 Plaintiff Big Bear Import Brokers, Inc. has filed a motion for partial summary judgment. Dkt. # 37. Defendant LAI Game Sales, Inc. has filed a motion for summary judgment. Dkt. # 33. Both motions are fully briefed. Dkt.41, 43, 35, 39. For reasons that follow, the Court will deny Big Bear's motion for partial summary judgment (Dkt.# 37) and grant in part and deny in part LAI's motion for summary judgment (Dkt.# 33).[FN1]

> FN1. Big Bear's request for oral argument is denied. The parties have fully briefed the issues and oral argument will not aid the Court's decision. *See Lake at Las Vegas Investors Group, Inc. v. Pac. Malibu Dev. Corp.*, 933 F.2d 724, 729 (9th Cir.1991).

I. Background.

LAI is a manufacturer, promoter, and seller of gaming machines. Big Bear is a manufacturer and seller of arcade-type games. In April of 2008, a sales representative from LAI, Chad Hughes, met the president of Big Bear, Aaron Pelto, at a trade show. Dkt. # 37 at 2. Pelto and Hughes had several meetings and conversations about the possibility of Big Bear becoming a distributor of one of LAI's most popular gaming machines-the "Stacker." Dkt. # 33 at 3; Dkt. # 35 at 3. At the end of the trade show, Hughes gave Pelto a Stacker distributor price sheet and, after the trade show, Pelto flew to Texas to meet with Hughes to further discuss Big Bear becoming a distributor. Dkt. # 35 at 4. The two came to an informal agreement and Hughes asked Pelto to prepare a contract (the "Purchase Contract"). *Id.* Pelto drafted the Purchase Contract and sent it to Hughes, who signed it and sent a copy back to Pelto. *Id.*

After receiving the signed Purchase Contract, Big Bear undertook preparation to begin distributing Stacker machines, which, according to Big Bear, resulted in substantial costs. Dkt. # 37 at 4. On May 1, 2008, Big Bear placed an order for 20 Stacker machines, which LAI filled. Dkt. # 33 at 4. Only a few months after sending the Stacker machines to Big Bear, however, LAI was "inundated with minor service and set up issues on some of the games purchased by Big Bear's few existing customers." *Id.* According to LAI, for that and other reasons, it informed Big Bear in July that it would not sell it more Stacker machines. *Id.* Soon after, LAI learned of the Purchase Contract that had been signed between Hughes and Big Bear. *Id.* at 5. LAI reaffirmed that it would supply no additional machines, and on October 8, 2008, Big Bear filed this lawsuit in state court, alleging breach of contract, breach of the covenant of good faith and fair dealing, and promissory estoppel. Dkt. # 1. LAI removed the case to this Court on the basis of diversity jurisdiction. Dkt. # 1.

II. Legal Standard.

A court must grant summary judgment if the pleadings and supporting documents, viewed in the light most favorable to the nonmoving party, "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Jesinger v. Nev. Fed. Credit Union*, 24 F.3d 1127, 1130 (9th Cir.1994). Substan-

tive law determines which facts are material, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *see Jesinger*, 24 F.3d at 1130. In addition, the dispute must be genuine, that is, the evidence must be "such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

***2** A principal purpose of summary judgment is "to isolate and dispose of factually unsupported claims." *Celotex*, 477 U.S. at 323-24. Summary judgment is appropriate against a party who "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322; *see Citadel Holding Corp. v. Roven*, 26 F.3d 960, 964 (9th Cir.1994). The moving party need not disprove matters on which the opponent has the burden of proof at trial. *Celotex*, 477 U.S. at 323.

III. Analysis.

LAI has moved for summary judgment on all claims. Big Bear has moved for summary judgment on the breach of contract claim. The Court will grant summary judgment to LAI on the breach of contract claim and the breach of implied covenant claim and will deny it as to the promissory estoppel claim and damages.

A. Breach of Contract.

To prevail on a breach of contract claim, a plaintiff must prove the existence of a contract between the plaintiff and the defendant, a breach of the contract by the defendant, and resulting damage to the plaintiff. *See Coleman v. Watts*, 87 F.Supp.2d 944, 955 (D.Ariz.1998) (citing *Clark v. Compania Ganadera de Cananea, S.A.*, 95 Ariz. 90, 387 P.2d 235, 237 (Ariz.1963)). LAI asserts that the parties did not have an enforceable contract because (1) Hughes, as a mere employee, had no authority to form the Purchase Contract on LAI's behalf, (2) Big Bear provided no consideration, (3) the contract is barred by the statute of frauds, and (4) the Purchase Contract is unconscionable. Big Bear seeks summary judgment on its breach of contract claim because (1) Hughes had authority to enter the Purchase Contract, (2) LAI ratified the Purchase Contract, and (3) LAI breached the Purchase Contract. The Court agrees that Big Bear provided no consideration for the Purchase Contract and that, as a result, there was no valid contract between LAI and Big Bear. [FN2]

> FN2. Because the Court agrees that there was no consideration for the Purchase Contract, the Court will not consider the other arguments by Big Bear and LAI.

To be enforceable, a contract must have adequate consideration and specification of terms so that the obligations of each party can be ascertained. *Rogus v. Lords*, 166 Ariz. 600, 804 P.2d 133, 135 (Ariz.App.1991). Mutuality of obligation is required and, significantly for this case, "is absent when only one of the contracting parties is bound to perform." *Carroll v. Lee*, 148 Ariz. 10, 712 P.2d 923, 926 (Ariz.1986). " 'Parties are, within reason, free to contract as they please, and to make bargains which place one party at a disadvantage; but a contract must have mutuality of obligation, and an agreement which permits one party to withdraw at his pleasure is void.' " *Shattuck v. Precision-Toyota, Inc.*, 115 Ariz. 586, 566 P.2d 1332, 1334 (Ariz.1977) (quoting *Naify v. Pac. Indem. Co.*, 11 Cal.2d 5, 76 P.2d 663, 667 (Cal.1938), and citing *Eaton Factors Company, Inc. v. Bartlett*, 1 Conn.Cir.Ct. 376, 24 Conn.Supp. 40, 42-43, 186 A.2d 166, 168 (1962) ("[T]o agree to do something and to reserve the right to cancel the agreement at will is no agreement at all[.]") (quotation omitted)). [FN3]

> FN3. Big Bear does not disagree with this principle of law. Instead, Big Bear relies heavily on this Court's decision in *AGA Shareholders, LLC v. CSK Auto, Inc.*, 589 F.Supp.2d 1175 (D.Ariz.2008), to argue that the Purchase Contract language and extrinsic evidence combine to show a five-year requirements contract. *AGA Shareholders* will be discussed below.

***3** The Purchase Contract did not obligate Big Bear to render any performance. Instead, Big Bear could withdraw from the contract at any time, for any reason, and never purchase Stacker machines at all. *See* Dkt. # 42-1 at 3-4 ("[Big Bear] may terminate this Contract at any time by providing written notice of termination," but LAI can terminate only for insol-

vency, fraud, assignment, or bankruptcy.). As a result, the Purchase Contract is illusory and void. *Shattuck*, 566 P.2d at 1334 ("[A]n agreement which permits one party to withdraw at his pleasure is void.").

Big Bear argues that the Court should interpret the contract as a valid requirements contract which obligated it to buy its requirement of Stacker machines from LAI for a period five years. Dkt. # 35 at 9. "Interpretation of a contract is a question of law for the court when its terms are unambiguous on its face." *Ash v. Egar*, 25 Ariz.App. 72, 541 P.2d 398, 401 (Ariz.App.1975). Under Arizona law, the Court should consider any relevant extrinsic "evidence and, if ... the contract language is 'reasonably susceptible' to the interpretation asserted by its proponent, the evidence is admissible to determine the meaning intended by the parties." *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 854 P.2d 1134, 1140 (Ariz.1993).

The Purchase Contract in this case is not reasonably susceptible to the interpretation asserted by Big Bear-that Big Bear could not cancel at will, but instead was bound to a five-year requirements contract. Although the contract does state that it "shall remain in force for five (5) years," it immediately qualifies this term by stating "unless sooner terminated as provided herein." Dkt. # 42-1 at 3. The next paragraph provides that "[Big Bear] may terminate this Contract at any time by providing written notice of termination." *Id.* The extrinsic evidence put forward by Big Bear-that its purpose in entering the agreement was to become a distributor for LAI, that it would not have ordered LAI's machines unless it had such an agreement, that it only intended to purchase products from LAI, and that LAI intended that Big Bear become a new distributor-does not alter the plain language that empowered Big Bear to terminate the contract at any time, for any reason. Dkt # 35 at 11-12. And because that plain language is not susceptible to an interpretation that in effect reads it out of existence, the contract gave Big Bear the right to terminate at will and therefore is invalid under Arizona law. *Shattuck*, 566 P.2d at 1334 ("[A]n agreement which permits one party to withdraw at his pleasure is void.").

Big Bear relies heavily on this Court's decision in *AGA Shareholders*, 589 F.Supp.2d 1175. The decision in *AGA* looked to the language of the AGA-CSK contract, extrinsic evidence of the parties' intent, and the parties' course of dealing before and after the contract was signed to hold that the contract was a valid five-year requirements contract. These factors made clear that the parties intended a contract in which CSK would purchase all of its requirements from AGA for a five-year period. *Id.* at 1180-85. Significantly, the contract language in *AGA* was susceptible to this interpretation. *Id.* at 1184 ("the language used in the Agreement adequately reflects the requirements nature of the contract"). Indeed, the Court recognized that extrinsic evidence of the parties' intent is relevant only if " 'the contract language is "reasonably susceptible" to the interpretation asserted by its proponent[.]' " *Id.* at 1181 (quoting *Taylor*, 854 P.2d at 1140). The contract in *AGA* did not provide that one party could terminate at will, and the litigants never argued that the contract was void for lack of consideration under *Shattuck*, 566 P.2d at 1334. *AGA* thus did not address the issue raised in this case.

***4** The Court concludes that the clear and unambiguous language of the Purchase Contract empowered Big Bear to cancel the contract at will. The language of the contract simply is not susceptible to the contrary interpretation-that Big Bear could not terminate the contract at will. Because such a provision renders the contract void under Arizona law, Big Bear may not prevail on its breach of contract claim.

B. Breach of the Implied Covenant.

LAI contends that it is entitled to summary judgment on this claim because there was no valid contract. The Court agrees. The implied covenant of good faith and fair dealing cannot be breached if the parties did not enter into a valid contract. *See* *Wells Fargo Bank v. Ariz. Laborers, Teamsters and Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 38 P.3d 12, 28 (Ariz.2002). Summary judgment will be granted to LAI on this claim.

C. Promissory estoppel.

LAI also argues that it is entitled to summary judgment on Big Bear's claim for promissory estoppel. To prevail on a claim for promissory estoppel, a plaintiff must prove (1) that the defendant made a promise, (2) that it was reasonably foreseeable that the plaintiff would rely on the promise, and (3) that the plaintiff relied on the promise to his detriment. *Higginbottom*

v. State, 203 Ariz. 139, 51 P.3d 972, 977 (Ariz.App.2002). LAI claims that Big Bear cannot prevail on a claim for promissory estoppel because LAI made no promise-only Hughes made a promise, and he had no authority to act on behalf of LAI. Dkt. # 33 at 13. Big Bear contends that Hughes had authority to act on behalf of LAI and, in any event, the question is one of fact for the trier of fact at trial.

Under Arizona law, a principal is not liable for actions of an agent unless the actions are based on one of two kinds of authority: actual authority or apparent authority. *O.S. Stapley Co. v. Logan*, 6 Ariz.App. 269, 431 P.2d 910, 913 (Ariz.App.1967). Generally, for an agent to have actual authority to act on a principal's behalf, the principal must have given explicit permission to the agent. *Ruesga v. Kindred Nursing Ctrs. W., L.L.C.*, 215 Ariz. 589, 161 P.3d 1253, 1261 (Ariz.App.2008). Hughes did not have actual authority to enter the Purchase Contract on behalf of LAI.

Actual authority can be proven in two ways (1) through express authority in which a " 'principal has stated in very specific or detailed language' " that an agent has authority, or (2) through implied authority in which an agent has authority " 'to act in a manner in which an agent believes the principal wishes the agent to act based on the agent's reasonable interpretation of the principal's manifestations.' " *Ruesga*, 161 P.3d at 1261 (quoting Restatement (Third) of Agency § 2.01 cmt. b). LAI has provided undisputed evidence that Hughes did not have authority to enter into the Purchase Contract and that, at the time he signed it, he knew he did not have such authority. Dkt. # 42-1 at 55-56 (Hughes admitting he had a feeling that he was not allowed to enter the purchase agreement). Because Big Bear has the burden of showing actual authority and has presented no evidence of such authority, the Court finds that Hughes did not have actual authority. *Celotex*, 477 U.S. at 322.

***5** The Court cannot reach the same conclusion with respect to apparent authority. When a "principal has intentionally or inadvertently induced third persons to believe that ... a person was its agent although no actual or express authority was conferred on him as agent," apparent authority exists. *Ruesga*, 161 P.3d at 1261. To show apparent authority, Big Bear must show (1) that LAI engaged in conduct that led Big Bear to believe that Hughes had apparent authority to enter the Purchase Contract, and (2) that Big Bear's reliance on the apparent authority was reasonable. *Anchor Equities, Ltd. v. Joya*, 160 Ariz. 463, 773 P.2d 1022, 1025-26 (Ariz.App.1989).

Big Bear has presented evidence that LAI hired Hughes as a Regional Sales Manager to sell games, sent Hughes to the trade show where he met Pelto, and identified him with a booth decorated with LAI's logo, LAI clothing, and a nametag to market and promote LAI games. Dkt. # 35 at 7-8. Big Bear contends that these actions by LAI made it reasonable for Big Bear to believe that Hughes had authority to enter into the Purchase Contract. Although these facts are not in dispute, the inferences to be drawn from them are hotly contested. Big Bear argues that its president met LAI's Regional Sales Manager and United States Sales Manager at a trade show and discussed the possibility of Big Bear becoming a distributor. The Regional Sales Manager gave Pelto a price sheet and invited Pelto to LAI's Texas office to discuss the agreement further. From what Pelto saw, Hughes as a salesman was authorized to enter into a sales contract on behalf of LAI. In contrast, LAI argues that it merely sent a newly-hired sales representative to a trade show to stand at a booth that could have been staffed by a model or a child, that the representative was so excited to make a sale that he signed a contract he knew he had no authority to sign, and that LAI, upon learning of the agreement, quickly terminated it. LAI contends that these facts provide no reasonable basis upon which Big Bear could conclude that Hughes had authority to bind LAI.

"In cases in which the evidence is conflicting, or susceptible to different reasonable inferences, the nature and extent of an agent's authority is a question of fact to be determined by the trier of fact. The question is one of law for the court only where different reasonable and logical inferences may not be drawn from the evidence." *First Union Nat'l Bank v. Brown*, 166 N.C.App. 519, 603 S.E.2d 808, 815 (N.C.App.2004); *see also Bailey v. Worton*, 752 So.2d 470, 475 (Miss.App.2000) ("The fact finder must determine whether there is sufficient evidence to meet the ... test for recovery under the theory of apparent authority[.]"); *John Scowcroft & Sons Co. v. Roselle*, 77 Idaho 142, 289 P.2d 621, 623 (Idaho 1955) ("Where existence of agency is disputed, it is a question of fact for the jury."); *LeBlanc v. New England Raceway,*

LLC, 116 Conn.App. 267, 976 A.2d 750, 759-60 (Conn.App.2009) ("Whether apparent authority exists is a question of fact, requiring the trier of fact to evaluate the parties' conduct in light of the attenuating circumstances."). Because differing inferences regarding Hughes' apparent authority can be drawn from the facts in this case, apparent authority must be resolved at trial and cannot be decided on summary judgment.[FN4]

> FN4. It is not clear that Big Bear is entitled to a jury trial on its promissory estoppel claim. Promissory estoppel is an equitable remedy. *Double AA Builders, Ltd. v. Grand State Constr., L.L. C.*, 210 Ariz. 503, 114 P.3d 835, 843 (Ariz.App.2005). Big Bear may not be entitled to a jury trial on such a claim. *See In re Estate of Newman*, 219 Ariz. 260, 196 P.3d 863, 877 (Ariz.App.2008). The parties should address this issue in their proposed final pretrial order. The parties should also address Restatement (Second) of Contracts § 90(1) (1981) and its statement that "[t]he remedy granted for breach may be limited as justice requires." For example, the parties should consider whether a promissory estoppel remedy allows the recovery of lost profits, or should be limited to lost out-of-pocket expenses.

D. Damages.

***6** LAI contends that Big Bear cannot prove lost profits with any reasonable certainty. Dkt. # 33 at 14-17. To recover lost profits damages, a plaintiff must provide evidence "to furnish a reasonably certain factual basis for computation of probable losses." *Rancho Pescado, Inc. v. Nw. Mut. Life Ins. Co.*, 140 Ariz. 174, 680 P.2d 1235, 1245 (Ariz.Ct.App.1984). The standard is "that the existence of the profits cannot be nebulous, although there can be some uncertainty in fixing the measure or extent of those profits which certainly would exist." *Schuldes v. Nat'l Surety Corp.*, 27 Ariz.App. 611, 557 P.2d 543, 548 (Ariz.App.1976).

Big Bear has submitted a Damage Report by Robert M. Semple, CPA, outlining the financial damages that he contends were sustained by Big Bear. Dkt. # 36-2 at 32-44. LAI contends that this report is based on speculation because it is undisputed that Big Bear did not lose any actual orders of Stacker machines as a result of LAI's conduct. Dkt. # 33 at 15. LAI argues that the evidence of lost sales consists of phone calls made to potential customers who did not finalize sales or negotiate sale prices. *Id.* at 15, 557 P.2d 543. Semple, however, looked at Big Bear's actual sales during the short period when LAI supplied it with Stackers Machines to estimate the sales that would have occurred had LAI continue supplying the machines. Dkt. # 36-2 at 35-36. The Court cannot say as a matter of law that such an approach is unfounded. The trier of fact will be required to consider the reasonableness of such an approach to damages in light of all the evidence.

LAI contends that Big Bear cannot collect damages for losing sales of machines Big Bear was never required to purchase. In support of this argument, LAI cites to a Fifth Circuit case in which the court was applying Texas law on damages. *See Hiller v. Mfrs. Prod. Research Group of N. Am., Inc.*, 59 F.3d 1514 (5th Cir.1995). It is clear, both from the contract itself and the briefs of the parties, however, that Arizona law applies here. *See* Dkt. # 42-1 at 4 ("This Contract shall be governed ... in accordance with ... the laws of the ... State of Arizona").

LAI argues that Big Bear cannot recover lost profits that it could have prevented by cover, particularly given that there were similar goods available in the marketplace. Dkt. # 33 at 16. While LAI may be correct that Big Bear cannot recover for damages that could have been avoided by reasonable effort, *see Coury Bros. Ranches, Inc. v. Ellsworth*, 103 Ariz. 515, 446 P.2d 458, 463 (Ariz.1968), the suitability of cover-replacements for the Stackers machines-is a question of fact that cannot be decided on summary judgment.

IT IS ORDERED:

1. Big Bear's motion for partial summary judgment (Dkt.# 37) is **denied.**

2. LAI's motion for summary judgment (Dkt.# 33) is **granted in part and denied in part.**

3. The Court will set a final pretrial conference by separate order.

D.Ariz.,2010.
Big Bear Import Brokers, Inc. v. LAI Game Sales, Inc.
Not Reported in F.Supp.2d, 2010 WL 729208 (D.Ariz.)

END OF DOCUMENT

231 F.3d 1060, Fed. Carr. Cas. P 84,166
(Cite as: 231 F.3d 1060)

H

United States Court of Appeals,
Seventh Circuit.
Shelley OPP, an individual, Plaintiff-Appellant,
v.
WHEATON VAN LINES, INCORPORATED, d/b/a Wheaton World Wide Moving, an Indiana corporation, and Soraghan Moving & Storage, Incorporated, an Illinois corporation, Defendants-Appellees.
No. 99-3015.

Argued May 9, 2000.
Decided Nov. 3, 2000.

Shipper sued carriers, alleging fraud and seeking to recover full value of property damaged during shipment. Carriers moved for summary judgment. The United States District Court for the Northern District of Illinois, Arlander Keys, United States Magistrate Judge, 56 F.Supp.2d 1027, granted motion. Shipper appealed. The Court of Appeals, Manion, Circuit Judge, held that: (1) shipper's ex-husband did not have express authority to act as shipper's agent and limit carriers' liability; (2) factual issues as to whether shipper's ex-husband had implied authority to act as shipper's agent and limit carriers' liability precluded summary judgment on such grounds; and (3) factual issues as to whether shipper's ex-husband had apparent authority to act as shipper's agent and limit carriers' liability precluded summary judgment on such grounds.

Affirmed in part; reversed and remanded in part.

West Headnotes

[1] Carriers 70 ⚿147

70 Carriers
70II Carriage of Goods
70II(H) Limitation of Liability
70k147 k. Nature of Right to Limit Liability. Most Cited Cases
The Carmack Amendment makes carriers who transport goods liable for actual loss or injury to property caused by receiving or delivering carrier unless carrier does the following to limit its liability: (1) maintains appropriate tariff, (2) obtains shipper's agreement as to her choice of liability, (3) gives shipper reasonable opportunity to choose between two or more levels of liability, and (4) issues receipt or bill of lading prior to moving shipment. 49 U.S.C.A. § 14706(a), (c)(1)(A); Violent Crime Control and Law Enforcement Act of 1994, § 20110(a)(1), as amended, 42 U.S.C.A. § 13710(a)(1).

[2] Principal and Agent 308 ⚿101(2)

308 Principal and Agent
308III Rights and Liabilities as to Third Persons
308III(A) Powers of Agent
308k98 Implied and Apparent Authority
308k101 Contracts in General
308k101(2) k. Contracts with Common Carriers. Most Cited Cases
Shipper's ex-husband did not have express authority, under Illinois law, to act as shipper's agent and limit carriers' liability when he signed bill of lading for shipment of shipper's property, given absence of evidence that shipper explicitly granted authority to ex-husband to bind her to agreement limiting carriers' liability and given shipper's sworn statement that she never requested or intended for ex-husband to do anything other than open door to residence and allow carriers' representatives to remove her property.

[3] Principal and Agent 308 ⚿1

308 Principal and Agent
308I The Relation
308I(A) Creation and Existence
308k1 k. Nature of the Relation in General. Most Cited Cases
Illinois law of agency, as well as the federal common law of agency, accord with the Restatement of Agency. Restatement (Second) of Agency § 1 et seq.

[4] Principal and Agent 308 ⚿14(1)

308 Principal and Agent
308I The Relation
308I(A) Creation and Existence
308k14 Implied Agency

308k14(1) k. In General. Most Cited Cases

Principal and Agent 308 ⚿96

308 Principal and Agent
308III Rights and Liabilities as to Third Persons
308III(A) Powers of Agent
308k95 Express Authority
308k96 k. In General. Most Cited Cases

Principal and Agent 308 ⚿99

308 Principal and Agent
308III Rights and Liabilities as to Third Persons
308III(A) Powers of Agent
308k98 Implied and Apparent Authority
308k99 k. In General. Most Cited Cases
Under Illinois law, agent's authority may be either actual or apparent, and actual authority may be express or implied.

[5] Principal and Agent 308 ⚿123(5)

308 Principal and Agent
308III Rights and Liabilities as to Third Persons
308III(A) Powers of Agent
308k118 Evidence as to Authority
308k123 Weight and Sufficiency
308k123(5) k. Declarations of Principal. Most Cited Cases

Principal and Agent 308 ⚿123(6)

308 Principal and Agent
308III Rights and Liabilities as to Third Persons
308III(A) Powers of Agent
308k118 Evidence as to Authority
308k123 Weight and Sufficiency
308k123(6) k. Declarations, Representations, and Acts of Agents. Most Cited Cases
Under Illinois law, only the words or conduct of the alleged principal, not the alleged agent, establish the actual or apparent authority of an agent.

[6] Principal and Agent 308 ⚿96

308 Principal and Agent
308III Rights and Liabilities as to Third Persons
308III(A) Powers of Agent
308k95 Express Authority
308k96 k. In General. Most Cited Cases
Under Illinois law, agent has express authority when the principal explicitly grants the agent the authority to perform a particular act.

[7] Federal Civil Procedure 170A ⚿2491

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2491 k. Carriers and Warehousemen, Actions Involving. Most Cited Cases
Material issues of fact existed as to whether shipper's ex-husband had implied authority to act as shipper's agent and limit carriers' liability when he signed bill of lading for transportation of shipper's property, precluding summary judgment for carriers on shipper's claim, under Carmack Amendment, to recover full value of property damaged during shipment. 49 U.S.C.A. § 14706(a), (c)(1)(A).

[8] Principal and Agent 308 ⚿99

308 Principal and Agent
308III Rights and Liabilities as to Third Persons
308III(A) Powers of Agent
308k98 Implied and Apparent Authority
308k99 k. In General. Most Cited Cases

Principal and Agent 308 ⚿118.1

308 Principal and Agent
308III Rights and Liabilities as to Third Persons
308III(A) Powers of Agent
308k118 Evidence as to Authority
308k118.1 k. In General. Most Cited Cases
Under Illinois agency law, "implied authority" is actual authority that is implied by facts and circumstances, and may be proved by circumstantial evidence.

[9] Principal and Agent 308 ⚿99

308 Principal and Agent
308III Rights and Liabilities as to Third Persons
308III(A) Powers of Agent

308k98 Implied and Apparent Authority
308k99 k. In General. Most Cited Cases
Under Illinois law, agent has implied authority for the performance or transaction of anything reasonably necessary to effective execution of his express authority. Restatement (Second) of Agency § 35.

[10] Federal Civil Procedure 170A ⚿2491

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2491 k. Carriers and Warehousemen, Actions Involving. Most Cited Cases
Material issues of fact existed as to whether shipper's ex-husband had apparent authority to act as shipper's agent and limit carriers' liability when he signed bill of lading for transportation of shipper's property, precluding summary judgment for carriers on shipper's claim, under Carmack Amendment, to recover full value of property damaged during shipment. 49 U.S.C.A. § 14706(a), (c)(1)(A).

[11] Principal and Agent 308 ⚿99

308 Principal and Agent
308III Rights and Liabilities as to Third Persons
308III(A) Powers of Agent
308k98 Implied and Apparent Authority
308k99 k. In General. Most Cited Cases
Under doctrine of apparent authority, principal will be bound not only by the authority that it actually gives to another, but also by the authority that it appears to give.

[12] Principal and Agent 308 ⚿99

308 Principal and Agent
308III Rights and Liabilities as to Third Persons
308III(A) Powers of Agent
308k98 Implied and Apparent Authority
308k99 k. In General. Most Cited Cases
"Apparent authority" arises under Illinois law when a principal creates, by its words or conduct, the reasonable impression in a third party that the agent has the authority to perform a certain act on its behalf.

[13] Federal Courts 170B ⚿628

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(D) Presentation and Reservation in Lower Court of Grounds of Review
170BVIII(D)2 Objections and Exceptions
170Bk627 Evidence and Witnesses
170Bk628 k. Admission or Exclusion of Evidence. Most Cited Cases
Appellant challenging grant of summary judgment in appellee's favor waived argument as to admissibility of affidavit on which appellee relied when she failed to raise argument in district court.

[14] Federal Courts 170B ⚿714

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(H) Briefs
170Bk714 k. Specification of Errors; Points and Arguments. Most Cited Cases

Federal Courts 170B ⚿915

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)7 Waiver of Error in Appellate Court
170Bk915 k. In General. Most Cited Cases
Court of Appeals would not address issue of whether summary judgment was properly granted for carriers on shipper's fraud claim when argument on appeal cited no legal authority or facts from the record disputing district court's conclusion.
***1061** Gregory J. Abbott (argued), Kane & Abbott, Chicago, IL, for plaintiff-appellant.

***1062** Robert Ostojic (argued), Leahy, Eisenberg & Fraenkel, Chicago, IL, for defendants-appellees.

Before MANION, KANNE, and ROVNER, Circuit Judges.

MANION, Circuit Judge.

Shelley Opp sued two carriers, Wheaton Van Lines and Soraghan Moving and Storage, alleging fraud and seeking to recover the full value of her property that was damaged during shipment. The carriers

231 F.3d 1060, Fed. Carr. Cas. P 84,166
(Cite as: 231 F.3d 1060)

moved for summary judgment, arguing that there was no evidence of fraud, and that their liability for damaging Ms. Opp's property was limited as set forth in the bill of lading that was signed by her ex-husband, Mr. Opp. The district court granted the defendants' motions, finding no evidence of fraud, and concluding that Mr. Opp had the authority to bind Ms. Opp to the terms of the bill of lading. Ms. Opp appeals. We affirm the grant of summary judgment on the fraud claim, but reverse and remand on the property damage claim.

I.

Shelley Opp lived in California with her husband, Richard Opp, until they sought a divorce in August 1996, and Ms. Opp moved to Illinois. In June 1997, Ms. Opp contacted Soraghan Moving and Storage (an agent of Wheaton Van Lines) to move her personal property from California to Illinois. She provided Soraghan with a list of her items, and Linda Kloempken (a Soraghan employee) phoned Ms. Opp to give her an estimate of the moving charges. Ms. Opp then notified Kloempken that she wanted to insure her property for its full value of $10,000.00. And Soraghan movers conducted a "walk-through" of the California residence at which Mr. Opp presided at Ms. Opp's request.

Kloempken then faxed to Ms. Opp an "Estimate/Order for Service" form which included the following: "NOTICE: ACTUAL DECLARED VALUE MUST BE DETERMINED BY SHIPPER PRIOR TO LOADING AND SO INDICATED IN THE BILL OF LADING." The estimate form also contained the following printed and handwritten information: "SHIPPER INTENDS TO DECLARE A VALUATION OF: /s (shipper to advise $10,000 Full Replacement 85, 65, 45)." Ms. Opp signed the form. According to Kloempken, she explained to Ms. Opp that the phrase "shipper to advise" meant that Ms. Opp or her representative must advise the mover at the time the shipment was picked up whether Ms. Opp would like full replacement coverage of $10,000.00. According to Ms. Opp, she was never informed that the person releasing her property in California would have to sign anything, declare any value for her property, or do anything other than give the movers access to her belongings. The estimate form also provided a location where Ms. Opp could designate someone as her "true and lawful representative," but she made no such designation.

On the day of the move, the movers in California called Ms. Opp in Illinois to notify her that their arrival at the California home would be delayed by a half-hour due to a flat tire. Ms. Opp then phoned Mr. Opp at his office and asked him to go to the house, open the door, and "let the movers in." Ms. Opp also told Kloempken that "someone" would be at the California home to give the movers access to her property. While the movers were loading Ms. Opp's property from the California home, Mr. Opp signed the bill of lading on a line that indicated that he was Ms. Opp's authorized agent, and he allegedly agreed to limit the carriers' liability for her property at $.60 per pound.[FN1] Mr. Opp also signed an inventory of the property that indicated that he was its "owner or authorized agent." After the movers left, Mr. Opp called Ms. Opp to tell her that the movers "picked up your stuff."

> FN1. While the parties agree that Mr. Opp signed the bill of lading, they dispute whether he made the notation that limited the carriers' liability to $.60 per pound.

***1063** On July 8, 1997, the truck carrying Ms. Opp's belongings was struck by a train, damaging most of her property. On that same day, a Soraghan employee (Pamela Comparin) phoned Ms. Opp to request her to bring a check to Soraghan's office to pay for the shipment. Ms. Opp brought a cashier's check to the office that same day. Comparin notified Ms. Opp about the damage to her property on July 14, 1997, and she returned Ms. Opp's check on July 15.

Ms. Opp inspected her damaged property on July 15, and estimated its full replacement value to be over $10,000.00. The carriers claimed that their liability was limited according to the bill of lading, and they tendered a check to Ms. Opp in the amount of $2,625.00, which she never cashed or returned.

Instead, Ms. Opp sued the carriers pursuant to the Carmack Amendment, 49 U.S.C. § 11707 *et seq.*, seeking (in Count I of her Amended Complaint) to recover $10,000.00 for property damage, and alleging (in Count II of her Amended Complaint) that Soraghan committed fraud by requesting an immediate payment for the shipment on the same day that it allegedly learned about the damage to Ms. Opp's

property. The carriers moved for summary judgment, arguing that Mr. Opp had the authority to sign the bill of lading and limit the carriers' liability. Soraghan also moved for summary judgment on the fraud claim, arguing that there was no evidence of fraud, and that Ms. Opp sustained no damages because Soraghan returned her uncashed check seven days after she delivered it to Soraghan. The district court granted the carriers' motions, finding that Mr. Opp had the actual and apparent authority to sign the bill of lading as Ms. Opp's agent, and concluding that Ms. Opp failed to establish a triable issue of fact to support her fraud claim. Ms. Opp appeals.

II.

"We review the district court's entry of summary judgment *de novo*," *Miller v. American Family Mut. Ins. Co.*, 203 F.3d 997, 1003 (7th Cir.2000), viewing all of the facts, and drawing all reasonable inferences from those facts, in favor of the nonmoving party. *Id.* Summary judgment is proper if the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Silk v. City of Chicago*, 194 F.3d 788, 798 (7th Cir.1999) (citing Fed.R.Civ.P. 56(c)). "A genuine issue for trial exists only when a reasonable jury could find for the party opposing the motion based on the record as a whole." *Roger v. Yellow Freight Systems, Inc.*, 21 F.3d 146, 149 (7th Cir.1994).

A. The Property Damage Claim

[1] Ms. Opp argues on appeal that the district court erred in granting summary judgment for the carriers on her claim of damages in the amount of $10,000.00-the full value of her property. She asserts that there is a genuine issue of material fact as to whether the carriers satisfied the conditions necessary to limit their liability under the Carmack Amendment. The Carmack Amendment makes carriers who transport goods liable for the "actual loss or injury to the property caused by [the receiving or delivering carrier]," 49 U.S.C. § 14706(a)(1), unless the carrier does the following to limit its liability: (1) maintain an appropriate tariff pursuant to 42 U.S.C. § 13710(a)(1), *Jackson v. Brook Ledge, Inc.*, 991 F.Supp. 640, 645 (E.D.Ky.1997); (2) obtain the shipper's agreement as to her choice of liability; (3) give the shipper a reasonable opportunity to choose between two or more levels of liability; and (4) issue a receipt or bill of lading prior to moving the shipment. *Hughes v. United Van Lines, Inc.*, 829 F.2d 1407, 1415 (7th Cir.1987); 49 U.S.C. § 14706(c)(1)(A). According to Ms. Opp, the district court's decision to grant summary judgment was improper because she never authorized Mr. Opp to sign the bill of lading and limit the carriers' liability, and thus the carriers never obtained her agreement as to her choice of liability.

***1064** [2][3] Ms. Opp's property damage claim requires us to apply the principles of agency law to determine whether Mr. Opp had the authority to act as Ms. Opp's agent and limit the carriers' liability when he signed the bill of lading. The district court recognized that "[i]t is not clear whether actions arising from the Carmack Amendment are governed by the federal common law of agency, or by the state common law," *Opp v. Wheaton Van Lines, Inc.*, 56 F.Supp.2d 1027, 1035 n. 6 (N.D.Ill.1999), and it applied Illinois law because "federal and Illinois laws of agency both recognize that an agent's authority can be actual or apparent." *Id.* The parties do not challenge the district court's application of Illinois law, and we will apply it as well. We also note that the Illinois law of agency, as well as the federal common law of agency, accord with the Restatement. *See Moriarty v. Glueckert Funeral Home, Ltd.*, 155 F.3d 859, 865-66 n. 15 (7th Cir.1998) (the federal courts have relied on the Restatement of Agency as a valuable source for establishing the federal common law of agency); *see also National Diamond Syndicate, Inc. v. United Parcel Service, Inc.*, 897 F.2d 253, 259 (7th Cir.1990) (the Restatement accords with Illinois agency principles of actual and implied authority); *see also Emmenegger Const. Co., Inc. v. King*, 103 Ill.App.3d 423, 59 Ill.Dec. 237, 431 N.E.2d 738, 742-43 (1982) ("The law of agency in Illinois is in accord with the Restatement of Agency (Second) on the subject of apparent authority.").

[4][5] "An agent's authority may be either actual or apparent, and actual authority may be express or implied." *C.A.M. Affiliates, Inc. v. First American Title Ins. Co.*, 306 Ill.App.3d 1015, 240 Ill.Dec. 91, 715 N.E.2d 778, 783 (1999). And "[o]nly the words or conduct of the alleged principal, not the alleged agent, establish the [actual or apparent] authority of an agent." *Id.*

[6] We first note that the record clearly demonstrates that Mr. Opp never received the express authority to represent Ms. Opp and to limit the carriers' liability. "An agent has express authority when the principal explicitly grants the agent the authority to perform a particular act." *Id.* There is no evidence in this case that Ms. Opp explicitly granted authority to Mr. Opp to bind her to an agreement that limited the carriers' liability for her goods. Ms. Opp stated in her affidavit that she never requested or intended Mr. Opp to do anything other than to open the door and allow the movers to remove her property. And the record contains no testimony from Mr. Opp. Because the record provides no counter-affidavits that establish an explicit agency relationship between Ms. and Mr. Opp, we must accept Ms. Opp's affidavit as true and conclude that she never explicitly granted Mr. Opp the authority to limit the carriers' liability. *See* Lydon v. Eagle Food Centers, Inc., 297 Ill.App.3d 90, 231 Ill.Dec. 640, 696 N.E.2d 1211, 1215 (1998).

[7][8][9] We next determine whether Mr. Opp had the implied authority to limit the carriers' liability. "Implied authority is actual authority that is implied by facts and circumstances and it may be proved by circumstantial evidence." Wasleff v. Dever, 194 Ill.App.3d 147, 141 Ill.Dec. 86, 550 N.E.2d 1132, 1138 (1990). "[A]n agent has implied authority for the performance or transaction of anything reasonably necessary to effective execution of his express authority." *Advance Mortg. Corp. v. Concordia Mut. Life Ass'n*, 135 Ill.App.3d 477, 90 Ill.Dec. 225, 481 N.E.2d 1025, 1029 (1985) (quoting 2A C.J.S. *Agency* § 154 (1972)); *see also* Restatement (Second) of Agency § 35. Thus we must determine whether it was reasonably necessary for Mr. Opp to sign the bill of lading in order to execute his express authority to open the door to give the movers access to Ms. Opp's property.

The carriers argue that because Ms. Opp allegedly knew that the bill of lading had to be signed when her property was picked up, but she arranged for Mr. Opp ***1065** to be the only person present in California for the move, Ms. Opp's request for Mr. Opp to tender the goods to the movers also included the necessary authority for him to sign the bill of lading. But as noted above, Ms. Opp only told Mr. Opp to open the door. She made no request for him to sign anything, or to make any agreement as to the carriers' liability. Ms. Opp also testified that she was never informed that the person releasing her property in California would have to sign a bill of lading and declare a value for her property. Moreover, the record contains no testimony from Mr. Opp at all, and thus it is unclear whether he ever implied from Ms. Opp's request that he was also authorized to limit the carriers' liability, or whether he merely thought that he was signing forms to confirm that Ms. Opp's goods were taken from the home. The record also lacks testimony from any of the movers who picked up Ms. Opp's personal property in California, and we have no indication from them what Mr. Opp understood about the significance of his signature (and alleged notations) on the bill of lading. Thus we conclude that there is insufficient evidence to support a grant of summary judgment for the carriers on this issue.

[10][11][12] We must then consider whether Mr. Opp had the apparent authority to sign the bill of lading and limit the carriers' liability. Under the doctrine of apparent authority, "a principal will be bound not only by the authority that it actually gives to another, but also by the authority that it appears to give." Petrovich v. Share Health Plan of Illinois, Inc., 188 Ill.2d 17, 241 Ill.Dec. 627, 719 N.E.2d 756, 765 (1999). "Apparent authority arises when a principal creates, by its words or conduct, the reasonable impression in a third party that the agent has the authority to perform a certain act on its behalf." Weil, Freiburg & Thomas, P.C. v. Sara Lee Corp., 218 Ill.App.3d 383, 160 Ill.Dec. 773, 577 N.E.2d 1344, 1350 (1991). Thus we must determine whether the evidence demonstrates that Ms. Opp's words or conduct created a reasonable impression in the carriers that Mr. Opp had the authority to sign the bill of lading and limit their liability.

[13] The carriers argue that they reasonably believed that Mr. Opp had the authority to sign the bill of lading because Ms. Opp allegedly knew that a bill of lading had to be signed when her goods were picked up, she had arranged for the carriers to contact Mr. Opp to preside at the prior walk-through, and she had also arranged for Mr. Opp to be the only person present at the California home to tender the goods. But material facts in the record also justify a reasonable inference that Mr. Opp did not have the apparent authority to limit the carriers' liability. It is undisputed that Ms. Opp told Kloempken at Soraghan that she wanted the full replacement value of $10,000.00 on her goods, which is reflected on Wheaton's Esti-

mate/Order for Service form. Ms. Opp never designated a "lawful representative" on the space provided on the estimate form, and thus Wheaton's own form lacked any indication that Mr. Opp was her agent. And when the movers were delayed by a flat tire on their moving truck, they called to notify Ms. Opp in Illinois, not Mr. Opp in California. Additionally, Ms. Opp testified that the carriers never informed her that the person releasing her property in California would have to sign anything, declare any value for her property, or do anything other than to give the movers access to her belongings, which indicates that the carriers could not reasonably conclude that she knew that the bill of lading had to be signed in California, and that Mr. Opp had that authority. And there is no evidence in the record that the carriers had any knowledge that Ms. Opp ever discussed the valuation of her property with Mr. Opp. We conclude, therefore, that summary judgment is precluded because the record provides sufficient evidence to enable a reasonable jury to find that Mr. Opp lacked the apparent authority to limit ***1066** the carriers' liability.[FN2] *See Roger,* 21 F.3d at 149.

FN2. We note that Ms. Opp also challenges the district court's decision by arguing that the carriers failed to demonstrate that they met the other three elements required to limit their liability under the Carmack Amendment. First, Ms. Opp argues that the carriers failed to show that they maintained a tariff with the Interstate Commerce Commission (ICC) because they neglected to lay the foundation for the tariff they attached in their summary judgment motion, and because the affidavit submitted in their reply brief (to lay the foundation for the tariff) is inadmissible. But Ms. Opp's argument relies on outdated law, as carriers are no longer required to keep a tariff on file with the ICC. *Jackson,* 991 F.Supp. at 645. And her attack on the admissibility of the affidavit is waived because she failed to raise it in the district court. *See Karazanos v. Madison Two Associates,* 147 F.3d 624, 629 (7th Cir.1998); *see also Friedel v. City of Madison,* 832 F.2d 965, 971 n. 4 (7th Cir.1987). Furthermore, Ms. Opp presents no evidence to contradict the carriers' affidavit, and thus we agree with the district court that this claim fails.

Ms. Opp also argues that the carriers never established that they gave her a reasonable opportunity to choose between two or more levels of liability, and never issued a receipt or bill of lading to her prior to moving the shipment. But her arguments lack factual or legal support, and thus we decline to consider them. *See United States v. Mason,* 974 F.2d 897, 901 (7th Cir.1992).

B. The Fraud Claim

[14] Ms. Opp also challenges the district court's denial of her fraud claim. Because Soraghan's employee, Ms. Comparin, called Ms. Opp seeking full payment of the shipping charge on the same day her property was destroyed, Ms. Opp suspects fraud. The district court concluded that Comparin's affidavit asserting that at the time of the call she "did not know that the truck carrying Ms. Opp's belongings was struck by a train" was uncontested, so there was no genuine issue of fact on that count. We also note that the record on appeal indicates that after the wreck, Soraghan returned Ms. Opp's check uncashed. While the validity of this claim seems unlikely on the present record, Ms. Opp's one-paragraph argument on appeal cites no legal authority nor any facts from the record that dispute the district court's conclusion. Thus we need not address the matter further, and affirm the district court's decision to grant Soraghan's motion for summary judgment on this claim. *See Mason,* 974 F.2d at 901.

III.

We conclude that summary judgment is precluded on the property damage claim because there are genuine issues of material fact as to whether Mr. Opp had the implied or apparent authority to limit the carriers' liability. We decline to consider Ms. Opp's fraud claim on appeal because it lacks factual and legal support. Accordingly, we AFFIRM the district court's decision to grant Soraghan's summary judgment motion on Ms. Opp's fraud claim, and REVERSE and REMAND the district court's decision to grant the carriers' summary judgment motion on Ms. Opp's property damage claim.

C.A.7 (Ill.),2000.

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Supreme Court of New Hampshire.
Arthur SINCLAIR
v.
TOWN OF BOW.
No. 83-120.

Aug. 10, 1984.

Prospective buyer brought action for breach of contract against town's board of selectmen alleging that they failed to carry out an agreement entered into by their administrative assistant to sell 386 silver commemorative coins. The Superior Court, Merrimack County, Cann, J., entered judgment in favor of buyer, and town appealed. The Supreme Court, Brock, J., held that: (1) doctrine of apparent authority did not apply, since buyer's position after the aborted sale was no worse than it had been before, and (2) administrative assistant did not have implied actual authority to bind town in sale of the commemorative coins, since he did not believe he could approve the sale unilaterally.

Reversed.

West Headnotes

[1] Municipal Corporations 268 ⚿230

268 Municipal Corporations
268VII Contracts in General
268k230 k. Powers of Officers or Boards. Most Cited Cases
Anyone dealing with an agent of a municipal corporation is bound to ascertain the nature and extent of his authority.

[2] Municipal Corporations 268 ⚿230

268 Municipal Corporations
268VII Contracts in General
268k230 k. Powers of Officers or Boards. Most Cited Cases
A plaintiff who relies upon a government official's unauthorized conduct or statements cannot be deemed to have been injured by the government.

[3] Municipal Corporations 268 ⚿230

268 Municipal Corporations
268VII Contracts in General
268k230 k. Powers of Officers or Boards. Most Cited Cases
Local and other governments are excluded from application of the doctrine of apparent authority.

[4] Principal and Agent 308 ⚿150(2)

308 Principal and Agent
308III Rights and Liabilities as to Third Persons
308III(C) Unauthorized and Wrongful Acts
308k150 Effect of Exceeding Authority in General
308k150(2) k. Rights and Liabilities of Principal. Most Cited Cases
Under doctrine of apparent authority, a principal is liable for the unauthorized acts of his agent, if the principal has either so conducted his business as to give third parties the right to believe that the act in question is one he has authorized his agent to do, or that it is one agents in that line of business are accustomed to do; the doctrine rests on the general principle of estoppel by which one who has given a false appearance to a situation is barred from denying the falsity.

[5] Principal and Agent 308 ⚿103(6)

308 Principal and Agent
308III Rights and Liabilities as to Third Persons
308III(A) Powers of Agent
308k98 Implied and Apparent Authority
308k103 Purchases, Sales, and Conveyances
308k103(6) k. Sales and Conveyances in General. Most Cited Cases
Doctrine of apparent authority did not apply in action for breach of contract brought against town by prospective buyer of commemorative coins, who alleged that town failed to carry out agreement entered into by its administrative assistant to sell buyer the coins, since buyer's position after the aborted sale was no

worse than it had been before.

[6] Principal and Agent 308 ⚿99

308 Principal and Agent
308III Rights and Liabilities as to Third Persons
308III(A) Powers of Agent
308k98 Implied and Apparent Authority
308k99 k. In General. Most Cited Cases
Delegation of authority to an agent may be either express or implied, but it must involve some conduct of the principal indicating an intent that the agent should have the authority in question.

[7] Principal and Agent 308 ⚿99

308 Principal and Agent
308III Rights and Liabilities as to Third Persons
308III(A) Powers of Agent
308k98 Implied and Apparent Authority
308k99 k. In General. Most Cited Cases
Doctrine of "implied actual authority" focuses upon the agent's understanding of his authority, that is, whether agent reasonably believed, because of the conduct of the principal, including acquiescence, communicated directly or indirectly to him, that the principal desired him to so act.

[8] Principal and Agent 308 ⚿99

308 Principal and Agent
308III Rights and Liabilities as to Third Persons
308III(A) Powers of Agent
308k98 Implied and Apparent Authority
308k99 k. In General. Most Cited Cases
An agent has no implied authority unless he believed that he had such authority.

[9] Principal and Agent 308 ⚿103(6)

308 Principal and Agent
308III Rights and Liabilities as to Third Persons
308III(A) Powers of Agent
308k98 Implied and Apparent Authority
308k103 Purchases, Sales, and Conveyances
308k103(6) k. Sales and Conveyances in General. Most Cited Cases
Administrative assistant of town's board of selectmen did not have implied actual authority to bind town in sale of 386 commemorative coins, since he did not believe he could approve such sale unilaterally.
****174 *389** Tardif, Shapiro & Cassidy, Concord (R. Peter Shapiro, Concord, on the brief and orally), for plaintiff.

Upton, Sanders & Smith, Concord (Russell F. Hilliard, Concord, on the brief and orally), for defendant.

BROCK, Justice.

The plaintiff, Arthur Sinclair, brought an action for breach of contract against the defendant, the Town of Bow (town). He alleged that the town failed to carry out an agreement, entered into by the administrative assistant to the town's board of selectmen, for the sale to the plaintiff of 386 silver commemorative coins.

After a trial in Superior Court (*Cann,* J.), the jury awarded the plaintiff damages. The town appealed, on the stated ground that the trial court should have granted the town's motion for a directed verdict. The town argues that the evidence presented at trial could not support a finding that the administrative assistant had authority to enter into a binding contract for the sale of the coins in question. We reverse.

In 1975, the plaintiff was appointed to a committee planning the observance of the town's 250th anniversary, which was to take place in 1977. The plaintiff is a coin collector, and he proposed that the town authorize the minting of coins (actually medallions, since they are not legal tender) to commemorate both the town's anniversary and the bicentennial of the American Revolution.

The coins were minted and sold throughout 1976 and 1977 under the plaintiff's direct supervision. He arranged for the printing of articles in two newspapers, announcing that pewter, bronze, silver ***390** and gold-plated coins were available, and that orders should be sent directly to him.

The articles also announced "a limit of two per order" on the sale of silver coins. The plaintiff testified that he set this limit because he believed that the coins would be in great demand, and he wished to prevent the "possibility of a lot of people in town not being able to buy one, because somebody else could come

in and hoard the market, so to speak." The silver coins were priced at $15 each.

In fact, the coins sold poorly. The plaintiff continued to sell the coins from his house, and on occasion sold as many as five silver coins to one person. In December 1977, the plaintiff accounted to the town for the coins sold up to that time, and turned over all the unsold coins. Throughout the next two years, the town's selectmen considered several proposals for disposing of the coins, but refused to sell them for less than their original list prices.

The coins were still offered for sale at the town offices. The town advertised the sale through a sign in the offices, as well as in the town's annual report. Neither of these notices contained any mention of a ****175** per-order limit on silver coins. The uncontradicted evidence indicated that in practice, however, all requests for bulk sales were referred to the selectmen.

In early 1979, the director of a non-profit organization requested the town's assurance that it would sell him coins at the original price, as long as the supply lasted, for resale through his organization. The administrative assistant referred this request to the selectmen. They agreed to sell the coins at the original prices, with no mention of a limit, but stated: "We would want to reserve the right to sell some of the medallions to local people if they ask for them at the same price." It is not clear how many coins the organization actually purchased.

Toward the end of 1979, the price of silver bullion began to increase substantially. By January 14, 1980, it had risen to more than $40 per troy ounce. The plaintiff was aware of this, and he also knew that each silver commemorative coin contained nearly a full troy ounce of pure silver.

On January 14, 1980, the plaintiff went to the town offices carrying $2,000 in cash. Because the secretary who normally handled coin sales was absent due to illness, the plaintiff dealt only with the administrative assistant, Walter Jones.

The plaintiff offered to buy the remaining silver coins for the listed price of $15 each, and asked how many were left. Mr. Jones said that he could not be certain, but that his records indicated 386 silver coins remaining. The plaintiff again offered to buy all the ***391** coins, paying $2,000 immediately and the balance on receipt of the coins.

There was conflicting evidence regarding the rest of the conversation. The plaintiff testified to this effect: Mr. Jones said he could not give the plaintiff any coins that day because they were in a safe to which he did not have access. Mr. Jones then wrote out a "bill of sale" acknowledging receipt of $2,000 from the plaintiff as a "deposit" toward the purchase of 386 silver coins, and adding: "Balance of $3,790 payable on delivery of coins." At this point, Mr. Jones telephoned the chairman of the board of selectmen and told him that he had a buyer for the silver coins at $15 each. After the call was completed, the plaintiff left the office.

Mr. Jones testified to the following effect. He could not recall telling the plaintiff that the coins were in a safe; in fact, they were in a locked closet to which he did have access. He did not give the plaintiff any coins because "I did not have that authority"; but he did not say anything to the plaintiff about his lack of authority, nor did the plaintiff ask about it. He called the chairman *before* writing the bill of sale, to ask if he had any objection to a bulk sale of all the remaining silver coins for $15 each. When the chairman said he had none, Jones then wrote out the bill of sale and the plaintiff left.

Within an hour of the plaintiff's departure, Sara Swenson, another member of the three-member board of selectmen, entered the office, and Mr. Jones asked her if she objected to one person's purchasing all the coins. Unlike Mr. Jones and the chairman, Mrs. Swenson knew of the recent rise in the price of silver. She did object to the sale, as later did the third member of the board.

At their regular meeting that evening, the selectmen voted to offer the coins for sale to the general public at the old price, but with a limit of five coins per order. The plaintiff's $2,000 was returned to him, over his objection.

This suit followed, with the plaintiff claiming damages in the form of lost profits from his inability to resell the coins. After denying the town's motion for a directed verdict, the trial court instructed the jury that they should find for the plaintiff if Mr. Jones had

actual authority or apparent authority to sell him the coins. The jury found for the plaintiff and awarded damages based on a resale price of $40 per coin. The town appealed.

****176** [1][2][3] Our analysis begins with the rule that anyone dealing with an agent of a municipal corporation is "bound to ascertain the nature and extent of his authority," *Smith v. Epping*, 69 N.H. 558, 560, 45 A. 415, 416 (1899), and that consequently a plaintiff "who relied upon the government official's unauthorized conduct or ***392** statements cannot be deemed to have been injured by the government." *City of Concord v. Tompkins*, 124 N.H. 463, ---, 471 A.2d 1152, 1156 (1984); *see generally* 1A C. Antieau, Municipal Corporation Law § 10.26 (1984). The effect of the rule is to exclude local (and other) governments from application of the doctrine of "apparent authority."

[4] Under that doctrine, a principal is liable for the unauthorized acts of his agent, if "the principal has either so conducted his business as to give third parties the right to believe that the act in question is one he has authorized his agent to do, or that it is one agents in that line of business are accustomed to do." *Davison v. Parks*, 79 N.H. 262, 263, 108 A. 288, 289 (1919). The doctrine "rests on the general principle of estoppel by which one who has given a false appearance to a situation is barred from denying the falsity." *Reed v. Linscott*, 87 N.H. 139, 140, 175 A. 240, 241 (1934).

In recent years, more courts have permitted limited applications of this doctrine to local governments, "to prevent unjust enrichment and to accord fairness to those who bargain with the agents of municipalities for the promises of the municipalities." *Wiggins v. Barrett & Associates*, 295 Or. 679, 669 P.2d 1132, 1142 (1983); *see generally City of Concord v. Tompkins, supra* at ---, 471 A.2d at 1156-58. The plaintiff in such cases

> "must show a good faith reliance upon the municipality's conduct, lack of actual knowledge or lack of the means of obtaining actual knowledge of the facts in question, and ... a change in position to the extent that plaintiff would incur 'a substantial loss were the local government allowed to disaffirm its previous position.' "

Parker v. West Bloomfield Twp., 60 Mich.App. 583, 592, 231 N.W.2d 424, 428 (1975) (quoting 2 C. Antieau, Municipal Corporation Law § 16A.01, a 16A-7 (1973)); *see City of Concord v. Tompkins, supra* at ---, 471 A.2d at 1154; *Wiggins v. Barrett & Associates, supra* at 1146 (Linde, J., specially concurring).

[5] We need not decide whether to depart from our existing rule and follow this trend, because in this case, there was no change in position. If the plaintiff, relying on his agreement with Jones, had contracted to sell 386 silver coins to a third party for $40 each, and if the other elements of apparent authority were present, the town might have been liable under the modern rule; however, that is not the case here. *See City of Concord v. Tompkins, supra* at ---, 471 A.2d at 1157-58. Nor did the town retain any benefit here, as the government did in *Wiggins v. Barrett & Associates supra; see also* ***393***Marrone v. Town of Hampton*, 123 N.H. 729, 735-36, 466 A.2d 907, 910-11 (1983). The plaintiff's position after the aborted sale was no worse than it had been before.

Accordingly, we hold that the doctrine of apparent authority has no possible application to this case, and should not have been submitted to the jury.

There remains the possibility that Mr. Jones had actual authority to sell the coins in bulk. He could only acquire such authority by delegation from a majority of the selectmen, who have statutory power to "manage the prudential affairs of the town." RSA 41:8; *Marrone v. Town of Hampton*, 123 N.H. at 735, 466 A.2d at 910; *see generally* 10 E. McQuillin, Municipal Corporations § 29.15 (3d rev. ed. 1981).

[6] Delegation of authority to an agent may be either express or implied, but it must involve some conduct of the principal (here the selectmen) indicating an intent that the agent should have the authority in question. *See generally* H. Reuschlein and ****177** W. Gregory, Handbook on the Law of Agency and Partnership § 14 (1979). In this case, two selectmen testified, and the plaintiff concedes, that the selectmen never expressly granted to Mr. Jones the authority to sell coins in bulk. The plaintiff argues, however, that they granted that authority by implication.

[7] We disagree. "The doctrine of implied actual authority focuses upon the *agent's* understanding of his authority: whether the agent reasonably believed, because of conduct of the principal (including acqui-

escence) communicated directly or indirectly to him, that the principal desired him so to act." *Lewis v. Washington Metro. Area Transit Auth.*, 463 A.2d 666, 670 n. 7 (D.C.App.1983) (emphasis in original).

[8] Whether implied authority "follows as a reasonable incident or construction of the terms" of express authority, *Reed v. Linscott*, 87 N.H. at 140, 175 A. at 241, or results from acquiescence by the principal in a course of dealing by the agent, *Lamoureux v. Morin*, 72 N.H. 76, 77, 54 A. 1023, 1024 (1903), "an agent has no implied authority unless he believed that he had such authority." *Columbia Outfitting Co. v. Freeman*, 36 Cal.2d 216, 219, 223 P.2d 21, 24 (1950).

The plaintiff laid great emphasis, both at trial and in this appeal, on the almost unlimited authority regarding the coins which was given by the selectmen to the anniversary committee and to him in 1975. He notes the lack of any per-order limit on the signs announcing the sale of coins at the town offices. He also points out that the ***394** official description of the administrative assistant's duties includes the broad directive to "[f]ollow through on all town projects as Selectmen's representative." All of these facts might lead an outside observer to think that Mr. Jones had authority to sell all of the coins.

As we have seen, however, the crucial question here is not whether a third party could reasonably believe that Mr. Jones had been given the authority to sell coins in bulk, but whether Mr. Jones himself believed it. The evidence indicates overwhelmingly that he did not.

Jones had referred all previous requests for bulk sales to the selectmen. When the plaintiff asked to purchase all the remaining silver coins, Jones refused to deliver any coins to him at that time (even though the plaintiff had sufficient cash to purchase 133 coins), and made a point of asking the chairman of the board of selectmen for his approval of the sale. An hour later, he asked a second member of the board for her approval. These acts are incompatible with a belief on Jones's part that he could approve the sale unilaterally.

[9] If Jones wished the plaintiff to believe that the sale had been completed, due to Jones's belief that the transaction would be beneficial to the town and his consequent desire to prevent the plaintiff from having second thoughts, that says nothing about his actual authority to sell the coins. It only indicates that, after talking to the chairman, he believed that getting the approval of a majority of the selectmen would be no more than a formality. It is clear, however, that he considered that approval essential to the consummation of the sale. Accordingly, we hold that Mr. Jones had no authority to bind the town in this matter. The defendant's motion for a directed verdict should have been granted.

Reversed.

DOUGLAS, J., did not sit; the others concurred.
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